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## Value Divergence in Global Intellectual Property Law

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# Value Divergence in Global Intellectual Property Law

J. JANEWA OSEITUTU\*

From the money in our pockets and the goods and services that we use, to a more peaceful world—the WTO and the trading system offer a range of benefits . . . .<sup>1</sup>

China agreed to a series of intellectual property rights commitments that will protect American jobs.<sup>2</sup>

## ABSTRACT

*It is a challenge for the United States to adequately protect the interests of its intellectual property industries. It is particularly difficult to effectively achieve this objective when the interests of the United States are not in line with the social, cultural, and economic goals of other nations. Yet, as a major exporter of intellectual property protected goods, the United States has an interest in negotiating effective international intellectual property agreements that are perceived to be legitimate by the state signatories and their constituents. Focusing on value divergence, this Article contributes to the growing body of literature on developing a robust but flexible global intellectual property system. The Article argues that the trade-based approach to global intellectual property law undermines the apparent gains made in international intellectual property*

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1. *10 Benefits of the WTO Trading System*, WTO (2008), [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm) [hereinafter *WTO*].

2. *China Agrees to Significant Intellectual Property Rights Enforcement Initiatives, Market Opening, and Revisions to Its Indigenous Innovation Policies That Will Help Boost U.S. Exports at the 21st Session of the U.S.-China Joint Commission on Commerce and Trade*, U.S. DEP'T OF AGRIC., <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2010/12/0663.xml> (statement by U.S. Trade Rep. Ron Kirk).

*protection because it promotes a utilitarian economic view of intellectual property law while minimizing other values. Trade-based intellectual property also reduces the need for intellectual property interests to align, and therefore fails to achieve mutually beneficial agreement on substantive intellectual property law and policy.*

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## INTRODUCTION

In this global era, policy makers, lawyers, and adjudicative bodies must grapple with the fundamental question of how to reconcile competing values and interests. This Article uses global intellectual property law as the specific illustration of the role of values in shaping the law. Intellectual property rights, like real property rights, are informed by societal values. But the primary international legal agreement that regulates global intellectual property rights ignores the diverse national values that influence the ways in which various states determine the appropriate role for intellectual property in their society. Thus, global intellectual

property provides an opportunity to reevaluate assumptions about the purpose of intellectual property laws.

A thirty-year-old computer programmer and avid movie fan residing in the United States can afford to buy legitimate copies of the latest films even if she is not quite willing to pay the full price for the goods. Most likely, she is also able to afford the basic medications she needs to ensure her overall health and well-being. Now, imagine you are a twenty-two-year-old woman who lives in a small developing country village. You are delighted to have clean water and are grateful for your income of approximately eighty cents per day. You love American music, especially Eminem and Beyoncé, and would love to have their latest albums. You can buy the authentic version of one of these albums for approximately half your monthly salary. Alternatively, you can obtain the pirated version for something equivalent to five days' work. Yet, you know that copyright infringement is characterized as stealing, and you know that your government is under a great deal of pressure to protect copyright. You are therefore inclined to enjoy whatever you can hear on the radio. Some of the artists might be willing to forego the rents from your purchase of the legitimate albums, but the record labels and their governments are not quite so forgiving.

But what if you must choose between purchasing a schoolbook that you need for your part-time studies at a cost equivalent to two months of your salary and obtaining photocopies for a fraction of the price? What if you grew up believing in the value of education as taking priority over everything else? What if the national conscience is that education is the key to social and economic development, not to mention national and global success?<sup>3</sup> Your country also strongly values a healthy population and tries to keep drug prices low so that people can afford their medications. This scenario illustrates how it becomes more challenging to strike the appropriate balance between user interests and producer interests in light of the values<sup>4</sup> and goals of the nation-state.

Intellectual property is a trade priority for the United States because American exports of copyrighted musical works, films, and literary works can be tremendous sources of revenue for American industries.<sup>5</sup> The same is true for American

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3. Pamela Samuelson, *Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULT. ECON. 95, 103 (1999) ("Some culturally laden rules will likely come under attack as violations of TRIPS, and some of these challenges may be successful. No WTO member could expect to justify denying copyright protection to the works of foreign authors on the ground that the denial would advance a deeply held cultural value of promoting low-cost education and dissemination of knowledge, as the U.S. did in the nineteenth century."). *But see* James Thuo Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885, 903 (2004) ("[D]eveloping countries are suspicious of a form of development that equates progress primarily with economic growth achieved through export-led growth, which excludes attainment in meeting social objectives like education and health.").

4. The word "values" can be defined in various ways. The English language definition that best refers to the use of the word "values" in this Article is "consider to be important or beneficial." THE CONCISE OXFORD DICTIONARY 1584 (Judy Pearsall ed., 10th ed. 1999).

5. Amanda Horan, Christopher Johnson & Heather Sykes, *Foreign Infringement of Intellectual Property Rights: Implications for Selected U.S. Industries 3* (U.S. Int'l Trade Comm'n, Office of Industries Working Paper No. ID-14, 2005) (noting that the value added

pharmaceutical, mechanical, and other technologies.<sup>6</sup> It is not surprising, therefore, that American industry associations seek to stamp out illegal downloading of music and films, and to strengthen global border controls so that counterfeit goods and pirated works can be seized and destroyed.<sup>7</sup> Efforts to change the public perception of intellectual property infringement are evident from the television and movie advertisements that characterize copyright infringement as theft,<sup>8</sup> to the Recording Industry Association of America materials designed to discourage students from downloading free music.<sup>9</sup>

Yet the online piracy problem is so rampant in certain countries that some companies have attempted to deal with online piracy by acknowledging this reality, and serving the market rather than fighting it.<sup>10</sup> At the same time, legislation prohibiting the circumvention of digital locks has heightened concerns about fair use in copyright law and access to knowledge.<sup>11</sup> With respect to patents, non-governmental organizations and commentators have raised the alarm about the implications of patents for public health issues.<sup>12</sup> The public has been made aware

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in the U.S. economy due to the film, music, publishing, and entertainment and business software industries reached \$626.2 billion, or 6% of the U.S. economy, in 2002).

6. *Id.* at 4 (noting that for the pharmaceutical industry, total U.S. production amounted to an estimated \$100 billion in 2001).

7. *Id.* at 4–5 (noting that estimated losses due to foreign copyright piracy in fifty-two selected countries amounted to \$12.5 billion and that the value of imported goods seized by U.S. Customs and Border Protection for intellectual property rights (IPR) infringement in 2003 amounted to \$94 million).

8. *See, e.g., Governments Around the World Take a Stand for Creators, Consumers, MOTION PICTURE ASS'N OF AM.*, <http://www.mpa.org/contentprotection/public-service-announcements>.

9. The Recording Industry Association of America (RIAA), an organization that represents the majority of American record companies characterizes the illegal downloading of music as theft. *See Scope of the Problem*, RECORDING INDUS. ASS'N OF AM., [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy-online-scope-of-the-problem](http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem). The counterargument to this is that unlike the theft of physical goods, downloading free music may deprive the owner from collecting income from the sale of the musical work, but it does not deprive the owner, or anyone else, from the use and enjoyment of the musical work. Unlike physical objects, intangible goods cannot be possessed and controlled. *See Mark A. Lemley, Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

10. David Barboza, *Google and Big Music Labels Are Betting on Free Downloads in China*, N.Y. TIMES, Apr. 6, 2009, at B4, available at <http://www.nytimes.com/2009/04/06/technology/companies/06music.html> (“Last Monday, the world’s biggest record labels, including EMI, the Warner Music Group and Vivendi’s Universal Music, said they would seek to profit here by working with Google and offering free downloads of music to anyone inside China. Google, which has no plans to offer the service elsewhere, hopes to build traffic and win new advertisers by allowing the Chinese to search for free music on its site.”).

11. Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT’L L.J. 637, 657 (2009).

12. *See* Lawrence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 986–88 (2007) (noting the various United Nations actions and resolutions with respect to access to medicine and intellectual property rights, based on the work of United Nations officials as well as the work of nongovernmental

that life-saving medicines are not always accessible to those who need them most and pharmaceutical companies have had to respond accordingly. There has also been a resulting wealth of scholarship on access to medicines and access to knowledge.<sup>13</sup>

The World Trade Organization (WTO)<sup>14</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>15</sup> is the primary multilateral agreement at the center of these global controversies. Consumers are not always able to pay the high prices for patented or copyrighted products, or they may face difficulties in obtaining the copyrighted information or patented medications they need. Alternatively, strong intellectual property laws may not be part of the national value system. Taken together, these factors would make intellectual property infringement a rational choice.<sup>16</sup> On the other hand, the adequate enforcement of intellectual property standards is seen as a problem. Indeed, some commentators identify the enforcement provisions in the TRIPS Agreement as being relatively weak.<sup>17</sup> The response is to create more rules aimed at enforcement, as the Anti-

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organizations); J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 450–51 (2000) (noting developing country concerns about the costs associated with intellectual property protection, including issues such as access to medicine).

13. See, e.g., Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165, 171 (2000) (noting the patent-related health concerns of developing country members not having access to medicine); Shaver & Sganga, *supra* note 11, at 639 (suggesting that the “right to take part in cultural life should be interpreted so as to take advantage of the insights of recent scholarship on free culture and access to knowledge”); Ellen ‘t Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 28–30 (2002) (describing major criticisms of TRIPS in terms of access to medicine and stating that the safeguards that TRIPS puts in place “increasingly present barriers to medicine access”); Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 778 (2009) (noting that “international copyright system should place greater emphasis on human rights objectives and norms” with respect to access to knowledge).

14. The World Trade Organization was established in 1994. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

15. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

16. See, e.g., Llewellyn Joseph Gibbons, *Do As I Say (Not As I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations*, 64 S.M.U. L. REV. 923 (2011) (arguing that, on a national scale, intellectual property piracy has been part of the road to development for various nations). As an example, Professor Gibbons discusses how American patent law sanctioned the piracy of European inventions as part of the United States development strategy. *Id.*

17. Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L & COMP. L. 37, 42 (2002).

Counterfeiting Trade Agreement (ACTA)<sup>18</sup> purports to do, or to increase intellectual property protection as the intellectual property chapter of the Trans-Pacific Partnership Agreement (TPP)<sup>19</sup> aims to do. But strong enforcement rules seek to correct a perceived problem without attempting to understand or address the reasons why various WTO member states, or their citizens, may hold differing views of intellectual property law and the appropriate balance of interests.

As a major exporter of intellectual property protected goods,<sup>20</sup> the United States has a clear interest in facilitating the creation of effective international intellectual property agreements. At a minimum, this requires the conclusion of agreements that are perceived to be legitimate by the state signatories and their constituents. This sense of legitimacy will be affected by whether or not the agreements are seen to be beneficial for all the parties.<sup>21</sup> The challenge for the United States, therefore, is to effectively protect the interests of its intellectual property industries, particularly where these interests may not coincide with the social, cultural, and economic goals of other nations.<sup>22</sup>

Scholars have written about the level of flexibility that TRIPS allows, with the term “TRIPS flexibilities” becoming part of the global intellectual property narrative. Some scholars express the view that TRIPS has sufficient flexibility, which should be used,<sup>23</sup> while others observe the inequity in TRIPS and encourage

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18. *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF THE U.S. TRADE REP., <http://www.ustr.gov/acta> [hereinafter ACTA].

19. *Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REP., <http://www.ustr.gov/tpp> [hereinafter TPP]. On Dec. 14, 2009, the USTR notified Congress of its intent to commence negotiations. *Id.* The negotiating partners are the United States, Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. The seventh round of negotiations commenced on June 20, 2011. *Id.* A leaked copy of the draft intellectual property chapter is available at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

20. Bradley S. Butterfield, Kevin J. Mason, Joseph B. Payne & Robert R. Trumble, *Human Resources and Intellectual Property in a Global Outsourcing Environment: Focus on China, India, and Eastern Europe*, 15 INT'L HUM. RES. J. 1, 1 (2006) (stating that companies in the United States earned \$44 billion in royalties and license fees overseas in 2002).

21. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 278 (1991) (“To be effective, a TRIPS Agreement must reconcile the needs of both proprietor nations of the West and the consuming countries of the developing world.”).

22. *Id.* (“A durable agreement must be based on mutual gain and cannot be imposed by the information-producing countries on the developing world. Unless the interests of the information-consuming nations (the developing countries) are considered seriously, a long-run solution to the problem will not occur. In sum, the major players in the GATT negotiations must begin to focus on an agreement that promises mutual gain.”).

23. Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 Mich. St. L. Rev. 137, 160–64 (noting that there are ways to protect traditional knowledge using the existing TRIPS text); Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CAL. L. REV. 1571, 1574 (2009) (suggesting that TRIPS offers developing countries a greater degree of flexibility in the area of pharmaceuticals than has been generally recognized).

a more development-oriented interpretation of TRIPS.<sup>24</sup> Some commentators advocate a trade-based strategy as an effective way to improve global intellectual property protection,<sup>25</sup> while others question the legitimacy of TRIPS<sup>26</sup> or its utility for developing countries.<sup>27</sup> Distinct from the existing literature, this Article contributes to the discussion on developing a robust but flexible global intellectual property regime by promoting value divergence as a means to facilitate interest convergence. The Article argues that the weakness of trade-based intellectual property is that it obscures the divergent ways in which nations value their intellectual property. However, taking the value differences into account is essential to the long-term success of global intellectual property law.

Focusing on the long-term interests of the United States and the other WTO member states, this Article advocates a change in the direction of global intellectual property law. Trade-based intellectual property has emphasized a commodity-oriented<sup>28</sup> approach to intellectual property that tends to negate the non-economic contributions of patent and copyright laws.<sup>29</sup> Nonetheless, despite its shortcomings, TRIPS, and other trade-based intellectual property agreements, should not be rejected entirely. Rather, the merger between trade and intellectual property should shift from utilizing trade as a tool to harmonize business-driven intellectual property laws to an intellectual property sensitive lens that accounts for differences

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24. See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1041–46 (2009) [hereinafter Yu, *Objectives*] (suggestion that Articles 7 and 8 of TRIPS can be used as a “seed” of development); see also Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 387–89 (2006) [hereinafter Yu, *Discontents*] (describing how TRIPS can be interpreted through a “pro-development lens”).

25. Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 BUFF. L. REV. 713, 757–60 (1999) (noting that there is a “long-term potential of IP to stimulate domestic creativity and attract foreign investment, thereby aiding national economic development” for developing countries); Leaffer, *supra* note 21, at 294 (noting that solutions to piracy problems “must be trade-based and flexible enough to meet the needs of the international community”).

26. See Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion*, 27 U. PA. J. INT’L ECON. L. 681, 724–38 (2006) (noting numerous reasons why the TRIPS is a contract of adhesion).

27. *Id.* at 736–37 (stating that the terms in TRIPS are “onerous and unfavorable” for developing countries).

28. Samuelson, *supra* note 3, at 96 (“[TRIPS] puts a trade ‘spin’ on intellectual property rules that have in the past been guided by a host of other principles, including those related to cultural policies embodied in national laws. This last difference from earlier agreements may, in the long run, have a profound impact on national intellectual property laws in part because it may push national laws toward greater commodification of intellectual property products.” (footnote omitted)).

29. Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 917 [hereinafter Okediji, *Public Welfare*] (observing that intellectual property rights have existed for the welfare of the state and that “[t]he extension of intellectual property rights to the global context, and its rationalization as a free trade issue, obscures the importance of national conditions and the priority of domestic welfare goals even where these may be inconsistent with globalization”).

in national values.<sup>30</sup> In so doing, it would also support the theoretical trade policy goal of promoting harmonious relationships.<sup>31</sup> In other words, trade-based intellectual property should shift towards a vision that embraces the diverse goals and values that national intellectual property regimes may reflect.

Central to this analysis is an acknowledgement of the relevance of the value-driven interests; including the political, cultural, and economic differences and motivations of the various actors in the international community. This approach takes a long-term focus rather than a short-term focus, which makes sense in light of the long-term nature of these trading relationships.<sup>32</sup>

The WTO claims to promote peace by facilitating trade and “providing countries with a constructive and fair outlet for dealing with disputes over trade issues.”<sup>33</sup> However the trend in global intellectual property appears to be inconsistent with this theoretical objective of trade law. It is not clear that the current model of trade-related intellectual property fits with the goal of promoting peace<sup>34</sup> and cooperation rather than primarily serving to protect the business interests of multinational corporations.<sup>35</sup> Thus, while there may be a shared interest in reaching agreements

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30. The ability of the trade regime to incorporate intellectual property, while recognizing the differences between the two will have an impact on the long-term success of TRIPS. *See, e.g.*, 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, 281 (1997) (“Success will depend on how well the GATT/WTO system addresses the differences between intellectual property and other trade matters.”).

31. *WTO, supra* note 1 (“History is littered with examples of trade disputes turning into war. . . . [I]f trade flows smoothly and both sides enjoy a healthy commercial relationship, political conflict is less likely. What’s more, smoothly flowing trade also helps people all over the world become better off. People who are more prosperous and contented are also less likely to fight.”). With respect to developing countries, promoting value divergence and gradual interest convergence would also be consistent with commitments to assist developing countries in accordance with GATT (1947) arts. XXXVI and XXXVIII and GATS art. IV. *See infra* Part VI.B.

32. *WTO, supra* note 1 (noting that a short-sighted protectionist view that defends particular sectors against imports ignores how other countries are going to respond). The WTO recognizes the value of long-term thinking, acknowledging that “[t]he longer term reality is that one protectionist step by one country can easily lead to retaliation from other countries.”). The WTO purports, therefore, to seek a win-win situation.

33. *Id.* (emphasis omitted). Whether or not one accepts this as the truth or as rhetoric, promoting peace remains one of the theoretical aspirations of trade law. As long as this is a stated goal, then trade agreements should be held accountable to this standard. Avoiding trade disputes and conflicts would militate in favor of balanced agreements that benefit all parties involved rather than agreements that are primarily aimed at protecting the interests of industrialized nations.

34. *See, e.g.*, JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 56–59 (5th ed. 2008) (discussing the theoretical understanding that trade promotes peace). Of course, as the authors note, promoting peace is not the only foreign policy goal of international trade. For instance, U.S. trade policy goals may include building allies or pressuring countries to change their policies. *Id.* at 59.

