



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
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International Law and Justice Working Papers

IILJ Working Paper 2009/5

**THE ROLE OF INDIA, CHINA, BRAZIL AND
OTHER EMERGING ECONOMIES IN
ESTABLISHING ACCESS NORMS FOR
INTELLECTUAL PROPERTY AND
INTELLECTUAL PROPERTY LAWMAKING**

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ISSN: 1552-6275

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Cite as:
IILJ Working Paper 2009/5
Finalized 07/30/09
(www.iilj.org)

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Abstract

This paper discusses the role that emerging economies could play in rendering intellectual property law and lawmaking more responsive to changing conditions. At present, neither the North nor the South is likely to challenge the accommodations made in the TRIPS Agreement. In the North, the politics of change is complex; the South largely lacks expertise. But emerging economies have the political will to improve access to the world's intellectual output on behalf of their poorest citizens. At the same time, they have growing creative sectors and thick legal and political cultures, capable of striking new and imaginative balances between proprietary and access interests. Because the goals of these economies are best served by partnering with least-developed countries and members of civil society interested in IP issues, these nations also have an incentive to improve another type of access norms—norms of participation, fairness and transparency in international lawmaking. These nations are, in other words, in a unique position to contribute to the reforms that are the cornerstone of the global administrative law agenda.

The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking

Rochelle C. Dreyfuss*

It is no secret that the TRIPS Agreement¹ is fraying around the edges. Developing countries feel short-changed. While the Agreement's patent, copyright, and trade secrecy requirements raise the cost of, and impede access to, the information products generated in the North, TRIPS fails to offer any protection to the traditional knowledge, genetic resources, and folklore that constitute much of the intellectual wealth of the South. Yet to materialize are the Agreement's vaulted promises: technical assistance in writing TRIPS-compatible legislation that is adapted to developing countries' needs and foreign investments that can help these countries prosper.

Developed countries are, in some ways, equally stymied. The technological landscape is changing in ways that necessitate revision of the intellectual property system. In some cases, higher levels of protection are required (the ease of digital distribution is, for example, challenging territorially-based enforcement mechanisms). In other situations, reductions in existing obligations may be desirable (for instance, the same digital technologies facilitate forms of open innovation that are less dependent on intellectual property protection). However, the politics of change is complex and the duty to conform to TRIPS makes it even harder to respond effectively to new domestic realities. TRIPS was largely written at the behest of the owners of standard forms of intellectual property (patents, copyrights, trademarks);² it creates rights for producers, but says little about the rights of users.³

While TRIPS could arguably be altered to deal with the difficulties that WTO members are experiencing, lawmaking within the WTO is at an impasse. In other parts of the WTO, adjudication by the Dispute Settlement Board (DSB)⁴ is taking up the slack. But successive panels (and in some instances, the Appellate Body) have interpreted the TRIPS Agreement so rigidly, member states have been left with insufficient room to

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments -- Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement or TRIPS].

² See, e.g., SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (Cambridge University Press 2003).

³ See, e.g., Henning Grosse-Ruse-Khan and Annette Kur, *Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection* (Max Planck Institute for Intellectual Property, Competition & Tax Law, Research Paper Series No. 09-01, 2008), available at <http://ssrn.com/abstract=1326429>.

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments -- Results of the Uruguay Round, 33 I.L.M. 1226 (1994) [hereinafter DSU].

maneuver, especially with regard to improving access.⁵ For problems that require a coordinated solution, many members of the WTO are beginning to give up on the trade framework. In Larry Helfer's words, they are shifting to other regimes,⁶ including regional and bilateral arrangements;⁷ instruments administered by UN-related entities, such as the World Health Organizations (WHO) and particularly the World Intellectual Property Organization (WIPO);⁸ human rights agreements;⁹ as well as negotiations over the Convention on Biological Diversity¹⁰ and a criminal enforcement treaty.¹¹ The result is cacophony: thickets of rights,¹² conflicting demands,¹³ disputes that perpetually cycle,¹⁴ and new uncertainties.¹⁵

In this environment, emerging economies such as India, Brazil, and China, may well hold the key to the future.¹⁶ On the one hand, significant numbers of residents in

⁵ Graeme B. Dinwoodie and Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7(2) J. INT'L ECON. L. 431 (2004) (hereinafter Public Domain); Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *TRIPS and the Dynamics of International Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95 (2004) (hereinafter Dynamics); Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement*, 13 MICH. TELECOMM. & TECH. L. REV. 445 (2007) (hereinafter Diversifying).

⁶ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 20-22 (2004).

⁷ Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47 (2008).

⁸ See generally, G B Dinwoodie and R C Dreyfuss, *Enhancing Global Innovation Policy: The Role of WIPO And Its Conventions In Interpreting the TRIPS Agreement*, in (Carlos Correa, ed. forthcoming); see also *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, _ Houston L. Rev. _ (forthcoming).

⁹ Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1 (2008).

¹⁰ Convention on Biological Diversity art. 15(1), June 5, 1992, 31 I.L.M. 818, 823 (1992).

¹¹ Office of the United States Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA): Request for Public Comments*, 73 Fed. Reg. 8910 (Feb. 15, 2008); Amy Tsui, *WTO IPR Case Against China Raises Issue of TRIPS Adequacy*, 77 PAT. TRADEMARK & COPYRIGHT J. (BNA) 615 (Apr. 3, 2009); Trainer, *supra* note 7.

¹² Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 AM. J. INT'L L. 641, 646-58 (2004) (describing overlap between rights protected by TRIPS and the CBD).

¹³ See, e.g., Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005) [hereinafter *EC-GI*].

¹⁴ See, e.g., *Anheuser-Busch v. Budejovický Budvar NP*, [1984] F.S.R. 413 (CA) (U.K.); *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, 45 Eur. H.R. Rep. 36 [830] (Grand Chamber 2007); *Case T-225/06, Budejovický Budvar v. OHMI - Anheuser-Busch (BUD)*, http://oami.europa.eu/ows/rw/resource/documents/CTM/case-law/jj060225_en.pdf (Dec. 16, 2008).

¹⁵ See Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter *EC – Bananas*] (suggesting that it was not within the jurisdiction of WTO arbitrators to assess whether measures authorized under the WTO Agreements might result in noncompliance with obligations under WIPO Conventions).

¹⁶ See generally, Daniel Benoliel & Bruno Salama, *Towards an Intellectual Property Bargaining Theory: The Post-WTO Era* (Mar. 4, 2009) (working paper), available at <http://ssrn.com/abstract=1353286> (discussing the “east asian tigers”); Gregory Shaffer, Michelle Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345 (2008).

these countries suffer from the same access problems experienced by less developed economies. On the other hand, these nations have growing creative sectors that are beginning to enjoy the benefits of strong intellectual property protection. Because countries in this “emerging Middle” internalize the problems of both the North and the South, they are forced to acquire the political will needed to accommodate the demands of all kinds of intellectual property producers and users—that is, to strike the types of delicate balances that are currently eluding policymakers elsewhere. Equally important, these countries have a thick legal and political culture and can ably defend their domestic legislation in international circles. As emerging economies move into a leadership position in establishing new practices and advancing their pro-access views, they are sure to challenge the preeminent role of the North in setting world norms for intellectual property protection.

The engagement of emerging economies in international intellectual property lawmaking could produce another key benefit. Because these nations represent the demands of intellectual property consumers as much as they do intellectual property creators, their goals are best served by partnering with groups currently under-represented in the international arena, including least-developed countries; nongovernmental organizations involved in areas such as healthcare, where access to protected works is key; and other members of civil society interested in challenging the current primacy of the holders of standard intellectual property rights. Thus, while furthering their own interests in access to knowledge products, emerging economies will also work to improve another type of access—the ability to participate in a fair and transparent process of international lawmaking. Furthermore, so long as they take consistent positions at all negotiations over intellectual property instruments, emerging economies could contribute to the harmonization and integration of international norms, and thereby reduce the problems associated with regulatory overlap. These nations are, in other words, in a unique position to contribute to the reforms that are the cornerstone of the global administrative law agenda.¹⁷

This paper begins, in Part I, by describing the problems currently plaguing intellectual property law for countries at both extremes of the development spectrum. Part II then examines the solutions, both domestic and international, that are emerging from the Middle. Part III considers how the participation of these countries in international negotiations over intellectual property can influence global administrative norms.

I. The Problem

Post the Uruguay Round, the intellectual property system has been experiencing serious difficulties. The TRIPS Agreement sets out minimum standards of protection and enforcement obligations for rights long-protected by multilateral instruments currently administered by WIPO, including patents and trademarks, which remain the subjects of

¹⁷ See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROB., Summer / Fall 2005, at 15.

the Paris Convention,¹⁸ and copyrights, which are covered by the Berne Convention.¹⁹ TRIPS also codifies commitments to protect certain intellectual properties that previously received less strong international recognition, including geographical indications, sound recordings, industrial designs, trade secrets, and integrated circuits.²⁰ And because it is a part of the WTO framework, TRIPS introduces a compliance mechanism into the international intellectual property realm: it makes the Agreement subject to the new, judicialized dispute settlement provisions of the WTO.²¹ To accommodate the interests of countries new to these obligations, the Agreement staggers the dates for full compliance in accordance with levels of development.²² It also permits limited exceptions and provides a framework for compulsory patent licensing.²³ In addition, the Agreement promises technical assistance²⁴ and, for the least developed, technology transfer.²⁵ Nevertheless, almost immediately after the Agreement went into force, troubles emerged on both sides of the development divide.

a. Developing Countries

No sooner was the ink dry on the TRIPS Agreement than it became clear that developing countries had struck a bad deal, for the trade-off to which they had agreed—access to foreign markets in exchange for raising intellectual property levels—turned out to be something of a losing proposition. The profits available on commodities do not offset the supracompetitive prices charged for protected knowledge products. As a result, the fruits of contemporary innovation efforts are beyond the reach of most of the population of these states.²⁶ Without strong creative industries of their own and absent any recognition for the information wealth of the South (genetic resources, folklore, traditional knowledge), many nations have found it difficult to persuade their citizens to enact implementing legislation in the time periods set out in the TRIPS Agreement. Furthermore, many of these countries had expected that TRIPS would represent a ceiling to demands by the North—that TRIPS would, in effect, replace the unilateral trade sanctions previously used by the United States to induce countries to strongly protect

¹⁸ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter the Paris Convention]; TRIPS, *supra* note 1, arts. 16-21 & 27-33.

