

**THE INTERNATIONAL RELATIONS OF INTELLECTUAL  
PROPERTY: NARRATIVES OF DEVELOPING  
COUNTRY PARTICIPATION IN THE  
GLOBAL INTELLECTUAL PROPERTY SYSTEM**

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INTRODUCTION

The protection of intellectual property rights in developing countries has been problematic since the genesis of the international system in the nineteenth century.<sup>1</sup> From the moment a select group of European countries concluded a multilateral agreement for the

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1 The two principal international treaties for intellectual property protection were concluded in 1883 and 1886 respectively. Although bilateral relations between countries secured a degree of international protection for authors, the network of bilateral agreements was often discriminatory and provided a limited scope of protection. The Paris Convention and the Berne Convention established a comprehensive system for patent and copyright protection respectively. Despite limited membership by developed countries, the colonies and foreign territories controlled by a few European sovereigns made the geographic scope of the treaties significant. See *infra*, note 3. Nonetheless, international protection for intellectual property remained a patchwork system of disparate norms, rules, levels of protection and overlapping membership of a variety of multilateral instruments. The TRIPS Agreement ushered in a new regime with extensive membership, unprecedented levels of global protection, coordination with some pre-existing international agreements, the incorporation of the Paris and Berne Conventions, enforcement obligations and mechanisms, and a meaningful shift to substantive harmonization in various aspects of intellectual property protection. See generally, J.H. Reichman, "Universal Minimum Standards of Intellectual Property Protection under The TRIPS Component of the WTO Agreement" in Carlos M. Correa & Abdulqawi A. Yusuf, eds., *Intellectual Property and International Trade: The Trips Agreement* (London; Boston: Kluwer Int'l 1998) [hereinafter Reichman, Universal Minimum Standards]; J.H. Reichman, "From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement" (1996/97) 29 N.Y.U. J. Int'l L. & Pol. at 11 (1996/97) [hereinafter Reichman, Free Riders].

protection of industrial property in 1883,<sup>2</sup> non-Western societies, principally in Africa and Asia, were swept under the aegis of the international intellectual property system through the agency of colonial rule.<sup>3</sup> Within three years, an international agreement for copyright was also concluded.<sup>4</sup> Between these two premier accords—the Paris and Berne Conventions—the framework for the modern global system was firmly secured, such that these two treaties remain integral components of the World Trade Organization’s (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).<sup>5</sup>

In the recent groundswell of academic and public commentary on the development impact of the TRIPS Agreement specifically, and intellectual property rights more generally, several different strategies have emerged in efforts to mitigate the effects of exclusive proprietary interests, to identify development benefits from intellectual property rights, or to stem the incessant demand for stronger rights through what are now commonly referred to as “TRIPS-plus” bilateral and

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2 See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 [hereinafter Paris Convention].

3 European colonial expansion started in the fifteenth century in the Americas, and then turned to Asia. By the late eighteenth century, India had become a British colony although France had earlier appropriated parts of that country. As the United States, and later South America, became independent European expansion turned to Africa while simultaneously deepening its hold in Asia. As a result of the Berlin Conference in 1884–1885, Africa was divided among European countries most notably Britain, France, Portugal, Germany and Belgium. Consequently, just as the major international agreements for patents and copyright were being negotiated or concluded, considerable changes were also taking place in world political geography, which affected participation and membership in these agreements. See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Centre for Commercial Law Studies, Kluwer, 1987) at 79 (noting that the vast colonial holdings of France, Germany, Italy, Belgium, Spain and the UK effectively extended the Berne Convention worldwide). The French and British governments formally declared that their accession would extend to all their colonies and “foreign possessions” such as protectorates. *Id.* With respect to the British, the consent of so called self-governing colonies, such as India, was sought before including them in the accession. *Id.* at 791. At the time of its ratification, the Spanish government held that the Convention would extend to “all territories dependent on the Spanish Crown.” *Id.* at 790. Similarly, Germany, Portugal and other European powers extended the Convention to the various territories under their control. See generally, *id.* at 787–810.

4 See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention].

5 See Marrakesh Agreement Establishing the World Trade Organization, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

regional agreements.<sup>6</sup> In addition, various efforts by scholars, non-governmental organizations (NGOs) and international institutions have converged to sustain these strategies, which are usually associated with narratives about the participation of developing countries in the international intellectual property system. I identify the major narratives as: (1) the human rights narratives; (2) the cultural narratives; and (3) the welfare enhancing or doctrinal narratives.<sup>7</sup>

Each of the narratives offers a different perspective on how to place developing country interests/priorities on the intellectual property agenda, how to integrate developing country values and interests in substantive intellectual property norms, and how to facilitate developing country participation in international intellectual property standard setting. The narratives, in distinctive and overlapping ways, have influenced the strategies employed by developed and developing countries in negotiating international intellectual property rules.<sup>8</sup> They have also made important contributions to the understanding that intellectual property rights are not scientifically derived, but instead culturally construed and negotiated between the state and private interests.

The three narratives are linked conceptually in the efforts to reframe the justifications for intellectual property protection to reflect the interests of developing countries or to resist the strengthening of intellectual property rights globally. However, the narratives can also be used to support the current normative underpinnings of the intellectual property system. This particular effect is deeply troubling. Nonstate actors, international institutions and developing states have continued to challenge prevailing forms of intellectual property protection and processes of intellectual property lawmaking with significant reliance on the narratives. The narratives provide

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6 See *e.g.*, David Vivas-Eugui, "Regional and Bilateral Agreements in a TRIPS-plus World: The Free Trade Area of the Americas (FTAA)" (Quaker United Nations Office Publication, 2003); Maria Julia Oliva, "Intellectual Property in the FTAA: Little Opportunity and Much Risk" (2003) 19 *Am. U. Int'l L. Rev.* at 45, 53; Alan Story, "Burn Berne: Why the Leading International Copyright Convention Must Be Repealed," (2003) 40 *Hous. L. Rev.* at 763, 772 n. 41; Hernan L. Bentolila, "Lessons from the United States Trade Policies to Convert a 'Pirate': The Case of Pharmaceutical Patents in Argentina," (2002–2003) 5 *Yale J. L. & Tech.* at 1.

7 Various strains of these narratives predate the TRIPS Agreement. I would argue, however, that the ire over the TRIPS Agreement galvanized longstanding objections to intellectual property in developing countries and yielded a syllogism in the challenges advanced against the TRIPS Agreement specifically, as well as intellectual property rights in general.

8 See Laurence H. Helfer, "Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 *Yale J. Int'l L.* at 1 (discussing the strategy of regime shifting used by developed and developing countries).

countervailing norms and political space in international institutions for developing countries to resist, reframe or in other ways weaken the current regime of intellectual property protection. But the narratives may also constrain developing countries by implicitly strengthening the presumption of legitimacy that is so powerfully associated with strong intellectual property rights in the developed countries.

In this article, I provide a historical review of the relationship between international law, intellectual property rights and the developing world, with sub-Saharan Africa and Asia as my main points of reference. The relationships I recount establish the context for the dominant narratives (identified above) that seek in different ways to rationalize the persistent crises of legitimacy that confront the international intellectual property system as applied to developing countries. I briefly describe these narratives, highlighting key themes and essential attributes of each one. I argue that a measured approach to these narratives is warranted notwithstanding the widespread embrace of their presumptive utility to developing countries. I suggest that the narratives paradoxically provide significant benefit to arguments that support, rather than question, the current international intellectual property system. I therefore urge care and caution in the uncritical deployment of discourses that ultimately constitute means by which expansionist intellectual property rights (or intellectual rights at all) are justified with respect to developing countries. To the extent that the narratives are intended as countervailing norms or other tools for developing countries to deploy against the pervasive reach of intellectual property rights in developing countries, there is a need to consider how these narratives might instead affirm the very premise of the global system.

My endeavors are not merely critical or cautionary. I seek to isolate and expose implicit assumptions in the orthodoxy that challenges existing intellectual property laws on behalf of developing countries. A subsidiary objective is to show how acutely developments in international intellectual property reflect broader movements in international law,<sup>9</sup> and to suggest how this is reflected in the structure

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9 This is particularly relevant given the entrenched domesticization of most intellectual property scholarship, notwithstanding the acknowledged importance of the TRIPS Agreement and the increasingly well known impact of international intellectual property developments on domestic intellectual property law. See *e.g.*, Ruth Okediji, "Toward an International Fair Use Standard" (2000) 39(1) *Colum. J. Transnat'l L.* at 75; Okediji, "TRIPs Dispute Settlement and the Sources of (International) Copyright Law" (2001) 49 *J. Copyright Soc'y* at 585 [hereinafter Okediji, TRIPs Dispute Settlement]; Laurence R. Helfer, "World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act" (2000) 80 *B.U. L. Rev.* at 93; Graeme B. Dinwoodie, "The Development and Incorporation of International Norms in the Formation of Copyright Law" (2001) 62 *Ohio St. L. J.* at 733;

of developing country participation in the global intellectual property system. To this end, I also identify theories of international relations that complement existing accounts of developing country participation in the international intellectual property system.<sup>10</sup>

In Part I, I review the historical context in which intellectual property became an integral component of the international economic order, starting with the initial period of European contact and interaction with territories in Africa and Asia. I identify three distinct periods of intellectual property multilateralism and briefly describe the main objectives of each period with respect to developing countries.<sup>11</sup> As with any effort at periodization, the multilateralisms identified significantly overlap. The boundary lines are blurred rather than clear, transient rather than fixed. These multilateralisms are important more for what was emphasized in relation to broader events in the development of international law, rather than for their discrete contributions to substantive intellectual property norms. My goal is to focus on the principal developments in the international context that might help explain characteristics of the nature and form of participation by developing countries in the international intellectual property system today.

Part II describes the three narratives of developing countries in the intellectual property system and discusses how these narratives have, in some instances, facilitated the legitimization and extension of strong intellectual property rights in developing countries. Part III

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Jane C. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exceptions" (2001) *Revue Int'l Du Droit D'Auteur* at 17; Neil Netanel, "The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement" (1997) 37 *Va. J. Int'l L.* at 441.

- 10 A small but growing body of literature has focused on the application of international relations theory to explain, rationalize, predict or justify outcomes in intellectual property negotiations and prospects for compliance. See *e.g.* Kal Raustalia, "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 *Case W. Res. J. Int'l L.* at 387; Ruth L. Okediji, "TRIPs Dispute Settlement and the Sources of (International) Copyright Law" (2001) *J. Copyright Soc'y* 49 at 585; Ruth L. Okediji, "Rules of Power in an Age of Law" in Kwan C. Choi & James Hartigan, eds., *Handbook of International Trade: Economic and Legal Analysis of Trade Policy and Institutions* (forthcoming London: Blackwell 2004) [hereinafter Okediji, Rules of Power]; Ruth L. Okediji, "Public Welfare and the WTO: Reconsidering the TRIPs Agreement" (2003) 17 *Emory Int'l L. Rev.* at 819 [hereinafter Okediji, Public Welfare and the WTO]; Helfer, Regime Shifting, *supra* note 8.
- 11 There is one caveat. Part I necessarily cuts across a broad expanse of international law, emphasizing the dialectic between the presumptions of classical international law and the post-modern criticism of its method, techniques and cultural prerogatives. In so doing, the criticism of European expansion—politically through colonialism, legally through extra-territorialism and culturally through popular and academic discourse—is dominant. However, as readers will note in subsequent parts of the article, my goal is not to reproduce the main points of critical discourses. My objective involves a critique of both the dominant and reactionary discourses that frame current academic preoccupations about the substance of international intellectual property law and negotiating strategies.

provides a general discussion of developing country participation in the international intellectual property system in the context of theories of state behavior. It is an attempt to identify elements of the domestic/international interface that affect how developing countries approach intellectual property negotiations. Part IV continues this discussion with an emphasis on challenges to developing countries' ability to effect change in the global intellectual property system. I conclude with observations about the narratives of intellectual property rights within the specific context of the domestic/international interface.

## I. MULTIPLE MULTILATERALISMS

### A. *The First Multilateralism (1500's–1945): The Era of Imperialism/Colonialism*<sup>12</sup>

The "first multilateralism" occurred during the early period of European contact through trade with non European peoples. Precise dates are difficult to ascertain, but historians generally identify the first phase of European contact with Africa as commencing prior to the fifteenth century.<sup>13</sup> During this period, trans-Saharan trade routes linked Africa to the Mediterranean region, which already had commercial interaction with Europeans.<sup>14</sup> Trans-Saharan trade was an important source of gold for Europeans, who used it for minting currency.<sup>15</sup> The Mediterranean merchants brokered this trade relationship between Africans and Europeans, given the difficulty for Europeans to travel to African coasts.<sup>16</sup> The maritime revolution introduced innovations such as new sails and compasses, which facilitated long journeys by sea and enabled direct contact between the two continents.<sup>17</sup> Portugal made the first contact by sailing across the Atlantic,

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12 I am grateful for the assistance of Professor Emmanuel Akyeampong, Department of History, Harvard University, in writing this section. Any errors are, of course, mine alone.

13 See, e.g., Roland Oliver & Anthony Atmore, *Medieval Africa: 1250–1800* (Cambridge University Press, 2001) 11; Thomas Pakenham, *The Scramble for Africa, 1876–1912*, (London: Weidenfeld & Nicholson, 1991) 15.

14 On the trans-Saharan trade, see Ralph Austen, *African Economic History*, (London, J. Currey ch. 2 1987); and A.G. Hopkins, *An Economic History of West Africa* (New York, Columbia University Press, 1973) 79–87.

15 Pakenham, *supra* note 13, at 16–17.

16 J. Devisse & S. Labib, "Africa in Inter-Continental Relations" in *General History of Africa: Africa from the Twelve to the Sixteenth Century* (D.T. Niane ed., UNESCO 1984) 648.

17 F.D. Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons, Edinburgh and London, 1922) at 3 n. 1 (stating "It is interesting to note that it was the conquest of the ocean which directly led to the expansion of the peoples of Europe...").

linking Africa South with Africa North.<sup>18</sup> By the end of the fifteenth century, maritime contact between Asia and Europe had also occurred by virtue of European interest in the spice trade.<sup>19</sup> Again, this commercial relationship was brokered initially by Mediterranean merchants in an overland trading network.<sup>20</sup>

The possibility of direct contact intensified trade between Europeans and non European peoples, eventually necessitating the negotiation of legal arrangements to govern relations between local citizens and European merchants.<sup>21</sup> By the seventeenth century, however, trade in slaves displaced the earlier trade in gold and spices, and introduced a different strategy for European contact with Africa and the territories where slave labor was required. When, in the nineteenth century, Britain abolished the slave trade and became active in suppressing it, yet another phase of European relations with non Europeans commenced. Trade in agricultural commodities was a primary focus of interaction particularly in Africa, where emphasis was placed on the growth and export of cash crops, which had become essential to the industrial revolution.<sup>22</sup> As trade in agriculture flourished, so did interest in the religious lives of non Europeans. Merchants and missionaries from Europe became important actors in the efforts to “civilize” non European peoples. Ongoing European innovations, notably the development of quinine, reduced the hazards of traveling to the African interior, making European incursions into African territories routinely possible.<sup>23</sup>

By the late nineteenth century, notable changes were taking place in the commercial relations between Europeans and Africans. Specifically, Europeans were less willing to engage in trade on terms

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18 Oliver & Atmore, *supra* note 13, at 11. Portuguese exploration of the south Atlantic began in 1417. They reached Senegal and the Cape Verde Islands shortly before 1460.

19 Giles Milton, *Nathaniel's Nutmeg* 3, 5 (Farrar Straus, 1999). See also, Michael N. Pearson, *Port Cities and Intruders: The Swahili Coast, India and Portugal in the Early Modern Era* (Baltimore, Johns Hopkins University Press, 1998).

20 Holden Furber, *Rival Empires of Trade in the Orient, 1600–1800*, 298–99 (Minneapolis: University of Minnesota Press, 1976).

21 Richard Roberts & Kristin Mann, “Law in Colonial Africa” in Richard Roberts & Kristin Mann eds., *Law in Colonial Africa* (Heinemann: James Curry, 1991) at 10 (noting that as early as the mid-sixteenth century, Portuguese traders made attempts to avoid African laws regarding regulating ships running aground, goods of deceased Europeans and demands for gifts).

22 Joseph Inikori, *Africans and the Industrial Revolution: A Study in International Trade and Economic Development* (Cambridge: Cambridge University Press, 2002).

23 Philip Ehrensaff, “The Political Economy of Informal Empire in Pre-Colonial Nigeria, 1807–1884” (1972) *Canadian Journal of African Studies*, Vol. 6, No. 3. at 451, 461 (describing first systematic use of quinine as “an event which was to shatter this well-established pattern of African-European commercial relationships”); Gregory Maddox, “Series Introduction” in Gregory Maddox ed., *Colonialism and Nationalism in Africa: Conquest and Resistance to Colonialism in Africa*, at xii (New York: Garland Publishing, 1993).

established by local rulers in Africa.<sup>24</sup> This unwillingness was fueled by several developments taking place in Europe, including the economic benefits brought about by industrialization, and a concomitant social transformation occasioned by, among other things, growing literacy rates.<sup>25</sup> Political and social attitudes in Europe were consequently informed by a sense of superiority in all spheres, and culminated in the desire to spread this enlightenment to non Europeans.<sup>26</sup> Initially, Europeans simply pursued changes in their terms of trade with non-Europeans.<sup>27</sup> This effort eventually became more formally organized

24 Roberts & Mann, "Law in Colonial Africa" *supra* note 21 at 11–24 (describing the rise of various colonial institutions to deal with local citizens).

25 See Ruth L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1996) 24 *Denv. J. Int'l L. & Pol'y* at 109, 114–115 (describing the social transformation) [hereinafter Gana, *Has Creativity Died?*]; Roberts & Mann, "Law in Colonial Africa" *supra* note 21 at 11 (attributing changes in the legal relations between Europeans and Africans to industrialization and an emergent sense of material and cultural superiority). See also, Lugard, *supra* note 17 at 5 (summarizing the general European colonial mission):

It was the task of civilisation to put an end to slavery, to establish Courts of Law, to inculcate in the natives a sense of individual responsibility, of Liberty, and of Justice, and to teach their rulers how to apply these principles; *above all, to see to it that the system of education should be such as to produce happiness and progress.*" (Emphasis added).

26 Lugard, *id.* As Chief Justice Marshall put it:

On the discovery of this immense continent [North America] the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the new, by bestowing on them, civilization. . . ." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

27 Roberts & Mann, "Law in Colonial Africa," *supra* note 21 at 11; See also, Martin Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure" in Richard Roberts & Kristin Mann eds., *Law in Colonial Africa* (Heinemann: James Curry 1991) at 61, 62–63 (linking the importance of private property in European legal, economic and social philosophy to the land tenure system established by the British in African colonies). European conceptions of property essentially defined the relationship between people and their labor. This fundamental feature of Western political and economic thought is firmly established in philosophical analyses of intellectual property rights. See *e.g.*, Wendy Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 *Yale L. J.* at 1533; Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 *Geo. L. J.* at 287; Gana, *Has Creativity Died?* *supra* note 25 at 112–120 (discussing how European philosophy generally influenced the development of intellectual property); Ruth L. Gana, *Problems and Prospects for International Copyright At the Close of the Twentieth Century: Lessons for The United States* (1995) (unpublished SJD dissertation on file with author and at Harvard Law School Library) at 1–7 (describing the evolution of the concept of property through judicial doctrines such as "use-value" and "exchange value" and its effect in legitimizing the extension of property rights in the fruit of intellectual endeavors in the United States during the eighteenth century).



through the introduction of new authorities and institutions to regulate dealings with local citizens or dealings among Europeans while in non European territories.<sup>28</sup> Formal colonial rule in Africa and Asia was consolidated steadily over the course of the nineteenth century.

This brief history suggests that before the conclusion of the Paris and Berne Conventions in the nineteenth century, many territories in Africa, Asia and the Pacific were already affected by intellectual property regulations implemented through the various forms of formal and informal European administration in these regions.<sup>29</sup> Consequently, what the Paris and Berne Conventions initially accomplished was the establishment of a network of relationships between the European

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- 28 Roberts & Mann, "Law in Colonial Africa" *supra* note 21 at 11–24 (describing the rise of various colonial institutions to deal with relations with local citizens). Even under the Capitulations system which applied to Near and Far Eastern peoples, Western states provided consuls who were declared competent to act as judges in civil and criminal cases that involved Europeans. European law typically was applied by these judges. See generally, W.S. Culbertson, "Commercial Treaties" in Seligman & Johnson, eds., 4 *Encyclopaedia of the Social Sciences* (New York: Macmillan, 1930) at 26. For a brief description of the Capitulations system, see Antonio Cassese, *International Law*, (Oxford: OUP, 2001) 23–24.
- 29 Roberts & Mann, "Law in Colonial Africa," *supra* note 21 at 13 (noting that following the annexation of West African Crown colonies, "British officials established the first in a succession of new courts, where Europeans or Creoles assumed responsibility for hearing civil and criminal cases. At the same time, common law, equity, and statutes of general application in force in England were introduced by reception acts used throughout the British Empire to impose the whole body of prevailing English law. Subsequently, the Crown Colony governments created bodies of statutory law by passing local ordinances. The early British courts in these areas were supposed to follow English procedures and to apply English law to disputes involving Europeans and Creoles."). See generally, *id.* at 11–24. Peoples inhabiting French colonies were treated as subjects and French colonial rule, like Portugal's, included notions of political integration clearly expressed in some instances by the direct application of French law in the colonial territories. See Anthony Allot, "The Development of the East African Legal Systems during the Colonial Period" in D.A. Low & Alison Smith eds., *History of East Africa* (Oxford: Clarendon, 1976) at 348, 348–49. See also, R.F. Betts & M. Asiwaju, "Methods & Institutions of European Domination" in A. Adu Boahen ed., *Africa Under Colonial Domination 1880–1935* (1985) at 321. With respect to intellectual property specifically, see Ruth L. Gana, "Two Steps Forward: Reconciling Nigeria's Accession to the Berne Convention and the TRIPS Agreement" (1996) 27 *Int. Rev. of Industrial Property and Copyright Law* at 446, 447 (noting the application of the British Copyright Act of 1911 in the Nigerian colony). But see, *id.*, at note 4, suggesting that it is more accurate to state that the British Copyright Act was Nigeria's first contact with copyright law by means of an Ordinance that introduced English Law into Lagos in 1862; Paul Edward Geller, "Legal Transplants in International Copyright: Some Problems of Method" (1994) 13 *UCLA Pac. Basin L. J.* at 199, 200 (noting examples of legal transplants including the British Copyright Act of 1911 which "was transplanted throughout the British Empire in the twentieth century, until such time as British colonies and dominions became independent and enacted their own copyright laws, based more or less on the British model."; Peter Drahos & John Braithwaite, "Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context," (2002) 20 *Wis. Int'l L. J.* at 451 (noting India's colonial patent law of 1856); David Hurlbut, *Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property*, (1994) 34 *Nat. Resources J.* 379, at 384.

member countries—a relationship that consolidated colonial power by expanding the geographic scope of rights acquired in the governing country to the colonies and, in some cases, the protectorates.<sup>30</sup> The late nineteenth century had also witnessed transformations in intra-European commercial relations occasioning the formalization of relations through treaties.<sup>31</sup> Many of these treaties included commitments respecting intellectual property. Accordingly, the network of bilateral commercial treaties had slowly introduced reciprocal protection for intellectual property rights between European countries.<sup>32</sup> In essence, the extension of intellectual property rights was not directed at the inhabitants of the governed territories at all, but instead to facilitate commercial relations among colonial powers as trade between European powers occurred on and among the various territories on behalf of foreign sovereigns.<sup>33</sup>

Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions *with each other* in regions beyond Europe.<sup>34</sup> Granted, intellectual property systems in Europe prior to the seventeenth century were neither fully developed<sup>35</sup> nor had intellectual property protection become a

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30 Protectorates were distinguished from colonies through a commitment by the European power to recognize and respect local laws and customs, and to constrain its jurisdiction over the local inhabitants. In practice, however, many protectorates were administered substantially the same way as colonies. See Allot, *supra* note 29 at 348–349.

