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Intellectual Property Rights: Talking Points for RP-US FTA Negotiations

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Delia S. Tantuico and Errol Wilfred Zshornack

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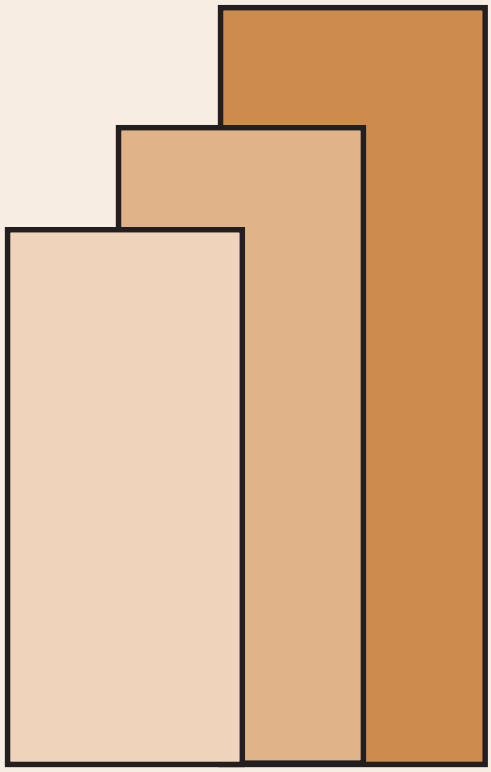

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INTELLECTUAL PROPERTY RIGHTS: TALKING POINTS FOR RP-US FTA NEGOTIATIONS

A B S T R A C T

Intellectual property rights – copyrights, trademarks, patents, trade secrets, and related rights –have become increasingly important with the advent of increased international trade, global and knowledge-based economy and fast developing technology. A strong intellectual property rights regime is necessary in order to attract foreign trade and direct investments. For this reason, the protection of intellectual property rights has become an important negotiating item in all FTAs which the United States has entered into. In view of the proposed RP-US FTA negotiations, this paper seeks to determine whether the existing intellectual property regime in the Philippines provides adequate and sufficient legal protection of intellectual property rights.

It also seeks to determine whether the administrative and judicial processes are adequate and speedy and acceptable in the enforcement and protection of said rights in the light of FTAs already entered into by the United States with other countries, in general, and with Singapore, in particular, which will be the benchmark for the RP-US FTA. Other relevant issues in the protection of intellectual property rights such as the annual review of ountries by the United States Trade Representative in relation to Special 301 of the U.S. Trade Law; piracy of optical media, including books and pharmaceuticals; and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) are also discussed. The author proposes certain provisions to be added to the Intellectual Property Code; sustained, consistent and stricter implementation of intellectual property laws including more efforts at curbing piracy; and more importantly, a strong political will and a strong determination to strengthen intellectual property rights, as necessary to make the IPR regime up to par with U.S. and international

Keywords: TRIPS, Intellectual Property Rights, Dispute Settlement, WTO, FTA, Market Access, Optical Media Act, E-commerce Law, Legal Protection, Investments, Capability Building

EXECUTIVE SUMMARY

This paper discusses certain issues and questions on adequacy of intellectual property laws, enforcement and protection of intellectual property rights and improved market access for persons and entities relying on intellectual property rights, in the light of the proposed negotiations for an RP-US Free Trade Agreement.

OVERVIEW

The paper starts with a general discussion of the following aspects of intellectual property rights:

1. The role of intellectual property rights (IPR) in a global economy and in the investment climate of developing countries like the Philippines;

2. Intellectual property rights in relation to the World Trade Organization (WTO) and Trade-Related Aspects of Intellectual Property (TRIPS); and

3. Intellectual property rights , bilateralism and free trade agreements (FTAs).

With respect to the proposed RP-US FTA negotiations, the three areas of consideration are: adequacy of IPR protection; enforcement and administrative/judicial dispute settlement of IPR cases; and improved market access for persons relying on intellectual property. In this connection, answers to the following questions are discussed:

1. Are existing standards in the Intellectual Property Code and special laws acceptable to the U.S. in the light of existing U.S. FTAs , especially the Singapore- U.S. FTA, which, the U.S. has indicated, would be the benchmark for future FTAs with Asean countries? If they are not adequate, what changes have to be made?

2. Are the standards of enforcement speedy and adequate enough to afford protection of of IPR?

3. Are "Special 301" of the U.S. Trade Law as well as the issue of piracy relevant to the FTA negotiations? If they are, what will it take for the Philippines to be removed from the "priority watch list" to "watch list?"

4. What is the economic impact of piracy on the economy in general and investments in particular?

5. Do the existing laws on intellectual property provide an environment which guarantees improved market access for prospective investors?

Part I discusses intellectual property rights in relation to the global economy, investments and TRIPS. Laws for the protection of intellectual property rights are not static but change in concert with changes in technology and society. Norms for intellectual property developed rapidly in the 20th century – the century that saw the creation of photocopiers, radio, television, videocassette recorders, cable television, satellites, computers and the Internet. The global economy and the development of knowledge-based economies have compelled numerous developing countries to strengthen IPR regimes which is necessary in order to attract investments and to be competitive in the global economy.

TRIPS

An important related development in the growing importance of intellectual property rights in international trade and business is the introduction of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) within the World Trade Organization (WTO). TRIPS by its nature, ties trading rights to intellectual property protection. There remains, however, considerable controversy on the economic impact of TRIPS on developing countries like the Philippines.

Developing countries went along with the TRIPS agreement for a variety of reasons but generally to achieve economic benefits. It is not clear whether the hoped-for economic benefits have been achieved.

The U.S. ASEAN Agenda

Part II discusses the U.S. ASEAN agenda.

The signing of TRIPS was also expected to result in a decline in U.S. bilateral activity on intellectual property but it is clear that there has been no apparent decline. The recent push by the U.S. for FTAs in all parts of the world proves this lack of decline. The Enterprise for ASEAN Initiative (EAI) was announced in October 2002 . It is under EAI where the U.S. offered the prospect of bilateral free trade agreements with ASEAN countries. The first U.S. FTA with an ASEAN country was with Singapore which serves as a benchmark for future FTAs in ASEAN.

IPR and FTAs

The negotiation of FTAs is a mechanism used by the U.S. in advancing the protection of intellectual property rights. It is a given that every FTA which the U.S. has entered into contains very detailed provisions on IPR. It is safe to assume that if an RP-US free trade agreement is negotiated, it would contain very detailed provisions on intellectual property rights.

"Special 301" of the U.S. Trade Law

"Special 301" is a constant presence , whether in the foreground or background, in almost all U.S. negotiations for an FTA. It is also safe to assume that it will have a big presence in the negotiations for a proposed RP-US FTA. It would, therefore, be prudent for the RP negotiating panel to take into consideration the concerns of the USTR in the 2004 and 2005 Special 301 Report on the Philippines.

Status and Outlook of IPR in the Philippines

Part III discusses the outlook and status of intellectual property rights in the Philippines. It discusses the legal framework and existing IPR laws including the Constitution, the Civil Code and the Intellectual Property Code. It also identifies the intellectual property-related treaties acceded to by the Philippines as well as special laws on intellectual property, such as the Optical Media Act and the Electronic Commerce Act.

Enforcement and Dispute Settlement

While administrative and judicial processes for the settlement of IPR disputes are in place, the speed of the settlement of such disputes is a relevant consideration in determining whether the protection of intellectual property rights is adequate.

The Intellectual Property Office is the main administrative agency tasked with the administrative settlement of IPR disputes. It coordinates very closely with other government agencies such as the Bureau of Customs, the National Bureau of Investigation, the Philippine National Police, the Department of Justice and the Department of Local Governments.

For the speedy judicial settlement of IPR cases, special intellectual property courts have been designated. Certain reportorial requirements for intellectual property cases have also been imposed.

In summary, the basic laws and organizational structures are in place for a stronger protection of intellectual property rights. The IP laws meet the minimum standards set by TRIPS. We have approved the Optical Media Act and the Implementing Rules and Regulations. We have acceded to all treaties on intellectual property rights and we are a member of the World Intellectual Property Organization (WIPO). Several reforms have also been made in the area of administrative and judicial dispute settlement of intellectual property rights cases.

There is, however, a perceived lack of enforcement of these laws and the administrative and judicial processes are not speedy enough to be considered adequate. The strong resolve to enforce existing IPR laws and a speedier settlement of IPR cases have to be proven convincingly to the U.S. negotiators

Three Major Issues in IPR Protection

The three major issues in intellectual property rights protection between the Philippines and the U.S. are:

1. Adequate and sufficient legal protection of intellectual property rights;
2. Speedy and adequate administrative and judicial processes and strict enforcement of IPR laws; and
3. Improved market access for persons relying on intellectual property.

While the Philippines has complied with the minimum standards of intellectual protection under TRIPS, it is not sufficient, as shown by the other FTAs between the U.S. and other countries. Certain provisions have to be added to the Intellectual Property Code such as: provisions on protection of rights management information; the enactment of a special law on cyber-crimes; data protection of a subsisting patent; domain names on the Internet; electronic temporary and transient copies and electronic transmission of works .

Administrative and judicial processes are also in place but these processes are not speedy enough to be considered adequate. The case of McDonald's Corporation vs. L.C. Big Mak Burger which was an action for trademark infringement and unfair competition, illustrates this point. It took the judicial system 15 years to finally decide the case. As of this writing, the Supreme Court decision in favor of McDonald's has not been enforced. There are still many Big Mak stands all over the country.

Piracy of Optical Media, Books and Fake Drugs

The issue of piracy is an important consideration in the proposed negotiation for an RP-US FTA. The negative economic impact of piracy cannot be glossed over. The U.S. incurred trade losses due to piracy amounting to USD 120 million. The Philippines also incurred trade losses in the form of lost tax revenues (Php 3.7 billion in 2001 alone); cost of legal fees and IPR investigations (about Php 60 million and losses in the IT sector.

The USTR recognizes the efforts of the Philippine Government in curbing piracy. Of special mention were the approval of the Implementing Rules and Regulations of the Optical Media Act, better coordination among government agencies, as well as increased raids of pirated optical media. All these, however, were not considered adequate and sufficient. The U.S. expects more sustained and consistent efforts and more and better results in curbing piracy. We should show significantly improved enforcement of IPR laws against counterfeiting and piracy.

Parallel Importation

Parallel importation in the Philippines affects the sale and pricing of pharmaceuticals. In 2000, Administrative Order No. 85 authorized the parallel importation of certain medicines by the Philippine International Trading Corporation (PITC). This is now the subject of a case between the Pharmaceutical and Health Care Association of the

Philippines and the Secretary of Health, et al. The purpose of parallel importation of medicines is to make cheaper drugs available to the consumers. The Philippine Patent Law, on the other hand, prohibits parallel importation and is considered an infringement of the rights of the patent holder. Parallel importation is allowed by TRIPS under certain circumstances, to make cheaper medicines available to developing countries. TRIPS also allows developing countries to produce generic copies of patented drugs for specified illnesses; but, countries that lack the capacity to produce cheaper medicines are left empty-handed.

FTAs and Patented Pharmaceuticals

An FTA with the U.S. would have a negative impact on locally manufactured patented drugs as well as those imported from other countries. An FTA would mean cheaper and better quality drugs imported into the Philippines from the U.S. The local pharmaceutical industry would be affected adversely.

Conclusions and Recommendations

The basic structure and framework are in place for a stronger intellectual property rights protection in the Philippines. We have passed special laws, the latest of which was the Optical Media Act, we have adhered to treaties concerning intellectual property rights. It would be safe to say that we have done much to strengthen IPR protection but we cannot say that we have done enough. The protection of IPR will always be a work in progress. This is true especially in the area of combating piracy, enforcement of IPR laws and speedy disposition of IPR cases.

The following are the conclusions and recommendations:

1. Certain provisions have to be added to the Intellectual Property Code make it up to par with IPR provisions in most of the FTAs with the U.S.

2. Issues relating to "Special 301" cannot be avoided and will definitely be discussed. It is always used as a leverage in any FTA negotiation. More effort has to be exerted in curbing piracy and we have to prove a strong political will and resolve in protecting IPR.

