

Global Intellectual Property Governance (Under Construction)

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Top down as well as bottom-up models of regulation are shifting to a governance paradigm characterized by the greater interaction among public, private and civil society sectors, as well as potential increased flexibility of law. As applied to intellectual property, particularly in the international context, governance literature is emerging but still episodic. In this Article, I examine the World Intellectual Property Organization's Development Agenda, currently being implemented through its Committee on Development and Intellectual Property. WIPO's efforts to address global development goals with intellectual property can be theorized through the more participatory and dynamic legal mechanisms promised by global governance. Among the challenges are fragmentation, policy incoherence and a relative lack of due process of softer law, as enacted and as enforced. The pragmatic impact of this major WIPO initiative — evaluated both

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in terms of the projected benefits and risks of global governance — remains to be seen.

INTRODUCTION

"Development" is inherently both an under- and overdeveloped idea.¹ Thus, the framing skills of regulatory entrepreneurs are of critical significance in linking it to intellectual property within the interplay of global governance structures, agents and their mediating institutions.² A governance paradigm supplements and even substitutes for the binary "command and control" or decentralized alternatives that have dominated the literature of regulation.³ Defined recently as "organized efforts to manage the course of events in a social system,"⁴ among the chief characteristics of newer governance approaches are the kinds of agents involved, including private-public partnerships and/or non-state actors including civil society.⁵ The increasing roles of these actors in a nodal⁶ or networked⁷ regulatory framework can encourage, among other things, greater collaboration, competition, and/or diversity, as they work with traditional state actors.⁸ Another relative innovation of global governance theory is the heightened awareness of the techniques or technologies of governance, specifically, the differing degrees of normativity characterizing the norms used to govern.⁹ Governance scholars invoke the term "soft law," for instance, which international law scholars use to denote something (there is some dispute over exactly what) less

1 Gustavo Esteva, *Development*, in THE DEVELOPMENT DICTIONARY 6 (Wolfgang Sachs ed., 1991).

2 SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 182 (2003).

3 Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345-48 (2004); Janet Hope, Dianne Nicol & John Braithwaite, *Regulatory Capitalism, Business Models and the Knowledge Economy*, in REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 109, 115-26 (Edward Elgar ed., 2008).

4 Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 3 (2008).
5 *Id.* at 16, 21.

6 Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 TEMP. L. REV. 401 (2004).

7 Burris et al., *supra* note 4, at 22.

8 Lobel, *supra* note 3, at 376-81.

9 Burris et al., *supra* note 4, at 30; Lobel, *supra* note 3, at 388.

binding and enforceable than positive treaty law¹⁰ — nonetheless something to which attention needs to be paid, for often these nimbler expressions of normativity eventually make their way into the overall regulatory matrix along a spectrum, rather than a binary between soft (often ignored) and hard (often over-emphasized). Conversely, when it pays attention to intellectual property, global governance literature so far has approached it either as an occasion for celebration, especially in the context of digital technologies,¹¹ or dirge, particularly when discussing the asymmetrical bargain driven in large part by private actors in catalyzing the WTO TRIPS agreement.¹² This Article attempts to trace further the liminal zone between soft and hard law, by describing how development is being effectuated through softer global intellectual property governance mechanisms such as recommendations promulgated within the World Intellectual Property Organization (WIPO). In doing so, it links the governance analysis to its pluralism antecedents.¹³ Legal

