

## INTELLECTUAL PROPERTY AND THE DEVELOPMENT DIVIDE

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“The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, ‘merely useful and for the sake of something else.’ For the same reason, economic growth cannot sensibly be treated as an end in itself. Development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy.”

—Amartya Sen, *Development as Freedom*<sup>1</sup>

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This Article was incubated in various venues, including the Pacific Intellectual Property Scholars (PIPS) Conference (2003 and 2005), the Pacific Northwest Center for Health Law and Policy Conference on Corporate Health Care and Governance in the Health Care Marketplace (2004); the Michigan State University Conference on Intellectual Property, Sustainable Development and Endangered Species: Understanding the Dynamics of the Information Ecosystem (2004); the University of Oregon Wayne Morse Center Conference on Malthus, Mendel and Monsanto: Intellectual Property and the Law and Politics of the Global Food Supply (2004); the Law & Society Association Annual Meeting Roundtable on Intellectual Property and Globalization (2004); the Pacific Northwest Center for Health Law and Policy Conference on Global Health & Justice: Paradigms for Multidisciplinary Collaboration (2005); and the University of California Davis Faculty Speaker series (2005).

Many thanks to everyone who made helpful comments at these conferences, and on drafts of this paper, including Donna Arzt, Mark Chinen, Graeme Dinwoodie, Rochelle Dreyfuss, Brett Frischmann, James Gathii, Daniel Gervais, Renee Giovarelli, Laurence Helfer, Jessica Litman, Doris Long, Lydia Loren and all the other PIPS participants, Tayyab Mahmud, Bob Menanteaux, Ruth Okediji, David Skover, Ron Slye, Madhavi Sunder and Peter Yu. I particularly want to thank Keith Aoki for his constant encouragement, cheerful friendship and model minority inspiration, without which this Article would have remained dormant. Reference librarians Kerry Fitz-Gerald and Bob Menanteaux, as well as research assistants Jennifer Dinning, Class of 2006, and Kateryna Mogulevska, Class of 2007, were extremely helpful and I owe them a big debt of gratitude. Finally, I thank Dean Kellye Testy and Associate Dean Annette Clark who provided the institutional support that enabled me to complete this longstanding project.

This Article is dedicated to my children, Nikolai Chon Diamond and Chloe Chon Diamond.

<sup>1</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 14 (1999).

“Americans spend more on cosmetics than it would cost to provide basic education to the two billion people in the world who lack schools, and Europeans spend more on ice cream than it would cost to provide water and sanitation to those in need . . . .”  
 —Richard Peet with Elaine Hardwick, *Theories of Development*<sup>2</sup>

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INTRODUCTION: TOWARDS EQUALITY IN GLOBAL  
INTELLECTUAL PROPERTY

In the early twenty-first century, the concept of intellectual property is beginning to encounter insistently the concept of development. These recent interactions, occurring within the context of

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<sup>2</sup> RICHARD PEET WITH ELAINE HARTWICK, *THEORIES OF DEVELOPMENT* 7 (1999).

accelerating globalization, have renewed questions about the fundamental purpose of intellectual property. Indeed, one leading observer has noted the absence of any explicit overarching principle or policy of international intellectual property.<sup>3</sup> This has led to a consensus among many scholars of growing and dangerous asymmetries<sup>4</sup> in intellectual property norm-setting and interpretation occurring in multilateral and bilateral activities across the world. Intellectual property, while purporting to heed the issues of development, often runs rough-shod over the central concerns of development.

This Article attempts to map the challenges raised by these encounters between intellectual property and development. It proposes a normative principle of global intellectual property—one that is responsive to development paradigms that have moved far beyond simple utilitarian measures of social welfare. Recent insights from the field of development economics suggest strongly that intellectual property should include a substantive equality principle, measuring its welfare-generating outcomes not only by economic growth but also by distributional effects. This new principle of substantive equality is a necessary corollary to the formal equality principles of national treatment and minimum standards that are now imposed on virtually all countries regardless of their level of development.

It has only been approximately ten years since the Trade-Related Aspects of Intellectual Property Rights (TRIPS) entered into force as a part of the world trading system administered through the World Trade Organization (WTO).<sup>5</sup> Yet in that short period, TRIPS has effected a

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<sup>3</sup> Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 888 (2003) [hereinafter Okediji, *Public Welfare*].

<sup>4</sup> CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 5-6 (2000) (listing “North-South Asymmetries” including a negligible proportion of developing countries’ world R&D expenditures, patents and trade in medium and high technology goods); see also Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249 (2003). International relations specialists use the term “asymmetry” to refer to an imbalance in power and resources between developed and developing countries. See Robert O. Keohane, *Comment: Norms, Institutions, and Cooperation*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 65, 65-66 (Keith E. Maskus & Jerome H. Reichman eds., 2005) [hereinafter INTERNATIONAL PUBLIC GOODS]:

Power is distributed in a highly asymmetrical fashion. The United States, the European Union, and to a lesser extent, large, rich states such as Japan have a great deal of influence in the World Trade Organization (WTO), in the stipulation and implementation of the TRIPS agreement, and in domains not regulated by international institutions. Small, poor states have little influence: They are “policy-takers,” rather than “policy-shapers.”

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

tectonic shift in the landscape of intellectual property law. The emergence of the WTO/TRIPS framework has also spurred long-standing international intellectual property law institutions, such as the World Intellectual Property Organization (WIPO), into greater activity.<sup>6</sup> I will call this recent historical phenomenon “intellectual property globalization,”<sup>7</sup> recognizing of course that forms of international intellectual property mechanisms existed prior to the turn of this millennium.<sup>8</sup>

Intellectual property globalization has been a fertile period for generating new insight into the concept of intellectual property. For example, there is new empirical evidence measuring the actual impact of intellectual property laws on rates of innovation and economic

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<sup>6</sup> See, e.g., World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997); World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997). See generally Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 98 AM. SOC'Y INT'L L. PROC. 213 (2004) [hereinafter Dinwoodie, *Property Law System*] (describing WIPO's efforts to reinvent itself in the aftermath of the World Trade Organization).

<sup>7</sup> Used primarily outside of law, “globalization” is a complex term that made its first appearance in the late twentieth century. Sociologist Anthony Giddens characterizes it as ‘the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by the events occurring many miles away and vice versa.’ ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990). While there is no set definition, globalization is frequently invoked to describe this intense interconnectedness across different realms including communications, economics (in particular, financial markets), geography as well as political and social systems. See, e.g., WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* 4 (2000) (defining globalization as a process that “tends to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe”). As discussed in depth in this Article, globalization is increasingly characterized (or perhaps driven) by pervasive marketization and trade, a process that is overseen by the three Bretton Woods Institutions (BWIs), consisting of the International Bank for Reconstruction and Development (also known as the World Bank), the International Monetary Fund (IMF), and the World Trade Organization (WTO).

<sup>8</sup> See Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315, 320-41 (2003) (describing various multilateral regimes preceding TRIPS). Various international law scholars are beginning to advocate a “law and globalization” model of analysis vis-à-vis traditional international law, in which legal analysis shifts away from nation-states and towards transnational norm-generating activity. See, e.g., Frank J. Garcia, *Globalization and the Theory of International Law* (Boston College Law School, Legal Studies Research Paper Series, Research Paper No. 75, 2005), available at <http://ssrn.com/abstract=742726> (arguing for a recasting of international law away from a society of states model and toward a global society model); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 489 (2005) (arguing for an expanded “law and globalization” framework that situates cross-border norm development at the intersection of various areas of law and disciplines, to “afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms”). This conceptual shift is becoming apparent also in the area of intellectual property. See, e.g., Peter Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights* 21 AUS. J. DEV. STUD. 44 (2005) [hereinafter Drahos, *An Alternative Framework*] (contrasting pre-1995 period of sovereignty to post-1995 period of globalization and advocating nodal governance approach to generating global intellectual property norms).

growth, a key justification for the regulatory intervention into the public goods problem that intellectual property represents.<sup>9</sup> This inquiry has been characterized in the past more by conjecture than hard data.<sup>10</sup> Moreover, the crisis over access to patented antiretroviral drugs has recently injected human rights and social justice debate into a field dominated by commercial instrumentalism and economic rationales, and given intellectual property a reason to reconsider its welfare generating justification.<sup>11</sup>

However, when intellectual property globalization encounters development, even in debates that prominently feature development concerns, dysphoria ensues. This is true even though the term “development” features prominently in the basic legal texts that purportedly address differentials among disparately-situated member states in an otherwise formally equal global intellectual property system. For example, the TRIPS Agreement references the “*developmental . . . objectives*” of all member states as well as member states’ ability to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their *socio-economic and technological development*.”<sup>12</sup> And, an agreement between the United Nations and WIPO also refers to the latter being

a specialized agency [within the UN] and as being responsible for taking appropriate action in accordance with its basic instrument,

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<sup>9</sup> See, e.g., INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH (Carsten Fink & Keith E. Maskus eds., 2005) (collecting recent World Bank analyses); Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS, *supra* note 4, at 3, 13; KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000) (analyzing recent literature on the economic effect of TRIPS on least developed countries (LDCs)); see also Paul J. Heald, *Misreading a Canonical Work: An Analysis of Mansfield's 1994 Study*, 10 J. INTEL. PROP. L. 309 (2003).

<sup>10</sup> COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 17-18 (2002) [hereinafter CIPR REPORT], available at [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm) (Box 1.2 quoting various economists skeptical of the value of intellectual property, such as Edith Penrose, Fritz Machlup, Lester Thurow and Jeffrey Sachs).

<sup>11</sup> See generally *infra* Section I.C. See also James Thuo Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in the U.S. Foreign Policy*, 7 J. GENDER RACE & JUST. 267 (2003); Oxfam, *Priced Out of Reach: How WTO Patent Policies Will Reduce Access to Medicines in the Developing World*, [http://www.oxfam.org.uk/what\\_we\\_do/issues/health/bp04\\_priced.htm](http://www.oxfam.org.uk/what_we_do/issues/health/bp04_priced.htm) (last visited Apr. 13, 2006); OXFAM, *GENERIC COMPETITION, PRICE AND ACCESS TO MEDICINES: THE CASE OF ANTIRETROVIRAL IN UGANDA* (July 10, 2002), available at [http://www.oxfam.org/eng/pdfs/pp020710\\_no26\\_generic\\_competition\\_briefing\\_paper.pdf](http://www.oxfam.org/eng/pdfs/pp020710_no26_generic_competition_briefing_paper.pdf).

<sup>12</sup> TRIPS, *supra* note 5, at art. 8 (emphasis added). In addition, the Preamble refers to the “special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws.” *Id.* at pmb1. As discussed in further detail below in Section I.A, *infra*, TRIPS Article 7's list of objectives state that “[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation . . . in a manner conducive to social and economic welfare.” *Id.* at art. 7.

treaties and agreements administered by it, inter alia, for 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*.<sup>13</sup>

Yet arguably, while the impact of intellectual property globalization on the relative well-being of developing countries compared to developed countries<sup>14</sup> has been discussed in the specific

<sup>13</sup> Agreement between the United Nations and the World Intellectual Property Organization art. 1, Dec. 17, 1974 [hereinafter UN-WIPO Agreement], available at <http://www.wipo.int/treaties/en/agreement/index.html>; see also Convention Establishing the World Intellectual Property Organization, ¶ 13(1), July 14, 1967, 21 U.S.T. 1749, 848 U.N.T.S. 3. The WIPO Convention was amended on October 2, 1979, and entered into force on June 1, 1984. See generally James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9.

<sup>14</sup> This Article will frequently contrast developing countries with developed countries. In the WTO framework, “developing countries” self-identify themselves as such, subject to challenges from other countries. See World Trade Organization, Who are the Developing Countries in the WTO?, [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Apr. 13, 2006). Generally, however, this term refers to

poor . . . nations, using criteria based almost exclusively on per capita income. The . . . countries in this group include states which are variously labeled as developing countries, underdeveloped countries, low-income countries, Majority World, the South or the Third World. These nations generally have low levels of technology, basic living standards and little in the way of an industrial base. Their economies are mainly agricultural and are characterized by cheap, unskilled labour and a scarcity of investment capital. Per capita incomes are below \$5000 and often less than \$1500. Around 70% of the world’s population live in the developing countries, almost all of which are in Africa, Asia, Oceania and Latin America.

ANDY CRUMP, *THE A TO Z OF WORLD DEVELOPMENT* 78-79 (Wayne Ellwood ed., 1998).

Within the WTO, “developing countries” are contrasted to “least developed countries” (LDCs), the latter category being defined by the U.N. Conference on Trade and Development (UNCTAD). See United Nations Conference on Trade and Development, Least Developed Countries (LDCs), <http://www.unctad.org/templates/countries.asp?intItemID=1676> (last visited Apr. 13, 2006). Generally, however, this term refers to “poor, commodity-exporting developing countries with little industry . . . [with] per capita Gross Domestic Product (GDP) of \$1000 or less (at 1970 prices); manufacturing that contributed 10% or less of GDP; and a literacy rate of 20% or less.” CRUMP, *supra*, at 156.

Because LDCs are a subset of the category developing countries, I will not differentiate LDCs from developing countries as a whole, except when the TRIPS agreement or other international instruments discussed here refer specifically to LDCs.

“Developed countries” refers to the

northern, industrialized nations, sometimes also referred to as the “First World.” The list of developed countries varies according to the organization which is compiling the tables. However, it almost always includes the 35 market-oriented countries of the Organization for Economic Co-operation and Development (OECD) as well as Bermuda, Israel and South Africa. Generally, nations having a per capita income of over \$10,000 are included in the group.

*Id.* at 78.

As many have pointed out, there are unfortunate connotations to the terms “developed,” “developing” and “least developed” as applied to countries in the context of a taxonomy indicating wealth and status. See, e.g., Gustavo Esteva, *Development*, in *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* 6, 6-25 (Wolfgang Sachs ed., 1992). However, these terms must be used in the intellectual property literature if, as Professor Doris Long points out, for no other reason than their use in relevant treaties. See, e.g., TRIPS, *supra*

(and obviously important) question of access to patented pharmaceuticals within the context of member states' rights<sup>15</sup> to regulate public health,<sup>16</sup> there has been little inquiry (at least within the U.S.) into the development concerns of many developing nations.<sup>17</sup> These concerns, expressed through the Millennium Development Goals, are a centerpiece of the United Nations in its efforts to assure a certain basic threshold of human material support and dignity throughout the world.<sup>18</sup> Adopted in 2000, the nations of the U.N. system committed to "eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat [] diseases, ensure environmental sustainability and develop a global partnership for development," by 2015.<sup>19</sup>

And while there is a rapidly increasing body of scholarship on protection of traditional knowledge,<sup>20</sup> relatively little attention has been

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note 5, at arts. 65-67; Berne Convention for the Protection of Literary and Artistic Works app., opened for signature Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; see also Doris Estelle Long, "Democratizing" Globalization: Practicing the Policies of Cultural Inclusion", 10 CARDOZO J. INT'L & COMP. L. 217, 222 n.13 (2002). Indeed part of the project of this Article is to examine the implications of the legal use of terms that are so fraught with unexamined non-legal meanings.

<sup>15</sup> World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) (adopted Nov. 14, 2001) [hereinafter Doha Declaration] (affirming "WTO members' right to protect public health and, in particular, to promote access to medicines for all") (emphasis added). Note that two separate Doha Ministerial Declarations were issued on November 14, 2001; the one referenced herein as the "Doha Declaration" was specific to the issue of TRIPS and public health. The other, referenced herein as the "Doha Ministerial Declaration," more generally addressed the objectives of the so-called "Doha development round." See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (adopted Nov. 14, 2001) [hereinafter Doha Ministerial Declaration].

<sup>16</sup> See also Decision of the General Council, Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Aug. 30, 2003) [hereinafter General Council Decision], available at [http://www.wto.org/english/tratop\\_e/trips\\_e/implement\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implement_para6_e.htm).

<sup>17</sup> The CIPR Report, which was commissioned by the U.K. government and chaired by John Barton, a U.S. law professor, is the most sustained academic effort to address the concept of development. CIPR Report, *supra* note 10, at 8:

We therefore conclude that far more attention needs to be accorded to the needs of the developing countries in the making of international IP policy. Consistent with the recent decisions of the international community at Doha and Monterrey, the development objectives need to be integrated into the making of IP rules and practice.

See also Graham Dutfield, Literature Survey on Intellectual Property Rights and Sustainable Human Development (Apr. 2003), [http://www.iprsonline.org/unctadictsd/docs/GDutfield\\_LiteratureSurveyOnIP\\_April2003.pdf](http://www.iprsonline.org/unctadictsd/docs/GDutfield_LiteratureSurveyOnIP_April2003.pdf).

<sup>18</sup> UN Millennium Development Goals, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), available at <http://www.un.org/millenniumgoals/index.html>.

<sup>19</sup> *Id.*; see also JEFFREY SACHS, THE END OF POVERTY, ECONOMIC POSSIBILITIES FOR OUR TIME 210-25 (2005).

<sup>20</sup> See, e.g., Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004); Peter K. Yu, *Traditional*

paid to local development cultures and values outside this context.<sup>21</sup> Nor, except in the context of technology transfer and technical assistance to implement intellectual property minimum standards, has much attention been paid to whether and how intellectual property globalization should contribute to what some development or welfare economists, taking a developmental ethics perspective, have called human capability potentials,<sup>22</sup> culminating in the so-called human development approach.<sup>23</sup>

In other words, analysis of the intersection of intellectual property and development is sector-specific,<sup>24</sup> absent larger guiding principles within intellectual property that truly address the central concerns of development. The debate over intellectual property's relationship to

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*Knowledge, Intellectual Property and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT'L & COMP. L. 238 (2003); Shubha Ghosh, *Reflections on the Traditional Knowledge Debate*, 11 CARDOZO J. INT'L & COMP. L. 497 (2003); Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171 (2003) [hereinafter Coombe, *Fear, Hope and Longing*]; Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998) [hereinafter Coombe, *Intellectual Property*]; Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000); Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229 (1998); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

<sup>21</sup> Notable exceptions include Olufunmilayo B. Arewa, "Piracy," Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property (unpublished manuscript, on file with author); Madhavi Sunder, *The Invention of Traditional Knowledge* (UC Davis Legal Studies Research Paper Series, Paper No. 75, 2006), available at <http://ssrn.com/abstract=890657>; Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69 (2000) (analyzing relationship of intellectual property to cultural values in India, generated by the film *Fire* by Deepa Mehta); Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEG. STUD. 11, 13-21 (1998) (explicitly discussing neoliberal assumptions and the inevitably politicized nature of any global intellectual property regime); and Ruth L. Gana, *The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL'Y 315 (1996) (contrasting the human rights status of intellectual property rights with the right to development and self-determination; arguing for IP systems that reflect unique socioeconomic and cultural norms and that are consistent with development objectives).

<sup>22</sup> See *infra* Section III.B.

<sup>23</sup> UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT (1991), available at <http://hdr.undp.org/reports/global/1991/en/> (inaugurating new criterion of development, the Human Development Index (HDI), which measures development through longevity, knowledge and income sufficiency); see also MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT (1995). The UNDP's recent human development approach arguably had its genesis in the mid-1970's with the International Labour Organization's "*Basic Needs Approach*, 'aiming at the achievement of a certain specific minimum standard of living before the end of the century.'" Esteva, *supra* note 14, at 15.

<sup>24</sup> For a recent excellent introduction to these various sectors, see Graham Dutfield, *Introduction to TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY* (Christophe Bellmann et al. eds., 2003) [hereinafter TRADING IN KNOWLEDGE].

essential drugs<sup>25</sup> has not generalized into whether or how knowledge goods, critical in meeting basic human needs (such as provision of food, water, education and health care), are facilitated or impeded by intellectual property globalization.<sup>26</sup>

Of course, a growing number of intellectual property specialists are starting to attend to intellectual property globalization in the context of development.<sup>27</sup> Yet relatively few analyses so far have analyzed the legal impact of the term “development” in the international legal documents that refer specifically to it.<sup>28</sup> Nor has there been a sustained effort to link these terms to recent development literature, or to what has been proposed as a human right to development.<sup>29</sup>

As implemented and interpreted thus far, intellectual property globalization seems to have incorporated the standard domestic balancing test between protection of knowledge goods through intellectual property and, on the other hand, access by consumers and

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<sup>25</sup> The World Health Organization (WHO) has issued a list of essential drugs, defining them as “those drugs that represent the best balance of quality, safety, efficacy and cost for a given health setting.” World Health Organization, *Medicines Strategy: Framework for Action in Essential Drugs and Medicines Policy 2000-03*, at 7, WHO Doc. WHO/EDM/2000.1 (2000). As Laurence Helfer describes it, the “essential drug concept has led the WHO and its member governments to adopt lists of essential drugs as part of their national drug policies . . . The WHO itself publishes a Model List of Essential Drugs and updates it every two years.” Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the New Dynamic of International Intellectual Property Law-Making*, 29 YALE J. INT’L L. 1, 42 n.186 (2004) [hereinafter Helfer, *Regime Shifting*].

<sup>26</sup> As Susan K. Sell puts it:

Even if the [access to essential medicines] campaign ultimately triumphs on the medicines issue, the rest of the agreement still locks in a commitment to intellectual property as a system to exclude and protect. The public-regarding side of the balance is vastly overshadowed by the private rights side of the ledger.

SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 174 (2003).

<sup>27</sup> See *infra* Section I.C. for a sustained discussion. In addition to the scholars discussed there, the aforementioned CIPR Report, *supra* note 10, should be included. See also INTERNATIONAL PUBLIC GOODS, *supra* note 4.

<sup>28</sup> But see Maskus & Reichman, *supra* note 9, at 31-32; Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INTELL. PROP. 493, 502 (2002); Okediji, *Public Welfare*, *supra* note 3, at 914:

A particularly revealing aspect of these disputes is the way each of the Panels and the Appellate Body have ducked the thorny question of how to apply the preambular statements and the broad themes of Article 7 and 8 to evaluate the substantive obligations of the TRIPS Agreement. While tribunals can use strict construction to constrict or expand the requirements of TRIPS, the vagueness of these general qualifications in Articles 7 and 8 will likely lead to a one-way ratchet of rights.

See also L. Danielle Tully, *Prospects for Progress: The TRIPS Agreement and Developing Countries After the Doha Conference*, 26 B.C. INT’L & COMP. L. REV. 129, 139 n.78 (2003) (citing developing country proposals regarding Articles 7 and 8).

<sup>29</sup> Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N., GAOR 41st Sess., No. 53, U.N. Doc. A/4/53 (Dec. 4, 1986); L. Amede Obiora, *Beyond the Rhetoric of a Right to Development*, 18 LAW & POL’Y 355 (1996); James C.N. Paul, *The Human Right to Development: Its Meaning & Importance*, 25 J. MARSHALL L. REV. 235 (1992). But see Gana, *supra* note 21, and scholarship discussed in more detail *infra* Section I.C.

users<sup>30</sup> to information embedded within these protected knowledge goods.<sup>31</sup> This domestic balancing test—writ large on the global stage—is widely acknowledged as the primary TRIPS framework even by the developing countries whose welfare is most directly affected by the inclusion of other criteria.<sup>32</sup> For all countries, this balancing test is assumed—at least in approximate terms—to generate optimal social welfare via the intellectual property bargain.

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<sup>30</sup> While the statutory rights of the owners of intellectual property are often referred to by shorthand as IPRs (intellectual property rights), *see infra* note 280, the language of rights has not been applied as consistently to the need of users of intellectual-property-protected goods to access these goods for various purposes. *Cf.* Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21 (2004) (calling for the articulation of a user right in the context of TRIPS). *See generally* L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991). This remains a severely under-theorized area of intellectual property law despite the abundance of literature on the public domain and access issues. *See* Margaret Chon, *The Emerging Rights of Access to Knowledge* (unpublished manuscript, on file with author).

International human rights instruments recognize user rights at the same time that they may also recognize intellectual property rights. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 27, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,” whereas subsection two states, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”); *see also* Convention on the Rights of the Child, G.A. Res. 44/25, art. 29, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 15, U.N. Doc. A/6316 (Dec. 16, 1966); Paul, *supra* note 29, at 253 (discussing Philip Alston’s criteria for deciding on what is a new human right and characterizing human rights as a positive law regime with post-WWII rights created out of “thin air”). However, it remains to be seen how the mainstream human rights agencies frame and interpret user rights. *See generally* Laurence Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance in Collective Management of Copyright and Related Rights* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 05-28, 2006), available at <http://ssrn.com/abstract=816984>. In this Article, I have tried to avoid using the term “right” to refer to either side of the balance.

<sup>31</sup> TRIPS Article 7 (entitled “Objectives”) places “[t]he protection and enforcement of intellectual property rights” within a framework of “mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” TRIPS, *supra* note 5, at art. 7 (emphasis added). A leading treatise writer on the TRIPS negotiating history has commented that

[t]he importance accorded to . . . Articles [7 and 8] in the Doha negotiations [on development] is unlikely to formally change the legal status of these provisions, but may lead a panel to take a longer look at how these provisions should be interpreted in the context of the Agreement as a whole, especially with respect to the need for balance.

DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 120 (2d ed. 2003) (providing negotiating history, travaux préparatoires and comments on each Article of TRIPS); *see, e.g.*, Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000) [hereinafter Section 110(5) Panel Report] (interpreting Article 13’s three step test).

<sup>32</sup> *See, e.g.*, Council for Trade-Related Aspects of Intellectual Property Rights, *Submission on TRIPS and Public Health by the African Group, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela*, ¶ 21, IP/C/W/296 (June 29, 2001) [hereinafter WTO, *Submission*] (discussing Articles 7 and 8 of TRIPS).

I argue here that this binary analysis is overly simplistic even in the domestic context and is radically incomplete in the global context. Intellectual property, when it encounters development either domestically or globally, must incorporate a more comprehensive understanding of social welfare maximization. The title of this Article refers to a development divide. This alludes not only to the material divide figuring in other debates on intellectual property,<sup>33</sup> but also to an unnecessary ideological divide between efficiency and distributional-driven understandings of development.<sup>34</sup>

The overall assessment of intellectual property's instrumental goal—the promotion of “Progress,” at least in the U.S. context—has been dominated of late by the assumption that pure wealth or utility-maximization serves adequately to evaluate social welfare.<sup>35</sup> Reliance on these metrics can be explained by an analogy to a drunk looking for his keys under a streetlight: since it is extremely difficult to measure how intellectual property affects rates of innovation, policy-makers tend to over-rely on rough proxies that *can* be measured, such as the “bottom line” of economic growth or losses, or net trade balances or deficits. This approach dovetails with the interests of intellectual property industries, whose short term goals of maximizing revenue generation are not necessarily aligned with society's long term dynamic goals of maximizing innovation.<sup>36</sup> While severely problematic even in the domestic welfare generating context, this type of crude welfare calculation can have brutal consequences in the context of intellectual property globalization.

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<sup>33</sup> See, e.g., Peter K. Yu, *Introduction to Symposium, Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1 (2002) [hereinafter Yu, *Introduction*] (describing a global digital divide in access to networked digital technology); Madeleine Mercedes Plasencia, *Telecommunications in the Twenty-First Century: Global Perspectives on Community and Diaspora Among Netcitizens*, 52 ADMIN. L. REV. 1033, 1039 (2000) (same).

<sup>34</sup> Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 225 (2004):

The result is a wall between the two sides of the development agenda, the effect of which is to make the established legal framework the background condition in which other objectives, including social objectives, must be pursued. It is as if the legal framework of investment, production and exchange had no effect on the social and, aside from the changes described above, the incorporation of social objectives into the development agenda had few necessary institutional implications.

<sup>35</sup> James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 41 (2003) (“Indeed, the post-Cold War ‘Washington Consensus’ is invoked to claim history teaches the only way one gets growth and efficiency is through markets; property rights, surely, are the *sine que non* of markets.”); see also Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000). See *infra* Section III.B. for a detailed discussion of this claim.

<sup>36</sup> See, e.g., Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987).

Over-reliance on utility-maximization ignores distributional consequences.<sup>37</sup> Within domestic intellectual property policy-making, this insight will often be met with a shrug. Equality concerns are second order concerns to efficiency norms, if voiced at all.<sup>38</sup> But intellectual property globalization has made these aspects of the provision of basic knowledge goods increasingly difficult to ignore.<sup>39</sup>

In the parallel universe of development economics, an alternative to raw utilitarianism in the measurement of social welfare has gained broad consensus. The assumption that wealth or utility maximization is the sole legitimate measure of social welfare meant that a single economic growth indicator (i.e., gross national or gross domestic product) was thought to suffice in the development context. But this measure could actually miscalculate welfare: a majority of a country's people could be living without access to the essential goods and services required for human functioning, with a small percentage of its population capturing a disproportionate amount of the overall wealth. Recognizing this shortcoming in the standard welfare economics approach, economists such as Amartya Sen began to theorize an alternative human capability approach towards the measurement of social welfare, which has been adopted by mainstream development institutions.<sup>40</sup> Since 1991, the Human Development Index, composed of three variables—life expectancy at birth, educational attainment, and the standard of living measured by real per capita income<sup>41</sup>—has been used annually by the United Nations Development Programme to measure social welfare within and across nations.<sup>42</sup> Yet this human capability approach, based on the idea that a society is not fully developed until certain basic needs are provided for all of its people, has not yet informed intellectual property globalization.

More recently within the area of development economics, others are taking a fresh look at public goods theory. While economists have long recognized that “most of the real economy operated in the messy world of impure public goods” and “[t]heorising about the provision of

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<sup>37</sup> A.P. Thirlwall, *Development as Economic Growth*, in THE COMPANION TO DEVELOPMENT STUDIES 41, 42 (Vandana Desai & Robert B. Potter eds., 2002).

<sup>38</sup> Cf. Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

<sup>39</sup> Peter M. Gerhart, *Distributive Values and Institutional Design in the Provision of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS, *supra* note 4, at 69, 70 (“Although we normally do not highlight this distributive question when we talk about national intellectual property systems, it always remains relevant.”).

<sup>40</sup> SEN, *supra* note 1.

