

# Alternative Dispute Resolution in International Intellectual Property Disputes

## I. INTRODUCTION

Intellectual property<sup>1</sup> is intangible, and unlike with conventional property, the value of intellectual property does not lie in the individual possession of the property. The value of intellectual property lies in its exclusive use and licensing by the owner. Because intellectual property is essentially information, it has become very hard to protect in the current global economy as information transfer and communications have reached unprecedented levels of accessibility and sophistication. Today, intellectual property is emerging as one of the most valuable commodities in the global market. In many ways, the global economy is coming to depend on technology.<sup>2</sup> The United States and other nations have entered into multilateral treaties which have mechanisms to increase the protection of intellectual property. Arbitration and mediation mechanisms have been outlined in recent multilateral agreements with the recognition that traditional litigation is no longer an effective means of settling international intellectual property disputes.<sup>3</sup>

In light of recent trade agreements between the United States and other nations, the use of alternative dispute resolution (ADR) in intellectual property disputes between parties of different nationalities should experience a significant increase.<sup>4</sup> The trend of increasing access to ADR in international intellectual property disputes should provide for more efficient and economical resolution of these disputes.<sup>5</sup> By their nature, intellectual property disputes often involve technical information. Areas of intellectual property, such as patents, often involve issues of law and technology that are rarely addressed by judges, and thus, the judges are unfamiliar with these issues.<sup>6</sup> Therefore, the use of ADR, with arbitrators and mediators with experience in the technical field at issue, will save time and effort and

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<sup>1</sup> "Intellectual property," for purposes of this Note, includes all forms of intellectual property such as patents, copyright, trademarks, and trade secrets unless otherwise indicated.

<sup>2</sup> Rory J. Radding, *Intellectual Property Concerns in a Changing Europe: The U.S. Perspective*, 7 INT'L L. PRACTICUM 41, 41 (1994).

<sup>3</sup> World Intellectual Property Organization, Press Release No. 93, Oct. 1, 1993 [hereinafter WIPO].

<sup>4</sup> One of the most recent and significant trade agreements that the United States has entered into is the General Agreement on Tariffs and Trade (GATT), which contains a significant number of dispute resolution provisions. See GATT, *infra* note 15.

<sup>5</sup> WIPO, *supra* note 3.

<sup>6</sup> TOM ARNOLD ET AL., PATENT ADR HANDBOOK § 5.02 (1991).

will likely lead to more equitable results.<sup>7</sup>

The nature of international disputes lends itself to conflicts as a result of diverse legal systems and tribunal procedures.<sup>8</sup> Also, international intellectual property disputes often involve nations that may have very different ideas regarding intellectual property and the level of protection that it should be afforded.<sup>9</sup> Finally, the use of ADR in intellectual property disputes will alleviate the burden that courts face when disputed technology has gone beyond the scope of the status quo legal systems.<sup>10</sup> This note will explore the use of ADR in international patent disputes, discuss recent treaties that have addressed ADR procedures, and analyze the structure of the World Intellectual Property Organization (WIPO) arbitration center that opened in Geneva in October of 1994.<sup>11</sup>

## II. ADR OF PATENT DISPUTES IN THE UNITED STATES

Only during the past decade has the United States recognized arbitration and mediation as useful tools in patent disputes.<sup>12</sup> The United States forbade arbitration of patent disputes prior to 1983 because patents were viewed to involve the public interest.<sup>13</sup> The belief was that the government had a duty to intervene in private patent disputes through the court system to enforce the public interest. The rule that patent disputes were non-arbitrational was not reversed until Congress enacted legislation in 1983.<sup>14</sup> Since this change, patent arbitration has gradually been gaining acceptance in the United States. As the legal community recognizes that ADR may be suitable for intellectual property settlements domestically, the opportunities for using ADR to solve international disputes become even more apparent.

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<sup>7</sup> *Id.*

<sup>8</sup> WIPO, *supra* note 3.