10 Samantha Besson, *Theorizing the Sources of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 170, 171 (Samantha Besson & John Tasioulas eds., 2010). Soft law is defined as "rules which are neither strictly binding nor completely void of any legal significance," MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 30, 52-53 (4th ed. 2003) (quoting Rudolf Bernhardt, *Customary International Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 61, 62 (Rudolf Bernhardt ed., 1984)); see also Mary E. Footer, *The Role of "Soft" Law Norms in Reconciling the Antinomies of WTO Law 2-3* (July 14, 2008), available at <http://ssrn.com/abstract=1159929> (paper presented at the Society of International Economic Law (SIEL) Inaugural Conference 2008) ("The term 'soft law' in international law and international relations is often used to characterize a variety of extra-legal or non-legal norms, which are 'in the twilight between law and politics' and which, while deliberately of a non-binding character, have legal relevance."). Laurence Helfer provides examples of soft law such as U.N. resolutions or position papers. See 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, 78 (2004). Doris Long mentions model laws, restatements, legal guides, model rules, and joint recommendations. Doris Estelle Long, *"Democratizing" Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT'L & COMP. L. 217, 258, 267 (2002). Other examples in intellectual property might include fair use guidelines or copyleft licenses, Niva Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 101 (2005), or the Uniform Domain Name Dispute Resolution Policy (UDRP) promulgated by the World Intellectual Property Organization (WIPO). Graeme Dinwoodie, *The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 61, 76-79 (Daniel Gervais ed., 2007).

11 Lobel, *supra* note 3, at 432.

12 See, e.g., Burris et al., *supra* note 4, at 26.

13 Margaret Chon, *A Rough Guide to Global Legal Pluralism*, in WORKING WITHIN

scholarship in the domain of international law generally lacks the analysis of "power relations among legal spheres, the extent to which any legal sphere expresses local normative standards, and social interactions among spheres."¹⁴ The international intellectual property literature in particular has not explored alternative norm agents such as non-state actors or alternative norms such as soft law as precisely as it has explored the inter-regime challenges posed by the encounters between intellectual property and public health or human rights through the rubric of regime-shifting.¹⁵ This is an attempt to move the scholarly conversation forward.

The recent "sources of law" approach by Dinwoodie and Dreyfuss evokes norm-setting and norm interpretation within a newer governance paradigm as applied to the TRIPS context.¹⁶ Weaving back and forth between formal, hard law such as the WTO Dispute Settlement Body's (DSB) decisions and informal soft law norms such as "Reports of Standing Committees, Model Law, or the advice given by WIPO technical advisors to WTO members,"¹⁷ they taxonomize the possible universe of norms available to the DSB in addition to the treaty text; they also caution that not all norms are equal or equally transparent.¹⁸ Most references to soft law in the

THE BOUNDARIES OF INTELLECTUAL PROPERTY 446 (Rochelle Dreyfuss, Harry First & Diane Zimmerman eds., 2010) (suggesting that a pluralistic exploration of global intellectual property could include, among other dimensions, a more robust parsing of: "(1) *actors* (or the de-centering of the state); (2) *directions* (or the de-centering of a top-down regulatory process and of international law's focus on public or so-called formal 'hard' law); and (3) *domains* (or the de-centering of intellectual property's master narratives, particularly of innovation-fueled economic development)").

14 Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 *STUD. L. POL. & SOC'Y* 149, 151 (2008) ("Despite the excellent legal scholarship on international law processes . . . there has been relatively little *sociolegal* scholarship in this domain. One consequence of th[is] absence . . . is a lack of attention to three critical domains of sociolegal analysis: the relations of power among legal actors and legal regimes, processes of meaning making and legal consciousness, and the impact of various structures of social relationships on formal relationships or informal social processes such as shaming and social pressure . . .").

15 Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 *LOY. L.A. L. REV.* 323, 408-17 (2004); Helfer, *supra* note 10, at 42 n.186.

16 Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 *HOUS. L. REV.* 1187, 1214-33 (2009).

17 *Id.* at 1225.

18 *Id.* at 1226; see also Michael Fromkin, *Semi-Private International Rulemaking: Lessons Learned from the WIPO Domain Name Process*, in *REGULATING THE*

international intellectual property literature, by contrast, do not describe what might make it more or less reliable as a source of norms. There are "softer" forms of hard law and "harder" forms of soft law. In the area of fair trade standards, for example, some private standards originally promulgated by non-governmental organizations (NGOs) or private firms become "harder" by virtue of being registered as certification marks with the U.S. Patent and Trademark Office (USPTO), or even "harder" because they further comply with standards set by the International Organization for Standardization (ISO), which in turn allows for the possibility of compliance with Article 2 of the WTO Agreement on Technical Barriers to Trade, itself a presumption that the standard is not a trade barrier under the WTO framework.¹⁹