<sup>41</sup> Kamal Malhotra, *The Purpose of Development*, 26 MICH. J. INT'L L. 13, 13-18 (2004) (explaining components of the HDI); *see also* UL HAQ, *supra* note 23, at 46-66 (same).

<sup>42</sup> UNITED NATIONS DEV. PROGRAMME, *supra* note 23 (inaugurating the Human Development Index of development that ranks health education, nutrition and employment).

public goods has become a long story in economics,<sup>43</sup> a new “rubric” of global public goods is emerging.<sup>44</sup> Global public goods theorists include an enormous array of things as potential public goods. Indeed states themselves can be viewed as public goods, as can markets and legal regimes.<sup>45</sup> To one degree or another, each of these other global public goods (like all public goods) bears the characteristics of non-rivalry and non-exclusivity. Each also has the potential either to benefit diverse global populations through positive spill-over effects or to generate tremendous negative externalities.<sup>46</sup>

Of particular significance to this Article is the concept of international legal regimes, such as the TRIPS component of WTO, as a type of intermediate public good,<sup>47</sup> potentially but not always leading to positive global public good outcomes such as the production of more knowledge goods. Various other global public goods relating to the provision of human needs are integrally entwined with knowledge goods and, I argue here, must be analyzed in tandem with them. These include communicable disease control, education, cultural norms and even equality.<sup>48</sup>

The enormous variety of items now classified as global public goods differentiates this newer type of public goods theory from its predecessor. Several other major points of departure exist between standard public goods theory and the more recent approaches that self-consciously address globalization. Global public goods theorists ask insistently who the beneficiaries of public goods are—that is, who are the haves and have-nots? Moreover, some theorists focus not only on under-supply of public goods (or over-supply of public bads), but also unequal *access* to global public goods.<sup>49</sup> These various beneficiary

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<sup>43</sup> Peter Drahos, *The Regulation of Public Goods*, in INTERNATIONAL PUBLIC GOODS, *supra* note 4, at 46, 47.

<sup>44</sup> See, e.g., INTERNATIONAL PUBLIC GOODS, *supra* note 4; GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999) [hereinafter GLOBAL PUBLIC GOODS I]; PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul et al. eds., 2003) [hereinafter GLOBAL PUBLIC GOODS II].

<sup>45</sup> Inge Kaul et al., *Why Do Global Public Goods Matter Today?*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 7 [hereinafter Kaul et al., *Why*]; Inge Kaul et al., *How to Improve the Provision of Global Public Goods*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 21, 44 [hereinafter Kaul et al., *How to Improve*].

<sup>46</sup> Global public goods theorists have not only expanded the number of potential public goods that require international cooperation for adequate provision, but have also identified certain public “bads,” such as global warming, disease outbreaks or international financial instability. These bads also have characteristics of nonrivalry and nonexclusivity. Correcting the under-supply or under-access of public goods is as important as, and is often the flip side of, coping with these global bads. Kaul et al., *How to Improve*, *supra* note 45, at 42 (citing Desai).

<sup>47</sup> Kaul et al., *Why*, *supra* note 45, at 11.

<sup>48</sup> Equality is discussed at greater length *infra* Section IV.B.

<sup>49</sup> Pedro Conceição, *Assessing the Provision Status of Global Public Goods*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 152.

questions differentiate this approach from the previous public goods approach.<sup>50</sup>

To the extent that development encompasses not only economic but also cultural, social, and political dimensions of national well-being,<sup>51</sup> a more deliberate consideration of these newer concepts in development economics could ameliorate intellectual property's one-sided emphasis on pure wealth- or utility-maximization. In the trade context of TRIPS, this emphasis tends to favor countries with well-established intellectual property industries<sup>52</sup> and compounds a bias towards measuring the development effects of intellectual property solely through economic growth.<sup>53</sup> The net result is an intellectual property balance that has become increasingly lopsided in favor of producer interests, possibly to the detriment of overall global social welfare and clearly to the detriment of the most vulnerable populations.

Arguably, even the legitimate public health and welfare objectives of developed countries such as the U.S. are in danger of being trumped by the "trade utilitarianism"<sup>54</sup> of the substantive provisions in TRIPS.<sup>55</sup> Thus, if "development analysis is relevant even for richer countries"<sup>56</sup> such as the U.S., then it is pertinent to whether longstanding American doctrines such as copyright fair use can survive TRIPS Article 13's

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<sup>50</sup> Inge Kaul & Ronald U. Mendoza, *Advancing the Concept of Public Goods*, GLOBAL PUBLIC GOODS II, *supra* note 44, at 78, 89 ("More than the notion of public goods, the concept of the public domain is actively and often heatedly debated.")

<sup>51</sup> Declaration on the Right to Development, *supra* note 29; UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, *THE CULTURAL DIMENSIONS OF DEVELOPMENT: TOWARDS A PRACTICAL APPROACH* (1995). See generally Paul, *supra* note 29.

<sup>52</sup> A recent estimate, by the World Bank, suggests that most developed countries would be the major beneficiaries of TRIPS in terms of the enhanced value of their patents, with the benefit to the U.S. estimated at an annual \$19 billion. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002: MAKING TRADE WORK FOR THE WORLD'S POOR* 133 (cited in the CIPR REPORT, *supra* note 10, at 24).

<sup>53</sup> PEET WITH HARTWICK, *supra* note 2, at 13; Esteva, *supra* note 14, at 12-13, 17.

<sup>54</sup> Long, *supra* note 14, at 243.

<sup>55</sup> Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COL. J. TRANS'L L. 75 (2000) [hereinafter Okediji, *Toward*] (arguing that the U.S. fair use provision probably flunks the three-step test of TRIPS Article 13). But see Pamela Samuelson, *Implications of the Agreement on Trade-Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. CULTURAL ECON. 95, 100-03 (1999) (surmising that existing exceptions and limitations reflecting cultural values, such as the U.S. fair use exception, may have been grandfathered into TRIPS and therefore not violate Article 13); Stuart Macdonald, *Exploring the Hidden Costs of Patents*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 13, 36 (Peter Drahos & Ruth Mayne eds., 2002) ("TRIPS has forced the developing world to examine the patent system more deeply and thoroughly. This is something that most firms and most governments in the developed world should have done years ago.")

<sup>56</sup> SEN, *supra* note 1, at 6; see also Obiora, *supra* note 29, at 358 ("Development is not just for the 'Other.' An expansive definition of development suggests that no nation has 'arrived,' so to say."); cf. Hope Lewis, *Women (Under)Development: Poor Women of Color in the United States and the Right to Development*, in *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* 95 (Adrien Katherine Wing ed., 2000).

three-step test.<sup>57</sup> The development policy space for all countries has been constricted by minimum standards; for example, wealthy countries such as Canada cannot maintain exceptions for early workings of patents to promote generic competition.<sup>58</sup> Regardless of the differential impact on developing as opposed to developed countries, the concept of development has not been mapped fully for the benefit of either group of countries.

Thus in addition to the venerable principles of national treatment and minimum standards,<sup>59</sup> resulting in formal equality<sup>60</sup> among nations who participate in regimes of intellectual property globalization, I suggest that intellectual property globalization must incorporate a principle of substantive equality.<sup>61</sup> Indeed this principle is arguably the very core of a human development-driven concept of “development,” whether expressed as heightened attention to distributional concerns, or to the social consequences of economic growth, or as a commitment to poverty reduction. Certain foundational capacities, whether viewed as

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<sup>57</sup> TRIPS, *supra* note 5, at art. 13 (Limitations and Exceptions: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”). Compare Okediji, *supra* note 55, with Samuelson, *supra* note 55.

<sup>58</sup> Panel Report, *Canada—Patent Protection of Pharmaceutical Products (Generic Medicines)*, WT/DS114/R (Mar. 17, 2000) [hereinafter Canada Panel Report]. This was not appealed by Canada and now adopted by the Dispute Settlement Body (interpreting TRIPS Article 27.1 (“[P]atents shall be available and patent rights enjoyable without discrimination as to . . . the field of technology . . .”), Article 28.1 (“A patent shall confer on its owner the following exclusive rights: . . . making, using, offering for sale, selling, or importing for these purposes that product . . .”) and Article 30 (“exceptions to the exclusive rights . . . do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”)).

<sup>59</sup> TRIPS, *supra* note 5, at art. 3; Paris Convention for the Protection of Industrial Property art. 2, July 14, 1967, 21 U.S.T. 1583 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works art. 5, *supra* note 14.

<sup>60</sup> See Graeme B. Dinwoodie & Rochelle Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT’L L. 95, 96 (2004) (commenting on the overly-formalist interpretation of the TRIPS dispute resolution panels, resulting in “formal equality” among states).

<sup>61</sup> I have previously proposed a normative equality principle in traditional knowledge protection. See Margaret Chon & Shubha Ghosh, Joint Comment on WIPO Draft Report: Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Nov. 2, 2000), available at <http://www.wipo.int/tk/en/tk/ffm/ffm-report-comments/msg00008.html>.

[W]e propose that the creation of an appropriate system for the protection of traditional knowledge *should be guided by the goal of empowering traditionally subordinated groups*. Since traditional knowledge is rooted in the groups that have developed such knowledge over time, it is necessary to protect the peoples who are the source of the knowledge. Preservation of the people entails granting and protecting fundamental economic and non-economic rights held by the people. While acknowledging that intellectual property law and human rights are distinct, we also recognize that they should be guided by the same principle: protection of groups that have been typically subordinated and on whose existence the development of intellectual property depends.

*Id.* (emphasis added).

the sum of individual capabilities or as national capacities, should guide application of the rules of intellectual property globalization. The provision of certain global public goods must take precedence over others. For example, the provision of basic food, health care, and education must be prioritized over the provision of intermediate public goods such as legal regimes that facilitate innovation through the grant of exclusionary rights. After all, basic education and adequate health status are prerequisites to any capacity-building for the technological progress that is one of the biggest rationales of TRIPS.<sup>62</sup>

The TRIPS Preamble as well as TRIPS Article 8 both reference the key term “development,” which can be interpreted to incorporate a substantive equality norm, as evidenced by other documents such as the U.N. Millennium Development Goals.<sup>63</sup> According to the Vienna Convention on the Law of Treaties, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>64</sup> The UN-WIPO Agreement similarly references “development,” which can be similarly incorporated throughout all of WIPO’s activities.<sup>65</sup> Thus, these institutions can and should manifest the equality norm that is expressed in the broader development context within which both organizations operate.

The proposed principle of substantive intellectual property equality would be analogous to strict scrutiny review in the judicial context of U.S. constitutional law. It would be foundational to any form of intellectual property decision making. Simply put, the decision maker should accord much less deference and exercise much more skepticism towards the proposed government action (in this case, the regulatory intervention by the state in the form of the grant of intellectual property protection) in the context of the provision of a basic human development capability, such as basic education or health care. In a norm-setting (as opposed to norm-interpreting or judicial) context, the

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<sup>62</sup> Joseph Stiglitz, *Learning to Learn, Localized Learning and Technological Progress*, in *ECONOMIC POLICY AND TECHNOLOGICAL PERFORMANCE* 126 (Partha Basgupta & Paul Stoneman eds., 1987) [hereinafter Stiglitz, *Learning to Learn*] (inquiry into the learning process leading to technological progress that, in turn, leads to economic growth).

<sup>63</sup> UN Millennium Development Goals, *supra* note 18.

<sup>64</sup> Vienna Convention on the Law of Treaties Between United States and International Organizations art. 31(1), Mar. 21, 1986, 25 I.L.M. 543 [hereinafter Vienna Convention]. According to Mark Janis, “treaties are to be interpreted primarily by reference to the treaties text, giving rather less emphasis than might some municipal laws of contract to the circumstances surrounding the explicit agreement of the parties. The ‘context’ referred to in the Convention means only a treaty’s own preamble and annexes . . . .” MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 30 (4th ed. 2003).

<sup>65</sup> UN-WIPO Agreement, *supra* note 13.

decision maker should err on the side of creating a norm that maximizes the access to the public good by the most needy.<sup>66</sup>

Some who adhere to utilitarianism will question the introduction of substantive equality as a normative principle.<sup>67</sup> The implicit assumption in standard liberal economic theory is that efficiency will lead to equality in the long run because all boats will rise with economic growth and, in the case of intellectual property, concomitant innovation. Yet a few global public goods theorists claim that the opposite may in fact be true: equity can lead to greater efficiency. Moreover, there is growing evidence that international cooperation on the provision of public goods depends on actual and perceived equity in the formulation, substance and outcome of international agreements. I develop this claim further in the body of this Article.

On the other side of the coin, some who adhere to a bleak view of development will question why I even bother with the concept of development at all.<sup>68</sup> Indeed, there is early evidence to support this pessimism.<sup>69</sup> One must not take an overly-naïve view of development's

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<sup>66</sup> Peter Gerhart suggests that a

healthy international system that respected distributive values could provide for . . . judicial review of international agreements to determine whether they meet norms of fairness in the division of rewards. Although this approach would have to be exercised gingerly, with due respect for the doctrine of *pacta sunt servanda* and the need to preserve the stability of mutual cooperation, the approach could curb opportunistic behavior by powerful countries and would reinforce norms leading to the fair distribution of gains from cooperation.

Gerhart, *supra* note 39, at 75-76.

<sup>67</sup> See Thomas F. Cotter, *Market Fundamentalism and the TRIPS Agreement*, 22 CARDOZO ARTS & ENT. L.J. 307 (2004) (addressing law and economics-based critiques of the Doha Declaration).

<sup>68</sup> Estevea, *supra* note 14, at 6-25 (describing the various failed incarnations of development, including pure economic growth, integration with social growth, the so-called unified approach, participative development, the basic needs approach, endogenous development and, currently, sustainable development and human development); see also PEET WITH HARTWICK, *supra* note 2, at 150-53.

In the legal academic world, this perspective has been espoused most vigorously by Tayyab Mahmud, Ruth Gordon and Jon Sylvester. See Tayyab Mahmud, *Postcolonial Imaginaries: Alternative Development or Alternatives to Development?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 25, 26 (1999) (arguing that development should be jettisoned altogether: "I submit that a radical critique must move beyond the discourse of alternative development and begin to imagine alternatives to development."); Ruth Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 2 (2004); see also Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1198-99 (2000).

<sup>69</sup> Frederick M. Abbott, *Intellectual Property Rights in Global Trade Framework: IP Trends in Developing Countries*, 98 AM. SOC'Y INT'L L. PROC. 95, 97 (2004). Abbot discusses the aftermath of the Doha Declaration and reports:

[T]here is bad news as well, and in many ways the bad news is more noteworthy than the good news. While multilateral negotiations were going on in Geneva and progressive strides towards promoting access to medicines were being made, the U.S. Trade Representative (USTR) and Pharmaceutical Research and Manufacturers of America (PhRMA) were busy incorporating an alternative and highly restrictive set of

ability to leverage intellectual property's potential for addressing equality. This Article is written with a keen awareness of the center-margins momentum of development.<sup>70</sup> Yet many who have examined the question of power in various forms of socio-political and legal relations have emphasized that even the relatively powerless have some agency,<sup>71</sup> and that margins should impact centers as much as the other way around.<sup>72</sup> Some international relations theorists even claim that we need to insist against the center-margin paradigm in a world destabilized by the multidirectional impacts of globalization.<sup>73</sup> My methodology here tries to reflect alternative, critical understandings of development, while acknowledging that there typically is a discernible hegemonic approach that requires careful attention—in this case, liberal economic theory. I also try not to overemphasize the North-South distinction, recognizing that there may be shifting alliances between and among developed and developing countries as power blocs within the WTO.<sup>74</sup> Nonetheless, it is useful for purposes of this analysis to use the terms “developing” and “developed” in a strategic essentialist<sup>75</sup> sense as

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rules in new “free trade” agreements [such as the CAFTA and the Australian Free Trade Agreement] that will effectively undermine the flexibilities in the Doha Declaration and the Decision on Implementation, thus preventing access to lower priced generic medicines. The extent of these restrictions is extraordinary, and they will have bad effects on the poor.

*Id.*

<sup>70</sup> PEET WITH HARTWICK, *supra* note 2, at 11.

<sup>71</sup> See generally SELECTED SUBALTERN STUDIES (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).

<sup>72</sup> BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003); Brenda J. Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, in GLOBAL CRITICAL RACE FEMINISM, *supra* note 56, at 27.

<sup>73</sup> See generally L.H.M. LING, POSTCOLONIAL INTERNATIONAL RELATIONS: CONQUEST AND DESIRE BETWEEN ASIA AND THE WEST (2002); Thomas F. McInerney, *Law and Development as Democratic Practice*, VOICES OF DEVELOPMENT JURISTS, Mar. 30, 2004, available at [http://www.idli.org/DLRC/vdj/vdj1\\_2004.pdf](http://www.idli.org/DLRC/vdj/vdj1_2004.pdf) (critiquing law and development/rule of law programs; suggesting model based on Habermas: discursive intersubjective law-making by citizens).

<sup>74</sup> See PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 196-97 (2002) [hereinafter DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM]:

The first basis of [US] diplomacy was that jumping on the TRIPS bandwagon was in [the developing country's] own interests if they wanted to attract capital and become a knowledge economy . . . . Even on India, the most powerful holdout [to TRIPS], the US worked tirelessly, pointing out to India that . . . it had a software and film industry that gave it very different interests from other developing countries such as the ASEANS, and so on. At the same time, . . . [the U.S.] went to the ASEANS and said these guys [India and Brazil] should not be representing you because they don't care about investment climate.

See also SELL, *supra* note 26, at 161 (describing U.S. proposal to put a wedge between India and Brazil and those countries without domestic manufacturing capacity for pharmaceuticals).

<sup>75</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

proxies for broad and enduring differences between the global intellectual property “haves” and “have-nots.”

As observers situated on all parts of the ideological spectrum have noted, intellectual property policy-making is made far more, not less, multivariate and contingent when it goes global. However, this proposed principle is not adding complexity for complexity’s sake. There are many compelling reasons why an additional first principle of international intellectual property is necessary. A substantive equality principle transforms the relatively crude binary intellectual property balancing test into a more nuanced and context-sensitive discourse about the instrumental purpose of intellectual property. It also reconsiders that purpose within the context of intellectual property globalization with its especially pressing questions of distribution. And finally, it begins to explicitly address questions of equity, fairness, and justice, issues that have been submerged if not altogether ignored in much of the domestic discourse of intellectual property.

The concept of intellectual property has encountered the concept of development but, up to now, these concepts have merely coexisted. A new first principle of intellectual property fairly demands to be articulated in the context of globalization. This recalibration of the concept of intellectual property in light of the concept of development is actually long overdue. It is a gift that intellectual property globalization can give to the domestic social welfare analysis of intellectual property, in a recursive move that is characteristic of our postmodern global age.<sup>76</sup>

## I. INTELLECTUAL PROPERTY ENCOUNTERS DEVELOPMENT

### A. *The WTO Encounters Development*

All observers agree that intellectual property globalization was accelerated greatly by TRIPS. Adopted in 1994 as part of the Uruguay Round of the WTO, TRIPS establishes uniform minimum standards for many basic areas of intellectual property law, compared to the patchwork and subject-specific approach of previous bilateral or multilateral agreements.<sup>77</sup> TRIPS binds its signatories to the principle of national treatment such that a country cannot treat a foreign intellectual property rights holder any worse than it would treat its own

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<sup>76</sup> GIDDENS, *supra* note 7, at 39 (“We are abroad in a world which is thoroughly constituted through reflexively applied knowledge, but where at the same time we can never be sure that any given element of that knowledge will not be revised.”).

<sup>77</sup> Ruth Okediji, *TRIPs Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC’Y USA 584, 587 (2001) [hereinafter Okediji, *TRIPs Dispute Settlement*].

nationals.<sup>78</sup> “National treatment . . . substitutes a rule of non-discrimination for the principle of reciprocity.”<sup>79</sup> Most importantly, TRIPS is administered under the jurisdiction of the WTO dispute settlement understanding (DSU) mechanisms for enforcing trade violations—as opposed to the previous largely ineffectual systems for enforcing violations of extant treaties.<sup>80</sup> Concerns over global freeriding<sup>81</sup> drove the placement of intellectual property issues on the world trade agenda; these new global intellectual property laws are now buttressed by relatively effective enforcement mechanisms via the global trade framework.<sup>82</sup>

Because so many countries, both rich and poor, have a strong interest in participating in the rules of global trading established by the WTO, intellectual property norms have now been imported into many countries that had previously little to no legal regulation in this area. Intellectual property laws through TRIPS are linked to non-intellectual property issues, such as trade in agricultural and textile goods. Termed linkage bargaining, previously unrelated areas are now linked via negotiations over universal trade rules.<sup>83</sup> Linkage bargaining was critical to getting developing countries to sign on to the higher standards of intellectual property protection than they would have otherwise desired.<sup>84</sup>

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<sup>78</sup> TRIPS, *supra* note 5, at art. 2 (entitled “National Treatment”).

<sup>79</sup> GRAEME B. DINWOODIE, WILLIAM O. HENNESSEY & SHIRA PERLMUTTER, *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* 79 (2001).

“The first international copyright treaties were based on a system of material reciprocity. Under material reciprocity, country A would grant country B’s authors the same protection as country B would grant country A’s authors.” *INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY* 222 (Anthony D’Amato & Doris Estelle Long eds., 1996) (quoting Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1 (1988)).

<sup>80</sup> TRIPS, *supra* note 5, at art. 64 (“Dispute Settlement”). The Berne and Paris Conventions, for example, were never enforced, although hypothetically member states could bring complaints before the International Court of Justice.

<sup>81</sup> “A freerider is a person who takes the benefit of an economic activity without contributing to the costs needed to generate that benefit. In the case of intellectual property the freerider takes the benefit of information for which the costs of discovery/creation have been met by the producer.” Peter Drahos, *Introduction* to *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT*, *supra* note 55, at 3-4. As economist Suzanne Scotchmer recently observed, harmonized intellectual property standards are “a tool by which cross-border externalities can be recaptured by the innovating country.” Suzanne Scotchmer, *The Political Economy of Intellectual Property Treaties*, 20 J.L. ECON. & ORG. 415, 416 (2004).

<sup>82</sup> See Maskus & Reichman, *supra* note 9, at 5.

<sup>83</sup> MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 12-13, 92-93 (1998). See generally Symposium, *The Boundaries of the WTO*, 96 AM. J. INT’L L. 1 (2002) (symposium on linkages).

<sup>84</sup> Okediji, *TRIPs Dispute Settlement*, *supra* note 77, at 610-11 (describing under regime theory why countries might have entered into agreements against their best interests); see also Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371-79 (2006) [hereinafter Yu, *Discontents*] (describing four narratives explaining why developing countries signed onto TRIPS).

Furthermore, the minimum standards of TRIPS are an example of deep integration—“integration not only in the production of goods and services but also in standards and other domestic policies.”<sup>85</sup> In contrast to the previous trade approach of shallow integration, where the focus was on trade barriers at the borders rather than harmonization of standards across borders, under TRIPS, developing countries are no longer thought to need the special protection of high trade barriers in light of their relative economic vulnerability.<sup>86</sup> The TRIPS approach abandons the special treatment approach of shallow integration and adopts a formalistic, universalistic approach of deep integration of minimum standards regardless of a country’s economic status. The end of preferential treatment for poor countries is tied to the ever-pervasive process of marketization of economies across the world.<sup>87</sup>

The allusions within the TRIPS Agreement to national public policy and public interest concerns related to development were placed there at the behest of the so-called “Group of 14” developing countries.<sup>88</sup> As stated earlier, this language includes “*developmental . . . objectives*” of all member states, mentioned in the

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<sup>85</sup> Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 128.

<sup>86</sup> *Id.* at 130-31:

When barriers at nations’ borders were high, as they were in the immediate postwar period, governments and citizens could sharply differentiate international policies from domestic policies. International policies dealt with the border barriers, but nations were sovereign over domestic policies without regard for the impact on other nations. . . .

In the 1980s the notion that developing countries should develop behind high barriers began to change.

<sup>87</sup> *Id.*

<sup>88</sup> These were: Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe. Other participants in the Uruguay round that submitted proposed drafts included the European Community, the United States, Switzerland, Japan and Australia. GERVAIS, *supra* note 31, at 73 n.1; *see also* Adronico O. Adede, *Origins and History of the TRIPS Negotiations*, in TRADING IN KNOWLEDGE, *supra* note 24, at 28; Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 508-09 (2005) [hereinafter Gervais, *Intellectual Property, Trade & Development*].

[T]he emerging outline of a possible TRIPS result had essentially been at the level of principles, not legal texts. The draft legal texts, which emanated from the European Community, the United States, Japan, Switzerland, and Australia, foreshadowed a detailed agreement covering all IP rights then in existence . . . . As a reaction, more than a dozen developing countries proposed another “legal” text, much more limited in scope, with few specific normative aspects. They insisted on the need to maintain flexibility to implement economic and social development objectives. In retrospect, some developing countries may feel that the Uruguay Round Secretariat did them a disservice by preparing a “composite” text, which melded all industrialized countries’ proposals into what became the “A” proposal, while the developing countries’ text became the “B” text. The final Agreement mirrored the “A” text. As such, it essentially embodied norms that had been accepted by industrialized countries. The concerns of developing countries were reflected in large part in two provisions—Articles 7 and 8.

*Id.* at 508 (footnotes omitted).

Preamble, as well as to a reference in TRIPS Article 8 (entitled “Principles”) to member states’ ability to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their *socio-economic and technological development*.”<sup>89</sup> TRIPS Article 7 (entitled “Objectives”) frames “[t]he protection and enforcement of intellectual property rights” within a framework of “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.”<sup>90</sup>

The Group of 14 pushed to include this language referencing development after it became inevitable that intellectual property rights were to be included in the global trading framework.<sup>91</sup> By presenting their own text, these countries wanted

to highlight the importance of public policy objectives underlying national IPR [Intellectual Property Rights] systems, the necessity of recognizing those objectives at the international level and . . . the need to respect and safeguard national legal systems and traditions on IPRs, in view of the diverse needs and levels of development of states participating in the IPR negotiations.<sup>92</sup>

From the perspective of developed countries, non-tariff trade barriers such as overly-lax intellectual property standards were viewed as the key challenge in a post-TRIPS environment. The resulting one-size-fits-all<sup>93</sup> minimum standards of intellectual property protection contained in TRIPS apply to countries varying widely in their levels of development.<sup>94</sup> Thus this language of “development” was to provide developing countries with some leeway to argue in favor of flexibilities in the minimum standards mandated by TRIPS, if these flexibilities served the purposes of development.<sup>95</sup>

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<sup>89</sup> TRIPS, *supra* note 5, at art. 8 (emphasis added).

<sup>90</sup> *Id.* at art. 7; *see also id.* at art. 66 (entitled “Least-Developed Country Members,” setting forth transitional periods for LDCs).

<sup>91</sup> Abdulqawi A. Yusuf, *TRIPS: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 10-14* (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998). There is widespread agreement among historians of TRIPS that the move to link intellectual property rights to global trade regime was instigated by U.S. corporations, led primarily by Pfizer and IBM. *See SELL, supra* note 26; DRAHOS WITH BRAITHWAITE, *INFORMATION FEUDALISM, supra* note 74; RYAN, *supra* note 83.

<sup>92</sup> Adede, *supra* note 88, at 28.

<sup>93</sup> Numerous commentators have adapted the term “one-size-fits-all” not only to describe the new minimum standards that now apply across the board to all nations, but also to describe the inflexibility of these standards as applied to countries varying greatly in their level of development.

<sup>94</sup> *See SELL, supra* note 26, at 13.

<sup>95</sup> *See* World Trade Organization, *Work on Special and Differential Provisions*, [http://www.wto.org/english/tratop\\_e/dev\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](http://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm) (last visited Apr. 13, 2006) (summarizing various WTO and TRIPS provisions that make special provisions for LDCs).

Indeed, during the recent policy debate over the compulsory licensing provisions of TRIPS in the context of the AIDS pandemic,<sup>96</sup> a number of developing countries invoked these references to development to argue before the TRIPS Ministerial in Doha, Qatar (Doha) that TRIPS should not place limits on public health priorities.<sup>97</sup> A key impediment, however, is that the language referencing development in TRIPS is not mandatory, but rather hortatory, and is placed within parts of the treaty that are not in the main treaty body.<sup>98</sup> This issue (rather than the substantive content of development) has preoccupied the few legal scholars who have addressed these terms.<sup>99</sup>

Partly in recognition of the inequalities permeating this global trading regime, the current “Doha Development Round” of the WTO is supposed to focus on the needs of the least developed countries.<sup>100</sup> One of the most galvanizing events so far of the Doha Round, by all accounts, has been the negotiation between developed and developing countries over the relationship of TRIPS to public health. TRIPS allows for limited exceptions to the exclusive rights of patent and copyright. One of them is Article 30, which includes “exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate rights of the patent owner, taking account of the legitimate interests of third parties.”<sup>101</sup> Another is Article 31, which allows countries to engage in compulsory licensing under certain conditions, the most salient of which is that “any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.”<sup>102</sup> Because many developing countries in need of pharmaceuticals do not have domestic manufacturing capacity, this condition effectively nullified any ability to invoke compulsory licensing. Essentially, governments can only override the patents as long as they order generic substitutes from

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<sup>96</sup> Many accounts have been written about this issue. For a succinct overview, see DRAHOS WITH BRAITHWAITE, *INFORMATION FEUDALISM*, *supra* note 74, at 5-10. See also SELL, *supra* note 26, at 121-62.

<sup>97</sup> WTO, *Submission*, *supra* note 32, at 5 para. 18 (For example, the argument was advanced that “Article 7 is a key provision that defines the objectives of the TRIPS Agreement. It clearly establishes that *the protection and enforcement of intellectual property rights do not exist in a vacuum*. They are supposed to benefit society as a whole and do not aim at the mere protection of private rights.” (emphasis added)).

<sup>98</sup> *But see* Vienna Convention art. 31(1), *supra* note 64 (a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). A treaty’s “context” includes preambles and annexes. *Id.* at art. 31(2). See *infra* Section IV.C. for further discussion.