¹⁹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended on Sept. 29, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention]; TRIPS, *supra* note 1, arts. 9-13.

²⁰ TRIPS, *supra* note 1, arts. 28-24; 14; 25-26; 39; & 35-38. The enforcement obligations are found in arts. 41-61.

²¹ TRIPS, *supra* note 1, art. 64.

²² TRIPS, *supra* note 1, art. 65. Under the original time table, the transition periods would be over. However, they have been extended for least-developed countries, Decision of the Council for TRIPS of 27 June 2002, *Extension of the Transition Period Under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25 (July 1, 2002); Decision of the Council for TRIPS of 29 November 2005, *Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members*, IP/C/40 (Nov. 30, 2005).

²³ TRIPS, *supra* note 1, arts. 13, 13, 17, 26.2, 30 & 31, arts. 41-61.

²⁴ TRIPS, *supra* note 1, art. 67.

²⁵ TRIPS, *supra* note 1, art. 66.2.

²⁶ See, e.g., Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85 (2007).

intellectual property within their borders.²⁷ In reality, however, these demands did not cease when TRIPS went into force. Instead, developed countries have imposed “TRIPS-plus” requirements through unilateral threats of trade sanctions and through bilateral negotiations, for instance, over free trade agreements (FTAs), European Partnership Agreements (EPAs) and bilateral investment treaties (BITs).²⁸

These problems are, by now, well recognized and the focus of considerable international consternation.²⁹ For these purposes, the real question is causation: why has it proved so difficult for countries to take advantage of the accommodations TRIPS provided, step to the technological frontier, and enjoy the benefits of strong intellectual property protection? Why have they so easily succumbed to obligations exceeding TRIPS minimum standards? Part of the answer is surely the absence of promised foreign investments as well as technical and legal assistance. More poignantly, however, it appears that the drafters of TRIPS seriously underestimated the obstacles inherent in the development process. As economists know, information is sticky—it is not easily transmitted or learned. Without sufficient technological infrastructure and absorptive capacity, the promises of TRIPS cannot be realized easily.

The essential medicines problem provides a dramatic illustration. TRIPS negotiators actually considered the possibility that patents would pose an access problem. Article 31 of the Agreement therefore provides members with the power to license third parties in situations where the patent holder abuses its position or otherwise fails to adequately supply the market. The provision, however, includes a limitation: art. 31(f) mandates that “any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.” For states that can manufacture their own pharmaceuticals, this provision works as envisioned.³⁰ But many members lack the capacity to manufacture drugs at the level of purity required for medical use and cannot, therefore, cope with their health problems consistent with this obligation.

In the Doha Round, that problem was alleviated in the short run by waiving art. 31(f) for the production of medicines, subject to a series of requirements that protect right

²⁷ See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 12-2 (3d ed. 2008 SWEET & MAXWELL). Cf. Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623, 633 (2006) (noting that the United States agreed to give up unilateralism under § 301 of its Trade Act in exchange for a stronger dispute settlement system). See also ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW*, § 8.8 (2d ed. 2008); JOHN CROOME, *RESHAPING THE WORLD TRADE SYSTEM: A HISTORY OF THE URUGUAY ROUND* 113 (Kluwer Law Int’l 1998).

²⁸ See e.g., Peter Drahos, *BITS and BIPS: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791 (2001). As Drahos notes, the United States also raises the stakes through § 301 of its Trade Act, 19 U.S.C. § 2411. See also MATTHIAS BUSSE, AXEL BORRMANN & HARALD GROBMANN, *THE IMPACT OF ACP/EU ECONOMIC PARTNERSHIP AGREEMENTS ON ECOWAS COUNTRIES: AN EMPIRICAL ANALYSIS OF THE TRADE AND BUDGET EFFECTS* (2004), http://www.hubrural.org/pdf/hwwa_etude_ape_eng.pdf.

²⁹ Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008); Reichman and Dreyfuss, *supra* note 26.

³⁰ Brazil and Thailand have both issued (or threatened to issue) compulsory licenses to reduce the cost of health care, see Robert C. Bird & Daniel R. Cahoy, *The Emerging BRIC Economies: Lessons from Intellectual Property Negotiation and Enforcement*, 5 NW. J. TECH. & INTELL. PROP. 400 (2007).

holders from the spread of cheap pharmaceuticals into the North. In the long run, the TRIPS Agreement is to be amended to include a similar set of conditions.³¹ Indeed, the Ministerial Conference used the occasion of granting this dispensation to stress the WTO's commitment to development and to allowing members to engage in interest-balancing.³² Nonetheless, the WTO missed the underlying lesson: without a sufficiently strong technological infrastructure, developing countries will continue to have trouble capturing the benefits of TRIPS. They cannot become net producers of intellectual property until they establish creative industries that operate at the intellectual frontier. And they cannot reach that point without training and education. As Maggie Chon has argued, educational material must be accessible³³ and as Jerry Reichman has suggested, training opportunities are equally critical.³⁴ To learn from the technological assistance received and become creative in its own right, a country needs to engage in "fair following." The essential-medicines crisis produced by art. 31(f) highlighted the infrastructure problem, but by only providing for access, it failed to solve the long term problem of generating absorptive capacity.

To be sure, TRIPS appears to include the flexibilities members need to make education and training opportunities available. For copyrighted materials, TRIPS incorporates the Berne Convention, which includes a fair amount of room to maneuver: it leaves the concepts of a "work of authorship," originality," and the idea/expression dichotomy to national legislation and it includes an Appendix that empowers member states to create local translations of works when copyright holders do not voluntarily meet their needs.³⁵ TRIPS also carries over and expands on an exceptions clause found in the Berne Convention. Thus, it permits members to enact exemptions in "special cases," if they do not "conflict with normal exploitation" or "unreasonably prejudice legitimate interests."³⁶ On the patent side, the height of the inventive step is not specified;³⁷ the terms "making, using, offering for sale, selling or importing,"³⁸ are not

³¹ TRIPS, art. 31bis.

³² World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration], *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm; World Trade Organization, Declaration on the TRIPS agreement and Public Health, WT/MIN(01)/DEC/2 (2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. *See generally* Frederick M. Abbott and Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921 (2007), *available at* <http://ssrn.com/abstract=1025593>.

³³ *See* Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007) [hereinafter "From Below"]; Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821 (2006).

³⁴ J. H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997).

³⁵ TRIPS, *supra* note 1, art. 9.1; Berne, *supra* note 19, app. (Special Provisions Regarding Developing Countries).

³⁶ TRIPS, *supra* note 1, art. 13; Berne *supra* note 19, art. 9(2) reads slightly differently and covers only the reproduction right. *See generally*, P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT* (2008), <http://www.ivir.nl/publicaties/hughenoltz/finalreport2008.pdf>.

³⁷ TRIPS, *supra* note 1, art. 27.1.

³⁸ TRIPS, *supra* note 1, art. 28.

defined; and whole classes of inventions can be excluded from patenting requirements.³⁹ There are also the aforementioned compulsory licensing opportunities and an “exceptions” provision similar to the one available for copyright.⁴⁰ Astute lawyers should be able to utilize these flexibilities to design domestic intellectual property systems that allow the populace to hone their creative and technological skills, and perhaps even work on incremental improvements that meet other local needs.⁴¹

The rub, however, is the need for astute lawyering. It is not only information necessary to establish creative industries that is sticky; so too is the knowledge needed to foster a legal community capable of utilizing the Agreement’s flexibilities effectively. For example, both the Berne Appendix and the accommodation on medicines worked out in the Doha Round are underutilized. The problem appears to be that these provisions interpose significant hoops, including the need to issue precise declarations, notifications, and regulations, along with a commitment to continued monitoring. Without lawyers to oversee implementation, these restrictions can quickly turn into insurmountable obstacles. Furthermore, neither the Appendix nor the Doha waiver/amendment was drafted in a manner conducive to use. Both, for example, give the right holder the power to end the conditions under which the third party is permitted to operate. It is difficult to imagine that anyone would be willing to translate works or gear up to supply drugs if the right holder can simply march in as soon as it realizes there is a viable market, and obliterate the investment. With a stronger legal culture, developing countries would likely have insisted on accommodations that avoid these problems.⁴²

Developing countries face an equivalent problem with respect to their domestic legislation. The best strategy for creating educational and training opportunities is far from evident; good legal (and economic) skills are needed to figure out the appropriate rules.⁴³ Furthermore, any departure from the intellectual property regime prevalent in the North is likely to attract a challenge in the WTO. It takes well a sophisticated and well-funded legal team to bargain for a waiver or defend national laws in the TRIPS Council, before a dispute resolution panel, or at the Appellate Body. Making matters even worse, to date, there have been no disputes involving a country at the least-developed end of the development spectrum. Accordingly, there has been no opportunity to generate the norms that would provide developing countries with guidance on what sorts of moves they can safely regard as compatible with international obligations.

³⁹ TRIPS, *supra* note 1, arts. 27.2 & 27.3.

