

**CONFLICTING AIMS: SUSTAINABLE DEVELOPMENT  
AND INTELLECTUAL PROPERTY RIGHTS IN  
CANADIAN FOREIGN POLICY**

by

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## **ABSTRACT**

Controversy over intellectual property (IP) is not a new issue; however, IP protection is receiving greater attention as this protection covers a more diverse subject matter and affords stronger protection to IP than ever before. IP protection is an important variable in the development prospects for many countries as the extent of IP has implications on environmental, economic and social well-being. Foreign Affairs and International Trade Canada (DFAIT) maintains a commitment to protecting IP internationally through multiple and bilateral trade and investment agreements. At the same time, DFAIT puts forward a sustainable development agenda that pledges the department to incorporating concerns over the economic, environmental and social well-being of developing countries through multilateral agreements. In this paper, I argue that DFAIT's commitment to IP protection undermines its sustainable development policy. This project will investigate the issue in more detail and examine the reasons for this disconnect in Canadian foreign policy.

**Keywords:** Intellectual Property; DFAIT; Sustainable Development; International Development; Neoliberalism; Canada-US Relations

**Subject Terms:** Neoliberalism – Canada; Intellectual property – Canada; Intellectual property -- Developing countries; Foreign trade regulation; Canada -- Politics and government

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# **1: INTRODUCTION TO INTELLECTUAL PROPERTY AND THE DEBATE SURROUNDING IT**

Controversy over intellectual property (IP) regulation is not new. In 1851 there was concern that “[t]he privileges granted to inventors by patent laws are prohibitions on other men...[t]he privileges have stifled more invention than they have promoted...however, beneficial [patent rights] may be to him who receives the privilege, the community cannot be benefited by it” (Commission on Intellectual Property 2002, 9). Proponents of IP regulation champion IP protection for its ability to encourage further innovation, as it will provide monetary incentive for people to put their time and effort into new discoveries; researchers know that they will make a profit off of their work as they own the rights to that creation. However, monopoly rights restrict access to the knowledge that has been created. This prevents the entire society from benefiting from this knowledge. Concern over IP regulations has only grown in magnitude with the increasing prevalence of knowledge-based industries and the wider range of topics now subject to IP protection.

The level of subject matter that is now defined as IP has significantly increased in the past century. Specifically, over the last twenty years “there has been an unprecedented increase in the level, scope, territorial extent and role of IP rights protection” (Commission on Intellectual Property Rights 2002, 6). Traditionally, IP rights were granted for new inventions like the steam engine. However, we have now entered an era where IP rights cover new inventions as well as discoveries of pre-existing

knowledge. For example, in 1997, the Texas based company RiceTek applied and received a patent on a genome of basmati rice. The US patent office gave RiceTek rights to any basmati rice hybrid that was grown in North and South America. This was criticised on the basis that this hybrid was not new, as crossbreeding of rice had been used for centuries in India. India asked the US Patent Office to re-evaluate this patent and took the issue to the WTO. In 2002, in response to public, political and judicial challenges, RiceTeK renamed its rice and removed obstacles on Indian rice exports to the US (Goldfinger 2007). As Vandana Shiva states, “Patents and intellectual property rights are supposed to be granted for novel inventions. But patents are being claimed for ...every aspect of the innovation embodied in our indigenous food and medicinal systems” (Shiva, 2000). Not only has the subject matter covered under IP protection increased, the length of this protection has also increased. For example, in Canada patent rights have increased from four to twenty years.

In the international debate over IP, the arguments for IP protection are espoused by developed countries and the arguments against IP protection are held by developing countries. This has been described as a “knowledge divide” between developed countries, who are responsible for most of the knowledge creation and developing countries who have “comparatively less developed markets, institutions, telecommunications, infrastructures or educated people to create, adapt, and make effective use of the rapidly growing stock of knowledge” (Leung 2004, 2).<sup>1</sup> Most research and development (R&D) occurs in developed countries, which means that the

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<sup>1</sup> This statement is not designed to disregard the knowledge generated from developing countries (such as traditional knowledge), but merely to highlight the difference in the amount of research and development that occurs in the developed versus the developing world.

reliance on IP protection exists in developed countries and is unfamiliar in many developing countries (Braga and Fink 1998, 579). At the same time, the majority of patent holders reside in developed countries and the patent holder is dependent on IP protection to secure their product and any profit that goes along with selling their product (Maskus and Reichman 2005, 10).

With the growing interconnectedness of national economies, patent holders have become increasingly concerned with patent protection abroad. This has been marked by the pursuit of international protection for IP by developed countries, through various international agreements. For developing countries, this has significant implications on the environmental, economic and social well-being of their country. Current IP protection has made it “costly and difficult to obtain cutting-edge technologies needed for public health, agriculture, environmental protection and provision of other public goods” (Maskus and Reichman 2005, 28). Developing countries are concerned about IP protection because current IP regulations deny them access to knowledge and products that can have life and death consequences. For example, restricted access to drugs in the face of the HIV/AIDS pandemic means a death sentence for those infected with the disease that do not have the means to pay the high cost for antiretroviral drugs.

The regulation of IP plays a central role in development, as it affects areas such as public health, agriculture, technology transfer and the management of biodiversity.

While IP protection may benefit certain companies or countries, the central concern between IP protection and developing countries is that strong IP protection<sup>2</sup> may hinder development attempts rather than encourage them (Vivas-Eugu 2003, 2). Specifically,

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<sup>2</sup> The term strong IP protection refers to lengthy patent and copyright protection as well as an extensive list of items covered under the umbrella of IP.

IP rights can hamper local innovation by creating barriers for local innovators through the increased cost of goods, like software, necessary for domestic innovation. At the same time, IP rights allow foreign firms to obtain patents, which restrict domestic firms from competing against the foreign firms. Furthermore, IP rights limit the ability for developing countries to learn new technologies through imitation, which is, historically, one of the ways countries have understood and adapted foreign technology.<sup>3</sup> In addition, IP rights raise the prices on products such as pharmaceuticals and seeds, both essential for economic, social and environmental wellbeing (Commission on Intellectual Property Rights 2002, 6).

Due to pressure from the OECD countries, most notably the US, there has been a trend of ever-increasing levels of IP protection (Maskus and Reichman 2005, 5). What have been the reasons for this trend? It has been argued that we have witnessed a change in the economic structure of many developed countries over the twentieth century—a change from an industrial based economy to a knowledge-based economy (Maskus 2000, Grandstrand 1999; Fink and Maskus, 2004). This change, the inclusion of knowledge with land, labour and capital for economic importance, has been detailed by many academics and institutions (OECD 1996, 2-3; Kenny 1996; Grandstrand 1999; Thurow 2000; Cowen and Harison 2001; Maskus 2000; Fink and Maskus 2004) and has been marked by increased protection for IP, both within developed countries and on the international stage. This increased protection for IP rights is being accomplished through bilateral and multilateral agreements, including IP agreements, trade agreements and investment agreements.

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<sup>3</sup> For example, Japan, the US, South Korea and Taiwan all relied on reverse engineering to increase their domestic technological capacity (Lal 2003, 1).

In Canada, two departments regulate IP: Foreign Affairs and International Trade Canada (DFAIT) and Industry Canada. Within Industry Canada, the Canadian Intellectual Property Office is the key agency regulating Canadian IP policy. While both of these departments play an important role in Canadian IP policy, this project will focus on DFAIT due to its responsibility over Canadian foreign policy and its involvement with IP regulation.<sup>4</sup> DFAIT continues to support a policy of strong IP protection. It does this by signing trade and investment agreements that contain IP clauses. This policy will be detailed in further chapters, but overall, Canada supports lengthy copyright and patent protection as well IP coverage over a wide range of subject matter. I will argue that these policy decisions contradict the overall theme of Canadian foreign policy that DFAIT likes to project.

Canada portrays itself as a 'good global citizen', one that is committed to human rights, peacekeeping and international development. This tradition of ethics in foreign policy stems from the golden era of Canadian foreign policy under Lester Pearson. However, DFAIT has received a great deal of criticism for its policy decisions that undermine Canada as a "good global citizen." As Andrew Cohen argues, "As a soldier Canada is ill-equipped; as a donor, Canada is underfunded and ineffective; as a diplomat, Canada is becoming less influential and less imaginative" (Cohen 2003:109).<sup>5</sup> DFAIT has been accused of placing economic policy ahead of other foreign policy goals (McBride 2005, 138). Nevertheless, this has not prevented Canada's current government from reaffirming its commitment to values in its foreign policy stating that "Canada may

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4 CIDA is Canada's development arm, but will not be addressed in this analysis, as DFAIT is responsible for negotiating trade and investment agreements, which lay out rules of IP protection.

5 See also Sjolander, Smith and Steinstra, 2003.

not be a superpower—but we stand for higher values to which all peoples aspire, and it is important that our actions as Canadian promote these values in all corners of the Earth” (Canadian Press, 2006). This commitment to ethics in foreign policy has materialized in the sustainable development strategies that each federal department has been required to create since 1997 (Government of Canada, 2002).

DFAIT’s sustainable development agenda puts forth the idea of a sustainable future. This is one “that includes sustainable development as an overarching objective of Canadian foreign and trade policy” (Government of Canada 2007, 1). In DFAIT’s most recent sustainable development agenda, sustainable development is defined as “a way of thinking and behaving that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Government of Canada 2007, 1). DFAIT has committed itself to making decisions that take into account the social, economic and environmental factors of development (Government of Canada 2007, 1). This commitment follows Canada’s goal of promoting its values in foreign policy and continues to place Canada as a “good global citizen” on the international stage. However, a disconnect between DFAIT’s sustainable development agenda and its IP policy exists. DFAIT’s position on IP regulation in multilateral and bilateral trade and investment agreements supports a system of IP regulation that contradicts its sustainable development agenda.

Why does this disconnect between these two policies exist? There are three possible reasons. The first is that DFAIT has been pressured to align its policies with the US to maintain its close trade relationship with the US. The second is that there is intense pressure from Canadian businesses to protect IP on the international level. The

last possible reason for this disconnect is that different political parties have created the two policies and this is why they diverge from one another. Through an analysis of primary materials, including policy documents, press releases and official government statements, as well as an examination of secondary sources, including academic literature, this project will examine each hypothesis and draw general conclusions on the state of Canadian IP policy. Chapter two of this project will examine the arguments both for and against IP regulation as well as trace the history of IP protection. Chapter three will examine the relationship between IP and development in further detail. Recent statistical evidence will be used to describe the relationship between IP and development. In Chapter four, an analysis of DFAIT's position on IP in international agreements will be conducted. Last, in Chapter five, this project will examine each possible hypothesis for the current disconnect between these two policies and put forth recommendations to resolve this problem.

## **2: INTELLECTUAL PROPERTY RIGHTS: THEORIES AND HISTORY**

There are two theoretical arguments put forth for the need for IP protection. The first group revolves around the notion of property as a natural right. Natural justifications follow the notion of “property as pre-social, a natural right expressing the rights of persons which are prior to the state and law” (Getzler 1996, 641). As John Locke concluded, property rights are derived from natural law (Richards 2002, 523). All property is justified because it was produced through the labour of an individual. It is the reward for one’s labour (May 2002, 126). If someone is going to invest their time and effort into researching an invention, they should own that invention, as it is a direct product of their labour.

