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Crisis, Coercion, and Choice**

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Intellectual property protection and antitrust in the developing world: crisis, coercion, and choice

Susan K. Sell

The nations of the developing world have made a dramatic turn toward market-oriented policies. As recently as 1985, developing countries were still pressing for a new international economic order (NIEO) based on economic nationalism and the rejection of global liberalism. Yet, today even the most ardent former champions of extensive state intervention in the economy and of discrimination against foreign investors have adopted policies that emphasize private-sector initiative, nondiscrimination, and economic openness. What accounts for this change in policy? Have these countries changed their minds or just their policies? These are the questions addressed here, with specific reference to intellectual property (i.e., patents and copyrights) protection and antitrust policy.

This analysis of intellectual property protection and antitrust policy in the developing world suggests the usefulness of decomposing the broad issue of economic liberalization to account for variation across issue-areas. Despite the fact that developing countries are increasingly embracing a market orientation, the process of economic reform differs between the areas of intellectual property, on the one hand, and antitrust policy on the other. A nuanced analysis of the impact of both power and ideas is necessary to account for the differences.

Two perspectives in international relations theory, neorealism and interpretivist neoliberalism, offer different explanations for policy change. Neorealism emphasizes the role of power and leads us to expect that weak states will comply with the preferences of powerful states. By contrast, interpretivist

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neoliberalism examines the role of learning and norms as sources of change and focuses more squarely on the redefinition of national interests. Both types of analysis can accommodate the role of international institutions. In the rationalist neorealist variant, institutions can alter the incentives facing states and can play an important role in enhancing the credibility of commitments as well as reducing the incidence of cheating by monitoring compliance. For interpretivist neoliberals, institutions can play a more transformative role and help states to redefine their interests by spreading new norms and value orientations. According to John Ikenberry and Charles Kupchan, norms are “general principles upon which a certain vision of international order is based. Value orientations are norm-based attitudes toward specific policy issues and types of behavior.”¹ In both issue-areas the overriding interest is prosperity; the norm is liberalism. The value orientations of the two are competition in antitrust policy and property rights in intellectual property protection.

At the outset, I want to emphasize that the distinction between power and learning is hardly black and white. Both are present in these two issues. The line between learning and “being taught a lesson” can be very fine indeed.² External pressure can be used by elites in targeted states to achieve coalitional realignments or to push through painful reforms that the elites deem necessary. When elites redefine their interests, to promote liberalization for example, external pressure can often provide a convenient boost for them to move against domestic opposition. However, with the sole exception of Mexico, there is as yet no strong domestic constituency for intellectual property protection in developing countries. Therefore, I argue not that one perspective is right and the other wrong but rather indicate what aspects of each case the different perspectives help to explain. On balance, neoliberalism provides a more thorough account of the changes in antitrust policy, whereas neorealism provides a better accounting of the changes in intellectual property protection.

In the intellectual property case, learning on the part of U.S. policymakers was important in the adoption of a coercive strategy to force recalcitrant countries to pass laws strengthening the protection of intellectual property. Once the United States adopted a coercive strategy, this case is best explained by external coercion, as the United States has aggressively linked higher levels of protection to trade issues through Section 301 of the U.S. Trade Act. The United States has applied significant direct pressure on targeted states. These states are highly dependent on access to the U.S. market and are, therefore, vulnerable to U.S. threats of trade sanctions. Examining the effects of this coercive strategy suggests that explanations based on power can account for the

1. G. John Ikenberry and Charles Kupchan, “Socialization and Hegemonic Power,” *International Organization* 44 (Summer 1990), pp. 283–315. The quotation is drawn from p. 285 fn. 3.

2. This phrase is adapted from comments by Marshall Alcorn at a seminar entitled “The Rhetoric of Disciplined Inquiry,” George Washington University, Washington, D.C., 9 October 1993.

substance, timing, and adoption of policies protecting intellectual property. However, this case also reveals the limits of a coercive strategy; weak states can resist external threats even at substantial costs to themselves. In nearly every instance, targeted states have chosen not to implement and enforce these new policies. In short, targeted countries have changed their policies but not their minds. If targeted countries do not accept the value orientation preferred by the powerful state, and no politically influential domestic constituency favors the new policies, one can expect nonimplementation and robust domestic resistance.

By contrast, in the antitrust case no country has employed an overt coercive strategy. Pressure for change has come from within the developing countries themselves. General external pressure for market-oriented reform is certainly present in the form of the International Monetary Fund's conditionality policy and the World Bank's structural adjustment lending program. However, these two institutions have not pushed antitrust policies because their economists argue that import liberalization will achieve the efficiency goals of such policies.³ While implementation has proceeded slowly, and it is as yet too early to make sweeping generalizations, evidence suggests that developing countries have changed their minds, not only their policies. Evidence that these states have accepted the value orientation of antitrust includes: the emergence of politically powerful domestic constituencies favoring the new policies; the sequence of policy change (norm change prior to policy adoption); and the voluntary and active quest for information and assistance in drafting laws and training officials to administer the new policies. The economic crisis of the early 1980s helped to resuscitate the moribund United Nations Conference on Trade and Development (UNCTAD) restrictive business practices (RBP) code. In December 1980 the United Nations General Assembly unanimously adopted the Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBP set). Under its terms, an intergovernmental group of experts (IGE) is charged with implementing and interpreting the provisions therein. Although the IGE has no enforcement powers, its mandate is to provide a forum for consultation and discussion of national and legislative experience.⁴ This institutional mechanism has played an important role in expediting the adoption of antitrust policies in developing countries. Since

3. See Clive Gray, "Antitrust as a Component of Policy Reform: What Role for Developing Countries?" in Dwight Perkins and Michael Roemer, eds., *Reforming Economic Systems in Developing Countries* (Cambridge, Mass.: Harvard Institute for International Development, 1991), pp. 403–40; World Bank, *Korea: Managing the Industrial Transition*, vol. 1, *The Conduct of Industrial Policy* (Washington, D.C.: World Bank, 1987), p. 74; and World Bank, *Korea: Managing the Industrial Transition*, vol. 2, *Selected Topics and Case Studies* (Washington, D.C.: World Bank, 1987), pp. 34, 80, and 88.

4. United Nations General Assembly, "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices," TD/RBP/CONF/10/Rev. 1 (New York: United Nations, 1981).

1989, developing countries have been flocking to UNCTAD to learn more about the operation of antitrust policies. The antitrust case reveals a process that has been more gradual, circuitous, and more dependent on domestic circumstances within developing countries. The neoliberal emphasis on choice, learning, and the role of international institutions can account for the substance, adoption, and implementation of these policies. However it cannot account for the timing of the change; in this regard neorealism, with its emphasis on constraints facing weak states, offers insights.

These two cases highlight the usefulness of moving beyond the debate between rationalist neorealism and interpretivist neoliberalism. While it seems fairly obvious that coercion is unnecessary if states have accepted the norms and value orientations at issue, less obvious are the conditions under which coercion by the stronger party fails to yield the desired results. The United States has invested enormous amounts of time and energy in its coercive strategy and has thus far had very little to show for it in intellectual property protection. I am not claiming that coercion never works, but that it largely has failed in intellectual property protection. Furthermore, the prospects for the sustainability of the new policies seem to be much better in the area of antitrust policy, in that the new policies are a product of these states' redefined interests.

Since the mid-1980s, developing countries have been adopting laws and policies for the protection of intellectual property based on a conception common to the industrialized world—namely, intellectual property as private property. Because the effective protection of private property rights is a cornerstone of a liberal economic order, these new policies reflect the developing countries' shift toward a market economy. Intellectual property protection is important for both international investment and trade. Investors are reluctant to build plants or issue licenses in countries where their technology and know-how are not protected. Exporters of products or processes based on intellectual property seek to recover costs of developing the property and to prevent counterfeiting and piracy. In the past, many developing countries refused to issue patents to foreign inventors because patent protection provides a temporary monopoly and raises the prices of protected property. Other developing countries did offer protection, but on a relatively limited basis. Indeed, during the NIEO era, developing countries rejected the notion that intellectual property should be construed as private property. Instead, they argued that intellectual property should be transferred with no remittance because it was the "common heritage of mankind." Their new policies of protecting intellectual property as private and commercial reverse this conception.

Similarly, in the area of antitrust policy developing countries are beginning to adopt laws and policies that resemble those of the industrialized world. In the past, the few developing countries that had antitrust laws exclusively targeted local subsidiaries of foreign-based multinational corporations in the service of economic nationalism. Instead of using antitrust policies to promote domestic

market competition, these countries had employed them to control foreign enterprises' activities. More recently, developing countries have come to perceive antitrust policies as relevant for their own domestic enterprises and are designing policies to break up domestic public monopolies that are a legacy of previous eras of economic nationalism. The adoption of antitrust legislation and policies and the creation of domestic institutions to monitor and enforce such policies will become increasingly important as these countries continue opening their markets and stimulating private-sector activity.

The two cases warrant comparison because the participants in the NIEO negotiations saw both issues as components of an integrated assault on economic liberalism. Developing countries sought changes in prevailing modes of both antitrust policy and intellectual property protection as part of their quest for a new international scientific and technological order. In the antitrust area, they sought to eliminate technology-transfer contract clauses that restricted their ability to use the technology to become more self-sufficient. In the area of intellectual property, they sought to weaken international standards of protection to gain access to technologies without paying royalty fees to the holders of intellectual property. Indeed, the strategic incentives in each issue-area are different. Free riding on others' intellectual property is an attractive option; the widespread piracy of patented goods underscores the point. In cases in which riding free is the most attractive option, those who seek to prevent it face the burden of changing the payoffs. Here neorealism provides compelling insights; in particular, the incentives to forgo free riding must be supplied from the outside.⁵

By contrast, antitrust policies reduce domestic monopoly power and can help stimulate foreign investment and the importation of foreign goods. These policies reduce prices for consumers, whereas intellectual property protection tends to increase prices of desired goods. Once developing countries began moving toward market-oriented policies they had economic incentives to adopt antitrust policies. The incentives are inherent in antitrust policies since such policies can promote efficiency gains. These gains can accrue to the developing countries, as opposed to the foreign holders of intellectual property rights. The movement toward antitrust policy is being negotiated much more palpably in the domestic arena.⁶ Previously privileged domestic groups, such as the *chaebol* (conglomerates) in South Korea, have marshaled their enormous power to block antitrust legislation. The winners under the old policies stand to lose

5. As Lisa Martin argues in *Coercive Cooperation* (Princeton, N.J.: Princeton University Press, 1992), such incentives may be supplied by either hegemonic power or institutions. However, in the intellectual property case, international institutions played a minimal role in providing incentives for developing countries to change their policies of lax protection.

