Faculty Scholarship

2012

Intellectual Property and Asian Values

Peter K. Yu
peter_yu@msn.com

Follow this and additional works at: https://scholarship.law.tamu.edu/facscholar

Part of the Comparative and Foreign Law Commons, and the Intellectual Property Law Commons

Recommended Citation

Available at: https://scholarship.law.tamu.edu/facscholar/399

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact areteen@law.tamu.edu.
INTERNATIONAL INTELLECTUAL PROPERTY SCHOLARS SERIES*

INTELLECTUAL PROPERTY AND ASIAN VALUES

PETER K. YU**

I. INTRODUCTION ........................................................................................................... 330
II. THE ASIAN VALUES DEBATE ............................................................................. 336
   A. Human Rights ....................................................................................................... 336
   B. Intellectual Property ............................................................................................. 339
      1. Cultural Developments .................................................................................. 340
      2. Economic Developments .............................................................................. 351
      3. Geopolitical Rivalries .................................................................................... 365
III. CHIN迪ASEAN ................................................................................................... 370
IV. AGENDA ................................................................................................................ 378
   A. Traditional Issues ............................................................................................... 379

* The Marquette Intellectual Property Law Review International Intellectual Property Scholars Series features the works of leading national and international scholars whose areas of research include the study of important topics in international intellectual property law and policy. The 2011–2012 Editors of the Marquette Intellectual Property Law Review would like to thank Professor Yu for accepting the invitation to publish in this series.

** Copyright © 2012 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor, Centre for International Intellectual Property Studies, University of Strasbourg. Earlier versions of this Article were presented at the Colloquium on China and International Law at the University of Chicago Law School, the “International Intellectual Property Law and the 21st Century: Will Developing World Lead or Follow?” Symposium at UCLA School of Law, the “Recent Developments in Intellectual Property Law in Southeast Asia” Workshop organized by the Centre for Comparative Law and Development Studies in Asia and the Pacific at the University of Wollongong, as a public lecture sponsored by the Asia-Pacific Intellectual Property Law Institute in the School of Law at Murdoch University, and as a faculty colloquium at Marquette University Law School. The Author would like to thank Christoph Antons, Irene Calboli, Tom Ginsburg, Neil Netanel, and Ken Shao for their kind invitations and hospitality and Bruce Boyden, Irene Calboli, Sun Haochen, and the participants of these events for their valuable comments and suggestions. He is also grateful to Lindsey Purdy for excellent research and editorial assistance.
I. INTRODUCTION

In the past few years, many scholars and commentators have explored why the West has been more economically developed and technologically advanced than other parts of the world. In his new book, Civilization: The West and the Rest, renowned historian Niall Ferguson identified six “killer applications” that have helped the West achieve its rise to global dominance.¹ In a cautiously titled book, Why the West Rules—for Now, archaeologist-historian Ian Morris also questioned why the West has dominated the globe for the past two centuries and whether such dominance would continue amid the rise of China, India, and other emerging powers.² Using a different entry point, Newsweek International editor Fareed Zakaria explored the “rise of the rest,” discussing how global powers could shape up in what he called the “Post-American World.”³ Although all of these books carry a mostly positive message, they were all written against a background of growing worries that the West will eventually lose its competitive edge.

Indeed, the release of these books has coincided with the growing attention commentators are now paying to the rise of Asia. While some wonder whether the twenty-first century will be the Asia Century,⁴

---

others have examined the growing role of the so-called BRICS countries, which initially included Brazil, China, India, and Russia but have now been generalized to cover other emerging middle-income countries, such as South Africa. A growing number of books have also looked at the role of China and India in Africa and Latin America.

this century will be the “Asian Century”). Some commentators, however, are more certain. See, e.g., STEVE CHAN, CHINA, THE US AND THE POWER-TRANSITION THEORY: A CRITIQUE ix (2007) (“It is anticipated that by the year 2025, seven of the world’s ten largest economies will be located in Asia.”); ODED SHENKAR, THE CHINESE CENTURY: THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER, AND YOUR JOB (2005) (declaring the twenty-first century as the “Chinese Century”); EDWARD TSE, THE CHINA STRATEGY: HARNESING THE POWER OF THE WORLD’S FASTEST-GROWING ECONOMY 6 (2010) (stating that “one of the safer predictions for the first half of the twenty-first century is that China’s growth, supported by that of India and several other countries, will make Asia the source of more than half the world’s gross domestic product by around 2030”).


Some even contrast the oft-criticized “Washington Consensus” with the “Beijing Consensus,” a term coined by former *Time* foreign editor Joshua Ramo. In March 2011, the Associated Press launched the global economic tracker, examining developments in emerging developing countries. As the press reasoned, these developments are likely to have important global implications ranging from increased prices for

---


8. John Williamson, an economist and a senior fellow of the Institute for International Economics, coined the term “Washington Consensus.” John Williamson, *What Washington Means by Policy Reform*, in *Latin American Adjustment: How Much Has Happened?* 7 (John Williamson ed., 1990). The Washington Consensus was derived from recommendations in ten different areas: (1) fiscal deficits; (2) public expenditure priorities; (3) tax reform; (4) interest rates; (5) the exchange rate; (6) trade policy; (7) foreign direct investment; (8) privatization; (9) deregulation; and (10) property rights. *Id.*


[The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the “old-physics” argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. In physics terms, it is about using innovation to reduce the friction-losses of reform.

The second Beijing Consensus theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead of quality-of-life, the only way to manage the massive contradictions of Chinese development. This second theorem demands a development model where sustainability and equality become first considerations, not luxuries. Because Chinese society is an unstable stew of hope, ambition, fear, misinformation and politics only this kind of chaos-theory can provide meaningful organization.

Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes. *Id.* at 11–12. For discussions of the Beijing Consensus, see generally *id.*; Stefan A. Halper, *The Beijing Consensus: How China’s Authoritarian Model Will Dominate the Twenty-First Century* (2010).

raw materials to an accelerated pace of global economic recovery.\footnote{Id.}

The last time policymakers and commentators paid such an enormous amount of attention to Asia was two decades ago, amid the rise of Japan and other newly industrialized countries. The elevated status of these countries, in turn, led some Asian leaders to declare the need to recognize, promote, and protect the so-called "Asian values," which they claimed had provided a formula for economic success,\footnote{See discussion Part I.A.} or the so-called "East Asian miracle."\footnote{See generally Ha-Joon Chang, The East Asian Development Experience: The Miracle, the Crisis and the Future (2006) (discussing the Asian miracle and the ensuing economic crisis).} Although today's discourse seems to be going in the same direction as that of two decades ago, it is actually quite different. The present discourse is not simply about the economic rise of Asia. Rather, it touches on how China, India, and other countries in the region have greatly improved their competitiveness and technological capabilities. To some extent, these countries are now threatening to compete with the West on its home turf while playing its own game.

property scholar Jerome Reichman questioned whether developing countries should follow the developed countries' lead in adopting their intellectual property system or whether they should lead in the knowledge economy by building their own comparative advantages. As he declared:

To the extent that intellectual property laws do play an ancillary but important role, there are, roughly speaking, two different approaches on the table. One is to play it safe by sticking to time-tested IP solutions implemented in OECD [Organisation for Economic Co-operation and Development] countries, with perhaps a relatively greater emphasis on the flexibilities still permitted under TRIPS (and not overridden by relevant FTAs). The other approach is to embark on a more experimental path... that advanced technology countries currently find so daunting.

One set of questions commentators have yet to explore concerns whether Asian countries will take unified positions on international intellectual property law and policy. Can we identify any underlying "Asian values," approaches, or practices in the area? Are the developments in Asia homogenous enough to foster common positions within the region? Does it matter whether any of the Asian countries can attain hegemonic status on the continent? If Asia indeed will assume a more dominant global role in the future, as commentators have claimed, which countries will be involved, how will they be involved, and what issues will be found on their policy agendas?

These questions are important for at least two reasons. First, given the growing attention scholars have paid to Asia and the so-called BRICS countries, a systematic analysis of the role these countries will play in future international intellectual property negotiations is likely to provide a better understanding of the international intellectual property...
system. Second, intellectual property industries have repeatedly criticized China and Southeast Asian countries for their widespread piracy and counterfeiting problems. A better grasp of Asian developments will certainly help anticipate those challenges confronting the international intellectual property system.

Part I of this Article examines intellectual property developments in relation to the decades-old “Asian values” debate. Although the debate began in the human rights context, this Part uses the debate as a starting point to evaluate whether Asian cultures, practices, and conditions can help provide the needed rallying force to help Asia establish unified positions on intellectual property law and policy. This Part further examines the region’s diversity in economic and technological developments and the continuous rivalry among the different regional powers. This Part concludes that one can neither locate any distinct values, approaches, or practices on intellectual property law and policy nor identify any established pan-Asian positions in the area.

Part II explores the role Asian countries will play if these emerging countries exert more influence on the development of the international intellectual property system. Drawing on the earlier discussion concerning how Japan and, to some extent, South Korea are unlikely to team up with other Asian countries to develop a united front for the Asian developing world, this Part contends that Asian countries as a group may not be able to establish a position comparable to that of the European Union or the African Group. Nevertheless, this Part argues that, if China, India, and members of the ASEAN (Association of Southeast Asian Nations) agree to team up to form a “Chindiasean” alliance, the resulting alliance will be a formidable force in future international intellectual property negotiations.

Part III concludes with a discussion of ten key items that will find their way to Chindiasean’s common policy agenda if such an alliance is ultimately established. Because of the alliance’s potential role in shaping global intellectual property norms, Chindiasean is as much a “normative community” as it is a political alliance. The first five items

19. The ten current ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Member Countries, ASEAN SECRETARIAT, http://www.aseansec.org/74.htm (last visited Apr. 4, 2011).
20. SIMON TAY, ASIA ALONE: THE DANGEROUS POST-CRISIS DIVIDE FROM AMERICA 150 (2010) (advancing the concept of “Asia’s normative community”). As Professor Tay explained, the development of an Asian normative community would offer at least three benefits:
in the agenda concern traditional issues advanced by less developed countries. The remaining items represent new issues on which the international community has yet to achieve a consensus or formulate a position. Taking a first look at this common policy agenda in the intellectual property literature, this Part seeks to provide insights into issues that will emerge in future international intellectual property negotiations.

II. THE ASIAN VALUES DEBATE

A. Human Rights

The Asian values debate, which began in the human rights area, has been quite controversial. Although it is hard to pinpoint which values are included in these so-called Asian values, commentators have generally defined such values to include "authoritarianism, cooperation, harmony, and order." By embracing cultural relativism, critics argue, the Asian values debate "undermine[s] . . . the universality of the human rights regime as an empirical matter and present[s] a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere." The debate has also raised challenging questions about whether Asian countries, including those that have hitherto had a disappointing human rights record, could use Asian values as a "cultural excuse" for transgressions in the area.

TAY, supra note 20, at 155.

21. See, e.g., Michael C. Davis, Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values, 11 HARV. HUM. RTS. J. 109, 109 (1998) [hereinafter Davis, Constitutionalism and Political Culture] (noting that Asian values "seem to include authoritarianism, cooperation, harmony, and order as the predominant values of Asian culture").


23. See Simon S.C. Tay, Human Rights, Culture, and the Singapore Example, 41 MCGILL L.J. 743, 747 (1996) (noting that commentators "suspect that the cultural argument is a pretext to excuse continuing transgressions by repressive governments"); see also Michael Davis, Chinese Perspectives on Human Rights, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 3, 22 (Michael C. Davis ed., 1995) [hereinafter HUMAN RIGHTS AND CHINESE VALUES] ("It is important to note that in the Bangkok Declaration Asian governments were formulating a response not only to a Western
Championed by Malaysian and Singaporean leaders, the "Asian values" debate reached its climax when Asian countries adopted the Bangkok Declaration at the Asian preparatory conference before the World Conference on Human Rights in Vienna in 1993. Although this state-coordinated declaration did not articulate the oft-discussed Asian values, it states explicitly that, "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

The position articulated in this declaration was attractive to many participants of the Asian regional conference, many of whom had repeatedly criticized the existing international human rights regime for ignoring non-Western interests. The concern for a lack of cultural sensitivity is not new; it can be traced back to the regime’s inception. When the regime’s founding document, the Universal Declaration of Human Rights, was drafted, the American Anthropological Association already sent a long memorandum to the Human Rights

challenge but primarily to the challenge of their own people.

24. Cf. Mark Beeson, Regionalism and Globalization in East Asia: Politics, Security and Economic Development 135 (2007) [hereinafter Beeson, Regionalism and Globalization] ("In Southeast Asia, in particular, a number of prominent figures—including Malaysia’s Mahathir [bin Mohamad] and Singapore’s Lee Kuan Yew—were trumpeting the merits of ‘Asian values’ as an explanation for the region’s economic take-off.").


Commission, expressing its concern, or even fear, that the Declaration would become an ethnocentric document. As the association put it in the now infamous memorandum, ""[t]he primary task' the drafters faced was to find a solution to the following problem: 'How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?'"  

Notwithstanding these concerns, the Bangkok Declaration was subsequently rejected at the Vienna Conference. Commentators have also widely questioned whether Asian values actually exist in the human rights area. As Randall Peerenboom reminded us:

"[t]he "Asian values" debate was not a single debate, not only about values in Asia, and not only about universalism versus relativism. Rather it was a series of debates about a range of issues. It is a mistake to reduce the many complex debates to the politically charged and easily resolved issue of whether authoritarian governments (sometimes) have invoked culture to deny citizens in their countries their rights. It does a disservice to the difficulty of the issues and the increasingly sophisticated and nuanced views of those who are trying to take diversity seriously to simply dismiss them as apologists for dictators. Put more bluntly, it is intellectually lazy and emblematic of the arrogant and narrow-minded ethnocentricism that has led many in Asia, and elsewhere, to view the human rights movement as the latest neo-colonial attempt to impose with missionary zeal the values,"


institutions, and ways of life popular in the West on the Rest.\textsuperscript{30}

Interestingly, although there has been voluminous literature on Asian values, those discussions mostly reflect values in East Asia, as opposed to those found throughout Asia. For example, a considerable amount of literature has focused on both the tension and compatibility between Confucianism and Western human rights.\textsuperscript{31} While Confucianism undoubtedly has some influence in many Asian countries, such as China, Japan, Singapore, South Korea, and Vietnam, it has less relevance to other Asian countries, especially those in South Asia.\textsuperscript{32} Indeed, it was ironic that the locus of the Confucianism debate was in East Asia, while the Bangkok Declaration was adopted more than two thousand miles away in Thailand.

\textbf{B. Intellectual Property}

In recent years, the debate on Asian values in the human rights area has slowly disappeared. Meanwhile, commentators have paid growing attention to intellectual property developments in Asia, due largely to the region’s rapid rise and the increasing interest in intellectual property and technology matters. In light of these developments, this Part undertakes a holistic inquiry into whether any Asian values in intellectual property law and policy actually exist and whether one could identify unified pan-Asian positions in the area. This Part focuses in particular on the region’s cultural, economic, technological, and geopolitical developments.

\textsuperscript{30} Peerenboom, \textit{supra} note 22, at 1–2. As he elaborated: Descriptive relativism holds that the moral beliefs, standards, values, or principles of individuals, groups or societies conflict in fundamental ways, and thus disagreements will remain in some cases even after all factual and logical disputes are resolved. These fundamental differences may be due to culture; variation in the personality, psychology, or experiences of individuals; or to other factors such as levels of economic development, the relative stability or instability of the state, and the likelihood of civil war or terrorism. Virtually no one denies the truth of descriptive relativism. Broad multi-country studies have found significant regional differences with respect to democratization, labor rights, women’s rights and personal integrity rights. Most of the debate therefore is over two other forms of relativism, normative and metaethical relativism, or other related issues.