<sup>9</sup> Eileen Hill, *Trade-Related Aspects of Intellectual Property Rights: General Agreement on Tariffs and Trade*, BUSINESS AMERICA, Sept. 10, 1990, at 17. See also, Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 329 (1993-94).

<sup>10</sup> WIPO, *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> 35 U.S.C. § 294 (1988).

<sup>13</sup> In the United States, the patent is viewed as a monopoly for the inventor for a fixed term of years in return for the public retaining use after the term expires. The power of Congress to grant patents is a Constitutional right as a means to advance science.

<sup>14</sup> 35 U.S.C. § 294 (1988); see also, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 366 (1994).

### III. FUNDAMENTAL PROBLEMS OF INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES

One of the fundamental problems in international intellectual property law disputes is the myriad conceptual differences in the way in which different nations view intellectual property rights. Until the recent ratification of the General Agreement on Tariffs and Trade (GATT),<sup>15</sup> which resulted in dramatic changes in domestic patent law in the United States,<sup>16</sup> domestic law required that patent applications be maintained in secret, and disclosure not be made until the granting of the patent. The secrecy of pending applications distinguished domestic law from foreign patent registration procedures, where disclosure occurs at the time of filing.

In addition to registration differences among nations, the view of intellectual property's role in society varies internationally as well. In the United States, the granting of a patent is viewed as a *quid pro quo* where the inventor receives a monopoly on her invention for a period of twenty years,<sup>17</sup> and the public receives the benefit of having the knowledge placed in the public domain at the end of the term. Other nations view patents as an exclusive right of the inventor. In Japan, the public does not have a stake in intellectual property during the term of the patent, despite the fact that some have observed that sixty percent of Japanese economic progress has been a result of technology advancement.<sup>18</sup>

The differing international views of intellectual property go beyond the role of the public with respect to intellectual property. Some nations view intellectual property as a tool used by industrialized nations to control less developed nations. The less industrialized nations, such as India, give very little legal protection to intellectual property within their borders.<sup>19</sup> Because less industrialized nations provide little protection for intellectual property,

<sup>15</sup> General Agreement on Tariffs and Trade—Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994.

<sup>16</sup> See *Intellectual Property; GATT Bill Brings Major Reforms to Domestic Intellectual Property Law*, DAILY REPORT FOR EXECUTIVES, Dec. 5, 1994, at 231.

<sup>17</sup> The term for patents in the United States was changed by GATT. The term for a patent has changed from a term of seventeen years from the date that the patent was granted, to a period of twenty years from the date of filing. 35 U.S.C.A. § 154(a)(2) (West Supp. 1995).

<sup>18</sup> Mark S. Cohen, *Japanese Patent Law and the WIPO Patent Law Harmonization Treaty: A Comparative Analysis*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 847, 849-50 (1994).

<sup>19</sup> Luxman Nathan, *Will the Pirates Walk the Plank? Prospects for Reform in India's Intellectual Property Rights Standards*, 6 HELVIDIUS, COLUM. U. UNDERGRADUATE J.L. & PUB. POL'Y 44, 44-46 (1994).

the owner of intellectual property has few means to protect her property in these nations. Thus, in order to protect their intellectual property, many individuals will not enter the markets of less industrialized or third-world nations, and progress is further deterred in these nations.<sup>20</sup> Mechanisms employed under international agreements, that include ADR provisions, may provide better means for protecting intellectual property in less developed nations, and industrialized nations may then decide to enter the markets in these nations.

As we realize the fundamental differences that exist in intellectual property philosophy, the emergence of new technology will continue to increase the amount of international litigation. Increased international litigation has led to a need for arbitration for all forms of international intellectual property disputes.<sup>21</sup> Significant technological changes have occurred which will have a paramount effect on international transactions and relations. Revolutions in the development of transportation, communications, and information have created a new global business environment.