6. Particularly in South Korea and Taiwan, antitrust policies have become a potent political weapon in the hands of democratic reformers. See Susan K. Sell, "Antitrust in Korea and Taiwan: The Link Between Politics and Money in the Context of Democratization," prepared for annual meeting of the American Political Science Association, New York, 1-4 September 1994. In the text that follows, the terms "Korea" and "Korean" refer to South Korea.

under the new policies; but their power is beginning to erode under pressures for social change and the leadership of bold reformers. Domestic constituencies for antitrust legislation are emerging in developing countries in the context of democratization and economic reform. Populist aspects of antitrust policy, such as protecting consumers, promoting small- and medium-sized enterprises, and recasting government–business relations are becoming important weapons in anticorruption battles and in changing the domestic balance of power within the state in favor of the urban middle class. Reformers have significant political incentives to promote antitrust policies. Under conditions in which incentives are built-in, such as in antitrust policy, neoliberalism provides a more compelling explanation. Finally, the fact that the NIEO negotiators themselves saw the issues as components of an integrated assault on economic liberalism suggests the usefulness of comparing the two cases and provides insights into the prospective fates of these policies in a markedly changed international economic environment.

This article proceeds in four sections. The first examines the role of the economic crisis of the 1980s. The next two sections analyze trends in intellectual property protection and antitrust policy, respectively. The fourth section presents conclusions about these cases and suggests further research based on this analysis.

Economic crisis

The economic downturn that began in the late 1970s and progressively worsened in the 1980s heightened power differentials between the industrialized and the developing countries. Bank lending to developing countries dropped sharply in the early 1980s. The resulting scarcity of external financing in the form of private bank loans was accompanied by a sharp drop in foreign direct investment in developing countries. Between 1981 and 1986, inflows of foreign direct investment dropped by nearly 25 percent.⁷ Higher oil prices hurt non-oil-exporting developing countries, and many developing countries were saddled with huge foreign debts. This bleak situation was exacerbated by a resurgence in trade protection and a drop in commodity prices. The euphoria of the NIEO gave way to a landscape of sharply reduced opportunities, and developing countries scrambled to adjust to this less hospitable economic environment. The consensus that had been so crucial to the developing countries' multilateral NIEO agenda was shattered. Developing countries were far more vulnerable to these economic shocks than were the industrialized countries. For example, in 1982 Mexico announced that it was no longer able to service its debt.

These economic shocks prompted developing countries to adopt policies that promoted their integration into the global economy. Even a casual observer of

7. Manuel Agosin and David Gold, "Recent Trends in FDI and Related Activities by TNCs," *The CTC Reporter*, no. 21, Spring 1986, p. 21.

current trends in developing countries must be struck by the extent to which the policies have come to resemble the wishes of the United States and other wealthy industrialized countries. Throughout the postwar era the United States consistently argued that the road to development is paved by the free play of market forces and repeatedly urged the developing world to adopt liberal economic policies. Thus, to the extent that developing countries are opening their markets, liberalizing trade and investment, adopting stronger policies to protect intellectual property rights, privatizing public-sector enterprises, and embracing market mechanisms, they are “doing the right thing” from the vantage point of the United States.

The economic crisis of the 1980s was an international constraint to which states had to respond. Clearly constraints matter, but responses to those constraints depend on choice. What were the more proximate causes for these policy changes? Why, for example, did they wait nearly a decade to use the institutional machinery established for antitrust to facilitate the adoption of new policies? By what mechanisms did these changes come about? What were the sources of these new policies? In short, the economic crisis of the early 1980s was a facilitating condition for the policy change. Yet it is insufficient for understanding the precise timing of the changes, the sources of the substance of the new policies, and the mechanisms through which these changes came about. We need to look elsewhere to understand why the effects of the economic crisis played out as they did.

Intellectual property protection: coercion and its limits

The most important factor in the recent spread of intellectual property protection policies has been coercion; the United States has applied significant pressure on developing countries to offer stronger intellectual property protection. But the ensuing analysis reveals that this coercive strategy has had quite limited results. The United States consistently has sought to strengthen intellectual property protection abroad. Throughout the 1960s and 1970s, its efforts at exhortation in various multilateral forums, including the World Intellectual Property Organization and UNCTAD, produced paltry results. Beginning in the early 1980s, at the behest of various U.S. corporate interests, the United States achieved quick results through its bilateral consultations with Hungary, Singapore, South Korea, and Taiwan.⁸ Through these early successes

8. Industry associations in service, investment, high-technology, agricultural chemical, pharmaceutical, and entertainment sectors lobbied Congress for more effective intellectual property protection abroad. Among the most active groups were the Associations of: the Pharmaceutical Manufacturers; the Chemical Manufacturers; the Semiconductor Industry; and the International Intellectual Property Alliance (an umbrella organization of eight trade associations: American Publishers, Inc.; American Film Marketing; Data Processing and Service Organizations; Computer

the U.S. government learned that exhortation alone was ineffective, but that linking trade and intellectual property protection could yield the desired results. American policymakers learned through systematic bilateral consultations that a coercive strategy was more promising. The United States tightened this linkage between trade and intellectual property through its amendments to the Trade and Tariff Act in 1984 and again in 1988. It now can swiftly retaliate with trade sanctions in the event that targeted countries fail adequately to protect its intellectual property.

The link between U.S. power and the move toward the market by developing countries is the U.S. ability to exploit the vulnerability of targeted states. The United States possesses considerable market power, and access to the U.S. market is critical for many developing countries. In response to the economic crisis of the early 1980s, developing countries increasingly have tipped the balance away from import-substituting industrialization toward export-led strategies. The debt crisis, the perceived exhaustion of models of import-substituting industrialization, and the success of the East Asian countries all have contributed to this export-led shift. Therefore, access to northern markets has become more important.

Tables 1–4 illustrate the extent of targeted developing countries' vulnerability to U.S. trade threats. Table 1 shows the value of selected developing countries' exports as a percentage of their gross domestic product (GDP) between 1982 and 1992. Table 2 shows the dollar value of these countries' exports to the United States. Table 3 indicates the percentage of selected developing countries' trade conducted with the United States. With the lone exception of China, the United States is the largest importer for each of these countries' goods. By contrast, as illustrated in Table 4, only two of the targeted states, Mexico and South Korea, rank in the top ten trading partners for the United States (ranked third and sixth, respectively). Therefore, these countries are far more dependent on trade with the United States than the United States is on them. By the mid-1980s, the U.S. market absorbed more than half of Latin American exports and one-third of exports from East Asia. Thus, the United States has significant potential leverage over these countries. As Alan Sykes points out, "If access to the U.S. market is restricted, the target nation cannot readily make up the losses by redirecting its exports."⁹

The United States has wielded its market power through Section 301 of the Trade Act, which allows it to threaten trade retaliation for inadequate intellectual property protection to induce policy changes in targeted states.

Software and Services Industry; Business Software Alliance; Computer and Business Equipment Manufacturers; National Music Publishers; the Recording Industry of America; and Motion Picture Association of America).

9. See p. 282 of Alan O. Sykes, "Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301," *Law and Policy in International Business*, vol. 23, no. 2, 1992, pp. 263–330.

Section 301 of the Trade Act of 1974 gives the President power to enforce U.S. rights under trade agreements or to eliminate policies and practices that discriminate or impose unjustifiable burdens on U.S. commerce. The act also permits industries, trade associations, and individual companies to petition the United States Trade Representative (USTR) to investigate actions of foreign governments. If the USTR decides to investigate, the first step is consultation with the foreign government to try to resolve the problem. If these efforts fail, within a year (in all but subsidies cases, for which a shorter time period is mandated) the USTR recommends appropriate action to the President. This appropriate action often consists of the threat of retaliation via trade sanctions. After pressure from the private sector, the United States also linked generalized system of preferences (GSP) benefits, which grant preferential market access for developing countries, to the effective protection of intellectual property.

Section 301 cases

In a comprehensive analysis of the U.S. record in Section 301 actions, Sykes found that “Section 301 is fairly successful in inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights; . . . success is more likely with a GSP beneficiary.”¹⁰ Table 5 provides a summary of the Section 301 cases in which intellectual property issues were at stake. In all eight cases, the targeted governments agreed to improve intellectual property protection along the lines desired by the United States. Furthermore, the timing of the changes demonstrates the strong link between this exercise of U.S. leverage and the changes in targeted states. In short, both the substance and the timing of these policies can be explained as a product of coercion. The detailed examination of a number of Section 301 cases against developing countries below illustrates the relationship between the substance and timing of policy change in targeted states, on the one hand, and the exercise of U.S. coercion, on the other.

However, as the following cases demonstrate, there is a sharp disparity between the adoption of these policies and their implementation and enforcement. While developing countries have acquiesced in a formal sense by adopting new laws and policies, they have resisted implementing and enforcing these policies. This discrepancy between policy adoption and implementation underscores the fact that developing countries are acting under duress but are not converts.

In the 1985 intellectual property rights case against South Korea, the Korean government acquiesced in 1986 by enacting product patent protection for

10. Sykes, “Constructive Unilateral Threats in International Commercial Relations,” p. 313.

TABLE 1. *Exports of goods and nonfactor services as a percentage of gross domestic product*

Country	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Argentina	10.9	8.9	8.2	11.4	8.0	7.5	8.8	15.3	10.5	7.6	6.3
Brazil	7.9	12.0	14.5	12.4	9.0	9.5	10.9	8.4	7.2	8.5	— ^a
Chile	19.1	23.4	22.5	28.1	31.1	33.3	37.4	37.9	37.1	35.7	33.1
China (PRC)	10.5	9.7	11.0	11.8	13.0	15.6	14.5	13.7	19.0	21.9	—
India	6.5	6.4	6.6	6.1	5.8	5.9	6.1	7.2	—	—	—
Mexico	15.0	18.2	17.1	14.9	16.9	19.7	16.9	15.9	15.7	14.0	—
South Korea (ROK)	37.0	36.1	36.4	34.5	38.5	41.8	39.6	33.7	30.4	28.8	29.6
Thailand	24.0	20.6	22.6	24.4	26.7	30.1	34.3	36.6	36.5	—	—

^aDash = data not available.

Source. International Monetary Fund, *International Financial Statistics Yearbook*, vol. 46, (Washington, D.C.: International Monetary Fund, 1993), pp. 136–37.