3. A strong IPR regime is necessary to achieve the purposes of an RP-US FTA, which are to attract foreign investments and increase the volume of trade between the Philippines and the U.S. A strong IPR regime will always be beneficial to the Philippines and will always be a positive factor in future bilateral or regional trade agreements.

4. The Philippines should negotiate for the implementation of TRIPS insofar as parallel importation is concerned. The Philippines should determine for itself when it should resort to parallel importation.

5. The Philippines should insist on capability building measures such as faster transfer of technology, assistance in terms of reducing piracy including consumer education, customs border patrol and police enforcement.

6. The conclusion of an FTA between the Philippines and the U.S. would give the Philippines a better chance of changing its status under "Special 301" from "priority watch list" to "watch list."

7. A strong IPR regime will effectively increase trade with and direct investments from the United States.

LIST OF ANNEXES

INTELLECTUAL PROPERTY RIGHTS: TALKING POINTS FOR RP-US FTA NEGOTIATIONS[1]

By
Delia S. Tantuico
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Introduction

On March 23, 2005, India's parliament gave final approval to legislation barring drug manufacturers from producing low-cost versions of patented medicines from the United States and elsewhere. Government officials said the law was a condition of India's membership in the World Trade Organization. (John Lancaster, Washington Post, March 25, 2005). Prior to this, India was looked up to as a model of third world countries for producing cheap pharmaceutical products and making them available to its citizens and the rest of the world, especially to developing and poor emerging countries. For more than three decades, Indian drug companies have skirted patent rules - and infuriated pharmaceutical firms in other countries – by means of a loophole that allows them to copy foreign medicines by altering the processes used to manufacture them. (Ibid).

The banning of low-cost versions of patented medicines means that India is now shifting from a regime of weak to stronger intellectual property rights protection. It is interesting to note that the approval of the law coincided with the visit of U.S. Secretary of State Condeleezza Rice to India and her announcement that the United States would help India further increase and develop its international trade.

This recent development in India demonstrates the growing importance of intellectual property rights in a global economy as well as its complexities and challenges in an era of fast-paced technological development, WTO and TRIPS.

Overview

This paper on Intellectual Property Rights: Talking Points for RP-US FTA Negotiations, seeks to provide answers to the following issues and questions in the light of the proposal to negotiate a Free Trade Agreement with the U.S.:

In General – Intellectual Property Rights, Investments and Bilateral Trade Negotiations like FTAs

[1] This research paper was funded by the Philippine APEC Study Center Network (PASCN).

1. Role of intellectual property rights (IPR) in a global economy and in the investment climate of developing countries like the Philippines.

2. Intellectual property rights, WTO and TRIPS.

3. Intellectual property rights, bilateralism and free trade agreements (FTAs).

Specifically, with respect to the proposed RP-US FTA Negotiations:

1. Major issues in IPR protection between the Philippines and the U.S. in relation to:
    a. Standards

        - Are existing standards in the Intellectual Property Code acceptable by the U.S. in the light of FTAs already entered into by the U.S., especially the Singapore-U.S. FTA, America's first FTA with an Asian-Pacific nation and which, the U.S. has indicated, "would serve as a benchmark for future free trade agreements with other nations in the region?" (Fact Sheet, Bureau of Economic and Business Affairs, Washington, DC, July 22, 2003).

        - If the existing standards are not yet adequate, what changes have to to be made?

    b. Enforcement and Dispute Settlement of IPR

        - Are the standards of enforcement speedy and adequate enough to afford protection of IPR?

        - Are "Special 301" of the U.S. Trade Law as well as the issue of piracy relevant to the FTA negotiations? In this connection, what does it take for the Philippines to be removed from the watch list or at least to be downgraded from "priority watch list" to "watch list"?

        - What is the economic impact of piracy on the economy in general and investments in particular?

    c. Improved Market Access for Persons Relying on Intellectual Property

        - Do the existing laws on intellectual property provide an environment which guarantees improved market access for prospective investors? (The paper will discuss various trade sectors such as audio-visual products and software, books, pharmaceuticals and various goods such as accessories, bags and clothing apparel).

2. IPR Capability-building Measures Which the U.S. Can Provide to the Philippines

    - What capability-building measures can the U.S. give to the Philippines to strengthen IPR protection and enforcement?

Part I. Intellectual Property Rights, Investments, The Global Economy, TRIPS

a. Intellectual Property Rights

Intellectual property – copyrights, trademarks, patents, trade secrets, and related rights – may be said to have originated from and based on Adam Smith's concept on the importance of free markets and fair competition which was first publicly declared in his book "The Wealth of Nations." The grant by a state of some form of exclusive rights in inventions originated in the early part of the 15th century in Venice and spread rapidly during the 16th century to Germany, France, the Netherlands, and England. It was recognized that in a free market economy, patent protection provides the necessary incentive to invent, to disclose the invention, to invest in the commercial development of the invention, and to encourage others to design around the patented invention. (Lehman). This concept was later extended to copyrights for literary and artistic creations. The Statute of Queen Anne, enacted in 1709 in England, was the first true copyright statute and the first recognition of the source of the copyright interest in the creative act of authorship. (Ibid).

Laws for the protection of intellectual property rights are not static but change in concert with changes in technology and society. It is part of the reason that the norms in the field of intellectual property developed so rapidly in the 20th century – the century that saw the creation of photocopiers, radio, television, videocassette recorders, cable television, satellites, computers and the Internet. It is also the reason why some "revolutionary" ideas of entirely changing the concept of copyright or even abolishing copyright in this era of fast technological development, are emerging.

b. Intellectual Property Rights, the Global Economy and Investments

Before the advent of increased international trade and global economy, intellectual property laws were mainly territorial and of local application. They were used to protect inventions, publications, musical compositions and artworks from infringement within a country. As international trade and business increased, the effects and application of intellectual property laws beyond national borders began to develop. Today, economic globalization is the transcendent commercial and political force. In a global economy, emerging and developing countries like the Philippines have a strong interest in attracting trade, foreign direct investments and technological expertise. Also, the global economy is

a knowledge-based economy. As such, the creation of knowledge and its adaptation to product designs and production techniques are essential for commercial competitiveness and economic growth. (Maskus, 1997). A knowledge- based economy is largely dependent on the protection of intellectual property rights. In this context, intellectual property rights are important to developing economies, as are important factors in improving and expanding market access and promoting dynamic competition. (Ibid). All these have almost compelled numerous developing countries to strengthen their IPR regimes as this is the only way to attract investments and to be competitive in the global economy. Stronger intellectual property protection is also necessary to protect key information technologies, databases and electronic information transfer.

c. Intellectual Property Rights, WTO and TRIPS

An important related development in the growing importance of intellectual property rights in international trade and business is the introduction of the multilateral agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) within the World Trade Organization (WTO). Starting in the 1980s, a number of industrial countries led by the United States, increasingly perceived inadequate enforcement of IPRs in importing countries as reducing their competitive advantage. The United States used unilateral threats of sanctions to deal with perceived patent and copyright infringements in foreign countries and was an active proponent of multilateral disciplines in this area. Despite initial opposition by many developing countries, the WTO started negotiations in 1986 until 1993 to adopt enforceable rules regarding ownership rights to intellectual property (IP). The Uruguay Round accords resulted in the TRIPS agreement.

TRIPS, by its nature, ties trading rights to intellectual property protection. It covers the gamut of intellectual property from copyright to patents to trademarks, to service marks, trade secrets, industrial designs and geographic indicators. Infringement and anti-counterfeiting remedies are also included in the TRIPS, for both domestic and international protection. (Folsom, Gordon, Spanogle, Jr., p. 218, 1996).

The TRIPS agreement, however, does not require uniform intellectual property laws for all WTO member countries; it merely provides for minimum standards to be complied with. Neither does it give specific IP protection; it only creates domestic avenues to protect IP. TRIPS empowers developing and least developed countries to counteract IPR holders' market power by giving them options such as compulsory licensing, price regulation, parallel imports, and encouragement of differential pricing schemes for drugs that poor countries cannot afford.

Contrary to a widespread perception, by the time the TRIPS agreement entered into force, many developing countries like the Philippines, already had IPR laws and procedures that met a number of their TRIPS obligations. Developing and emerging countries like the Philippines became signatories of TRIPS in the hope of developing and increasing international trade and attracting foreign investments. It is not clear whether this has been achieved.

(1)Economic Impact of TRIPS on Developing Countries

There remains considerable controversy on the economic impact of TRIPS on developing countries like the Philippines. As the World Bank has indicated:

> " Because the overwhelming majority of intellectual property…. is created in the industrialized countries, TRIPS *has decidedly sifted the global rules of the game in favor of those countries*... Developing countries went along with the TRIPS agreement for a variety of reasons, ranging from the hope of additional access to agricultural and apparel markets in rich nations, to an expectation that stronger IPRs would encourage additional technology transfer and innovation. However, the *promise of long-term benefits seems uncertain and costly to achieve in any nation, especially the poorest countries.* In addition, the administrative costs and problems with *higher prices for medicines and key technological inputs* loom large in the minds of policy makers in developing countries. Many are pushing for significant revisions of the agreement." (World Bank (2001), p. 129, emphasis added, cited in Lall 2001).

TRIPS' main reason for existence is to give competitive advantage to industrial and developed countries and to minimize patent and copyright infringements in foreign countries. While the benefits of the TRIPS agreement to the least developed and developing countries still have to be proven, suffice it to say that TRIPS has contributed to IP protection throughout the world by putting pressure on countries to provide IP protection. Also, TRIPS is a signal to the whole world that compliance with the minimum standards for IP protection set by TRIPS is almost a necessity in international trade.

(2) Intellectual Property, Bilateralism and TRIPS

An interesting insight on bilateralism in intellectual property in relation to TRIPS was written by Peter Drahos, Herchel Smith Senior Fellow in Intellectual Property , Queen Mary College, University of London in 1997. Most of his views are useful and relevant in view of the U.S. initiative to pursue bilateral trade agreements. It examines the way in which bilateral trade negotiations like FTAs are being used by the U.S. and others to build more extensive protection for intellectual property than that set out in the WTO TRIPS agreement. It shows examples of US/EU negotiations with countries such as Nicaragua, Jordan and Mexico to illustrate "how developing countries are being drawn into highly complex multilateral/bilateral web of intellectual property standards over which they have little control."(Drahos, Summary, p.2, 2001).

The paper states that during the negotiations on TRIPS (1986-1993), there were suggestions that if developing countries agreed to TRIPS, the U.S. "would ease off negotiating intellectual property standards bilaterally." TRIPS sets minimum standards of IPR standards and protection and the WTO and WIPO were expected to be the "principal fora for the negotiation of new intellectual property standards."

The signing of TRIPS was expected to result in a decline in U.S. bilateral activity on intellectual property but it is clear that there has been no apparent decline. In fact, the recent U.S. FTAs show that the U.S. has adopted what Mr. Drahos has called a "TRIPS plus" policy. This means that in bilateral trade negotiations which the U.S. enters into, especially those with weaker economies (Chile, Morocco, Jordan, Mexico), the U.S. requires standards of IPR protection higher and more extensive than the minimum standards set in TRIPS or eliminates an option for a TRIPS member under a TRIPS standard.