The second group of arguments are utilitarian. It is claimed that IP protection is necessary for continued innovation and discovery. Within various IP literature (Maskus 2002; Matthews 2004), IP rights are defended on the basis “that private property stimulates and facilitates the production and accumulation of wealth” (Samuels 1961, 98). It is maintained that IP protection is necessary to allow companies and individuals to develop ideas, profit from these ideas and then have the money available to conduct further research (Werhane and Gorman, 2005: 264). At the same time, research and development of new ideas adds to the social good because it furthers the development of

humanity. For example, the World Intellectual Property Organization (WIPO)<sup>6</sup> claims that without patent protection, nearly two-thirds of all modern medicines may not have been developed and the revenue generated from these medicines would not have been available for future research (Cook 2002, 187-188). Grouping both natural and utilitarian arguments together leads us to the main argument found in current pro-IP literature; innovation occurs when the inventor is rewarded and this innovation is good for society, therefore, an incentive needs to be associated with innovation so that further R&D is pursued and this helps further the development of humanity.

This theoretical reasoning is not without its critics. The proponents of IP protection (North 1981; Maskus 2000) all take the same theoretical view that people invest their time when there is personal gain involved; “underlying this argument is a clear perception of what drive human endeavour: individual benefit” (May 2002, 127). However, the legal protection of objects is a recent event in human history; the first patent law was created in 1474 in Venice (Cook 2002, 14). For 15 000 years humanity continued to innovate, research and develop new ideas without any formal mechanism to assign ownership and protect that ownership from other people using it. New ideas were created, progress happened, all without a legally protected incentive system (Cook 2002, 14). Countries that did not have IP protection—such as Switzerland until 1907 or the Netherlands until 1912—still maintained a high level of innovation. IP protection is only part of the innovation system (Stiglitz, 2006, 111).

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<sup>6</sup> The World Intellectual Property Organization was created in 1967. It is an agency of the United Nations. The WIPO was created to promote international IP protection. The agencies goals include promoting an IP culture, integrating IP into national policies, developing international IP laws and standards, increasing the efficiency of WIPO management and delivering services in global IP protection. (World Intellectual Property Organization)

IP rights are often proposed as a way to encourage innovation. However, in actuality, IP rights can inhibit innovation. IP rights

limit the diffusion of the innovations that they are intended to promote. When the innovation process is cumulative, strong protection for the first-generation producer limits the scope of second-generation producers, and slows down follow-on innovation. Patents often establish barriers to entry that are unjustified in terms of the technical contribution effectively made. (Correa, 2004: 786)

Communication between scientists is discouraged as trade secrets may lead to large profits. Sharing of scientific knowledge is necessary for further advances in research areas and patent protection discourages the sharing of information, which in turns stifles the level research. These groups of arguments in favour and against IP protection have been bounced back and forth for over a century.

## **2.1 Historical Overview of International Intellectual Property Protection**

Modern international IP protection began with the Paris Convention for the Protection of Industrial Property in 1883, then furthered under the Berne Convention for the Protection of Artistic Literacy and Artistic Works in 1886. The Paris Convention covered industrial property and set out common rules that each contracting state must follow. The Berne Convention gives the same level of protection for literacy and artistic works in all member states. However, both of these treaties were seen as weak and vague because they lacked enforcement mechanisms (Maskus 2000, 15). In response to this, developed countries, most notably the US, have been the driving force behind increased IP protection at the international level. This has been marked by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the World Trade

Organization (WTO), as well as the Anti-Counterfeiting Trade Agreement (ACTA) that is currently under negotiation.

The United States is the most vocal proponent of stronger IP protection, while both the European Union and Japan also play an important role in championing increased IP protection. Policy makers within the US have subscribed to the idea that the protection of IP is linked hand-in-hand with US economic success (Lehman 1998, 82-83; Cook 2002, 19). As Brian Lehman (1998, 77), who was the Assistant Secretary of Commerce and Commissioner of Patent and Trademarks from 1993 to 1998, illustrates this position

in the next century, US economic growth and competitiveness will largely be determined by the extent to which the US creates, owns, preserves, and protects its intellectual property, and the extent to which the federal government can foster economic growth by creating incentives for private sector investment in research and development, promoting stronger intellectual property protection abroad, reducing barriers to trade and servicing US business interests throughout the world.

Since the US is the major force pushing for more extensive IP protection, it is necessary to examine the strategies it uses to protect IP internationally. This protection is accomplished in three parts (Sornarajah 2004, 47-49). A critical discussion of each part will be undertaken later in this paper. For now, it is important to identify each element of the overall strategy.

The first part is to take unilateral action against states that are not upholding IP protection. The US does this by placing states that do not uphold acceptable IP standards on the 301 list. Section 301 of the US Trade Act is “the principal statutory authority under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny U.S. rights or

benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict U.S. commerce” (Grier 2005). Section 301 is used to address unfair trading practices, including IP protection. If a 301 investigation is embarked upon it can result in the negotiation of a bilateral agreement between the US and the country in question, or it can result in trade sanctions. The US government justifies Section 301 because

A trade agreement is only optimally effective if it is properly implemented and enforced by the parties to the agreement... When agreement cannot be reached and an unfair trade practice continues to be applied, under the auspices of international law, countries may be allowed to retaliate or impose prohibitive duties on the imports from the country promulgating the unfair trade practice. (International Trade Administration)

Part of the reason that South Korea, Argentina, Brazil, Thailand, Taiwan and China invoked stronger IP legislation in the 1980s and 1990s was due to threats from the US using Section 301 authority (Maskus 2000, 4).

The second part of this strategy is to negotiate multilateral agreements on IP. The TRIPS agreement was signed in 1994, with the advent of the WTO. The TRIPS agreement established a minimum level of protection that each Member of the WTO will give to intellectual property. There are five areas that the TRIPS agreement covers: how basic principles of the trading system and other international IP agreements should be applied, how to give adequate protection to IP rights, how countries should enforce those rights adequately in their own territories, how to settle disputes on IP between members of the WTO and special transitional arrangements (World Trade Organization, 2006). The TRIPS agreement was a momentous change in the international protection of IP because of its broad coverage, the nature of its provision and the links to a dispute

settlement mechanism that could lead to the implementation of trade sanctions (Richerston 95, 881-883). The US is now in the process of negotiating the ACTA. The ACTA specifically addresses IP. The ACTA has three areas of focus: “a) increasing international cooperation, b) establishing best practices for enforcement, and c) providing a more effective legal framework to combat counterfeiting and piracy” (Government of Canada 2008d). This agreement will be discussed in further detail in chapter four.

The third part of this strategy is to use bilateral investment treaties (BITs) to protect IP. A BIT is an agreement between two countries “for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country” (UNCTAD 2004). BITs protect IP by including it in the definition of foreign investment. This is done because it is believed that IP is a significant strategic asset, especially in industries such as biotechnology and pharmaceuticals. By defining investment to include IP, it gives IP holders the same general guarantees, such as national treatment and most favoured nation status that it gives to all other investors. It also affords IP holders the same investor-state dispute mechanism designed for foreign investment. This definition gives IP holders the legal basis they need to issue a cause of action against a host country, if they feel that their IP is not protected to the level that the BIT outlined (UNCTAD 2007a, 4). By extending the same rights that investors get under BITs to IP holders, IP protection under BITs goes beyond those afforded in the TRIPS agreement (Correa 2004, 28). Ultimately, the level of protection that IP has is determined by how the term IP is defined. A broad definition of IP creates the possibility for more investor disputes, while a narrow definition means a more limited scope for any potential claims (UNCTAD 2007a).

To this three-part strategy, a fourth must be added, which ties into the idea of IP as investment. Free trade agreements include provisions on IP. The inclusion of IP with free trade agreements is part of the new generation of trade agreements negotiated since the 1980s, which saw agreements cover areas beyond the trade in goods (McBride 2005, 8). Some directly cover IP, such as the NAFTA, while others refer to a previously signed BIT that addressed IP, such as the Canada-Costa Rica FTA. What is important and interesting to note here is that the premise behind free trade is to tear down barriers to trade between the parties signing the agreement. However, by including provisions that protect IP in free trade agreements, it essentially creates a barrier to free trade, as IP regulations create monopoly rights for IP owners.

Canadian IP policy mirrors the US's strategy in several ways. DFAIT includes IP protection in its BITs as well as defines IP as investment in free trade agreements; "Canadian policy is to include intellectual property rights (IPRs) as a form of investment in our bilateral investment agreements and the investment chapters of our Free Trade Agreements (FTAs)" (Consultations and Liaison Division, Foreign Affairs and International Trade Canada, e-mail to author, 7 April 2008). Canada is also party to the TRIPS agreement and involved with the negotiations for the ACTA. Unlike the US, Canada does not have a Section 301 list. Canada's strategy on international IP protection will be explored in further detail in chapter four.

Debate over the regulation of IP is not new. However, the impact that IP regulation can have on developing countries has dramatically increased over the last twenty years as the scope and length of IP rights has increased. The extent of IP rights has important consequences for developing countries as it influences their potential

economic, social and environmental development, which DFAIT has identified as part of sustainable development. The relationship between IP and development needs to be examined in detail to draw conclusion on DFAIT's IP policy and what it means to its sustainable development strategy.

### **3: INTELLECTUAL PROPERTY AND DEVELOPMENT: THEORY AND REALITY**

There is a knowledge divide between developed and developing countries.

Developed countries have the majority of R&D industries, which benefit from stronger IP protection. The global Gross Expenditure on Research and Development (GERD) in 2002 was \$829.9 billion US. Developed countries accounted for \$645.8 billion US, while developing countries spent \$183.6 billion US and Less-Developed Countries spent \$0.5 billion US. Spending by developed countries made up 77.8% of the global GERD, while spending by developing and less-developed made up 22.2% of GERD (UNESCO 2005, 4). At the same time, the majority of patent holders are located in developed countries. Out of the patents granted by the United States Patent and Trademark Office in 2001, 93.4% was granted to developed countries and 7.3% to developing countries. Less-developed countries had no patents granted<sup>7</sup> (UNESCO 2005, 4). While the majority of R&D and patent granting occurs by developed countries, developing countries are strengthening their IP protection. There is mounting evidence that shows that increased IP protection has little benefit for developing countries; and, in some cases, IP protection is having a negative impact on their economic growth (Braga 1998; Correa 2004; Correa 2005; Coriat et al. 2006; Drahos 2002; May 2002; Vanadana 2001). If this is the case, why are developing countries signing agreements, such as the TRIPS agreement and various BITs that require them to strengthen their IP laws? Developing

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<sup>7</sup> Any inventor can apply for a patent from the US Patent and Trademark Office, regardless of their citizenship.

countries have the expectation, which has been encouraged by developed countries, that long-term benefits of IP protection will lead to economic development (Palombi 2007, 73). This is a theory driven rationale; in reality, the evidence does not support this theory.

