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U.S. Bilateral Agreements and the Protection of Intellectual Property Rights In Foreign Countries: Effective for U.S. Intellectual Property Interests or a Way Out of Addressing the Issue?

I. Introduction

Intellectual property rights have become a topic of interest in the international community during the past ten years. Authorized copyright holders in particular have put pressure on the United States government and the international community to stop the infringement of original works. Counterfeiting and piracy rates have continued to remain high every year, especially in the technology areas like software and CD-ROMs.1

Recognizing a need to advance national interests by helping to enforce the protection of U.S. intellectual property rights, the United States started executing bilateral agreements with many of its Asia-Pacific allies in the 1990's. In 1993, the U.S. and the Philippines entered into a bilateral agreement that specifically addressed the intellectual property rights problems in the Philippines.2 In the same year, a model comprehensive copyright protection agreement was afforded to U.S. copyright holders in Taiwan.3 The U.S. continued to expand protection for its

1. Software and Information Industry Association, SIIA's Report on Global Software Piracy 1999, 18-19 (1999). The Asia-Pacific region had the highest percentage of software piracy in world in 1999, with Vietnam at 97% and China at 95%. Id. The average amount lost in revenues to software piracy was $2.9 billion in 1998. Id. In 2000, Vietnam continued to have the highest percentage at 98%, with China coming in second at 91%. Id.


intellectual property license holders in the Asia-Pacific region by enacting a more complete bilateral agreement with China in 1995. While the terms of those agreements differ, the results were the same: protection and enforcement of intellectual property rights.

Many provisions of the bilateral agreements were never implemented. The effectiveness of bilateral agreements was called into question by Senator Max Baucus in 1989; but he did so before most of the intellectual property rights bilateral agreements had come into existence. Currently, it appears that intellectual property rights bilateral agreements are used by the United States as tools to implement more comprehensive legislation and to create more thorough enforcement efforts. For a foreign country that executes bilateral agreements with the United States, the emphasis on the bilateral agreement is to help the foreign country's international and economic standing, not preserve intellectual property rights.

This comment will explain the background of the aforementioned bilateral agreements on intellectual property right protection and examine if the agreements accomplished their intended goals. This comment will also examine the other side of those bilateral agreements, where the foreign countries get more than they bargained for, without putting forth much effort. The effectiveness of bilateral agreements may be key to protecting U.S. intellectual property rights and the results should be a good indicator of how the U.S. should pursue future problems with foreign countries. Unfortunately, the results do not appear to solve many of the problems that are faced by U.S. intellectual property license holders or by the international intellectual property community.

II. Bilateral Agreement Backgrounds

A. U.S.-Philippines Bilateral Agreement

In 1993, United States Trade Representative Michael Kantor and the Philippines' Secretary of Trade and Industry Rizalino S. Navarro entered into an intellectual property rights bilateral agreement, the Understanding Concerning the Protection and Enforcement of Intellectual Property Rights [hereinafter

"Philippines Bilateral Agreement"]. While the Philippines Bilateral Agreement covered traditional aspects of intellectual property,' such as copyrights, trademarks, and patents, it did not follow the current U.S. model that goes further to extend protection, including the protection of databases and making circumvention tools illegal.8

1. Copyright Protection Efforts—With specific reference to copyright protection, the Philippine government agreed to abide by the provisions in the Paris Convention and the Berne Convention, which are recognized internationally as the standards for intellectual property.9 The Philippines Bilateral Agreement specifically included protection for a term of fifty years to sound recordings, literary works, and computer programs.10 There were also provisions to prohibit the rental of the copyrighted works to the public and give exclusive rights to the producers of sound recordings and authors of computer programs.11

The inclusion by the Philippine government of the protection of computer programs and their treatment as a literary work was a large step for that country.12 The Philippines recognized that neither the government nor the private sector could reproduce or use software without the correct licensing by the exclusive license

6. Philippines Bilateral Agreement, supra note 2, at 1. As of Jan. 1, 2001, the U.S. Trade Representative was Charlene Barshefsky. President George W. Bush nominated Robert Zoellick to become the new U.S. Trade Representative under his administration, but he was not confirmed at the time that this article was published.

7. Id.

8. 17 U.S.C. § 1201 (1999). In 1998, Congress passed the Digital Millennium Copyright Act. Id. This broadened the scope of copyright protection to include on-line copyright infringement and the use of circumvention tools for software illegal acts. Id. The circumvention tools, usually referred to as Acrackz" or Ahackz", are used to circumvent source protection codes and allow the infringer to copy software without the owner's permission. Id.


10. Philippines Bilateral Agreement, supra note 2, at 2. The U.S. recently amended their copyright terms to protect most sound recordings, literary works, computer programs, etc... for a term of seventy years. 17 U.S.C. § 102(b) (2000).

11. Id. This provision applies to all works recognized in the agreement as having copyright protection so that commercial advantage will not be taken of the original works. Id.

12. Id.
holder.\textsuperscript{13} The provisions, while more comprehensive than before, are basically useless without enforcement of the new laws.