Highly technical intellectual property, such as patents and copyrights, are not the only areas needing increased protection in the global economy. Other branches of intellectual property, such as trademarks and trade secrets, may be a corporation's most valuable asset.<sup>22</sup> Trademark protection is an area where irreparable harm can occur if disputes are bogged down in lengthy litigation.<sup>23</sup> Thus, all areas of intellectual property require the flexible and expedient settlement that ADR mechanisms may provide for the parties.

#### IV. ADVANTAGES OF USING ADR IN INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES

In a global market that is continually evolving, the advantages of solving international intellectual property disputes through ADR methods are significant. ADR methods provide specific benefits that are particularly important to intellectual property matters.<sup>24</sup> Complex issues, such as choice of law or jurisdiction, will no longer be problematic when dispute settlement procedures are outlined in multilateral agreements. Other advantages of ADR methods in international intellectual property disputes

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<sup>20</sup> Luxman, *supra* note 19, at 44-46.

<sup>21</sup> WIPO, *supra* note 3.

<sup>22</sup> Floyd A. Mandell, *In Trademark Litigation, Success Often Depends on Timing and Foresight*, NAT'L L.J., May 16, 1994, at c22.

<sup>23</sup> *Id.*

<sup>24</sup> ARNOLD, *supra* note 6, § 5.01.

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include expediency, confidentiality, tribunals with technical experts, and emphasis on settlement instead of determination of rights.<sup>25</sup>

The advantages of using ADR are particularly important in technical cases, such as those involving patents.<sup>26</sup> Expedient settlement is of paramount importance in the rapidly changing technology of today's market, where patents and the technology being disputed may actually become obsolete before a matter reaches the litigation stage.<sup>27</sup> Another danger that the expediency of the ADR methods may prevent is the saturation of a market with infringing materials.<sup>28</sup> A danger exists in the delay inherent in traditional litigation because a market can become so saturated with infringing material that by the time the dispute reaches trial, no mechanism can correct the injury to the damaged party. Thus, one of the strongest arguments for the implementation of further ADR is that the time frame of intellectual property disputes may be shortened, and parties may be able to correct their injuries.

The second advantage of ADR in international intellectual property disputes is the confidentiality that ADR provides to parties in patent and technology disputes.<sup>29</sup> In areas of technology, such as trade secrets, where confidentiality is imperative, the litigation system and discovery process may deter parties from seeking restitution for infringements of protected technology.<sup>30</sup> The confidentiality of ADR methods provides a further benefit that international litigation under the International Court of Justice or domestic courts cannot provide.

A third advantage of ADR is that mediation used in international intellectual property disputes is problem solving and not right determinative.<sup>31</sup> The fact that mediation focuses on solving the problem and not on the rights of the individuals is the key to its effectiveness in dispute settlement. One of the fundamental problems with intellectual property disputes is the existence of different views that developed and undeveloped countries have with respect to intellectual property rights.<sup>32</sup> By focusing on

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<sup>25</sup> *ADR More Than a Means of Resolving Disputes—Maintain Relationships, Save Time and Money, Leapfrog Outside Firms*, CORP. LEGAL TIMES, May 1994, at 1 [hereinafter *ADR*].

<sup>26</sup> Allan J. Kaufman, *Conflict Resolution: ADR Offers Legitimate, Flexible Options*, MICH. LAW. WKLY, Oct. 17, 1994, at 5.

<sup>27</sup> ARNOLD, *supra* note 6, § 5.03.

<sup>28</sup> Robert G. Krupka et al., *Section 337 and the GATT: The Problem or the Solution*, 42 AM. U. L. REV. 779, 783 (1993).

<sup>29</sup> ARNOLD, *supra* note 6, § 5.05.

<sup>30</sup> *Id.*

<sup>31</sup> *ADR*, *supra* note 25, at 1.