\textit{Id.} at 7–8.

\textsuperscript{31} \textit{See, e.g.}, BELL, \textsc{Beyond Liberal Democracy}, \textit{supra} note 26; BELL, \textsc{East Meets West}, \textit{supra} note 26; CONFUCIANISM AND HUMAN RIGHTS, \textit{supra} note 26; DE BARY, \textsc{Asian Values}, \textit{supra} note 26; THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, \textit{supra} note 26; HUMAN RIGHTS AND CHINESE VALUES, \textit{supra} note 23.

\textsuperscript{32} \textit{See infra} discussion Part I.B.1.
1. Cultural Developments

In the past two decades, commentators have used cultural differences to account for the massive piracy and counterfeiting problems in Asia. Very typical are discussions of how Asian cultures, in particular Confucianism, have militated against intellectual property reforms. Similar discussions have also been made of the familial and community values and strong protection of the public interest as embodied in Islam.

Although the latter discussions focus primarily on countries in the Middle East, they have high relevance to many Muslim-majority countries in Asia, such as Indonesia, Malaysia, and Pakistan.

As far as Confucianism is concerned, the starting point of most discussions is William Alford’s seminal work, To Steal a Book Is an


35. See Kemp, supra note 7, at 241 (“With a population of more than 240 million people, almost 90 percent of which is Muslim, Indonesia is the world’s most populous Muslim country.”).
Elegant Offense. Although this provocative book has inspired a whole generation of intellectual property scholars studying developments in East Asia—myself included—it has also attracted some pointed criticisms. For example, Shi Wei questioned whether the book’s catchy title actually created a misleading impression about the cultural values in China, including Confucianism. As he wrote:

“To Steal a Book is an Elegant Offense” (Qie Shu Bu Suan Tou) ... is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book Kong Yi Ji, written by the famous novelist Lu Xun. In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the “clichés” of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was “a big, pallid man whose wrinkled face often bore scars,” and was made fun of by everybody. He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. “To Steal a Book Is an Elegant Offense” was his argument when he was taunted. His personal character and way of thinking are thus far removed from the Confucian values. ... Indeed, the phrase “To Steal a Book Is an Elegant Offense” was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book ... made its debut in the mid 1990s.

Ken Shao also noted the many developments in China that Professor Alford did not cover. Questioning whether Professor Alford had presented an incomplete picture, Professor Shao encouraged us to reassess the impact of Confucianism on intellectual property protection and enforcement in China. As more research and archival records become available, this spirited debate will only advance even further.

36. ALFORD, supra note 33.
38. Id. (footnotes omitted).
40. See id.
To fully understand the debate Professor Alford’s book has inspired, it is important to distinguish the weak form of his claim from its strong form. The strong form states that Confucianism militates against intellectual property reforms in China. It accounts for the failure of the many reforms pushed by foreign countries and intellectual property rights holders to induce improvements in intellectual property protection and enforcement.

Although provocative, this strong form of the claim is likely not supported by the reality on Chinese soil. As I pointed out in the past, there are striking similarities between Confucianism and what we have in the West regarding the public domain. While copying may be an important living process for a Confucian Chinese to acquire understanding of human behavior, to improve life through self-cultivation, and to transmit knowledge to the posterity, Chinese poets and literary theorists widely disagreed on the appropriate extent of copying. If the Chinese did not subscribe to intellectual property notions, it is only those notions that were derived from a maximalist tradition, where the importance of the public domain is largely ignored.

Moreover, traditional Chinese culture does not always call for verbatim reproduction, the means by which massive piracy and counterfeiting are often conducted. Rather, Confucianism has called for the transformative use of preexisting works that is tailored to the user’s needs and conditions. As Professor Alford acknowledged, through the editing of the Classics and his comments in the Analects, Confucius demonstrated that “transmission, far from being a passive endeavor, entailed selection and adaptation if it was to be meaningful to oneself,

41. See Yu, From Pirates to Partners, supra note 15, at 224-25; see also ALFORD, supra note 33, at 20 (“The indispensability of the past for personal moral growth dictated there be based access to the common heritage of all Chinese.”).

42. See ALFORD, supra note 33, at 28 (“Interaction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture.” (internal quotations omitted) (quoting ARTISTS AND TRADITIONS: USES OF THE PAST IN CHINESE CULTURE xi (Christian Murck ed., 1976)). The Chinese believed that “the essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients who lived in a distant, idealized ‘golden age.’” Id. Subsequent generations thus have to interact thoroughly with the past in order to acquire this understanding to guide their behavior, to improve through self-cultivation, and to transmit such knowledge to the posterity. See id. at 25.

43. See id. at 26-29 (noting that Chinese poets and literary theorists disagreed on the appropriate use of past works).

44. For a recent discussion of the public domain, see generally JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2010).
one’s contemporaries, and one’s successors.” Indeed, the ability to make transformative use of preexisting works can demonstrate one’s comprehension of and devotion to the core of the Chinese culture as well as the ability to distinguish the present from the past through original thoughts.

To some extent, the need for meaningful transmission in traditional Chinese culture can be analogized to the transformative use doctrine pronounced by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* In *Campbell*, a music publisher brought a copyright infringement action against the rap band 2 Live Crew for its salacious rap parody of Roy Orbison’s “Oh, Pretty Woman.” Emphasizing that transformative works are socially important and exploring whether fair use covers the contested parody, Justice Souter noted the importance of transformative works:

> Although . . . transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

In the end, the Court suggested that 2 Live Crew’s rendition of the song might have constituted fair use and remanded the case to the lower court.

Just as it is important to ask what the Confucian position of copying is, it is equally important to examine the Western position in intellectual property law and policy, if such a position exists at all. Individualism alone, for example, does not fully summarize the Western intellectual property position. In the past decade, intellectual property scholars have widely questioned the narrow and incomplete definition of intellectual property rights advanced by developed countries and their supportive rights holders. As the West develops more sophisticated

---

45. ALFORD, supra note 33, at 25.
47. Id. at 572–73.
48. Id. at 579 (citations omitted).
49. See id. at 594.
50. See, e.g., James Boyle, Foreword: The Opposite of Property?, LAW & CONTEMP.
notions of intellectual property rights, it may find that these notions and Confucianism may be more compatible with each other than one has anticipated.51

Compared with the strong form of Professor Alford's claim, its weak form seems to be more in line with the reality on the ground, although native Chinese scholars continue to disagree with such an assessment.52 This weak claim states that Confucianism has prevented Western notions of intellectual property rights from taking root in China.53 Nevertheless, it does not suggest any incompatibility between the two notions. Nor does it contend that Confucianism will militate against

---

51. See Yu, From Pirates to Partners, supra note 15, at 223–25 (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, Piracy, Prejudice, and Perspectives, supra note 33, at 76–77 (same). Compare XIANFA art. 20 (1982) ("The state promotes the development of the natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions.") and id. art. 47 ("The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."), with U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

52. See Charles R. Stone, Comment, What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property, 92 MARQ. L. REV. 199, 199–200 (2008) ("Chinese scholars continue to aver that China invented at least one kind of protection—copyright—over six hundred years earlier. They also disagree upon the factors that led to the recognition of intellectual property.") (footnote omitted). Professor Alford did acknowledge the existence of this line of scholarship. Nevertheless, he contended that their enquiries to date "treat[ed] imperial efforts to control the dissemination of ideas as constituting copyright" and ended there. ALFORD, supra note 33, at 18.

53. See, e.g., ALFORD, supra note 33, at 1 (considering "why intellectual property law, and in particular copyright, has never taken hold in China"); id. at 2 (noting that "imperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture").
intellectual property law reforms. Thus, if reforms are introduced—either internally through the borrowing of foreign ideas or externally in response to foreign pressure and coercive trade policies—such reforms may help China establish an exogenously developed intellectual property system.

In fact, legal transplants from abroad and coercive trade pressure from the United States were the primary means by which the new intellectual property regime was established in China. It is therefore no surprise that foreign legal transplants were also a key focus of Professor Alford’s book. Although the level of overall intellectual property protection in China has yet to satisfy the United States government and its rights holders, improvements in such protection had been quite significant in the past two decades.

When we go beyond the discussion of Confucianism to locate Asian values, the task becomes even more challenging. Regardless of whether we embrace the strong or weak form of Professor Alford’s claim, we have to think seriously about whether it actually makes sense to generalize the Confucianism debate to cover other Asian cultures. There are several reasons.

First, as pointed out earlier, Confucianism only forms the cultural basis of a small number of countries in East Asia. Islam, for example, is important to countries like Indonesia, Malaysia, and Pakistan. Hinduism is very important to South Asia, covering places such as Bangladesh, India, and Nepal. Buddhism is also very important to Southeast Asian countries, such as Cambodia, Laos, Myanmar, Thailand, and Sri Lanka. Indeed, as David Kang observed, “[t]he states of Southeast Asia experienced twin cultural influences, from India and from China.”

Even in China, Confucianism is only one of the three dominant philosophies in traditional Chinese society; Buddhism and Daoism had and continue to have very significant influence. As one commentator

---

54. See Yu, China Puzzle, supra note 15, at 185–88 (discussing the establishment of the intellectual property regime in China in the 1980s and 1990s as a result of external pressure).

55. See ALFORD, supra note 33, at 30–55 (discussing foreign transplants in the intellectual property area and how the Chinese “learn[ed] the law at gunpoint”).

56. DAVID C. KANG, EAST ASIA BEFORE THE WEST: FIVE CENTURIES OF TRADE AND TRIBUTE 52 (2010); see also BEESON, REGIONALISM AND GLOBALIZATION, supra note 24, at 49 (“Evidence of the influence of other cultures on Southeast Asia can be seen from the extensive impact of Hinduism and Buddhism, although the historical record of the region’s early development is sketchy and imperfect.”); GEORGE COEDES, THE INDIANIZED STATES OF SOUTHEAST ASIA (1996) (tracing India’s influence on Southeast Asian culture).

57. See ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE
observed, "[t]he bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right." Also present in the Chinese territory are many

58. Stone, supra note 52, at 202. As he elaborated:

Although there is no doubt that Confucianism in its various incarnations played a central role in the development of printing and the dissemination of classical texts that, in turn, contributed to the eventual development of Chinese intellectual property, it is probably a mistake to focus all of our attention upon Confucianism in the first place.

It was not for two or three hundred years after the invention of printing that the Confucian classics appeared in print. Chinese historians also note that as early as the turn of the seventh century, Buddhist scriptures reproduced among the populace outnumbered the Confucian classics by thousands of times. The world’s earliest extant complete book on paper is probably the Buddhist text Parable Sutra (256). The earliest extant printed text is a Buddhist dharani sutra scroll (c. 704–751) discovered in a temple in Korea in 1966; it was probably printed in China. The first complete printed book is probably the Buddhist Diamond Sutra (868) discovered by Aurel Stein in Dunhuang during his second expedition of 1907. And when commercial printing arose in the tenth century, the output was unprecedented: "nearly half a million copies of Buddhist books and pictures are known to have been printed in the eastern part of China in one small area alone over a period of less than half a century."

It is thus no secret that Buddhism is inseparable from the earliest book copying, production, and printing in China. The reproduction of religious texts is uniquely appealing to Buddhists because it is a tenet of that religion that the copying and distribution of its sutras is a way to receive the blessings of its founder. The Buddha, it is said, once remarked, "Whoever wishes to gain power from the dharani [charms] must write seventy-seven copies and place them in a pagoda." The underlying "religious motivation is ... confirmed by the earliest printings of the dharani discovered in Japan and Korea." Furthermore, because Buddhism ideally required the "austere ideal of renunciation of the world of things," it is not a philosophy that would naturally be expected to place much value on the concept of "owning" rights to printed texts, especially when these texts were religious and produced for pious motives. Indeed, the concept of "property" is something that Buddhism is unlikely to celebrate, as the material world is itself "a deception, a dream from which we must awaken sooner or later." In other words, Buddhism is not only inextricably
minority cultures and beliefs, including the Zhuang, Hui, Uygur, Yi, Tibetan, Miao, Manchu, Mongol, and Buyei.\(^5\)

Second, even if we focus only on Confucianism, that philosophy continues to evolve. What we find in Confucianism today is actually quite different from the teachings of Confucius.\(^6\) From the *Analects* to Neo-Confucianism propounded by Zhu Xi (1130–1200) to the living principles used in modern Asian societies, Confucian teachings have undergone many significant transformations. There are also many

---

related to all aspects of China’s earliest book production, reproductions of its texts were initially made in vastly greater numbers than the Confucian classics, and its underlying philosophy seems uniquely ill-suited to the creation of what we in the West might consider a property right.


59. See JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* 176 (6th ed. 1999) ("The largest of the fifty-six minority groups are the Zhuangs (15.4 million), Hui or Chinese Muslims (8.6 million), Uygur (7.2 million), Yi (6.5 million), Tibetans (4.5 million), Miao (7.3 million), Manchus (9.8 million), Mongols (4.8 million). Bouyei (2.1 million), and Koreans (1.9 million).");

60. As William Theodore De Bary wrote:

[When questioned "What does Confucianism have to offer today?"] I am . . . obliged to ask: "[w]hose Confucianism are we talking about?" If it is the original teachings of Confucius in the *Analects*, then almost nothing said about Confucianism today speaks to that. Indeed even the anti-Confucian diatribes earlier in [the twentieth] century spoke rarely to Confucius' own views but only to later adaptations or distortions of them.

WM. THEODORE DE BARY, *THE TROUBLE WITH CONFUCIANISM* xi (1991); see also DE BARY, *ASIAN VALUES*, supra note 26, at 11 ("Problems of continuity and change in the evolution of major traditions must be considered. Confucianism should not be thought either static or monolithic—that is, taking the sayings of Confucius and Mencius just by themselves, to represent an historically developing, often conflicted, and yet gradually maturing Confucian tradition."); Liu Shu-hsien, *Confucian Ideals and the Real World: A Critical Review of Contemporary Neo-Confucian Thought*, in *CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY: MORAL EDUCATION AND ECONOMIC CULTURE IN JAPAN AND THE FOUR MINI-Dragons* 92, 92 (Tu Wei-Ming ed., 1996) (noting that the term "Confucianism" "may refer to the philosophical tradition represented by Confucius and Mencius, or it may refer to the institutions and customs that emerged in the long course of Chinese history through the influence of Confucian thought"); Benjamin Schwartz, *Some Polarities in Confucian Thought*, in *CONFUCIANISM AND CHINESE CIVILIZATION* 3, 3 (Arthur F. Wright ed., 1964) (considering "universal and perennial" questions concerning whether "the original teachings of the founders [of Confucianism] can be extricated from the interpretations of the followers").

different strands of Confucianism. As noted Confucian scholar Theodore de Bary observed, a strong liberal tradition existed in at least one strand of Confucianism, even though Confucianism is generally not publicly identified with liberal theories. Likewise, Professor Alford reminded us that “approaches rooted in portrayals of culture as essentially impervious to change, whether from within or beyond the society being examined,” run the risk of being unidimensional.

Furthermore, those Asian countries that adopt Confucianism embrace it for different reasons and to very different extents. As Professor Kang recently noted:

the main secondary states of East Asia chose Confucianism and Chinese ideas more for their own reasons than from Chinese pressure. In Korea, Vietnam, and Japan, the debate about how to organize government and society occurred between warriors and scholars, with the Confucian literati winning in Korea and Vietnam and the warriors ultimately winning in Japan. Although Chinese ideas were deeply embedded from the founding of these states, just as significantly, Chinese ideas were grafted onto what indigenous cultures, and the two coexisted—sometimes uncomfortably—resulting in only partial Sinicization.

