A Tale of Two Development Agendas

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A Tale of Two Development Agendas

PETER K. YU*

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* Copyright © 2009 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. An earlier version of this Article was delivered as the opening lecture of the Dean’s Lecture Series at Ohio Northern University Pettit College of Law on September 21, 2007. The article was also presented at the Fifth Annual Work-in-Progress Intellectual Property Colloquium at American University Washington College of Law and benefited from peer discussion at the Second EDGE Network Annual Conference in Vancouver, Canada, and the “Strategies to Implement a WIPO Development Agenda” Workshop at the University of Hong Kong Faculty of Law. The Author would like to thank Scott Gerber, Liam O’Melinn, Joshua Sarnoff, and Jeremy de Beer for their kind invitations and hospitality and Pedro Roffe for suggesting the close resemblance between the WIPO Development Agenda and the International Code of Conduct on the Transfer of Technology. He is also grateful to Colleen Chien, Jeremy de Beer, Daniel Gervais, Christopher May, and Joshua Sarnoff for their valuable comments and suggestions; Jonathan Soike for excellent research and editorial assistance, and the staff of the Ohio Northern University Law Review in particular Jake LaForet and Charlotte Sidor, for their patience in the production process.
I. INTRODUCTION

It was the year of Our Lord two-thousand and four. The international intellectual property regime was in a deepening crisis. While developed countries were pushing for the establishment of bilateral and regional trade and investment agreements, less developed countries responded by pursuing development agendas at the World Trade Organization ("WTO"), the World Intellectual Property Organization ("WIPO"), and other international fora that

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2. The Agreement on Trade-Related Aspects of Intellectual Property Rights distinguishes between developing and least developed countries. Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPs Agreement], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter Marrakesh Agreement]. This Article uses "less developed countries" to denote both developing and least developed countries. When referring to the TRIPs Agreement, this Article returns to the terms "developing countries" and "least developed countries."
govern public health, human rights, biological diversity, food and agriculture, and information and communications.  

From the standpoint of less developed countries, the recent developments in the international intellectual property regime are both exciting and worrisome. On the one hand, they reflect a growing momentum these countries have not experienced in decades—since perhaps the establishment of the New International Economic Order in the mid-1970s. The developments therefore have provided an unprecedented opportunity for countries to recalibrate the balance in the international intellectual property system. On the other hand, the developments are remarkably similar to those that took place in the wake of the old—and admittedly failed—Development Agenda, which less developed countries advanced in the 1960s and 1970s. These similarities have raised concerns about whether the present Development Agenda will follow the path of its ill-fated predecessor.

This Article brings together these two Development Agendas—or, to be more precise, two sets of development agendas—to evaluate the potential success of the present Development Agenda. Drawing on lessons from the earlier agenda, this Article provides insights into whether and how the present agenda can be made more successful and effective. For comparison purposes, the Article refers to the present agenda throughout as the “New Agenda” and uses the term the “Old Agenda” to denote the agenda advanced in the 1960s and 1970s. The word “old” is used here not to indicate the obsolescence of the earlier agenda, which remains highly relevant today. Rather, the term is used to remind readers that the present agenda, despite its broad coverage and widespread support, represents an ongoing struggle by less developed countries to develop an innovation system that responds to their needs, concerns, and local conditions.

Part II traces the development of the Old Agenda. In particular, it discusses (1) the drafting of the Protocol Regarding Developing Countries (“Stockholm Protocol”) to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), (2) the formation of WIPO as a specialized agency of the United Nations, (3) the establishment of the draft International Code of Conduct on the Transfer of Technology (“International

4. See discussion infra Part II.C.
5. See discussion infra Part II.
Code of Conduct” or “Code”), and (4) the revision of the Paris Convention for the Protection of Industrial Property (“Paris Convention”).

Part III takes stock of the New Agenda. This Part covers not only developments in the WTO and WIPO, but also those in the other fora that govern human rights, public health, biological diversity, food and agriculture, and information and communications. Although the length of this Article does not allow me to provide more detailed discussions of these vastly diverse fora, this Part illustrates how intellectual property issues have been transformed from a narrow, technical domestic issue to one that is multifaceted and central to the international policy agenda. This Part further suggests that the increased fragmentation of international law, the continuous blurring of boundaries between the different issue areas, and the growing complexity of the international intellectual property regime have provided less developed countries with both promises and challenges.

Part IV concludes with six brief observations concerning the similarities and differences between the Old and New Development Agendas. This Part begins by focusing on the various players, fora, and issues involved in the two agendas. It then discusses the changing political environment surrounding the development of the New Agenda, the growing public awareness of intellectual property issues in the past decade, and the emergence of new ideas, concepts, and rhetorical frames that have been used to boost the New Agenda. This Part suggests that the significant differences between the Old and New Agendas may provide hope for greater economic, social, cultural, and technological development in the less developed world. It nevertheless cautions that, if this hope is to be realized, less developed countries and their supporters need to take the New Agenda seriously and mobilize before they lose their momentum.

II. THE OLD DEVELOPMENT AGENDA

In the 1960s and 1970s, less developed countries repeatedly expressed serious concern about the inappropriateness of the international intellectual property system for their own economic, social, cultural, and technological development. Although the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”) had yet to be established and there were no salient public health crises, like the HIV/AIDS pandemic in
Africa, these countries were gravely troubled by the high international intellectual property standards set by the colonial powers. Even worse, because of past colonization, virtually all of these standards were developed without much of the participation of less developed countries. Through colonial acts, the standards were transplanted directly from the metropolitan states to the colonial territories, even though these territories had not signed the international conventions. These standards not

11. There were, nevertheless, serious problems concerning access to medicines in many less developed countries. See, e.g., Srividhya Ragavan, Of the Inequals of the Uruguay Round, 10 MARQ. INTELL. PROP. L. REV. 273, 280 (2006) (noting a severe lack of access to medicines and a high rate of epidemic diseases in India).

12. As the Resource Book on TRIPS and Development suggested in the TRIPs context:
The Paris and Berne Conventions have been in force for more than a century and a great deal of state practice under these conventions has accumulated. . . . [However], a number of WTO Members were not parties to the Paris and Berne Conventions for much of the historical evolution of these treaties. A number of developing and least-developed WTO Members were subject to foreign rule for a good part of the period during which the Paris and Berne Conventions were evolving. The developing and least-developed Members might argue in favour of being allowed to develop their own state practice before the practices of developed Members are used to interpret TRIPS.

UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 51 (2005); see also R.P. ANAND, NEW STATES AND INTERNATIONAL LAW 20 (1972) ("Having lost their international personality, the Asian states could not play any active role in the development of international law during the most creative period of its history in the latter part of the nineteenth and the beginning of the present century.").

13. See Ruth L. Gana (Okediji), The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development, 18 LAW & POL’Y 315, 329 (1996) ("As colonies, developing countries were not signatories to the early international intellectual property treaties although the treaty provisions often extended to them through the colonial administration."); see also Ulf Andersfeldt, INTERNATIONAL PATENT-LEGISLATION AND DEVELOPING COUNTRIES 119 (1971) ("The faculty to extend Union territory and, in certain cases, full membership status to colonies and other dependencies has been used particularly by France, and to a limited extent by Great Britain, Germany and Holland."). As Professor Okediji explained:

Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe. Granted, intellectual property systems in Europe prior to the seventeenth century were neither fully developed nor had intellectual property protection become a systematic policy designed primarily for encouraging domestic innovation. Whatever protections existed, however, would be exerted against other Europeans in colonial territories in the process of empire building. The [early period of European contact through trade with non-European peoples] thus was characterized predominantly by the extension of intellectual property laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories.

only ignored their local conditions, but also hampered access to the information, knowledge, and technology needed for competitiveness, internal growth, and development.

Once these countries joined the international community following their declaration of independence, they "became more assertive of their rights and aware of their international obligations." As shown by the problems created by state succession to treaties, these countries were torn between affirming and denouncing international obligations into which their former colonial rulers had entered on their behalves.

As newly independent states, these countries were "keen to establish their membership of international society by joining various multilateral agreements and international organizations." Such membership would provide these countries with highly desirable opportunities to exercise their newfound independence and sovereignty. As Georges Abi-Saab wrote many decades ago, "[f]or the newly independent states, sovereignty is the hard won prize of their long struggle for emancipation. It is the legal epitome of the fact that they are masters in their own house."

Unfortunately, for these new comers, the extant standards were too high and did not take into account the specific economic conditions and technological backwardness of these countries. The adoption of these standards, therefore, would likely impede efforts to catch up with other developed countries. As Sam Ricketson and Jane Ginsburg explained the different objectives underlying the development of the Berne Convention:

The Convention is essentially concerned with the private interests of authors, and with raising the level of protection that is accorded to them. Such questions are not usually of great significance to developing countries. These are at varying stages of economic development, with the consequences that the standard of living of their populations is generally much lower than that found in the developed countries. Economic development, even where this means no more than the attainment of a basic level of self-sufficiency, is therefore an overriding goal for these countries. Ways of achieving

this object are through the promotion of literacy and through technical and vocational training, and these programmes, in turn, necessitate ready access to a wide range of educational and informational materials. The authors and publisher/providers of many of these works, however, will usually be resident in one of the developed countries, and the works themselves will generally be subject to copyright protection both in that country, as well as under Berne. This naturally causes problems for a developing nation, which is generally deficient in the foreign currency that is needed to buy stocks of these works, or to purchase authorization to reproduce, translate, or otherwise utilize them for their purposes.  

Against this background, less developed countries advanced the Old Development Agenda in the 1960s. To help us better understand this Agenda, this Part focuses on (1) the drafting of the Stockholm Protocol, (2) the formation of WIPO as a specialized agency of the United Nations, (3) the establishment of the International Code of Conduct, and (4) the revision of the Paris Convention. Although these four developments are discussed in separate sections, they took place concurrently and were interdependent. They are therefore more correctly seen as part of a larger development agenda—in this case, the Old Development Agenda.

A. Stockholm Protocol

When the Berne Convention was revised in Brussels in 1948, only India and Pakistan participated as fully independent nations. While other less developed countries were previously subject to the Berne provisions, the Convention applied to them only by virtue of their status "as dependent territories." Once they became independent, they therefore began to question the extant international copyright relationship—in particular, whether they should continue as members of the Berne Convention in their own right or whether they should withdraw from the Union. While India, Pakistan, the
Philippines, and many former French and Belgian African colonies elected to remain bound by the Convention, Indonesia decided to withdraw from the Union.\textsuperscript{22}

Notwithstanding their new Berne memberships, many less developed members, along with those that had chosen to remain outside the Union, questioned whether those copyright standards that were set up primarily for the developed world would be appropriate for them in light of their limited economic development and technological backwardness. To further explore this question, the African Study Conference on Copyright was convened in Brazzaville in August 1963.\textsuperscript{23} Jointly organized by the United International Bureau for the Protection of Intellectual Property ("BIRPI," an acronym for its French name, Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle) and the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), this conference sought "to assist the new African states to formulate appropriate principles for the drafting of their own copyright laws."\textsuperscript{24}

Participating in the conference were twenty-three African countries, some non-African countries, and a number of nongovernmental international organizations.\textsuperscript{25} Although "[p]art of the seminar was purely educational and informational,"\textsuperscript{26} the African delegates "expressed the view that the major conventions needed to be reexamined in light of the specific needs of the African continent."\textsuperscript{27} At the end of the conference, the participants adopted three specific recommendations: (1) the reduction of the copyright term stipulated in article 7 of the Berne Convention; (2) the modification of article 20 to facilitate the development of bilateral agreements that would allow parties to derogate from their international obligations; and (3) special provisions for the protection of African folklore and for promoting free educational use of copyrighted works.\textsuperscript{28} The participants further proposed the development, with the assistance of UNESCO and WIPO, of a model copyright law suitable for conditions in Africa.\textsuperscript{29}

All of these recommendations were badly needed by less developed countries. Up until the Brazzaville Conference, "the preparatory work for the Berne revision had taken no account of the[ir] problems . . . , and had been

\textsuperscript{22} Id.  
\textsuperscript{23} For a discussion of the Brazzaville Conference, see generally Johnson, \textit{supra} note 18, at 103-08.  
\textsuperscript{24} Ricketson \& Ginsburg, \textit{supra} note 18, at 888.  
\textsuperscript{25} See id. The list of these countries is available at Johnson, \textit{supra} note 18, at 104 n.43.  
\textsuperscript{26} Ricketson \& Ginsburg, \textit{supra} note 18, at 888.  
\textsuperscript{27} Id. (quoting Johnson, \textit{supra} note 18, at 107).  
\textsuperscript{28} NdéntNdïaye, \textit{The Berne Convention and Developing Countries}, 11 Colum.-VLA J.L. \& Arts 47, 47-48 (1986).  
\textsuperscript{29} Ricketson \& Ginsburg, \textit{supra} note 18, at 889.
essentially concerned with the question of raising the level of protection offered by that Convention." Although the original Berne Convention included less developed members, such as Haiti and Tunisia, "the process of decolonization brought into existence a large number of new independent states, notably in Africa and Asia." The growing number of these states, in turn, had magnified the problem of having high copyright standards in the less developed world.

Four months after the Brazzaville Conference, the governing bodies of the Berne Union and the newly-created Universal Copyright Convention ("U.C.C.") adopted a similar resolution in a joint session in New Delhi. The resolution "stress[ed] the need to allow compulsory licenses for educational and translation purposes." During the session, the Indian delegation proposed a feasibility study on the introduction of compulsory reproduction licenses for educational purposes and of translation licenses that were similar to those found in the U.C.C. Pursuant to this proposal, the governing bodies invited the secretariats to prepare the study and "gave their general support to the work of the recent Brazzaville Conference, in particular the proposal for a draft model law for African countries." This proposal eventually led to the development of the Tunis Model Law on Copyright, which has significant influences on the copyright laws of many African countries.

In the following year, an expert study group "recommended the text of a new article on developing countries to be added to the Berne Convention." Generally sympathetic to the plight of less developed countries, the group emphasized that "exceptional measures for the benefit of developing countries

30. Id.
31. See id. at 883 ("Of the initial signatories of the Berne Act, two can be fairly regarded as falling within the category of what are today called developing countries.").
32. Id. at 885.
33. Ndiaye, supra note 28, at 48. For a discussion of the joint session, see generally Johnson, supra note 18, at 116-18.
34. Ndiaye, supra note 28, at 48.
35. See Ricketson & Ginsburg, supra note 18, at 889.
36. Id. at 889-90.
38. See Kuruk, supra note 37, at 814-15.
were in principle justified." The experts also noted "the advantages to authors if developing countries were induced to draft their domestic copyright legislation on the pattern of the Berne Convention."

These recommendations, to some extent, reflected the dilemma confronting many developed Berne members. On the one hand, they "saw the potential for encouraging these 'new' states to join and by doing so expand the realm of governance for intellectual property, which would potentially benefit the export oriented companies in their own national intellectual property-related sectors." The developed Berne members therefore were willing to offer concessions as "sweeteners" to entice these countries to join the Union. On the other hand, these members were reluctant to adopt those changes to the Berne Convention that would be needed if they were to attract newly independent states. Because these countries had fought hard to raise the international copyright standards over the past eighty years, these changes would be major setbacks and were deemed highly undesirable.

To complicate matters, the Berne Convention faced significant competition from the U.C.C., which UNESCO adopted in 1952 to provide an alternative to entice the United States and other American countries to join the international copyright family. Under the U.C.C., member states were allowed to grant compulsory licenses for translation purposes and to retain formalities in their copyright systems. The Convention also counted among its members the United States, which did not join the Berne Union until 1989. In short, the U.C.C. presented an attractive alternative, especially for those countries that "wished to obtain protection for their works abroad but

40. Id.
41. Id.
42. MAY, supra note 16, at 22.
43. Cf. Gana, supra note 13, at 330 ("Accommodation led to special terms of accession to international treaties by developing countries. These 'sweeteners' became the distinguishing feature of international treaty making between developed and developing countries affecting every area of international commitment including intellectual property treaties." (footnote omitted)).
44. See RICKETSON & GINSBURG, supra note 18, at 885 (recounting that there was "a general view that the future growth of the Union would be restricted unless some specific concessions were made in favour of developing countries, both inside and outside the Union").
45. These revision conferences were held in Berlin in 1908, in Rome in 1928, and in Brussels in 1948. See id. at 92-120 (discussing the Berne revision conferences in Berlin, Rome, and Brussels).
46. See id. at 1177-83; Yu, Currents and Crosscurrents, supra note 3, at 342.
48. U.C.C., supra note 47, art. III.
felt unable or unwilling to accord to foreign works the high level of protection required by the Berne Convention."

Such competition had raised concerns among BIRPI and the developed Berne members that the newly independent states might either join the U.C.C. or establish their own separate union. Indeed, as Barbara Ringer, the former U.S. Register of Copyrights, recalled, "[t]here was obviously a fear that . . . Berne would become a moribund old gentlemen's club." This fear was understandably justified. By the time the Intellectual Property Conference of Stockholm ("Stockholm Conference") was held in 1967, the U.C.C. already had attracted twenty-six less developed country members, with its total membership lagging behind the Berne Convention by only two. While "the former French African colonies and some of the former British Asian Dominions had preferred Berne, . . . the UCC had attracted the Central and South American countries and a number of former British dependent territories." The only major barrier that would prevent countries from migrating from Berne to the U.C.C. was the Berne safeguard clause, which prohibited Berne members that have withdrawn from the Union from benefiting from the U.C.C. in countries that were members of both the U.C.C. and the Berne Convention. Although this clause helped deter defection, it did not affect those countries that had yet to join the Union, including many less developed countries in Africa, Asia, and the Americas.

50. RICKETSON & GINSBURG, supra note 18, at 886; see also Ringer, Role of the United States, supra note 39, at 1061 (describing the U.C.C. as "a new 'common denominator' convention that was intended to establish a minimum level of international copyright relations throughout the world, without weakening or supplanting the Berne Convention"). But see RICKETSON & GINSBURG, supra note 18, at 889 (noting the interest of African states to join the Berne Convention in light of the fact that the Convention, "in view of its longer history, was seen as the more prestigious instrument"); Ringer, Role of the United States, supra note 39, at 1068 (stating that "the Berne Union has the prestige and traditions that the U.C.C. lacks").

51. See Ringer, Role of the United States, supra note 39, at 1075 (noting the declaration of the Indian Registrar of Copyrights that "a country like India would have no alternative but to denounce both Berne and the U.C.C. and 'to strike out on its own or, if possible, sponsor or join a separate Union with other countries similarly placed' if the Stockholm Protocol was blocked).

52. Id. at 1066; see also Eugene M. Braderman, International Copyright—A World View, 17 BULL. COPYRIGHT SOC'Y USA 147, 147 (noting the "fear that there would be a mass exodus of developing countries from Berne and into the UCC").

53. RICKETSON & GINSBURG, supra note 18, at 886. These countries included Argentina, Brazil, Cambodia, Chile, Costa Rica, Cuba, Ecuador, Ghana, Guatemala, Haiti, India, Kenya, Laos, Lebanon, Liberia, Malawi, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Venezuela, Yugoslavia, and Zambia. Id. at 886 n.17.

54. Id. at 886.

55. See U.C.C., supra note 47, art. XVII & app. decl.

56. At the time of the Stockholm Conference, the Berne Convention had twenty-eight less developed country members, while the U.C.C. had twenty-six. RICKETSON & GINSBURG, supra note 18, at 886. Only seven of these countries had memberships in both Conventions. See id.
In June 1967, the Stockholm Conference was convened to provide a forum for revising substantive provisions of the Berne Convention, along with one provision of the Paris Convention (which would be amended to accommodate inventors' certificates in Socialist countries).\(^\text{57}\) The Conference also sought "to effectuate the structural and administrative reform of the Paris and Berne Unions as well as of the then existing five special agreements under the Paris Union."\(^\text{58}\) By revamping the BIRPI's structure, this conference helped pave the way for the organization to join the United Nations as a specialized agency.\(^\text{59}\)

Although only two less developed countries participated in the Brussels Revision Conference in 1948, these countries accounted for slightly more than forty percent of the Berne membership by the time the Stockholm Conference was held.\(^\text{60}\) During the Conference, they unsurprisingly expressed their deep dissatisfaction with the high copyright standards in the Convention, arguing that those standards "did not take sufficient account of their particular needs."\(^\text{61}\) As the leader of the less developed world, India expressed its concerns about "the high prices and frequent unavailability of [copyright] works from the developed countries" and strongly advocated the need for special and differential treatment that would "allow for the freer circulation of . . . works in developing countries."\(^\text{62}\) Taking its lead, less developed countries threatened to make drastic changes to their international copyright arrangements, unless major concessions were made to accommodate their economic, social, cultural, and technological needs.\(^\text{63}\)

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58. BOGSCH, supra note 57, at 24.

59. See discussion infra Part II.B.

60. See RICKETSON & GINSBURG, supra note 18, at 885 (noting that "by the time of the Stockholm Conference, twenty-four members of the Union (with a total membership of fifty-seven) could be regarded as developing countries within the terms of appropriate UN resolutions on the subject" (footnotes omitted)); see also MAY, supra note 16, at 22 ("As more and more new states emerged during the post-1945 period of accelerated decolonization, the membership profile of the BIRPI started to shift from being dominated by industrialized and developed states.").

61. RICKETSON & GINSBURG, supra note 18, at 885.

62. Id. at 887.

63. See Ringer, Role of the United States, supra note 39, at 1065; see also RICKETSON & GINSBURG, supra note 18, at 899 (noting that "African and Asian countries took a similar approach to that of India, with general support of socialist countries").
To some extent, less developed countries perceived the demanded arrangements as a means to promote literacy and provide training and vocational assistance. Their colonial backgrounds also led them to view these arrangements as moral obligations on the part of the former colonial powers. Nevertheless, to reassure developed countries that the proposed concessions would not weaken the Union, India argued that [the concessions] were necessary at this stage in order to enable the developing countries to attain the high standards of protection required by the Convention. [Because] a person “making a long jump took steps backward to enable him to make a greater leap forward[,] . . . ‘any temporary lowering of the standards of the Convention would eventually be more than compensated for’.

The Stockholm Conference eventually led to the development of a special protocol for less developed countries. This protocol, if adopted, would allow less developed countries to make reservations to the Berne Convention in the areas of copyright duration and reproduction, translation, and broadcasting licenses. Because the protocol was not drafted as an amendment to the Berne Convention, it neither affected the protections in developed countries nor reduced the high standards of protection within the Union. Rather, it provided less developed countries with “interim measures that would be abandoned by countries when they reached higher levels of development.”

Although the Stockholm Protocol was as best a compromise as less developed countries could elicit from their more developed neighbors, many less developed countries were disappointed that “not enough had been achieved” in the Conference and that the Protocol “was only a halfway step in the right direction.” Meanwhile, the European and Latin American members expressed their dissatisfaction with the protocol. Among these

64. See RICKETSON & GINSBURG, supra note 18, at 899.
65. See, e.g., id. (“Underlying [the position of these countries] was the view that their lack of development was largely due to their colonial past, and that the obligation of the developed states to assist them was in the nature of a moral debt.”); ANAND, supra note 12, at 98 (noting the “moral obligation of the Western Powers to help the countries which they colonized and exploited”).
66. RICKETSON & GINSBURG, supra note 18, at 899 (footnotes omitted).
68. RICKETSON & GINSBURG, supra note 18, at 895.
69. Id. at 913.
critics, "the British delegation took the strongest stance, arguing that the Protocol appeared to be a way of giving economic assistance to developing nations at the expense of authors and that it was an inappropriate way of achieving this objective." 70 Such a position reflected the view of the British publishing industries and author groups, which "argued [before the Stockholm Conference] that emphasis should be placed on other forms of economic assistance to developing countries, or alternatively that the present proposals be pursued in the forum of the UCC rather than the Berne Union." 71 Although Britain was highly critical of the protocol, it abstained from voting in the end, partly out of the "fears of offending the developing nations, particularly those with large markets for English-language books such as India and Pakistan." 72

Joining Britain in abstentions were Mexico and Uruguay, which "had made clear their opposition to the Protocol throughout the Conference." 73 Along with Argentina, they argued that "no intellectual or artistic progress would be possible if the protection of authors was weakened." 74 Their positions, to some extent, reflected their beliefs in strong protection of authors as enshrined in the American Declaration on the Rights and Duties of Man. 75 Adopted shortly after the Second World War, Article 13 of the Declaration stipulated that "[e]very person . . . has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author." 76

In retrospect, less developed country members were able to successfully develop the protocol because they were sufficiently mobilized before the Stockholm Conference—something worth contrasting with their more tentative and reactionary response during the TRIPs negotiations. 77 In the words of Register Ringer, "the developing countries were well organized and prepared to fight" from the outset. 78 Five months before the Stockholm

70. Id. at 899.
71. Id. at 897. Not all interest groups were unsympathetic to the interests of less developed countries. The European Broadcasting Union, for example, "suggested that special concession should also be made in relation to broadcasting rights in those countries." Id. at 889. Nevertheless, as Charles Johnson pointed out, it "was probably the only non-governmental international organization that did not view the principles embodied in the new Article 25bis [which later became the protocol] with a degree of skepticism or alarm." Johnson, supra note 18, at 125.
72. RICKETSON & GINSBURG, supra note 18, at 913.
73. Id.
74. Id. at 899.
76. Id. art. 13.
77. See Yu, Currents and Crosscurrents, supra note 3, at 363.
78. Ringer, Role of the United States, supra note 39, at 1070.
Conference, they gathered together to strengthen their position at the East Asian Seminar on Copyright in New Delhi. Among the participants were "delegates from fourteen Asian states, including a number of important countries that were not members of either international convention, such as Indonesia, Malaysia, Korea, and Iran." At the end of the seminar, the participants "adopted a resolution recommending specific changes in the protocol that would substantially lower the standards of protection required under it." This resolution became "the basis for a proposal which was to be made by ten developing Asian and African nations at the Stockholm Revision."