<sup>32</sup> Developing countries feel there should be a lower standard of intellectual property protection for their nations because of the great need that exists in developing countries for the

problem solving and not exclusively on the rights of each party, settlement may be reached through compromise. Determining rights, especially when dealing with two or more distinct legal systems, may prove problematic in any dispute. Concentrating on settlement gives the parties a more tangible goal and the ability to fashion a remedy more suited to their particular problem.<sup>33</sup>

One ADR tool that has been implemented in international intellectual property disputes is mediation panels. Mediation panels are advantageous because mediators may be chosen who have some relevant technical expertise.<sup>34</sup> Expert mediators will alleviate the need to educate a judge and a jury in technical matters and will decrease the factfinder's reliance upon technical expert opinion. The failure to have an expert mediator in the area of technology may lead to a "draconian result."<sup>35</sup> In the twenty-first century, ADR is likely to emerge as a powerful tool for settlement in international intellectual property disputes. This is a result of international trade agreements which outline ADR procedures such as the dispute resolution provisions in the General Agreement on Tariffs and Trade (GATT).<sup>36</sup>

#### V. GATT: ALTERNATIVE DISPUTE RESOLUTION OF INTELLECTUAL PROPERTY DISPUTES THROUGH MEDIATION PANELS

Disputes involving intellectual property are often the result of varying standards of protection for intellectual property in individual nations.<sup>37</sup> More highly developed industrial nations tend to provide higher standards of intellectual property protection than less-developed nations.<sup>38</sup> For these reasons, intellectual property protection was introduced at the insistence of the United States into the Uruguay Round GATT talks.<sup>39</sup> Ratified in 1994,<sup>40</sup> GATT has had a significant effect on United States intellectual

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advancement of technology. See Hill, *supra* note 9, at 17.

<sup>33</sup> ADR, *supra* note 25, at 1.

<sup>34</sup> *Corporate Legal Times Roundtable*, CORP. LEGAL TIMES, May 1993, at 21.

<sup>35</sup> Martin Fox, *Attorneys Praise Alternate Methods to Settle Disputes*, N.Y. L. J. May 26, 1994, at 1.

<sup>36</sup> GATT, *supra* note 15, annex. to art. VI.

<sup>37</sup> *Coopers & Lybrand: EC Commentaries*, Dec. 22, 1994, § 14.1.

<sup>38</sup> Hill, *supra* note 9, at 17.

<sup>39</sup> GATT was originally proposed in 1947. The latest rounds of talks involving intellectual property took place during the Uruguay Round in Geneva. See Peter Truell, *The Outlook: Trading Places in Global Commerce*, WALL ST. J., Aug. 14, 1989, at 1.

<sup>40</sup> GATT was passed by the House of Representatives on November 29, 1994, and by the Senate on December 1, 1994. President Clinton then signed the agreement into law on

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property law. GATT effectively rewrote United States patent statutes, redefining the patent term commencement and changing the duration of a utility patent.<sup>41</sup> These changes placed the United States in line with the rest of the world in many aspects of patent law.<sup>42</sup> The final round of GATT talks resulted in an agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), which should provide better international standards of protection to intellectual property.<sup>43</sup> The Dispute Settlement Understanding under GATT is to be used to cover TRIPS.<sup>44</sup>

One method established by GATT to improve intellectual property protection is the creation of a General Council to monitor the use of the agreements and individual nations' compliance with the agreement provisions.<sup>45</sup> Essentially, GATT functions as an agreement between governments to regulate trade disputes.<sup>46</sup> All members subject to the provisions in GATT are under the authority of the World Trade Organization (WTO).<sup>47</sup> The WTO has the objective of providing a stable framework for world trade.<sup>48</sup> Dispute settlement procedures are also provided to any member of GATT who requests dispute resolution.<sup>49</sup>

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December 8, 1994. *Global Trade Pact Signed by Clinton*, CHI. TRIB., Dec. 8, 1994, at 1.