Theoretically, there are four possible areas, put forth by advocates of IP protection, where developing countries can benefit if they increase their domestic protection of IP. The first is an increase of foreign investment in that country. As multinational companies feel more secure that their assets are not going to be reproduced without their permission they are more likely to invest in the country. The second possible benefit is that the level of technology transferred into the country will increase<sup>8</sup> if stronger IP regulations are adopted. This will ultimately lead to a transfer of expertise, which will contribute to the local economy. A third possible benefit is that local business innovation will increase, as their innovations will be protected. The last benefit of IP protection is the prevention of trade sanctions or further bilateral negotiations from being levied against the country (Matthews 2002, 109). Each of these areas needs to be evaluated to see if there is any merit to these claims because foreign investment, the transfer of technology and domestic innovation are central for economic, social and environmental development.

### **3.1 Foreign Direct Investment**

Investors face risks when they enter foreign markets, as in any market the prices and opportunities cannot be completely predicted. In developing countries the risks are

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<sup>8</sup> Under Article Four of the TRIPS agreement: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." However, there are no qualifiers as to what technological innovation, "mutual advantage and a manner conducive to social and economic welfare" actually consist of.

greater as investors may be concerned about the reliability and fairness of property rights. Foreign investors prefer to conduct businesses in environments with well-enforced property rights (Rose-Ackerman and Tobin 2005 3, 5-6). Therefore, trade and investment agreements are signed in the hopes of creating a stable investment climate and attracting foreign investment. Foreign investment can create employment opportunities. It can make domestic firms more efficient as they are exposed to new competition. It can open up new markets for the host country's exports by bringing in companies that have established business contacts (Cosbey 2002, 6-7). This is especially attractive if the new market is the US as the US has "the largest and most technologically powerful economy in the world, with a per capita GDP of \$46 000" (CIA 2008). There are, of course, very convincing counter arguments to all of these touted benefits (see Cosbey 2002); however, it is easy to see why a developing country would want to attract foreign investment into their country if these benefits materialized. As stated on DFAIT's website, "from the perspective of developing countries, investment has a positive impact on development...Developing countries need and want the capital that investment brings and they want to ensure that investment flows predictably to their countries" (Government of Canada 2008a).

One of the most often employed methods used to increase foreign investment is the implementation of a BIT. Often, developing countries do not have much to offer in natural resources, domestic markets, access to foreign markets, infrastructure or labour. To counteract this, they offer legal concession (Walter 2000, 608-609). One of these legal concessions is to increase the level of IP protection. As previously discussed, most BITs cover IP by including it in the definition of investment. Developing countries offer

investors stronger IP protection to encourage that investor to bring its business into the countries. The idea behind this is that if an investor is not concerned that its product will be stolen it is more likely to bring its business into the country. While developing countries continue to sign BITs with the hope of attracting foreign investment, the evidence on the relationship between BITs and increased foreign investment is mixed.

There have been several studies on the relationship between foreign investment and BITs, and there are different results from each study depending on the methodology used. Peter Egger and Michael Pfaffermayr, used the largest available set of bilateral outward foreign investment stock data from the OECD and data from the World Bank, they found that BITs increase foreign investment by 15 to 30% (2004, 801). However, UNCTAD (1998) and Rose-Ackerman and Tobin (2005, 34) found a weak link between foreign investment increases and BITs and Hallward-Driemier (2003) found very little evidence of any positive effect. Braga and Fink (1999, 541) also conclude that while foreign investment is increasing it is concentrated in very few countries. Egger and Pfaffermayr, explain for the differences in these studies because UNCTAD (1998) only relied on a cross-section analysis and Hallward-Driemeier, focused on developing economies and foreign investment flows rather than stocks (Egger and Pfaffermayr, 2004, 797).

There is obvious debate over the relationship between BITs and foreign investment. However, in an influential document by the Commission on Intellectual Property Rights found that strong IP protection alone does not increase foreign investment (2002, 13). For example, several countries that appeared on the United States Trade Representative watch list were the worst violators of IP protection and some of the

largest recipients of foreign investment in the past twenty years. These include Argentina, Brazil and China (Matthewes 2002, 112). If IP protection, alone, led to increased foreign investment this would not be the case (Commission on Intellectual Property Rights 2002, 13). Despite the mixed data, the most critical conclusion one can make is that there are other factors that are important for a country to attract foreign investment. These include the existence of a skilled workforce, infrastructure, political stability and tax incentives (Braga and Fink 1999, 554; Maskus 2002, 369; Cosby 2002). As Mary Hallward-Driemer (2003, 21) shows in her study, the impact of BITs and foreign investment, countries with strong domestic institutions are most likely to gain foreign investment, not countries with BITs.

### **3.2 Technology**

Access to technology has always been necessary for economic development (Oxfam 2007) and the creation and establishment of domestic technological capacity is a pivotal determinant for economic growth: “[t]echnological change is a principle source of sustained growth in living standards and is essential for the transformation and modernization of economic structures” (Maskus and Reichman 2005, 11; see also Correa 2005, 229). Historically, this has occurred through reverse engineering, as in the case of Japan, the US, South Korea and Taiwan. Each of these countries relied on weak patents in the early stages of industrialisation (Lal 2003, 1). In fact, it was the US who was known as the “bold pirate of intellectual property” in the 18<sup>th</sup> century. It sent spies into the United Kingdom to gather information on the processes used and to attract skilled workers to migrate (Oxfam 2007, 14-15). Developing countries rely on imitation and

reverse engineering to build technological capabilities; technological activity in developing countries happens by learning to use imported technologies, rather than creating new technologies.

Developing countries have been trying to increase their access to foreign technology with the goal of enhancing their technological capabilities. Developed countries argue that if this is going to happen then IP protection must be strengthened (Correa 2005, 228). This was how the TRIPS agreement was promoted to developing countries. There are three possible reasons technology would be transferred if the level of IP protection increases. The first is that the publication of patents could give background information that is necessary to stimulate new inventions within the developing country. The second relates to foreign investment and that if multi-national companies (MNCs) come to the country they will bring new level of technology with them. The third reason is that businesses from developed countries may invest in new product research in developing countries (Duran and Michalopoulos 1999).

It has been fourteen years since TRIPS has been implemented. Has technology been transferred to developing countries at a higher rate than in the pre-TRIPS era? The results are mixed. Some countries with high IP standards, such as some African countries, have experienced low levels of technological transfer, while some countries with weak IP protection, such as South Korea and Brazil, had the most amount of technology transferred (Correa 2005, 228). This is the same result we see with foreign investment; there are factors beyond IP protection that lead to technological transfer. In fact, IP protection can actually inhibit technological transfer. The Commission on Intellectual Property Rights concluded that countries that have acquired significant

technological capabilities have had weak IP protection and that in general weak IP protection is more likely to lead to economic growth as developing countries are dependent on reverse engineering (Commission on Intellectual Property Rights 2002, 22; see also Correa 2005).

The TRIPS agreement specifically calls for technology transfer. Article seven of the TRIPS agreement states

the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. (TRIPS Article 7)

During the DOHA round, developing countries raised concern over the lack of technological transfer occurring. In response to this the Working Group on Trade and Transfer of Technology was established. While there has been a great deal of analytical work on the issue of the transfer of technology, no practical recommendations have been produced on what can be done to increase the transfer of technology to developing countries (South Centre 2005, 9).

### **3.3 Local Business Innovation**

IP protection is also promoted for its ability to spur innovation in the domestic economy of developing countries. Local businesses will be more likely to conduct R&D if they know their inventions will be protected, as they will be rewarded for their efforts. This is because weak trademark protection in poor nations can stifle product development and the entry of new firms (Maskus 2002, 370-371). However, this argument simplifies economic development in poor nations. While the idea that there is more incentive for

people to invest in R&D of a new idea/product can be advanced, there are outside factors that play a role in innovation, beyond IP protection. IP protection is supposed to encourage local business development. In reality, if the local capacity to conduct R&D in the country is lacking IP rights do not fill this void. Patent rights may provide an incentive to conduct R&D, but if there is limited capacity to make use of it, then IP protection alone cannot encourage innovation (Commission on Intellectual Property Rights 2002, 15).

Even when the capacity to innovate exists, IP protection may hamper local business development because IP creates monopolies on products that businesses need to innovate. The Ukraine has a high level of software-piracy. For a business that is just getting started it will need an operating system for its computers. In the Ukraine, this costs \$150 US; if that business also needs Microsoft Word, then an additional \$300 US needs to be added onto this cost (Computer Crime Research Centre 2004). Why would a business pay these costs, if they can download this software for free?

A study by Walter Park and Juan Carlos Ginarte examined the economic benefits of increased intellectual property protection in sixty countries. In the case of R&D, IP protection “matter[s] for the R&D activities of the developed economies but not for those of the less developed economies. This suggests that, for the latter group of economies, either their R&D responds to different incentives (such as cultural rewards) or a significant part of their R&D activity is imitation” (Park and Ginarte 1997, 60). Park and Ginarte conclude that IP protection will lead to economic growth by encouraging the research sector to take risks and invest. However, if the country has a limited or nonexistent research sector, the country would not receive any economic benefits of IP

protection (1997, 51). There are other aspects, beyond IP protection that are more important for local business innovation: infrastructure, business law, taxes, and the level of poverty all affect whether a business can invest in R&D (Cosbey 2002; Hallward-Driemeier 2003).

### **3.4 Trade Sanctions and Bilateral Negotiations**

The last reason a developing country would want to increase IP protection is to remove itself from the Section 301 list of the US and prevent further bilateral investment negotiations. History has demonstrated that signing an IP agreement does not necessarily mean that a country will be spared a 301 investigation. For example, South Africa was placed on the 301 list in response to the “Medicines and Related Substances Control Act”. Under the TRIPS agreement a government can “adopt measures necessary to protect public health” (Final Act, 1994). Using this stipulation, the South African government passed the “Medicines and Related Substances Control Act” in 1997 which “stipulates that ‘the Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public’” and, in particular, the “conditions on which any medicine put on the market by the patent holder or with his consent may be imported by a third party in South Africa” (Correa 2000, 82-83). In response to the “Medicines and Related Substances Control Act” South Africa was placed on the 301 list. At the same time, the Pharmaceutical Manufacturers Association (PMA), made up of thirty-nine of the world’s biggest pharmaceutical manufactures (Oxfam 2001), brought a case against the South African government challenging that the act was unconstitutional in regards to South Africa’s patent laws.

This case was dropped partly because of the massive uprising of civil society against the PMA and partly because the PMA had a weak case (May 2002, 135). The US also removed South Africa from Section 301. Despite South Africa using stipulations within the TRIPS agreement, it was still subject to retaliation from the US government.