In contrast, developed countries "were in disarray" before the Stockholm Conference. Despite their eagerness to widen the base of the Berne Union and their concern over potential defection or abandonment, developed countries remained reluctant "to put forward an affirmative program as an alternative to [the program advanced in the run-up to the Stockholm Conference]." Indeed, "the comments of governments on [the] recommendations [on the program of the Stockholm Conference] were relatively sparse and desultory" even though the program was made available almost a year in advance. As Register Ringer recalled:

Despite expressions of alarm at the trend they observed, the prevailing attitudes among the representatives of the developed Berne members seemed to be apathetic resignation and futility. They

79. See id. at 1067. For a discussion of the seminar, see Johnson, supra note 18, at 158-63.
80. RICKETSON & GINSBURG, supra note 18, at 897. "Of the 19 East Asian States which were invited, only four declined. Four other states had delegated observers." Johnson, supra note 18, at 158 (footnote omitted).
81. Ringer, Role of the United States, supra note 39, at 1067.
82. RICKETSON & GINSBURG, supra note 18, at 898.
83. Ringer, Role of the United States, supra note 39, at 1067.
84. Id.; see also RICKETSON & GINSBURG, supra note 18, at 896 ("By the end of March 1967, only eighteen governments had forwarded their responses to BIRPI, and of these only eleven dealt with the issues raised by the Protocol.").
85. Ringer, Role of the United States, supra note 39, at 1067. As Professors Ricketson and Ginsburg recounted:

The programme for the Stockholm Conference was published in May 1966, but member states were slow in registering their observations on its provisions. By the end of March 1967, only eighteen governments had forwarded their responses to BIRPI, and of these only eleven dealt with the issues raised by the Protocol. These governmental submissions have been described as "less than profound," revealing that most of the developed nations had not formulated any coherent attitude to the claims of their developing neighbours.

RICKETSON & GINSBURG, supra note 18, at 896-97 (noting that, except for Britain and France, "the comments from other developed nations were generally favourable, containing at least lip-service recognition of the problems of developing countries" (footnotes omitted)).
exhibited a notable lack of leadership and of affirmative programs, in contrast to the developing countries’ representatives, who, under the leadership of the Indian delegation, proposed a detailed program for which they fought effectively and tenaciously.\textsuperscript{86}

Notwithstanding the initial success of less developed countries and the early momentum they had built, these countries soon found out painfully that the protocol they worked hard to develop in the Stockholm Conference would not come into force. Their failure was due in part to four significant concerns developed countries had:

[1] the lack of any real guarantee that authors would be paid in cases of use for ‘teaching, scholarship and research’ and the problems that might arise with respect to the transmittal of compensation in the case of the other reservations; [2] the provisions allowing export of copies to other developing countries; [3] the inadequate definition of a developing country; and [4] the lack of any direct incentive to developing countries to improve the level of protection beyond that offered by the Protocol.\textsuperscript{87}

To make matters worse, the United States had stated that “the Protocol, if adopted, would pose a near insurmountable barrier to that country’s desired accession to the Convention.”\textsuperscript{88} Although the country was outside the Berne Union at that time, its position remained highly influential.

When the Permanent Committee of the Berne Union met in December 1967—the first formal opportunity to review the Stockholm Act and the new protocol—“[t]he reluctance of the developed nations to commit themselves to the Protocol became clear . . . , although only the UK was prepared to state unreservedly that it would not ratify it.”\textsuperscript{89} Other countries with major producers of copyrighted works, such as France, Italy, and Spain, soon took the lead from Britain and refused to ratify the new Act.\textsuperscript{90} While France initially “welcomed” the adoption of the Protocol as a suitable solution,” the country “adopt[ed] a more critical view of the Protocol [over the next year or so] and was ultimately to refrain from ratifying it.”\textsuperscript{91}

\textsuperscript{86} Ringer, Role of the United States, supra note 39, at 1066; accord Johnson, supra note 18, at 142 (“As a group, . . . [the sketchy comments of governments on the Protocol] do indicate a lack of leadership and a concerted program among the developed countries, in contrast with the unity and determination shown by the developing countries of Africa and Asia.”).

\textsuperscript{87} RICKETSON & GINSBURG, supra note 18, at 913-14.

\textsuperscript{88} Id. at 914.

\textsuperscript{89} Id. at 916.

\textsuperscript{90} See Ndiaye, supra note 28, at 51.

\textsuperscript{91} RICKETSON & GINSBURG, supra note 18, at 913.
As opposition and non-action continued, the less developed world had no choice but to accept the fact that the Stockholm Protocol was "a dying if not dead duck." Only Senegal, Pakistan, and Romania "ratified the Stockholm Protocol in full," while Canada, Denmark, Finland, West Germany, Israel, Spain, Sweden, Switzerland, and the United Kingdom "positively signaled their rejection of the Revision." To prevent what some commentators have called the "crisis in international copyright," the United States brokered a meeting in Washington, D.C. that resulted in a package deal involving amendments to both the Berne Convention and the U.C.C. The package deal was highly successful, and the Berne members gathered again in Paris in 1971—this time, "in an atmosphere of cooperation and good will that was as gratifying as it was unusual." In lieu of the much-criticized protocol, these countries adopted an optional appendix that has "less far-reaching provisions." To prevent less developed countries from picking the U.C.C. over the Berne Union, the U.C.C. was also simultaneously amended so that both conventions offered similar treatment to these countries. As Professors Ricketson and Ginsburg summarized:

From the point of view of the developed countries, this [appendix] was something they could 'live with'; from that of the developing countries, it represented a reluctant admission that this was the most they were likely to be able to obtain. . . . The immediate result [of the Paris Revision Conference] was that all the major protagonists for concessions at the Stockholm Conference, chose to stay in the Berne Convention.

Although the Berne members quickly ratified the new Paris Act (including the appendix), which has been subsequently incorporated by reference into the TRIPs Agreement and the WIPO Copyright Treaty, the

92. Barbara A. Ringer, Recent Developments in International Copyright: The Paris Meetings of February, 1969, 16 BULL. COPYRIGHT SOC'Y USA 223, 224 (1969) [hereinafter Ringer, Recent Developments]; accord Braderman, supra note 52, at 157 (noting that "[the Stockholm Protocol now appeared to be a dead issue]").
93. Okediji, Sustainable Access, supra note 67, at 157; see id. at 157 nn.54-55.
94. Howard D. Sacks, Crisis in International Copyright: The Protocol Regarding Developing Countries, 1969 J. BUS. L. 26; see Braderman, supra note 52, at 157-58 (alluding to the "crisis in international copyright"); see also Ringer, Role of the United States, supra note 39, at 1070 (stating that the Stockholm Conference "was probably the worst experience in the history of international copyright conventions").
95. See RICKETSON & GINSBURG, supra note 18, at 920-22.
96. Ringer, Recent Developments, supra note 92, at 224.
97. BOGSCH, supra note 57, at 25.
98. RICKETSON & GINSBURG, supra note 18, at 956 (footnotes omitted).
99. TRIPs Agreement, supra note 2, art. 9(1); WIPO Copyright Treaty art. 1, adopted Dec. 20, 1996, S. TREATY DOc. No. 105-17, at 1 (1997) [hereinafter WCT]; see also RUTH L. OKEDEJI, THE INTER-
appendix was more effective in theory than in practice. With its length exceeding that of the original Berne Act, the approved appendix is complex, lengthy, and burdensome. As Ruth Okediji cautioned us, "[t]he transaction costs involved in fulfilling [its] requirements are not insignificant, and the waiting period by itself materially reduces the value of the copyrighted material to consumers."  

Consider, for example, the conditions under which one has to satisfy before a compulsory license is issued for "teaching, scholarship, and research" purposes. Article II, which governs translation licenses, requires a waiting period of three years after the work's first publication if the work is not available in the requested language. Although the waiting period can be reduced to one year under specified conditions, that period cannot be reduced if the work has been published in English, French, or Spanish—the languages "spoken in the vast majority of the colonial territories in Africa,
Asia and the Americas."\textsuperscript{106} To provide reasonable notice, Article II further imposes an additional "grace period" of six to nine months.\textsuperscript{107} With respect to reproduction licenses, Article III extends the waiting period from three years to seven years for fiction, poetry, art, and music and five years for other non-scientific works.\textsuperscript{108} As Professor Okediji reminded us, "[f]or most scientific works, waiting three years means that there is a risk of the information becoming less relevant."\textsuperscript{109}

Even worse, the appendix "do[es] not address the most pressing need for developing countries: bulk access to creative works available at reasonable prices and translated into local languages."\textsuperscript{110} Premised on traditional printing technologies, the appendix did not allow less developed countries to take advantage of new "online modes of delivery which might well be attractive to developing countries with large and widespread populations."\textsuperscript{111} From the standpoint of development, the appendix was therefore "a dismal failure";\textsuperscript{112} "its provisions do not seem to have been taken up by the countries for which it was intended."\textsuperscript{113}

"As of 2004, only thirteen . . . countries had expressed an interest to WIPO, though Singapore apparently expressed an interest and then didn’t

\begin{itemize}
\item \textsuperscript{106} Okediji, Sustainable Access, supra note 67, at 163.
\item \textsuperscript{107} Berne Convention, supra note 7, app. art. II(4).
\item \textsuperscript{108} Id. app. art. III(3).
\item \textsuperscript{109} OKEDJI, INTERNATIONAL COPYRIGHT SYSTEM, supra note 99, at 15.
\item \textsuperscript{110} Id. at 6.
\item \textsuperscript{111} RICKETSON & GINSBURG, supra note 18, at 925; see also Okediji, Sustainable Access, supra note 67, at 185 (suggesting that "[l]imitations on access to digital informational works . . . should be offset by a proportional increase in access to print works").
\item The Appendix . . . can be seen as an incentive to authors and publishers in the developed countries to co-operate in the making of voluntary licensing arrangements: the compulsory licenses remain in the background both as a reminder of the needs of developing countries and as a threat to be brought into operation if there is a reluctance to provide access. The fact that, to date, so few developing countries have invoked the Appendix may be an indication that authors and publishers in the developed countries have been far more willing to license their works than was previously the case. Alternative explanations, that need to be properly tested in each instance, are (i) that the social and economic problems of some of these countries are so intense that concern about copyright matters is not going to be a high priority, as distinct from overcoming famine, drought, floods, earthquakes, or civil war; or (ii) that the advent of digital technologies and communications may now render the provisions of the Appendix unnecessary to meet the developmental needs of these countries, even though such uses may, in principle, come within the scope of its provisions and may therefore pose a different set of challenges for authors and rights owners from developed countries.
\item \textsuperscript{113} RICKETSON & GINSBURG, supra note 18, at 925.
\end{itemize}
renew its notification.”114 “[O]f those countries that have made the necessary declarations, very few actually seem to have implemented such licensing schemes in their domestic laws.”115 It is therefore no surprise that Professor Okediji and other commentators have called for a reform of the Appendix,116 although they conceded that such reform is likely to be very difficult in light of the unanimous vote needed for the amendment.117

**B. WIPO**

In addition to developing the Stockholm Protocol, the Stockholm Conference resulted in the creation of WIPO. Formally established in 1970, the organization replaced BIRPI, an organization formed as a result of the 1893 merger of the two secretariats that administered the Berne and Paris Conventions.118 That merger “mov[ed] control of the organization from the Swiss, who had been exclusively responsible for funding BIRPI, to a more formal governing body that included a structure where delegates from member countries would meet regularly.”119

The idea of forming an international intellectual property organization dates back to the 1962 meeting of the Permanent Bureaux of the Berne and Paris Unions.120 The reasons were twofold. First, as Stephen Ladas

114. **Okediji, International Copyright System, supra** note 99, at 15-16 (footnote omitted). As Professors Ricketson and Ginsburg stated:

As of Dec 2004, the following countries had made declarations . . . with respect to . . . [Articles] II and III: Bangladesh, Cuba, Jordan, Mongolia, Oman, Philippines, Sudan, Syrian Arab Republic, United Arab Emirates, and Vietnam, while Thailand had made a declaration with respect to Article II . . . Cyprus and Slovenia have made reservations with respect to translations. Previous declarations . . . had been made by Algeria, Bahrain, Democratic People's Republic of Korea, and Singapore, but these have not been renewed.

**Ricketson & Ginsburg, supra** note 18, at 957 n.447 (citations omitted).

115. **Ricketson & Ginsburg, supra** note 18, at 957.

116. **See Okediji, Fostering Access to Education, supra** note 112, at 10 (“At the very least, the time barriers and other features that have rendered the Appendix a failure must be positively addressed. Otherwise, the Appendix simply remains a dull sword for advancing development interests.”); **see also id. at** 11-12 (calling for “more specific adaptation of the Appendix to the digital environment” and the development of “countervailing principles that preclude countries from negotiating around access rules”).

117. **See Berne Convention, supra** note 7, art. 27(3) (stipulating that the revision of the Appendix “shall require the unanimity of the votes cast”); **see also Alan Story, Burn Berne: Why the Leading International Copyright Convention Must Be Repealed, 40 Hous. L. Rev. 763 (2003) (advocating the repeal of the Berne Convention).**

118. **See Bogsch, supra** note 57, at 21-22 (discussing the history of BIRPI).

119. Debora J. Halbert, *The World Intellectual Property Organization: Past, Present and Future*, 54 J. Copyright Soc'y U.S.A. 253, 258-59 (2007) (footnote omitted); **accord May, supra** note 16, at 23 (“One of the key changes . . . was the assumption of responsibility for the budget, program and activities of the organization by its members, removing this responsibility from the Swiss government which up until this time had effectively controlled the organization.”).

120. **May, supra** note 16, at 23; **accord Sisule F. Musingu & Graham Dutfield, Multilateral
explained, the proposal to establish such an organisation “was advocated as intended to head off any attempt by outsiders, such as the United Nations Economic and Social Council ["ECOSOC"] or the United Nations Conference on Trade and Development ["UNCTAD"], to deal with the subject of intellectual property and eventually to form a Specialized Agency of the United Nations in this field." Second, such a change would “transform [BIRPI] from a developed country club into an organisation with a multilateral character that could attract developing countries including the newly independent ones.” The formation of WIPO therefore would have the same effect of the Stockholm Protocol: by accommodating the needs of less developed countries, it would widen the base of both the Berne and Paris Unions. As of April 2009, WIPO has 184 member states.

Although WIPO did not become a U.N. specialized agency immediately following the Stockholm Conference, “the draft of the WIPO Convention and the drafts for the revision of the then existing seven treaties, presented by BIRPI to the Stockholm Conference, were proposed with [that] objective in mind.” In December 1974, WIPO finally became a U.N. specialized agency. As Árpád Bogsch, the former WIPO director general, pointed out, the U.N. status brought to WIPO three apparent benefits:

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1. **AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)**

2. **STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 92 (1975).**

3. **MUSUNGU & DUTFIELD, supra note 120, at 4.**

4. **See ANDERFELT, supra note 13, at 260 ("From the beginning it was realized that the most crucial provision of the Convention for the new organization would be the one concerning membership, for only an organization open to all interested countries, it was thought, whether Union members or not, could obtain a status as a Specialized agency of the United Nations."); MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 126 (1998) ("The 1974 Agreement to join the UN system turned the organization from a rich man's club of industrialized countries into a potentially universal membership, international governmental organization of developing countries that needed considerable educational services.").**


6. **BOGSCHE, supra note 57, at 26.**

7. **Dr. Bogsch is one of the longest serving director generals of an international governmental organization. As Michael Ryan pointed out: The WIPO story of institution-building leadership by one person is matched in the history of international governmental organizations only at GATT and at the International Labor Organization. Eric Wyndham White at the GATT and David Morse at the International Labor Organization each served as director general for some twenty years beginning in 1948 and were instrumental in institution building.**

RYAN, supra note 123, at 126-27 & n.2.
(i) the fact that dealing with intellectual property was the prerogative and the task of WIPO would receive worldwide recognition, (ii) WIPO would have more or less the same members as the United Nations, and in particular, many developing countries would join WIPO (only very few of them belonged to BIRPI), (iii) the governments of Member States would be liberated from having to deal with the fixing of salaries, other working conditions and pensions of the staff, since salaries and pensions would automatically follow the so-called “common system” of the United Nations and its specialized agencies.¹²⁷

In short, the U.N. status “would enable the internal administration of the organization to benefit from the economies of scale available inside the [United Nations].”¹²⁸

Given these multiple benefits, one commentator has questioned whether “the transformation of BIRPI/WIPO into a UN agency was not just another strategy of those IP experts defending private interests in order to legitimize and continue almost a century’s work of strengthening IP protection under the cloak of a credible and supposedly neutral UN organization.”¹²⁹ Commentators have also tied the popularization of the term “intellectual property” to the founding of WIPO,³¹⁰ although it is worth pointing out that the this term does not “propertize” intellectual creations, but rather “intellectualizes” property—something critics of intellectual property rights often overlook.¹³¹

Notwithstanding the benefits mentioned by Dr. Bogsch, “some of the industrialized countries [initially] feared that the developing countries would become the great majority of the membership and would try to weaken, rather than to strengthen, the international protection of intellectual property.”¹³² For example,

¹²⁷. BOGSCH, supra note 57, at 28.
¹³². BOGSCH, supra note 57, at 28.
Borgsch’s desire to link up with the UN . . . prompted the WIPO to agree to be listed as co-author on the 1974 United Nations Conference on Trade and Development (UNCTAD) report The Role of the Patent System in the Transfer of Technology to Developing Countries, despite the report’s thrust being widely divergent from the WIPO’s position on the role of patents in technological transfer.\textsuperscript{133}

Developed countries “were worried that these new developing country members might question and undermine the key promotional aspects of . . . WIPO’s activities.”\textsuperscript{134} They also feared that the creation of the new organization “would jeopardize the independence and autonomy of the [Paris and Berne] Unions and would introduce international politics in an international legal system that had been signally successful and effective for nearly eighty years.”\textsuperscript{135}

In light of these concerns, during the Stockholm Conference, “both France and Italy spoke against the creation of WIPO, but [did not oppose its creation] given that the majority of member states approved of the new organization.”\textsuperscript{136} Their concerns were prescient, however. Less than a decade after WIPO’s formation, the “one country, one vote” system was partly blamed for the shifting of the negotiating forum on international intellectual property matters away from WIPO to the General Agreement on Tariffs and Trade (“GATT”), a trade-based forum which eventually became the WTO.\textsuperscript{137}

Although WIPO’s newfound U.N. status brought to the organization many benefits, it also complicates matters by duplicating activities that were already conducted under the United Nations’ auspices. For example, WIPO’s activities partially overlapped with those of UNESCO and UNCTAD. As the administrator of the U.C.C., UNESCO’s importance in the copyright area speaks for itself.\textsuperscript{138} In fact, the organization “started off as a potentially

\begin{itemize}
  \item \textsuperscript{133} \textit{MAY}, supra note 16, at 24. As Andrée Menescal described:
    This report justified the changes in developing countries’ IP legislation regarding, for example, “stricter provisions for compulsory licensing and revocation as remedies for non-use” and the “strong provisions against abuses in patent licensing agreements” as “a shift from primary concern with the protection of private interests of the patent holder (mostly a foreigner in the case of developing countries), towards safeguarding the general public interest and economic needs of the country concerned.” Based on these findings, the report recommended a revision of the existing international patent system with the purpose “of making patent laws and practices capable of effectively complementing other instruments of policy for national development.”

  \item \textsuperscript{134} \textit{MAY}, supra note 16, at 24.

  \item \textsuperscript{135} \textit{LADAS}, supra note 121, at 92.

  \item \textsuperscript{136} \textit{Halbert}, supra note 119, at 259.

  \item \textsuperscript{137} \textit{See} \textit{Yu, Currents and Crosscurrents}, supra note 3, at 357-58.

  \item \textsuperscript{138} \textit{See} \textit{PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?} 112 (2002) (“UNESCO had been useful to the US in sponsoring the development
important forum for defending and promoting developing countries' interests in the copyright area—ensuring that copyright standards were consistent with the needs of educational and scientific users of information."  

It is therefore no surprise that, "during the Stockholm Conference, UNESCO registered concern regarding the potential competition between the two organizations. UNESCO saw itself as the body best able to interpret culture and copyright issues. WIPO, for its part, sought to be the definitive body for interpreting intellectual property disputes."  

Nevertheless, with the United States' withdrawal from the organization in 1984, UNESCO's importance has greatly decreased. Its standard-setting role in the copyright area declined further following the United States’ accession to the Berne Convention and the ultimate incorporation of the Convention into the TRIPs Agreement. While the Berne membership has now increased to 164, the U.C.C. has not added many new members since the Paris Revision Conference. As of April 2009, it has only 65 members—half of the total number of Berne members. In recent years, however, UNESCO has become active again in such areas as the protection of traditional cultural expressions and intangible cultural heritage. It remains to be seen whether such protection will help UNESCO regain an active role in international copyright developments.

of the Universal Copyright Convention (UCC) in the 1940s, a convention the US had wanted. UNESCO served as the UCC's secretariat when the UCC came into effect in September 1955." (footnote omitted)).  

139. MUSUNGU & DUTFIELD, supra note 120, at 19-20.  

140. Halbert, supra note 119, at 261 (footnote omitted).  

141. See DRAHOS & BRAITHWAITE, supra note 138, at 112 (discussing the United States' withdrawal from UNESCO).  

142. See Halbert, supra note 119, at 261 (noting that UNESCO's concerns regarding the potential competition between the organization and WIPO "became irrelevant once the U.S. joined Berne in 1989 and the Soviet Union collapsed in the early 1990s rendering the UNESCO treaty virtually obsolete and providing WIPO with additional interpreive power as the sole remaining organization dedicated to IP issues, at least for the brief period before TRIPs entered the international scene"); Okediji, International Relations, supra note 13, at 328 (noting that "the mandatory obligation within TRIPS to ratify the Paris text of the Berne Convention eliminated the UCC as an option for developing countries").  


Compared to UNESCO, UNCTAD was generally not considered a predominant forum for intellectual property negotiations, due to its pro-development stance and its focus away from technical intellectual property issues. Nonetheless, it has played significant roles in intellectual property matters as they relate to development and the transfer of technology. As Sisule Musungu and Graham Dutfield pointed out:

Since its inception and up to the period leading to the creation of the WTO, UNCTAD had served as an important forum for developing countries to develop strategies to gain access to developed country markets and to develop analytical work which demonstrated the serious negative consequences for technology development and related objectives that arose from the existing intellectual property regimes. More than any other organisation in the UN system, UNCTAD had a legitimate claim to jurisdiction over the development of a trade-related agreement covering intellectual property. Indeed, it is because of these competences that the Agreement between the UN and WIPO specifically mentions the responsibilities and competence of UNCTAD. Moreover, at the time when the agreement between WIPO and the UN was being prepared, WIPO was undertaking a joint study with UNCTAD on the role of the patent system in the transfer of technology to developing countries.

To reduce the overlap between WIPO and the two other U.N. agencies, article 2 of the Agreement between the United Nations and the World Intellectual Property Organization ("WIPO Agreement") provides:

[WIPO] recognizes the responsibilities for co-ordination of the General Assembly and of the Economic and Social Council under the Charter of the United Nations. Accordingly, the Organization agrees to co-operate in whatever measures may be necessary to make co-ordination of the policies and activities of the United Nations and those of the organs and agencies within the United Nations system fully effective. The Organization agrees further to participate in the work of any United Nations bodies which have been established or may be established for the purpose of facilitating such co-operation

146. MUSUNGU & DUTFIELD, supra note 120, at 19 (footnotes omitted); see also JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 566 (2000) ("Probably no organization other than . . . UNCTAD . . . would have had a greater claim to develop a trade-related agreement for intellectual property. . . . Through its work on the Code of Conduct on Transfer of Technology it had done more analytical work on the trade implications of intellectual property rights than any other UN organization.").
and co-ordination, in particular through membership in the Administrative Committee on Co-ordination.\textsuperscript{147}

Although this Agreement "obliges WIPO to take into consideration the recommendations of the United Nations (whether coming from the General Assembly or the Economic and Social Council . . . ),"\textsuperscript{148} the United Nations, thus far, has yet to adopt any recommendation that explicitly deals with intellectual property matters.\textsuperscript{149} Indeed, as Sisule Musungu and Graham Dutfield have lamented, "ECOSOC's inter-agency review mechanism is very weak and is incapable, in particular, of ensuring that the activities of the specialised agencies are compatible with the aims of the UN."\textsuperscript{150}

In the technology transfer area, article 10 of the WIPO Agreement provides:

The Organization agrees to co-operate within the field of its competence with the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial Development Organization, as well as the agencies within the United Nations system, in promoting and facilitating the transfer of technology to developing countries in such a manner as to assist these countries in attaining their objectives in the fields of science and technology and trade and development.\textsuperscript{151}

Article 1 further states that the organization is charged with "promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development."\textsuperscript{152} Taking note of this founding mission, less developed countries and their supporters increasingly demand WIPO to pay special attention to their development needs and to "share the UN's focus on global developmental issues rather than a more technical focus on the governance and protection of IPRs."\textsuperscript{153} As Argentina and Brazil noted

\begin{enumerate}
\item \textsuperscript{148} BOGSCH, \textit{supra} note 57, at 83; \textit{see also} MAY, \textit{supra} note 16, at 25 (stating that "as a specialized agency of the UN, the WIPO was, and is, required to work in accordance with the UN's overall developmental mission").
\item \textsuperscript{149} \textit{Cf.} BOGSCH, \textit{supra} note 57, at 120 (noting that the United Nations did not adopt any recommendations that explicitly dealt with intellectual property from 1974 to 1992).
\item \textsuperscript{150} MUSUNGU & DUTFIELD, \textit{supra} note 120, at 20.
\item \textsuperscript{151} UN-WIPO Agreement, \textit{supra} note 147, art. 10.
\item \textsuperscript{152} \textit{Id.} art. 1.
\item \textsuperscript{153} MAY, \textit{supra} note 16, at 4.
\end{enumerate}
in their proposal for the establishment of a WIPO Development Agenda ("WIPO Development Agenda Proposal"):

As a member of the United Nations system, it is incumbent upon ... WIPO ... to be fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals. Development concerns should be fully incorporated into all WIPO activities. WIPO's role, therefore, is not to be limited to the promotion of intellectual property protection.