<sup>41</sup> The utility patent term in the United States increased from a seventeen-year term commencing with the grant of a patent to a twenty-year term commencing at the date of filing. The term for a design patent, fourteen years, however, remained the same. A design patent is distinguished from a utility patent by the fact that a utility patent must have a "use," while a design patent must be "aesthetic." See 35 U.S.C.A. § 101 (West Supp. 1995); Thomas G. Field, Jr., *Intellectual Property: Some Practical and Legal Fundamentals*, 35 IDEA: J. L. & TECH. 79, 89 (1994).

<sup>42</sup> As a result of GATT, the United States became a first-to-file nation. Under a first-to-file system, patent applicants are not required to prove they are the inventors of the technology. The applicant must simply be the first to file the application. See Leaffer, *infra* note 48, at 290.

<sup>43</sup> Hill, *supra* note 9, at 17.

<sup>44</sup> GATT, *supra* note 15, Agreement on Trade-Related Aspects of Intellectual Property Rights, annex 1C.

<sup>45</sup> The World Trade Organization was created under GATT to administer the trade provisions of the agreement. GATT, *supra* note 15, Agreement Establishing the World Trade Organization, art. I.

<sup>46</sup> *Id.*

<sup>47</sup> GATT, *supra* note 15, Agreement Establishing the World Trade Organization, art. IV.

<sup>48</sup> Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 298 (1991).

<sup>49</sup> Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 329 (1993-94).

Dispute settlement is carried out by third-party panels of experts who are members of GATT and who are appointed by the General Council.<sup>50</sup>

GATT is not self-executing. Parties may only rely upon the underlying principles of GATT being utilized and enforced in the national courts and agencies.<sup>51</sup> GATT does not establish a court system to construe GATT or to settle disputes arising under GATT. Disputes between nations under GATT are often to be settled using GATT panel decisions.<sup>52</sup> Once a decision is rendered, the panel recommends the member concerned conform to the terms of the agreements. In addition, the panel may suggest effective means of implementing its recommendations.<sup>53</sup> The panel may not issue binding judgments which "add to or diminish the rights and obligations provided in the covered agreements."<sup>54</sup>

GATT has developed a sophisticated system of dispute panels that are comprised of international jurists and experts.<sup>55</sup> These panels should prove useful in patent disputes where experts in the substantive area of the technology at issue may participate on the panels with international jurists, allowing technical expertise to complement an international legal decision. GATT panels provide a powerful force in promoting fair international competition, especially in the area of intellectual property, where trademarks, copyright, and patents are often infringed across borders. Under GATT procedures, a party may file a complaint which is then reviewed by GATT committees and the panels of experts who investigate the dispute and report their recommendations.<sup>56</sup> While this process should expedite settlements in international intellectual property disputes, member nations of GATT have been asking for even better dispute resolution mechanisms that would include shorter time limits.<sup>57</sup>

GATT should enable industrialized nations to provide improved protection to their citizens' intellectual property. The dispute mechanisms that have been established by GATT may be a significant step toward overcoming the problems previously experienced in international intellectual property disputes. The standards of protection employed by GATT through mechanisms such as mediation panels may finally satisfy industrialized nations, such as the United States, who have been frustrated by what they

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<sup>50</sup> Leaffer, *supra* note 48, at 301.

<sup>51</sup> Al J. Daniel, Jr., *Agricultural Reform: The European Community, The Uruguay Round, and International Dispute Resolution*, 46 *ARK. L. REV.* 873, 905 (1994).

<sup>52</sup> *Id.* at 906.

<sup>53</sup> GATT, *supra* note 15, annex. 2, art. XIX, § 1.

<sup>54</sup> *Id.* at § 2.

<sup>55</sup> Daniel, *supra* note 51, at 907.

<sup>56</sup> Leaffer, *supra* note 48, at 301.

<sup>57</sup> *Id.* at 302.

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view as inadequate protection under the World Intellectual Property Organization in less industrialized markets.