TABLE 2. *Value of exports to the United States (in thousands of U.S. dollars)*

Country	1987	1988	1989	1990	1991
Argentina	930,599	1,217,212	1,185,397	1,698,931	— ^a
Brazil	7,183,143	8,388,319	7,744,372	7,459,893	6,387,483
Chile	965,950	1,242,356	1,363,786	1,340,910	1,267,571
China (PRC)	3,020,413	3,357,938	4,404,887	5,175,334	6,147,516
India	2,252,391	2,556,216	—	2,643,570	—
Mexico	13,265,079	13,453,232	16,091,910	18,834,135	18,951,857
South Korea	18,362,736	21,477,257	20,694,317	19,419,654	18,607,413
Thailand	1,734,490	2,545,959	3,419,008	3,968,018	5,132,831

^aDash = data not available.

Source. United Nations, *1991 International Trade Statistics Yearbook*, vol. 1, *Trade by Country* (New York: United Nations, 1993), pp. 24, 102, 162, 170, 420, 498, 580, and 866.

pharmaceuticals and improving enforcement procedures. According to the president of the U.S.-based Pharmaceuticals Manufacturing Association (PMA), Gerald Mossinghoff, “The Korean case was a major step forward and set an important example of what could be accomplished using trade instruments to

TABLE 3. *Percentage of trade conducted with the United States*

Country (rank)	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Argentina (1) ^a	13.4	9.9	10.8	12.2	10.3	14.6	13.3	12.4	13.8	— ^b
Brazil (1)	20.5	23.1	28.6	27.2	25.8	27.4	24.8	22.5	23.7	20.2
Chile (1)	19.3	26.1	24.6	21.8	20.1	19.9	18.3	17.0	16.2	14.8
China (3)	8.0	7.8	9.3	8.6	8.5	7.7	7.1	8.4	8.3	8.6
India (1)	9.2	15.0	15.0	18.1	18.7	18.6	18.4	—	14.7	—
Mexico (1)	50.7	62.9	62.4	65.1	72.0	64.6	65.9	70.0	70.2	69.7
South Korea (1)	28.6	33.9	36.0	35.6	40.1	38.9	35.4	33.2	30.0	26.0
Thailand (1)	12.8	15.0	17.2	19.7	18.1	18.6	20.1	21.6	22.7	21.3

^aRank of the United States as a trading partner, based on 1991 figures, is shown within parentheses.

^bDash = data not available.

Source: United Nations, *1991 International Trade Statistics Yearbook*, vol. 1, *Trade by Country* (New York: United Nations, 1993), pp. 24, 102, 162, 170, 420, 498, 580, and 866.

TABLE 4. *Value of U.S. exports in selected developing countries (in thousands of U.S. dollars)*

Country (rank) ^a	1987	1988	1989	1990	1991
Mexico (3)	14,572,859	20,621,656	24,843,516	28,245,178	33,143,982
South Korea (6)	7,660,050	10,669,469	13,469,690	14,393,889	15,496,451
China	3,488,357	4,956,696	5,806,829	4,805,549	6,278,071
Brazil	3,998,894	4,247,215	4,798,002	5,061,527	6,147,835
Thailand	1,481,938	1,682,717	2,291,224	2,991,110	3,752,521
India	1,457,516	2,482,114	2,462,499	2,485,815	1,997,630
Chile	796,155	1,064,599	1,410,753	1,672,267	1,838,996
Argentina	1,088,909	1,054,663	1,036,744	1,179,126	2,044,691

^aRank of country as a U.S. trading partner is included if country is among the top ten partners.

Source: United Nations, *1991 International Trade Statistics Yearbook*, vol. 1, *Trade by Country* (New York: United Nations, 1993), p. 940.

TABLE 5. *U.S. experience with intellectual property cases under Section 301 of the Trade Act of 1974*

<i>Case no.</i>	<i>Country</i>	<i>Area</i>	<i>Year filed</i>	<i>Year case terminated or suspended</i>	<i>GSP beneficiary</i>
301-49	Brazil	Informatics	1985	1989	Yes
301-52	South Korea	Intellectual property rights	1985	Open	Yes
301-61	Brazil	Pharmaceutical patents	1987	1989	Yes
301-68	Argentina	Pharmaceutical patents	1988	1989	Yes
301-82	Thailand	Copyright enforcement	1990	1991	Yes
301-84	Thailand	Patent protection	1991	Open	Yes
301-85	India	Intellectual property protection	1991	Open	Yes
301-86	China (PRC)	Intellectual property protection	1991	1992	No

Source. Adapted from Alan O. Sykes, "Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301," *Law and Policy in International Business*, vol. 23, no. 2, 1992, pp. 263–330.

achieve intellectual property objectives."¹¹ The Korean case remains open because the private actors who have been monitoring Korean compliance—the International Intellectual Property Alliance and the PMA—have been disappointed in Korea's performance. The pharmaceutical manufacturer Bristol-Meyers Squibb Company charged Korean companies with piracy and in 1989 filed new Section 301 complaints with the USTR.¹² As a result, Korea has remained on the USTR's watch list of intellectual property rights violators. The U.S. Business Software Alliance and the International Intellectual Property Alliance also have closely monitored Korea's performance. In July 1992, the Business Software Alliance estimated that 86 percent of the personal computer software used in Korea was pirated, accounting for more than \$300 million in losses.¹³ Despite the passage of the Computer Program Protection Act (CPAA) in Korea in July 1987, penalties for piracy in Korea are still relatively low; the

11. Gerald J. Mossinghoff, "For Better International Protection," *Les Nouvelles* 26 (June 1991), pp. 75–79 and p. 76 in particular.

12. Michael P. Ryan, "Strategy and Compliance with Bilateral Trade and Dispute Settlement Agreements: USTR's Section 301 Experience in the Pacific Basin," *Michigan Journal of International Law* 12 (Summer 1991), pp. 799–827 and p. 824 in particular.

13. "Software Piracy: Self-Defense the Best Choice for Victims," *Business International*, vol. 24, 20 July 1992, p. 250.

maximum fine for piracy is 3 million won (about \$4,000).¹⁴ The Business Software Alliance continues to press for amendments to the CPAA to raise penalties against piracy, and the International Intellectual Property Alliance has recommended that Korea remain on the Section 301 watch list.

The 1987 PMA-initiated case against Brazil for its lack of patent protection for pharmaceutical products is noteworthy because it is the only case that resulted in trade retaliation by the United States under Section 301 provisions. After Brazil refused to alter its policy, the United States placed a 100 percent retaliatory tariff (totaling \$39 million) on imports of Brazilian pharmaceuticals, paper products, and consumer electronics.¹⁵ Brazil filed a General Agreement on Tariffs and Trade complaint against U.S. trade retaliation, but it “withdrew its complaint when the sanctions were dropped [in summer 1990] in exchange for Brazil’s patent commitments.”¹⁶ Then-President Fernando Collor de Mello proposed patent legislation that would protect pharmaceutical products and process patents for the first time. The patent reform package presented to the Brazilian legislature in May 1991 “denies protection to drugs that are not made in Brazil, a provision intended to force patent holders to manufacture or license them locally.”¹⁷ These conditions do not satisfy the PMA, and it will continue to monitor Brazil’s approach. In the words of one transnational corporation executive, “Brazil is looking for something to get it off the hook with the US Trade Representative. But I’m not really optimistic.”¹⁸ The PMA recommended that Brazil remain on the USTR watch list in 1992. A 1993 USTR investigation was terminated in February 1994 after Brazil promised USTR Mickey Kantor that it would enact a new patent law. However, in the wake of the political scandals of the Collor administration, intellectual property protection has been put on hold by the Brazilian legislature. Brazilian and USTR negotiators met five times between May 1993 and February 1994 to discuss the possibility of trade sanctions for Brazil’s failure to protect U.S. pharmaceutical patents. The 1991 patent bill had still not been passed, and Brazilian Senator Jose Richa indicated that he would not pressure the Senate to hurry passage of a new law.¹⁹

In 1988, the PMA filed a petition against Argentina. In consultations between the U.S. and Argentine governments, Argentina pledged to strengthen patent protection for pharmaceuticals by 1992. The PMA subsequently agreed

14. Fred M. Greguras and Moon Sung Lee, “Software Licensing in Korea,” *Les Nouvelles* 27 (December 1992), pp. 215–19 and p. 217 in particular.

15. “Differences Over Code on Patents,” *Latin American Regional Reports—Brazil*, RB-91-04, (London: Latin American Newsletters, 2 May 1991), p. 4.

16. Mossinghoff, “For Better International Protection,” p. 77.

17. John Pearson, “The Patent Pirates are Finally Walking the Plank,” *Business Week*, Industrial/Technology ed., 17 February 1992, p. 127.

18. William Neuman, “IPR Protection Improves, but Reforms not Uniform,” *Business Latin America*, 20 April 1992, p. 127.

19. Scott Studebaker, “Brazil: Constitutional Revision Session Floundering,” *Latin American Law and Business Report* 2 (April 1994), pp. 11–13 and p. 12 in particular.

to withdraw its Section 301 petition. The Argentine Congress was considering various proposals for strengthened pharmaceutical protection that reflected the U.S. demands yet quickly backpedaled on the issue of pharmaceutical patents. The Argentine government's agency in charge of intellectual property protection argued that a strong patent law would lead to higher drug prices and fewer jobs. The Argentine associations representing domestic pharmaceutical producers (primarily pirate laboratories) and distributors echoed these sentiments, citing the high cost of health care and specter of putting their employees out of work. An official from a wholesale pharmaceutical distributors association, Reftels, told U.S. negotiators that, "there were no saints in this issue—each side was simply protecting its own economic interests."²⁰ Argentina has remained on U.S. watch lists, and in early 1993 Argentina was ranked as the top Latin American violator of pharmaceutical patents "due to a powerful group of firms dedicated to copying patents and selling pirated drugs throughout Latin America."²¹ The Argentine Congress is likely to water down reform proposals due to strong domestic opposition.