WIPO is accordingly already mandated to take into account the broader development-related commitments and resolutions of the UN system as a whole. However, one could also consider the possibility of amending the WIPO Convention (1967) to ensure that the "development dimension" is unequivocally determined to constitute an essential element of the Organization's work program. We therefore call upon WIPO General Assembly to take immediate action in providing for the incorporation of a "Development Agenda" in the Organization's work program.154

This proposal makes great sense. As Professor Halbert reminded us, "WIPO was born into the controversy of how intellectual property would impact the developing world."155 Moreover, in recent years, the United Nations has introduced a number of documents that are relevant to intellectual property protection, such as the outline and development of the Millennium Development Goals.156 In addition, the ECOSOC has also paid greater attention to intellectual property matters. As U.N. Secretary-General Ban Ki-moon noted in the opening session of ECOSOC in April 2007, "[t]he rules of intellectual property rights need to be reformed, so as to strengthen technological progress and to ensure that the poor have better access to new technologies and products."157

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155. Halbert, supra note 119, at 262.
The growing demand for a pro-development reorientation of WIPO is somewhat ironic. It was only a couple of decades ago when multinational corporations, industry groups, and their supporting developed countries heavily criticized WIPO for weakening the high international standards for intellectual property protection. As Barry MacTaggart, the former president of Pfizer International Inc., wrote in a *New York Times* opinion piece in 1982:

And now, the United Nations, through its World Intellectual Property Organization, is trying to grab high-technology inventions for underdeveloped countries. . . . What's more, the revisions to the Paris treaty being considered by delegates to the United Nations organization would confer international legitimacy on the abrogation of patents. The principle the World Intellectual Property Organization seeks to introduce would enable a nation to deny the inventor the protection of a patent or, worse still, prevent him from exercising his own invention if the product is not made from scratch in that nation.158

Today, by contrast, multinational corporations, industry groups, and developed countries have generally embraced WIPO as a forum for heightening the standards of intellectual property protection—for example, through the introduction of the draft Substantive Patent Law Treaty (“SPLT”),159 assistance in addressing Internet domain name disputes,160 or efforts to promote awareness of intellectual property rights in less developed countries.161 It is therefore no surprise that developed countries, in particular the United States, have been actively dissuading WIPO from returning to its development roots. As reported in the first session of the Intersessional Intergovernmental Meeting on a Development Agenda for WIPO:

The [U.S.] Delegation observed that intellectual property was only a part of the solution, and other infrastructure must also be put in place for development. Development, in general, was the domain of other

158. Barry MacTaggart, *Stealing from the Mind*, N.Y. TIMES, July 9, 1982, at A23; see also DRAHOS & BRAITHWAITE, supra note 138, at 61 (discussing MacTaggart's opinion piece).
161. See MAY, supra note 16, at 61-66 (discussing WIPO's technical assistance and capacity-building efforts); see also Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 45 (2002) (noting that "[i]t will require a 'culture change' at WIPO and WTO to adjust the type of technical assistance to developing countries' needs").
UN Agencies, not WIPO. The Delegation stated that WIPO must continue to focus on promoting intellectual property protection. It did not believe that the UN needed another development agency as it already had several such agencies, exclusively devoted to, and with specific competence in development, such as UNCTAD and the UNDP. The Delegation further stated that the United States of America strongly believed that WIPO’s current legal framework and its administrative structure provided ample room to address intellectual property related development issues.\footnote{162}{WIPO, \textit{Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO: Report of the First Session}, IIM/1/6 (Aug. 18, 2005), available at http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_6.doc.}

According to developed countries, “WIPO does not have the resources to support wider developmental objectives, and in any case it lacks the expertise in development that would be required to fulfill such demands.”\footnote{163}{MAY, supra note 16, at 83.}

\section*{C. International Code of Conduct}

Following the Stockholm Conference, countries pushed eagerly for the establishment of an International Code of Conduct on the Transfer of Technology. The development of this Code came at a time when less developed countries had gained unprecedented momentum in their negotiations with developed countries following the oil crisis and OPEC’s success in the early 1970s.\footnote{164}{See SUSAN K. SELL, \textit{POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST} 79 (1998) [hereinafter \textit{SELL, POWER AND IDEAS}] (“[T]he OPEC actions of 1973 created the opportunity for the developing countries’ demands to be heard at the multilateral level. The industrialized counties were reluctant to negotiate over the NIEO but felt they had to because of the pressure of commodity power during a period of slow economic growth.”).}

“[D]rafted on the assumption that transfer of technology to developing countries is desirable and that the transfer process will increase the prosperity of developing countries,”\footnote{165}{Ton J.M. Zuijdijk, \textit{The UNCTAD Code of Conduct on the Transfer of Technology}, 24 \textit{MCCLL} L.J. 562, 564 (1978).} the Code sought “to eliminate those clauses in transfer of technology contracts which are harmful to the economic development of developing countries” as well as other restrictive foreign investment practices.\footnote{166}{\textit{Id.} at 563; accord \textit{Id.} (“The Code was drafted as a response to a variety of complaints expressed by developing countries with respect to transfer of technology transactions. Their dissatisfaction stems from the fact that often, in transfer of technology contracts, restrictive clauses which are detrimental to developing countries are inserted.”).}

Examples of these detrimental practices included:

\begin{itemize}
\item \textbf{(1)} grant-back provisions;
\item \textbf{(2)} challenges to validity;
\item \textbf{(3)} exclusive dealing;
\item \textbf{(4)} restrictions on research;
\item \textbf{(5)} restrictions on use of
personnel; (6) price-fixing; (7) restrictions on adaptations; (8) exclusive sales or representation agreements; (9) tying arrangements; (10) export restrictions; (11) patent-pool or cross-licensing agreements; (12) restrictions on publicity; (13) payments and other obligations after expiration of industrial property rights; and (14) restrictions after expiration of arrangements.  

Less developed countries were also frustrated by the fact that "transfer of technology contracts often . . . involve[d] packaged transfer of previously developed technology, unsuitable to the[ir] needs."  

Although the drafting of the Code did not begin until the mid-1970s, commentators traced its historical origins to the debate on transfer of technology in the mid-1960s—around the time when UNCTAD was established. As Professor Sell recounted the origin of the technology transfer debate:

In 1963 the United Nations held a Conference on the Application of Science and Technology for Development in Geneva. This conference affirmed the developing countries' belief that the United Nations could help them in their quest for greater access to technology. . . . [T]he conference's most important outcome was the conviction that the United Nations had a central role to play "to facilitate the transfer of science and technology to developing countries and to help developing countries overcome obstacles in their access to necessary knowledge and its effective application."  

To follow up on the Conference, ECOSOC set up an Advisory Committee for the Application of Science and Technology for Development the following year.  

UNCTAD was established in the same year in response to heavy pressure from the less developed world. As Ton Zuijdijk recounted:

At [UNCTAD's first session], the Conference recommended that "[c]ompetent international bodies . . . should explore possibilities for

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167. Sell, Power and Ideas, supra note 164, at 93; see also UNCTAD, The Role of the Patent System in the Transfer of Technology to Developing Countries 54-63 (1974) (discussing the abuses in patent licensing agreements and regulatory practices).

168. Countess Pease Jefferies, A Preliminary Evaluation of the Proposed Text, in International Technology Transfer, supra note 57, at 17, 20; accord Zuijdijk, supra note 165, at 563 ("[T]he technology acquired by a developing country is frequently not suitable to its needs; often such technology and the form in which it is obtained are not conducive to the development of local technological capabilities.").

169. Sell, Power and Ideas, supra note 164, at 67.

170. Id.

171. Id.
adaptation of legislation concerning the transfer of industrial technology to developing countries, including the possibility of concluding appropriate international agreements in this field.” The idea was raised again in 1972 at UNCTAD III in Santiago, Chile when the Conference requested a joint study by the UNCTAD and WIPO Secretariats of “possible bases for new international legislation regulating the transfer of technology from developed to developing countries of patented and non-patented technology.” The idea became more pronounced when, in 1973, the Trade and Development Board of UNCTAD requested the Intergovernmental Group on Transfer of Technology (the predecessor of the UNCTAD Transfer of Technology Committee) “to study the possibility and feasibility of an international code of conduct in the field of transfer of technology.” . . . In the summer of 1974, the concept of a Code was boosted by the General Assembly in its important Programme of Action on the Establishment of a New International Economic Order in which the Assembly specifically decided that “[a]ll efforts should be made: [t]o formulate an international code of conduct for the transfer of technology corresponding to needs and conditions prevalent in developing countries.”

In the meantime, the Group of 77 was also very active in expressing their growing concern about the lack of transfer of technology. For example, the Charter of Algiers, which was adopted in a Group of 77 ministerial meeting in 1967, “emphasized the importance of acquiring technology from the North” and “stated that ‘developed countries should encourage the transfer of knowledge and technology to developing countries by permitting the use of industrial patents on the best possible terms and eliminate restrictions on the granting of licenses and the use of patents and trademarks.’” The subsequent Lima Declaration “stated that the international community should promote the massive transfer of operative technology to developing countries on favorable terms to contribute to their industrialization.” The Manila Declaration also “addressed the issues of technology transfer, strengthening the technological capacity of developing countries, . . . and called for a code of conduct for the transfer of technology and the revision of the international patents system.”

To put these abstract ideas into practice,

172. Zuijdwijk, supra note 165, at 564-65 (footnotes omitted).
173. SELL, POWER AND IDEAS, supra note 164, at 68 (footnote omitted).
174. Id.
175. Id.
a number of developing countries introduced legislative measures to increase state intervention in the screening and control of technology transactions [and to reduce their dependence on foreign suppliers]. . . . In the late 1960s and early 1970s Argentina, Brazil, India, Mexico, and the Andean Pact countries each enacted laws that codified their dissatisfaction with market principles governing technology transactions.176

To some extent, the International Code of Conduct can be seen as an effort to translate these nation-based measures into international norms. According to Professor Sell, "the more immediate impetus for a . . . code came from key developing countries' experiments in national and regional legislation in technology transfer."177

"The earliest formulation of [the Code] was undertaken in April 1974 by a group of experts under the auspices of the Pugwash Conferences on Science and World Affairs,"178 a nongovernmental forum that brought together "scientists from East and West to discuss possible scientific solutions to the problems of nuclear weapons and disarmament."179 The draft Pugwash Code "was important because it became the basis of the Group of 77's first proposal in the UNCTAD negotiations [that Professor Zuijdijk mentioned earlier]."180 "[B]y convening, under the auspices of a reputable organization, an international group of experts including high-level scientists, which was hosted by a prominent Swiss academic institute," the Pugwash exercise also strengthened the credibility of the less developed countries' demands.181 Indeed, the

176. Id. at 69 (footnote omitted); see also id. at 81-86 (discussing the key national and regional legislation in technology transfer in the less developed world); Jefferies, supra note 168, at 27-33 (discussing attempts by less developed countries to regulate transfer of technology).

177. SELL, POWER AND IDEAS, supra note 164, at 81.


179. Geoffrey Oldham, The Pugwash Code, in INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at 193, 194. As Susan Sell described further:

The first conference was held in 1955, where Bertrand Russell and Albert Einstein presented a manifesto for peace. The Pugwash group has been prominently involved in urging the development of nuclear-testing agreements between the former Soviet Union and the United States, and has been active in the disarmament movement.

SELL, POWER AND IDEAS, supra note 164, at 241 n.17.

180. SELL, POWER AND IDEAS, supra note 164, at 87.

181. Essam E. Galal, The Developing Countries' Quest for a Code, in INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at 199, 200; see also Oldham, supra note 179, at 195 ("The fact that a group of individuals, all of whom had a great deal of experience in dealing with or studying the problems of technology transfer, had been able to agree on a draft Code, meant that the Group B position that a code was an intractable problem was negated.").
Pugwash Conference “provided a long-awaited opportunity for interaction between North/South experienced practitioners of international technology transfer and knowledgeable scholars and political and economic experts.”

“In the fall of 1977, the General Assembly decided ‘to convene a United Nations conference to negotiate and to take all decisions necessary for the adoption of an international code of conduct on the transfer of technology.’” The Assembly also decided that this Conference would meet under the auspices of UNCTAD. From the standpoint of international intellectual property norm-setting, the use of UNCTAD as a forum for negotiating this International Code of Conduct is interesting. Although the Code no doubt would affect the protection of intellectual property rights, the negotiation of the Code was held outside WIPO—a U.N. agency specialized for handling intellectual property matters.

Despite the high hopes of less developed countries, the Code was troubled from the very beginning. Although the Code was intended to apply to all international transactions involving technology transfer, what constituted such transactions remained highly controversial. While less developed countries “[took] the position that transactions within the same country may be of an international character if one of the parties is a company controlled by a foreign corporation,” developed countries considered such transactions purely domestic and that the Code would not be applicable to situations in which technology has crossed national boundaries. Their position was understandable. From the outset, many of these countries were hostile to the project and “saw the code as an interventionist instrument, the aim of which was to endorse bureaucratic structures that would hinder the transfer process instead of facilitating it.”

As Susan Sell summarized, the most hotly contested issues included “(1) whether the character of the code should be binding or voluntary; (2) chapter 1 of the code (definition and scope of application); (3) chapter 4 of the code (restrictive business practices); and (4) chapter 9 of the code (applicable law and the settlement of disputes).” In light of these inherent problems, the negotiation of the Code was proceeding very slowly. Although progress had

182. Galal, supra note 181, at 200.
183. Zuijdijk, supra note 165, at 564 (footnote omitted).
184. Id.
185. Id. at 568.
186. Id.
188. Sell, POWER AND IDEAS, supra note 164, at 89. For a detailed discussion of the draft International Code of Conduct, see id. at 90-96; Thompson, supra note 178.
been made, negotiation was eventually forestalled by the debt crises in Latin America in the late 1980s. The stalled discussions were further weakened by the arrival of the Reagan Administration in the United States, which introduced a new and radically different antitrust policy. As Professor Sell recounted:

The eventual failure of the conference to agree upon a satisfactory code was due to three factors: changes in U.S. leadership; bureaucratic factors (the group system in UNCTAD and a loss of faith in the organization); and changes in the world economic situation (a precipitous drop in foreign investment, the Third World debt crisis, and subsequent pressure to sacrifice ideological concerns for a more highly competitive environment, which led Third World policymakers to more aggressively seek foreign investment more aggressively rather than strictly control it).

While the failure of the conference was due to changes in U.S. leadership and bureaucratic factors, this third factor—the economic slump of the late 1970s and early 1980s—was the most important. It was the strongest shock to the optimism of the Group of 77’s member states. Not only did it take the wind out of their sails, but it led them to abandon the whole ship.

189. As Professor Sell described:

The pressing economic problems faced by developing countries forced them to sacrifice many of the ideological premises that had fueled the effort to get an international code of conduct for the transfer of technology. The activist developing countries’ legislation, which had inspired numerous provisions in the draft code, was called into question by the countries’ own lawmakers and subsequently amended to reflect new economic realities. These trends, which became evident in the early eighties, led most developing countries to lose interest in the code effort.

SELL, POWER AND IDEAS, supra note 164, at 105; see also Chantal Thomas, Transfer of Technology in the Contemporary International Order, 22 FORDHAM INT’L J. 2096, 2108 (1999) (“With the onset of the debt crisis in the early 1980s, . . . whatever momentum remained in the[] efforts [to complete the International Code of Conduct] dwindled along with the NIEO movement more generally.”).

190. As Professor Sell recounted:

After the third session a mood of disillusionment and frustration set in. In retrospect, several key Group of 77 delegates felt that they should have agreed to the Code as it stood in 1980, at the end of the third session and before the Reagan administration came to power in the United States. Many Group of 77 delegates, as well as UNCTAD personnel, noted a dramatic change in the tenor of the negotiations beginning in 1981.

SELL, POWER AND IDEAS, supra note 164, at 97.

191. Id. at 98, 106; see also Hanns Ullrich, Competition, Intellectual Property Rights and Transfer of Technology, in INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at 363, 363-64. As Hanns Ullrich explained:

The reason for this failure are manifold: divergences from the antitrust law concepts of major industrialized nations as regards restrictive exploitation of intellectual property;
Thus, by the time the TRIPs Agreement was being developed in the mid-1980s, the support for the Code had largely disappeared. The negotiation stopped in 1985 and has not resumed since.\textsuperscript{192} UNCTAD, in the process, "was [also] marginalized . . . and has not recovered its influence on the global governance of intellectual property since."\textsuperscript{193} As Professor Okediji wrote, the failed negotiations over the International Code of Conduct "was an epiphenomenon linked to much deeper unresolved challenges of how legal doctrines of sovereignty and equality could logically find meaning in a global market in which the productive capacity of most developing countries was viewed as being dependent on economic and political support from the developed world."\textsuperscript{194}

Even if the negotiation of the Code were to be resurrected today, it remains unclear whether the Code would still be relevant or effective. As UNCTAD stated in its evaluation report shortly before the completion of the TRIPs Agreement:

Recent technological advances in such fields as informatics, telecommunications, biotechnology and new materials have greatly contributed to . . . changes [in the technology area]. They have had a profound impact on almost all sectors of industrial activity and have general trends to liberalize not only markets but also antitrust as a form of market regulation; the decline of the bargaining position of developing countries; the shift of technology transfer to other mechanisms than licensing; and a complete change in perception of intellectual property.

\textit{Id.}

\textsuperscript{192} As Professor Sell stated:

Beginning in October 1978, negotiators met in six sessions, the last of which was held in Geneva in May 1985. . . . There was considerable progress on several difficult issues during the first three sessions, but after 1981 the mood of the conference quickly became one of disillusionment and frustration. The last three sessions were characterized by heightened ideological rhetoric, a hardening of positions on both sides, and stonewalling tactics. . . . By the sixth session in May 1985, positions on both sides had been hardened to the point of no return. Not only was Group B thoroughly intransigent, but the Group of 77 consensus had vanished.

\textit{Sell, Power and Ideas, supra} note 164, at 89, 98; see also Galal, \textit{supra} note 181, at 204-08 (discussing the breakdown of the 1983 Code Conference).

\textsuperscript{193} \textit{May, supra} note 16, at 81; accord \textit{Brathwaite & Drahos, supra} note 146, at 68 (noting that "[t]he international organization which has been most marginalized by the shift of the intellectual property forum to WTO has been UNCTAD"); \textit{Musungu & Duffield, supra} note 120, at 19 (noting that "UNCTAD has lost its pre-eminence on matters of trade, intellectual property and development and rarely participates in WIPO negotiations such as the SPLT negotiations as an observer").

\textsuperscript{194} Ruth L. Okediji, \textit{History Lessons for the WIPO Development Agenda, in Development Agenda, supra} note 14, at 137, 151 [hereinafter Okediji, \textit{History Lessons}].
deeply influenced the development of technology, as well as its application to the production of goods and services.\footnote{195. UNCTAD Secretariat, The Status of the Negotiations: A 1990 Evaluation, in INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at 139, 139.}


The NIEO documents sought to order the international economy according to both the substantive principle of economic redistribution to "level" the international economic playing field and the institutional principle of international cooperation to achieve these ends. The norm of "special and differential treatment for developing countries" was central to the NIEO framework. This principle provided that industrialized actors were required to accord developing-country actors treatment more favorable than they would accord other industrialized actors, in order to aid the process of industrialization.

Thomas, supra note 189, at 2106.} According to one commentator, NIEO "constituted the most important international law initiative taken by the developing world in attempting to remedy colonial inequities."\footnote{198. ANTONY ANGHIÉ, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 313 (2005).}

Moreover, as Pedro Roffe and Taffere Tesfachew observed:

During the 1960s and 1970s, much of the debate on industrial and technological development concentrated on the question of technology transfer and, in particular, on the terms and conditions of acquiring technology. Technology was generally assumed to be like any other product and the process of technology transfer to be effected the same as any other transaction between a seller and a buyer. The 'tacit' elements of the transfer and the fact that local learning of new skills may be necessary to complete the transaction were not given much consideration.\footnote{199. Roffe & Tesfachew, supra note 57, at 381.}

Today, however, increased globalization and the continuous liberation of trade and foreign direct investment regimes have shifted the focus from "discussion on intellectual property . . . to how to make such systems efficient and useful instruments for encouraging innovation and diffusion of technical
knowledge." In fact, to many less developed countries, "what matters most was [no longer] the transfer of technology per se but what happens to the technology once it has been transferred"—for example, whether the transferred technology can be exploited or adapted without heavy restrictions by intellectual property rights.

The type of technical knowledge many countries need today is also much more complex than what they needed in the past. As Rubens Ricupero and Gamani Corea, two former UCTAD Secretary-Generals, explained:

There are two relevant categories of knowledge that are essential for economic progress and competitiveness. The first consists of knowledge embodied in machines and equipment which makes it possible to control sophisticated processes for producing goods and services and marketing them at a profit. The other category, to some extent still elusive, consists of tacit knowledge, that is, knowledge embodied in the organizational routines and collective expertise or skills of specific production, management, research and development and marketing. It is the first type of knowledge that people generally have in mind when discussing today's knowledge-intensive economy and the transfer and diffusion of technology. However, as knowledge becomes a more decisive factor, and a more critical commodity, its acquisition and diffusion will require that the two aspects of knowledge be considered as an integral part of knowledge transfer. This makes the process of technology transfer more than ever a continuous and uninterrupted learning process.

Finally, the mindsets of many less developed countries—especially those in the middle-income group—have changed significantly today. Although these countries are deeply dissatisfied with the high intellectual property standards required by the TRIPs Agreement and the TRIPs-plus bilateral and regional trade agreements, they begin to see the benefits of using the

201. Roffe & Tesfachew, supra note 57, at 382.
202. Rubens Ricupero & Gamani Corea, Preface to INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at xx; see also COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 24-25 (2003) [hereinafter IPR COMMISSION REPORT] ("The effective transfer of technology also often requires the transfer of 'tacit' knowledge, which cannot be easily codified.... This is why even the best-designed programmes to foster national capacity for research which are funded by donors have not always been successful."); LEAST DEVELOPED COUNTRIES REPORT, supra note 157, at 4 (underscoring the need to conceptualize knowledge in light of "the fundamentally dynamic character and plural aspects shaping knowledge production and generation, as knowledge is perceived as socially disembodied and universally transferable" and "the components and processes that shape the production and generation of knowledge").
intellectual property system to promote their indigenous industries. Such mindsets therefore contrast interestingly with the mindsets they had in the 1960s and 1970s, when they were primarily concerned about "access to technology generated in developed countries and its transfer to developing countries." Indeed, in light of recent developments, Peter Drahos has questioned whether "India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did.

Notwithstanding the questionable relevance of the International Code of Conduct in today's business environment, the Code has three main legacies. First, "such negotiations gave an opportunity to identify problems and obstacles facing the transfer of technology to developing countries and to build up a consensus on a number of issues, thus resulting in a large degree of agreement." Such consensus is particularly important to less developed countries in the run-up to the negotiation of the TRIPs Agreement. The timing of the drafting of the Code cannot be better.

Even today, the development of a dialogue among less developed countries would be highly beneficial. The negotiation process would help these countries define their interests while at the same time "provid[ing] a platform for collective learning . . . [and] a focal point [for] . . . cooperation." After all, less developed countries' participation in international

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204. As Rubens Ricupero and Gamani Corea recalled:

[U]ntil about the mid-1960s, the developing world, with the exception of a few countries, did not show much interest in the problems of modern science and technology. Even when there was interest, the problem was articulated mainly in terms of access to technology generated in developed countries and its transfer to developing countries.

Ricupero & Corea, supra note 202, at xix.