Another reason that TRIPS was signed by developing countries was in hopes that if the TRIPS agreement was signed the US would ease off negotiating IP protection in BITS. As the Director for Intellectual Property of the Office of the US Trade Representative said: “What happens if we fail [to obtain TRIPS]? I think there are a number of consequences to failure. First, will be an increase in bilateralism. For those of you who think bilateralism is a bad thing, a bad thing will come about” (Emory 1989, 370). If developing countries failed to agree to the TRIPS Agreement they would have to negotiate one-on-one with the US (Drahos 2002, 774). A multilateral negotiation is much more favourable than bilateral negotiations for developing countries because in bilateral negotiations developing countries can easily be out muscled, especially in negotiations with the US. Another reason for avoiding BITs is that the BITS that are being negotiated never rescind on the IP protection described in previous BITS, most often the IP protection becomes more extensive (Drahos 2001, 799; Sornarajah 2005). As is evident, increased IP protection does not mean a country will not be subject to a 301 investigation or bilateral negotiations.

### **3.5 Disparities between Theory and Reality**

There are theories that IP protection will help the development prospects for developing countries. However, the reality that exists does not support this theory. Foreign investment is not dependent on IP, the level of technology is not being

transferred as a result of increased IP, local business innovation is stifled by IP protection and strengthening IP laws has not prevented trade investigations and further bilateral negotiations from being placed onto developing countries. More research is necessary in all four areas, especially once the TRIPS agreement applies to Least Developed Countries in 2013. Nevertheless, it is evident that the link between IP protection and development is weak at best. IP protection is not encouraging economic, social or environmental development. Instead, in some cases, it is hampering the development prospects. The central problem between IP rights and development is that

the IP system seeks to achieve this reconciliation [between public access and incentive for innovation] by conferring a private right, and private material benefits. Thus the (human) right to the protection of “moral and material interests” of “authors” is inextricably bound up with the right to the private material benefits which result from such protection. And the private benefit to the creator or inventor is derived at the expense of the consumer. Particularly where the consumer is poor, this may conflict with basic human rights, for example, the right to life. (Commission on Intellectual Property Rights 2002, 6)

Despite the evidence against IP protection and development, increased IP protection is still being sought by developed countries, including Canada. This analysis now turns to evaluate Canadian IP policy and its commitment to sustainable development.

## **4: CANADA, SUSTAINABLE DEVELOPMENT AND INTELLECTUAL PROPERTY: THE DISCONNECT IN DETAIL**

Now that the relationship between IP and development has been discussed, Canada's position on sustainable development and IP protection needs to be examined in further detail. Canada has a long history of promoting itself as a "good global citizen," which stems from the golden era of Canadian Foreign Policy under Lester Pearson. It has been promoted through a commitment to peacekeeping, development and conflict mediation.<sup>9</sup> Kim Nossal has described this as "middle-power activism." It is driven by the belief that Canada can and should get involved in matters of world politics, as it could make a difference (2000, 2). Canada's role as a "good global citizen" is furthered through its sustainable development policy, which each federal department is required to plan for. DFAIT has made a commitment to policies that are compatible with sustainable development, that fall into the perception of Canada as a "good global citizen; however, its policies on IP conflict with this commitment.

### **4.1 DFAIT and Sustainable Development**

Sustainable development has been a catchphrase in the Canadian public service since 1995, when Bill C-83 incorporated sustainable development concerns within the Auditor General Act and required all Ministers to create sustainable development strategies for their departments by 1997 (Government of Canada 2002). Sustainable

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<sup>9</sup> For example, when the US wanted to go to war with Iraq in 2001, Canada tried to broker a deal in the United Nations.

development can be a concept with a very broad definition; sustainable development can mean environmental sustainability or it can also incorporate social and economic dynamics as well. DFAIT uses a broad definition, the same as the United Nations, for sustainable development; it is “a way of thinking and behaving that meets the needs of the present without compromising the ability of future generations to meet their own needs”(Government of Canada 2007, 1).

The department is committed to a sustainable world, which is defined as

prosperous and environmentally healthy with resource levels maintained for future generations. A sustainable world is safe, secure and socially just and culturally tolerant, where diversity is warmly embraced and fundamental human rights are enjoyed by all. A sustainable world seeks innovative multilateral approaches to resolve political, trade, environmental and social issues. (Government of Canada 2007, 1)

This vision will materialize if DFAIT applies “a coherent and principled approach to policy development and implementation, fostering the integration of *economic, social and environmental considerations* (emphasis added) into all areas of its decision making” (Government of Canada 2007, 1).

DFAIT’s sustainable development policy has changed over the years from a policy with very wide goals, to ideas that are more concrete and then back to all encompassing goals. In 2000, DFAIT aimed to apply sustainable development to: economic growth and prosperity, building peace and security, Canadian values and culture, and greening the Department’s operations (Government of Canada 2000a). In 2003, DFAIT’s sustainable development strategy involved the following: improve Departmental mechanisms to ensure that sustainable development is an operating premise at DFAIT; Strengthen the linkages between trade promotion and policy and the protection

of the environment; Promote sustainable development in the Department's international activities; Clarify understanding of the interaction among the social, economic and environmental pillars of sustainable development, and of how human security and human rights relate to sustainable development (Government of Canada, 2007a). In 2006, DFAIT reviewed its goals once more and choose four areas of concentration: “Ensure greater integration of [sustainable development] in Departmental policies, programs and operations, Ensure that Canada’s commitment to [sustainable development] is evident in our bilateral, regional and multilateral relations, Promote international security, respect for human rights, good governance and the rule of law as prerequisites for sustainable development, Implement the two Departments’ priority commitments related to the outcomes of the World Summit on Sustainable Development, Johannesburg 2002” (Government of Canada, 2007b). The most recent Sustainable Development Strategy incorporated the previous Strategy’s goals into two broad goals. The first is to “ensure greater integration of sustainable development into departmental policies, programs and operations” (2007) and “advance Canada’s sustainable development interest as they relate to foreign affairs and international trade” (Government of Canada 2007).

Two themes can be taken from these strategies. The first is that DFAIT believes that sustainable development includes the environmental, economic and social well-being of a society. The second is that DFAIT wants to make sure that Canada’s commitment to sustainable development is established in the treaties that are negotiated between Canada and other countries. DFAIT’s sustainable development policy does not correspond with its policy on IP regulation. While researching this project, no government documents were found that explicitly addressed the relationship between IP and sustainable

development, including no acknowledgement of the impact that IP protection can have on sustainable development prospects. Therefore, it is reasonable to assume that DFAIT believes that IP protection is compatible with its sustainable development agenda.

IP protection affects economic development through the level of technology transferred to developing countries, as well as the level of local innovation occurring in the country. Social development is influenced by monopolies on products necessary for human survival. Environmental well-being and IP policy cross paths over the protection of biological information and farming practices. To evaluate whether Canadian policy on the international protection of IP is compatible with DFAIT's goal of sustainable development an examination of Canada's IP policies in its various trade and investment agreements is necessary. This is because "Canadian policy is to include intellectual property rights (IPRs) as a form of investment in our bilateral investment agreements and the investment chapters of our Free Trade Agreements (FTAs)" (Consultations and Liaison Division, Foreign Affairs and International Trade Canada, e-mail to author, 7 April 2008). This analysis will focus on three different types of international agreements that address IP: the TRIPS agreements, the Foreign Investment Promotion and Protection Agreements (FIPA-previously known as BITs) and the NAFTA agreement.

## **4.2 TRIPS**

Since the inception of the TRIPS agreement, it has garnered a great deal of criticism from academics, members of civil society, developing and developed countries. Among these concerns, there are three central areas that have drawn the most attention: public health, biodiversity and the harmonization of IP regulation between all Members of the WTO. All three of these concerns fit under the umbrella of sustainable

development as each concern has direct consequences on the economic, social and environmental development of developing countries.

#### **4.2.1 Pharmaceuticals**

A healthy population is a central element to economic development, because healthy people are more productive in society (World Health Organization 2008). Access to medicines is part of supporting a healthy population; reducing the availability of medicines to the public by enforcing exclusive benefits for the patent holder negatively affects the health of a population. The TRIPS agreement impacts public health because it extended patent length on pharmaceuticals in all Members of the WTO. The HIV/AIDS pandemic is the most visible example of this problem. The original wording of the TRIPS agreement allowed countries to issue compulsory licences to provide cheaper medicines. The problem was that the TRIPS agreement specifies that compulsory license must be authorized for the domestic market: “[f]or any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use” (TRIPS, Article 31.) While this provision works for developed countries that have the resources to produce generic drugs, many developing countries lack the technological expertise and equipment required to produce generic drugs (Blouin and Westin 2003, 54).

In an effort to change the TRIPS agreement a group of developing countries proposed an amendment to the agreement in the 2001 Doha Ministerial meeting. The proposed document would “affirm that nothing in the TRIPS prevents WTO members from adopting measures to protect public health and would clearly assert a country’s right to use compulsory licensing and other means to decrease drug prices” (Blouin and

Weston 2003, 54). This amendment would allow a country to import generic drugs in the face of a health emergency.

In response to the proposal at the Doha round, Canada took the position that “the TRIPS Agreement provides individual members with the necessary flexibility to adopt measures in order to protect sectors of vital importance in their countries, such as public health” (Consultations and Liaison Division, Foreign Affairs and International Trade Canada, e-mail to author, 7 April 2008.) Pierre Pettigrew, the Minister of International Trade at the time, stated in a parliamentary hearing that “[o]ur position is that the TRIPS agreement is probably acceptable, probably good, as is. Indeed, with the built-in flexibilities in the existing agreement, we will be able to find room to accommodate the needs of developing countries” (Pettigrew 2001). The problem with this statement is that the Canadian government failed to recognize the pressure that developing countries experience from foreign governments and companies. For example, as previously discussed, South Africa was subject to law suits and placed on the US Section 301 list when it tried to use the built-in flexibilities of the TRIPS agreement. The Canadian response to the South African controversy was muted. Canada sided neither with the South African government nor with the US (Blouin and Westin 2003, 53). However, one must remember that while policy decisions are normally verbalized, remaining silent is also a policy decision. By remaining quiet on the issue, Canada effectively showed it had no qualms about the US policy.

Despite Canada’s initial opposition to the amendment, the Government of Canada ultimately supported the changes, which added, “Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences

are granted” (Declaration on the TRIPS agreement and public health, 2001).

Coincidentally, or not, Canada’s position changed when it became concerned over the availability of Cipro, an antibiotic used to treat anthrax. After September 11<sup>th</sup>, worry over Anthrax poisoning spread through the US and Canada, despite the fact that no new anthrax cases were reported in Canada (Lancet 2001, 1563). However, the Canadian government demand the possibility of an anthrax attack deemed a health emergency, and commissioned a compulsory licence to produce the drug generically. The compulsory licence was then halted as opposition developed in response. Instead, Canada negotiated a price cut with Bayer, the patent holder of Cipro (Sell 2003, 160). A similar scenario was playing out in the US, as the US also needed increased amounts of Cipro after September 11<sup>th</sup>. The issuing of compulsory licensing goes directly against US actions to prevent developing countries from producing generic drugs (Lancet 2001, 1563). It would be completely hypocritical to issue compulsory licences for health emergencies and discourage developing countries from doing the same. In light of this, the TRIPS amendment was passed on 30 August 2003.