35. Okediji, *Public Welfare, supra* note 29, at 858–59 (“While the TRIPS negotiations ostensibly took place between state actors, the driving force of the negotiations were private

that facilitate trade in intellectual property goods, there may be distinct societal objectives for intellectual property law, even for those countries with similar levels of economic development. These differences have value, and are relevant because intellectual property is unlike traditional trade subject matter.<sup>36</sup> Intellectual property policy could be narrowly construed as purely economic policy. However it does not have to be necessarily so confined. For a given nation, it can be an important part of cultural policy, educational policy, or economic development policy.

Part I of this Article explains the incorporation of intellectual property into the trade agenda as a deliberate strategy to avoid the need to agree on mutually beneficial intellectual property policies. As part of this discussion, the Article identifies some of the differences between traditional trade subject matter and intellectual property. In Part II of the Article, value divergence and gradual interest convergence are proposed as an alternative strategy for strengthening the international intellectual property regime. Part III of the Article outlines the disturbing trend towards increased intellectual property protection and the role of the economically powerful nations in setting global intellectual property norms. Part IV of the Article utilizes WTO disputes involving China and Canada to illustrate how value differences surface in the TRIPS context. Both of these countries have been identified by the United States as being among the most egregious violators of American intellectual property rights.<sup>37</sup> Finally, the Article explains how value divergence is consistent with the TRIPS Agreement and how it can gradually lead to the convergence of intellectual property interests.

#### I. TRADE-RELATED INTELLECTUAL PROPERTY AS A STRATEGIC DECISION WITH A SHORT-TERM VISION

This discussion primarily focuses on intellectual property treaties such as TRIPS (the “Agreement”), and bilateral or plurilateral trade agreements that are premised on trade liberalization. Despite the proliferation of trade-related intellectual property agreements, TRIPS remains the most significant multilateral intellectual property agreement. Hence, it is the focal starting point for this value divergence analysis. In particular, the Article discusses copyright and patent law because these areas of intellectual property law have the greatest implications for human development, including access to new technologies and knowledge goods.

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actors, specifically intellectual property industries and their associated lobbies.”); Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post-TRIPS Strategies*, 10 CARDOZO J. INT’L & COMP. L. 79, 81–86 (2002). It is not only TRIPS that has been questioned, but the entire WTO trading regime. However, this Article will focus on trade-related intellectual property rather than on the WTO regime in general. See Gathii, *supra* note 3, at 908 (“To address the WTO’s legitimacy crisis, there is a real need to make the trading system work for all countries, and that means a good-faith effort to address these substantive issues of concern to developing countries.”).

36. See *infra* Part III.

37. OFFICE OF THE U.S. TRADE REP., 2010 SPECIAL 301 REPORT 5 (Apr. 30, 2010) [hereinafter 301 REPORT].

*A. Brief Background to TRIPS*

The trade-based approach to global intellectual property is based on the short-term economic interests of intellectual property-producing nations. For instance, the stated rationale for protecting American intellectual property overseas is that infringing activity causes financial losses for rights holders, and “undermines key U.S. comparative advantages in innovation and creativity to the detriment of American businesses and workers.”<sup>38</sup>

In the shift to an information economy, the United States became more concerned about protecting its intangible rights.<sup>39</sup> Developing countries were seen as the primary offenders.<sup>40</sup> However, prior attempts at creating a global intellectual property regime within the World Intellectual Property Organization (WIPO) were unsuccessful partly due to disagreement about whether restricting competition to protect intellectual property profits enhances the welfare of the consuming public.<sup>41</sup> Hence, the use of the General Agreement on Tariffs and Trade (GATT) was identified as a solution to weak intellectual property rights in developing countries.<sup>42</sup> The GATT would assist the intellectual property-producing nations in ensuring that their intellectual property rights would be protected overseas.<sup>43</sup>

While supporting the use of the GATT framework, some scholars recognized that high intellectual property standards should be a long-term objective and that it would be necessary to take into account the “countervailing interests of the developing nations whose exigent economic interests differ from those of the

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38. *Id.* at 5. The report also suggests links between intellectual property piracy and organized crime, as well as threats to public safety. *Id.* at 10–11, 45. Finally, it is suggested that piracy “hinders the sustainable economic development of other countries.” *Id.* at 5.

39. Leaffer, *supra* note 21, at 274 (“In its progressive shift to an information-based economy, the United States has become increasingly vulnerable to piracy, expropriation, and otherwise inadequate protection of its intellectual property in certain foreign countries.” (footnote omitted)). The perception that strong intellectual property rights are a critical element of American comparative advantage remains true today. See, for example, a May 17, 2011 letter from various senators to President Obama, urging him to ensure that the TPP includes high standards of intellectual property protection. The senators wrote, “A robust knowledge economy provides the United States with one of our largest sources of competitive advantage, and intellectual property is the engine that drives it. Put bluntly, intellectual property equals jobs.” *Hatch, Cantwell Lead Bipartisan Group of Senators in Calling on President to Maintain Strong IP Rights in Trans-Pacific Partnership Trade Agreement*, THE U.S. SENATE COMM. ON FIN., <http://finance.senate.gov/newsroom/ranking/release/?id=9bcacbf4-3041-49ad-b4cd-6cd9bbad55a4>.

40. Leaffer, *supra* note 21, at 281–88.

41. Dreyfuss & Lowenfeld, *supra* note 30, at 281 (“Intellectual property regimes were initially to be integrated by the World Intellectual Property Organization (WIPO). For many years, that effort was stalled in part because its members could not agree on issues such as whether (and when) consumer welfare is enhanced by sacrificing competition to protect profits in creative efforts.”).

42. Leaffer, *supra* note 21, at 276–77.

43. *Id.* at 299–300.

West.”<sup>44</sup> Professor Leaffer therefore suggested a two-tier system that would allow lower levels of protection for developing countries.<sup>45</sup> The United States’ negotiating position during the Uruguay round, however, was that developing countries should not receive differential treatment.<sup>46</sup> Nonetheless, developing countries and least developed countries were ultimately given a delayed implementation period.<sup>47</sup>

### *B. Strategic Advantages of the Trade-Based Strategy*

TRIPS was the first major step towards harmonizing global intellectual property standards in a trade-based regime. The Agreement covers seven categories of intellectual property, including patents, copyrights, trademarks, and geographical indications.<sup>48</sup> The international agreements that existed prior to TRIPS, such as the Berne Convention<sup>49</sup> and the Paris Convention,<sup>50</sup> were independent of the regime for the regulation of international trade. From the perspective of the United States, these treaties were inadequate because they did not establish substantive norms, nor did they have any effective enforcement mechanism.<sup>51</sup> The WIPO was also seen as a forum that was sympathetic to developing countries and those who do not favor a pro-intellectual property stance.<sup>52</sup> The use of a trade-based approach through the WTO was a way to overcome the difficulty of having to accommodate and address these differences.<sup>53</sup>

The enforceability of the agreements that were part of the WTO framework was also perceived to be an advantage for the *demandeurs* of increased intellectual property protection. Compared to other areas of international law, the WTO has a relatively well-developed dispute resolution system.<sup>54</sup> To the extent that

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44. *Id.* at 278.

45. *Id.* at 306–07 (recommending a transitional period for developing countries, Professor Leaffer states that “[a] system that does not take into account the differing cultural, economic, and moral aspirations of the developing countries will be doomed to failure and will not be enforced effectively by those countries on which it is imposed”).

46. *Id.* at 306.

47. TRIPS, *supra* note 15, art. 66. This period was subsequently extended for least developed countries. *See infra* note 280.

48. *Id.* arts. 1.2, 2, 9, 15, 22 & 27.

49. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne Convention].

50. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

51. Leaffer, *supra* note 21, at 293–94.

52. *See* Andrew J. Grotto, *Organizing for Influence: Developing Countries, Non-Traditional Intellectual Property Rights and the World Intellectual Property Organization*, 8 MAX PLANCK Y.B. U.N. L. 359, 372 (2004).

53. Leaffer, *supra* note 21, at 294.

54. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994,

international law can be enforced, trade rules have been enforced through the use of GATT panels and, subsequently, the WTO Dispute Settlement Body.<sup>55</sup>

The implementation of a dispute settlement recommendation can be reviewed,<sup>56</sup> and if a member state fails to comply with the rules, affected states can be authorized to retaliate by withdrawing trade concessions, for example.<sup>57</sup> In practice, a WTO member can choose to ignore a panel or Appellate Body ruling.<sup>58</sup> Nonetheless, WTO members can resort to the WTO dispute resolution mechanism as a way to promote compliance with the intellectual property minimum standards.<sup>59</sup>

Thus, incorporating intellectual property into the trade agenda was a deliberate strategy that appears to have successfully eliminated the need to find points of mutual interest in intellectual property law and policy.<sup>60</sup> Because the focus shifted to reaching agreement on trade, it reduced the need to negotiate agreement on mutually satisfactory intellectual property norms and subsumed divergent national intellectual property values within the larger trade agenda.<sup>61</sup>

This strategy enabled countries with strong intellectual property industries, like the United States, to make trade-offs with countries without intellectual property intensive industries.<sup>62</sup> The advantage of linking trade to intellectual property rights is that it created an incentive for WTO members to conclude an agreement, even if they were not intellectual property producers or did not see TRIPS as beneficial for

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Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. A list of disputes is available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

55. *Id.* art. 2.

56. *Id.* art. 21.

57. *Id.* art. 22.

58. The extent to which an individual state can choose to do so will depend on whether or not it can afford to do so. This may depend on whether or not it can, for example, afford to pay fines that may be levied and how much it needs access to the markets of the other state as compared to the level of demand for access to its own markets.

59. *See id.* art. 3.

60. *See* CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 5 (2000) (discussing the role of the United States in initiating the process of moving intellectual property standards into the GATT Uruguay Round Negotiations); Okediji, *Public Welfare*, *supra* note 29, at 846–48 (discussing the use of threats of trade sanctions to pressure developing countries into the TRIPS negotiations).

61. Okediji, *Public Welfare*, *supra* note 29, at 853–55 (noting, with respect to developed countries, the differing underlying philosophies of intellectual property protection between the European Community and the United States and that “[t]he disparities between intellectual property policies of developed countries were strategically obscured during the TRIPS negotiations given the primary (and shared) goal of strengthening rights in the global market”) (footnote omitted).

62. One such area of importance to developing countries is agriculture. Gathii, *supra* note 3, at 887, 908–10. However, the gains that were expected have not been made. *See id.* (pointing out that agriculture and commodity trade have been exempted from free trade while areas in which developed countries have comparative advantage have been favored. Professor Gathii explains how the agriculture and commodity markets, where developing countries have an advantage, continue to benefit from protectionism in developed countries. Trade liberalization in these areas would benefit developed countries. However, this has not happened.).

them. Countries negotiated intellectual property rights in order to secure gains in agriculture, textiles, and market access. Importantly, any nation that wanted to be part of the WTO had to agree to TRIPS.<sup>63</sup> This is both the strength and weakness of this trade-based approach.

### C. Flaws in the Trade-Based Strategy

International treaties are based on the notion of consent.<sup>64</sup> One may fairly assume, therefore, that the conclusion of an international agreement implies that there was agreement on the substantive issues that the treaty addresses and that all parties to the negotiation fully understood what the agreement was about. Yet, TRIPS exists because there were reasons to agree on a broader trade agenda rather than a shared interest in the *intellectual property* outcome.<sup>65</sup> Contrary to the values of win-win, fairness, and cooperation that are espoused by the WTO,<sup>66</sup> the TRIPS

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63. TRIPS was part of a single undertaking, meaning that it was not possible to join the WTO and opt out of TRIPS. GATT 1994, *supra* note 14, art. II.2. TRIPS was not an optional agreement but rather, once a state became part of the WTO, it had to accept the WTO Agreement and the required annexes, including TRIPS. *Id.*

64. See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 169–70 (1996) (stating that there is a “notion of consent” in the law of treaties).

65. Whether or not trade agreements generally represent a fair bargain remains open to debate. Development scholars have been critical of the benefit of free trade for developing economies. See, e.g., HA-JOON CHANG, *BAD SAMARITANS: RICH NATIONS, POOR POLICIES, AND THE THREAT TO THE DEVELOPING WORLD* 73–74 (“In recommending free trade to developing countries, the Bad Samaritans point out that all the rich countries have free(ish) trade. This is, however, like people advising the parents of a six-year-old boy to make him get a job, arguing that successful adults don’t live off their parents and, therefore, that being independent must be the reason for their successes. They do not realize that those adults are independent *because* they are successful, and not the other way around. In fact, most successful people are those who have been well supported . . . . Likewise . . . the rich countries liberalized their trade only when their producers were ready, and usually only gradually even then. In other words, historically, trade liberalization has been the *outcome* rather than the *cause* of economic development.” (emphasis in original)). Professor Chang goes on to argue that while free trade may be a good short-term strategy, poor countries will increase their respective consumption, which is not a good way to develop the economy. *Id.* at 74.

66. For instance, the principles of non-discrimination as set out in GATT Article I (most-favored-nation treatment) and Article III (national treatment) are fundamental obligations of international trade. Further, the dispute settlement mechanism is set up to promote cooperation among WTO member states, encouraging them—where they deviate—to bring their laws into compliance with their WTO obligations. See DSU, *supra* note 54, art. 3.4 (“Recommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.”); DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW* 143 (2008) (“One of the principal goals of the WTO is to promote a fair and neutral system of multilateral trade.”).

Agreement was not driven by the need to achieve a winning solution for all nations, or even for the majority of nations.<sup>67</sup>

This might be seen as the quid pro quo and therefore a fair bargain. If some countries negotiated a poor bargain, perhaps it is their loss. But, if one takes that attitude to long-term trading relationships, how does that affect the outcome and the dynamics of the relationships? One can anticipate a relatively negative effect.<sup>68</sup> The implementation and enforcement of global intellectual property standards can be attained by employing a strategy that generates resistance and resentment towards the *demandeurs* of increased intellectual property protection. Alternatively, the *demandeurs* of intellectual property protection can take a long-term view to the protection of their interests and their relationship with nations that, based on their national values, calibrate the intellectual property balance differently.

One might also counter that it is sufficient to have trade-based agreement even if there is disagreement on substantive intellectual property law or policy. This is, arguably, simply part of the reality of how international negotiations work. Indeed, it may be an effective short-term strategy. However, as much as the intellectual property-producing nations may seek to have all nations implement high levels of intellectual property protection, the trade-based strategy that was the basis of TRIPS is proving to be effective only to a certain extent.<sup>69</sup> The long list of countries on the United States Special 301 Watch List indicates that the goal of getting countries to change their intellectual property practices is an ongoing effort.<sup>70</sup> Moreover, it has been suggested that TRIPS is in crisis.<sup>71</sup>

Even assuming that all the TRIPS parties understood, and accepted, the bargain that was being made, the TRIPS bargain—or at least the way it has been interpreted and applied—is rather lopsided in favor of rights holders.<sup>72</sup> Thus, it is not necessarily a question of renegotiating the agreement, but rather of interpreting and applying the agreement in accordance with the negotiated balance contained therein. Importantly, TRIPS started a trend, which has been continued through

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67. CORREA, *supra* note 60, at 3 (noting that industrialized countries adopted higher intellectual property standards only after they had achieved a certain level of technological development); *see also* Leaffer, *supra* note 21, at 299–300.

68. Gathii, *supra* note 3, at 887 (“Indeed, if the trade agenda also continues to expand into only those areas in which developed countries have a comparative advantage while leaving unaddressed outstanding issues within existing agreements that currently are inimical to the interests of developing countries, this expansion will erode the gains of any reforms aimed at the effective and full participation of developing countries and citizens in both the decision and policy making aspects of the WTO.”).

69. *See, e.g.*, Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter *China-U.S. Panel Report*].

70. 301 REPORT, *supra* note 37, at 19–40 (noting the countries that are on the priority watch list and watch list).

71. Yu, *Objectives*, *supra* note 24, at 1024 (arguing that there is a tendency “to overlook the fact that the TRIPS Agreement is now in a deepening crisis”).

72. *See, e.g.*, Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement*, 13 MICH. TELECOMM. & TECH. L. REV. 445, 449 (2007).

bilateral and plurilateral trade agreements, of treating intellectual property as a trade matter.

Yet, as the next Part argues, intellectual property law is distinct from the traditional trade subject matter.<sup>73</sup> Among the WTO agreements, intellectual property stands apart as an area of substantive national law that has been incorporated into the WTO agreements and standardized on the basis that it is “trade-related.”<sup>74</sup> However, the challenge inherent in this trade-based strategy is that domestic intellectual property laws, like domestic property laws, are shaped by national values and goals. These value differences do not vanish simply because they have been ignored.

## II. TRIPS COMPARED TO OTHER WTO AGREEMENTS

This Part introduces some of the challenges of merging trade and intellectual property and briefly compares intellectual property to traditional international trade subject matter. Trade rules seek to regulate the exchange of commodities between sovereign states. Trade rules, generally speaking, harmonize procedures that favor transparency and competition. The WTO agreements cover subjects like tariffs, rules of origin,<sup>75</sup> technical barriers to trade,<sup>76</sup> customs valuation, and subsidies, among others.<sup>77</sup> The fundamental obligations under the WTO are to provide national treatment and most-favored-nation treatment to foreign goods.<sup>78</sup> The WTO agreements also aim to ensure transparency of rules and the availability of judicial procedures.<sup>79</sup> The rules on substantive areas of law like health and environmental law or investment law, for example, are, in stark contrast to TRIPS,

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73. Okediji, *Public Welfare*, *supra* note 29, at 917 (“Intellectual property rights have historically been justified by reference to national priorities unlike the free trade ideal, which from its earliest articulation, has treated national and global interests as interdependent parts of the welfare calculus. . . . In its long history, intellectual property rights have existed primarily for the welfare of the state. The extension of intellectual property rights to the global context, and its rationalization as a free trade issue, obscures the importance of national conditions and the priority of domestic welfare goals even where these may be inconsistent with globalization.”).

74. See CHOW & SCHOENBAUM, *supra* note 66, at 7 (noting that “national laws regulating trade in most cases are implementations of international obligations that have their origin on the international level”) (emphasis omitted).

75. See GATT 1994, *supra* note 14; Agreement on Rules of Origin, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397 [hereinafter Rules of Origin].

76. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter Agreement on Technical Barriers].

77. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [hereinafter SCM Agreement].

78. See GATT 1994, *supra* note 14, arts. I, III.

79. See, e.g., General Agreement on Trade in Services arts. 2–3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

fairly minimal. This is undoubtedly due in part to some recognition of the difficulties inherent in imposing or prescribing substantive norms at the international level in respect of matters of policy typically left to national governments.