31 Rainer Fremdling, Historical Precedents of Global Markets 4–5 (Groningen Growth and Development Centre, October 1999), <http://www.ggdc.net/pub/gd43.pdf> (describing how bilateral agreements with most-favored-nation clauses created a multilateral free-trade area). See generally, Culbertson, *supra* note 28 at 24, 25–26.

32 See Culbertson, *supra* note 28; Michael A. Ugolini, “Gray-Market Goods under the Agreement on Trade-Related Aspects of Intellectual Property Rights,” (1999) 12 *Transnat’l Law* 451, 454, n. 12.

33 It was during the nineteenth century that European powers replaced informal commercial control and diffuse legal arrangements with formal colonial rule. See Roberts & Mann, *supra* note 21 at 11–12. On the various legal incursions by Europeans in Africa prior to formal colonialism, see Margaret Priestly, *West African Trade and Coast Society: A Family Study* (OUP 1969); Omoniyi Adewoye, *The Judicial System in Southern Nigeria: 1854–1954*, (London: Longman, 1977) at 33–35.

34 In this respect, non-European peoples and their territories were, initially, mere objects of inter-European economic rivalry. Nineteenth century international law offered the doctrinal tools of “war” and “treaties” to resolve competition among Europeans for control and ownership over non-European territories and peoples. See Cassese, *supra* note 28 at 24. See also, Lugard, *supra* note 17 at 4 (noting Germany’s competitive desire for colonies notwithstanding that Germans were welcome in British colonies and were entitled to the same treatment as British citizens while in those colonies).

35 Patents in particular were dispensed at the prerogative of the Crown like other privileges. Isolated examples of exclusive privileges for innovations did exist, however the first patent system was developed in the late fifteenth century. See Mandich, “Venetian Patents (150–1550)” (1948) 30 *J. Pat. & Trademark. Off. Society* at 166. See generally,

systematic policy designed primarily for encouraging domestic innovation.<sup>36</sup> Whatever protections existed, however, would be exerted against other Europeans in colonial territories in the process of empire building. The first multilateralism thus was characterized predominantly by the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories. Finally, given the colonial treatment of non Europeans as subjects rather than citizens of the European power, these laws could not be applied *to* or *for* local citizens.<sup>37</sup> It was not until the late twentieth century, as globalization deepened the economic linkages between nations,<sup>38</sup> that intellectual property rights became an explicit tool for addressing the potential of developing countries to limit the power of foreign control over access to technology and knowledge goods once these goods entered their borders. Global ownership of intellectual property rights became one of a number of ways that the sovereignty of former colonies was directed away from an obligation to promote the domestic welfare of citizens, to a duty to subordinate that welfare to the vicissitudes of the market ideology. This transformation was effected by the second multilateralism.

B. *The Second Multilateralism (1945–1990's):  
The Era of Formalism*

The second multilateralism was characterized by intense debates about the techniques of international law necessary for developing countries to join the international intellectual property system and the kind of concessions that should be made to accommodate the disparate levels of economic and technological capacity of these

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F.D. Prager, "The Early Growth and Influence of Intellectual Property" (1952) 34 J. of Pat. Off. Society at 106.

36 Patent grants, instead, were used initially to encourage immigration of skilled labor. See generally, Edward C. Waltersheid, "The Early Evolution of the United States Patent Law: Antecedents" (1994) 76 J. Pat. & Trademark Off. Society at 697; Michael N. Meller, "Principles of Patentability and Some Other Basics for a Global Patent System" (2001) 83 J. Pat. & Trademark Off. Soc'y at 359 (noting that 19<sup>th</sup> century patent rules did not effectively generate inventions).

37 Although intellectual property laws applied to the colonies, since the people were not considered citizens but rather subjects of the European power, the privileges of European laws did not extend to them.

38 Much of this deepening was occasioned by the technologies that are the subject of intellectual property rules, or the activity that these technologies make possible. See Ruth Gana Okediji, "Copyright and Public Welfare in Global Perspective" (1999) 7 Ind. J. Global Legal Stud. at 117.

countries. The formal demise of colonialism was accompanied by the application of international law doctrines such as “sovereignty” and “statehood” to developing countries. The principle of self-determination provided the doctrinal justification to recognize the sovereignty of former colonies, and to legalize their participation in the international community of states with all its processes, institutions and values. Paradoxically, concessions for developing countries were constructed as an incident of “self-determination” which, inevitably, was often no more than an opportunity for developing countries to become more European. Nonetheless, self-determination ideally represented the aspiration of self governance. It was a key organizing principle of the new international political and economic order after World War II.<sup>39</sup>

Upon independence, former colonies had no choice but to be “states” in the Western tradition and thereby part of the existing international system.<sup>40</sup> Positivism had replaced natural law as international law’s principal doctrinal tool.<sup>41</sup> Within this framework, statehood conferred rights and obligations in a manner predetermined by the existing international order. Isolationism or retreat was structurally impossible given the legacy of pre-colonial interactions, followed by colonial institutions that had radically altered the laws, social mores, political systems, and cultural practices of non Europeans.<sup>42</sup> In any

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39 Diane F. Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims” (1998) 23 Yale J. Int’l L. at 1, 31:

“However much the goal of national self-determination might have been compromised in the face of competing considerations (or, in some cases, by virtue of U.S. diplomats’ poor grasp of history and demography), the peacemakers at Versailles officially adopted the principle as their North Star when they set out to remap postwar Europe.” [footnotes omitted]

See also, Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press 1995) 94 (“Between 1945 and 1980 the principle of self-determination became the most dynamic concept in international relations.... Self-determination was soon recognized not only as a writ for obtaining decolonization but... it achieved the status of a fundamental right of all ‘peoples’ and became a prerequisite for the development of ‘friendly relations among nations.’”).

40 David Kennedy, “New Approaches to Comparative Law: Comparativism and International Governance” (1997) Utah L. Rev. 545 at 569 (“the classic international legal system consolidated the state sovereign as the only subject of international law and extended a proceduralized order... to universal application, equated it with civilization... as an expression of European enlightenment culture and colonial power”).

41 Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law” (1999) 40 Harv. Int’l L. J. at 1 [hereinafter Anghie, *Finding the Peripheries*].

42 By pointing to the effect of colonialism on cultural societies, I am not suggesting either passivity or complicity on the part of local citizens in non European territories. Instead, I am suggesting that the very process of interaction before, during and after the colonial encounter produced new laws, new institutions and new practices in Africa and Asia. In some cases, however, laws were directly applied from the

event, non-participation was itself a form of interaction with the international. In essence, colonization had accomplished an assimilation that decolonization could not dismantle since it only reordered the context of engagement between Europe and the developing world.

The transition from dependent subjects to independent states was mediated by the rise of international institutions<sup>43</sup> which expedited the integration of the new states by providing special membership privileges, financial assistance and less onerous obligations with respect to treaties ratified by these countries.<sup>44</sup> Intellectual property treaties and institutions were no exception. With respect to patents, developing countries had successfully blocked the strengthening of the Paris Convention.<sup>45</sup> The Berne Convention, however, was modified by the Stockholm Protocol negotiated shortly after the independence era specifically to address needs of developing countries.<sup>46</sup> The Protocol was highly controversial due to its extensive limitations on rights of authors and publishers. It was subsequently changed and replaced by the Paris Revisions in 1971. The Paris Revisions took place in coordination with changes to the Universal Copyright Convention (UCC),<sup>47</sup> another copyright treaty with global reach that provided a weaker level

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metropolis to the territory without significant change. This was the case with intellectual property laws.

- 43 An important institutional apparatus of this period was the Mandate System administered by the League of Nations. For a careful account of the relationship between colonialism, international law and the transition by developing countries to sovereign states, see Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2002) 34 *N.Y.U. J. Int'l L. & Pol.* at 513 [hereinafter Anghie, *Colonialism*].
- 44 One prominent example is the Generalized System of Preferences (GSP) under the trade system. See "Enabling Clause"—Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26<sup>th</sup> Supp.) at 203 (1980). Other examples include systems of financing international tribunals (e.g., the ICC, the UN—Scale of Assessments for the Apportionment of the Expenses of the United Nations, U.N. GAOR, 54th Sess., Agenda Item 125, at 7, A/RES/54/237/D (2000)) which are scaled to countries' economies; provisions in the Montreal Protocol on Substances that Deplete the Ozone Layer that set lower standards for less-developed countries, Montreal Protocol art. 5, 26 I.L.M.1550 (1987); and the International Development Association of the World Bank (setting eligibility for 2004 participation at \$865 gross national income per capita).
- 45 Paul Salmon, "Cooperation Between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)" (2003) 17 *St. John's J. Legal Comment.* 429, 433 (noting that developing countries successfully staved off strengthening of patent rules at the Paris revisions, which "ended in a North-South stalemate.")
- 46 See generally Irwin A. Olian, "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris" (1974) 7 *Cornell Int'l L. J.* at 81; Ricketson, *supra*, note 3 at 590–664 (discussing at length the relationship between developing countries and the Berne Convention).
- 47 Universal Copyright Convention, Sept. 6, 1952, Geneva, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, revised July 24, 1971, Paris, 25 U.S.T. 1341, T.I.A.S. No. 7868.

of protection than the Berne Convention.<sup>48</sup> The Revisions adopted a complex Appendix, much less radical than the Stockholm Protocol, designed to facilitate access by developing countries to copyrighted works through a compulsory license system.<sup>49</sup> The Appendix is generally acknowledged as a failure in terms of its utility to and by developing countries. Nonetheless, the mandatory obligation within TRIPS to ratify the Paris text of the Berne Convention eliminated the UCC as an option for developing countries. The TRIPS Agreement continued the tradition of deference to economic development concerns primarily by providing a delayed schedule of implementation for least-developed and developing countries.<sup>50</sup>

The incorporation of the newly sovereign states into the international intellectual property system reflected two ironic features. First, it paralleled the structure of judicial administration present during the first multilateralism in that differences existed in the laws that applied to developed (European) countries and those that applied to developing (non European) countries.<sup>51</sup> The developing country “discount”

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48 Kelsey Martin Mott, “The Relationship Between the Berne Convention and the Universal Copyright Convention” (1967) 11 *IDEA* 306, 307; Ralph Oman, “The United States and the Berne Union: An Extended Courtship” (1988) 3 *J.L. & Tech.* 71, 75–76 (summarizing relationship between the UCC and the Berne conventions); James J. Merriman, Note, “Battling Motion Picture Pirates in Turbid International Waters” (1991) 23 *Case W. Res. J. Int’l L.* 623, 627–28.

49 See generally, Nora Maija Tocups, “The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries” (1982) *J. of the Copyright Soc’y U.S.A.* at 402; Barbara A. Ringer, “The Role of the United States in International Copyright—Past Present, and Future” (1967–1968) 56 *Geo. L. J.* at 1050. See also, Records of the Conference for the Revision of the Universal Copyright Convention (Paris: UNESCO, 1973) (includes the Report of the General Rapporteur which states: “Essentially [the Paris Conference’s] purpose was to satisfy the practical needs of developing countries for ready access to educational, scientific and technical works, without weakening the structure and scope of copyright protection offered by developed countries under both the Universal Copyright Convention and the Berne Convention.” *Id.* at 57. However, it is well recognized that the Appendix has not been a successful experiment in addressing developing country needs. The Appendix remains part of the TRIPs system, but it is likely that the inactivity that has surrounded the Appendix is likely to remain the status quo. See Daniel J. Gervais, “The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New” (2002) 12 *Fordham Intell. Prop. Media & Ent. L. J.* at 929, 942 (noting that as of January 15, 2002, only eight developing countries have made the necessary declarations to use the Appendix).

50 See J.H. Reichman, “Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection” (1989) 22 *Vand. J. Transnat’l L.* 747, 822–827 (discussing preferential treatment under the copyright Conventions); J.H. Reichman, “The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions” (1995) 17 *Hastings Comm/Ent L. J.* at 763, 783–784 n. 115 (observing that “[i]n principle, the TRIPS Agreement—unlike prior multilateral trade agreements—provides no special regime that weakens international minimum standards as such for developing countries.”).

51 In addition to the examples cited above, the WTO’s Dispute Settlement Understanding illustrates the different expectations for least-developed countries. Article 24

in terms of lesser obligations in international institutions, or exceptions to international rules, reflected the pragmatic deficiency and substantive unsoundness of the doctrinal mechanisms, which had insisted on a universal conception of membership in the international community. Developing members since then have remained less than full members of the community of states in terms of structure, process, rights, obligations and power. Even the rule-oriented system established by the Uruguay Round negotiations<sup>52</sup> has been recognized by scholars as a continuation of this trend in light of the strategies by which powerful countries continue to control outcomes in international fora.<sup>53</sup>

The second notable aspect of developing countries in the international system is that their incorporation took place by using one of the principal doctrinal tools that had facilitated subjugation of non Europeans, namely treaties. Established rules of treaty succession played a significant role in sustaining the second multilateralism throughout the decolonization era. Indeed, without the facility of international law, the continuity of intellectual property laws applicable in developing countries would have been infeasible.<sup>54</sup> In general,

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states that “[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226, art. 24.1 (1994). See also Rio Declaration on Environment and Development, U.N. GAOR, 47 Sess., Annex 1, Agenda Item 21, at 8, U.N. Doc. A/CONF. 151/26 (Vol. I), princ. 7, princ. 15 (1992), reprinted in 31 I.L.M. 874, 878 (1992) (placing a higher burden on developed states to protect the environment, and stating that “the precautionary approach shall be widely applied by States according to their capabilities”); Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, (1990) 1 *Colo. J. Int’l Envtl. L. & Pol’y* 69, 94–95 (discussing treatment of developing countries in the United Nations Convention on the Law of the Sea).

- 52 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 134 (2d ed. 1999) (stating that the WTO, as a rule-based system, leads to “settlement primarily with reference to the existing agreed rules rather than simply with reference to the relative economic or other power that the disputants possess”).
- 53 See, e.g., Richard H. Steinberg, “In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO” (2002) 56 *Int’l Org.* 339 (examining how, despite the consensus-based rules of the GATT/WTO, countries may still use power to affect outcomes); Okediji, *Rules of Power*, *supra* note 10; An Chen, “The Three Big Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of the Great 1994 Sovereignty Debate, Section 301 Disputes (1998–2000), and Section 201 Disputes (2002–Present),” (2003) 17 *Temp. Int’l & Comp. L. J.* 409, 461; Matthew S. Dunne III, Note, “Redefining Power Orientation: A Reassessment of Jackson’s Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System” (2002) 34 *Law & Pol’y Int’l Bus.* 277, 279, and 323–34.
- 54 A leading commentator affirms this by employing the doctrinal tool of sovereignty as it applied to Member States (who then applied it to their territories) as a basis for

states that had obtained independence without use of force often addressed treaty succession by agreements with the former controlling power.<sup>55</sup> Despite various levels of political control over its overseas territories (“dominions,” “protectorates” or “colonies”), the mechanics of treaty accession required the status of sovereign statehood. Independence alone, however, was insufficient to deal neatly with the problem of accession.

The Berne Convention had no formal means to recognize the former colonies since its provision for accession referenced “countries outside the Union”<sup>56</sup> and as colonies they had technically been “within” the Union. A method was needed so that the new political status of these countries could be represented and acknowledged despite (or in addition to) the extant application of the treaties to the countries. The method developed was a declaration by the countries that the relevant Act applicable prior to independence would continue to be honored.<sup>57</sup> These “declarations of continued adherence” speak powerfully of how the mechanics of transition skillfully obscured the substantive retention of the indices of colonial rule. The institution responsible for administering the international intellectual property system, the United International Bureaux for the Protection of Intellectual Property (“BIRPI”)<sup>58</sup> facilitated this practice by providing standardized forms for the declarations. In a classic theoretical

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“a presumption of continuity which should apply in the case of a newly independent country that has not indicated its attitude to the Convention. Accordingly, the making of a declaration of continued adherence simply confirms an existing state of affairs and does not represent any kind of novation or alteration of a country’s obligations under the Convention. See Ricketson, *supra* note 3 at 806–807 (emphasis added). To stress the purely functional character of post-independence declarations of adherence to the Berne Convention, Ricketson states that these declarations were “strictly unnecessary” but for the expediency of removing any uncertainty that may exist between the period between independence and making the declaration.” *Id.* at 807.

- 55 D.P. O’Connell, “Independence and Succession to Treaties” (1962) 38 BYIL at 118. [“It has become virtually routine practice for the ex-British territories, or territories in respect of which Great Britain had international responsibility, to sign agreements with the United Kingdom Government providing for a devolution of British treaties affecting the territories concerned.” at 118.]
- 56 See Art. 29 (1) of the Berne Convention, Berlin Act. “Any country outside the Union may accede to this Act and thereby become party to this Convention and a member of the Union.”
- 57 As a matter of international law, countries can only accede to the latest version of the treaty at the time of accession. Thus, for example, dominions such as Australia and South Africa acceded to the Berlin Act in 1928, while most African countries acceded to the Brussels Act. The various distinctions between these iterations of the Berne Convention have been rendered irrelevant today in light of the TRIPS Agreement which effectively imposes the Paris (1971) Act as the official global text for copyright protection.
- 58 The World Intellectual Property Organization (WIPO) replaced BIRPI in 1967. Convention establishing the World Intellectual Property Organization, 21 U.S.T. 1749, 828 U.N.T.S. 3.



move not uncommon to international law, the BIRPI practice dealing with accession was justified in reference to the dichotomy between “private” and “public” realms. According to leading commentators who spoke approvingly of this scheme, the Berne Convention Acts were “regulatory” in nature, and thus constituted

an international law of which the conditions of application are clearly defined, it being left to the states to fit them within the framework of their national laws. When the present State separates from the colony or [sic] overseas territory and grants its independence, continuity must normally be assured. The new State must continue to benefit from the advantages provided by the Convention in question and to remain bound by the obligations derived from it, except for contrary provisions inserted in the acts of transfer of sovereignty. This continuity is all the more necessary as the rights acquired by third parties must be safeguarded.<sup>59</sup>

Two points are interesting about the perspective BIRPI adopted. First, the ongoing application of intellectual property laws was presumptively appropriate, necessary and legitimate under international law. Not only were developing countries the beneficiaries of intellectual property laws (and presumably all other laws) transferred through colonial rule, but their newly acquired statehood subjected them to obligations of adherence. Second, and very important, third party interests—interests of citizens of other countries (presumably Europeans) “must” be safeguarded in developing countries. Even at the decisive moment of independence, intellectual property laws were not directed at the domestic innovation environment, but were rather projected outwards to foreign nationals who would benefit from protection. Developing countries, in essence, serviced the international system and not vice-versa.

The ambit of the international intellectual property system was inescapable for most developing countries; it was as though intellectual property protection was an incident of statehood itself. For example, under the Berne Convention, if a country made a declaration of continued adherence, the pre-independence application of the Convention remained in force in the developing country.<sup>60</sup> This was also the case under the Paris Convention by virtue of general principles of international law that recognize a state’s inherent capacity to make and enter into treaty relations. A denunciation of the Berne Convention had the effect of continuing the application of the relevant Act

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<sup>59</sup> Ricketson, *supra* note 3 at 806 (quoting Claude Masouye).

<sup>60</sup> *Id.* at 805.

between the country's date of independence and the date of denunciation.<sup>61</sup> Only an affirmative act of accession post-independence would result in the inapplicability of the Berne Convention in that country, but only for the time period between independence and accession.<sup>62</sup> For developing countries who did not act at all after independence, the Convention continued to apply on the terms of the pre-independence accession of the European power whether through declarations<sup>63</sup> or by virtue of customary international law.