<sup>99</sup> See *infra* Section I.C.

<sup>100</sup> Doha Ministerial Declaration, *supra* note 15.

<sup>101</sup> TRIPS, *supra* note 5, at art. 30 (“Exceptions to Rights Conferred”).

<sup>102</sup> *Id.* at art. 31 (“Other Use Without Authorization of the Right Holder”).

domestic producers. But most of the countries that need the drugs most urgently have no pharmaceutical industry of their own.

The battle over these legal provisions culminated in various concessions: first in the so-called Doha Declaration on TRIPS and Public Health,<sup>103</sup> and then in the General Council Decision that allows the most desperate countries to override patents on expensive antiretroviral drugs and order cheaper copies from generic manufacturers located in other countries.<sup>104</sup> Negotiations over the implementation of these concessions are still underway.<sup>105</sup>

### B. *The WIPO Encounters Development*

Before the WTO was put on center stage as the global intellectual property norm enforcer, WIPO was the primary administrative body for the major multilateral intellectual property institutions such as the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.<sup>106</sup> Since TRIPS came into force, it has been widely observed that WIPO seems under increasing pressure to adopt a high protectionist stance towards intellectual property. TRIPS Article 68 specifically sets forth a framework for cooperation between the Council for TRIPS and WIPO,<sup>107</sup> and a cooperation agreement was quickly executed.<sup>108</sup> While arguably WIPO has historically been more receptive to producer than user interests,<sup>109</sup> this tendency was most evident in the negotiations

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<sup>103</sup> Doha Ministerial Declaration, *supra* note 15.

<sup>104</sup> General Council Decision, *supra* note 16.

<sup>105</sup> Abbott, *supra* note 69, at 97; *see also* Frederick M. Abbott, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines*, in *INTERNATIONAL PUBLIC GOODS*, *supra* note 4, at 393, 393 [hereinafter Abbott, *Hydra*].

<sup>106</sup> Articles 1 through 21 of the Berne Convention have been incorporated into TRIPS through TRIPS Article 9 ("Relation to the Berne Convention"). Similarly, Articles 1 through 12 and Article 19 of the Paris Convention have been incorporated into TRIPS through TRIPS Article 2 ("Intellectual Property Conventions").

<sup>107</sup> TRIPS, *supra* note 5, at art. 68 ("Council for Trade-Related Aspects of Intellectual Property Rights").

<sup>108</sup> Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) [hereinafter WIPO-WTO Agreement].

<sup>109</sup> Pedro de Paranaguá Moniz, *The Development Agenda for WIPO: Another Stillbirth? A Battle Between Access to Knowledge and Enclosure* 29-32 (July 1, 2005) (unpublished LLM thesis in Intellectual Property, Queen Mary & Westfield College, University of London), available at <http://ssrn.com/abstract=844366> (claiming the existence of an historically close relationship between WIPO and copyright industries). WIPO's operating budget is derived substantially from fees generated from Patent Cooperation Treaty filing fees, most of which come from applications filed by developed country members. For example, in the year 2005, WIPO projected that approximately 90% of its income would be derived from filing fees (PCT Union, Madrid Union and Hague Union combined). Of a total projected income of 313,560 francs, only 17,223 would come from member state contributions and 284,578 would come from filing fees.

leading up to the 1996 enactment of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The contentious proceedings illustrated the increasing tensions between copyright producers and users in the context of digital technology, and the willingness of WIPO to accede to producer interests in the face of consumer and small firm opposition.<sup>110</sup>

In addition, WIPO has been trying to address sector-specific issues related to development. For example, it has been investigating quite extensively the thorny issues relating to the protection of traditional knowledge, engaging in extensive fact-finding.<sup>111</sup> It has been involved in discussions on how to coordinate obligations under the Convention for Biological Diversity with obligations under TRIPS.<sup>112</sup> And it has been trying to reinvent itself through activities such as cooperation agreements with WTO to assist with the implementation of TRIPS<sup>113</sup> as well as the negotiation and implementation of the Uniform Dispute Resolution Procedure (UDRP) for Internet domain names.<sup>114</sup>

More recently, WIPO has been put under pressure by a coalition of developing countries and non-governmental organizations (NGOs) to re-consider its intellectual property mandate in light of development. The WIPO 31st General Assembly met in the fall of 2004, and agreed to “further examine a proposal originally presented by a group of developing countries to enhance the development dimension in all of

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See WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], PROGRAM AND BUDGET 2004-2005, at 179 tbl. 18, available at [http://www.wipo.int/documents/en/document/govbody/budget/2004\\_05/pdf/wo\\_pbc\\_6\\_2.pdf](http://www.wipo.int/documents/en/document/govbody/budget/2004_05/pdf/wo_pbc_6_2.pdf) (Income 1998-2009: Variation by Source of Income and Union).

<sup>110</sup> See JESSICA LITMAN, DIGITAL COPYRIGHT 128-50 (2001); Jessica Litman, *Digital Copyright and Information Policy*, in GLOBALIZATION OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY: EUROPE, ASIA, AND THE INTERNET 299-309 (Craig et al. eds., 1999); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 430-31 (1997).

<sup>111</sup> See, e.g., WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998-1999) 25 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf>. WIPO has recently extended the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for another two years. See Press Release 421, WIPO (Sept. 9, 2005), available at [http://www.wipo.int/edocs/prdocs/en/2005/wipo\\_pr\\_2005\\_421.html](http://www.wipo.int/edocs/prdocs/en/2005/wipo_pr_2005_421.html).

<sup>112</sup> Helfer, *Regime Shifting*, *supra* note 25, at 34.

<sup>113</sup> WIPO-WTO Agreement, *supra* note 108. This agreement was precipitated by TRIPS Article 68. See Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123, 132-33 (2004) [hereinafter Helfer, *Mediating Interactions*]:

The Agreement requires the two organizations to share information received from their respective members relating to intellectual property laws and regulations; mandates that each organization provide technical and legal assistance to developing countries that are members only of the other organization; and delegates to WIPO certain administrative functions contained in TRIPS.

<sup>114</sup> WIPO runs a Domain Name Dispute Resolution Service, which processes an enormous number of arbitrations. See WIPO Arbitration and Mediation Center—Domain Name Disputes, <http://arbiter.wipo.int/domains/index.html> (last visited Apr. 13, 2006).

WIPO's work."<sup>115</sup> Originally submitted by Argentina and Brazil, this so-called "Development Agenda" item was then discussed in the context of inter-sessional intergovernmental meetings held during the spring and summer of 2005 prior to the General Assembly's 2005 fall meeting. In addition, WIPO sponsored international seminars on intellectual property and development open not only to member states, but also to NGOs, civil society organizations (CSOs) and other interested observers. This set of meetings provides insight into how WIPO understands its role vis-à-vis the U.N. development mandate.

The Development Agenda proposal (AB Proposal) called for WIPO to implement its functions in the context of various initiatives of the United Nations, of which it is now an agency, including the adoption of the Millennium Development Goals.<sup>116</sup> The proposal reiterated the instrumental purpose of intellectual property and called for a contextualized assessment of the impact of intellectual property globalization on development. It alluded to the Doha Declaration on TRIPS and Public Health as "an important milestone" for the recognition that "the protection of intellectual property[] should operate in a manner that is supportive of and does not run counter to the public health objectives of all countries."<sup>117</sup> It also referenced paragraph 19 of the WTO's Doha Ministerial Declaration, in setting the mandate for the TRIPS Council in the context of the Doha Development Agenda, which refers explicitly to the need to "take fully into account the development dimension."<sup>118</sup> Among other specific suggestions, the AB Proposal requested that WIPO adopt a high-level declaration on intellectual property and development and consider amending its convention to incorporate the development dimension into WIPO's objectives and functions.<sup>119</sup>

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<sup>115</sup> Press Release 397, WIPO (Oct. 5, 2004), available at [www.wipo.int/edocs/prdocs/en/2004/wipo\\_pr\\_2004\\_397.html](http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_397.html).

<sup>116</sup> WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11 (Aug. 27, 2004) [hereinafter *AB Proposal*], available at [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/wo\\_ga\\_31\\_11.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf); see also WIPO, *Report on the Thirty-First (15th Extraordinary) Session*, at 33-37, WO/GA/31/15 (Oct. 5, 2004), available at [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/wo\\_ga\\_31\\_15.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_15.pdf). This proposal was joined by twelve other member states (Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela).

<sup>117</sup> *AB Proposal*, *supra* note 116, at 2.

<sup>118</sup> Doha Ministerial Declaration, *supra* note 15.

<sup>119</sup> *AB Proposal*, *supra* note 116. Other specific actions proposed include safeguarding public interest flexibilities such as exceptions for the specific development needs of developing countries. The proposal specifically recommended that the objectives and principles of TRIPS Articles 7 and 8 be incorporated into WIPO's draft Substantive Patent Law Treaty (SPLT). It proposed that WIPO take up discussions on a draft Treaty on Access to Knowledge and Technology, to be guided by a balanced approach to intellectual property enforcement, and to promote further development-oriented technical cooperation and assistance. *Id.*

Even at the early stage of the discussion of the Development Agenda proposal, there were two major views on the part of the member states of how intellectual property globalization should handle development. The first could be characterized as insular: WIPO's methods in ensuring strong intellectual property protection across the board were appropriate and no real effort to engage with development concerns needed to take place. The other could be characterized as intersectional: intellectual property activities should be more responsive to development concerns such as health care, access to educational materials, and improving infrastructure as a measure of improving the economy. The insular intellectual property perspective was expressed by countries in the so-called Group B,<sup>120</sup> the European Union, and various groups nominally dubbed NGOs.<sup>121</sup> The intersectional perspective was shared by a group of developing countries informally known as "Friends of Development": the Asian Group; CARICOM (the Caribbean Community); and the African Group. Thus, the terms on which intellectual property globalization was to encounter development were already being contested.

Informal minutes of the various meetings held in the spring and summer of 2005 present a picture of the mechanical workings of WIPO as an agency that is not particularly equipped to mediate these differences in perspective. At the second inter-sessional intergovernmental meeting on the Development Agenda, held in June 2005, various NGOs and governmental representatives testified about the relationship of intellectual property to development.<sup>122</sup> It became clear that the Group B nations were trying to push the discussion of the Development Agenda off to what the developing countries viewed as an ineffectual committee<sup>123</sup> and/or were trying to frame development solely

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<sup>120</sup> The United Kingdom along with the U.S., Canada, Australia, Japan, Switzerland, and other wealthy OECD countries are known colloquially at WIPO as "Group B." See, e.g., Posting of Isabelle Scherer to Intellectual Property Watch, <http://www.ip-watch.org/weblog/index.php?p=3> (Apr. 11, 2004, 10:09 EST) (reporting on remarks of Jonathan Dudas, Director of the United States Patent and Trademark Office, and referring to "[t]he delegation of Canada, on behalf of Group B (i.e., an informal grouping composed of Australia, Canada, the European Union, Japan, Monaco, New Zealand, Norway, Switzerland, Turkey and the United States)"); Thiru Balasubramaniam, Notes from First Day of WIPO General Assembly, <http://www.ipjustice.org/WIPO/092704notes.shtml> (last visited Apr. 13, 2006) (referring to "Canada, on behalf of Group B (15 original European Community states, Japan, USA, Canada, Australia, New Zealand, Switzerland and some others)").

<sup>121</sup> It is notable that AB Proposal includes a request that WIPO differentiate between public interest NGOs and user organizations. *AB Proposal*, *supra* note 116, at 5.

<sup>122</sup> See WIPO, *Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO*, IIM/2/10 (Sept. 1, 2005) [hereinafter *Intergovernmental Meeting*], available at [http://www.wipo.int/edocs/mdocs/mdocs/en/iim\\_2/iim\\_2\\_10.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/iim_2/iim_2_10.pdf).

<sup>123</sup> Known as the Permanent Committee for Cooperation for Development Related to Intellectual Property (PCIPD). See *id.* at 23. At the time of this suggestion, it had apparently gone for four years without meeting and had voted to disband its parent committee in 2002 (notes on file with author).

as an issue of technical assistance.<sup>124</sup> On the other hand, the developing countries and various NGOs articulated a hodgepodge of felt needs,<sup>125</sup> ranging from competition policy<sup>126</sup> to education.<sup>127</sup>

These positions did not soften during the subsequent General Assembly meeting held in the fall of 2005. For example, Argentina stated that

[w]ith respect to the Doha Plan of Action, . . . its implementation requires working towards a common strategy for securing national policy space for developing countries in all areas, which allows members to adopt the most appropriate measures and priorities and to realize their right to development . . . . The Plan of Action also called on WIPO as a UN Agency to include in all its future plans and activities including legal advice a development dimension that includes promoting development and access to knowledge for all, pro-development norm setting, establishing development-friendly principles and guidelines for the provisions of technical assistance and the transfer and dissemination of technology.<sup>128</sup>

The U.S. stated, on the other hand, that while it was in favor of a frank exchange of views, it did not support WIPO becoming a permanent development body.<sup>129</sup> There was continued skirmishing over the correct venue for the continued discussion of the issues.

At the time of this writing, there is a stand-off. The First Session of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) was held from February 20 to 24, 2006 in Geneva. There were two sets of proposals: a set of sixty six detailed proposals from the Group of Friends of Development, and a list of forty five, including proposals from the Africa Group, Chile, Colombia, and the United States. All one hundred eleven proposals, containing substantive and procedural suggestions, will form the basis for the discussions at the Second Session scheduled for June 26 to 30, 2006.<sup>130</sup>

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<sup>124</sup> TRIPS Article 66.2 provides: "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base." TRIPS, *supra* note 5, at art. 66.2. Article 67 provides: "developed country Members shall provide . . . technical and financial cooperation in favour of developing and least-developed country Members." *Id.* at art. 67.

<sup>125</sup> CI/TACD Statement on the Development Agenda to the Second Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, *available at* <http://www.cptech.org/ip/wipo/ci-tacd062005.html> (last visited Apr. 13, 2006).

<sup>126</sup> *Intergovernmental Meeting*, *supra* note 122, at 86 (statement of South Africa).

<sup>127</sup> Posting of Teresa Hackett, [teresa.hackett@eifl.net](mailto:teresa.hackett@eifl.net), to <http://lists.essential.org> (June 22, 2005), <http://lists.essential.org/pipermail/a2k/2005-June/000464.html>.

<sup>128</sup> South-North Development Monitor, Sept. 29, 2005 (on file with author).

<sup>129</sup> *Id.*

<sup>130</sup> Provisional Committee on Proposals Related to a World Intellectual Property Organization Development Agenda (PCDA), 1st Sess., Geneva, Feb. 20-24, 2006, *available at* [http://www.wipo.int/edocs/mdocs/mdocs/en/pcda\\_1/pcda\\_1\\_www\\_56972.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_1/pcda_1_www_56972.pdf) (last visited Apr. 13, 2006).

As one recent observer has stated, the Development Agenda proposal is simply another iteration of a decades-long struggle between developing countries and developed countries over appropriate intellectual property policy in the international arena.<sup>131</sup>

### C. *Academic Analyses of These Early Encounters*

The recent scholarship of intellectual property globalization<sup>132</sup> falls into several general genres. One insists on adherence to a classical international law view that the nation-state is the best guardian of the domestic welfare bargain and the international trading system should not be allowed to intrude upon this traditional police power. Another variation welcomes the proliferation of multiple actors in the global arena and (implicitly) predicts that the system will mostly be improved from the ensuing pluralism. While all genres express some worry that the proper intellectual property balance is being maintained in the global arena, a third group is clearly much more skeptical of intellectual property globalization. It is a heterogeneous group, addressing different distributional concerns under the rubrics of “information feudalism,” “neocolonialism,” or “romance of the public domain.”

Although scholars in all three groups tentatively and occasionally refer to development, none state that development has any claim on intellectual property other than as a reminder that intellectual property balance might be increasingly askew. And none suggest the need for a substantive principle of equality within the intellectual property welfare calculus that would mirror the trend in development economics of incorporating equality measures in the global welfare calculus.

#### 1. Classical

The first body of scholarship is best exemplified by the work of Ruth Okediji and Jerome Reichman.<sup>133</sup> Both have long written about

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<sup>131</sup> Moniz, *supra* note 109, at 33-37.

<sup>132</sup> For the sake of brevity, I am apologetically omitting some important early (pre-WTO) pioneers such as A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 800; Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989); William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97. Any other omissions in this section are my oversight, and I apologize in advance.

<sup>133</sup> See, e.g., Okediji, *Public Welfare*, *supra* note 3; Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117 (1999) [hereinafter Okediji, *Copyright and Public Welfare*]; J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000); J.H.

the difficulty inherent in the dual balancing act of intellectual property globalization: the domestic welfare balance between the producers and users of intellectual property along with the simultaneous global welfare balance between developing and developed countries. They insist on the primacy of the nation-state as the initial arbiter and enforcer of the domestic welfare balance. In their view, the basic challenge with globalization is how to protect that domestic balance from being corrupted from undue pressures introduced by globalized trade regimes such as TRIPS.

For example, a recent piece by Reichman, co-authored by Keith Maskus, a development economist specializing in intellectual property, suggests that the DSU powers of the WTO must be exercised in a way that recognizes an implicit reservation of welfare and police powers of the state pursuant to Article XX of the GATT.<sup>134</sup> Similarly, Okediji has written that in a global public welfare calculus, “the determination of resource allocation, including allocation of intellectual property rights, must first reflect and promote domestic welfare, since globalization does not entail a complete loss of sovereignty.”<sup>135</sup> She recently reiterated that

[a]s balance in intellectual property regulation is negotiated domestically, the international system should do what it does best—*promote the welfare of nation states by recognizing the legitimate exercise of sovereign discretion in domestic affairs*. Only where the state fails in its mandate—either by over- or by under-protecting owners of intellectual property—should the international system

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Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997).

<sup>134</sup> Maskus & Reichman, *supra* note 9, at 31:

In any event, the burgeoning encroachment of international IPRs on the reserved welfare and police powers of states constitutes an anomaly in public international law that must be fixed before it cripples the WTO and fatally weakens the infrastructure that supports world trade. One should not view this as some minor irritant to be blamed on NGOs or recalcitrant developing countries.

For an overview of the GATT, see *ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW* 197 (John P. Grant & J. Craig Barker eds., 2d ed. 2004) (quoting PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* 116 (5th ed. 2001)):

[The General Agreement on Tariffs and Trades or GATT] originated as a contractual arrangement, signed at Geneva on 30 October 1947, and put into force by the simultaneous Protocol of Provisional Application . . . , wherein the parties recited . . . their recognition of the need for an International Trade Organization and their undertaking to observe the principles of the Draft Charter of that body, then under consideration. That organization, however, never came into existence. . . . In consequence, “it was left to the trade negotiations (or ‘rounds’) held under the auspices of the GATT to devise a *de facto* institutional machinery. . . . The last round of negotiations, the Uruguay Round (1986-93) saw the creation in 1994 of the World Trade Organization (WTO) as the new principal institution of the multilateral trading system.” . . . The GATT remains the foundation of the WTO framework and is the pre-eminent agreement in the international trade area.

<sup>135</sup> Okediji, *Copyright and Public Welfare*, *supra* note 133, at 125.

pierce the sovereign veil, as it does currently with respect to human right violations, to demand accountability on behalf of citizens. . . . However, when the international system assumes a welfare neutrality in the context of intellectual property interpretation, and when it accommodates a broader set of actors and recognizes varied sources of law in the form of different institutions, it actually perverts the traditional paradigm of public international law by undermining the capacity of states to regulate in ways that best address the interests of their citizens.<sup>136</sup>

This classic international law position was advanced as well by Rochelle Dreyfuss and Andreas Lowenfeld, who argued in the context of TRIPS dispute resolution that in the absence of a clear-cut

international norm on which member states have agreed would allow the WTO to assume the enforcement role long missing from the Berne and Paris Conventions[,] . . . deference to each state's own law is appropriate, on the theory that lack of consensus is an indication that there is no "best rule" and that different economies and cultures require different rules.<sup>137</sup>

Others have also taken this basic approach.<sup>138</sup>

While one can sense a growing alarm about the welfare imbalance caused by intellectual property globalization throughout this scholarship,<sup>139</sup> overall these scholars trust the social welfare measures of

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<sup>136</sup> Ruth L. Okediji, *The Institutions of Intellectual Property: New Trends in an Old Debate*, 98 AM. SOC'Y INT'L L. PROC. 219, 221 (2004) (emphasis added); see also Ruth L. Okediji, *Sustainable Access to Copyrighted Digital Information Works in Developing Countries*, in INTERNATIONAL PUBLIC GOODS, *supra* note 4, 142, 147-48 [hereinafter Okediji, *Sustainable Access*] ("In sum, the international system has become a major source of domestic copyright norms, which has destabilized and, in some instances, inverted the traditional sphere of sovereign prerogative with far-reaching consequences for the normative principles that potentiate access to content.").

<sup>137</sup> Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 297 (1997). Indeed, Dreyfuss and Lowenfeld specifically examine a hypothetical involving a copyright dispute between a developed country and a developing country, and state that compliance by the developing country with the TRIPS minimum standard may lead to a less than optimum standard being applied.

<sup>138</sup> *Accord* Dinwoodie & Dreyfuss, *supra* note 60, at 102 (arguing for less formalism in TRIPS/GATT jurisprudence to accommodate claims of national importance and "to protect the viability of the TRIPS Agreement in its early years"); see also Samuelson, *supra* note 55, at 95 (discussing the problem of "incomplete commodification" of knowledge goods compared to other goods in trade, e.g., alcohol, because of cultural policies and values embedded in intellectual property laws).

<sup>139</sup> See Maskus & Reichman, *supra* note 9, at 31:

Telling poor people in rich countries that the TRIPS Agreement prevents domestic policymakers from regulating access to essential medicines will not long remain politically feasible. As matters stand, if nothing had been done to address the plight of millions dying of AIDS because of TRIPS patent rights, then the WTO would have contributed to the greatest health tragedy in history.

See also Okediji, *Copyright and Public Welfare*, *supra* note 133, at 167:

Once the international rules were set in place, the focus turned to strengthening

intellectual property. They tend to focus on the need for norm-setting and norm-enforcing institutions such as the WTO Dispute Settlement Body to be less formalistic in its decision-making. Thus any normative proposal would be in the direction of paying more attention to domestic policy priorities in the interpretation of existing rules. Substantive proposals tend to focus on developing greater domestic flexibilities.<sup>140</sup>

## 2. Pluralist

A second genre of recent writing in the area of intellectual property globalization is advanced by Graeme Dinwoodie,<sup>141</sup> Daniel Gervais,<sup>142</sup> Laurence Helfer,<sup>143</sup> Peter Yu,<sup>144</sup> and others.<sup>145</sup> These scholars articulate more pluralistic norms for the determination of global social welfare in the intellectual property context. For the most part, they welcome the proliferation of actors in intellectual property globalization, although

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intellectual property rights internally. This domestic turn, in tandem with the international system, expanded marginalization to discrete and disaggregated individuals, including a vast majority of United States citizens, as well as citizens of developing countries. One of the profound effects of globalization, therefore, is the determination of socioeconomic status based on access to, or control of, information products.

<sup>140</sup> Quite a few commentators have suggested exploiting the flexibilities within TRIPS to remedy the perceived increasing imbalance. *See, e.g.*, Dreyfuss, *supra* note 30 (calling for a user right); Okediji, *Toward*, *supra* note 55 (proposing an international fair use doctrine); Okediji, *Sustainable Access*, *supra* note 136, at 182-83 (same); Heald, *supra* note 4, at 289-92 (urging developing countries to expand exhaustion/first sale doctrine and to refuse to enforce one-sided license agreements). Another set of proposals focuses on strengthening national competition law and policies. *See, e.g.*, Shubha Ghosh, *Comment: Competitive Baselines for Intellectual Property Systems*, in *INTERNATIONAL PUBLIC GOODS*, *supra* note 4, at 793.

<sup>141</sup> *See* Dinwoodie, *Property Law System*, *supra* note 6, at 216.

<sup>142</sup> *See* Gervais, *Intellectual Property, Trade & Development*, *supra* note 88; Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 *MARQ. INTELL. PROP. L. REV.* 1 (2005); Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 929 (2002).

<sup>143</sup> Helfer, *Regime Shifting*, *supra* note 25.

<sup>144</sup> Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 *LOY. L.A. L. REV.* 323 (2004) [hereinafter, Yu, *Currents and Crosscurrents*] (exploring the five crosscurrents that have emerged in the international intellectual property regime in recent years: reciprocization, diversification, bilateralism, non-nationalization, and abandonment; concludes by providing observations on the international intellectual property regime in five different areas: bargaining frameworks, regime development, global lawmaking, harmonization efforts, and judicial trends); Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 *U. CIN. L. REV.* 569 (2002).

<sup>145</sup> Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection*, in *INTERNATIONAL PUBLIC GOODS*, *supra* note 4, at 884 (using global public goods theory to illustrate complexity of TRIPS policy-making).

some sound a cautionary note. Helfer is best known for his work on the concept of regime-shifting, in which he claims that

state and non-state actors shift lawmaking initiatives from one international venue to another for many reasons. In the case of intellectual property rights, developing countries and their allies are shifting negotiations to international regimes whose institutions, actors, and subject matter mandates are more closely aligned with these countries' interests. Within these regimes, developing countries are challenging established legal prescriptions and generating new principles, norms, and rules of intellectual property protection for states and private parties to follow. Intellectual property regime shifting thus heralds the rise of a complex legal environment in which seemingly settled treaty bargains are contested and new dynamics of lawmaking and dispute settlement must be considered.<sup>146</sup>

Thus, according to Helfer, NGOs, CSOs, intergovernmental organizations (IGOs) and other non-state actors have entered into the intellectual property norm-generating fray and influenced policy-making outcomes. Because of their ability to shift from intellectual property rule-making venues to human rights and other venues, developing countries are not as handicapped by the rules of the intellectual property game, and can use regime-shifting to their strategic advantage.<sup>147</sup> Implicitly, this is a positive development, particularly since the core institutions of intellectual property globalization such as the WTO and WIPO are resistant to the concerns of developing countries. Underlying this analysis is an assumption that institutions such as human rights organizations and public health agencies have the wherewithal to "correct" the excesses of development caused by the over-extension of intellectual property norms.<sup>148</sup>

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<sup>146</sup> Helfer, *Regime Shifting*, *supra* note 25, at 14 (defining "regime-shifting" as "an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another," using examples of TRIPS and food, agriculture, public health, biodiversity and human rights); *see also* Laurence Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 8 (2003) [hereinafter Helfer, *Human Rights and Intellectual Property*] (discussing two approaches: conflict and balance; outlining U.N. human rights interventions in IP); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357 (1998).

<sup>147</sup> Helfer, *Regime Shifting*, *supra* note 25, at 6; *cf.* JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 571 (2000) (defining forum-shifting and suggesting that it is a game that only the powerful states can play).

<sup>148</sup> *Cf.* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1218 (2005) (claiming that "Democracy persists as long as We the People, even when faced with a WTO ruling that calls into question a host of local regulations, can still assert our will over such regulation through normal political processes"). However, the interventions by non-state and/or non-IP actors so far seem to function as weak "side-constraints" to what is normatively a utilitarian-driven vision of the common good in this area. Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 300 (1997). This potential shortcoming of human

Indeed, Dinwoodie claims that “[s]uch a dispersed system may possess advantages over the classical model[,] . . . can . . . be more responsive to social conditions and hence more dynamic than the treaty process.”<sup>149</sup> Yet he has also noted the extent to which private firms, such as Internet Service Providers (ISPs), may generate intellectual property norms through their digital right management practices and cautions that “no public structuring [of private ordering] . . . currently exists [to] hold[] private lawmakers to account for their decision to alter the balance of national autonomy and universal rules.”<sup>150</sup>

These commentators tend to view TRIPS as allowing developing countries sufficient policy space to participate in a framework that has moved decisively beyond sovereign calculations of social welfare. Whatever flaws attended the original bargain—and they concede asymmetry in the negotiations—these do not irredeemably poison the outcome. For example, Gervais believes that “TRIPS should be seen, and accepted, as a given. Further, it may be defended as an appropriate reference point for developing nations in the context of TRIPS Plus bilateral trade discussions . . .”<sup>151</sup> He suggests several specific ways in which developing countries can maximize TRIPS flexibilities. Similarly, Yu points to the many different opportunities for engagement as well as “constructive ambiguities”<sup>152</sup> within TRIPS, which, in his view, allow for the possibility of a “pro-development”<sup>153</sup> presumption in norm-interpretation. Nonetheless, he recognizes at the same time that “many less developed countries still lack experience with intellectual property protection and the needed human capital to develop laws that

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rights critiques will be developed further *infra* Section II.B.

<sup>149</sup> Dinwoodie, *Property Law System*, *supra* note 6, at 216.

<sup>150</sup> Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTITUTIONAL & THEORETICAL ECON. 161, 178 (2004) [hereinafter Dinwoodie, *Private Ordering*] (“International copyright law embodies important structural or institutional norms that impinge directly upon the generation and distribution of knowledge: national autonomy, diversity of values, and resistance to orthodoxy, are all valuable[] tools in optimizing the knowledge supply.”).

<sup>151</sup> Gervais, *Intellectual Property, Trade & Development*, *supra* note 88, at 535:

Indeed, post-TRIPS developments have been going in two (arguably diverging) directions. On the one hand, TRIPS-related development within WTO, as well as recent developments in the WIPO, have tried to be more responsive to the perceived needs of developing countries and the interests of users in securing access to protected content and material on terms they consider reasonable. This even includes broad exceptions to obligations to obtain permissions and licenses. On the other hand, IP developments in bilateral and regional trade agreements mirror the so-called “maximalist” approach.

<sup>152</sup> Yu, *Discontents*, *supra* note 84, at 387 (citing JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 7 (2001)); *see also* Gervais, *Intellectual Property, Trade & Development*, *supra* note 88, at 528-34 (suggesting that developing countries utilize “normative elasticity” of TRIPS to formulate policy responsive to their needs).