Third, by focusing on the discrete values in Asia—whether as Asian values or simply as “values in Asia”—the “Asian values” debate “underestimates both the historical ruptures of colonization and the present forces of global interaction.” In Michael Davis’ view, “cultural

---

62. See, e.g., DE BARY, ASIAN VALUES, supra note 26, at 108-09 (discussing how freedom of expression and association is recognized in “a significant line of Confucian thought”); WM. THEODORE DE BARY, THE LIBERAL TRADITION IN CHINA (1983) (deriving the liberal tradition in Confucianism from writings of neo-Confucianist thinkers).

63. ALFORD, supra note 33, at 6.

64. KANG, supra note 56, at 26; see also LUCIAN W. PYE WITH MARY W. PYE, ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY 55 (1985) (“The East Asian countries of China, Japan, and Korea—and also Vietnam in Southeast Asia—all absorbed and refined Confucian values and concepts of authority. But because of their individual cultural traditions, they also had their separate versions of Confucianism, which increasingly diverged as each country followed a different path to political modernization.”).

65. See BELL, BEYOND LIBERAL DEMOCRACY, supra note 26, at 54 (noting that the use of the term “values in Asia” “is sensitive to the pluralism of values within Asia yet retains the implication that such values can pose challenges to Western liberal approaches to human rights”); Peerenboom, supra note 22, at 7 (noting such a possible distinction in the human rights context but observing the many problems that will arise even with the use of the term “values in Asia”).

66. Tay, supra note 23, at 747; see also BEESON, REGIONALISM AND GLOBALIZATION,
relativist theories... are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse." The "Asian values" debate also ignores the fact that "there are different views of human rights voiced in Asia, by opposition politicians, scholars, and non-government organizations."

A case in point is the Bangkok Non-Governmental Organizations Declaration of March 27, 1993, which contrasted significantly with the Bangkok Declaration—to be more precise, the Bangkok Governmental Declaration. As Simon Tay reminded us:

[the N.G.O. Declaration differs significantly both from the Bangkok Declaration by governments and what... has, for convenience, termed the "Asian view". The Declaration places a stronger emphasis on civil and political rights than does the Declaration by government representatives. It calls for democracy to be "fostered and guaranteed in all countries" and for Asian governments to "lift constraints on political rights... by repealing repressive laws... and liberalising the political system." Like the Bangkok Declaration by the Asian governments, it calls for cultural rights to be recognized on the basis that "[t]here is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures". The N.G.O. Declaration explicitly stipulates, however, that "cultural practices which derogate from universally accepted human rights... must not be tolerated."
Indeed, the drafters of the Non-Governmental Declaration criticized the Governmental Declaration for “reflect[ing] the continued attempt by many Governments of the Asia-Pacific region to avoid their human rights obligations, to put the state before the people and to avoid acknowledging their obligations to account for their failures in the promotion and protection of human rights.”

Fourth, as important as the influence of Confucianism may be in East Asian countries—or for that matter, Islam in the Middle East—one has to wonder whether the discussion of these influences is just based on cultural stereotypes. Communitarian philosophies are not unique to the Chinese or the Muslims; they can be found in civilizations around the world. While most in Western societies would find it misleading or overly simplistic to attribute the massive unauthorized copying problem on the internet in their countries to the communitarian underpinnings of Judeo-Christianity, it is equally problematic to attribute piracy and counterfeiting in Asia to Asian cultures. Simply put, it is just misleading and overly simplistic to describe piracy and counterfeiting as a cultural problem.

---

71. Nongovernmental Organizations’ Response to the Bangkok Declaration, reprinted in HUMAN RIGHTS AND INTERNATIONAL RELATIONS, supra note 26, at 211; see also TAY, supra note 20, at 12 (“While perhaps having some merit, the Asian values argument was suspect because its spokesmen were often politicians or officials associated with more authoritarian governments and regimes. It was suspected to be a relatively sophisticated argument to justify existing power structures.”).

72. Simon Tay made a similar observation. See Tay, supra note 23, at 747 (“Critics [of the cultural argument] will say the Asian view tends to generalizations and stereotypes of what is ‘Asian.’”).

73. See REIN MÜLLERSON, HUMAN RIGHTS DIPLOMACY 87 (1997) (“The West has had its own communitarian phases of development and communitarian ideas and practices can still be found in some sectors of Western society. And currently, many people in the West are thinking of how to put some limits on individualism, which, while being necessary for human liberation and economic development, may become excessive and indeed constitute a threat for both liberty and economic development.”); Aryeh Neier, Asia’s Unacceptable Standard, FOREIGN POL’Y, Autumn 1993, at 42, 42 (“Hong Kong’s entrepreneurs, who have made that colony an outstanding economic success, are as individualistic as their Western counterparts. And seminal figures in the development of the West’s rights-based traditions, such as John Locke and Thomas Jefferson, also had their communitarian sides.”).

2. Economic Developments

Like culture, the economic and technological developments in Asia have been highly diverse and uneven. As David Llewellyn reminded us in his recent book, *Invisible Gold in Asia*:

The term “Asia” was originally a Western concept to describe the eastern part of the land mass of Eurasia separated from Europe by the Ural Mountains—or, as the ancient Greeks would have said, “everything east of Greece.” It incorporates a number of regions and peoples from vastly varied civilisations. It is likely that the peoples of ancient Asia themselves, such as the Chinese, 75. As Mark Beeson pointed out:

In the Asia-Pacific, . . . there is a far greater range of potential members in terms of their respective levels of economic development and organization, political practices and structures of government, and even in their respective cultural traditions and backgrounds, something that reduces the ability to act in concert as a consequence. There are dramatic differences in the size of the economies of APEC’s members . . . before we even begin to think about the way such economies are organized at the political level or integrated into wider structures of international governance, development and security.

BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 4. Similarly, Yash Ghai noted:

The economic and political systems in Asia show a remarkable diversity, ranging from semi-feudal kingdoms in Kuwait and Saudi Arabia, through military dictatorships in Burma and Cambodia, effectively one-party regimes in Singapore and Indonesia, communist regimes in China and Vietnam, ambiguous democracies in Malaysia and Sri Lanka, to well-established democracies like India. There are similarly differences in their economic systems, ranging from tribal subsistence economies in parts of Indonesia through highly developed market economies of Singapore, Hong Kong and Taiwan and the mixed economy model of India, to the planned economies of China and Vietnam.

Yash Ghai, Asian Perspectives on Human Rights, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS, supra note 26, at 54, 54–55; see also BEESON, REGIONALISM AND GLOBALIZATION, supra note 24, at xiv (“[I]f there is one observation that is always made about East Asia it is about its diversity.”); id. at 116 (“Heterogeneity may be the leitmotif of East Asia, but the diversity of political systems found in Southeast Asia makes generalization difficult, if not foolhardy.”); ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES 3 (2010) (stating that “it is never easy to jumble all Asian nations together and establish their economic and technological needs and how they might resolve any attendant problems”); TAY, supra note 20, at 19 (“The region has no single, strong, and enduring history of unity and accepted commonality, whether in polity, culture, language, or religion.”); id. at 38 (“Any claim by one Asian country would be met with vehement denials from others. Asia is a region that is not only diverse but divided by tensions and unsettled questions.”); Christoph Antons, Analyzing Asian Law: The Need for a General Concept, 13 LAW IN CONTEXT 106 (1995) (discussing the challenges in analyzing Asian law in light of the diverse historical and sociological backgrounds); Christopher Heath, Intellectual Property Rights in Asia, in INTELLECTUAL PROPERTY LAW IN ASIA, supra note 57, at 3, 5 (noting the lack of common cultures, religions, and colonial backgrounds in Asia).
Indians, Japanese, Persians and Arabs, did not conceive the idea of Asia because they did not view themselves collectively in the way Europeans did.6

For analytical convenience, the United Nations Statistics Division divides Asia into five different macro sub-regions: (1) central Asia; (2) eastern Asia; (3) southern Asia; (4) south-eastern Asia; and (5) western Asia. Table 1 lists the different countries included in the U.N. geoscheme. Although the Statistics Division stated explicitly that “[t]he assignment of countries or areas to specific groupings is for statistical convenience and does not imply any assumption regarding political or other affiliation of countries or territories by the United Nations,”77 the classification makes salient the challenges in determining at the outset which countries are to be analyzed for the purposes of identifying pan-Asian positions in intellectual property law and policy.

76. DAVID LLEWELLYN, INVISIBLE GOLD IN ASIA: CREATING WEALTH THROUGH INTELLECTUAL PROPERTY xiv-xv (2010); accord DE BARY, ASIAN VALUES, supra note 26, at 2 (“In historical fact, while the diverse cultures of Asia are each to some degree multicultural (that is, the product of long cultural interactions), there was, until modern times, no consciousness among them of a shared Asian identity .... Traditionally the distinct civilizations of Asia did not identify themselves with a common continental culture, whatever the religious bonds they may have shared with other Asian peoples.”); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 303 (3d ed. 2007) (“Asia may exist more in western thinking than in Asian, and the diversity of Asia is perhaps greater today than it ever has been.”).

<table>
<thead>
<tr>
<th>Central Asia</th>
<th>Eastern Asia</th>
<th>Southern Asia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kazakhstan</td>
<td>China</td>
<td>Afghanistan</td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>China, Hong Kong</td>
<td>Bangladesh</td>
</tr>
<tr>
<td>Tajikistan</td>
<td>China, Macau</td>
<td>Bhutan</td>
</tr>
<tr>
<td>Turkmenistan</td>
<td>Democratic People's Republic of Korea</td>
<td>India</td>
</tr>
<tr>
<td>Uzbekistan</td>
<td>Japan</td>
<td>Iran (Islamic Republic of)</td>
</tr>
<tr>
<td></td>
<td>Mongolia</td>
<td>Maldives</td>
</tr>
<tr>
<td></td>
<td>Republic of Korea</td>
<td>Nepal</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pakistan</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sri Lanka</td>
</tr>
<tr>
<td><strong>South-Eastern Asia</strong></td>
<td><strong>Western Asia</strong></td>
<td></td>
</tr>
<tr>
<td>Brunei Darussalam</td>
<td>Armenia</td>
<td></td>
</tr>
<tr>
<td>Cambodia</td>
<td>Azerbaijan</td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>Bahrain</td>
<td></td>
</tr>
<tr>
<td>Lao People's Democratic</td>
<td>Cyprus</td>
<td></td>
</tr>
<tr>
<td>Republic</td>
<td>Georgia</td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>Iraq</td>
<td></td>
</tr>
<tr>
<td>Myanmar</td>
<td>Israel</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>Jordan</td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>Kuwait</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>Lebanon</td>
<td></td>
</tr>
<tr>
<td>Timor-Leste</td>
<td>Occupied Palestinian Territory</td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>Oman</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qatar</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Saudi Arabia</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Syrian Arab Republic</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Turkey</td>
<td></td>
</tr>
<tr>
<td></td>
<td>United Arab Emirates</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yemen</td>
<td></td>
</tr>
</tbody>
</table>

Table 1: Composition of Geographical Sub-regions in Asia (As of Feb. 17, 2011)

78. Id.
Even if we limit our discussion to only eastern, southern, and south-eastern Asia—or even the West-centric Far East—it remains difficult to compare the economic developments in countries in these different sub-regions. Out of all the countries, Japan has the strongest and most sophisticated economy. In Mark Besson’s view, this country is “especially important as an exemplar of a highly successful Asian state.”

Although China has recently overtaken Japan to become the world’s second largest economy on an aggregate basis, behind only the United States, Japan still dominates China dramatically on a per capita basis. With a per capita GDP of 39,738 in 2009, Japan is one of the richest developed countries. In the same period, China, by contrast, has a per capita GDP of only 3,744. It therefore should still be classified as a low-to-middle-income developing country. Indeed, China’s per capita GDP is lower than that of Malaysia and Thailand, not to mention Japan, Singapore, and South Korea.

In the area of intellectual property protection, Japan has improved considerably in the last two decades. In the early 1980s, Japan was widely criticized for its limited intellectual property protection, due largely to the United States’ trade deficit with Japan. By the time the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) was negotiated, Japan slowly assumed the role of a key trilateral partner with the United States and the European Communities—thanks in no small part to the push by local and foreign intellectual property industries. Most recently, Japan was instrumental

79. BEESON, REGIONALISM AND GLOBALIZATION, supra note 24, at 106.
82. Id.
83. Id.
84. See MICHAEL P. RYAN, PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC 16-17 (1995) (providing a list of Section 301 trade disputes involving Japan from 1974 to 1989); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 24 (2001) (stating that Japan was identified as a priority foreign country under the Super 301 process for providing inadequate market access to U.S. goods and services).
86. See generally DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY
in driving the negotiation of the Anti-Counterfeiting Trade Agreement ("ACTA"),\textsuperscript{87} a voluntary plurilateral agreement that aims to set a new and higher benchmark for international intellectual property protection and enforcement among like-minded countries.\textsuperscript{88}

Unlike Japan, China arrived much later in both the economic and intellectual property scenes; it is the "new kid on the block" of the World Trade Organization ("WTO").\textsuperscript{89} Nevertheless, it now has successfully established itself as a dominant Asian economic power. Today, China is the world’s largest exporter and second largest economy and trading nation.\textsuperscript{90} It is also one of the world’s largest recipients of foreign direct investment ("FDI") with capital inflows of about $50 billion, behind only the United States and the United Kingdom.\textsuperscript{91} Its factories “make 70 percent of the world’s toys, 60 percent of its bicycles, half its shoes, and one-third of its luggage.... [China also] builds half of the world’s microwave ovens, one-third of its television sets and air conditioners, a quarter of its washers, and one-fifth of its refrigerators.”\textsuperscript{92}

Given China’s geopolitical importance and its immense growth potential, some commentators have linked China to the United States, creating what they have called the G-2 (Group of 2).\textsuperscript{93} As they argued, G-2 is likely to be crucial to discussions on global matters, which range from economic recovery to climate change. Some economists and commentators also highlighted the growing economic interdependence


\textsuperscript{88.} See generally Peter K. Yu, ACTA and Its Complex Politics, 3 WIPO J. 1 (2011) (criticizing the use of the “country club” approach to negotiate ACTA); Peter K. Yu, Six Secret (and Now Open) Fears of ACTA, 64 SMU L. REV. 975 (2011) [hereinafter Yu, Six Secret Fears] (discussing the serious concerns about ACTA).

\textsuperscript{89.} Yu, Access to Medicines, supra note 6, at 352.

\textsuperscript{90.} C. Fred Bergsten et al., China’s Rise: Challenges and Opportunities 9 (2009).


\textsuperscript{92.} Shenkar, supra note 4, at 2-3.