### VI. WIPO: WORLD INTELLECTUAL PROPERTY ORGANIZATION

The World Intellectual Property Organization (WIPO) was established as a specialized agency of the United Nations on July 14, 1967, to administer treaties<sup>58</sup> dealing with intellectual property. WIPO falls under the jurisdiction of the International Court of Justice,<sup>59</sup> and the process for settling disputes in this system is both complex and lengthy. In recent years, WIPO has been viewed as deficient in dispute settlement because few enforcement mechanisms exist within the WIPO structure.<sup>60</sup> For these reasons, WIPO has sought to introduce new methods of dispute resolution that may prove more efficient in addressing the unique disputes of the global intellectual property market. One method of solving the problems of international intellectual property disputes is the harmonization of intellectual property treatment.<sup>61</sup> Another means of providing intellectual property protection that WIPO has pursued is the opening of the WIPO Arbitration Centre (Centre) at its headquarters in Geneva. The Centre offers dispute settlement between private parties in areas of intellectual property law in the international sphere.

The Centre provides a structure for arbitration, mediation, expedited arbitration, and combinations of mediation and arbitration for private parties with intellectual property disputes.<sup>62</sup> The Centre administers arbitration and mediation procedures through the use of qualified neutral parties from around the world.<sup>63</sup> The Centre also provides a forum for discussion of international intellectual property issues and will conduct training programs for mediators.<sup>64</sup> Parties may refer disputes to the Centre through the use of an arbitration clause in a contract or through a submission agreement from

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<sup>58</sup> Specifically, WIPO administers the Paris Convention, the Berne Convention, the Madrid Agreement, and the Rome Convention. See Cordray, *infra* note 60, at 122.

<sup>59</sup> Leaffer, *supra* note 48, at 301.

<sup>60</sup> Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y, 121, 131-32 (1994).

<sup>61</sup> Attempts at international harmonization had been tried for several years. However, the United States, a leader in world intellectual property, resisted changing to a first-to-file nation.

<sup>62</sup> WIPO, *supra* note 3.

<sup>63</sup> *Id.*

<sup>64</sup> WIPO Arbitration Center: *International Center for the Resolution of Intellectual Property Disputes - Introductory Information*, Oct. 1994.

opposing parties in an existing dispute.<sup>65</sup> Additionally, the Centre provides a schedule of costs and fees for arbitrators and mediators that are calculated based upon the amount of money in dispute.<sup>66</sup>

Mediation at the Centre is carried out using neutral intermediaries. The mediation is non-binding, and the parties may pull out of the settlement procedures at any time before a settlement is signed.<sup>67</sup> However, if the parties fail to reach a settlement, a method of arbitration exists at the Centre that calls for a combination of mediation and arbitration.<sup>68</sup> Under this method, when a dispute is not settled through mediation within a prearranged time frame, the dispute goes directly to arbitration.<sup>69</sup>

Arbitration is carried out using either a single arbitrator or a three-member panel composed of neutral arbitrators. Unless other procedures are chosen by the parties, each side in a dispute settlement using a three-member panel may choose one neutral party, and the Centre will choose the third.<sup>70</sup> Arbitration, unlike mediation, is binding upon the parties, and a party may not withdraw from the process before a settlement is reached.<sup>71</sup> Also, a method for expedited arbitration is outlined by WIPO that allows for an expedited award decision, and thereby a reduction in the cost of settlement.<sup>72</sup>

During the initial months of the Centre's existence, no arbitration has occurred between parties. However, the Centre is used as a forum to discuss arbitration and mediation in international intellectual property disputes.<sup>73</sup> WIPO anticipates a delay before any dispute resolution process actually takes place because members of WIPO are just beginning to include arbitration clauses in their international intellectual property contracts.<sup>74</sup>

Previously, WIPO administered all of the major international intellectual property disputes, including one of the most encompassing bilateral intellectual property agreements,<sup>75</sup> the Paris Agreement. Other

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<sup>65</sup> WIPO, THE SERVICES OF THE WIPO ARBITRATION CENTER, Oct. 1994, at 9.