Similarly, Thailand agreed to improve its intellectual property protection in response to the 1990 Section 301 filing over its lax copyright enforcement. The United States is Thailand's largest export market, providing the United States with significant leverage. The USTR repeatedly has cited Thailand on its priority watch list, and in the 1991 patent protection case Thailand indicated that it would consider compliance and "is looking to the results of the GATT negotiations for possible guidance."²² Therefore, that case remains open. Intellectual property protection has placed Thai leaders in a difficult position. In 1987, Prime Minister Prem Tinsulanond's administration was ousted in a no-confidence motion after attempting to strengthen Thailand's copyright laws. Intellectual property protection is controversial in Thailand because piracy has become a lucrative business there. The government has a strong interest in protecting the piracy industry that provides jobs in manufacturing as well as in over 12,500 retail shops.²³ The domestic political stakes are obviously high so, "Bangkok's approach has been to compromise when necessary then fail to put the newly negotiated regulations in place."²⁴ Thai Commerce Minister Subin Pinkhayan rejected U.S. offers to help draft legislation, indicating that such an action would constitute a breach of sovereignty.²⁵ Thai officials repeatedly have complained about "the United States' tendency to use its 'economic muscle to

20. Market Notes, *Latin American Law and Business Report* 1 (August 1993), p. 32.

21. Helen J. Simon, "Unfair Practices in the Spotlight," *Business Latin America*, 25 January 1993, pp. 6–7.

22. Mossinghoff, "For Better International Protection," p. 76.

23. Chris Shore, "The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974," *Law and Policy in International Business*, vol. 23, no. 3, 1992, pp. 725–48 and p. 729 in particular.

24. "Thai–U.S. Trade Relations Skate on Thin Ice over IP Rights Inaction," *Business Asia*, 13 November 1989, pp. 371–72.

25. *Ibid.*, p. 372.

throw its weight around and bully' its trading partners."²⁶ The United States has continued to pressure Thailand and has kept Thailand on its priority watch list as an intellectual property violator through 1994.

The 1991 Indian intellectual property case is still open. The United States decided to delay trade retaliation due to progress in U.S.–Indian negotiations over patent protection. Hamish McDonald, reporting in the *Far Eastern Economic Review*, pointed out that “India has taken steps to meet foreign concerns about enforcement of intellectual property rights under existing laws.”²⁷ Beginning in 1991, Prime Minister P. Narasimha Rao implemented a liberal economic reform package substantially relaxing conditions for foreign investment. India softened its position against the inclusion of intellectual property rights on the GATT agenda. India has taken steps to strengthen protection for computer software, videos, and films and has also improved its enforcement efforts. The Business Software Alliance has extended its activities to India and is keeping close watch on developments there, particularly regarding enforcement. Despite India’s moves in the desired U.S. direction, it has remained on the USTR’s watch list.

The last Section 301 case listed in Table 5 concerned intellectual property rights in the People’s Republic of China (PRC). Initiated in 1991, this case has been the subject of intense negotiations. Trade linkage thus far has proven effective only on paper. The PRC enacted its first patent legislation in 1984, but this legislation was deemed inadequate by interested parties in the United States. Section 301 consultations between the two countries in August 1991 proved frustrating, but the PRC promised to resume discussions over copyright and patent protection in October of that same year. The value of the PRC’s exports to the United States was an estimated \$18,969 million in 1991 and rose to \$25,729 million in 1992, so the threat of trade sanctions was palpable.²⁸ After repeatedly threatening to impose sanctions, the USTR formally withdrew its Section 301 special investigation in January 1992. As a result of the negotiations, the PRC agreed to enact new laws and regulations to expand the scope of protection and to join two international copyright conventions by the summer of 1993.²⁹ As did governments in the other cases, the Chinese government superficially complied, but its piracy activities have continued unabated. In June 1994, the United States designated China a Section 301 priority country for copyright violations; deputy USTR Charlene Barshefsky noted that while China had “world class” laws to protect intellectual property rights, they were

26. Shore, “The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974,” p. 747 n. 108.

27. Hamish McDonald, “The Late Convert: India Wins Reprieve in Patent Row with U.S.,” *Far Eastern Economic Review*, 5 December 1991, pp. 64–65. The quotation is from p. 65.

28. Export values are from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1993*, 113th ed. (Washington, D.C.: Bureau of the Census 1993), p. 813, table 1351.

29. Joseph T. Simone, Jr., “Improving Protection of Intellectual Property,” *China Business Review* 19 (March/April 1992), p. 9.

rarely enforced.³⁰ The pirating of music recorded on compact discs and of computer software comprise two lucrative industries. An estimated 100 percent of the compact discs produced and 95 percent of all the software used in China are pirated; indeed, the Chinese government helps the pirates by granting import concessions for machinery needed to produce compact discs.³¹ In the compact disc case, the Chinese set up factories as joint ventures with South Korean and Taiwanese investors who sought partners among relatives of the Chinese Communist party; according to industry officials, these connections “may explain why there has been so little copyright enforcement.”³²

The PMA also filed a Section 301 petition against Chile for failure to protect pharmaceutical patents but withdrew after consultations with the Chilean government, which promised to enact a pharmaceutical patent law by late 1989. Subsequently, several patent laws were proposed, but the PMA rejected them all as inadequate. After continued bilateral discussions, Chile finally enacted an acceptable law, which went into effect in September 1991 and for the first time extended patent protection to pharmaceutical products. The law guarantees protection for fifteen years; the United States had requested a twenty- to twenty-five-year guarantee but agreed that Chile was moving in the right direction. In 1993 and 1994 the United States continued to pressure Chile to strengthen its copyright protection, due to rampant computer software, videotape, and audiotape piracy. The United States also is distressed that Chilean law provides neither semiconductor mask work (the individual design of a chip’s layers) nor trade secret protection.³³

GSP status

In its quest to secure more extensive guarantees of intellectual property protection, the United States also has threatened a target country’s status as a GSP beneficiary. The 1974 Trade and Tariff Act included intellectual property protection as a new criterion for extending and/or maintaining GSP benefits; yet Washington did not pursue this avenue until the late 1980s after consistent pressure from industry associations. In three instances, involving India, Mexico, and Thailand, GSP benefits were denied for failure to enact adequate patent protection. In 1987, Mexico continued its refusal to pass pharmaceutical product protection and lost \$500 million in GSP benefits.³⁴ The USTR cited Mexico again in 1989 under Section 301, but dropped Mexico from the list due to evidence that Mexico was considering major changes in intellectual property

30. Philip Shenon, “Chinese Accused of Pirating Disks,” *New York Times*, 18 August 1994, p. D1.

31. *Ibid.*

32. *Ibid.*, p. D17.

33. Market Notes, *Latin American Law and Business Report*, vol. 2, no. 1, January 1994, p. 31.

34. Figures for both the Mexican and Thai cases are from Mossinghoff, “For Better International Protection,” p. 76.

legislation in 1990. In 1989, the PMA filed a complaint against Thailand, and when Thailand failed to acquiesce it was denied its duty-free benefits under GSP in the amount of \$165 million. In both cases, the targeted government faced strong domestic opposition to greater intellectual property protection from powerful local drug manufacturers and was concerned that extending pharmaceutical product protection would lead to higher consumer prices. Under continued pressure from the PMA via the USTR, in February 1992 the Thai government approved amendments to its Patents Act. The PMA is still dissatisfied because the new act does not offer pipeline protection (that is, for invented but not yet marketed products) nor does it eliminate compulsory licensing.³⁵ The Thai government cannot make further concessions without placing itself in a precarious position; the Government Pharmaceutical Organization dominates the local Thai drug industry and benefits from piracy, so pharmaceutical patents are a particularly sensitive issue. In 1992, India lost \$80 million in GSP benefits over its weak protection of pharmaceuticals.

An especially sharp reversal from past policies of economic nationalism currently is under way in Mexico. This case differs from the others because Mexico appears to have redefined its interests and decided that the benefits of intellectual property protection outweigh its costs. Mexico's extreme trade dependence on it gives the United States extra leverage, but in the past Mexico has successfully resisted U.S. pressure. Many factors are at work, including the Mexican decision to join the GATT in 1986; the change in leadership that brought President Carlos Salinas de Gortari to power by a narrow margin (50.7 percent of the vote) in December 1988; Mexico's placement on USTR's priority watch list; and Mexico's eagerness to participate in the North American Free Trade Agreement (NAFTA). The fact that the Salinas administration initiated the Mexican-U.S. NAFTA talks suggests that Mexico was motivated by the incentives that such an agreement might bring. In other words, Mexico's changed behavior is due to the high value it now places on international institutions, such as NAFTA.³⁶

The Mexican government also announced the Program of Modernization of Industry and Foreign Trade 1990-1994, which explicitly stated its commitment to stronger intellectual property protection. The connection between Section 301 pressure and the Mexican response was clear, as the United States immediately took Mexico off the priority watch list. On 28 June 1991 Mexico enacted a new industrial property law that represented a marked reversal of past policies. The new Mexican law for the first time extended patent

35. Traditionally, developing countries have favored the use of exclusive compulsory licenses in cases in which the patentee fails to exploit commercially the patent in the developing country. Under exclusive compulsory licenses, the patent rights are transferred to local parties. As Pfanner points out, "when an exclusive license is granted, the patent owner is excluded from using his own invention." See Klaus Pfanner, "Compulsory Licensing of Patents: Survey and Current Trends," *Sartryck ur NIR Nordiskt Immateriellt Rättskydd*, doc. 1 NIR 1/85, p. 5.

36. This point was suggested by an anonymous reviewer for *International Organization*.

protection to chemical, pharmaceutical, agrichemical, and biotechnology products. The law also included provisions for the protection of trade secrets (which had never been protected by Mexican law), stipulated that the importation of patented goods would constitute “working” the invention (that is, the making of the product that embodies the invention or the making of the patented process), and virtually eliminated the grounds for granting compulsory licenses.³⁷ According to Mike Privatera, the public affairs director for the U.S.-based pharmaceutical manufacturer Pfizer Inc., “The Mexicans gave us everything we wanted.”³⁸

These Section 301 and GSP cases demonstrate that the U.S. strategy has been largely successful in securing compliance on paper. The timing of the new policies can be explained by a neorealist approach that emphasizes coercion. Indeed, even though most analysts argue that neoliberal explanations are superior in accounting for the substance or content of policies, in this case the neorealist analysis appears to be sufficient. The policies have been the result of direct pressure from industry representatives via the USTR, who have been instrumental in shaping the substance of the new policies through consultations with targeted governments. Yet, in nearly every instance the targeted countries have engaged in foot dragging and chosen not to implement and enforce the new policies. The continued monitoring and repeated threats of renewed Section 301 action in the absence of satisfactory enforcement of the new policies suggest that the trend toward greater protection of intellectual property is not being as ardently embraced as the United States would wish. The targeted states acquiesce on paper and do just enough to free themselves of U.S. pressure—but no more. While these countries have changed their policies, they have not changed their minds about the merits of intellectual property protection. Even when the United States carried out its threats by imposing sanctions on Brazil, India, Mexico, and Thailand, the targeted countries did not comply. Free riding on others’ intellectual property and the profits from piracy still outweigh the liberal norm of respect for property rights. With the sole exception of Mexico, at this stage in their development, they do not yet see intellectual property protection as being in their interests. While some evidence suggests that this is beginning to change, the widespread acceptance of the norm of intellectual property protection is still a long way off.