Part II. The U.S. ASEAN Agenda

During the past two years, there has been a spate of bilateral Free Trade Agreements (FTAs) entered into between the United States and several countries like Morocco, Jordan, Chile, Australia and Singapore. Prior to this, the United States signed a Bilateral Copyright Agreement with Vietnam in 1998, followed by a Trade Agreement in 2000. All these are indicative of the U.S. efforts to give itself a competitive edge and increase its market access in the international market by entering into bilateral trade agreements with as many countries as possible. The ASEAN was part of this grand design. This led to the Enterprise for ASEAN Initiative (EAI).

a. Enterprise for ASEAN Initiative (EAI)

The ASEAN is the United States' fifth largest trading partner collectively. The region represents about 500 million people with a combined gross domestic product of USD 737 billion and a two-way trade of nearly USD120 billion annually. The Enterprise for ASEAN Initiative was announced in October 2002 to strengthen ties with the ASEAN countries. It is under the EAI where the United States offered the prospect of bilateral free trade agreements with ASEAN countries that are committed to economic reforms and openness inherent in an FTA with the United States. The U.S. goal is to create a network of bilateral FTAs with ASEAN countries. (www.ustr.gov/Trade, 2004). The United States and individual ASEAN countries will jointly determine if and when they are ready to launch FTA negotiations. As stated by the president George W. Bush, "When you hear me talk about negotiating trade agreements, really what we're doing is leveling the playing field . What we're really doing is making sure America has a chance to compete on the same terms that people can sell into our market. And if they don't respond…, we'll use the tools necessary to make sure that the playing field is level." (Speech delivered in Appleton, Wisconsin, March, 2004).

The first U.S. Free Trade Agreement with an ASEAN country as a result of the Enterprise for ASEAN Initiative was with Singapore. The Singapore-U.S. FTA has been hailed as a model for future FTAs with ASEAN. (Fact Sheet released by the White House, Office of the Press Secretary, Washington, D.C., October 26, 2002, www.state.gov, 2004)

The intellectual property rights chapter in the Singapore-U.S. FTA is comprehensive and detailed enough to be considered as the law on intellectual property rights for Singapore. It

covers all aspects of IPR. A considerable part of the chapter is on enforcement of IPR laws. It is safe to assume that should an FTA between the United States and the Philippines be negotiated, many provisions on IPR in the Singapore-U.S. FTA will be adopted.

b. Intellectual Property Rights and FTAs

Just as TRIPS linked trade with intellectual property rights protection, the negotiation of free trade agreements (FTAs) is also a mechanism used by the U.S. in advancing the protection of intellectual property rights. The U. S. had to break the resistance of ten developing countries who were opposed to make a code on intellectual property as a negotiating item in a new GATT round. This led to U.S. bilateralism on intellectual property ; thus, FTAs with intellectual property as a negotiating item. (Drahos, 2001).

In bilateral trade negotiations between states involving a strong and weak state, like the United States and the Philippines, the U.S. has developed "models" or "prototypes" of the kind of bilateral treaties it wishes to have with other countries. The FTA that the U.S. has negotiated with Jordan served as a model for the FTAs with Chile and Singapore. The FTA with Singapore in turn, will serve as a model for all FTAs with ASEAN countries. (Ibid, pp. 4 – 5). Suffice it to say at this point that in all of these FTAs, there are very detailed provisions on intellectual property rights as this is necessary for improving market access of U.S. products as well as for expanding trade in merchandise and services. (Maskus, p. 1, 1997).

To discuss whether intellectual property rights should be used as a negotiating item in FTAs would not be a productive exercise as it is a given that every FTA which the U.S. has entered into, contains detailed provisions on intellectual property rights. While it is true that, for reasons of expediency, if certain provisions on intellectual property rights already exist in a country's intellectual property code, there is no need to repeat these same provisions in detail in the FTA, it is also true that there is no harm done if these provisions are repeated in the FTA. Similarly, certain provisions on intellectual property rights which are already in international agreements which the Philippines has adhered to, for example, need not be repeated in detail in an FTA also for reasons of expediency. They could be incorporated into the FTA merely by reference. Needless to say, the fact remains that all U.S. FTAs , including the Singapore – U.S. FTA which will be used as a model for the negotiations for the proposed RP – U. S. FTA, contain very detailed provisions on intellectual property rights protection. It is safe to assume, therefore, that this will also be the case if negotiations for an RP-U.S. FTA push through. The inclusion in the FTA of very detailed provisions on intellectual property rights will be a reassurance to both parties of their commitment to strengthen protection of intellectual property rights.

Another opportunity used by the United States to strengthen protection and enforcement of intellectual property is the increasing number of trade and investment framework agreement (TIFA) being negotiated. The United States has TIFAs with the Philippines, Indonesia and Thailand. Only those with TIFAs may later on opt for FTA negotiations. TIFAs may be considered as a prelude to FTAs.

c. Intellectual Property Rights and "Special 301"

"Special 301" is a part of the U.S. Trade law that requires the U.S. Trade Representative (USTR) to identify countries that deny adequate protection for intellectual property rights or that deny fair and equitable market access for U.S. persons who rely on IPR. (www.usinfo.state.gov - Introduction to Intellectual Property Rights: the U.S. Special 301 Process, 2004).

"Special 301" was also largely a response to the United States' failure to obtain an agreement on trade in counterfeit goods at the end of the Tokyo Round (1979). During the 1980s, the U.S. reformed its Trade Act of 1974 to "create a linkage with intellectual property…. The principal enforcement tool of U.S. trade policy, section 301, was amended to make it clear that it could be used to obtain protection for U.S. intellectual property. The result was "Special 301." (Drahos, p. 3, 2001).

Under "Special 301," the USTR must decide which countries to identify each year in a Special 301 review, as "priority foreign countries." These are countries that have the most egregious acts, policies, or practices, or whose acts, policies or practices have the greatest adverse impact on relevant U.S. products and are not engaged in good faith negotiations to address these problems. If so identified, the country could face bilateral U.S. trade sanctions if changes that address U.S. concerns are not made. The USTR has also created a "Priority Watch List" and "Watch List." Placement of a trading partner on the "Priority Watch List" or "Watch List" indicates that particular problems exist in that country with respect to enforcement of IPR or market access for persons relying on intellectual property. Countries placed on the "Priority Watch List" are the focus of increased bilateral attention concerning the problem areas.

While "not all trade negotiations that the USTR carries out with other countries involve the process under Special 301, nevertheless section 301 is a constant presence whether in the foreground or background in U.S. bilateralism on intellectual property." (Ibid).

On the effectiveness of Special 301 as a "negotiating tool," Ambassador Richard W. Fisher, Deputy U.S. Trade Representative , in his testimony in Washington, D.C. on "Special 301," once remarked:

> "One fascinating aspect of the Special 301 process occurs just before we make our annual determinations, when there is often a flurry of activities in those countries desiring not to be listed or to be moved to a lower list. IP laws are suddenly passed or amended, and enforced activities increase significantly." (cited in Drahos , p. 3).

It is clear from the above remark that "Special 301" will have a "big presence" in the negotiations for the proposed RP-U.S. FTA. It would be prudent for the RP negotiating panel to take into consideration the Special 301 Report on the Philippines

for 2004 and make sure that the issues discussed are acted upon or adequately explained.

Part III. Intellectual Property Rights in the Philippines: Status and Outlook

In the context of the global economy, WTO- TRIPS, the Enterprise for ASEAN Initiative and "Special 301," we will discuss the status and outlook of intellectual property rights in the Philippines, keeping in mind the proposed negotiations for an FTA with the United States.

A. Legal Framework and Existing Laws

The concept of intellectual property rights has been in existence in the Philippines for almost two centuries now.

The first known intellectual property law in the Philippines was the Spanish patent law promulgated on March 27, 1826. This resembled closely the contemporaneous French law. As to when and how this law or a subsequent one was first adopted and administered in the Philippines is unknown. (Sapalo, 1994). The first known copyright law was the Spanish Law of Intellectual Property of 1879 which was made applicable to the Philippines in 1887. Subsequently, during the American regime, American patent laws and copyright laws were made applicable to the Philippines. In 1924, the Philippine Legislature passed the first law protecting intellectual property.

1. The Philippine Constitution of 1987

The Philippine Constitution of 1987 embodies the concept of intellectual property protection in Article 14, Section 13 as follows:

> "The state shall protect the exclusive right of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people for such period as may be provided by law."

Since intellectual property rights are enshrined in the fundamental law of the land, the protection of these rights is guaranteed. Citizens cannot, therefore, be deprived of these rights.

2. The Civil Code of the Philippines

Intellectual property rights and their protection are echoed by Title II, Article 721 of the Civil Code of the Philippines when it provides for "intellectual creation" as a mode of acquiring ownership. Thus, under the Civil Code, the following acquire ownership:

a. The author with regard to his literary, dramatic, historical, legal, philosophical, scientific or other work;

b. The composer, as to his musical composition;
c. The painter, sculptor, or other artist, with respect to the product of his art; and

d. The scientist or technologist or any other person with regard to his discovery or invention.

3. The Intellectual Property Code (Republic Act No. 8293)

The basic law governing intellectual property in the Philippines is the Intellectual Property Code (IPC) (Republic Act No. 8293) enacted on January 1, 1998. Prior to the Intellectual Property Code, Presidential Decree No. 49 as amended by Presidential Decree No. 1988 issued in November, 1972 by President Ferdinand Marcos during the martial law regime, was the operative law on intellectual property rights. When the WTO-TRIPS Agreement took effect, there was much pressure on the Philippine government to enact a comprehensive intellectual property code; otherwise, it would be in the "priority watch list." The enactment of the Intellectual Property Code in 1998 was considered a step towards the effective implementation of the WTO-TRIPS Agreement.

The declaration of policy of the IPC states that "an effective intellectual and industrial property system is vital to the development of domestic creative activity, facilitates transfer of technology, attracts foreign investments and ensures market access for our products…." It also states that it is also the policy of the State to streamline administrative procedures of registering patents, trademarks and copyright, to liberalize the registration on the transfer of technology, and to enhance the enforcement of intellectual property rights.

Several changes were incorporated in the Intellectual Property Code to avoid being in the "priority watch list" of the U.S. Trade Representative. The enactment of the IPC was largely due to the pressure from the U.S. Trade Representative for a stronger IPR code, with stronger enforcement provisions. The "sword of Damocles" was always the prospect of being on the "priority watch list." Historically, however, enforcement and administrative procedures were always the problem rather than the existence of laws.
Among the changes made to the IPC to strengthen the enforcement of intellectual property rights were: (a)the increase in penalties for violations of the Code, particularly for copyright and trademark infringement; (b) the new law removed the reciprocity requirement before a foreign patent or trademark holder may bring an action in the Philippines for intellectual property right protection; (c) the term of patents under the IPC was increased from seventeen (17) to twenty (20) years; and (d) courts are now empowered to impound sales invoices and other documents evidencing sales in actions for trademark infringement.

It is clear that early on, the U. S. Trade Representative (USTR) has been consistently advocating for stronger intellectual property rights protection and more effective enforcement and administration of intellectual property laws. The Philippines has always complied with the enactment of special laws and/or amendments to the existing laws in accordance with the WTO TRIPS agreement. In spite of this, the Philippines

continues to be on the "priority watch list of the U.S. Trade Representative. The problem seems to be, as will be indicated in detail later, the lack of political will to enforce existing laws, resulting in inadequate enforcement of the IPC and related laws and inadequate protection of intellectual property rights. Today, seven years after the enactment of the Intellectual Property Code, the Philippines remains on the "priority watch list" of the U.S. Trade Representative. Effective enforcement continues to be a problem.

4. Intellectual Property-Related Treaties Acceded to by the Philippines

The Philippines has acceded to almost all of the intellectual property-related treaties, agreements and conventions on intellectual property rights. These are:

a. WTO-TRIPS agreement ratified by the Philippine Senate in 14 December 1994.

   The Uruguay Round of trade negotiations resulted in the Trade-Related Aspects of Intellectual Property (TRIPS) which is the most comprehensive multilateral agreement on IPR.

b. World Intellectual Property Organization Convention (WIPO) (1980).

c. The Berne Convention for the Protection of Literary and Artistic Works (1951 for administrative provisions and 1997 for substantive provisions).

d. The Rome Convention for the Protection of Performers, Producers of Phonograms (1984).

e. The Paris Convention for the Protection of Industrial Property as revised at Lisbon on September 27, 1965 and to the revision done at Stockholm on administrative matters on July 16, 1980.

f. The WIPO Copyright Treaty (WCT) ratified by the Philippine Senate, which took effect on October 2, 2002; and

g. The WIPO Performance and Phonograms Treaty (WPPT) ratified by the Philippine Senate and which took effect on October 2, 2002.