\textsuperscript{93.} Compare Bergsten et al., supra note 90, at 25 (noting the need for China and the United States to “develop a very informal but increasingly effective ‘G-2’ ... to help guide the global governance process on an increasing number of economic topics”), with Halper, supra note 9, at 216-18 (arguing against the elevation of the U.S.-China relations to the bilateral status of a special G2 relationship).
between China and the United States by alluding to "a chain-gang relationship" between the two countries,\textsuperscript{94} or what Niall Ferguson and Moritz Schularick have described as "Chimerica."\textsuperscript{95}

In the intellectual property area, China's developments have also been quite impressive, especially in major cities and coastal areas.\textsuperscript{96} Today, China is among the top 5 countries filing patent applications through the Patent Cooperation Treaty ("PCT") under the auspices of the World Intellectual Property Organization ("WIPO").\textsuperscript{97} In 2010, the number of PCT applications increased by 56.2\% to 12,337, moving China to the fourth spot, behind only the United States, Japan, and Germany.\textsuperscript{98}

Since 1994, the Chinese Patent Office, which later became the State Intellectual Property Office ("SIPO"), has also been recognized as an international searching authority for PCT purposes.\textsuperscript{99} In Peter Drahos' view, such recognition made China "a player in the top tier of patent offices that will dominate the emerging system of global patent administration."\textsuperscript{100} It is therefore no surprise that, in 2007, SIPO met with the European Patent Office, the Japanese Patent Office, the Korean Intellectual Property Office ("KIPO"), and the United States Patent and Trademark Office to discuss ways to "improv[e] the efficiency of their examination systems and to harmonize their office

\begin{thebibliography}{99}

\bibitem{95} Niall Ferguson & Moritz Schularick, "Chimerica" and the \textit{Global Asset Market Boom}, \textit{10 INT'L FIN. 215} (2007).

\bibitem{96} \textit{See Yu, China Puzzle}, supra note 15, at 185-88 (tracing the development of the intellectual property regime in China); Yu, \textit{From Pirates to Partners II}, supra note 15, at 975-99 (examining the progress China has made in the intellectual property arena).


\bibitem{98} \textit{Id.} The 2010 figures for the United States, Japan, and Germany were 44,855, 32,156, and 17,171, respectively.


\bibitem{100} \textit{Id.}

\end{thebibliography}
While piracy and counterfeiting problems remain, China has begun to make a pro-active move from the imitation model to a new innovation model. The State Council’s recently adopted National Intellectual Property Strategy, for example, seeks to strengthen the country’s indigenous and innovative capacities. The strategy strongly indicates the leaders’ growing understanding of the important role intellectual property protection and enforcement play in driving a country’s economy.

Like China, India has very impressive economic and technological developments. Thus far, this other BRICS country has yet to compete effectively against China, in part due to the problems with its poor infrastructure, bureaucratic red tape, and failure to attract a substantial amount of FDI. However, India, which already has the world’s second largest population, is catching up fast and possesses strengths that China may not have—for example, a younger workforce with a good command of English, higher population growth, superior capital efficiency, strong investment growth potential, and entrepreneurship. Some

101. Id. at 236.
102. See generally LI YAHONG, IMITATION TO INNOVATION IN CHINA: THE ROLE OF PATENTS IN BIOTECHNOLOGY AND PHARMACEUTICAL INDUSTRIES (2010) (discussing China’s move from an imitation model to an innovation model).
104. See Peter K. Yu, The TRIPS Enforcement Dispute, 89 NEB. L. REV. 1046, 1123 (2011) (considering it highly encouraging that China now understands the importance of domestic innovation); see also Yu, From Pirates to Partners, supra note 15, at 189–96 (noting the need to convince Chinese leaders why intellectual property protection will benefit China).
105. See Pete Engardio, Introduction to CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS 27 (Pete Engardio ed., 2006) [hereinafter CHINDIA] (noting “India’s decrepit infrastructure [and] bureaucratic red tape”); The Rise of India, in CHINDIA, supra, at 45, 49 (“[C]ompared to China with its modern infrastructure and disciplined workforce, India is far behind in exports and as a magnet for foreign investment.”); see also ROBYN MEREDITH, THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA AND WHAT IT MEANS FOR ALL OF US 57 (2007) (“China is winning the sprint, and [India is] going to win the marathon.” (quoting Kamal Nath, India’s minister of commerce and industry)). But see id. at 154 (“China has proved so much more efficient than India at development and managing its economy that th[e] scenario [that India’s economy will overtake China’s] is unlikely unless China falls into political turmoil.”).
106. See Why India May Be Destined to Overtake China, in CHINDIA, supra note 105, at 27 (discussing India’s strengths vis-à-vis China); The Rise of India, supra note 105, at 50 (noting the “deep source of low-cost, high-IQ, English-speaking brainpower [that] may soon have a more far-reaching impact on the U.S. than China”). As one commentator observed interestingly:

Chinese analysts argue that because India’s salaries are lower, costs are cheaper, thereby making Indian products more competitive. Language is also a
commentators even predicted that India will overtake China economically in the second half of this century.  

Within the intellectual property area, India has also garnered significant attention. The strength of its software industry speaks for itself. Its generic pharmaceutical industry, which features such companies as Ranbaxy and Dr. Reddy's Laboratories, is also considered one of the most important and sophisticated in the world. Because India "makes more than a fifth of the world's generic drugs" and eighty-five percent of generic HIV/AIDS antiretrovirals in Sub-Saharan Africa, commentators have noted the significant impact a reduced supply of Indian generic drugs will have on the global access to essential medicines in the less developed world. 

In December 2007, India finally joined China, Japan, and South Korea in having its patent office designated as an international searching authority. As of this writing, India has yet to conclude an

---

factor. Chinese businessmen fear that U.S. businesses will prefer Indian products because of the Indian facility with English. In a strange turn of events, the Chinese population is now asking whether their market is likely to be flooded with cheap Indian goods.

Lal, supra note 57, at 141.

107. See, e.g., The Rise of Chindia, in CHINDIA, supra note 105, at 13, 14 ("Until now, China has attained dramatically higher growth. But some experts believe India's superior capital efficiency, higher population growth, and younger workforce mean growth is more sustainable and will enable India to surpass China in economic growth in the coming decades."); Why India May Be Destined to Overtake China, supra note 106, at 27 (discussing the different factors that may enable India to surpass China).


110. KAMAL NATH, INDIA'S CENTURY 110 (2008).


112. See, e.g., Kenneth C. Shadlen, Is AIDS Treatment Sustainable?, in THE GLOBAL GOVERNANCE OF HIV/AIDS: INTELLECTUAL PROPERTY AND ACCESS TO ESSENTIAL MEDICINES (Obijiofor Agina, John Harrington & Peter K. Yu eds., forthcoming 2012) ("[I]t is estimated that more than half of those receiving AIDS treatment in the developing world are treated with generic [antiretrovirals] produced in India."); Yu, Access to Medicines, supra note 6, at 388-89 (noting that the picture "may change as generic manufacturers in the BRICS countries, such as those in India, become more active in developing on-patent drugs, partly as a result of the TRIPs Agreement").

113. Press Release, Ministry of Commerce & Industry, India Recognised as
agreement with the International Bureau of WIPO. In the future, India is likely to join China, Japan, and South Korea to become countries with a large volume of PCT applications.

If these accomplishments are not enough, India, along with Brazil, has been the undisputed leader of the developing world in international intellectual property discussions.\footnote{114} For example, before the adoption of the TRIPS Agreement, India demanded the revision of both the Berne Convention for the Protection of Literary and Artistic Works\footnote{115} and the Paris Convention for the Protection of Industrial Property,\footnote{116} the two leading international intellectual property conventions.\footnote{117} The goodwill and leadership they developed in this early period continue even today. Although it remains unclear whether "India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did,"\footnote{118} India is likely to continue to feature prominently in regional and international intellectual property debates.\footnote{119}

Outside these three powerful Asian economies, Hong Kong, Singapore, South Korea, and Taiwan are in a league of their own. Commentators have described these countries and regions as newly industrialized economies, the "four little dragons," or the "four Asian tigers."\footnote{120} Consider South Korea, for example. The country already has a highly successful home electronics industry that produces many innovative products; Samsung remains a household name in the West. In 2007, "Korea ranked fourth in the... International Patent Applications statistics, occupying 4.47% of global patents.... Korea
[also] had the highest number of resident patent applications filed per billion dollars of GDP and per million dollars of R&D expenditures.\textsuperscript{121}

Moreover, KIPO has been very active in recent years. With the Japanese Patent Office and China’s SIPO, KIPO formed the Asian Trilaterals, which regularly engage in policy dialogues among Asian patent offices.\textsuperscript{122} KIPO now “has superhighway arrangements in place with the Japanese Patent Office . . . and the [U.S. Patent and Trademark Office], and it is also moving into a superhighway arrangement with the Danish [Patent Office].”\textsuperscript{123} Most recently, South Korea completed a free trade agreement with the United States, which is pending Congressional approval.\textsuperscript{124} Included in the agreement is an extensive intellectual property chapter that seeks to align the country’s intellectual property standards with those of the United States.\textsuperscript{125}

Like South Korea, Singapore has entered into a free trade agreement with the United States.\textsuperscript{126} In fact, Singapore was one of the first Asian countries to enter into such a bilateral agreement. Singapore’s emphasis on the development of a knowledge-based economy is understandable. Being a small, but highly urbanized\textsuperscript{127} city state that focuses primarily on foreign investment,\textsuperscript{128} exports of high-

\textsuperscript{121} Ji-Hyun Park, South Korea, in INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 259, 275 (Paul Goldstein & Joseph Straus eds., 2009) [hereinafter INTELLECTUAL PROPERTY IN ASIA] (footnote omitted). See generally Keun Lee & Yee Kyoung Kim, IPR and Technological Catch-Up in Korea, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY 133 (Hiroyuki Odagiri et al. eds., 2010) [hereinafter INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP] (examining how South Korea caught up in the field of intellectual property and technological development).

\textsuperscript{122} DRAHOS, supra note 99, at 233.

\textsuperscript{123} Id. at 239 (footnote omitted).


\textsuperscript{128} See BEESON, REGIONALISM AND GLOBALIZATION, supra note 24, at 165 (“The essence of the strategy the Singaporean government adopted was to make itself an attractive
technology products, intellectual property rights play a very important role in the country's future economic development. While Singapore has a high per capita GDP and very high levels of intellectual property protection and enforcement, it is also a founding member of the ASEAN, a regional group that includes some of the weakest economies in Southeast Asia. If it continues to stay within the group and assumes greater leadership, it is likely to play a very important role in the development of intellectual property law and policy in Asia.

Within ASEAN, the divergence in economic and technological developments is the most blatant. While Singapore is no doubt the economic leader in the pack, Indonesia, the Philippines, and Vietnam are included in what the Goldman Sachs analysts have termed the N-11 investment location for mobile international capital.


130. See Trade in Services (% of GDP), WORLD BANK, http://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS (last visited Apr. 10, 2011) (reporting that trade in services accounted for 95.1% of Singapore's GDP in 2009); Ng-Loy, supra note 128, at 240 (“Singapore’s economic planning for the 1990s included strategies to promote the service sector together with manufacturing, to deepen the technology base, and to create an ‘external’ economy through globalization. The idea behind the strategy to deepen the technology base in Singapore was to move Singapore up the value-chain in manufacturing, especially in emerging fields such as biotechnology, and to attract research and development (R&D) activities.”).

131. GDP Per Capita, supra note 81.

132. See Dean A. DeRosa, US Free Trade Agreements with ASEAN, in FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES 117, 163 (Jeffrey J. Schott ed., 2004) (“Singapore is economically the strongest ASEAN country, but unlike its ASEAN partners it is not an agriculture-exporting country.”).
(Next Eleven) countries, along with other Asian economies such as Bangladesh, Iran, Pakistan, and South Korea. Like the BRICS countries, this group of large developing countries has the potential to pose considerable challenge to major developed economies. Meanwhile, Cambodia, Laos, and Myanmar, the three new ASEAN members, remain least developed countries—similar to such other Asian neighbors as Afghanistan, Bangladesh, Bhutan, Nepal, and Timor-Leste. The ASEAN-China Free Trade Area (ACFTA), for example, will not be fully implemented in Cambodia, Laos, Myanmar, Vietnam until 2015, five years after the full implementation in the ASEAN-6 countries (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand). The ASEAN members have also received benefits under the Early Harvest Program in ACFTA, which provides for the early opening of markets for specific goods and services in China.

In sum, there are significant differences over the economic and technological developments within Asia. Table 2 further identifies the considerable variations in technological developments and innovation capabilities. Because economic developments have heavily influenced the state of intellectual property protection and enforcement, the wide diversity of regional developments virtually guarantees the non-existence of any established consensus on intellectual property law and

133. See Jim O'Neill et al., How Solid Are the BRICs? 7–8 (Goldman Sachs, Global Economics Paper No. 134, 2005) (advancing the concept of the N-11 countries in response to questions concerning whether there are more “BRICs” out there).
134. See id. at 7.
136. Dorothy-Grace Guerrero, China’s Rise and Increasing Role in Asia, in China’s New Role, supra note 7, at 191, 193.
137. See Michael A. Glonsky, Stabilizing the Backyard: Recent Developments in China’s Policy Toward Southeast Asia, in China and the Developing World, supra note 7, at 150, 173 (“Initiatives like the [ASEAN-China Free Trade Area] and Early Harvest Program . . . were designed to give ASEAN states a preferential opportunity to penetrate the China market.”); Guerrero, supra note 136, at 193 (“[The Early Harvest Program] grants three-year duty-free entry for ASEAN goods into the Chinese markets. After this, China’s manufactured goods will have full free tariff access to Southeast Asian markets.”); Wang Jiangyu, Association of Southeast Asian Nations–China Free Trade Agreement, in Bilateral and Regional Trade Agreements: Case Studies 192, 198 (Simon Lester & Bryan Mercurio eds., 2009) (discussing the Early Harvest Program in the ASEAN-China Free Trade Area).
policy in Asia. Indeed, intellectual property developments vary significantly within Asia. As Professor Llewellyn observed:

Countries around Asia feature in every different category of IPR development: from the advanced relying on its own innovation and creativity (Japan), to those moving—at varying speeds—from imitator to innovator (China, India, Taiwan and South Korea); those aiming to use in the development of their own Invisible Gold the technology and known-how introduced by foreign investors (Singapore, Indonesia, Malaysia and Thailand); to the newly industrialising countries... still highly dependent on foreign technology and assistance (Vietnam, Cambodia and Laos). 138

138. LLEWELLYN, supra note 76, at 117.
MARQ. INTELL. PROP. L. REV.  [Vol. 16:2

<table>
<thead>
<tr>
<th>Countries</th>
<th>GDP (Current US$)</th>
<th>GDP per capita (US$)</th>
<th>Domestic Pat Apps</th>
<th>Domestic TM Apps</th>
<th>R&amp;D Expend. (%GDP)</th>
<th>High-tech Exports (US$M)</th>
<th>Researchers in R&amp;D (mil)</th>
<th>S&amp;T Journal Articles</th>
</tr>
</thead>
</table>

139. As the World Bank explained:
GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars. Dollar figures for GDP are converted from domestic currencies using single year official exchange rates. For a few countries where the official exchange rate does not reflect the rate effectively applied to actual foreign exchange transactions, an alternative conversion factor is used.


140. As the World Bank explained:
GDP per capita is gross domestic product divided by midyear population. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars.

GDP Per Capita, supra note 81.


143. “Expenditures for research and development are current and capital expenditures (both public and private) on creative work undertaken systematically to increase knowledge, including knowledge of humanity, culture, and society, and the use of knowledge for new applications. R&D covers basic research, applied research, and experimental development.” Research and Development Expenditure (% of GDP), WORLD BANK, http://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS (last visited Apr. 10, 2011).

144. “High-technology exports are products with high R&D intensity, such as in aerospace, computers, pharmaceuticals, scientific instruments, and electrical machinery. Data are in current U.S. dollars.” High-Technology Exports, supra note 129.

145. “Researchers in R&D are professionals engaged in the conception or creation of new knowledge, products, processes, methods, or systems and in the management of the projects concerned. Postgraduate PhD students … engaged in R&D are included.” Researchers in R&D (Per Million People), WORLD BANK, http://data.worldbank.org/indicator/SP.POP.SCIE.RD.P6 (last visited Apr. 10, 2011).