Antitrust policy as a choice: changing their minds?

In contrast to the intellectual property protection case, the adoption of antitrust policies in developing countries has been based on choice within

37. Summarized from Oscar Becerril, “Mexico’s New Law Liberalizes Technology Transfer,” *Les Nouvelles* 27 (March 1992), pp. 4–5.

38. Mike Privatera is quoted in William Neuman, “IPR Protection Improves, But Reforms Not Uniform,” *Business Latin America*, 20 April 1992, p. 127.

constraints rather than on coercion. Antitrust policies have been adopted voluntarily, and the international institutional machinery established in 1980 under the RBP Set has played an increasingly important role. As with intellectual property rights, the economic crisis of the early 1980s promoted the policy shift in developing countries. However, the effects of the crisis were different in this case: in the antitrust context, industrialized countries have refrained completely from direct hegemonic coercion and threats.

On one level, the antitrust case is consistent with the neorealist expectation that the weak conform to the preferences of the strong. Yet this case is also consistent with a conceptualization of international relations that focuses on the diffusion of ideas—here, neoliberal economic ideology. In the intellectual property case, learning on the part of U.S. policymakers led to the adoption of a coercive strategy; external coercion led developing countries to change their policies. The sequencing of policy change in the antitrust case is different, and norm change may have preceded policy change. The underlying cause for norm change here was the economic crisis of the 1980s. But the more proximate causes are to be found in the realm of ideas.

As Thomas Biersteker points out, “in most instances, the ‘demand’ for policy reversal came from technocratic entry points for new thinking . . . within the state. Although these factions were present before the early 1980s, the magnitude of the economic crisis, along with the failure of past policies, provided them with an opportunity to articulate an alternative set of ideas.”³⁹ The ideas were borrowed from the international pool—the Reagan and Thatcher economic revolutions and the academic economists (i.e., the “Chicago school”)—and were given further credence by the demonstration effect of the East Asian success stories.⁴⁰

The switch toward export-led industrialization and attendant economic liberalization have raised a host of economic issues that did not seem salient to developing countries during the NIEO era. Undeniably, certain coercive elements have been at work, for economic policy changes have been in part driven by structural adjustment programs through the International Monetary Fund and the World Bank.⁴¹ Economic liberalization is a core component of

39. Thomas Biersteker, “The ‘Triumph’ of Liberal Economic Ideas in the Developing World,” in Barbara Stallings, ed., *The New International Context of Development* (Cambridge: Cambridge University Press, forthcoming), manuscript p. 13.

40. In the early 1980s, the East Asian “miracles” were inaccurately held up as paragons of free market economics. Much of the subsequent East Asian scholarship has exposed this fallacy and demonstrated the importance of extensive state intervention in these countries’ development policies. On the demonstration effect, see G. John Ikenberry, “The International Spread of Privatization Policies: Inducements, Learning, and ‘Policy Bandwagoning,’” in Ezra Suleiman and John Waterbury, *The Political Economy of Public Sector Reform and Privatization* (Boulder, Colo.: Westview, 1990), pp. 88–110.

41. In fiscal year 1988, the following twenty-six countries accounted for 85 percent of World Bank lending geared to reforming industrial and trade policies: Argentina, Brazil, Chile, China, Colombia, Ecuador, Egypt, Greece, Hong Kong, Hungary, India, Indonesia, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Singapore, Thailand,

International Monetary Fund conditions for loans to developing countries. Furthermore, a spillover effect from coercive economic policies could account for the timing of the changes in antitrust policy, helping to explain the ten-year lag between the establishment of institutional mechanisms to expedite the passage of antitrust laws and the developing countries' use of those mechanisms.⁴²

Deregulation, privatization, and the liberalization of trade and investment climates pose new challenges for developing countries. For example, by deregulating economic sectors, states need to ensure that the former regulations are not replaced by private-sector anticompetitive behavior, such as market allocation or price fixing. As states privatize formerly state-owned enterprises, they need to ensure that private-sector owners do not abuse their positions and replicate the inefficiencies of the former state sector. By breaking up former state monopolies, states seek to ensure that the new entities do not engage in restrictive business practices. In addition, by liberalizing trade and investment climates, developing countries are abandoning their former stance of discriminating against foreign-based multinational corporations.

Thus, an economic logic is at work insofar as a country eventually gains an interest in promoting competition in its domestic market as a consequence of liberalization. Even so, what distinguishes this case from that of intellectual property protection is that an international institution, established in 1980 through the adoption of the RBP set, has played a significant role in spreading the industrialized countries' conceptions of antitrust and competition policy. The institutional mechanisms established under the terms of the RBP Set provide a forum for education, the drafting of legislation, and the training of officials in implementation and enforcement of antitrust laws and policies. Policymakers in developing countries are recognizing the connections between liberalization and antitrust policies. Instead of having the United States dictate the substance of the policies under the threat of trade sanctions, these countries are taking the initiative and actively requesting the help and advice of the IGE established by the RBP set. In other words, the more proximate explanation suggests a significant role for international institutions and choice. The voluntarism in this case represents a contrast to the transparent coercive hegemony of the intellectual property case.

A decade after the adoption of the set of principles and rules, the president of the Second Conference to Review the Set opened the Conference by noting that "The world was now quite different from what it had been 10 years ago when the Set of Principles and Rules had been adopted, or even 5 years ago when the first Review Conference had been held. The past year, in particular,

Turkey, Venezuela, and Yugoslavia. See Claudio R. Frischtak, *Competition Policies for Industrializing Countries*, Policy and Research Series no. 7 (Washington, D.C.: World Bank, 198), p. 25 nn. 3 and 4.

42. Vinod Aggarwal suggested this point in his comments on an earlier draft of the present article.

had seen very rapid changes in the international economy and there was now a greater and more widespread appreciation of the benefits of the free market and competition.”⁴³ Indeed, the UNCTAD secretariat has received requests for technical assistance under the terms of the RBP set from fifty-nine developing and Central European countries beginning in 1989.

The countries have requested many different types of assistance, including organizing regional and national seminars or workshops, drafting legislation, and training RBP officials. Table 6 lists the countries that have requested assistance and the nature of the requested assistance. UNCTAD initially provided assistance in the form of regional workshops to introduce interested countries to the operation of antitrust legislation and the control of restrictive business practices. Due to the huge demand in this area, it has expanded its activities to include national seminars, advisory missions, training workshops, and on-the-job training internships.⁴⁴

As Table 6 shows, fifty-two countries have participated in UNCTAD’s regional workshops, and an additional five countries have requested UNCTAD assistance in conducting regional seminars. Twelve countries have participated in national seminars on restrictive business practices; two countries plan to participate, and an additional twenty-one countries have requested help from UNCTAD for their national seminars. Currently, fourteen countries have restrictive business practices laws on the books; four are currently drafting legislation; two have planned to draft such legislation; and four have requested UNCTAD assistance in preparing laws. Finally, the training missions sponsored by UNCTAD address issues of implementation. Three countries have thus far participated in training missions; four have plans to participate; and four more countries have requested UNCTAD assistance in training antitrust officials.

The first country to adopt RBP laws after the UNCTAD negotiations was South Korea. According to a spokesman for the Korean government, his country “responded immediately after the adoption of the Set by introducing the Act for Monopoly Regulation and Fair Trade and had started a systematic control of anti-competitive and unfair business conduct.”⁴⁵ The Korean government modeled its law after those of Japan and Germany, yet added uniquely Korean elements. For example, violators of the law have been required to issue public apologies. The staff of the Korean Fair Trade Office judges this remedy to be, “perhaps even more powerful than monetary remedies.”⁴⁶

43. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, TD/RBP/CONF.3/9 (Geneva: UNCTAD, 11 February 1991), p. 1, par. 3.

44. *Ibid.*, p. 2, par. 7.

45. *Ibid.*, p. 15, par. 46.

46. Stanley P. Wagner, “Antitrust: The Korean Experience 1981–85,” *The Antitrust Bulletin*, Summer 1987, pp. 471–522. The quotation is from p. 500.

TABLE 6. *Status of Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBP) technical assistance programs, by country^a*

<i>Requesting country</i>	<i>Regional seminar</i>	<i>National seminar</i>	<i>Drafting legislation</i>	<i>Training RBP officials</i>
Albania	Request	Request	—	—
Argentina	Action	Action	Law	Plan
Bangladesh	Action	—	—	—
Botswana	Action	—	—	—
Bolivia	Action	—	—	—
Brazil	Action	NA	Law	Request
Brunei	Action	Request	—	—
Bulgaria	Request	Request	—	—
Cameroon	Action	Request	Request	—
Chile	Action	Action	Law	Action
China	Action	Action	Request	Request
Colombia	Action	Request	Draft	—
Costa Rica	Action	Request	—	—
Cuba	Action	Action	—	—
Dubai	Request	Request	—	—
Ecuador	Action	Request	—	—
Egypt	Action	Request	—	—
Ethiopia	Action	—	—	—
El Salvador	Action	—	—	—
Fiji	Action	—	—	—
Gambia	Action	—	—	—
Ghana	Action	Action	Draft	Plan
Guatemala	Action	—	—	—
Guinea	Action	Action	Request	—
Honduras	Action	—	—	—
Indonesia	Action	Action	Request	Request
India	Action	—	Law	—
Iran	Action	—	—	—
Kenya	Action	Action	Law	Action
Lesotho	Action	—	—	—
Liberia	Action	—	—	—
Madagascar	NA	Request	—	—
Mexico	Action	Request	—	—
Mongolia	Action	Request	—	—
Morocco	Action	Request	—	—
Myanmar	Action	Request	—	—
Nepal	Action	—	—	—
Nicaragua	Action	—	—	—
Nigeria	Action	Plan	Plan	Plan
North Korea	Action	Request	—	—
Oman	—	Request	—	—
Pakistan	Action	—	Law	—
Peru	Action	Action	Law	Request
Poland	Request	Request	Law	—
Philippines	Action	Action	Draft	—
Romania	Request	Request	—	—
Russian Federation	Action	Request	Law	—

TABLE 6. *continued*

<i>Requesting country</i>	<i>Regional seminar</i>	<i>National seminar</i>	<i>Drafting legislation</i>	<i>Training RBP officials</i>
Somalia	Action	—	—	—
South Korea	Action	—	Law	—
Sri Lanka	Action	Request	Law	Action
Swaziland	Action	—	—	—
Thailand	Action	Action	Law	—
Trinidad and Tobago	Action	Request	—	—
Tunisia	Action	—	Law	Request
Uruguay	Action	—	—	—
Vietnam	Action	Plan	—	—
Venezuela	Action	—	Law	—
Zambia	Action	Action	Plan	Plan
Zimbabwe	Action	—	Draft	—

^aRequest = action has been requested; Dash = no action currently is planned; Action = action has taken place; Law = a law has been enacted; Plan = action is planned; NA = not applicable; Draft = drafting of legislation is in progress.