⁴⁰ The patents provision permits members to enact “limited” exemptions so long as they “do not unreasonably conflict with a normal exploitation,” and “do not unreasonably prejudice the legitimate interest of the patent owner, taking account of the legitimate interests of third parties.” TRIPS, *supra* note 1, art. 30. There are similar exceptions provisions for trademark, art. 17, and industrial designs, art. 26.2.

⁴¹ Rochelle C. Dreyfuss, *Fostering Dynamic Innovation, Development and Trade: Intellectual Property as a Case Study in Global Administrative Law* (NYU Sch. of Law, Public Law Research Paper No. 08-66), available at <http://ssrn.com/abstract=1316925>.

⁴² Girish R. Kumar, South-South Cooperation Strategy in Dealing with the Identified Common Challenges in Intellectual Property (Feb. 19, 2009), available at <http://ssrn.com/abstract=1346304>.

⁴³ See Reichman & Dreyfuss, *supra* note 26 (noting that it is possible to devise regimes that promote local training by either raising or lowering the height of the inventive step).

A developing nation that can “lawyer up” would be at a real advantage not only in regard to drafting and defending legislation, it could also be proactive: it could insist on renegotiating the Agreement to deal with its development problems. It could revamp the exceptions provisions and add standards to protect the users (and not just the producers) of intellectual property. It could even bring its own challenges in the DSB and require developed countries to live up to their express obligations to engage in technology transfer. Indeed, Susy Frankel suggests that WTO members might even consider challenging unilateral attempts to impose TRIPS-plus obligations as nonviolation complaints.⁴⁴

B. Developed Countries

Admittedly, TRIPS has had much more positive effects in the North, where many creative sectors are benefiting from the added revenues available on world markets. But even here, the dynamics of information production are changing in ways that make revision of both national laws and the TRIPS Agreement desirable. The soaring cost of medicine, which is making patient access in the North almost as difficult as it is in the South, has led experts to question the operation of the patent system. In the life sciences, there is concern that patenting has moved too far upstream. Patents over genes, protein sequences, diagnostic correlations, and other fundamental knowledge allow patentees to dominate broad technological opportunities.⁴⁵ The thickets of rights produced are difficult and costly to negotiate. Furthermore, through such measures as the United States’ Bayh Dole Act (which has attracted many imitators⁴⁶), universities have become players in the patent enterprise.⁴⁷ Their involvement in the commercialization of basic science has led to the patenting of information that would have formerly gone into the public domain and has, in the United States, prompted courts to restrict defenses to infringement that formerly eased the need for costly negotiations.⁴⁸

⁴⁴ Susy Frankel, *The Utility of Potential Non-Violation Disputes About TRIPS and TRIPS Plus Agreements* (forthcoming).

⁴⁵ See, e.g., NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH (2006); Cf. Justice Breyer’s dissent from the dismissal of certiorari in *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006).

⁴⁶ See, e.g., Pallava Bagla, *India Allows Government Scientists to Own Companies*, 323 SCIENCE 1278 (March 6, 2009); Kazuhiro Asakawa, *Transition in Japan’s Biotechnology Sector: Institutional —Organizational Co-Evolution*, in STRUGGLES FOR SURVIVAL INSTITUTIONAL AND ORGANIZATIONAL CHANGES IN JAPAN’S HIGH-TECH INDUSTRIES (Kazuhiro Asakawa ed., 2006), available at <http://www.springerlink.com/content/1614956178355143/fulltext.pdf>.

⁴⁷ See also Rai & Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289 (2003); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, 16 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION, AND ECON. GROWTH 97 (2005) (noting changing pressures in academia); THE ROYAL SOCIETY, KEEPING SCIENCE OPEN: THE EFFECTS OF INTELLECTUAL PROPERTY ON THE CONDUCT OF SCIENCE (2003), available at <http://www.royalsoc.ac.uk/displaypagedoc.asp?id=11403>.

⁴⁸ *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002); see also *Embrex, Inc. v. Serv. Eng’g Corp.*, 216 F.3d 1343 (Fed. Cir. 2000). See generally Rochelle Dreyfuss, *Protecting the Public Domain of Science: Has the Time for an Experimental Use Defense Arrived?*, 46 ARIZ. L. REV. 457 (2004).

Outside the life sciences, there are also many concerns about over-protection. In the information technology industry, the patent-to-product ratio is extremely high, meaning that products often involve many features that are separately patented and which are meant to interoperate with other products that are also subject to multiple patent rights. With many patents required to discover and make novel products, transaction costs rise, as does the probability of holdouts. Compounding the problem, many of the players in this sector find that they must acquire patents for defensive purposes, leading to a situation where patents can cost more to acquire and negotiate than they generate in new revenue.⁴⁹

In the copyright sectors, there are also many who question the need for strong protection. As the cost of reproducing works has declined through digitization, the need to provide incentives to intermediaries, such as publishers and recording companies, has diminished.⁵⁰ The success of Linux and other open-source and open-data initiatives, along with the work of Eric von Hippel and Kathy Strandburg on user-innovation, has demonstrated that there are significant creative activities that do not rely directly on standard intellectual property rights.⁵¹ Indeed, it is becoming clear that many of the new types of creativity can be hampered by strong rights regimes. For example, appropriation art and mashups are possible only if artists can use the work of others (and, in fact, those who work in those areas utilize Creative Commons licensing to reduce the salience of intellectual property protection).⁵² There are also many new players in this sector, including internet service providers, like Earthlink, which act as conduits to the web; information service providers, like YouTube and Flickr, which permit users to generate and share their own creative works; and search engines and other information aggregators, like Google and eBay. Because these entities make novel uses of intellectual property and cannot efficiently monitor the works they transmit, they would all be severely constrained under a strict application of traditional intellectual property law.⁵³

To be sure, the obstacles that the South faces in attempting to reduce the levels of intellectual property protection do not exist in the North, where there is a substantial legal and political culture ready to identify new strategies, devise new laws, and make the case for them. But in the North, there is also a forceful counter-narrative. University involvement in patenting is said to promote technology transfer.⁵⁴ For industries, like

⁴⁹ James Bessen & Michael J. Meurer, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 138-44 (2008). Patent trolls may make the situation even worse, see Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 NO. 1 INTELL. PROP. L. BULL. 1 (2005).

⁵⁰ See Paul Ganley, *The Internet, Creativity and Copyright Incentives*, 10 J. INTELL. PROP. RTS. 188, 193 (2005) (noting how the Internet is causing traditional intermediary incentives to become outdated).

⁵¹ See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 79-91 (2005) (discussing why users freely reveal their innovations even though standard intellectual property rights are available); Katherine J. Strandburg, *Users as Innovators: Implications for Patent Doctrine*, 79 U. COLO. L. REV. 467 (2008).

⁵² See Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 303-09 (2006); LAWRENCE LESSIG, *REMIX* 226-27 (2008).

⁵³ Christopher M. Newman, *Infringement as Nuisance*, CATH. U. L. REV. (forthcoming, 2009), available at <http://ssrn.com/abstract=1354110>.

⁵⁴ DAVID C. MOWERY ET AL., *IVORY TOWER AND INDUSTRIAL INNOVATION: UNIVERSITY-INDUSTRY TECHNOLOGY TRANSFER BEFORE AND AFTER THE BAYH-DOLE ACT IN THE UNITED STATES* 33-34 (2004).

pharmaceuticals, where patents protect products that are costly to invent but easily copied, intellectual property rights remain a necessity. Digitization cuts both ways. It reduces the costs of publication, but it also gives rise to new information enterprises (database compilation, for example)—and thus to new demands for protection.⁵⁵ Furthermore, the ease of distribution means that there are entire industries (journalism is an example) that are at risk of going out of business unless new types of intellectual property rights are created, the coverage of existing rights is broadened, or enforcement mechanisms are strengthened.⁵⁶

With equally strong arguments on both sides of the debate over intellectual property rights, the result is a political stalemate. For example, passage of patent reform in the United States has been stalled for several years. The pharmaceutical industry is concerned that any attempt to deal with the patent-to-product ratio problem will undermine their rights; the research tool industry has obstructed proposals for a research exemption that would ease the degree to which patents on fundamental discoveries can obstruct downstream research. Similarly, any attempt to lower the infringement risks facing Internet intermediaries runs headlong into copyright holders' concerns about rampant piracy.⁵⁷

TRIPS complicates the matter. Negotiations over change dissolve into arguments over what TRIPS permits. On the patent side, compromises are difficult to reach because TRIPS includes a commitment to technological neutrality.⁵⁸ Since the DSB has elevated that requirement to a structural feature of the Agreement, it is not immediately evident how to create one law for sectors like pharmaceuticals, where strong protection is needed, and a different one for information technology, where protection is getting in the way of progress.⁵⁹ On the copyright side, that structural impediment is absent. But, as Graeme Dinwoodie and I demonstrated, the combination of local and international review makes negotiated compromises vulnerable to unraveling, always in the direction of raising the

⁵⁵ Council and Parliament Directive 96/9, Of the European Parliament and of the Council on the Legal Protection of Databases, 1996 O.J. (L 77) 20 (EC).

⁵⁶ Digitization has also put pressure on the TRIPS Agreement's core commitment to territoriality. The ubiquity of infringement, the possibility of moving the locus of infringement to "information havens" or suing in "information hells" has also put new pressures on domestic courts, and has led to demands for new kinds of rights, such as robust doctrines of contributory infringement. See Rochelle Dreyfuss, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819 (2005).

⁵⁷ See, e.g., *Obama Administration Asked for 'Balance' in Intellectual Property Appointments*, 77 PAT., TRADEMARK & COPYRIGHT J. (BNA) 631 (April 10, 2009) (describing a letter from a coalition including librarian associations, the consumer electronics industry, the Electronic Frontier Foundation (EFF), Knowledge Ecology International (KEI), and the Wikimedia Foundation, asking President Obama to take account of "the diversity of stakeholders affected by IP policy" in making his appointments to positions with influence over intellectual property matters).

