



**SCHOOL OF LAW**  
TEXAS A&M UNIVERSITY

Texas A&M University School of Law  
**Texas A&M Law Scholarship**

---

Faculty Scholarship

---

2015

## The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements

Peter K. Yu  
peter\_yu@msn.com

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



Part of the [Intellectual Property Law Commons](#), and the [International Trade Law Commons](#)

---

### Recommended Citation

Peter K. Yu, *The Strategic and Discursive Contributions of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*, 62 Drake L. Rev. Discourse 20 (2015).  
Available at: <https://scholarship.law.tamu.edu/facscholar/407>

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 [aretteen@law.tamu.edu](mailto:aretteen@law.tamu.edu).

---

---

THE STRATEGIC AND DISCURSIVE  
CONTRIBUTIONS OF THE MAX PLANCK  
PRINCIPLES FOR INTELLECTUAL PROPERTY  
PROVISIONS IN BILATERAL AND  
REGIONAL AGREEMENTS

*Peter K. Yu\**

TABLE OF CONTENTS

I. Introduction .....	20
II. Strategic Contributions.....	23
III. Discursive Contributions.....	28
IV. Conclusion.....	31

I. INTRODUCTION

In June 2013, the internationally recognized Max Planck Institute for Intellectual Property and Competition Law (Max Planck Institute)—now the Max Planck Institute for Innovation and Competition—released its *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements* (Max Planck Principles).<sup>1</sup> Drafted by the Institute’s directors and research fellows in collaboration with a team of outside experts, this document seeks to facilitate the development of “international rules and procedures that can achieve a better, mutually advantageous and balanced regulation of international [intellectual property].”<sup>2</sup>

---

\* Copyright © 2014 Peter K Yu, Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. The Author served as one of the 10 outside experts involved in the development of the Max Planck Principles for Intellectual Property Provisions in Bilateral and Regional Agreements. He would like to thank Josef Drexl, Reto Hilty, and Henning Grosse Ruse-Khan for their invitation to participate in this project, and Timothy Alberts for excellent research and editorial assistance.

1. MAX PLANCK INST. FOR INTELLECTUAL PROP. & COMPETITION LAW, PRINCIPLES FOR INTELLECTUAL PROPERTY PROVISIONS IN BILATERAL AND REGIONAL AGREEMENTS (2013), *available at* [http://www.ip.mpg.de/files/pdf2/Principles\\_for\\_IP\\_provisions\\_in\\_Bilateral\\_and\\_Regional\\_Agreements\\_final1.pdf](http://www.ip.mpg.de/files/pdf2/Principles_for_IP_provisions_in_Bilateral_and_Regional_Agreements_final1.pdf) [hereinafter MAX PLANCK PRINCIPLES].

2. *Id.* preface.

The goal of this document is straightforward. International trade negotiations have become increasingly complex,<sup>3</sup> and countries have repeatedly used intellectual property standards as bargaining chips.<sup>4</sup> Even worse, many of the negotiated agreements were concluded through nontransparent, undemocratic, and unaccountable processes.<sup>5</sup> These recent negotiations have therefore created an urgency for international experts to endorse a set of consensus principles to guide the future development of bilateral and regional trade agreements (BRAs).

As with all documents drafted by a committee in collaboration with outside experts sharing different backgrounds, experiences, opinions, concerns, and ideological persuasions, the final text of the Max Planck Principles is filled with broad and compromising language. The document also does not provide any path-breaking solutions to problems it seeks to address, even though it does incorporate solutions that other commentators have previously explored. Instead, the Principles' strength and success lie in the important descriptive and normative statements they provide on how countries should negotiate intellectual property provisions in BRAs.

Although the document does not explicitly mention plurilateral agreements, it is likely to apply well to this type of agreement, which Simon Lester and Bryan Mercurio have referred to as a form of "loose" regional agreements.<sup>6</sup> Thus, the Max Planck Principles provide important guidance on not only the recent free trade and economic partnership agreements, such as those established by the European Union and the United States, but also the Anti-Counterfeiting Trade Agreement (ACTA),<sup>7</sup> the Trans-

---

3. For discussions of the complexities in international trade and intellectual property negotiations, see generally Peter K. Yu, *The Non-multilateral Approach to International Intellectual Property Norm-setting*, in RESEARCH HANDBOOK ON INTERNATIONAL INTELLECTUAL PROPERTY LAW (Daniel J. Gervais ed., forthcoming 2014) [hereinafter Yu, *International Intellectual Property Norm-setting*]; Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1 [hereinafter Yu, *Regime Complex*].