3. Geopolitical Rivalries

While culture does not provide the underlying intellectual property values, and the region’s highly uneven economic and technological developments have made it difficult to achieve a consensus, geographical rivalries—and the lack of a regional hegemon—have made it difficult for Asia to develop unified positions on intellectual property law and policy. Indeed, such rivalries continue to dominate

---

147. 2005 was selected to maximize the amount of data available for comparison purposes. It is important to remember that, in the past few years, technological and innovation capabilities have increased dramatically in many fast-growing Asian countries such as China and India.

148. Regional hegemony is important because it gives countries the power to shape regional laws, policies, and developments according to its own interests. Nevertheless, commentators remain skeptical that any Asian country can become a hegemon in the region. See KANG, supra note 56, at 171 (“Given the changes in the international system and the central place of the United States there is almost no chance that China will become the unquestioned hegemon in East Asia.”); see also Peter K. Yu, Sinic Trade Agreements, 44 U.C. DAVIS L. REV. 953, 1022 (2011) (noting that the development of a unified Asian position down the road is rather unlikely).
the interactions among countries within the region.

Since the explosion of the Chinese economy, commentators have suggested a growing rivalry in Asia between China and Japan. This rivalry is not new; it dates back to at least the nineteenth century. Nevertheless, China was fairly weak in the twentieth century, following repeated attacks by imperialist powers. Mao's autarky, self-reliance, and import substitution policies also made China backward, leaving the country with limited foreign technology and capital while isolating it from the international community.

In recent years, however, the rivalries between China and Japan have become more apparent, thus raising concerns among their Asian neighbors. A case in point is the disagreement between the two countries over the acceptable participants of the 2005 East Asian Summit. This disagreement foreshadowed the growing rivalry and a deepening conflict between China and Japan. Other early signals of this rivalry include

Beijing's blockage of the possibility of Japan having a permanent seat on the UN Security Council; their competing claims to petroleum deposits and islands in the East China Sea; and China's irritation at the visits of former Prime Minister Koizumi to the Yasukuni Shrine, where Japan's war dead, 14 of whom are regarded as war criminals by China and South Korea, were buried.

Despite this rivalry, the ongoing push for initiatives under ASEAN+3 (an ad hoc group that includes ASEAN, China, Japan and South Korea), ASEAN+6 (an ad hoc group that includes ASEAN+3, Australia, New Zealand, and India), and the proposed China-Japan-South Korea free trade agreement seems to suggest that "China understands that the future of the region depends upon a constructive relationship between China and Japan."


150. See Yu, From Pirates to Partners, supra note 15, at 198.

151. See Guerrero, supra note 136, at 192 ("The rift in the first [East Asian Summit] was the tip of the iceberg that is the Sino-Japanese conflict.").

152. Id. at 192.

153. Zhang Yunling & Tang Shiping, China's Regional Strategy, in POWER SHIFT:
Regardless of whether China can work closely with Japan, the wide
differences in economic and technological developments in the two
countries will continue to make it difficult for them to reach a consensus
over issues related to intellectual property law and policy. It is one
thing to have no major conflict between these two countries, but it is
quite another thing to have the two countries coordinating their
positions on intellectual property law and policy.

India also plays a very important role in Asia’s future development.
As Robert Kagan put it, “In Asia . . . it is a three-way, not a two-way,
competition.” 154 Indeed, the rapidly-changing dynamics in the Indian
economy and the country’s domestic industries 155 have presented some
interesting twists to the future position of this traditional vanguard of
the developing world. India has also been actively establishing bilateral
and regional trade agreements 156 while being instrumental in the

---

154. ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS 41
(2009); see also BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 88 (“[B]oth
India and China have the potential to redefine the balance of influence and power within any
grouping of which they are a part and the very definition of the region any new institution
claims to represent.”); see also Jason Burke, India’s Deals with Sri Lanka Heighten Stakes in ‘Great
Game’ with Beijing, GUARDIAN (London) (June 9, 2010, 11:45 AM),
to be the pre-eminent power in Asia and whether Asia ends up multipolar or unipolar will be
determined by what happens in the Indian Ocean. Currently there is a power vacuum there
and the Chinese want to fill it.” (quoting Brahma Chellaney, Professor of Strategic Studies,
Centre for Policy Research, New Delhi)).

155. See, e.g., Dwijen Rangnekar, Context and Ambiguity in the Making of Law: A
discussing the changing dynamics of the Indian pharmaceutical industry).

156. As one commentator observed:
The Indian government has negotiated a framework agreement with ASEAN whose
ambition and scope resemble the China-ASEAN agreement. It has also negotiated
an economic cooperation agreement with Singapore, which could be a launching
pad of sorts for an India-ASEAN FTA. An FTA with Thailand is also joining the
list. Thanks to these and other diplomatic efforts, New Delhi now holds its own
annual summit meeting with ASEAN in an “ASEAN + 1” arrangement, and India
was included in the December 2005 East Asian Summit.

Ellen L. Frost, China’s Commercial Diplomacy in Asia: Promise or Threat?, in BALANCE OF
INFLUENCE IN ASIA, supra note 149, at 95, 99 (footnote omitted); see also Julia Ya Qin,
China, India and WTO Law, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC
ORDER 167, 196 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010) (“It was not
until recent years that India began to enter into regional free trade arrangements with others,
mostly its neighbouring countries.”); Wang Jiangyu, The Role of China and India in Asian
Regionalism, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, supra, at 333,
356–58 (discussing India’s regional trade initiatives). But see TAY, supra note 20, at 64
(“[India] has negotiated a free trade agreement with ASEAN, but this was subject to much
haggling that showed not just economic differences but also that India has not observed and
continued development of the IBSA trilateral cooperation, featuring India, Brazil and South Africa.\textsuperscript{157}

Asian countries increasingly see the benefits of having India embraced a greater role in regional policy. Some countries, for example, found it desirable to include India in the East Asian Summit to "provide a 'hedge' against Chinese dominance."\textsuperscript{158} Many Asian countries have also been frustrated by the "influx of cheap Chinese consumer goods, competition for export markets, . . . growing trade deficit[s],"\textsuperscript{159} and diversion of FDI.\textsuperscript{160} Indeed, "Malaysian and Indonesian workers are [now] complaining about jobs being lost to Chinese workers because of the closing of enterprises that are losing orders to China."\textsuperscript{161}

Finally, one cannot ignore the important role the United States has absorbed the social norms prevailing in ASEAN, and perhaps does not want to. As a result, India remains peripheral relative to others."\textsuperscript{162}

\textsuperscript{157} As stated in IBSA's website:
Established in June 2003, IBSA [the India-Brazil-South Africa Dialogue Forum] is a coordinating mechanism amongst three emerging countries, three multiethnic and multicultural democracies, which are determined to contribute to the construction of a new international architecture, to bring their voice together on global issues and to deepen their ties in various areas. IBSA also opens itself to concrete projects of cooperation and partnership with less developed countries.


\textsuperscript{158} See Beeson, Institutions of the Asia-Pacific, supra note 4, at 88; see also TAY, supra note 20, at 89 ("More and more are talking not of a 'Chindia' of interdependence but of a new Cold War between China and India."); Guerrero, supra note 136, at 192 ("Japan and ASEAN members that were wary of an East Asia Co-Prosperity Sphere under China's leadership responded to Beijing's diplomatic offensive by proposing the inclusion for India, Australia and New Zealand.").

\textsuperscript{159} Joshua Eisenman, China's Post-Cold War Strategy in Africa: Examining Beijing's Methods and Objectives, in CHINA AND THE DEVELOPING WORLD, supra note 7, at 29, 42; accord ELLIS, supra note 7, at 1 (noting the "concern at increasing volumes of competitively priced Chinese goods, both contraband and legitimate, that are beating out the goods of Latin American producers in their own countries and displacing them in their traditional export markets"); Chris Alden, China's New Engagement with Africa, in CHINA'S EXPANSION INTO THE WESTERN HEMISPHERE, supra note 7, at 213, 226 (noting the "concern posed by the arrival of low-cost consumer goods [from China], which have enabled Africans to purchase basic items formerly beyond their reach but that threaten local manufacturing capacity"); Glosny, supra note 137, at 156 ("ASEAN states are worried that with China's low-cost and increasingly efficient manufacturing sector, cheaper Chinese goods will flood their domestic markets and compete effectively with Southeast Asian-produced goods in other markets."); see also TAYLOR, CHINA'S NEW ROLE IN AFRICA, supra note 7, at 63–86 (discussing the impact of cheap Chinese goods in Africa).

\textsuperscript{160} See Glosny, supra note 137, at 159–60 (discussing ASEAN's concerns over diversions of foreign direct investments).

\textsuperscript{161} Guerrero, supra note 136, at 194.
historically played in Asia, even though the country is not on the continent. In the last few years, the Obama administration has shown a greater interest in Asia than its predecessor. Secretary of State Hillary Clinton, for instance, set the precedent by choosing to visit Asia over Europe or the Middle East in her first overseas trip. In a speech in Tokyo, President Obama also described the United States as an “Asia Pacific nation.” As he declared: “As a[n] Asia Pacific nation, the United States expects to be involved in the discussions that shape the future of this region, and to participate fully in appropriate organizations as they are established and evolve.”

In fact, there have now been growing discussions about the potential rivalry in Asia between China and the United States. Nevertheless, if such rivalry intensifies, it is very likely that Asian countries will be highly reluctant to enter into situations where they have to pick between the two countries. As David Shambaugh pointed out:

[H]aving to choose between Beijing and Washington as a primary benefactor is the nightmare scenario for the vast majority of Asian states... It is not an exaggeration that all Asian states shall seek to have sound, extensive, and cooperative relations with both the United States and China, and thus will do much to avoid being put into a bipolar dilemma.

Despite these concerns, there is no denying that if there is a power shift between the China and the United States, Asian countries will have “a critical role [to play] in deciding whether such a shift in the relative standing of the world’s two largest economies will be orderly or

162. Cf. TAY, supra note 20, at 6 (“Despite increased trade and economic integration among Asian countries, ... the United States remains the final market for as much as 60 percent of Asian production.”).

163. See Yu, China, U.S. Need Each Other, supra note 94; see also BERGSTEN ET AL., CHINA’S RISE, supra note 90, at ix (noting that Clinton’s trip to Asia “is the first time in decades that the maiden foreign trip by the Secretary of State in a new administration was to Asia and signaled the importance the Obama administration attaches to relations with the region”).


165. Id.

166. David Shambaugh, Introduction: The Rise of China and Asia’s New Dynamics, in POWER SHIF, supra note 153, at 1, 17; accord Frost, supra note 156, at 105 (noting that Asian counties “do not wish to be forced to choose between Beijing and Washington”).
In sum, the uncertainty within the region and the continuous rivalry among the Asian powers—or Asia Pacific powers, if the United States is included—have made it difficult for Asian countries to foster pan-Asian positions on intellectual property law and policy. In the near future, Asian countries are very unlikely to play a role that is similar to that of the European Union or the African Group.

III. CHINDIASEAN

Although Part I has shown that distinct values, approaches, or practices unlikely exist in the area of intellectual property protection and enforcement, questions remain regarding whether Asian countries will eventually develop unified positions on intellectual property law and policy. While the existence of Asian values, approaches, or practices may help develop such positions, such development does not depend on the existence of those values, approaches, or practices. The question, therefore, is not whether those values, approaches, or practices exist, but whether intellectual property values, approaches, or practices can be Asianized.

To date, countries in different parts of the world have taken coherent positions as a regional group. The textbook examples are the African Group and the European Union. Thus far, the wide-ranging regional diversity has made it difficult for Asian countries to foster common positions. For example, Japan was instrumental in establishing the TRIPS Agreement and remains a key player in the push for plurilateral or multilateral efforts in the international intellectual property arena. It also advanced the proposal for ACTA and now

167. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 92; cf. AMITAV ACHARYA, CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER 224 (2001) ("The rise of China has led to prospects that ASEAN might either resort to balancing against, or bandwagoning with, China, the two postures commonly found in a realist understanding of responses to rising powers."); Frost, supra note 156, at 116 ("Non-Chinese Asians welcome China's new role [in Asia], but they have no desire to be dominated by China—or by Japan or India, for that matter. They see an actively engaged United States as a balancing and stabilizing presence that expands their room to maneuver and their freedom to choose.").

168. Cf. id. at 16 (noting that the question over whether it is East Asia or the Asia Pacific "presents initial problems of organizational and analytical coherence that are not as pronounced" in other region).

169. This question, to some extent, reminds us of what Mahathir bin Mohamad, Malaysia's former prime minister, sometimes called the "Asianization of Asia." BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 76.
serves as the agreement’s depository.170 Meanwhile, Singapore and South Korea have entered into free trade agreements with the United States.171 Because these high-income countries will benefit from stronger intellectual property protection and enforcement, they, with the exception of the ASEAN-affiliated Singapore, are unlikely to team up with their poorer neighbors to develop pan-Asian positions on intellectual property law and policy.

Nevertheless, the middle- and low-income Asian countries still have strong incentives to team up with each other to strengthen their own positions. As I mentioned earlier, the establishment of South-South alliances can be highly beneficial. These alliances, for example, “will allow less-developed countries to shape a pro-development agenda, articulate more coherent positions, or even enable these countries to establish a united negotiating front. The[y] . . . will also help these countries establish a powerful voice in the international debates on public health, intellectual property, and international trade.”172

Once Japan and South Korea are taken out, the most powerful alliance will arise when China, India, and the ASEAN members team up to foster common positions for the Asian developing world. Such an alliance can be described either as the China-India-ASEAN triangle or, in shorter form, Chindiasean.173 Chindiasean is unique, as it unites two leading middle-income developing countries with an Asia-based regional group. (Although Singapore is a developed economy that may not benefit from positions taken by this regional alliance, its founding membership and growing leadership in ASEAN and such noneconomic considerations as security are likely to ensure Singapore to remain part of the alliance.)174

170. ACTA, supra note 87, art. 45.
171. See KORUS FTA, supra note 125; USSFTA, supra note 126.
172. Yu, Access to Medicines, supra note 6, at 370.
173. Chindiasean builds on what Pete Engardio and his colleagues at Business Week described as Chindia. CHINDIA, supra note 105. An identical combination has also been advanced in the form of the Asian Economic Community. See Michael Ewing-Chow & Edrick Gao, The Asian Economic Community: ASEAN—A Building or a Stumbling Block for China and India Economic Cooperation, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, supra note 156, at 387, 387 (“At the first East Asia Summit . . . held in Kuala Lumpur on 14 December 2005, the Indian Prime Minister, Manmohan Singh, outlined his vision of an emerging Asian Economic Community . . . as including ASEAN, India and China.”).
174. See JURGEN HAACKE, ASEAN’S DIPLOMATIC AND SECURITY CULTURE: ORIGINS, DEVELOPMENT AND PROSPECTS 7 (2009) (“Singapore’s leaders have long associated a major potential security risk with the consequences of a breakdown of the normative framework governing sub-regional order in Southeast Asia.”). See generally id. at
From the standpoint of international intellectual property politics, the existence of both China and India, the two so-called BRICS countries, are important. Since the 1960s, Brazil and India have served as the twin leaders of the developing world in international intellectual property negotiations. Although China until recently has not become active in the international community, it has since picked up tremendous momentum. The existence of China and India in Chindiasean, therefore, allows the alliance to be prominently featured in future international intellectual property negotiations. In fact, given the immense power of both China and India, which can only grow, any Asian alliance that excludes them is unlikely to succeed.