2. \textit{Enforcement Efforts}—The enforcement provisions of the Philippines Bilateral Agreement focus on the Inter-Agency Oversight Committee on Intellectual Property Rights (Committee).\textsuperscript{14} The Committee was formed to coordinate, recommend, enforce, and implement intellectual property rights initiatives throughout the Philippines.\textsuperscript{15} The Committee chose to have copyright infringement actions brought in an administrative hearing instead of a traditional court.\textsuperscript{16}

The United States, in response, created a Special Task Force on Piracy and Counterfeiting.\textsuperscript{17} The Task Force was implemented to ensure the prosecution of copyright infringement crimes and investigate criminal copyright infringement.\textsuperscript{18} Penalties for infringing activities in the Philippines were to become more strict and include prison sentences and/or fines.\textsuperscript{19}

Finally, the Bureau of Customs in the Philippines was to establish border enforcement of intellectual property rights similar to the United States' intellectual property rights border enforcement.\textsuperscript{20} The customs officials, according to the Philippines Bilateral Agreement, would receive help from the United States in technical assistance and training procedures.\textsuperscript{21} Copyright owners would be permitted to contact Customs officials about potential infringing materials that may enter or leave the country.\textsuperscript{22} The Philippines Bilateral Agreement is better than no agreement, but not nearly as comprehensive as the proposed intellectual property rights agreement with Taiwan.

\begin{itemize}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} Philippines Bilateral Agreement, supra note 2, at 4-6. The Committee was to meet on a regular basis and issue operating instructions by Aug. 31, 1993. \textit{Id.}
\item \textsuperscript{15} \textit{Id.} at 5-6.
\item \textsuperscript{16} \textit{Id.} Copyright infringement actions in the United States are generally brought in federal courts, not in administrative agencies. \textit{Id.} Copyright owners may also bring a cause of action in a state court, providing that there is a state copyright law. \textit{Id.}
\item \textsuperscript{17} Philippines Bilateral Agreement, supra note 2, at 5-6.
\item \textsuperscript{18} \textit{Id.} at 6.
\item \textsuperscript{19} \textit{Id.} The United States also has penalties consisting of fines. \textit{Id.} The minimum fine in 2000 for an infringer in a civil suit was $750 if the conduct was not willful, or up to $150,000 if the copyright owner proved willfulness. \textit{Id.} In criminal proceedings, fines in 2000 could not exceed $2,500. Philippines Bilateral Agreement, supra note 2, at 6.
\item \textsuperscript{20} \textit{Id.} at 6-7.
\item \textsuperscript{21} \textit{Id.} at 7.
\item \textsuperscript{22} Philippines Bilateral Agreement, supra note 2, at 7.
\end{itemize}
B. U.S. - People's Republic of China Bilateral Agreement

The United States and China have entered into several bilateral agreements in the past, some dealing with intellectual property rights. In 1995, a new agreement was signed by U.S. Trade Representative Kantor with China involving more strict enforcement of copyrights, helping to create a better economic and trade relationship. The Agreement Regarding Intellectual Property Rights [hereinafter “China’s 1995 Bilateral Agreement”] was more focused on technological products, such as CD-Roms and software, and enforcement of existing laws to protect intellectual property rights.

1. General Contents—China’s 1995 Bilateral Agreement contains the same traditional provisions as most of the other intellectual property rights bilateral agreements. The People’s Republic of China was to create a Working Conference on Intellectual Property Rights that would be comprised of State Council’s Departments of relevant industries, such as science, technology, economic cooperation, and justice. The Conference would be charged with carrying out policy studies, monitoring the implementation of the laws, monitoring enforcement efforts described in the laws, and providing education on intellectual property rights.

2. Enforcement Efforts—In China’s 1995 Bilateral Agreement, China created a State Council Intellectual Property Enforcement Action Plan to help the state and provinces enforce the contents of the agreement. China created specialized courts to hear intellectual property cases and implement effective litigation. The United States and China would also cooperate with each other in customs seizures and in exchanging information about possible infringing activities. China pointed out its diligent efforts that were made in recent years to enforce the earlier bilateral agreements, but the U.S. had more results in mind.

25. Compare, e.g., Philippines Bilateral Agreement, supra note 2.
27. Id.
28. Id. at 883.
29. Id. at 882.
31. Id. at 883. The earlier agreement between the U.S. and China was the Memorandum of Understanding of Intellectual Property Rights, supra note 24.
Remedies and penalties in China’s 1995 Bilateral Agreement included fines, injunctions to halt the infringement activity, and the forfeiture of any goods that were used to produce the infringing materials. China did recognize that criminal penalties may be imposed, but gave no indication about the severity of the penalties.

C. Copyright Agreement with Taiwan

No formal intellectual property rights agreement exists between the governments of Taiwan and the United States that is as comprehensive as the one proposed by the American Institute in Taiwan [hereinafter AIT] and the Coordination Council for North American Affairs [hereinafter CCNAA]. The two entities have entered into an agreement to protect the rights of copyright holders in both countries, known as the Agreement for the Protection of Copyright Between the American Institute in Taiwan and the Coordination Council for North American Affairs [hereinafter “Taiwan’s bilateral agreement”]. While no bilateral agreement to-date contains all of the provisions that are suggested by the AIT-CCNAA alliance, the proposals are a path for the future that may be enforceable in years to come.

1. Copyright Protection Efforts—In Article 1 of Taiwan’s Bilateral Agreement, the parties agreed to provide and maintain adequate legislation in their respective countries to maintain rights of authors and other copyright holders. Article 2 expressed the definitions of “literary and artistic works” to include books, pamphlets, computer programs, lectures, oral works, musical works, choreographic works, sound recordings, movies, videotapes, and drawings. This Article included the most comprehensive list of definitions of any bilateral agreement in the region.