Another significant piece of the second multilateralism is associated with the failed efforts of the United Nations Economic, Social and Cultural Committee (UNESCO), which was established in 1945. UNESCO's mission of "advancing through the educational and scientific and cultural relations of the peoples of the world the objectives of international peace and of the common welfare of mankind",<sup>64</sup> it made particularly suited to advocate policies and principles related to copyright and information policies reflecting the interests and needs of developing countries under the new international economic order.<sup>65</sup> Armed with its mandate, and reinforced by the post World War II emphasis on human rights and integration of former colonies into the international community of states, UNESCO was responsible for the development of the UCC. The UCC was supported most notably by the United States which, at the time, had not joined the Berne Convention but had become interested in pursuing international copyright relations.<sup>66</sup>

The steady rise of a highly profitable and dominant media in the developed countries, the transformation into a knowledge based economy and the political power of intellectual property owners eventually led to an interest on the part of the United States to join the Berne Convention given its emphasis on strong authorial protection. It is now generally accepted that this single event proved

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61 *Id.* at 806.

62 *Id.* at 801–803 (describing the applicability of this principle to countries whose political identity was carved out from a country or political unit that had been subject to Convention).

63 *Id.* at 799–800; see generally *id.* at 796–810 for a discussion of all the rules concerning the application of the Berne Convention following independence or other change in political status of developing countries.

64 See Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, pmbl., TIAS No. 1580, 4 UNTS 275, 276.

65 The New International Economic Order was spearheaded through UNCTAD and reflected efforts by developing countries to assert greater control over technology transfer, multinational enterprises and other economic activities related to economic development goals. The NIEO was dominant feature of the post-independent years of the 1970s through the 1980s.

66 See generally, Barabara Ringer, *The Role of the United States in International Copyright—Past, Present and Future* (1968) 56 *Geo. L.J.* at 1050.

significant in preparing the international community for the third multilateralism established by the WTO system. It is noteworthy that prior to the formal commencement of the Uruguay Round negotiations, and to its accession to the Berne Convention, the United States withdrew its membership from UNESCO, citing UNESCO's "hostility toward the basic institutions of a free society, especially a free market and a free press".<sup>67</sup> The United States also objected to the "new information order" which was arguably directed at subverting concentrated ownership of information products in the developed countries. Despite the United States' recent rejoining of UNESCO,<sup>68</sup> and the formal persistence of the UCC as an instrument of international law, the incorporation of substantive provisions of the Berne Convention into the TRIPS Agreement has, for all intents and purposes, relegated the UCC to the periphery of international copyright protection. Consequently, developing countries have no options for protection of copyrighted works at a level arguably more suitable for their developmental and cultural interests.

In conclusion, formalism characterized the mechanics of recognition of the new sovereign states and, then, constructed the conditions for their participation in various international fora. Formalism effectively glossed over the purpose and functions of intellectual property laws in developing countries, and legitimized a process by which developing countries' continued adherence to colonial legislation was secured under the guise of an "international" law divorced from the domestic needs, priorities or constraints of the countries.<sup>69</sup> The formal tools of engagement, withdrawal and reengagement from various treaties and international institutions also facilitated the strategic exercise of power by developed countries and ensured the progressive

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67 See U.S. Statement on UNESCO, *New York Times*, Dec. 30, 1983, at A4. See generally, Michael J. Farley, Comment: Conflicts over Government Control of Information—The United States and UNESCO (1985) 59 *Tul. L. Rev.* at 1071.

68 See generally, Sean D. Murphy, *United States Return to UNESCO* (2003) 97 *Am. J. of Int'l L.* at 977.

69 David Kennedy has summed up this tension between international law and culture as follows: "For the internationalist, differences between states are there to be bridged, unified, transcended, or managed by the rules and institutions of international law, both public and private. . . . Although international law must accurately reflect sovereign will and be understood in the context of society, the internationalist seeks to build bridges among states by remaining agnostic about culture. . . . International law reflects, engages, bridges, governs states. . . . [i]f each state internalizes its own cultural differences, "manages its minorities," the internationalist can, by bridging states, bridge cultures. . . . The term "culture" creates difficulties when it wriggles free of the term "nation"—when the nation-state becomes a formal, legal, administrative unit, and culture an alternative pattern of differences and solidarities, a conflicting set of loyalties. If culture can slip the collar of the nation, it might also infect one the global, transforming a cosmopolitan bridge into a cultural hierarchy." See Kennedy, *supra* note 40 at 552–553.

strengthening of intellectual property rights, which coalesced in the third multilateralism.

C. *The Third Multilateralism (1994–current): The Era of Consolidation*

International intellectual property agreements prior to TRIPS were truly minimalist in their substantive requirements, thus allowing developing countries legal room to act (or not) on intellectual property laws. As noted above, either course of action nonetheless tended to produce the same result, namely the ongoing application of the relevant international treaty in the absence of an affirmative denunciation. The colonial statutes, when first enacted, obviously satisfied most relevant international obligations. Nonetheless, under the second multilateralism each country could implement its treaty obligations as it deemed appropriate. A failure to implement obligations domestically did not entail the costs that now are characteristic of the third multilateralism.

As the history of intellectual property rights in Europe illustrates, unconditional intra-European protection of innovative activity was rare prior to the nineteenth century;<sup>70</sup> indeed, blatant discrimination against non-nationals of the protecting country was usually the norm.<sup>71</sup> Increased commercial activity gave rise to the antidiscrimination principles that subsequently appeared in trade agreements, many of which encompassed the protection of intellectual property rights.<sup>72</sup> Upon the formal completion of decolonization, intellectual property

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70 Culbertson, *supra* note 28 at 24–26 (discussing the widespread discriminatory commercial practices between European states); Emerson Stringham, *Patents and Gebrauchsmuster in International Law* (Madison, WI: Pactor Publications, 1935) 46 (describing discrimination in early patent laws. “A patentee possessed the exclusive right of producing the object in his own country but he was not permitted to break through the domestic customs boundary either directly by prohibiting import, or indirectly by prosecuting those who carried on trade with imported patented goods . . . [P]atent law reflects the economic polarity of nationalism seeking to exclude foreign competition and internationalism seeking to enter foreign markets.” *Id.*

71 *Id.* See also, Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660–1800* (Cambridge: Cambridge University Press, 1989) at 11 (discussing efforts by Italian craftsmen to gain protection from local competition and guild restrictions).

72 For an overview of the role of trade agreements in the development of international intellectual property law, see Ruth L. Okediji, *Back to Bilateralism? Pendulum Shifts in International Intellectual Property Protection* (2004) 1 *Ottawa Journal of Law and Technology* (forthcoming). The antidiscrimination principle that features so prominently in current international intellectual property agreements is derived from trade agreements that historically incorporated intellectual property protection. See Okediji, *id.* See also, Ricketson, *supra* note 3 at 36 (noting that the most favored nation treatment and national treatment clauses in the Berne Convention are holdovers from bilateral trade agreements).

rights in the former colonies no longer constituted an explicit means of securing foreign territories/markets from other European countries. Gradually, intellectual property rights became a means for all the European countries to control competition from former colonies as global rights became an entrenched feature of international economic relations.

It is well-known, for example, that most developing countries retained the structure and form of laws and institutions established during the colonial period, including intellectual property laws.<sup>73</sup> Indeed, prior to the compelled compliance with intellectual property rights imposed by the TRIPS Agreement, many developing and least developed countries still had as their own domestic laws the old Acts and Ordinances of the colonial era.<sup>74</sup> While some developing countries had laws in place that attracted the ire of the developed countries by explicit refusals to grant patents

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73 Until 1989, Lesotho operated under the Patents, Trade Marks and Designs Protection Proclamation of 1919, a United Kingdom instrument. Umesh Kumar, *An Introduction to the African Industrial Property System* (Wm. W. Gaunt & Sons, 1993) at 27. Mauritius, a former French colony, continued to operate under its Trade Marks Act (1868) and Patents Act (1975) for over twenty years after obtaining independence in 1968. *Id.* at 162. Swaziland also inherited its IP regime “as a colonial legacy.” *Id.* at 208. The same is true with respect to other laws and institutions. See, e.g., Ruth Gordon, “Growing Constitutions” (1999) 1 U. Pa. J. Const. L. 528 at 549–50. Mahmood Mamdani, “The Social Basis of Constitutionalism in Africa” 28 J. Mod. Afr. Stud. 359, 364; Maxwell O. Chibundu, “Law In Development: On Tapping, Gourding, and Serving Palm-Wine” (1997) 29 Case W. Res. J. Int’l L. 167 at 230; Miranda Stewart, “Global Trajectories of Tax Reform: the Discourse of Tax Reform in Developing and Transition Countries” (2003) 44 Harv. Int’l L. J. 139 at 145 (noting that the importance of colonial influence on the tax systems of developing countries is “widely recognized by tax reformers”).

74 Paul J. Coetser, “The Legal System of Malawi” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 1.8 (stating that the “Acts and Ordinances” of the United Kingdom remain in effect). See also, Thomas J. Stallings, “The Legal System of Burundi” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 1.4 (c) (stating that Burundi’s legal system still consists largely of the Napoleonic Code); Vannan F. McKellar, “The Legal System of Burkina Faso” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 1.3 (noting continued adherence to French civil law); Nellie Mitchell, “The Legal System of Chad” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 19(b) (stating that post-colonial system continued to be based on French civil law); Samuel O. Gyandoh, “The Legal System of Ghana” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 1.2 (noting continued vitality of English common law); T. Jackson, “The Legal System of Kenya” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) (also noting continued vitality of English common law); Don Tella O’ Bannon & Nathaniel C. Obiagba, “The Legal System of Nigeria” in Kenneth R. Redden, William Emerson Brock eds., 6 *Modern Legal Systems Cyclopedia* (W.S. Hein, 1990) at § 1.7(b)(1) (Kenneth R. Redden ed., 1990) (noting continued adherence to English common law and British statute law of general application).

to pharmaceutical products,<sup>75</sup> or through compulsory licensing provisions,<sup>76</sup> or by the failure to enforce recognized rights,<sup>77</sup> many others simply had obsolete laws. Given the prevailing socio-economic conditions in most of these countries, existing intellectual property laws were not a reform priority as these benefited the domestic industries that were able to free ride, or were deemed irrelevant to the domestic public. The TRIPS enterprise, then, was simultaneously to upgrade, update and reshape the laws of these countries to secure for intellectual property owners the benefits of ownership on a global scale for purposes of rent transfers from developing to developed countries.<sup>78</sup>

The often cited justifications for the third multilateralism include the rise of countries in Southeast Asia with manufacturing capacity rivaling those of industrialized countries; erosion of the competitive and comparative advantage of western countries in world markets in areas such as textiles, manufactured goods, and the corresponding

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75 See, e.g., Peter Drahos & John Braithwaite, "Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context," (2002) 20 Wis. Int'l L. J. at 451, 466 (citing India's patent laws that excluded patents on pharmaceutical products); David P. Fidler, "A Globalized Theory of Public Health Law" (2002) 30 J. L. Med. & Ethics at 150, 157 (noting that "[p]rior to TRIPS, many developing countries did not recognize patents on pharmaceutical products . . ."); J.M. Spectar, "Patent Necessity: Intellectual Property Dilemmas in the Biotech Domain & Treatment Equity for Developing Countries" (2002) 24 Hous. J. Int'l L. at 227, 240 (listing Thailand and Brazil as examples of countries that did not recognize such patents).

76 See, e.g., Theresa Beeby Lewis, Comment, "Patent Protection for the Pharmaceutical Industry: A Survey of the Patent Laws of Various Countries (1996) 30 Int'l Law. 835, 856-57, 863-64 (citing Argentina, Korea and Thailand as examples of countries whose pre-TRIPS patent laws included compulsory licensing provisions).

77 For authors commenting on the weakness of enforcement mechanisms before TRIPS, see, e.g., Monique Cordray, *GATT v. WIPO*, 76 J. Pat. & Trademark Off. Soc'y 121, 131-33 (1994) (noting lack of enforcement mechanisms before TRIPS); Naomi A. Bass, Note, Implications of the Trips Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century, (2002) 34 Geo. Wash. Int'l L. Rev. at 191 (stating "(f)or those developing countries previously willing to implement pharmaceutical patent protection in the absence of the TRIPS Agreement, methods of enforcement were typically inadequate . . ."); Ruth Okediji, "TRIPS, Dispute Settlement and the Sources of (International) Copyright Law" (2001) 49 J. of the Copyright Soc. 585, 587-594 (discussing lack of treaty enforcement in the pre-TRIPS era and linking it to the larger compliance problem characteristic of international law). See generally, Ruth L. Gana, "Prospects for Developing Countries Under the TRIPS Agreement" (1996) Vand. J. Int'l L. (analyzing issues affecting developing countries with respect to international intellectual property law, treaties and the TRIPS Agreement particularly).

78 See Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, D.C.: Institute for International Economics, 2000) [hereinafter Maskus, Intellectual Property Rights] (estimating wealth transfer to developed countries flowing from TRIPS compliance); World Bank Publication, *Global Economic Prospects 2002; Making Trade Work For The World's Poor* at 137 (Washington, D.C.: World Bank, 2001) (stating net inflow of \$19.1 billion to the United States from rent transfers).

rise of the service sector;<sup>79</sup> and ultimately the shift in developed countries from manufacturing to knowledge based economies. The need to secure a competitive platform in international markets required a substantive reformation of intellectual property laws in developing countries and an institutional framework that would make compliance with intellectual property laws an economic imperative. Hence the unfolding of trade-related intellectual property rights introduced by the United States and the European Union as part of the negotiating agenda for the Uruguay Round.<sup>80</sup>

The starting point of the third multilateralism was the TRIPS Agreement. In addition to strong minimum standards of protection in all the major categories of intellectual property, the Agreement provides, *inter alia*, minimum obligations for remedies,<sup>81</sup> administrative and judicial processes,<sup>82</sup> border controls,<sup>83</sup> and is subject to the infamous WTO dispute settlement process.<sup>84</sup> Given the immense amount of effort—political and economic—invested in the Uruguay Round negotiations, and the TRIPS component particularly,<sup>85</sup> some commentators assumed that TRIPS represented the apogee of the third

79 See Reichman, *Free Riders*, *supra* note 1 at 22–23; Marshall A. Leaffer, “Protecting United States Intellectual Property Abroad: Toward a New Multilateralism” (1991) 76 *Iowa L. Rev.* 273.

80 There is a rich body of literature on the negotiation of the TRIPS Agreement, including its specific details. For a leading article on the latter, see *e.g.*, Reichman, *Universal Minimum Standards*, *supra* note 1. On the TRIPS negotiations, Ruth L. Okediji, “Public Welfare and the Role of the WTO: Reconsidering the Trips Agreement” (2003) 17 *Emory Int’l L. Rev.* 819, 842–50 (briefly summarizing the history of TRIPS negotiations); Gail E. Evans, “Intellectual Property as a Trade Issue—The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights” (1994) *World Competition L. & Econ. Rev.* (providing a detailed evaluation of the negotiations).

81 TRIPS, *supra* note 5, arts. 44 (injunctions), 45 (damages), 46 (other remedies) and 53 (provisional measures) are among the judicial enforcement obligations of members.

82 Arts. 42 (fair and equitable procedures), 43 (evidence), and 47 (right of information) are among the administrative and judicial obligations of members.

83 *Id.*, art. 51.

84 *Id.*, art. 9(1), art. 64. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); Jerome H. Reichman, “Securing Compliance With the TRIPS Agreement After U.S. v. India” (1998) 1 *J. Int’l Econ. L.* 585; Okediji, “TRIPs Dispute Settlement”, *supra* note 10 at 616–24 (describing WTO dispute settlement process).

85 Andrew T. Guzman, “A Compliance-Based Theory of International Law” (2002) 90 *Cal. L. Rev.* at 1823, 1837 (“... the Uruguay Round negotiations, leading to the establishment of the World Trade Organization (“WTO”), lasted eight years, [and] consumed enormous resources...”); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, “Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together” (1997) 37 *Va. J. Int’l L.* at 275; Adebambo Adewopo, Essay, “The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection” (2002) 33 *U. Tol. L. Rev.* at 749, 756. (“The most significant development in global trade is the conclusion of the Uruguay Round leading to the World Trade Organization (“WTO”) [FN25] and the signing of the TRIPS Agreement.”); David E. Miller, “Combating Copyright Infringement in Russia: A Comprehensive Approach for Western

intellectual property multilateralism.<sup>86</sup> The length of the negotiations and the complexity occasioned by the number of subjects subsumed in the negotiating agenda certainly should have occasioned diplomatic exhaustion.

However, the proliferation of bilateral and regional trade agreements with requirements that enhance and further raise minimum intellectual property standards suggests that the third multilateralism is still in its infancy. The TRIPS Agreement was apparently just the platform for dynamic movements in the development of international intellectual property norms. The TRIPS-plus agreements reflect and incorporate post-TRIPS developments in international intellectual property,<sup>87</sup> thus binding countries to obligations beyond the conceivable ambit of a future trade round. While bilateralism may yet yield another era of patchwork obligations in intellectual property,<sup>88</sup> it is clear that this strategy is a key component of developed country interest in ever increasing levels of protection in foreign markets.<sup>89</sup> Further, the core principles of “national treatment” and “most favored nation treatment” will inevitably produce a network of states that enjoy the heightened post-TRIPS treatment, arguably creating a customary international practice with its own force of law. The progression from state practice to bilateralism, to multilateralism to regionalism—reveals a classic form of evolutionary path dependency in the development of international intellectual property law.<sup>90</sup>

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Plaintiffs” (2000) 33 Vand. J. Transnat'l L. 1203 (“TRIPS is widely viewed as one of the most important results of the Uruguay Round.”) (footnote omitted).

86 See, e.g., Peter Drahos, “BITS and BIPS—Bilateralism in Intellectual Property” (2001) 4 Journal of World Intell. Property 791.

87 See e.g., WIPO Performances and Phonograms Treaty, (WPPT) (1996), Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997), WIPO Doc. CRNR/DC/95 (Dec. 23, 1996), 36 I.L.M. 76 (1997).

88 The United States has signed many trade agreements that could be characterized as TRIPS-plus. See e.g., U.S.-Jordan: Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 41 I.L.M. 63 (2002); U.S.-Chile Free Trade Agreement, <http://www.ustr.gov/new/fta/Chile/text>, United States—Singapore Free Trade Agreement, <http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf>.

89 See Drahos, *supra* note 86; Okediji, Back to Bilateralism? *supra* note 72 (arguing that bilateralism has always been the norm in U.S. foreign policy and that the TRIPS Agreement, not the bilateral treaties, represents an aberration in foreign economic policy).

90 Path dependency theory, like international relations, offers useful insights about the structure of the international intellectual property system. In my view, while the promise of international relations is mostly of pragmatic consequence for developing countries, path dependency is extremely important for understanding and anticipating future rounds of intellectual property negotiations both at bilateral, regional, and international levels. Take, for example, the post-TRIPS upsurge in bilateralism in intellectual property treaties. In a recent short essay, I concluded that bilateralism has been the dominant strategy of United States foreign policy. Bilateralism in this context reveals a strong preference for capturing the benefits of economies of



Ultimately, post-TRIPS norms represent the codification of political tradeoffs masquerading as positivist obligations imposed by law.

The third multilateralism progressively seeks to integrate developing countries into the international system as beneficiaries and participants with respect to the established norms rooted in the Paris and Berne Conventions. The unbroken chain of five hundred years of intellectual property in developing countries is profoundly troubling given the costs of such laws and the currently low levels of domestic innovative activity in most of these countries.<sup>91</sup> But this is perhaps substantively less unsettling than the fact that colonial laws remained in effect in these countries through the negotiation of the TRIPS Agreement. The colonial legacy, modified slightly by nationalist orientation in patent laws of countries such as India,<sup>92</sup> and already affirmed by the international intellectual property administration, provided a firm foundation for the third multilateralism. Indeed, the third multilateralism—in terms of its scope and significance in international intellectual property regulation—may not have been possible but for the framework of existing national laws on the books in

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scale that characterizes the idea of “increasing returns path dependence.” See generally, S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History* (1995) 11. J. L. Econ. & Org. 205 (noting the origins of increasing returns path dependency). Knowing how entrenched bilateralism has been in international commercial agreements may have influenced the way developing countries approached the TRIPS negotiations; a hold out for greater concessions bilaterally in exchange for intellectual property protection may, for example, have been a better bargain. As I have argued, the complexity and large number of subjects negotiated during the Uruguay Round yielded concessions in the TRIPS Agreement that successfully consolidated an unprecedented level of global intellectual property protection. See Okediji, *Public Welfare and the WTO*, *supra* note 10. Path dependency, like other theoretical tools, has unfortunately, if unsurprisingly, not been systematically applied to intellectual property rights. But see, Paul A. David, “Intellectual Property Institutions and the Panda’s Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History,” in Mitchel B. Wallerstein; Mary Ellen Mogue; Roberta A Schoen eds., *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, DC: National Academy Press, 1993).

91 A. Samuel Oddi, “The International Patent System and Third World Development: Reality or Myth?” 1987 *Duke L. J.* 831, 843–44. (“The first reality is that the overwhelming majority of patents granted by developing countries are granted to foreigners. In contrast, a significant number (although a majority in only a few countries) of patents granted in any given developed country are granted to nationals of that country. The second reality is that very few inventions are made by nationals of developing countries and, as a result, very few domestic or foreign patents are granted to them.”) See also, WIPO, *Developing Countries (PCT) Division, Statistics: The Patent Cooperation Treaty (PCT) and the Developing Countries in 2002*, Table 1, [http://www.wipo.int/cfdpct/en/statistics/pdf/cfdpct\\_stats\\_02.pdf](http://www.wipo.int/cfdpct/en/statistics/pdf/cfdpct_stats_02.pdf) (last visited Feb. 23, 2004) (showing low patent applications from developing countries).

92 George K. Foster, Comment, “Opposing Forces in a Revolution in International Patent Protection: The U.S. and India in the Uruguay Round and its Aftermath” (1998) 3 *UCLA J. Int’l L. & Foreign Aff.* 283, 309 (noting that India changed its patent laws in 1970).

most developing countries. Extending the formalism of “sovereignty” and “equality”, the trade regime legitimized the structural legacy of intellectual property treaties. International law qualified developing countries to participate in the international community and advanced the principle that full membership required adherence to universal norms of human rights, intellectual property and free trade. Participation in these various systems served as confirmation of the status of developing countries as “sovereigns” with attendant obligations disguised as privileges.