*A. The TRIMs Agreement and the SPS Agreement*

The Agreement on Trade-Related Investment Measures (TRIMs) only applies to investment measures that are related to trade in goods.<sup>80</sup> It does not set out any substantive minimum standards for investment measures but requires national treatment, meaning that there should be no discrimination against foreign goods, and prohibits quantitative restrictions.<sup>81</sup> In other words, there is a general prohibition on protectionism but the standard exceptions that are normally allowed in trade law would apply.<sup>82</sup> Thus, there is a relatively high level of flexibility to allow for national differences.

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) affirms the right of members to take measures to protect human, animal, and plant life or health.<sup>83</sup> With respect to harmonization, the SPS Agreement prohibits WTO members from “arbitrarily or unjustifiably” discriminating between member states “where identical or similar conditions prevail.”<sup>84</sup> On harmonization, the SPS Agreement requires that WTO member states “base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist.”<sup>85</sup> WTO member states are also to accept the sanitary and phytosanitary standards of other member states as equivalent “even if these measures differ from their own or from those used by other Members trading in the same product” if certain conditions are met.<sup>86</sup> Like TRIMs, the SPS Agreement has a fair amount of flexibility.

*B. The TRIPS Agreement*

By comparison, TRIPS not only requires national treatment and most-favored-nation treatment but also establishes minimum standards for intellectual property protection.<sup>87</sup> The core trade commitments of national

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80. See Agreement on Trade-Related Investment Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

81. *Id.* art. 2.

82. *Id.* art. 3.

83. See Agreement on the Application of Sanitary and Phytosanitary Measures art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

84. *Id.* art. 2.3. Article 3 of TRIMs provides that “[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.” TRIMs Agreement, *supra* note 80, art. 3.

85. SPS Agreement, *supra* note 83, art. 3.1.

86. *Id.* art. 4.1.

87. TRIPS, *supra* note 15, arts. 3–4, 9–40.

treatment and most-favored-nation treatment are arguably the two obligations that address obstacles to trade.<sup>88</sup> This is because these fundamental obligations address conditions that affect competition between domestic and foreign goods with a view to ensuring that the law does not favor domestic producers or privilege some nations to the exclusion of others.<sup>89</sup> The minimum standards of TRIPS aim to protect innovation by curbing free-riding.<sup>90</sup> However, while free-riding may be a problem for investors in new and innovative goods, it does not necessarily result in differential treatment of foreign and domestic goods.<sup>91</sup> If copying is tolerated for all producers, then the national treatment and most-favored-nation obligations are met. The core trade law principles of national treatment and most-favored-nation treatment do not require that all nations have a certain minimum level of intellectual property protection. In this way, TRIPS goes beyond what the traditional trade system seeks to achieve.

Although there are major intellectual property treaties that predate TRIPS,<sup>92</sup> the Agreement is significant because, while it does not mandate deep harmonization,<sup>93</sup> it establishes *enforceable* intellectual property rules, the enforceability being a significant change.<sup>94</sup> Thus, minimum standards were established to a greater degree than existed before and this harmonizing aspect was reinforced by virtue of dispute settlement rules that require compliance.<sup>95</sup> This means that all WTO member states are required to implement domestic intellectual property laws that are consistent with TRIPS.

The TRIPS Agreement requires all member states to provide minimum terms of protection and, among other things, prohibits members from excluding certain technologies from protection.<sup>96</sup> For example, the minimum term of protection for patents is twenty years from the date of filing.<sup>97</sup> Prior to TRIPS, there was no

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88. See, e.g., Dreyfuss & Lowenfeld, *supra* note 30, at 279.

89. GATT 1994, *supra* note 14, arts. I, III.

90. Dreyfuss & Lowenfeld, *supra* note 30, at 279 (citing TRIPS, *supra* note 15, arts. 3, 9, 15, 39).

91. *Id.* (“[B]ecause a country’s refusal to protect against copyists leaves all innovators operating within that country on something of an equal footing, the absence of intellectual property protection is not a direct barrier to international trade.”). *But see* Samuelson, *supra* note 3, at 99–100 (discussing how continental European moral rights in the copyright context can be a barrier to trade because, for instance, the artist can prevent modification to the work after sale).

92. See, e.g., Berne Convention, *supra* note 49; Paris Convention, *supra* note 50.

93. Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85, 86 (2007).

94. Dreyfuss & Lowenfeld, *supra* note 30, at 277 (identifying enforceability as one of the significant achievements of TRIPS); see also Reichman & Dreyfuss, *supra* note 93, at 89 (explaining that TRIPS established minimum standards but did not require “deep harmonization”).

95. CORREA, *supra* note 60, at 2 (explaining that the enforcement provisions of TRIPS were a significant departure from the prior intellectual property treaties).

96. TRIPS, *supra* note 15, arts. 12–13, 30, 33.

97. *Id.* art. 33.

minimum term of patent protection.<sup>98</sup> TRIPS also incorporates a minimum fifty-year term of protection for copyright<sup>99</sup> and requires patent protection to be available for all fields of technology.<sup>100</sup> This is over and above the obligations to provide national treatment and most-favored-nation treatment to all other WTO member states.<sup>101</sup> Moreover, defining minimum enforceable standards can create both theoretical and practical problems.<sup>102</sup>

### III. HOW INTELLECTUAL PROPERTY DIFFERS FROM TRADITIONAL TRADE IN GOODS

Given the ways in which intellectual property differs from traditional trade subject matter, it is curious that TRIPS goes beyond the other WTO agreements to harmonize substantive minimum standards to the extent that it does.

First, intellectual property can implicate trade in goods, services, foreign direct investment, and technology transfer.<sup>103</sup> Intellectual property rights may relate to the goods or services.<sup>104</sup> However, through technology transfer, intellectual property may also be the subject of the exchange—although no physical item necessarily passes hands. This is because it is only the legal fiction that is involved.

Second, modern trade is about exchanging goods and services in the global marketplace. Yet copyright and patented goods may be, but are not necessarily, goods that are traded in the marketplace. In other words, they may have value that is not market-related. For instance, copyrighted goods are knowledge goods<sup>105</sup> as well as artistic creations. The value in copyright may include the right to preserve the integrity of the work or the right of the creator to be identified, or not identified, as the author of the work.<sup>106</sup> There may also be, for example, cultural value placed on a creative artwork, and it may be offensive to sell it in the market place.<sup>107</sup>

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98. See, e.g., Paris Convention, *supra* note 50.

99. TRIPS, *supra* note 15, art. 12.

100. *Id.* art. 27.

101. *Id.* arts. 3–4. Most-favored-nation status requires that nations extend any advantage or favor conferred on one WTO member states to all other WTO member states. *Id.* art. 4.

102. Dreyfuss & Lowenfeld, *supra* note 30, at 302 (suggesting that that TRIPS could have a significantly different impact on developing countries than the other WTO Agreements. In particular, the cost of setting up copyright, trademark, and patenting offices, as well as the costs involved in monitoring and enforcing intellectual property rights is significant).

103. CHOW & SCHOENBAUM, *supra* note 66, at 10.

104. For instance, a business may hold trademark rights that distinguish its goods and services from those of other businesses, patent rights for a particular technology, or copyright protection for a literary or artistic work.

105. Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 806–07 (2007).

106. Copyright Act of 1976, 17 U.S.C. § 106A (2006).

107. For example, for its most significant cultural treasures, Japan “impose[s] restrictions upon conservation and use of tangible objects, including their acquisition, protection, maintenance, alterations, repairs and exportation.” Geoffrey R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT’L & COMP. L.J. 283, 313 (2006) [hereinafter Scott, *Cultural Property*]; see also Bunkazai Hogo-ho [Law for the Protection of Cultural Properties], Law No. 214 of 1950, arts. 34-2 to 47 (Japan)

Third, many things determine levels of intellectual property protection, including social and cultural values. Intellectual property policies reflect societal values, not unlike domestic health policies or cultural policies.<sup>108</sup> Patent and copyright laws are substantive domestic law and are territorial in nature. These laws must be capable of accommodating changes in domestic public policy as well as technological and social changes in that society.<sup>109</sup> This close connection between societal goals and values makes the convergence of intellectual property interests essential to the long-term success of global intellectual property law.

Imagine if all nations had to adhere to a set of global real property standards.<sup>110</sup> Imagine if these nations had to agree, for example, that communal property would no longer be tolerated and all nations would be required to follow the English model because foreign property systems were causing tremendous financial losses for wealthy English real estate investors who engage in significant cross-border transactions. One might ask why there should be no communal property and how this kind of harmonized system would account for cultural and value differences. Intellectual property laws, like real property laws, are shaped by national values. It is true that real property, like land, cannot move across borders like intangible property and may not have reason to find its way into a trade agreement. However, in an information age where intangible property has become an increasingly important currency, the movement of intangible goods from one value system to another requires an acknowledgement of the differences between these systems, even if the basic legal standards have been harmonized.

Finally, various commentators have pointed out the irony of trade liberalization serving as a tool to create frameworks that facilitate monopolies.<sup>111</sup> It has been observed that intellectual property rights are the opposite of free trade because they

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[hereinafter The 1950 Law], available at <http://www.tobunken.go.jp/~kokusen/ENGLISH/DATA/Htmlfg/japan/japan01.html>.

108. For instance, depending on the underlying philosophy, a nation could support a public health care system, while other nations view private healthcare as the better option.

109. Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, 34 *ECOLOGY L.Q.* 713, 722 (2007) ("Patents and copyrights, as instruments to promote progress in science and the arts, must be flexible and responsive to changes in technology, economic considerations, and public policy.").

110. Some scholars have pointed out the perils of treating intellectual property like real property and comparing the two. See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 *DUKE L.J.* 1, 25–31 (2004). However, because copyright, patent, and trademark have become increasingly "propertized," the property analogy remains helpful. See *id.* at 8–22; Menell, *supra* note 109, at 720–21 (2007) ("Notwithstanding observations by several scholars that the term 'intellectual property' originated recently, the courts and legislatures have long considered patents, copyrights, and trademarks to be 'property' . . . . There can be little question today that intellectual property assets are forms of 'property.'" (footnotes omitted)).

111. E.g. Anupam Chander, *Exporting DMCA Lockouts*, 54 *CLEV. ST. L. REV.* 205, 207 (2006) [hereinafter Chander, *Exporting DMCA*] (referring to the DMCA provisions contained in several U.S. bilateral trade agreements, Professor Chander observes that "[t]here is a special irony that *free trade* might lead to a legal framework that *facilitates monopolies* in the after-market" (emphasis in original)); Dreyfuss & Lowenfeld, *supra* note 30, at 280.

reflect limited monopolies rather than liberalization.<sup>112</sup> The goal of the WTO is to facilitate competition on a global level,<sup>113</sup> yet intellectual property rights, taken to the extreme, can be anticompetitive.<sup>114</sup> Interestingly, TRIPS has been characterized as promoting competition.<sup>115</sup> However, there are differing conceptions of the trade-distorting effects of intellectual property rights. For example, the United States has interpreted weak intellectual property protection as trade distortion due to the loss of comparative advantage.<sup>116</sup> India, on the other hand, has interpreted trade distortion as government interference in the marketplace in order to protect intellectual property rights.<sup>117</sup>

Despite its shortcomings, the reality is that trade-related intellectual property is here to stay. Nonetheless, it is a significant failure for TRIPS to be perceived as an agreement that lacks benefit for the citizens of many countries. The question is how best to make trade-related intellectual property work effectively for all nations. The next Part of this Article discusses how fostering value divergence can lead to gradual interest convergence.

#### IV. STRENGTHENING THE GLOBAL INTELLECTUAL PROPERTY REGIME THROUGH VALUE DIVERGENCE

Societal goals and values influence the national and global intellectual property narrative. Strengthening global intellectual property law therefore requires better accommodation of national values.<sup>118</sup> The word “values” can be defined in various ways. The phrase “societal values” as used in this Article refers to the principles or objectives that a nation-state considers important. For example, one could place value on access to low-cost educational materials and low-cost medicine, or on promoting technology and supporting the entertainment industry. In considering the interests of the intellectual property rights holder *vis-à-vis* other interests, states recognize that intellectual property rights are not absolute. They are subject to limitations and exceptions.<sup>119</sup> These include limitations such as the length of protection or exceptions such as fair use in copyright law or research exceptions in patent law.<sup>120</sup>

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112. See PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 213, 223 (1996).

113. *What Is the World Trade Organization?*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm).

114. See, e.g., Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 103 (2006) (noting the tension between antitrust law and intellectual property law).

115. Dreyfuss & Lowenfeld, *supra* note 30, at 280.

116. *Id.* at 281 n.14.

117. *Id.*

118. See Doris Estelle Long, *Democratizing” Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217, 239 (“If global integration is to continue and regionalism is to take its place as a support (and not a counter) to globalization, ‘local’ concerns must be addressed in global processes that acknowledge and give value to such concerns.”).

119. See Carrier, *supra* note 110, at 82–144.

120. See Copyright Act of 1976, 17 U.S.C. § 107 (2006); Patent Act of 1952, 35 U.S.C. § 271(e)(1).

The challenge of reaching agreement despite conflicting interests and cultural differences is unique neither to international intellectual property law nor to international treaty making. Dispute resolution literature, for instance, recognizes the utility of seeking mutually beneficial results.<sup>121</sup> The focus is on interests rather than on conflicting positions because the problem often lies in the conflict “between each side’s needs, desires, concerns, and fears.”<sup>122</sup> It may not always be apparent what the shared interests are.<sup>123</sup> Nonetheless, looking for shared interests can assist the parties to the negotiation to create options that are mutually satisfactory.<sup>124</sup>

Underlying many of the arguments in favor of a more balanced global regime is the theme of achieving a greater degree of fairness for all involved.<sup>125</sup> Arguments for change that aim to increase fairness by taking into account the views and circumstances of those who are politically and economically disadvantaged, whether states or individuals, appeal to higher moral principles, human rights, and the benevolent nature of human kind. These arguments are valuable and necessary. Unfortunately, in a market-driven global system, such appeals may prove to be less persuasive than the appeal of short-term economic gain. This is why, in pursuing and promoting a fair and balanced global intellectual property regime, there is utility in acknowledging the role of interest convergence in facilitating change.<sup>126</sup>

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121. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 70 (Bruce Patton ed., 2d ed. 1991).

122. *Id.* at 40. “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.” *Id.* at 41.

123. *Id.* at 71.

124. *Id.* at 70–80. “In a complex situation, creative inventing is an absolute necessity. In any negotiation it may open doors and produce a range of potential agreements satisfactory to each side. Therefore, generate many options . . . . Look for shared interests and differing interests to dovetail. And seek to make their decision easy.” *Id.* at 79–80.

125. *See generally* CORREA, *supra* note 60, at 5; Harris, *supra* note 26.

126. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980). Professor Bell argues that *Brown v. Board of Education*, 347 U.S. 483 (1954), was not the product of some newly found morality and a desire to do the right thing, but rather, a combination of factors made the decision in favor of racially integrated schools more appealing than it otherwise might have been. Bell, *supra* at 524. According to Professor Bell, the 1954 Supreme Court decision in *Brown* came at a time when it had economic and political value. *Id.* at 524–25. For instance, the NAACP and the federal government took the position that the *Brown* decision helped provide credibility to the United States as it competed with Communist countries to win over third world countries. *Id.* In addition, U.S. prestige and leadership in international circles had been damaged by U.S. segregation, particularly in light of the U.S. principle that all men are created equal. *Id.* Further, the *Brown* decision had value for African American veterans who had fought in World War II. *Id.* Finally, continued segregation was seen as a barrier to further industrialization in the southern United States. *Id.*; *see also* Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 369 (2002) (“[C]oncern for international appearances drove domestic policy during this period.”). This is not to suggest that racial differences are relevant to the global intellectual property dynamic. However, parallels can be drawn between domestic racial disparities and global cultural and value differences.

The notion of interest convergence as a catalyst for change reflects the world as it is rather than the world as it should be.<sup>127</sup> In this sense, it tends to be a more realist vision of how change can be achieved, particularly where there is an imbalance of political or economic power or where cultural differences may be significant.<sup>128</sup>

In the international intellectual property context, negotiations take place between countries with significantly different levels of industrialization, disparities in economic wealth, and, in some cases, distinct or conflicting views about the appropriate role for intellectual property.<sup>129</sup> This makes it difficult to achieve agreement, and it requires compromise on the part of the various actors. Indeed, this difficulty in agreeing on intellectual property standards is part of the reason why intellectual property was moved into the trade framework.

However, the treatment of copyright and patent industries exclusively from a trade perspective may fail to achieve a positive long-term outcome. This is because a narrow trade focus neglects the non-commodity value that nations may attach to intellectual property rights.<sup>130</sup> An objective of intellectual property policy in some

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127. See Bell, *supra* note 126, at 523, 526 (explaining that in the context of racially integrated schools, the competing values were the conflicting interests of blacks who were interested in desegregating schools and whites who preferred to maintain the existing policies); Delgado, *supra* note 126, at 371 (explaining that the “interest convergence” approach “acknowledges that race and racism are ideas and thus, in some sense, under our control, but holds that material factors, including competition for jobs, social and pecuniary advantage, and the class interest of elite groups . . . play an even larger role”). This is not to suggest that race is a factor in international intellectual property negotiations. What I am suggesting is that it is important to acknowledge that where there are conflicting economic interests or power dynamics, meaningful change requires a confluence of the interests of the parties involved.

128. See Bell, *supra* note 126, at 523 (positing, in the context of racial integration, that the principle of interest convergence provides that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites”). In the context of global intellectual property law, the principle of interest convergence can be applied to support the notion that the interests of developing countries (as the politically and economically weaker actors) in shaping intellectual property laws to suit their needs will be better accommodated to the extent their intellectual property interests converge with those of industrialized countries (as the politically and economically stronger actors). It can also be said, however, that the interests of intellectual-property-producing countries in protecting and selling their intellectual property goods will be advanced when they recognize the need to find areas where their interests converge with those nations who are not major producers of intellectual property protected goods.

129. There are 153 WTO member states. *Who We Are*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm). Approximately two-thirds of the WTO members are developing countries. *Overview*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm).