The 1992 Memorandum also noted the Chinese government’s advances in the protection of intellectual property rights. Clearly, these advances were not substantial enough to satisfy the U.S. Trade Representative. It appeared that the Chinese penalties would have a more deterrent effect if they mimicked those of the U.S. See discussion, supra note 19.

32. China’s 1995 Bilateral Agreement, supra note 4, at 890.
33. Id. at 891. It appeared that the Chinese penalties would have a more deterrent effect if they mimicked those of the U.S. See discussion, supra note 19.
34. Taiwan’s Bilateral Agreement, supra note 3.
35. Compare China’s 1995 Bilateral Agreement, supra note 4; Philippines Bilateral Agreement, supra note 2.
36. Taiwan’s Bilateral Agreement, supra note 3, at 1.
37. Id. at 2-3.
38. Compare Philippines Bilateral Agreement, supra note 2, at 2; China’s 1995 Bilateral Agreement, supra note 4, at 883.
The remaining Articles stated that both published or unpublished works would be protected for a term of fifty years after the death of the author. Exclusive rights to translation of works and specific authorization rights to the copyright owners would also be granted protection for a period of fifty years.

2. Comparison of the Original Works Categorization—Taiwan’s Bilateral Agreement contains the most comprehensive definition of original works in any of the bilateral agreements. In comparison, the Philippine government refused to allow oral communications transmitting ideas or thoughts to be covered under the intellectual property rights agreement. Taiwan’s Bilateral Agreement explicitly gives more rights to the exclusive copyright holder than do the other bilateral agreements. Rights to license public performances and communications of the copyrighted work is the most comprehensive, other than U.S. Copyright Law.

III. Background of the U.S. Trade Representative’s Special 301 Annual Reviews

A. Authority for the United States to Impose Trade Sanctions

Under 19 U.S.C. § 2411, the United States Trade Representative is given the authority to suspend trade agreement concessions, negotiate new bilateral agreements, and take “appropriate and feasible” action to enforce U.S. rights under bilateral trade agreements. According to U.S. law, commerce includes acts or policies that deny “adequate and effective protection of intellectual property rights.” Generally, any international policy that threatens U.S. intellectual property rights may be met with bilateral agreement negotiations or trade sanctions.

39. Taiwan’s Bilateral Agreement, supra note 3, at 4.
40. Id. at 5-7.
41. Philippines Bilateral Agreement, supra note 2, at 2.
42. Taiwan’s Bilateral Agreement, supra note 3, at 5-8.
44. 19 U.S.C. § 2411(c) (2000). This section also allows the U.S. Trade Representative to respond to foreign practices that burden U.S. commerce and are unreasonable. Id.
45. 19 U.S.C. § 2411(d)(3)(B)(i)(II) (2000). The definition of commerce is very broad and covers a variety of acts, policies, services, and practices that could burden or restrict U.S. commerce. Id.
46. 19 U.S.C. § 2411(c) (2000). This section gives the U.S. Trade Representative numerous options in dealing with unreasonable foreign conduct. Id. She may impose import restrictions, enter into binding agreements, initiate
Under 19 U.S.C. § 2416, the United States Trade Representative may monitor the implementation of measures contained in agreements entered into by foreign countries. Further action, other than monitoring, may be taken if the U.S. Trade Representative believes that a foreign country is not satisfactorily implementing the measures contained in the agreement. While the power to take measures beyond simply monitoring agreements is vested in the Trade Representative, it is rarely used.

B. Contents of the “Special 301” Annual Reviews

Each year, the U.S. Trade Representative posts a new list of countries that have not enforced intellectual property rights, have not enacted laws to protect intellectual property rights, or have failed to meet the provisions of a bilateral agreement that was entered into with the United States. The “Special 301” Annual Review [hereinafter “Special 301” Report] breaks the countries down into three different categories of concern: The Priority Watch List, the Watch List, and the Priority Foreign Country List.

The Watch List generally contains between thirty and forty countries at one time, while the Priority Watch List usually contains about seven or eight countries that have allowed rampant intellectual property violations to occur and have not adequately enforced intellectual property rights. Few countries are posted as priority watch countries, but they are clearly the worst offenders of intellectual property rights.

1. Priority Foreign Country—Countries classified as a “Priority Foreign Country” are those that have the most egregious acts being performed and/or have the most adverse policies toward the United States and its products. These countries fail to enforce investigations, or suspend duty-free treatment. Id. Former U.S. Trade Representative Kantor threatened to impose tariffs on certain import products as a sanction for the 1994 investigation. Special 301 Investigation into China’s IPR Enforcement Practices, U.S. DEP’T ST. DISPATCH, Jan. 9, 1995, available in 1995 WL 8643464.