Despite its powerful impact and strategic function, the TRIPS Agreement did not resolve satisfactorily or completely the participation of developing countries in the international intellectual property system. The global health crises, in sub-Saharan Africa in particular, generated such powerful and unabated controversy about the effects of strong intellectual property protection in developing countries that the legitimacy and success of the TRIPS enterprise, indeed of the entire international intellectual property regime, has been called into question on an unprecedented scale.<sup>93</sup> While academic and public critique about the role of intellectual property in developing countries has been a long-standing feature of international intellectual property law and policy, not until the TRIPS Agreement has such global public attention been focused on the welfare effects of intellectual property protection in developing countries.<sup>94</sup> With the multiple “trade and . . .” linkages, the global debate about the efficacy of intellectual property rights in and for the developing world

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93 Criticism of the TRIPS regime has resulted in legal symposia, see, e.g., *The NEXUS Symposium: An Interdisciplinary Forum on the Impact of International Patent & Trade Agreements in the Fight against HIV & AIDS*, (2003) 17 *Emory Int'l L. Rev.* 389; *2002 Conference, Access to Medicines in the Developing World: International Facilitation or Hindrance?* (2002) 20 *Wis. Int'l L. J.* 481; Symposium, *The Global AIDS Crisis: Human Rights, International Pharmaceutical Markets and Intellectual Property*, (2002) 17 *Conn. J. Int'l L.* 149; attention from the World Health Organization (WHO), see, e.g., WHO/Carlos M. Correa, *Implications of the Doha Declaration on the TRIPS Agreement and Public Health* (June 2002), <http://www.who.int/medicines/library/par/who-edm-par-2002-3/doha-implications.pdf>; and sources discussed in Ellen Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, (2002) 3 *Chi. J. Int'l L.* 27, 35–36; and, perhaps most significantly, the WTO: *Doha Ministerial Declaration on the TRIPS Agreement and Public Health*, (2002) 41 *I.L.M.* 755.

94 A search in the Index to Legal Periodicals database retrieved 120 documents on intellectual property and developing countries in the ten years after 1994. The sixteen-year period before 1994 yielded 20 documents. Even with the increase in the number of law periodicals, this difference reflects a much more intense scrutiny of the effects of the global intellectual property regime on developing countries. For criticisms of the TRIPS regime, see, e.g., sources cited *supra* note 88. See Carlos C. Correa, “Trips and Access to Drugs: Toward a Solution for Developing Countries Without Manufacturing Capacity?” (2003) 17 *Emory Int'l L. Rev.* at 389 (discussing problems with the Doha compromise).

reflects the complexity of the trade and intellectual property merger.<sup>95</sup> More fundamentally, however, it is also a reflection of how the regulation of intellectual property rights in the information era is an ineluctable return to the fundamental challenge of the international system, namely, how to “manage” the formal collapse of colonialism and at the same time accommodate many of the institutions, processes and doctrines that reflect its pervasive influence on the structure of modern international relations.

## II. NARRATIVES OF DEVELOPING COUNTRY PARTICIPATION IN THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM

### A. *The Human Rights Narrative*

The independence of many countries in Africa and Asia occasioned significant disruption in the established method and structure of relations between existing Western states.<sup>96</sup> Very quickly, polarizing

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95 On this merger and its implications for intellectual property, see e.g., *From Gatts to Trips—The Agreement on Trade-Related aspects of Intellectual Property Rights*, Friedrich-Karl Beier & Gerhard Schrickler eds., (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, 1996); *GATT or WIPO? New Ways in the International Protection of Intellectual Property*, Friedrich-Karl Beier & Gerhard Schrickler eds., (Munich: Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, 1989); *Liberalization of Services and Intellectual Property in the Uruguay Round of GATT*, Giorgio Sacerdoti ed., (Fribourg, Switzerland: University Press 1990). See also *Symposium, Uruguay Round—GATT/WTO*, (1995) 29 Int'l Law. 335; J.H. Reichman, “Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection,” (1989) 22 Vand. J. Transnat'l L. 747 at 812–27; Carlos A. Primo Braga, “The Economics of Intellectual Property Rights and the GATT: A View from the South,” (1989) 22 Vand. J. Transnat'l L. 243, 26–64; Frederick M. Abbott, “Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework” (1989) 22 Vand. J. Transnat'l L. 689; R. Michael Gadbow, “Intellectual Property and International Trade: Merger or Marriage of Convenience?” (1989) 22 Vand. J. Transnat'l L. 223; *International Trade and Intellectual Property: The Search for a Balanced System*, George R. Stewart et al. eds. (Boulder, Co.: Westview Press, 1994); Monique L. Cordray, “GATT v. WIPO,” (1994) 76 J. Pat. Trademark Off. Soc'y at 121,135. On the competing mechanics of welfare under international trade and intellectual property see Gana Okediji, *supra* note 38; For an analysis utilizing game theory to argue for a welfare oriented TRIPS dispute settlement philosophy, see Okediji, *Public Welfare and the WTO*, *supra* note 10.

96 International law became very much preoccupied with the techniques and methods of dealing with newly independent states with distinct cultural, economic and religious identities. The rise of international institutions is largely attributed to decolonization and the process of integrating former colonies into the international system. Of course, bridging differences between political units has been a part of international law since the Peace of Westphalia. Nonetheless, the sheer number of countries that had become independent added a new dimension to the post-War commitment to institutions in which sovereign power would devolve. The structure of these institutions permitted developing countries to advance interests, challenge actions and otherwise add to the cost of administering international “law.” As some scholars have argued, however, international law, through a diversity of methods, has actively

cultural differences were introduced into the international environment that sought at once to transcend culture, and to immunize international law from the reality of non European societies.<sup>97</sup> The impetus for decolonization itself was the end of World War II, and the euphoric principles associated with liberal democracy.<sup>98</sup> Of course, one strain of liberalism had already made its presence known in international law most brutally, even if quietly, in the justifications of colonialism offered by international law,<sup>99</sup> and then in the creation of the mandate system to administer the former colonies of defeated European states after World War I.<sup>100</sup> Under the mandate system, former colonies were put under a trust system administered by the League of Nations. As scholars have pointed out, this “half-way

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engaged in marginalizing these countries by its formal insistence on a universal set of values that are at least reminiscent, if not entirely consistent with European political traditions and experience. The question of international law's universality remains a central part of the discipline. For explorations of these issues, and how cultural difference has been treated by international law, see *e.g.*, Kennedy, *supra* note 40. For an account of how international law enabled colonialism and an ongoing manifestation of colonial attributes, see Anghie, *Finding the Peripheries*, *supra* note 41.

97 See Kennedy, *supra* note 40 at 563–580 (describing the relationship between international law and culture). In broad terms, liberalism supplied the principal analytical tool used for assimilating former colonies into the international community of states. However, as Antony Anghie has argued, it was positivism that defined the conditions of participation in the international system. Thus engaged with liberalism, positivism controlled the terms of assimilation of nonEuropean states into the system. See generally, Antony Anghie, *Finding the Peripheries*, *supra* note 41. See also, Anghie, *Colonialism*, *supra* note 43 at 517 (noting that universality in the interwar period was liberal in character).

98 Abram Chayes, Thomas Ehrlich & Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (Boston: Little, Brown, 1968); David Kennedy, “When Renewal Repeats: Thinking Against the Box” (2000) 32 N.Y.U. J. Int'l L. & Pol. at 335; Mary Ellen O'Connell, “New International Legal Process” (1999) 93 Am. J. Int'l L. 334; Anne-Marie Slaughter Burley, “International Law and International Relations Theory: A Dual Agenda” (1993) 87 Am. J. Int'l L. 205.

99 Anghie, *Finding the Peripheries*, *supra* note 41.

100 The legal basis for the mandate system was Article 22 of the Covenant of the League of Nations which provided in relevant part:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

See League of Nations Covenant art. 22. On the mandate system, see Quincy Wright, *Mandates Under the League of Nations* (University of Chicago Press, 1930).

house” for former colonies was not fundamentally different from the colonial experience.<sup>101</sup> However, the system reflected in part, two things: a conscious disquiet with the condition of the liberal premise, namely the insistence on sovereignty as the criteria for participation in the international community<sup>102</sup> of states and, the derivative formal acknowledgment of the equality of all peoples.<sup>103</sup>

The end of World War II brought about a confrontation of these two factors. Self-determination blossomed both as a principle of political organization and identity against the world, and as an internal mechanism to deal with competing claims of people groups in non European societies<sup>104</sup> whose social organization could, did and does, at times threaten the stability and authority of the new invention of the post-colonial state.<sup>105</sup> As Thomas Franck described it:

[s]elf-determination was soon recognized not only as a writ for obtaining decolonization but . . . it achieved the status of a fundamental right of all ‘peoples’ and became a prerequisite for the development of ‘friendly relations among nations.’ In other words the concept was, at least potentially, both universalized and internationalized, in that it could be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community.

Thus, self-determination was both a right and an obligation,<sup>106</sup> ultimately codified in several constitutional instruments of international law—the U.N. Charter and joint articles 1 of the 1966 Human

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101 See *e.g.*, H. Duncan Hall, *Mandates, Dependencies and Trusteeships* (Carnegie Endowment for International Peace, 1948). See also, Anghie, *Colonialism*, *supra* note 43 at 580–608 (describing the various goals of the mandate system and how it extended and justified the colonial exercise).

102 Nigel Purvis, “Critical Legal Studies in Public International Law” (1991) 32 *Harv. Int’l L. J.* at 81, 93–94 (1991) (defining liberalism in international law as partly a philosophy that views sovereignty as “the foundation of international life”). See also Martii Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 1–51 (Helsinki: Finnish Lawyers’ Pub. Co., 1989) (noting the difficulty of objectifying international law).

103 Gerry J. Simpson, “Imagined Consent: Democratic Liberalism in International Legal Theory” (1994) 15 *Austl. Y.B. Int’l L.* 103 “[W]here domestic liberal theory appeals to a conception of the individual as a bearer of rights and a democratic actor, classical liberalism substitutes the State for the individual and posits the nation-State as the free and equal object and subject of international law.” See also, Purvis, *supra* note 102 at 88 (offering a critique of liberal international law as, among other things, internally incoherent).

104 Franck, *Fairness in International Law and Institutions*, *supra* note 39 at 94–95.

105 Kennedy, *supra* note 40 at 571.

106 Franck, *Fairness in International Law and Institutions*, *supra* note 39 at 94 (“ . . . the concept was . . . both universalized and internationalized, in that it could be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community.”).

Rights Covenants.<sup>107</sup> Structurally, self-determination was the animating principle for the transition not from colonies to independent states alone, but also from uncivilized societies to civilized members of the international community.

The theoretical and normative significance of self-determination as a human right cannot be overstated. Self-determination in the 1966 Covenants broadly reflected a convergence of the liberal commitment to the supremacy of the nation state as the object of international law, the legacy of positivism in deciding how statehood is acquired, the immutability of naturalism in its willingness to pierce the sovereign veil<sup>108</sup> and, a complicity in the acceptance of Western legal and political traditions as an objective universal truth. This complicity has been addressed by scholars,<sup>109</sup> but not with direct application to intellectual property rights.<sup>110</sup> Although human rights attach to people

107 G.A. Res. 2200A, International Covenant on Economic, Social and Cultural Rights, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 53, U.N. Doc. A/6349 (1966).

108 Naturalism had once been the dominant analytical tool of international law prior to the nineteenth century. Naturalism did not distinguish between European and non-European peoples but asserted that a universal international law derived from human reason was applicable to all people.

109 See e.g., Makau wa Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harv. Int'l L.J. 201; Peter Van Ness, *Introduction to Debating Human Rights: Critical Essays from the United States and Asia* (London: Routledge Peter Van Ness ed., 1999) 13 ("Most in the non-Western world are determined not to let the United States impose its particular definitions of democracy and human rights upon them, especially if that imposition tends to violate central moral principles of their own cultural communities."); see also Abdullahi Ahmed, "Problems of Universal Cultural Legitimacy for Human Rights" in *Human Rights in Africa: Cross-Cultural Perspectives* 15, 15-25 (Washington, D.C.: The Brookings Institution, Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990) (questioning legitimacy of applying individualistic Western philosophies to African culture); and Makau Mutua, "Terrorism and Human Rights: Power, Culture, and Subordination" (2002) 8 Buff. Hum. Rts. L. Rev. at 1, 12. ("The human rights movement must abandon the savage-savior-victim metaphor if there is going to be real hope in a genuine international discourse on rights. The relentless efforts to universalize an essentially European corpus of human rights through Western crusades cannot succeed. Nor will demonizing those who resist it.")

110 For an early treatment of the relationship between human rights and intellectual property, see Ruth L. Gana, "The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development" (1996) 18 Law and Policy 315. For recent scholarship dealing with this relationship, see e.g., Laurence Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2003) 5 Minn. Intellectual Property Review 47; David Weissbrodt and Kell Schoff, "Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7" (2003) 5 Minn. Intellectual Property Review at 1; Sol Picciotto & David Campbell, "Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property" in *New Perspectives on Property Law, Obligations and Restitution* 279 (London: Cavendish, Alistair Hudson ed., 2003); Kelley A. Friedgen, Comment, "Rethinking the Struggle Between Health & Intellectual Property: A Proposed Framework for Dynamic, Rather than Absolute, Patent Protection of

and “peoples,” it is nonetheless usually a “state” (or the international community) that owes an obligation to ensure the satisfaction of the demands imposed by these universal values.

Article 27(2) of the Universal Declaration of Human Rights provides 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.” This basic premise is repeated in other human rights instruments, most notably the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>111</sup> Article 15 of the ICESCR acknowledges the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>112</sup> These human rights provisions, worded as broadly as other major constitutional sources of intellectual property law,<sup>113</sup> were obscure and largely ignored until the HIV/AIDS epidemic in sub-Saharan Africa became a major international concern. This public health crisis drew significant attention to the effects of strong patent rights for pharmaceuticals—a feat accomplished by the TRIPS Agreement—and the corresponding limited opportunities for developing countries to secure access to medicines.<sup>114</sup>

But what precisely does the human right to own works of innovation or authorship mean? Correspondingly, how might a “human rights approach” to intellectual property transform the current international system in a manner meaningful to developing countries’ long term interests?

There are two ways of thinking about the function of human rights claims in the international intellectual property system. The first is to consider human rights as a situs for public rights to the fruit of innovative endeavor on equal footing with the right of the innovator. Each

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Essential Medicines” (2002) 16 *Emory Int’l L. Rev.* 689; Symposium, *The Global AIDS Crisis: Human Rights, International Pharmaceutical Markets and Intellectual Property* (2002) 17 *Conn. J. Int’l L.* 149; Symposium, *Intellectual Property, Development, and Human Rights*, (2002) 14 *Fla. J. Int’l L.* 147.

111 See *supra* note 107.

112 See *id.* Art. 15(1).

113 In the United States, the Constitutional authority for patents and copyright grants Congress the power “To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” See U.S. CONST., Art. I, Sec. 8, cl. 8.

114 Nabila Ansari, “International Patent Rights in a Post-Doha World” (2002) 11 *Currents: Int’l Trade L. J.* 57, 61 (2002). (“The tremendous public pressure generated by global activists led to the slashing of AIDS drugs prices by pharmaceutical companies, and an executive order from President Clinton that supported the use of compulsory licensing for sub-Saharan Africa” [footnote omitted]; Susan K. Sell, “Industry Strategies for Intellectual Property and Trade: the Quest for TRIPS, and Post-TRIPS Strategies” (2002) 10 *Cardozo J. Int’l & Comp. L.* at 79, 106. (describing global mobilization “to highlight the public health consequences of overly broad patent rights”).

claim—the public and the individual—exerts its own force within the system, thus forcing a balancing act that provides room for the exercise of limitations and exceptions to promote public access. This approach necessarily recognizes the legitimacy of enforcement of intellectual property rights, while providing opportunities to develop norms that might effectively contain those rights in a strategic balance. In essence then, user's interests are just as rights-based as the interests of owners. A second approach is to view human rights claims as a means of introducing strategic incoherence into the international intellectual property system in efforts to weaken the power of developed countries during multilateral negotiations. This approach is reflected partly in the strategies of "regime-shifting" in correlation with efforts of international institutions to incorporate intellectual property concerns more substantively in their activities.<sup>115</sup> These two approaches are not mutually exclusive. Instead they may serve as polestars, each exerting complementary pressure to influence international intellectual property lawmaking more toward a notion of the public good.

The dominant treatment of the relationship between human rights and intellectual property has been dialectic. Most of the literature frames the relationship in terms of how human rights might be used as a countervailing force against intellectual property rights.<sup>116</sup> This containment or "push back" strategy is the classic balancing posture of the human rights discipline regardless of the approach taken. Human rights push back on sovereignty in the face of gross abuses of individual rights. They also impose affirmative obligations on the state. The panoply of rights seeks not coherence but balance between groups and individuals, between political and economic concerns and between

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115 See *e.g.*, Implementation of the International Covenant on Economic, Social and Cultural Rights, Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c), Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, Oct. 2, 2000. See generally, Helfer, *supra* note 8.

116 For examples of this approach, see, *e.g.*, Alicia Ely Yamin, "Not Just a Tragedy: Access to Medications as a Right under International Law" (2003) 21 B.U. Int'l L. J. at 325, 327–28 (arguing that a human rights framework "imposes an obligation to interpret [treaties and statutes relating to trade, competition, intellectual property] in the manner that most fully advances the public's health interests"); Leonard S. Rubenstein, Human Rights and Fair Access to Medication, (2003) 17 Emory Int'l L. Rev. at 525, 532. ("Both sources of law [human rights and IP principles] are internationally recognized based on binding treaties, but one could also argue that human rights law should actually take precedence over intellectual property law."); Haochen Sun, "A Wider Access to Patented Drugs under the TRIPS Agreement" (2003) 21 B.U. Int'l L. J. at 101, 136. ("Intellectual property protection should keep a balance between the need to provide incentives to reward and spur innovation and the need to ensure that society benefits from having maximum access to new creations. Just as too little protection of intellectual property rights can impede innovation and trade, so can too much protection undermine fundamental human rights.") See also sources listed in Helfer, *supra* note 110 at 49 n. 4 (2003).



the universal and the particular. The institutional revitalization of the relationship between human rights and intellectual property has largely been the work of the United Nations Sub-Commission on the Promotion and Protection of Human Rights.

In August 2000, the Sub-Commission adopted a resolution which, *inter alia*, noted an absence of human rights concerns and principles in intellectual property agreements and called for a human rights approach to the implementation of intellectual property rights, and the development of international intellectual property systems.<sup>117</sup> A human rights approach to intellectual property, as framed by Resolution 2000/7 and subsequent activities in this regard<sup>118</sup> does not at all entail an examination of intellectual property rights *strictu sensu*. Instead, a human rights approach so far appears to mean the development of structural responses to an imbalance between owners of knowledge products and users of such products. Resolution 2000/7 describes merely the incompatibility between human rights and the “implementation” of the TRIPS Agreement.<sup>119</sup> Therefore, the primary focus of the “human rights approach” to TRIPS appears to be in addressing the effects of the rights and not the subject of the rights.<sup>120</sup> Such an emphasis is consistent with the recognition of a human right in ownership of innovative endeavor. It also collapses the two approaches to the most basic premise, namely that states have an obligation to offer intellectual property protection.

This construction of a human right to intellectual property suggests that despite the tension between the two subjects, the normative roots are essentially the same, namely the recognition of the value of the human person through the protection of the fruit of creative endeavors.<sup>121</sup> This is typically the position advanced even by the most

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117 See Weissbrodt and Schoff, *supra* note 110 at 25–30 (describing the adoption of Resolution 2000/7).

118 *Id.* at 34–41 (describing some of these activities).

119 For example, the Resolution speaks to actual or potential conflicts that exist “between the *implementation of the TRIPS Agreement* and the realization of economic, social and cultural rights . . .” and that “implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights . . .” See preface & ¶2 and ¶9.

120 See Weissbrodt and Schoff, *supra* note 110 at 15 (stating that “the imbalance in the way international obligations are realized under TRIPS and the human rights treaties was a significant motivating factor in the Sub-Commission’s decision to adopt Resolution 2000/7”).

121 This reflects, in part, the continental tradition of valuing the creator primarily in intellectual property systems. Even in the utilitarian tradition of common law countries, however, strains of natural rights are evident in intellectual property jurisprudence. See Alfred C. Yen, “Restoring the Natural Law: Copyright as Labor and Possession” (1990) 51 *Ohio St. L.J.* at 517, 527 (describing natural law elements of early copyright law); Jane C. Ginsburg, “A Tale of Two Copyrights: Literary Property in Revolutionary France and America” (1990) 64 *Tul. L. Rev.* at 991, 995. (“Similarly, while the law

ardent advocates of developing country interests.<sup>122</sup> The very idea of protecting rights to intangible goods is, of course, a reflection of ideals regarding the dignity of labor, and how fundamental labor is to life and living. At its core, the human rights discipline does not encounter intellectual property as much as it complements it; it does not resist it as much as it attempts to contain its effects. In this narrative, human rights is a redemptive discipline, important to the mission of recognizing and protecting the ability of people to participate in the public interest goals animating the intellectual property system. The point of the human rights (HR) narrative is not to transform intellectual property rights, nor decry their validity. Indeed, the HR narrative sees the intellectual property system as a constitutive part of the universal values it seeks to affirm in and among states. Thus, the codification of a human right to own intellectual property in both the UDHR and the ICESCR.

Further, the HR narrative considers intellectual property rights as a *necessary* complement to the disciplines' mandate. According to a Report by the Office of the High Commission on Human Rights, "[h]uman rights and the equitable treatment of authors

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of U.S. letters predominantly reflects and implements utilitarian policies, U.S. law was not impervious to authors' claims of personal right. Indeed, some of the earliest U.S. state copyright laws set forth author-oriented rationales of which any modern Frenchman would be proud—and from which some revolutionary legislators might have drawn considerable inspiration.")