<sup>153</sup> Yu, *Discontents*, *supra* note 84, at 387-89.

are tailored to their interests and local conditions.” As a result, they might have no option but to “meet their TRIPS obligations by simply transcribing its mandates into law.”<sup>154</sup>

Despite all the regime-shifting<sup>155</sup> and potential alternative norm-generating<sup>156</sup> activity, these proposals have yet to substantively impact how social welfare is calculated in intellectual property. Like the first group of scholars, this second group is primarily focused on ways in which alternative norms may be expressed via existing mechanisms (in some cases, procedural mechanisms akin to forum-shifting and joinder of parties).<sup>157</sup> It is far from clear, however, whether these recommendations will consistently shift substantive norms in favor of developing countries.

### 3. Skeptical

The final category of work approaches intellectual property globalization with more consistent skepticism toward either the assumptions underlying the concept of intellectual property or the concept of development, or perhaps both. Skeptical scholars tend to come closest to articulating the need for a new substantive norm in the context of intellectual property globalization. The most prolific is probably Peter Drahos from Australia, but this group includes many diverse perspectives both in the U.S. and outside the U.S.<sup>158</sup>

Given the uncertain benefits of minimum standards of intellectual property for many developing countries, one might question why these countries acceded to it. According to Drahos, developing countries were misled during the TRIPS negotiations about the advantages that they would receive from linking their acceptance of intellectual property norms to concessions by developed countries on agricultural issues.<sup>159</sup>

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<sup>154</sup> *Id.* at 378; see also Yu, *Currents and Crosscurrents*, *supra* note 144, at 408-16 (describing inter-regime and intra-regime shifting bargaining frameworks for both developed and developing countries).

<sup>155</sup> Helfer, *Regime Shifting*, *supra* note 25.

<sup>156</sup> Dinwoodie, *Private Ordering*, *supra* note 150, at 161; Dinwoodie, *Property Law System*, *supra* note 6, at 217.

<sup>157</sup> As pointed out by John Braithwaite and Peter Drahos, “[f]orum-shopping, in the words of one US judge, is a ‘national legal pastime’ in the US (Wright: 1967: 333).” BRAITHWAITE & DRAHOS, *supra* note 147, at 564.

<sup>158</sup> See, e.g., Aoki, *supra* note 21; Abbott, *supra* note 69; Arewa, *supra* note 20; Boyle, *supra* note 13; Chander & Sunder, *supra* note 20; Coombe, *Fear, Hope and Longing*, *supra* note 20; Coombe, *Intellectual Property*, *supra* note 20; Dutfield, *supra* note 24; Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613 (1996); Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763 (2003).

<sup>159</sup> DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 11. In contrast to this monolithic narrative of bait and switch, Peter Yu offers multiple narratives of why

While TRIPS was presented as a win-win solution to developing countries via linkage bargaining, “most importer nations did not have a clear understanding of their own interests and were not in the room when the important technical details were settled.”<sup>160</sup> Alternatively, they vastly over-estimated the benefit that would accrue to their own domestic intellectual property holders.<sup>161</sup> Moreover, as observed in the U.S. with respect to its domestic welfare balance, recently with the copyright industry’s digital agenda, it is relatively harder to mobilize user interests, which are diffuse compared to producer interests.<sup>162</sup> The end result is a type of “information feudalism.”<sup>163</sup>

This heightened skepticism towards the benefits of intellectual property globalization is shared by others in this group. For example, Keith Aoki questions the norm of transcendentalism throughout intellectual property, which is particularly slippery in the global context. He states:

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developing countries acceded to TRIPS, including non-mutually exclusive stories of bargain, coercion, ignorance and self-interest. See Yu, *Discontents*, *supra* note 84, at 371-79.

<sup>160</sup> DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 192.

<sup>161</sup> *Id.*; accord COENRAAD J. VISSER, MAKING INTELLECTUAL PROPERTY LAWS WORK FOR TRADITIONAL KNOWLEDGE IN THE WORLD BANK, POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 207-09 (J. Michael Finger & Philip Schuler eds., 2004) (discussing six reasons why developing countries agreed to TRIPS). But see Ruth L. Okediji, *TRIPs Dispute Settlement*, *supra* note 77, at 609-10 (arguing that regime theory explains better than a strictly power-based account why “the U.S. was largely unsuccessful in its unilateral efforts to raise global levels of protection and why all states were willing to submit to binding and enforceable dispute resolution”); Yu, *Discontents*, *supra* note 84.

<sup>162</sup> Drahos, *supra* note 43, at 46, 50 (“Mancur Olson’s analysis of the logic of collective action provides one example. Concentrated interests are more likely to organize to gain a legislative outcome than diffuse interests because concentrated interests face lower costs of organization and greater individual gains. Diffuse interests face the reverse.”).

<sup>163</sup> DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 1-3, 16:

[T]he title of our book [may] seem[] too harsh and inaccurate a description of the modern knowledge economies in which intellectual property rights play a central role. Even if we can make the case that current standards of intellectual property protection are excessive, can we really say this will propel us into feudalism? . . .

. . . .  
 . . . The redistribution of property rights in the case of information feudalism involves a transfer of knowledge assets from the intellectual commons into private hands. These hands belong to media conglomerates and integrated life sciences corporations rather than individual scientists and authors. The effect of this, we argue, is to raise levels of private monopolistic power to dangerous global heights, at a time when states, which have been weakened by the forces of globalization, have less capacity to protect their citizens from the consequences of the exercises of this power. . . .

. . . .  
 . . . A situation in which intellectual property rights are used to achieve massive wealth transfers to a small group of developed nations at the expense of other nations squares with no theory of justice we know of, except the one that Thrasymachus gives to Socrates in Plato’s *Republic*: “I define justice or right as what is in the interest of the stronger party.”

If . . . globalization is heterogeneous, lumpy, incomplete, and uneven, and bypasses large regions of the world, then a “one-size-fits-all” approach towards international intellectual property protection may reproduce on a global scale the problematic and sharp inequalities of access and information that currently characterize development on the regional or national scales. Also, by focusing on international multilateral solutions to current dilemmas, we risk suppressing creation of industry-specific levels of intellectual property protection that tailor protection appropriately to industry-specific considerations and constraints.<sup>164</sup>

Intellectual property globalization magnifies this universalist tendency by its insistence on technology-neutral rules via TRIPS Article 27.1. As we have seen, this potentially strips nations of their ability to make nuanced, industry-specific intellectual property judgments such as patent exemptions for generic drug competition.<sup>165</sup> The escape valve of exceptions and limitations to patent rights is insufficient to express domestic welfare values, as global decision-makers increasingly view patents in absolute property rights terms. Aoki recognized early on that some remedy is needed for this increasingly absolutist property rights construction of intellectual property, such as a doctrine analogous to the public trust doctrine in environmental law. This doctrine would “reserve[] to the federal government [responsibility] to keep certain information (for example, some types of basic scientific research, information in databases, educational purposes and uses . . .) available and open to benefit both the public and private owners.”<sup>166</sup>

Another area of intellectual property’s application to development is in the area of traditional knowledge. Anupam Chander and Madhavi Sunder have turned orthodoxy on its head by suggesting that progressive intellectual property scholars have over-romanticized the

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<sup>164</sup> Keith Aoki, *Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1344-45; see also Keith Aoki, *The Stakes of Intellectual Property Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 270-74 (David Kairys ed., 3d ed. 1998) (discussing the bizarre consequences of the exportation of U.S. intellectual property norms). I would make a stronger claim that subject matter transcendentalism of intellectual property causes tremendous difficulties when it effaces the material differences between developing countries and developed countries (where the need for access to books is conflated with issues of access to the latest Hollywood film). See *infra* Section IV.

<sup>165</sup> Howse, *supra* note 28, at 496:

The recent decision of a WTO panel, in the Canadian Generic Medicines case ignores these words about balance and mutual advantage and may have harmful effects on developing countries. . . . Even though it was dealing with an explicit “exceptions” provision, comprehensible only if there are legitimate, competing policy interests, the Panel was only interested in how much the rights holder might lose, not in how much society might gain, from a given exception. It never asked what scope the exception might require to achieve the social purpose at issue.

<sup>166</sup> Aoki, *supra* note 21, at 43; see also Aoki, *supra* note 164, at 1345-47 (1996) (arguing that market forces tend to cater to the needs and tastes of high income consumers, and thus global intellectual property regimes deepen global structural inequalities).

public domain precisely at the time when groups of people who have been historically disempowered have the potential to claim rights to exclude.<sup>167</sup> The distributional consequences of open access are not being critically analyzed by scholars or others who take their entitlement to rights for granted.<sup>168</sup> Chander and Sunder provocatively highlight the submerged distributional question in intellectual property by calling into question the standard liberal assumption that the public domain always serves distributionally positive purposes.

The skeptical views veer closer than do the classical and pluralist scholars to a critique of the substantive fairness of intellectual property globalization.<sup>169</sup> Some of these writers also explicitly engage with the core concept of development. For example, Drahos notes the tremendous material inequality among developing and developed countries and defines development as being

about achieving a group of objectives for poor people including better educational and job opportunities, greater gendered equality, better health and nutrition, protection of the environment, natural resources and biodiversity. Drawing on 50 years of development experience a three-pronged strategy for development based on the promotion of opportunity, facilitating empowerment and enhancing security has been proposed.<sup>170</sup>

Yet none so far has put forth a consistent method for intellectual property to break out of its insularity in order to engage with development objectives within its own paradigm. The scholarship is rife with the usual exhortations to heed the existing limitations and exceptions to exclusive rights. We are left with the impression of a severely out-of-balance system that needs badly to be corrected, but again, no new principle of substantive equality within intellectual property itself is proposed.

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<sup>167</sup> Chander & Sunder, *supra* note 20; see also Coombe, *Fear, Hope and Longing*, *supra* note 20.

<sup>168</sup> Chander & Sunder, *supra* note 20, at 1336-37. This is analogous to the move of postmodern theorists who claimed the death of the author around the same time that those who had historically been denied the privilege of voice were beginning to claim agency. Nancy Hartsock, *Foucault on Power: A Theory for Women?*, in *FEMINISM/POSTMODERNISM* 157, 163 (Linda J. Nicholson ed., 1990):

Somehow it seems highly suspicious that it is at the precise moment when so many groups have engaged in "nationalisms" which involve redefinitions of the marginalized Others that suspicions emerge about the nature of the "subject," about the possibilities for a general theory which can describe the world, about historical "progress." Why is it that just at the moment when so many of us who have been silenced begin to demand the right to name ourselves, to act as subjects rather than objects of history, that just then the concept of subjecthood becomes problematic?

<sup>169</sup> See, e.g., Aoki, *supra* note 21, at 18-20.

<sup>170</sup> Drahos, *supra* note 81, at 3. His most recent effort to address the asymmetries of TRIPS, however, is largely procedural. See Drahos, *An Alternative Framework*, *supra* note 8, at 16-21.

## II. CONCEPTS OF DEVELOPMENT

This recent crisis within intellectual property globalization over local public health concerns can be viewed as evidence of a rupture in the seamlessness of the concept of development, a concept which has been deployed by the developing countries to argue for flexibility in the increasingly one-sided and rigid application of intellectual property rules. At the risk of simplifying extremely heterogeneous perspectives,<sup>171</sup> two contrasting concepts of development are sketched here: (neo)liberal and skeptical.<sup>172</sup> Generally it can be said that one school emphasizes economic growth and efficiency; the other pays more heed to distributional consequences of growth.<sup>173</sup>

My purpose here is to demonstrate that the assumptions underlying intellectual property globalization fit comfortably within a set of assumptions based on a particular concept of development, that is the (neo)liberal development school of thought. Thus, predictably, that view of development is consistently expressed and privileged when the meaning of development is contested in the context of intellectual property norm interpretation.

Development as a term of art is a fairly recent social construct:

It is difficult to imagine a world without development, for it seems as if development has always been one of the fundamental criteria by which nations and peoples are defined. In fact, however, the contemporary concept of development has a quite short history. Notions of progress and growth have been part of Western discourse for well over a hundred years and, more generally, since the [E]nlightenment. “Development” as it is currently construed (i.e.,

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<sup>171</sup> See generally PEET WITH HARTWICK, *supra* note 2 (development theories include but are not limited to economics-based growth theory, sociology-based modernization theory, as well as critiques based on Marxist and neo-Marxist, post-structuralism, post-colonialism, post-development, feminist theories and, finally, critical modernism and radical democracy).

<sup>172</sup> This terminology is mine but parallels taxonomies proposed by others. See, e.g., Kenneth W. Abbott, *Development Policy in the New Millennium and the Doha “Development Round”*, at viii-ix (Northwestern Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Group, Paper No. 03-12, 2003) [hereinafter Abbott, *Development Policy*] (contrasting “the enlightened standard view” with “critical views” on trade reform); James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT’L L.J. 263, 273 (2000) (contrasting “integrationist strand” of developing world scholarship on international law with “nationalist strand”).

<sup>173</sup> See generally Michael S. Barr & Reuven S. Avi-Yonah, *Globalization, Law & Development: Introduction and Overview*, 26 MICH. J. INT’L L. 1, 1-2 (2004):

The debate has therefore focused primarily on how globalization can be managed in a way that helps development. In this debate, some have advocated maximum reliance on free markets, free trade, and laissez faire policies in the international arena, while others have advocated adapting something akin to the “mixed economy” model that is already generally applied in the developed countries domestically to international economics, resulting in a bigger role for national or transnational regulation of both trade and investment.

modernization and national economic growth), however, is essentially a post-World War II phenomenon.<sup>174</sup>

Its late twentieth century incarnation is often attributed to President Harry Truman's 1949 inauguration speech, in which he stated:

We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of *underdeveloped areas*. The old imperialism—exploitation for foreign profit—has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing.<sup>175</sup>

Development is an outgrowth of both the United Nations system as well as the Bretton Woods Initiatives (BWI)<sup>176</sup> establishing the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (known colloquially as the World Bank) and ultimately the WTO.<sup>177</sup> The decolonization of large parts of the developing world and the concomitant emergence of new nation states contributed to the growth of a huge development bureaucracy as of the mid to late twentieth century, a bureaucracy that continues to expand.<sup>178</sup> To its severest critics, development unleashed a juggernaut of imperialistic, colonizing, impoverishing and violent programs against most of the world's poor in the name of human progress and humanitarianism.<sup>179</sup> Even those who believe that development can be rehabilitated admit that it has caused, and continues to impose costs, on the most vulnerable of the world's populations, as well as severe dislocations and disruptions among traditional cultures and ways of life.<sup>180</sup>

Development is often conflated with sheer economic growth. But as Richard Peet and Elaine Hartwick explain, “[d]evelopment differs from economic growth in that it pays attention to the conditions of production, for example, the environments affected by economic activity, and to the social consequences, for example, income distribution and human welfare.”<sup>181</sup> There is ongoing tension and unresolved debate about this contested concept. The post-

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<sup>174</sup> Gordon & Sylvester, *supra* note 68, at 2.

<sup>175</sup> Esteva, *supra* note 14, at 6 (citing DOCUMENTS ON AMERICAN FOREIGN RELATIONS (1967)) (emphasis added).

<sup>176</sup> So-called because they were conceptualized at the 1944 international conference held in Bretton Woods, New Hampshire.

<sup>177</sup> PEET WITH HARTWICK, *supra* note 2, at 53-57.

<sup>178</sup> RAJAGOPAL, *supra* note 72, at 95-134 (arguing that development supplanted less-acceptable overt forms of colonization and is a form of neo or post-colonial power by developed countries over former colonies).

<sup>179</sup> See generally the essays gathered in THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER, *supra* note 14.

<sup>180</sup> Paul, *supra* note 29, at 237-44 (describing development “wrongs” such as large scale dam projects, involuntary resettlement projects, large scale irrigation projects, large scale commercial farming projects, etc.)

<sup>181</sup> PEET WITH HARTWICK, *supra* note 2, at 1.

developmental school, the one that has rejected development entirely, insists that “development is, above all, a way of thinking.”<sup>182</sup>

#### A. *The (Neo)liberal Approach to Development*

One way of thinking about development derives primarily from economic theory.<sup>183</sup> The dominant flavor has changed over time from a Keynesian approach that unashamedly approved of state intervention to the current model, based on neoclassical economics and known alternatively as neoliberalism or the Washington consensus.<sup>184</sup> These disparate economic approaches are denoted here as (neo)liberal to highlight that the “neo” aspect is a relatively recent gloss on what is primarily a “liberal” aspect: “‘liberal’ in the classical sense of . . . reliance on markets and the price mechanism, ‘liberal’ in the contemporary sense of concern for victims, but ‘neo’ in the sense that suffering was accepted as an inevitable consequence of reform and efficiency.”<sup>185</sup> I also bracket (neo) because many otherwise liberal development specialists are increasingly uncomfortable with the costs borne by developing countries and their inhabitants under the (neo)liberal vision.<sup>186</sup> Nonetheless, the current development model, at least as administered through the development agencies of the IMF, the World Bank and the WTO, is most frequently referred to by supporters and detractors alike as neoliberal. It is without question the dominant approach.

According to the (neo)liberal world view, the development system basically works, with some minor adjustments needed as problems arise. To remedy politically unacceptable differences among the developing and developed countries, policymakers need just add a little

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<sup>182</sup> Mahmud, *supra* note 68, at 26:

[Furthermore,] the development project entails “epistemic violence” a violence against the other exercised by hegemonic systems of knowledge and a violence embedded in the constitutive functions of such systems. As a result, even its critiques remain imprisoned within the imaginary of development, and can only speak of alternative development.

<sup>183</sup> It is also informed by sociological approaches such as modernization theory. However, I do not explore these other disciplinary approaches within my discussion of (neo)liberalism because the field of intellectual property is dominated by utilitarian approaches with a passing (at least in the U.S.) nod to natural rights or moral rights theories.

<sup>184</sup> Robert Kuttner, *Development, Globalization, and Law*, 26 MICH. J. INT’L L. 19, 22 (2004) (defining origins of the term Washington consensus).

<sup>185</sup> PEET WITH HARTWICK, *supra* note 2, at 53.

<sup>186</sup> Perhaps the most well-known spokesperson (as well as critic) of this approach is economist Joseph E. Stiglitz. See generally JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 53-88 (2003) (outlining mistakes caused by what he terms “market fundamentalists” and rigid neoliberal ideology in Bretton Woods Institutions such as the IMF).

more “equality” and stir.<sup>187</sup> Mistakes are minor and the overall direction is positive.<sup>188</sup> One underlying assumption is that short term costs of free trade will result in long term gains by pushing countries into greater economic growth.<sup>189</sup> Economic growth is the *sina qua non* of development.<sup>190</sup> More recent (neo)liberal glosses normatively privilege economic efficiency but also manage to make room for social issues.<sup>191</sup> Nonetheless, the overall emphasis is on growth and not equality.<sup>192</sup>

(Neo)liberalism is characterized by certain policy recommendations, including, among other things, trade liberalization, foreign direct investment, and property rights.<sup>193</sup> In the intellectual property world, this (neo)liberal emphasis on property rights resonates very deeply with the dominant rationale for exclusive rights conferred

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<sup>187</sup> Rittich, *supra* note 34. For a slightly more critical (neo)liberal perspective, see Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT’L L.J. 287 (2000) (exploring the tensions and contradictions between free markets and democracy, focusing on three mediating factors—material redistribution, political exclusions and restraints, and ideology); cf. Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044 (2004) (reviewing AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003)).

<sup>188</sup> See UNITED NATIONS DEV. PROGRAMME, *supra* note 23; SEN, *supra* note 1; JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* (1991).

<sup>189</sup> Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 99 (2002):

At the hands of this trade policy elite, ‘embedded liberalism’ came to be recast as *economics, and economics became ideology, the ideology of free trade*. The central notion that governed the conception of the relationship of trade policy to domestic policy generally was that wherever trade barriers such as tariffs had direct price-distorting effects in the market of the importing country, removal of those barriers enhanced aggregate domestic welfare in that the total gains to consumers could be shown always to exceed the total losses to producers/workers. Put in this crude way, the case for trade liberalization appeared to be totally indifferent to any notion of a just distribution of benefits and burdens from the removal of trade restrictions. . . . How then, was the insider network able to turn a blind eye to these issues of distributive justice? Above all, through the notion that gains to the winners should allow us to fully compensate the losers from removal of trade restrictions, while still netting an aggregate welfare gain.

<sup>190</sup> See Caio M. Pereira Neto, *Development Theory and Foundations of Universal Access Policies* 3-29 (Aug. 2005) (unpublished J.S.D. Thesis, Yale Law School), available at <http://lsr.nellco.org/yale/student/papers/12> (describing the focus by mainstream development economists on efficiency and growth).

<sup>191</sup> Rittich, *supra* note 34, at 202-03:

[A]t least at the rhetorical level, social issues have now been accepted both as ends of development in and of themselves and as important factors to the achievement of general economic growth. As a result, issues ranging from human rights to gender equality no longer stand outside the development agenda, nor is their importance to economic development still seriously debated.

<sup>192</sup> CONSULTATIVE BOARD, *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* (2004), available at [http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf).

<sup>193</sup> PEET WITH HARTWICK, *supra* note 2, at 52 (listing ten policy recommendations). See *infra* Section III.B for a further explanation of public goods theory.

by copyrights and patents.<sup>194</sup> Moreover, the WTO Agreement, of which TRIPS is an annex, is based on a free trade rationale: that economic growth is achieved most efficiently through free trade. Within the TRIPS framework, liberalizing trade includes addressing the problem of non-existent or weakly enforced domestic intellectual property systems,<sup>195</sup> so as to correct “trade distortions” caused by free-riding. Thus, much of the economic literature on intellectual property and development focuses on the impact of liberalizing intellectual property laws—which translates into increased state intervention by strengthening them—on foreign direct investment in developing countries.<sup>196</sup> Foreign direct investment is thought to be an optimal way for developing countries to increase their knowledge capacity, technical innovation and ultimately their economic growth.<sup>197</sup>

One important consequence of this (neo)liberal paradigm on global intellectual property policy-making is that the policy debate over other development concerns, such as access to essential medicines, is not easily expressed in intellectual property law or trade law generally. These demands for intellectual property to accommodate development concerns have been nurtured instead within separate human rights or public health paradigms. Not only have these attacks on intellectual property norms been collateral ones, but they also have arguably failed to alter the basic assumptions of either the intellectual property or the trade paradigms.<sup>198</sup>

A second consequence of the (neo)liberal world view is that standards grounded in economic rationales, by virtue of being hard-

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<sup>194</sup> This will be developed at length *infra* Section III.B. discussing global public goods.

<sup>195</sup> See RYAN, *supra* note 83. Pamela Samuelson describes three trade distortions related to intellectual property. Samuelson, *supra* note 55, at 97 (“[I]nadequate substantive laws that allow pirates to operate legally; . . . inadequate procedural or remedial rules that impede effective enforcement. . . and lack of enforcement of facially adequate laws and procedures.”). *But see* Letter from Jagdish Bhagwati to Editor of The Financial Times (Feb. 14, 2001), available at <http://www.columbia.edu/~jb38/FT%20Letter%20on%20IPP.pdf> (arguing against intellectual property laws in the WTO as early as 1990 in his Harry Johnson lecture in London, and stating that “[i]ntellectual property protection . . . is for most poor countries a simple tax on their use of such knowledge, constituting therefore an unrequited transfer to the rich, producing countries”); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 182-85 (2004) (critiquing the harmful lobbying by intellectual property industries, resulting in the inappropriate insertion of intellectual property rules within the WTO).

<sup>196</sup> See Maskus & Reichman, *supra* note 9, at 11-15 (summarizing studies); SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES (2000); Carlos A. Primo Braga & Casten Fink, *The Relationship Between Intellectual Property Rights and Foreign Direct Investment*, 9 DUKE J. COMP. & INT’L L. 163 (1998).

<sup>197</sup> Accord Gervais, *Intellectual Property, Trade & Development*, *supra* note 88, at 515-16.

<sup>198</sup> See, e.g., Helfer, *Human Rights and Intellectual Property*, *supra* note 146; Okediji, *Toward*, *supra* note 55, at 83-84 (contrasting the “instrumentalist school of thought” that is opposed to linkage between trade and other disciplines with the “utilitarian school of thought” regarding trade policy, where trade policy is seen as an instrument of foreign policy and thus encourages some linkage of human rights and environmental protection concerns to the trade framework).

wired into TRIPS, are privileged over possible alternative rationales based on different models of development. These economically-based “first principles” of intellectual property might be modified subsequently with so-called soft law exhortations such as WTO Council Directives, non-binding statements by other international governmental organizations such as U.N. agencies and/or exploitation of interstices within the treaty text.<sup>199</sup> Nonetheless, both the successful attempt to hard-wire<sup>200</sup> an alternative purpose to TRIPS through references to development, as well as subsequent soft law interventions, take on the quality of after-thoughts to the obvious primacy of the economic rationales.

Recall that making “room to manoeuvre”<sup>201</sup> around the mandatory minimum standards of TRIPS was the impetus behind the Group of 14’s proposal to insert the key terms into that document, as well as the compulsory licensing provisions that became such a source of contention in the debate over public health.<sup>202</sup> Yet these deliberate references to “development” have proven to be relatively flabby shields against the much more durable patent and copyright swords, at least within the internal logic of intellectual property globalization. (Neo)liberal concepts of development mean that the term “development” is already captured by a discourse that privileges the efficiency norms and incentive rationale of intellectual property, rather than the human development and basic needs approach favored by those advocating access to goods protected by intellectual property.

Development agencies such as the United Nations Conference on Trade and Development (UNCTAD) or the International Centre for Trade and Sustainable Development (ICTSD) stand ready to provide technical assistance and help with “capacity-building”<sup>203</sup> for countries

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<sup>199</sup> Soft law is defined as “rules which are neither strictly binding nor completely void of any legal significance.” JANIS, *supra* note 64, at 52-53 (quoting Rudolf Bernhardt, *Customary International Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 61, 62 (Rudolf Bernhardt ed., 1984)). Laurence Helfer provides additional examples of soft law such as U.N. resolutions or position papers. See Helfer, *Regime Shifting*, *supra* note 25, at 78; Long, *supra* note 14, at 258. Doris Long mentions model laws, restatements, legal guides, model rules, *id.* at 258, and joint recommendations. *Id.* at 267.

<sup>200</sup> Or “bake in,” to use Lydia Loren’s term. Lydia Pallas Loren, *Technological Protections in Copyright Law: Is More Legal Protection Needed?*, 16 INT’L REV. L. COMPUTERS & TECH. 133, 139 (2002) (analyzing impact of WIPO Treaty on user rights; suggesting minimum level of user rights modeled after the EU Information Society Directive).

<sup>201</sup> WTO, *Submission*, *supra* note 32, at 3 para. 5

<sup>202</sup> DRAHOS WITH BRAITHWAITE, *INFORMATION FEUDALISM*, *supra* note 74, at 145:

One of the key objectives of the US pharmaceutical industry was to set the strongest possible limits on the use of compulsory licenses. The US proposal flowed from a principle of prohibiting compulsory licenses subject to some exceptions. Other countries started from the position that such licenses could be granted subject to certain conditions being met. Ultimately, the more liberal approach to compulsory licenses prevailed.

<sup>203</sup> As Peter Gerhart points out, “[b]ecause policymakers confront a world with no institutional

unable to comply readily with intellectual property standards.<sup>204</sup> Other specialized intellectual property agencies such as WIPO are pressed into the service of educating the developing countries about their insufficiently developed systems of intellectual property protection.<sup>205</sup> In this version of development, industry capture of international trade negotiation processes is a given and not particularly problematic.<sup>206</sup> The recourse of less powerful countries to these exercises of naked political power is, *ex ante*, to game the system, by anticipating what developed countries might want and withholding it as a chip<sup>207</sup> or, *ex poste*, to participate in more transparent and democratic global governance systems.<sup>208</sup>

But even within this (neo)liberal way of thinking about development, many are registering strong reservations about the costs that developing countries and their populations are bearing for the liberalization of their markets.<sup>209</sup> Deep integration can only function well under certain conditions. Open markets must avoid races to the bottom and control opportunism, among other things.<sup>210</sup> When

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mechanism for making transfer payments between countries, we have relied on several forms of crypto-redistribution to build redistributive values into the global system. Capacity-building . . . depends on the kind of unilateral payments that are redistributive in nature.” Gerhart, *supra* note 39, at 76.

<sup>204</sup> UNCTAD-ICTSD CAPACITY BUILDING PROJECT ON IPRS, RESOURCE BOOK ON TRIPS AND DEVELOPMENT: AN AUTHORITATIVE AND PRACTICAL GUIDE TO THE TRIPS AGREEMENT (2005), available at <http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm>. In a recent report issued by UNCTAD-ICTSD, various sectors relevant to intellectual property and development were identified as:

- TRIPS and public health;
- WIPO’s intellectual property agenda;
- The need to determine internationally agreed principles for the development of intellectual property standards; and
- Ways to develop a pro-competitive international system of IP law.

See UNCTAD-ICTSD CAPACITY BUILDING PROJECT ON IPRS, TOWARDS DEVELOPMENT-ORIENTED INTELLECTUAL PROPERTY POLICY: ADVANCING THE REFORM AGENDA (2003), [http://www.iprsonline.org/unctadictsd/bellagio/docs/Bellagio2\\_Report.pdf](http://www.iprsonline.org/unctadictsd/bellagio/docs/Bellagio2_Report.pdf).

<sup>205</sup> WIPO-WTO Agreement, *supra* note 108.

<sup>206</sup> RYAN, *supra* note 83.

<sup>207</sup> See JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 402-04 (2001) (providing summary of future issues related to intellectual property in the WTO); Heald, *supra* note 4.

<sup>208</sup> See, e.g., DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 187-89. Writing slightly earlier, Doris Long accepts that “the effectiveness of harmonization standards should be judged at least in part through their ability to facilitate trans-border trade,” albeit “carefully balanced against competing concerns of equity and distributive justice.” Her policy prescriptions include greater transparency in decision-making processes. Long, *supra* note 14, at 260-68.