Moreover, ASEAN can benefit from access to the Chinese and Indian markets as well as the influx of foreign direct investment from these two countries. Although ASEAN was constituted as a group, its constituent countries compete more against than complement each other. As Assafa Endeshaw noted recently:

Besides the economic structures of Indonesia, Malaysia, Philippines and Thailand are “more competitive than complementary . . . ASEAN economies are more complementary to the industrial countries (as well as to the Asian [newly industrialized economies]) than to each other. And each ASEAN country wants to protect its domestic industries from competition from neighbors”. The overall consequence is that ASEAN countries, except Singapore, are “not markets for each other’s primary products. And they cannot supply each other’s needs for technology and capital goods” . . . .

The disparity in levels of industrialization and the competitive standing of ASEAN economies inevitably translates into reluctance “to share markets” but an urge to protect “domestic industries from regional cooperation”. The less developed of them tend to be more inward-looking and

214 (“ASEAN’s diplomatic and security culture has been meant to mediate estrangement and insecurity in Southeast Asia.”); TAY, supra note 20, at 51 (“[O]ne of the earliest achievements of ASEAN was to avoid further confrontation among its members.”).


preoccupied with the basic development problems of unemployment, poverty and income inequality. They fear that premature competition for their industries will result in benefits biased in favour of the more developed members; the industrial competence of the latter will enable them to pre-empt the high value added industries and process if industrial location is left to market forces under free trade.\(^{177}\)

The existence of ASEAN in Chindiasean is equally important. As mentioned in Part I.C, China and India are likely to be top competitors in Asia in the future. In fact, tension may rise when the Indian economy begins to catch up with that of China.\(^{178}\) As a result, ASEAN will play its much-needed role in serving as a mediator between the two countries, taking advantage of its wide experience in building consensus.\(^{179}\) The inclusion of ASEAN will also build on its wide experience in intellectual property cooperation developed through the 1995 ASEAN Framework Agreement on Intellectual Property Cooperation.\(^{180}\)

\(^{177}\) ASSAFA, supra note 75, at 66 (footnotes omitted).

\(^{178}\) See Lal, supra note 57, at 142 ("[A]s India continues to grow, if China shows reluctance to accord the country status as a peer in the international arena, the resulting friction could lead to renewed tensions.").

\(^{179}\) See ACHARYA, supra note 167, at 79 ("The ASEAN Way . . . is a claim about a process of regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontation styles which are often contrasted with the adversarial posturing, majority vote and other legalistic decision-making procedures in Western multilateral negotiations."); BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 2 (describing the "ASEAN Way" as an "informal, consensus-based approach to international cooperation"); HAACKE, supra note 174, at 7 ("ASEAN's diplomatic and security culture comprises six core norms: sovereign equality, non-recourse to the use of force and the peaceful settlement of conflict, non-interference and non-intervention, non-involvement of ASEAN to address unresolved bilateral conflict between members, quiet diplomacy, and mutual respect and tolerance"); BEESON, REGIONALISM AND GLOBALIZATION, supra note 24, at 219 (noting that there is "very little chance of regional elites losing ‘face’” in processes conducted the ASEAN Way). See generally ACHARYA, supra note 167 (providing an excellent discussion of ASEAN's distinctive approach to political and security co-operation).

Moreover, as China and India continue to grow, their positions may be closer to those of developed countries than their less developed counterparts. Some commentators have already wondered whether the emerging BRICS countries can continue to serve as leaders of the less developed world as they once did. The addition of ASEAN in Chindia is, therefore, highly important, as the positions taken by ASEAN are likely to be more moderate than those of the two BRICS countries. Such moderation also resonates well with the large poor populations within China and India, thus allowing the Chinese and Indian governments to work closely with their ASEAN neighbors.

To be certain, questions remain regarding whether ASEAN countries can become equal partners with China and India. Most of the ASEAN members are economically weak. Those that are strong on a per capita basis, like Singapore, have a small economy. Indeed, one of the main concerns for any partnerships between a BRICS country and other less developed countries is the bargaining disparity between and among the parties. If the arrangement is unfair, the ultimate alliance is unlikely to be more attractive than what the weaker countries already get under the existing multilateral system.

Nevertheless, by combining its ten members and having an economy comparable to that of China and India, ASEAN may be able to

note 57, at 247.

181. See, e.g., Drahos, Developing Countries, supra note 118, at 765 (“It is . . . not clear that India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did.”).

182. Cf. Yu, Access to Medicines, supra note 6, at 389 (“[T]he wide gap between the rich and the poor and the growing regional disparities in the BRICS countries have induced their government leaders to develop policies to work more closely with their poorer trading partners.”).

183. As I noted earlier: [T]he impending challenge for these countries concerns how to set up an alliance in a way that would prevent the BRICS countries from dominating their much weaker and more dependent partners. After all, the former are more powerful and possess more human capital, technical knowledge, and legal expertise. Without adequate protection, the BRICS countries may abuse their leadership roles at the expense of others. Thus, if the partial BRICS alliances are to be successful, it is important to build safeguards into the alliances to protect the weaker members and to allow them to retain their autonomy and identity. It is also important to develop trust among the participating members so that they can work together closely without worrying about potential exploitation.

Id (footnote omitted).

provide the much-needed political and economic clout to balance either China or India. The regional group also provides a multitude of votes that are important to both countries in a “one country, one vote” system under the United Nations—for example, in WIPO and UNESCO.185

To China and India, the support of ASEAN members may become even more important, as the coalition with ASEAN members would strengthen their clout in negotiations with the United States and the European Union.186 The combination of China, India, and ASEAN may also provide an effective countervailing force against the continued push for stronger global intellectual property standards by the trilateral partnership of the European Union, Japan, and the United States.187 Even if it fails to resist this push, Chindiasean can strategically exploit the growing rifts among the three countries,188 thus enlarging the policy space of the less developed world. As John Odell noted, a sophisticated negotiation strategy includes not only tactics for building coalitions, but also tactics “for splitting rival coalitions... and for defending against efforts by outsiders to break one’s own.”189

185. See Yu, Access to Medicines, supra note 6, at 388 (“[N]umbers matter in a ‘one country, one vote’ system, like WIPO and the United Nations. There are only five BRICS countries, but many more less developed countries.”).

186. See Robert Bird & Daniel R. Cahoy, The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach, 45 AM. BUS. L.J. 283, 317 (2008) (“Through the use of a collective action mechanism, it may be possible for a country with a certain level of immunity to share the protection with one or several countries more susceptible to FDI economic retribution. The use of coordinated behavior may bring about a more equitable result, so long as one is aware of the legal limits of such mechanisms and the anticoordination strategies that may be employed by opponents of the system.”); Yu, Access to Medicines, supra note 6, at 367 (“[T]he creation of alliances among less developed countries will help many less developed countries combat the external pressure each country will face on a one-on-one basis from the European Communities, the United States, or other powerful trading partners.”).

187. Cf. Yu, Access to Medicines, supra note 6, at 356 (“[I]f [a coalition among the BRICs countries] is well built and maintained, it can even become an effective counterweight to the trilateral cooperation among the European Communities, Japan, and the United States, all of which were instrumental in pushing for the adoption of the TRIPs Agreement.”).


Within Asia, an alliance with the ASEAN members would further strengthen their positions vis-à-vis Japan, a still dominant economic power in the region.\textsuperscript{190} For India, such an alliance would steer the discussion away from ASEAN+3 or East Asian Community.\textsuperscript{191} For China, such an alliance would be at least as attractive as ASEAN+3, although the resulting alliance would go in a rather different direction. Teaming up with Japan and Korea is quite different from having an alliance with India and ASEAN.

Notwithstanding these many benefits, there remain some unavoidable challenges. For example, there exist “IP-irrelevant factors”\textsuperscript{192} that would make it difficult for these countries to cooperate with each other, such as xenophobia, nationalism, racism, mistrust, and resentment.\textsuperscript{193} As I noted earlier, “[n]o matter how much more globalized and interdependent the world has become, some countries will always remain reluctant to cooperate with others, either because of historical conflicts, border disputes, economic rivalries, cultural differences, or spillover issues from other areas.”\textsuperscript{194} Indeed, the historical record of cooperation among less developed countries has been far from promising.\textsuperscript{195}

\textsuperscript{190} Cf. Guerrero, supra note 136, at 191, 193.
\textsuperscript{191} See id. at 192 (discussing the developments regarding ASEAN+3, the East Asia Community, the East Asia Co-Prosperity Sphere, and the East Asian Summit).
\textsuperscript{192} “IP-irrelevant factors” are those factors that are largely unaffected by intellectual property protection. See Peter K. Yu, The International Enclosure Movement, 82 IND. L.J. 827, 852–53 (2007).
\textsuperscript{193} See Yu, Access to Medicines, supra note 6, at 393. The tension between China and India provides a good example. See Muthucumaraswamy Sornarajah & Wang Jiangyu, Introduction and Overview, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, supra note 156, at 1, 12 (“China still claims the area that is Arunachal Pradesh and India claims that some 38,000 square mile on its border are occupied by Chinese forces.”); see also Frost, supra note 156, at 98 (“Indian officials remain suspicious of China’s intentions and hope to track and if possible match its initiatives.”).
\textsuperscript{194} Yu, Access to Medicines, supra note 6, at 393.
\textsuperscript{195} See id. at 388 (“[C]oalition-building efforts put up by less developed countries historically have failed.”); Jean Touscoz, A Changing Policy Landscape, in INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT 287, 288 (Surendra J. Patel et al. eds., 2001) (“[T]he ‘big five’ non-members of OECD (Russia, China, Brazil, India and Indonesia) do not always act in concert; the least developed countries themselves do not present a common front.”). As Frederick Abbott elaborated:

Over the past 50 years, there have been a number of efforts to achieve solidarity or common positions among developing countries in international forums. At the broad multilateral level there was (and are) the Group of 77, and the movement for a New International Economic Order. At the regional level, the Andean Pact in the early 1970s developed a rather sophisticated common plan to address technology
Moreover, ASEAN members continue to compete with China and India. As Lee Kuan Yew, Singapore's founding leader, observed in 2004, "[w]hat will pull [ASEAN] together is the need to be sufficiently competitive against two huge countries now in the World Trade Organisation and wanting to industrialise and join the export markets: India and China." There are also additional questions concerning whether the region will have "enough political and ideological internal coherence to allow it to facilitate and encourage the underlying economic integration that has already occurred," including regional harmonization in the intellectual property area.

Nonetheless, on balance, Chindiasean seems to be beneficial to all parties. First and foremost, such an alliance allows China, India, and ASEAN to achieve what they alone cannot. In the near future, the positions of China, India, and ASEAN would also remain quite close to each other. In the area of technology transfer and technical assistance, for example, this group of countries would "serve as worthy allies at least until their interests grow further apart from those of their less developed partners."

Thus, it is not surprising that China and India have already begun to coordinate their positions to maximize leverage and effectiveness of their international negotiations. In the June 2010 meeting of the TRIPS Council, for example, the two countries joined hands in raising concerns about the development of TRIPS-plus enforcement trends. Their

and IP issues (ie Decisions 84 and 85). Yet these efforts were largely unsuccessful in shifting the balance of negotiating leverage away from developed countries. In fact, developing country common efforts to reform the Paris Convention in the late 1970s and early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.


196. LLEWELLYN, supra note 76, at 121–22.

197. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, supra note 4, at 16.

198. See ASSAFA, supra note 75, at 66 ("[G]iven the wide disparity in levels of industrialization and the competitive standing of the ASEAN economies, any IP harmonization will clash with some of the member states' policies of maintaining protection of local markets and industries. This is simply because harmonization of IP will have the inevitable effect of breaking down some of the barriers.").

199. Yu, Access to Medicines, supra note 6, at 392.

200. Council for Trade-Related Aspects of Intellectual Property Rights [TRIPS Council], Minutes of Meeting ¶¶ 248–73, IP/C/M/63 (Oct. 4, 2010) [hereinafter TRIPS Council Minutes]; see also Yu, TRIPS and Its Achilles' Heel, 18 J. INTELL. PROP. L. 479, 518–21 (2011) (discussing China and India's interventions at the TRIPS Council); The Problems with the "TRIPS plus" Enforcement Trend: China's View, S. BULL., 28 July 2010, at 13 (collecting the
important interventions were a direct response to the release of the draft text of the Anti-Counterfeiting Trade Agreement as well as the growing concern over the systematic problems created by the high intellectual property enforcement standards established through bilateral, plurilateral, and regional trade agreements. A few years earlier, China and India also served as cosponsors of the proposal to introduce a new article 29bis in the TRIPS Agreement, which would create an obligation to disclose in patent applications the source of origin of the biological resources and traditional knowledge used in patent-seeking inventions.

IV. AGENDA

While the previous Part focuses on the establishment of Chindiasean as a geopolitical alliance, this Part turns to its ability to shape global intellectual property norms. To a large extent, Chindiasean could serve as an alternative locus of intellectual property norm making. It could also become what Professor Tay described as “Asia’s normative community.” The development of such a community is important, because a coherent common policy agenda will help the Chindiasean member states achieve a more powerful voice, greater political leverage, and more desirable bargaining outcomes. The shared regional norms will also help bind the members together, notwithstanding the challenges mentioned earlier in the previous Part.

If Chindiasean is to pursue a coherent policy agenda, one has to wonder what items this agenda will contain. To help identify these...
potential items, this Part examines issues that are of great importance to China, India, and ASEAN. Part III.A focuses on traditional issues that are already under discussion in the international intellectual property arena. Part III.B discusses new issues that have only emerged recently and on which Chindiasean could have a major impact.

A. Traditional Issues

1. Enforcement

Enforcement will remain a key issue for many Asian countries in at least the next decade. As I noted elsewhere, the enforcement mechanisms available under the TRIPS Agreement are rather weak.206 In the view of developed countries and intellectual property right holders, the mechanisms are just primitive, obsolete, and inadequate.207 To some extent, Part III of the TRIPS Agreement can be seen as the Agreement’s “Achilles’ heel.”208 There remain many historical, economic, tactical, disciplinary, and technological challenges to improving enforcement within the WTO—or in the present context, within Asia.

Moreover, many Chindiasean members are now on the United States Trade Representative’s Section 301 watch list or priority watch list (see table 3). Due to such constant external pressure, these countries have a strong need to develop a collective response,

206. See generally Yu, TRIPS and Its Achilles’ Heel, supra note 200, at 483-504 (discussing the weakness of the TRIPS enforcement provisions).
207. See, e.g., EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR TRADE, STRATEGY FOR THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES 3 (2005), available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf (“Violations of intellectual property rights (IPR) continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement.”); TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 4 (2008) (noting that “it has become apparent to some national governments and regional organizations that the ‘aggressive’ enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods”); Timothy P. Trainer, Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?, 8 J. MARSHALL REV. INT’L PROP. L. 47 (2008) (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional free trade agreements in the area of border enforcement).
coordinate negotiation and litigation strategies, and establish a forum for sharing experience, knowledge, and best practices. A more coordinated regional approach toward intellectual property enforcement therefore will benefit all Chindiasean members.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>China</td>
<td>306</td>
<td>306</td>
<td>306</td>
<td>OCR</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
<tr>
<td>India</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
<tr>
<td>Indonesia</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>WL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
<tr>
<td>Pakistan</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>WL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
<tr>
<td>Philippines</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>WL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
<tr>
<td>S. Korea</td>
<td>PWL</td>
<td>WL</td>
<td>WL</td>
<td>PWL</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taiwan</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>WL</td>
<td>WL</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td>WL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
<td>PWL</td>
</tr>
</tbody>
</table>

WL=“Watch List”  PWL=“Priority Watch List”  306=Section 306 Review  OCR=Out-of-Cycle Review

Table 3: United States Trade Representative’s Special 301 Actions

2. Traditional Knowledge and Cultural Expressions

The protection of traditional knowledge and cultural expressions is of great importance to many Asian countries. India, for example, is concerned about protecting its traditional knowledge, cultural heritage, and genetic resources. Its biodiversity law remains one of the most comprehensive and well-drafted laws in the region. Meanwhile, China

209. The data were taken from the annual Special 301 reports issued by the Office of the United States Trade Representative.