⁵⁸ TRIPS, *supra* note 1, art. 27.1.

⁵⁹ Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000) [hereinafter *Canada-Pharmaceuticals*]. But see Dinwoodie & Dreyfuss, *Diversifying*, *supra* note 5 (suggesting alternative ways to conceptualize remedial measures).

level of intellectual property protection.⁶⁰ Knowing the DSB's potential for upsetting domestic compromises, the parties are less likely to enter into them in the future.

II. The Role of Emerging Nations in Developing Intellectual Property Norms

The situation for emerging economies is quite different from that of either the North or the South. Nations like Argentina, Brazil, China, and India have reached a point in their development where they are beginning to see the benefits of intellectual property protection.⁶¹ At the same time, all of these countries have populations with profound access needs. Thus, they are forced to compromise. In order to earn the supracompetitive returns available on world markets for cutting-edge products, they must identify areas where intellectual property rights will spur domestic industries to become innovative.⁶² But the presence of a substantial population living in poverty means that they must simultaneously protect access to essential information products. Accordingly, these countries necessarily have the will to enact the sort of compromises that are elusive in the North. As important, many of these countries have or are developing a strong legal infrastructure⁶³ and a few have even attained considerable market power.⁶⁴ Accordingly, they have the skills and the political heft needed to navigate the TRIPS Agreement—to write legislation, negotiate waivers, defend their actions—and thus to exert a strong influence on the future development of intellectual property norms.

a. Domestic legislation

⁶⁰ *Id.* For example, in the Sony Bono Copyright Act, those interested in strong copyright protection won a 20-year extension in the copyright term. In exchange, they gave up control over the rebroadcasting music in small drinking and eating establishments. A challenge to term extension went to the Supreme Court, where it lost on the theory that congressional decisions on harmonizing U.S. law with that of its trading partners deserves deference, *Eldred v. Ashcroft*, 537 U.S. 186 (2003). However, the exception for rebroadcasts did not receive the same deference in the DSB and was held to be inconsistent with TRIPS obligations, Panel Report, *United States – Section 110(5) of US Copyright Act*, WT/DS160/R (June 15, 2000) [hereinafter *US-110(5)*].

⁶¹ See, e.g., Francesco LaForgia, Fabio Montobbio, and Luigi Orsenigo, *IPRs and Technological Development in Pharmaceuticals, Who is Patenting What in Brazil after TRIPS?*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 293 (Neil Weinstock Netanel, ed., 2008); WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], *WORLD PATENT REPORT: A STATISTICAL REVIEW* (2008), 25 (2008) (demonstrating that China is rapidly becoming a prolific filer of utility model patents); WIPO, *PROVISIONAL COMMITTEE ON PROPOSALS RELATED TO A WIPO DEVELOPMENT AGENDA* [hereinafter *PCDA*], *FOURTH SESSION DRAFT REPORT 15*, PCDA/4/3/Prov.2 (June 11-15, 2007), available at http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_4/pcda_4_3_prov_2.doc (tracing the growth of pharmaceutical patenting in China and other countries). See generally Adi Gillat, *International Regulatory Competition of Intellectual Property Laws and the Case of Small Innovative Economies* (JSD thesis, on file at NYU School of Law).

⁶² In theory, intellectual property rights available in other markets could equally well spur innovation. In practice, however, local incentives appear to remain important.

⁶³ See, e.g., Brandt Goldstein, *Notes From China: Legal Education Playing Catch-Up, in a Hurry*, WALL STREET JOURNAL LAW BLOG, June 5, 2008, <http://blogs.wsj.com/law/2008/06/05/notes-from-china-legal-education-playing-catch-up-in-a-hurry/>; Shaffer et al., *supra* note 16 (documenting the rise in legal expertise for dealing with trade matters in Brazil).

⁶⁴ Salama and Benoliel, *supra* note 16, particularly stress market power in modeling the power of emerging nations to exert influence on the way in which the TRIPS Agreement is implemented.

On the question of tailoring law to domestic needs, India provides a case in point. As Lionel Bently demonstrated in connection with the debate over translation rights, India has a long history of negotiating its way through a morass of domestic politics, colonial rule, and international obligations.⁶⁵ Its recent Patent Act utilizes those talents to good effect. Immediately prior to TRIPS, India recognized patents on pharmaceutical processes but not on pharmaceutical products.⁶⁶ As a result, it developed a strong industry adept at finding manufacturing methods that reduce the cost of generic drugs and increase supply on both Indian and foreign markets. The industry also served as a training ground for budding Indian scientists.

The TRIPS patent obligations—specifically, the obligations to maintain technological neutrality and to protect products as well as processes—threatened this arrangement.⁶⁷ However, India recovered nicely. In the Patent Act drafted to comply with TRIPS, it provided that “new form[s] of a known substance which do[] not result in the enhancement of the known efficacy” as well as “new use[s] for a known substance” that do not significantly improve efficacy are not patentable.⁶⁸ The statute, § 3(d) of the Indian Patent Act, assures the continued availability of generic drugs because it limits medicines to a single 20-year patent term, even when new applications or formulations are developed.⁶⁹ This constraint not only sustains the generic drug sector, it also gives the industry the freedom to find new uses for old medicines (including, arguably, cures for neglected diseases) and to find treatments that are more easily administered.⁷⁰ Thus, the statute permits India to service the broader community of needy patients. In an action by Novartis concerning the protectability of the drug Gleevec, India has already defended this statute before its local courts.⁷¹ Although the Indian tribunals did not reach the question whether the provision is compatible with TRIPS, India has a good argument that the Agreement leaves it free to define the inventive step as it sees fit. Whether matters will get to that stage is, however, an open issue: so far, India has managed to side-step a challenge—in part, by provoking a public protest that has restrained Novartis from having the issue brought before the DSB.⁷²

⁶⁵ Lionel Bently, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHL.-KENT L. REV. 1181 (2007).

⁶⁶ Shammed Basheer, *'Policy Style' Reasoning at the Indian Patent Office*, 3 INTELL. PROP. Q. 309 (2005).

⁶⁷ TRIPS, *supra* note 1, art. 27.1.

⁶⁸ The Patents Act, No. 39 of 1970, § 3(d) (Universal 2005) (India). An explanation provides that “salts, ... metabolites, ... combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.”

⁶⁹ See Shammed Basheer and Prashant Reddy, *The “Efficacy” of Indian Patent Law: Ironing Out the Creases in Section 3(d)*, 5 SCRIPTED 232 (2008), available at <http://ssrn.com/abstract=1086254>.

⁷⁰ If course, the work will not be patentable, but that may not matter to Indian pharmaceutical companies, which do rely on the same “blockbuster” models as Northern companies and have lower operating costs, see David W. Opperbeck, *Patents, Essential Medicines, and the Innovation Game*, 58 VAND. L. REV. 501 (2005).

⁷¹ For a description of the case, see Alessandra Acuri & Roasa Castro, *How Innovative is Innovative Enough? Reflections on the interpretation of Article 27 TRIPS from Novartis v. Union of India* (Soc’y of Int’l Econ. Law, Working Paper No. 52/08, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159821.

⁷² See, e.g., Letter from Berne Declaration Group, to Novartis (Apr. 26th 2007), available at <http://www.evb.ch/en/p25011413.html>. Signed by over 75 organizations, including many NGOs involved in medical issues, and individuals from around the world.

India has been equally active protecting its cultural heritage, which includes information of considerable current value. In some instances, India has decided to capture the benefits for itself. For example, it has instituted strong protection for geographic indications, with the expectation that it will be able to label goods with these signals of local, traditional production and thereby raise their prices on world markets.⁷³ In other situations, India has decided that the better strategy is to put the information into the public domain. In order to prevent “biopiracy”—the incorporation of the knowledge into foreigners’ patents—it has developed a digital library of traditional knowledge. The information is available in five languages (English, German, French, Japanese and Spanish), and classified in a manner that permits patent examiners around the world to consider the information prior art, and thus ineligible for patent protection.⁷⁴

Of course, a single set of domestic laws does not amount to a change in international law. However, India is acting in parallel with—or in some instances, setting an example for—other emerging economies. Not all these nations take the same approach or legal position that India does on every issue. For example, Brazil has solved its access problems by the judicious use of threats to award compulsory licenses.⁷⁵ The Andean states have approached the biopiracy situation by using bilateral negotiations to develop information sharing programs—that is, to insure that the proceeds from any intellectual property rights developed from local knowledge are shared with the local communities.⁷⁶ On the other hand, the Andean countries are similarly opposed to what they call “second use patents.”⁷⁷ Furthermore, India’s views also have champions within developed countries. India is joined by the EC in its interest in promoting local trade with geographic indications.⁷⁸ And since the patenting of new forms and new uses of old drugs facilitates “evergreening” (perpetuation of patent protection through successive applications on minor variations), there are also groups in the North intent on ending the practice.⁷⁹ Clearly, new norms can develop as particular approaches are imitated and shared. As the next sections suggest, these practices also achieve international recognition as they are defended in international courts and put on the agendas of international organizations.

⁷³ Suresh C. Srivastava, *Geographical Indications and Legal Framework in India*, 38 ECON. & POL. WKLY. 4022 (2003).

⁷⁴ Traditional Knowledge Digital Library, <http://www.tkdil.res.in/tkdil/langdefault/common/home.asp?GL=Eng> (last visited July 7, 2009).

⁷⁵ See, e.g., Salama and Benoliel, *supra* note 16.