122 See *e.g.*, Peter Drahos, "The Universality to Intellectual Property Rights: Origins and Developments," in *Intellectual Property and Human Rights* (Geneva: WIPO, 1999) 33, 34. ("Linking intellectual property to human rights discourse is a crucial step in the project of articulating theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. . . . Viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.") Rosemary J. Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) 52 DePaul L. Rev. at 1171 (articulating "two visions—one of fear and one of hope, and, to suggest a point of reconciliation of these visions located in a broader frame of reference, the place of creativity in the international human rights framework and its integral relation to issues of cultural life and identity"); Rosemary J. Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. of Global Legal Stud. at 59–115 (urging protection of indigenous knowledge as a form of intellectual property "through the prism of the major international human rights covenants"); "Thus, all 130 States that are party to the CESCR have international human rights obligations to ensure that the IPRs recognized in their jurisdictions are established, granted, exercised, enforced, licensed, and otherwise used in a fashion that does not infringe upon the human rights recognized in the two international Covenants. Moreover, States may have human rights obligations not simply with respect to acts of violation in their own territory of jurisdiction, but also in countries other than their own under international law principles." *Id.* at 70 (footnote omitted).

and inventors . . . remain the underpinnings of IP systems.”<sup>123</sup> The Report goes on to identify how provisions of the TRIPS Agreement correspond with rights granted by the ICESCR, and adds:

[t]he TRIPS Agreement also promotes other values deemed essential for the realization of human rights. For example, the TRIPS Agreement prohibits discrimination on the basis of nationality in the area of IPR's; this is supported by the non-discrimination principles contained in the human rights instruments. The Agreement promotes the rule of law at the national level; it requires *inter alia*, the observance of due process by requiring that judicial procedures are fair and equitable, decisions are in writing and reasoned, and that parties have an opportunity to appeal. The Agreement provides for international cooperation to fight copyright piracy and trademark counterfeiting, which often have links to organized crime. The TRIPS Agreement also promotes the rule of law at the multilateral level by commonly agreed rules and peaceful settlement of disputes through a multilateral system.<sup>124</sup>

Consequently, a principal feature of the HR narrative is resistance to the effects of an “imbalanced” system,<sup>125</sup> and not the system itself. As articulated presently by most scholars, nongovernmental organizations and international institutions, the HR narrative accepts the implicit premise of the European justification for intellectual property rights, namely the rationalization of private property as an aspect of liberty.<sup>126</sup> Further, the narrative assumes the efficacy of the intellectual property system even in cultures where liberty norms find expressions in places other than the stronghold of private property or individualism.

In essence, then, the HR narrative in its popular rendition is a source of authority for the international intellectual property system. Within the narrative, intellectual property internalizes the universality of human rights and relegates cultural differences to the realm of the domestic as a responsibility that lies outside the purview of intellectual property as it is currently constructed. This strange interplay, within

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123 Intellectual Property Rights and Human Rights: Report of the Secretary-General, ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., Provisional Agenda item 4, § II.B.2, U.N. Doc. E/CN.4/Sub.2/2001/12, at 7 (2001), requested by Sub-Commission and prepared by the office of the High Commission of Human Rights.

124 *Id.* at 8.

125 The Report goes on to state that “The challenge of the national and international rule-maker is to find the optimal balance between various competing interests with a view to maximizing the public good, while also meeting the human rights of authors and inventors.” *Id.* at 8.

126 Gordon, *supra* note 27.

the HR narrative, between human rights and intellectual property pervasively allows the narrative to remain consistent with the discipline's balance between the right to self-determination, and the right to own intellectual property, while undermining the essence of the right to self-determination and development.<sup>127</sup> In other words, having internalized intellectual property as a norm, the narrative could mandate that it is the responsibility of *states* to balance intellectual property rights against other interests.<sup>128</sup> Consequently, intellectual property rights and the treaties that promote them can and should be honored both as a matter of positivist international law, and as a moral obligation of human rights.

This result is troubling for several significant reasons. The protection of intellectual property in the Paris and Berne Conventions are not necessarily the only way to protect creative works.<sup>129</sup> In other words, as I have argued elsewhere, the human right to own or enjoy the fruit of creative endeavor does not lead us inexorably to the form or scope of protection required by TRIPS.<sup>130</sup> If anything, a human rights conception of intellectual property would suggest that the principle of self-determination, which guarantees to a people the freedom to determine their social, legal and political institutions—in essence, the right to self-governance—is the platform on which the content of Art. 27(2) is guaranteed as the sole prerogative of the people or state.

The effect of legitimizing the particular form of intellectual property embodied in international agreements reflects an entrenched acceptance of the political ideals about property, liberty and personhood that has long been foundational to western liberal democracies. The universality of human rights through the agency of intellectual property rights thus may be understood as continued affirmation of values inconsistent with non European cultures, whether the intellectual property rights are “balanced” or not. Finally, it is crucial to note

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<sup>127</sup> Gana, *supra* note 110 at 336–341.

<sup>128</sup> And this is precisely the position taken in the Sub-Commission Report:

An optimal balance within IP systems at the national and multilateral level can be reached by properly determining the definition of protectable subject matter, the scope of rights, permissible limitations and the term of protection. This balance is constantly developing, both at the national and international level, in response to economic and technological as well as political developments. The TRIPS Agreement is a minimum rights agreement that leaves a fair amount of leeway to member countries to implement its provisions within their own legal system and practice and fine-tune the balance in light of domestic public policy considerations. *Id.* at ¶7.

<sup>129</sup> Steven Shavell & Tanguy Van Ypersele, “Rewards Versus Intellectual Property Rights,” (2001) 44 J. L. & Econ. 525 (arguing that an optional reward system is superior to an intellectual property rights system).

<sup>130</sup> Gana, *supra* note 110 at 323–326, 339–341.

the perverse effect and irony of using human rights discourse to limit a human right. Human rights simply cannot serve as an arbiter between equally valid claims of owners who have a human right to their intellectual creations, and users who have a right to demand from the state the conditions by which they can pursue their own welfare.<sup>131</sup> The state may address the demand of users in ways that do not involve violations of intellectual property rights such as state purchase of the works in question. Using intellectual property rights to subsidize social welfare is, in the views of some, arguably just as serious a violation of human rights, as is protecting intellectual property rights in a way that imperils public health and safety.<sup>132</sup> Of course, the converse argument is true: rewards for innovators do not have to be in the form of exclusive proprietary rights.

These concerns about the limitations of the HR narrative are amplified when we move from the context of essential medicines and access to drugs, to the relatively banal and non-life threatening domain of music, literary and artistic works. Limited access to copyrighted works will undoubtedly hinder long term development prospects, but this is unlikely to evoke the emotive responses that are so intensely associated with the discourse over the effects of intellectual property rights in the public health context. When the effects of TRIPS implementation cannot be measured in loss of human lives, the HR narrative loses much of its intuitive moral appeal and political force. This is not

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131 See *e.g.*, Owen Lippert, "One Trip to the Dentist Is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas" (1998) 9 *Fordham Intell. Prop. Media & Ent. L.J.* at 241, 267 (arguing for strong IP protection on the grounds that IP rights are human rights).

"The court of world opinion would rightly condemn a country if it argued that upholding human rights imposed a unfair competitive disadvantage. Property rights are human rights, and intellectual property rights are property rights. All deserve respect." *Id.*

Robert J. Gutowski, Comment, "The Marriage of Intellectual Property and International Trade in the Trips Agreement: Strange Bedfellows or a Match Made in Heaven?" (1999) 47 *Buff. L. Rev.* at 713, 745, 746:

A common criticism levied against the TRIPs Agreement maintains that it violates the sovereign right of nations to development; however, Western industrialized countries contend that intellectual property rights are natural, human rights and are so recognized in the Universal Declaration of Human Rights (UDHR). TRIPs accentuates the tension between these discordant "regimes of rights." While those opposed to TRIPs see international protection of IP and the sovereign right to development in direct conflict, TRIPs adherents view these rights as complimentary—that in order to develop, nations must recognize and employ IP protection. The author argues that "TRIPs provides a new and vital structure that can both protect IP in the international order and, in part, stimulate development in poorer nations." *Id.* at 715.

132 *Id.*

unlike the traditional tension between political human rights, which enjoy strong approval and emphasis by developed countries, and economic human rights which have received significantly less attention if not outright rejection as "human rights."

The implications of an uncritical application of human rights norms and rhetoric to affirm TRIPS and post-TRIPS agreements are echoed in an important discussion between two leading scholars regarding the relationship between international human rights and international trade. Professor Ernst-Ulrich Petersmann has argued, in a robust collection of writings, for the constitutionalization of economic rights, thus equating the right to trade (and by extension intellectual property) with other fundamental human rights, which he argues are essential features of a democratic state.<sup>133</sup> In contesting the normative premises relied on by Professor Petersmann, Professor Philip Alston warns of the danger of "epistemological misappropriation"<sup>134</sup> evident in the argument that the international economic order of the WTO complements the guarantees of human rights. As Alston argues, this kind of a "human rights approach to trade" will "fundamentally redefine" the contours of the human rights discipline with serious negative consequences.<sup>135</sup> The economic rights that emerged triumphant at the conclusion of the Uruguay Round are not "per se recognized as economic rights within the framework of international human rights law."<sup>136</sup> Alston stresses that such rights arising from WTO agreements, including the TRIPS Agreement which is arguably consistent with Article 15 of the ICESCR, "should not be considered to be analogous to human rights. Their purpose is fundamentally different. Human rights are recognized for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumentalist reasons. Individuals are . . . empowered as economic agents for particular purposes and in order to

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133 See Ernst-Ulrich Petersmann, "Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," (2002) 13 *European J. International L.* at 621; Ernst-Ulrich Petersmann, "Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships" (2001) 4 *J. Int'l Econ. L.* 3; Ernst-Ulrich Petersmann, "Constitutionalism and International Organizations" (1996) 17 *Northwestern J. Int'l L. Bus.* at 398; Ernst-Ulrich Petersmann, "How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?" (1999) 20 *Mich. J. Int'l Law* at 1; Ernst-Ulrich Petersmann, "Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition" (1999) 34 *New Eng. L. Rev.* at 145.

134 Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" (2002) 13 *Eur. J. Int'l. L.* at 815.

135 *Id.* at 816.

136 *Id.* at 822.

promote a specific approach to economic policy. . . . Instrumentalism should not be confused with a human rights approach.”<sup>137</sup>

Uncritically deployed, the HR narrative continues the rationalization of the imperial/colonial ages as a necessary mission to “civilize” non European societies. Specifically, it affirms the premise that developing countries lag behind economically because of their failure to develop institutions of private property and the rule of law, and to protect these “indispensable ingredients” as human rights guarantees, effected through liberal trade and competition laws.<sup>138</sup>

In focusing on the effects of the TRIPS Agreement, the HR narrative can do much better to reflect universal human rights values and processes. The current narrative is an important response to a serious threat to human society, particularly in developing countries. Nonetheless, the narrative must outlast the current crisis and develop tools that will facilitate meaningful inquiry as it moves from context to context.

The HR narrative must seriously re-engage the content of specific human rights guarantees and determine whether intellectual property rights *as they exist and in light of the conditions that produced them*, can ever truly be reconciled with the core principals of international human rights law. A framework for such consideration is already evident in the Statement of the Committee on Economic and Cultural Rights.<sup>139</sup> The next major inquiry will be to develop a model consistent with the fundamental mission of the corpus of human rights norms.

### B. *The Cultural Narratives*

Despite philosophical traditions that yield distinctive doctrines in intellectual property, the two major approaches to the justification

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<sup>137</sup> *Id.* at 826.

<sup>138</sup> To quote Petersmann, “Wherever freedom and property rights are protected, individuals start investing, producing and exchanging goods, services and income. Personal self-development and enjoyment of human rights require the use of dispersed information and economic resources that can be supplied most efficiently, and most democratically, through the division of labor among free citizens and through liberal trade promoting economic welfare, the freedom of choice and the free flow of scarce goods, services and information across frontiers in response to supply and demand by citizens. . . . The moral “categorical imperative” of maximizing personal autonomy and equal liberties across frontiers corresponds with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition.” See Petersmann, “Time for a United Nations “Global Compact,” *supra* note 133 at 621.

<sup>139</sup> Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights and Intellectual Property, Statement by the Committee on Economic, Social and Cultural Rights, 14 Dec. 2001, E/C.12/2001/15 (setting forth principles for assessing the human rights-compatibility of intellectual property rights).

of rights are uniformly European: the common law and civil law traditions. Globalization and efforts at harmonization continue to exert pressures for the essentialization of the normative underpinnings of each tradition. As several authors have pointed out, echoes of continental natural rights values are present in the common law tradition, and common law utilitarianism is evident in *droit d'auteur* systems.<sup>140</sup> Thus, despite the doctrinal discourse generated by these different intellectual property traditions, in essence the choice is between two Europes, not between Europe and something different.

The cultural narratives are closely related to the HR narrative and generally subsumed in or connected to the latter.<sup>141</sup> Cultural narratives are premised generally on the principle of self-determination. They typically begin with what I have described elsewhere as “the rhetoric of difference.” The cultural narratives seek to maintain and sustain the legitimacy of difference, not overcome or manage those differences. The argument starts generally with the proposition that developing countries have different value systems, engage in creative endeavor for different reasons and are organized communally or through kinship ties rather than as individuals. These differences in values, organization, and heritage, the narrative argues, require different considerations for intellectual property rights to be meaningful in developing countries. Most recently, the focus of the cultural narrative has been on the subject of protection for indigenous knowledge.

Indigenous knowledge “refers to the knowledge held, evolved and passed on by indigenous peoples about their environment, plants and animals, and the interaction of the two. Many indigenous peoples have developed techniques and skills that allow them to survive and flourish in fragile ecosystems without causing depletion of resources or damage to the environment.”<sup>142</sup> While indigenous knowledge does not often meet the criteria for current forms of intellectual property, the appropriation of such knowledge to produce commercially viable

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140 Ginsburg, A Tale of Two Copyrights, *supra* note 121; Yen, Restoring the Natural Law, *supra* note 121.

141 Rosemary J. Coombe, “Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity” (1998) 6 *Ind. J. Global Legal Stud.* at 59, 81. (“Through the concept of intellectual property rights we deploy widely accepted Western assumptions.”)

142 Dr. Erica-Irena A. Daes, Some Observations and Current Developments on the Protection of the Intellectual Property of Indigenous Peoples (July 23, 1998) (available at <http://www.wipo.org/eng/meetings/1998/indip/daes.htm>).



products has proved highly controversial.<sup>143</sup> In particular, the contributions of local citizens are typically never acknowledged, neither is any remuneration paid to them. This distinct problem has generated proposals for “benefit-sharing” agreements<sup>144</sup> and other means by which traditional knowledge might be protected from appropriation.<sup>145</sup> Almost uniformly, participants in this narrative reject the viability of intellectual property rights for indigenous knowledge.<sup>146</sup> The arguments tend to focus on the purpose for which creativity and creative works are used in developing countries, and the limited nature of intellectual property rights which would be insufficient to protect

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143 See, *e.g.*, Larry Rohter, Brazil Moves to Protect Jungle Plants From Foreign Biopiracy, N.Y. Times, Dec. 23, 2001, at A4; Andrew Pollack, Patenting Life: A Special Report; Biological Products Raise Genetic Ownership Issues, N.Y. Times, Nov. 26, 1999, at A1.

144 The concept of “benefit-sharing” gained visibility in the Convention on Biological Diversity, Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 837 (1992). It includes equitable arrangements between indigenous people and patent holders, and is designed to ensure that “genetic resources or traditional knowledge are obtained on mutually agreed terms and with the approval of the traditional holders of that knowledge.” Vandana Date, “Global “Development” and its Environmental Ramifications—The Interlinking of Ecologically Sustainable Development and Intellectual Property Rights” (1997) 27 Golden Gate U. L. Rev. at 631, 666–67; Gerard Bodeker, “Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing” (2003) 11 Cardozo J. Int’l & Comp. L. at 785, 799 (“The concept of benefit sharing in the development of herbal medicines has only recently begun to find its place in the intellectual property sphere.”) One of the most detailed articles about benefit-sharing in the indigenous knowledge context is Ikechi Mgbeoji, “Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?” (2001) 9 Ind. J. Global Legal Stud. at 163.

145 Shuba Ghosh, “The Traditional Terms of the Traditional Knowledge Debate” (2001) 11 Cardozo J. Int’l and Comp. L. at 497 (noting modes of legal protection of traditional knowledge along four lines: (1) a “public domain” model, where certain basic biological, genetic or other information is treated as unowned but appropriable; (2) a “trust” model, where certain basic biological, genetic or other knowledge is treated as a sort of communal “res” by “trustees” for the benefit of designated “beneficiaries;” (3) a “commercial use” model, where ownership rights in certain basic biological, genetic or other information are assigned to the first party to reduce such knowledge to a commercially marketable product; and (4) a “private property” model, where rights in certain biological, genetic or other information are assigned by the geographically superordinate sovereign within which such resources are located and treated as the assignee’s “private property”); Shubha Ghosh, Traditional Knowledge, Patents, and the New Mercantilism (Part II), (2003) 85 J. Pat. & Trademark Off. Soc’y at 885, 887 (suggesting an approach to establishing state regimes to protect indigenous knowledge from exploitation).

146 See, *e.g.*, Paul Kuruk, “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual Rights and Communal Rights in Africa” (1999) 48 American L. Rev. at 769 (asserting that IP laws are inadequate to protect indigenous knowledge); See Christine Haight Farley, “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” (1997) 30 Conn. L. Rev. at 1, 4. (“Application of intellectual property laws, whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use.”)

the spiritual, religious or moral interests associated with traditional knowledge.<sup>147</sup>

The cultural narratives generally seek to address or argue for the recognition and protection of innovation in developing countries under alternative systems. A vital component of these narratives also argues for the incorporation of non European values into the international system. In both these approaches, however, the narratives overemphasize the cultural differences between intellectual property and indigenous knowledge, and under-emphasize the cultural relevance of intellectual property rights to all societies. Specifically, the cultural narratives essentialize creativity in *developed* countries. As in developing countries, creativity in developed countries is motivated by different interests and reflects a diversity of values. Particularly with respect to copyright, these values are inevitably a reflection of cultural developments. The cultural narratives also implicitly accept the artificial standards of what constitutes patentable or copyrightable subject matter in order to make the argument for why intellectual property rights will not or cannot appropriately address the interests of peoples in developing countries.

Creative expression in developing countries may not be “fixed” as required by copyright, or “novel” as required by patent laws. Authorship and ownership may be difficult to determine in a communal setting and “nonobviousness” or “utility” may be an unwieldy standard for much of the innovation that occurs in developing countries. But these reasons do not ineluctably require a unique system of protection to accommodate these distinctions. To insist that this is the only or ideal response to the international intellectual property system is to accept Eurocentrism as the metric for the “global” consensus. In essence, arguing *for* difference *because of* difference exalts cultural dominance instead of challenging it; the status quo remains intact.

It is true that the value system and forms of creativity differ in developing countries. However, these differences in themselves do not justify the need for an entirely separate system of protection.<sup>148</sup> In the first place, such a strategy continues the disparate treatment between what is considered “European” and what is considered “different.” As mentioned earlier, the fact is that the criteria for patentability or copyrightability are themselves culturally contingent.<sup>149</sup> Arguing

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147 Kuruk, *id*; Haight Farley, *id*. See also, Gana, Has Creativity Died? *supra* note 25.

148 See generally, Ruth L. Okediji, *Making Room at the Table: The Protection of Indigenous Knowledge at the Interstices of Human Rights, International Law, and Intellectual Property Law* (mimeo, 2002).

149 Margo Bagley, “Patently Unconstitutional: Geographical Limitations on Prior Art in a Small World,” (2003) 87 Minn. L. Rev. at 679; Margo Bagley, “Still Patently Unconstitutional: A Reply to Professor Nard” (2003) 88 Minn. L. Rev. at 239.

that cultural differences make traditional knowledge unsuitable for protection under the intellectual property system ascribes a scientific validity to European-based intellectual property criteria that simply is not sustainable. For example, new technologies have stretched and, in some cases transformed, longstanding assumptions of intellectual property.<sup>150</sup> Cultural narratives tend to ignore the fact that the criteria for intellectual property changes with time and with technology. There is an inherent elasticity in intellectual property categories that has sustained the institution of intellectual property throughout the centuries. Thus, as I have argued elsewhere, if there was a desire to do so, certain types of creative works in indigenous societies and developing countries can fit comfortably within the modern intellectual property system.<sup>151</sup> To opt for an alternative is to avoid rather than confront the presumption of propriety associated with the current system.

Finally, the alternative to intellectual property proposed by the cultural narratives is to protect traditional knowledge under the “customary law” of developing countries.<sup>152</sup> The narrative has ignored critical anthropological literature that demonstrates that customary law is not a product of dynamic indigenous life, but instead, reflects indigenous interaction with colonial power, as institutionalized through the apparatus of colonial institutions.

The path-breaking work of scholars such as Sally Falk Moore and Martin Chanock show in historical detail how customary law “was constituted out of the residue left after the colonial modification of the [indigenous] . . . polity.”<sup>153</sup> What was an indigenous law metamorphosed into a new and discrete body of rules constructed, modified or contrived between colonial and local rulers. Indigenous law was transposed into a political and legal system set up by the colonial power, and applied in a socio-economic context altered both by the slave trade and colonial rules; hence, the essence of a true indigenous law was lost.<sup>154</sup> As Martin Chanock sums it:

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualizing relationships and powers and a weapon within African communities which were

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150 Consider, for example, business method patents, the extension of copyright to cover software, para-copyright protection for content protection devices and other recent developments.

151 Okediji, *supra* note 142.

152 *Id.*

153 See Sally Falk Moore, *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880–1980*, (New York: Cambridge University Press, 1986) 317.