Why did the Canadian government originally oppose the changes? Chantal Blouin and Ann Weston argue that Canada choose to align itself with the other Quad countries at the WTO (the EU, the US and Japan) as it was “perceived to be in Canada’s interest to preserve strong IP protection for pharmaceutical products” (2003, 54). The Government of Canada considered the change in the TRIPS agreement as a potential threat to the pharmaceutical companies in Canada, as “concerns were expressed about exhaustion of patents, and particularly, about ‘parallel importing’ and the fear of seepage into northern markets, if cheaper drugs were permitted in the south” (Foster 2002, 14).

The extent of the pharmaceutical lobby in Ottawa will be discussed in further detail in chapter five. What needs to be stressed here is that the pharmaceutical lobby is one of the most organized and effective lobbies in Canada, and when the TRIPS amendment was on the table the lobbyist machine was in overdrive to prevent it from being passed. It was only after the Cipro debate that Canada changed its position.

Once the TRIPS agreement was amended Canada took a leadership role in revising domestic laws so they supported the amended TRIPS agreement. The Canadian government was the first government to introduce legislative changes that would make it easier for Canadian pharmaceutical companies to export their products to countries that needed them (Government of Canada, 2003). The changes to the Patent Act added a new section that authorized “third party use of patented inventions to address public health problems afflicting developing and least-developed countries especially those resulting from HIV/AIDS, TB, malaria and other epidemics. The new section in question will allow for the issuance of compulsory licences to Canadian firms, typically generic drug companies, authorizing them to manufacture in Canada specific patented pharmaceutical products for the sole purpose of exporting them to least-developed and developing countries that are unable to produce domestically the pharmaceuticals needed to respond to their public health problems” (Government of Canada 2003).

This bill, alternatively known as the Jean Chretien Pledge to Africa, was passed in May 2004 with a great deal of fanfare. Pierre Pettigrew credited Canada for taking a lead role in implementing these changes and argued that “these actions demonstrate Canada’s strong commitment to the development objectives set out in the WTO Doha Development Agenda” (Government of Canada 2003.) Bill Graham, Minister of Foreign Affairs at the

time, argued that “[t]his is one of the most important steps Canada can take to advance global health and human rights, and we hope to see other G-8 countries following suit” (Government of Canada 2003).

While the leadership that the Canadian government demonstrated with this bill is admirable and shows a commitment to the welfare of developing countries, as of mid 2007, “not a single tablet had been exported under the Canadian legislation” (Elliott 2008, 60). Stephen Lewis, the former United Nations Special Envoy for HIV/AIDS in Africa, placed the responsibility for the delay on big pharmaceutical companies, but ultimately with the Canadian administration. He argued that it requires the “government to step in and amend the regulations and deliver a compulsory licence, which the legislation allows them to do...The fact that the government hasn't done this is what is [ultimately] stalling this process” (Kossick 2006; see also Elliott 2008). Canada has put the interests of the brand-name pharmaceutical industry ahead of its commitment to sustainable development. If Canada wanted to show a true commitment to sustainable development, it needs to go further than its initial 2004 legislation change by taking steps to streamline the legal process of accessing generic drugs (Elliott 2008, 64) The TRIPS agreement impacts the economic, social and environmental well-being of a society by preventing citizens from accessing agricultural tools, various technologies and pharmaceuticals. Despite DFAIT’s sustainable development plan to include sustainable development into the international agreements it signs, especially the multilateral agreements, this did not materialize in the original TRIPS agreement and a great deal of resistance was shown towards the amended agreement.

#### 4.2.2 Biodiveristy

The second area where sustainable development and the TRIPS agreement cross paths is over biodiversity, specifically Article 27 of the TRIPS agreement. This Article describes what government must make patentable and what can be excluded. Under Article 27(b) Member may exclude from patentability:

plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. **However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof** (emphasis added).

(TRIPS Article 27,b)

The main problem with this article is the ambiguity of what makes an effective *sui generis* system. A *sui generis* system “refers to the creation of a new national law or the establishment of international norms that would afford protection to intellectual property dealing with genetic resources -or biodiversity - and the biotechnology that might result” (International Intellectual Property Institute 2004). The Union for the Protection of New Varieties of Plants (UPOV) promotes a system of protection of biodiversity and this is argued to be an appropriate system of *sui generis* protection. The UPOV is made up of sixty-five countries, twenty-one of which could be classified as industrial countries.

The UPOV pushes for plant variety protection (PVP) protection, a form of IP protection. A PVP

gives patent-like rights to plant breeders. What gets protected in this case is the genetic makeup of a specific plant variety. The criteria for protection are ...: novelty, distinctness, uniformity, and stability. PVP laws can provide exemptions for breeders, allowing them to use protected varieties for further breeding, and for farmers, allowing them to save seeds from their harvest. In plant breeding, PVP is the weaker sister of patenting mainly because of these exemptions. (Kuyek, 2001)

The ambiguity over a *sui generis* system was defended because it allows governments to create tailor made policies. In fact the overarching trend has been towards harmonization. As the former Vice Secretary-General of the UPOV stated, “Countries have a great deal of freedom in devising their own laws on genetic resources and farmers’ rights and so on, *as long as the new laws do not conflict with UPOV requirements* (emphasis in original)” (Kuyek, 2001). Seeing as the UPOV is predominantly made up of the same countries that champion IP rights it is safe to assume that UPOV requirements represent a high standard of protection.

The TRIPS agreement directly opposes the concept of sustainable development when it comes to agriculture and biodiversity. The TRIPS agreement allows patent rights to be granted on seeds, which encourages the commercialisation of seeds. This leads to an increase in monoculture and poses a direct threat to the world’s food supply because crop failure increases with the use of monoculture practices. The lack of diversity in the crops means that diseases or pests can wipe out an entire crop. For developing countries in particular, wide spread crop failure would be a catastrophe (ActionAid 2003, 5). Biodiversity is important for sustainable development. Variety in plant forms and species makes them more resistant to disease, drought and other disasters that can occur. By granting IP protection to agriculture, the TRIPS agreement could result in a situation where the world food’s supply is dominated by private corporations (ActionAid 2003, 2), a questionable contribution to sustainable development.

Canada’s position on *sui generis* protection is that it “supports the flexibility allowing WTO Members to determine which type of regime meets the requirement of *sui generis* protection, as long as the form of protection adopted meets certain objective

criteria” (Government of Canada 2008b). The problem with this statement is that the objective criteria that needs to be met is undefined. And while Canada supports the flexibilities in the TRIPS agreement, the ambiguity of an *effective sui generis* system leaves a great deal to interpretation. Developing countries are under a large degree of external pressure to implement regulations, as the South African case demonstrates. As Curtis Cook reminds us:

the power and influence of certain nations extends far beyond the geographic boundaries that define their territory. Consequently, these nations exert considerable pressure on other nations, groups of nations and international institutions to the extent that their role transcends that of active participant in a collaborative process. They call the shots when it best suits their agenda and they act as enforces not only within their own borders but through a powerful reach that is assisted by the types of international institutions they have created. (Cook 2002, 62)

The ambiguity of the TRIPS agreement has not encouraged tailor made IP policies in regards to plants and animals, as developing countries are heavily influence by organizations like the UPOV and developed countries. Overall, any expansion of IP is most likely not going to help developing countries, instead it will lead to higher prices on seeds, which will makes sustainable development harder to achieve (Commission on Intellectual Property Rights 2002). Under the sustainable development strategy DFAIT aims to include sustainability in the agreements it signs but the TRIPS agreement is not harmonious with DFAIT’s sustainable development agenda.

#### **4.2.3 Harmonization of Intellectual Property Protection**

The most significant impact of the TRIPS agreement, overall, was the harmonization of IP protection between all members of the WTO. This was accomplished by extending the length of patents as well as the scope of IP protection. Developing

countries are not on the same economic playing field as developed countries, and placing them under the same rules and regulations as the developed countries reduces the options they have available to address country-specific issues. Instead of allowing developing countries to address their unique economic circumstances, the TRIPS agreement “effectively deprives them of their ability to tailor and implement policies concerning the recognition and enforcement of intellectual property” (Palombi 2007, 73). One-size fits all policies are not conducive to the economic well-being of a country. We have witnessed the effects of cookie cutter economic policies in the Asian economic crisis and the policies implemented by the IMF.<sup>10</sup> According to DFAIT, economic well-being is part of sustainable development, therefore, the harmonization of IP undermines is sustainable development strategy.

The World Bank states that development is about expanding the ability of people “to shape their own futures” (World Bank 2000). If this is the case then, as Peter Drahos states, “we have a prima facie normative reason to be concerned about the loss by developing countries of national sovereignty over standards that impact on sectors such as agriculture, food, environment, health and education” (Drahos, 2002). This is one area where Canada has taken a positive step in addressing sustainable development and IP because Canada supports flexible implementation of the TRIPS agreement. Canada is committed to special and differential treatment (S &DT) of WTO provisions. Canada is

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<sup>10</sup> Joseph Stiglitz, the former chief economist and vice president of the World Bank detailed how the International Monetary Fund (IMF) imposed demands for Asian countries to tighten monetary policy and balance budgets before they received any aid. The IMF implemented these policies because these were the same policies used in Latin America to counter act the financial crises in the 1980s. The problem was that East Asian countries already had budget surpluses and they had tight monetary policies, these countries had a problem in the private sector not the government. The IMF’s polices led to higher interest rates and shrunk the economy. See Stiglitz 2000.

“willing to examine S&DT proposals that make a constructive contribution to integrating developing countries into the multilateral trading system. .... Canada also recognizes the need for flexibility and calibration of S&DT measures, as developing country Members have different needs and capacities” (Government of Canada 2008f). However, the Canadian government does not support “proposals that would require amending existing agreements that prejudge current negotiations that involve open-ended requests for trade-related technical assistance and capacity building or those that allow self-granted automatic extensions of S&DT provisions and/or blanket exemptions. In Canada’s view, these would not help meet the objectives of S&DT” (Government of Canada 2008f). This policy allows Canada to support flexibility, which appeases the interests of developing countries. At the same time, it shows a commitment to the current international IP protection, which appeases the interests of the pro-IP protection side of the debate.

Overall Canada remains committed to the TRIPS agreement, while at the same time Canada is committed to sustainable development. These two policies are contradictory. The problem is that “TRIPS-style protection may work against sustainable development objectives by making goods such as pharmaceuticals [as well as seeds], more costly and less accessible to the poor” (International Institute for Sustainable Development, 2000). Pricing pharmaceuticals, seeds and other technologies that the general population cannot afford does not follow DFAIT’s definition of sustainable development. The one area that Canada fares well in is a commitment to flexibility in implementing IP policies. While Canada does not want to amend the TRIPS agreement, recognition that flexibility is important is a step in the right direction. Unfortunately, this policy is undermined by Canada’s bilateral investment policy.