130. See 301 REPORT, *supra* note 37, at 5. For instance, the United States Trade Representative (USTR) describes innovation and creativity as “essential to our prosperity and to the support of countless jobs in the United States” and focuses on the effect of intellectual property infringement on legitimate businesses. *Id.* However, intellectual property rights are not necessarily limited to goods that are the subject of trade, or economic rights. See Berne Convention, *supra* note 49, art. 6 *bis*, which provides for the protection of authors’ moral rights. Increasingly, there are discussions about the protection of traditional

countries is to protect cultural goods primarily for reasons unrelated to their market value.<sup>131</sup> This affects the assessment of the national intellectual property balance. Thus, in the context of global intellectual property agreements that involve multiple countries, it is underinclusive to have a focus that is predominantly economic and commodity-oriented.

An inclusive mutual-interest-seeking strategy can be supported by both moral arguments and by rational self-interest. When interests converge, parties with cultural and economic barriers, and with potentially conflicting agendas, can work towards mutually satisfactory progress. Global intellectual property negotiations require the development of policy across cultural and economic differences. In order to effectively harmonize substantive enforceable intellectual property rules, the climate must therefore be conducive to making the changes required.<sup>132</sup> This means that intellectual property protection is one, among many, factors that play a role. At a minimum, there must be some common economic, political, and social goals that support the level of intellectual property protection mandated by these trade agreements. Yet, trade-based intellectual property strategies have ignored this reality and have failed to seek globally beneficial intellectual property laws.

While there are positive aspects to having strong intellectual property rights, there may also be legitimate reasons for a particular nation to have minimal intellectual property rights in furtherance of its national interest.<sup>133</sup> Unfortunately, the current trend in international intellectual property is to attempt to minimize diversity as much as possible. This strategy is counterproductive in the long term. The next Part will outline how intellectual property-producing nations have dominated norm setting in TRIPS and subsequent trade-related intellectual property agreements in an attempt to counter, or avoid, value divergence.

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knowledge for both economic and non-economic reasons. See J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (2011).

131. See World Intellectual Property Organization, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, GRTKF/IC/14/12 § 2, ¶ 20 (Aug. 26, 2009); World Intellectual Property Organization, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, GRTKF/IC/9/INF/4, Annex II (Mar. 27, 2006) (outlining a comparative summary of TCE *sui generis* legislation); Ghana Copyright Act of 2005, §§ 17, 44, 64 (providing perpetual protection for Ghanaian folklore); New Zealand Trade Mark Act, 2002, § 17 (prohibiting the registration of marks that are likely to offend a segment of the community, including the Maori); CODE CIVIL No. 27811 (2002) (Peru) (providing *sui generis* protection for indigenous knowledge); Panama, *Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge*, WIPO (2000), [www.wipo.int/wipolex/en/details.jsp?id=3400](http://www.wipo.int/wipolex/en/details.jsp?id=3400).

132. Professor Yu refers to this as an “enabling environment.” Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 173, 213–14 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *China Puzzle*].

133. Dreyfuss & Lowenfeld, *supra* note 30, at 282 (observing that intellectual property laws are tailored over time such that a country can achieve the appropriate balance between producers and users of intellectual property protected goods).

V. NORM SETTING BY THE NATIONS THAT PRODUCE INTELLECTUAL PROPERTY  
PROTECTED GOODS

This Part outlines the disparity between the goals of intellectual property-producing nations and intellectual property-consuming nations. In addition, this portion of the Article discusses the trend towards increased protection through TRIPS, bilateral agreements, and ACTA before turning to some examples of value divergence in trade related intellectual property disputes.

A. *The TRIPS Narrative*

Various scholars have observed that the trend in international intellectual property policy since TRIPS is toward increased intellectual property rights.<sup>134</sup> This is due in part to the view held by some that, while TRIPS established minimum standards, it did not go far enough.<sup>135</sup> Other scholars have challenged the validity of TRIPS or have described it as being in a critical state.<sup>136</sup> Numerous commentators have identified problems with TRIPS and the subsequent developments in international intellectual property law, including the way TRIPS was negotiated, its effect on different countries, and the likelihood that it works for all nations or that it was intended to benefit all nations.<sup>137</sup> Further, in recognition of

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134. Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 286 (2004) (“[S]erious questions arise as to the sustainability of the attempt in TRIPS to resolve the international externality aspects of protecting new knowledge goods. An additional criticism leveled at the emerging IPR system is that the agenda for increasing protection has been articulated and pushed by rich-country governments effectively representing the commercial interests of a limited set of industries that distribute knowledge goods.”).

135. Sherwood, *supra* note 17, at 40 (“The TRIPS Agreement was the result of a compromise among sharply divided countries and does not reflect a robust level of protection.”). Sherwood also suggests that rather than focusing on compliance issues, the focus should be on the role of intellectual property as an incentive for innovation and creativity. *Id.* at 40–42. He argues that developing countries will benefit from recognizing the value of intellectual property and developing their intellectual property systems. *Id.* at 45.

136. See CORREA, *supra* note 60, at 3 (noting that developing countries received no compensation for acquiescing to increased intellectual property protection); Harris, *supra* note 26, at 691–93 (noting numerous reasons why TRIPS is a contract of adhesion); Peter K. Yu, *World Trade, Intellectual Property and the Global Élites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1, 4 (2002) (noting the growing resentment over TRIPS is creating a “legitimacy crisis within the international trading system”).

137. See, e.g., CORREA, *supra* note 60, at 3; CHIDI OGUAMANAM, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE (2006); Chon, *supra* note 105; Long, *supra* note 118, at 260–68; SISULE F. MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) 3 (2003), available at [http://www.geneva.quino.info/pdf/WIPO\(A4\)final0304.pdf](http://www.geneva.quino.info/pdf/WIPO(A4)final0304.pdf) (noting that the appropriateness of the standards contained in TRIPS for developing countries has been seriously questioned, and that the TRIPS standards may be too high for these countries); Okediji, *Public Welfare*, *supra* note 29, at 839–42; Reichman & Dreyfuss, *supra* note 93;

the needs of developing countries, particularly in relation to access to medicines, commentators have been engaged in discourse about the need to maintain the TRIPS flexibilities.<sup>138</sup> This is essential because it is unlikely that there will be major revisions to TRIPS in the near future. However, the benefits of flexibility go beyond accommodating developing countries. Flexibility can, in the long term, also bolster American global intellectual property goals.

While the minimum intellectual property standards established by TRIPS were welcomed in some quarters,<sup>139</sup> Professors Dinwoodie and Dreyfuss observe that TRIPS and the corresponding WTO jurisprudence protect producer interests while little is done to protect user interests.<sup>140</sup> The reason for this outcome is that the history surrounding the drafting and negotiation of TRIPS reflects a heavy involvement and influence of intellectual property industries and intellectual property associations.<sup>141</sup> Hence, the interests of the producers of intellectual property goods were well accounted for in the Agreement. However, from the perspective of the public, little was gained. For example, countries like India, which for policy reasons did not previously provide patent protection for pharmaceuticals, now have to do so.<sup>142</sup>

Professor Correa, one of the scholars who has been critical of TRIPS from a developing country perspective, characterizes the Agreement as creating standards of intellectual property protection that suit industrialized countries.<sup>143</sup> He describes the Agreement as part of a deliberate attempt to protect industrialized world

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Susan K. Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933, 934 (2003); Yu, *Objectives*, *supra* note 24.

138. See Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 508 (2005) (developing countries insist on the need to maintain flexibility to implement economic and social development objectives); Chakravarthi Raghavan, *NGOs Demand "Pro-Public Health" Interpretation of TRIPS*, THIRD WORLD NETWORK, <http://www.twinside.org.sg/title/pro.htm>.

139. See CORREA, *supra* note 60, at 3 (explaining that industrialized countries, driven largely by the United States, forced developing countries to adopt intellectual property standards that were consistent with those that had been implemented in industrialized countries).

140. Dinwoodie & Dreyfuss, *supra* note 72, at 449 (suggesting that TRIPS gives strict international scrutiny to legislation that impinges upon producer interest while allowing domestic legislatures the freedom to create legislation that affects user interests. This results in intellectual property laws that favor intellectual property rights holders.).

141. Antonina Bakardjieva Engelbrekt, *The WTO Dispute Settlement System and the Evolution of International IP Law: An Institutional Perspective*, in INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 106, 119 (Annette Kur & Marianne Levin eds., 2011) (citing SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALISATION OF INTELLECTUAL PROPERTY RIGHTS (2003) and Andréa Koury Menescal, *Those Behind the TRIPS Agreement: The Influence of the ICC and the AIPPI on International Intellectual Property Decisions*, 2005 INTELL. PROP. Q. 155 on the involvement of the International Chamber of Commerce, the Association for the Protection of Industrial Property, and others in negotiating and drafting TRIPS).

142. Kapczynski, *supra* note 23, at 1576–78 (discussing India's prohibition on patented medicine prior to TRIPS).

143. CORREA, *supra* note 60 at 5 (arguing that most developing countries would have shared the objective of combating piracy but that TRIPS goes beyond that because it is based on a policy of "technological protectionism").

technology and to ensure that industrialized countries continue to produce innovations while industrializing countries serve as markets for these innovative goods.<sup>144</sup> This might seem like an excessively cynical view of the TRIPS negotiations. However, Professor Leaffer's scholarship, arguing in favor of the merger between trade and intellectual property, also supports this understanding of TRIPS.<sup>145</sup>

The situation Professor Leaffer describes more accurately represents a desire to protect the Western competitive advantage, as Professor Correa points out, rather than a desire to reduce barriers to trade. Although TRIPS provided for a delayed implementation period for developing and least-developed countries,<sup>146</sup> the grace periods of five<sup>147</sup> and ten<sup>148</sup> years that were given to the developing and least-developed countries were inadequate. Another challenge, from a practical perspective, is that there are social and economic costs in monitoring and enforcing intellectual property rights.<sup>149</sup>

Further, while the intellectual property standards in TRIPS may, arguably, support innovation in certain instances,<sup>150</sup> they may also create obstacles to innovation.<sup>151</sup> Professors Chon and Long, for example, point out the focus on trade utilitarianism<sup>152</sup> and its negative impact on developing nations,<sup>153</sup> while Professor

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144. *Id.* (discussing the role of the United States in initiating the process of moving intellectual property standards into the GATT Uruguay Round Negotiations).

145. *See* Leaffer, *supra* note 21, at 298. Professor Leaffer explains that intellectual property became "a trade issue as the economies of the United States and other Western countries have become dependent on selling information. As transfer of technology becomes increasingly internationalized . . . Western countries, and particularly the United States, need a vast international market to recover their costs." *Id.*

146. TRIPS, *supra* note 15, arts. 65, 66.

147. *Id.* art. 65.2.

148. *Id.* art. 66.1.

149. MICHAEL PERELMAN, *STEAL THIS IDEA: INTELLECTUAL PROPERTY RIGHTS AND THE CORPORATE CONFISCATION OF CREATIVITY* 193 (2002) (discussing the costs of maintaining a patent office, and referring to a study that estimated the 1978 cost of running the U.S. Patent Office to be approximately \$90 million and the cost of running the system, including the role of the private sector, to be approximately \$330 million in 1978); Dreyfuss & Lowenfeld, *supra* note 30, at 302 (suggesting that that TRIPS could have a significantly different impact on developing countries than the other WTO agreements. In particular, the cost of setting up copyright, trademark, and patenting offices, as well as the costs involved in monitoring and enforcing intellectual property rights is significant.).

150. *See* TRIPS, *supra* note 15, art. 7 (objective of TRIPS is to promote innovation); Shanker A. Singham, *Competition Policy and the Stimulation of Innovation: TRIPS and the Interface Between Competition and Patent Protection in the Pharmaceutical Industry*, 26 *BROOK. J. INT'L L.* 363, 372-79 (2000) (arguing that stronger intellectual property rights promote innovation and economic development).

151. *See, e.g.,* PERELMAN, *supra* note 149, at 3, 106-14 (arguing that the current system of intellectual property rights is wasteful, stifles the dissemination of information, and blocks scientific and economic progress. Perelman also points out that copyright protection offers little incentive to creative artists but rather rewards the movie studios and music distribution companies.).

152. *See* Chon, *supra* note 105, at 805-07; Long, *supra* note 118, at 243 ("Whether or not intellectual property laws may be justified under theories of natural law, labor, or

Okediji notes the apparent flexibility to incorporate higher intellectual property standards and the corresponding insistence on inflexible minimum standards.<sup>154</sup> This scholarship details the lack of common intellectual property interests between developing and developed countries.<sup>155</sup> The existence of such divergent interests militates against intellectual property agreements and WTO decisions<sup>156</sup> that fail to adequately acknowledge distinct societal development goals.

### B. Bilateral Trade Agreements

It is clear from TRIPS, and from the subsequent developments in this field, that the trend in global intellectual property law is towards increased intellectual property protection. There has been a proliferation of regional and bilateral agreements that strengthen intellectual property protection.<sup>157</sup> Intellectual property producers, like the United States, and the European Union and its member states, continued to negotiate agreements to increase intellectual property rights post-TRIPS.

The United States, for example, has concluded bilateral trade agreements with a number of countries, including Australia, Morocco, Korea, Singapore, Jordan, Israel, Guatemala, Peru, and others.<sup>158</sup> These bilateral trade agreements have chapters on the protection of intellectual property rights. The Dominican Republic Central America Free Trade Agreement or “CAFTA” (agreement between the United States, Dominican Republic, Costa Rica, El Salvador, Guatemala, Nicaragua, and Honduras), for example, requires the signatories to become parties

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personality, TRIPS establishes only one *international* philosophy for their protection—utilitarianism, or more precisely *trade* utilitarianism.” (emphasis in original)).

153. Chon, *supra* note 105, at 811 (“[D]istributional policy choices will appear disproportionately to affect states with smaller markets, less international negotiating power, smaller budgets for public research, and poorer and less empowered consumers.”); Long, *supra* note 118, at 266–67.

154. See Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 *FORDHAM L. REV.* 2379, 2400–03 (2009) [hereinafter Okediji, *Regulation of Creativity*].

155. See, e.g., GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 9 (2008) (observing that intellectual property rights generally result in increased prices and a reduced access to knowledge); Chon, *supra* note 105; Helfer, *supra* note 12, at 974; Reichman, *supra* note 12, at 450–51.

156. These decisions can be dispute resolution panel decisions or decisions of the WTO member states—including the work of the TRIPS Council. For instance, in response to a request from the least developed country members, the TRIPS Council extended the delayed implementation period to July 1, 2013. See Council for Trade-Related Aspects of Intellectual Property Rights, *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) [Decision of Council for TRIPS].

157. James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 *WASH. L. REV.* 421, 427 (2011); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 *U. OTTAWA L. & TECH. J.* 125, 129 (2004).

158. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REP., <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

to the WIPO Copyright Treaty,<sup>159</sup> WIPO Performances and Phonograms Treaty,<sup>160</sup> Patent Cooperation Treaty,<sup>161</sup> and other international intellectual property agreements that were not incorporated into TRIPS.<sup>162</sup>

Moreover, many of these agreements require the signatories to adopt American intellectual property standards that are higher than those required by the international treaties.<sup>163</sup> For instance, Article 11 of the WIPO Copyright Treaty requires the parties to provide effective legal remedies to prevent the circumvention of digital locks.<sup>164</sup> The United States implemented the WIPO Copyright Treaty through the Digital Millennium Copyright Act (DMCA).<sup>165</sup> Section 1201(a)(1)(A) of the DMCA prohibits the circumvention of technological measures that control access to the protected work,<sup>166</sup> while section 1201(a)(2) prohibits, among other things, manufacturing, importing, providing, or trafficking in any technology, product, service, or device that is designed to circumvent a technological measure.<sup>167</sup> This goes beyond what the WIPO Copyright Treaty requires.<sup>168</sup>

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159. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty].

160. World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).

161. Patent Cooperation Treaty, June 19, 1970, 28.7 U.S.T. 7645, T.I.A.S. No. 8733.

162. The Dominican Republic-Central America-United States Free Trade Agreement ch. 15, art. 15, para. 1, Aug. 5, 2004, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

163. *See* Chander, *Exporting DMCA*, *supra* note 111, at 217.

164. *See* WIPO Copyright Treaty, *supra* note 159, at 71. Article 11 requires parties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” *Id.*

165. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998) [hereinafter DMCA] (amending the United States Copyright Act, Title 17 of the U.S. Code).

166. *Id.* § 1201(a)(1)(A) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.”).

167. *Id.* § 1201(a)(2) (“No person shall manufacture, import, . . . or otherwise traffic in any technology, product, [or] service . . . that . . . (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.” (quotation marks omitted)).

168. *See* Michael Geist, *The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements*, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA, 204, 207, 245–46 (Michael Geist ed., 2010).

Despite the domestic critique of the DMCA, it is effectively being exported to other countries through bilateral trade agreements.<sup>169</sup> The bilateral trade agreements that the United States has negotiated since the enactment of the DMCA contain provisions that require DMCA-style, anti-circumvention measures.<sup>170</sup> Moreover, it has been suggested that the position promoted by the United States internationally is not in line with American social and cultural considerations, particularly the limitations on intellectual property rights that are respected domestically.<sup>171</sup> Bilateral trade agreements enable intellectual property-producing nations to negotiate higher intellectual property standards. Hence, they further advance the pro-intellectual property rights agenda within the context of international trade.

### C. Plurilateral Trade Agreements

The most recent plurilateral “trade-related” intellectual property agreement is the ACTA, which mandates increased intellectual property enforcement standards.<sup>172</sup> The TPP is currently being negotiated and has an intellectual property chapter that provides for higher intellectual property standards than TRIPS.

Scholars and non-governmental organizations have raised the alarm about the recently concluded ACTA text and the trend towards increased intellectual property rights.<sup>173</sup> These negotiations were part of a regime-shifting strategy that excluded the majority of the world’s nations. ACTA, which was negotiated by a handful of

169. See Chander, *Exporting DMCA*, *supra* note 111, at 205–06 (expressing concern that “we may be exporting our all-too-narrow vision of intellectual property to many of our trading partners”); see also *id.* at 208 (discussing the anti-competitive effect of the DMCA, observing that “[g]arage door openers and printer cartridges were certainly far from the minds of lawmakers when they passed the DMCA in 1998. Yet, in an environment in which silicone chips are embedded in more and more of our most ordinary products, potentially copyrightable material can be found in the most unexpected places. This makes it possible to invoke the DMCA’s anti-circumvention provisions in a wide variety of areas—including printer cartridges, garage door openers, and video game multiplayer interfaces . . . .” (footnote omitted)); see generally Andrew Christie, Sophie Waller & Kimberlee Weatherall, *Exporting the DMCA Through Free Trade Agreements*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS* 211, 211–43 (Christopher Heath & Anselm Kamperman Sanders eds., 2007).