48. Id.
50. Id.
51. See, e.g., id.
52. Id. “Priority foreign countries are those countries that (1) have the most
agreements or make any efforts to stop illegal activities that often occur. \(^3\) Within thirty days of the country being labeled a "priority foreign country," the United States Trade Representative is authorized to initiate an investigation into the country's activities. \(^4\)

2. **Priority Watch List**—A country that is cited to the "Priority Watch List" is one that continues to allow rampant violations of intellectual property rights. \(^5\) More specifically, the countries have a "lack of adequate and effective intellectual property protection or market access." \(^6\) There are generally ongoing negotiations about the intellectual property rights problems while the country is on the Priority Watch List. \(^7\)

3. **Watch List Countries**—The Watch List was created to monitor progress of implementation commitments to the U.S. with respect to intellectual property rights. \(^8\) Once a country has been placed on the "Watch List" by the USTR, the United States expects that certain initiatives will be passed in accordance with a bilateral agreement to protect intellectual property rights. \(^9\) The U.S. also looks to see if efforts were made to pass legislation or intellectual property rights protection. \(^10\) Watch List countries have certain problems that the U.S. expects them to remedy in a way that conforms to an agreement or to U.S. standards. \(^11\) While this list is

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\(^3\) See, e.g., USTR Announces Results of Special 301 Review, supra note 49.


\(^5\) USTR Announces Results of Special 301 Review, supra note 49.

\(^6\) Id.

\(^7\) Id. The "Special 301" Reports are generally released in April of each year.


\(^9\) Id.

\(^10\) Id.

not as potentially harmful in the trading world, it still keeps
countries nervous about its status with the United States.\footnote{62}

IV. Why a Bilateral Agreement?

For many countries, bilateral agreements represent good will
gestures toward finding a remedy to a bad situation. In many of the
intellectual property rights bilateral agreements, participant
countries are attempting to use the agreement to remove them-
severs from the U.S. Trade Representative’s “Special 301” Lists and
escape possible trade sanctions.\footnote{63} In other scenarios, Asian-Pacific
countries who receive negative press and poor statistics for
intellectual property enforcement are attempting to “save face.”\footnote{64}
The best way for these countries to prove that they are reliable and
steady for growth is to show the world that they are flexible and
willing to help address international concerns. What they receive in
return is far greater than the contents of their respective bilateral
agreements.

A. Special 301 Considerations

As a condition of the bilateral agreements, both China and the
Philippines stated explicitly in their bilateral agreements that the
United States must remove both countries from the “Special 301”
Priority Watch List.\footnote{65} Although each country escaped from the list
during the year that the agreements were executed, the United
States saw no actual improvement substantial enough to keep those
trade partners off of the lists permanently.\footnote{66} As a result, the
Philippines and Taiwan returned to one of the “Special 301” lists
and remain on the lists today.\footnote{67} China, because of its elevated trade
status granted in 2000, remains under the monitoring provisions of
the U.S. Trade Representative.\footnote{68}

\footnote{62. \textit{Id.}}
\footnote{63. \textit{See Philippines Bilateral Agreement, supra} note 2, at 8; China’s 1995
Bilateral Agreement, \textit{supra} note 4, at 886.}
\footnote{64. \textit{Microsoft to Clamp Down on Vietnamese Piracy, COMPUTERGRAM INT’L,
July 16, 1999, available in 1999 WL 21237323.}}
\footnote{65. \textit{See Philippines Bilateral Agreement, supra} note 2, at 8; China’s 1995
Bilateral Agreement, \textit{supra} note 4, at 886.}
\footnote{66. \textit{See, e.g., USTR Announces Two Decisions: Title VII and Special 301
(last modified April 29, 1995), 1996 Special 301 Report, infra note 72.}}
The Philippines and Taiwan were both cited to the Watch List in the year 2000. \textit{Id.}}
\footnote{68. \textit{See id. Legislation was enacted in 2000 to give China permanent normal
trade status with the United States. The House of Representatives voted 237-197}
I. Reasons for the Philippines to Enter Into a Bilateral Agreement—After the Philippines Bilateral Agreement was executed in 1993, the U.S. removed the Philippines from the Priority Watch List.69 The U.S. expected that the Philippines would comply by enacting laws that favored intellectual property rights protection and enforcement of certain copyright standards.

In 1995, the United States cited the Philippines to the Watch List to ensure that efforts were being made to implement the conditions of the Philippines Bilateral Agreement.70 Since then, the Philippines has remained on the Watch List for its failure to properly implement the provisions and conditions of the Philippines Bilateral Agreement.71

In October 1996, the U.S. Trade Representative ordered an out-of-cycle review on the Philippines to determine if measures were being taken to enact the proposed intellectual property rights legislation and how serious the government took the enforcement efforts.72 The review did help to speed up the legislation initiative, but the legislation that finally passed both the Senate and the House were substantially different versions of anticipated intellectual property rights legislation.73 The Philippines remained on the Watch List in 1997 for its failure to publicize infringing activity and its failure to deter others from copyright infringement.74

In 1998, the Philippines created an Intellectual Property Office within the Department of Trade and Industry, but that was not enough to take them off of the Watch List.75 The U.S.T.R. found that the weak enforcement efforts and broad licensing restrictions


69. Philippines Bilateral Agreement, supra note 2, at 8.
70. 1995 Special 301 Report, supra note 66.
74. Id.
75. 1998 Special 301 Report, supra note 71.
that were proposed by the government were not in compliance with the Philippines Bilateral Agreement. 76

In 1999, the Philippine government continued to have ambiguous Code provisions and inconsistent enforcement efforts. 77 Therefore, the Philippines remained on the Watch List of the U.S. Trade Representative. 78

In 2000, the Philippines was again cited to the Watch List for a variety of reasons. 79 First, the Special 301 Report looked at the failure of the Philippine government to implement TRIPS Agreement obligations and legislation. 80 Second, there were ineffective enforcement efforts against piracy and high levels of piracy for the year. 81 Third, the Philippines has failed to enact an acceptable or effective regulatory system to combat piracy or infringement problems. 82 Thus, the Philippines did not meet its obligations under familiar multilateral agreements or under the USTR's guidelines. Without satisfying all of the provisions of the Philippines Bilateral Agreement, the Philippines will most likely continue to remain on the Watch List and have the possibility of moving onto the Priority Watch List in future years.