4. See Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 893–94 (2007).

5. See, e.g., Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 998–1015 (2011) [hereinafter Yu, *Six Secret Fears*] (discussing the secretive process used to negotiate the Anti-Counterfeiting Trade Agreement).

6. Simon Lester & Bryan Mercurio, *Introduction to BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 1, 2* (Simon Lester & Bryan Mercurio eds., 2009).

7. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011,

Pacific Partnership (TPP) Agreement,<sup>8</sup> the Transatlantic Trade and Investment Partnership (TTIP) Agreement,<sup>9</sup> and the Regional Comprehensive Economic Partnership (RCEP) Agreement.<sup>10</sup>

The Max Planck Principles are highly authoritative, thanks to the initiative of the Institute, the tireless drafting efforts of its directors and research fellows—most notably, Henning Grosse Ruse-Khan (the project’s coordinator)—the participation of 10 outside experts, and the endorsement of dozens of signatories.<sup>11</sup> Representing many different countries, these signatories come from diverse and wide-ranging backgrounds, including the policy circle, academia, and civil society organizations.<sup>12</sup>

Notwithstanding the Principles’ specific focus and the constraints of the drafting process, the document makes important contributions at both the strategic and discursive levels. This Essay discusses these two sets of contributions and situates them in the context of the ongoing challenges confronting the development of the international trading and intellectual property systems.<sup>13</sup> The Essay concludes by briefly highlighting two important areas of interfaces that the Principles, by design, are unable to address.<sup>14</sup>

Although this Essay was written with the Max Planck Principles in mind, much of the analysis will apply to other documents seeking to delineate a set of coherent principles on intellectual property provisions in BRAs. A case in point is the Global Congress Declaration on Fundamental

---

50 I.L.M. 243.

8. See *Trans-Pacific Partnership (TPP)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Feb. 19, 2014) (providing information about the TPP).

9. See *Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/ttip> (last visited Feb. 19, 2014) (providing information about the TTIP).

10. See *Regional Comprehensive Economic Partnership (RCEP)*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/> (last updated Oct. 14, 2013) (providing information about the RCEP).

11. See *List of Drafters*, MAX PLANCK INST. FOR INNOVATION & COMPETITION, [http://www.ip.mpg.de/en/pub/news/fta\\_statement/list\\_of\\_drafters.cfm](http://www.ip.mpg.de/en/pub/news/fta_statement/list_of_drafters.cfm) (last updated Feb. 18, 2014); *List of Supporters*, MAX PLANCK INST. FOR INNOVATION & COMPETITION, [http://www.ip.mpg.de/en/pub/news/fta\\_statement/list\\_of\\_supporters.cfm](http://www.ip.mpg.de/en/pub/news/fta_statement/list_of_supporters.cfm) (last updated Feb. 18, 2014).

12. See *List of Supporters*, *supra* note 11.

13. See discussion *infra* Parts II–III.

14. See discussion *infra* Part IV.

Public Interest Principles for International Intellectual Property Negotiations.<sup>15</sup> Drafted and endorsed by researchers, scholars, and policy specialists from more than 40 countries, this declaration built on the Max Planck Principles and was recently adopted at the Third Global Congress on Intellectual Property and the Public Interest in Cape Town, South Africa, in December 2013.<sup>16</sup> Like the earlier document, this new declaration is badly needed in light of the increasing comprehensiveness, complexity, and fragmentation of the international trading and intellectual property systems.