⁷⁶ See Rafael T. Boza, *Protecting Andean Traditional Knowledge and Biodiversity Perspectives Under The U.S.-Peru Trade Promotion Agreement*, 16 CURRENTS: INT’L TRADE L.J. 76 (2008).

⁷⁷ CARLOS CORREA, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES (2000), available at <http://www.netamericas.net/Researchpapers/Documents/Ccorrea/Ccorrea1.pdf>.

⁷⁸ Sachin Chaturvedi, *India, the European Union and Geographical Indications: Convergence of Interests and Challenges Ahead*, 4 S. ASIA ECON. J. 99 (2003), available at <http://sae.sagepub.com/cgi/reprint/4/1/99>.

⁷⁹ See, e.g., European Generic Medicines Association, *Evergreening*, <http://www.egagenerics.com/gen-evergrn.htm> (last visited July 14, 2009); Thomas A Faunce and Joel Lexchin, “Linkage” *Pharmaceutical Evergreening in Canada and Australia*, 4 AUSTL. & N.Z. HEALTH POL’Y 8 (2007), available at <http://www.anzhealthpolicy.com/content/4/1/8>.

b. International adjudication.

In theory, there are several international tribunals with adjudicatory authority that extends to intellectual property cases. In practice, however, the WTO's dispute settlement procedure is the main locus of dispute resolution. The European Court of Human Rights has had a few intellectual property cases, but none directly implicating the substantive questions that are plaguing the intellectual property community.⁸⁰ The International Court of Justice is also theoretically available for disputes involving the Paris and Berne Conventions, but it has never heard a case.⁸¹ In contrast, the DSB has been heavily involved in determining the capacity of WTO members to respond to new situations and to adjust their laws to local needs.⁸² Its ability to articulate international norms is somewhat constrained in that adjudicators can hear only disputes arising under the WTO agreements.⁸³ However, that restriction is somewhat mitigated by the Vienna Convention's references to subsequent practices and relevant rules of international law.⁸⁴

More limiting is the way in which the cases have been presented. Thus, while less-developed countries may well have viable complaints (for example, regarding the failure of developed countries to comply with their obligations to transfer technology, to provide technical assistance, or to regard TRIPS as setting a limit on demands for intellectual property protection⁸⁵), no action by a developing country has ever become the subject of a formal adjudication. Nor have these countries often been named as respondents.⁸⁶ The result is that adjudicators have mainly been called upon to elucidate the meaning of TRIPS in cases that feature developed economies on both sides of the dispute. Because, as noted earlier, international representation of developed countries has been largely dominated by high protectionist interests, none of the litigants in these

⁸⁰ Helfer, *supra* note 9.

⁸¹ Paris Convention, *supra* note 18, art. 28(1); Berne Convention, *supra* note 19, art. 33 (1).

⁸² The seven cases are Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter *India-Pharmaceuticals*]; Appellate Body Report, *Canada—Term of Patent Protection*, WT/DS170/AB/R (Sept. 18 2000); *Canada-Pharmaceuticals*, *supra* note 59; *US-110(5)*, *supra* note 60; Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002); Panel Report, *European Communities—Protection of Trademarks and Geographic Indication for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005) [hereinafter *EC-GI*]; Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter *China-Enforcement*]. Technically, there were eight disputes as both the United States and the European Communities brought an *India-Pharmaceuticals* challenge. There are also two disputes that involved intellectual property tangentially in that retaliation was sought in the intellectual property sector, *see EC—Bananas*, *supra* note 15 (involving Ecuador); Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/ARB (Dec. 21, 2007) (involving Antigua).

⁸³ DSU, *supra* note 4, art. 1.

⁸⁴ Vienna Convention on the Law of Treaties arts. 31(3)(b) and (c), May 23, 1969, 1155 U.N.T.S., 8 I.L.M. 679; Rochelle Cooper Dreyfuss, *Intellectual Property Confronts Trade: The Roles of the TRIPS Council, the DSB and WIPO in Supporting Development and Preserving Dynamic Innovation*, forthcoming

⁸⁵ *See* Frankel *supra*, note 44.

⁸⁶ To be sure, developing countries have been involved in earlier stages of the dispute resolution process. Their cases have settled, often in ways favorable to development. However, these settlements are better viewed as waivers and not as establishing new norms of behavior.

disputes has had a strong incentive to argue for interpretations that maximize TRIPS flexibilities.

Especially telling are the cases that involve the three “exceptions” provisions for copyright (art. 13), patents (art. 30), and trademarks (art. 17). These measures most heavily implicate members’ ability to balance user and producer interests, yet the three cases—*US-110(5)* (involving certain establishments’ unauthorized rebroadcasts of copyrighted works); *Canada-Pharmaceuticals* (involving the ability of generic producers to stockpile and test patented pharmaceuticals) and *EC-GI* (on the relationship between trademarks and geographic indications)—all involved developed countries on both sides and all yielded decisions that heavily circumscribe members’ abilities to safeguard access interests. The Panels ignored the domestic rationales for the challenged legislation,⁸⁷ they considered the various parts of the tests cumulatively (which meant that the interests of third parties were not reached),⁸⁸ and they largely refused to interpret terms like “normal,” “legitimate,” “prejudice,” and “unreasonable” normatively.⁸⁹ In the patents case, the exceptions provision was also subjected to a separate analysis on whether it was technological neutral.⁹⁰

There have, however, been two (technically, three) cases involving emerging economies, and they were resolved quite differently. In two cases involving India, the United States and the European Communities challenged the efficacy of provisions instated to protect pharmaceuticals during TRIPS’ transition period; in a dispute against China, the United States raised the question of compliance with TRIPS’ enforcement obligations.⁹¹ While the cases were not uniform wins for the respondent, each resolution makes clear just what a difference the participation of an emerging economy can make. Thus, although *India-Pharmaceuticals* ultimately held that India had not properly safeguarded the interests of pharmaceutical patent holders, India won on two profoundly important points. First, the complainants had argued that during the negotiations, India had agreed to protect patentability in a specific way. The Appellate Body, however, firmly rejected the notion that expectations that were not codified into the final agreement could be enforced through a violation complaint.⁹² Second, the Appellate Body emphasized that where there is no controlling international norm, member states are owed substantial deference in the way they choose to implement their obligations.⁹³

⁸⁷ For example, the copyright exception test, like the Berne Convention, uses the term “special.” That could have been used to examine the justification for the measure; instead it was taken to mean “clearly defined,” *US-110(5)*, *supra* note 60, ¶¶ 6.107-6.110. On options for examining the justifications, see Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 751 n.73 (2001); Dinwoodie & Dreyfuss, *Dynamics*, *supra* note 5.

⁸⁸ See, e.g., *id.*, at ¶ 7.20; *Canada-Pharmaceuticals*, *supra* note 59 at ¶ 7.21.

⁸⁹ See, e.g., Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three Step Test” for Copyright Exemptions*, 187 REVUE INTERNATIONALE DU DROIT D’AUTEUR 17 (2001). To be sure, the *Canada-Pharmaceuticals* Panel considered the practices of other states to determine the patent holder’s legitimate interests, it was not persuaded that they demonstrated a consensus position, *supra* note 59, ¶¶ 7.78-7.82.

⁹⁰ *Id.*, at ¶ 6.69.

⁹¹ *India-Pharmaceuticals*, *supra* note 82; *China-Enforcement*, *supra* note 82.

⁹² *India-Pharmaceuticals*, *supra* note 82, ¶ 45.

⁹³ *Id.*, ¶¶ 46, 59.

Similarly, China did not win the entire *China-Enforcement* case. Rather, the Panel found that China was not adequately protecting the censored elements in copyrighted works and that it needed to do more to prevent counterfeit goods from entering the channels of commerce. Nonetheless, the Panel carefully preserved China's national prerogatives. It gave it extensive leeway to determine how to dispose of infringing goods and where to set the threshold for criminal enforcement. It emphasized that the wording of the enforcement provisions requires members to give judicial authorities the *power* to order particular remedies, but does not require specific results.⁹⁴ The Panel also held that TRIPS remedies are not exclusive.⁹⁵ While it found that "the Agreement contains substantive obligations that are not simply matters of national discretion,"⁹⁶ it stressed that TRIPS is a *minimum* standards regime and that it gives members freedom to determine the most appropriate method of implementing their obligations.⁹⁷

Especially with respect to the question whether China had set its threshold for criminal enforcement too high, the difference between this case and the *US-110(5)* case is dramatic. In *US-110(5)*, the Panel engaged in fairly speculative determinations of the harm caused by the rebroadcasts.⁹⁸ In considering the impact of the challenged practice on the right holders' future markets, it refused to take account of how the establishments that had been allowed to rebroadcast music without payment would react if they were required to obtain authorization.⁹⁹ In contrast, the *China-Enforcement* panel measured the impact of China's enforcement obligations by examining the profit to infringers, and not the impact on right holders. Careful attention was paid to the specifics of how China's local markets operate.¹⁰⁰ Speculative harm was excluded: the Panel held the United States to strict evidentiary standards and even rejected assertions concerning the difficulty of finding information in China.¹⁰¹

Given the wording of the TRIPS Agreement, the DSB is likely to be far more deferential to member states in cases involving enforcement in general, and criminal liability in particular.¹⁰² Nonetheless, the ability of China—aided in certain respects by the participation of three other emerging economies, Brazil, Argentina, and China

⁹⁴ *China-Enforcement*, *supra* note 82, ¶¶ 7.236, 7331.

⁹⁵ *Id.*, ¶ 7.240.

⁹⁶ *Id.* and *id.*, ¶ 7.507.

⁹⁷ *Id.*, ¶¶ 7.513 (citing art. 1.1), 7.602.