### 4.3 DFAIT and Investment Agreements

Besides the TRIPS agreement Canada protects IP internationally by including IP “as a form of investment in [its] bilateral investment agreements and the investment chapters of our Free Trade Agreements” (Consultations and Liaison Division, Foreign Affairs and International Trade Canada, e-mail to author, 7 April 2008). The level of protection that IP has under a BIT, is ultimately determined by how IP is defined. A narrow definition means a more limited scope for any potential claims (UNCTAD 2007a), while a broad definition opens the possibility for more investor disputes.

Canada has negotiated three categories of BITS: the OECD model, the NAFTA model and the FIPA model. Canada’s history with BITs dates back to 1990 with the Canada-Poland Foreign Investment Promotion and Protection agreement using the OECD model. This was employed until Canada signed the NAFTA, where it changed its BIT program to the NAFTA model. The second is the NAFTA model. The third is recently created FIPA program. Through an examination of these investment agreements it becomes apparent that Canada maintains a strong commitment to all encompassing IP protection that shows little flexibility across countries.

Under the OECD model, Canada signed five investment agreements with: Poland, the USSR, Argentina, Hungary and Czech and Slovak Federal Republic. In each of these agreements, intellectual property is defined as the “[r]ights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets as well as know how” (Canada-Poland BIT; Canada-USSR BIT; Canada-Argentina BIT; Canada-Hungary BIT). In these agreements investment is defined to include intellectual property. Under these agreements IP was given MFN status (article 3, no. 3) and national treatment

(article 3, no.4). National treatment “means that within each country, foreign inventors cannot receive worse treatment than domestic investors” (Scotchmer 2001, 416). The United Nations Commission on International Trade Law would handle any dispute between the countries (Article ix, no. 3).

In 1994, Canada changed its BIT model so that they were modelled after the NAFTA agreement, incorporating similar provisions as NAFTA’s chapter 11 (Newcombe 2004). Canada has negotiated NAFTA style FIPAs with: the Ukraine, Latvia, Philippines, Trinidad and Tobago, Barbados, Ecuador, Venezuela, Panama, Egypt, Thailand, Armenia, Uruguay, Lebanon, Costa Rica, Croatia and Romania. In all of these agreements, except for the Philippines, the definition of IP was expanded to the following: “IPRs means copyright and related rights, trademark rights, patent rights, rights in layout designs of semiconductor integrated circuits, trade secret rights, plant breeders' rights, rights in geographical indications and industrial design rights.” In the Philippines agreement IP is defined as the following: “includes copyright and related rights, trademark rights, patent rights, and the other rights referred to in the Agreement on Aspects of Trade-Related Intellectual Property Rights forming part of the Agreement establishing the World trade Organization, done at Marrakesh, April 1994.” (Canada-Philippines BIT) Under these agreements, the definition of investment includes IP, which gives IP holders access to the MFN and national treatment clauses. Investors also have access to dispute resolution settlements that are similar to chapter 11 of the NAFTA. An in-depth discussion of the concerns of NAFTA’s chapter 11 is beyond the scope of this paper; nevertheless, it must be stated that chapter 11 dramatically expanded the rights of investors, giving them the right to sue governments in private hearings. In the past

private parties could not sue states because they lacked the required status. The NAFTA changed this (McIlroy 2001, 324). As Mary Bottari and Michelle Swenarchuk illustrate, “[i]f a company believes that a NAFTA government has violated these new investor rights and protections, it can initiate a binding dispute resolution process for monetary damages before a trade tribunal offering none of the basic due process or openness guarantees afforded in national courts” (2001, 9). Since the NAFTA’s inception there have not been a large amount of Chapter 11 cases filed against Canada, Mexico and the US, but the few that have been “are sexy” (McIlroy 2001, 330). Ethyl Corp, Methanex and S.D. Myers are all examples of cases where a country was sued under chapter 11 by an investor, two of which involved Canada paying damages to a company. These FIPAs have a more expansive definition of IP while also giving investors more rights as they can directly sue the “offending” government.

This model of investment agreement was the norm until 2004 when Canada scrapped the BIT program, and replaced it with the FIPA program. As defined by the Government of Canada “A FIPA is an international treaty providing binding obligations on host governments regarding their treatment of foreign investors and investments. By setting out clear rules and an effective enforcement mechanism, a FIPA provides a stable legal framework to promote and protect foreign investment. It typically sets out a range of obligations that host governments guarantee pertaining to non-discriminatory treatment, expropriation, transfer of funds, transparency, due process and dispute settlement” (Government of Canada 2008a ). There are two overall goals for a FIPA. The first is to signal that Canada is a stable environment for foreign investment and the other is to encourage Canadian investment into the other agreement holder’s country.

Canada has justified its revamped FIPA program because it believes that it will face increased pressure from the business community to be more active in developing global investment protection, in response to the US's reinvigorated Trade Act of 2002 which gave the President authority to fast track trade agreements (Global Economic Justice Report 2003).

In 2007, the Canadian government reaffirmed its FIPA program under the Global Commerce Strategy (GCS). The GCS is the "Government of Canada's plan for helping Canadian companies meet the demands of an increasingly complex and competitive global economy, and build even greater prosperity for the future... the GCS is founded on the notion that higher productivity and better access to North American and global markets will strengthen Canada's position as a destination and partner of choice for international business" (Government of Canada 2008). There are three priorities of this strategy. The first is to boost Canadian participation in global investment by building on the North American advantage. The second is to renew the international negotiation agenda. The third is to better connect Canadian companies with global opportunities (Government of Canada 2008b). The second priority is of concern to this project. Under this priority the Government of Canada has adopted a more vigorous trade agenda that includes FIPAs (Government of Canada 2008c). At the time of writing, Canada currently has negotiated 24 FIPAs, and is in negotiations for nine more. Canada is also in negotiation for eight additional free trade agreements, while already subscribing to seven FTA's, including NAFTA and the WTO.

There are two notable differences between Canada's FIPA program, and Canada's previous BIT program. The first is that the FIPA program includes a general

exception provision that covers measures to protect human, animal or plant life or health (Newcombe 2004). The model text includes states:

Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health. (Government of Canada 2004 article 10, no. 1)

This allows both signing parties to maintain some form of flexibility when applying international rules and helps address concerns over the harmonization of IP. However, it is important to note that the measures a country enacts cannot infringe upon the investment or investors or act as a restriction on trade or investment.

The second difference between the new FIPA model and the old NAFTA model is evident in the recently signed Canada-Peru FIPA. In the NAFTA model, investment is defined to include IP. In the Canada-Peru FIPA investment does not specifically refer to IP. The entire definition of investment has changed from a broad open-ended definition to a closed list of defined investment. Some speculate this is a response to concern over the investor disputes being generated by NAFTA's chapter 11 (Boscariol and Silva 2006) in an attempt to reform investor provisions.

In response to this omission, DFAIT stated that IP is protected in the FIPA "through the coverage of intangible property acquired in the expectation or used for the purpose of economic benefit. Intangible property, such as IP rights owned by a Canadian investor, generates economic returns and thus constitutes an investment for the purposes of the Canada-Peru FIPA, the NAFTA and the Model FIPA" (Consultations and Liaison Division, Foreign Affairs and International Trade Canada, E-mail to author, 7 April

2008). Canada is still committed to protecting IP through its FIPA program. As Gilies Gauthier (2007), the Director of the Investor Trade Policy Division for DFAIT, confirmed that the FIPA currently under negotiation with China would use a broad definition of investment that included intellectual property.

Overall, DFAIT's FIPA program undermines its sustainable development agenda on two levels. The first is that DFAIT wants to encourage multilateral agreements. FIPAs are bilateral agreements. The second is that the FIPA program removes the flexibility that Canada remained committed to in the TRIPS agreement because it uses the same definition of IP and the level of IP protection in each agreement. Lack of flexibility does not allow a developing country the ability to tailor its IP policy so that it benefits it. This contradicts the sustainable development agenda as economic well-being is best created when a developing country can implement tailor made policies.

#### **4.4 NAFTA**

Under Article 1709.12 of the NAFTA patent protection is "at least [twenty] years if protection commences at the time of filing, or 17 years from the date of grant" (Tancer 1993, 1181-1182). Canada amended its IP regulation by passing Bill C-91, which brought Canadian IP policy in line with the US and was necessary to meet its IP obligations under NAFTA (Harrison 2004, 137). This will be explored in further detail in chapter five. What is central to highlight here is that Canada strengthened its IP regulation for NAFTA, which in turn, requires Canada to negotiate stronger IP regulation than in the pre-NAFTA era. The NAFTA agreement is a TRIPS-plus agreement as it accords stronger IP protection than the TRIPS agreement (Correa 2004; McBride 2005, 88). A TRIPS-plus standard is defined as "requir[ing] a Member to implement a more

extensive standard; or which eliminate an option for a Member under a TRIPS standard” (Drahos 2001, 793). TRIPS accords IP protection only after the investment has been established in the country. NAFTA may extend protection to the investment prior to the establishment of the investment in the host state. NAFTA investor provisions were used in all NAFTA style agreements. Canadian IP policy plays an important role in the IP policy of the countries it signs agreements with as free trade agreements can “serve as a restricting tool, or put differently as a condition institutional framework that promotes and consolidates neo-liberal restricting” (Grinspun and Krekewich 1994, 22). The agreements Canada signs act as conditioning frameworks on Canadian policy, and in turn require Canada to negotiate certain provisions in future agreements it signs with other countries, which creates a conditional framework that other countries are subject to.

#### **4.5 Recent Development in Canadian Intellectual Property Protection**

Despite the increasing call for revision of international IP policy, Canada has demonstrated a continued commitment to IP through the Security Prosperity Partnership (SPP) and the Anti-Counterfeiting Trade Agreement (ACTA). In the current negotiations of the SPP agreement, IP policy is being addressed in two ways: the first is through the North American Competitiveness Council (NACC) and the second is by specifically analyzing IP policy. The NACC has been created so that businesses have a say in “identifying and targeting those initiatives that are most relevant to creating a more competitive market” (Office of the Prime Minister, 2006). The NACC is made up of thirty private sector representatives. The job of the NACC is to provide recommendations on business related competitiveness to governments. These include competitiveness in the automotive, manufacturing and pharmaceutical services. The council is a who’s who of

business representatives, including CEO's of New York Life, General Motors, Ford, Lockheed Martin, Canfor, CN, Suncor and Merck. The Council will meet once a year with SPP ministers and meets with senior government official's year round (Global research 2007). The NACC released the following statement in 2007, before the SPP meeting in Montebello, Quebec: "we strongly encourage the Government of Canada to show greater progress in enacting stronger IP laws and in providing more effective tools for law enforcement officials to interdict shipments of pirated and counterfeit goods in and out of the country" (North American Competiveness Council 2007, 14). This business lobby wants stronger IP protection and they have direct access to government officials.