The last two treaties were enacted by the WIPO to enhance intellectual property rights protection in the light of the latest developments in technology. Notable provisions in these two treaties are the rights management protection and effective technology measures. These two rights will be discussed more in detail later.

5. Special Laws

As indicated earlier, the USTR has advocated for the enactment of certain special laws to make the protection of intellectual property rights in the Philippines stronger. Among these laws are:

(1) The Optical Media Act of 2003 (OMA) (Republic Act No. 9239)

This law, enacted on February 10, 2004 highlights the efforts of the Philippine government in its campaign against piracy. The OMA which reorganized the Videogram Regulatory Board, reiterates the policy of the State to "ensure the protection and promotion of intellectual property rights…; institute means to regulate the manufacture, mastering, replication, importation and exportation of optical media." The law gives both policy-making, administrative and enforcement powers to the Optical Media Board. (OMB). It can conduct inspections by itself or with other agencies; hear and resolve administrative cases against violators of the OMA; deputize, whenever necessary, provincial governors, city and municipal mayors and representatives of the national government agencies. It also requires the licensing and registration of the importation, exportation, acquisition, sale or distribution of optical media, possession and operation of manufacturing equipment, parts and accessories and the mastering, manufacture, replication, importation or exportation of optical media, and the destruction and disposal of seized materials.

While the USTR commended the Philippine government on the passage of the Optical Media Act (OMA) in its 2004 Special 301 Report, in the same breath he (USTR) lamented the fact that at that time, the Implementing Rules and Regulations of the OMA had not yet been approved. This is an indication that, as far as the USTR and presumably other trading partners of the Philippines are concerned, enforcement and implementation of laws are more important than just the passage and enactment of laws. The approval of the Implementing Laws and Regulations will help prove the resolve of the Philippine government to effectively enforce the Optical Media Act to curb piracy of optical discs.

(2) The Electronic Commerce Act (Republic Act No.8792)

The Electronic Commerce Act was enacted as a reaction to the "love bug " virus. While the basic purpose of the E-Commerce Act is the recognition and regulation of the use of electronic commercial and non-commercial transactions, it is the only existing law which provides for penalties for cyber-crimes such as hacking, or any access to corrupt, alter, steal or destroy using a computer or other similar information and communication device. It also punishes the unauthorized copying , reproduction, dissemination, distribution , alteration, substitution ….. of protected material, electronic signatures or copyrighted works including legally protected sound recordings.

There may be a necessity to enact a special law punishing cyber-crimes specifically, considering the spate of cyber-crimes committed. As indicated earlier, the Electronic

Commerce Act is the only law punishing cyber-crimes. In a digital era, such special law will help in the stronger protection of intellectual property rights.

6. Enforcement and Dispute Settlement

The enforcement and dispute settlement of intellectual property rights are just as important as the enactment and existence of laws protecting intellectual property rights. Disputes concerning intellectual property rights may be settled administratively and judicially. Generally speaking, administrative settlement is more expeditious than judicial settlement ; thus, it is usually resorted to before going to the courts. The speed of the settlement of intellectual property rights disputes is a relevant consideration in determining whether the protection of intellectual property rights is adequate. While the administrative and judicial machinery for the settlement of disputes exists in the Philippines, the speed of such settlement leaves much to be desired, as will be shown later.

a. Administrative

(1) Intellectual Property Office (IPO)

The Intellectual Property Office (IPO) is the main administrative agency tasked with the administrative enforcement of the Intellectual Property Code. The IPO's ability to enforce intellectual property laws, however, largely depends on its coordinated efforts with other government agencies and the private sector. Such agencies include the Philippine National Police (PNP), the National Bureau of Investigation (NBI) and the Bureau of Customs (BOC).

(a) Bureau of Customs (BOC)

Rules and regulations were prescribed on September 23, 2002 thru Customs Administrative Order No. 6-2002. These rules are aimed at preventing the entry into the country of merchandise which infringe upon intellectual property rights. Under these rules, the Bureau of Customs is mandated to maintain an Intellectual Property Rights (IPR) registry where IP holders may record their IPR and other relevant information in order to assist the BOC.

On September 12, 2003, Customs Special Order No. 19-2003 was issued which conferred a permanent character to the intellectual property unit which is vested with the power to conduct searches and seizures, apprehensions and monitoring of shipments found or suspected to be violating intellectual property laws, rules and regulations.

(2) National Bureau of Investigation (NBI)

As the lead agency tasked with investigation of violations of the law, the NBI assists holders of intellectual property rights in investigating acts of

infringement. The NBI is empowered to apply with the courts for search warrants when necessary.

(3) The Philippine National Police (PNP)

The Philippine National Police may provide assistance to the Intellectual Property Office and other government agencies in enforcing intellectual property laws, serving warrants of arrest and court processes such as writs injunction.

(4) The Department of Justice (DOJ)

The DOJ has formed a Task Force on Anti-Piracy of Intellectual Property. The prosecutors in the task force underwent regular training to equip them with the knowledge necessary for the successful handling of intellectual property cases.

(5) The Department of Interior and Local Government (DILG)

The DILG has issued a Memorandum Circular to all local government executives enjoining them to adopt the draft ordinance prepared by the Intellectual Property Office for the protection of intellectual property rights.

(b) Judicial

When administrative remedies are ineffective in the settlement of intellectual property rights disputes, the only remedy left is to resort to the courts. Prior to 1995, intellectual property cases could be filed in any court, subject only to the rules of procedure. As part of the effort to expedite the disposition of IPR cases, certain changes were made after the passage of the Intellectual Property Code. These are:

(1) Designation of IP Courts

As far back as 1995, the Supreme Court designated certain special courts to hear and decide intellectual property cases. There are currently 65 designated intellectual property courts throughout the country. The designation of special IP courts is aimed at the speedy disposition of cases involving intellectual property disputes.

(2) Approval of Rule on Search and Seizure for Infringement Cases

The new rule on search and seizure for intellectual property cases may be availed of even in civil cases and is broad enough to cover even the seizure and impounding of items, which may serve as relevant evidence of infringement.

(3) Reportorial Requirement for Intellectual Property Cases

To closely monitor the progress of intellectual property cases pending in the courts, the Office of the Court Administrator of the Supreme Court issued on March 30, 2004 its Circular No. 47-2004 enjoining the judges and clerks of court of the designated intellectual property courts to submit on a monthly basis to the IPO a list of intellectual property cases filed with them indicating the status of each case.

In summary, the Philippines has taken several major strides in strengthening the protection of intellectual property rights. These are: (a) The enactment of the Intellectual Property Code which was a step towards the implementation of the WTO TRIPS agreement; (b) We have acceded to all the major treaties and conventions on intellectual property, including the WIPO Copyright Treaty (WCT) and the WIPO Treaty on Performances and Phonograms (WTPP); (c) We have also enacted the Optical Media Act at the prodding of the U.S., to give more teeth to the campaign against piracy of optical media; and, (d) Several reforms have also been made in the area of administrative and judicial dispute settlement of intellectual property rights cases.

While the basic laws and organizational structures are in place for a stronger protection of intellectual property rights in the Philippines, both for its citizens and for foreign investors and trading partners, a perceived lack of enforcement of these laws and the speedy administrative and judicial settlement of disputes involving IPR continue to be a problem. The effort may be there but the desired results of these efforts are sorely lacking. These will have to be proven convincingly if we are to negotiate from a position of strength in the negotiations for an RP-U.S. Free Trade Agreement.

Part IV. Three Major Issues in IPR Protection Between the Philippines and the U.S.

Protection of intellectual property rights is one of the elements of the business climate that may affect the volume and composition of trade and investment flows (Maskus, 2000 cited in Hoekman, 2004). Many analysts claim that strong IPRs play a much larger role in signaling to potential investors that a particular country recognizes and protects the rights of foreign firms to make strategic business decisions with few government impediments (Sherwood, 1990 cited in Maskus, 1998). For countries with IPRs that are still being strengthened, as in most developing countries like the Philippines, harmonization of IPRs within the TRIPS agreement will increase the attractiveness for investors. These are main considerations in negotiations for Free Trade Agreements. These are also the same issues which the United States will consider if negotiations for an RP – U.S. FTA will take place.

Specifically, the three major issues in intellectual property rights protection between the Philippines and the U.S. are:

1. Adequate and sufficient legal protection of intellectual property rights;
2. Speedy and adequate administrative and judicial processes and strict enforcement of IPR laws; and
3. Improved market access for persons relying on intellectual property. Included in this is the issue of piracy.

1. Adequate and Sufficient Legal Protection of Intellectual Property Rights

As previously indicated, the Philippines has clearly indicated its willingness to adhere to international standards and internationally accepted principles of intellectual property rights. There is no doubt that our IPR laws are in compliance with the minimum standards set in TRIPS. Compliance with minimum standards, however, is not sufficient. On the basis of the nine FTAs already negotiated by the U.S., there is a need to add certain provisions to our IPR laws. Most of these provisions are imperative in the light of the WIPO Internet Treaties which we have already acceded to. These same provisions will later on form part of the RP- U.S. FTA as shown by the FTAs already negotiated by the U.S. These provisions are also in the Singapore – U.S. FTA which, as previously stated, will be the model for all U.S. FTAs with ASEAN countries. It goes without saying that even without the proposed RP-US FTA negotiations, these provisions are necessary for the Philippines to be up to par with the latest international standards of intellectual property rights protection. These international standards are as dynamic as the rapid development of technology. The common provisions to be added to the Intellectual Property Code include:

(a) Protection of Rights Management Information

Rights management information means information which identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance or phonogram; information about the terms and conditions of the use of the work, performance, or phonogram; and any numbers or codes that represent such information, when any one of these items is attached to a copy of the work, performance, or phonogram or appears in conjunction with the communication or making available of a work performance, or phonogram to the public.

In order to provide adequate and effective legal remedies to protect rights management information, certain acts are punishable, such as the intentional removal or alteration of any rights management information without authority and having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right. The distribution or importation for distribution of rights management information, knowing that it has been altered without authority is also

punishable.

It is interesting to note that while Singapore obliges to accede to the WIPO Performances and Phonograms Treaty which has the very same provision quoted above, the same provision was required to be included in the U. S. – Singapore FTA. It is safe to assume that should there be negotiations for an RP- U.S. FTA, the United States will also require the same provision to be included, even if the Philippines has already acceded to the WIPO Performances and Phonograms Treaty.

(b) Law on Cyber-crimes and Effective Technological Measures

The E-Commerce Law is the only law punishing certain acts relating to the Internet such as hacking and unauthorized access to certain programs. It is, however, inadequate and insufficient to implement the WIPO Internet Treaties. There is, therefore, a need for a separate law to punish cyber-crimes.

The law must contain provisions punishing the circumvention of effective technological measures or any technology, device, or components that, in the normal course of its operation, controls access to a copyright-protected work.

Parenthetically, there are several bills pending in Congress on cyber-crimes; but, they have suffered the same fate as thousands of other bills introduced in Congress. This is probably indicative of the lack of priority which our lawmakers give to such bills.

(c) Data Protection of a Subsisting Patent

One of the provisions of the U.S.- Singapore FTA on patents is data protection of a subsisting patent for marketing approval of a pharmaceutical product. If the holder of a subsisting patent permits the use by a third party of the subject matter of a subsisting patent to support an application for marketing approval of a pharmaceutical product, the third party shall provide that any product produced under such authority shall not be made, used, or sold in the territory of that party other than for purposes related to meeting requirements for marketing approval. If the party permits exportation, the product shall only be exported outside the territory of the party who holds the patent for purposes of meeting marketing approval requirements. This provision is for the protection of patent holders to protect the confidentiality of data which was the basis of the patent.

(d) Domain Names on the Internet

As previously indicated, the only law governing the Internet in the Philippines is the E-Commerce Law. It does not, however, contain any provision on the use of domain names which is an important aspect of the

Internet. It is safe to assume, therefore, that the U.S. would require provisions on the use of domain names to be added. These provisions would require that we provide for Uniform Domain Name Dispute Resolution Procedures for the country-code top-level domains of the Philippines. It would also require that we prove public access to a reliable and accurate "Whois" database of contact information of each domain name registrant. These provisions would combat the problems of copyright and trademark cyber-piracy.