Source. Adapted from UNCTAD, "Activities Relating to Specific Provisions of the Set: Technical Assistance, Advisory and Training Programs on Restrictive Business Practices," doc. TD/B/RBP/83, 6 August 1991, p. 5, par. 20, and doc. TD/B/RBP/90, 28 July 1992, pp. 11–12.

Another key difference between Korea's antitrust policies and intellectual property protection is that Korea is implementing and enforcing antitrust policies. Korea has targeted the chaebol, or domestic industrial conglomerates; in 1981 the thirty Korean chaebol comprised less than 1 percent of corporations, yet accounted for 39.7 percent of sales in mining and manufacturing.⁴⁷ Between 1981 and 1985, "in every case involving a major chaebol, violations of the statute were found, and the subsequent corrective orders indicate that the chaebol were treated no less harshly than other defendants."⁴⁸ In this case there is no discrepancy between the adoption of the policies and their implementation; Korea's National Assembly both supports and approves of the activities of the Fair Trade Office.⁴⁹

The domestic consumer demand to restrain the power of the chaebol has increased over time. Once viewed as engines of development, in the popular mind chaebol are now perceived as corrupt and inefficient. Between 1986 and 1992, not much forward movement on antitrust policy occurred; the chaebol actively resisted government policies and became adept at dodging them. With the recent democratization of Korea, public pressure against the chaebol has increased. Korea amended its Fair Trade Act in November 1992, "to

47. Roger Alan Boner and Reinald Krueger, *The Basics of Antitrust Policy*, Technical Paper no. 160 (Washington, D.C.: World Bank, 1991), p. 43 n. 92.

48. Wagner, "Antitrust," p. 505.

49. *Ibid.*, p. 516.

strengthen restrictions on cross-ownership and capital investment limits for large business groupings.”⁵⁰ This was the strongest legislative measure yet to curb chaebol power. Elected in December 1992, President Kim Young Sam launched an aggressive anticorruption campaign that has focused on the chaebol and their use of financial power to buy elections. In November 1993, Chung Ju Yung, founder of Hyundai (one of the largest chaebol) and a presidential candidate in the 1992 election, was sentenced to three years in prison for violating election laws by diverting \$62.8 million from the Hyundai Group to finance his campaign.⁵¹ According to Koo Suk-moo, vice president of the Korea Economic Research Institute, “The general public has linked business activities with personal wealth accumulation. . . . They now look at them [the chaebol] as entities of destructive power and influence.”⁵² In response to this negative assessment, John Burton reported that in April 1993 the chairman of the Fair Trade Commission, Han Lee-hun, announced that the new government of President Kim “will use anti-trust laws as its main weapon to curb the economic power of the chaebol. . . . Han explained that . . . their dominance of the domestic economy prevented the growth of small and medium businesses.”⁵³ In the summer of 1993, Han unveiled a new line of attack by initiating Fair Trade Commission investigations into the chaebol’s internal trading practices. According to Burton, the chaebol’s extensive internal trading “reduces the ability of small businesses to sell products and services to the conglomerates.”⁵⁴

President Kim rode into office on a populist wave; thus far he has exhibited bold leadership and has been unafraid to confront the chaebol directly. He has made it clear that antitrust instruments will become increasingly important in the battle. Paralleling these efforts, he has added campaign finance and tax reform to his arsenal. According to an UNCTAD report, looking back on Korea’s decade-long experience in the RBP field, the Korean spokesman noted that “technical co-operation from international organizations such as UNCTAD and from developed countries had been very useful. During the past 10 years, the various international meetings on antitrust or RBP control, including the IGE meetings and seminars held by UNCTAD, had provided his country with good advice which had been instrumental in the efficient enforcement and improvement of fair trade policy in Korea.”⁵⁵ Thus, in contrast to the Korean

50. UNCTAD, “Draft Report of the Intergovernmental Working Group of Experts on Restrictive Business Practices on its Eleventh Session,” TD/B/RBP/L.58/Add. 1, UNCTAD, Geneva, 26 November 1992, p. 9, par. 40.

51. “Hyundai Founder Sentenced for Violating Election Laws,” *New York Times*, 2 November 1993, p. A10.

52. Koo is quoted in Bruce Cheeseman, “Hyundai Probe Turns Up Heat on Big Business,” *South China Morning Post*, 13 December 1992, p. 2.

53. John Burton, “South Korea to Probe Chaebol Power,” *Financial Times*, 7 April 1993, p. 7.

54. *Ibid.*

55. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*,” p. 16, par. 49.

efforts to strengthen intellectual property protection, the Korean implementation of antitrust policy has been influenced by UNCTAD activities, has been undertaken for domestic reasons, and is supported by the populace.

While South Korea was in a sense the post-RBP-set pioneer, a number of other developing countries also have adopted antitrust legislation and policies to control RBPs. Venezuela hosted an UNCTAD regional seminar in September 1990. Venezuela's new antimonopoly law established the Anti-Monopoly Superintendency to implement its policies. A 1992 test case suggested that the superintendency would apply the new law stringently. Venezuelan Sugar Distributor Company contracted with domestic sugar mills to be the exclusive distributor of sugar to the mills and asserted its right to set prices. *Business Latin America* reported that Superintendent Ana Julia Jatar challenged these contracts and "says the firm must negotiate contracts without exclusive clauses in order to open the way for competition. Observers say Jatar could be testing the water with 'small fry' before confronting the powerful cartels that have traditionally dominated Venezuela's distribution system."⁵⁶ During 1992 and 1993, the superintendency expanded its activities by initiating its own investigations and rendering numerous opinions and consultations, "the most important of which related to proposed mergers and acquisitions in electric power, airline, vegetable oil, beverage, paint, ceramic, automobile, and insurance sectors. Decisions to date reflect the practical approach of the agency in addressing problems of economic efficiency and consumer welfare," in the words of Thomas Hughes.⁵⁷ Importantly, the Venezuelan law is targeting domestic monopolies; this is a clear departure from the Andean countries' earlier antitrust approach of targeting only transnational enterprises.

The Venezuelan Anti-Dumping and Subsidies Commission of the Ministry of Industry published a block exemption to the antimonopoly law in July 1993, defining "certain activities which because of their relatively minor impact on the total market would not be considered an abuse of dominant market position (designed primarily to help small businesses)."⁵⁸ The Venezuelan government passed a new antimonopoly law in August 1993 and a new privatization law that, as Hughes points out, provided that "the privatization process shall be null and void if the results violate the Venezuelan antimonopoly legislation."⁵⁹ This underscores policymakers' concerns that the privatization process should promote domestic competition rather than merely transfer economic concentration to private hands. At least through the end of 1993 Venezuela was implementing this law; for example in November the

56. Management Alert, *Business Latin America*, 3 August 1992, p. 268.

57. Thomas Hughes, "Venezuela: Recent Developments," *Latin American Law and Business Report 2* (February 1994), p. 23.

58. Thomas Hughes, "Venezuela: Recent Developments," *Latin American Law and Business Report 1* (August 1993), pp. 27-28.

59. Thomas Hughes, "Venezuela: Recent Developments," *Latin American Law and Business Report 1* (September 1993), pp. 32-33.

antimonopoly authorities barred the local airline Avensa from participating in bidding for the privatization of Venezuela's other local airline, Aeropostal, to avoid the creation of a dominant market position for Avensa within the country.⁶⁰

Chile began liberalizing its economy most recently in 1985.⁶¹ After returning to democracy in March 1990, the Chilean government strengthened the institutions responsible for promoting and implementing liberalization and free competition. In 1990, Chile revised its former antimonopoly law (Decree 211 of 1973) to expand the responsibilities of the National Economic Tribunal (Fiscalia Nacional), which has extensive investigative powers, to include the control of price distortions with respect to imports (Law 18.525).⁶² Chile also participated in UNCTAD's regional RBP seminar in Caracas in September 1990 and discussed its experience in the control of RBPs; furthermore, Chile participated in the UNCTAD-sponsored RBP officials training program. The Chilean delegate to the second review conference stated that "his country was keen on constantly improving its legislation with the objective of promoting free competition. All these developments were fully in line with the Set of Principles and Rules. Moreover, Chile was willing to share its experience with other countries wishing to adopt and implement competition legislation."⁶³ By organizing and conducting these seminars and meetings, UNCTAD has created a forum in which developing countries can compare notes with each other as they begin adopting and implementing these new policies.

In light of its intellectual property stance regarding pharmaceuticals, Brazil launched an interesting investigation into Brazilian pharmaceutical companies under its antitrust laws. Although Brazil lifted price controls on Brazilian pharmaceuticals, the Ministry of the Economy has continued to monitor prices in an effort to protect consumers and prevent unfair business practices.⁶⁴ Brazil's Administrative Council for Economic Defense (CADE) is charged with investigating and punishing unfair business practices (i.e., monopoly and cartel formation). In 1992, CADE fined several Brazilian pharmaceutical companies for the abusive practice of trying to raise prices by withholding consumer goods.

60. Thomas Hughes, "Venezuela: Recent Developments," *Latin American Law and Business Report 1* (November 1993), p. 26.

61. The Chilean government had adopted neoclassical economic reforms in the early 1970s after the takeover by Augusto Pinochet. For a discussion of this earlier period see Alejandro Foxley, *Latin American Experiments in Neoconservative Economics* (Berkeley: University of California Press, 1983).

62. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, p. 26, par. 91.

63. *Ibid.*

64. This paragraph is based on Pinheiro Neto-Advogados, "Investigation of Pharmaceutical Industry for Abuse of Economic Power," *Latin American Law and Business Report 1* (April 1993), pp. 23-24.