<sup>209</sup> See, e.g., Howse, *supra* note 189.

<sup>210</sup> Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 134 (Races to the bottom occur when “developing countries . . . [are] subject to constant pressure from potential investors for lower standards in order to attract new investment.” Moreover, “[f]irms in developed economies often have monopoly or market power in international trade, so that the international

participating in open markets, there are special risks for developing countries, which are particularly vulnerable to “a weak hand in multilateral settings”<sup>211</sup> and “inappropriate standards.”<sup>212</sup> Even developed countries such as the U.S. cede autonomy over national welfare concerns, including delicate domestic balances regarding the proper level of intellectual property protection in specific industries or for specific purposes.<sup>213</sup>

Integrating intellectual property standards through TRIPS is supposed to result in long term economic growth through innovation across all member states, at the cost of short term decreases in access to goods because of higher prices. For developing countries, this innovation-driven growth (created primarily through foreign direct investment and accompanying technology transfer) may be an abstract or perhaps even non-existent benefit.<sup>214</sup> Firms may not enter into the poorest countries regardless of the level of intellectual property protection they offer because no profit is likely to be made where consumers cannot pay.<sup>215</sup> Eminent supporters of free trade such as economist Jagdish Bhagwati state that

by th[e] test of mutual advantage, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not belong to the WTO. It facilitates, even enforces with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it).<sup>216</sup>

Another economist deeply concerned with development, Jeffrey Sachs, points to a global division in innovation and technological advance, noting “roughly a 96-fold higher ratio of patents per capita in the top ten countries than in the rest of the world.”<sup>217</sup> And yet, in the area of

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market in the product they produce or consumer deviates markedly from the competitive model.”).

<sup>211</sup> *Id.* at 139.

<sup>212</sup> *Id.* at 140-45.

<sup>213</sup> Maskus & Reichman, *supra* note 9, at 20-28; *see also* Dinwoodie & Dreyfuss, *supra* note 60; Okediji, *Toward*, *supra* note 55.

<sup>214</sup> CIPR REPORT, *supra* note 10, at 25-26 (“We conclude therefore that in most low income countries, with a weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth. On the contrary, rapid growth is more often associated with weak IP protection.”).

<sup>215</sup> CIPR REPORT, *supra* note 10, at 40-46 (documenting the complexity of factors, including the presence or absence of intellectual property protection, that affect access to pharmaceuticals).

<sup>216</sup> José E. Alvarez & Jagdish Bhagwati, *Afterword: A Question of Linkage*, 96 AM. J. INT’L L. 126, 127 (2002); *accord* BHAGWATI, *supra* note 195, at 182 (“But pharmaceutical and software companies muscled their way into the WTO and turned it into a royalty-collection agency simply because the WTO can apply trade sanctions.”).

<sup>217</sup> Jeffrey Sachs, *The Global Innovation Divide*, INNOVATION POL’Y & ECON., Apr. 2003, at 131, 132:

[T]he top ten innovating countries account for around 94% of all of the patents taken out in the U.S. in the year 2000, yet these countries have a combined population of only around 14% of the world’s population. . . .

pharmaceuticals, the “rest of the world” has a demonstrable short term need for affordable life-saving drugs.<sup>218</sup>

Thoughtful observers across the political spectrum have voiced increasing concern that the intellectual property minimum standards of TRIPS are simply inappropriate for the poorest countries, and of questionable benefit for some of the middle income countries. TRIPS severely constrained the policy-making space for countries in areas of critical concern for public health. For example, prior to TRIPS, India was able to design a patent law policy that suited its national circumstances.<sup>219</sup> Its current relative success in this intellectual property-driven industry is attributable to this flexibility, which is no longer available to countries at relatively low levels of development.

### B. *Skeptical Views of Development*

Skeptical ways of thinking about development share in common a critique of (neo)liberalism.<sup>220</sup> To a greater or lesser extent, these

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If we look at the bottom 128 countries (with population of at least 1 million) . . . each of those countries has fewer than 150 patents. Those countries have 63% of the world’s population, but only 1174 patents in the year 2000, or just 0.75% of all the patents taken out in the U.S. that year.

Sachs serves as the current Director of the UN Millennium Development Project. See UN Millennium Project, *Who We Are*, <http://www.unmillenniumproject.org/who/sachs.htm> (last visited Apr. 13, 2006).

<sup>218</sup> Argentinean economist Carlos M. Correa states that “[t]he static-dynamic efficiency rationale applicable to an industrial country does not necessarily hold where inequality is high. Strong protection for intellectual property rights may have significant negative allocative consequences in developing countries without contributing to—and even impeding—their technological development.” Carlos M. Correa, *Managing the Provision of Knowledge: The Design of Intellectual Property Laws*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 410, 414 [hereinafter Correa, *Managing*]; see also Carlos M. Correa, *Pro-Competitive Measures Under the TRIPS Agreement to Promote Technology Diffusion in Developing Countries*, 4 J. WORLD INTELL. PROP. 481 (2001). Indeed, many legal and economic scholars in the U.S. agree that prematurely privileging intellectual property protection over a diffusion or public domain model of knowledge goods production, whether in the U.S. or abroad, “could have deleterious effects on global welfare.” SELL, *supra* note 26, at 13 (citing numerous sources); see also STIGLITZ, *supra* note 186, at 244-46.

<sup>219</sup> Assad Omer, *Access to Medicines: Transfer of Technology and Capacity Building*, 20 WISC. J. INT’L L. 551, 559-61 (2002); Kumariah Balasubramaniam, *Access to Medicines: Patents, Prices and Public Policy—Consumer Perspectives*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 55, at 90, 101; accord Drahos, *An Alternative Framework*, *supra* note 8, at 10:

Interestingly, India did not choose to abandon patent law as a tool of regulatory policy, but instead to redesign it to suit her own national circumstances—a country with a low R&D base, with a large population of poor people and having some of the highest drug prices in the world. Passed in 1970, India’s new patent law followed the German system of allowing the patenting of methods or processes that led to drugs, but not allowing the patenting of the drugs themselves.

<sup>220</sup> David Slater, *Contesting Occidental Visions of the Global: The Geopolitics of Theory and North-South Relations*, BEYOND LAW, Dec. 1994, at 97 (outlining four omissions from

various schools of thought also assume historically-driven, path-dependent, structural impediments to development. Sometimes this is attributed to the ongoing effects of colonization.<sup>221</sup> At other times, economic determinism drives the analysis.<sup>222</sup> In yet other cases, feminist<sup>223</sup> or post-colonial<sup>224</sup> insights result in the conclusion that the current system is not designed to result in a level playing field between developed and developing countries. Some post-development theorists argue in favor of jettisoning the entire development system or forcing it to go outside the rules that it has made for itself.<sup>225</sup> As a member of that school, Wolfgang Sachs argues that “development is a complex contradictory phenomenon, one reflective of the best of human aspirations and yet, exactly because great ideas form the basis of power, subject to the most intense manipulation and liable to be used for purposes that reverse its original ideal intent.”<sup>226</sup> Yet, as Gordon and Sylvester recently reiterated, “[d]evelopment has evolved into an essentially incontestable paradigm with such a powerful hold on our collective imaginations that it is almost impossible to think around it.”<sup>227</sup>

Skeptical approaches towards development are characterized by their emphasis on the enduring nature of power differentials among nation-states, as well as attention to forms of resistance<sup>228</sup> to these differentials. They view the (neo)liberal development paradigm as

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globalization discourse: (1) failure to connect contemporary power relations to historical geopolitical relations; (2) failure of postmodern cultural critiques to account for the power of neoliberal theories of globalization; (3) failure to critique newer forms of intervention, e.g., UN; and (4) indifference to non-Western theoretical knowledges).

<sup>221</sup> See Mahmud, *supra* note 68, at 26.

<sup>222</sup> Dependency perspectives, which draw heavily on Marxist and neo-Marxist material analysis, fall within this category. See PEET WITH HARTWICK, *supra* note 2, at 14.

<sup>223</sup> SHAWN MEGHAN BURN, WOMEN ACROSS CULTURES: A GLOBAL PERSPECTIVE 133-57 (2000).

<sup>224</sup> See, e.g., HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1999); EDWARD SAID, ORIENTALISM (1979). See generally Vijay Mishra & Bob Hodge, *What is Post(-)colonialism?*, 5 TEXTUAL PRACTICE 399-414 (1991), reprinted in COLONIAL DISCOURSE AND POST-COLONIAL THEORY 276, 276-90 (Patrick Williams & Laura Chrisman eds., 1994); Ali Behdad, *Traveling to Teach: Postcolonial Critics in the American Academy*, in RACE, IDENTITY, AND REPRESENTATION IN EDUCATION 40, 40-49 (Cameron McCarthy & Warren Crichlow eds., 1993); PEET WITH HARTWICK, *supra* note 2, at 132-37; Cheryl McEwan, *Postcolonialism*, in THE COMPANION TO DEVELOPMENT STUDIES, *supra* note 37, at 127-30.

<sup>225</sup> Esteva, *supra* note 14, at 25 (describing the various failed incarnations of development including pure economic growth, integration with social growth, the so-called unified approach, participative development, the basic needs approach, endogenous development, and, currently, sustainable development and human development); see also PEET WITH HARTWICK, *supra* note 2, at 150-53. In the legal academic world, this perspective has been espoused by Tayyab Mahmud as well as Ruth Gordon. See *supra* note 68.

<sup>226</sup> Wolfgang Sachs, *Introduction* to THE DEVELOPMENT DICTIONARY, *supra* note 14, at 1.

<sup>227</sup> Gordon & Sylvester, *supra* note 68, at 2.

<sup>228</sup> RAJAGOPAL, *supra* note 72, at 13.

based on a toxic “catching-up” rationale,<sup>229</sup> which immediately marks certain countries as inferior because they are “less developed,” while masking the oppressive activities of “more developed” countries as benign providers of technical assistance.<sup>230</sup> As Gordon and Sylvester state,

the entire development project is premised on its subjects “developing” into something else—and that something else is the West. Thus, in the name of modernization, cultures have been destroyed, communities uprooted or eradicated, and whatever sovereignty emerging nations possessed has virtually disappeared. The concept of development privileges certain societies, cultures and institutions, while disparaging others; it is grounded in defining the “Other” as incompetent, inferior and in need of transformation.<sup>231</sup>

In contrast to the (neo)liberal approach, which views laws as neutral rules of the development game, skeptical approaches tend to view laws generally as instruments of domination, creating legal norms and standards that are predictably and one-sidedly in favor of the developed countries.<sup>232</sup> International law has played an important justifying role in the evolution of (neo)liberal development ideology (and, conversely, development ideology has contributed to the expansion of international law).<sup>233</sup> Traditional international law specialists generally are complicit with the more powerful states’ interests, which are themselves captured by the interests of global corporate capital.<sup>234</sup> Moreover, over-reliance on a statist paradigm results in paying insufficient attention to units of analysis other than states.<sup>235</sup> So, for example, the role of social movements and indigenous resistance to development is overlooked in many mainstream legal analyses.<sup>236</sup>

From a skeptical perspective, (neo)liberal legal scholarship often over-relies on human rights as the primary accepted remedy to the massive political, cultural, and social problems engendered by development.<sup>237</sup> Indeed, the human rights response to development

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<sup>229</sup> *Id.* at 12, 16.

<sup>230</sup> MOHAMMED BEDJAOUI, *An Evaluation of the Balance of Power with a View to Changing the Present Order*, in TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 76 (1979) (explaining basic principles of the NIEO as a response to “the persistence of domination in the form of neo-colonialism and imperialism” and critiquing “technical cooperation . . . [as] a powerful agent in this ‘legal prosthesis’”).

<sup>231</sup> Gordon & Sylvester, *supra* note 68, at 5.

<sup>232</sup> BEDJAOUI, *supra* note 230.

<sup>233</sup> RAJAGOPAL, *supra* note 72, at 27.

<sup>234</sup> Saskia Sassen, *Whose City is It? Globalization and the Formation of New Claims*, in THE GLOBALIZATION READER 70-76 (Frank J. Lechner & John Boli eds., 2000).

<sup>235</sup> RAJAGOPAL, *supra* note 72, at 32-33.

<sup>236</sup> *Id.* at 3.

<sup>237</sup> Obiora, *supra* note 29, at 358-59 (“[T]he vision of development operative in this Article is a recipe for massive institutional transformation in lieu of the piecemeal strategy of crisis-

encourages the continued compartmentalization of development, ruled by economic thinking, from any non-economic concerns.<sup>238</sup> Similarly, calls for increased democratization and participation are viewed cynically, as mechanisms that appeal to political ideals while maintaining material status quo.<sup>239</sup>

Although the “right to development,” declared by the U.N. General Assembly in 1986, has the potential to collapse the boundary between economic and non-economic development boxes, it has not yet been a robust source of legal change.<sup>240</sup> Gordon and Sylvester document that:

As the lost development decade of the 1980s unfolded and these movements collapsed, Third World states attempted to incorporate development into the burgeoning rights discourse, and thus to explicitly claim comprehensive development as a legal right. . . . These efforts in many ways mirror the larger evolution of the development discourse; with the movement to establish a law of international development, countries of the Third World seized the legal initiative to establish development as a legally mandated imperative.

. . . International law was an instrument that promoted the interests of the North at the expense of the South. The South now sought to turn the tables by using international law to re-order the international political and economic sphere and to achieve the goal of development.<sup>241</sup>

The insistence by developing countries to include the term “development” in the TRIPS agreement can be seen as part of a “turnaround is fair play” proactive legal strategy. TRIPS imposed what many suspected were inappropriately high minimum standards of intellectual property protection upon developing countries and thus set the stage for enduring structural inequity.<sup>242</sup> Indeed, as the previous Section concluded, some (neo)liberal welfare economists who have

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oriented analyses which isolate violations of human rights to the neglect of structural causes.”); cf. Rittich, *supra* note 34, at 222:

[R]eferences to human rights within the development and market reform policies are not necessarily references to human rights as they are understood by the international human rights institutions, human rights scholars, the activist community or the wider civil society. Rather, they are inevitably references to only a limited domain of human rights, typically identified as basic human rights. While access to basic health care and education may sometimes be described as a right, in general the [BWIs] seek the language of human rights only in regard to civil and political rights.

<sup>238</sup> RAJAGOPAL, *supra* note 72, at 216-17.

<sup>239</sup> *Id.* at 144 (“Just as decolonization was the political precursor to modernization of the Third World, democratization could then be the precursor to neoliberal globalization.”). See generally *id.* at 135-61 (chapter on democracy and the discontent of development).

<sup>240</sup> See *id.* at 219-22; Gordon & Sylvester, *supra* note 68, at 61-64.

<sup>241</sup> Gordon & Sylvester, *supra* note 68, at 49-51.

<sup>242</sup> Sell points out, however, that there is contingency in this deterministic account, in that TRIPS would not have occurred without mobilization of the OECD consensus and industry agency. SELL, *supra* note 26, at 165.

examined this area have tentatively found that while the distributive effects of pharmaceutical patents resoundingly redound to the benefit of the developed countries, the dynamic benefit for developing countries is uncertain at best.<sup>243</sup>

Yet when developing countries attempted to invoke these potentially ameliorative provisions in TRIPS, in justifying their enactment of domestic “flexibilities” (such as when South Africa attempted to invoke its parallel importation law<sup>244</sup> or Brazil its compulsory licensing law<sup>245</sup>), they have been met with strong-arm tactics from countries such as the U.S. with substantial pharmaceutical patent industries. Moreover, through ongoing section 301 pressure,<sup>246</sup> as well as the negotiation of so-called TRIPS-plus and other bilateral or regional agreements,<sup>247</sup> the U.S. is currently by-passing the minimum standards and the negotiated transition periods for developing countries under TRIPS Articles 65 and 66, which were to allow developing

<sup>243</sup> Maskus & Reichman, *supra* note 9, at 11-15 (summarizing empirical economic studies).

<sup>244</sup> Carlos M. Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 MICH. J. INT'L L. 331, 349 (2004) (describing dispute between the United States and South Africa and Brazil with respect to parallel imports and compulsory licenses); Shubha Ghosh, *State Creation of Gray Markets as a Limit on Patent Rights*, 14 FLA. J. INT'L L. 217 (2002) (same).

<sup>245</sup> Anselm Kamperman Sanders, Inaugural Lecture Delivered on the Occasion of the Acceptance of the Chair of European and International Intellectual Property Law (May 20, 2005), *The Development Agenda for Intellectual Property: Rational Humane Policy or “Modern-day Communism?”*, available at <http://www.unimaas.nl/bestand.asp?id=3827> (describing the action brought (and subsequently withdrawn) against Brazil by the U.S. before the WTO (WT/DS199/1), based on the position that the Brazilian compulsory licensing provision for non-working was in violation of Article 27(1) of TRIPS).

<sup>246</sup> “Section 301” refers to unilateral action by the United States pursuant to the Trade Act of 1974. “Aimed at bolstering the leverage of U.S. trade negotiations, . . . section 301 . . . requires the United States Trade Representative to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access.” Yu, *Discontents*, *supra* note 84, at 372 (citing 19 U.S.C. § 2242(a)(1)(A)). However, as Yu further points out, “in United States—Sections 301-310 of the Trade Act of 1974, the WTO dispute settlement panel confirmed that a member state could only pursue unilateral sanctions after it had exhausted all actions permissible under the rules of the international trading body.” *Id.* (citing to Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999)). Therefore, according to Yu, section 301 is more correctly viewed as a technique of public shaming, which costs the infringing country political capital in the international trading system. Interestingly, though, many policymakers in developing countries still respond to section 301 despite the WTO panel decision. E-mail from Peter Yu, Associate Professor of Law, Michigan State University College of Law, to author (Sept. 25, 2005) (on file with author).

<sup>247</sup> Sanders, *supra* note 245, at 19 (describing over 40 bilateral investment treaties (BITs) and free trade agreements (FTAs) that provide for exclusivity of drug testing data, requiring more than TRIPS); Drahos, *An Alternative Framework*, *supra* note 8, at 7:

Each new bilateral agreement that sets higher standards of intellectual property is picked up by the MFN principle of TRIPS. The savings of MFN become significant as more states enter into agreements with the US. If, for example, 29 states each enter into a bilateral agreement with the US that contains the same provisions on intellectual property, the MFN principle spreads those standards amongst all the states. Without MFN, 435 agreements would be needed.

countries more time for compliance.<sup>248</sup> Even laws designed as concessions to developing countries, such as the technical assistance provisions of TRIPS, rarely work to the advantage of these countries.<sup>249</sup> The same is true of the compulsory licensing provisions, such as the Appendix to the Berne Agreement, because it was forged in the context of an over-determined relationship between the developed countries and their former colonies.<sup>250</sup> From a perspective skeptical of development, this simply illustrates a truism that law is always embedded in institutions that operate politically in favor of the more powerful. (Neo)liberal proposals about democratic participation in decision-making are yet another masked rhetorical game of enforcing the unequal conditions of development.<sup>251</sup>

As put succinctly by Drahos, “[u]nderneath the development ideology of intellectual property there lies an agenda of underdevelopment. It is all about protecting the knowledge and skills of the leaders of the pack.”<sup>252</sup> Indeed, this quote from someone who works squarely within a (neo)liberal framework suggests that intellectual property globalization is so out of balance that (neo)liberal reformers and skeptical critics of development are in fact converging in their views.

### C. Conclusion

(Neo)liberal views maintain that growth necessarily results in an increase in overall social welfare and thus are not so concerned with distributional consequences. Alternatively, social concerns are

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<sup>248</sup> SELL, *supra* note 26, at 123. “TRIPS-Plus” refers to bilateral agreements or regional multilateral agreements, often denominated as “free trade agreements,” in which minimum standards that exceed the TRIPS minimum standards are negotiated. Examples of this include the U.S.-Chile Free Trade Agreement Article 17.5 (requiring copyright term of life of the author plus seventy years) as compared to TRIPS Article 9 (incorporating Berne Convention Article 7(1), which establishes a term of life of the author plus fifty years). *See also* Abbott, *supra* note 69, at 97-99 (discussing details of the Central American Free Trade Agreement and the Australian Free Trade Agreement).

<sup>249</sup> Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 IDEA 167 (2004) (describing difficulty in meeting reporting requirements of Article 67 as well as technology transfer requirements under Article 66.2). One way to view these provisions is that they serve to let off pressure from developing countries and/or to justify the existence of development agencies, rather than to actually help the client countries.

<sup>250</sup> Okediji, *Sustainable Access*, *supra* note 136, at 156-62.

<sup>251</sup> Rajagopal views mainstream development democracy efforts as the latest technology for maintaining unequal relations between developed and developing countries. RAJAGOPAL, *supra* note 72, at 143-44 (describing genesis of the link between development, peace and democracy in early 1990s reports put out by the UNSG, Boutros Boutros-Ghali and extended by the World Bank in the form of the Comprehensive Development Framework (CDF)).

<sup>252</sup> DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 12.

incorporated into the (neo)liberal framework only to the extent that they also demonstrably contribute to economic growth.<sup>253</sup> While the skeptical views contain some strains that reject economic growth as the measure of development, it is safe to assume that the developing country members of the WTO do view economic growth as a primary vehicle of development. The question for them, however, is to what extent economic growth should function as the *sole* measure of healthy development.

As Obiora points out, “[g]iven the loaded framework for development . . . it is uncertain what development really is. For this reason an outright repudiation of the concept without a viable alternative may do more harm than good.”<sup>254</sup> The brief sketch above necessarily exaggerates the distance between two extreme views. There is convergence between the two frameworks, with some (neo)liberal institutions advocating “market-centered agendas for social justice”<sup>255</sup> or “pro-poor growth agendas.”<sup>256</sup> The next section describes

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<sup>253</sup> Rittich, *supra* note 34, at 236-37.

[BWIs] now have a series of enabling arguments for focusing attention on issues of social and distributive justice. It is important, however, to recall that they retain two basic limiting arguments from an earlier era. The first is that such issues may be political; as such, they may fall outside the realm of factors that the[y] are authorized to consider in their lending decisions. Second, the[y] maintain that they have no independent, free-floating mandate to act as human rights enforcers; they are strictly limited in their decisions to considerations that demonstrably further economic development. As a result, they are only able [to] advance objectives such as human rights or gender equality to the extent that they *also* contribute to economic growth. These two arguments structure the engagement with human rights, distributive concerns and other social justice claims.

*Id.* (emphasis added) (footnotes omitted).

<sup>254</sup> Obiora, *supra* note 29, at 364.

<sup>255</sup> Rittich, *supra* note 34, at 228-29:

These are projects that respond to issues ranging from gender equality to improved corporate social responsibility and better labor standards in the new economy, largely by relying upon market forces and market incentives. What both joins them together and distinguishes them from other social justice projects is that they present the pursuit of social objectives as essentially congruent and coterminous with the current direction of institutional reform, if only they are approached in the right spirit and with a property consciousness of governance norms.

<sup>256</sup> Abbott, *Development Policy*, *supra* note 172, at 6.

What policies are needed to attack the complex phenomenon of poverty? Development specialists and IDOs agree that effective development strategies must be *comprehensive*. Almost all now accept that market reforms, trade, and competition are essential to provide opportunities for *pro-poor growth* and address other problems. But market reforms must be shaped and supported by innovative policies and institutions in a range of issue areas.

The 1999 ADB Strategy incorporates a comprehensive approach aimed at producing “socially inclusive development.” It includes three main “pillars:” (a) sustainable, *pro-poor growth*, coupled with policies to mitigate inequality; (b) social development; and (c) good governance, including sound macroeconomic policy.

*Id.* (emphasis added) (footnotes omitted).

development approaches that straddle views driven purely by efficiency concerns with those driven purely by distributional ones.

### III. EXPLORING DEVELOPMENT ECONOMICS

In this section, two relatively recent nuances on the concept of development are described: (1) the human capabilities approach pioneered by the United Nations Development Programme, popularized by economist Amartya Sen and advocated in legal scholarship by philosopher Martha Nussbaum; and (2) the global public goods approach, an interdisciplinary effort also being spearheaded by the United Nations Development Programme. These two approaches are grounded in (neo)liberal development economics rather than concepts of development that are more based on political, cultural or post-colonial theory. In other words, they are more readily connected to the concept of intellectual property, which, as it is currently framed, is heavily influenced by the discourse of law and economics. Curiously, therefore, the relevance of these two areas of development economics to the term “development” as it appears in the key legal texts of intellectual property globalization is relatively underexplored.<sup>257</sup>

These newer ways of liberal thinking about development share a common ground in at least three ways. First, they lead to strong claims that intellectual property globalization must be much more attentive to basic needs than it has been in the domestic context. Second, both approaches express an abiding concern with questions of access and distribution, questions that are strongly raised by the skeptical ways of thinking about development. And finally, both point to the creation of a substantive equality principle to guide intellectual property globalization, similar to the creation of a substantive equality standard of comparison in the area of development economics.

#### A. *The Human Capabilities Approach*

As described by Martha Nussbaum:

The account of human capabilities has been used as an answer to a number of distinct questions such as: What is the living standard? What is the quality of life? What is the relevant type of equality that

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<sup>257</sup> Cf. Pereira Neto, *supra* note 190, at 2 (“[P]ublic policies towards widespread access to information and communication technologies (ICTs) can impact the development process on three levels: (i) they tend to have a positive effect on economic growth; (ii) they contribute to expanding human freedoms (i.e. functionings and capabilities) and (iii) they contribute to reducing inequality.”).

we should consider in public planning? . . . [T]he most illuminating way of thinking about the capabilities approach is that it is an account of the space within which we make comparisons between individuals and across nations as to how well they are doing.<sup>258</sup>

The human capabilities approach was forged in the recognition that while the standard economic measure of the standard of living—gross domestic product (GDP)<sup>259</sup>—measures economic growth, it does not adequately measure economic *development*. According to this view, economic growth is a necessary but not sufficient condition to development because

an aggregate measure of growth . . . pays no attention to how that output is distributed amongst the population; it says nothing about the composition of output (whether the goods are consumption goods investment goods or public goods such as education and health provision), and it gives no indication of the physical, social and economic environment in which the output is produced.<sup>260</sup>

In 1979, economist Amartya Sen began questioning the use of GDP as the measure of economic development, and began theorizing towards a new approach, which ultimately became known as the capability approach.<sup>261</sup> He defines

[t]he capability of a person [as] reflect[ing] the alternative combinations of functionings the person can achieve, and from which he or she can choose from one collection. . . . Some functionings are very elementary, such as being adequately nourished, being in good health, etc., and these may be strongly valued by all, for obvious reasons. Others may be more complex, but still widely valued, such as achieving self-respect or being socially integrated. Individuals may, however, differ a good deal from each other in the weights they attach to these different functionings—valuable though they may all be—and the assessment of individual and social advantages must be alive to these variations.<sup>262</sup>

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<sup>258</sup> Nussbaum, *supra* note 148, at 279.

<sup>259</sup> Gross domestic product per capita is measured by the total amount of goods and services produced per head of the populations. Thirlwall, *supra* note 37, at 41. Gross national product is measured by the value of the “total final output of goods and services produced by an economy.” PEET WITH HARTWICK, *supra* note 2, at 4 (quoting WORLD BANK DEVELOPMENT REPORT 1989, at 291).

Currently, the World Bank uses “gross national income (GNI) per capita” as the prime indicator of development. World Bank, Country Classification, <http://www.worldbank.org/data/countryclass/countryclass.html> (last visited Apr. 13, 2006).

<sup>260</sup> Thirlwall, *supra* note 37, at 42.

<sup>261</sup> As Sen so charmingly writes, “[C]apability is not an awfully attractive word. It has a technocratic sound, and to some it might even suggest the image of nuclear war strategists rubbing their hands in pleasure over some contingent plan of heroic barbarity.” Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

<sup>262</sup> *Id.* at 31.

Both Sen and Nussbaum have attempted to define measures of capability that correlate to development. However, Sen's definitions have been less categorical and more conceptually linked to freedom since "[a]ccording to Sen, 'the category of capabilities is the natural candidate for reflecting the idea of freedom to do', since 'capability to function reflects what a person can do.'"<sup>263</sup> Sen defines five distinct types of freedom "that contribute, directly or indirectly, to the overall freedom people have to live the way they would like to live."<sup>264</sup> Among these are "arrangements that society makes for education, health care and so on, which influence the individual's substantive freedom to live better."<sup>265</sup>

On the other hand, Nussbaum's list of basic human functions derives from what she characterizes as an Aristotelian approach toward the subject, and is offered as "a first approximation, . . . a story about what seems to be part of any life we will count as a human life."<sup>266</sup> She then goes on to define what should count as "certain basic functional capabilities at which societies should aim for their citizens, and which quality of life measurements should measure . . . ."<sup>267</sup>

This list includes:

Being able to live to the end of a human life of normal length . . . .

Being able to have good health, including reproductive health; to be adequately nourished . . . .

Being able to use the senses; being able to imagine, to think, and to reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training . . . .<sup>268</sup>

One of her purposes in articulating this more specific list of capabilities is to "provide a basis for central constitutional principles

<sup>263</sup> G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in *THE QUALITY OF LIFE*, *supra* note 261, at 9, 24 ("Sen says that 'capability reflects a person's freedom to choose between different ways of living.'").

<sup>264</sup> SEN, *supra* note 1, at 38.

<sup>265</sup> *Id.* at 39. Sen distinguishes between "functionings" and "capabilities." He states the "[t]he functionings relevant for well-being vary from such elementary ones as escaping morbidity and mortality, being adequately nourished, having mobility, etc., to complex ones such as being happy, achieving self-respect . . . ." Sen, *supra* note 261, at 36.

<sup>266</sup> Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 61, 75-76 (Martha C. Nussbaum & Jonathan Glover eds., 1995) (listing basic human attributes). Sen's freedom approach has been criticized as not sufficiently precise or measurable, and as insufficiently complex. See Pereira Neto, *supra* note 190, at 36 (summarizing critiques).

<sup>267</sup> Nussbaum, *supra* note 266, at 82.