The SPP is also looking at IP policy directly. A growing concern with business leaders is piracy and counterfeiting. The "Security and Prosperity Partnership's Intellectual Property (IP) dialogue is for Canada, Mexico and the United States to agree on a work plan that will constitute a strategy for combating piracy and counterfeiting, in order to contribute to the overall objective of Promoting Growth, Competitiveness, and Quality of Life" (Security and Prosperity Partnership of North America 2007,1). Canada is in discussions under the SPP to align IP protection, specifically addressing counterfeit and pirated goods. The idea is to align each countries IP policy to "improve IP protection and enforcement" (Security and Prosperity Partnership of North America 2007, 1). This will be accomplished by developing best practices for enforcement, increasing public outreach and involving the business community to take a larger role in preventing IP theft (Security and Prosperity Partnership of North America 2007, 1). Under the SPP, Canada may increase the length and scope of patent and copyright

protection. This would impact developing countries as Canada would need to negotiate the new level of IP protection in its future FIPAs, as was done after the NAFTA.

The most recent development in international IP policy is the ACTA. On 23 October 2007, Canada announced that it has joined negotiations with other developed countries including, the US, the EU, Japan and South Korea. Noticeably absent from the negotiations are any developing countries, the group most likely to be opposed to any increases in IP protection. The “aim of this agreement is to develop international standards to better combat the trade in counterfeit trade-marked and pirated copyright goods” (Government of Canada 2008e). While industry is on board with the ACTA there is concern that the “goal to set a new, higher benchmark for enforcement that countries can join voluntarily” (Digital Civil Rights in Europe 2008) would be similar to the tactic used when negotiating the failed Multilateral Agreement on Investment (MAI). The MAI was negotiated between OECD countries. Critics charged that an agreement negotiated within the ‘rich man’s club’ of the OECD would be forced onto developing countries to sign the agreement. The majority of transnational companies are based in OECD countries and if developing countries wanted to maintain access to international investment they would have been under pressure to sign the MAI, despite the fact they had no role in its negotiations (Bray 1998, 127). Similar concerns are being raised in response to the ACTA. An IP agreement negotiated between developed countries would create strict IP regulations, which would then be pushed onto developing countries. While the ACTA is a multilateral agreement, there is reason to be concerned that sustainable development objectives will be undermined by strengthening IP regulations in the ACTA.

The Canadian government has made a commitment to sustainable development and DFAIT aims to incorporate sustainable development into its policies and international agreements. This means a commitment to social, economic and environmental well-being. IP protection is connected to sustainable development as IP covers things such as pharmaceuticals, seeds and genes; all of which impact the three areas of development in DFAIT's vision of sustainable development. DFAIT's sustainable development policy is undermined by a support for strong IP protection in the TRIPS agreement, a broad definition of investment that includes IP in its FIPAs and a commitment to further IP protection under the SPP and ACTA. Canada's IP policy can be characterized as one that puts the needs of IP holders over its commitment to sustainable development. This raises the question, why does Canada put these interests first? An examination of possible hypothesis is necessary to provide a reason for this inconsistency.

## **5: EXAMINING REASONS FOR THE DISCONNECT IN DFAIT'S POLICIES**

Canada's IP policy has been transformed, at both the domestic level and international level over the past eighty years, and especially in the last two decades. Domestically, Canadian IP policy has transformed from one that could be characterized by short-term patent protection and government intervention through compulsory licenses, to a policy climate of lengthy IP protection and minimal government intervention. Internationally, Canada's IP policy has changed from one where IP policy was governed under the Paris Treaty and the Berne Convention to one where IP is now covered under FTAs, FIPAs and other multilateral agreements (TRIPS, ACTA, SPP). As detailed in Chapter four, the current governance of IP regulation, both domestically and internationally, contradicts its sustainable development agenda. There are three possible explanations for the transformation that has created this contradiction. The first is that Canadian IP policy has been driven by the desire to attract and secure an economic relationship with the US. The second is that the Canadian government faces pressure to increase IP protection from firms operating in Canada who are concerned about the protection of their products abroad. Last, this policy climate could exist because of a difference in policy creation by the governing parties over the past twenty year. One governing party could have created one policy while a new governing party could have created another. Looking at these three theories it becomes apparent that US interests have been the driving force behind Canadian IP policy. This falls into the larger theme of

the acceptance of the neo-liberal doctrine by DFAIT. The neo-liberal doctrine has given the corporate world a more powerful voice in government policy creation.

## **5.1 The Ever Important Relationship with the United States**

International policy has had a central role in shaping Canadian policy. In recent years, “more than 60 percent of the national standards approved...have been based on international standards” (Canada 2002b, 3). IP policy is one of those standards.

However, in the case of IP, it has not been a variety of international pressures that have been the biggest influence; rather, it has been the US that has played a major role in shaping Canada’s IP policy. Canada’s relationship with the US has been a principal concern of Canadian policy makers for as long as British North America has existed. It has changed from one of fear over ‘54-40 or fight’ rhetoric, to one of concern on how to maintain positive trade relations with the US. The US is Canada’s most important economic partner; it is Canada’s number one trading partner, and Canada often makes decisions to maintain access to the US market.<sup>11</sup> As Doern and Sharaput argue that “the Canadian position on IP became trade positions, where ‘real politique’ was how to respond to the American insistence that patent and IP protection be strengthened” (2000, 129).

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<sup>11</sup> For example, Canada signed CUFTA to prevent the US from closing the border. Canada participates in the SPP to solidify access to the US market.

Canada's history of harmonizing its IP policies with the US starts with the Patent Act in 1969. Before this, compulsory licenses<sup>12</sup> were allowed in Canada. Compulsory licensing gave the federal government the power to regulate pricing on drugs. If the drug cost was seen as prohibitive for the public a compulsory licence could be granted. This would increase competition in the market for that drug by allowing a generic company rights to produce the drug, therefore, driving down the price of that drug.

This policy climate remained static until 1969, with the Patent Act Amendment. This amendment allowed for compulsory licenses to import medicines that were patented outside of Canada. Patent holders were awarded a 4% royalty, but there was a considerable amount of objection from the patent holders (Matthews, J. 1996: 471). Business groups, located in the US, argued that Canada was free riding by importing drugs produced in countries with tougher patent laws, essentially bypassing the need to create long patent length in Canada. This policy made it "profitable to import and sell copies of patented medicines... and successful generic drug companies were founded in Canada" (Matthews, J. 1996: 471).

In response to criticisms from patent holders, the federal government established the Commission of Inquiry on the Pharmaceutical Industry (the Eastman Commission) in 1984. The Eastman Commission was designed to review IP policies for pharmaceuticals. Overall, the Commission endorsed Canada's system of compulsory licenses because this

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<sup>12</sup> A compulsory license allows a third party to manufacture the product: "When a firm holding a patent for a given invention does not go into production of the good in question or produces it in quantities judged to be insufficient or at an excessive price, and when the availability of this good is considered to be in the public interests, the authorities have the right, by means of compulsory licences, to arrange for the good to be produced by another firm of its choice. The other firm can then access and use the information contained in the patent. In such circumstances, a fee is paid to the patent owner" (Coriat, Orsi and D'Almeida, 2006: 1036).

system encouraged competition within the pharmaceutical industry. However, it did recommend four years of protection for patent holders (Matthews J. 1996, 471).

This policy climate of limited IP protection lasted until 1987, with Bill C-22. Bill C-22 was a show of good faith to the US administration before the Canada-United States Free Trade Agreement (CUFTA) was signed. CUFTA was seen as necessary to secure access to the US market as Canadian exports to the US had increased from fifty-seven percent of total exports in 1965 to seventy-eight percent in 1985 (White 1988, 801). In the 1980s Canada witnessed the most severe economic recession since the 1930s. This recession “guaranteed that the threat to secure access to the American market for Canada’s exports would be defined as the central problem for Canadian Trade Policy” (Doern and Tomlin 1991, 19). Without Bill C-22 the White House threatened to drop CUFTA negotiations because they viewed C-22 as a test as to whether Prime Minister Mulroney had the backbone to make the concession that the US expected (Harrison 2004, 36). As former Prime Minister John Turner stated, it was the “desire of the government of Canada to bow to American pressure to amend our drug patent legislation and dramatically increase prices in order to maintain the free trade negotiations” (Harrison 2004, 137).

Bill C-22 did not appease the US and they pushed for further protection of IP in the NAFTA negotiations. In 1992, Canada passed Bill C-91 which, according to the governing Conservative party, was necessary “to meet its intellectual property rights obligations under GATT and NAFTA” (Harrison 2004, 137).<sup>13</sup> This bill ended the era of compulsory licenses and “established a patent regime for pharmaceuticals that was

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<sup>13</sup> See also Anis and Wen, 1998: 36.

both the draft text of the Uruguay Round GATT agreement and of the NAFTA agreement” (Vandergraft and Kanavos 1997; 246). The NAFTA has expanded IP protection to a level never before seen in Canada (McBride 2005, 88). As is evident by the events described above, the Canadian government has continually bowed to pressure from the US and amended its domestic IP policy. However, equating Canada’s policy to pressures from the US is a realist analysis, and while this realist analytical lens is useful, it is limited. One must delve one level deeper to look at the reasons why the United States is pushing increased IP protection on the international stage. By examining US IP policy creation it is clear that US IP policy has been formed by American corporations concerned with lost profits associated with piracy and copyright infringement.

In 1986, the US International Trade Commission estimated that “the annual worldwide losses of all US industry due to inadequate intellectual property protection abroad were between \$43 billion and \$61 billion” (Sell and Prakash 2004, 15). In an effort to recoup lost profit, several US businesses that were dependent on IP protection for profits (including IBM and Pfizer) organized together to institutionalize IP protection on the international level (Ryan 1999, 4; Doern and Tomlin 1991, 67; Sell 2002). The business lobby in the US managed to convince key people within the US administration that IP was in the national interest of the country by emphasising the link between IP based goods and services to US competitiveness in the global market. They linked the theft of IP to the much larger negative effect on US competitiveness and argued that stronger IP protection would help the US out of its perceived economic downturn (Sell and Prakash, 2004, 158). This led to the ‘pro-patent’ era of the 1980s, where the patent system strengthened in the US, and US foreign policy actively pursued IP protection in

international trade and investment agreements (Grandstrand 1999, 4). The primary concern of the lobbyists in Washington was the piracy of electronic products in third world countries; however, in Canada's case the concern was over drug patents (Doern and Tomlin, 67). For example, it was the Intellectual Property Committee (IPC)<sup>14</sup> in the US that was not satisfied with Bill C-22 and pushed for further protection of IP in the NAFTA negotiations (Sell 2002, 110). The assumption that IP protection will lead to US economic success has put the US in the driver seat of stronger IP protection on the international stage and has played a significant role in shaping Canadian IP policies.

US corporate interests have not solely been contained within bilateral and regional agreements. US corporate interests were the principle force behind the TRIPS agreement. Susan Sell has written a comprehensive account of the role of US businesses. She concludes that the TRIPS agreement "is a significant instance of global-rule making by a small handful of well-connected corporate players and their governments" (Sell 2002, 171). This is also supported by a wide range of authors and organizations (Haslam , 92; Drahos 2002, 769; Stigilitz 2006, 115; UNCTAD 2007, 95; Suzanne Scothmer 2004,420). Without the business lobby, TRIPS, more likely, would not have been implemented. While the TRIPS agreement does not go beyond what NAFTA protects as IP policy, Canada's IP policy can now be contested by all Members of the WTO as disputes over IP can be brought up in the WTOs Dispute Settlement Body.