The narratives within emerging global governance models draw from various theoretical strands: a sociolegal focus on agents and social process, a critical legal focus on structural privileges, as well as a traditional international relations focus on state power. Decentralized or distributed global governance models have recently emerged in the context of sustainable forestry management, for example, in which various non-state actors such as public interest NGOs or trade associations set private standards ultimately adopted by public agencies.²⁰ At their most triumphal, these narratives of multi-stakeholder governance systems "are best understood as compound accountability systems, resting on . . . open and transparent decisional procedures, and dynamic competition among certification programs for business and public acceptance."²¹ Other accounts of global governance as applied to international intellectual property focus on the Internet as an innovative regulatory host for non-state-based governance, including institutions such as the Internet Corporation for Assigned Names and Numbers (ICANN)²² or private intermediaries with jurisdiction over so-called user-generated content, where norms of creators and these corporate intermediaries connect and sometimes clash.²³ Similarly, some sociolegal

GLOBAL INFORMATION SOCIETY 211 (Christopher T. Marsden ed., 2000), available at <http://www.law.miami.edu/~froomkin/articles/tprc99.pdf>.

19 Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311, 2323-24 (2009).

20 Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programs*, in *RESPONSIBLE BUSINESS? SELF-GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS* 259 (Olaf Dilling et al. eds., 2007). Similar processes have occurred in the certification of fair trade commodities such as coffee. See also Chon, *supra* note 19.

21 Meidinger, *supra* note 20, at 284.

22 Lobel, *supra* note 3, at 432.

23 Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 *THEORETICAL INQUIRIES L.* 309 (2011).

scholars have articulated nodal governance theory, which describes sites "where knowledge, capacity and resources are mobilized to manage a course of events,"²⁴ and where ensuing norms can be set by private actors, whether motivated by public or private interests. These alternative models of governance share an emphasis on decentralized approaches to regulation, often driven by non-state actors (or regulatory entrepreneurs) through soft law. Indeed, norms may even be generated through information gathering or other social practices²⁵ and not by the coercive power of legal rules.

Some emerging global governance models share a common focus on power relations among actors within a systems perspective. The concept of regime-shifting, imported from the international relations literature, describes the inter-regime aspects of global intellectual property,²⁶ where both powerful and less powerful state actors can and do shift venues — or forum-shop — among different, coexisting regulatory, mostly public law, regimes. Other scholars have produced detailed case studies of private interests driving public law in international intellectual property regimes, resulting in asymmetric public law norms such as TRIPS.²⁷ These less sunny accounts have typically focused on the primary role of private industry association actors rather than public interest NGOs. They caution that powerful state actors in global governance structures within a regime complex such as international intellectual property may continue to press their advantage, echoing international law scholars such as Eyal Benvenisti and George Downes who worry about the problems of fragmented versus integrated international regimes.²⁸

These various global governance models and narratives are nonetheless still partial. They are evolving from the traditional preferences within the

24 Scott Burris, Peter Drahos & Clifford Shearing, *Nodal Governance*, 30 AUSTL. J. LEGAL PHIL. 30 (2005), available at <http://ssrn.com/abstract=760928>.

25 Andrew T.F. Lang, *Regimes of Law and Regimes of Knowledge: Governing Global Services Trade* (London Sch. of Econ. Legal Studies, Working Paper No. 15/2009, 2009), available at <http://ssrn.com/abstract=1423538>; Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009).

26 Yu, *supra* note 15, at 408-17; Helfer, *supra* note 10, at 42 n.186.

27 PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 196-97 (2002).

28 Eyal Benvenisti & George Downes, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597 (2007) ("[F]ragmentation is a . . . serious problem . . . because it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law.").

intellectual property literature for analysis based on sovereign actors, public law and the innovation and economic growth paradigms. Among other things, what is missing is more consistent attention to alternative agents and norms (or the various interfaces between these and "law on the books") as they pertain to global public goods besides knowledge.