2. Reasons for China to Enter Into a Bilateral Agreement—The U.S. Trade Representative has cited China to the “Special 301” list regularly in recent years. After China’s 1995 Bilateral Agreement was signed, the U.S. downgraded China from a Priority Foreign Country to Watch List status. 83 Because China was attempting to relieve some of the intellectual property rights problem areas, the Representative deemed the Watch List designation appropriate. 84

The ideal intellectual property rights provisions promised by China would have occurred if China’s bilateral agreement would have been followed. Unfortunately, U.S. Trade Representative Charlene Barshefsky determined that there were still egregious violations of intellectual property rights in 1996. 85 The “Special

76. Id.
78. Id.
80. Id.
81. Id.
82. Id.
83. 1995 Special 301 Report, supra note 66.
84. Id.
85. 1996 Special 301 Report, supra note 72.
301” Report for 1996 re-established China as a Priority Foreign Country due to the rampant piracy and failure to implement the provisions of China’s bilateral agreement. The U.S. also threatened to impose trade sanctions and begin an investigation if implementation did not occur.

The threats that were given in 1996 were voiced in 1997 when China was again named a Priority Foreign Country. The “Special 301” Report cited that China would be monitored under the 1974 Trade Act and that sanctions could be issued if more efforts were not made for implementation of China’s bilateral agreement. It appeared that China had not done enough to fight software piracy or trademark counterfeiting. Even with the continued violations, sanctions were still not issued.

A different tone was taken in the 1998 “Special 301” Report. While China was still recognized as a Priority Foreign Country, the U.S. Trade Representative praised China for their efforts in reducing the number of intellectual property protected products that were being exported from the country. The U.S. government admitted for the first time that China had a “functioning system” to protect intellectual property rights, including a Chinese government survey that revealed that over 800 people had been imprisoned for their illegal infringing activities. While these examples of progress were applauded, the 1998 “Special 301” Report continued to include concerns about software piracy, the lack of judicial review in the trademark field, and major counterfeiting problems. The 1999 “Special 301” Report did not shed any new light on the situation in China. The country remained on the Priority Foreign Country list and continued to be monitored by the U.S. Trade Representative. While the number of pirated copyright works dropped and a new copyright protection law was expected to be passed, nothing new was accomplished in the actual legislation or enforcement fields with regard to China’s bilateral agreement.

87. Id.
88. 1997 Special 301 Report, supra note 73.
89. Id.
91. 1998 Special 301 Report, supra note 71.
92. Id. This survey was conducted by the Chinese government and the U.S. was unable to verify these numbers due to China’s failure to put the surveys in the public record. Id.
93. Id.
94. 1999 Special 301 Report, supra note 77.
implementation. Software piracy continued to be a problem in 1999, posting numbers of grave concern to software companies.

In September 2000, new legislation passed that granted China permanent normal trade status with the United States. Under the law, P.L. 106-286, China receives nondiscriminatory treatment from the United States in its trade relations. While the new law does not specify that China must be removed from the “Special 301” Lists, the U.S. Trade Representative did not place China on any of the Watch Lists. Instead, China was placed under the monitoring provisions and continues to promise changes in its approach to intellectual property rights.

From 1997 through 1999, China’s software piracy rates dropped slightly, from 96% in 1997, 95% in 1998, to 91% in 1999. The amount of revenue lost by the illegal infringement has steadily declined as well, from approximately $1,200,000 in 1998 to $650,000 in 1999. While these numbers look impressive, the revenues make up about one third of the lost revenues in the entire Asia-Pacific region and are not shown in the “Special 301” Reports.

3. Reasons for Taiwan to Enter Into a Bilateral Agreement—Taiwan has also been on and off of the “Special 301” Watch list of the U.S. Trade Representative. Taiwan’s problems on the Watch List have been ongoing since 1995, when it was first placed on the list. Since then, the U.S. Trade Representative has insisted that Taiwan incur out-of-cycle reviews and has threatened Taiwan with sanctions on trade relations for their lack of enforcement efforts.

In 1998, U.S. Trade Representative Charlene Barshefsky placed Taiwan on the “Special 301” Watch List for failing to adequately protect U.S. intellectual property rights. Lack of cooperation in defending copyright interests in courts and administrative agencies fueled Taiwan’s citation, as well as non-effective practices in reducing the exportation of pirated and counterfeit

95. Id.
96. See Snyder, supra note 90.
100. Id.
101. Id.
102. See 1995 Special 301 Report, supra note 66; 1997 Special 301 Report, supra note 73.
103. 1995 Special 301 Report, supra note 66.
105. 1998 Special 301 Report, supra note 71.
goods.\textsuperscript{106}

Taiwan was the United States' second-largest source of counterfeit goods, falling behind China for first place.\textsuperscript{107} Over 250 seizures were made in 1998 of Taiwanese products that violated intellectual property rights.\textsuperscript{108} To make matters worse, customs officials seized over $75 billion worth of illegal goods in 1998.\textsuperscript{109} An excellent example of the problem falls in software piracy.