<sup>66</sup> WIPO, at 40-48.

<sup>67</sup> *Id.* at 23-28.

<sup>68</sup> *Id.* at 35.

<sup>69</sup> WIPO, WIPO MEDIATION RULES — WIPO ARBITRATION RULES — WIPO EXPEDITED ARBITRATION RULES 74-75 (1994) [hereinafter RULES].

<sup>70</sup> Lawrence Mattis, et al., *International Developments Trade: IP Treaty Developments*, 4 No., 11 J. PROPRIETARY RTS. 28, 28 (1992).

<sup>71</sup> RULES, *supra* note 69m at 74-75 (1994).

<sup>72</sup> WIPO *Arbitration Center: International Center for the Resolution of Intellectual Property Disputes - Introductory Information*, Oct. 1994 [hereinafter *Center*].

<sup>73</sup> WIPO, *supra* note 65, at 49.

<sup>74</sup> *Center*, *supra* note 72.

<sup>75</sup> Giunta & Shang, *supra* note 49, at 334.

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treaties, such as the Patent Cooperation Treaty (administered under WIPO), tried to harmonize patent rules internationally.<sup>76</sup> However, this protection was limited to member countries. The most protective and far reaching international intellectual property agreement, however, appears to be included in GATT. Presently, GATT is the multilateral treaty that provides the most encompassing treatment of intellectual property disputes. However, it is uncertain whether GATT can provide adequate protection,<sup>77</sup> or solve all of the inadequacies of the previously existing patent dispute mechanisms.

WIPO has no effective means to enforce an individual nation's intellectual property laws. The world market has demonstrated WIPO's ineffectiveness in providing a protection mechanism for intellectual property. A need has developed for a system that is "trade-based and flexible" enough to meet the needs of an international community.<sup>78</sup> WIPO also works with other groups to protect intellectual property, such as the International Association for the Protection of Industrial Property (IAPIP).<sup>79</sup> The IAPIP is a non-governmental, multinational organization which works to protect intellectual property and advocates the use of ADR in intellectual property disputes.<sup>80</sup> WIPO's recognition of the impending need for change in both the public and the private sector has led to the opening of the Arbitration Centre in Geneva.

### VII. PROBLEMS IN INTERNATIONAL FORUMS: GATT v. WIPO

When an individual has a problem in a foreign nation, the individual often must deal with a foreign legal system to seek compensation. This process presents many complex issues, including choice of law questions, the existence of equitable remedies, and the measure of damages.<sup>81</sup> Under both WIPO and GATT, the treatment of the dispute may be resolved under structured dispute conventions that may alleviate many of these problems.

As two forums have emerged to deal with multilateral treaties in the

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<sup>76</sup> Alan S. Gutterman, *International Intellectual Property: A Summary of Recent Developments and Issues for the Coming Decade*, 8 SANTA CLARA COMPUTER & HIGH TECH L.J. 335, 339 (1992).

<sup>77</sup> Giunta & Shang, *supra* note 49, at 335.

<sup>78</sup> Leaffer, *supra* note 48, at 294.

<sup>79</sup> *Seeking New Industrial Property Rules in a Changing World*, DAILY YOMIURI, Apr. 7, 1992, at 3 [hereinafter *Changing World*].