170. Chander, *Exporting DMCA*, *supra* note 111, at 212.

Each of these mandates lengthy anti-circumvention requirements, permitting exemptions to the anti-circumvention rule roughly as narrow as those in the DMCA. In other words, there is no hint of concerns for the possible anti-competitive effects of the DMCA. The only exception is the draft of the . . . Free Trade Area of the Americas, which permits each country to specify its own exemptions.

*Id.*

171. See *id.* at 207 (noting that “the DMCA might not have adequately accounted for the concerns of the neighboring legal subdiscipline of competition”).

172. See ACTA, *supra* note 18.

173. See Program on Information Justice and Intellectual Property, *Text of Urgent ACTA Communique*, AM. UNIV. WASH. COLL. OF LAW (June 23, 2010), <http://www.wcl.american.edu/pijip/go/acta-communique>.

partners—the United States, Canada, Mexico, Australia, the European Union, Japan, Morocco, South Korea, New Zealand, and Singapore—generated controversy over the secrecy of negotiations and things like border measures.<sup>174</sup> ACTA allows nations to accede to the agreement following its conclusion by the select group of nations that were invited to participate in the initial sessions.<sup>175</sup>

The ACTA can be described as “TRIPS-plus” not because it changes the scope, length, or nature of any intellectual property right but in the sense that it increases the standards that have been set for the enforcement of those rights.<sup>176</sup> For example, it incorporates some of the WIPO Copyright Treaty digital protection standards, which are not part of TRIPS and not subject to any enforcement mechanism.<sup>177</sup> ACTA also encourages governments to cooperate with the business community in protecting intellectual property rights.<sup>178</sup>

Although ACTA has not been well received, it is not unusual for trade agreements to generate resistance.<sup>179</sup> On the other hand, the hostility to ACTA may be indicative of a growing recognition on the part of citizens of an increasing loss of input into, and control over, the national intellectual property policies that affect their lives and represent their shared values.<sup>180</sup> If trade-related intellectual property agreements, such as ACTA and TRIPS, are viewed as having been negotiated

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174. Press Release, Office of the U.S. Trade Rep., The Office of the U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTNA Negotiations, <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-ac> (“Participants in the negotiations included Australia, Canada, the European Union, represented by the European Commission, the EU Presidency (Spain) and EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.”). For a critique of ACTA, see Program on Information Justice and Intellectual Property, *Preliminary Analysis of the ACTA Text*, AM. UNIV. WASH. COLL. OF LAW, (Apr. 21, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/statement-of-pijip-assoc-dir-sean-flynn-on-the-release-of-the-acta-negotiating-text>.

175. ACTA, *supra* note 18, art. 39 n.17, identifies the following parties as being among the limited participants in the ACTA negotiations: Australia, the Republic of Austria, Canada, the European Union and its member states, Japan, the Republic of Korea, the Kingdom of Morocco, the Republic of Singapore, the Swiss Confederation, and the United States of America.

176. *See* ACTA, *supra* note 18, arts. 6–10, 12, 23, 25–27.

177. *Id.* art. 27, para. 5, art. 27, para. 6, art. 27, para. 7. Compare with art. 11 of the WIPO Copyright Treaty, *supra* note 159.

178. ACTA, *supra* note 18, art. 27, para. 3.

179. For instance, there was controversy generated by the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA]. There were large protests when the WTO met in Seattle, Washington in 1999. *See In Pictures: The WTO Seattle Protests*, BBC NEWS (Dec. 1, 1999, 11:20 GMT), <http://news.bbc.co.uk/2/hi/americas/544786.stm>; University Libraries, *WTO Seattle Collection*, UNIV. OF WASH., <http://content.lib.washington.edu/wtoweb/>.

180. This can become a question of democratic input, which is not my purpose here. In this Article, I do not seek to analyze whether or not citizens of a particular nation have their views adequately represented in international negotiations. Instead, for the purposes of the Article, I assume that governments that take a particular stance on high intellectual property standards are representing their citizens in doing so.

unfairly, and as reflecting the interests only of certain countries, there is a high risk that these agreements will be perceived as irrelevant and even illegitimate.<sup>181</sup>

Indeed, the legitimacy of the TRIPS Agreement has been called into question, as has its validity for all nations, particularly when there is little regard for their unique circumstances.<sup>182</sup> The question of legitimacy is significant for the United States because, as sovereign states, nations may sign onto intellectual property agreements, even those that are not in their favor, and then simply choose not to comply.<sup>183</sup> If nation-states and individual citizens of these states see that the national intellectual property laws, which implement their international obligations, reflect their national values, they are more likely to see the laws as relevant to their circumstances. In the long term, the sense of ownership that arises from genuine input into the shaping of suitable international and domestic intellectual property rules will lead to a more robust regime.

The numerous reasons why states comply with international law are complex and go beyond the scope of this Article.<sup>184</sup> However, it seems fairly obvious that if an agreement is neither socially nor economically beneficial to a given nation, its implementation and compliance will prove to be challenging. Nonetheless, compared to a plurilateral agreement like ACTA, the WTO, despite its flaws, offers more advantages.

#### *D. Why the WTO Is Still a Relevant and Better Alternative*

One might take the position that with the increasing number of bilateral agreements, TRIPS is becoming irrelevant. However, TRIPS remains the only multilateral, trade-related intellectual property agreement, and it is significant for this reason. Further, decisions handed down by WTO panels have legal implications for the parties to the case and are not technically binding on other

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181. See Donald P. Harris, *TRIPS and Treaties of Adhesion Part II: Back to the Past or a Small Step Forward?*, 2007 MICH. ST. L. REV. 185, 196–206 (arguing that TRIPS could be considered a treaty of adhesion because there was an inequality of bargaining power and oppressive economic coercion).

182. See CORREA, *supra* note 60; Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 304–05 n.107 (2004) (“Increasingly broad and vocal consortiums of . . . NGOs . . . are challenging the ‘moral, political and economic legitimacy’ of TRIPS, focusing on provisions of the treaty that affect public health, human rights, biodiversity, and plant genetic resources.” (internal quotation marks omitted) (quoting Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) [hereinafter Helfer, *Regime Shifting*])).

183. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 497–507 (2005) (suggesting that states may sign on for a variety of reasons even if they have no intention of complying with a treaty. Some of the reasons for doing so include the fact that it can be difficult to get information about state practice or that ratification may be a sufficient signal to satisfy transnational actors (such as multinational corporations) who want to see a change in the law.).

184. I refer here to international law as including international treaties, customary international law, and soft law norms. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002); Hathaway, *supra* note 183.

WTO panels, but they do provide a standard which guides the WTO members in their understanding of their obligations.<sup>185</sup> In this way, the prescriptive impact of WTO dispute resolution panels, and decisions or statements by member states, such as the Doha Declaration, is much broader and more significant than the application of a particular bilateral treaty. It is also possible that WTO interpretations of intellectual property obligations will influence the understanding of intellectual property rights in the context of trade-related bilateral and plurilateral agreements.

### 1. The Advantage of the WTO for Developing Countries

In international law and politics, there is, arguably, rule by the most powerful nations.<sup>186</sup> In this sense, the economically and politically powerful nations effectively dominate with the force of a majority even if they are numerically a minority in the global context.<sup>187</sup> Norm setting is therefore controlled by these dominant actors. Acknowledging the views of economically weaker states enables all parties to be treated as equals, whether or not they are, in fact, economically and politically powerful. In international trading relations, this may, as in domestic law, help to create a global system that more closely reflects the interests of all nations. It allows the countries with less political and economic influence to have the flexibility they need to implement policies that will allow them to strengthen their societies.<sup>188</sup>

However, the clear trend in trade-based intellectual property norm setting is to sidestep intellectual property value differences through the use of trade regimes. The ACTA, for instance, is a recent example of the “regime shifting” that Professor Helfer describes as a strategy nations use to achieve results that are more difficult to attain in a multilateral setting.<sup>189</sup> This was a way to avoid having to agree on intellectual property law and policy. Instead, the language of trade was used, and, in the case of the ACTA, a handful of relatively like-minded nations reached an agreement to which others could later accede. Alternatively, a single country, or group of similarly situated countries, often less influential nations, may find themselves negotiating intellectual property clauses in trade agreements with powerful entities like the United States or the European Union.

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185. See DSU, *supra* note 56, at art. 3, para. 2

186. See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 72–75 (2006) (detailing international relations realist theory about the coercive power of states in making international law).

187. Cf. Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 162–63 (2003) (explaining that minority status among shareholders is based on some indicia of control as well as the power relations within a corporation). In the global context, the majority of nations end up with a minority-like status in trade negotiations. This is due to their weaker economies and their corresponding dependence on wealthy nations for financial support and access to markets.

188. Cf. *id.* at 171–72 (arguing that protecting minorities may help end the trap of poverty in which many minority families tend to find themselves, thereby, allowing them to become more economically productive).

189. Helfer, *Regime Shifting*, *supra* note 182, at 6.

Unfortunately, regime shifting can exacerbate power imbalances, which can make it more difficult to achieve agreements that are globally acceptable. With respect to legitimacy, plurilateral agreements like the ACTA risk a worse fate than TRIPS because it was negotiated by a handful of nations rather than in the multilateral WTO setting. Yet, trade-based intellectual property agreements are already hampered by their perceived lack of validity and relevance for many nations.

The appeal of TRIPS, therefore, is that it provides a more inclusive multilateral framework. Even for the less powerful countries, the WTO framework offers advantages over bilateral or plurilateral arrangements. Hence, it is worth expending the effort to refine the interpretation and application of TRIPS rather than finding ways to dismantle the agreement in response to the pro-rights nature of the WTO decisions and the general trend in global intellectual property law. This pro-intellectual property trend is reversible. As the next Part argues, the problem is not as much in TRIPS as it is in the *interpretation and application* of the Agreement. Due to the multilateral nature, WTO decisions have a potentially greater impact than bilateral and plurilateral agreements. TRIPS remains relevant, therefore, because the WTO is well situated to set the tone with respect to the global understanding of trade-related intellectual property rights.

#### VI. TRIPS DISPUTES AND VALUE DIVERGENCE

This Part of the Article contemplates two WTO disputes: one involving an emerging superpower, China, and another involving a Western industrialized country, Canada, to illustrate the relevance of values.

In line with its commitment to “aggressively protect American intellectual property overseas,”<sup>190</sup> the United States compiles an annual list of countries that fail to meet American standards for intellectual property protection.<sup>191</sup> A country may be identified by the United States as failing to adequately protect intellectual property rights even if it is compliant with its international obligations.<sup>192</sup> Several countries made it on the recent United States Trade Representative (USTR) Special 301 Priority Watch List, including China and Canada.<sup>193</sup>

The recent tensions between the United States and China, or the United States and Canada, may be part of the normal growing pains associated with relatively

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190. 301 REPORT, *supra* note 37, at 5.

191. Trade Act of 1974, 19 U.S.C. §§ 2411–2420 (2006).

192. The Trade Act of 1974 provides that an unreasonable policy or practice can include the failure to provide adequate and effective protection for intellectual property rights “notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights.” *Id.* § 2411(d)(3)(B)(i)(II).

193. 301 REPORT, *supra* note 37, at 19, 25. Canada and China, America’s two largest trading partners, remain on the 2011 USTR Special 301 Priority Watch List. *See* Press Release, Office of the U.S. Trade Rep., USTR Releases Annual Special 301 Report on Intellectual Property Rights, <http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-releases-annual-special-301-report-intellectual-p>.

new harmonized intellectual property standards.<sup>194</sup> However, they can also be explained as a failure to acknowledge value divergence in global intellectual property law and policy. For instance, the government of the United States is aware that copyright piracy is not necessarily a priority for the government of China but nonetheless continues to pressure China to make it a priority.<sup>195</sup>

*A. The WTO China Copyright Dispute as an Example of Value Differences*

Since the conclusion and implementation of the TRIPS Agreement, WTO panels and trade negotiators are able to influence the calibration of the national intellectual property balance.<sup>196</sup>

In a recent dispute between China and the United States,<sup>197</sup> the United States took issue with alleged widespread copyright infringement in China.<sup>198</sup> In the complaint, the United States argued that Chinese law was not TRIPS compliant because it allowed authorities to dispose of infringing goods outside of commercial channels with destruction as a last resort, did not offer copyright protection to works that were contrary to Chinese censorship laws, and imposed criminal penalties for piracy on a commercial scale—the threshold for which the United States considered too high.<sup>199</sup> The United States asserted that Chinese law was inconsistent with China's obligations under Articles 9, 41,<sup>200</sup> 46, 59, and 61<sup>201</sup> of

194. As part of the Marrakesh agreements, TRIPS came into force on January 1, 1995. See Article 3, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).

195. See 301 REPORT, *supra* note 37, at 20.

The United States notes that at times particular enforcement actions are directed not only at copyright or trademark infringement, but also include infringement activities that may be considered more serious under the Chinese legal system. There is a concern that such actions lead to the public perception that the enforcement authorities are not focused on enforcing intellectual property specifically. This perception can be reinforced when effective enforcement measures are not taken against well-known infringers. The United States urges the Chinese government to demonstrate consistent resolve when fighting piracy and counterfeiting . . . by taking firm action against such infringers, so that they will adjust their business models to respect intellectual property laws, and thereby send a strong signal throughout the country.

*Id.*

196. See Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 467–68 (2004) (discussing the choices WTO panels face in balancing competing policy goals).

197. China-U.S. Panel Report, *supra* note 69.

198. See 301 REPORT, *supra* note 37, at 19 (“The U.S. copyright industries report severe losses due to piracy in China.”).

199. China-U.S. Panel Report, *supra* note 69, at 2–3, 4–5.

200. The relevant language reads as follows:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of

the TRIPS Agreement. China responded, in essence, that its laws were TRIPS compliant and that the panel should reject the American interpretation of Chinese law and TRIPS obligations.<sup>202</sup>

The panel concluded that denying copyright protection for censored works was inconsistent with the Berne Convention, Article 5, paragraph (1)<sup>203</sup> obligation as incorporated into TRIPS Article 9, paragraph 1.<sup>204</sup> The United States was also successful in its argument that removing the infringing trademark from a good was insufficient and that it was inconsistent with China's obligations under Articles 59 and 46 of TRIPS.<sup>205</sup> However, the panel accepted the use of donations and auctions as acceptable disposal of the goods.<sup>206</sup> On the important question of criminal thresholds for piracy, the panel concluded that the United States had failed to meet its evidentiary burden<sup>207</sup>—essentially, the United States made allegations of commercial scale infringement but did not provide sufficient evidence to support its claims.

This case may signal the inadequacy of the TRIPS enforcement provisions. However, another interpretation is that, despite having acceded to the WTO in 2001, the most suitable copyright policy for China at this time may be substantially

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infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

TRIPS Agreement, *supra* note 15, art. 41, para. 1.

201. The relevant language reads as follows:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful [sic] trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other [c]ases of infringement of intellectual property rights, in particular where they are committed wilfully [sic] and on a commercial scale.

*Id.* art. 61.

202. *See* China-U.S. Panel Report, *supra* note 69.

203. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27 [hereinafter Berne Convention].

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

*Id.* art. 5, para. (1).

204. China-U.S. Panel Report, *supra* note 69, at 39, 134.

205. *Id.* at 69–71, 134.

206. *Id.* at 69, 72–74, 78–79, 85.

207. *Id.* at 125, 132, 133.

different from the most suitable copyright policy for the United States.<sup>208</sup> In seeking areas of intellectual property policy commonality, it might be more fruitful to seek to understand *why* copyright enforcement is not a priority for China rather than pressuring China to change its priorities.

For instance, the historical approach to property and intellectual property rights taken by some Asian cultures was markedly different from that of the United States. The classic example is that of copyright in China. In his seminal work, *To Steal a Book Is an Elegant Offense*, Professor Alford explains that in China, not only was copying acceptable, it was considered a compliment.<sup>209</sup> He argues that attempts to introduce Western intellectual property law into China have been relatively unsuccessful because of the failure to consider the relevance of Western models of intellectual property protection for China.<sup>210</sup> Because knowledge of the past functioned as an instrument for moral development and as a method for measuring relationships, it was considered crucial for the Chinese to have broad access to such knowledge. Therefore, the role of the past was inconsistent with the concept of the fruits of intellectual efforts as private property.<sup>211</sup>

Japan, although its current intellectual property laws and practice are largely in line with the United States, provides another example of an Asian society that took a distinct approach to culture and copyright.<sup>212</sup> Japan enacted its first modern copyright legislation in 1899 following international pressure arising from treaty obligations with Great Britain, the United States, Italy, Germany, France, and the Netherlands.<sup>213</sup> Professor Scott characterizes Japan as a collectivist society and describes the Japanese approach to copyright as being culturally distanced from the economic approach of the United States.<sup>214</sup> For example, the definition of cultural property includes intellectual property, and copyrighted works are considered cultural assets.<sup>215</sup> Also, Japanese copyright law is more heavily influenced by the German and French traditions and therefore treats authors' economic rights as distinct from moral rights.<sup>216</sup>

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208. As discussed, this case involved questions of censorship and criminal enforcement. However, I focus on copyright, as this was the primary intellectual property issue in this dispute.

209. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 27–29 (1995) (explaining that in Chinese culture it was acceptable to reproduce or imitate the works of highly regarded artists from the past as part of one's own artistic work). For a contrary view, see Peter K. Yu, *Intellectual Property and Asian Values* 7–8 16 MARQ. INTELL. PROP. L. REV. (forthcoming 2012) (manuscript at 7–8), available at <http://ssrn.com/abstract=1945104>.

210. ALFORD, *supra* note 209, at 2.

211. *Id.* at 18–20.

212. See Scott, *Cultural Property*, *supra* note 107, at 302, 308 (explaining that Japan had a strong caste and class system but that one could change classes, so there was no revolution as there was in Europe).

213. *Id.* at 330, 331 (explaining that there was a nascent intellectual property system in Japan by the beginning of the Tokugawa period, which was from 1603 to 1867).

214. *Id.* at 300, 318.

215. *Id.* at 316, 318.

216. *Id.* at 339.

There are some obvious differences between developed countries and emerging economies such as China or India or culturally distinct nations, like Japan. But nations that share more cultural and economic similarities also differ on their views about the appropriate intellectual property balance, as shaped by their national values.