154 See generally, *id.*

undergoing basic economic changes, many of which were interpreted and fought over by those involved in moral terms. The customary law, far from being a survival, was created by these changes and conflicts. It cannot be understood outside of the impact of the new economy on African communities. Nor can it be understood outside of the peculiar institutional setting in which its creation takes place. African legal conceptions, strategies and tactics are formed both by the impact of capitalism and by the interaction of the communities thus affected with the concepts, strategies and power of British colonial legal institutions.<sup>155</sup>

The many diverse permutations of colonial rule as administered by various European powers lie beyond this article's scope. But to recap and elaborate on the main points of the first multilateralism, commercial trade was the principal focus of initial interaction between Europeans and non European peoples. Eventually, this gave way to formal colonial rule either "directly" by extending European laws to the territories, as is generally associated with the French system, or the "indirect" rule perfected by the British, which utilized local institutions, law and custom to enforce British laws and thus blended African institutions with the colonial administration. Under both systems, regular invocations of pre-colonial customs or rules (approved by the colonial power of course) were used to govern civil disputes between the indigenous populations. Criminal matters or matters relating to interests that might bear directly on the objectives and interests of the European powers and their ability to control the territories remained subject to European laws.<sup>156</sup>

Regardless of its form, the administration of European power had the same purpose of re-creating non European societies in Europe's image pursuant to the "civilizing" mission of colonial powers. Literacy occupied a chief place in measuring what constituted a civilized people.<sup>157</sup> Ultimately, social changes in European society, combined with technology changes propelled by industrialization made it possible for the balance of powers between European powers and non European

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155 Martin Chanock, *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (New York: Cambridge University Press, 1985) 4.

156 See Betts & Asiwaju, note 29 at 324 (describing this practice as a "dyarchical judicial arrangement"). See also, Richard Roberts & Kristin Mann, "Law in Colonial Africa," in Richard Roberts & Kristin Mann eds., *Law in Colonial Africa* (Heinman, 1991) at 3; Patrick Manning, *Francophone Sub-Saharan Africa, 1880-1995* (Cambridge University Press, 1998) at 58, and generally at 57-78.

157 David Armitage, Literature and Empire, in *1 The Oxford History of the British Empire: The Origins of Empire 100* (Oxford University Press, 1998) (listing printing as one of the skills distinguishing Europeans from non Europeans).

peoples, in Africa particularly, to shift in favor of Europeans who subsequently demanded and then imposed or superimposed European legal concepts to govern interactions with the local citizens.<sup>158</sup> The profound transformation occasioned by literacy and, later, by the industrial revolution shaped the European perception of their superiority, justifying their attempts to “civilize” non Europeans.<sup>159</sup> As Lord Lugard, the revered British administrator put it

“We develop new territory as Trustees for Civilisation, for the Commerce of the World. . . . As Roman imperialism laid the foundations of modern civilisation, and led the wild barbarians of these islands along the path of progress, so in Africa today we are repaying the debt, and bringing to the dark places of the earth, the abode of barbarism and cruelty, the torch of culture and progress, while ministering to the material needs of our own civilisation.”<sup>160</sup>

Intellectual property law, which has played only an incidental role (if any at all) in the literature on the relationship between international law, colonialism and developing countries, is paradigmatic of the motives, strategies and justifications of the colonial experience in Africa and Asia, particularly as they reflected race consciousness.<sup>161</sup> European law was the central tool of control, power, influence and change in the European colonies. So called “customary laws” were in reality a synthesis of European values and local practices acceptable

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158 Bruce Waller, Europe and the Wider World, in *Themes in Modern European History, 1830–90* 285–86 (Bruce Waller, ed.) (Unwin Hyman, 1990) (listing armed steamboats (*i.e.*, gunboats) and improvements in weapons technology such as the invention of the rifle as examples of innovations that enabled European powers to conquer non-European peoples).

159 See Gana, *supra* note 25, 112–116 (describing the link between European ideals of civilization, literacy and more subtly, race).

160 See Lugard, *supra* note 17, on the title page.

161 A vital and growing body of international law scholarship has explored the link between race and international law, specifically in the justification of the colonial exercise. See *e.g.*, Anghie, *Finding the Peripheries*, *supra*, note 41; Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, (1996) 5 Soc. & Legal Stud. 231 (1996); B.S. Chimni, *International Law and World Order* (Newbury Park, Calif.: Sage Publications, 1993); Symposium, *International Law and the Developing World: A Millennial Analysis*, (2000) 41 Harv. Int'l L. J. 595; Symposium, *Critical Race Theory and International Law: Convergence and Divergence*, (2000) 45 Vill. L. Rev. 827; Colloquium, *International Law, Human Rights, and LatCrit Theory*, (1997) 28 U. Miami Inter-Am. L. Rev. 177; James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, (2000) 41 Harv. Int'l L. J. 263; Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, (2000) 45 Vill. L. Rev. 827; Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, (1997) 28 U. Miami Inter-Am. L. Rev. 177.

to the ruling authorities, with the application of local laws shaped by European institutional implementation.<sup>162</sup>

To replace intellectual property categories with cultural customary law simply replicates, not escapes, colonial history. Perversely, invocations of customary law neglects that customary law as currently conceived in most African societies is subject to static precedent, particularly in former British colonies such as Nigeria and Ghana. While a dynamic customary system for the protection of indigenous knowledge could be imagined, the challenge will remain how to “translate” domestic customary protection into the global system of protection. It is precisely in this relationship between the “customary” and the “modern” that innovation in developing countries is vulnerable to misappropriation and minimization.

### C. *The Welfare Enhancing/Doctrinal Narratives*

Given incessant demands for ever increasing levels of protection by intellectual property owners, commentators and members of the general public in developed countries began to consider the impact of strong intellectual property rights on public welfare in the United States.<sup>163</sup> The unexpected and unprecedented success of the TRIPS Agreement actually masked an uninterrupted agenda of strengthening protection for rights at home and abroad. The vulnerability of knowledge goods to misappropriation attendant to the effects of globalization intensified interest group politics to coordinate forces in an effort to entrench strong intellectual property rights on a global basis.<sup>164</sup> This compelled the convergence of public interest concerns worldwide, yielding a strong body of literature that identifies how the expansionist trend undercuts the very goals of intellectual property

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162 See generally, Chanock, *supra* note 155; Moore, *supra* note 153. See generally also, Mann & Roberts, *supra* note 21.

163 See generally, Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001) (criticizing the growing scope of copyright and patent protection); Rosemary J. Coombe, *The Cultural Life of Intellectual Properties* (Durham, N.C.: Duke University Press, 1998) (arguing that copyright and trademark law can be used to suppress dissent); and Jessica Litman, *Digital Copyright* (Amherst, N.Y.: Prometheus Books 2001) (attacking recent extensions of copyright law).

164 Saul Levmore, “Property’s Uneasy Path and Expanding Future” (2003) 70 U. Chi. L. Rev. at 181, 186; (describing intellectual property rights as the product of interest group pressures); Justine Pila, “Bound Futures: Patent Law and Modern Biotechnology” (2003) 9 B.U. J. Sci. & Tech. L. at 326, 365 (noting key role of “effective lobbying” by the biotech industry in obtaining support for global patent protection); Susan K. Sell, “Trade Issues and HIV/AIDS” (2003) 17 Emory Int’l L. Rev. 933, 942 (tracing history of industry lobbying for global IP protection); Nermien Al-Ali, “The Egyptian Pharmaceutical Industry after Trips—A Practitioner’s View” (2003) 26 Fordham Int’l L. J. at 274 (describing industry lobbying at 1994 TRIPS negotiations).

in the Western tradition. In response, important doctrinal limitations to intellectual property rights have been revived and advanced vigorously by academics, some policymakers, and public interest groups concerned about the destabilization of intellectual property policy.<sup>165</sup> The correlation between global welfare and domestic welfare for the first time became explicitly intertwined, thus providing developing countries with authoritative doctrinal arguments with which to delimit the incursion of intellectual property rights on their domestic legal framework.

The significant contributions of scholars such as Professor Jerry Reichman have almost singularly helped to advance the body of literature that constitutes the doctrinal narratives with respect to developing country interests. But the narratives comprise more than the concerns of developing countries and I focus on the general arguments for limitations internationally on intellectual property rights, rather than specific prescriptions for developing countries.

The doctrinal narratives look within intellectual property doctrine to make arguments about welfare enhancing tools beneficial to developing countries. The narratives begin with an empathetic acknowledgment of the difficulty confronting developed countries by the challenge of the information revolution and the transition to a knowledge economy.<sup>166</sup> Doctrinal narratives mostly do not challenge the propriety of intellectual property protection per se, nor question its efficacy for stimulating innovation in developing countries. Indeed, a fundamental attribute of doctrinal narratives is the acceptance of the basic rationale of intellectual property rights in the developed countries: that market failures justify the interdiction of property rights over public goods.

Doctrinal narratives do not necessarily oppose the extension of intellectual property to developing countries. Indeed, some variants within the narrative affirm the long-held position that intellectual property protection, as defined and practiced in the United States, is a positive economic value universally applicable for the good of all peoples, including those that live in different economic and cultural conditions.<sup>167</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> Reichman, *Free Riders*, *supra* note 1; Abbott, *supra* note 90; Leaffer, *supra* note 74;

<sup>167</sup> Robert M. Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, (1997) 37 *IDEA* 491, 544 ("it can be expected that developing countries will experience the solid economic benefits which flow from robust protection of intellectual property" once an adequate public administration is put in place); Anthony D. Sabatelli & J.C. Rasserthe, *Impediments to Global Patent Law Harmonization*, (1995) 22 *N. Ky. L. Rev.* 579, 619 ("developing countries will not be able to participate adequately in world trade and encourage investment and technology transfers unless the

The major focus of the doctrinal narrative is the extent to which the axiomatic constitutional imperative of the “progress of Science and the useful Arts”, intended to benefit the public, has been sabotaged by private capital with organized access to the legislative process. Thus, the doctrinal narratives have as their essence, a public choice problem and an economic welfare problem. As to the public choice problem, the question is how to ensure that legislation is affected and influenced by interests other than those of the owners of intellectual property. The implicit assumption, of course, is that what constitutes the “public interest” is not itself embedded in the second contested problem, namely what measure of welfare best reflects the public interest.

The debates on this particular issue are not unfamiliar, and the answers are not self-evident. For present purposes, the point is that the doctrinal narratives, like the human rights narratives, assume the essential correctness and universality of the current intellectual property system. In some renditions of these narratives, developing countries are not the central objects at all. Instead, developing countries are part of an intellectual toolkit useful in the fight against the domestic aggrandizement of intellectual property owners. Essentially, developing countries at the international level serve as the “public” face in defending or protesting demands for higher rights in multilateral fora. As a strategic matter, developing countries ameliorate the public choice problem that is cardinal to international law, namely the inability of non-State actors to participate meaningfully in the development of international legal norms.<sup>168</sup> The important benefits of the doctrinal limitations of western intellectual property law become powerful tools for developing countries in circumscribing the expansive reach of the TRIPS and TRIPS-plus regimes.<sup>169</sup>

The doctrinal narratives start from the fundamental baseline of American intellectual property discourse, namely utilitarianism. The narratives hold firmly to the ideals of welfare inherent in the policy objectives behind the recognition of proprietary interests in

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need for strong and effective international patent protection is recognized. Initially, it may be difficult for the developing nations to upgrade their systems to conform to those of the developed nations. However, such conformity ultimately would be in their economic best interest because of the economic investments that would be encouraged.”).

168 In a positivist framework, this is still the case although a notable feature of modern international relations is the strong presence of non-governmental organizations and other non-state actors, including most recently private interest groups.

169 For an influential account of an example of this phenomenon, see Pamela Samuelson, “The U.S. Digital Agenda at WIPO” (1997) 37 *Va. J. Int'l L.* at 369 [hereinafter Samuelson, *U.S. Digital Agenda at WIPO*]; Julie E. Cohen, “WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?” (1999) 21 *Eur. Intell. Prop. Rev.* at 236.



knowledge goods, and advance powerful legal, economic and policy arguments directed at sustaining the robustness of the welfare component of intellectual property. While the narratives are in many ways distinctly American, the essentialism of the third multilateralism has propelled these arguments to the center stage of global negotiations over intellectual property rights. In essence, the insistence on limits to proprietary interests of intellectual property owners forced a powerful marriage between public interest advocates in developed countries, and developing countries concerned over the exercise of rights in their markets and the implications for their citizens for accessing protected material, be it drugs, literary works or the benefits of the Internet.

From a developed country perspective, the convergence of interests between public interests groups in the developed world and developing countries was of immense strategic importance in allowing these groups to overcome the domestic public choice problem by transferring the locus of the battle to international fora. In such international fora, developing countries possessing the requisite characteristics for participation in treaty negotiation (i.e. statehood and membership in the international institution) were able to advance arguments for limitations on intellectual property rights, at times supplementing these with normative constraints imposed by other agreements, such as the International Undertaking for Plant Genetic Resources or the Convention on Biological Diversity. Within the doctrinal narratives, human rights and cultural claims serve to bolster arguments in favor of fair use exceptions in copyright, research or experimental use exceptions in patent law, or compulsory license/government use in both areas. The role of competition law is also typically identified in the doctrinal narratives, although not elaborated beyond the general point that competition policy is a useful tool to counter abuses of intellectual property rights.

Like the human rights narratives, the doctrinal narratives are heavily dependent on the development of access mechanisms in the current intellectual property systems of developed countries. Most of the limitations identified or proposed are modeled on the practices in developed countries. This has important strategic benefits, not the least of which is that these limitations have, at least until recently, successfully coexisted with strong protection levels in developed countries. Nonetheless, the point is that in recommending these doctrinal limitations for developing countries, the doctrinal narratives offer both what is pragmatic for negotiation purposes, as well as an opportunity to reinforce as an international norm, what has been successful in the domestic experience of developed countries. Developing

countries thus provide a platform on which global welfare norms, at least as an extension of welfare norms in developed countries, can be developed and reinforced. Once developed, retreat from such global norms becomes difficult for those developed countries, such as the United States, where these norms are being contested and, in some cases, curtailed significantly by courts.

Doctrinal narratives are vitally important in resisting the wholesale propertization of knowledge goods. Practically speaking, doctrinal limitations in developed countries constitute an important means of containing intellectual property expansion, since the presence of these limits in countries arguing for stronger global intellectual property rights makes the limitations arguably *de facto* legitimate under current international standards. The doctrinal narratives thus offer a means for developing countries to translate their concerns within the existing rules of the international economic system.

The doctrinal narratives are a vital part of the development of a meaningful international intellectual property policy for both developed and developing countries. There is no doubt that some of the limitations inherent in the domestic iterations of copyright and patent laws offer important lessons and benefits for development interests. However, any promised benefit from implementing limitations cannot replace the fundamental need of developing countries to determine how best to stimulate domestic innovation. It should also be noted that while the doctrinal narratives have helped to preserve policy spaces to address development needs, access alone to protected goods is neither the end of what developing countries seek, nor is it the only interest at stake in a global intellectual property system. As both the human rights and cultural narratives suggest, the deeper question for developing countries is whether and how intellectual property rights make sense given the present realities of life in these regions. Specific access mechanisms consistent with the domestic challenges facing developing countries must be developed and proposed.

International intellectual property treaties reinforce the fundamental assumptions of international law that developing countries are somehow endued, by their christening as "sovereigns," with the freedom to interact with intellectual property in a way that is culturally meaningful, economically sustainable and politically feasible. All the narratives, in essence, are discourses of interaction, not a reflection of the realities of the encounter between peoples of developing countries and the international intellectual property system, nor of the lasting and multifaceted consequences of that encounter.

### III. INTERNATIONAL RELATIONS AND INTERNATIONAL INTELLECTUAL PROPERTY REGULATION

#### A. *A Context for International Relations*

Despite the absence of significant domestic benefit from intellectual property protection most developing countries are members of, and participate in, institutions where intellectual property issues are discussed and negotiated. Why have developing countries by and large failed to effect change in the international system for their benefit?

There exists a robust body of multidisciplinary literature replete with numerous responses to these inquiries, ranging from the weak economic power of developing countries, the effective coalition strategies of developed countries, and linkage-bargaining where developed countries exchange gains in one area for greater intellectual property rights. In this section, I suggest that an important complement to the various theories advanced is the nature of state interaction in the international context. Specifically, state behavior in the international economic system is fundamentally connected to the internal domestic processes that inform the state's negotiating power, priorities and willingness to bargain. Thus, to explain the interaction between developing countries and the international intellectual property system, it is necessary to consider the international system more generally, and to examine state behavior more strategically.

The effects of globalization<sup>170</sup> as the primary rationalization of the demands of market actors pursuing maximum returns for innovative products in the global market has forcibly intruded into a discipline that has been neatly categorized by more or less precise distinctions of "national" and "international" intellectual property law. As with other disciplines, intellectual property, increasingly and ineluctably is the subject of re-inventive efforts with international obligations supplying much of the justification for expanding rights. From rights management systems to copyright term extension, domestic intellectual property policy is now customarily justified by international obligations. This is true for developed countries that pursued greater global rights during the third multilateralism, and for developing countries who ostensibly exchanged those rights for more immediate interests.

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<sup>170</sup> "Globalization" is a contested term used in a multiplicity of ways to include or exclude, emphasize or de-emphasize, certain actors and aspects of the heightened levels of economic integration. Critics of a market centered view of globalization have recently begun to eschew the use of this term and instead employ terms such as "globality" or "globalism." The critique is, in part, based on the historicity of the process that the term globalization attempts to capture and, in their view, hold hostage to a dominant free-market ideology. See, e.g., Martin Shaw, *Theory of the Global State: Globality as an Unfinished Revolution* 2-7 (New York: Cambridge University Press, 2000) (describing

The three dominant theories of international relations are Realism, Institutionalism and Liberalism.<sup>171</sup> These theories overlap, interact and, in some instances reinforce political theory by explaining why and how states relate and cooperate. In recent years there has been an explicit attempt to bring the tools and insights of international relations to the international law discipline and vice-versa.<sup>172</sup> The importance of this interdisciplinary project for international law has been noted, and in some cases heralded and championed by

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globalization as a third narrative of change in the international realm. The first two are post-modernity and post-cold war world). He argues that:

[G]lobalization became dominant once the political transition [of the post-cold war world] ceased to impress, and the most pervasive forms of change appeared to be located in the expansion of market relations, ubiquitous commodification and the communications revolution that mediated them. The global remained largely undefined, however, because the content of globalization seemed little more than a speeding up of the marketization of the previous, neo-liberal decade. The global meant principally, it seemed, the negation of the national boundaries which had defined the old order; it did not have a core meaning of its own." *Id.*

In an earlier article, I defined globalization as dispensing with the "centrality of national sovereignty" and emphasized "the ascendancy of private decision making, replacing sovereign prerogative . . ." Gana Okediji, Copyright and Public Welfare, *supra* note 38, at n. 1. As I noted there, most attempts to define globalization acknowledge, to different degrees, the dominant role of private markets and a corresponding abrogation or discounting of the absoluteness of sovereign authority as the dominant feature of international relations. The emerging critique focuses, quite rightly, on the assumptions in the globalization literature, either that globalization is "new" or that it is an unconscious working out of a free market in a higher evolutionary process. See Shaw, *id.* note 166 at 4-5. In this article, I acknowledge the legitimacy of this critique in terms of the breadth of what globalization does in fact entail. For my purposes, however, what is central to my argument is that there is an altered state of "sovereignty" and that the interaction between the sovereign and the domestic polity is both under-examined and overemphasized in the literature on globalization. Under-examined because the domestic effects of sovereign activity in the international realm are often not included in the calculus used to define globalization (except in the context of developing countries), and over-emphasized because the relationship between the domestic market and the international market is typically the only premise for rationalizing globalization as a process. As I argued in the earlier article, and continue in this Article, welfare vectors other than economic variables are insufficiently accounted for in arguments about the efficacy of a *global* free market.

171 Each of these schools certainly have sub-divisions that emphasize and introduce different variants of the main theoretical narratives. There are "neo-realists," also known as "structural realists," "functionalists," "neofunctionalism" and neo-liberal institutionalism (which is essentially another name for regime theory). The international relations lexis, in this regard, can be somewhat confusing. For simplicity, I have chosen to employ the core premises of the major theories although I readily acknowledge that some of the different strains may affect my general conclusions. Again, this section is not intended to provide an exhaustive analysis or synthesis of international relations and intellectual property.

172 For examples of scholarship critical of this integration see Outi Korhonen, "Liberalism and International Law: A Centre Projecting a Periphery," (1996) 65 *Nordic J. Int'l L.* 481; Martii Koskeniemi, "The Place of Law in Collective Security" (1996) 17 *Mich. J. Int'l L.* 455.

international law scholars.<sup>173</sup> The integration of these two disciplines also offers a variety of doctrinal tools to facilitate a broad public international law project, namely how international law might facilitate the role of states in maximizing the welfare of individual citizens.<sup>174</sup>

Since the state is the primary actor in both international law and international relations,<sup>175</sup> these disciplines share some fundamental assumptions rooted in theories of the state. For example, both a Hobbesian view of the state and a Realist theory of international relations would, in principle, support the argument that collective groups exist to mediate power relations between actors, whether these are individual actors within a state or states in the international community. These two theoretical approaches focus on the self-interested behavior of actors and make the case for a strong, central authority to mediate conflicting interests.<sup>176</sup> Realism, the dominant theoretical paradigm of international relations, emphasizes

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173 See *e.g.*, Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *Am. J. Int'l L.* 205 ("Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another. At the very least, they should aspire to a common vocabulary and framework of analysis that should allow the sharing of insights and information."); Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 *Yale J. Int'l L.* 335, 336 (noting that the international law discipline "has fallen behind other fields of law in developing an analytical approach informed by social science," in particular "the most closely related social science discipline, international relations." He concludes that modern international relations theory offers the opportunity to integrate the two disciplines and incorporates rigorous modes of economic analysis and inquiry "in which [international law] has been weakest." *Id.* at 340.