206. Roffe, supra note 187, at 266.


208. See BRAITHWAITE & DRAHOS, supra note 146, at 528.

209. Jean F. Freymond, The Role of Third Parties as Facilitators, in INTERNATIONAL TECHNOLOGY TRANSFER, supra note 57, at 237, 238.
affairs remain limited, and these countries continue to suffer from policy incoherence and coordination problems.\textsuperscript{210}

Second, the negotiation process "influenced the adoption of policies in developing countries\textsuperscript{211} and has a major residual effect on the TRIPs Agreement. As Abdulqawi Yusuf reminded us, some of the provisions in the draft text advanced by less developed countries\textsuperscript{212} during the TRIPs negotiations "were either directly based on or inspired by those of the Draft International Code of Conduct on the Transfer of Technology."\textsuperscript{213} Those provisions are now enshrined in the text of the TRIPs Agreement. For example, article 8(2) of the TRIPs Agreement, which lays out the principles of the Agreement, 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."\textsuperscript{214} Article 31(k) exempts members from their obligations under article 31 when the unauthorized use "is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive."\textsuperscript{215} Article 31(k) further stipulates that "[t]he need to correct anti-competitive practices may be taken into account in determining the

\textsuperscript{210.} As Peter Drahos observed:

Key factors that explain the negotiating failures of developing countries are a lack of trust amongst developing country groups, a myopic focus on single issues rather than the game in aggregate, insufficient political support from the capitals for negotiators, inadequate technical analyses of issues, a failure of co-ordination across and within bilateral and multilateral fora and, finally, a lack of boldness of vision.


\textsuperscript{211.} Roffe, supra note 187, at 267.

\textsuperscript{212.} Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [TRIPs Negotiating Group], Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, MTN.GNG/NGI I/W/7 (May 14, 1990).


\textsuperscript{214.} TRIPs Agreement, supra note 2, art. 8(2).

\textsuperscript{215.} Id. art. 31(k).
amount of remuneration in [cases of unauthorized use]."\textsuperscript{216} Finally, article 40 permits WTO member states to take appropriate measures to curb "an abuse of intellectual property rights having an adverse effect on competition in the relevant market."\textsuperscript{217}

Thus, even though the International Code of Conduct did not enter into force, some of its provisions have found its way to the TRIPs Agreement. As Pedro Roffe pointed out, the inclusion of the Code's language in the Agreement is particularly important, because "the issue of restrictive practices was, in a way, peripheral to the concerns of the TRIPs Agreement."\textsuperscript{218} With the built-in protection against anti-competitive practices, the TRIPs Agreement can now be viewed as "an important step forward in the quest for internationally agreed principles to control anti-competitive practices in transfer of technology transactions, leaving scope for further evolution of law in this area."\textsuperscript{219} While less developed countries have yet to take advantage of these provisions, it remains important that the provisions exist in the TRIPs Agreement and are available to these countries should need arise.

Finally, the drafting of the International Code of Conduct provides a wealth of materials that will become handy for those researchers exploring the interface between intellectual property protection and competition or antitrust policies. Indeed, commentators have increasingly called for the use of competition law as a counterbalancing mechanism.\textsuperscript{220} Shortly after the

\textsuperscript{216} Id.
\textsuperscript{217} Id. art. 40(2).
\textsuperscript{218} Roffe, supra note 187, at 279.
\textsuperscript{219} Id. at 296.
\textsuperscript{220} As John Braithwaite and Peter Drabos explained:

A great attraction of competition law is that it recruits business to do the consumer movement’s work. In the US, private actions by injured business competitors have been encouraged by the prospect of obtaining enormous damages; for example, there were dozens of private actions against AT&T before it was dismantled. Anti-competitive practices usually have business as well as consumer victims; the business victims normally have more resources and incentive to launch court cases against monopolistic practices. When business players unite to check the predatory practices of one or more of their own kind they create positive externalities for citizens. Sometimes these externalities have a global reach. Competition law is a way of constituting these externalities. For example, the best chance of checking Microsoft's domination of the rules for the electronic superhighway is antitrust suits funded by other computing industry firms. At the level of lobbying for structural change, a good framework of competition law, as existed in the Anglo-Saxon countries during the 1980s, allowed the International Telecommunications Users Group to challenge the monopoly of the major telecommunications provider in one country after another. The result is that consumers in many nations now have much cheaper telephone services. INTUG was not a consumer group in the sense of a group of household consumers; it was a coalition of big business users of telecommunications services led by companies like American Express.
introduction of the TRIPs Agreement, Ernst-Ulrich Petersmann noted that both developed and less developed countries "will need more systematic rules on the protection of competition among trade-related intellectual property rights and on the prevention of their anticompetitive abuse." Likewise, Jerome Reichman proposes to use "competition law to curb the abuse of market power" as a pro-competitive strategy for implementing the TRIPs Agreement in less developed countries. Most recently, Jonathan Berger discussed how less developed countries can use competition policy to "increase access to a sustainable supply of affordable essential medicines." Recommendation No. 7 of the WIPO Development Agenda further calls for WIPO to "[p]romote measures that will help countries deal with intellectual property-related anti-competitive practices."

D. Paris Convention

While less developed countries were working on the International Code of Conduct, they made parallel demands for a revision of the Paris Convention. Like the demand for the revision of the Berne Convention and the development of the International Code of Conduct, their concerns about the inappropriateness of the international patent system date back to the early 1960s. In November 1961, "Brazil and many other developing nations demanded for the first time—within the UN system—rules on the protection of intellectual property . . . favourable to their economic development, BRAITHWAITE & DRAHOS, supra note 146, at 621 (citation omitted). For discussion of issues at the intersection of intellectual property protection and competition policy, see CARLOS M. CORREA, INTELLECTUAL PROPERTY AND COMPETITION LAW EXPLORING SOME ISSUES OF RELEVANCE TO DEVELOPING COUNTRIES (ICTSD Programme on IPRs and Sustainable Development, Issue Paper No. 21, 2007), available at http://www.iprsonline.org/resources/docs/correaOct07.pdf.


222. See J.H. Reichman, From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement, 29 N.Y.U. J. INT’L L. & POL. 11, 52-58 (1997); see also John T. Cross & Peter K. Yu, Competition Law and Copyright Misuse, 56 DRAKE L. REV. 427, 428 (2008) (noting that, in response to the market abuses by copyright holders that stifle competition and innovation, "courts, litigants, policymakers, and commentators have increasingly embraced competition law, the doctrines of copyright misuse and unclean hands, and tort law concepts as counter-balancing tools").


224. WIPO, The 45 Adopted Recommendations Under the WIPO Development Agenda ¶ 7, http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited July 6, 2008) [hereinafter WIPO, 45 Adopted Recommendations]; see also IPR COMMISSION REPORT, supra note 202, at 149 ("Developed countries and international institutions that provide assistance for the development of IPR regimes in developing countries should provide such assistance in concert with the development of appropriate competition policies and institutions.").
including proper controls against abuse, thereby putting 'development' issues and 'public interest concerns' on the international IP agenda.'

Titled The Role of Patents in the Transfer of Technology to Under-Developed Countries, this proposal was tabled against a background of dissatisfaction of the international patent system in Brazil, which has been a member of the Paris Convention since its inception. A few months earlier, the Brazilian Parliament established a special "inquiry commission," the Comissão Parlamentar de Inquérito, "to analyze the domestic abuses of patent monopolies by multinational pharmaceutical corporations. The Commission made reference to the abuses regarding the non-working of patents by foreigners, the restrictive practices in licensing agreements, the payment of high royalties, including royalties for expired patents, and the high cost of medicines." To many developed countries, the Brazilian proposal provided "a threat to existing international conventions on patents and also to the hitherto unchallenged position of the Paris Union." Nevertheless, "the General Assembly passed a resolution requesting that the Secretary General prepare a report on the effects of patents on the economies of underdeveloped countries." This report was published later as The Role of Patents and the Transfer of Technology to Developing Countries.

Like Brazil, India was also deeply dissatisfied with the international patent system. Shortly after gaining independence in 1947, India established the Patents Enquiry Committee, also known as the Tek Chand Committee, to review the adequacy of the Indian patent system in promoting industrialization. Finding that the extant system "enabled multinational companies to gain patent rights beyond the scope of their inventions," the Committee "recommended incorporating compulsory licensing provisions to minimize the

226. See id. at 765.
227. Id. at 764.
228. ANDERFELT, supra note 13, at 173. As Ulf Anderfelt explained:
    The criticism of [Brazil’s proposal], as voiced by several delegations, emphasized three things: that abuses to which the patent system might give rise ought to be remedied through national legislation; that the existing machinery of the Paris Union was highly sufficient to deal with any questions concerning its field of activity and that countries not yet members ought to accede to it; and that particularly for developing countries unpatented or unpatentable technology was of greater importance than patented inventions.
    Id.
229. Roffe & Vea, supra note 14, at 95. The resolution was reprinted in Principal Decisions by the International Community Regarding the Patent System, WORLD DEV., Sept. 1974, at 37, 37.
230. Id. at 96.
231. See Ragavan, supra note 11, at 279.
potential for abuse of monopolies."

Its recommendations were subsequently incorporated into the patent law when the law was amended in 1950.

A decade later, the government appointed Justice Rajagopala Ayyangar to head a committee that sought “to promote law reforms to improve local industrialization in critical areas like food and drugs.” Taking into account the limited economic development within the country, the Ayyangar Committee unsurprisingly articulated the need for differential treatment for food, medicine, chemical inventions, and educational materials; the prohibition of product patents (as compared to process patents) in pharmaceuticals and agricultural chemicals; and the provision of compulsory licensing and the local working requirement. This report eventually paved the way for the establishment of the 1970 Patent Act, under which India did not provide patent protection for pharmaceutical products until 2005.

In sum, Brazil and India were both vocal about the need to reform the international patent system, and both of them had provided major leadership since the 1960s. One of the major changes they pushed for was the revision of the Paris Convention, which India had demanded as early as June 1974. Such a demand for revision makes a lot of sense. As Carolyn Deere recounted:

In the 1970s, nationals of developing countries held only around 1 per cent of the world’s 3.5 million patents. . . . 80 per cent of patents granted worldwide at that time were owned by major corporations from five industrialized countries. Further, over 80 per cent of the patents in force in developing countries were held by foreigners and registered on the basis of research conducted elsewhere.

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232. Id.
233. Id.
234. Id. at 281.
235. See id. at 281-89 (discussing the Ayyangar Committee Report).
237. As Professor Sell wrote:

In 1974, India sought improvements in the existing [Paris C]onvention before it would consider joining. India felt that developing countries lacked sufficient leverage in the Paris Convention and that developing countries needed special provisions to grant them effective bargaining power. The Indian delegation felt that the Paris Convention needed a stronger emphasis on states’ rights vis-à-vis patentees.

Sell, POWER AND IDEAS, supra note 164, at 114; see Roffe & Vea, supra note 14, at 99 (“The idea of a possible revision of the Paris Convention was first advanced in June 1974 when the Director General of WIPO was instructed to create and convene an Ad Hoc Group of Governmental Experts.”).
238. DEERE, supra note 210, at 43.
UNCTAD further "estimated that 90 to 95 percent of patents granted in developing countries were not exploited, or properly worked."\(^{239}\)

Based on these statistics, it is therefore no surprise that UNCTAD "advanced more assertive conclusions on the need for the revision of international conventions" in its 1974 report on the role of the international patent system in transferring technology to less developed countries.\(^{240}\) This report, on which WIPO was reluctantly listed as the co-author, contrasts interestingly with the 1964 report. That earlier report took "the view that international conventions, namely the Paris Convention, were not in need of reform for purposes of addressing the special problems of developing countries."\(^{241}\)

In December 1977, a group of WIPO experts, who took into account the new UNCTAD report, adopted a declaration that "served as the guiding instrument for the Diplomatic Conference on the revision of the Paris Convention."\(^{242}\) That declaration implied the "need to consider cases in which exceptions and corrections to the principle of national treatment and preferential treatment toward developing countries should be allowed."\(^{243}\) On the basis of this recommendation, "WIPO established in 1976 the Preparatory Intergovernmental Committee on the Revision of the Paris Convention."\(^{244}\)

Although the Paris Convention was revised in Lisbon in 1958, its membership in the less developed world had substantially increased since that revision conference. As Pedro Roffe and Gina Vea recounted: "[m]any African countries adhered to the Paris Convention after independence. More than half of the current African membership joined the Paris Convention...\(^{245}\)

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\(^{239}\) Sell, Power and Ideas, supra note 164, at 121.

\(^{240}\) Deere, supra note 210, at 45. As the report stated:

The set of practices of the international patent system and its specific impact on the developing countries...require a revision of the current patent laws and administrative practices of the developing countries. The purpose of any such revision will have to be that of making patent laws and practices capable of effectively complementing other instruments of policy for national development. Of particular relevance in this connexion are, among others, the following aspects: treatment of nationals and foreigners; independence of patents; rights conferred by a patent; policies concerning the subject of patentability; duration of patent grants; adequate and effective provisions to prevent and correct the abuses resulting from the exercise of the rights conferred by the patent; using patent fees as a flexible instrument of patent policy; introduction of inventors' certificates, utility models and other relevant means for promoting national scientific and technological capabilities. 1974 UNCTAD Report, supra note 167, at 64.

\(^{241}\) Roffe & Vea, supra note 14, at 96. Instead, the report found that "[c]apacity-building effort at the domestic level was the major issue, not the reform of the international system." Id.

\(^{242}\) Id. at 99.

\(^{243}\) Id.

\(^{244}\) Id. at 99-101.
During the 1960s and 1970s. During that time, less developed countries had also undertaken "a wave of legal reforms" in their intellectual property systems, including "the strengthening of the working requirement and the expansion of measures to prevent so-called patent abuses and promote the transfer of the technology." The proposed Paris revision therefore sought to consolidate these reforms. As Pedro Roffe and Taffere Tesfachew summarized:

The key aspects of the revision process of the Paris Convention... were mainly: to place on an equal footing the treatment of patents and inventors' certificates; the review of Article 5A on compulsory licensing; the recognition of preferential arrangements for developing countries; the introduction of changes to Article 5quater dealing with the importation of products manufactured by a process patented in the importing country.

With respect to Article 5A of the Paris Convention, less developed countries sought the following amendments:

[T]he importation of patented products should not be equivalent to exploitation of the patent; non-voluntary licenses could, under certain circumstances, have an exclusive character; and developing countries should enjoy a sort of preferential treatment to reduce the time-limits provided for in the Convention for the granting of non-voluntary licenses as well as for the revocation of the patent without the prior granting of a non-voluntary licence.

As Pedro Roffe and Gina Vea pointed out, the proposed amendments to Article 5A "were an attempt to fundamentally reshape the Convention by revisiting the notions of local working, remedies to abuses, and the relationship between compulsory licenses and forfeiture or revocation of patents. It was the most radical attempt to revise the Convention in its entire history."

In addition, less developed countries "sought either to delete [Article 5quater] from the convention or at least be exempted from it." That provision provided protection to imported products manufactured under a process patent, thus reducing the chance that the patent in the invention will

245. Id. at 84.
246. Roffe & Vea, supra note 14, at 92.
247. Roffe & Tesfachew, supra note 57, at 387 (footnote omitted).
248. Id. at 388.
250. SEL., POWER AND IDEAS, supra note 164, at 119.
be properly and sufficiently worked in these countries.\textsuperscript{251} An exemption from Article 5quater therefore would allow the country to "withhold protection from the owner of the process patent if that product was manufactured abroad."\textsuperscript{252} Finally, the countries demanded the inclusion into the Convention of "provisions authorizing national laws to take corrective measures in three cases, namely, those in which patent rights are abused; the patented invention was not, or was not sufficiently, worked in the country where the patent was granted; and the public interest was involved."\textsuperscript{253}

Although less developed countries sought to lower the levels of protection in the Paris Convention, the United States "went into the Paris Diplomatic Conference in 1980 hoping to obtain higher standards of protection. Instead it found itself having to defend the existing Paris Convention standards."\textsuperscript{254} It is understandable why the United States vehemently opposed the demands by less developed countries during the Paris revision conference. Other developed countries also "suspected that developing countries' governments were using patents as a scapegoat for more difficult problems internal to their economies."\textsuperscript{255}

The United States' opposition eventually led to the famous stalemate between developed and less developed countries over the Nairobi text of the Convention.\textsuperscript{256} The negotiations broke down after a first consultative meeting in Geneva in June 1985.\textsuperscript{257} As Peter Drahos and John Braithwaite recounted:

\begin{quote}
[T]here was little hope of achieving consensus [in WIPO] between the numerous states of the South, which were intellectual property importers, and a few wealthy states, which were intellectual property exporters, especially in the 1970s and 1980s when developing countries were claiming that much technological knowledge was in fact the common heritage of mankind.\textsuperscript{258}
\end{quote}

\textsuperscript{251} Article 5quater provides:

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Paris Convention, supra note 9, art. 5quater.

\textsuperscript{252} \textit{Sell, Power and Ideas}, supra note 164, at 120.

\textsuperscript{253} Id.

\textsuperscript{254} DRAHOS & BRAITHWAITE, supra note 138, at 111.

\textsuperscript{255} MAY, supra note 16, at 31.

\textsuperscript{256} See \textit{Sell, Power and Ideas}, supra note 164, at 123-30.

\textsuperscript{257} Id. at 130.

\textsuperscript{258} DRAHOS & BRAITHWAITE, supra note 138, at 112.
To make matters worse, "in the middle of the Paris Convention revision process, there emerged an event that sidetracked the general revision. In June 1983, the Director General proposed a new complementary treaty to the Paris Convention that would" later be widened to cover a wide variety of substantive patent issues, such as "the unity of invention, the first-to-file versus the first-to-invent criteria, the minimum duration of rights, enforcement issues, exclusion of certain fields of technology from patentability, and the rights and obligations of patentees."

In response to the stalemate caused by the Nairobi text, developed countries, led by the United States and influenced by multinational corporations, abandoned the intellectual property-based forum for the GATT/WTO with a goal to develop new substantive intellectual property norms that are enforceable through a dispute settlement process. Although less developed countries initially stayed together to fight the developed countries' effort to enlarge the negotiation mandate beyond border control measures and the protection against counterfeiting, they eventually succumbed to the developed countries' aggressive tactics and their own economic crises.

After negotiations for close to a decade, countries in both the developed and less developed worlds finally agreed to the Marrakesh Agreement Establishing the World Trade Organization, which included in its annex an intellectual property-related multilateral agreement known as the TRIPs Agreement. Entering into effect on January 1, 1995, the Agreement has adversely impacted many less developed countries, and these impacts have precipitated the establishment of the New Development Agenda.

III. THE NEW DEVELOPMENT AGENDA

When scholars and policymakers discuss the New Agenda, they tend to focus on the WIPO Development Agenda. Given WIPO's technical expertise, the importance of that agenda speaks for itself. It is also understandable why

259. Roffe & Vea, supra note 14, at 105.
260. See Yu, Currents and Crosscurrents, supra note 3, at 357-58 (discussing the shifting of negotiations in the intellectual property area by developed countries from WIPO to the WTO); see also Lars Anell, Foreword to DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS vii, vii (2d ed. 2003) (noting that "[i]n some quarters, there was a reluctance to give WIPO an active role in the [TRIPs] negotiations").
263. Marrakesh Agreement, supra note 2.
less developed countries and their supporters have placed high hopes on the success of that agenda. Nevertheless, the WIPO Development Agenda is only one of the many development agendas that have been established in the past few years. The first recent development agenda was actually established not at WIPO, but at the WTO during the Doha Development Round of Trade Negotiations ("Doha Round"). This Part therefore begins by discussing the Doha Development Agenda. It then examines the WIPO Development Agenda as well as the many additional "development agendas" that have been established in other international fora.

By showing that pro-development initiatives extend beyond the areas of intellectual property and international trade, this Part explores the interfaces between intellectual property protection and other important economic, social, and cultural goals. This Part also shows the adverse spillover effects of increased intellectual property protection and the problems posed by the one-size-fits-all—or more precisely, super-size-fits-all—approach taken by the TRIPs Agreement.

Bringing all of these fora together is important; it allows us to see how each international regime handles intellectual property matters. As Laurence Helfer observed, "[t]he responses in each regime [other than WIPO and the WTO] differed, . . . [and their responses ranged] from acceptance (biodiversity) to tolerance (PGRs) to skepticism (public health) to antagonism (human rights)."265 By exploring the activities conducted in these myriad fora, this Part highlights the growing opportunities for less developed countries to recalibrate the balance in the international intellectual property system.

**A. Doha Development Agenda**

The Doha Development Agenda was the first development agenda established in the post-TRIPS era. The Doha Round was launched in part as a response to the need for greater multilateral negotiations in the wake of the September 11 tragedies and the growing need for cooperation between the United States and other less developed countries.266 Of notable importance in


266. See, e.g., Louise Amoore et al., Series Preface to AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO xiii (2003) (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").
the intellectual property area was the adoption of the Doha Ministerial Declaration ("Ministerial Declaration")\(^{267}\) and the Declaration on the TRIPS Agreement and Public Health ("Doha Declaration").\(^{268}\)

Paragraph 19 of the Ministerial Declaration concerned the work program conducted by the TRIPs Council, including "the review of Article 27.3(b) [of the TRIPs Agreement], the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration," which focused on implementation-related issues and concerns.\(^{269}\) This paragraph further stated that "[i]n undertaking [its work], the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."\(^{270}\)

Compared to the Ministerial Declaration, the Doha Declaration focused more specifically on the interplay between intellectual property protection and the protection of public health. The first two paragraphs of the Declaration explicitly "recognize[d] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics . . . [and] the need for the [TRIPs Agreement] to be part of the wider national and international action to address these problems."\(^{271}\) Paragraph 4 declared that member states "agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health" and that "the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all."\(^{272}\)

Paragraph 5 then underscored the various "flexibilities" reserved to all WTO member states under the TRIPs Agreement.\(^{273}\) As Frederick Abbott


\(^{268}\) WTO, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

\(^{269}\) Ministerial Declaration, supra note 267, ¶ 19.

\(^{270}\) Id.

\(^{271}\) Doha Declaration, supra note 268, ¶ 1-2.

\(^{272}\) Id. ¶ 4.

\(^{273}\) Id. ¶ 5. These flexibilities include the following:

a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

c) Each Member has the right to determine what constitutes a national emergency.
pointed out, less developed countries have the following flexibilities in the public health area:

The TRIPS Agreement . . . does not . . . restrict the authority of governments to regulate prices. It . . . permits [compulsory or government use licenses] to be granted. It permits governments to authorize parallel importation. The TRIPS Agreement does not specify that new-use patents must be granted. It allows patents to be used for regulatory approval purposes, and it does not require the extension of patent terms to offset regulatory approval periods. The TRIPS Agreement provides a limited form of protection for submissions of regulatory data; but this protection does not prevent a generic producer from making use of publicly available information to generate bioequivalence test data. The TRIPS Agreement provides substantial discretion for the application of competition laws.274

The most important of all, Paragraph 6 of the Doha Declaration "recognized that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement."275 Pursuant to this paragraph, the TRIPs Council adopted the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health on August 30, 2003.276 Shortly before the Sixth WTO Ministerial Conference in Hong Kong, this decision was formalized as the proposed article 31bis of the TRIPS Agreement.277 If ratified by two-thirds of the WTO membership by December 2009 (a two-year extension from the earlier December 2007 deadline), the proposed amendment would allow

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or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Id.

countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.\textsuperscript{278}

Although the Doha Round focuses significantly on the lack of access to medicines in less developed countries, it has considered other issues, such as growing tension between the TRIPs Agreement and the Convention on Biological Diversity\textsuperscript{279} and the need for greater protection of traditional knowledge and cultural expressions. Paragraph 19 of the Ministerial Declaration, for example, instructed the TRIPs Council "to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore."\textsuperscript{280} In the past few years, proposals have also been advanced to promote the disclosure in patent applications of traditional knowledge and genetic resources used in inventions for which intellectual property rights are applied.\textsuperscript{281} These proposals will be discussed in Part III.C below.