US corporations have shaped Canadian IP policy by lobbying the US administration to pressure Canada to amend its IP policy. Both bilateral and regional trade agreements that Canada has signed with the US have increased the protection of IP

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<sup>14</sup> A US based lobby group, with a membership that varied from eleven to fourteen corporations between 1986-1996. It included General Motors, DuPont, Time Warner and Proctor & Gamble.

in Canada. This impacts developing countries because Canada seeks the same level of IP protection it has in domestic policy in international agreements. For example, the recent Canada-Peru FIPA requires both countries to uphold the level of IP protection within the TRIPS agreement (Canada-Peru FIPA). These changes undermine DFAIT's sustainable development commitments as increased IP protection is contradictory to DFAIT's sustainable development goals of environmental, economic and social wellbeing.

## **5.2 Intellectual Property and Domestic Interests**

Not only do international corporations affect Canadian IP policy, Canada is also under pressure to protect IP from both domestic industry and foreign owned companies based in Canada. While small businesses lobby for IP protection, big business is the most influential private actor in IP policy setting. Big Business includes MNCs and groups like the Business Council on National Issues and the Alliance of Manufacturers and Exporters. Within the big business community the call for IP protection has been led by biotechnology firms, telecommunications firms, computer companies, the major banks in Canada and the Pharmaceutical Manufacturers Association of Canada-now known as Canada's Research-Based Pharmaceutical Companies(Rx&D) (Doern and Sharaput 2000, 25). The most influential lobby group for IP protection is the pharmaceutical industry in Canada and that is where this paper will focus its discussion.

Pharmaceutical companies play an important role in Canada's economy. In 2001 the pharmaceutical and medicine industry was the fifth largest and fourth fastest growing industry of all the high knowledge manufacturing industries in Canada (Government of Canada 2002c). In 2006, pharmaceutical and bio-pharmaceutical companies represented thirty seven of Canada's top one hundred corporate R&D spenders (Industry Canada

2005) and in 2005 R&D spending by the industry was \$1.2 billion (Industry Canada 2005).

Rx&D is the organization representing over fifty brand-name research-based pharmaceutical companies in Canada (Canada's Research-Based Pharmaceutical Companies, 2007). Rx&D gained most of its lobbying experience through Bill C-22. During the Bill approval process the Rx&D conducted "the most effective and well organized lobby Ottawa had ever seen" (Erola 1991, 93). In the case of Bill C-91, it was labelled the Merck Frost bill because they were the ones driving the bill through parliament (Snider 1991) and Merck-Frost is an influential member of the Rx&D. When NAFTA was being negotiated, the Rx&D hired practically every lobby firm in Ottawa to push its agenda. John Harding, spokesperson of the Opposition in 1993, described how the Rx&D sent a message to MPs that whatever you want, you have can have; whether it be tickets to sports games or promises of R&D grants in their political riding (Snider 1991). The Rx&D was also able to play on the political tension over Quebec separatism that was present in the early 1990s. The majority of brand name companies are in Quebec, and Quebec does not want to lose these. Any change in patent law would be seen as an assault on the provincial industry by the PQ party (McGregor 2002).

In the case of the TRIPS agreement, the Rx&D was influential on Canada's position in negotiations. There was concern that if cheaper drugs were allowed to be produced in the South, these drugs would leak into Northern countries (Foster 2002). Several large brand-name pharmaceutical companies started hiring Liberals, who had close ties to the government, to increase access to Canadian policy makers (McGregor 2002). In response to the proposed Doha declaration, the pharmaceutical lobby

successfully convinced the government that the “proposed declaration [was] a potential threat to the interests of the pharmaceutical industry” (Blouin and Westin 2003, 54). The pharmaceutical lobby in Canada is powerful, organized and has the same goals as its US counterparts. Combined with US corporate pressure it has played an important role in shaping Canadian IP policy.

### **5.3 A Case of Civil Service Bureaucracy?**

The relationship between pharmaceutical companies and the Liberal party leads to the third hypothesis; the disconnect between the DFAIT’s IP policy and its sustainable development agenda is due to differing political parties that have been in power. Does the disconnect exist because one party put legislation in place to protect IP while another wanted sustainable development? Reviewing the positions on IP policy by the governing parties over the last twenty years shows this is not the case.

Prime Minister Mulroney’s statement that “Canada is open for business,” led to an era of policy changes that supported the business community in Canada. Both Bill C-22 and C-91, lobbied for by the pharmaceutical companies, were passed by the Progressive Conservative (PC) party. The PC government negotiated NAFTA. The Mulroney government’s embrace of neo-liberal policies and close ties with its US counterparts opened Canada up to pressure from the US on its IP regulations.

While in opposition, the Liberals vocalized considerable opposition to NAFTA and Bill C-22. Nevertheless, after gaining power in 1992, the Liberals moved to further tighten patent laws and bring them in line with the US. Brian Tobin, in opposition to the PC, accused drug companies “of raping the poor” (McGregor 2002). When he became

Trade Minister, in regards to IP protection, he “talked of fostering innovation and maintaining Canada’s commitment to its international trade partners” (McGregor 2002). The Liberal party signed NAFTA and the WTO, which included the TRIPS agreement. It continued to negotiate BITs that incorporated IP protection, and started negotiations on the SPP. Pierre Pettigrew, former Minister of International Trade, also argued in favour of Rx&D’s position in regards to the TRIPS amendment suggestion it was flexible enough (Blouin and Westin 2003, 54). The Liberal party successfully furthered the protection of IP policy that Canada implemented domestically and pursued internationally.

It seems as though Canada’s current government is convinced of the link between IP protection and economic prosperity. They have recommitted to securing trade and investment agreements that cover IP with the Global Commerce Strategy (GCS). The governing Conservatives are also negotiating the SPP and the ACTA. The governing Conservatives have supported increased patent length. As David Emerson said in a speech on 2 May 2007, “Prosperity requires a vibrant business environment. Business relies on a free, secure and rules-based society. And prosperity provides the foundation for creating jobs, wealth and opportunity for our citizens” (Emerson, 2007). Businesses would argue that patent and copyright law is part of a rules based system, a predictable environment where they know their inventions are protected. Despite changes in the governing political party, DFAIT’s IP policy has continued to be expanded. Each governing party has instilled stronger IP patent regulation while at the same time continuing to publish a sustainable development agenda committed to the environmental, economic and social well-being.

## 5.4 Conclusion

The disconnect between DFAIT's IP policy and its sustainable development agenda goes directly against Canada's prized position as a "good global citizen." Instead of supporting development agendas, strong IP protection undermines them. DFAIT views IP as a trade issue and in doing so it prioritizes corporate interests over others. This follows the general theme of DFAIT's policies that places economic interests ahead of other concerns. Several examples of this include trade with China despite its documented human rights abuses and the government's unwillingness to prevent Canadian companies from investing in conflict zones (McBride 2005, 138). This is part of the larger theme that has occurred over the past thirty years; the priority of corporate interests in various policies. This is due to the acceptance of neo-liberal policies in Canada, where the state's role is reduced and concerns over financial capital and business success are prioritized (McBride 2005, 141). The corporate capture of IP policies in Canada undermines DFAIT's sustainable development policy. The acceptance of neo-liberal policy has serious implications for the future of sustainable development. As Vandana Shiva asserts

The global free trade economy has become a threat to sustainability and the very survival of the poor and other species is at stake not just as a side effect or as an exception but in a systemic way through a restructuring of our worldview at the most fundamental level. Sustainability, sharing and survival is being economically outlawed in the name of market competitiveness and market efficiency. (2000)

IP protection is an area that needs to be revamped so that corporate interest is no longer the main priority. DFAIT has recognized the importance of sustainable development and the need to incorporate these concerns into their policies. If Canada wants to live up to the reputation as a "good global citizen" it must address this gross

inconsistency. IP policy is an ideal policy for Canada to take a lead role in amending so that it does not hamper the development prospects for various countries. Canada is a respected member of the international community. It can garner the attention of many powerful countries, as it is a member of organizations like the G8, the OECD, and NATO. It also has the geographical location that gives it a special relationship with the world's superpower. At the same time, Canada can interact with the other less powerful countries without the baggage that past and present superpowers have. We have no history of colonialism or military invasion and we are not seen as threatening. Canada could play a central role in brokering a deal between the developing countries and developed countries on IP policy. By adopting an IP regime pushed for by corporate America, Canada loses this ability. Disappointingly, instead of championing the rights of developing countries, Canada either remains silent on the controversy (ie. The South African case) or supports the US position, which is evident by the continuing increase in the duration and scope of IP in Canada and Canada's involvement with the SPP and the ACTA.

However, Canadian action alone will not be enough. As Christopher May argues "only by re-valuing the public domain, only by establishing and legitimizing the knowledge commons, can the profound inequalities that seem possible in the information age be avoided" (May 2002, 144). If this is going to it will require three things: a reconceptualization of property, a co-ordinated effort on the part of developing countries to stand together against the US's intense IP protection campaign and opposition to IP protection from global civil society.

There is reason to remain optimistic that IP protection may be changed. Greater attention is being drawn to the issue of IP protection and how property is defined. The report by the Commission on Intellectual Property Rights is testament to the fact that some countries, in this case the United Kingdom, are aware of the problems between IP protection and development. At the same time, resistance to the current governance of IPs has increased within civil society over the last fifteen years. Groups are being drawn together with the common understanding that “the system is being abused with horrendous consequences” (Heywood 2002, 227). For example, due to resistance from civil society, the Multilateral Agreement on Investment, “NAFTA on Crack” (Roth 1997), was not signed. As Belgium’s Foreign Trade Minister said “the growing pressure from civil society further exacerbated the differences of opinion within the OECD” (Kobrin 1998, 98). At the same time, we have witnessed more co-operation between developing countries in the negotiation of the WTO, as the Doha rounds have stalled as developed and developing countries are at an impasse.

The corporate capture of IP policy in Canada has consequences for developing countries; Canada signs investment agreements that contain extensive protection for IP and Canada refuses to criticize current agreements, instead believing that the current flexibilities in the agreements are satisfactory. With the expanding body of knowledge on the disconnect between IP protection and development, Canadian IP policy needs to be re-evaluated. Michelle Swenarchuk (2007) called for a full public debate involving government, legal and scientific experts and the Canadian public on the issue of life patents. However, this debate needs to delve deeper than life patents. It needs to review Canadian IP law overall, to bring it into line with Canada’s development goals abroad.

This debate also must involve business and not-for-profit organizations. It will require amending the scope and length of Canadian IP policy. Canada should bring its IP policies in line so that it supports the economic, social and environmental well-being of developing countries instead of undermining them. If Canada wants to live up to its reputation as a “good global citizen” it must revamp its IP policies and place the social interests ahead of corporate interests. Without this change, Canada as a “good global citizen” is merely a facade that covers the rule of corporate interests in Canadian policymaking.

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