⁹⁸ A measure of the Panel's willingness to speculate can be seen by comparing the estimate of the EC copyright holders' loss (\$53.65 million per year) in the decision with the findings at arbitration (€ 1,219,900 per year, at a time when the dollar and the euro were close to parity), Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1 (Nov. 9, 2001) [hereinafter *US-110(5)*].

⁹⁹ *Id.*, ¶¶ 4.9-4.15.

¹⁰⁰ *China-Enforcement*, *supra* note 82, ¶ 7.577.

¹⁰¹ *Id.*, ¶¶ 7.626-7.630 and ¶ 7.7.630-7.632.

¹⁰² For example, TRIPS, *supra* note 1, arts. 1.1 and 41.5 make clear that members' duties regarding implementation are determined contextually. See generally Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

Taipei¹⁰³—to protect the concepts of minimum standards, deference, and TRIPS flexibilities is highly significant. Should India be put to the defense of § 3(d), equally important principles might be elucidated. First, because India’s main defense would be that it has the right to determine the meaning of “inventive step,” a decision in its favor would establish the proposition that the many undefined terms in the TRIPS Agreement are, indeed, left open for domestic interpretation.¹⁰⁴ Moreover, because the Indian provision—while facially neutral—is clearly intended to have its principal impact on pharmaceuticals,¹⁰⁵ a decision for India would also provide guidance on the meaning of the prohibition on “discrimination as to . . . the field of technology.” As we saw, the *Canada-Pharmaceutical* Panel’s elevation of this provision to structural importance makes it difficult for countries to utilize the patents’ exception provision and to reconcile the competing interests of the various sectors of the patent industries.¹⁰⁶ The full participation of emerging countries in the adjudicatory process should, in sum, lead to the articulation of a balanced set of norms that will benefit both developed and developing countries.¹⁰⁷

c. International Lawmaking

While the previous section suggests that emerging economies could establish new international intellectual property norms through international adjudication, that procedure is expensive and fraught with uncertainties. Most of the cases involving TRIPS issues have been decided only at the panel level. Accordingly, the Appellate Body’s views remain largely unknown. Besides, there is no general principle of stare decisis on which domestic lawmakers can rely. International agreements are thus a core source of norm-development.

Recent deliberations of the WTO and WIPO demonstrate how significant participation by increasingly sophisticated emerging nations can be. India, for example, tried hard to limit the inclusion of intellectual property into WTO negotiations during the Uruguay Round.¹⁰⁸ While it was unsuccessful at that time, its recent accomplishments at the WTO have been substantial. India was active in negotiating the Doha Declaration,¹⁰⁹ and the international initiatives that it has instigated since that time are well documented

¹⁰³ See, e.g., *China-Enforcement*, *supra* note 82, ¶¶ 7.203, 7.205-7.206, 7.211

¹⁰⁴ See text at notes 35-38, *supra*.

¹⁰⁵ Section 3(d) speaks only of second uses. However, it is accompanied by an official Explanation that mentions “metabolites,” a term unique to the pharmaceutical field.

¹⁰⁶ See text at notes 58-59, *supra*.

¹⁰⁷ These decisions—which emphasize national autonomy and deference—support the notion, suggested by Susy Frankel, *supra* note 44, that unilaterally-imposed TRIPS-plus obligations (in the form of FTAs and BITS) run afoul of the structural core of the Agreement. Cf. Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) (limiting US use of § 301 actions).

¹⁰⁸ Gervais, *supra* note 27, at 16 (§ 1.18); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* (2001).

¹⁰⁹ See, e.g., World Trade Organization, Preparations for the Fourth Session of The Ministerial Conference, Communication from India, WT/GC/W/459 (Nov. 6, 2001); T.N. Srinivasan, *India at the Doha Round*, <http://www.econ.yale.edu/~srinivas/India%20in%20the%20Doha%20Round.pdf>.

and closely followed.¹¹⁰ It is also trying to simplify the post-Doha waiver/amendment procedures, which—as we saw—are complicating the ability of developing countries to import generic pharmaceuticals.¹¹¹ At the same time, it is raising other questions concerning generic drug importation before the TRIPS Council.¹¹² Furthermore, India is working on protecting its own intellectual contributions. It is pursuing its interest in increasing protection for geographic indications and in protecting traditional knowledge from biopiracy (or, alternatively, to promote benefit sharing).¹¹³ It is also at the forefront on the protection of biological materials under the Convention on Biological Diversity and has made various proposals for resolving conflicts between TRIPS and the CBD.¹¹⁴ India is, of course, not alone on these initiatives. On the generic drug issues, it is joined by Brazil;¹¹⁵ on biological diversity, its allies include Brazil, China, Ecuador, and South Africa.¹¹⁶ For geographic indications, it is aligned with the EC (and opposed by Argentina).¹¹⁷

For emerging nations, WIPO is an even more attractive venue. It has a more open structure than does the WTO and in recent times, has been more active than the WTO in considering new norm-building initiatives. Although its stated mission is to “promote intellectual property throughout the world,” one of the reasons that negotiations over intellectual property shifted to the WTO was because WIPO was perceived to be more inclined toward balance: developing countries not only have an equal vote, they cannot be bought off with side-payments in the form of access for its commodities to world markets. WIPO also has longstanding expertise in intellectual property matters. Most important, since the shift in focus to the WTO, WIPO has had to work hard to maintain

¹¹⁰ See, e.g., Seema Sapra, INDIA IN THE WTO, <http://indiainthewto.wordpress.com/about/> (last visited July 7, 2009), a blog maintained by doctoral student Seema Sapra.

¹¹¹ See Seema Sapra, *Archive for the 'TRIPS Issues' Category*, INDIA IN THE WTO, <http://indiainthewto.wordpress.com/category/trips-issues/> (last visited July 7, 2009); text at notes 31 and above 43, *supra*.

¹¹² *Id.* See also Keiru, *India: Intervention at WTO TRIPS Council on Public Health Dimension of the TRIPS Agreement*, KNOWLEDGE ECOLOGY NOTES, Mar. 9, 2009, <http://www.keionline.org/blogs/2009/03/09/india-trips-council/>.

¹¹³ See Kasturi Das, *International Protection of India's Geographical Indications with Special Reference to "Darjeeling" Tea*, 9 J. WORLD INTELL. PROP. 459 (2006); Gervais, *supra* note 27, at 389 and 43 (§§ 1.46, 1.50); Gervais, *supra* note 27, at 71-74 (§§ 1.91-1.94). See also *id.* at 76-80 (§§ 1.97-1.100), proposing an amendment to the TRIPS Agreement on biological resources and traditional knowledge.

¹¹⁴ INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, TRIPS COUNCIL DISCUSSES BIODIVERSITY, HEALTH IN INFORMAL MODE (2007), <http://ictsd.net/i/ip/39087/>. For the proposals, see WTO, TRIPS Issues: Article 27.3b, traditional knowledge, biodiversity, http://www.wto.org/english/tratop_e/TRIPS_e/art27_3b_e.htm.

¹¹⁵ Keiru, *Statement by Brazil at TRIPS Council: Public Health Dimension of TRIPS Agreement*, KNOWLEDGE ECOLOGY NOTES, Mar. 4, 2009, <http://www.keionline.org/blogs/2009/03/04/brazilian-intervention-at-trips-council/>.

¹¹⁶ See *supra*, note 114. See generally, Daniel Gervais, *(Re)implementing TRIPS to Foster Innovation*, _ J. World Int'l Prop'y _ (forthcoming).

¹¹⁷ See *supra*, note 113; Press Release, Europa, WTO Talks: EU Steps Up Bid for Better Protection of Regional Quality Products (Aug. 28, 2003), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1178>; World Trade Organization, Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications For Wines And Spirits, TN/IP/W/10/Rev.2 (July 24, 2008), *available at* <http://docs.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/ip/W10R2.doc>.

its relevance; receptivity to the needs of those badly represented in the WTO appears to be one of its new niches.¹¹⁸ Because there are both formal and informal ties between WIPO and the WTO, developments in WIPO can create both freestanding intellectual property norms and also exert considerable influence on the interpretation of the TRIPS Agreement.¹¹⁹

Three developments illustrate the power that emerging economies have in this environment. First, the TRIPS' exceptions provisions, which received such a constrained interpretation by the DSB, are a particular focus. WIPO has made several studies of national limitations and exceptions (L&E) to copyright protection and has recently conducted a similar survey on patents.¹²⁰ Supplemented by an analogous effort by Chile on behalf of APEC,¹²¹ these materials demonstrate the many ways in which emerging nations have managed to improve access to protected works without substantially sacrificing the interests of intellectual property holders. The compilations thus provide templates for similarly-situated economies, as well as for developing countries that lack the legal resources to devise L&Es for themselves. The compilations are also valuable to those groups in the North that are interested in promoting access interests. As important, WIPO's authoritative collection of L&Es will help future TRIPS adjudicators understand the need for balance and the kinds of approaches necessary to keep domestic laws responsive to changes in the creative and technological environment. The *US-110(5)* and *Canada-Pharmaceuticals* and panels both showed some interest in state practices;¹²² as noted earlier, the Vienna Convention also deems state practices to be relevant interpretive data.

Second, WIPO issues more formalized reports on how its own instruments should be interpreted. The significance of these reports is controversial: although they are the product of considerable consultation and expert deliberation, they are not subjected to a vote by the membership and in some instances, they arguably go beyond simple interpretation and push the law beyond the norms set by the WIPO conventions. The DSB has, accordingly, been reluctant to consider these reports, even when they deal with

¹¹⁸ See Dreyfuss, *supra* note 84; Dinwoodie and Dreyfuss, *supra* note 8. WIPO's Working Group on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore is an example of an effort to develop new niche specialities, see <http://www.wipo.int/tk/en> (last visited July 7, 2009).