## II. STRATEGIC CONTRIBUTIONS

Although the Max Planck Principles were drafted in collaboration with academic commentators, the document is more practical than theoretical. The Principles provide direct guidance on how countries, developing countries in particular, can enhance their bargaining position while at the same time providing much-needed adjustments to the international trading and intellectual property systems.<sup>17</sup> Such guidance is particularly welcome for developing countries, which often “lack . . . resources, expertise, leadership, negotiation sophistication, [and] bargaining power.”<sup>18</sup>

As a strategic document, the Max Planck Principles make four important contributions. The first contribution is the assistance they provide to promote coherence in an increasingly complex and fragmented international trading system. As I have noted in an earlier article, fragmentation occurs along geographic, sectoral, and disciplinary lines.<sup>19</sup> Although commentators have yet to achieve consensus on whether fragmentation helps or hurts developing countries, most commentators take the view that fragmentation tends to hurt these countries more than it helps them.<sup>20</sup> As a result, the development of clear and concise principles is

---

15. See *Global Congress Endorses Principles for International Intellectual Property; Criticizes Trans Pacific Partnership (TPP)*, PROGRAM ON INFO. JUST. & INTELL. PROP. (Dec. 16, 2013), <http://www.pijip.org/2013/12/16/global-congress-endorses-principles-for-international-intellectual-property-criticizes-trans-pacific-partnership-tpp>.

16. See *id.*

17. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 11–30.

18. Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 386 (2008).

19. See Yu, *Regime Complex*, *supra* note 3, at 21–32.

20. See Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 11 (2011);

needed to reduce complexity and fragmentation.

In the past few years, commentators have widely lamented the incoherence of the international intellectual property regime—or, more correctly, the “international intellectual property regime complex,”<sup>21</sup> which can be defined as “a non-hierarchical, decentralised conglomerate regime that includes not only the traditional area of intellectual property laws and policies, but also the overlapping areas in related international regimes or fora.”<sup>22</sup> For example, the *Gowers Review of Intellectual Property* (*Gowers Review*), which was commissioned by the U.K. government, underscored the need to develop intellectual property rights in a coherent manner within both the national and international regulatory systems.<sup>23</sup> Jagdish Bhagwati, researchers from the Asian Development Bank, and other commentators also alerted us to the problems created by the so-called “spaghetti bowl” or the “noodle bowl.”<sup>24</sup> As Viet Do and William Watson vividly described, “[t]he reality of [regional trade agreements] is a certain lumpiness, with the spaghetti tangled in or around four or five discernible clumps—meatballs, perhaps.”<sup>25</sup>

The second contribution of the Max Planck Principles concerns the guidance they provide to restore the balance within the international trading and intellectual property systems. While the acute power asymmetry between developed and developing countries has made such restoration very difficult, if not impossible, the guidance the document

---

Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 978–79 (2011).

21. Yu, *Regime Complex*, *supra* note 3, at 13. For discussions of this regime complex, see *id.* at 13–21; Kal Raustiala, Commentary, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1025–29 (2007).

22. Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 4 (2009) [hereinafter Yu, *Global Intellectual Property Order*].

23. See ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 58–61 (2006).

24. See Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, in JAGDISH BHAGWATI & ANNE O. KRUEGER, THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (1995); Wang Jiangyu, *Association of Southeast Asian Nations–China Free Trade Agreement*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES, *supra* note 6, at 192, 224; Richard Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, 53 SING. ECON. REV. 449 (2008); Yu, *Sinic Trade Agreements*, *supra* note 20, at 978; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 13–14 (Asian Dev. Bank Inst., Working Paper No. 144, 2009), available at <http://ssrn.com/abstract=1480508>.

25. Viet D. Do & William Watson, *Economic Analysis of Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 7, 10 (Lorand Bartels & Federico Ortino eds., 2006).

provides helps level the playing field quite considerably.<sup>26</sup> The Principles also provide the much-needed roadmap to help developing countries strengthen their bargaining position while increasing their sophistication in negotiating BRAs.<sup>27</sup>

One of the challenges concerning developing countries during the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>28</sup> was their limited knowledge about intellectual property and their equally limited ability to bargain with developed countries. As Carolyn Deere Birkbeck, Peter Drahos, Susan Sell, and many other commentators noted, developed countries and their supportive industries successfully used their superior knowledge in the intellectual property field to overwhelm negotiators from developing countries.<sup>29</sup> If this unfortunate piece of history is not to be repeated, the latter group needs to better understand the system while strengthening their negotiating abilities. The Principles will come in handy to provide strategic guidance in both directions.