\section*{B. WIPO Development Agenda}

While developed and less developed countries were in the middle of their negotiation on the permanent solution to implement Paragraph 6 of the Doha Declaration, Argentina and Brazil introduced an important proposal to establish a WIPO Development Agenda during the organization's General Assembly in October 2004.\textsuperscript{282} The proposal "call[ed] upon [the] WIPO General Assembly to take immediate action in providing for the incorporation of a 'Development Agenda' in the Organization's work program."\textsuperscript{283}

As noted by the proponents and supporters of this proposal, WIPO has failed its mission as a U.N. specialized agency to promote the development of less developed countries. According to Sisule Musungu and Graham Dutfield: "[t]he main objective of the organisation—the promotion of the protection of

\begin{thebibliography}{99}
\bibitem{278} Although the initial deadline for ratification was December 1, 2007, the deadline has been recently extended for another two years. \textit{William New, TRIPS Council Extends Health Amendment; Targets Poor Nations' Needs}, INTELL. PROP. WATCH, http://www.ip-watch.org/weblog/2007/10/23/wto-trips-council-focuses-on-developing-nations-needs/ (Oct. 23, 2007). As of this writing, slightly over a quarter of the 153 WTO member states, including the United States, India, Japan, China, and most recently members of the European Communities, have ratified the proposed amendment. WTO, \textit{Members Accepting Amendment of the TRIPS Agreement}, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (Aug. 2, 2007).
\bibitem{280} Ministerial Declaration, \textit{supra} note 267, \S\ 19.
\bibitem{281} See discussion \textit{infra} Part III.C.3.
\bibitem{283} \textit{Id.}
intellectual property—is quite narrow and... has raised concerns about the ability of the organisation to incorporate development objectives in its activities." The proposal by Argentina and Brazil therefore aims to reduce and eventually eliminate the historical "bias against latecomers to the intellectual property policy field—developing countries." It "also seeks to position WIPO in a better position to contribute towards tackling the key challenges of the 21st century and thereby the achievement of the MDGs [Millennium Development Goals]." As Sisule Musungu put it, "the key question... is how innovation, technology, and science (knowledge) can be harnessed to contribute to the attainment of [these goals]." He and Professor Dutfield argue that the organization should take up "broad development objectives and measures to ensure that developing countries benefit from modern scientific and technological advances in health, environment, communication, information technology and food and nutrition among others."
Similarly, the United Kingdom Commission on Intellectual Property Rights ("IPR Commission") has called on WIPO to "act to integrate development objectives into its approach to the promotion of IP protection in developing countries" and to "give explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits."\(^{289}\) Although the Commission recognizes WIPO's role in promoting intellectual property rights, it states that WIPO "needs to do so in a much more nuanced way that is fully consistent with the economic and social goals to which the UN, and the international community are committed."\(^{290}\)

To be certain, the proposal for the WIPO Development Agenda was originally developed as a partial response to the push for the draft SPLT and growing efforts to harmonize national patent standards.\(^{291}\) However, the WIPO Development Agenda is much broader today and has evolved into a much larger agenda on pro-development reform of the international intellectual property system. The issues addressed by the agenda also implicate activities outside WIPO. Indeed, the WIPO Development Agenda Proposal explicitly mentioned the Doha Declaration three times in its effort to underscore the development dimension and social function of intellectual

\(^{289}\) IPR COMMISSION REPORT, supra note 202, at 159.

\(^{290}\) Id. at 158.

\(^{291}\) See MUSUNGU & DUTFIELD, supra note 120, at 11-15.
property.\textsuperscript{292} One of the recommendations in the now-adopted agenda also incorporates the language in article 7 of the TRIPs Agreement.\textsuperscript{293}

Since the announcement of the establishment of the WIPO Development Agenda, 111 proposals had been submitted. Some of them (like the proposal to adopt development-friendly principles and guidelines) were abstract. Others (such as the proposal to establish a WIPO Standing Committee on IP and Technology Transfer or the one to establish a specific fee in the Patent Cooperation Treaty for development purposes), however, were rather specific. In addition, some proposals—for example, those nineteen recommendations that WIPO adopted and earmarked for immediate implementation—do not require a substantial amount of new institutional resources and were ready for implementation. Meanwhile, other proposals, such as those concerning the establishment of the Treaty on Access to Knowledge and Technology or a multilateral agreement concerning publicly funded research, will require lengthy and complex negotiation. Such negotiation may be even deadlocked as a result of the significant differences between developed and less developed countries.

After years of deliberation in the Provisional Committee on Proposals Related to a WIPO Development Agenda and the Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, the WIPO General Assembly finally adopted the Development Agenda in October 2007.\textsuperscript{294} This agenda includes forty-five recommendations that are grouped into six different thematic clusters: (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.”\textsuperscript{295} As Neil Netanel summarized succinctly:

\begin{quote}
To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “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”, in accordance with Article 7 of the TRIPS Agreement.
\end{quote}

WIPO, \textit{45 Adopted Recommendations, supra} note 224, ¶ 45.

\textsuperscript{292} See \textit{WIPO Development Agenda Proposal, supra} note 282, ¶¶ 12, 17, 55; see also \textit{MAY, supra} note 16, at 77 (discussing the linkage between the WIPO Development Agenda and Doha deliberations).

\textsuperscript{293} As Recommendation No. 45 states:

\begin{quote}
To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “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”, in accordance with Article 7 of the TRIPS Agreement.
\end{quote}

WIPO, \textit{45 Adopted Recommendations, supra} note 224, ¶ 45.


\textsuperscript{295} WIPO, \textit{45 Adopted Recommendations, supra} note 224.
The Development Agenda decisively rejects th[e] IP-centric view. It posits that strong intellectual property protection does not consistently promote creative activity, facilitate technology transfer, or accelerate development. The Development Agenda accordingly places the benefits of a rich and accessible public domain, national flexibilities in implementing IP treaty norms, access to knowledge, UN development goals, cubing of IP-related anti-competitive practices, and the need to balance the costs and benefits of intellectual property protection firmly within WIPO's central mission. For the first time in WIPO's history, it places the need for balance, flexibility, and a robust public domain on par with promoting IP protection in all WIPO matters affecting developing countries.296

Crudely classified, the agenda's recommendations cover reforms that go in two directions. One set of recommendations seeks to enhance the development dimension of WIPO and reform the institution itself. Such reform is particularly important in light of the institution's "heavy reliance on filing fees from the Patent Cooperation Treaty, the narrow definition of its mandate, and the development of training programs that serve this narrow mandate."297 As the Group of Friends of Development reminded us:

WIPO's existence is not dependent on rightholders, and rightholders do not "fund" WIPO. WIPO as an international intergovernmental organization is answerable to its Member States and its existence depends on its Members only. The global protection systems which contribute significantly to WIPO's income are systems that have been created by Member States. Rightholders must not lose [sic] sight of the central role played by Member States in the establishment of these services. Consequently, as much as the International Bureau should strive to provide efficient services as mandated by Members, payment for those services by rightholders should in no way provide a basis for anyone to claim that the users of those protection systems have the right to determine the agenda or priorities of the Organization, or even the manner in which the incomes of the Organization are to be allocated under its Programme and Budget. WIPO must remain a Member-driven Organization, where the role of the Secretariat is focused on facilitating the work of the Members and implementing decisions and instructions received from Member States.298

298. WIPO Development Agenda Proposal, supra note 282, ¶ 27.
This set of reforms is particularly timely in light of the recent allegations of corruption, nepotism, and misuse of funds within the organization and the controversy surrounding the age of the outgoing Director General.299

The second set of recommendations focuses on restoring balance in the international intellectual property system. They "call[] into question whether economic development and wealth creation are the sole metrics for measuring development . . . [and] put an end to WIPO's monolithic 'IP as power tool of development' approach."300 Taking advantage of the technical expertise and institutional legitimacy of WIPO, these recommendations seek to address development-related problems created by the high intellectual property standards of the TRIPs Agreement and the continued push for even higher standards through the TRIPs-plus bilateral and plurilateral trade agreements and the draft SPLIT. The recommendations also underscore the growing interest among less developed countries in obtaining protection for traditional knowledge and cultural expressions. In addition, "by purposively directing scrutiny to the methodology and content of the relationship between other international law regimes and the activities of WIPO, the Development Agenda has . . . occasioned reexamination of the unsettled relationship between IP protection and development goals."301

In March 2008, the newly created WIPO Committee on Development and Intellectual Property held its first meeting. Although the meeting focused primarily on procedural issues and was criticized by civil society organizations for insufficient transparency, member states remained hopeful and found the agenda developing in the right direction.302 Four months later, the Committee met again. The reaction was cautious, but generally favorable.303 Although a controversy recently emerged over the budget allocation concerning the implementation of five items of the WIPO Development Agenda,
the budget was subsequently revised. It remains to be seen how effective the agenda will be, but some commentators have expressed their optimism.

If the agenda succeeds, it is likely to help rejuvenate WIPO. Today, there is a tendency to focus on the adverse impacts of the TRIPs Agreement and the activities within the Doha Round or in the TRIPs Council, as compared to developments at WIPO. However, it is important not to overlook the potential impact of activities conducted at WIPO, especially when it is rejuvenated. As Bernt Hugenholtz and Ruth Okediji pointed out in their comparison of the two organizations:

[T]he WTO is primarily a trade regime. It does not have the primary responsibility for the development of IP norms qua IP norms; instead, IP protection is viewed through its impact on free trade, which provides a distinct gloss on the interpretation of TRIPS obligations that often disregards cultural and other relevant criteria central to both national and international copyright systems. Secondly, the WTO lacks the important historical context and technical considerations to evaluate the need for an international instrument on [limitations and exceptions] and to analyze the nature and scope of what might be contained in such an instrument. Indeed, the agreements that the WTO is charged to enforce originate from WIPO and are equally subject to WIPO’s oversight.

WIPO has several additional advantages. According to Jayashree Watal, WIPO “can... start discussions on IP subjects more easily than the WTO... [and] draw upon experts from both the government and the private sector for more broad-based discussions.” WIPO also provides unique services for the


305. See, e.g., Sara Bannerman, The WIPO Development Agenda Forum and Its Prospects for Taking into Account Different Levels, in IMPLEMENTING WIPO’S DEVELOPMENT AGENDA, supra note 207 (noting that “one of the most important battles of the Development Agenda at WIPO—the battle over the inclusion of development in WIPO’s mandate—has already been won”). But see MAY, supra note 16, at 80-81 (noting that “many developing countries’ representatives see [the development of a Committee on Development and Intellectual Property] as a mechanism by which the WIPO secretariat and the developed countries can effectively (again) sideline developmental concerns”).

306. See MAY, supra note 16, at 104.


308. WATAL, supra note 261, at 5.
fast-growing industries of many developed and middle-income developing countries. As Sisule Musungu and Graham Dutfield pointed out: “[i]t is one thing to move substantive standards to WTO in the form of TRIPS and quite another to take the PCT or Madrid systems to the WTO or to San Francisco, for example. There is no other viable alternative . . . to the . . . services that WIPO provides for industry.”

C. Development Agendas in Other International Fora

Apart from the WTO and WIPO, other international fora have played increasingly important roles in ensuring that intellectual property protection not hinder economic, social, cultural, and technological development in less developed countries. Indeed, some of them are much more favorable to less developed countries than the WTO and WIPO. This section focuses on developments in regimes in the areas of human rights, public health, biological diversity, food and agriculture, and information and communications. To illustrate the continuous proliferation of intellectual property-related fora, the end of this section also highlights new developments in the World Customs Organization.

Although this Article, despite its Dickensian length, does not allow for a more extended treatment of each of these regimes, this section takes stock of the key developments concerning the many diverse development agendas established outside the WTO and WIPO. When examining these developments, however, it is important to keep in mind the existence of additional pro-development efforts that are being undertaken by UNCTAD, the International Labor Organization, the U.N. Development Programme, U.N. Industrial Development Organization (“UNIDO”) and other U.N. organizations.

1. Human Rights

With the growing protection of intellectual property rights and the deepening of HIV/AIDS crisis, human rights organizations and advocates have actively explored the human rights implications for intellectual property protection. As the U.N. Sub-Commission on the Promotion and Protection of Human Rights stated in its Statement on Intellectual Property Rights and Human Rights, “the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights . . . [and] there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international

309. MUSUNGU & DUTFIELD, supra note 120, at 23.
310. For a background on these organizations, see MUSUNGU, supra note 210, at 25-35.
human rights law, on the other.”\textsuperscript{311} In light of these conflicts, this statement reminded governments of “the primacy of human rights obligations over economic policies and agreements,”\textsuperscript{312} such as the TRIPs Agreement, and noted the “social function of intellectual property.”\textsuperscript{313} The statement also requested “[g]overnments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation.”\textsuperscript{314}

Following this statement, the High Commissioner for Human Rights offered a critical examination of the TRIPs Agreement.\textsuperscript{315} The report provided five observations concerning the potential challenge for developing a human rights approach to the TRIPs Agreement. First, as the High Commissioner pointed out:

[T]he overall thrust of the TRIPS Agreement is the promotion of innovation through the provision of commercial incentives. The various links with the subject matter of human rights—the promotion of public health, nutrition, environment and development—are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement.\textsuperscript{316}

Second, “while the Agreement identifies the need to balance rights with obligations, it gives no guidance on how to achieve this balance.”\textsuperscript{317} Although the Agreement “sets out in considerable detail the content of intellectual property rights,” such as the requirements for the grant of rights, the duration of protection, the modes of enforcement, it “only alludes to the responsibilities of IP holders that should balance those rights in accordance with its own objectives. . . . [U]nlike the rights it sets out, the Agreement does not


\textsuperscript{312} Id. ¶ 3.

\textsuperscript{313} Id. ¶ 5.

\textsuperscript{314} Id. ¶ 4.


\textsuperscript{316} Id. ¶ 22; see also Musungu, supra note 210, at 4-5 (“So far the only widely accepted notion has been that intellectual property is trade-related, justifying the TRIPS Agreement in the WTO but not the notion that intellectual property rules are also education-related, health-related, defence-related and environment-related and so forth.”).

\textsuperscript{317} High Commissioner’s Report, supra note 315, ¶ 23.
establish the content of these responsibilities, or how they should be implemented.\textsuperscript{318}

Third, because of the required minimum standards, the TRIPs Agreement has taken away a high degree of autonomy and a considerable amount of policy space from each WTO member state. The lack of such autonomy, in turn, may affect the state’s “abilities to promote and protect human rights, including the right to development.”\textsuperscript{319} As the High Commissioner reminded us, article 2(3) of the Declaration on the Right to Development provides explicitly that:

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{320}

Fourth, and related to the third, “the protection contained in the TRIPS Agreement focuses on forms of protection that have developed in industrialized countries.”\textsuperscript{321} As a result, less developed countries are required to offer protection that does not always take into account the local needs, interests, and conditions. Even worse, such protection may significantly reduce a country’s ability to promote public health or participation in development.

Fifth, limited attention has been devoted to the protection of “the cultural heritage and technology of local communities and indigenous peoples” in the current international intellectual property regime.\textsuperscript{322} There have also been growing concerns about the use of trade pressure to impose TRIPs-plus legislation that could result in the development of “IP systems that are inconsistent with States’ responsibilities under human rights law.”\textsuperscript{323}

Notwithstanding these concerns, the High Commissioner recognized the flexibilities built into the TRIPs Agreement and that “much still depends on how the TRIPS Agreement is actually implemented.”\textsuperscript{324} While these flexibilities are important and may help retain the balance in the international intellectual property system, it is important to remember that taking advantage

\begin{footnotesize}
\begin{itemize}
\item[318.] Id.
\item[319.] Id. \textsuperscript{\textsuperscript{124}}
\item[321.] High Commissioner’s Report, supra note 315, \textsuperscript{\textsuperscript{125}}
\item[322.] Id. \textsuperscript{\textsuperscript{126}}
\item[323.] Id. \textsuperscript{\textsuperscript{127}}
\item[324.] Id. \textsuperscript{\textsuperscript{128}}
\end{itemize}
\end{footnotesize}
of these flexibilities requires expertise and resources. As noted in UNCTAD’s most recent Least Developed Countries Report:

Even with its inbuilt flexibilities, the TRIPS Agreement is highly problematic for LDCs owing to the high transaction costs involved in complex and burdensome procedural requirements for implementing and enforcing appropriate national legal provisions. LDCs generally lack the relevant expertise and the administrative capacity to implement them.325

A few years after the release of the High Commissioner’s Report, the Committee on Economic, Social and Cultural Rights issued an authoritative interpretive comment on article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)—a provision that requires each state party to the Covenant to “recognize the right of everyone . . . [t]o 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.”326 As the Comment stated:

Ultimately, intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights.327


According to the interpretative comment, "the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration."328

Finally, in September 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples,329 which has been under development since the mid-1990s.330 With respect to the protection of intangible cultural heritage, the Declaration 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, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.331

This focus on the protection of intangible cultural heritage echoes provisions in the Universal Declaration of Human Rights,332 the International Covenant on Civil and Political Rights ("ICCPR"),333 the ICESCR,334 and other international human rights instruments.335 Although the Declaration does not cover

328. Id.
331. U.N. Declaration, supra note 329, art. 31(1).
334. ICESCR, supra note 326, art. 15(1)(a).
335. Article 15(2) of the International Labor Organization Convention No. 169, for example, provides:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.
intellectual property rights per se, the protection of indigenous heritage, such as the protection of traditional knowledge and cultural expressions, is likely to have major ramifications for the protection of intellectual property rights.

2. Public Health

Although the World Health Organization ("WHO") has a mandate over public health issues, its interest in intellectual property issues only began with the arrival of the TRIPs Agreement. In 1996, the World Health Assembly adopted a resolution on Revised Drug Strategy, which requested the WHO Director General to "report on the impact of the work of the WTO with respect to national drug policies and essential drugs and make recommendations for collaboration between WTO and WHO, as appropriate." The resolution led to the publication of a guide to the public health consequences of the TRIPs Agreement, which encouraged WTO member states to minimize the effects of patents on the availability of essential drugs by using the flexibilities built into the Agreement. Developed countries, however, found the publication controversial. While they initially opposed granting the WHO competence in reviewing health-related intellectual property issues, the European Communities soon changed their position in light of the massive HIV/AIDS pandemic in Africa.

In February 2004, the World Health Assembly established the Commission on Intellectual Property Rights, Innovation and Public Health to "collect data and proposals from the different actors involved and produce an analysis of intellectual property rights, innovation, and public health,

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Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (1989). In addition, as I noted earlier:


including the question of appropriate funding and incentive mechanisms for
the creation of new medicines and other products against diseases that
disproportionately affect developing countries." Following a number of
comments and reports, the Commission released its final report in April 2006.

As stated in the report, the Committee sought to "illuminat[e] how
intellectual property rights might affect public health ... [and] to consider
how diseases which disproportionately affect developing countries could best
be addressed, and to seek solutions."340 Despite the broad scope of the report,
it sent a strong and important signal to WHO member states that the protection
of intellectual property rights is only a means to an end, but not an end itself.
Such protection therefore needs to be balanced against other important, and
often more important, goals, such as the promotion of public health.341 In
addition, as Nicoletta Dentico, the health policy advisor of IQsensato, noted:

[The Report] made 60 recommendations requesting that policymakers consider making adjustments to the current R&D system and
developing new mechanisms to stimulate needs-driven medical
innovation. It also recognized that governments have a crucial role to
play with regard to the different interventions across disease areas—well beyond the most neglected tropical diseases—needed to
promote essential innovation and access to lifesaving medicines.342

The establishment of this Committee in the WHO is significant. At the
very least, it shows "that intellectual property matters, particularly as they
relate to innovation, are not an exclusive preserve of WIPO."343 Indeed,
allowing WHO to take up more responsibility in the intellectual property area,
especially where it intersects with public health, may be beneficial. As Sisule
Musungu pointed out:

Not only will [organizations such as WHO] bring the best science to
bear on the problems of today but they will have a core competence

ea56r27.pdf.


=view&id=106&Itemid=60.

342. Nicoletta Dentico, *Implementing the WHO Global Strategy on Public Health, Innovation & IP: An Opportunity That Should Not Be Squandered by Poor Implementation*, In Focus (IQsensato), Mar. 12,

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and a legitimacy that WIPO does not as well as better penetration at the local level. With these research results and information, developing countries will be better placed to take a lead in policy experimentation and innovations to improve the intellectual property regimes so as to offset the overly protectionist tendencies of the industrialised countries. The overall result will be to maintain the supply of global public goods in an emerging transnational system of innovation. Such processes are also guaranteed to better, though not necessarily fully, take into account the public interest in the innovation, development and intellectual property debates and processes.\footnote{Id. (footnote omitted).}

Although there have been limited developments in the public health regime thus far, and the WHO did not attain much global attention until the outbreak of the SARS (severe acute respiratory syndrome) epidemic in spring 2003,\footnote{As Scott Burris wrote: [D]uring the SARS outbreak that the notoriously “weak”... WHO... was able to exercise considerable control over states simply by issuing press releases: lacking formal power to compel the cooperation of affected states, WHO was able to use its ability to issue travel warnings to mobilize the considerable influence of travelers and those who decide where to place factory orders. Scott Burris, Governance, Microgovernance and Health, 77 TEMP. L. REV. 335, 339 (2004).} the organization has begun to focus on intellectual property issues. Nongovernmental organizations (“NGOs”) have also utilized the forum, hoping that the organization will provide greater expertise in the public health area and the development of a new perspective that is not available in regimes that focus solely on intellectual property and international trade.\footnote{Tim Hubbard and James Love proposed a treaty that sought to help revamp the way governments fund research and development while alleviating concerns by the United States and other major countries over the free-riding problem. Tim Hubbard & James Love, A New Trade Framework for Global Healthcare R&D, 2 PLOS BIOLOGY 147 (2004), available at http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=340954&blobtype=pdf.} Although it remains to be seen how much the WHO Development Agenda can contribute to the promotion of development dimension of intellectual property rights, the importance of such a highly specialized and credentialed agency is not to be ignored.

3. Biological Diversity

As discussed earlier, less developed countries have developed a growing concern about the interface of the TRIPs Agreement and the Convention on Biological Diversity (“CBD”). Such interface is important, because many less developed countries are bound by both agreements. The CBD “was adopted
in 1992 under the auspices of [the United Nations Environment Programme] when 150 government leaders signed it at the Rio Earth Summit." Article 1 states the Convention's objectives as "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources." As Professor Helfer explained, the origin of the Convention stemmed from the diverging positions taken by developed and less developed countries. While "biodiversity-rich but biotechnology-poor developing countries sought financial benefits and technology transfers as incentives to conserve rather than exploit the genetic resources within their borders[, b]iodiversity-poor but biotechnology-rich industrialized states . . . sought to minimize benefits and transfers while maximizing access to those resources."

To strike a compromise, the CBD "allow[s] industrialized countries to support the transfer of proprietary technologies to developing states as a quid pro quo for access." It recognizes the contracting states' "sovereign right to exploit their own resources pursuant to their own environmental policies, and the[ir] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Article 8(j) further requires countries to:

respects, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

With respect to technologies that are subject to intellectual property protection, the CBD states that access to and transfer of these technologies to less developed countries "shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights." Acknowledging the potential influence of these rights on its implementation, the Convention obligates the contracting parties to "cooperate

347. MUSU NGU, supra note 210, at 34.
348. CBD, supra note 279, art. 1.
349. Helfer, Regime Shifting, supra note 265, at 28.
350. Id.
351. CBD, supra note 279, art. 3.
352. Id. art. 8(j).
353. Id. art. 16(2).
... to ensure that such rights are supportive of and do not run counter to its objectives.\(^{354}\)

Thus far, 191 countries have joined the CBD,\(^{355}\) making it "perhaps the most authoritative international instrument yet that recognizes the traditional knowledge of indigenous and local communities."\(^{356}\) The United States signed the CBD but has yet to ratify it, while France, Italy, Switzerland, and the United Kingdom ratified the Convention subject to interpretive statements.\(^{357}\) As of 2002, more than thirty of the contracting parties—mostly less developed countries—"had adopted or were considering enacting laws governing third party access to biodiversity-related resources located within their borders."\(^{358}\)

Notwithstanding the importance of the CBD, the TRIPs Agreement has yet to develop an explicit relationship with the Convention, other than to mention plants, plant varieties, and biological and microbiological processes in article 27(3)(b).\(^{359}\) To promote this linkage, the Ministerial Declaration "instruct[ed] the Council for TRIPS . . . to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore."\(^{360}\) This instruction echoes the official statement of the Conference of the Parties, which "[s]tresses the need to ensure consistency in implementing [the two agreements], with a view to promoting increased mutual supportiveness and integration of biological diversity concerns and the protection of intellectual property rights."\(^{361}\) In recent years, the Conference of the Parties, along with

\(^{354}\) Id. art. 16(5).


\(^{357}\) Helfer, Regime Shifting, supra note 265, at 31-32.

\(^{358}\) Id. at 31 n.128 (citing MICHEL PETIT ET AL., WHY GOVERNMENTS CAN'T MAKE POLICY: THE CASE OF PLANT GENETIC RESOURCES IN THE INTERNATIONAL ARENA 49 & 80 n.1 (2001)).

\(^{359}\) Article 27(3)(b) of the TRIPs Agreement provides:

Members may also exclude from patentability . . . plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

TRIPs Agreement, supra note 2, art. 27(3)(b).

\(^{360}\) Ministerial Declaration, supra note 267, ¶ 19.

NGOs, "have expressed concern about the adverse effects of TRIPs on the CBD and have sought to harness intellectual property rules to promote compliance with the Convention."362

To promote consistency between the CBD and the TRIPs Agreement, less developed countries have advanced a proposal to amend the TRIPs Agreement by adding a new article 29bis, which, if adopted, would create an obligation to disclose in patent applications the source of origin of biological resources and traditional knowledge used in inventions for which intellectual property rights are applied.363 Drawing on the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, this proposal parallels Switzerland's recent proposal to amend the PCT Regulations.365 The proposed article 29bis further requires patent applicants to disclose their compliance with access and benefit-sharing requirements under the relevant national laws.366 Although a large number of less developed countries have supported the proposal,367 the United States and

363. See Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania, Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity, WT/GC/W/564/Rev.2 (July 5, 2006) [hereinafter Article 29bis Proposal] (requiring patent applicants to "disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin").
364. As stated in the Bonn Guidelines:
Contracts 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. . . .