*B. The WTO Canada Patent Pharmaceuticals Dispute as an Example of Value Differences*

Canada, the European Union, and the United States work closely together on various matters and are among a handful of parties that negotiated the ACTA. Yet they continue to have differences over intellectual property rights. Indeed, many of the TRIPS disputes that led to the establishment of WTO panels were between developed countries, including the EU and the United States.<sup>217</sup> In other words, even countries<sup>218</sup> that are relatively similarly situated may have value differences that generate tension.

Canada and the United States are both New World English speaking nations, with legal systems that are based on the British common law system. These two countries are neighbors, allies, and partners in the North American Free Trade Agreement.<sup>219</sup> They share many more similarities than differences. Both the Canadian and the American patent and copyright laws are consistent with their current international obligations.<sup>220</sup> Yet, these two nations have fundamental value differences that shape their perceptions of the intellectual property balance. Hence, Canada is on the USTR Special 301 Watch List as one of the most egregious violators of intellectual property rights.<sup>221</sup> The *Special 301 Report* is compiled annually by the USTR to identify countries that, in the view of the United States

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217. See *Disputes by Agreement*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A26#select\\_e\\_d\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#select_e_d_agreement). Panels were established for DS50 (United States-India), DS59 (United States-Indonesia), DS79 (European Union-India), DS114 (European Union-Canada), DS160 (European Union-United States), DS170 (United States-Canada), DS174 (United States-European Union), DS176 (European Union-United States), DS290 (Australia-European Union), and DS362 (United States-China). *Id.*

218. The EU (formerly the European Community and its member states) participates in WTO disputes. For the sake of simplicity, I refer to “countries” even though this term is properly applied to the EU member states but not the EU itself.

219. NAFTA, *supra* note 179.

220. Note that while Canada has signed the WIPO Internet Treaties, it has not ratified them. See *Treaties and Contracting Parties*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16) (Nov. 22, 2011). This means that Canada has agreed in principle to the treaties, but it is not obligated to implement the treaties into its domestic law until it has ratified them.

221. 301 REPORT, *supra* note 37, at 11, 25. The United States wants Canada to implement the WIPO 1996 Internet Treaties, identifying internet piracy as a problem in Canada. *Id.* In addition, the USTR criticizes what it considers to be Canada’s weak border enforcement because border agents do not have the authority to seize allegedly infringing goods without a court order. *Id.*

government, provide inadequate intellectual property protection.<sup>222</sup> The test for the USTR is whether the level of protection is satisfactory to the United States.<sup>223</sup>

One of the early WTO intellectual property disputes was between the European Union and Canada, with the United States and other countries joined as third parties.<sup>224</sup> The case involved a question of pharmaceutical protection and what constitutes a limited exception to the patent right. Canadian legislation permitted generic manufacturing companies to engage in research for the purposes of meeting regulatory requirements (the “regulatory review exemption”).<sup>225</sup> The legislation also allowed companies to manufacture the patented drug six months before the expiry of the patent so that the generic version of the drug would be ready to go on the market once the patent expired (the “stockpiling exemption”).<sup>226</sup> Brazil, India, Cuba, and Israel agreed with Canada,<sup>227</sup> while the United States<sup>228</sup> and Japan<sup>229</sup> agreed in part but argued against stockpiling. The panel preferred the position put forth by the United States and Japan.<sup>230</sup>

Article 30 of TRIPS allows for limited exceptions to the patent right, provided that the exception does not unreasonably conflict with the normal exploitation of the patent or prejudice the legitimate interests of the patent owner.<sup>231</sup> However, the legitimate interests of third parties must also be considered.<sup>232</sup>

Canada argued that the limited exceptions to the right conferred, taking into account the legitimate interests of third parties, should be read in light of Articles 7 and 8 of TRIPS.<sup>233</sup> Article 7 of the Agreement recognizes the need to balance interests in a manner that is conducive to social welfare.<sup>234</sup> Article 8 of TRIPS allows nation states to take measures to protect public health, provided the measures are consistent with the Agreement.<sup>235</sup> The Canadian position was that the

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222. The report also identified inadequate protection as a problem in Brazil, China, India, Italy, Russia, Spain, and the Ukraine. *Id.* at 11.

223. Trade Act of 1974, 19 U.S.C. § 2411(a)(1)(B)(ii) (2006). This explains why nations may comply with their international obligations and still find themselves on the USTR Special 301 Watch List.

224. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000) [hereinafter Canada Panel Report].

225. *Id.* at 2.

226. *Id.* at 2–3.

227. *Id.* at 106, 111, 119–21.

228. *Id.* at 138.

229. *Id.* at 123.

230. *Id.* at 156, 162, 169, 174.

231. TRIPS, *supra* note 15, art. 30.

232. *Id.* Article 30 states: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.” *Id.*

233. Canada Panel Report, *supra* note 224, at 25.

234. TRIPS, *supra* note 15, art. 7.

235. *Id.* art. 8, para. 1. Article 8, paragraph 1 states: “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-

interest of ensuring access to low-cost drugs as soon as the patent expired was both legitimate and important.<sup>236</sup> As such, Canada argued, TRIPS requires balance, and intellectual property rights should not be allowed to override “social and economic welfare, and the rights of others.”<sup>237</sup>

The United States submitted that the regulatory review exemption was acceptable.<sup>238</sup> The American position was that while Articles 7 and 8 gave insight into the objectives and purposes of TRIPS, neither of these provisions “diminished the substantive obligations of the Agreement.”<sup>239</sup> The United States took the position that the stockpiling exception was not justified as a limited exception.<sup>240</sup> While disagreeing that stockpiling shortened the patent term,<sup>241</sup> the United States submitted that the stockpiling exception would unreasonably prejudice the legitimate interests of the right holder. The question, from the U.S. perspective, was whether the limitation interfered with the economic benefits that a patent holder would normally enjoy during the patent period.<sup>242</sup> The United States argued that the stockpiling exception was not necessary to facilitate the immediate entry into the market of generic drugs.

Although the panel acknowledged that Articles 7 and Article 8 must be kept in mind when analyzing the limited exceptions under Article 30,<sup>243</sup> it does not appear that the panel gave much weight to these provisions or to the Canadian arguments that were based on these balancing provisions of TRIPS. The panel considered “limited exceptions” and concluded, looking at the dictionary definitions of “limited,”<sup>244</sup> that the exception must be minor, insignificant, or restricted.<sup>245</sup> The exception must be measured by “the extent to which the exclusive rights of the patent owner have been curtailed.”<sup>246</sup> In particular, according to the panel, Article 30 requires the economic impact of the exception to be considered.<sup>247</sup> With respect to the stockpiling, the panel concluded that, in the absence of limitations on the quantity of production, allowing manufacturing of the patented product during the last six months of the patent term abrogated the rights of the patent holder during that time.<sup>248</sup>

Interestingly, the panel’s analysis did not reflect a consideration of the broader societal interests that were advanced or the fact that there would be no commercial implications until *after* the patent had expired. Rather, the panel seemed to hold the view that commercial benefits that may have existed after the expiration of the

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economic and technological development, provided that such measures are consistent with the provisions of this Agreement.” *Id.*

236. Canada Panel Report, *supra* note 224, at 27.

237. *Id.* at 25, 27.

238. *Id.* at 138–42, ¶¶ 5.34, 5.36.

239. *Id.* at 139, ¶ 5.36.

240. *Id.* at 142.

241. *Id.* at 143.

242. *Id.* at 141.

243. *Id.* at 154, ¶ 7.26.

244. *Id.* ¶¶ 7.27–7.28.

245. *Id.*

246. *Id.* at 155, ¶ 7.31.

247. *Id.*

248. *Id.* at 156, ¶ 7.36.

patent term were part of the normal part of the patent owner's right to exclude others from making and using the patented good during the patent term.<sup>249</sup> The panel also found the six-month period to be a commercially significant period of time over the course of a twenty-year patent term.<sup>250</sup> Not only was the societal priority on a public health care system that requires access to low-cost drugs not given due consideration but also the period of market exclusivity granted by a patent was deemed to extend beyond the expiry of the patent term. This was considered an integral part of the commercial gain to which the patent holder should be entitled.

Thus, the panel focused on the economic interests of the patent holder.<sup>251</sup> Yet, Article 7 of TRIPS speaks to the role of intellectual property in contributing to social welfare and speaks to a "balance of rights and obligations."<sup>252</sup> The Canadian calibration of this balance may be based on Canada placing relatively equal importance on the value of public health and the interests of society in having access to low-cost medications and the ability of the patent holder to delay the market entry of the generic product.<sup>253</sup> In this instance, the dissemination of technology in a manner conducive to social welfare may have been the prevailing factor for Canada in assessing the role of patents and the interests of the patent holder, vis-à-vis the interests of the consuming public.

We are asked to take as a given, without justification, that the economic interests of the patent holder should be prioritized over the other interests at stake.<sup>254</sup> The assumption is that the economic interests of the patent holder spur his or her innovation and that without sufficient incentive there will be a lack of innovation. However, it is not clear that innovation is necessarily driven by economic

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249. In the Canada Panel Report, the Panel writes:

In view of Canada's emphasis on preserving commercial benefits *before* the expiration of the patent, the Panel also considered whether the market advantage gained by the patent owner in the months after the expiration of the patent could also be considered a purpose of the patent owner's right to exclude "making" and "using" during the term of the patent. In both theory and practice, the Panel concluded that such additional market benefits were within the purpose of these rights.

*Id.* at 156, ¶ 7.35 (emphasis in original).

250. *Id.* at 156–57.

251. See Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, J. WORLD INTELL. PROP. 493, 494 (2000).

252. TRIPS, *supra* note 15, art. 7.

253. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 548 (Can.) ("Until 1993 the Minister of Health was not directly concerned with patent issues. Indeed, Parliament's policy since 1923 had been to favour health cost savings over the protection of intellectual property by making available to generic manufacturers a scheme of compulsory licensing of an 'invention intended or capable of being used for medicine or for the preparation or production of medicine' under s. 39(4) of the *Patent Act*.").

254. See Okediji, *Public Welfare*, *supra* note 29, at 914–15 (noting that WTO dispute panels have tended to focus on private economic interests, emphasizing the market interests of intellectual property rights holders in determining whether a TRIPS violation has occurred and "[f]urther, the cases suggest that the panels . . . have interpreted the provisions almost solely in light of the economic expectations of the private right holders" (footnote omitted)).

motivations.<sup>255</sup> Additionally, in this case, the patent holder was not deprived of his economic rights. The exclusive right to make the product was curtailed by six months, but the generic version would not be available for sale until *after* the expiry of the patent. This is not simply a question of determining the appropriate standard for assessing the balance that was built into TRIPS, vis-à-vis the rights of the patent holder. Rather, it is a question of giving those balancing provisions any weight whatsoever.<sup>256</sup> Ultimately, the panel's analysis reads out the balance that was written into Articles 7 and 8 of TRIPS.<sup>257</sup>

What if the primary role of intellectual property law in a given nation is to promote social welfare, health or culture?<sup>258</sup> What if the role of intellectual property is valued differently in a particular instance, and the corporate economic interests are not, therefore, prioritized? TRIPS, if it is to be relevant, must be sufficiently malleable to suit all nations. The Agreement does not prohibit states from prioritizing public interest concerns as part of the domestic calibration of the intellectual property balance.

As Professor Okediji suggests, the imbalances resulting from the way in which TRIPS was negotiated can be corrected in the enforcement phase by deferring to state policy.<sup>259</sup> The tensions that arise at the intersection of intellectual property

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255. Andrew W. Torrance & Bill Tomlinson, *Patents and the Regress of Useful Arts*, 10 COLUM. SCI. & TECH. L. REV. 130, 132, 166 (2009); see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 27 (2010) (observing that despite significant efforts, it is difficult to quantify the net effect of counterfeiting and piracy on the economy); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1116–18 (2009) (discussing how various nations attained high levels of economic growth without having strong intellectual property rights). *But see* Viktor Mayer-Schönberger, *The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 J. L. & POL'Y INFO. SOC'Y 153, 166–68 (2010) (arguing that the patent system overall tends to benefit entrepreneurs); Rod Falvey, Neil Foster & David Greenaway, *Intellectual Property Rights and Economic Growth* 1, 7–9 (Internationalisation of Economic Policy Research Paper Series, Paper no. 12, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=715982](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=715982) (showing a positive relationship between intellectual property protection and economic growth).

256. See Howse, *supra* note 251, at 493.

257. TRIPS, *supra* note 15, art. 7–8. With respect to the question of how a WTO panel should interpret that balance, it should be done, like any other international agreement, in accordance with the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 and, like any other WTO dispute, on a case-by-case basis. See Okediji, *Public Welfare*, *supra* note 29, at 915 (noting that WTO-TRIPS dispute cases incorrectly assume that multiple levels of tension and policy differences were resolved during the TRIPS negotiations and therefore presume that the domestic balance should be renegotiated in light of the international obligations).

258. Henning Grosse Ruse-Khan, *Protecting Intellectual Property Under BITs, FTAs, and TRIPS: Conflicting Regimes or Mutual Coherence?*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 4 (Chester Brown & Kate Miles eds., 2011) (noting that various commentators have pointed out the impact of intellectual property rights on a range of public interest matters like public health, education, and food security).

259. Okediji notes the following:

rights and global public health, education, or the protection of cultural heritage, reflect the recognition that the value in intellectual property rights is not just in the economic benefits conferred to the right holder. The need to recognize values other than the private economic interests of the rights holders have become increasingly salient since the time of TRIPS was implemented.<sup>260</sup> This is true not only for TRIPS, but also for bilateral and multilateral trade-related intellectual property agreements.

## VII. VALUING DIVERSITY

Minimum intellectual property standards can facilitate trade. This is because if there is some guaranteed minimum level of protection, intellectual property goods can cross borders more easily, and the rights holders can have some assurance that their rights will be respected in various nations. However, advising countries that increased intellectual property rights will be good for their social and economic development does not make it so.<sup>261</sup> For instance, it has been observed that attempts to increase standards through substantive harmonization efforts, such as the Draft Substantive Patent Law Treaty,<sup>262</sup> were premature.<sup>263</sup> This is because a number of countries are still struggling to adjust to the TRIPS standards and further negotiations are likely to be detrimental to the countries that already find the TRIPS standards too high.<sup>264</sup> Indeed, moving towards even greater harmonization by

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The TRIPS negotiations best reflect an uncooperative game with a core that subverted the competitive assumptions. This requires the existence of mechanisms to correct imbalances that are attributed to the provisions of the TRIPS Agreement. This can be done in the area of TRIPS enforcement, by deferring to state policy, to the extent that the policy seeks to preserve a balance between owners and users, as well as owners and downstream innovators, in efforts to promote public welfare. . . . In short, all countries should be concerned about the domestic welfare balance in intellectual property policies of other member states given the interdependence of the global economic system. If the TRIPS Agreement is enforced with a maximalist brush, the welfare goals of domestic intellectual property will be subverted, as will the welfare goals intrinsic to the competitive trade model.

Okediji, *Public Welfare*, *supra* note 29, at 861.

260. For instance, the Doha Declaration on the TRIPS Agreement and Public Health, *infra* note 314, para. 17, adopted subsequent to this decision, acknowledges the importance of health-related societal goals and values.

261. Okediji, *Regulation of Creativity*, *supra* note 154, at 2404–07 (noting that WIPO makes claims to developing countries about the benefits of increased copyright protection, but arguing that the WIPO internet treaties are of no apparent benefit).

262. World Intellectual Property Organization, Standing Committee on the Law of Patents, *Draft Substantive Patent Law Treaty* (SPLT), WIPO Doc. SCP/10/2 (Sept. 30, 2003).

263. Reichman & Dreyfuss, *supra* note 93, at 91–92 (suggesting that it is too soon after TRIPS to attempt further harmonization and noting that developing countries are still attempting to absorb the social costs of elevated patent standards created by TRIPS).

264. *Id.* at 92 (arguing that “the dynamics of TRIPS and the post-TRIPS trade agreements teach that even a development-sensitive negotiation process is likely to produce an instrument that furthers interests of developed countries at the expense of poorer, less powerful participants”).

focusing on the commodity<sup>265</sup> value of intellectual property goods creates two problems that weaken the regime.<sup>266</sup>

First, the trade orientation tends to overemphasize this narrow commodity view of copyrighted and patented goods. Hence, it minimizes the ability of states to prioritize values such as social and economic development, access to knowledge, or the promotion of cultural heritage.<sup>267</sup> Assessing intellectual property outcomes in relation to private economic gain also fails to recognize, for instance, that copyright subsists even if the copyrighted work *never* becomes an article of commerce. The value of the copyright may be that the author is acknowledged for her work and that the integrity of the work is protected, rather than any market value that may attach to the work. Copyrights and patents are not predicated on the sale or commercialization of the protected good.

Second, utilizing this kind of strategic pressure could, quite reasonably, be perceived as bullying tactics. Ultimately, the likelihood of success is decreased if the pressured parties fail to buy into the system. Even if the national leaders are co-opted through political pressure, the citizens may resist the standards or find themselves unable to comply due to a lack of resources. Indeed, the more that the intellectual property laws that states adopt are contrary to their interests, the greater the likelihood of resistance and hostility to the changes. Assuming that states are rational actors, they will act, where possible, in their own self-interest.<sup>268</sup>

State resistance to agreements that work against their interests can take many forms, both formal and informal.<sup>269</sup> Where there are overriding national objectives,

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265. “Commodities” are defined as “those things, which are useful or serviceable, particularly articles of merchandise moveable in trade. Goods, wares, and merchandise of any kind; articles or trade or commerce.” BLACK’S LAW DICTIONARY 310 (9th ed. 2009).

266. I speak here primarily of copyrights and patents. Trademarks, on the other hand, are designed to be used in the course of trade.

267. See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97 (2007); OseiTutu, *supra* note 130.

268. Guzman, *supra* note 184, at 1841. Professor Guzman explains that the self-interest can be identified based on the basis of public interest or public choice theory. *Id.* The former assumes that governments act in the interest of their citizens while the latter assumes that government decisions are shaped by pressure from interest groups and may not reflect the national interest. *Id.* Because it is difficult to predict the outcome of interest group analysis, it is difficult, Professor Guzman explains, to apply it to normative analysis. *Id.* For the purposes of this Article, this writer assumes that states are rational actors and that they will act in their self-interest, regardless of how that self-interest is determined.