The third contribution of the Max Planck Principles relates to the emphasis they place on flexibilities and “ceilings.”<sup>30</sup> These ceilings are meant to be contrasted with “floors,” which are common and ubiquitous in agreements designed to set international minimum standards—be they trade agreements, intellectual property agreements, or other types of agreements.<sup>31</sup> The Principles explicitly recognize the need for countries to

---

26. See, e.g., MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 11, 13, 18, 20, 21, 22, 27, 28, 29, 30.

27. See, e.g., *id.* ¶¶ 13, 16, 26.

28. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

29. See CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 8, 54–55 (2009); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 98 (2003); Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 161, 169 (Peter Drahos & Ruth Mayne eds., 2002).

30. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶ 4. See generally Annette Kur & Henning Grosse Ruse-Khan, *Enough Is Enough—The Notion of Binding Ceilings in International Intellectual Property Protection*, in *INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS* 359 (Annette Kur with Marianne Levin eds., 2011) (discussing the notion of ceilings in intellectual property law and policy).

31. See Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM.

adopt standards that are tailored to their social, economic, and technological conditions.<sup>32</sup> The document also highlights the concern that the detailed and highly prescriptive standards many BRAs transplant from developed to developing countries fail to take account of the latter's specific needs, interests, conditions, and priorities.<sup>33</sup>

Since the beginning of this millennium, developing countries have successfully launched development agendas at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), and in other fora governing public health, human rights, biological diversity, food and agriculture, and information and communications.<sup>34</sup> Although these agendas have primary foci in different issue areas, they work in tandem to preserve the sovereignty, autonomy, and policy space countries fought hard to retain in the international intellectual property regime.

The final contribution of the Max Planck Principles pertains to the focus they generate on inclusiveness. The document outlines ways to ensure that BRAs will be negotiated in processes that involve multiple stakeholders and that provide meaningful and equal opportunities for these various actors to influence the negotiations.<sup>35</sup> More importantly, the Principles help facilitate the development of treaties and trade mechanisms that are democratically designed, achieve legitimacy, earn public trust, and have staying power. In the long run, well- and fairly-negotiated outcomes<sup>36</sup> will bring more benefits to both developed and developing countries than what we have today.

Even though the WTO and its developed country members have thus far refused to admit it, one of the major challenges in the current Doha Development Round of Trade Negotiations is that the international trading body—and, by extension, its TRIPS Agreement—has lost its legitimacy and the trust of a large number of WTO members, especially those in the developing world.<sup>37</sup> Although developing countries were

---

U. INT'L L. REV. 727, 756–57 (2011).

32. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 6, 11, 18.

33. See *id.* ¶ 7.

34. See Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 511–40 (2009).

35. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 10–17.

36. Cf. *id.* ¶¶ 18–22 (advancing principles to facilitate the development of well- and fairly-negotiated outcomes).

37. See SELL, *supra* note 29, at 173; Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1024 (2009).



promised concessions in textiles and agriculture in exchange for stronger intellectual property protection and expanded market access, developed countries have not fulfilled their part of the bargain.<sup>38</sup> A case in point is developing countries' continued frustration with agricultural subsidies—cotton subsidies, in particular.<sup>39</sup> Another example is developed countries' continued failure to transfer technology to developing countries despite the explicit obligations under Articles 66 and 67 of the TRIPS Agreement<sup>40</sup> and Paragraph 11.2 of the Doha Ministerial Decision of 14 November 2001.<sup>41</sup>

Thus, if the WTO and its TRIPS Agreement are to regain legitimacy, BRAs have to be negotiated in a way that is both fair and inclusive. Adhering to the Principles will not guarantee that the negotiated agreements will be fair to both sides, due in large part to developing countries' drastically weaker bargaining power. Nevertheless, such adherence would help create a fair and inclusive process, which in turn could yield more buy-in from developing countries even if they could not bargain with developed countries as equal partners.

Taken together, all four contributions have shown how the Max Planck Principles can provide important strategic guidance on how countries can develop intellectual property provisions in future BRAs. The first three contributions discussed in this section—coherence, balance, and flexibility—parallel the analytical framework used in the *Gowers Review*.<sup>42</sup> The last contribution—inclusiveness—was a major concern sparked by the increasingly inappropriate negotiation of “country club” agreements among developed and like-minded countries—a phenomenon that began only a few years ago.<sup>43</sup>

---

38. See Peter K. Yu, *Are Developing Countries Playing a Better TRIPS Game?*, 16 UCLA J. INT'L L. & FOREIGN AFF. 311, 318–19 (2011); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 379–86 (2006).