(e) Electronic Temporary and Transient Copies

A provision that temporary and transient copies (such as those made in the RAM of a computer) are nevertheless copies and fully subject to the reproduction right. This is critical in a digital, networked world in which copyrighted material can be fully exploited without a permanent copy ever being made by the user.

(f) Electronic Transmission of Works

A provision protecting the right to control any manner of transmitting works, including interactive transmissions over electronic networks, like the Internet, with only minor exceptions for sound recordings and performances, would also have to be added.

All of the above provisions are provisions in the WIPO Internet Treaties which the Philippines has already acceded to but which are not part of the Intellectual Property Code. These were included in most of the U.S. FTAs including the Singapore-U.S. FTA.

2. Speedy and Adequate Administrative and Judicial Processes and Strict Enforcement of IPR Laws

The framework for the implementation of intellectual property rights protection in the Philippines exists. The administrative and judicial processes are also in place. There is, however, a need to show that the Philippines is serious in its efforts to implement and enforce existing laws and to speed up the administrative and judicial processes. Whatever is being done by the law enforcement authorities is not perceived as adequate and effective especially in the area of piracy. There is a need to show a strong political will to institute reforms for a speedier administrative and judicial dispute settlement.

The lack of speedy and adequate judicial processes with respect to IPR laws is shown by the case of McDonald's Corporation vs. L.C. Big Mak Burger, an action for trademark infringement and unfair competition which was decided by the Supreme Court of the Philippines in favor of McDonald's Corporation on August 18, 2004 . It took the judicial system fifteen years before the case was finally decided by the highest court of the land. Clearly, this is unacceptable by any standard. The timeline for the case is shown as Annex 1.

Interestingly enough, as of this writing, there are still Big Mak hamburger stands notwithstanding the Supreme Court decision in favor of McDonald's. Of what use is a legal victory which cannot be enjoyed by the victors? We hope it will not take another fifteen years for the judicial administrative machinery to enforce the decision.

3. Improved Market Access for Persons Relying on IPR

(a) Piracy and Counterfeiting of Copyrighted Goods

Piracy is a deterrent to improved market access for persons relying on IPR and is a non-trade barrier. There is no doubt that piracy of copyrighted optical discs and trademarked goods exist. The only bone of contention is the extent of the piracy and the efforts exerted by the government agencies concerned to eliminate or at least reduce such piracy to a level acceptable to the United States. If unabated, the Philippines could be elevated to "priority foreign country" category which could result in trade sanctions. Also, a decrease in pirated and counterfeited goods would improve market access for persons relying on intellectual property while an increase thereof would deter such market access. The 2004 "Special 301" Report on the Philippines by the United States Trade Representative gives much insight into the issue of piracy in the Philippines. Whether we like it or not, "Special 301" is an important negotiating item in any U.S. free trade negotiations.

Before we discuss the economic impact of piracy, we will first discuss the inter-related issue of the 2004 "Special 301" Report.

(1) The 2004 Special 301 Report

The U.S. Trade Representative, in his 2004 Special 301 Report, included the Philippines under the "Priority Watch List." In general, the 2004 report indicated that many developing countries and new members of the World Trade Organizations (WTO) are among progress toward implementing their anti-counterfeiting obligations under the WTO Agreement on TRIPS. The USTR, however, added that problems remain, "particularly in the area of enforcement."

USTR placed 33 trading partners on the "watch list" for IPR. Among the ASEAN countries are Malaysia, Thailand and Vietnam. Another 16 trading partners are on the "priority watch list" which entails greater scrutiny. Eleven of these, including India, Indonesia, Taiwan and the Philippines, were on last year's priority list. The four, including Korea, were moved this year from the "watch list" to the "priority watch list" (www.usinfo.state.gov). While the Philippines was one of the countries specifically mentioned which the USTR considered as showing "some positive development in the global adherence to IPR enforcement such as the passage of new legislation on protecting optical discs," the report states that the lack of IPR

protection and enforcement continues to be a global problem. It also calls for certain governments, including the Philippines, to take stronger actions to combat commercial piracy and counterfeiting. (ibid).

The report also notes that "the United States will consider all options, including but not limited to initiation of dispute settlement consultations, in cases where countries do not appear to have implemented fully their obligations under WTO-TRIPS agreement." (Executive Summary 2004 Special 301 Report).

(2) The 2004 Special 301 Report on the Philippines

In his 2004 Special 301 Report on the Philippines, the USTR devotes special attention to the increasingly important issue of "the need for significantly improved enforcement against counterfeiting and piracy, with particular emphasis on the ongoing campaign to reduce production of unauthorized copies of 'optical media' products such as CDs, VCDs, DVDs, and CD-ROMs;" in short, the issue of piracy.

What is very significant is one sentence in the executive summary, which should help the Philippines in proving its resolve to curb counterfeiting and piracy. The report says:

> "The issue on these and other countries ultimately is one of the foreign government's political will to effectively address piracy and counterfeiting."(Underscoring supplied.)

Special issues and concerns about the Philippines in the Special 301 Report include the following:

(aa) Serious concerns remain regarding the lack of consistent, effective, and sustained IPR protection;

(bb) U.S. distributors report high levels of pirated optical discs of cinematographic and musical works, computer games, business software, as well as widespread unauthorized transmissions of motion pictures and other programming on cable television;

(cc) Trademark infringement in a variety of product lines also is widespread, with counterfeit or pirated merchandise openly available in both legitimate and illegitimate venues;

(dd) The Philippine government's failure to implement data protection measures for innovative pharmaceutical and agricultural chemical products and copyright provisions

consistent with its obligations under the WIPO treaties;

(ee) Counterfeit goods from China, Malaysia, Hong Kong, Taiwan, and Thailand continue to enter the Philippines in large quantities.

All of the above concerns may be summed up in the lack of strong political will and resolve to adequately, effectively and consistently enforce protection of intellectual property rights.

(3) The International Intellectual Property Alliance (IIPA)

The International Intellectual Property Alliance is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. It is comprised of six trade associations representing 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world.

Interestingly enough, the reasons for keeping the Philippines under the "Priority Watch List" given by the USTR are the same reasons given by the International Intellectual Property Alliance (IIPA) in its 2004 Special 301 Report on the Philippines. The main reason given by IIPA is the continued existence of "unauthorized optical disc plants" which engage in pirate production and inadequate actions taken against pirate reprinters and photocopy shops.

The IIPA also recommended certain actions to be taken in 2004 . Among these are:

- Run sustained enforcement raids against pirate optical disc production facilities;
- Run coordinated sustained raiding, including against pirate book reprint facilities and photocopy shops, cable pirates and businesses or Internet cafes using unauthorized software;
- Clear backlogs of investigations and court cases;
- Reinstate specialized IP prosecutors in the Department of Justice;
- Implementation of the Optical Media Law;
- Pass copyright amendments to fully implement the WIPO "Internet" treaties; and
- Ensure that P.D. 1203 which has been repealed should not be "exploited."

(International Intellectual Property Alliance 2004 Special 301 Report on the Philippines).

The Philippine government prepared a response to the recommendations of the IIPA and in fact refuted most of their allegations especially in the context of existing laws and administrative procedures. The Philippine government submits "that the country should now be de-listed from the Special 301 Priority Watch List. The priority given by Philippine Government to IPR protection highlighted by the signing into

law Republic Act No. 9230, otherwise known as the Optical Media Act last 10 February 2004 cannot simply be glossed over nor be ignored." (Response to the International Intellectual Property Alliance 2004 Special 301 Report for the Philippines, April, 2004).

Be that as it may, it is clear that the IIPA works very closely with the U.S. Trade Representative in the annual "Special 301" reviews and that the USTR gives much weight to the recommendations of the IIPA. The concerns of the IIPA should, therefore, be addressed adequately.

(4) The 2005 Special 301 Report on the Philippines

After this paper was submitted for final approval, the USTR released the 2005 Special 301 report on the Philippines. While in general the concerns remained the same as in the 2004 report, it is interesting to note that the 2005 report recognizes the fact that "the Philippines made significant progress in 2004 which the U.S. copyright industry noted could lead, if continued, to the elimination of optical media piracy in the Philippines." (USTR 2005 Special 301 Report, underscoring supplied). The improvements mentioned are the passage of the Optical Media Act in February 2004 , the creation of the Optical Media Board, accession to the WIPO Internet Treaties, improved coordination of the groups responsible for IPR enforcement, and an increased number of raids of production facilities and retail establishments. In the same breath, however, the report states:

> "However, despite these improvements, U.S. industry continues to raise serious concerns about high levels of copyright piracy and trademark counterfeiting, including book piracy, increasing levels of pirated optical media imported into the country, and pervasive end user software piracy."

The report also mentions a growing number of backlog of cases in the domestic system. It also specifically mentions that the U.S. will use the bilateral Trade and Investment Framework Agreement (TIFA) to assist the government in strengthening its IPR regime.

It would seem that while the USTR recognizes the efforts and progress in the enforcement of IPR laws and strengthening of IPR protection by the Philippine government, it still does not consider the results sufficient. It expects more sustained and consistent efforts and more and better results especially in curbing piracy. Interestingly enough, the report states that the 2005 review devotes special attention to the need for "significantly improved enforcement against counterfeiting and piracy." It even mentioned that what the Philippines and other countries needed, including Vietnam, is the "foreign governments' political will to effectively address piracy and counterfeiting ." (2005 Special 301 Report).

(b) Economic Impact of Piracy

(1) U.S. Trade Losses

According to IIPA, in 2001, U.S. trade losses due to piracy amounted to USD115.8 million and in 2002, USD 120 million. The total losses for

2003 are still being compiled by IIPA but so far, their data shows USD 45 million for pirated books, USD 33 million for motion pictures and USD 22.2 million for records and music. (Please see Annex 2 for comparative data from 1999 to 2003). (IIPA 2004 Special 301 Report on the Philippines, www.iipa.com/countryreports.html).

(2) Philippine Trade Losses

(aa) Lost Tax Revenues

On the Philippine side, the Philippines is losing some Php 7.5 billion in forgone tax revenues yearly due to the deluge of fake goods in the country (Business World, 2, November 2, 2002). The Brand Protection Association (BPA), a private watchdog for private corporations, also released a report in 2002 which said that industries are losing billions yearly in potential sales.

> "In 2001 alone, the aggregate sales of the products of at least 15 products that are being faked stood at over Php3.7 billion… which translate into a tax revenue loss which will be equal to Php1.3 billion, largely comprising forgone duties, business taxes and value-added tax collection" (BPA files, 2002).

(bb) Cost of legal fees and IPR investigations

Aside from these losses, corporations have also spent some Php 30 million each in legal fees and IPR investigations in 2001.

(cc) Losses in the IT Sector

A study from the International Data Corporation revealed that the information technology sector of the country could more than double if piracy is cut by 10%. Another study entitled "Expanding Global Economies: The Benefits of reducing Software Piracy," stated that if the Philippines could reduce its 63 percent piracy rate to 53 percent in four years, the industry could grow even more and create 2,000 new high-tech, high-wage jobs, generating and additional Php1 billion in tax revenues, Php19.2 billion to the economy, and an additional Php13.7 billion in the local industry revenues (Manila Times, b2, April 4, 2003).

(dd) Textbooks

One concern of the IIPA is the unauthorized printing of copyrighted textbooks presumably on the basis of an exemption under

Presidential Decree No. 1203 which was expressly repealed by the Intellectual Property Code. According to the IPO, international publishers lose an average of USD 60 million due to local piracy. The Philippines has been tagged as the "second worst territory in Asia for publishers" (Philippine Star, B-3, October 12, 2002). The above figure does not take into consideration the approximately 7, 500 copyrighted books which are freely accessible on the Internet. While this problem is prevalent not just in the Philippines but worldwide, this underscores the need for the inclusion of provisions of the WIPO Internet treaties in a separate law.