<sup>268</sup> Nussbaum, *supra* note 148, at 287. This list appears to be slightly different from the version published in *Human Capabilities*, Nussbaum, *supra* note 266, and was apparently "revised as a result of . . . recent visits to development projects in India." *Id.* at 286.

that citizens have a right to demand from their governments.”<sup>269</sup> Her goal is to justify a normative political philosophy.<sup>270</sup> Although Sen originally developed the approach squarely within the context of welfare economics,<sup>271</sup> Nussbaum further contextualized it within Rawlsian theories of distributive justice, feminist philosophy, and post-colonial debates over universalism versus relativism.<sup>272</sup> Throughout all the philosophical debates, she maintains:

The basic intuition from which the capability approach begins . . . is that certain human abilities exert a moral claim that they should be developed. . . . Human beings are creatures such that, provided with the right educational and material support, they can become fully capable of all these human functions. . . . When these capabilities are deprived of the nourishment that would transform them into the high-level capabilities that figure on the list, they are fruitless, cut off, in some way but a shadow of themselves. They are like actors who never get to go on the stage, or a musical score that is never performed.<sup>273</sup>

This insight has been adapted by the United Nations Development Programme in its Human Development Report. Issued annually, it relies on a “Human Development Index,” which “measures ‘development’ in terms of longevity (life expectancy at birth), knowledge (adult literacy and mean years of schooling), and income sufficiency (the proportion of people with sufficient resources to live a decent life).”<sup>274</sup> Although it is an approach that emphasizes fairness in addition to growth, it is important to understand that it includes a growth measure (income sufficiency) and is not exclusive of economic growth. Indeed, as argued in a later section of this Article, economic efficiency is often enhanced by greater equality.<sup>275</sup>

Why should intellectual property globalization heed this approach? That it is an offshoot of welfare economics makes it highly relevant in

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<sup>269</sup> MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 12 (2000). Elsewhere, she states that she aims to “provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.” *Id.* at 5.

<sup>270</sup> *Id.* at 10.

<sup>271</sup> For this work, Sen won a Nobel Prize in economics in 1998.

<sup>272</sup> NUSSBAUM, *supra* note 269, at 1-33.

<sup>273</sup> Nussbaum, *supra* note 266, at 88.

<sup>274</sup> PEET WITH HARTWICK, *supra* note 2, at 5; *see also* Pereira Neto, *supra* note 190, at 38 (attributing the adoption of the HDI to Mahbub ul Haq); Malhotra, *supra* note 41, at 17 (describing the Human Development Report, Human Development Index, and the capability approach to measuring development). Moreover, there is growing movement within development studies dedicated to expanding this approach. *See* Human Development and Capability Association, <http://fas.harvard.edu/~freedom/index.cgi> (last visited Apr. 13, 2006).

<sup>275</sup> Pereira Neto, *supra* note 190, at 49-50 (discussing recent research indicating that “a more equal distribution of wealth tends to bring stability and to align the incentives of individuals in the direction of pursuing economic growth”).

any reconsideration of the instrumental purpose of intellectual property, which in its current guise is heavily rationalized within an economic framework. That it is grounded as well in political philosophy means that it is connected to a set of normative justifications beyond simple utility maximization and thus compels a fresh look at intellectual property, perhaps through a more cosmopolitan set of theoretical norms. In any event, a practical philosophical approach that asks what the goal of government ought to be in providing its citizens with basic needs comports with the instrumental purpose of intellectual property in promoting “Progress” domestically or generating welfare globally.

### B. *The Global Public Goods Approach*

This section will explore another recent gloss on development that has great potential to resonate with intellectual property globalization—global public goods theory. This is because, as all intellectual property specialists are aware, public goods theory addresses the non-rivalrous and non-exclusive qualities of goods.<sup>276</sup> In the case of intellectual property, these goods are called knowledge goods.

The subject of intellectual property law—for example, a song about ice cream<sup>277</sup>—is quite different from the typical good in the marketplace—ice cream itself. If the songwriter plays a song about ice cream, I can listen to it without detracting from others also hearing it either at the same time or later—thus it is nonrivalrous: consumption by one does not prevent consumption by others.<sup>278</sup> And if I’m playing the song after having purchased a CD, anyone within hearing distance can also listen to it—thus it is non-exclusive: payers and nonpayers alike can benefit from the good.<sup>279</sup> By contrast, if I eat an ice cream cone,

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<sup>276</sup> Although the concept has roots dating back at least as far back as the Middle Ages in Europe, Meghnad Desai, *Public Goods: A Historical Perspective*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 66, economist Paul Samuelson is widely credited with introducing the concept of “public goods” to the rest of us in 1954. *Id.* at 64, 76 (citing Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387-89 (1954)).

Public goods theory drifted from economic literature into intellectual property academic discourse and was firmly implanted by the early 1980s. *See, e.g.*, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003); Edmund Kitch et al., *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990). For a brief overview of this theoretical approach towards intellectual property, see generally ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 10-18 (3d ed. 2003). *See also* ROBERT P. MERGES & JANE C. GINSBURG, *FOUNDATIONS OF INTELLECTUAL PROPERTY* 51-68 (2004).

<sup>277</sup> SARAH MCLACHLAN, *ICE CREAM* (Sony Songs & Tydee Music 1993).

<sup>278</sup> Kaul et al., *Defining Global Public Goods*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 2, 2-3 [hereinafter Kaul et al., *Defining GPG*].

<sup>279</sup> *Id.*; *see also* Todd Sandler, *Assessing the Optimal Provision of Public Goods: In Search of the Holy Grail*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 131.

another person cannot eat that same cone—thus an ice cream cone is rivalrous. And if I eat an ice cream cone after I've purchased it from the local ice cream parlor, a person sitting next to me is not able to benefit directly from its food energy—thus an ice cream cone is exclusive. A public good is simply one that has the qualities of being both non-rivalrous and non-exclusive.

As the familiar narrative unfolds, unprotected knowledge goods such as creative works or inventions may be subject to freeriding and thus lead to sub-optimal levels of innovative activity. Hence the “public goods problem.” So to address this market failure, it is necessary for the state to intervene by providing legal rights to exclude others in the form of copyrights and patents. This will enable market transactions in knowledge goods among rational, rights-bearing actors, and ultimately encourage the production and widespread distribution of more knowledge.

Without such legal rights to exclude others, the songwriter will have little incentive to write songs, because listeners like me can “freeride” on her efforts by listening without paying. Without such rights, society may not fully internalize the benefit of producing knowledge goods and thus goods may be under-produced. Without such rights, there is market failure. Therefore intellectual property rights (IPRs) come to the rescue.<sup>280</sup> In the international context, cross-border externalities—freeriding by country Y on country X's innovations—can be prevented.<sup>281</sup>

As economist Joseph E. Stiglitz states generally about public goods: “The central public policy implication of public goods is that the state must play some role in the provision of such goods; otherwise they will be undersupplied.”<sup>282</sup> In the case of knowledge goods, intellectual property provides a legal incentive for authors and inventors to produce them. Public goods theory locks powerfully into the (neo)liberal belief in the primacy of property rights in the form of IPRs.

Foregrounded in this dramatic trajectory are efficiency and dynamic long-term economic growth goals; footnoted, if acknowledged at all, are equity or short-term costs or inefficiencies. In intellectual property terms, the trade-off between short term costs and long run growth is expressed by the conceptual difference between static and

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<sup>280</sup> Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 308, 311. The term IPR is used more frequently by development economists than by intellectual property scholars.

<sup>281</sup> Scotchmer, *supra* note 81, at 415 (“I investigate both the incentive to join . . . treaties and the incentive to harmonize. As compared to an equilibrium in which the countries' policy makers make independent choices, harmonization will generally strengthen protections. This analysis recognizes that public sponsorship is sometimes an efficient alternative to intellectual property.”).

<sup>282</sup> Stiglitz, *supra* note 280, at 311.

dynamic efficiencies.<sup>283</sup> Static efficiency is “achieved when there is an optimal use of existing resources at the lowest possible cost”<sup>284</sup> and dynamic efficiency is “the optimal introduction of new or better products, more efficient production processes and organization, and (eventually) lower prices.”<sup>285</sup> Intellectual property law is said to enhance dynamic efficiency (that is, the rate of innovation over the long run) at the cost of static efficiency (increased prices and greater impediments to access generated by intellectual property laws in the short run), depending on the term of protection.

Public goods theory is a post hoc yet powerful (neo)liberal rationalization of what the various Constitutional framers did when they inserted an instrumental copyright and patent clause into Article I of the Constitution, exhorting Congress to make these laws “promote the Progress of Science and useful Arts.”<sup>286</sup> Intellectual property instrumentalism makes particular sense in the U.S. context where the “rights” generated by the various intellectual property laws are viewed predominantly as commercial rights rather than personal or human rights, as they might be viewed in other western cultures,<sup>287</sup> and where the “Progress” mandate of the Constitution became fused early on with a market-driven economic system, resulting in the spectacular growth of the U.S. into today’s world’s biggest superpower.<sup>288</sup> Who can argue with success? The public goods story of intellectual property is a type of winner’s history. And, as described above, the policy framework generated by the public goods tale has become an entrenched binary analysis: How to balance rights to exclude with the countervailing need for public access?

However, public goods theory is both much more limited as well as more multivariate than this unadorned storyline suggests, depending on the discipline outside of law to which one turns for further elaboration. Thus, pure economic theory would apply the term “public

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<sup>283</sup> *Id.* (“The gain in dynamic efficiency from the greater innovative activity [from intellectual property protection] is intended to balance out the losses from static inefficiency from the underutilization of the knowledge or from the underproduction of the good protected by the patent.”)

<sup>284</sup> Correa, *Managing*, *supra* note 218, at 411.

<sup>285</sup> *Id.*

<sup>286</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>287</sup> Most observers of the field agree that the competing paradigms (the natural rights perspective and the personhood perspective) are minority perspectives within U.S. academic discourse. *Cf.* Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>288</sup> See Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 114-22 (1993); Malla Pollack, *What is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001); Michael Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3 (2001).

goods” to a tiny class of goods (perhaps only the military) whereas sociologists and political scientists might apply it to any good the non-provision of which generates largely negative externalities. Moreover, the regulatory or policy consequences flowing from the designation of a good as a “public good” are far more diverse than we are accustomed to thinking about in the intellectual property arena: there are many ways to incentivize innovation than to automatically privatize goods through a scheme of exclusive rights such as patent or copyright.

Until recently, public goods have not been theorized much beyond traditional notions of jurisdiction bounded by nation-states.<sup>289</sup> And in the original formulation of public goods theory, there was a simple public-private binary. However, both the increasing pace and proliferation of international decision-making among nation-states, as well as among states and other institutions such as IGOs, NGOs, or CSOs,<sup>290</sup> have catalyzed various development scientists and policymakers to rethink the concept of public goods within an explicitly global framework.<sup>291</sup>

These global public goods theories build on the longstanding insight that many public goods, including knowledge goods, are not pure public goods, but rather are a mix of public or private—or are “impure” public goods.<sup>292</sup> Lawmakers and policymakers choose where on the continuum of public to private to set certain levels of rights, and where corresponding duties or countervailing rights may be appropriate. It is not inevitable that a public good be privatized to cure market failure, nor is it written in stone that a private good must remain private if it has partial public good characteristics (partly non-rivalrous and/or non-exclusive). In other words, the “public-ness” of a good is in part socially constructed.<sup>293</sup>

“Publicness and privateness are highly variable and malleable social norms.”<sup>294</sup> Particularly due to the proliferation of global actors,

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<sup>289</sup> Kaul et al., *Introduction* to GLOBAL PUBLIC GOODS I, *supra* note 44, at xix, xxiii (“[P]ublic goods analysis has been applied to global problems. But there has been surprisingly little examination of what global public goods really are—and few attempts to map out a typology of such goods.”).

<sup>290</sup> John Boli & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organizations*, in THE GLOBALIZATION READER, *supra* note 234, at 262; David Held & Anthony McGrew, *Political Globalization: Trends and Choices*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 185.

<sup>291</sup> Kaul et al., *Why*, *supra* note 45, at 2, 5:

The analyses reveal that the provision of global public goods occurs largely without the benefit of relevant, up-to-date theory. Public goods theory often lags behind the rapidly evolving political and economic realities—marked by a state-centric and national focus and, consequently, providing poor support for advice on the provision of global public goods in today’s multiactor world.

<sup>292</sup> Drahos, *supra* note 43, at 47.

<sup>293</sup> Kaul & Mendoza, *supra* note 50, at 86.

<sup>294</sup> Kaul et al., *Why*, *supra* note 45, at 8; see also Kaul et al., *Global Public Goods: Concepts*,

including non-state actors, the concept of public requires critical re-examination in a global regulatory environment. The public can no longer simply be reduced to the state; the public includes civil society, corporations, as well as the state—and in the context of globalization, “transnational nonstate, non-profit actors.”<sup>295</sup> Indeed, Meghnad Desai claims that the provision of today’s public goods has a “neomedieval character . . . [because] multiple authorities of varying power are involved at different levels of jurisdiction.”<sup>296</sup>

Just as public goods (knowledge) can be turned by policy choices into private goods (as through intellectual property laws),<sup>297</sup> the reverse is true as well. Private goods such as education can be made the subject of public provision through the public education system.<sup>298</sup> In the latter example, public education has been made into a de facto public good because it has been assigned the quality of nonexclusivity as a matter of social choice.<sup>299</sup> This suggests that the qualities of goods that make them “public goods” or “private goods” are not inevitable, natural, or devoid of social context—except for a very small subset of goods such as sunshine or air. *What might make a good, such as education, especially important to categorize as “public” is whether its nonprovision has externalities that are largely negative.*<sup>300</sup>

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*Policies and Strategies, in GLOBAL PUBLIC GOODS I, supra note 44, at 450, 479 [hereinafter Kaul et al., Concepts, Policies and Strategies]:*

[P]ublicness and privateness are not fixed attributes. Indeed, if the requisite technologies are available, the publicness of a good can be influenced by policy. Making a good more private will increase the chance that it will be provided, even in a decentralized setting. Two methods may be used: assigning property rights or internalizing externalities.

<sup>295</sup> Kaul et al., *Why, supra note 45, at 10.*

<sup>296</sup> Desai, *supra note 276, at 63.* One example of this might be the Motion Picture Export Association, which is a U.S. industry group qualified as a “legal export cartel under the Webb-Pomerene Export Trade Act of 1918 . . . [referring to itself as] ‘a little State Department.’” DRAHOS WITH BRAITHWAITE, *INFORMATION FEUDALISM, supra note 74, at 175.* Another example is IANNA, which parcels out Internet Domain names. Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003).

<sup>297</sup> Kaul & Mendoza, *supra note 50, at 80-84; see also Aoki, supra note 21, at 28-46* (deconstructing public/private distinction upon which intellectual property rights in knowledge goods are based); Samuelson, *supra note 55, at 98* (describing the phenomenon of “incomplete commodification” of knowledge goods, evidenced in part by the public subsidies of artistic production, and comparing that to the skepticism with which public subsidies of manufactured goods are viewed).

<sup>298</sup> Kaul et al., *How to Improve, supra note 45, at 22.*

<sup>299</sup> Kaul & Mendoza, *supra note 50, at 87* (proposing an expanded definition of public goods to include “three groups: technically nonexcludable, public by policy design, and inadvertently public”); *see also* Kaul et al., *How to Improve, supra note 45, at 22-23* (“The revised, two-level definition [of public goods] is as follows: Definition 1: Goods have a special potential for being public if they have nonexcludable benefits, nonrival benefits, or both. Definition 2: Goods are de facto public if they are nonexclusive and available for all to consume.”).

<sup>300</sup> Desai, *supra note 276, at 68* (arguing that in 19th century Britain, the fight for urban infrastructure such as water and sanitation made these goods “public in the sense that they were almost universally beneficial or at least beneficial for a large group”).

Thus, public goods theorists include an enormous array of things under the rubric of potential public goods. As stated earlier, states themselves can be viewed as public goods, as can markets and legal regimes.<sup>301</sup> The U.N. Secretary-General has identified ten global public goods of particular importance globally, including: “Basic human dignity for all people, including universal access to basic education and health care” and “[c]oncerted management of knowledge, including worldwide respect for intellectual property rights.”<sup>302</sup>

Global public goods theorists are from disciplines other than economics, and thus there has been more work done on the question of political power as it relates to the distribution of public goods. In other words, the definition of global public goods is not just technical: Does a good possess non-exclusive, non-rivalrous characteristics? It is also profoundly political: Who wins and who loses from the presence or absence of public goods?<sup>303</sup> Moreover, some theorists focus not only on under-supply of public goods (or over-supply of public bads), but also unequal *access* to global public goods.<sup>304</sup> This includes further parsing of different reasons for deficient provisions, which may include “underuse, underprovision, undersupply, malprovision, overuse, and various access problems.”<sup>305</sup> These various beneficiary questions differentiate this approach from the standard public goods approach.<sup>306</sup>

Coupled with this awareness of inclusion and exclusion on a global level is a focus on process: “whether the public, including all interested groups, actually has a say in the decision-making process on how much of the good to produce and how to organize the production process.”<sup>307</sup>

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<sup>301</sup> Kaul et al., *Why*, *supra* note 45, at 7; Kaul & Mendoza, *supra* note 50, at 88.

<sup>302</sup> Kaul et al., *How to Improve*, *supra* note 45, at 44, 58 (citing The Secretary-General, *Road Map Towards the Implementation of the United Nations Millennium Declaration, delivered to the General Assembly*, U.N. Doc A/56/326 (Sept. 6, 2001)). One of the central challenges of public goods theory is how to determine preferences. Desai, *supra* note 276, at 70-73. Although preferences may vary across different levels of development, I am assuming here that everyone has a preference for certain basic human needs such as food, health and education.

<sup>303</sup> This is important because

we live in a highly divided and inequitable world where some actors are more influential than others in setting public policy agendas and where some goods, even supposedly public goods, are more easily accessible to some people than to others. Answering the beneficiary question and assessing the good’s scope of publicness will . . . help in analyzing—and correcting—supply problems . . . [and] can provide clues to who is free riding on whom and need[s] incentives to cooperate.

Kaul et al., *Defining GPG*, *supra* note 278, at 9; *see also* Kaul & Mendoza, *supra* note 50, at 92 (the “triangle of publicness” includes “[p]ublicness in the distribution of (net) benefits”).

<sup>304</sup> Conceição, *supra* note 49, at 152.

<sup>305</sup> Kaul et al., *How to Improve*, *supra* note 45, at 26.

<sup>306</sup> Chander & Sunder, *supra* note 20, at 1331-39 (questioning the distributional benefits of a public domain framework); Kaul & Mendoza, *supra* note 50, at 89 (“More than the notion of public goods, the concept of the public domain is actively and often heatedly debated.”).

<sup>307</sup> Kaul, et al., *Concepts, Policies and Strategies*, *supra* note 294, at 479; *see also* Kaul et al., *How to Improve*, *supra* note 45, at 24 (explaining the triangle of publicness).

Participation by those directly affected by the provision of public goods, rather than reliance upon “experts” or the arrogation of critical decision-making by technical elites,<sup>308</sup> has high normative value in global public goods theory.

Finally, while sustainability, like development, is a contested concept,<sup>309</sup> the proponents of a global approach state that “at a minimum, a global public good would meet the following criteria: its benefits extend to more than one group of countries and do not discriminate against any population group or any set of generations, present or future.”<sup>310</sup> This sustainable development principle, like the beneficiary question and the participation question, is directly concerned with distributional issues.

The classic story of public goods as applied to the knowledge economy is tidy and, like all elegant theories, has the virtue of simplicity. Yet it has also had the unwitting (and, from a skeptical development approach, devastating) result of excising critical variables out of the intellectual property policy analysis. The only market failure or externality accounted for is the failure to internalize the costs of innovation. Thus, the plot always leads to the conclusion that property-like rights are desirable as a starting point.

Whether framed by the disciplines of political science or international relations, where the concern is to avoid prisoner’s dilemmas, or by the economist’s perspective of avoiding negative externalities, global public goods theory is a fresh look at a (neo)liberal theory badly in need of repair in a globalized context.

#### IV. A PROPOSED SUBSTANTIVE EQUALITY NORM

While the previous sections have demonstrated that there is no consensus on how to think about development, there are, nevertheless, predominant ways of thinking about development. Specifically, the (neo)liberal approach to development mutually reinforces the narrow public goods discourse of intellectual property. Thus, it is no accident that much of the scholarship of intellectual property globalization

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<sup>308</sup> Cf. STIGLITZ, *supra* note 186, at 53-88 (comparing the mistakes made by the experts at the IMF with the freedom needed for developing countries to choose appropriate paths of development); Kaul et al., *How to Improve*, *supra* note 45, at 28 (“The lack of publicness in decisionmaking can weaken the technical soundness of policy choices, undermine the legitimacy and credibility of organizations, and erode the sense of policy ownership so essential for effective follow-up to international agreements.”).

<sup>309</sup> Esteva, *supra* note 14, at 16 (“[I]n its mainstream interpretation, sustainable development has been explicitly conceived as a strategy for sustaining ‘development’, not for supporting the flourishing and enduring of an infinitely diverse natural and social life.”).

<sup>310</sup> Kaul et al., *Defining GPG*, *supra* note 278, at 16.

continues to perpetuate intellectual property insularity. The challenge is to move beyond this insularity towards a more intersectional dynamic.

In this section, I argue that a principle of substantive equality is required. It is not enough to insist on procedural fairness or that countries adhere to formal equality in the form of national treatment coupled with minimum standards. There must also be a focus on substantive equality. At a minimum—in the absence of new multilateral agreements or amendments to TRIPS or to other multilateral instruments such as the Berne Convention, or to WIPO's governing documents—I propose that this substantive equality principle be integrated throughout intellectual property globalization decision-making via a legal rule akin to the strict scrutiny doctrine in U.S. constitutional law. This doctrine generally allows decision-makers to review and strike down government regulation under a non-deferential standard of review (also known as strict scrutiny review) where that state-granted right will interfere substantially with a suspect category. By analogy, the decision-maker will exert strict scrutiny review where the regulation (in this case, the government intervention in the form of the grant of an exclusive right over intellectual property or the withholding of an exception or limitation of that exclusive right) conflicts with a basic need (in this case, the provision of a development-sensitive human need, as defined in part by the Millennium Development Goals). This principle of equality would be applied both domestically as well as in international decision-making venues.

The human capability approach and the global public goods approach to development support this proposal. These branches of welfare economics attend to basic human needs and not just overall wealth maximization. Both approaches explicitly address distributional issues, questions that increasingly blemish the wealth generating rationale of intellectual property. And both ways of thinking about development have been accepted by mainstream development institutions within the United Nations.

In the current rule-generating and rule-interpreting environment of intellectual property globalization, the presumption has been that intellectual property is good because it promotes economic growth. But as the area of development economics shows, economic growth is not synonymous with economic development. Intellectual property can no longer afford to be insular, as if it does not affect or is not affected by the provision of other global public goods. Explicit connections must be made between intellectual property and other global public goods addressing basic development needs, including food, education as well as the already highly publicized health care sector. Intellectual property, after all, cannot “take root” absent a basic national capacity, which can only be developed with a population that has its essential

needs met.<sup>311</sup> Much of the discussion of intellectual property globalization has taken pitched a fairly high level, for example, about the benefits of sharing scientific research, the impact of digital technology, and so on. It bears keeping in mind that much of the world's population lacks access to essential nutrients,<sup>312</sup> basic education, and basic health care.<sup>313</sup> Basic needs have been underemphasized in much of the debate about what to do about intellectual property globalization.

Even more interesting though is that much of the fairness discussion in the legal literature on intellectual property globalization so far has focused on the question of procedural fairness. For example, several writers have called for "democratic property rights,"<sup>314</sup> in which intellectual property rule-setting and rule interpretation take place with full information and active participation by all affected parties. Notions akin to forum-shifting and joinder of parties have also been discussed,<sup>315</sup> as well as procedural mechanisms akin to burdens of proof or presumptions to check the power of the DSU to override national welfare considerations.<sup>316</sup> While these efforts to inject more procedural equality into intellectual property globalization are positive, I suggest that much more is required.

I explore these two points further below.

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<sup>311</sup> CIPR REPORT, *supra* note 10, at 23; *see also* 3D, IN-DEPTH STUDY SESSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS (2005), available at [http://www.3dthree.org/pdf\\_3D/3DIPHRStudySessreporteng.pdf](http://www.3dthree.org/pdf_3D/3DIPHRStudySessreporteng.pdf), at 4-8 (discussing the relationship of intellectual property to education, food and health).

<sup>312</sup> Although this Article does not address the issue of food security and plant genetic resources, they too could be addressed within the basic needs framework presented here. *See generally* Michael Blakeney, *Agricultural Research: Intellectual Property and the CGIAR System*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 55, at 108; Sol Picciotto, *Defending the Public Interest in TRIPS and the WTO*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 55, at 224; Keith Aoki, *Malthus, Mendel and Monsanto: Intellectual Property and the Law and Politics of Global Food Supply: An Introduction*, 19 J. ENVTL. L. & LITIG. 397 (2004); Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247 (2003); Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433 (2002) (arguing that asymmetries in WTO work to the benefit of developed countries with food subsidies and against the interests of developing countries who are forced into market open-ness).

<sup>313</sup> UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT (2005), available at <http://hdr.undp.org/reports/global/2005>.

<sup>314</sup> DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 15; Long, *supra* note 14, at 217; Boyle, *supra* note 13, at 7; Shaffer, *supra* note 145, at 901-07.

<sup>315</sup> *See supra* Section I.C.

<sup>316</sup> *See supra* Section I.C.

A. *From Intellectual Property Insularity to Intersectionality*

From a global public goods perspective, there is no hierarchy among different global public goods. This can lead us out of the intellectual solipsism generated by a purely intellectual property-oriented public goods approach. International legal regimes can be viewed as types of intermediate global public goods, “which contribute towards the provision of final global public goods.”<sup>317</sup> Indeed, global public goods theorists urge the production of more international agreements and institutions to facilitate the production of public goods. One way of looking at this is that the WTO or WIPO carries the potential to build knowledge capacity and push countries towards creating more sophisticated legal systems, which in turn catalyze economic development generally. Nonetheless, although the existing intellectual property framework may treat TRIPS as a type of unmitigated global public good, other public goods merit equal if not greater consideration.<sup>318</sup>

The WTO Ministerial’s Doha Declaration on the TRIPS Agreement and Public Health was a product of accounting for at least four separate public goods within a trade framework. Of course, the primary public good from the intellectual property perspective is the TRIPS regime and the increased innovation that it is supposed to foster.

However, in addition, the WTO had to consider that knowledge of antiretroviral drug therapy, whether or not protected by intellectual property law, is a public good that might need to be disseminated in ways other than through the intellectual property system of exclusive rights. Good health is also a global public good because it generates positive externalities from which everyone, not just the individual, benefits. The devastating effect of AIDS in many developing countries makes this point without any further need for elaboration. And finally, equity (as discussed further below) was a strong public good variable that drove the final result.

As described earlier, by relying on key terms in TRIPS Article 8 that were intended to function as a type of “development check” to a purely economic analysis, developing countries challenged high protectionist patent standards set by the U.S. and other developed countries, and ultimately forced the WTO to change inappropriate compulsory licensing provisions.

From a perspective informed by human capabilities and global public goods theory, however, this case study does not stop with the

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<sup>317</sup> Kaul et al., *Defining GPG*, *supra* note 278, at 13.

<sup>318</sup> Shaffer, *supra* note 145, at 895-901 (building on this complexity insight when he suggests that it is important to focus on who the participants are in TRIPS-related disputes because of the variety of different stake-holders involved in the outcome).

triumphant issuance of the Doha Declaration. The final WTO General Council decision in August of 2003 imposed a bureaucratic structure for compulsory licensing.<sup>319</sup> Compulsory licensing provisions in international agreements, e.g., the Berne Appendix, are generally hard-fought but not deployed favorably for developing countries.<sup>320</sup> There are potential and actual roadblocks to effective implementation of the General Council Decision.<sup>321</sup> Thus the Doha Declaration and General Council Decision are political concessions to developing countries, but in reality may be more symbolic than practical in nature.

The deep integration of legal regimes required by TRIPS will lead inevitably and repeatedly to the imposition of inappropriately high standards of intellectual property protection for developing countries. This, in turn, can result in the continual denial of certain basic human needs from being met, unless those global public goods are given priority at all possible decision points over other intermediate public goods such as legal regimes. The injection of a substantive equality principle at each of the decision points before and subsequent to the Doha Declaration would ensure that the legal text would be construed and applied in a way that defers to the basic needs of those who require access to the patented drugs.

The language of “limitations” and “exceptions” or the existence of flexibilities, whether through the mechanisms of parallel imports or compulsory licensing, might provide room in international intellectual property instruments to allow access to basic, first order human needs without the wholesale stripping away of patents or copyrights. However, these provisions have more often than not been construed against the needs of users. A substantive equality principle would provide a minimum threshold of access in the context of basic needs, to what has been termed a “one-way ratchet” in favor of the rights-owner.<sup>322</sup>

### B. *From Procedural to Substantive Equality*

One question that might be posed at the outset is: Why aren't proposals to enhance procedural fairness sufficient? Indeed, global public goods theorists propose a norm of “matching circles of stakeholders and decisionmakers” in order “to create opportunities for

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<sup>319</sup> See Abbott, *Hydra*, *supra* note 105, at 414-15; James Love, Consumer Project on Technology, CPTech Statement on WTO Deal on Exports of Medicines, Aug. 30, 2003, <http://www.cptech.org/ip/wto/p6/cptech08302003.html>.

<sup>320</sup> Okediji, *Sustainable Access*, *supra* note 136, at 162-68; Story, *supra* note 158, at 788.

<sup>321</sup> See Abbott, *Hydra*, *supra* note 105, at 414-15.