<sup>80</sup> *Id.*

<sup>81</sup> Williard Alonzo Stanback, *International Intellectual Property Protection: An Integrated Solution to the Inadequate Problem*, 29 VA. J. INT'L L. 517, 518 (1988).

current international intellectual property arena, concern is growing as to how GATT and WIPO will work together without, as one commentator stated, "a wasteful struggle for turf."<sup>82</sup> This concern becomes more acute in light of the opening of the new Arbitration Centre in Geneva, an attempt by WIPO to expand its role in international intellectual property disputes. The Arbitration Centre will overcome one of the largest obstacles to using WIPO in intellectual property disputes: having to appear before the International Court of Justice, which involves complex and time consuming procedures, especially for parties who are in need of expeditious remedies. Most nations recognize the increased use of arbitration and other methods of dispute resolution as a necessity. The IAPIP, whose Congress has been examining proposals for the administration of effective dispute resolution between private parties under international arbitration in WIPO since 1992, is also recognized by the world community as an important administrative body for dispute resolution.<sup>83</sup>

Advantages and disadvantages for the protection of intellectual property exist in both WIPO and GATT with respect to resolving disputes in the international sphere. GATT provides a better standard for protection of intellectual property because, unlike the treaties enforced by WIPO, GATT lays down minimum standards of patent protection and provides a workable definition of what is patentable.<sup>84</sup> Unlike the WIPO Centre, GATT also provides disputing parties with binding mediation panels. However, WIPO still maintains a significant role in the registration of international patents and the development of international patent legislation.<sup>85</sup> Also, WIPO has years of experience and background in dealing with international intellectual property issues, for which GATT cannot immediately compensate. However, both GATT and WIPO are entering new areas in the use of arbitration and mediation with respect to intellectual property disputes.

GATT appeals to developed countries for intellectual property protection, while WIPO is more likely to appeal to developing countries who see intellectual property as a tool of control and not a commodity for trade.<sup>86</sup> Significant tension exists between GATT and WIPO, as two independent systems of patent protection and dispute resolution seem to be emerging in both. In light of recent trends, the role these two independent bodies will have in relation to each other seems unclear.

WIPO, however, is only effective for those countries who choose to

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<sup>82</sup> Leaffer, *supra* note 48, at 303.

<sup>83</sup> *Changing World*, *supra* note 79, at 3.

<sup>84</sup> Frances Williams, *GATT Joins Battle for Rights to Protect - Frances Williams on Differences with WIPO over Intellectual Property Jurisdiction*, FIN. TIMES, July 7, 1994, at 7.

<sup>85</sup> *Id.*

<sup>86</sup> Giunta & Shang, *supra* note 49, at 331.

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join the convention. Many developing countries have declined to join because doing so would be against their best interests and they would have little to gain by joining WIPO. On the other hand, GATT provides incentives for developing nations to join outside the area of intellectual property. Developing countries view the protection of intellectual property as a domination tool used by the more advanced nations, who tend to generate more of the valuable patents and copyrights used in today's market, and therefore resist the intellectual property protection. Thus, GATT would provide better protection to industrialized nations because incentives exist within it to encourage less developed nations to join.<sup>87</sup> Also, GATT is more flexible in adapting to emerging technological innovation under the TRIPS agreement.<sup>88</sup> In the end, GATT will most likely emerge as the dominating force in international intellectual property disputes because the United States, a leader in intellectual property development, has been a strong supporter of GATT.

### VIII. CONCLUSION

The overwhelming benefits of using ADR methods for international trade disputes should encourage greater use of ADR methods in such disputes. Recent decisions seem to indicate a trend toward an increased use of arbitration and mediation in international intellectual property disputes. This trend will most likely continue as international jurisprudence evolves to accommodate advances in technology and information transfer in our society.

ADR is a likely mechanism to alleviate the obstacles present within international intellectual property disputes that exist due to different cultural views of intellectual property and jurisprudence. The flexibility and communication that ADR methods encourage will decrease many of the obstacles to efficient resolution of intellectual property disputes in the global market. As alternative dispute resolution becomes more prevalent, cooperation between WIPO and GATT should be developed, utilizing the strengths of both organizations to foster effective arbitration and mediation rules throughout the global market.

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<sup>87</sup> Cordray, *supra* note 60, at 131-32.

<sup>88</sup> Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465, 483 (1994).