Adding concern in unauthorized textbook printing is the proposed bill introduced by Senator Panfilo Lacson providing for the mechanism for compulsory reproduction of unavailable copyrighted books and printed materials for schools and universities 30 days after the commencement of classes. If enacted, the Philippines will be in violation of its obligations under TRIPS.

Under an Appendix to the Berne Convention, a license can only be granted by a government after the passage of five years following the date of first publication of the book in the foreign country of origin (three years in the case of "works of the natural and physical sciences, including mathematics, and … technology"; seven years in the case of "works of fiction, poetry, drama, and music and … art books). In addition to the time periods, the Berne appendix provides that a license first be sought from the right holder. Many requirements under the Berne appendix are not included in the provisions of the bill.

(ee) Fake Drugs

The World Health Organization (WHO) estimated that 10% of the global pharmaceutical commerce is made up of fake drugs. Most of the illegal trade is allegedly taking place in Southern Asia. The fake drugs are estimated to have a value of USD 32 billion a year. About 85% of the world's prescription drugs are consumed in developing countries and as much as 25% of pharmaceuticals are fake (Manila Bulletin, September, 2002).

"Fake drugs" is the collective term of drug preparations that are of substandard quality or are illegally imported. They have been adulterated or are made up of inactive or substandard ingredients, bootlegged or unregistered (Calleja 2002). The Bureau of Foods and Drugs (BFAD) confiscates about 150 to 300 million worth of fake drugs every year. BFAD estimates that nearly 30% of the drugs in the country are counterfeit (Tubeza, 2002). In 2004, Filipinos

> consumed about Php 7 billion worth – or 1.4 million kilograms – of fake drugs. Senator Pia Cayetano said she was amazed that of the 1.4 million kilograms of fake drugs which entered the Philippines and distributed to pharmacists last year, only two bags were confiscated by the Bureau of Customs. (Ubac, 2005).
>
> The issue of fake drugs also brings about the issue of parallel importation and pharmaceuticals.

Parallel Importation and Pharmaceuticals

Parallel importation in the Philippines affects the sale and pricing of pharmaceuticals.

Parallel imports are goods brought into a country without the authorization of the patent, trademark, or copyright holder after those goods were placed legitimately by rightsholders in another country. (Watal, 1998). These goods are legitimate copies, not pirated copies or knockoffs. Parallel imports are regulated by IPR laws. The TRIPS agreement recognizes, in Article 6, the prerogative of each country to set its own regulations covering parallel imports. Owners of U.S. patents and copyrights are protected from parallel imports. Few developing countries restrict parallel trade. (Saggi,1998).

Parallel importation is also a scheme whereby a similarly branded product that is cheaper in another country will be imported and introduced in the local market. The Philippine Patent Law prohibits parallel importation under Sec. 71 which provides that one of the rights of a patent holder where the subject matter of a patent is a product, is "to restrain, prohibit and prevent any unauthorized person or entity from making, using, offering for sale, selling of importing that product." The U.S. generally gives the rightsholder the right to prevent parallel imports of patented or copyrighted products but is more open to such imports under trademarks. (Watal, 1998).

The issue of parallel importation is now the subject of a case between the Pharmaceutical and Health Care Association of the Philippines, Inc. vs. the Secretary of Health, Director of Bureau of Food and Drugs and the Philippine International Trading Corporation. During the administration of then President Joseph Estrada, Administrative Order No. 85, S. of 2000, dated July 14, 2000 was issued. It authorized the Department of Health and the Department of Trade and Industry to intensify efforts in making essential and life-saving medicines affordable and accessible to the public, especially to the poorer segments of society. This in effect institutionalized the parallel importation of certain medicines by the Philippine International Trading Corporation (PITC). The constitutionality of the Administrative Order and the legality of the parallel importation is now being challenged in the aforementioned case. As of this writing, the case is still pending.

There are many essential medicines being distributed in the Philippines by pharmaceutical companies that are licensed from abroad with the parent companies mostly in Europe and North America. There are also pharmaceutical manufacturers in India which are also licensed by the very same parent companies. Since labor is cheaper in India, the retail price would be lower; thus the rationale for importing these medicines from India. A sample of the comparative prices is shown in Annex 4.

It is interesting to note that the U.S. – Singapore FTA, intentionally or inadvertently, does not contain a provision providing for the right of a copyright owner to prevent parallel imports of its products manufactured outside of Singapore that are not intended.

Patents and Pharmaceuticals

The recent development in India mentioned earlier, brings to fore the issue of pharmaceuticals and patents, an issue which could crop up in the negotiations of an RP – U.S. FTA. It is a known fact that the United States is home to giant multinational pharmaceutical companies which holds patents to pharmaceuticals which are used worldwide. Strong patent protection for pharmaceuticals drives medical progress by providing economic incentives for innovation. Without international respect for pharmaceutical patents, medical innovation would suffer. A study in 1966 showed that 65% of pharmaceutical products would not have been introduced without adequate patent protection. (Mossinghof, 2004). The underlying reason why pharmaceutical progress is dependent on intellectual property protection is the staggering cost of drug development. It costs an average of USD 500 million to develop a new medicine. The downside to a strong patent protection , especially in less developed countries, is the high cost of patented medicines. (ibid). This is the reason why India in 1970 adopted legislation prohibiting patents for medicines. This law, by allowing for existing patents to be ignored and drugs to be copied, enabled the development of a local pharmaceutical industry. When the legislation first took effect, domestic production accounted for about 25% of the market, In 2003, it reached 70% of bulk drugs. (Ibid). This practice also fueled the rapid growth of India's USD5 billion pharmaceutical industry while providing its people and those of other developing countries countries with reliable and advanced generic medicines.

While the TRIPS allows developing countries to produce generic copies of patented drugs, for specified illnesses, countries that lack the capacity to produce cheaper drugs are left empty- handed. (ibid).

India is different in that it has the capacity to produce cheaper drugs. The

Paris-based Doctors Without Borders estimates that 700,000 people in Africa and other developing nations rely on generic drugs from India to stay alive. These drugs generally are sold for about 5 percent of the cost of name brands. (Lancaster, Washington Post Foreign Service, March 24, 2005). As stated earlier, the Philippines imports cheap generic drugs from India.

The new law passed by the Parliament of India which prohibits the production of low-cost versions of patented medicines from the United States and elsewhere will not cut off the existing supply of existing generic medicines. It permits continued production of drugs that are already on the market as long as their manufacturers pay royalties to the patent holders. (Ibid). The payment of of royalties will definitely increase the price of these medicines and India will cease to be the supplier of cheap medicines to developing countries. The bigger concern, however, centers on new medicines. The measure requires that generic Indian companies wait three years before they can apply to produce a new drug. (Ibid). While such patent restrictions could be overridden in the event of a national emergency, the fact remains that this new law in India cuts off a supply of cheap medicines for developing and emerging countries.

This change of policy on pharmaceuticals in India is an indication that as a developing country becomes industrialized and increases its international trade, the need for stronger intellectual property rights protection arises. It also shows the growing acceptance of the fact that although generally perceived as a benefit only for developed countries with large pharmaceutical industries, patent protection is even more important for developing countries. A strong pharmaceutical patent regime increases local pharmaceutical research and development, attracts foreign investment, fosters technology transfer, provides high-technology employment, and increases exports. It also protects people from fake drugs. (Mossinghoff, 2004).

Be that as it may, the problem of high cost of patented medicines in less developed countries like the Philippines, remains. Perhaps the solution lies in allowing parallel importation which is allowed under TRIPS, of generic drugs to countries which do not have the capability of producing these generic drugs.

FTA and Patented Pharmaceuticals

An FTA with the U.S. would have a negative impact on locally patented and generic medicines as well as those imported from other countries. Presumably, an FTA would mean cheaper and better quality drugs imported into the Philippines from the U.S. This would place U.S. patented medicines at a big advantage over locally produced patented medicines and could even kill the fledging local generic medicine industry. While it may be true that an FTA would not necessarily reduce the prices of U.S.

manufactured pharmaceuticals down to the level of generic medicines or cheaper medicines from India (if they are still available), the demand for U.S. manufactured or licensed patented pharmaceuticals would increase, as consumers normally are willing to pay a little more for better quality, especially for an important commodity like medicines. Coincidentally, there has been much publicity lately about fake medicines. To guard against fake medicines and to make sure that they get the desired effect from a medical prescription, especially in life or death situations, consumers would rather buy the more reliable U.S. patented medicines. In short, the local pharmaceutical industry as well as the generic medicine industry, would be adversely affected by an FTA. The positive side to cheaper U.S. patented medicines as a result of an FTA is that fake medicines could be driven out of the market or at least minimized.

(ff) Optical Media

The underground business of pirating copyrighted works in the country was worth Php7 billion. It was expected to be reduced with the enactment of the Optical Media Act. The 2004 Special 301 report of the USTR, however, indicates that the Optical Media Act will not be fully implemented until the implementing rules and regulations are in place. While the Philippine government may have made some headway in going after pirated optical media, a lot more has to be done in terms of strict enforcement of the OMA and bringing those involved in pirated optical media to court.

The Philippines remained one of the countries in Asia Pacific with the highest software piracy rates, trailing eight nations in annual survey of 14 economies in the region (Piracy Study, 2004). The country lagged behind New Zealand, Japan, Australia, Singapore, Taiwan, Korea, Hong Kong, Malaysia, and India in software protection (Bautista, 2004).

When the Optical Media Board which replaced the Videogram Regulatory Board was given broad powers to go after intellectual property pilferers and monitor the reproduction of copyrighted works in digital discs and other more sophisticated forms of technology that may be developed in the future, the exercise of their new powers have not made enough improvements to merit de-listing from the "priority watch list." For, after the commercial outlets for pirated video are raided, they usually reopen and resume their trade after a few days. This is made possible through the fast and easy way of reproducing pirated items.

The latest data on pay-TV piracy in 2004 across Asia shows the Philippines as the fourth highest at an estimated cost of USD

70.4 million. The first three were India (USD 564.6), Thailand (USD 140.8) and Taiwan (USD 113). The total cost of television piracy in the Asian-Pacific region is costing pay-TV broadcasters USD 970 million in 2004, mostly in potential subscription revenue (Fowler, 2004). Please see Annex 3 for the table which shows the data.

(gg) IT Investments

Professor Ramon Clarete of the University of the Philippines School of Economics, after conducting a study, came to the conclusion that there is a "high negative correlation" between investments in software development and information technology in general and estimates of intellectual property rights theft for the four years up to December, 2002. IT investments quadrupled from a year earlier in 2000 when the piracy rate posted a seven percentage-point decline to 70% in 1999. Similarly, investments in 2001 increased by 38.2% when piracy rates dropped by nine percentage points in 2000. Piracy rate in 2001 was 63% which went up to 68% in 2002. As result of the decline in investments, new hiring in the software sector was cut in half in 2002 and by 65.2% in 2003.

Data from the Business Software Alliance (BSA) shows that investments in software and IT-related services reached Php216.994 million in 1999 and grew to Php960.52 million in 2001. On the other hand, the investment level declined in 2002 when the country posted a higher piracy rate of 63% in 2001. On 2002, IT investments fell to Php605.029 million and the country's exports of IT software and services reached USD 186 million when the industry's contribution to the country's GDP was less than 1%. The data used were from the Board of Investments and from the industry group BSA which counts some of the biggest software companies as its members like Microsoft, McAfee, and Sybase.

The issue of piracy of digital music, movies and other devices, books, clothing apparel and drugs cannot be taken lightly by the Philippine negotiating panel. The same goes with the issues and concerns raised in the 2004 "Special 301" report of the USTR as well as the International Intellectual Property Alliance. All these issues boil down to piracy and the infringement of copyrighted products. It will take a lot of convincing the U.S. panel that the Philippines has a very strong resolve, coupled with a strong political will, to curb piracy. Certainly, it will take more than just conducting raids and destroying the pirated goods. There has to be a concerted effort from all levels of the government, including the general public, to eradicate, or at least to minimize the infringement of copyrighted goods. If piracy is eliminated, there will be improved market access for exporters to the Philippines as well

as other persons who rely on IPR and a non-trade barrier will be eliminated. Unless the Philippine panel gives this assurance, the Philippines will have a weak bargaining position in the FTA negotiations.