<sup>322</sup> Okediji, *Public Welfare*, *supra* note 3, at 914.

all to have a say about global public goods that affect their lives.”<sup>323</sup> Such an approach is less likely to lead to the sense of marginalization that has led many to equate globalization with the unilateral imposition of standards and norms upon the developing world that are more suitable for rich countries.<sup>324</sup> The perception (based often on reality) that global public goods agendas were set or decisions made without collaboration or participation by affected nations has surfaced at the activist level as exemplified by the “battle in Seattle,”<sup>325</sup> as well as in the popular critiques of globalization.<sup>326</sup>

The participation question even could be viewed as a type of distributional question: How is decision-making power distributed? One challenge is to match the “structure of political decisionmaking . . . with the range and type of a good’s spillover effects.”<sup>327</sup> As various legal academics have pointed out, the international regimes that determine intellectual property law and policy are often Byzantine and have no formal relational lines of decision-making authority.<sup>328</sup> NGOs and CSOs are increasingly involved in setting state and international policy-making and yet their roles, influence and representativeness are uncertain.<sup>329</sup> Another challenge with respect to procedural fairness is to give more voice to poorer nations, who are structurally disadvantaged by having fewer informational resources, and fewer chips to put on the bargaining table than the richer countries have.<sup>330</sup>

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<sup>323</sup> Kaul et al., *Why*, *supra* note 45, at 5.

<sup>324</sup> *Id.* at 12.

<sup>325</sup> Cecelia Albin, *Getting to Fairness: Negotiations Over Global Public Goods*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 264.

*The need for active involvement in setting agendas*

. . . .

Efforts to launch another round of multilateral trade talks at the 1999 WTO meeting in Seattle collapsed partly over this matter. Major industrial countries suggested negotiations on issues of little immediate priority for developing countries, such as electronic commerce, investment policy, and labor and environmental standards. Developing countries, for their part, insisted on the need for further progress in removing barriers to their exports of textiles and agricultural products before debating new concerns.

*Id.*

<sup>326</sup> See THE INTERNATIONAL FORUM ON GLOBALIZATION, ALTERNATIVES TO ECONOMIC GLOBALIZATION: A BETTER WORLD IS POSSIBLE 56-61(2002).

<sup>327</sup> Kaul et al., *How to Improve*, *supra* note 45, at 28.

<sup>328</sup> See Helfer, *Regime Shifting*, *supra* note 25, at 8 (describing “the existence of multiple, discrete regimes, any one of which may plausibly serve as a site for future policy development, [which] leaves considerable room for maneuvering by different clusters of states (or states and NGOs) seeking to maximize their respective interests”).

<sup>329</sup> Boli & Thomas, *supra* note 290; Michael Edwards & Simon Zadek, *Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors*, in GLOBAL PUBLIC GOODS II, *supra* note 44, at 200.

<sup>330</sup> Kaul et al., *How to Improve*, *supra* note 45, at 30-31; Shaffer, *supra* note 145, at 895-907.

Thus, ensuring procedural fairness is certainly an important dimension of intellectual property globalization. But there is growing evidence that international cooperation on the provision of public goods depends on actual and perceived equity in the formulation, substance and outcome of international agreements.

Equity impacts efficiency in several ways. The first two are what J. Mohan Rao calls the enabling and lubricating functions of equity.<sup>331</sup> Equity functions in an instrumental way to promote cooperative behavior in the shared production of public goods, thus enabling a greater volume of public goods to be produced than would be produced in its absence.<sup>332</sup> Related but not identical to this observation, “norms of fairness and justice provide focal points around which social conflict can be mitigated and efficiency-enhancing social bargains made,” and thus equity “lubricates” the process of cooperation.<sup>333</sup>

Finally and most significantly, equity itself is a public good that may be undersupplied if attention is not paid to mechanisms for facilitating its production.<sup>334</sup> As Lisa Martin writes:

[w]e can also see a growing consensus that failure to assure a relatively equitable distribution of benefits from cooperation can prevent, or at least greatly delay, the creation of cooperative mechanisms. While legal scholars, sociologists and philosophers tend to trace this fact to deeply embedded norms of fairness, political scientists focus more on bargaining incentives and the desire of actors to increase their share of any benefits produced. If lack of equity prevents the creation of cooperative mechanisms that could benefit all, equity comes to take on some characteristics of a public good.<sup>335</sup>

Recognizing equity as an important global public good in its own right comes from the pragmatic understanding that international cooperation simply will not occur in the absence of an overall sense of fairness and justice by relevant actors. Few public goods in a global context can be produced by one nation or institution alone. And in the deep integration and linkage bargaining context within which the WTO TRIPS Agreement must operate, fairness becomes a critical factor for

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<sup>331</sup> J. Mohan Rao, *Equity in a Global Public Goods Framework*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 68, 70.

<sup>332</sup> *Id.* at 70.

<sup>333</sup> *Id.* at 82.

<sup>334</sup> *Id.* at 70, 83.

<sup>335</sup> Lisa Martin, *The Political Economy of International Cooperation*, in GLOBAL PUBLIC GOODS I, *supra* note 44, at 58; *see also* Kaul et al., *Concepts, Policies and Strategies*, *supra* note 294, at 475:

Inequity creates cross-border externalities in the form of social instability, ethnic tensions and environmental damage. But in a truly global sense (as articulated by [Amartya] Sen) it is also an inherently transnational issue and an issue of global, system risk. The reason is that inequality has assumed such proportions that policies “merely” aimed at creating a level playing field no longer suffice . . . .

the success of intellectual property legal regimes. As Carlos Correa has stated, “When the [knowledge] products are essential for life—as with food and pharmaceuticals—allocative efficiency becomes an important objective on both economic and equity grounds.”<sup>336</sup> In other words, equality tilts the balance towards static efficiency and away from dynamic efficiency arguments, at least for resource-poor areas of the world. A failure to understand that will lead to policy impasses.

Although an in-depth treatment of equity is beyond the scope of this Article, Cecelia Albin suggests several fairness principles that should be considered in any international treaty negotiation<sup>337</sup> and has a number of suggestions for what she calls “getting to fairness.”<sup>338</sup> One of Albin’s principles is the “needs” principle, which would “target the world’s poorest people or countries, regardless of other considerations.”<sup>339</sup> Because the international intellectual property regime of TRIPS currently functions on a “formal equality” rather than actual equality basis, attention to the disempowered and resource-poor can help to remedy the resulting disparities.

The inequitable nature of technical knowledge production and capacity-building relevant to developing countries is starkly illustrated by health care research and development, which focuses almost exclusively on the diseases of the rich countries:

Protected by intellectual property rights, private industry naturally focuses its technology development on products to serve affluent consumers with effective purchasing power. Weak profit incentives discourage commercial research and development investments on diseases of the poor. Lacking market power, the diseases of the poor are “orphaned” by benign neglect. Similar concerns over equitable access are expressed about health-related information. Information may be a global public good, but its meaning and utilization are likely to vary with literacy, education and communications infrastructure.<sup>340</sup>

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<sup>336</sup> Kaul et al., *Concepts, Policies and Strategies*, *supra* note 294, at 411.

<sup>337</sup> Albin, *supra* note 325, at 267.

<sup>338</sup> *Id.* at 270-74. These suggestions include:  
Creating a just and fair negotiating structure,  
Formulating a broad, inclusive agenda,  
Ensuring that all parties are represented,  
Crafting clear, transparent rules,  
Choosing a neutral and accessible venue,  
Ensuring a fair negotiation process,  
Giving all parties a say in selecting procedures,  
Giving all parties an effective voice, and  
Ensuring fair play.

*Id.*

<sup>339</sup> *Id.* at 268.

<sup>340</sup> Lincoln C. Chen et al., *Health as a Global Public Good*, in *GLOBAL PUBLIC GOODS I*, *supra* note 44, at 284, 294.

Looking again at the case of patented pharmaceuticals, for twenty diseases, 99% of the global disease burden is concentrated in low and middle income countries. However, in 1992, less than 5% of the total global R&D was spent on their health problems.<sup>341</sup> In 1996, only 0.5% of pharmaceutical patents related to tropical diseases such as malaria. U.S. patents dominate, with over 50% of the worldwide pharmaceutical patents. A 1999 UNDP report indicated that 97% of patents worldwide are held in developed countries, while 80% of patents in developing countries also belong to owners of the rich countries.<sup>342</sup> There is little evidence that TRIPS has changed this picture so far.<sup>343</sup> Indeed, economists agree that the global re-distributional effect of strengthening intellectual property laws will benefit the U.S. predominantly and only a handful of other developed countries in the short run, especially in the pharmaceuticals sector.<sup>344</sup> Yet, TRIPS standards mandate patent protection for pharmaceuticals (the year 2016 is now the “flexibility” for LDCs) for all member nations of the WTO. Even this transitional period for the poorest countries is viewed as too much of a concession by U.S. industry interests.<sup>345</sup>

Common to the episteme of those concerned with development, whether coming from a (neo)liberal perspective or a skeptical one, is a heightened awareness of radical inequalities among different global populations. These inequalities are pervasive, as measured not only by GDP, but also by levels of malnourishment, ill health, and lack of education. Besides confronting these disjunctures on a regular basis, development specialists also appreciate, with an urgency that domestic intellectual property policy-makers perhaps do not always appreciate, that international cooperation is critical to achieving the development objectives, among which are the “promotion of opportunity, facilitating

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<sup>341</sup> Jean O. Lanjouw, *Intellectual Property and the Availability of Pharmaceuticals in Poor Countries*, INNOVATION POL’Y & ECON., Apr. 2003, at 91, 98.

<sup>342</sup> Paranaguá Moniz, *supra* note 109, at 14.

<sup>343</sup> See CIPR REPORT, *supra* note 10, at 37-40 (concluding that patent rights will have little impact on stimulating research and development into diseases affecting the very poorest populations). See generally James Love, *Access to Medicine and Compliance with the WTO TRIPS Accord: Models for State Practice in Developing Countries*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 55, at 74; Ruth Mayne, *The Global Campaign on Patents and Access to Medicines: An Oxfam Perspective*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 55, at 244.

<sup>344</sup> SACHS, *supra* note 19, at 61-64; STIGLITZ, *supra* note 186, at 245:

In the final stages of the Uruguay negotiations, both the Office of Science and Technology and the Council of Economic Advisors worried that we had not got the balance right—the agreement put producers interests over users. We worried that in doing so, the rate of progress and innovation might actually be impeded; after all, knowledge is the most important input into research, and stronger intellectual property rights can increase the price of this input.

See generally BHAGWATI, *supra* note 195; Bhagwati, *supra* note 216.

<sup>345</sup> SELL, *supra* note 26, at 123.

empowerment [of poor populations] and enhancing security.”<sup>346</sup> Thus substantive equality is a key analytical component to intellectual property decision-making in this global context.

C. *Why Stop at Public Health? Capability for Basic Education*

How does or could a substantive equality principle work in a practical sense? This section of the Article explores how it might impact copyright and capacity building for education, an issue which has received relatively less attention than the now-familiar debates over patents and building capacity for health in developing countries or for scientific research in developed countries.<sup>347</sup>

I first sketch the problem from the perspectives of developing countries that have large educational deficits. If we focus on these perspectives, then the question is how copyright policy can or should accommodate these development concerns, which are about meeting basic human capabilities. From an “essential needs” standpoint, access to basic educational materials is as important as access to life-saving medicines. Education is fundamental to the capacity-building upon which all further progress is made.<sup>348</sup> Although copyright is only one of many factors that go into the provision of basic education, it is an essential policy lever for educational development generally.<sup>349</sup>

I then develop the proposed substantive equality principle within intellectual property based on a more wholistic understanding of

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<sup>346</sup> *Id.* at 3.

<sup>347</sup> See, e.g., Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation?: The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

<sup>348</sup> CIPR REPORT, *supra* note 10, at 28.

The ability of countries to absorb knowledge from elsewhere and then make use and adapt it for their own purposes is also of crucial importance. This is a characteristic that depends on the development of local capacity *through education*, through R&D, and the development of appropriate institutions without which even technology transfer on the most advantageous terms is unlikely to succeed.

*Id.* (emphasis added); accord Drahos, *An Alternative Framework*, *supra* note 8, at 15.

For developing countries the coming century of knowledge-based growth raises two basic development priorities. The first is that these countries must give more urgent attention to encouraging investment in human capital. This essentially translates into investment in health and education. Without growth in human capital developing countries will be left to participate in simple commodities markets rather than the knowledge economy.

*Id.*

<sup>349</sup> Okediji, *Copyright and Public Welfare*, *supra* note 133, at 160-61 (“Protecting intellectual property without a correlating investment in education, and other policies specifically directed at macroeconomic conditions, will not yield significant long-term benefits to the national economy.”).

development economics, and I suggest generally how it could change the way that copyright norms are generated or applied in the context of knowledge goods for basic education. Finally, I will acknowledge some issues with, and point to, future directions for this proposal.

### 1. Knowledge as a Global Public Good: The Context of Developing Countries

As Yochai Benkler points out,

it is odd to think of cultural production as an area that ever came to be thought of as “dominated,” in any useful meaning of the word, by market production. As an analytic matter, . . . books are forms of information, public goods, and could not, even in principle, be provisioned efficiently by markets alone. As a practical matter, we have always relied heavily on organizational and institutional forms insulated from both state and markets to produce information, knowledge, and culture. That is what the university and academic freedom are centrally about. That is what underlies the heavy reliance of the arts on philanthropy and on a culture of esteem and status as crucial motivating forces. That is what public schools and libraries are about. Our understanding of information, knowledge, and culture as “public goods” in the formal economic sense should have immunized us from mistaking the presence of important market-based approaches for the whole, or even the core, of the story of information and cultural production. And yet, it does seem that our perception of where information generally, and culture in particular, comes from came to be dominated over the second half of the twentieth century by a vision of Hollywood and the recording industry.<sup>350</sup>

Similar to the over-production of pharmaceuticals aimed at the diseases of the rich, there is an over-production of knowledge goods and cultural goods aimed at the needs or desires of the rich. This is true even with respect to intellectual property scholarship that addresses social justice values. U.S. copyright scholarship privileges the first amendment and other aspects of democratic theory<sup>351</sup> and overlooks essential needs generally. There is an over-focus on entertainment products such as music and movies (freeriding concerns over which heavily drove TRIPS formation<sup>352</sup>) and under-focus on educational

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<sup>350</sup> Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as Modality of Economic Production*, 114 YALE L.J. 273, 348-49 (2004).

<sup>351</sup> Cf. Shaffer Van Houweling, *supra* note 38; Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998).

<sup>352</sup> INTELLECTUAL INTELLECTUAL PPROPERTY ALLIANCE, IIPA'S 2004 FINAL ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND PIRACY LEVELS IN-COUNTRY, <http://www.iipa.com/pdf/IIPA%20USTR%202005%20SPECIAL%20301>

products such as textbooks. The provision and dissemination of knowledge goods related to education and development generally is not thought of as legitimate copyright issue, except in the narrow context of the fair use debates in the U.S. educational and library communities. Generally, it is fair to say that developed country copyright scholars have overlooked the importance of basic education as a foundation to every other kind of development criteria. This has been exacerbated by the heavy emphasis on issues related to digital technology, which are arguably more relevant to developed than to developing countries, especially the least developed countries.<sup>353</sup> Yet ironically, the first copyright statute, the Statute of Anne, was subtitled “An Act for the Encouragement of Learning.”<sup>354</sup>

Knowledge goods dramatically affect the provision of education. And education is “essential to the provision of almost every other public good—and to the enjoyment of private goods.”<sup>355</sup> Thus, education is an input to the production of knowledge goods, and knowledge is an input to the production of educational public goods. On both Nussbaum’s list of capabilities and Sen’s list of functioning appear the provision of basic education.<sup>356</sup> This is also a specific goal listed as one of the Millennium Development Goals.<sup>357</sup> It is also high on the agenda of many developing countries. Education has been recognized as a human right under the framework of the International Covenant on Economic, Social and Cultural Rights as well as the Convention on the Rights of the Child.<sup>358</sup> Indeed, there has been such an increase in the provision of

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%20DECISIONS%20with%20revised%20BSA%20figures%20for%20the%20Middle%20East%20060405.pdf (last visited Apr. 13, 2006). For sustained critiques of the concept of piracy as it relates to China, see the corpus of Peter K. Yu. See generally Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT’L & COMP. L. (2005); Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT’L & COMP. L. R. 127 (2003); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2001); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1 (2001). See also DRAHOS WITH BRAITHWAITE, INFORMATION FEUDALISM, *supra* note 74, at 19-38 (deconstructing piracy). See generally SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001).

<sup>353</sup> Cf. Yu, *Introduction*, *supra* note 33 (arguing that digital intellectual property issues are as important to developing countries as are bread issues); Okediji, *Sustainable Access*, *supra* note 136 (discussing access to digital works by developing countries while acknowledging the great need for print works).

<sup>354</sup> Craig Joyce, *L. Ray Patterson: Copyright (and Its Master) in Historical Perspective*, 10 J. INTEL. PROP. L. 239, 243 (2003).

<sup>355</sup> Kaul et al., *How to Improve*, *supra* note 45, at 45.

<sup>356</sup> SEN, *supra* note 1, at 38-39; Nussbaum, *supra* note 148, at 287.

<sup>357</sup> UN Millennium Development Goals, *supra* note 18 (listing the “[a]chieve[ment] [of] universal primary education”).

<sup>358</sup> See International Covenant on Economic, Social and Cultural Rights (CESCR) art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (alluding to a right to education); Convention on the Rights of the

basic education lately that some developing countries, short on resources already, are simply not able to meet the demand that has been created by these calls for increased access.<sup>359</sup>

Compelling reasons exist for public provision of basic education. Studies have repeatedly shown that educational levels of girls and women are an important determinant of children's health.<sup>360</sup> Basic education and literacy are thought to increase opportunities to impart basic information about health and nutrition as part of a curriculum,<sup>361</sup> to enable mothers to read written instructions and acquire basic health information from media,<sup>362</sup> to overcome some traditional inhibitions in adopting newer health care methods, and to give mothers self-confidence to use the health care system.<sup>363</sup> Indeed, ample evidence demonstrates that basic education and literacy levels contribute more to health status than does GNP.<sup>364</sup> Even in developed countries, higher educational levels have been strongly linked to lower morbidity and mortality levels.<sup>365</sup>

Basic education is also correlated with more productive and profitable agricultural activity.<sup>366</sup> It is thought to increase the ability of

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Child art. 29, Nov. 20, 1989, 1577 U.N.T.S. 3 (same). The CESCR General Comment No. 13 (1999) states:

[T]he right to receive an education, including the right to universal and free primary education, has three dimensions of obligations: to *respect, protect and fulfil* [sic]. The right to education includes the right to *availability* of functioning educational institutions and programmes, *accessibility* of educational institutions and programmes for all without discrimination, *acceptability* in the form and substance of education and *adaptability* of education to the needs of changing societies and communities.

3D, *supra* note 311, at 5.

<sup>359</sup> Celia W. Dugger, *In Africa, Schools Feed a Different Hunger*, N.Y. TIMES, Oct. 24, 2004, at A11.

<sup>360</sup> WORLD DEVELOPMENT REPORT, KNOWLEDGE FOR DEVELOPMENT 1998-99, at 17 [hereinafter KNOWLEDGE FOR DEVELOPMENT]. "A study of 45 developing countries found that the average mortality rate for children under 5 was 144 per 1,000 live births when their mothers had no education, 106 per 1,000 when they had primary education only, and 68 per 1,000 when they had some secondary education." *Id.*; see also SEN, *supra* note 1, at 195-99. Generally speaking, women are more heavily impacted by poverty on a global level. See Barbara Stark, *Women, Globalization, and Law: A Change of World*, 16 PACE INT'L L. REV. 333, 339-42 (2004) (women comprise 70 percent of the world's 1.3 billion absolute poor).

<sup>361</sup> KNOWLEDGE FOR DEVELOPMENT, *supra* note 360, at 41.

<sup>362</sup> *Id.* at 41, 120.

<sup>363</sup> *Id.* at 41.

<sup>364</sup> Sen differentiates between two types of success in the reduction in mortality: what he calls growth mediated (which relies heavily on dramatic increases in levels of income) and support-mediated (which relies on low-cost labor pool providing social services such as health care and basic education, in the absence of rapid economic growth). SEN, *supra* note 1, at 43-46.

<sup>365</sup> Nancy Adler et al., *Socioeconomic Status and Health: The Challenge of the Gradient*, in HEALTH AND HUMAN RIGHTS: A READER 181, 182-85 (Jonathan M. Mann et al. eds., 1999) (summarizing evidence that socioeconomic status (SES), including education, impacts health status in U.S. and Europe).

<sup>366</sup> KNOWLEDGE FOR DEVELOPMENT, *supra* note 360, at 41.

populations to adapt to changing economic environments.<sup>367</sup> Last but not least, education has been strongly correlated to economic growth per se, both in developed countries<sup>368</sup> as well as developing countries.<sup>369</sup> Thus, for purposes of development, “education has positive spillovers internationally; higher education levels can lead to slower population growth, better disease control, more stable and more robust political systems, both nationally and internationally.”<sup>370</sup>

This widely shared understanding has led the vast majority of countries to provide education publicly rather than privately. Indeed, because of its importance, the U.S. has long chosen to provide universal compulsory public education, with private alternatives for those willing to pay.<sup>371</sup> Developing country governments also play important roles in promoting basic learning capacity beyond the primary level, and in facilitating the transfer and dissemination of such basic knowledge through communications infrastructure.<sup>372</sup>

As noted earlier, making education public demonstrates the socially constructed quality of goods. Although classified as a private good (because of its rivalrous and exclusive qualities), it can be seen as a type of basic need leading to human capability. Thus basic education has intrinsic value and its public provision is a type of “commodity egalitarianism.”<sup>373</sup> Because of the fundamental importance of education, knowledge inputs to education such as educational materials should be widely accessible rather than distributed only in limited ways.

While this Article is concerned primarily with the relationship of knowledge goods to building basic knowledge capacity (basic education), it is also important to note some aspects of building technical knowledge capacity. In the intellectual property literature, perhaps the best-known of the development specialists concerned with knowledge and global public goods theory is Joseph E. Stiglitz, former chief economist of the World Bank.<sup>374</sup> According to him, the “global” quality of knowledge as a public good arises from the universality of certain kinds of knowledge,<sup>375</sup> as well as its integral role in capacity

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<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 20 (“One study had found that growth in years of schooling explained about 25 percent of the increase in GDP per capita in the United States between 1929 and 1982.”).

<sup>369</sup> *Id.* at 19-22.

<sup>370</sup> Kaul et al., *How to Improve*, *supra* note 45, at 46.

<sup>371</sup> Stephen P. Heyneman, *The Role of Textbooks in a Modern System of Education* (forthcoming Nov. 2006) (on file with author). Desai claims that Adam Smith “had made a powerful plea for the state to provide education and training to overcome the debilitating effects of the division of labor in modern factories.” Desai, *supra* note 276, at 67.

<sup>372</sup> KNOWLEDGE FOR DEVELOPMENT, *supra* note 360, at 26.

<sup>373</sup> Kaul & Mendoza, *supra* note 50, at 85.

<sup>374</sup> Stiglitz, *supra* note 280, at 310 (listing four other global public goods besides knowledge: international economic stability, international security, the international environment and international humanitarian assistance).

<sup>375</sup> *Id.* at 311.

building in lesser developed countries, through “learning to learn.”<sup>376</sup> He observes that “the ability to learn has to be learned, that the skills associated with learning are, like other skills, specialized.”<sup>377</sup> He also asks, “Why is it that the growth rates and income levels of various countries have not converged faster than they have?”<sup>378</sup> The answer in part lies in a knowledge gap.<sup>379</sup>

There are different kinds of knowledge gaps, which demand different kinds of state interventions and approaches. For example, the efforts of some governments to promote the use of the LINUX operating system as a cheap and more flexible alternative to Microsoft’s proprietary system can be seen as an example of government intervention into building technical learning capacity that is not based on a proprietary rights model.<sup>380</sup> Stiglitz points out that R&D structure is even more highly concentrated among rich countries than GDP is.<sup>381</sup> And the World Bank claims that “[f]or most developing countries, local research has to focus on more essential needs . . . [and] should build on local knowledge, which can have tremendous value.”<sup>382</sup>

Economist Jeffrey Sachs divides the world into three areas: one of endogenous growth in which innovative activity takes place on a

<sup>376</sup> Stiglitz, *Learning to Learn*, *supra* note 62, at 125.

<sup>377</sup> *Id.* at 126. He posits two ways to learn, in the context of technological learning: 1) learning by doing; 2) learning by learning. Learning by doing may increase production immediately. Learning by learning (R&D) may increase production in the long term. Stiglitz hypothesizes that it may not help developing countries to switch to costly techniques that would increase production in the long term because the benefit tends to be very small in the short term. *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> KNOWLEDGE FOR DEVELOPMENT, *supra* note 360, at 26.

<sup>380</sup> Trans Atlantic Consumer Dialogue, Workshop on Global Access to Essential Learning Tools, Apr. 5, 2004 (unpublished notes) (on file with author).

<sup>381</sup> Stiglitz, *supra* note 280, at 312-13.

<sup>382</sup> KNOWLEDGE FOR DEVELOPMENT, *supra* note 360, at 38. Peter Drahos goes even further in distinguishing among different kinds of knowledge goods for different purposes.

Knowledge has more qualities than merely those of the “public good.” Within information economics it has been recognized that knowledge becomes more durable through use and that the use of knowledge often leads to more knowledge. . . .

. . . .  
The policy implications of information economics theory for intellectual property contrast strongly with those to be found in the appropriation model. The innovation model developed by Mandeville, for example, argues that highly innovative industries are crucially dependent on flows of uncodified information. . . .

The principal role of intellectual property is to pay for the delivery of what Kenneth Boulding . . . once termed “frozen knowledge” (embodied or codified knowledge).

INTELLECTUAL PROPERTY xvi-xvii (Peter Drahos ed., 1999) (citations omitted). Indeed, Drahos’ most recent analysis of knowledge goods extends far beyond the scope of this Article and can be summarized here as a taxonomy along several different axes: (1) pure v. impure; (2) independent of norms, exist as norms, dependent on norms; (3) capability-independent v. capability-dependent; (4) information goods: codified v. uncodified knowledge; (5) artifact-embodied v. skill-embodied. Drahos, *supra* note 43, at 52-55.

significant scale (approximately 1 billion people); another area of technological diffusers, absorbing new technology within a span of 5-25 years (approximately 3.5 billion people, including China, India, and Mexico); and a third group, which he calls “marginalized” (about 2.5 billion people).<sup>383</sup> With respect to the poorest countries, he suggests, among other things, a rethinking of the IPR regime, in particular the need for technology diffusion through copying and reverse engineering.<sup>384</sup>

In the context of the provision of materials for even technical education, these observations further buttress the claim that regulatory alternatives to intellectual property for increasing knowledge must be considered. Innovation may simply not be at issue when fundamental texts are already available and require dissemination. But even at a technical education level, states may have a strong policy justification for prioritizing imitation and diffusion over protection of knowledge goods. Thus a country’s provision of information could include “development based on access to public goods using strategies of free-riding and diffusion,”<sup>385</sup> depending on the circumstances. Yet, as noted above, these domestic regulatory strategies have been circumscribed by intellectual property globalization so far.

In any event, knowledge goods are important to development whether in the context of basic education or technical education. In either case, it is crucial to understand where to place national priorities, to build knowledge capacity and infrastructure. Building knowledge capacity is often a non-commercial endeavor and “few countries on their own and out of national interest would gather or develop knowledge that has no commercial value. Yet such knowledge is critical to the progress of developing countries on which balanced and stable future world economic growth will depend.”<sup>386</sup> Thus, there is a very strong public goods quality to knowledge production of any sort. Initial knowledge is a key input to the production of further knowledge.<sup>387</sup> Knowledge infrastructure can affect the pace of development and the extent to which developing countries can avail themselves of the fruits of the global public good of knowledge.<sup>388</sup> Technology transfer, in the context of the provision of either basic or

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<sup>383</sup> Sachs, *supra* note 217, at 133.

<sup>384</sup> *Id.* at 140. Similarly, Stiglitz suggests that optimal development strategies should focus on “dynamic comparative advantage,” which for developing countries may mean that “[a]s imitators, they need not expend the resources that the innovators had to spend on R&D; they need not repeat the mistakes that the innovators inevitably make as they experiment with alternative technologies. But as imitators, they cannot capture the rents commonly associated with innovation.” Stiglitz, *Learning to Learn*, *supra* note 62, at 11-42.

<sup>385</sup> Drahos, *supra* note 81, at 1, 4.

<sup>386</sup> Kaul et al., *Concepts, Policies and Strategies*, *supra* note 294, at 475.

<sup>387</sup> Stiglitz, *supra* note 280, at 312.

<sup>388</sup> *Id.* at 317.

technical education, should focus on development with this building block understanding.

Knowledge pops up frequently as a public good of critical concern to development specialists: “[k]nowledge is the most public of all public goods: it is strongly nonrival, and *its benefits cut across many issues of public concern.*”<sup>389</sup> Knowledge has a strong dose of “natural” public goods qualities and many possible constructed public goods qualities. Its “public” side can range from totally free access to limited access to an explicit policy of fostering inclusiveness.<sup>390</sup> Intellectual property globalization should account for the full range of uses to which knowledge is put and the range of policy options with respect to knowledge goods, particularly in the context of basic education. In other words, there is a lot of “room for manoeuvre” both for intellectual property protection in the form of copyright, on the one hand, and for limitations and exceptions to copyright in order to access knowledge goods for essential education, on the other.

As Ruth Okediji has recently pointed out, there is a taxonomy of different types of access,<sup>391</sup> as well different national and international provisions governing access for educational and library use.<sup>392</sup> Access will also depend on whether the knowledge is in print or digital form, which would be useful for distance education efforts in those countries that have available infrastructure.<sup>393</sup> The policy space for her proposed reforms in this area depends in large part on the recognition of a greater flexibility than currently exists under the applicable legal regimes.<sup>394</sup>

## 2. Substantive Equality and Copyright Norms

A proposal for a substantive equality norm within intellectual property globalization poses raises several conceptual challenges. How will it be identified by and incorporated into international bodies? How

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<sup>389</sup> Kaul et al., *How to Improve*, *supra* note 45, at 45 (emphasis added); *see also id.* (“The challenge is to strike a balance between promoting the broader use of knowledge (enhancing static efficiency) and providing incentives to generate more knowledge (fostering dynamic efficiency).”).