39. See Ravi Kanth Devarakonda, *TRADE: “Cotton Dossier” Will Make or Break WTO’s Doha Round*, INTER PRESS SERVICE (June 9, 2010), <http://www.ipsnews.net/2010/06/trade-cotton-dossier-will-make-or-break-wtorsquos-doha-round/>.

40. TRIPS Agreement arts. 66–67.

41. World Trade Organization, *Implementation-Related Issues and Concerns: Decision of 14 November 2001*, ¶ 11.2, WT/MIN(01)/17, 41 I.L.M. 757 (2002).

42. See GOWERS, *supra* note 23, at 6–7.

43. See Daniel Gervais, *Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm Making in the Wake of ACTA*, in *TRADE GOVERNANCE IN THE DIGITAL AGE: WORLD TRADE FORUM* 323, 324 (Mira Burri & Thomas Cottier eds., 2012); Peter K. Yu, *The ACTA/TPP Country Clubs*, in

### III. DISCURSIVE CONTRIBUTIONS

The second set of contributions made by the Max Planck Principles concern the ongoing intellectual property debate. Endorsed by intellectual property experts from around the world,<sup>44</sup> the document serves as an authoritative statement not only on what policymakers and negotiators should do, but also on what is wrong with our current intellectual property system—domestic and international alike.

At the discursive level, the Principles make six important contributions. First, the intellectual property system cannot be designed with the belief that one size will always fit all. More importantly, if there is only one size, that size cannot be extra-large.<sup>45</sup> As I have noted repeatedly, the TRIPS Agreement is flawed not only because it is “one size fits all” but also because it is “super size fits all.”<sup>46</sup> Economists and development experts have empirically shown that countries need to adopt intellectual property standards that are tailored to their economic conditions, imitative or innovative capacity, research and development productivities, and the presence of the much-needed human capital.<sup>47</sup> It is therefore highly important that the Principles call for the inclusion of prodevelopment flexibilities and safeguards in BRAs.<sup>48</sup>

Second, intellectual property should be developed in a transparent, democratic process that provides accountability. The procedures that the Max Planck Principles call for stand in stark contrast to the nontransparent, undemocratic, and unaccountable processes that have been used to negotiate ACTA, the TPP, the TTIP, and other BRAs.<sup>49</sup> The contrasting processes explain why such negotiations have thus far been highly controversial. The efforts to sign ACTA, for example, attracted protests from the public in multiple European cities and resulted in an unprecedented rejection by the European Parliament.<sup>50</sup>

---

ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 258 (Dana Beldiman ed., 2014); Yu, *Six Secret Fears*, *supra* note 5, at 1074–83.

44. See *List of Drafters*, *supra* note 11; *List of Supporters*, *supra* note 11.

45. See James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV., No. 9, at 1, 3–4.

46. E.g., Yu, *Global Intellectual Property Order*, *supra* note 22, at 9.

47. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 233 n.502 (2000).

48. See, e.g., MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 4, 5, 21.

49. See *id.* ¶¶ 10, 12, 13, 14, 15, 17, 28.

50. See MONICA HORTEN, A COPYRIGHT MASQUERADE: HOW CORPORATE

Third, the development of intellectual property law and policy should not be conducted as a faith- or rhetoric-based exercise. Instead, it should be based on empirical support and verifiable data.<sup>51</sup> Not only do the Max Planck Principles call for evidence-based law- and policymaking, but they also underscore the importance of undertaking impact studies.<sup>52</sup> Those studies are consistent with the WIPO Development Agenda, which includes “assessment, evaluation, and impact studies” among one of its six clusters of recommendations.<sup>53</sup> Impact assessments have also been widely used in the fields of biological diversity, human rights, and public health.<sup>54</sup>

Fourth, the negotiation of intellectual property provisions in BRAs should not privilege intellectual property rights holders.<sup>55</sup> Although rights holders have played an admittedly important role in the intellectual property system, the advent of new technologies—including the internet and other new media—has led to the emergence of a rich and wide variety of new or previously unengaged stakeholders.<sup>56</sup> Thus, regardless of how good the intentions of intellectual property rights holders may be, it would be highly unwise to leave the development of the intellectual property system to only a narrow group of self-interested players.<sup>57</sup>

---

LOBBYING THREATENS ONLINE FREEDOMS 106–28 (2013).