174 See Anne-Marie Slaughter, "Liberal International Relations Theory and International Economic Law" (1995) *Amer. Uni. J. of Int. L. Pol.* 717, 721–731 (reviewing the major theoretical paradigms in international relations and suggesting that Liberalism has much to offer international law in this regard). See also Slaughter Burley, *supra* at 206–207. ("Liberalism focus[es] . . . on an analytically prior set of relationships among states and domestic and transnational civil society. The "black box" of sovereignty becomes transparent, allowing examination of how and to what extent national governments represent individuals and groups operating in domestic and transnational society." *Id.* at 207.)

175 Liberal international relations theory focuses on nonstate actors and their alliances with one another, as well as their respective states, as the primary sources of the new international order. Professor Anne-Marie Slaughter is one of the prominent scholars in the development, articulation and advancement of a theory of liberal international relations. See *e.g.*, Anne-Marie Burley, "Toward an Age of Liberal Nations" (1992) 33 *Harv. Int'l L. J.* 393; Anne-Marie Slaughter, "The Real New world Order" (1997) *Foreign Affairs*, Sept.–Oct. at 183; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 *Eur. J. Int'l Law* 503; Anne-Marie Slaughter, "Liberal International Relations Theory and International Economic Law" (1995) 10 *Am. U. J. Int'l L. & Pol'y* at 717.

176 Interestingly enough, this is also characteristic of a regime under a rule of law.

the primacy of state power in international relations.<sup>177</sup> Correspondingly, a Hobbesian philosophical view favors a powerful state with a strong central authority which suggests, at most, a system of co-existence between states rather than integration.<sup>178</sup> Given Hobbes' antagonism to mixed sovereignties, the objectives of international cooperation would be limited to what is necessary to reinforce the state's authority and power.<sup>179</sup> Institutionalism, also known as regime theory, is a modern derivation from the Realist school. This theoretical account similarly accords a central role to state power, but institutionalists interpose international regimes as variables that mediate between behavior and outcome.<sup>180</sup> Institutionalism proceeds on the assumption that states have some common ends (or interests), which can be achieved through the establishment of "regimes."

#### B. A Brief Introduction to Regimes

Regimes are defined generally as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>181</sup> They may or may not involve a formal agreement or treaty.<sup>182</sup> Regimes are systematic; they contemplate long term commitments and typically represent bargain linkages among a number of issues. In this respect, regimes differ from mere international agreements, which tend to

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177 See Kenneth Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979) 104 (surveying a variety of theories on state behavior). See also E.U. Petersmann, "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization" (1995) 6(2) *Eur.J.I.L.* at 161.

178 See Thomas Hobbes, *Leviathan*, Book 2, para. 12, p. 29 (New York: Oxford University Press, J.C.A. Gaskin, ed. 1996).

179 *Id.* See generally, Bruno Simma and Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization" (1998) 9(2) *Eur. J. Int'l L.* at 266 (identifying four views of the international system and approximating Hobbes with the Realist tradition).

180 For an influential work on Institutionalism, see Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, N.J.: Princeton University Press, 1984). See Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World" (1982) 36 (2) *Int'l. Org.* 299 (criticizing the indiscriminate use of the word "regime" and distinguishing between outcomes that are a result of independent decisions reflecting self-interest that result in cooperative outcomes between states, and those decisions that are constrained by joint decision making because independence is not feasible. In this schematic, the former outcome is not a regime but the working out of international politics).

181 See David Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" (1982) 36 *Int'l Org.* 185, 186. The WTO system is a leading example of a regime.

182 Robert Keohane, *The Demand for International Regimes* (1982) 36 *Int. Org.* 325 at 333-336 (distinguishing between regimes and agreements).

be ad-hoc and may revolve around narrower interests. Notwithstanding, regimes can be reflected or established through international agreements.<sup>183</sup>

International regimes reduce transaction costs and thus make it more likely that states will act in cooperation rather than conflict. In sum, the main thrust of Institutionalism is that international cooperation results from a realization by states that there are substantial gains to be derived from acting in concert.<sup>184</sup> Put in this way, Institutionalism helps explain the importance of domestic governments and why states need (demand) and create (supply) international regimes that constrain their exercise of power.<sup>185</sup> The precept that acting in concert affords substantial gains has been extended to topics ranging from multilateral trade agreements to forms of constitutional democracies to voting rights. Public choice, game theory, particularly theories of coalition formation, and social choice model this thesis quite well. Various modified applications of these theoretical models exist in legal, economic and political science literature.<sup>186</sup>

Liberalism deviates from Realism and Institutionalism most significantly by viewing non-state personalities, as the primary actors in both domestic and international communities. In this view “[s]tate behavior is . . . determined not by the international balance of power, whether or not mediated by institutions, but by the relationship between these social actors and the governments representing their

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183 For a considerable collection of essays exploring different aspects of regimes, see Special Issue Symposium, *International Regimes* (1982) 36 *Int. Org.*

184 Examples of gains include, reductions in transactions costs, certainty and predictability in world markets and information supply. See generally, Keohane, *supra* note 182, and especially at 337–345.

185 Institutionalists do not necessarily jettison the centrality of power in international relations. Indeed, Institutionalism is a post-war derivative of Realism and the tension between these two paradigms is paralleled by the debates between Hobbes and Grotius over the nature of the state. See generally Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977). For a Grotian perspective on regimes, see Donald J. Puchala and Raymond F. Hopkins, “International Regimes: Lessons from Inductive Analysis” (1982) 36 (2) *Int’l Org.* 245 (1982).

186 For some important contributions from these different disciplines, see James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, Mich.: University of Michigan Press, 1962); Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); Amartya Sen, *Collective Choice and Social Welfare* (San Francisco, Holden-Day, 1970); Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957); William Riker, *The Theory of Political Coalitions* (San Francisco, Holden-Day, 1962). I have benefited greatly from Riker’s work in construing the unrecorded, informal and, perhaps, even unconscious sub-plot of the TRIPS negotiations. For the pioneering work on coalitions as a critical element of game theory, see John von Neumann and Oscar Morgenstern, *Theory of Games and Economic Behavior* (Princeton, N.J.: Princeton University Press, 1944).

interests in varying degrees of completeness.”<sup>187</sup> Further, there is a nuanced distinction between liberal international law and liberal international relations. Broadly, the liberal project in international law is normative, prescribing the role of the state in respect to individual rights, democratic virtue and, to a much more limited extent, socio-economic rights. Liberalism in international relations assumes the existence of these rights and is, generally speaking, a descriptive project. Both converge in emphasizing the role of nonstate actors in determining the norms, rules and institutions of the international domain. In this regard Liberalism, as a theory of the international system is sometimes associated with Kantian political theory.<sup>188</sup>

In simplified analysis, Realism would suggest that an international organ/institution defer strongly to a state’s asserted prerogative, but would not require a state to account for the exercise of that prerogative as this would implicitly undermine its sphere of authority. Liberal international law would most seriously pierce the veil of sovereignty and evaluate the domestic environment for unjustified bias against its citizens, or conduct that violates international norms. It might, for example, suggest that the WTO grant standing to private parties to bring complaints<sup>189</sup> or, at least, accord a weightier role to submissions of private actors. Further, it would contemplate that WTO agreements be directly applicable in domestic settings.<sup>190</sup> Institutionalism would represent a median level of deference to the extent that rules, norms and procedures can produce order between states. Its goal, then, is not to evaluate the distributive efficiency of the regime but to operate in a way that produces and reflects the cooperative arrangement.<sup>191</sup>

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187 See Anne-Marie Slaughter, *Liberal International Relations Theory*, *supra*, note 175 at 727–728. See also Anne-Marie Slaughter Burley, *supra* note 173 at 227–228 (outlining the core assumptions of Liberal theory). But see John Gerard, “International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order” (1982) 36(2) *Int’l Org.* 379 (criticizing the focus on power as the causal explanation for regimes and positing that there is social purpose for the “internationalization of political authority.” He characterizes the international economic order as an example of this fusion of power and legitimate social purpose and terms this “embedded liberalism,” which he asserts informs the content of the post World War II international economic order). See generally, *id.* at 385–404.

188 For an application of this philosophy to international law, see Fernando Teson, “The Kantian Theory of International Law” (1992) 92 *Colum. L. Rev.* 53, 54 (describing this as a liberal theory of international law).

189 See Evans, *supra* note 80 (advocating this position).

190 Professor Petersmann has been a foremost proponent of direct application of the WTO agreements, and he explicitly proceeds from liberal assumptions. See Part II, *supra*, discussion of the Human Rights narratives.

191 Functionalism and neofunctionalism focus on the role of private actors as forming alliances that ultimately overcome conflict between states. Again, the focus is on the outcome between states, not between states and their domestic constituents. In the specific context of money and trade regimes, Professor Ruggie argues that it is national interest, not power or the regimes themselves, which constrains states from



The emphasis on order among sovereign states in international law and international relations focuses attention on benefits flowing to participating countries from agreements, notwithstanding the domestic welfare consequences of such participation. Thus, outside of recognized exceptions in international law such as war, or human rights violations, states are generally not held accountable for the domestic effect of their international economic acts. Further, there is so far no effective theoretical framework for analyzing the role of sub-national actors and their influence on state behavior with regard to issues of domestic welfare.<sup>192</sup> With the means and strategies of international cooperation as the primary focus, existing theoretical models in both disciplines tend to minimize the state's role as an agent of domestic welfare,<sup>193</sup> except in the area of political human rights.<sup>194</sup>

Leading regime theorists stress that understanding the relationship between the domestic and international spheres requires that decision-makers be simultaneously concerned with domestic and international considerations.<sup>195</sup> In the international arena, an

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meddling in the international market. See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order*, 36 *Int'l Org.* 379, 385–392 (1982).

192 This is essentially the problem of identifying the linkages, and defining the nature of the overlap, between domestic politics and international relations. For one attempt at this, see Putnam, *infra* note 196 at 427. Even the functionalist tradition, which examines the role of sub-actors and transnational alliances as a source of cooperation, does so to explain the outcome of order among states, and not to evaluate how these sub-national and supranational actors affect domestic welfare. In his article, positing the desire for domestic stability (social order) as the source of “embedded liberalism” in the international economic system, Professor Ruggie’s analysis entails some discussion of this overlap in the context of the domestic market. See Ruggie, *supra* note 191. In this context, welfare is denominated only by reference to the market; my conception of welfare extends beyond the outcomes that market forces are likely to produce.

193 But see Ruggie, *supra* note 191. Of course, it may also be that the term “welfare” is used, as in the trade sense, to denote efficient markets. Thus, when the state acts in the international arena to preserve markets, the assumption is that it is acting in the interest of domestic welfare. Again, this highlights the tension between welfare as employed in the trade sense, and welfare in the intellectual property context. In the Liberal tradition, however, there is a strong argument that states need international institutions not to broker their self-interested power relationships, but to escape the domestic pressures that lead to failure to act in ways that benefit domestic welfare. The international economic system of the GATT is premised on this ideal. See E.U. Petersmann, *The Transformation of the World Trading System*, *supra* note 179 at 166–167 (citing postwar institutions such as GATT, the IMF and the United Nations as manifestations of a “constitutional insight” that governments risk becoming prisoner’s of interest groups unless they subject themselves to international agreements that serve constitutional functions analogous to domestic constitutions).

194 See Makau wa Mutua, *The Ideology of Human Rights*, (1996) 36 *Va. J. Int'l L. J.* 589 (criticizing the dominance of political human rights in the NGO movement to the detriment of socio-economic rights).

195 See *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States 4* (Madison, Wis.: University of Wisconsin Press, Peter J. Katzenstein ed., 1978); Stephen

“adequate account of domestic determinants of foreign policy and international relations must stress politics: parties, social classes, interest groups (both economic and non-economic), legislators, and even public opinion and elections, not simply executive officials and institutional arrangements.”<sup>196</sup> This occasions a troublesome, manipulative use of international law. Assertions of sovereign prerogative in the face of international obligations, or reliance on international obligation to excuse domestic government failures, are both equally subversive of the institutions and processes designed to facilitate the operation of the rule of law in both the domestic and international arena. It invokes Realist views of states as completely focused on their own power in relation to the power of other states.<sup>197</sup> In this view, rules of international behavior and the institutions responsible for developing and enforcing them are but convenient agents for demonstrations of state power.<sup>198</sup> Actions really taken for reasons of power may be rationalized by international law.<sup>199</sup> Similarly, domestic policy may be used to rationalize actions that are inconsistent with international law.<sup>200</sup>

For developing countries then, the various narratives become important sources of power because these narratives are expressed through international institutions such as the Human Rights Sub-Commission, the World Health Organization, the Food and Agriculture Organization and a variety of NGO's. It would be difficult to engage in "regime shifting" without some buy in to the narratives which sustain or at least inform these institutions and regimes. Consequently, regime shifting or even forum shifting should not be seen as a costless move. The narratives that are deployed or rationalized

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D. Krasner, "United States Commercial and Monetary Policy: Unravelling the Paradox of External Strength and Internal Weakness" in *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States*, *supra* note 167; Peter J. Katzenstein, *International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States*, (1978) 30 *Int'l Org.* at 1.

196 Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two Level Games" (1988) 42 *International Org.* at 427, 432.

197 See Kenneth Waltz, *Theory of International Politics* 104 (Reading, Mass.: Addison-Wesley 1979) (surveying a variety of theories on state behavior).

198 See Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, (1982) 36 *Int'l Org.* 185, 190-191.

199 *Id.*

200 For example, national security or defense is often a classic example of a domestic concern that has been considered as "legitimate" cause for deviation from international obligations. See *e.g.*, TRIPS Art. 73 (security exceptions). Sometimes treaties will provide specific examples of exceptions that may be invoked by members. More likely, however, treaties tend to provide a penumbra of subjects which may provide grounds for a member to employ unilateral prerogative by explicit reservations of sovereign residual power or by recognition of a certain scope for sovereign initiative. See *e.g.*, Art. XX of the GATT Agreement (an example of the latter); Art. 13, 30 and 31 of the TRIPS Agreement (examples of the former).

within the various fora and regimes have important implications for how developing countries can sustain two vital elements of their participation in the international intellectual property system; 1) coalition dynamics and; 2) the premise that some deviation from the European model may be necessary. As discussed, all the narratives assume the legitimacy and propriety of the system. Thus it is entirely plausible that even with regime shifting, developing countries are actually losing normative ground with respect to the second element. If this is the case, regime shifting may ultimately be more about where lines are drawn in intellectual property regulation, and not whether they are drawn at all. A more disturbing issue is that to the extent regime shifting upsets coalitional dynamics between developing countries, the loss on the development side is actually doubled. Not only is there a dilution of a normative proposition, however subtle, but there is also the political loss resulting from splinters between developing countries whose membership in various regimes may be different, or whose position on issues within the regimes may differ.

#### IV. CHALLENGES FOR THE DEVELOPING STATE IN THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM

##### A. *Power and the People*

Of the three dominant theories of international relations, Liberalism is useful for analyzing domestic public welfare implications flowing from intellectual property regulation.<sup>201</sup> Liberalism analyzes state behavior in the international arena on a similar premise as political scientists observe domestic politics, namely that states act in ways that reflect the influence of domestic interest groups and the constraints placed by domestic institutions.<sup>202</sup> The international relations strand of Liberalism would accord significant importance to the role of private industry groups, as well as other domestic interest groups in analyzing the willingness of developing countries to engage the international intellectual property system. However, Liberalism falls short of its promise for my purposes, because in its instrumentalist agenda

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201 Despite its focus on individuals and groups in the society, liberalism tends to focus mostly on political rights and interests as the indicia of state authority and legitimacy in international relations. As such, Liberalism undergirds and most manifestly permeates international law subjects such as human rights because in its normative posture, Liberalism strips sovereigns of legitimacy in areas where the sovereign has failed to be responsible for the welfare of its citizens. However, the extent to which economic well-being and political welfare overlap and interact, as a matter of state obligation, has not been as widely attended to under the Liberal agenda. Indeed, Liberalism's emphasis on the "political" dimensions of the human rights movement has gained increasing criticism among international lawyers.

202 Slaughter Burley, *A Dual Agenda*, *supra* note 173 at 226–228.

(analyzing the source of conflict and order among states) it does not provide tools for evaluating the significance of the disparate levels of influence across competing interest groups. In other words, as a framework for analysis, Liberalism offers insights into the domestic sources of international behavior, but does not account for the boomerang effect, or dual interaction, of international behavior on the domestic sphere and vice versa.<sup>203</sup> In particular, the relatively low levels of innovation in most developing countries mean that without domestic intellectual property stakeholders to exert pressure on developing countries, the interests of cooperation and the benefits of a bargain in other areas will produce a less demanding stance by these countries with respect to intellectual property rights. Strong intellectual property rights then, do not occasion immediate or significant domestic repercussions for the governments of most developing countries. But concessions in agriculture or textiles, sectors where domestic interest groups are more organized and/or have a direct relationship to the government's economic development plan and priorities are strong pressure points for developing countries.

A sufficient account of the domestic spillover effects of intellectual property rights<sup>204</sup> will entail a discussion of processes through which international obligations are translated into the domestic setting. This process also plays a role in how states negotiate international obligations. Thus, for example, in the United States, and to a lesser extent the EU, the use of domestic implementing legislation<sup>205</sup> to effectuate treaty obligations suggests that the only bargains that will be made are those that Congress will enforce by incorporating them into domestic legislation.<sup>206</sup> Implementing legislation, however, may undermine the

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203 Putnam, *supra* note 196 (noting this deficiency in international relations theory).

204 Putnam, *supra* note 196 at 426–433 (criticizing the failure to account for domestic spill-over effects in international relations scholarship).

205 Not all treaties implicate the legislative arm and may be observed by executive action (or inaction) such as arms control treaties. Other treaties may be “self-executing,” *i.e.*, the substantive provisions automatically become a part of domestic law. In recent times, however, self-executing treaties have become more infrequent. The focus on bi-lateral treaties by scholars, who have worked on developing theories of breaches of international agreements, limits the broad applicability of the conclusions to multilateral settings. See *e.g.*, John K. Setear, “Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility” (1997) 83 Va. L. Rev. at 1.

206 Of course, compliance in the sense of domestic legislation that incorporates the substantive treaty provisions into domestic law is not the same as enforcement of the substantive provisions of the treaty. Enforcement is the domain of the judicial branch (both international and domestic) and, as I mention later in this article, a judicial strategy of strict construction as a means of preserving sovereign discretion while maintaining fidelity to the treaty, may not yield results satisfactory to treaty partners who construe the provisions differently, nor will it necessarily be consistent with international law prescriptions. An economic analysis of how separation of powers

security and the predictability of an international agreement because it invariably substitutes domestic law as the standard for application of the substantive treaty provisions.<sup>207</sup> Theoretically then, the use of implementing legislation may constitute an implicit allocation of interpretive power to the state as a matter of first principles.<sup>208</sup> Of course, implementing legislation also gives domestic interest groups a “second bite at the apple” to influence the domestic effects of the treaty obligations. In developing countries with less established constitutional cultures, less sophisticated processes for implementing international obligations, and weaker democratic institutions, international obligations tend to pass straight through the shield of sovereignty to affect the domestic polity. With specific regard to the TRIPS Agreement, this lack of a domestic politico-legal buffer—either to exercise legitimate discretion to interpret TRIPS obligations, or to confine aggressive reaches of international economic law—exposes citizens in developing countries to the most egregious abuses of the intellectual property system.

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influences treaty compliance might yield important insights into when implementing legislation signals prospects of deviation, and the degree of such deviation. This would, in turn, provide some guidelines for domestic compliance that may be explicitly included in future treaties. From a descriptive point of view, it would also help to predict the necessity for harmonization under the constraints of supranational adjudication. I will leave these projects for another day. But for contributions to the question of treaty compliance in the context of separation of powers doctrine, see John C. Yoo, “Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution” (1999) *Colum. L. Rev.* 2218 (arguing, in response to criticism to his first article that advances historical arguments in support of non-self-executing treaties, that requiring domestic implementing legislation of treaties that touch on matters within Congress’s Art. I, Section 8 powers reflects strong adherence by the Framers to a strong separation of powers doctrine).

207 See *e.g.*, *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2<sup>nd</sup> Cir. 1998). (citing the Berne Convention Implementation Act (BCIA) as the source of law for selecting a conflicts rule. According to the Court “Section 4(a)(3) of the Act amends Title 17 to provide: “No right or interest in a work eligible for protection under this title may be claimed by virtue of . . . the provisions of the Berne Convention . . . Any rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of . . . the provisions of the Berne Convention.”) Berne Implementation Act of 1988, Pub. L. 100–568, 102 Stat. 2853, 17 U.S.C. § 10. See also *The Bridgeman Art Library, Ltd. v. Corel Corporation*, 36 F. Supp.2d 191 (S.D.N.Y. 1999) (concluding that while the Copyright Act, as amended by the BCIA, extends certain protection to the holders of copyright in Berne Convention works as there defined, the Copyright Act is the *exclusive* source of that protection.) (emphasis mine).

208 See generally, Joel Trachtman, *The Theory of the Firm, and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, (1996–1997) 17 *Nw. J. Int’l L. & Bus.* 470, 535–38. See also, Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, (1999) 20 *Mich. J. Int’l L.* 697 (outlining different kinds of international institutions and variables that influence the willingness of states to become members).

### B. *The Nature of the Developing State*

The rigid adherence by classical Realists to a paradigm of international relations based predominantly on state preoccupation with power has been modified by alternative theories that stress international cooperation and the international role of subnational actors. Nevertheless, the shared interests that produce regimes inevitably are a function of power.<sup>209</sup> To the extent that states act in coalitional form in the process of negotiating regimes,<sup>210</sup> power, as well as the desire for institutions, are relevant variables in the pursuit of international cooperation.<sup>211</sup> Stating that institutions mediate the tendencies of “anarchical” international society does not discount the role of power, because the mediative force of an international regime is defined by the continued presence of a “demand” for that institution in the form of incentives for states to comply.<sup>212</sup> Power thus influences the nature and the possibility of incentives available for and during international negotiations. And it is precisely the lack of power that unleashes the potential of regimes to bring about some gain—whether strategically or substantively—for developing countries. Developing countries do not necessarily always make substantive gains in intellectual property treaties by regime shifting. However, by engaging in these various regimes, developing countries can make gains in other areas as developed countries seek firm commitments for intellectual property protection. Historically, cooperation in intellectual property has not been a priority for developing countries compared to cooperation in agriculture and textiles. Thus, as the linkage literature suggests,

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209 For a modern treatise on the coalitional strategies that are at the core of Realism, see Hans Morgenthau and Kenneth W. Thompson, *Politics among Nations: The Struggle for Power and Peace* (New York: Knopf, 1985).