In early 1994, the Brazilian Ministries of Finance and Justice began drafting a new antitrust law.⁶⁵ The president of CADE, Ruy Coutinho, indicated that the new law will substantially speed the processing of antitrust cases from nearly two years to forty-five days. The bill will also define the term “abusive prices”—important because government officials have interpreted this term in politically convenient ways that often bear no relationship to anticompetitive practices. Strengthening policies is an important step; in the past these policies have not been frequently enforced, and Brazilian courts have overturned most CADE administrative decisions when appealed by businesses.

Mexico passed a new antitrust law in December 1992 that came into effect in June 1993. As Natalia Delgado and Steven Martin suggest, “essentially, the Act is the Mexican government’s attempt to implement United States antitrust policy in Mexico.”⁶⁶ As in the intellectual property case, Mexico is strongly motivated by NAFTA. Chapter 15 of the NAFTA agreement covers competition policy, and according to Jeffrey Lang and Laura Brank requires that, “each Party adopt measures preventing monopolies and state enterprises from unfairly discriminating against, or engaging in, anti-competitive practices with respect to investments of other NAFTA parties.”⁶⁷ Mexico has moved swiftly to implement the law and establish an intensive training program to develop the necessary expertise for staffing the Federal Competition Commission (FCC).⁶⁸

India has fundamentally changed its treatment of foreign investors, and since 1989 has relaxed barriers to entry. The Monopolies and Restrictive Trade Practices Act (MRTP) of 1969 had been used to limit the entry of foreign multinationals into the Indian market. However, as *Business Asia* reported, a senior executive of a large Indian enterprise (the Tata Group) pointed out that, “the way the law is being applied now ‘has the effect of keeping the legislation intact while dismantling, in practice, the entire edifice of regulatory controls built up in the 1970s.’”⁶⁹

Relaxing the former stringent criteria for industrial licenses, in late 1988 the Indian government approved a major collaboration between Tata Iron and Steel Company (TISCO) and U.S.-based Timken Company to produce bearings. As characterized by *Business Asia*, “The controversial project won government permits despite vocal opposition from existing manufacturers—on

65. This paragraph is based on Scott Studebaker, “Brazil: Economic Plan, Privatization, Status of Constitutional Congress, and Other Recent Developments,” *Latin American Law and Business Report 2* (February 1994), p. 8.

66. Natalia Delgado and Steven Martin, “Mexico: The New Law of Economic Competition,” *Latin American Law and Business Report 1* (June 1993), p. 27.

67. Jeffrey Lang and Laura Brank, “A Step in the Right Direction: Unlocking the Mexican Energy Market,” *Latin American Law and Business Report 1* (August 1993), p. 14.

68. Market Notes, “Mexico’s SECOFI Implements Competition Law,” *Latin American Law and Business Report 1* (May 1993), pp. 34–35.

69. “Tata Timken Shows India’s Monopolies Law is Losing Its Teeth,” *Business Asia 4* (September 1989), p. 292.

the very grounds that likely would have led to its rejection a few years ago.”⁷⁰ Other Indian bearing manufacturers argued that the Tata–Timken venture would flood the market and hurt local producers. The government’s monopolies commission rejected their arguments and defended the venture on the grounds that: (1) it would result in product upgrading due to access to superior technology and (2) the venture would not seize the dominant market share but instead would create a countervailing force and thus stimulate domestic competition.⁷¹ Thus India has eased its discrimination against foreign multinational corporations and has gone so far as to defend the merits of foreign multinational investment even against local opposition. The Indian government also has approved numerous joint ventures between Indian firms and transnational enterprises such as Minnesota Mining and Manufacturing (3M) and Honeywell Company; while it is entirely possible that some joint ventures may have anticompetitive effects, the Tata–Timken ruling suggests that India’s monopolies commission is concerned with stimulating domestic competition.

In another strong reversal of past discriminatory policies, in 1993 the Indian cabinet approved Coca Cola’s plans to set up a wholly owned venture to produce its soft drinks in India.⁷² In the words of *The Economist*, “Keeping soft drinks makers out of India has been a fetish with Indian socialists ever since a previous government chucked out Coca Cola in 1977.”⁷³ India’s leading soft drinks company, Parle, had been protected from foreign competition due to the stringent limits on shareholdings in local affiliates. Under the 1973 Foreign Exchange Regulation Act, foreign ownership was limited to 40 percent of equity.⁷⁴ The Indian government lifted this restriction in August of 1991, and in 1993 alone over a hundred companies had won approval to increase their equity in Indian affiliates.⁷⁵ Coca Cola’s welcome back on such generous terms demonstrates this complete policy reversal.⁷⁶

While the following cases do not reveal extensive implementation, the countries below voluntarily have sought UNCTAD counsel and availed themselves of UNCTAD’s training programs. In Latin America, the Andean Pact countries had participated in UNCTAD regional seminars and each requested national level workshops. As the Colombian spokesman said, “as economies were liberalized the Set of Principles and Rules had shown its usefulness. . . . The dismantling of quantitative restrictions in Colombia had led

70. Ibid.

71. Ibid., p. 293.

72. Suman Dubey, “India Clears Some Foreign Investments, Sending Bullish Signal on Reform Drive,” *Wall Street Journal*, 24 June 1993, p. A6.

73. “Indian Economy, Pepsi Generation,” *The Economist*, 6 June 1990, p. 40.

74. Jayanta Sarkar, “Back in Charge: India’s Reforms Entice Foreign Firms to Raise Their Profile,” *Far Eastern Economic Review*, 8 July 1993, pp. 49–50.

75. Ibid.

76. I thank an anonymous reviewer for *International Organization* for suggesting this example to me.

to the adoption of antidumping and countervailing duty statutes, and the beginning of revision of antimonopoly legislation.”⁷⁷

Peru also adopted antitrust policies. Peru participated in regional and national seminars conducted by UNCTAD and has requested further UNCTAD assistance in training antitrust officials to implement and enforce these policies. In November 1991 the legislature passed over 126 laws, many of them designed to stimulate private-sector activity, and radically reoriented the country’s formerly statist economic policies. As part of this sweeping change Peru eliminated state monopolies in telecommunications, postal and railway services, and utilities.⁷⁸

In 1987, Sri Lanka adopted antitrust legislation and created the Fair Trading Commission of Sri Lanka, which applied the principles laid down in the RBP set of principles and rules.⁷⁹ Sri Lanka also received assistance from UNCTAD in the forms of a regional seminar and a program to train RBP officials. The Philippine government introduced Bill 996 in 1989 to address antitrust and RBP issues. This bill proposed to establish an independent antitrust commission and was variously inspired by the RBP code, U.S. laws and court decisions, and European models or experience. Speaking on behalf of the Group of 77 (developing countries), the Philippine delegate emphasized that, “In the 10 years since the adoption of the Set, the functions of the Intergovernmental Group of Experts had assumed greater importance as Governments made competition policy a priority.”⁸⁰ In November 1992 at the IGE meeting, the spokesman for the Philippine government indicated that UNCTAD had provided generous technical support for the development and institutionalization of Philippine competition policies.⁸¹

Many African countries, such as Ghana, Kenya, Nigeria, and Zambia, also have actively sought UNCTAD assistance in designing policies to control RBPs. For example, Ghana availed itself of UNCTAD’s services by: participating in a national seminar in February 1991; hosting an UNCTAD consultant and UNCTAD RBP staff member for a working visit for advice in drafting legislation; meeting with UNCTAD RBP experts in London in May 1992 and visiting London’s Office of Fair Trading; and returning to Geneva to discuss Ghana’s RBP program with the RBP Unit of UNCTAD.⁸²

77. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*,” p. 17, par. 56–57.

78. Based on Sally Bowen, “Peru Opens Up Economy with Deluge of Laws,” *Financial Times* 20 November 1991, p. 8, quoted in Pierre Guislain, *Divestiture of State Enterprises: An Overview of the Legal Framework*, technical paper no. 186 (Washington, D.C.: World Bank, 1992), p. 10 n. 27.

79. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, p. 18, par. 58.

80. *Ibid.*, p. 38, par. 144.

81. UNCTAD, “Draft Report of the Intergovernmental Working Group of Experts on Restrictive Business Practices on Its Eleventh Session,” p. 10, par. 43.

82. UNCTAD, *Review of the Operation of and Experience Arising from the Application and*

The institutional mechanisms established in 1980 have come to serve a number of important functions. Multilateral assistance in the form of UNCTAD's regional seminars has introduced large groups of government officials to basic RBP control principles. The IGE has become a forum for informal consultations that, as summarized by UNCTAD, has "served in the past to identify problems that developing countries . . . faced in RBP control, had provided a forum for discussions of possible solutions to such problems and had served to establish important contacts between experts of developed and developing countries."⁸³ UNCTAD also has compiled and distributed a list of RBP control authorities in numerous countries, complete with phone numbers, addresses, and fax numbers and a standardized checklist for information requests and for steps that countries must take in preparing a case and requesting consultation.⁸⁴ In this sense it is reducing transaction costs for interested states and thereby providing important benefits to participants.

Beyond reducing transaction costs, the IGE has become a source of detailed substantive information about the rationale for and operation of the control of RBPs. During each session of the IGE, states are encouraged to engage in multilateral and bilateral consultations on RBPs, address specific problems, and establish contacts with experts. Participants have praised these consultations as helpful and informative, and in response to the IGE's request, the UNCTAD secretariat has pledged to continue to provide facilities for these consultations. UNCTAD has encouraged states to present seminars on specific substantive topics, including deregulation and the treatment of natural monopolies, at these meetings.

By contrast to the acrimonious first conference to review the RBP Set in 1985, the second conference in 1990 was characterized by a high degree of consensus on the merits of both the set of principles and rules and the activities of UNCTAD in this area. At UNCTAD VIII, which took place in Cartagena in February 1992, member states agreed that: "UNCTAD should pursue, through the Intergovernmental Group of Experts on Restrictive Business Practices, its work with regard to policies and rules for the control of restrictive business practices to encourage competition, to promote the proper functioning of markets and efficient resource allocation, and to bring about further liberalization of international trade."⁸⁵ The NIEO focus on economic exploitation is absent from this formulation. As the spokesman for the industrialized countries noted, "an increasing number of developing and eastern European

Implementation of the Set of Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/B/RBP/89/Add.1 (Geneva: UNCTAD, 30 September 1992), p. 2, par. 4-9.

83. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, p. 29, par. 104.

84. UNCTAD, "Adoption of the Agenda and Organization of Work," TD/B/RBP/86, UNCTAD, Geneva, 21 July 1992.

85. *Ibid.*, p. 2.

countries were following the Set's principles in developing their own RBP legislation. . . . The Set . . . had stood the test of time better than could have been imagined in 1980."⁸⁶

Clearly the institutional mechanisms for RBP control established in 1980 have played an important role in providing information, facilitating transnational learning, and getting others to join the growing number of countries accepting the principle of RBP control. In Ikenberry and Kupchan's terms, this is a case of "normative persuasion" in which the participating countries have learned more about and accepted the idea of RBP control prior to adopting policies.⁸⁷ By actively approaching UNCTAD both for help in the design of these policies and for consultations to improve their functioning, developing countries have been volunteers rather than coerced targets of manipulation by the powerful. Developing countries have redefined their interests, and the institutional mechanisms provided by UNCTAD have expedited the adoption of new antitrust policies. Furthermore, UNCTAD has provided an arena in which developing countries can choose from an array of approaches to RBPs, design and adopt RBP control policies for their own reasons, learn from each other as well as from industrialized countries' experts, and do so in such a way that does not compromise domestic legitimacy.

Conclusion

The intellectual property protection case is an example of what Ikenberry and Kupchan refer to as socialization through external inducement, or, "acts before beliefs." They describe the causal chain of behavior change as externally induced policy change (that is, "cooperation through coercion") leading to norm change (that is, "cooperation through legitimate domination").⁸⁸ The process of normative change is still under way and is, therefore, still reversible. The distance between adopting policies on paper and believing in their intrinsic merits is significant. The fact that developing countries have not vigorously enforced these new policies suggests that domestic opposition continues to be robust. Interested private parties in the United States, such as the Business Software Alliance, the International Alliance for Intellectual Property, the PMA, and the Semiconductor Industry Association, know that the distance between formal policies and actual commitment to the value of heightened standards of protection and their enforcement is great. Thus, they are continuing to monitor the implementation of these policies and to threaten Section 301-based action.

86. UNCTAD, *Report of the Second United Nations Conference to Review All Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, pp. 20–21, par. 70 and 71.

87. Ikenberry and Kupchan, "Socialization and Hegemonic Power," p. 290.

88. *Ibid.*, p. 291.

Business associations also are pursuing alternative channels to both secure compliance and convince developing countries of the merits of protection. For example, the PMA has funded research demonstrating the negative effects of lax protection on developing countries' economies. Ad hoc groups, led by representatives of U.S. licensing interests, have lobbied actively in Brazil and Mexico for increased patent protection. These groups engage in educational activities and meet with local business leaders. According to Robert Sherwood, who has represented the Brazil ad hoc group, nearly every Brazilian business leader that he met with "has suffered losses when key technical employees have been hired away from competitors, taking proprietary technology with them."⁸⁹

The depth and sustainability of these recent policy reforms in intellectual property protection will depend on the emergence of politically influential indigenous interests committed to this direction. Resistance is still the name of the game, but at the same time some evidence exists that this may be changing. Pockets of nascent indigenous interests in stronger intellectual property protection are beginning to emerge. For example, Sherwood documents a case in which a Brazilian company owner sought to acquire a metal etching technology from abroad, "but if he reached an agreement with a foreign source, he stood the risk of losing that technology through employee departure to a competitor while still being obligated to pay for the acquired technology. He dropped his plans."⁹⁰ Robert Merges cites a link between stronger intellectual property protection and the new dynamism of indigenous industries: "A recording industry flourished in Hong Kong for the first time after the passage of a copyright act protecting sound recordings; the Indian software industry saw a growth surge after a copyright was extended to software."⁹¹

As more developing countries' domestic industries suffer from a lack of adequate intellectual property protection and as their high value-added export products that incorporate intellectual property come to be pirated, these industries will support stronger enforcement. Videotape movie producers and record producers in Brazil, Mexico, the Philippines, Singapore, and South Korea; computer associations in Malaysia and Thailand; and some drug manufacturers in India have all demonstrated an interest in stronger standards of intellectual property protection. In the late 1980s, the associated chambers of commerce urged the Indian government to join the Paris Convention; in 1991, Indian computer software exporters formed the Indian Federation Against Software Theft (INFAST).⁹²

89. Robert M. Sherwood, "New Theory of Conductivity in Licensing," *Les Nouvelles* (December 1989), p. 187.

90. *Ibid.*

91. Robert Merges, "Battle of the Lateralisms: Intellectual Property and Trade," *Boston University International Law Journal* 8 (Fall 1990), pp. 239-46. The quotation is from p. 246.

92. On the Paris Convention, see Robert Mallott, "1990s Issue: Intellectual Property Rights," *Les Nouvelles* (December 1989), p. 152. I thank an anonymous reviewer for *International Organization* for providing me with the INFAST example.

Additionally, as Pacific Rim countries continue to promote joint ventures with transnational enterprises, a greater stake in intellectual property protection will be necessary if they expect to acquire leading-edge technology. Without such protection, prospective partners will not be willing to share their most valuable technology. In fact, private investors have been able to secure commitments from joint venture partners that the U.S. government, Section 301 notwithstanding, has been unable to secure. For example, in order to curb piracy, Texas Instruments, International Business Machines Corporation, and Microsoft Corporation all have become partners with local industries in Taiwan through licensing agreements for computer hardware, software, and chip production.⁹³ This suggests that corporations may be better able to create situations of mutual benefit by extracting guarantees of intellectual property protection from parties that have been recalcitrant in the Section 301 process in exchange for sharing expertise and technology in joint ventures.

Developing countries have begun to encounter new problems as their enterprises have expanded to manufacture technologically sophisticated goods for export. In fact, computers exported from Taiwan have been copied by companies in England, the PRC, and Southeast Asia, thus turning the tables on the old pattern: "before they copied others, now others copy them."⁹⁴ In response to domestic demand from large well-established export-oriented enterprises in Taiwan, three industrial organizations (the National Anti-Counterfeiting Committee of the National Federation of Industries Republic of China, the Association for Computer Industry, and Taiwan Toy Manufacturers Association) have lobbied for policy changes to curb piracy and counterfeiting of Taiwanese goods.⁹⁵ Taiwanese toy manufacturers may now register their intellectual property based on guidelines developed by its industry association. Nonetheless, these indigenous efforts have yet to succeed in changing government policy to the extent that the United States desires. Continuing Section 301 and U.S. private-sector pressure bears this out. These policies will be implemented effectively only when these countries embrace them for their own reasons.

The prognosis for the control of RBPs appears to be more positive. Developing countries are moving in the same market-led direction by adopting antitrust policies. They are moving more slowly than is the case with intellectual property protection, but with the help of UNCTAD, they are tailoring policies to fit their particular situations. They also are voluntarily making use of the resources provided by the RBP IGE. These policies will be more politically palatable and will be perceived as more legitimate because

93. Paul Liu, "A Review of Intellectual Property Laws in Taiwan: Proposals to Curb Piracy and Counterfeiting in a Developing Country," *Brigham Young University Law Review* vol. 5, no. 3, 1988, pp. 619-42 and p. 630 in particular.

94. *Ibid.*, p. 630.

95. *Ibid.*

they cannot be construed as the result of “buckling” under crude foreign pressure.

Developing countries face a delicate challenge ahead, and the commitment to liberalism is hardly carved in stone. The U.S. Section 301 strategy in intellectual property has helped to mobilize developing countries’ domestic opposition, particularly among local pharmaceutical manufacturers and others who profit from product piracy.⁹⁶ It has also put elites in developing countries in a difficult position. If they succumb to U.S. pressure, they are subject to criticisms of selling out their sovereignty to foreign interests. The sentiments that animated the NIEO are still present in the developing world, especially in Latin America. For example, despite the fact that the Partido Revolucionario Institucional (PRI) won the recent Mexican election, questions of social justice dominated the populist campaign of Cuauhtemoc Cardenas Solorzano (Partido de la Revolucion Democratica; PRD). While he received only 17 percent of the vote, his focus on the roots of the political violence that erupted in Chiapas in early 1994 highlighted distributive issues that the PRI will have to face in order to keep political peace. In the wake of the Brazilian financial scandals and resignation of President Collor, the populist candidate Luis Inacio Lula de Silva began reviving interest in economic nationalism. In December 1993, disillusioned Venezuelan voters elected President Rafael Caldera with just over 30 percent of the vote. Caldera’s campaign rhetoric appealed to nationalist sentiment with his harsh attacks on the International Monetary Fund and World Bank; he also pledged to reverse many of the market-opening “fatal economic policies” of his predecessor Carlos Andrés Perez.⁹⁷

The present article suggests that rationalist neorealist analysis provides powerful insights into factors such as asymmetrical power relations and international constraints. However, these factors do not capture some important aspects of the story. The spread of hegemonic norms is hardly automatic. Interpretivist analyses that focus on learning, choice, international institutions, and nonstate actors, such as industry associations and transnational enterprises, provide compelling insights into variation across issues.

While an in-depth treatment of the domestic politics of all the countries discussed herein is beyond the scope of this article, it would be fruitful to examine the domestic politics of both the powerful states as well as the states that are the targets of powerful states’ efforts to alter their policies. A more precise understanding of the conditions under which targeted states find

96. In the recently concluded Uruguay Round the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) include important exemptions for developing countries. As Kent points out, developing countries “obtained a major concession, which would allow them to continue to pursue conscious policies of drug patent exemption.” See Christopher Kent, “NAFTA, TRIPS Affect IP,” *Les Nouvelles* 28 (December 1993), p. 176.

97. Lowell Fleischer, “Round of Presidential Elections will Determine Whether Region will Continue Economic and Political Reform,” *Latin American Law and Business Report* 2 (January 1994), p. 2.

external pressure beneficial for domestic reasons, and those under which they will resist such pressure, would provide insights into the process of hegemonic socialization. Furthermore, the role of nonstate actors, such as industry associations and transnational enterprises, in the domestic politics of both the initiating and targeted states should be highlighted. Both the mechanisms for and the impacts of transnational links between these parties are worth further investigation.

The spread of hegemonic norms alters domestic political incentives. The sustainability of the new direction in developing countries will depend on both the emergence of politically powerful domestic constituencies committed to the new direction and the ability of interested private parties to mobilize these constituencies to uphold and enforce these policies. Forging transnational links between private parties will become increasingly important to marshal lasting support for an open international economic order.