Taiwan has decreased its software piracy rates over the past three years, but not by substantial numbers. According to the Software and Information Industry Association, Taiwan lowered its piracy rate of 63% in 1997 to 54% in 1999.\textsuperscript{110} Revenues lost to companies from these numbers, though, have been unsteady.

In 1996, approximately $117,000 was lost to infringing software.\textsuperscript{111} In 1998, the number jumped to $141,000.\textsuperscript{112} In 1999, the amount of lost revenues declined to $123,000.\textsuperscript{113} These numbers help explain why the U.S. Trade Representative refused to take Taiwan off of the Watch List and continued to pressure the government for better intellectual property rights protection.

\textbf{B. Trade-Related Considerations}

\textit{1. The Philippines Considerations.} — The Philippine government acknowledged the necessity of having an excellent trade reputation with respect to the protection and enforcement of intellectual property rights.\textsuperscript{114} The U.S. private sector was included in a specific provision to make certain that they had a market presence in the Philippines pursuant to the agreement.\textsuperscript{115} Another provision contained wording that the U.S. and Philippine governments would consult on technological developments that have an impact on intellectual property rights.\textsuperscript{116} Facilitating trade and innovation was one of the main goals of the Philippines in

\begin{notes}
\textsuperscript{107} \textit{Counterfeit Goods Flow from Taiwan to US}, supra note 104.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{111} \textit{SIIA's Report on Global Software Piracy 1999}, supra note 1 at 19.
\textsuperscript{112} \textit{Id.}
\textsuperscript{114} Philippines Bilateral Agreement, supra note 2, at 1.
\textsuperscript{115} \textit{Id.} at 7.
\textsuperscript{116} \textit{Id.} at 7-8.
\end{notes}
signing the bilateral agreement, obvious in the text of the Philippines Bilateral Agreement.117

2. China's Considerations—China was granted "Most Favored Nation" trade status for several years in a row, and recently received normal trade status with the United States.118 This has not come without the price of bilateral agreements protecting U.S. copyright holders. The United States and China have an esteemed bilateral science and technology cooperation program, using approximately thirty bilateral agreements to meet their goals.119 Although China has entered into many bilateral agreements with the United States, the enforcement aspect of these agreements generally goes untouched.120

China conceded in China's bilateral agreement that one of the reasons behind protecting intellectual property rights was to develop its economy and have joint ventures occur between the United States private sector and Chinese businesses.121 China also insisted that different U.S. governmental agencies, such as the Customs Service and the Patent and Trademark Office, provide assistance to China in improving enforcement efforts and training.122 Between the assistance and the exchange of information, the U.S. hoped that China would be able to quickly and easily open trade and protect intellectual property rights in one swoop.

3. Taiwan's Considerations—Because Taiwan's agreement was not made as a bilateral agreement between the actual governments of the countries, there were no trade considerations in entering in to the agreement.123 Assuming that the agreement were ratified by the U.S. and Taiwan, there would presumably be provisions for the facilitation of trade that would be added to the existing agreement.

117. See generally Philippines Bilateral Agreement, supra note 2.
120. Interview conducted by Lauren Thierry with Greg Mastel, Senior International Economist, Economic Strategic Institute (Apr. 9, 1999). "China has not been diligent of forcing the bilateral agreements it has made with the United States... China has been good at making promises, but not so good at keeping them." Id.
122. Id. at 885.
123. Taiwan's Bilateral Agreement, supra note 3.
V. Insight and Analysis

A. Why Look to the Philippines and China for a Model

On its face, it appears that one of the primary reasons a country enters into a bilateral agreement with the United States is to protect some kind of internationally recognized right. With regard to intellectual property rights, the bilateral agreements appear to show a good faith promise by a foreign country to comply with U.S.-favored standards. Naturally, the United States applauds this recognition of rights. What the U.S. should be looking at, however, is what the foreign nation gets in return for this good faith promise.

It is obvious that foreign governments are relying on their bilateral agreements with the United States to receive special treatment with respect to the “Special 301” lists. Without the incentive to be removed from the “Special 301” lists, these countries do not appear to be interested in implementing more rigid intellectual property laws or standards. China did not enter into the more comprehensive 1995 bilateral agreement until the U.S. Trade Representative commenced an investigation into China’s intellectual property right enforcement.

Hong Kong is an example of what can happen when a foreign country does not enter into a bilateral agreement with the United States. Hong Kong has continuously been monitored on the “Special 301” Watch List and has received out of cycle reviews for their poor intellectual property rights behavior for the past three years.

Taiwan’s situation is not much different than Hong Kong’s scenario. Having been on the Watch List in 1995, Taiwan’s Bilateral Agreement did not keep them out of hot water. The reason that Taiwan did not appear on either the 1997 or 1998 “Special 301” Lists is because the U.S. Trade Representative herself believed the assurances that the Taiwanese government

124. See generally Philippines Bilateral Agreement, supra note 2; China’s 1995 Bilateral Agreement, supra note 3.
125. Id.
gave to her. After seeing that the results never materialized, Taiwan was again named to the 1999 and 2000 Watch Lists.