210 See Okediji, Public Welfare and the WTO, *supra* note 10 (using coalition theory to explain the TRIPS negotiations).

211 See Anne-Marie Slaughter, Liberal International Relations Theory, *supra* note 174 at 731 (noting that the international system contains elements of all three leading theories of international relations).

212 This implicates the rationalist theories of state behavior that regime theorists rely on heavily. My more subtle point is, however, that shared interests that facilitate coalitions can be a function of common positions of power in the international arena such as illustrated by developed countries during the TRIPS negotiations. The compromise made intra-coalitionally between the developed countries reflects the equal interests of these countries and the inability of one country to make a unilateral decision about the TRIPS outcome. See Arthur A. Stein, “Coordination and Collaboration: Regimes in an Anarchic World” (1982) 36(2) *Int’l Org.* at 299, 301 (identifying constrained interaction as a basic metric for the existence of international regimes); Gunner Sjøstedt, “Negotiating the Uruguay Round of the General Agreement on Tariffs and Trade” in *International Multilateral Negotiation*, 44, 69 (San Francisco: Jossey-Bass, William Zartman, ed., 1994) (noting the “leadership problem” stemming from the lack of U.S. hegemony during the Uruguay Round negotiations because power relationships between the leading countries had become more symmetrical).

regimes offer bargaining strategies that may not otherwise be available to developing countries given their relative lack of power in the international community.

Particularly in the area of intellectual property, state power is a critical variable for predicting outcome, because intellectual “property” is inherently a product of the exercise of state regulatory powers.<sup>213</sup> Thus, domestic political institutions are, consistent with Liberal theories of international relations, crucial in determining what a state does in the international arena.

The importance of domestic constituents in influencing international outcomes is patently obvious in the various accounts of the TRIPS negotiations, as well as recent bilateral and multilateral agreements. The influence of domestic constituents on the legislative branch significantly elevates the importance and costs of multilateral negotiations. In substantive terms, domestic government failure is associated with significant costs because those interest groups with the most influence will exert decisive pressure on state behavior in international settings. For example, if traditional U.S. political resistance to international processes coincides with strong pro-consumer interest group politics in the area of intellectual property regulation, deviation from a particular international rule would be expected. This was evident in the case of U.S. insistence that the TRIPS Agreement exclude an obligation to protect moral rights, which is a quintessentially European concept.<sup>214</sup>

One of the factors affecting a state’s strategy in international negotiations is the composition and relative influence of domestic constituents.<sup>215</sup> Consider, for example, that state “power” is largely defined by domestic institutions. These institutions are, in turn, accountable to citizens who may exert pressure upon or even vote the government out of power. Consequently, the reverberation of the cooperative strategies between sovereigns in international negotiations and the competing desires of relevant domestic interest groups, indicate that the effectiveness of “power” in the international context reflects the vibrancy of domestic politics.<sup>216</sup> Indeed, dictatorships are, in many respects, more “efficient” international actors because they are, unlike democratic “strong” governments, unencumbered

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213 As Lloyd Weinreb has put it, copyright is itself a form of market intervention and not a “natural” way of doing things). See Weinreb, “Copyright for Functional Expression” (1998) 111 Harv. L. Rev. 1149, 1240.

214 Concern by domestic interests in the United States over the Berne Convention requirement to protect moral rights was one of the significant issues and contributing factors to the delay in U.S. accession to the Berne Convention.

215 See Putnam, *supra* note 168, at 442–450.

216 *Id.* at 449.

by domestic constituents.<sup>217</sup> The absence of strong domestic institutions in developing countries makes it possible and easy for strong intellectual property laws to become absorbed in the domestic system of these countries. And developed countries pushing for such rights are aware of the lack of domestic accountability that such states will face. Consequently, the wishes of their (*i.e.*, developed countries') own domestic interest groups can be advanced at no cost politically (at least in theory) to developing states.

### C. *International Institutions and Domestic Welfare*

International law and international relations generally assume the value of democratic government.<sup>218</sup> Thus, the domestic conditions that result in particular treaty outcomes should have *some* relevance in the dispute resolution process of the WTO and in how domestic institutions implement international obligations. If Realism focuses on state power, Institutionalism on the rules and processes of the regime, and Liberalism on state interest in its domestic constituents, what is not accounted for is general domestic welfare that would include a combination of each of these factors in pursuit of identifiable social ends.<sup>219</sup> If the state lawfully cedes the advancement of domestic social goals to an international institution, then that institution should not focus solely on the outcome of "order" between states as its primary duty. Within the sphere of overlap between the national and international domains there must be an evaluation of, and an accounting for, the substantive effects of compliance with the international rule.

For developing countries, this means that in addition to upgrading domestic intellectual property legislation, the ability to adopt domestic policies in the future, or carve out legislative exceptions based purely on domestic policy priorities, is invariably delimited by the existence of a supranational adjudicatory body empowered

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217 This proposition is stronger when the government itself has several acceptable options or "win-sets" in international negotiations. When a government has only one real negotiating objective, democracies are stronger actors in this setting because the existence of domestic pressures can be invoked to exclude undesirable negotiating out. Putnam, *id.*

218 Indeed, Liberal international relations theory assumes the existence of democracies. See Slaughter Burley, *supra* note 173 at 207 (equating democracies and liberal states in describing the basic tenets of Liberal international relations theory).

219 This is an echo of a mounting critique of the dominant model of "liberal" international law and "liberal" international relations theory, which importunately maintains a rigid dichotomy between the economic and the political sphere, or between the "public" and "private" sphere, in almost all subjects of international law. See James Thuo Gathii, "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98 Mich. L. Rev. 1996.



to construe and enforce the substantive obligations of the TRIPS Agreement.<sup>220</sup> In sum, the heightened global rules for intellectual property protection necessary to secure comparative advantage in information goods also entail corresponding, albeit non-economic, costs for participating in the new regime.<sup>221</sup> With regard to pure trade matters, these costs are not new and tend to represent the tradeoffs inherent in the process of cooperative bargaining, whether between private parties or public authorities, at national or international fora.

With intellectual property issues, however, these costs have grown exponentially. In this regard, the most immediate point regime analysis offers is the importance of strong states. The history of international law, particularly the obligations usually imposed on developing countries in exchange for foreign assistance and other benefits, generally weaken the governance ability of these states. In essence, the ability to execute domestic welfare enhancing legislation is *pre-compromised* by the structure of international relations. Thus, in the specific area of intellectual property, state weakness is likely to be most evident in disputes that involve areas where there arguably is residual power or “wobble room”<sup>222</sup> for states to interpret TRIPS requirements in a manner consistent with domestic interests. In this regard, intellectual property disputes differ from trade disputes to the extent they require *ex post* construction of norms that historically

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220 But see J.H. Reichman, “Securing Compliance With the TRIPS Agreement After U.S. v. India” (1998) *Journal of International Economic Law* 585,596 (stating that the Appellate Body decision in U.S. v. India “seems certain to reinforce the residual power of states to forge their own intellectual property laws and polices within the reserved powers of GATT 1994, Article XX(d), except insofar as the black letter rules of the TRIPS Agreement otherwise clearly overrule or circumscribe such exercise of residual power”). Professor Reichman’s proviso is key to reconciling my thesis and his conclusion of the force of WTO dispute resolution. To the extent that TRIPS requires construction through the adjudicative process, it is difficult to determine precisely the scope of legitimate policy making power reserved to members, notwithstanding “black letter rules.” As the law and economics literature on rules versus standards attests, every law is itself a combination of rules and standards, thus necessitating some construction which cannot be determined prior to adjudication. See Cass R. Sunstein, *Problems with Rules*, (1995) 83 *Cal. L. Rev.* at 953; Louis Kaplow, “Rules Versus Standards: An Economic Analysis” (1992) 42 *Duke L.J.* 557. In my view, this uncertainty is a principal deficiency with regard to the predictability of future domestic intellectual property policy.

221 At least one leading political scientist views this constraint on U.S. discretion as a necessary feature of mutually beneficial agreements. See Stephen D. Krasner, “Power and Constraint” (2000) 1 *Chi. J. Int’l L.* 231, 232.

222 See Reichman, *supra* note 220, at 588. Professor Reichman views this wiggle room as the space created by the unharmonized norms of intellectual property, which he posits provide opportunities for domestic interpretation and application. Some economic scholarship suggests that this failure to achieve deep integration (or deliberate choice by states) is necessary to maximize domestic welfare. See Maskus, *supra* note 78, at 176–181.

have functioned to facilitate *different* domestic outcomes for member states.<sup>223</sup>

One effect of the harmonization of intellectual property rights within the trade regime is that it compelled a bargain over the welfare ideals of multilateral trade regulation and international intellectual property regulation.<sup>224</sup> The free trade system confines the discretionary power of states in a variety of areas<sup>225</sup> with the aim of increasing overall welfare benefits. The practice of free trade,<sup>226</sup> despite its adverse effects in specific sectors and industries, has been sustained on the premise that *overall* domestic welfare is benefited. Indeed, the temptation to respond solely to self-interested lobbies without regard for the general welfare of the economy was one of the criticisms of mercantilist policy by classical trade theorists.<sup>227</sup> This is why it is important for the WTO dispute settlement bodies to recognize a national welfare calculus in TRIPS disputes, as well as to animate the objectives listed in the TRIPS preamble. Weak states

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223 See W.R. Cornish, "Judicial Legislation," in *Law, Society and Economy* (New York: Oxford University Press, ed. Richard Rawlings) 359, 373 (1997) (expressing caution about the broad jurisdiction of the WTO and the imprudence of direct application of Community ratified treaties because ambiguous treaty formulations tend to "reflect the contradictory expectations of negotiating States.").

224 Gana Okediji, *supra*, note 38 (an economic and comparative analysis of "welfare" in international economic regulation and U.S. copyright law.).

225 The GATT operates through a system of binding tariffs. Each GATT member agrees to lower tariffs on specified products, thus facilitating "free trade" by the progressive elimination of barriers that distort the flow of trade. According to classical economic trade theory, trade barriers (both tariffs and the more pervasive non-tariff barriers) ultimately stymie an exporting country's comparative advantage and also has adverse welfare consequences for the importing country. According to Adam Smith, "... there should be no interruptions of any kind made to foreign trade, that if it were possible to defray the expences of government by any other method, all duties, customs, and excise should be abolished, and that free commerce and liberty of exchange should be allowed with all nations and for all things." See Adam Smith, *Lectures on Jurisprudence* (Oxford: Clarendon Press, Ed. A.L. Macfie and D.D. Raphael, P.G. Stein, 1978) 268. In *Wealth of Nations* Smith continued: "To give the monopoly of the home market to the produce of domestic industry, in any particular art or manufacture, is in some measure to direct private people in what manner they ought to employ their capitals, and must, in almost all cases, be either a useless or a hurtful regulation. If the produce of domestic can be brought there as cheap as that of foreign industry, the regulation is evidently useless. If it cannot, it must generally be hurtful. It is the maxim of every prudent master of a family never to attempt to make at home what it will cost him more to make than to buy. . . . If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage . . . . The natural advantages which one country has over another in producing particular commodities are sometimes so great that it is acknowledged by all the world to be in vain to struggle with them." Smith, *id.* at 399–400, 401.

226 In reality most states practice "managed" trade, which entails some government intervention in the domestic market.

227 See Smith, *supra* note 225.

that promote overly strong intellectual property rights should be corrected within the international process. In this regard, the human rights and doctrinal narratives provide a strong normative basis for WTO panels to give a voice to the real party in interest, namely the public.

In both trade and intellectual property, the immediate effects of multilateral integration portend opportunities for domestic constituents to exert pressure on states to address their specific welfare needs.<sup>228</sup> For this reason, the use of implementing legislation in countries such as the United States provides room for pernicious rent-seeking to influence the norms that determine how an international agreement will receive domestic force.<sup>229</sup> Such domestic implementation is more likely to be the target of strategic bargaining in the domestic political arena with the corresponding inefficiencies typically produced by interest-group specific legislation.<sup>230</sup> In developing countries, and certainly in least developed countries, implementing legislation could be a useful device for “translating” international obligations into domestic terms that make sense economically and culturally. Of course, this requires, as mentioned earlier, a strong domestic government which is rarely the case in these countries. In any event, there also must be a careful analysis of whose interests are being served, lest implementing legislation becomes another opportunity to introduce extra-treaty obligations.<sup>231</sup> How (and whether) to reconcile individual demands with national welfare interests, and domestic welfare with global welfare, is the exceptional challenge for intellectual property regulation.<sup>232</sup> It is also the classic problem of social choice.<sup>233</sup>

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228 See generally, Okediji, *Public Welfare and the WTO* *supra* note 10.

229 Petersmann, *supra* note 177. See also Cohen, *supra* note 169; Litman, *supra* note 163.

230 The Digital Millennium Copyright Act (DMCA) is one example of this. See Cohen, *supra*, note 163; Ginsburg, *Copyright Legislation for the Digital Millennium*, (1999) 23 *Colum.-VLA J. L. & Arts* at 137, 178. (criticizing the DMCA for its “lack of overall vision for copyright policy.”); Pamela Samuelson, *Why The Anticircumvention Provisions Should be Revised* (1999) 14 *Berk. Tech. L. J.* at 519.

231 This was the experience of the United States with the implementation of the WIPO Internet treaties.

232 Gana Okediji, *supra* note 38 at 123–124 (suggesting that the two welfare paradigms are different and will have to be reconciled) and at 172–184 (providing a critique of the assumption that welfare gains in trade are synonymous with the public welfare vision of the Constitutional clause respecting intellectual property). This challenge is sometimes also described in terms of competing constitutions of domestic and international governance. See *e.g.*, Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer, 1997) 41–57.

233 See Amartya Sen, “The Possibility of Social Choice” (1999) 89 (3) *American Economic Review* 349, 350.

Neo-liberal and public choice theories of international relations suggest that international regimes are necessary to help states overcome the tendency to act in ways that would distort presumed welfare gains arising from the discipline of international rules.<sup>234</sup> Independent of this development, international law has, over the last fifty years, witnessed a shift from its canonical organizing principle, "sovereignty," toward an emergent wisdom that the discipline ultimately should facilitate the welfare of citizens.<sup>235</sup> This corresponds somewhat with a Kantian view of the state, which emphasizes the importance of democratic rule for world peace, and with social contract theory, which anchors state legitimacy in the will of the governed. The state is constrained by the need to act for the people's benefit.<sup>236</sup> In this view, it is imperative for citizens to have access to government, and to participate in democratic decision-making<sup>237</sup> so that the legitimacy of the international order is derived from the consent of the citizens. Put differently, the international legal framework should function on behalf of citizens, with the state acting primarily as an agent of that will, and entering into international agreements that redound positively on domestic welfare. A Lockean rationalization of the international legal order would go one step further by advocating that the recognition of *individual* rights and liberties of citizens under international regimes renders a regime legitimate.<sup>238</sup> Consequently, a state that fails

234 See also Stephen Haggard and Beth A. Simmons, "Theories of International Regimes" (1987) 41 *Int'l Org.* 491.

235 See Thomas Franck, *The Emerging Right to Democratic Governance*, (1992) 86 *Amer. J. of Int'l Law* 46; Thomas Franck, *The Democratic Entitlement*, (1994) 29 *Richmond L. Rev.* 1.

236 As a matter of international law, however, these internal constraints were not traditionally subject to scrutiny or policing by any international norm, process, or institution. In this respect, sovereignty was clearly more or less absolute in the sense that it was immune to encroachment by "external" entities. In the last fifty years, however, this view of sovereignty has given way to a principle of sovereignty that is more fictitious than real.

237 Kantian political philosophy as a paradigm for international relations is reflected in constitutional theories of international relations. For Kant's leading essay on the role of democratic states in promoting international welfare, see I. Kant, "Perpetual Peace: A philosophical Sketch" in Kant, *Political Writings* (New York: Cambridge University Press, H. Reiss, ed.) 100, 1991. See generally, Fernando R. Teson, "The Kantian Theory of International Law," (1992) 92 *Colum. L. Rev.* 53. Concerns over the welfare impact of TRIPS have led some intellectual property scholars to advocate for individual standing to sue before WTO panels. See Gail Evans, *Lawmaking Under the Trade Constitution: A Study in Legislating By the World Trade Organisation* (The Hague: Kluwer, 2000).

238 How such recognition and enforcement would take place in the context of the WTO is subject to some debate. As noted above, some have advocated an individual right to sue as a means of addressing this perceived deficit in the WTO system. As a substantive and procedural matter, I am not inclined to favor this approach. Indeed, my argument in this paper is that it is the role of the state to act in ways that reflect its domestic welfare. The choice to engage in reciprocal free trade is an example of a decision that,

to respond equally to the needs of its citizens *should* account for this failure within the international legal realm.<sup>239</sup>

A fusion of Lockean and Kantian philosophical traditions would give us what one political scientist, speaking specifically in the context of the international economic order, has called “embedded liberalism.”<sup>240</sup> That is, the national and international governance structures should interact in a manner that ensures protection for domestic social welfare under a rule of law.<sup>241</sup> Integrated with Liberalism in international relations, this dialectic impels a perspective of the international domain as one that should facilitate the production of welfare for domestic constituents. In this view, the international system is understood to exist in its own right as an arbiter between states, as well as to provide support for primary state functions such as the provision of public goods, the protection of liberty, fundamental human rights and physical security.<sup>242</sup> International relations theories help us see that developing countries need the facility of international norms such as self-determination, and the power of strong domestic constituents

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while not beneficial to all industries, in theory enhances the common good. To favor free trade is not, however, to advocate an abandonment of the role of government in facilitating allocative efficiency. In his analytical case for free trade, Adam Smith’s proviso that protectionism is not obviously going to “increase that general industry of the society or to give it the most advantageous direction” distinguished him from earlier proponents of free trade. Yet, Smith was not absolutist in his conviction about the merits of free trade over protectionist strategies. He recognized limitations to the laissez-faire doctrine and supported the need for government interference in the market to ensure provision of public goods such as a justice system, national defense and education. For leading economic articles on Smith’s view of the governments role in supporting social institutions, see Jacob Viner, “Adam Smith and Laissez-Faire” (1927) 35 *Journal of Political Economy* 198; Nathan Rosenberg, “Some Institutional Aspects of the Wealth of Nations” (1960) 68 *Journal of Political Economy* at 557. Thus, in its classical mode, the case for free trade is not predicated on the absence of government responsibility for domestic welfare. Indeed, domestic welfare is the motivating force for free trade and inevitably requires a balancing of competing ends to ensure optimal outcomes from the application of trade rules in domestic contexts.

239 International human rights law is premised on this principle. See generally, Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990). See also Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *Amer. J. of Int’l L.* 866 (arguing that sovereignty cannot insulate a state from external coercive action if the state thwarts popular will).

240 Ruggie, *supra* note 191.

241 This view has its roots in liberal international relations theory. See Anne-Marie Slaughter Burley, *A Dual Agenda*, *supra* note 173 at 205.

242 This may generally be classified as an institutionalist view of international order. See Keohane, *supra* note 180 at 244. For what I would loosely describe as an Institutional view of international copyright law, see Netanel, *supra* note 9 at 475–479 (1997) (discussing interpretation of Article 13 of the TRIPS in light of an international law of freedom of expression); Neil Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale L.J.* 283, 347 (advancing a similar argument in the domestic context. He posits that “copyright is a limited proprietary entitlement through which the state deliberately and selectively employs market institutions to support a democratic civil society.”)

to constrain developing states by providing an incentive to resist the temptation to submit to opportunistic interest group demands exerted through developed states in international fora.

Weak states, economic pressures and narratives, which reinforce the legitimacy of intellectual property rights while seeking to limit their effect, have produced an international intellectual property system that undermines public welfare, and entrenches private actors as de facto sovereigns in the international economy. The narratives are an important part of the historiography of developing countries in the international intellectual property system. But it is important to consider the weaknesses of these narratives, and thus how they may be used to move the discourse over intellectual property rights in a direction that preserves some normative space and facilitates coalitional strategies. Such uses should, ideally, promote domestic welfare by reserving policy spaces for the development of specific doctrines suited to the needs of individual developing countries.

## V. CONCLUSION

Intellectual property rights have been extended to developing countries in an unbroken historical chain lasting over five hundred years. Over the course of this period, international law has yielded doctrines that have been instrumental to the political independence of these countries and, to a lesser extent through human rights law, to the political, social and economic guarantees for the people groups and individuals of these countries. The manifestation of economic guarantees remains a contested issue in international law in terms of which particular mix of markets and other institutions will produce optimal results. In the highly technological age of the twenty-first century, the regulation of intellectual property occupies a crucial role in this debate.

The *weltgeist* of the international intellectual property system is undoubtedly European, but also increasingly American. The narratives of developing country participation in the global system all seek to redeem the system from its own problematic history by restructuring the terms of engagement between developed and developing countries. To do so effectively will require that the current equilibrium of the doctrinal rules be construed in ways that facilitate opportunities for all forms of creativity to be recognized, and that recognize limits on intellectual property rights as a tool of public welfare. The narratives have played an important role in the relationship of developing countries with the international intellectual property system. All of the narratives, however, assume the presence of strong developing

states, the appropriateness of current intellectual property norms and the possibility of alternatives to the international system as we know it today. The narratives tinker around the margins of current boundaries and problems, but fail to directly question the assumptions sustaining the system. The narratives should be refocused in ways that build civil society, strengthen domestic institutions and propel the debate about the role of intellectual property rights in developing countries beyond the experience of developed countries.