<sup>390</sup> Kaul & Mendoza, *supra* note 50, at 100.

<sup>391</sup> Okediji, *Sustainable Access*, *supra* note 136, at 148:

[A]ccess . . . encompasses the unencumbered right to utilize a creative work (uncompensated creative access); privately negotiated terms of use between owners and users (negotiated access); qualified opportunities to utilize certain types of works through compulsory licensing (mandatory compensated access); as well as the opportunity to purchase and own the physical embodiment of the protected content (bulk compensated access).

<sup>392</sup> *Id.* at 166-77.

<sup>393</sup> *Id.* at 177-80.

<sup>394</sup> *Id.* at 181-86.

will it be identified by and incorporated into the municipal law of various member states?

A substantive equality norm is arguably embedded within the key term “development,” a term that is explicitly referenced in the TRIPS preamble and objectives. The interpretive principles applied to “development” are relatively straightforward. According to the Vienna Convention of the Law of Treaties, any treaty term shall be given its “ordinary meaning”<sup>395</sup> and evidence to support a treaty’s context may include “a treaty’s own preamble and annexes . . . as well as . . . subsequent agreements among the parties, subsequent practices of the parties in the application of the treaty, and ‘any rules of international law applicable in the relations between the parties.’”<sup>396</sup>

Moreover, a WTO dispute settlement panel has noted that “that the text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part.”<sup>397</sup> And despite the seeming confusion surrounding this issue,<sup>398</sup> a treaty’s “context” includes “preambles and annexes.”<sup>399</sup> A different dispute settlement panel has announced that TRIPS should not be “read in ‘clinical isolation’ from public international law.”<sup>400</sup> Among other things, emerging customary international legal norms of development

<sup>395</sup> Vienna Convention art. 31(1), *supra* note 64. To resolve a dispute over TRIPS, a WTO dispute settlement panel explicitly relied on GATT *acquis*, customary rules of interpretation of public international law, and specifically Article 31 of the Vienna Convention. Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and their Member States*, WT/DS79/R (Aug. 24, 1998).

<sup>396</sup> JANIS, *supra* note 64, at 30.

<sup>397</sup> Section 110(5) Panel Report, *supra* note 31, at 17 n.49.

<sup>398</sup> As the Panel in the Canada Panel Report found:

[T]he principle of effectiveness . . . , as the Appellate Body . . . held in *Alcoholic Beverages*, meant that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility” . . . . The principle of effectiveness required that account be taken of both the contextual provisions, which indicated that intellectual property rights were not intended to be unlimited, and the objectives provision, which made it clear that the TRIPS Agreement sought a balance of rights and obligations. To fail to take those provisions into account, and to read Article 30 as if it were intended that the TRIPS Agreement should be “neutral *vis-à-vis* societal values”, as the EC contended, would be to render Articles 7, 8.1 and 30 *inutile*. Such a result was not possible, as all parties to this proceeding, except for the EC and Switzerland, agreed.

Canada Panel Report, *supra* note 58, at 89.

<sup>399</sup> Vienna Convention art. 31(2), *supra* note 64; *see also* GERVAIS, *supra* note 31, at 80:

The preamble to the TRIPS Agreement is an essential part of it. Under “GATT” law, preambles are on occasion relied upon to a considerable extent by panels when the wording of a provision is not clear or where it is susceptible to divergent interpretations. . . . The preamble, together with footnotes, should be considered as an integral part of the agreement, a condensed expression of its underlying principles.

<sup>400</sup> Gervais, *Intellectual Property, Trade & Development*, *supra* note 88, at 528 (citing Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted May 20, 1996)).

derive from inter-government organizational documents such as U.N. General Assembly resolutions and other forms of soft law.<sup>401</sup>

Thus, consistent with a law and globalization paradigm, which focuses on transnational norm-generating activity as an organic process, I suggest here a broad set of materials from which to elucidate the intellectual property substantive norm of equality.

Even prior to TRIPS, the term “development” had a component that was directed towards a capability approach rather than a pure economic growth approach, as evidenced by the use by the UNDP of the Human Development Index since 1991. Since TRIPS, legal documents addressing equality rather than growth-driven development have been directed only to intellectual property treaties such as TRIPS,<sup>402</sup> but also in the context of other globalization activities. For example, the U.N. Millennium Development Goals announced by the U.N. General Assembly clearly provide for a minimum threshold of material well-being; such a threshold implies if not expressly directs attention to distributional and egalitarian considerations in the administration of all development activities under its aegis.

The WTO and WIPO are quite different in their constitution and mandate. But arguably, there are overlapping and synergistic development mandates for both institutions. On the WIPO side, these include the United Nations charter itself, particularly Chapter IX (pertaining to International Economic and Social Co-operation), Articles 55 and 56;<sup>403</sup> the Agreement Between the United Nations and WIPO;<sup>404</sup> and other soft law evidence of equality-driven development offered by Argentina and Brazil in their proposal to the WIPO for a Development Agenda, such as “the Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action at the first phase of the World Summit on the Information Society, and most recently the Sao Paulo Consensus adopted at UNCTAD XI.”<sup>405</sup> In addition, the U.N. has declared a right to development, and it is arguable that the content of this right must

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<sup>401</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6 (6th ed. 2003).

The material sources of custom are very numerous and include the following: . . . the opinions of official legal advisors, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

*Id.*

<sup>402</sup> Doha Ministerial Declaration, *supra* note 15; General Council Decision, *supra* note 16.

<sup>403</sup> U.N. Charter arts. 55-56.

<sup>404</sup> UN-WIPO Agreement art. 1, *supra* note 13.

<sup>405</sup> *AB Proposal*, *supra* note 116, at 1.

contain a substantive equality norm.<sup>406</sup> While beyond the scope of this Article, the right to development is a potentially powerful source of equality norms, focused on collective notions of self-determination in tandem with other, individual, human rights, directed at “the constant improvement of an entire population’s well-being.”<sup>407</sup>

On the WTO side, the original 1994 Marrakesh Agreement establishing the World Trade Organization references the need to attend to sustainable development.<sup>408</sup> In addition, the more recent Doha Development Objectives,<sup>409</sup> particularly paragraph 19 of the WTO’s Doha Ministerial Declaration adopted on November 14, 2001,<sup>410</sup> sets a mandate for the TRIPS Council in the context of the Doha Development Agenda, to wit, “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.”<sup>411</sup> The Doha Plan of Action convened by the so-called Group of 77 and China in 2005, addressed TRIPS and development.<sup>412</sup> In addition, the WTO is

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<sup>406</sup> Declaration on the Right to Development, *supra* note 29; 3D, *supra* note 311, at 4 (describing the right to development as “particularly relevant in supporting claims for public participation in IP decision-making processes at the national, regional and international level”); *cf.* Richard Warren Perry, *Rethinking the Right to Development: After the Critique of Development, After the Critique of Rights*, 18 LAW & POL’Y 225 (1996) (examining the United Nations’ Declaration of the Right to Development in the context of critiques of development discourse and of rights discourse; arguing that the assertion of a right to development by human rights activists may subvert development bureaucracy).

<sup>407</sup> Obiora, *supra* note 29, at 383, 385-392.

<sup>408</sup> The view that sustainable development was a central part of the WTO’s mandate was affirmed by the Appellate Body in Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 152, WT/DS58/AB/R (Oct. 12, 1998). I am indebted to James Gathii for pointing this out to me.

<sup>409</sup> Doha Ministerial Declaration, *supra* note 15.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* ¶ 19.

<sup>412</sup> Group of 77, Second South Summit, Doha Plan of Action, G-77/SS/2005/2 (June 12-15, 2005), available at [http://www.g77.org/southsummit2/doc/Doha%20Plan%20of%20Action%20\(English\).pdf](http://www.g77.org/southsummit2/doc/Doha%20Plan%20of%20Action%20(English).pdf).

[T]o enhance the development dimension of the international Intellectual Property Rights system, taking into account the different levels of development of developing countries with a view to ensuring affordable access to necessary basic products, including medicines and educational tools and software, the transfer of knowledge, the promotion of research and stimulation of innovation and creativity, and in this regard we call:

- a. for action to accelerate the work on the development related mandate concerning the TRIPS Agreement and the implementation related issues in the Doha Ministerial Declaration, especially on the issues of making intellectual property rules of TRIPS supportive of the objectives of the Convention on Biological Diversity;
- b. on WIPO, as a UN Agency, to include in all its future plans and activities including legal advice a development dimension that includes promoting development and access to knowledge for all, pro-development normsetting, establishing development friendly principles and guidelines for the provisions of technical assistance and the transfer and dissemination of technology . . . .

included by the statement at Monterrey in March 2002, in which governments welcomed “the decisions of the World Trade Organization to place the needs and interests of developing countries at the heart of its work programme.”<sup>413</sup>

To the extent that the meaning of “development” is ambiguous or obscure, the negotiating history (or *travaux préparatoires*) of TRIPS becomes relevant. Again according to the Vienna Convention Article 32, negotiating history falls within “Supplementary Means of Interpretation.”<sup>414</sup> A dispute settlement panel of the WTO has accepted Article 32 as an applicable interpretive principle with respect to TRIPS.<sup>415</sup> The insistence of the original Group of 14 developing countries to include references to “development” within Articles 7 and 8 in TRIPS support a substantive equality norm, especially in the face of an opposing “A” draft proposed by the developed countries and ultimately enacted as the final treaty text.<sup>416</sup> While opposition of the developed countries may indicate that the norm was not one that is accepted by all treaty parties, it is evidence that should be given some weight. As a leading treatise writer on TRIPS has stated, this negotiating history “may lead a panel to take a longer look at how these provisions should be interpreted in the context of the Agreement as a whole, especially with respect to the need for ‘balance.’”<sup>417</sup> Moreover, some of the same original Group of 14 member states (particularly Argentina and Brazil) are now ones that are pushing for a substantive concept of development via the Development Agenda proposal before WIPO. As the UNCTAD/ICTSD Resource book states, many developing countries 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

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*Id.*

<sup>413</sup> International Conference on Financing for Development, Mar. 21-22, 2002, *Monterrey Consensus*, ¶ 26, U.N. Doc A/CONF/198/11, available at <http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf>.

<sup>414</sup> Vienna Convention, *supra* note 64, Article 32:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure . . . .

<sup>415</sup> Canada Panel Report, *supra* note 58.

<sup>416</sup> Gervais, *Intellectual Property, Trade & Development*, *supra* note 88; cf. Okediji, *TRIPS Dispute Settlement*, *supra* note 77, at 613 (discussing example of the United States’ persistent objection to moral rights as a possible exception to the full operation of the TRIPS moral rights provision); Shubha Ghosh, *The Merits of Ownership; Or, How I Learned to Stop Worrying and Love Intellectual Property; Review Essay of Lawrence Lessig, the Future of Ideas, and Siva Vaidhyanathan, Copyrights and Copywrongs*, 15 HARV. J.L. & TECH. 453 (2002).

<sup>417</sup> GERVAIS, *supra* note 31, at 120.

develop their own state practice before the practices of developed Members are used to interpret the TRIPS Agreement.<sup>418</sup>

Sources of public international law outside of intellectual property per se guide the current understanding of “development” as equality-driven economic growth. As astute intellectual property pluralists such as Helfer have noted:

[L]awmaking has broken out of the confined institutional spaces of established international IP fora, such as WIPO and the WTO, and has expanded into a broad and growing array of other international venues in environmental law, human rights, and public health . . . [generating] what international relations scholars have referred to as “counterregime norms,” . . . to integrate . . . into the WTO and WIPO.<sup>419</sup>

As he also observes, “[w]ith only a few exceptions, there are no clear hierarchies among international legal rules. Nor is there a supreme international judicial body or legislature with the power to comprehensively reconcile inconsistent rules or balance competing policy goals.”<sup>420</sup>

Some international human rights treaties<sup>421</sup> directly address intellectual property, and this increasingly is an area that may be a source of emerging equality norms.<sup>422</sup> While human rights treaties and the soft law mechanisms that have been deployed to challenge intellectual property norms are ancillary to WTO and WIPO treaties,<sup>423</sup>

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<sup>418</sup> UNCTAD-ICTSD CAPACITY BUILDING PROJECT ON IPRS, *supra* note 204, § 3.3.

<sup>419</sup> Helfer, *Mediating Interactions*, *supra* note 113, at 127.

<sup>420</sup> *Id.*

<sup>421</sup> Peter Drahos, *Intellectual Property and Human Rights*, 3 INTELL. PROP. Q. 349 (1999) (discussing Universal Declaration of Human Rights arts. 27.1 & 27.2, International Covenant on Civil and Political Rights of 1966 (ICCPR), and International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)).

<sup>422</sup> *Cf.* Helfer, *supra* note 30, at 4:

The ICESCR Committee’s initial foray into the intellectual property arena began in the Fall of 2001, when it published an official Statement on Human Rights and Intellectual Property that contained a preliminary analysis of the treaty’s intellectual property provisions and their relationship to other economic and social rights. The Statement contemplated that the Committee would eventually publish more extensive “general comments” on the ICESCR’s intellectual property provisions.

Helfer concludes that the initial comment focused on equality as it pertains to authors rather than users.

<sup>423</sup> *See, e.g.*, Universal Declaration of Human Rights art. 27, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 12, 1948). Subsection one states that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,” whereas subsection two states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” *Id.* See Helfer, *Regime Shifting*, *supra* note 25, for more detail on human rights related to intellectual property; see also the developing literature on trade, intellectual property and human rights. *See, e.g.*, Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of the International Markets*, 37 LOYOLA L.A. L. REV. 407 (2003); Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 FLA. J. INT’L L. 155 (2002); Marjorie Cohn,

they can be viewed as additional evidence of substantive equality norms that should be incorporated into the intellectual property calculus through the language of development. If they are to be integrated with intellectual property in a meaningful encounter,<sup>424</sup> then they should be incorporated through a substantive equality normative principle. Other human rights norms address the norm of equality. Article 26 of the Covenant on Civil and Political Rights (CCPR Article 26)<sup>425</sup> guarantees, for example, that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>426</sup>

If equality is incorporated into TRIPS via the key term “development,” then this substantive equality norm is also incorporated within domestic law through TRIPS. Arguably, both the Preamble and Article 8’s references to development then can be deployed within domestic welfare calculations when basic needs are at issue in the domestic balance.

There are several ways in which a general substantive equality principle in intellectual property globalization, integrated throughout intellectual property norm setting and norm interpretation activities, might impact the provision of basic education public goods such as the availability of textbooks for developing countries. Some of the suggestions below have been made by others, but my claim here is that

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*The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 GA. J. INT’L & COMP. L. 427 (2001); Thomas F. Cotter, *Introduction to IP Symposium: Intellectual Property, Development and Human Rights*, 14 FLA. J. INT’L L. 147 (2002) (with articles by Winston P. Nagan, Susan K. Sell, Shubha Ghosh, and James Thuo Gathii).

<sup>424</sup> Nussbaum, *supra* note 148, at 300:

[A] list of human rights typically functions as a system of side-constraints in international deliberation and internal policy debates. . . . We are doing wrong to people when we do not secure to them the capabilities on this list. The traditional function of a notion of rights as side-constraints is to make this sort of anti-utilitarian point, and I see no reason why rights construed as capabilities—or analyzed in terms of capabilities—should not continue to play this role.

<sup>425</sup> International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.*

The European Convention also has similar language. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (Nov. 4, 1950); American Convention on Human Rights art. 1, 1144 U.N.T.S. 123 (Nov. 22, 1969).

<sup>426</sup> International Covenant on Civil and Political Rights art. 26, *supra* note 425. In U.S. Equal Protection Clause jurisprudence, governmental regulation would be subject to judicial scrutiny, the judicial deference towards which would depend on how “suspect” the particular governmental classification is considered to be. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).

a substantive equality principle linked to basic needs would make a difference in outcome for the neediest.

This norm also does not defer to the goodwill or good intent of domestic policymakers to achieve the optimal resource distribution of knowledge goods, based on a utilitarian social welfare calculus. It embodies a heightened skepticism towards both domestic and global decision-makers with respect to balance-setting, at least in the context of provision of basic goods.<sup>427</sup> (We may not be so concerned about agency capture when it comes to the provision of non-basic goods such as Hollywood DVDs.) At a very general level, such a principle would operate in the following directions.

Norm interpretation:

- Incorporating a principle of strict scrutiny into the interpretation of relevant treaty texts such as TRIPS, so as to influence the outcome of international intellectual property dispute resolution;<sup>428</sup>
- Incorporating a strict scrutiny principle into domestic law, regardless of the context of international treaty compliance, and applicable not only to the public regulation but also to private ordering (such as licensing practices being challenged by contract law).

Norm setting:

- Amending existing treaties to include language allowing for the incorporation of a development-related substantive equality norm;
- Expanding the flexibilities, exceptions and limitations within existing treaties; expanding transitional periods;<sup>429</sup>
- Expanding technical assistance to include development of indigenous publishing capacity;<sup>430</sup>

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<sup>427</sup> Rosemary Coombe has astutely observed that national governments are not always the best guardians of their citizens' welfare interests. See Coombe, *Intellectual Property*, *supra* note 20, at 59; accord Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002) (arguing that indigenous groups and non-U.S. citizens inside the U.S. must rely on international human rights instruments to enforce domestic civil rights); see also Sassen, *supra* note 234, at 71:

A basic proposition in discussions about the global economy concerns the declining sovereignty of states over their economies . . . . Yet this proposition fails to underline a key component in the transformation of the last fifteen years: the formation of new claims on national states to guarantee the domestic and global rights of capital. What matters for our purposes here is that global capital has made these claims and that national states responded through the production of new forms of legality.

<sup>428</sup> TRIPS, *supra* note 5, at pmb1., arts. 7, 8.

<sup>429</sup> *Id.* at art. 66.1 (regarding transitional periods).

<sup>430</sup> *Id.* at art. 66.2 (regarding other special provisions for technical assistance).

- Creating new treaties within intellectual property venues such as WIPO that directly address the question of basic needs;<sup>431</sup>
- Revising the Berne Appendix to include more expansive mechanisms for compulsory licensing for education, libraries, translation and other activities directed at the needs of developing countries.<sup>432</sup>

Norm alternatives:

- Expanding collective licensing schemes<sup>433</sup> and finding other alternative ways to compensate IP producers in developed countries;<sup>434</sup>
- Facilitating the development of domestic publishing capacity;
- Advocating for TRIPS plus standstill or rollback;<sup>435</sup>
- Encouraging the participation and increasing the effectiveness of indigenous social movements who could speak on or behalf of education “consumers” within their own countries, and link them with others to form a global social consensus for access to essential educational materials.<sup>436</sup>

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<sup>431</sup> See *supra* Section I.B (discussing *AB Proposal*, *supra* note 116); see also Drahos, *An Alternative Framework*, *supra* note 8, at 15-16 (describing a “framework treaty on access to knowledge” that would state “general principles . . . that would constitute the normative code for the evolution of the treaty . . . [based on a] human rights framework.” The proposed Treaty on Access to Knowledge is put forth by a coalition of civil society organizations and developing countries. See CPTech.org, May 9, 2005 Draft Text of Treaty on Access to Knowledge, <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>. (last visited April 13, 2006).

<sup>432</sup> See Berne Convention for the Protection of Literary and Artistic Works app., *supra* note 14; Okediji, *Sustainable Access*, *supra* note 136, at 181-86. See generally Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000).

<sup>433</sup> See the suggestions listed in the CIPR REPORT, *supra* note 10, at 108-09. See also Helfer, *supra* note 30; J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for OnGoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT’L L. 11, 56-57 (1998) (advocating the establishment of a forum to “facilitat[e] relations among foreign rightsholders, local enterprise, and government agencies”).

<sup>434</sup> See Joel P. Trachtman, *The Missing Link: Coherence and Poverty at the WTO*, 8 J. INT’L ECON. L. 611, 618 (2005) (advocating for a greater scope of redistributive concerns addressed by the WTO and possibly ameliorated by side payments); James Love, *Risks and Opportunities for Access to Knowledge*, in VISION OR HALLUCINATION? BRIEFING PAPERS TOWARDS THE WORLD SUMMIT ON THE INFORMATION SOCIETY 187, 203 (2005), available at [http://www.choike.org/nuevo\\_eng/informes/3592.html](http://www.choike.org/nuevo_eng/informes/3592.html) (describing a proposed A2K Treaty project that would include provisions to “finance free and open knowledge goods”); cf. William Fisher, *Don’t Beat Them, Join Them*, N.Y. TIMES, June 25, 2004, at A25 (advocating Internet user monthly licensing fee in lieu of copyright royalties for downloaded music files); Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSP. 121, 134-36 (2005) (outlining various business models in a world without copyright).

<sup>435</sup> See Maskus & Reichman, *supra* note 9, at 36-39.

<sup>436</sup> Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT,

In the specific context of TRIPS interpretation, the application of a general substantive equality norm might result in the following outcomes. A WTO dispute settlement panel might decide that Country A's policy to exclude copyright protection for textbooks and allow diffusion to flourish for a limited period of time in a specific field of study is acceptable under the three step test of Article 13.<sup>437</sup> Or, as Ruth Okediji proposes, a dispute settlement panel might develop a proportional approach to access in the context of determining whether a country's compulsory licensing of educational materials violates TRIPS.<sup>438</sup>

### 3. Some Parting Remarks to the Inevitable Critics

This proposed legal norm may please no one. For one thing, it is not particularly clear in its application.<sup>439</sup> But as Carol Rose has written in a different context, perhaps that is just the point. In some instances, the kind of property rule that is required is one of viscosity or fuzziness rather than clarity.<sup>440</sup> While clear rights of exclusion serve positive purposes in facilitating market transactions, they can also be dysfunctional in conditions that do not approximate market assumptions. Viscosity serves when there is no pressing need for rapid market transactions but where property rights may need to "be refashioned to meet new demands."<sup>441</sup> Moreover, a basic principle of substantive equality, once accepted, can easily be inserted into intellectual property standard-setting organizations in a decentralized network model of global regulation and policy-making.<sup>442</sup>

Others may view this Article as an anti-intellectual property tract. It is not. Among other human capabilities, both Sen and Nussbaum believe access to property and employment is central to human

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*supra* note 55, at 161, 180.

<sup>437</sup> I am indebted to Laurence Helfer for this example.

<sup>438</sup> Okediji, *Sustainable Access*, *supra* note 136, at 185-86. For further suggestions for copyright reform in the interests of developing countries, see *id.* at 182-86 (suggesting the development of doctrines such as an international fair use doctrine or copyright misuse doctrine; increasing the accountability of intellectual property institutions; establishing substantive copyright maxima).

<sup>439</sup> My approach is spelled out in greater detail in a forthcoming piece, where I apply the substantive equality principle to Article 10 of the Berne Convention in order to facilitate building educational capacity in developing countries. See Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. (forthcoming 2007).

<sup>440</sup> Carol M. Rose, *Property in All the Wrong Places*, 114 YALE L.J. 991 (2005) (reviewing MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003) and KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM* (2002)).

<sup>441</sup> *Id.* at 1006.

<sup>442</sup> See Drahos, *An Alternative Framework*, *supra* note 8, at 21.

flourishing. Thus, this Article is not claiming that intellectual property globalization should be completely dismantled. Indeed, small entrepreneurs and traditional knowledge holders may benefit from appropriate forms of intellectual property protection, broadly defined. A substantive equality principle helps to reframe government intervention as a regulatory choice, which can be accompanied by various degrees of skepticism, depending on the interests at stake. If anything, I am arguing against the idea of intellectual property transcendentalism, and in favor of returning to a more nuanced, culturally and contextually-sensitive, subject-matter-sensitive consideration of the intellectual property balance—something that is going rapidly extinct in the context of globalization.<sup>443</sup>

My effort will not please development skeptics. Under this view, it may be no accident that the key terms in the Preamble and other TRIPS provisions, or in the WIPO Agreement, that reference development have been virtually ignored so far by these organizations. As Alan Story has written, the intellectual property balance is often an “incoherent legal fiction” in the context of development.<sup>444</sup> I myself share some of this skepticism, but my own particular take toward development could be characterized as “critical modernism” which sees the “deficiency of development . . . in its limited aims (an abundance of things) and the timidity of its means (copying the West).”<sup>445</sup> Like many others who have observed this field over the past two decades, I am a messenger

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<sup>443</sup> *Accord* Lester C. Thurow, *Needed: A New System of Intellectual Property Rights*, HARV. BUS. REV., Sept.-Oct. 1997, at 94 (arguing against a one-size-fits-all system and in favor of a regime that accounts for differences in private versus public knowledge, developed versus developing countries, and different industries, types of knowledge, types of inventors and types of patents); Gordon & Sylvester, *supra* note 68, at 17 (urging a critical examination of the development assumption that “tradition was an impediment to modernization, and Third World countries were encouraged to abandon their traditional lifestyles, beliefs and value systems in favor of ‘modern’ Western norms and values”).

<sup>444</sup> Story, *supra* note 158, at 787; *id.* at 780-81:

Does [J.K.] Rowling’s [Harry Potter] story have the same cultural meaning in the U.K. as the meaning that the Urdu poems have in India? And have they both been produced for the same reasons and in even roughly similar or equal circumstances? Is it likely that the Nigerian film will get billing equal with *The Hulk* in Los Angeles movie theaters, let alone those in Lagos? And do filmmakers in the two countries have equality in their opportunities to make films?

*See also id.* at 767:

The purported balance or equilibrium of copyright—that is, a system that acts to balance the interests of owners and users—does not work, as a practical matter, in this globally unequal circumstance. The power inequality between corporate copyright owners in rich countries and users in poorer countries of the South reveals the theoretical incoherence of treating copyright as a balanced or balanceable system and suggests the nonapplicability of the “balance” metaphor in international copyright discourse.

<sup>445</sup> PEET WITH HARTWICK, *supra* note 2, at 197. The authors describe the methodology as “[c]riticize everything, convert critique into proposal, criticize the proposal, but still do something.” *Id.* at 198.

delivering a fairly straightforward if unpopular message and simultaneously trying to be part of the solution.<sup>446</sup>

I conclude this section with two short vignettes, which both occurred during the infamous Battle in Seattle, the third WTO Ministerial held in Seattle in 1999.

The day after the riot police began to throw tear gas at protesters in downtown Seattle, I was scheduled to give a talk at Plymouth Congregational Church at Sixth and Madison for a group that espoused a “No Patents on Life” position. (This is a position, by the way, that I do not necessarily share.) I was anxious about going downtown, especially to the very corner where the violence first began. However, once I made my way to the church, I was astonished to find that it was filled to the maximum with ordinary people: citizens who were interested in finding out about patents and what impact they had on global trade policy. It was standing room only and even though the coffee was horrible (which is a sacrilege in Seattle), people stayed well past the end of the panel discussion to continue debating the issues.

During that time, I also invited someone who was in town for the WTO ministerial<sup>447</sup> to give a guest lecture in my intellectual property class. I knew that he had been working for several years to publicize the issue of access to patented ARV drugs in sub-Saharan Africa. Trained as an economist, my guest speaker brought piles of transparencies with him. He began by showing charts with pharmaceutical prices, government research and development support, and firm marketing expenditures. He spoke in policy wonk language about the problem. Finally, about halfway through his presentation, he stopped his presentation and began to cry. My law students were stunned. He finally explained to them that he had gotten to know so many people in Africa through his work on this issue and many had since died.

#### CONCLUSION: TURNING INTELLECTUAL PROPERTY SWORDS INTO DEVELOPMENT PLOWSHARES

The concept of intellectual property has been forced to encounter the concept of development. However, the policy levers *within*

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<sup>446</sup> ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 43 (1998):

Like [Pierre] Schlag, I believe that “the typical supposition within the legal community that intellectual endeavour can and must converge in ‘solutions’ or ‘conclusions’ has a real tendency to kill thought,” but I am not sufficiently rationalist to believe that it is possible to convey an “is” without imparting an “ought.”

<sup>447</sup> For privacy reasons, I am not publishing details such as his name.

intellectual property law to address the core concerns of development are truncated. Intellectual property law is global in name but frighteningly insular in practice.

If the instrumental mandate of intellectual property law is truly to increase knowledge for positive purposes, then there must be fuller consideration of the provision of basic needs and other global public goods such as food security, education, and health care. Undernourished, diseased, dying, undereducated, or extremely impoverished populations are viewed by many as negative externalities both qualitatively and quantitatively more serious than the danger of under-incentivizing authors and inventors. The latter is the externality to which intellectual property law devotes its exclusive attention. This disjuncture over priorities has highlighted an increasingly untenable intellectual solipsism of the intellectual property policymaking framework, as intellectual property globalization encounters ethical concerns associated with development.

Intellectual property has not paid attention to recent development economics approaches that have examined the ethical and distributional consequences of economic growth. Moreover, the capture of the intellectual property policy debate by an absolutist discourse of economic rights obscures the politically and socially constructed nature of what is essentially a state regulatory intervention into what economists have come to term a public goods problem. Intellectual property globalization highlights the increasing imbalance between the protection of knowledge goods via intellectual property and the protection of other public goods, however denoted.

Within the domestic U.S. policy framework, distributional effects of intellectual property-driven growth have not been a central concern. This insouciance is reflected in our recent international negotiating positions, which are widely acknowledged to be driven heavily by the demands of certain intellectual property industry perspectives. Ignoring other perspectives can lead, and indeed have led, to inappropriate if not unjust legal rules. One important consequence of not connecting intellectual property to basic needs is that substantive equality is severely undervalued in intellectual property even though equality, as a public good in its own right, has a critical role to play in enhancing the efficiency norms that drive intellectual property law.

If the concept of intellectual property is truly to engage with, and not just brush by, the concept of development, then intellectual property globalization must incorporate a substantive equality principle within the intellectual property decision-making framework itself.