Part V. Capability Building Measures

In the Philippine government's Response to the IIPA 2004 Special 301 Report of the Philippines, several capability building measures by different government agencies were discussed. In general, the Philippine government stated that the issues pointed out by the IIPA in its 2004 report were the same as those in its 2003 report. Several actions and enforcement measures have been taken as part of the Philippine commitment to IPR protection. Among these are:

1. Measures being adopted and planned by the IPO and OMB

   In July 2001, the IPO convened the Intellectual Property Rights Enforcement Action Panel (IP-REAP). The purpose for its creation was to establish a forum and venue for long-term coordination and cooperation among the various government agencies.

2. Level of upgrading to improve the adequacy and effectiveness of intellectual property protection

   a. Training on Product Familiarization of Frequently Infringed Products. This training program was conducted last 12 November 2003. As part of the technical assistance package requested from the U.S government, it had, as its objective is to arm enforcement and investigation agencies with the latest updated knowledge and skills in the area of IPR protection.

   b. Launching of Handbook of Enforcement Procedures for IP cases

      Launched last March 26, 2004, the handbook is aimed at facilitating the investigation of IP cases by providing investigators and prosecutors relevant information and step-by-step procedures in determining whether or not there has been an IPR violation.

   c. Conduct of IP Seminars for Policy Makers, Business and General Public

      The IPO, through the IP Caravans, regularly conducts IP seminars for policy makers, business and the general public. Targeted were the local government unit executives and local council members of key cities in the Philippines.

d. Template Ordinance

One of the objectives of the IP Caravans is to foster intellectual property rights consciousness by lobbying for the passage by the respective local government units of a draft template ordinance for intellectual property enforcement.

e. Implementing Rules and Regulations for Optical Media Act

The Implementing Rules and Regulations for the Optical Media Act were approved in February, 2005. This will give a big boost to the campaign against piracy.

Part VI . Conclusions and Recommendations

The status and outlook of intellectual property rights in the Philippines vis-à-vis the U.S. agenda in ASEAN to negotiate more FTAs show that the basic structure and framework are in place for a stronger intellectual property rights protection which, as earlier indicated, will be a negotiating item in the proposed RP-U.S. FTA. Aside from the economic benefits of increased investments and trade, a strong IPR regime conveys commitment to move from opaque to transparent legal systems, from arbitrary pronouncements to unbiased enforcement of commercial laws, and from corruption to professionalism in public management. (Maskus, 1998). These sum up, in general, what the Philippine negotiating panel has to prove to their U.S. counterparts in the negotiations for an RP-U.S. FTA.

Can we categorically state at this time, that the Philippines has done enough for IPR protection? It would be safe to say that the Philippines has done much but not enough in the protection of IPR. The protection of IPR will always be a work in progress. It entails sustained effort and there will always be room for continued improvement. Yes, we made much progress and did much, but not yet enough to say that there is nothing more to do in strengthening IPR.

Specifically, the following are the conclusions and recommendations on the talking points for negotiation:

1. Certain provisions of the Intellectual Property Code have to be included to make the IPR up to par with the IPR provisions in most of the U.S. FTAs. The U.S. – Singapore FTA should be the model for negotiations for an RP- U.S. FTA. The specific provisions which have to be added are mentioned in the section on Adequate and Sufficient Legal Protection of IPR of this paper.

2. In relation to Special 301 and the Philippines being on the Priority Watch List:

   Issues relating to “Special 301” cannot be avoided and will definitely be discussed.

As shown earlier, it is always used as a leverage in any FTA negotiation, rightly or wrongly. The influence of the USTR in the negotiations should not be taken lightly.

The specific recommendations on this are:

a. While the Intellectual Property Code of the Philippines for the most part satisfies international standards and while the Philippines has adhered to most of the conventions and treaties on intellectual property, the U.S. Trade Representative is more interested in the implementation and enforcement of these laws. For example, even if the Philippines already passed the Optical Media Act, the USTR still emphasized the urgency of the approval of the Implementing Rules and Regulations. The USTR is more interested in enforcement and the speedy resolution of IPR disputes. For, what use are adequate standards if they are not properly implemented and enforced nor disputes settled expeditiously?

b. It is clear that the International Intellectual Property Alliance (IIPA) is a force to reckon with in the Special 301 yearly review of countries who are trading partners of the U.S. It would be helpful, therefore, to take into consideration their suggestions and recommendations. Needless to say, the facts and data which they base their recommendations on have to be verified and corrected, if not accurate. The IIPA is representative of "industry" which has to be consulted and its recommendations given serious consideration.

3. While it is true that the Philippines has taken great strides in the campaign against piracy of optical media, there is still a need to convince the USTR that we have the strong political will and determination to continue and take greater strides in our campaign against piracy. Be that as it may, we can show the U.S. what we have done in our efforts to curb piracy and to prove to them that our rates are piracy rates are lower than those of Vietnam. We should, therefore, be put on the " watch list" instead of the "priority watch list." This could be a talking point during the proposed RP-US free trade negotiations.

Much importance and attention is given to the issue of piracy, considering the billions of dollars lost by the United States not just in ASEAN but in other parts of the world as well. It is worth mentioning here that the administration of newly re-elected President Bush is planning a coordinated crackdown on the theft of American intellectual property. Almost a year now in the works but announced only about a month ago, the campaign is called the "Strategy Targeting Organized Piracy" or STOP. It reflects a desire within the administration to strengthen the ability of the U.S. companies to compete overseas at a time when the "…widening U.S. trade deficit continues to set records. Officials say rampant piracy of copyrighted or patented U.S. goods, particularly in China, is depriving American companies of billion of dollars a year in revenue. This will be the most

comprehensive effort ever launched to stop the trade in pirated goods." (Neil King, Jr. Asian Wall Street Journal, October, 2004). Efforts should, therefore, be exerted to reduce piracy.

Questions were raised why a country like Vietnam is only on the "watch list" even if they have more pirated goods than other countries on the "priority watch list" like the Philippines. The fact remains that the United States has the sole discretion under Special 301 as to who should be placed under the "watch list" and "priority watch list." Special 301 is a unilateral act of the United States. The broad criteria used by the USTR makes it difficult to determine how classifications are made under Special 301.

Vietnam has already entered into a Trade Agreement and a Bilateral Intellectual Property Agreement with the United States. There is, therefore, a very clear and definite existing mechanism whereby all intellectual property issues such as piracy will be properly and adequately addressed. Also, the long relationship between the United States and Vietnam during the Vietnam war may be another reason why Vietnam is being treated differently from any other nation. It may be that the United States is exerting much effort to help Vietnam recover economically from the ravages of war which, to a greater or lesser degree, the United States was responsible for. It may also be that the United States recognizes that compared to other democracies, Vietnam has not been on its own long enough. All of these may be reasons, rightly or wrongly, why the United States is giving Vietnam a more lenient treatment than other countries like the Philippines, in the Special 301 determination of who should be in the "watch list" and the "priority watch list."

The Philippines, on the other hand, has been on the "priority watch list" for many years now but for some reasons, our classification does not improve in spite of our efforts to strengthen intellectual property rights. We have done much but unlike Vietnam, our classification under Special 301 never changes. Our efforts are shown by the following:

a. We enacted the Intellectual Property Code of 1998 which meets the minimum standards set by the WIPO preparatory to our entry to WIPO;

b. We have acceded to almost all treaties on intellectual property rights as enumerated in Part III of this paper on the status and outlook of intellectual property rights in the Philippines;

c. We have passed laws, when necessary, to strengthen intellectual property rights protection in the Philippines, the latest of which was the Optical Media Act passed in 2003;

d. We have gained much headway in curbing piracy and the enforcement of intellectual rights such as better coordination among government agencies

tasked with enforcement of IPR, the creation of intellectual property courts which has sole jurisdiction over IPR cases.

e. Lastly, like Vietnam, we have a long history of political and economic ties with the United States dating back to the Commonwealth era and we were under their political tutelage until we were granted independence in 1946.

Needless to say, we also have a Trade and Investment Framework Agreement with the U.S. which serves as a "pre-requisite" to a Free Trade Agreement. All of these are sufficient grounds for us to negotiate that we be given the same treatment like Vietnam in terms of classification under Special 301. Specifically, we can now qualify as a country under the "watch list" instead of the "priority" watch list.

4. A strong IPR regime is necessary to achieve the purposes of an RP-US FTA which are to attract foreign investments and increase the volume of trade between the Philippines and the U.S. In the long term, this will be beneficial to the Philippines and will always be a positive factor in future bilateral or regional trade agreements which the Philippines will negotiate with other countries.

5.The Philippines should negotiate for the implementation of TRIPS insofar as parallel importation is concerned. This means that the Philippines should determine for itself when it can resort to parallel importation as provided for under TRIPS. This will give us the flexibility in making available cheaper medicines. Compulsory licensing and price regulation especially for pharmaceuticals and books should also be negotiated.

It should be noted that the deal that resulted from post-Doha negotiations at the World Trade Organization permits governments to seek a compulsory license in order to export generic versions of patented drugs to developing world nations, in the case of the latter experiencing a public health emergency and lacking pharmaceutical manufacturing capacity of their own. This certainly is an avenue that the Philippines can resort to in order to make cheaper medicines available here.

6..Finally, the Philippines should insist on capability building measures such as faster transfer of technology, assistance in terms of reducing piracy which would include consumer education, customs border patrol and police enforcement. Article 67 of TRIPS requires developed countries like the U.S. "to provide on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."

It is interesting to note that the United States recognizes the need for assisting

developing countries in strengthening IPR. In April, 2005, the U.S. proposed the creation of a partnership program within the WIPO that would strengthen the roles that WIPO and protection of intellectual property play in promoting development. The U.S.-proposed program would "improve WIPO's ability to provide better and more coordinated assistance to developing countries by facilitating links among developing countries, WIPO, other United Nations agencies, nongovernmental organizations and other groups." (Backgrounder, 2005). We should, therefore, negotiate that we be given whatever assistance is available under this proposed partnership within the WIPO, to strengthen intellectual rights protection.

As a closing statement to this paper, I wish to point out that the conclusion of an FTA between the Philippines and the United States will give the Philippines a better chance of changing its status under "Special 301" from 'priority watch list" to "watch list." For, the FTA will take the place of "Special 301" as the enforcement tool in strengthening the intellectual property rights of United States businessmen and other persons who rely on IPR. Also, a strong IPR regime resulting from an FTA with the U.S. will effectively increase trade with and direct investments from the United States.

R E F E R E N C E S

Bautista, Kerlyn G. 'Software industry hit as RP remains one of piracy havens in A/P', http://www.itmatters.com.ph/news/news 2004.

Brand Protection Association Files, 2002.

Calleja, Homobono B., M.D. 'Fake drugs endanger lives of millions: Vigilance is best weapon to fight counterfeit drugs', Manila Bulletin, P C7, 18 November 2002.

Drahos, Peter, 'Bilateralism in Intellectual Property', A paper prepared for Oxfam GB, 1997.

'Expanding Global Economies: The Benefits of Reducing Software Piracy,' Manila Times. B2, April 4, 2003.

Fact Sheet, Bureau of Economic and Business Affairs, Washington, D.C., 22 July 2003.

Fact sheet released by the White House, Office of the Press Secretary, Washington D.C., 26 October 2002, http://www.state.gov/ 2004

'Fakes Costing Government Php 7.5 B annually – Multinationals', Business World, p. 2, 27 November 2002.

Folsom, Gordon, Spanogle,Jr., International Business Transactions In a Nutshell, p. 218, Fifth Edition, West Publishing Co., St. Paul, Minn, (1996).

Fowler, Geoffrey, "TV Piracy Throughout Asia Grows Costlier', Asian Wall Street Journal, 27 October 2004.

International Intellectual Property Alliance 2004 Special 301 Report on the Philippines, http://www.iipa.com/countryreports.html 2004.