366. See Article 29bis Proposal, supra note 363 (requiring patent applications to "provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge").
367. See William New, WTO Biodiversity Amendment Backed; EU Seeks 'New Thinking' on GIs, INTELL. PROP. WATCH, http://www.ip-watch.org/weblog/2007/10/26/wto-biodiversity-amendment-backed-eu-seeks-new-thinking-on-gis/ (Oct. 26, 2007) (stating that "[t]he total number of WTO members now cosponsoring the [article 29bis] proposal appear to be in the majority of the [then-]151 WTO members").
Japan strongly oppose it, expressing fear that the additional requirement would destabilize the existing international patent system.368

Notwithstanding their opposition, the achievement of this proposal has at least three benefits. First, it promotes coherence between policies that seek to implement the CBD and the TRIPs Agreement. Given the limited resources and technical capacities less developed countries have, such coherence is particularly important. Second, because the United States has yet to ratify the CBD, developing a linkage between the TRIPs Agreement and the CBD may enable the benefits of the CBD to be spread to WTO members that have yet to join the CBD. Finally, the development of a disclosure requirement would strengthen the efforts to provide stronger protection of traditional knowledge at WIPO and other international fora. Such protection would also help safeguard the protection of the intangible cultural heritage of the more than 100 countries that are now parties to the Convention on the Safeguarding of Intangible Cultural Heritage.369

Another way to promote consistency between the CBD and the TRIPs Agreement is through the development of protection for traditional knowledge and cultural expressions. In September 2000, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established by WIPO.370 Since its inception, the Committee has sought to address the misappropriation of folklore, traditional knowledge, and indigenous practices by providing “a forum for international policy debate and development of legal mechanisms and practical tools.”371

Although folklore, traditional knowledge, and indigenous practices “are not necessarily IP resources in the sense that they are understood in developed countries, . . . they are certainly resources on the basis of which protected intellectual property can be, and has been, created.”372 If instituted, protection of these materials would have an impact on a wide variety of policy areas, including agricultural productivity, biological diversity, cultural patrimony, food security, environmental sustainability, business ethics, global competition, human rights, international trade, public health, scientific research,
sustainable development, and wealth distribution. The traditional knowledge
debate to date has been particularly intense, and the international community
has yet to reach a consensus on how to protect indigenous materials, due
partly to the limited understanding of the issue, the complexities involved in
defining the scope of protection and classifying the materials, and the
politically-sensitive nature of indigenous and minority rights.  

4. Food and Agriculture

In addition to the CBD, there has been growing discussion of the needs
to develop standards in the plant genetics resources regime in areas that
intersect with intellectual property protection. On the one hand, there are
strong interests in providing incentives to protect plant breeders and rules
that affect the ownership and transfer of plant genetic resources. For example, the
International Union for the Protection of New Varieties of Plants ("UPOV") requires each state party to "grant and protect breeders' rights."  Adopted
in 1991, the latest act of UPOV significantly affects the farmers' ability to sell
seeds or exchange them with others.

On the other hand, there are serious concerns about the need for farmers
to reuse seeds. For example, the International Undertaking on Plant Genetic
Resources for Food and Agriculture, which was adopted by the Food and
Agricultural Organization ("FAO") Conference in 1983, declares that "plant
genetic resources are a heritage of mankind and consequently should be
available without restriction." Because the 1991 Act of UPOV greatly
curtails the farmers' ability to share seeds with others, there has been growing
discussion of the need to develop farmers' rights.

Farmers' rights, which are defined generally as "rights arising from the
past, present and future contributions of farmers in conserving, improving, and
making available plant genetic resources, particularly those in the centres of
origin/diversity," form "a loosely defined concept that seeks to acknowledge
the contributions that traditional farmers have made to the preservation and

373. See generally Peter K. Yu, Cultural Relics, Intellectual Property, and Intangible Heritage, 81
375. See id. art. 14(1). Article 15(2), nevertheless, includes an optional exception that "permit[s]
farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have
obtained by planting, on their own holdings, the protected variety." Id. art. 15(2).
improvement of PGRs." They serve as "a counterweight to plant breeders' rights, compensating the upstream input providers who make downstream innovations possible." As Kal Raustiala and David Victor explained, "[t]he underlying idea is to compensate farmers for the incremental, collective innovations they create through their normal agricultural practices."

Although Resolution 5/89 of the FAO Conference recognized farmers' rights, it vested those rights in "in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well[l] as the attainment of the overall purposes of the International Undertaking [on Plant Genetic Resources for Food and Agriculture]." This resolution therefore created tension between the intellectual property and food and agriculture regimes.

In November 2001, after seven years of contentious negotiation, a new International Treaty on Plant Genetic Resources for Food and Agriculture was adopted. This new treaty sought to promote "the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security." Closely linked to the CBD, the treaty recognizes:

the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

The treaty also "recognize[s] the sovereign rights of States over their own plant genetic resources for food and agriculture, including . . . the authority to determine access to those resources."

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379. Id. at 37.
381. Farmers' Rights, supra note 377.
383. Id. art. 1.1.
384. Id. art. 9.1.
385. Id. art. 10.1.
The treaty further requires member states "to establish a multilateral system, which is efficient, effective, and transparent." As Professor Helfer explained:

In essence, the multilateral system is a communal seed treasury composed of thirty-five food and twenty-nine feed crops held both by states and CGIAR gene banks. In exchange for access to this common seed pool, private parties that create commercial products which incorporate PGRs received from the multilateral system must pay a percentage of their profits into a fund to be administered by the treaty's Governing Body. The fund will be used to promote conservation and sustainable use of PGRs, particularly by farmers in developing countries, whose conservation efforts the treaty expressly recognizes.

Although this new treaty struck a compromise by recognizing intellectual property rights in some plant genetic resources while promoting free access to other resources, such as raw plant genetic resources and those resided in international seed banks, the continuous push for farmers' rights is likely to boost the protection of traditional knowledge and cultural expressions. As Professors Raustiala and Victor observed, the same rationale underscores both the protection of traditional knowledge and that of farmers' rights.

5. Information and Communications

With the arrival of the Internet and new communications technologies and the emergence of the online social community, the developments in the information and communications area have taken on unprecedented significance. While WIPO seeks to regain its momentum by developing the

386. Id. art. 10.2.
387. Helfer, Regime Shifting, supra note 265, at 40.
388. As Professor Helfer wrote:

In response to the expansion of intellectual property rights, . . . actors in the PGR regime adopted different rules for each of these three categories. Wild PGRs were made subject to the sovereignty of the state in which they were located; "worked" PGRs were eligible for intellectual property protection by private parties, while the seeds and other plant materials located in international seed banks continued to be treated as the common heritage of humanity.

Id. at 34-35.

389. As they pointed out: "The farmer's rights movement has gained momentum as a broader group of indigenous communities—not just farmers—have realized that they could be victims of the same dividing line between 'raw' and 'worked' knowledge. As this broader coalition organized, it adopted a more general term: 'traditional knowledge.'" Raustiala & Victor, supra note 380, at 304.
WIPO Internet Treaties\textsuperscript{390} and undertaking a consultative process to examine the Internet domain name system,\textsuperscript{391} other fora have conducted activities to address problems and challenges in the global digital environment and the emerging knowledge economy.

In 2003, the World Summit on the Information Society ("WSIS") was held in Geneva under the auspices of the International Telecommunication Union ("ITU"). This summit underscored the concern over a widening digital divide between developed and less developed countries and the global importance of access to information and knowledge.\textsuperscript{392} The Geneva phase of the Summit was followed by a second Tunis phase in November 2005.\textsuperscript{393}

Although WSIS focuses on more than intellectual property issues, the concerns raised by the growing protection of intellectual property rights have been noted explicitly in the summit declaration and its accompanying action plan.\textsuperscript{394} Paragraph 42 of the Declaration of Principles from the Geneva Summit provides:

\textit{Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society.}\textsuperscript{395}

These documents were followed by the Tunis Action Plan, which called for the U.N. Secretary-General to convene the Internet Governance Forum to promote a "multilateral, multi-stakeholder, democratic and transparent" policy dialogue on Internet governance.\textsuperscript{396} Since its creation, the forum has met in


\textsuperscript{391} See generally WIPO INTERNET DOMAIN NAME PROCESS REPORT, supra note 160.


\textsuperscript{395} WSIS Declaration of Principles, supra note 392, \| 42.

\textsuperscript{396} Tunis Agenda, supra note 393, \| 72-73.
Athens, Rio de Janeiro, and Hyderabad, India, with future meetings scheduled
to be held in Sharm El Sheikh, Egypt and Vilnius, Lithuania.\textsuperscript{397} Although the
benefits of this forum remain to be seen, the forum no doubt has successfully
raised concerns in an emerging policy area and facilitated linkage between the
various established international regimes. It is, indeed, no coincidence that
Recommendation No. 24 of the WIPO Development Agenda "request[s] WIPO,
within its mandate, to expand the scope of its activities aimed at
bridging the digital divide, in accordance with the outcomes of the World
Summit on the Information Society also taking into account the significance
of the Digital Solidarity Fund."\textsuperscript{398}

Compared to the other fora, the WSIS process is characterized by a much
heavier participation of civil society organizations. Indeed, their participation
was so heavy that concerns over free speech were raised in the run-up to the
second summit in Tunisia, which is known for problems concerning free
speech and human rights.\textsuperscript{399} The extensive civil society participation was no
surprise. After all, the emergence of the information society has enabled
individuals to communicate with others in a borderless world. The
information revolution therefore has transformed virtually everybody into a
stakeholder in the global information society, thus making Internet governance
especially important. In fact, the growing development in this area may go
hand in hand with a recent development at the non-state level—the Access to
Knowledge Movement.\textsuperscript{400} As this movement grows, the public interest-orientated
information and communications policies—such as the preservation
of the public domain, the protection of fair use, and the development of media-
neutral policies—are likely to feature even more prominently on the agenda
of the emerging information and communications regime.

\textsuperscript{397} Information about the past and future Internet Governance Fora is available at
http://www.intgovforum.org/cms/.

\textsuperscript{398} WIPO, \textit{45 Adopted Recommendations}, supra note 224, \textit{\S} 24.

\textsuperscript{399} \textit{See} Jonathan Zittrain \& John Palfrey, \textit{Introduction} to \textit{ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING} 1, 1 (Ronald Deibert et al. eds., 2008) (describing the Tunisian government’s blocking of websites that were "critical of the summit’s proceedings or mentioning human rights" during WSIS); Molly Beutz Land, \textit{Protecting Rights Online}, 34 \textit{YALE J. INT’L L.} 1, 19 (2009) (stating that "[t]he lack of serious attention to the issue of filtering was particularly apparent in the decision to hold the second phase of WSIS in Tunisia, a country that engages in Internet censorship"); Kieren McCarthy, \textit{EU Attacks Police Tactics at Tunis Internet Conference}, \textit{THE GUARDIAN} (London), Nov. 16, 2005, at 22 (reporting about the European Union making "a formal complaint to the Tunisian government on the eve of a world internet summit in Tunis over heavy-handed police tactics").

6. Summary

Although commentators tend to focus on the development agenda established at the WTO or WIPO, there are many other equally important development agendas in other international fora. As international law becomes more fragmented, and issues areas continue to merge, an increasing number of fora will emerge to address problems created by intellectual property protection.

Most recently, the World Customs Organization ("WCO") has caught widespread attention in the area of intellectual property enforcement. To be certain, customs and border control is not a new issue area, and its strong relation to the protection and enforcement of intellectual property rights has been recognized from the inception of the TRIPs Agreement. The representatives of the Customs Cooperation Council were among the earliest observers in meetings of the TRIPs Negotiating Group of the GATT.401

Nevertheless, the recent active development in the WCO is worrisome. As one commentator noted, the WCO sought to set "new standards of intellectual property enforcement through the back door."402 Even worse, less developed countries have criticized the WCO secretariat for not providing sufficient opportunity for participation. In a recent submission to the WCO, Argentina, Brazil, China, Cuba, Ecuador, and Uruguay expressed their concern that the SECURE Working Group had "depart[ed] from the member-driven nature that should guide the process of the . . . Working Group" that the group's recent report "was produced without previous consultation to the Members of the Organization."403

Following these criticisms, the WCO decided to discontinue the working group and proposed to establish in its place a new committee that has a stronger focus on technical assistance and capacity building.404 While the WCO's decision reminds us of the importance of focusing on development, and suggests the potential for advancing pro-development positions through international participation—or international protest, in this case—the recent

401. TRIPs Negotiating Group, Meeting of the Negotiating Group of 23 September 1987, at 1, MTN.GNG/NCI11/2 (Oct. 8, 1987).
development at WCO also highlights the continued proliferation of fora and the potential for greater interactions between otherwise distinct issue areas. It is for this reason commentators have repeatedly emphasized the importance of focus on the development of linkages and regime complexes. As Rorden Wilkinson observed, one of the distinguishing features of the contemporary global governance system "is the way in which varieties of actors are increasingly combining to manage—and in many cases, micro-manage—a growing range of political, economic and social affairs."

IV. COMPARISON

In a recent article in the *Journal of World Intellectual Property*, Andréa Koury Menescal compared the establishment of the New Development Agenda to that of the Old Agenda. Focusing on the draft resolution Brazil introduced before the United Nations General Assembly in 1961, she highlights the strong resemblances between the two Development Agendas. For example, Jürg Engi of the International Association for the Protection of Intellectual Property ("AIPPI") made the following remarks in 1963:

> This may not sound nice but I might just as well tell you that I am of the opinion that there is a serious countermovement to the present highly desirable trend towards modernizing and strengthening industrial property protection of which I spoke a minute before. As you are aware, a number of attacks on the industrial property system have in the last few years been made, the whole system having encountered severe criticism not only in developing countries but also in highly industrialized countries.

> This general movement towards undermining industrial property rights has been particularly fierce in the pharmaceutical field... but what happens now in one particular technical field may soon extend to other fields.

These remarks strongly echo the statement made online by the U.S. Chamber of Commerce:

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408. Menescal, *supra* note 129.

409. Id. at 761 (quoting AIPPI, *ANNUAIRE* 1963/I, at 88-89).
Anti-IP forces are pressing their attacks in the U.S. Congress, in a growing number of key nations, and in multilateral forums like the World Trade Organization, the World Health Organization, and the World Intellectual Property Organization harming both developed and developing countries and their people....

The U.S. Chamber, as the voice of the broader business community, has launched a comprehensive campaign to rebuild global support for fundamental intellectual property rights.  

As Andréea Menescal wrote, the statement uttered by Engi "could easily have been made by someone dissatisfied with the World Trade Organization’s Doha Declaration of 14 November 2001... or with the proposal presented by Brazil and Argentina... in October 2004 calling for the establishment of [the WIPO Development Agenda]."

When one gets deeper into the policy demands made by less developed countries and the conceptual tools they used, one could find even more striking similarities between the two sets of development agendas. For example, the TRIPs-minus intellectual property standards less developed countries demand today easily reminds one of the active push for special and differential treatment for less developed countries by Brazil, India, and other less developed countries decades ago. Although the TRIPs Agreement sought to create minimum standards for the protection and enforcement of intellectual property rights, its preamble explicitly recognizes "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."  

Similarly, the commons concept that has been used widely in the free software, open source, free culture, and access to knowledge movements resembles the "common heritage of humankind" concept, which was advanced decades ago in part to "compensat[e] for colonial exploitation." That concept has been used in the past few decades to push for the protection of

411. Menescal, supra note 129, at 761.
412. See Roffe & Vea, supra note 14, at 107 (stating "[r]eferences to issues such as technology transfer, capacity building, flexibilities based on countries’ levels of development, access to knowledge, the preservation of the public domain, and access to new technologies (such as information and communication technology) are reminders of past events").
413. TRIPs Agreement, supra note 2, pmbl. recital 6.
414. Galal, supra note 181, at 201.
cultural property, an equitable disposal of materials found in outer space, the joint ownership of seabed resources under the United Nations Convention on the Law of the Sea, the mutually beneficial exploration and development of Antarctica, and the conservation of plant genetic resources.

In sum, commentators are right to point out the strong resemblances between the Old and New Agendas. As Debora Halbert reminded us, "the contemporary debates about access to knowledge, traditional knowledge and a development round are in no way new debates. These concerns have been present from WIPO's inception, but thirty-seven years of work have yet to see these issues resolved." According to her, "one of the most depressing realizations of reviewing the debates surrounding WIPO's creation is just how little has changed since 1967." Likewise, Professor Okediji found remarkable resemblances between NIEO and the WIPO Development Agenda:

Like the NIEO, the Development Agenda is framed as a regime of special and differential treatment for [developing and least developed countries]. Initiated by developing countries, with Brazil again at the lead, the proposal for a WIPO Development Agenda challenges the passive orthodoxy that positive welfare gains are inexorably a byproduct of IP protection. Like the Brazil-initiated resolution almost half a century ago, the various proposals focus squarely on the core IP treaties administered by WIPO and the absence of any explicit identification of how IP rights can and will

415. See Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, 249 U.N.T.S. 240 (stating that cultural artifacts are the "cultural heritage of all mankind").


418. See Antarctic Treaty, pmbl. ¶ 1, Dec. 1, 1959, 12 U.S.T. 794 ("[r]ecognizing that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord"). For an in-depth discussion of whether the concept should apply to Antarctica, see generally CHRISTOPHER C. JOYNER, GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION (1998).

419. See International Undertaking, supra note 376, art. 1 (stating "the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction").

420. See Halbert, supra note 119, at 262; Menescal, supra note 129, at 793; see also Roffe & Vea, supra note 14, at 99 (noting "[a] remarkable parallel... between the consensual, international declaration [of the WIPO Ad Hoc Group of Governmental Experts in December 1977] and the developing-country claims made almost 30 years later in the context of the WIPO Development Agenda").

421. Halbert, supra note 119, at 254.

422. Id. at 262.
complement the objectives of other international regimes or foster the goals of the global public order with respect to improving the lives of millions around the world. Finally, the WIPO Development Agenda challenges the constitutional context of WIPO’s institutional isolationism, requiring the Organization to meaningfully integrate the objectives of IP protection with the rights which serve as means to those ends.423

In light of the strong resemblances between the Old and New Development Agendas, this Part compares the two agendas in terms of their players, fora, and issues as well as the political environment surrounding their development, the level of public awareness of intellectual property issues, and the use of ideas, concepts, and rhetorical frames as a support for these agendas. Such comparison is important for three reasons.

First, it provides insight into the sustainability and future success of the New Agenda. If the agenda simply repeats its failed predecessor without making significant adjustments, this agenda is unlikely to succeed. As Andrés Menescal argued through a comparison of the Old and New Development Agendas:

The fact that the 2004 proposal reiterates the need “to foster the transfer of technology through foreign direct investment and licensing” for developing countries is evidence that the initiatives from the 1960s onwards brought home less to developing countries than the propagandistic efforts of the AIPPI’s and the ICC’s experts made the world believe. That such a proposal as the 2004 one was presented at all implies that the 1961 Brazilian Resolution failed and that the influence of private-interest experts linked to the AIPPI and the ICC continued unabashed even after the WIPO became a United Nations specialized agency in 1974.424

Thus, if the New Agenda is to be successful, drawing lessons or insights from the Old Agenda is essential. Because the two agendas share many common features, “the latter should be understood in the context of the former’s failure.”425 A study of the Old Agenda will also provide helpful lessons and direction for the future development of the New Agenda.426 As Menescal continued: “A historical perspective can help the new ‘countermovement’ to measure its opponents and prepare itself for the long and difficult process of

423. Okediji, History Lessons, supra note 194, at 152.
424. Menescal, supra note 129, at 793.
425. Id. at 762.
426. See Roffe & Tesfachew, supra note 57, at 400 (“A number of lessons could be drawn from past and recent attempts to deal with the issue of the transfer of technology at the multilateral level.”).
changing the rules on IP law and policy. Research and teaching will play a
decisive role in this process that may well take decades.\textsuperscript{427} Likewise, Surendra Patel, Pedro Roffe, and Abdulqawi Yusuf wrote:

Although the Code of Conduct negotiations never resulted in a final
agreement, and failed to materialize in a concrete legal instrument,
they continued to inform, inspire and influence the issues addressed
by these later instruments, as well as their approach and content,
particularly as regards the positions adopted by developing countries
in the course of their elaboration.\textsuperscript{428}

Second, a better understanding of the Old Agenda will promote a greater
appreciation and understanding of the political dynamics involved in the
negotiation process and the hard policy choices confronting the participating
members and international institutions. Indeed, the self-interests of and con-
cerns about marginalization may have made it more difficult for WIPO and
other international organizations to fully embrace a development agenda.\textsuperscript{429}
Some senior WIPO staff may still have vivid, and perhaps bitter, memories of
the shift of the intellectual property standard-setting activities from their organi-
zation to the GATT/WTO in the mid-1980s. As Keith Maskus noted colorfully,
"WIPO has been hit by a train since TRIPS was concluded."\textsuperscript{430} Similar develop-
ments have also marginalized UNCTAD and UNESCO,\textsuperscript{431} both of which have
been highly supportive of the efforts by less developed countries to recalibrate
the balance of the international intellectual property system.

In fact, since the creation of the TRIPs Agreement, WIPO seems to have
undertaken "a sustained campaign . . . to return the organization to the center
of global intellectual property policy making."\textsuperscript{432} As Graeme Dinwoodie
observed:

\begin{itemize}
\item \textsuperscript{427} Menescal, supra note 129, at 762.
\item \textsuperscript{428} Surendra J. Patel et al., \textit{Introduction} to \textit{INTERNATIONAL TECHNOLOGY TRANSFER}, supra note 57, at xxiii, xxiv.
\item \textsuperscript{429} See \textit{MAY}, supra note 16, at 95 (arguing that "we should recognize that the organization's
directors and staff have focussed on the task of ensuring the WIPO would not decline in importance, nor
come marginalized as some other specialized agencies of the United Nations have become").
\item \textsuperscript{430} Keith E. Maskus, \textit{The WIPO Development Agenda: A Cautionary Note}, in \textit{DEVELOPMENT AGENDA}, supra note 14, at 163, 164.
\item \textsuperscript{431} See \textit{MUSUNGU & DUTFIELD}, supra note 120, at 19-20.
\item \textsuperscript{432} \textit{MAY}, supra note 16, at 66; see also G. BRUCE DOERN, \textit{GLOBAL CHANGE AND INTELLECTUAL PROPERTY AGENCIES: AN INSTITUTIONAL PERSPECTIVE} 58 (1999) (stating that the desire for an intellectual property agency to move into the role of generating and distributing value-added intellectual property-related information "is undoubtedly accompanied by a concern that the agency . . . concerned might not survive or would lose influence unless it could take on such new aggressive service-oriented roles"); Okediji, \textit{History Lessons}, supra note 194, at 157 (noting that "the Development Agenda could be viewed as an explicit expansion of WIPO's mandate necessary for ensuring that the Organization remains relevant in the future").
\end{itemize}
[The sudden emergence of the WTO as part of the international intellectual property lawmaking process seemed to energize WIPO, resulting in the conclusion of several new treaties in copyright, patent and trademark law, as well as the reorganization... designed to make WIPO fit for the twenty-first century.]

Such reemergence provides a more complete picture of the full operation of an international organization. To be certain, WIPO, as a member-driven organization, cannot ignore the mandate given by its membership. However, it may be able to take action in areas when no clear mandate exists. Moreover, as Professor May pointed out, “WIPO does not merely operate on the basis of the clearly articulated interest of a majority of its members,” citing the development of the WIPO Internet Domain Name Process. According to him:

WIPO has moved beyond the passive secretariat model in international organizations, to one that is much more proactive. Although the international secretariat of the WIPO would... like to deny the claim, the WIPO is a highly politicized organization, and cannot be regarded merely as an agency providing technical services, as the debates around the WIPO Development Agenda have clearly revealed.

433. Graeme B. Dinwoodie, The Architecture of the International Intellectual Property System, 77 CHI.-KENT L. REV. 993, 1005 (2002) (footnotes omitted); see also Gervais, supra note 260, at 82 (suggesting that “WIPO [may] continue to be the primary forum for major norm-setting efforts and those efforts will then serve as a basis for future changes to the [TRIPS] Agreement”). Likewise, as Sisule Musungu and Graham Dutfield pointed out:

For WIPO itself, the advent of TRIPS created a significant strategic dilemma. The organisation had to share its hitherto ‘exclusive competence’ on intellectual property matters with the WTO. In a move aimed at preserving its relevance in the new scenario, WIPO quickly adopted a resolution in 1994 mandating the International Bureau to provide technical assistance to WIPO members on TRIPS-related issues. This was followed by a second resolution in 1995 to enter into a cooperation Agreement with the WTO for WIPO to provide technical assistance to developing country members of the WTO irrespective of their membership in WIPO.

434. May, supra note 16, at 59; see also Frederick M. Abbott, Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance, 3 J. INT’L ECON. L. 63, 72 (2000) (noting that “[t]he WIPO Domain Name Process is the leading example of a multilateral secretariat-based rule-making process which breaks from the traditional model of the passive secretariat”); Dinwoodie, supra note 433, at 1001 (“WIPO acted at the request of a single member state (the United States) to produce a report that, by virtue of delegation of de facto control of the domain name registration process from that single government, could be implemented by ICANN as substantive law without the usual airings found in the intergovernmental lawmaking process of which WIPO is a part” (footnote omitted)).