51. See WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 49–74 (2011); Yu, *The International Enclosure Movement*, *supra* note 4, at 897–99.

52. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 16, 22; see also Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1096–98 (2012) (discussing the need for human rights impact assessments); Yu, *The International Enclosure Movement*, *supra* note 4, at 901 (discussing the need for impact studies in the intellectual property area).

53. *The 45 Adopted Recommendations Under the WIPO Development Agenda*, WORLD INTELL. PROP. ORG., cluster D, <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited Feb. 19, 2014).

54. See, e.g., Convention on Biological Diversity art. 14(1)(a), June 5, 1992, 1760 U.N.T.S. 143; U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant) ¶ 35, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), available at <http://www.unhcr.org/refworld/category,LEGAL,CESCR,,441543594,0.html>; Comm'n on Intellectual Prop. Rights, Innovation & Pub. Health, World Health Org., *Public Health: Innovation and Intellectual Property Rights* 10 (2006).

55. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶¶ 10, 14, 15, 17, 22.

56. See Yu, *A Tale of Two Development Agendas*, *supra* note 34, at 538.

57. The same argument could be made against a process that privileges civil society organizations. As far as intellectual property is concerned, however, these organizations have not yet achieved as privileged a position as that of intellectual

Fifth, the negotiation of intellectual property provisions in BRAs should not take on a heavy gloss of trade, investment, or security.<sup>58</sup> In recent years, many developed countries—in particular the United States and members of the European Union—have used intellectual property standards as bargaining chips to negotiate their BRAs.<sup>59</sup> Distorted by the focus on trade or investment as the bottom line, the negotiation of many of these standards ends up ignoring incentives they seek to generate and the balance that the intellectual property system traditionally strikes.<sup>60</sup>

Finally, technical assistance should not be provided based on the interests of donor countries or the privileged members of an international intergovernmental organization—be it WIPO or the WTO.<sup>61</sup> While developing countries remain in need of assistance from developed countries, it is important that the former will be able to secure the type of assistance they need. Although the drafters of the Max Planck Principles were concerned about the plight of developing countries, they rightly refrained from taking a paternalistic approach to prescribe what these countries should do. Instead, the document underscores the need for these countries to have technical assistance that takes account of developmental needs.<sup>62</sup>

In sum, the Max Planck Principles provide important guidance on issues highly important to the ongoing intellectual property debate. The six contributions highlighted here not only provide a quick recapitulation of the major problems confronting our intellectual property system, but also

---

property rights holders. Given the current developments, it is also unlikely that they will be able to do so in the near future.

58. See Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, in HUMAN RIGHTS AND INTELLECTUAL PROPERTY: FROM CONCEPTS TO PRACTICE (Christophe Geiger ed., forthcoming 2014) (noting the problems raised by putting such a heavy trade gloss on intellectual property provisions); Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play 3* (Am. Univ. Wash. Coll. of Law Program of Info. Justice & Intellectual Prop., Research Paper Series No. 15, 2010) (noting the growing use of security to frame demands for higher intellectual property standards), available at <http://digitalcommons.wcl.american.edu/research/15/>.

59. See, e.g., Yu, *The International Enclosure Movement*, *supra* note 4, at 892–94.

60. See *id.* at 892–901 (discussing an emerging “incentive-investment divide” between national and foreign intellectual property policies).