King, Neil Jr. "Strategy Targeting Organized Piracy,' Asian Wall Street Journal, October 2004.
Lancaster, John. 'In Bow to WTO, India Targets Drug Copying,' Washington Post Foreign Service, March 24, 2005, Page E06

Lall, Sanjaya, 'Indicators of the Relative Importance of IPRs in Developing Countries,' UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, p. 1, November, 2001.

Lehman, Bruce. 'Support for Economic and Political Freedom' International Information Programs, http:/usinfo.state.gov/products/pubs/intelprp/support.htm 2005

Maskus, Keith. 'The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer', A paper prepared for the Conference "Public-Private Initiatives after TRIPS: Designing a Global Agenda," Brussels, July 16 – 19, 1997.

Mossinghoff, Gerald. 'Progress in the Pharmaceutical Industry,' International Information Programs, http:/usinfo.state.gov/products/pubs/intelprop/support.htm, 2005.

Response to the International Intellectual Property Alliance 2004 Special 301 Report for the Philippines, April 2004.

Saggi, Kamal. 'International Technology Transfer and Economic Development, (1998), *Technology and Intellectual Property,* World Bank, 2002.

Special 301 Report on the Philippines, Executive Summary. http://www.ustr.gov/ 2004

Tubeza, Philip C. '30 percent of drugs fake, says BFAD', Philippine Daily Inquirer, p. A25, 12 April 2002.

Ubac, Michael Lim. 'Pinoys took P7B worth of fake drugs last year', Philippine Daily Inquirer, 22 January 2005.

'U.S. Publishers Cite Government Move Versus Textbook Piracy'. Philippine Star, p. B3, 13 October 2002.

http://ustr.gov/Trade, 2004.

Watal, Jayashree, 'Implementing the Trips Agreement', *Technology and Intellectual Property*, p. 362, World Bank, 2002.

ANNEX 1

Timeline for McDonalds Corporation vs. L.C. Big Mak Burger

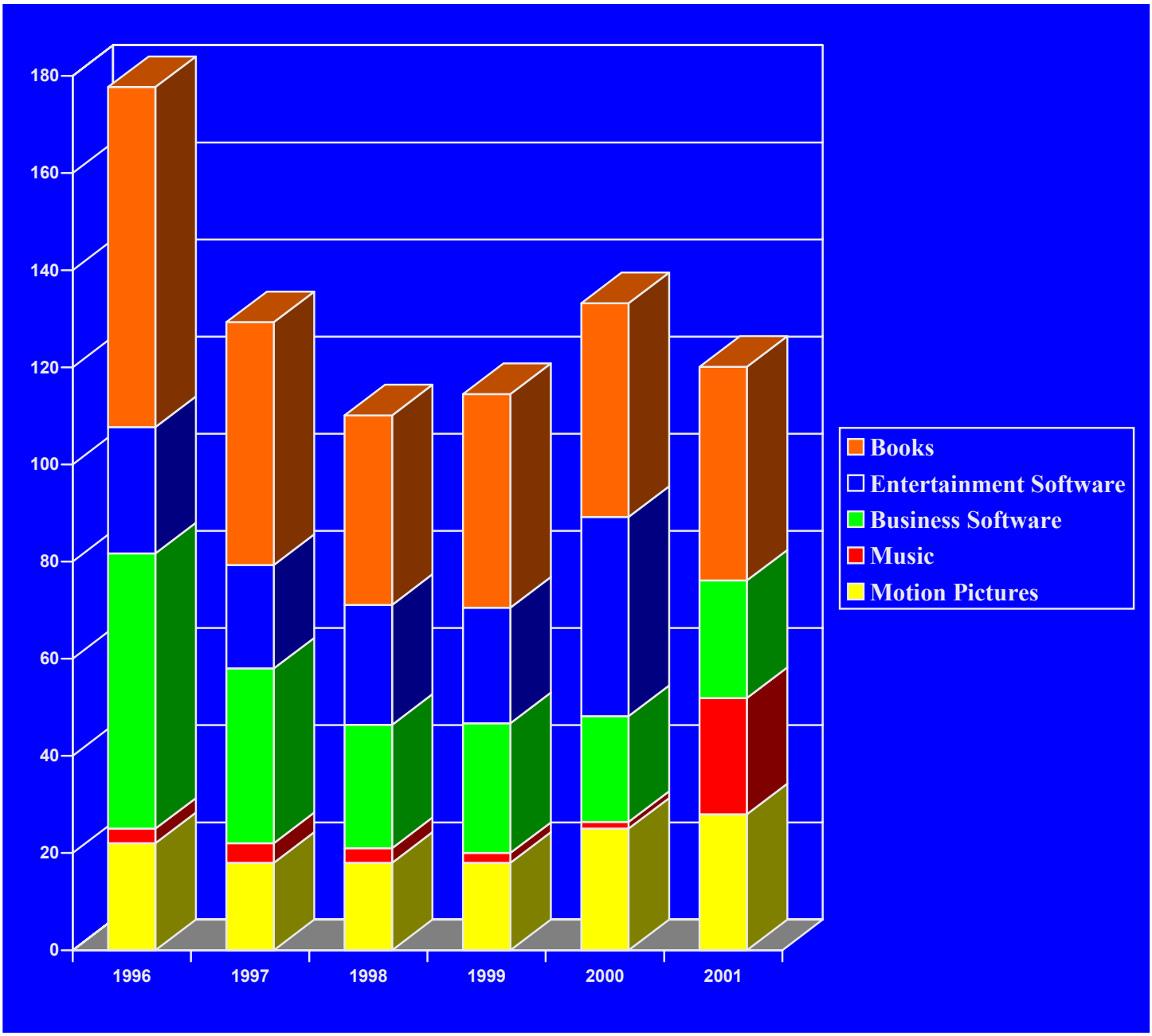
1979	1981	1985	1988	1990	1994	1999	2000	2004

Year	Month/Day	Development
1979	October 16	- McDonald's registers its "Big Mac" trademark with the U.S. Trademark Registry; then shortly thereafter, with the Philippine Bureau of Patents, Trademarks & Technology (PBPTT), now known as Intellectual Property Office (IPO).
1981	September	- McDonald's introduces its "Big Mac" hamburger sandwiches in the Philippine market.
1985	July 18	- On the basis of McDonald's Home Registration in the U.S., the PBPTT allows registration of the "Big Mac" mark in its Principal Register.
1988	October 21	- L.C. Big Mak Burger, Inc. applies with the PBPTT for the registration of the "Big Mak" mark for its hamburger sandwiches.
1990	June 6	- McDonald's sues L.C. Big Mak and its incorporators, stockholders and directors. This is after opposing L.C. Big Mak's registration and sending an extra-judicial demand for it to desist from using the mark or any similar mark.
	July 11	- The Regional Trial Court issues a temporary restraining order against L.C. Big Mak, et al. enjoining them from using the 'Big Mak' mark in the operation of their business.
	August 16	- The Regional Trial Court issues a writ of preliminary injunction replacing the temporary restraining order.
1994	September 5	- The Regional Trial Court renders judgment finding L.C. Big Mak liable for the trademark infringement and unfair competition.
	September or October	- L.C. Big Mak appeals to the Court of Appeals.
1999	November 26	- The Court of Appeals renders judgment reversing the decision of the Regional Trial Court and ordering McDonald's to pay L.C. Big Mak actual and moral damages.
2000	July 11	- The Court of Appeals denies the motion for reconsideration of

		McDonald's.
	July or August	- McDonald's appeals to the Supreme Court.
2004	August 18	- The Supreme Court renders judgment in favor of McDonald's setting aside the decision of the Court of Appeals and reinstating the decision of the Regional Trial Court.

ANNEX 2

US Trade Losses in the Philippines (in million US Dollars)

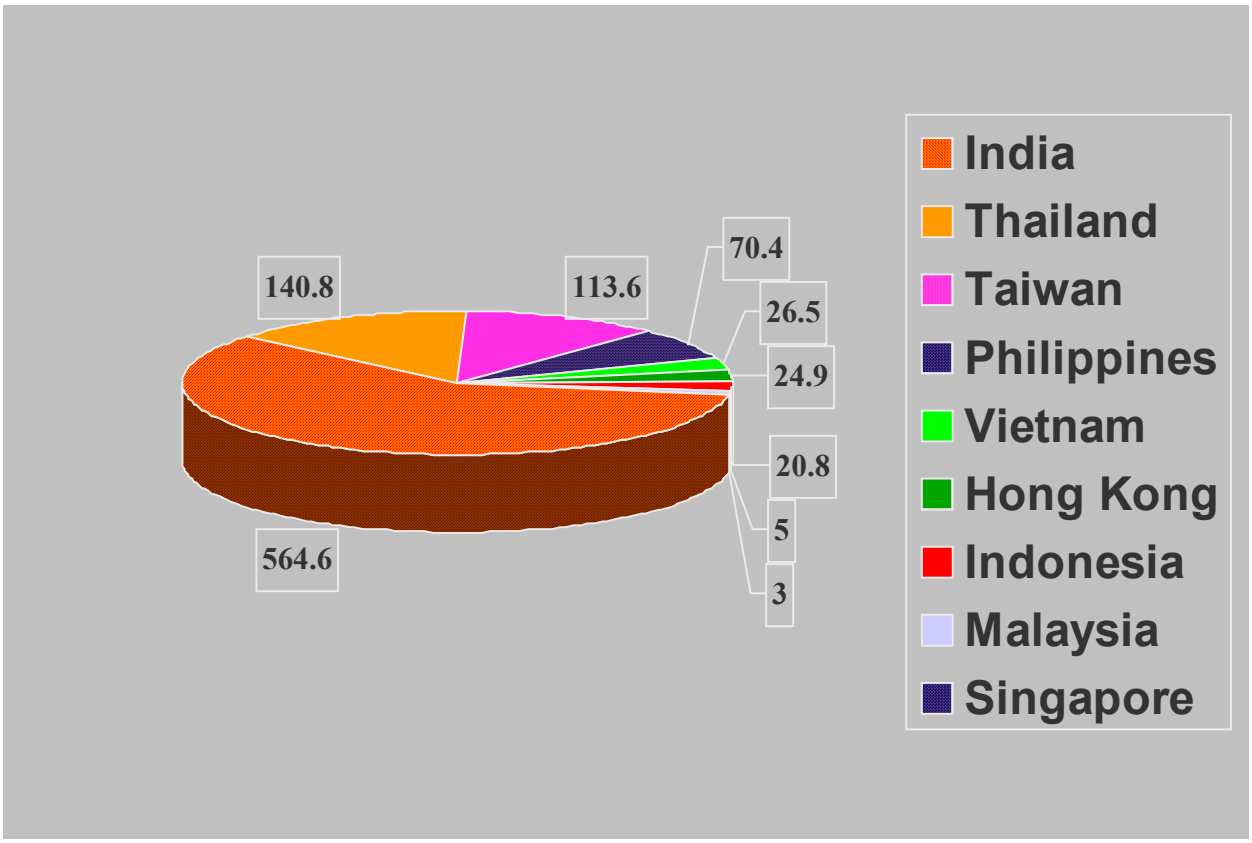


Source: International Intellectual Property Alliance 2004 Special 301 Report on the Philippines (www.iipa.com/countryreports.html).

A. ANNEX 3

Crime Show

Estimated cost of pay-TV piracy in 2004 across Asia *(in millions US Dollars)*



Source: Geoffrey Fowler: TV Piracy Throughout Asia Grows Costlier
(Asian Wall Street Journal, October 27, 2004)

ANNEX 4

Parallel Imported Medicines
(Price List Effective December 6, 2004)

Drug / Dosage	PITC Selling Price	Maximum Retail Price	Current market Price	Savings (% in PhP)
Bactrim Adult 400/80mg tab	2.15	7.00	15.60	55%
Ponstan 250mg tab	4.15	7.41	11.50	36%
Lopid 300mg cap	18.25	25.77	36.50	29%
Bricanyl 5mg tab	4.50	10.00	21.00	52%
Buscopan 20mg/ml inj	22.00	40.00	75.00	47%
Imodium 2mg cap	4.50	7.00	10.00	30%

Source: Philippine International Trading Corporation (PITC)