269. *Id.* at 1853 (“A country’s decision to follow international law reflects a judgment that the costs of a violation outweigh the benefits. Because the opportunities and risks facing a country vary both over time and across contexts, however, a country may choose to follow a particular law at one time or in one context and violate it at another time or in another context.”); Sherwood, *supra* note 17, at 37 (noting that intellectual property systems require a significant level of administrative and judicial discretion: “Unless those who operate those systems hold a belief that they serve local interests, international rules, however derived or enforced, are likely to achieve little. Put more precisely, there are probably a dozen ways a patent office can defeat an inventor and as many more ways available to a judge . . . In other words . . . international lawmaking has only a limited potential for forcing countries to do

governments may even contemplate implementing national laws that conflict with the intellectual property treaties.<sup>270</sup> On the other hand, if the state actor is politically and economically powerful, it can negotiate its interests separately through bilateral trade agreements, such as the various wine agreements in which the European Union negotiated better protection for its geographical indications.<sup>271</sup> It seems fairly apparent, however, that this is not the time to strengthen and further harmonize intellectual property laws. A significant level of harmonization may be challenging not only for developing countries, but for industrialized countries as well.

Although there has not been interest convergence on intellectual property law and policy, this does not mean that the international community should not strive to find areas of interest convergence. It is essential to the success of TRIPS and global intellectual property law to develop a globally beneficial intellectual property system, even if this means allowing value divergence and encouraging nations to tailor intellectual property laws to suit their specific needs. Not only would this be consistent with TRIPS, it would further the long-term interests of both intellectual property users and producers.

#### A. TRIPS Recognizes Value Diversity

It is precisely because there has not been a convergence of intellectual property interests that adequate attention must be accorded to Articles 7 and 8 of TRIPS. The objectives of TRIPS, as set out in Article 7 of the Agreement, provide that intellectual property rights should contribute to the promotion of innovation *and* to the transfer and dissemination of technology in a manner conducive to social and economic welfare.<sup>272</sup> Thus, while discussions of intellectual property often focus on

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what they are unprepared to do.”); *id.* at 44 (“For an IP regime to work well, there must be a belief in the country that the country’s interests are well served.”).

270. See Robert Block, *Big Drug Firms Defend Right to Patents on AIDS Drugs in South African Court*, WALL ST. J., Mar. 6, 2001, at A3; Gumisai Mutume, *AIDS Activists March Against Pharmaceutical Companies*, THIRD WORLD NETWORK, <http://www.twinside.org.sg/title/against.htm> (noting that protests ensued after March 5, 2001 when “subsidiaries of about 40 major drug makers challenged a 1997 South African law that permits the health minister to shop around for the lowest-priced patented products around the world, under a practice termed parallel importing. The law also allows compulsory licensing, giving the minister powers to permit local companies to manufacture generic versions of patented drugs.”). Due to this pressure, the forty drug manufactures later dropped the suit in 2005. See Anna Lanoszka, *Coalition of Pharmaceutical Producers Withdraws Lawsuit Against the South African Government*, GLOBALIZATION & AUTONOMY, [http://www.globalautonomy.ca/global1/glossary\\_entry.jsp?id=EV.0016](http://www.globalautonomy.ca/global1/glossary_entry.jsp?id=EV.0016).

271. Agreement Between Australia and the European Community on Trade in Wine, Austl.-EU, Jan. 31, 1994, 1820 U.N.T.S. 3 (entered into force Mar. 1, 1994).

272. Article 7 of TRIPS states the following:

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

TRIPS, *supra* note 15, art. 7.

the goal of promoting innovation, the Agreement also recognizes the importance of disseminating that technology as well as the need for intellectual property rights to contribute not only to economic welfare but also to social welfare. Further, Article 8, paragraph 1 of TRIPS allows members to take measures that are necessary to protect public health.<sup>273</sup> However, Article 8, paragraph 1 also requires the measures to be “consistent” with the provisions of the agreement.<sup>274</sup> These provisions serve as a safeguard. Even with this moderating language, many countries find the intellectual property minimum standards to be higher than what would be useful for their society, given their economic and social conditions.

Like other international agreements, TRIPS is to be interpreted in accordance with the ordinary meaning of the words in their context and in light of the object and purpose of the treaty.<sup>275</sup> The preamble of the Agreement, which forms part of the context,<sup>276</sup> recognizes the various goals of TRIPS and acknowledges the differing roles that intellectual property rights may play in different nations. The adequate and effective protection of intellectual property rights is one of the goals of TRIPS.<sup>277</sup> But the Agreement also recognizes that nations will have underlying public policy objectives for the protection of intellectual property.<sup>278</sup>

TRIPS recognizes that innovation is not the only role for intellectual property rights but that nations may have developmental and technological objectives.<sup>279</sup> In addition, TRIPS acknowledges the special needs of developing countries and states that they should be given “maximum flexibility” in implementing their obligations so that they can develop a sound technological base.<sup>280</sup> Recognizing that the

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273. “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.” TRIPS, *supra* note 15, art. 8, para.1.

274. *Id.*

275. Vienna Convention on the Law of Treaties, art. 31, para. 1, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”).

276. Article 31.2 of the Vienna Convention states: “The context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes. . . .” *Id.* art. 31, para. 2.

277. TRIPS, *supra* note 15, at 300 (“*Desiring* to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade” (emphasis in original)).

278. *Id.* (“*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.” (emphasis in original)).

279. *Id.*

280. *Id.* (“*Recognizing* also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.” (emphasis in original)).

implementation of the TRIPS obligations would be challenging for developing countries, the Agreement allowed developing countries and least-developed countries additional four-year and ten-year grace periods, respectively.<sup>281</sup> These statements of flexibility indicate an awareness that national objectives inform the national determination of the appropriate role for intellectual property rights in a given society.

The private nature of intellectual property rights is also explicitly recognized.<sup>282</sup> Indeed, these are state-granted private rights that are granted in exchange for some *public benefit*. There is no clear reason why, interpreting TRIPS in its context in accordance with the Vienna Convention on the Law of Treaties,<sup>283</sup> private interests should be prioritized over public interests. Indeed, the objectives of the Agreement suggest otherwise.<sup>284</sup> Finally, in line with the objectives of the WTO and the long-term nature of these trading relationships, TRIPS emphasizes the importance of reducing tensions by resolving disputes through multilateral procedures.<sup>285</sup> However, if the Agreement is consistently interpreted to favor rights holders, it may have the reverse effect and exacerbate tensions over time.

The apparent flexibilities in TRIPS may be part of the reason that intellectual property-producing nations seek to negotiate higher intellectual property standards through bilateral trade agreements or plurilateral agreements like the ACTA and the TPP. TRIPS consistent value divergence takes a long-term view to the development of the global intellectual property regime. It also recognizes that values may shift as local industries develop or as nations gain economic strength. Thus, nurturing an environment that supports strong intellectual property rights might take ten years for one nation but thirty years for another. How quickly a pro-intellectual property environment evolves may also depend on how much is done to enable countries to develop their own intellectual property industries.

While this Part has focused on TRIPS, as a trade-related intellectual property agreement that recognizes divergent values, it is worth noting that intellectual property agreements and national laws which are not trade-related reflect this

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281. *Id.* art. 65, para. 1, art. 65, para. 2 (giving developing countries an additional four years, for a total of five years from the date of entry into force of the WTO Agreement, to fully implement the obligations therein); *id.* art. 66, para. 1 (giving least-developed countries an additional ten years to fully implement their TRIPS obligations). However, these time periods are relatively short for nations that have been working towards economic and industrial development over the course of several decades. In 2005, WTO members extended the time period for least developed countries to implement TRIPS under Article 66.1 to 2013. See Decision of Council for TRIPS, *supra* note 156.

282. TRIPS, *supra* note 15, at 300 (“*Recognizing* that intellectual property rights are private rights.” (emphasis in original)).

283. *Supra* note 275.

284. See TRIPS, *supra* note 15, art. 7 (“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”).

285. *Id.* at 300 (“*Emphasizing* the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.” (emphasis in original)).

divergence of values as well. For instance, the Berne Convention provisions on moral rights,<sup>286</sup> the Convention on Biological Diversity,<sup>287</sup> and national laws that protect traditional knowledge reflect a diversity of views. Further, reference in international agreements to intellectual property rights as human rights is consistent with an understanding of intellectual property that goes beyond the economic value of the rights.<sup>288</sup>

The next Part of the Article addresses how embracing value divergence can lead to interest convergence.

### *B. Value Divergence Facilitates Interest Convergence*

Domestic and international intellectual property law and policy influence one another.<sup>289</sup> A great deal of scholarly critique has contemplated how to accommodate the needs of developing countries in the international intellectual property agenda.<sup>290</sup> However, there are also value differences among industrialized countries.<sup>291</sup> The flexibilities for which developing countries fought are valuable for all nations and should be encouraged by both industrializing and industrialized states.

Just as the intellectual property-importing nations should not expect to appeal purely to the goodwill of intellectual property-generating nations for more flexibility in accommodating their specific needs, the major intellectual property producers, like the United States, should not expect that promises of trade-offs in agriculture or market access will cause intellectual property-importing nations to internalize a pro-intellectual property rights stance. The strategy may have been effective in concluding an agreement. But the experience thus far illustrates that this strategy has its limitations. Certainly, China has formally agreed to protect U.S.

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286. Berne Convention, *supra* note 49, art. 6 *bis*.

287. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

288. *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), at 76 (Dec. 10, 1948). Article 27.2 states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." *Id.* art. 27, para. 2.

289. Okediji, *Regulation of Creativity*, *supra* note 154, at 2382.

290. Compare Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 139, 160–64 (noting that there are ways to protect traditional knowledge using the existing TRIPS text), and Kapczynski, *supra* note 23 (suggesting that TRIPS offers developing countries a greater degree of flexibility in the area of pharmaceuticals than has been generally recognized), with Yu, *Objectives*, *supra* note 24 (suggesting that Articles 7 and 8 of TRIPS can be used as a "seed" of development), and Yu, *Discontents*, *supra* note 24 (describing how TRIPS can be interpreted through a "pro-development lens").

291. The Canada Pharmaceutical dispute serves as an example. See *supra* Part VI.B. Note also, for instance, the divergent approaches of the United States and the European Union with respect to the protection of geographical indications. See Long, *supra* note 118, at 222–23.

intellectual property.<sup>292</sup> However, as the USTR notes, it appears that eliminating copyright piracy is not something the government of China is necessarily interested in pursuing.<sup>293</sup>

Various factors will determine the role a given nation believes its patent and copyright laws should play in society. These may include the level of economic development, the national history, and the social and economic goals. All these elements affect the societal values, including factors such as whether the society is more individualistic or more communitarian in nature. The convergence of intellectual property interests will not necessarily happen organically but it is something that can be facilitated in the long-term by creating a favorable environment. The right environment is necessary for global intellectual property law to move toward increased intellectual property rights for all nations.<sup>294</sup> Because intellectual property rights have economic, social, and even political implications, this enabling environment can be nurtured over time. Thus, promoting social and economic development is a way to generate mutually beneficial and, thus, more easily enforceable, intellectual property norms. This can be achieved by allowing nations to tailor intellectual property laws to suit their national objectives to the maximum extent permitted by TRIPS.<sup>295</sup>

Countries with relatively similar cultural backgrounds and levels of economic development diverge in their societal values and their domestic assessment of the appropriate intellectual property balance. It is questionable, therefore, to require all WTO members, including developing and emerging economies, to abide by standards that are arguably better suited to the goals of intellectual property-producing nations.<sup>296</sup> These standards, as they have been interpreted, may not even

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292. Press Release, Office of the U.S. Trade Rep., U.S.-China Joint Commission on Commerce and Trade 2010: China Agrees to Significant IP Rights Enforcement, Market Opening, and Revisions to Indigenous Innovation Policies that Will Help Boost U.S. Exports (Dec. 15, 2010), available at <http://www.ustr.gov/about-us/press-office/press-releases/2010/december/us-china-joint-commission-commerce-and-trade-2010>. The press release noted the following:

“China agreed to a series of intellectual property rights commitments that will protect American jobs. The commitments build on China’s recently announced Special Campaign against counterfeiting and piracy,” Ambassador Kirk said. “These commitments will have systemic consequences for the protection of U.S. innovation and creativity in China. We expect to see concrete and measurable results, including increased purchase and use of legal software, steps to eradicate the piracy of electronic journals, more effective rules for addressing Internet piracy, and a crack down on landlords who rent space to counterfeiters in China.”

*Id.*

293. 301 REPORT, *supra* note 37, at 19–20.

294. Yu, *China Puzzle*, *supra* note 132.

295. Subsequent bilateral and plurilateral agreements should retain the flexibilities established in TRIPS.

296. 301 REPORT, *supra* note 37, at 15 (noting that, although developing countries were required to implement their TRIPS obligations by January 2005, many are still in the process of establishing intellectual property mechanisms that the USTR considers to be adequate and effective).

suit the national conditions or societal goals of similarly situated industrialized countries.<sup>297</sup> Value divergence can be seen through a positive, rather than negative, lens. WTO panels and trade negotiators should, in accordance with the balancing function in TRIPS, acknowledge that each society has a distinct national identity, and that its treatment of intellectual property law may reflect its national identity, its goals, and its values.

### 1. Tailoring Intellectual Property Laws To Support National Objectives

International intellectual property treaties that predated TRIPS<sup>298</sup> allowed nations more scope to tailor their copyright or patent laws to suit their national circumstances. Thus, countries agreed to provide patent protection, for instance, but some countries elected not to patent medicines.<sup>299</sup> TRIPS differs from these long-standing treaties because the scope for tailoring intellectual property law to suit domestic needs has been significantly curtailed. Also, the pressure to become a party to these international agreements was much less significant than the pressure to join the WTO. Whereas membership in the WTO affects a nation's ability to benefit from greater market access, the benefits of becoming a party to the Berne Convention or the Paris Convention are limited to those relating to intellectual and industrial property.

If TRIPS is, as Professor Correa suggests, an attempt to stifle competition by developing countries, the interests of innovators and imitators could appear to be diametrically opposite.<sup>300</sup> It may be that TRIPS, however, was driven by technological protectionism and by the desire to have industrializing countries become markets for consumption. However, too much intellectual property protection might destroy not only the competition but also the purchasing market. If consumers do not have the economic wealth to purchase the copyrighted or patented goods, it will continue to be difficult for them to buy such goods. If the countries that are not highly technologically innovative constitute an important market for the intellectual property-generating countries, then it is, arguably, also in the interest of the technology-producing countries not only to permit but also to encourage such countries to tailor intellectual property agreements to suit their needs.<sup>301</sup>

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297. See Canada Panel Report, *supra* note 224.

298. Berne Convention, *supra* note 49; Paris Convention, *supra* note 50.

299. See, e.g., Kapczynski, *supra* note 23, at 1576–78 (discussing India's prohibition on patented medicines prior to TRIPS).

300. See CORREA, *supra* note 60, at 3–5 (explaining TRIPS as being part of American policy to create international rules that would counter its declining, competitive position in the global market place and identifying a number of factors that converged to make intellectual property significant for the United States. These included the growing importance of technology in international competition, the reduction or elimination of trade barriers, and the decline in U.S. supremacy in manufacturing.)

301. *Id.* at 5 (arguing that TRIPS was part of “a policy of ‘technological protectionism’ aimed at consolidating an international division of labour whereunder Northern countries generate innovations and Southern countries constitute the market for the resulting products and services”).

Moreover, for some nations copyright policy, for example, may be primarily cultural policy whereas for others it may be a matter of sound economic policy. On the other hand, for some countries, the prevailing motive may be the advancement of certain basic human rights and promoting access to affordable knowledge goods. The U.S. government advocates strong intellectual property rights because this is seen to be in the interest of U.S. industries.<sup>302</sup> This has only been somewhat effective.<sup>303</sup> It cannot be in the long-term interest of Canada, or newly emerging and developing nations, like India and Ghana, for instance, to advance U.S. business interests and intellectual property priorities over their own intellectual property priorities.<sup>304</sup> How the balance is determined must remain national, not global. This is because the role intellectual property plays is economic, social, and cultural. It is closely tied to a nation's history, level of development, philosophy, and goals.<sup>305</sup>

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302. 301 REPORT, *supra* note 37, at 5 (explaining that part of the role of the USTR is to protect U.S. intellectual property overseas to the benefit of American businesses and their employees).

303. The China-U.S. dispute is one example. *See supra* Part VI.A.

304. Responding to U.S. pressure, Canada, in its recently tabled legislation, mirrors the language of the United States' DMCA. *See* B. C-32, 40th Parliament, 3d Sess. § 41 (Can. 2010). The Canadian provision mirroring the DMCA digital lock provision has been the most controversial provision in the bill. In part, this is because the language of the WCT is fairly broad and does not require the treaty to be implemented in a specific way. *See* Michael Geist, *Long-Awaited Copyright Reform Plan Flawed, but Flexible*, TORONTO STAR, June 3, 2010 ("Despite a national copyright consultation that soundly rejected inflexible protections for digital locks on CDs, DVDs, e-books, and other devices, the government has caved to American pressure and brought back rules that mirror those found in the United States."); Canadian Music Creators Coalition, *Copyright Reform Bill Doesn't Help Canadian Artists*, (June 12, 2010), <http://www.musiccreators.ca/wp/?p=264>. The Coalition also notes that most new Canadian music is not promoted by major record labels, who focus mostly on foreign acts and calls on the government of Canada to support the Canadian cultural scene. *Id.*; Kashif Admed & Eric Miller, *Copyright Reform Needs 'Made in Canada' Approach*, VANCOUVER SUN, June 11, 2010 ("Although U.S. interests may be best served by instituting strong protection laws, Canada could allow consumers to bypass technological protections for personal use and still meet its international obligations."); Graham F. Scott, *How Canada's New Copyright Law Threatens To Make Culture Criminals of Us All*, THIS MAG. (Sept. 17, 2010), <http://this.org/magazine/2010/09/17/fair-copyright/> ("Under C-32 as currently written, circumventing any digital lock would be a crime, even if the purpose were legal. With this measure, the bill legitimizes the sinister notion that large corporate interests are entitled to broad, intrusive powers to control how individuals consume culture."); Michael Geist, *The Canadian DMCA: What You Can Do*, MICHAEL GEIST'S BLOG (Dec. 2, 2007), <http://www.michaelgeist.ca/content/view/2431/125/>. Thus, national values impact respect for, and adherence to, domestic intellectual property laws, even when those laws are driven by global forces.