Taiwan has also been the center of negative press with respect to their intellectual property rights enforcement. Not only has the U.S. Trade Representative publicly denounced Taiwan for its failure to eliminate obstacles for enforcement, but the U.S. Customs Service published their findings that Taiwan was the United States’ second-largest source for counterfeit goods in 1998. Between the negative press and the “Special 301” results, Taiwan should look to China and the Philippines to find ways of enacting a bilateral agreement with the United States that can be used in their favor.

B. What Philippines Bilateral Agreement Really Accomplished

It has already been noted that the Philippines wanted to create more trade with the United States and be removed from the “Special 301” Priority Watch List, but the undertones of the agreement suggest much more. What the Philippines got in return for signing and entering into the bilateral agreement was much more than a boost for intellectual property rights.

The Philippine government never exactly condoned the use of counterfeit or pirated software in every government agency, but it knowingly occurred. Otherwise, there would not have been a specific provision in the Philippines Bilateral Agreement stating that the government would comply with the copyright laws and not use illegal software. After the Philippines agreed in 1993 that the use of the illegal software would end, it took the country over four years to implement legislation to do so. Even the software giant Microsoft took notice of the problem, donating free software to the government of the Philippines.

The Philippines Bilateral Agreement received attention from investors as well as politicians. With the promises of holding

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128. See Yerkey, supra note 100.
129. 1999 Special 301 Report, supra note 49.
130. Trade: USTR Cites Taiwan for Possible Sanctions Over Failure to Protect Intellectual Property, supra note 106.
131. Counterfeit Goods Flow from Taiwan to U.S., supra note 104.
132. See supra page 3 and accompanying notes.
134. Philippines Bilateral Agreement, supra note 2, at 2.
136. Id.
software as an original work under the Philippines copyright law, Apple Computers and Acer, Inc. set up subsidiaries in the Philippines in 1997.\textsuperscript{137} The Philippines eventual return to the “Special 301” Watch List was not a deterrent to businesses or the government of the Philippines. With multi-national corporations pouring dollars and jobs into the Philippine economy, the Philippines managed to boost their economy and reputation in the information technology field and the intellectual property rights field. Overall, it appears that the Philippines did more than sign a promise to protect intellectual property rights with the Philippines Bilateral Agreement; it created a new hot-spot in its economy.

The U.S., unfortunately, has not received their benefit of the bargain. While new copyright and licensing legislation did pass in the Philippines, the U.S. promptly viewed the legislation as inadequate to conform with the Philippines Bilateral Agreement.\textsuperscript{138} Enforcement efforts have never risen to the expectations of the United States, creating yet another reason to keep the Philippines on the “Special 301” Watch List in 1999 and 2000.\textsuperscript{139} In other words, the good faith promise that brought prosperity to certain markets in the Philippines has done nothing for U.S. copyright holders. As this comment demonstrates, the Philippines is not the only country to get the upper hand with the United States in intellectual property law negotiations.

C. China’s 1995 Bilateral Agreement Accomplishments

China’s designation as a Priority Foreign Country in 1994 could have been detrimental to China’s economy and trade between China and the U.S.\textsuperscript{140} With an investigation ordered by the U.S. Trade Representative, China stood to lose their lowest-tariff status, as well as their trade status as a “Most Favored Nation.”\textsuperscript{141} After entering into China’s 1995 Bilateral Agreement, the U.S. was assured that their intellectual property rights would have more protection and that foreign trade would remain the same with China.\textsuperscript{142} China’s reasoning, looking at both the “Special 301”

\begin{itemize}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} See 1998 Special 301 Report, supra at note 71; 1999 Special 301 Report, supra note 77.
\item \textsuperscript{139} 1999 Special 301 Report, supra note 77.
\item \textsuperscript{140} See Special 301 Investigation into China’s IPR Enforcement Practices, supra note 125.
\item \textsuperscript{141} See supra note 119.
\item \textsuperscript{142} See China’s 1995 Bilateral Agreement, supra note 4, at 882-884.
\end{itemize}
considerations and the trade concerns, had more weight and won out by the end of 1999.

After China was re-named as a Priority Foreign Country in 1996, the U.S. did not order an investigation into intellectual property rights violations or irresponsible enforcement. Instead, monitoring was ordered and has continued to-date. After noting in 1997 that software piracy continued to be "a serious problem," the U.S. Trade Representative still did not move to impose sanctions.

This lack of pressure on the Chinese government allowed China to take advantage of China's 1995 Bilateral Agreement by applying for membership into the World Trade Organization [hereinafter WTO]. Membership in an organization, such as the WTO, that has major intellectual property rights agreements like those established at the Berne Convention and the Paris Convention could encourage China to actually implement the proposed legislation and enforcement efforts provided for in China's 1995 Bilateral Agreement. Unfortunately, this implementation has not occurred and this, in particular, was noted in the 2000 "Special 301" Report.

In another area, it took China four years, just like the Philippines, to implement a decree making it illegal for governmental entities to use pirated or counterfeit software. While U.S. Trade Representative Charlene Barshefsky praised the decree, these measures should have been implemented earlier to be in compliance with China's 1995 Bilateral Agreement.