61. See DEERE, *supra* note 29, at 200–01; Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 25 (2004).

62. See MAX PLANCK PRINCIPLES, *supra* note 1, ¶ 27.

remind us about how far the intellectual property policy debate has advanced. Although the issues discussed here have been around for more than a decade now, they did not receive much attention until recently. It is therefore important that developing-country governments and their supporters do not lose sight of the momentum they have built. It is also urgent that they take advantage of the Principles or similar documents to reflect on those BRAs they have already signed and to advance the position they are now taking in ongoing negotiations.<sup>63</sup>

#### IV. CONCLUSION

While the Max Planck Principles have made important contributions at both the strategic and discursive levels, they do not speak much about issues concerning the interfaces with BRAs other than the cross-disciplinary interactions between intellectual property and other issue areas.<sup>64</sup> The lack of such discussion was due in large part to the specific design of the document. The challenge of including all the principles in a four-page document is immense, and the drafters inevitably struggled with the usual trade-offs between breadth and brevity. Nevertheless, the omitted interface issues remain important in the context of intellectual property provisions in BRAs.<sup>65</sup>

External to the ever-expanding web of BRAs are issues concerning the interface between these agreements and the multilateral trading system. As shown by WIPO's recent successful negotiation of the Beijing Treaty on Audiovisual Performances<sup>66</sup> and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled,<sup>67</sup> developed and like-minded countries have not abandoned the multilateral forum, notwithstanding

---

63. See *id.* ¶ 30.

64. See *id.* ¶ 23.

65. See Sonja Bartsch et al., *Interfaces: A Concept for the Analysis of Global Health Governance*, in *GLOBAL HEALTH GOVERNANCE AND THE FIGHT AGAINST HIV/AIDS* 18 (Wolfgang Hein et al. eds., 2007) (advancing the concept and logic of “interfaces” for analyzing global governance); Peter K. Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 *ARIZ. ST. L.J.* 1563, 1622 (2013) (discussing the growing attention on the multifaceted interfaces between and among different international regimes).

66. Beijing Treaty on Audiovisual Performances, *adopted* June 24, 2012, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=295837](http://www.wipo.int/treaties/en/text.jsp?file_id=295837).

67. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, *adopted* June 27, 2013, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=301016](http://www.wipo.int/treaties/en/text.jsp?file_id=301016).

their negotiation of BRAs, ACTA, the TPP, the TTIP, and the RCEP.<sup>68</sup> Instead, BRAs and the multilateral system seem to be developing in a parallel fashion at the same time.<sup>69</sup> How the former interfaces with the latter will remain highly significant in the near future.

Internally, it is equally important to remember that BRAs vary considerably in goals, participants, format, coverage, language, and emphases. Such variations largely depend on the countries initiating the related agreements. While BRAs initiated by the United States tend to be created out of a template,<sup>70</sup> agreements negotiated by other countries contain more variations. The free trade agreements negotiated by China, for example, are filled with terms that are specifically tailored to the needs and interests of its negotiating partners.<sup>71</sup> Many of these agreements also seek to achieve noneconomic goals, along with the usual economic or trade-related targets.<sup>72</sup> Taken together, all of these variations could eventually precipitate tension, or even conflict, within the international trading and intellectual property systems, leading to what I have described as a “battle” of free trade agreements.<sup>73</sup>

There are still many important and intriguing issues concerning BRAs that the Max Planck Principles have been unable to address. Interestingly, many of these issues will bring us back to the need for having this document in the first place. The development of BRAs has created many new questions and unintended consequences. It is high time we use these

---

68. See Yu, *International Intellectual Property Norm-setting*, *supra* note 3.

69. See *id.*

70. For discussions of the United States’ template-based approach, see Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 794 (2001); Susy Frankel, *Challenging TRIPS-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT’L ECON. L. 1023, 1025 (2009); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 686 (1998).

71. See Yu, *Sinic Trade Agreements*, *supra* note 20, at 1011–13.

72. See Paul G. Buchanan, *Security Implications of the TPPA*, in NO ORDINARY DEAL: UNMASKING THE TRANS-PACIFIC PARTNERSHIP FREE TRADE AGREEMENT 82 (Jane Kelsey ed., 2010) (discussing the TPP’s security implications); Olivier Cattaneo, *The Political Economy of PTAs*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 28, 42–50 (Simon Lester & Bryan Mercurio eds., 2009) (discussing how political considerations can drive the negotiation of BRAs); Yu, *Sinic Trade Agreements*, *supra* note 20, at 992–1002 (discussing the noneconomic considerations that drive the negotiation of China’s free trade agreements).

73. Yu, *Sinic Trade Agreements*, *supra* note 20, at 1018; see also *id.* at 1018–27 (discussing this battle).

principles to assuage the collateral damage bilateral, plurilateral, and regional agreements have inflicted on the international trading and intellectual property systems.