305. Furthermore, intellectual property is philosophically more challenging to justify than real property because it is entirely a legal construct. One cannot say, with respect to intellectual property, that possession is nine-tenths of the law because the intangible cannot be possessed and controlled like a physical object. *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

As discussed, Canada and the United States are neighbors with many similarities, but they are also fundamentally different in certain ways that shape national intellectual property policy. Examples of the distinct cultural attitudes between the United States and Canada are evident from Canada's emphasis on public health care, public education—including public colleges and universities—and the availability of low-cost medicines.<sup>306</sup> The desire to keep the costs of medicines low was central to the Canadian position in the WTO *Canada Pharmaceutical* dispute.<sup>307</sup> This can be contrasted to the value the United States places on the free market, including privatized health care, private education, and the absence of price controls on pharmaceutical products. As compared to the United States, with its emphasis on the free market, Canada, with its emphasis on public access, may also place a higher value on access to affordable knowledge goods and the dissemination of information than on the commodity value of intellectual property goods. In the United States, the economic view of the role of intellectual property as a way to stimulate innovation appears to be the current, dominant cultural view.<sup>308</sup> By comparison, Canadian copyright policy, for instance, appears to be a mix of the economic goals and the promotion of culture and cultural heritage.<sup>309</sup>

It is not the right time to advance a maximalist global intellectual property agenda.<sup>310</sup> To the contrary, it is a valid intellectual property strategy to foster economic development and to put public welfare needs ahead of the desire to promote private economic gain. Historically, patent and copyright laws have been weak when countries have been developing economically.<sup>311</sup> Economic studies indicate that strong intellectual property rights are useful when economic development is relatively high and countries are producing, not just consuming, intellectual property-protected goods.<sup>312</sup> Thus, some countries will still be inclined

306. For a general analysis of some Canada-U.S. cultural differences, see SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* (1990).

307. Canada Panel Report, *supra* note 224, at 17.

308. See U.S. CONST. art. I, § 8, cl. 8.

309. There is no explicit constitutional provision that details the purpose of Canadian copyright law. Constitution Act, 1999, §§ 91(22), (23) (U.K.). However, the Canadian copyright policy is split between the Department of Canadian Heritage and Industry Canada, perhaps reflecting dual purposes of the role of copyright in Canadian society. See *Arts and Cultural Industries, CANADIAN HERITAGE*, <http://www.pch.gc.ca/eng/1266244047506/1266200598020>; *Canadian Intellectual Property Office (CIPO)*, INDUSTRY CANADA, [http://www.ic.gc.ca/eic/site/ic1.nsf/eng/h\\_00075.html](http://www.ic.gc.ca/eic/site/ic1.nsf/eng/h_00075.html).

310. See Reichman & Dreyfuss, *supra* note 93, at 86 (“[T]he international community should not rush to freeze legal obligations regarding the protection of intellectual property. It should wait until economists and policymakers better understand the dynamics of innovation and the role that patent rights play in promoting progress and until there are mechanisms in place to keep international obligations responsive to developments in science, technology, and the organization of the creative community.”).

311. DUTFIELD & SUTHERSANEN, *supra* note 155, at 10.

312. Carsten Fink & Carlos A. Primo Braga, *How Stronger Protection of Intellectual Property Rights Affects International Trade Flows*, in *INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH* 19, 22 (Carsten Fink & Keith

to implement laws that encourage the dissemination of knowledge. Indeed, promoting sustainable development is consistent with the WTO mandate. For instance, GATT acknowledges the need “to ensure that developing countries . . . secure a share in the growth in international trade commensurate with the needs of their economic development.”<sup>313</sup> Moreover, as part of the Doha Development Agenda, WTO member states reaffirmed their commitment to sustainable development.<sup>314</sup>

Intellectual property-producing countries can also benefit by supporting policies directed at creating stable nations rather than promoting laws that, because they are not suitable, may curtail another nation’s social and economic progress.<sup>315</sup> As local industries develop, there will be a decrease in value divergence and a corresponding increase in interest convergence. Naturally, this will vary depending on the type of intellectual property in question and on the strength of the local industry. For example, the United States is a major producer of motion pictures, and its motion picture industry has an interest, therefore, in protecting copyright in such works. As India has become the world’s largest major film producer,<sup>316</sup> its industry interests may converge with those of the United States with respect to protecting copyright in motion pictures.<sup>317</sup>

Nonetheless, WTO panels may have a tendency to render panel decisions that are consistent with the economic, right holder-focused approach that currently dominates global intellectual property law. Similarly, trade negotiators may be inclined to follow the same path and address intellectual property from an economic perspective, including treating intellectual property as an investment within the context of bilateral investment treaties.<sup>318</sup> However, the commodity orientation has its limitations. For example, some scholars suggest that the U.S. emphasis on capitalism, competition, individuality, and private property tends to promote the commodification of human effort, including many artistic and cultural products.<sup>319</sup> Others note that the direction intellectual property law has taken in the United States can have the effect of privileging intellectual property rights holders

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E. Maskus eds., 2005) (noting that “the introduction of IPRs stimulates innovation in the source country and thus increases future trade flows”).

313. GATT 1994, *supra* note 14, arts. XXXVI, para. 3. GATT, XXXVI (speaking of the need to encourage sustainable development); *see also* GATS, *supra* note 79, art. IV (speaking to the need to increase the participation of developing countries in world trade).

314. World Trade Organization (WTO) – Doha Ministerial Declaration 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, 41 I.L.M. 746, para. 6 (2002).

315. *See* CHANG, *supra* note 65, at 74 (arguing that free trade may maximize a country’s consumption but that free trade “is definitely not the best way to develop an economy”).

316. Madhavi Sunder, *Bollywood/Hollywood*, 12 THEORETICAL INQUIRIES IN L. 275, 294 (2011) (“Bollywood is the world’s largest film industry and Bollywood films are ‘the most-seen movies in the world.’” (footnote omitted)).

317. Of course, this can also generate tension. *See* Emily Wax, *Paying the Price for Hollywood Remakes; Bollywood Facing Copyright Lawsuit*, WASH. POST, Aug. 26, 2009, at A07.

318. *See* Ruse-Khan, *supra* note 258, at 15 (“IP rights hence are generally considered as protected investments under the US FTAs.”).

319. *E.g.*, Scott, *Cultural Property*, *supra* note 107, at 343.

at the expense of other social and legal considerations.<sup>320</sup> It is not a question of whether this private economic focus is correct; however, it must be acknowledged as but one view among others.

This would, at a minimum, militate against rigid interpretations of TRIPS and suggest a need for greater recognition of the balancing function of TRIPS.<sup>321</sup> Achieving a mutually beneficial and balanced international intellectual property policy in the current climate may mean accepting minimal standardization, encouraging flexibility in the interpretation and application of TRIPS and subsequent agreements, and recognizing the importance of social and economic value differences in approaches to intellectual property.

Thus, WTO panels and trade negotiators should, in accordance with the balancing function in TRIPS, acknowledge that each society has a distinct national identity and that its treatment of intellectual property law may reflect its national identity, goals, and values. At most, there should be an approximation of measures to the extent necessary to avoid impediments to trade, but not a harmonization of measures.<sup>322</sup> This can be achieved by looking for areas of mutual interest without restricting our understanding of intellectual property policy by interpreting it through a narrow economic lens. Embracing this kind of diversity is more likely to create a richer, more complex system: one that challenges us to respect value divergence.

### C. What If There Is No Middle Ground?

Countries like the United States, which play a leadership role in the global community, have set the tone and the direction of international intellectual property policy, for better or worse.<sup>323</sup> Thus, many of the intellectual property standards that have been adopted make good short-term business sense for the United States.

In light of the history of TRIPS and the subsequent agreements, one might query whether it is possible to find areas of global policy agreement on intellectual property. High standards of copyright or patent protection are reasonable for nations that have established industries that require intellectual property protection, but the same laws do not necessarily make sense for nations that do not have well-developed copyright or patent industries. This could lead one to conclude that

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320. *E.g.*, Chander, *Exporting DMCA*, *supra* note 111 (noting Margaret Jane Radin's suggestion that policy arguments about property in the digital environment take explicit cognizance of other policy considerations that tend to bound pro-propriety: contractual ordering, competition, and freedom of expression).

321. *See supra* Part VI.A.

322. Sherwood, *supra* note 17, at 46 ("Harmonization of intellectual property protection may not be realized any time soon. Yet it may not be necessary or even very useful. It may, as a matter of utility, be sufficient to reach diverse levels of protection which are nonetheless congruent enough that people are able to make investment and commercialization decisions without worrying about system differences. In other words, when the non-congruent differences can be left to the lawyers, a working equivalent of harmonization may well have been reached.")

323. Harris, *supra* note 181, at 186 (noting that the United States, European Union, and Japan (and the industries within these countries) are the forces most responsible for TRIPS).

interests will not converge to support high intellectual property rights for all nations at this time, or perhaps at any time.

To suggest that seeking shared interest in global intellectual property standards is futile would amount to an acknowledgement and recognition that strong intellectual property rights are being promoted even though they are simply not advantageous for many nations at this time. Moreover, to conclude that agreement is not possible would be an acknowledgement that there *was* and *is* not a mutually beneficial arrangement, but that TRIPS is indeed equivalent to a coercive contract.<sup>324</sup> It undermines the trade-based approach to global intellectual property because an agreement in form without substance is of little value.

The other point of resistance may be that with this view one would never have a global standard. For example, the Substantive Patent Law Treaty discussions did not advance, largely due to resistance from developing countries.<sup>325</sup> Indeed, it might take longer to achieve change, but the changes implemented are more likely to take root and to be more effective when there is significant buy-in. Ideally, there should be overarching, general standards but not necessarily to the level of detail that we have seen in the implementation of TRIPS and “TRIPS-plus” agreements. For example, the Berne Convention set standards, but it also allowed for a great deal of flexibility. TRIPS, as observed earlier, differs from previous intellectual property treaties because it is more detailed and the obligations are enforceable as part of the trade regime.<sup>326</sup> However, the problem lies not simply with TRIPS but with the fact that WTO panels have chosen to interpret TRIPS obligations and exceptions in light of the private economic interests of the right holder.<sup>327</sup> Unfortunately, this adopts and reinforces a narrow economic paradigm and understanding of intellectual property, which is being replicated in other agreements.

In theory, dissatisfied nations could opt to function outside of the WTO system and bear the consequences of such a decision. This would be extremely challenging for small economies that need access to the markets of larger economies at reasonable tariff rates. What appears to be a choice may amount to no choice at all. Furthermore, the multilateral setting provides smaller countries the opportunity to forge alliances with similarly situated countries, thereby finding strength in number.

It is worth noting that trade-based intellectual property agreements differ from many of the international treaties that are the subject of compliance scholarship in international law. International law scholars often focus on strategies for getting states to comply with international human rights instruments or environmental laws.<sup>328</sup> The distinction between intellectual property agreements, human rights treaties, and environmental law treaties is that human rights and environmental

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324. *Id.*

325. See WIPO, *Standing Comm. on the Law of Patents*, at 4–5, 19–21, WIPO Doc. SCP/10/11 (June 1, 2005); WIPO, *Memorandum from the WIPO Standing Comm. on the Law of Patents*, at 1–3, WIPO Doc. SCP/10/8 (Mar. 17, 2004); Reichman & Dreyfuss, *supra* note 93.

326. See TRIPS, *supra* note 15.

327. See *supra* Part VI.B (discussing the Canada Pharmaceutical dispute).

328. See Hathaway, *supra* note 183.

regulations are aimed at improving the human condition. The same cannot be categorically said for trade-related intellectual property rights. Unlike human rights, intellectual property rights are private economic rights. In the context of intellectual property, tensions arise around the enforcement of the rights in order to further private economic interests despite other public interests that may be at stake. Yet, intellectual property rights may or may not be beneficial to a society depending on the level of economic development.<sup>329</sup> Additionally, intellectual property rights, while they can have some positive effect, can also have detrimental effects on the cost and accessibility of the basic necessities, such as seeds for crops, medicines, and educational materials.<sup>330</sup>

The question is whether nations can be pressured into internalizing intellectual property laws that they do not value or that do not serve their goals and interests. Perhaps this can be done to some extent, but this can equally create resistance in various forms. For example, even if the government of a country, like China, recognizes the value of intellectual property rights, it may not have adequate infrastructure to enforce the laws.<sup>331</sup> Hence, when the United States initiated its WTO dispute with China, the laws required by TRIPS had already been implemented.<sup>332</sup>

#### CONCLUSION

This Article has argued that values shape the agenda. Intellectual property regimes, like real property systems—whether individualistic or communitarian—are influenced by societal values. Through value divergence, interest convergence can be sought, encouraged, and developed over time. This is important for the global intellectual property regime because intellectual property rights are not purely trade-based commodities and should not be treated as a purely trade matter.

Clearly, the goal of the United States and the other intellectual property producers is to ensure more adequate enforcement of intellectual property rights. Yet, scholars and nongovernmental organizations have raised the alarm about the trend in international intellectual property, including the recently concluded ACTA

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329. See Carsten Fink & Keith E. Maskus, *Why We Study Intellectual Property Rights and What We Have Learned*, in INTELLECTUAL PROPERTY AND DEVELOPMENT, *supra* note 312, at 1, 13.

330. Mattias Ganslandt, Keith E. Maskus & Eina V. Wong, *Developing and Distributing Essential Medicines to Poor Countries: The DEFEND Proposal*, in INTELLECTUAL PROPERTY AND DEVELOPMENT, *supra* note 311, at 207, 207–09.

331. Peter K. Yu, *The U.S.-China Dispute over TRIPS Enforcement*, 5 DRAKE OCCASIONAL PAPERS IN INTELL. PROP. L. 8–9 (2010) (noting that there is local resistance to change in China. Further, the problems China faces are not unlike the problems the United States faces with counterfeiting. Professor Yu points out that counterfeit goods are readily found in major U.S. cities and that U.S. authorities place low priority on pursuing piracy and counterfeiting cases, particularly in light of more pressing concerns, like terrorism.).

332. *Id.* at 7 (“[C]hallenging China on non-implementation grounds is likely to be very difficult, as most of the laws required under the TRIPS Agreement are already on the books . . . . [T]he problem with intellectual property protection in China is no longer with its laws, but rather with the enforcement of those laws.”).

text. If the U.S. global intellectual property strategy is to be successful in the long-term, it must be based predominantly on mutually beneficial agreement rather than on agreement that is achieved primarily through coercion. In other words, U.S. intellectual property goals will be facilitated by employing value divergence to stimulate the convergence of intellectual property interests in the long-term. The results may be less apparent in the short-term but are more likely to lead to effective long-term change.

Moreover, mutually beneficial agreement on global intellectual property is important because patent and copyright laws have implications for social issues beyond intellectual property law. Professor Yu suggests that there is a need for a development-friendly lens towards the interpretation of TRIPS.<sup>333</sup> Social development and economic interests are not necessarily mutually exclusive. Businesses may support education, for instance, for moral reasons, but it is also something that businesses need for market reasons.<sup>334</sup> Ultimately, a development-friendly lens is a humanity-friendly lens, as well as a business-friendly lens.

Professor Schoenbaum suggests that in this modern age of the “global village,” the United States cannot be seen to consistently be acting in its own self-interest.<sup>335</sup> It is in the interest of the United States to be seen to be a leader, acting in the interests of humanity.<sup>336</sup> Looking beyond intellectual property, there is a growing convergence of interests among states in peace, security, and stability.<sup>337</sup> Ultimately, because what happens in one nation affects what happens in another, it is essential to consider *human* needs in addition to private economic considerations.

This value divergence approach to the development of international intellectual property law and policy is more likely to bring long-term success because laws that

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333. Yu, *Objectives*, *supra* note 24, at 1027.

334. ADOLF A. BERLE, *POWER* 195 (1969). Berle argues that a successful industrial system requires a number of factors, and he identifies education as the single greatest component. *Id.* He explains the need for an educated and trained work force but also a sophisticated consumer to purchase the products of industrialization. *Id.* He states, “[b]usinessmen may want an educated public for humanistic reasons; but they *need* it for market reasons. Illiterates are poor consumers.” *Id.* (emphasis in original).

335. THOMAS J. SCHOENBAUM, *INTERNATIONAL RELATIONS: THE PATH NOT TAKEN: USING INTERNATIONAL LAW TO PROMOTE WORLD PEACE AND SECURITY* 54 (2006) (“As the preeminent global power, the United States cannot appear to be acting as if its own self-interest is all that matters.”).

336. *Id.*

337. *Id.* at 54; see James Thuo Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885, 915–16 (2004) (“I argue in favor of giving equal priority to leveling the playing field of international trade and commerce between developing and developed countries as an important pre-condition for establishing the trust and confidence in the system of global commerce among countries with different sources of competitive advantage. In addition, the fair competition resulting from leveling the playing field would give developing countries, including countries in the Middle East, a chance not only to feed their people, but perhaps even lay the basis for a middle-class that would in turn help build on the emerging democracies in the South. As a surplus or spin-off, elimination of subsidies in rich Western countries would most likely reduce the conditions of frustration and hopelessness among young people likely to be attracted by those interested in recruiting terrorists.” (footnote omitted)).

are seen to be more legitimate are more likely to be internalized and fully implemented. This, in turn, will lead to a more robust regime. Rather than striving to minimize differences, WTO member states, dispute resolution panels, and national trade negotiators should embrace these differences to the maximum extent possible. Additionally, the flexibilities established in TRIPS should be retained in subsequent bilateral, plurilateral, and multilateral intellectual property agreements.

Although the legitimacy of TRIPS has been called into question, it is not too late to restore legitimacy to the Agreement. Rather, it depends on how TRIPS is interpreted and applied. If TRIPS were to be interpreted in its context, which includes the preamble,<sup>338</sup> and in light of its objectives, then it would *not* be interpreted in a manner that necessarily prioritizes the private economic interests of the right holder over competing societal values and public interest considerations, including public economic interests. Embracing value divergence in the treatment of intellectual property rights in bilateral and plurilateral agreements is also relevant and appropriate. Finally, working to foster interest convergence by allowing value divergence advances the trade policy goal of promoting harmonious relations because it signals mutual respect rather than dominance. This long-term approach is more likely to lead to a more complex, richer, and ultimately more balanced global intellectual property system.

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338. Vienna Convention, *supra* note 275, art. 31.