China's standing as a trade partner never suffered after China's 1995 Bilateral Agreement was executed; in fact, China's trade standing has been elevated. China still maintained their trade status as a "Most Favored Nation" and continued to export millions of dollars to the U.S. 1999. In 2000, China received permanent

143. 1996 Special 301 Report, supra note 73.
147. Berne Convention, supra note 9; Paris Convention, supra note 9.
149. Id.
150. Special 301 Investigation Into China's IPR Enforcement Practices, supra note 125.
normal trade status.\textsuperscript{151} While China incurred an investigation for possible trade sanctions for intellectual property rights violations, and banned many U.S. imports of fruit and agricultural products after being placed on the Priority Foreign Country List in 1997.\textsuperscript{152} Never thinking to address this aspect in China’s 1995 Bilateral Agreement, the U.S. conceded that the unfair trade balance was not a tool to use in bilateral agreements.

\textbf{D. The Future of Effective Bilateral Agreements}

In looking at the Philippines and China, it appears that modern bilateral agreements for the protection of intellectual property rights are ineffective tools. The United States has received little in return for the amount of recognition, aid, and business it has poured into these countries. In order to make the bilateral agreements more effective, new provisions need to show the true power of the United States as a world leader, a trade partner, and an enforcer of copyright laws.

1. \textit{How to Deal with the “Special 301” Reports}—It would be easy to say that the U.S. Trade Representative should not bribe a foreign country into signing a bilateral agreement with the promise of taking the country off of one of the “Special 301” Lists. Unfortunately, it would also be presumptuous.

The United States Trade Representative has generally held her ground in making certain that each country is cited to at least the Watch List for its failure to implement any promised measures. What is missing, however, is a provision in each bilateral agreement that gives the U.S. Trade Representative discretionary authority to impose certain types of punishment for a country’s failure to implement the provisions in the bilateral agreement.

A perfect example would be a provision that authorizes an out-of-cycle review or an investigation within a certain prescribed period for each country that returns to one of the “Special 301” Lists the year after their bilateral agreement was enacted. Because the “Special 301” Lists have been shown to put a country into economic or political danger,\textsuperscript{153} using a scare tactic like a discretionary provision may enhance the bilateral agreement’s implementation power.

The discretionary power would be appropriate and legal for the U.S. Trade Representative to exploit, given the broad

\textsuperscript{151} P.L. 106-286 (2000).
\textsuperscript{152} See Snyder, \textit{supra} note 90.
\textsuperscript{153} See, \textit{e.g.}, Yerkley, \textit{supra} note 106.
discretionary remedies under 17 U.S.C. § 2411(c) (1999). There would undoubtedly be concern about the foreign country rejecting the bilateral agreement on this new ground. Fortunately for U.S. policy, being taken off of the “Special 301” list would probably be a more handsome offer than the scare of discretionary power to rename the foreign country for non-compliance. Looking at this as a balancing test, the immediate removal in the present would almost always win over predicting the future.

2. How to Deal with the Economic Advantages Given to the Foreign Countries—the United States, in dealing with intellectual property rights, includes provisions that force the U.S. into training and sharing technological advances with each foreign country with whom we execute a bilateral agreement.\(^\text{154}\) This idea is a catch for the foreign country, but is not balanced for the U.S. by an action from the foreign country. These training and technology provisions would be much more effective if they were conditioned upon a certain amount of implementation by the foreign country.

It would not be unconscionable or even threatening for the United States to repeat assurances that the U.S. would provide the technological and training assistance so long as the foreign country promised to punctually implement something in return. For example, at least one piece of copyright legislation should be passed within one year or else the U.S. will no longer be under an obligation to supply training to the foreign governments. Another example would be that the U.S. could condition the training and technology help on the lowering of piracy or counterfeit export rates within two years by the foreign country. Whatever the condition, the U.S. Trade Representative needs to be more precise in the wording of the bilateral agreements and more aggressive in assuring their implementation.

Again, the threat of future action would probably not be more intimidating than the threat of immediate or eminent action. If the U.S. Trade Representative decided to launch an investigation into intellectual property rights violations of a foreign country with high piracy rates, it would be more beneficial for the foreign country to take advantage of the bilateral agreement rather than await the outcome of the investigation. If the foreign country concedes that there may be problems in their actions and policies at the onset, it would save the country economic and political embarrassment. Instead of being found in a “Special 301” Report or investigation to have inappropriate standards for intellectual property rights, the

\(^{154}\) China’s 1995 Bilateral Agreement, supra note 4, at 885, 886.
country would simply show their willingness to enter into a bilateral agreement for the protection of intellectual property rights. The foreign countries are in this trend already, and it has not proven to be adverse to their interests yet.

VI. Conclusion

It is clear that a promise by a foreign country to enact legislation or revamp enforcement efforts is not enough to protect intellectual property rights. I do not blame the Philippines or China for executing their bilateral agreements. The bilateral agreements have proven to be successful for their economies and for their international standing.

The blame needs to be placed on the U.S. Trade Representative for allowing such broad provisions with few results. The United States laws give the U.S. Trade Representative an arsenal for dealing with countries that do not meet their obligations. Trade sanctions, investigations, or even something as simple as a press attack could help certain foreign countries conform to the ideas that they agreed to, in writing, in their bilateral agreements. Putting pressure on the foreign country to meet standards that are already established in the international community is not tyrannic, nor is it a new idea. Without a stated time line or a more narrow focus in the text of the bilateral agreements, foreign countries are getting away with intellectual property rights murder.

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