211. See Tanuja Garde, India, in INTELLECTUAL PROPERTY IN ASIA, supra note 121, at 55, 78 n.108 (stating that the 2002 National Biodiversity Act “addresses access to genetic resources and associated knowledge by foreign entities to provide for benefit sharing from the use of the resources, and also establishes the National Biodiversity Authority”).
pays considerable attention to protecting traditional herbal medicines.\(^{212}\) It has also recognized the importance of protecting intangible cultural heritage. In February 2011, China adopted a new intangible cultural heritage law.\(^{213}\) Apart from China and India, ASEAN countries also have important traditional knowledge and cultural expressions to protect.\(^{214}\) Examples include “headbands and skirts made from paperbark by Dayak groups in the interior of Borneo or in the complicated designs and weaving techniques for silk textiles, batik, brocade weaving and embroidery in countries like Thailand and Indonesia.”\(^{215}\)

In July 2006, a group of less developed countries advanced the proposal for a new article 29bis of the TRIPS Agreement.\(^{216}\) Out of the nine sponsors, five of them are from Asia (Brazil, China, India, Pakistan, and Thailand).\(^{217}\) Although it is unclear how long it will take the WTO membership to adopt this proposal, considering the large number of countries that have yet to ratify the protocol to amend the TRIPS Agreement in the public health area,\(^{218}\) the discussion of protection for traditional knowledge and genetic resources within the TRIPS context underscores the view that the TRIPS Agreement and the existing international intellectual property system provide inadequate protection to non-Western interests.\(^{219}\)

It is also worth noting the momentum created by the recent adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair

---

212. See Li, supra note 102, at 35–36 (discussing the protection of traditional Chinese medicines); Li Xuan & Li Weiwei, Inadequacy of Patent Regime on Traditional Medicinal Knowledge—A Diagnosis of 13-Year Traditional Medicinal Knowledge Patent Experience in China, 10 J. WORLD INTELL. PROP. 125 (2007) (examining the protection of traditional Chinese medicines).


214. See Draft ASEAN Framework Agreement on Access to Biological and Genetic Resources, reprinted in INTELLECTUAL PROPERTY LAW IN ASIA, supra note 57, at 261.


217. Id.


and Equitable Sharing of Benefits Arising from Their Utilization.  

Adopted on October 29, 2010, this new protocol aims to promote fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and the sustainable use of biological diversity.  

Like the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization, this new protocol will further strengthen Chindiasean’s position with respect to greater disclosure in patent applications of the traditional knowledge and genetic resources used in patent-seeking inventions.

3. Geographical Indications

The protection of geographical indications is quite important to many Asian countries. These countries continue to be dissatisfied with the fact that geographical indications are protected in a manner that favor primarily developed countries. For example, articles 22–23 of the TRIPS Agreement provide substantial protection to geographical indications for wines and spirits. Yet, they ignore the needs of many Asian developing countries, such as the need for stronger protection for geographical indications of food products grown primarily on their soil.

---


221. Id. art. 1.

222. As stated in the Bonn Guidelines:

Contracting Parties with users of genetic resources under their jurisdiction should take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted. These countries could consider...[m]easures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights.

Secretariat of the CBD, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization 16(d)(2) (2002), available at http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf; see also BRYAN BACHNER, INTELLECTUAL PROPERTY RIGHTS AND CHINA: THE MODERNIZATION OF TRADITIONAL KNOWLEDGE 22–23 (2009) (noting that the Bonn Guidelines were “approved by the CBD’s Conference of Parties... with a view to help countries that were drafting Access and Benefit Sharing... legislation”).

223. TRIPS Agreement arts. 23–24.

224. See KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 239 (2000) (“[T]he evolving language in TRIPS on geographical indications remains largely...confined to wines and spirits, while many developing countries point to
In recent years, many Asian countries have begun to notice the vast benefits of geographical indications. As a means to resolve the impasse over geographical indications, Hong Kong advanced "an alternative model for the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits under Article 23.4 of the TRIPS Agreement." Together with other WTO members, India, Pakistan, Sri Lanka also called on the WTO to extend the protection of geographical indications from wines and spirits to all products. If the discussion of the protection for traditional knowledge and cultural expressions is eventually tied to that for geographical indications—arguably the most practical compromise to link the European Union with the African Group—Asian countries are likely to play a rather important role in establishing greater protection for geographical indications.

4. Access to Essential Medicines

Since the expiration of the transitional period for developing countries in the TRIPS Agreement on January 1, 2005, access to essential medicines has been a major agenda item for any intellectual property discussions involving the developing world. The discussion of such access eventually culminated in the adoption of the Doha

---

*footnote 225.* See, e.g., PHILIPPE CULLET, INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT 333–37 (2005) (discussing how geographical indications can serve as a tool for protecting traditional knowledge); Dwijen Rangnekar, *Indications of Geographical Origin in Asia: Legal and Policy Issues to Resolve, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD* 273, 273 (Ricardo Meléndez-Ortiz & Pedro Roffe eds., 2009) (noting that geographical indications "are increasingly being seen as useful intellectual property rights for developing countries"); Madhavi Sunder, *The Invention of Traditional Knowledge, LAW & CONTEMP. PROBS.,* Spring 2007, at 97, 110 ("Mysore silk saris . . . have had a makeover since obtaining a geographical indication, updating [their] look with trendy new (but interestingly, natural) colors . . . and 'contemporary' designs inspired by temple architecture and tribal jewelry.").


*footnote 227.* See TRIPS Council, *Proposal from Bulgaria, Cuba, the Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Liechtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey and Venezuela* ¶ 20, IP/C/W/247/Rev.1 (May 17, 2001) ("The extension of the level of protection of geographical indications for wines and spirits to geographical indications for all other products is in the best interest and to the benefit of all WTO Members . . . ").
Declaration on the TRIPS Agreement and Public Health and the protocol to amend the TRIPS Agreement. If ratified by two-thirds of the WTO membership, the protocol will add a new article 31bis to the TRIPS Agreement, which will allow countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.

The debate on access to essential medicines is of particular importance to India, which has a very strong generic pharmaceutical industry. It is also important to China and Thailand, which are now major producers of active pharmaceutical ingredients and have taken on a growing role in the generic market, not to mention the ongoing public health needs in these countries and their Asian neighbors. To the disappointment of the multinational pharmaceutical industry, Thailand, along with Brazil, introduced compulsory licenses to increase access to needed pharmaceuticals. If its efforts continue and spread to other countries, the discussion of compulsory licensing arrangement in the

230. Although the initial deadline for ratification was set at December 1, 2007, it has been extended three times to December 2013. Countries Accepting Amendment of the TRIPS Agreement, supra note 218. As of this writing, more than a third of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Union, have ratified the proposed amendment.
231. See TRIPS Amendment, supra note 229; see also Yu, The International Enclosure Movement, supra note 192, at 872-86 (tracing the development of proposed article 31bis of the TRIPS Agreement).
232. See CHAUDHURI, supra note 109, at 180-221.
233. See Yu, Access to Medicines, supra note 6, at 363 (“Although China has yet to be as aggressive as India in exporting drugs or as successful as Brazil in promoting public health within the country, it already is the world’s largest producer of active pharmaceutical ingredients and is likely to be a very important player in the generic market.”); see also Li, supra note 102, at 54 (“Some Chinese researchers believe that China has advantages in producing ‘me too’ drugs because its capacity to conduct organic synthesis is very strong after many years of China’s being the target for outsourced MPC [multinational pharmaceutical companies] business.”); ELLEN F.M. ‘T HOEN, THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER: DRUG PATENTS, ACCESS, INNOVATION AND THE APPLICATION OF THE WTO DOHA DECLARATION ON TRIPS AND PUBLIC HEALTH 67 (2009) (“[M]iddle-income developing countries are important not only for the size of their markets but also because they have the production capacity to supply generic medicines in the developing world.”).
public health context and ways to promote innovation in the pharmaceutical area is likely to feature prominently on Chindiasean's policy agenda.

5. Internet and Other New Technologies

When the TRIPS Agreement was established in the mid-1990s, just shortly before the internet and electronic commerce entered the mainstream, its substantive standards were set at what Daniel Gervais described as “the highest common denominator among major industrialized countries as of 1991.” As a result, the Agreement failed to address challenges created by new technologies that emerged after the completion of its primary draft, including the technological change brought about by the internet and information revolution.

To date, the internet, new communications technologies, and file-sharing networks have posed significant challenges to intellectual property enforcement in the digital environment. While internet-related enforcement problems can be found everywhere, Asian countries play a critically important role in the larger debate, for at least three reasons.

First, China already has the world’s largest internet population, which amounted to over 513 million users in December 2011 according


236. See id. at 29 (“The 1992 text was not extensively modified and became the basis for the TRIPS Agreement adopted at Marrakesh on April 15, 1994.”).

237. See Marci A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. TRANSNAT'L L. 613, 614–15 (1996) (“Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.”); see also J.H. Reichman, The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions, 17 HASTINGS COMM. & ENT. L.J. 763, 766 (1995) (“[The principal weakness of the TRIPS Agreement] stems from the drafters' technical inability and political reluctance to address the problems facing innovators and investors at work on important new technologies in an Age of Information. The drafters' decision to stuff these new technologies into the overworked and increasingly obsolete patent and copyright paradigms simply ignores the systemic contradictions and economic disutilities this same approach was already generating in the domestic intellectual property systems.” (footnote omitted)).

to official statistics.\footnote{See \textit{China Internet Network Information Center, 29th Statistical Survey Report on the Internet Development in China} 4 (2012), \textit{available at} http://www1.cnnic.cn/uploadfiles/pdf/2012/2/27/112543.pdf [hereinafter CNNIC Survey Report].} If the growth continues, internet-related developments in China are likely to overwhelm that of the world. As I have noted often, the important question about the internet in China is not only how the internet will change China, but also how China will change the internet.\footnote{See, \textit{e.g.}, Yu, \textit{Six Secret Fears}, supra note 88, at 1046.}

Moreover, according to Internet World Stats, in December 2011, India already has a population of over 121 million, exceeding that of Japan.\footnote{Internet Usage in Asia, \textit{Internet World Stats}, http://www.internetworldstats.com/stats3.htm (last visited Apr. 11, 2011).} For the same period, Chindiasean made up for more than a third of the world’s internet population and has already exceeded that of the United States and the European Union combined (see table 4). If the growth trend continues, it is only a matter of time before Chindiasean makes up half of the world’s internet population.
Second, due to late economic development and technological backwardness, a substantial portion of internet users are school- or college-age students. In China, for example, internet users aged below thirty made up close to sixty percent of the total internet population. Thus, any law and policy relating to the internet is likely to have a substantial impact on the future pillars in the country. As far as internet-related law reforms are concerned, the stakes may be higher.

---

242. The data was taken or calculated from Internet World Stats, which is available at http://www.internetworldstats.com.


244. CNNIC SURVEY REPORT, supra note 239, at 19.

245. See Peter K. Yu, Digital Copyright Reform and Legal Transplants in Hong Kong, 48 U. LOUISVILLE L. REV. 693, 705 (2010) [hereinafter Yu, Digital Copyright Reform] (discussing how criminalizing online file sharing can adversely impact “a large number of individuals, including youngsters who are the future pillars of society”.).
than that of other type of intellectual property law reforms.

Third, many Asian countries, which range from China to Malaysia to Singapore, continue to control the flow of information within society. While human rights activists and commentators have heavily criticized the censorship regimes within these countries, these regimes ironically may provide the infrastructure needed to strengthen enforcement in the digital environment. These countries therefore may provide alternative models that may not exist in Western countries, although it remains to be seen whether such models would be compatible with free speech, free press, and privacy values found in other countries.

B. New Issues

1. Climate Change

One of the hottest issues in the international intellectual property policy arena concerns the use of intellectual property law and policy to respond to global climate change. Although it remains unclear what responses countries can come up with, China and India—two powerful countries that have significant carbon emissions—undoubtedly will play very important roles in any international climate change negotiations. The Copenhagen Summit already provides a very good example of the important role China can play in environment-related discussions. Capabilities for the development of climate change technology have also emerged in China, India, and other Asian countries.


247. See Yu, The Graduated Response, 62 FLA. L. REV. 1373, 1401–02 (2010) (discussing how the graduated response system would undermine the protection of free speech, free press, and privacy); Yu, Digital Copyright Reform, supra note 245, at 715 (discussing how the proposed disclosure and retention mechanism in Hong Kong’s digital copyright reform would chill speech).

248. See Steve Charnovitz et al., Global Warming and the World Trading System 93–94 (2009); Peter K. Yu, What Copenhagen Could Signal About U.S., China, Des Moines Reg., Dec. 17, 2009; see also TAY, supra note 20, at 154 (“It is clear that Asia’s continuing economic growth, while important for many, can have negative impacts on the environment and climate change for the planet.”).

249. See EUR. PATENT OFFICE, U.N. ENV’T PROGRAMME & INT’L CTR. FOR TRADE & SUSTAINABLE DEV., PATENTS AND CLEAN ENERGY: BRIDGING THE GAP BETWEEN EVIDENCE AND POLICY: FINAL REPORT 32 (2010) (“In the photovoltaic sector, for example, China has one of the largest producers and manufacturers, while India has one of the leading producers and manufacturers in wind technology. Meanwhile Thailand has significant activity..."
Moreover, because climate change discussions can lead to new innovation solutions that did not exist in the past, Chindiasean can also play a very important role in shaping the ongoing policy debate. As Peter Drahos pointed out, the increasing demands for policy adjustment to the global climate change requires "the US and China . . . to think about [the climate change, energy, and intellectual property rights regimes] in an integrated way." By linking intellectual property law and policy to environmental law regimes, Chindiasean may be able to come up with new practical home-grown solutions that will receive more buy-in from China and India at the international level.

Those solutions are likely important to many Asian countries, which have significant population and resources in areas that are vulnerable to floods, hurricanes, typhoons, tsunamis, severe droughts, or desertification. If the intellectual property system is not better managed to address climate change, those countries may suffer significantly. The tsunamis in Thailand, Indonesia, and other coastal areas in December 2004 and the vast damage resulting from such catastrophes remain vivid memories for many Asians.

2. Alternative Innovation Models

Although the existing intellectual property system focuses primarily on pathbreaking creations and innovations, many Asian countries have embraced sequential and cumulative innovations. For example, utility

---


253. See Hiroyuki Odagiri et al., IPR and the Catch-Up Process in Japan, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, supra note 121, at 95, 126 ("In indigenous sectors with mostly tiny firms [in Japan], many innovations occur in the form of practical devices rather than pure inventions."); Reichman, supra note 16, at 1124 (distingushing between "cumulative and sequential innovation" and "path-breaking innovation" and noting that "how to protect cumulative and sequential innovation—as distinct from path-breaking innovation—becomes an ever more pressing problem as more small- and medium-sized firms acquire a taste and capacity for such innovation"); see also SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 127-59 (2004) (discussing sequential
models or petty patents remain an important feature of the intellectual property systems in many of these countries. As Assafa Endeshaw described:

[Within Asia, there are different approaches towards minor inventions and their terms of protection as well as that for patents. Thus Indonesia accords protection to small product improvements through a “Simple Patent” (obviously a “petty patent”) for one time of five years. Vietnam, on the other hand, grants protection for “Utility Solutions” for six years. By contrast, Malaysia recognizes “Utility Innovations” for a period of five years but renewable for a further five. The Philippines recognizes design patents (which include utility models) and protects them for five years, too, but with a possibility of renewals for two consecutive periods of five years.]