¹¹⁹ See Articles 63 and 68 of TRIPS; Agreement Between the World Intellectual Property Organization and the World Trade Organization (Dec. 22, 1995), available at http://www.wipo.int/treaties/en/agreement/pdf/trtdocs_wo030.pdf; Dinwoodie and Dreyfuss, *supra* note 8; Ruth Okediji, *WIPO-WTO Relations and the Future of Global Intellectual Property Norms*, 39 NETH. Y.B. INT'L L. 69 (2008), available at <http://www.ssrn.com/abstract=1338902>.

¹²⁰ WIPO Standing Committee on Copyright and Related Rights, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, 9th Session, June 23-27, 2003, WIPO Doc. SCCR/9/7 (Apr. 5, 2003), see Hugenholtz and Okediji, *supra* note 36; WIPO Standing Committee on the Law of Patents, 13th Session, March 23 to 27, 2009, WIPO Doc. SCP/13/3 (Feb. 4, 2009), available at http://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_3.pdf.

¹²¹ WIPO Standing Committee on Copyright and Related Rights, Draft Report, 16th Session, March 10 to 12, 2008, WIPO Doc. SCCR/16/3 Prov. (Sept. 5, 2008), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_3_prov.doc.

¹²² See e.g., *US-110(5)*, *supra* note 60, at ¶ 6.55; *Canada-Pharmaceuticals*, *supra* note 59, at ¶ 7.82.

measures that have been incorporated by reference into the TRIPS Agreement.¹²³ But that could easily change. Emerging nations participate vigorously in the promulgation of these reports and clearly signal the points that are contentious. These signals could be used by policymakers in other countries, by nations seeking to avoid unilateral sanctioning, and by TRIPS adjudicators to differentiate between the provisions that provide useful interpretation and those that overreach the agreed frontier.

An example is the 1999 Report on the scope of the obligation to protect well known trademarks.¹²⁴ One part of this report tackled an issue that many domestic courts have confronted: the definition of a well known mark; another sets out a rule requiring member states to protect marks from dilution. Consensus was achieved on the definition, but Argentina (among other emerging states) refused to join in the dilution recommendation on the theory that it increased the level of trademark protection well beyond the likelihood-of-confusion requirement set out in the Paris Convention and the TRIPS Agreement.¹²⁵ While it would be possible for policymakers at both national and international levels to ignore the report entirely, it has been suggested that a better course would be to follow the unanimous recommendations, but to use Argentina's substantial reservations as a reason to reject reliance on the dilution provisions.¹²⁶

Third, and potentially most far-reaching, Argentina and Brazil have engaged WIPO in an ambitious "Development Agenda."¹²⁷ Launched in the aftermath of the Doha Declaration, this initiative (as its name suggests) is primarily directed at fostering development: integrating the intellectual property goals of WIPO with the Millennium Development Goals of the United Nations more generally: eliminating the "digital divide" and the "knowledge gap" among UN members and promoting more effective technology transfer and engagement in "development oriented" technical assistance.¹²⁸ Led initially by a Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), the initiative's proponents have now attained full status as the Committee on Development and Intellectual Property (CDIP), with regular meetings on a comprehensive set of recommendations.¹²⁹

As the Development Agenda has matured, its ambitions have evolved. They now deal with many of the issues at the overlap between the interests of emerging and

¹²³ See, e.g., *China-Enforcement*, *supra* note 82, ¶¶ 7.567, 7.585.

¹²⁴ WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, WIPO Doc. Publictaion 833(E) (Sept. 20-29, 1999), *available at* http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm.

¹²⁵ See WIPO, Memorandum of the Director on the Joint Recommendation, WIPO Doc. A/34/13 ¶ 8 (August 4, 1999), *available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1101. In contrast, the United States used the TRIPS Agreement as an excuse to ratchet up the level of trademark protection to include dilution, see GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 211 (2d ed. LexisNexis 2008).

¹²⁶ Dinwoodie & Dreyfuss, *supra* note 8.

¹²⁷ WIPO, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WIPO Doc. WO/GA/31/11 (Aug. 27, 2004), *available at* http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.doc.

¹²⁸ *Id.*

¹²⁹ See http://www.wipo.int/meetings/en/details.jsp?meeting_id=17382.

developing countries. These include proposals on protecting traditional knowledge and genetic resources, on drafting competition law, and on building technological and institutional infrastructure.¹³⁰ Notably, the initiatives also encompass many of the access problems that are equally vexing lawmakers in the North. For example, the CDIP was instructed to “[c]onsider the preservation of the public domain within WIPO’s normative processes . . . [, to] deepen the analysis of the implications and benefits of a rich and accessible public domain,”¹³¹ and to review the flexibilities available under international intellectual property law.¹³² To these ends, the CDIP has proposed studies of how the trademark, copyright, and patent systems protect the public domain and access interests; it is commissioning work on the interface between intellectual property and competition law; and developing proposals to revise licensing practices in order to improve access to protected works.¹³³ The CDIP is also commissioning economists to study the intellectual property system and examining proposals on the preservation of library materials, exclusions to patentable subject matter, and improving usage and dissemination of patented information.¹³⁴

These efforts have just begun; it remains to be seen whether they can be accomplished in a freestanding agreement and whether they will require amendments to TRIPS. Either way, the initiative that Argentina, Brazil, India, and other emerging economies have shown will have a significant impact on the development of the world’s norms regarding access to creative materials and to the opportunities to participate creative pursuits.

III. The Role of Emerging Nations in Developing Global Administrative Law Norms

Emerging—both as an economy and onto the world stage—is not an easy task and most countries do not accomplish it on their own. For one, they derive substantial strength from building coalitions with like-minded nations. As we saw, Brazil and Argentina jointly proposed the Development Agenda for WIPO; India has partnered with Argentina in opposing protection for second-use patents; the “Chindia” construct suggests how often China’s interests align with those of South East Asia.¹³⁵ Emerging economies also frequently partner with less developed countries, and occasionally, as in India’s alignment with the EC on geographic indications, with developed nations as well.¹³⁶

Civil society has also played a key role in emerging countries’ success, both in terms of tailoring domestic legislation to local needs and in furthering intellectual

¹³⁰ See, e.g., Provisional Committee on Proposals, *supra* note 61, at Annex 1, Clusters A and B.

¹³¹ *Id.*, Cluster B, ¶ 17. See also ¶ 20.

¹³² *Id.*, ¶¶ 17 & 22.

¹³³ WIPO, Committee on Development and Intellectual Property (CDIP), WIPO Doc. CDIP/3/3 (Mar. 18, 2009), available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_3.doc.

¹³⁴ WIPO, Committee on Development and Intellectual Property (CDIP), WIPO Doc. CDIP/3/5 (Mar. 23, 2009), available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_5.doc.

¹³⁵ See, e.g., PETER ENGARDIO, CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS (2006).

¹³⁶ See, e.g., Yu, *supra* note 16.

property agendas on the world stage. For example, Greg Shaffer and his coauthors have demonstrated how Brazil's ascendancy has depended strongly on the combined efforts of a professionalized political corps, well-functioning trade associations, an academy interested in fostering legal education, and NGOs, such as Doctors Without Borders and Oxfam, with specific technical expertise on intellectual property matters.¹³⁷ Duncan Matthews has likewise documented the way in which civil society helps provide emerging economies with the information and technical knowledge they need to follow the broad array of issues with which they are concerned.¹³⁸

Significantly, many of the groups involved in what Amy Kapczynski calls "A2K mobilization"¹³⁹ are also involved in efforts at the far ends of the development spectrum. They are active in helping developing countries deal with their international obligations. In that role, they shore up the natural alliances between the Middle and the South.¹⁴⁰ And because some of the leading figures come out of the free software movement, the farmers' rights movement, the open genomics movement, the Creative Commons, organizations of librarians, and the like, these organizations also create "back door" alliances between emerging countries and the low-protectionist factions that are having difficulty making headway in the political arena in the North.¹⁴¹

But as Duncan Matthews has shown, protectionist interests have fought back. The United States and the European Union use their entrenched positions to devise negotiation strategies that mute the voices of those involved in protecting access interests.¹⁴² One example is the move from WIPO to the WTO, which diluted the power of developing countries to resist an international instrument requiring high levels of intellectual property protection. The WTO's inhospitality to civil society participation is another. Even more important is the United States' continued use of Special 301 actions, including priority watch lists to threaten sanctions if standards are not raised to US-approved levels. And the proliferation of FTAs, BITs, and EPAs is an especially pernicious development. These deals are often struck with developing countries at a time in their development when they cannot resist Northern demands. The agreements assure intellectual property protection in markets that are so small, it is hard to believe that improving trading opportunities is their main objective. Rather, their intent seems to be to ratchet up apparent global norms on the level of protection. They increase the number of states with an (ostensibly) shared view on the meaning of TRIPS and, depending on how the most-favored-nation provision in the TRIPS Agreement is interpreted, they may

¹³⁷ Shaffer, *supra* note 16.

¹³⁸ Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369, 1374 (2007).

¹³⁹ Kapczynski, *supra* note 29. A2K stands for access to knowledge. See also Margaret Chon, *A Rough Guide to Global Intellectual Property Pluralism*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY PROTECTION (Rochelle Dreyfuss, Harry First, Diane Zimmerman eds., forthcoming).

¹⁴⁰ See, e.g., Yu, *supra* note 16.

¹⁴¹ Cf. *Obama Administration Asked for 'Balance' in Intellectual Property Appointments*, *supra* note 57, (describing the organizations working to improve balanced lawmaking in the United States). An example is the paper cited in *infra* note 144, on the effects of bilateralism. It was written by an academic who was commissioned by Oxfam as part of its Cut the Cost of Medicines Campaign.