Moreover, the WSIS process and the subsequent development of the Internet Governance Forum have shown the ongoing rivalry among the various international institutions that are involved in standard-setting activities concerning the Internet and the new digital environment. Organizations from the ITU to UNESCO have expressed their interest in being considered as the primary forum for developing these new standards. Even more challenging, the development of new technology has ushered in new forms of organizations that have been of growing importance to the international intellectual property regime. The Internet Corporation for Assigned Names and Numbers ("ICANN"), which is now charged with responsibilities for the day-to-day management of the domain name systems and the oversight of the operation of the authoritative root server system, is a private not-for-profit corporation in California that has entered into a contractual arrangement with the U.S. Department of Commerce.

Finally, by underscoring the differences between the two Development Agendas, and the promising developments concerning greater intellectual property activities in other fora and the growing public awareness of the issues, this Part provides hope for the New Agenda. Such a note of optimism helps generate the grassroots support needed to counter the push for stronger intellectual property protection by powerful countries and their equally powerful industries. The additional support also enables less developed countries and their supporters to work together to develop new negotiation and implementation strategies, to restore the balance in the international intellectual property system, and to develop more balanced concepts of protection and enforcement.

A. Players

Compared to the New Agenda, the Old Agenda was heavily state-centered—in part due to the fact that the international legal system "historically deferred to states as the guardians of domestic welfare, with the assumption that the appropriate exercise of sovereign power for domestic public interest would inure inevitably to the benefit of the global

436. Nevertheless, Sisule Musungu has praised the inclusive approach taken by the ITU when it organized the WSIS process:

The UN General Assembly gave the ITU the lead on this process and the ITU has taken it forward in a broadly inclusive fashion requiring the contribution of all relevant UN agencies and attracting attention from various levels of policy-making. Clearly, given the multiplicity of actors, interests and the scope of the impacts of these policies and the UN entities involved, this may ultimately be the way to proceed.

Musungu, supra note 210, at 20.

community." To the extent non-state actors are involved in the Old Agenda, their interests are usually reflected through those state actors that represent them.

For example, the revision of the Berne and Paris Conventions was a process dominated heavily by state actors. Although the publishing industries have played important roles in the Conventions' development—in particular, its attempt to defeat the Stockholm Protocol and Brazil's 1961 draft resolution—their interests were largely represented by their corresponding governments. Likewise, during the negotiation of the International Code of Conduct, government officials, rather than corporate executives, were heavily involved in the negotiation process, even though "efforts at finalizing work on the Code have been thwarted by countries with the greatest vested interests in the activities of transnational corporations." To many less developed countries at that time, corporations were mere "agents of transfer" of technology.

In the past few decades, however, private corporations have become more actively involved. Although they still express their views through their national governments, they also have been more aggressive in lobbying the governments in Brussels, Geneva, Tokyo, Washington, and other policy fora. For example, Professor Sell has shown how private corporations were the main proponents behind the push for stronger international intellectual

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439. See May, supra note 16, at 22-23 ("The subsequent series of conferences and reports, involving the International Chamber of Commerce and the Association for the Protection of Intellectual Property, alongside the BIRPI, effectively stifled the intent of the resolution, leaving the issues to re-emerge some 40 years later.").
441. Sell, Power and Ideas, supra note 164, at 4.
443. See May, supra note 16, at 99 ("[C]orporations and their representatives are very effective national lobbyists, and may well manipulate the make-up of delegations to the WIPO, shaping the arguments and debates before they are initiated in Geneva."); Sell, Private Power, supra note 261, at 106 (noting that the Intellectual Property Committee "succeeded in forgoing an industry consensus with its Japanese [Keidanren] and European industry counterparts [UNICE (Union of Industrial and Employers' Confederations of Europe)], who agreed to work on it and pledged to present these views to their respective governments in time for the launching of the Uruguay Round"). For the joint TRIPs proposal from the Intellectual Property Committee, Keidanren, and UNICE, see Intellectual Prop. Comm., Keidanren & UNICE, Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities (1988).
property protection in the TRIPs Agreement. As she pointed out: "What is new in [the TRIPs] case is that industry identified a trade problem, devised a solution, and reduced it to a concrete proposal that it then advanced to governments. . . . In effect, twelve corporations made public law for the world." Their active involvement and their role in driving the development of the TRIPs Agreement therefore have made "[s]tate-centric accounts of the Uruguay Round . . . at best incomplete, and at worst misleading."

The ability of multinational corporations to influence governments is in part derived from their mastery of technical details concerning intellectual property protection and enforcement and partly due to the resources they have vis-à-vis less developed countries. Many of these countries "lack the resources . . . to send delegates to [international] fora and thus have resorted to using nongovernmental organizations . . . to represent their interests." In one instance, the Foundation for International Environmental Law and Development, a London-based environmental NGO, negotiated a deal to represent Sierra Leone before the WTO Committee on Trade and Environment.

Although international NGOs that dominated the international intellectual property standard-setting process in the past were primarily corporations and industry groups, civil society organizations have been more active in recent years. As Andrée Menescal observed, "[t]he most welcome news to emerge from the 2004 [WIPO Development Agenda] debate is that developing countries’ governments are no longer alone in opposing an even further strengthening of the IP holders’ rights and the prevalence of private interests in the IP field." Likewise, Sisule Musungu and Graham Dutfield

444. See generally SELL, PRIVATE POWER, supra note 261.
445. Id. at 96.
446. Id. at 8; see also Gunther Teubner & Andreas Fischer-Lescano, Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS, supra note 37, at 17, 28 ("In the fields of cultural protection and biopiracy, . . . the key actors are not states but private entities, such as universities, museums, and business corporations.").
447. See SELL, PRIVATE POWER, supra note 261, at 98.
450. Menescal, supra note 129, at 794; see also DEERE, supra note 210, at 114 ("A key result of post-TRIPS tensions was the deepening complexity of the global IP system. The range of non-state actors involved in global IP debates become broader and many NGOs, industry groups, international organizations (IOs) and academic experts deepened their degree of engagement."); SELL, PRIVATE POWER, supra note 261, at 140 ("[W]hat is new is the mobilization of [grassroots activists, farmers’ groups, environmental groups, development groups, human rights groups, and consumer groups] to oppose an increasingly aggressive approach to intellectual property by US corporations.").
consider "[c]ivil society groups . . . the single most important factor in raising the issue of the impact of the international intellectual property standards, especially TRIPS standards, on development issues such as health, food and agriculture."^451

To be certain, the participation of NGOs in the international debate was not a new phenomenon. Nevertheless, there have been some differences in the nature and degree of their participation in recent years. As Richard Dogson and Kelly Lee wrote in the public health context: "[N]on-state actors have long played an important role in health governance. The difference here lies in the degree, and nature, of that involvement. . . . [T]here are examples of health governance emerging that incorporate non-state actors more intimately and numerous within processes of decision-making."^452 Indeed, many NGOs found themselves "woken up" by the harsh realities brought by the one-sided TRIPs Agreement and the public health crises it has created in the less developed world.^453 Meanwhile, others remain frustrated by the fact that they had been largely excluded from the WTO process.^454 According to Adronico Adede, their exclusion "may explain why they subsequently became so uncompromising towards the WTO, as shown when they helped to paralyse the 1999 Seattle Ministerial Conference, where it was expected that a Millennium Round would be launched."^455

During the Fifth WTO Ministerial Conference in Cancún in 2003, "high-profile NGOs, such as Greenpeace, Oxfam, and Public Citizen, explicitly backed the developing countries’ stand and heavily criticized developed

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^451. MUSUNGU & DUTFIELD, supra note 120, at 22 (footnote omitted).
^453. As Professor Sell wrote: "When I asked some public-regarding copyright activists 'where they had been' during TRIPS, they told me they had been 'sleeping' but that because of TRIPS they had 'woken up.'" SELL, PRIVATE POWER, supra note 261, at 181; see also Maskus, supra note 430, at 164 ("Policymakers, non-governmental organizations, the media, and even many legal scholars have awakened to the fact that IP regulations have rather fundamental implications for the processes of economic development.").
^454. As Adronico Adede explained:
  Given the negotiating system followed by the Uruguay Round, which even developing country sovereign states complained about, it is easily apparent that the non-governmental organizations and civil society had next to no opportunities for influencing the negotiations of the TRIPS Agreement during the conference processes between 1990 and 1994. They may, however, have had opportunities for organizing informal workshops and seminars to discuss TRIPS-related issues, but these were completely outside the official GATT negotiating procedures.
^455. Id. at 30.
countries, in particular the US and the EU, for a lack of consideration for their poorer trading partners." Likewise, they have increasingly demanded voices and roles in international organizations and processes through the submission of *amicus curiae* briefs to the WTO dispute settlement panels as third parties. Although NGOs do not have any right to submit these briefs, and the dispute settlement panels do not have any obligation to consider them, the Appellate Body of the Dispute Settlement Body stated clearly that a dispute settlement panel "has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*"

Similar developments occurred at WIPO. Shortly before the adoption of the WIPO Development Agenda Proposal, civil society organizations put together the Geneva Declaration on the Future of the World Intellectual Property Organization ("Geneva Declaration") to highlight the needs and demands of less developed countries. The declaration, which was circulated over the Internet and signed by more than 600 academics, researchers, inventors, public libraries, nonprofit organizations, and individuals, called for WIPO to undertake the following reforms:

- Express a more balanced view of the relative benefits of harmonization and diversity, and seek to impose global conformity only when it truly benefits all humanity;
- Reject a "one size fits all" system that "leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens";
- Establish a development round to openly discuss these issues;

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457. See generally Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L. J. 173 (2000) (examining the role that nongovernmental organizations do and should play in the WTO dispute resolution process, including the submission of *amicus curiae* briefs); Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47 (2001) (discussing the opportunity that the WTO dispute resolution process provides to nongovernmental organizations for participating in environmental cases); Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87 (2001) (exploring the arguments supporting and criticizing the increased judicialization of WTO dispute resolution, with particular emphasis on the battle over *amicus* briefs).


• Support the mandate from the 1974 U.N./WIPO agreement that WIPO "promote creative intellectual activity and facilitate the transfer of technology related to industrial property";
• Create "a moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge";
• Create standing committees on technology transfer and development issues;
• Support a Treaty on Access to Knowledge and Technology;
• Reform the technical assistance programs and provide developing countries with the ability to implement the Doha Declaration on TRIPs and Public Health.  

As the Geneva Declaration reminds us:

The proposal for a development agenda has created the first real opportunity to debate the future of WIPO. It is not only an agenda for developing countries. It is an agenda for everyone, North and South. It must move forward. All nations and people must join and expand the debate on the future of WIPO.

A year later, the Royal Society for the Encouragement of Arts, Manufactures and Commerce convened an international committee to draft the Adelphi Charter on Creativity, Innovation and Intellectual Property, which sets out eight new principles for the development of intellectual property rights and calls on governments and international community to focus on the public interest. In its first principle, the Charter states that "[l]aws regulating intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves." As the Charter continues: "The public interest requires a balance between the public domain and private rights . . . [and] a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual

460. Halbert, supra note 119, at 274-75.
461. Geneva Declaration, supra note 459. Likewise, Andrée Menescal wrote: [B]oth the "WIPO Development Agenda" and the public interest concerns on IP are no longer an issue only for developing countries, activists and NGOs calling for the prevalence of social and health issues over trade and profit with IP rights. Rather, they are of significant concern to an international network of public-interest NGOs, academics and consumers from both developing and developed countries.

Menescal, supra note 129, at 786.

463. Id. ¶ 1.
property laws." The Charter calls on governments to "facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature" and to take into account "developing countries' social and economic circumstances."

The growing participation of NGOs, academics, policy experts, and the media is significant for a number of reasons. First, they help advance the cause of less developed countries by serving as allies within the domestic political contexts. As Gregory Shaffer pointed out, less developed countries can "enhance the prospects of their success if other US and European constituencies offset the pharmaceutical industry's pressure on US and European trade authorities to aggressively advance industry interests."

Second, as in the case of academics and policy experts, they help identify policy choices and negotiating strategies that help less developed countries enhance their development potential. According to Andrée Menescal, "the support of intellectuals, especially legal scholars, is just as crucial as their previous support for an IP system that secured the protection of patent-holders' rights."

Finally, these players, in particular the mass media, help reframe the public debate that makes it more favorable to the cause of less developed countries. As John Braithwaite and Peter Drahos wrote in the public health context: "Had TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilizing the consensus that US business elites had built around TRIPS." Likewise,

464. Id. ¶ 3.
465. Id. ¶ 7.
466. Id. ¶ 8.
468. Shaffer, Recognizing Public Goods, supra note 467, at 480.
469. Menescal, supra note 129, at 762.
471. BRAITHWAITE & DRAHOS, supra note 146, at 576; accord DEERE, supra note 210, at 173 ("The effort by NGOs to shift international media coverage on compulsory licensing away from a frame
Professor Sell reminded us that “grants talk” is preferable to “rights talk” from the standpoint of international development, because it “highlights the fact that what may be granted may be taken away when such grants conflict with other important goals” and is likely to discourage policymakers from focusing on the entitlement of the rights holders.\(^4\)

Acknowledging the growing importance of NGOs and other stakeholders, the IPR Commission contended that “WIPO would benefit from drawing a wider group of constituencies with an interest in the IP system into its policy-making process, such as consumer organisations.”\(^4\)\(^7\)\(^3\)

As the Commission reasoned:

WIPO has always been responsive to the needs of the industrial sectors which make intensive use of IP. We are less persuaded that it is as responsive to the interests of consumers or users of IP-protected products. It is of crucial importance in this respect that WIPO is not perceived as being receptive primarily to those organisations which have an interest in stronger IP protection.\(^4\)\(^7\)\(^4\)

The Commission’s recommendation makes great sense in light of the changing political dynamics in the international intellectual property regime. Although state-centric international governance dominated the past, there has emerged a new form of global governance in which both state and nonstate actors play important roles. As Professor May explained:

The contemporary idea of global governance seeks to capture something more than the multilateral co-ordination of state activities through the membership of issue-specific organizations. Rather, global governance identifies the emergence and development of political leadership by these organizations, moving beyond their mere enacting of state governmental instructions and interests. Although no international organization has complete autonomy from, and power

dominated by the suggestion that IP is critical to innovation to a human rights frame, was critical to their success in prompting governments to address the relationship between TRIPS and public health.”). As Amy Kapczynski explained:

[f]rames affect what the players understand to be their interests, whom they believe to be their allies, and how they justify the change they seek. These frames direct as well as reflect material circumstances, and as a result, the domain of the political cannot be mathematically reduced to the domain of the material.

Kapczynski, A2K Mobilization, supra note 400, at 809.

472. SELI, PRIVATE POWER, supra note 261, at 146.

473. IPR COMMISSION REPORT, supra note 202, at 159.

474. Id.; see also MAY, supra note 16, at 84 (criticizing WIPO for effectively excluding “other UN agencies with significant interests in IPRs, from UNESCO to the UNDP, . . . from the policy deliberations at the WIPO in the last decade”).
over, its members, few international organizations remain only agents of state power.  

B. Fora

When the Old Agenda was being negotiated, the intellectual property regime was the main forum for negotiation. As less developed countries emerged out of decolonization, pro-development agencies, such as UNCTAD and UNIDO, came into existence and began to participate in the intellectual property debate. Nevertheless, the interests of each forum remained narrowly defined, and there was limited overlap between the different interests.

Although countries had been able to "shop" for a forum that would best promote and protect their interests, international forum-shifting activities were the exception rather than the norm. The textbook example of a successful forum shift is the shift of intellectual property negotiations from WIPO to GATT/WTO by developed countries. Other notable examples include the use of UNCTAD by less developed countries to promote their interests through the development of NIEO and the International Code of Conduct as well as UNESCO's development of the U.C.C. as an alternative to then Euro-centric Berne Convention.

In the New Agenda, however, there have been a much greater amount of forum-shifting activities. In fact, these shifts are no longer limited to those regimes that concern international trade, intellectual property, and development. Many new fora that are traditionally not considered part of the intellectual property regime have become affected. As I described in an earlier article, there has now emerged an "international intellectual property regime complex" that includes areas such as public health, human rights,
biological diversity, food and agriculture, and information and communications.\textsuperscript{480} It is for this reason the previous Part defines the Development Agenda broadly to cover important developments in these other regimes.

In addition, in the past couple of years, there has been an active push for the establishment of the Anti-counterfeiting Trade Agreement. As Professor Sell pointed out, "[t]he new anti-counterfeiting and enforcement initiatives [in this area] are just the latest mechanisms to achieve the maximalists' abiding goal of ratcheting up IP protection and enforcement worldwide."\textsuperscript{481} Although developed countries and their "allies" have discussed the agreement in secret, with the support of their industries, its lack of transparency in the negotiation process thus far has attracted an immense amount of criticisms in not only the less developed world, but also the developed world.\textsuperscript{482} Its harm to less developed countries has also raised significant concerns. As Professor Sell reminded us, "[t]he opportunity costs of switching scarce resources for border enforcement of IP 'crimes' is huge . . . [and t]here surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms."\textsuperscript{483}

While forum-shifting activities are important, Professor May suggested that a bigger issue—and a direct cause of these activities—is the continuous proliferation of international fora that can be used to discuss intellectual property matters.\textsuperscript{484} He therefore considers forum proliferation a more significant concern than forum shifting. Regardless of which development is more alarming, however, the greater use of these fora is likely to result in significant changes in the international intellectual property system that can help or hurt less developed countries.\textsuperscript{485}

On the one hand, the greater complexity in the international intellectual property regime will raise the transaction costs for policy negotiation and coordination. These costs are particularly problematic for countries with very limited resources and technical capacity. As Eyal Benvenisti and George


\textsuperscript{483} SELL, \textit{GLOBAL IP UPWARD RATCHET}, supra note 481.

\textsuperscript{484} See MAY, \textit{supra} note 16, at 66 (discussing forum proliferation); \textit{see also} IPR COMMISSION REPORT, \textit{supra} note 202, at 157 (noting that "[t]here are several international institutions involved in standard setting for intellectual property").

\textsuperscript{485} See MAY, \textit{supra} note 16, at 97 (noting that "forum proliferation introduces both risks and opportunities into the global governance of intellectual property").
Downs pointed out, the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries will ultimately help powerful states preserve their dominance in the international arena.  

On the other hand, the forum proliferation phenomenon and growing forum-shifting activities will help create "a 'safe space' in which [governments for both developed and less developed countries can] analyze and critique those aspects of TRIPS that they find to be problematic." This space, in turn, will help "generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO.

The existence of alternative fora will also help less developed countries generate "counterregime norms" to advance their interests in fora that have yet to be dominated by developed countries or that will ensure success for less developed countries. These norms may eventually be incorporated into the international intellectual property regime as "revisionist norms." A case in point is the growing intellectual property norms that are being shaped in the areas of human rights and biological diversity. Such norms have been used to justify reforms in the international intellectual property system. Had it not been for increasing action by less developed countries in these other regimes, these countries might not have been successful in pushing for favorable language in the Doha Declaration.

The potential for forum shifts by developed and less developed countries may also result in greater rivalry and competition among institutions. Such

487. Helfer, Regime Shifting, supra note 265, at 58.
488. Id. at 59.
489. See id. at 14 (defining "counter-regime norms" as "binding treaty rules and nonbinding soft law standards that seek to alter the prevailing legal landscape"); Donald J. Puchala & Raymond F. Hopkins, International Regimes: Lessons from Inductive Analysis, in INTERNATIONAL REGIMES 61, 66 (Stephen D. Krasner ed., 1983) (defining "counterregime norms" as norms that "either circulate in the realm of rhetoric or lie dormant as long as those who dominate the existing regime preserve their power and their consequent ability to reward compliance and punish deviance").
490. See Helfer, Regime Shifting, supra note 265, at 55 (noting that "[r]egime shifting allows state and nonstate actors, particularly those that have been ignored or marginalized in other international regimes, to experiment with alternative ways to achieve desired policy outcomes").
493. See Helfer, Mediating Interactions, supra note 491, at 134 (noting the "competition between the organizations for primacy over a shared policy space" in the biodiversity area); Helfer, Regime Shifting, supra note 265, at 34 (describing how the CBD contracting parties "are attempting to influence the terms of the debate by setting agendas, convening meetings, suggesting topics for further study, proposing a memorandum of understanding with WIPO, and directing the CBD's Executive Secretary to seek observer status with the TRIPs Council").
competition helps force these institutions to be more conscious of their goals and missions and to innovate in a way that would help them remain at the forefront of the international debate. As Bernt Hugenholtz and Ruth Okediji pointed out, "using multiple international institutions for the development of [a] new multilateral framework . . . [may promote] norm competition across different fora as well as . . . inter-agency competition and collaboration." 494 Professor May also noted that the establishment of the development agenda may help make WIPO more relevant to its less developed member states:

Some of the members of the WIPO have recognized that there are clear developmental issues that need to be (re)introduced into the debates around the international protection of IPRs. . . . The advantage for developed country members of the WIPO, in continuing policy deliberation there rather than at the WTO, is that they can take the process forward even if significant resistance is articulated within the organization itself. But, equally for the supporters of the Development Agenda, there interests can also be moved forward while some members of the WIPO continue to argue that development should be kept out of the organization's central remit.

Therefore we can conclude that the WIPO has benefited from forum proliferation, and has fought hard to retain its position at the center of the global governance of intellectual property. 495

C. Issues

Related directly to forum proliferation or increased forum-shifting activities is the increasing expansion and blurring of boundaries between the issue areas that are implicated by intellectual property protection. Indeed, the expansion of intellectual property rights and the creation of new rights were partly the cause of both forum proliferation and the growing overlap between traditionally distinct issue areas. As the Appellate Body suggested in United States—Standards for Reformulated and Conventional Gasoline, WTO agreements such as the TRIPs Agreement cannot be "read in clinical isolation from public international law." 496 Likewise, the WTO panel in India—Patent Protection for Pharmaceutical and Agricultural Chemical Products

494. HUGENHOLTZ & OKEDIJI, supra note 307, at 41.
495. MAY, supra note 16, at 104.
recognized the TRIPs Agreement as "an integral part of the WTO system." In fact, one could view the WIPO Development Agenda "as a call for the development of a global IP policy that coheres more meaningfully with other international law regimes"—a call to end "WIPO's institutional isolationism."

In the Old Agenda, there were two main issues. First, greater intellectual property protection might not be appropriate for less developed countries. Special and differential treatment therefore was warranted for enabling these countries to promote internal economic, social, cultural and technological development and to facilitate efforts to catch up with countries in the developed world. Second, as revealed in the negotiation of the International Code of Conduct, the transfer of technology is important, and the use of intellectual property rights can be abused. Norms therefore are needed to be established to reduce this abuse and to ensure the balance in the intellectual property system.

By contrast, the issues involved in the New Agenda are more diverse. First, the New Agenda is filled with many internal inconsistencies that can hardly be resolved at a doctrinal level. On the one hand, the development agenda calls for greater respect of sovereignty and autonomy other countries need to develop their intellectual property system. Similar to those advocating the Old Agenda, the proponents of the New Agenda demanded greater calibration and reduced protection within the international intellectual property regime—partly in response to the vastly different local conditions of less developed countries. The underlying premise is that countries need wide policy space and flexibilities to develop an innovation system that is tailored to their local conditions.

On the other hand, the New Agenda seeks to create new forms of protection for those in less developed countries and facilitate greater harmonization or universalization in areas that benefit those countries, such as the protection of traditional knowledge and cultural expressions. Like the agenda advanced by both the TRIPs Agreement and the TRIPs-plus bilateral and regional trade agreements, less developed countries are now advancing their own version of the TRIPs-plus agenda that focus on their needs, goals, and interests.
Article 29bis, for example, can be seen, from the standpoint of developed countries, as a TRIPs-plus provision that requires developed countries to offer protection based on the interests of less developed countries. To be fair to the latter, if given a choice between lower intellectual property standards and a lack of protection for traditional knowledge, these countries are likely to pick the former. One may even suggest that their desperation over ever-expanding intellectual property rights has driven them to demand intellectual property protection of its own—or the protection of what Michael Finger and Philip Schuler have termed “poor people’s knowledge.” However, from a doctrinal standpoint, it is hard to reconcile this proposal with the other demands of less developed countries for greater autonomy, policy space, and flexibilities.

Second, because of the significant gap between the rich and the poor and the fact that countries can be less developed, yet technologically proficient, many middle-income developing countries—most notably, Brazil, China, and India—have interests that conflict significantly with each other. As I pointed out in the past, these countries now have developed “schizophrenic” nationwide intellectual property polices. While they may want stronger protection for their fast-growing industries and highly economically developed regions, they want weaker protection in the remaining areas. The economies of these countries, indeed, are highly complex, and the profound sub-regional disparities in socio-economic conditions and technological capabilities have made it very difficult to implement nation-based intellectual property standards.