In recent years, a shanzhai culture emerged in China, raising challenging questions about the acceptable boundaries of sequential and cumulative innovation. While many intellectual property rights holders and commentators consider the shanzhai phenomenon highly undesirable, shanzhai products do offer some benefits, especially when the products provide improvements that otherwise would not occur. In a world where intellectual property rights holders are sometimes reluctant to undertake innovation, shanzhai products may provide the much-needed work around to advance technological developments. Shanzhai products, indeed, may provide an efficient means for Asian countries to catch up with their more developed trading partners. It may also allow nationals of those countries to appropriate the consumers’ surplus.

254. See, e.g., Preston M. Torbert & Zhao Jia, People’s Republic of China, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, supra note 128, at 233, 238 (discussing utility models and designs in China); Jacinto D. Jimenez, Philippines, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, supra note 128, at 270 (discussing designs and utility models in the Philippines); Joon K. Park, South Korea, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, supra note 128, at 337, 337 (noting the adoption of the Utility Model Act in South Korea); Michael F. Fedrick, Taiwan, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, supra note 128, at 389–90 (discussing the utility model patent protection in Taiwan).

255. ASSAFA, supra note 75, at 73.

256. “Originally, shan zhai was used to refer to a bandit stronghold outside government control [in imperial China]; today it is shorthand for a multitude of knockoffs, fakes, and pirated products. These include everything from mobile phones to medicine and movies to makeup, and they permeate China’s consumer markets.” TSE, supra note 4, at 79.

257. See Peter K. Yu, Enforcement, Economics and Estimates, 2 WIPO J. 1, 12 (2010)
More importantly, the continued development of *shanzhai* products may suggest the existence of an alternative path to innovation. Like the Beijing Consensus, China's innovation models may attract the attention of other countries that are working hard to catch up with developed countries. Indeed, commentators have begun to appreciate the different forms of innovation that are slowly emerging in China. While Zeng Ming and Peter Williamson discussed what they called "cost innovation," Tan Yinglan focused on "process innovation."

Dan Breznitz and Michael Murphree went even further in their recent book, *Run of the Red Queen* As they pointed out, "China's innovation capabilities are not solely in process (or incremental) innovation but also in the organization of production, manufacturing techniques and technologies, delivery, design, and second-generation innovation." Interestingly, the authors concluded that these other forms of innovation can complement the breakthrough innovation embraced by the United States and other developed countries. As Breznitz and Murphree insightfully observed:

"Because the infringing goods in these situations are of the same standard, or close to that standard, the unauthorised production of those goods may actually result in a consumers' surplus: consumers are now getting the same products for a much lower price.".

258. See Tse, supra note 4, at 79 ("The best *shan zhai* firms, which have established themselves not through thievery but through knockoffs and imitations, have also disrupted the status quo by inventing new and ingenious business strategies tailored specifically to local markets."); id. at 80 (noting that *shanzhai* firms "have short cycle times for new product introductions").

259. See generally RAMO, supra note 9 (advancing the concept of the Beijing Consensus); see also HALPER, supra note 9 (discussing the Beijing Consensus).


263. Id. at 4.

264. See id. at 206 ("[T]hanks to the fragmentation of production, the rise of China need not be seen as a zero-sum game by policy makers inside and outside the country.").
product innovators to keep churning out new ideas, and the novel-product-innovating countries need the Red Queen country to keep innovating on almost every aspect of production and delivery.\textsuperscript{265}

3. Special and Differential Treatment

In the past, special and differential treatment was developed to enable less developed countries to promote internal economic, social, cultural, and technological developments and to facilitate efforts to catch up with countries in the developed world. Although the TRIPS Agreement sought to build a super-size-fits-all template, by now it has been clear that such a template does not work well in the less developed world. It is also worth noting that the proponents of reforms to strengthen intellectual property protection and enforcement sometimes have ignored both the preamble\textsuperscript{266} and objectives of the TRIPS Agreement.\textsuperscript{267}

Indeed, the problems created by the TRIPS Agreement and the international intellectual property system have led to the establishment of many new development agendas at the WTO, WIPO, and in other forums governing public health, human rights, biological diversity, food and agriculture, and information and communications.\textsuperscript{268} At the WTO, for example, the Doha Development Round of Trade Negotiations was launched in November 2001 to facilitate greater cooperation between developed and less developed countries.\textsuperscript{269} Of notable importance was the adoption of the Doha Ministerial Declaration ("Ministerial

\textsuperscript{265} ld. at 18.

\textsuperscript{266} See TRIPS Agreement pmbl., recital 6 (explicitly recognizing "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base"); Peter K. Yu, TRIPS Enforcement and Developing Countries, 26 AM. U. INT’L L. REV. 726, 747-48 (2011) (discussing the portion of the preamble of the TRIPS Agreement that focuses on the interests of less developed countries).

\textsuperscript{267} See TRIPS Agreement art. 7 ("The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."); see also Peter K. Yu, The Objectives and Principles of the TRIPS Agreement, 46 Hous. L. Rev. 979, 1000-08 (2009) [hereinafter Yu, Objectives and Principles] (discussing article 7 of the TRIPS Agreement).

\textsuperscript{268} See Yu, A Tale of Two Development Agendas, supra note 175, at 511-40.

\textsuperscript{269} See, e.g., Louise Amoore et al., Series Preface to Narlikar, supra note 188, at xiii (noting that the launch of the Doha Round was "assisted to a large degree by the conciliatory international political climate that followed the September 2001 terrorist attacks in New York and Washington").
Declaration"), the Doha Declaration, and a new protocol to amend the TRIPS Agreement.

At WIPO, Argentina and Brazil also called for the establishment of a Development Agenda. Together with other less developed countries and civil society organizations, they successfully demanded reforms that sought to both enhance the development dimension of WIPO and restore the balance in the international intellectual property system. The agenda, which was adopted at the WIPO General Assembly in October 2007, now includes forty-five recommendations for action that range from technical assistance and capacity building to norm setting and public policy and from technology transfer to assessment, evaluation, and impact studies.

To some extent, the ongoing demands for special and differential treatment in the international intellectual property system are similar to the push for a greater "margin of appreciation" within the international human rights regime. These demands, indeed, recall many of the

---


271. Doha Declaration, supra note 228; see also Yu, The International Enclosure Movement, supra note 192, at 872–74 (discussing the Doha Declaration).

272. TRIPS Amendment, supra note 229; See Yu, The International Enclosure Movement, supra note 192, at 881–86 (discussing the proposed article 31bis of the TRIPS Agreement).


274. See Yu, A Tale of Two Development Agendas, supra note 175, at 519–20 (discussing the two lines of reforms that were included in the WIPO Development Agenda).


276. See The 45 Adopted Recommendations Under the WIPO Development Agenda, WIPO, http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited July 6, 2008) (listing all the 45 recommendations). The six different clusters include: (1) technical assistance and capacity building; (2) norm-setting, flexibilities, public policy and public domain; (3) technology transfer, information and communication technologies and access to knowledge; (4) assessment, evaluation and impact studies; (5) institutional matters including mandate and governance; and (6) other issues. Id.

277. As Laurence Helfer explained:
relativist discussions prevalent in the "Asian values" debate.\textsuperscript{278} As intellectual property and human rights become increasingly linked to each other in international policy discussions, the right to development\textsuperscript{279} and the right to culture,\textsuperscript{280} the two rights to which Asian

The doctrine is essentially the degree of discretion that the ECHR is willing to grant national decision makers who seek to fulfill their human rights obligations under the treaty. Although initially framed as requiring a decision in favor of a state where a government's decision to declare a public emergency (and thus to suspend most of its human rights obligations) was "on the margin" of compatibility with the treaty, the margin of appreciation doctrine has, over time, become a more limited tool by which the Court permits states a modicum of breathing room in balancing the protection of civil and political liberties against other pressing societal concerns. What is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states. Although partially in tension with autonomous and effective interpretations of the treaty, the doctrine has become an essential ingredient of the ECHR's success in fashioning an effective system of adjudication. Given that most of the rights and freedoms protected by the European Convention are not protected unconditionally, but rather expressly permit states to impose restrictions for specified reasons and under certain conditions, the Court must be sensitive to the fact that different acts of national balancing may be compatible with the treaty. Thus, although the effectiveness principle requires that restrictions on protected liberties must be construed narrowly, the ECHR has held that states "enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary." Only after granting such discretion will the Court exercise its independent "European supervision" to the relevant legislation and the decisions applying it.


\textsuperscript{278} See discussion supra Part I.A.

\textsuperscript{279} Article 2(3) of the Declaration on the Right to Development, for example, provides:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.


\textsuperscript{280} With respect to the protection of intangible cultural heritage, an issue that is of great importance to many less developed countries in Asia, article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples further declares:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control and develop their intellectual property over such cultural heritage, traditional knowledge, and
countries have paid special attention, are likely to become important features of the future international intellectual property debate.281

4. Uneven Economic and Technological Developments

Uneven development is a major characteristic of the less developed world, in particular the rapidly-growing emerging countries such as China and India and those with a significant gap between the rich and the poor. As I noted elsewhere in the case of China, the many conflicts and competing interests within China are likely to drive the country's leaders to develop a "schizophrenic" nationwide intellectual property policy.282 While the country wants stronger protection for its fast-growing industries, it prefers weaker protection in fields related to traditional cultural expressions.


pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs, due to its huge population, continued economic dependence on agriculture, the leaders' worries about public health issues, and their concerns about the people's overall well-being.\textsuperscript{283}

Interestingly, the challenges confronting China can be found in other similarly-situated countries, which range from India to Indonesia. As Fareed Zakaria observed, "India might have several Silicon Valleys, but it also has three Nigerias within it—that is, more than 300 million people living on less than a dollar a day. It is home to 40 percent of the world's poor and has the world's second-largest HIV-positive population."\textsuperscript{284} Indeed, "many middle-income developing countries... may want stronger protection for their fast-growing industries and highly economically developed regions, they want weaker protection in the remaining areas."\textsuperscript{285} Given the complexity of the various economies in Chindiaisean, the group may be able to draw on their own experience and problems to develop solutions that address the uneven development problems. Such solutions may be useful for the other less developed countries outside the regional alliance, such as Brazil and South Africa.

5. Abuse of Rights and Restraint on Trade

Less developed countries, most notably Brazil and India, have long held positions that call for the provision of safeguards against the abuse of intellectual property rights and restraints on trade. As Brazil declared in a submission to the TRIPS Negotiating Group:

When one speaks of "rights" of intellectual property owners, one is automatically bound to deal with the subject of "obligations" of these owners.

The objective of such obligations which deserves priority attention is to allow greater access to technological innovation for IPR users. If the whole attention of the discussions is centered on the interests of IPR owners, the balance of the entire IPR system is not taken into account.\textsuperscript{286}

\textsuperscript{283} See id. at 25.

\textsuperscript{284} ZAKARIA, supra note 3, at 133; see also VINAY RAI & WILLIAM L. SIMON, THINK INDIA: THE RISE OF THE WORLD'S NEXT SUPERPOWER AND WHAT IT MEANS FOR EVERY AMERICAN 211 (2007) ("One India wants. The Other India hopes. One India leads. The Other India follows." (italics omitted)).

\textsuperscript{285} Yu, A Tale of Two Development Agendas, supra note 175, at 559.

\textsuperscript{286} Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [TRIPS Negotiating Group], Submission from Brazil \textsuperscript{\textdagger}
During the TRIPS negotiations, India further reminded the delegates that “it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade.”

With China and India as its key constituents, Chindiasean is likely to call for a recalibration of the balance in the international intellectual property system by demanding a greater emphasis on not only rights but also responsibilities. For example, they could demand greater protection against the abuse of rights and restraints on trade. Such positions are well supported by the text and the negotiating history of the TRIPS Agreement, which already includes many provisions targeting abuse of rights or process and restraints on trade or competition. The preamble of the TRIPS Agreement memorialized the negotiators' desire to “reduce distortions and impediments to international trade ... and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” Article 8.2 further states that “[a]ppropriate measures ... may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”

C. Summary

In sum, many issues can find themselves on to Chindiasean’s policy agenda. Some of these issues are traditional issues advanced by less developed countries, many of which were under negotiation before even the establishment of the TRIPS Agreement. Others, however, are new issues on which the international community has yet to achieve a consensus or about which countries have not formulated a position.

\[\text{\footnotesize 12, MTN.GNG/NG11/W/30 (Oct. 31, 1988).} \]
\[\text{\footnotesize 287. TRIPS Negotiating Group, Meeting of Negotiating Group of 12–14 July 1989: Note by the Secretariat ¶ 4, MTN.GNG/NG11/14 (Sept. 12, 1989).} \]
\[\text{\footnotesize 288. See, e.g., TRIPS Agreement pmbl., recital 1; id. arts. 8.2, 40.1, 40.2, 41.1, 48.1, 50.3, 53, 63.1, 67.} \]
\[\text{\footnotesize 289. Id. pmbl., recital 1.} \]
\[\text{\footnotesize 290. Id. art. 8.2 (emphasis added); see also Yu, Objectives and Principles, supra note 267, at 1016–18 (discussing article 8.2 of the TRIPS Agreement).} \]
\[\text{\footnotesize 291. See Yu, A Tale of Two Development Agendas, supra note 175, at 468–511 (discussing the demands of less developed countries as they relate to the development of the Stockholm Protocol Regarding Developing Countries, the formation of WIPO as a specialized agency of the United Nations, the adoption of the draft International Code of Conduct on the Transfer of Technology, and the revision of the Paris Convention).} \]
Because it remains unclear whether these issues will actually be negotiated along the divide between developed and less developed countries, Chindiasean would have an opportunity to shape the negotiation of many of these issues.

Even more interestingly, because the Chindiasean members have very diverse backgrounds, technological capabilities, and innovation paths, the positions they take are likely to be quite different from those of developed countries. As I noted in the inaugural issue of *The WIPO Journal*, “[I]t is premature to assume that less-developed countries, once developed, will always want the existing international intellectual property system. There is a good chance that they may want or need something rather different!”\(^2\) In effect, Chindiasean may set alternative paths that provide other less developed countries, including those outside Asia, with some attractive policy choices. The positions Chindiasean takes therefore may help provide the much-needed momentum for reforms within the existing international intellectual property system, similar to the role played by Brazil and India a few decades ago.

V. Conclusion

This Article has shown that, in the area of intellectual property law and policy, one can neither locate any underlying distinct values, approaches, or practices nor identify established pan-Asian positions. Nevertheless, the middle- and low-income Asian countries may be able to work together to foster regional positions to influence future international intellectual property negotiations. While Japan and, to some extent, South Korea are unlikely to join other Asian countries in taking a strong pro-development stand for Asia, China, India, and ASEAN could team up to maximize their leverage and voice in the international intellectual property arena. They could help shape the development of a powerful regional normative community.

Although the positions and interests of the twelve members of Chindiasean continue to differ, developing a united front for these countries most certainly will help ensure a more desirable bargaining outcome in areas that range from the reshaping of global intellectual property enforcement norms to the protection of traditional knowledge and cultural expressions to the promotion of access to essential medicines. Having unified positions among these countries may also set

---

alternative paths for other less developed countries outside Asia. Thus, from the standpoint of international intellectual property policymaking, the growing intellectual property developments in Asia deserve our greater scholarly attention, even if this century does not end up becoming an Asian century.