¹⁴² Duncan Matthews, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* (Routledge 2003).

even automatically raise world standards.¹⁴³ In addition, it has been suggested that Special 301 actions, FTAs, BITs and EPAs are aimed at splitting coalitions—at using side agreements to buy off states that would benefit from advocating lower levels of protection and preventing them from participating in international lawmaking protective of access interests.¹⁴⁴

Faced with this strategy, emerging nations have no choice but to fight for more than just intellectual property norms that suit their needs: they must also protect their partners' ability to participate in international negotiations. They must, in other words, advocate for precisely the same transparency, and accountability principles that are at the core of the Global Administrative Law program. For example, the PCDA's initial agenda proposed a new mandate: "WIPO shall conduct informal, open and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs."¹⁴⁵ That agenda also contained a cluster of governance goals that emphasized cooperation by "relevant international organizations."¹⁴⁶ These included measures that ensure "the wide participation of civil society,"¹⁴⁷ steps to "improve WIPO's role in finding partners to fund and execute projects for IP-related assistance in a transparent and member-driven process;"¹⁴⁸ as well as commitments to operate "in a manner open and transparent to all Members" and to provide advance notice and agendas for all meetings.¹⁴⁹ The CDIP is beginning to implement these ideas in the work programs of WIPO's various Standing Committees.¹⁵⁰

Although the emphasis has thus far related to procedural protections that *facilitate* participation, rampant resort to bilateral negotiations suggests that there may also be a problem making sure that other states (and their allies) are *disposed* to act in ways that further access interests. Margaret Chon, relying on work by Amartya Sen and Martha Nussbaum, has suggested that the global intellectual property system also needs a set meta-norms designed to foster human capabilities (health, nourishment, literacy and basic mathematical and scientific training).¹⁵¹ Although her arguments are made on fairness and distributive justice grounds, such norms could also operate strategically. If these meta-norms were adopted, easy targets could no longer be picked off with bilateral agreements. They would have, in effect, precommitted to safeguard the intellectual property interests of their weakest citizens. Likewise, northern protectionists would have less room to maneuver. In addition to appealing to broader human rights arguments,

¹⁴³ TRIPS, *supra* note 1, art. 4; Frankel, *supra* note 44.

¹⁴⁴ PETER DRAHOS, BILATERALISM IN INTELLECTUAL PROPERTY (2001), *available at* http://www.anu.edu.au/fellows/pdrahos/reports/pdfs/bilateralism_ip.pdf.

¹⁴⁵ Provisional Committee on Proposals, *supra* note 61, Annex I, Cluster B, ¶ 21.

¹⁴⁶ *Id.*, Cluster E, ¶ 39.

¹⁴⁷ *Id.*, ¶ 42.

¹⁴⁸ *Id.*, ¶ 43.

¹⁴⁹ *Id.*, ¶ 44.

¹⁵⁰ CDIP, *supra* note 134.

¹⁵¹ Chon, "From Below," *supra* note 33 (citing AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) and MARTHA C. NUSSBAUM, HUMAN CAPABILITIES, FEMALE HUMAN BEINGS, IN WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathan Glover eds., 1995)).

limits could also be created from within intellectual property law itself. Indeed, several academics have made such proposals.¹⁵² Spearheaded by Annette Kur and Marianne Levin, a Nordic group of professors has even put forward specific suggestions for amending the TRIPS Agreement to impose ceilings on the level of protection that a WTO member may enact.¹⁵³

Emerging nations could produce yet another procedural benefit. Although the appeal to multiple international organizations is often conceptualized as “regime shifting,” it may be more productive to think of international intellectual property lawmaking organically, as a network of nodes, related through assorted links. Thus, while the WTO and WIPO take center stage in generating international intellectual property law, the World Health Organization has a strong interest in issues regarding access to medicines;¹⁵⁴ UNCTAD and UNIDO are involved in development issues;¹⁵⁵ UNESCO is engaged in improving technology transfer;¹⁵⁶ UNED is encouraging environmental technologies,¹⁵⁷ and the OECD is working on patent pooling as well as other patent law issues.¹⁵⁸ Emerging nations—and importantly, the civil society organizations on which they rely—act as the connective tissue in that they participate in the many fora in which their interests are at stake.¹⁵⁹ Although they may press different interests in different places (depending on the receptivity of the organization), the discussions foster cross-fertilization of ideas, which in turn promotes consensus on both intellectual property principles and meta-norms of substantive fairness and distributive justice. In that way, the increasing salience of emerging nations on the world stage could lead to a reduction in the cacophony produced by regulatory overlap.

¹⁵² See, e.g., Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 98 PROC. AM. SOC'Y INT'L L. 213, 219 (2004); Rochelle C. Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. Chi. L. Rev. 21 (2004).

¹⁵³ IPT (Intellectual Property Rights in Transition) Project, *Enough is Enough!: Ceilings on Intellectual Property Rights*, available at <http://www.law.nyu.edu/centers/engelbergcenter/conferences/ceilingsworkshop/index.htm>.

¹⁵⁴ See, e.g., WORLD HEALTH ORGANIZATION, COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INNOVATION AND PUBLIC HEALTH (CIPIH), PUBLIC HEALTH, INNOVATION AND INTELLECTUAL PROPERTY RIGHTS (2006).

¹⁵⁵ RUTH OKEDIJI, UNCTAD-ICSTD DIALOGUE ON MOVING THE PRO-DEVELOPMENT IP AGENDA FORWARD: PRESERVING PUBLIC GOODS IN HEALTH, EDUCATION AND LEARNING (2004), available at http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf; DWIJEN RANGNEKAR, UNCTAD/ICTSD CAPACITY BUILDING PROJECT, GEOGRAPHICAL INDICATIONS: A REVIEW OF PROPOSALS AT THE TRIPS COUNCIL (2002), available at <http://www.iprsonline.org/unctadictsd/docs/GI%20paper.pdf>; RUTH L. OKEDIJI, THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES 13-14 (2006), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf.

¹⁵⁶ See, e.g., Lucie Guibault, *The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment*, UNESCO E-COPYRIGHT BULLETIN, October-December 2003, available at http://portal.unesco.org/culture/en/files/17316/108747977511_guibault_en.pdf/1_guibault_en.pdf.

¹⁵⁷ Kumar, *supra* note 42.

¹⁵⁸ Birgit Verbeure, Esther van Zimmeren, Gert Matthijs, and Geertrui Van Overwalle, *Patent Pools and Diagnostic Tests*, 24 TRENDS IN BIOTECHNOLOGY 115 (2006); OECD, *Patents and Innovation: Trends and Policy Challenges* (2004), available at <http://www.oecd.org/dataoecd/48/12/24508541.pdf>.

¹⁵⁹ Cf. Matthews, *supra* note 138.

In fact, attempts to create more stable international rules through cooperation by intergovernmental organizations are already underway. The Development Agenda calls for WIPO to “intensify its cooperation on IP related issues with UN agencies ... and other relevant international organizations ... in order to strengthen coordination for maximum efficiency in undertaking development programs.”¹⁶⁰ The CDIP has already enlisted UNESCO and UNCTAD in its efforts, it is developing a coordinated program among the divisions within WIPO, and soliciting international input as it goes about furthering its agenda.¹⁶¹

To some extent, emerging economies can also improve cooperation on their own. As I have suggested elsewhere, one way to deal with overlapping interests is by developing concepts of institutional hierarchy, authority, and deference.¹⁶² Because they are enmeshed in deliberations within several organizations simultaneously, these nations can use their involvement to further these principles. For example, Argentina and India, which are both robust participants in WIPO and the WTO, also have representatives on the WHO’s Commission on Intellectual Property Rights.¹⁶³ Presumably, these positions can be used to enlist WHO’s expertise over medicine to advance the same access goals that these nations are trying to achieve in the WTO and at WIPO. At the same time, they can also influence the WTO and WIPO to accept WHO’s authority on such matters as making determinations about when nations are enduring health emergencies that require access to specific essential medicines.

CONCLUSION

With their large class of impoverished citizens and their increasing industrial muscle, emerging economies internalize all of the conflicts within the international intellectual property system. As they find solutions to their domestic problems and forge international alliances with similarly situated economies, they are positioned to taking a leadership role in developing a sounder intellectual property system—a system that recognizes the richness of the creative environment and the changing needs of both producers and consumers of knowledge products. Such a system would acknowledge not only cutting-edge science, but also traditional knowledge. It would support incentive-based knowledge production systems, but it would also make space for curiosity- and creatively-driven pursuits. Most important, it would be attentive to distributive justice and human development. As individual nations fully emerge as intellectual powerhouses, it would not be surprising if they move to the “other side” on various intellectual property issues and begin to champion the same views as developed countries pursue today.¹⁶⁴ Hopefully, however, new countries will move into their shoes and take up the challenge

¹⁶⁰ Provisional Committee on Proposals, *supra* note 61, Annex I, Cluster E, ¶ 40.

¹⁶¹ CDIP, *supra* note 134.

¹⁶² Dreyfuss, *supra* notes 41 & 84.

¹⁶³ *See supra* note 154.

¹⁶⁴ *See, e.g.*, Salama and Benoliel, *supra* note 16, who show that the domestic calculus—and hence the overall bargaining power—of emerging countries changes as their creative sectors attain dominant positions in the economy.

of keeping intellectual property law responsive to the needs of both producers and consumers of knowledge products.

As important, the same forces that are pushing the likes of India, Brazil, China and Argentina to find better accommodations among creative groups, users, and producers also propels them to foster better access to international lawmaking. The governance principles that they create may be as important a legacy as the intellectual property norms that they are currently advocating.