Third, the positions taken by developed and less developed countries remain in flux. As the technological capacity of less developed countries increases, their positions and support for the New Agenda may change. As Professor May observed:

[A]s the balance of technical leadership starts to move, perhaps accelerated by the impact of the recession on research and innovation in the most-developed countries (the US, Europe, and Japan), it is not clear that those states that previously argued for robust protection of IPRs will necessarily find themselves so advantaged by the current settlement. . . . [In fact, i]f the global downturn does consolidate and accelerate the shift in technological leadership in the global system, we are likely to see national negotiating teams from the most

502. See Basheer & Primi, supra note 264.
developed countries at WIPO being less all-encompassing in their support for the global intellectual property system.\(^{504}\)

With new issues comes the formation of new allies.\(^{505}\) For example, the proposals for stronger protection of traditional knowledge and cultural expressions may attract the unanticipated support of corporate rights holders, who have a strong "need to establish clear lines of ownership and reduce the risks of unenforceable contracts with suppliers of creative outputs, rather than any recognition of the rights of indigenous creators and innovators."\(^{506}\) Likewise, as Professor Okediji pointed out:

[i]n a digital era, the interests of developing countries ironically overlap with those of consumers in developed countries. Consequently, one of the notable paradigm shifts in the negotiation of international copyright agreements has been the tremendous rise in non-governmental organizations, private corporations and other non-state entities which have participated in alliance-building with developing countries to curtail the aggressive expansion of proprietary interests in information works and other copyrighted objects.\(^{507}\)

Thus, although development issues are generally considered issues of importance to less developed countries, "the social and economic costs of an even greater protection of intellectual property rights . . . have been felt in developing and developed countries alike, and have come to be viewed as a question of human development in general, no matter of North or South."\(^{508}\) As Andrée Menescal observed:

Public-interest issues now include the free flow of information in research and the promotion of innovation and creativity world-wide. The increasing tendency of the "capitalization of knowledge" or the "commercialization of science" has been regarded with apprehension by many academics, especially publicly financed researchers. This tendency refers both to the patenting of research results by academics themselves and to the (private) appropriation of public scientific

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504. Christopher May, *Afterword* to *IMPLEMENTING WIPO'S DEVELOPMENT AGENDA*, *supra* note 207.

505. See Yu, *Access to Medicines*, *supra* note 207, at 375-78 (discussing the potential for collaboration between players in developed and less developed countries).

506. *MAY, supra* note 16, at 100.


information and knowledge by industry at the expense of commons and of science itself.\footnote{Id. at 788-89.}

D. Political Environment

The political environments surrounding the two development agendas are very different. When the Old Agenda was being negotiated, many less developed BIRPI members only emerged out of decolonization. The cold war also loomed heavily in the background, making non-political discussion very difficult. As Sam Ricketson and Jane Ginsburg recounted, the "highly charged" atmosphere and the "considerable mutual mistrust" among the participants during the time in the run-up to the Stockholm Conference "was simply a reflection of what had been happening in other international forums for a number of years."\footnote{RICKETSON & GINSBURG, supra note 18, at 900.}

For example, while Western countries pushed aggressively for the recognition of private property in, say, the human rights area, the Eastern bloc expressed their concern about "strengthening the protection of private property and the potential interference with 'government control over science and art, and scientists and artists.'"\footnote{Yu, Reconceptualizing Intellectual Property Interests, supra note 335, 1067-68 (quoting Maria Green, Int'l Anti-Poverty L. Ctr., Drafting History of the Article 15(1)(c) of the International Covenant \footnote{Id. at 788-89.} ¶ 42, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000), available at http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823ce1256999005c3088/$FILE/G0044899.doc).}

As a result, many of the existing international human rights treaties were originally negotiated along cold war fault lines. While the West supported the ICCPR, the Socialist countries preferred the ICESCR.\footnote{512. See Green, supra note 511, ¶ 43 (noting that '[t]he final vote [on article 15(1)(c) of the ICESCR] was straight down cold war faultlines').} Even more interestingly, socialist countries seemed to be more concerned about the potential objections to whether governments could control science and art than about whether such protection would hurt development in their countries.

Likewise, during the negotiation of the International Code of Conduct, Turkey was grouped with the Group B developed countries by virtue of its membership in the NATO Alliance, even though the country was a less developed country.\footnote{See Homer O. Blair, Transnational Technology Transfer: Current Problems and Solutions for the Corporate Practitioner, 14 VAND. J. TRANSNAT'L L. 301, 302 (1981) (noting that "Turkey is not part of the Group of 77 where it logically should be, but is in Group B because of its NATO affiliation").} The negotiations were further colored by the 1973
Arab-Israeli War\textsuperscript{514} and the oil crisis, which helped precipitate the development of NIEO.\textsuperscript{515}

Indeed, such development was as much about political change as it was about economic change.\textsuperscript{516} In the early 1970s, less developed countries were increasingly frustrated by the extant international economic system, under which they remained economically and technologically backward.\textsuperscript{517} Although they had tried import substitution—by producing domestically those products they traditionally imported—they "felt they had exhausted the possibilities of [such an industrialization] strategy."\textsuperscript{518} As a result, they began to "adopt[] the view that significant government intervention was required to ensure autonomous domestic economic growth."\textsuperscript{519} As Chantal Thomas explained:

\begin{quote}
As Essam Galal stated:

We were fully aware of the political tensions during this period of the cold war, the Arab-Israeli War in 1973 being one example, as well as the economic tension as a result of the oil embargo, the oil crisis and the obligatory recycling of its funds to the supposed victims of the crisis.

Galal, \textit{supra} note 181, at 200; see Ringer, \textit{Role of the United States}, \textit{supra} note 39, at 1070 (noting that the problems in the Stockholm Conference were "exacerbated by the intense political atmosphere generated by the Arab-Israeli War").


\textit{See} NIGEL HARRIS, \textit{THE END OF THE THIRD WORLD: NEWLY INDUSTRIALIZING COUNTRIES AND THE DECLINE OF AN IDEOLOGY} 18 (1986) (stating that the Third World "identified not just a group of new states (joined later by the older states of Latin America), nor the majority of the world's poor, but a political alternative other than that presented by Washington and Moscow"); SELL, \textit{POWER AND IDEAS}, \textit{supra} note 164, at 58 (noting that the Third World "became a focal point, a rallying device, and a basis for coalitional politics pressuring a radical critique of the order of world political and economic power").

As Surendra Patel observed:

The success of decolonization in overcoming the long domination of imperial powers did not result in economic transformation which required technology as the basic component. The newly independent countries had major expectations for their rapid economic and social development which would bridge the vast gap in relation to the enormous advances of the rich countries within the last 150 years. Their hopes were high as to the availability of advanced science, and particularly modern technologies, to overcome poverty and rapidly eliminate the extreme suffering they had experienced for a long time under the domination of the industrialized nations.

Surendra J. Patel, \textit{From Santiago de Chile (1972) to the Dawn of the Third Millennium, in INTERNATIONAL TECHNOLOGY TRANSFER, supra} note 57, at 179, 191.

SELL, \textit{POWER AND IDEAS, supra} note 164, at 10.

Patel, \textit{supra} note 517, at 179, 191.
The origins of [the momentum to establish NIEO] lay in three changes to the international order in the postwar era: first, the "massive expansion of international organization for cooperative purposes"; second, the "growing importance of states representing non-Western civilizations" in the wake of decolonization and independence movements; and third, "the growing gap between the economically developed and the economically less developed countries."

To complicate matters, NIEO was developed at a time when some less developed countries had developed much more quickly than the others. As Fred Bergsten elaborated:

The calls for [NIEO] derive from two contemporary developments. One is the continued poverty of the countries of the Fourth World, which comprises mainly South Asia and most of Sub-Saharan Africa . . . . The explicit or implicit purpose of most of the policy proposals has been to help the poorest countries. Thus the bulk of the analysis and suggestions for change have been economic. . . . But the emergence of the NIEO as a serious international issue derives primarily from the rapidly growing strength of the countries of the Third World, which comprises virtually all of Latin America and the Middle East and most of East and Southeast Asia. Their interests in seeking a NIEO are at least as much political as economic. The Third World wants a greater participatory role in managing the world economy, both for reasons of status and because it believes that only through such a larger decision-making role can its interests be protected on an ongoing basis. It is demonstrably willing to link its rising economic power to political objectives to promote its demands.

Unfortunately, the interests of these so-called Third World and Fourth World countries—or in WTO's parlance, developing and least developed countries—did not coincide with each other. While the Third World countries "focus[ed] largely on acquiring new economic opportunities: access to the

520. Thomas, supra note 189, at 2105 (quoting WOLFGANG G. FRIEDMANN, ET AL., CASES AND MATERIALS ON INTERNATIONAL LAW 9-10 (1969)).

521. C. Fred Bergsten, Panel Discussion on the New International Economic Order, in NEW INTERNATIONAL ECONOMIC ORDER, supra note 515, at 347, 347; see also Roffe & Tesfachew, supra note 57, at 400 ("The reformist agenda of the 1970s focused mainly on the aspirations of the developing countries to improve their standing in the international system with emphasis on ‘equal opportunities for all countries’ and ‘the need for developed countries to grant special treatment to the developing countries in the field of the transfer of technology.’"" (emphasis and parenthetical omitted)).
markets of the industrialized countries for their exports of manufactured goods, access to international capital markets, access to modern technology," the Fourth World countries "continue[d] to stress its need for resource transfers through the traditional medium of foreign aid."522 Moreover, with the failure of the Latin American economies (and therefore greater reliance on developed countries for debt assistance and reduced leverage in demanding adjustment to the international economic system) in the 1980s, many less developed countries "set out to liberalize their economic policies"—often as a condition for debt relief.523 NIEO failed as a result.

Today, however, the cold war has ended, and the dynamics of the negotiations have changed significantly. As one commentator observed, "[i]n the contemporary post-Cold War world the assumptions underlying the Charter of Economic Rights, as well as those of the draft Code, are bound to appear outdated."524 Although the United States and the European Communities remain powerful, there have emerged a growing number of middle-income developing countries, such as Brazil, China, and India.525 It remains to be seen what role these countries will play and whether they can work together to rival the trilateral alliance set up by the European Communities, Japan and the United States.526

After all, less developed countries are more divided than is beneficial to them. Historically, they have had very limited success in using coalition-building efforts to increase their bargaining leverage. As Professor Abbott reminded us:

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 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

522. Bergsten, supra note 521, at 347.
523. Thomas, supra note 189, at 2108.
525. See Yu, Access to Medicines, supra note 207, at 358-70.
526. See id. at 356-57.
early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.\textsuperscript{527}

Even today, "the '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."\textsuperscript{528}

E. Public Awareness

When the Old Agenda was developed, intellectual property was not considered a major issue. In fact, intellectual property issues, in the past, were considered arcane, obscure, complex, and highly technical. Professor Sell, for example, has analogized intellectual property issues to "the Catholic Church when the Bible was in Latin."\textsuperscript{529} As she elaborated: "IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy. IP law is highly technical and complex, obscure even to most general attorneys. . . . [The US IP lobby's] possession of technical and juristic knowledge was an important source of its private authority."\textsuperscript{530} Likewise, the \textit{Gowers Review of Intellectual Property} ("Gowers Review") states: "For many citizens, Intellectual Property . . . is an obscure and distant domain—its laws shrouded in jargon and technical mystery, its applications relevant only to a specialist audience."\textsuperscript{531}

Today, however, the intellectual property debate is no longer as isolated as it was in the past. From Mickey Mouse to Barbie® Dolls to software patents, the intellectual property issues have reached the consciousness of the public at large. The dot-com boom (and its subsequent crash) and the adoption of digital lifestyle have also made intellectual property issues increasingly relevant to everyday life. It is, indeed, not unusual to find the mass media reporting about intellectual property matters.

As Peter Drahos and John Braithwaite reminded us, many of intellectual property-related developments and existing standards are not new. The Berne and Paris Conventions, for example, date back to the 1880s, around the time when colonial powers explored how they could further divide Africa during


\textsuperscript{528} Jean Touscoz, \textit{A Changing Policy Landscape}, in \textit{INTERNATIONAL TECHNOLOGY TRANSFER}, supra note 57, at 287, 288.

\textsuperscript{529} Sell, \textit{PRIVATE POWER}, supra note 261, at 99.

\textsuperscript{530} \textit{Id}.

their infamous "Scramble for Africa."\textsuperscript{532} However, with greater use of technology-based products, intellectual property standards and their continuous expansion begin to "affect basic goods such as seeds, services and information flows in a global trading economy that their full costs to citizens and business in general are coming to be appreciated."\textsuperscript{533} Indeed, as Andréa Menescal pointed out:

\textbf{[B]oth the "WIPO Development Agenda" and the public interest concerns on IP are no longer an issue only for developing countries, activists and NGOs calling for the prevalence of social and health issues over trade and profit with IP rights. Rather, they are of significant concern to an international network of public-interest NGOs, academics and consumers from both developing and developed countries.}\textsuperscript{534}

Moreover, the anti-globalization protests in Seattle, Washington, Prague, Quebec, Genoa, and other major cities have helped provide the needed background and momentum to the push for reforms in the international intellectual property system.\textsuperscript{535} The growing activism through civil society organizations has also helped raise the consciousness of intellectual property developments. As Amy Kapczynski recently wrote:

Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with "something like the reverence that earlier generations displayed in talking about social or racial equality"? Or that advocates of "farmers' rights" could mobilize hundreds of thousands of people to protest seed patents and an IP treaty? Or that AIDS activists would engage in civil disobedience to challenge patents on medicines? Or that programmers would descend upon the European Parliament to protest software patents?\textsuperscript{536}

In sum, the growing awareness of intellectual property issues may make the outcome of the New Agenda somewhat different from that of the Old Agenda. As Professor Halbert observed, what is new and promising about the New Agenda, as compared to the Old Agenda, "is the increased attention and

\begin{footnotes}
\item[532.] See generally \textsc{Thomas Pakenham}, \textit{The Scramble for Africa} (1992).
\item[533.] Drahos \& Braithwaite, supra note 138, at ix-x.
\item[534.] Menescal, supra note 129, at 786.
\end{footnotes}
resistance by the general public to these issues and the development of civil society organizations intent upon seeing the problems associated with the protection of intellectual property at the global level addressed.\textsuperscript{537}

Finally, some developed countries have become increasingly concerned about the plight of less developed countries. Most notably, the IPR Commission took the unusual position that stronger intellectual property protection may not sit well with economic development in less developed countries—a position that is particularly unusual in light of the positions British delegations have taken in past international intellectual property negotiations. As the Commission stated in its final report:

Analysis of the available evidence on the impact of IPR regimes on developing, or developed countries, is a complex task. . . . [W]e do not wish to focus on IPRs as an end in themselves, but on how they can contribute to development and the reduction of poverty. We believe that a prerequisite for sustainable development in any country is the development of an indigenous scientific and technological capacity. This is necessary to allow countries to develop their own process of technological innovation, and to enable them to absorb effectively technologies developed abroad. It is obvious that the development of such capacity is dependent on a large number of elements. It requires an effective education system, particularly at the tertiary level, and a network of supporting institutions and legal structures. It also requires the availability of financial resources, both public and private, to pursue technological development. There are many other factors that contribute to what are often known as "national systems of innovation".\textsuperscript{538}

Likewise, the recently-published \textit{Gowers Review} advanced many helpful recommendations that sought to recalibrate the balance in the existing intellectual property system.\textsuperscript{539} These recommendations are currently being explored and evaluated by many countries, especially those in the British Commonwealth.\textsuperscript{540} In light of these developments, one has to wonder whether there are internal developments at the private sector within this country that have helped transform the intellectual property debate.

\textsuperscript{537} Halbert, supra note 119, at 254.
\textsuperscript{538} IPR COMMISSION REPORT, supra note 202, at 20.
\textsuperscript{539} See generally GOWERS, supra note 531.
\textsuperscript{540} See, e.g., Peter K. Yu, Legal Transplants in the Digital Age (unpublished manuscript, on file with author).
F. Rhetoric

In international intellectual property negotiations, rhetoric and principles are always important. As John Braithwaite and Peter Drahos reminded us, "[r]hetoric, ‘the art of persuasive communication’, has a place in international negotiations and lobbying affecting business regulation." Thus far, developed countries, rights holders, and industry groups have deployed rhetorical strategies in two directions.

First, by linking intellectual property protection to such issues as economic growth, increased trade, and an influx of foreign direct investment, they managed to make intellectual property protection attractive while at the same time increasing the priority of such protection on the national policy agenda. As Daniel Gervais recounted, developed countries and the lobbies that pushed for stronger intellectual property protection believed that "TRIPS was a difficult but essential measure to jumpstart global economic development." Less developed countries therefore "were told to overlook the distasteful aspects of introducing or increasing intellectual property protection and enforcement in exchange for longer-term economic health."

Second, the proponents of strong intellectual property rights have used words such as "theft," "piracy," and "free riding" to condemn those countries that have failed to offer strong intellectual property protection. James Boyle compared their condemnation efforts to the writing of a morality play, which can be summarized as follows:

For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of Presumed Innocent or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries—led by the United States—have decided to take a stand. What’s more, the United States is standing up for more than just filthy lucre. It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo.

541. Braithwaite & Drahos, supra note 146, at 528 (citation omitted).
543. Gervais, supra note 542, at 43.
544. See Yu, Information Ecosystem, supra note 131, at 10.
545. Boyle, supra note 130, at 123; see also Braithwaite & Drahos, supra note 146, at 528
By "implying that infringers should be thought of like the pirates, slave traders and torturers of the past, . . . [the use of the term allows advocates of strong intellectual property rights] to establish the parallel with more violent assaults on human rights."546

In recent years, rights holders, industry groups, and policymakers have added "security" to provide rhetorical effect. The use of this new rhetorical frame plays unfortunately to the widespread sentiments developed in the wake of the September 11 tragedies. Government officials, for example, have repeatedly described how terrorists have used piracy and counterfeiting to fund their operations.547 As Professor Sell explained, "[i]ntroducing a security frame for IP has allowed these IP maximalists to enlist new actors, law enforcement agencies, in their cause. Law enforcement agencies have become eager recruits to the IP maximalists' network."548

Although less developed countries turned their attention to development, fairness, moral assistance, and common ownership in the past, their strategies have been more diverse in recent years. Together with civil society organizations, critics of intellectual property rights have problematized those terms used by rights holders and industry groups. For example, Richard Stallman, the founder of the Free Software movement and a leading critic of the term "intellectual property," considers the term an "unwise generalization" that is biased and confusing.549 By bringing together different sets of rights that originated differently, protect different subject matter, and raise different policy questions, the term, he argued, encourages simplistic thinking that ignores the different characteristics and limitations of copyrights, patents, trademarks, trade secrets, and other forms of intellectual property rights.

Moreover, by including the word "property," the term "intellectual property" glosses over the difference between abstract ideas and physical objects, thereby perpetuating the misunderstanding that one can develop property entitlements in ideas and information. As Mark Lemley warned us, the property label may tempt courts, lawyers, and commentators to continue

546. MAY, supra note 16, at 50.
548. SELL, GLOBAL IP UPWARD RATCHET, supra note 481, at 4.
the trend of treating intellectual property just like real property. By underscoring the property aspects of intellectual property rights, judges in civil law countries may also become worried that limiting intellectual property rights would raise difficult constitutional questions concerning government takings of private property.

Critics have also pointed out how the word "piracy" has been repeatedly misused by rights holders and industry groups to cover all forms of unauthorized copying. As Peter Drahos and John Braithwaite wrote:

Piracy remains a powerful evaluative word. To be called an intellectual property pirate is to be condemned. In a world where attention spans are divided by the media into ten-second sound bites it is the perfect word to use on TV, videocassettes, newspaper headlines and the radio. The received folk memory of "pyrates and rovers" on the sea does the rest.

To make things worse, the word piracy has now been used widely regardless of whether limitations and exceptions exist in the intellectual property system. For example, even though some sound recordings have fallen into the public domain in Europe, the U.S. recording industry insists that those recordings would be considered pirated if they appear on the U.S. market. Likewise, as Kevin Outterson and Ryan Smith pointed out, "counterfeit" drugs as defined by the pharmaceutical industry have included not only fake or counterfeit products, but also "safe and effective drugs from Canada"!

Interestingly, the increased awareness of intellectual property issues in recent years has allowed these critics to take new approaches to respond to the rhetorical moves taken by developed countries, industry groups, and rights holders. First, as Professor Kapczynski pointed out, the advocates in the free software, open source, free culture, and access to knowledge movements have "generate[d] new theories of their shared interests (in, say, the 'information commons' and 'access to knowledge') and new challenges to the legitimacy of exclusive rights in information." These new concepts, theories, terminologies, and collective frames, in turn, have allowed different groups to "theorize their interests, build alliances, mobilize support, and discredit..."

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552. DRAHOS & BRAITHWAITE, supra note 138, at 28.
their opponents," and explore a common agenda. As Professor Kapczynski described:

Access-to-medicines campaigners could use the human rights frame to create connections with human rights organizations and institutions in Geneva and New York. Farmers' rights campaigners’ arguments about sustainable development linked them to environmental groups. Claims for protection of traditional knowledge were framed in a way that drew connections to indigenous rights claims. Thus, each of these groups mobilized frames that made certain alliances and political arguments possible.

The development of these concepts, theories, terminologies, and collective frames is important. As Professor Boyle reminded us:

[A] successful political movement needs a set of (popularizable) analytical tools which reveal common interests around which political coalitions can be built. Just as "the environment" literally disappeared as a concept in the analytical structure of private property claims, simplistic "cause and effect" science, and markets characterized by negative externalities, so too the "public domain" is disappearing, both conceptually and literally, in an intellectual property system built around the interests of the current stakeholders and the notion of the original author. In one very real sense, the environmental movement invented the environment so that farmers, consumers, hunters and birdwatchers could all discover themselves as environmentalists. Perhaps we need to invent the public domain in order to call into being the coalition that might protect it.

Moreover, some critics of intellectual property rights have managed to redefine those terms or get us to rethink their usage. As Peter Jaszi aptly observed, "[o]ne might say that one nation’s ‘piracy,’ [sic] is another man’s ‘technology transfer.'" Piracy, after all, is in the eyes of the beholder. Similarly, activists have developed a "rhetoric of resistance" as a counterpoint to the rhetoric used by rights holders and intellectual property industries.

Critics of intellectual property rights have also managed to turn the term on its head—as exemplified by the coinage of the term "biopiracy." As

555. Kapczynski, A2K Mobilization, supra note 400, at 809.
556. Id. at 853 (footnotes omitted).
Professor Sell described, “[b]iopiracy is seen as a new form of Western imperialism in which global seed and pharmaceutical corporations plunder the biodiversity and traditional knowledge of the developing world. Biopiracy is the unauthorized and uncompensated expropriation of genetic resources and traditional knowledge.”

Carrying the baggage of the word “piracy,” the term biopiracy brings with it the massive energy industry groups and rights holders have built over the years. As Philippine activist Roberto Verzola lamented:

If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor. Don’t rich countries pirate poor countries’ best scientists, engineers, doctors, nurses and programmers? When global corporations come to operate in the Philippines, don’t they pirate the best people from local firms? If it is bad for poor countries like ours to pirate the intellectual property of rich countries, isn’t it a lot worse for rich countries like the US to pirate our intellectuals?

In fact, we are benign enough to take only a copy, leaving the original behind; rich countries are so greedy that they take away the originals, leaving nothing behind.

In the context of the lack of protection for indigenous heritage, Suzan Harjo, former head of the National Congress of American Indians, has also made a similarly poignant remark: “[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There’s little left that’s tangible. Now they’re taking what’s intangible.”

It is therefore understandable why commentators and policy experts, especially those who live in, work for, or are sympathetic to less developed countries, have actively documented the problems of biopiracy. Using this

560. Sell, Private Power, supra note 261, at 140 (footnotes omitted).
trope, less developed countries and their supporters have pushed actively for the protection of traditional knowledge and cultural expressions.

V. CONCLUSION

The Old and New Development Agendas are similar to each other, but they are also different in many respects. Through their comparison, this Article highlights the risks and challenges of the present agenda. It also shows that the agenda provides many strategic opportunities, which are further enhanced by the momentum less developed countries have built since the establishment of the Doha Round. Whether the present agenda will succeed will depend on whether less developed countries and their supporting governments and NGOs can mobilize in time before they lose the momentum.

Although it is too early to assess the present agenda, it is important to remember that this agenda is unlikely to be the last set of agendas the international intellectual property regime will ever see. Commentators have reminded us how the TRIPs Agreement should not be treated “as a crowning point of international intellectual property regulation.” The same is true for this present agenda, which should not be seen as the pinnacle of the pro-development movement in the intellectual property field.

In the near future, a new set of development agendas is likely to be established. Under this scenario, one could only hope that the present agenda will provide the needed foundations to ensure even greater success. If the present agenda could pave the way for the future agendas, it would be “a far, far better thing . . . than [it has] ever done.”


564. See Ruth L. Okediji, Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection, 1 U. OTTAWA L. & TECH. J. 125, 130 (2004); see also id. at 146-47 (noting that “[t]he TRIPS Agreement remains an important hallmark of international intellectual property law, but it very well may just have been a pause—albeit a significant one—in the historical progress of bilateral commercial treaties used as instruments of foreign relations by the United States”); DEERE, supra note 210, at 304 (“After a decade of tense North-South debates, TRIPS emerged a contested agreement. It was quickly apparent that far from a final deal, TRIPS was rather the starting point for further negotiations . . . .”); SELL, PRIVATE POWER, supra note 261, at 121 (“The TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning.”).


566. DICKENS, supra note 1, at 390.