In the remainder of this Article, I attempt to expand on our current partial understanding of global intellectual property governance. In Part I of the Article, I briefly discuss the effort to promote global development, which has been not fully connected to intellectual property despite textual support within soft and hard law documents to do so. In Part II, I focus on the possible construction of global intellectual property governance, taking the WIPO Committee on Development and Intellectual Property (WIPO CDIP) as a case study. In Part III, I reverse this process and deconstruct or assess this particular governance effort, in light of the question that Talia Fisher has asked with respect to these newer models generally: That it "is not only one of decentralization versus centralization of the law, but, also, decentralization to what entity, to what sort of legal agent?"²⁹ I would add to her important question: with what sort of norm? Nonetheless, different governance mechanisms, including self-governing cultural commons, independent of markets or states, are venues in which viable and flexible soft norms for intellectual property may develop in "institutions intermediate between private property and the state . . . sometimes called 'common property' or 'limited commons' and generally . . . collective (but not necessarily governmental or even formal) means for sharing and making productive and sustainable use of resources . . . [in forms] various and highly contextual."³⁰ A governance approach predicts a "more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals."³¹ Whether pluralistic governance regimes are superior to integrated regimes³² or whether less powerful actors, at

29 Talia Fisher, *Nomos Without Narrative*, 9 THEORETICAL INQUIRIES L. 473, 501 (2008).

30 Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 675, 676 (2010).

31 Lobel, *supra* note 3, at 344.

32 Robert O. Keohane, *The Regime Complex for Climate Change* (Feb. 3, 2010) (paper presented at the New York University International Legal Theory Colloquium 2010), available at <http://iilj.org/courses/documents/2010Colloquium.Keohane-Victor.pdf>; Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, (Hebrew Univ. Int'l Law Research Paper No. 07-08, 2008), available at <http://ssrn.com/abstract=1249432>.

the end of the day, will experience more substantive equality,³³ will depend on "structured agency"³⁴: how relevant agents engage with intellectual property governance structures through various global institutions. It will also depend quite a bit on their abilities to frame such key terms as "development" via both hard and soft law. In addition to potential problems of fragmentation and policy incoherence, other issues lurk, including possibly missing components of due process of soft law.

I. DEVELOPMENT AND/OR INTELLECTUAL PROPERTY?

A. Development

With respect to just one facet of the indeterminate idea of development — a working definition of "sustainable development" was forged as early as 1987 by what is widely viewed as an authoritative, albeit "soft law," source: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁵ The Copenhagen Declaration of 1995, another significant take on the meaning of development, states that sustainable development "must incorporate democracy; social justice; economic development; environmental protection; transparent and accountable governance; and universal respect for human rights."³⁶

Indeed, it is worth reiterating that the preamble to the 1994 Marrakesh Agreement establishing the World Trade Organization (Marrakesh Agreement) not only mentions sustainable development, but frames it as an objective.³⁷ This explicit reference, along with the objective and principles

33 Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821, 2885-86 (2006).

34 SELL, *supra* note 2, at 179-82.

35 Hans Christian Bugge, *1987-2007: "Our Common Future" Revisited*, in *SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW: WHAT DID THE BRUNDTLAND REPORT DO TO LEGAL THINKING AND LEGAL DEVELOPMENT, AND WHERE CAN WE GO FROM HERE?* 3, 7 (Hans Christian Bugge & Christina Voige eds., 2008) (quoting from U.N. World Comm'n on Env't & Dev., *Our Common Future*, ch. 2, U.N. Doc. A/42/427 (1987)).

36 U.N. World Summit for Soc. Dev., Copenhagen, Den., Mar. 6-12, 1995, *Copenhagen Declaration on Social Development*, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

37 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 *I.L.M.* 81 ("The *Parties* to this Agreement . . . [r]ecogniz[e] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily

in the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS),³⁸ creates a policy space for the integration of public interest concerns with the economic interests of intellectual property rights-holders.³⁹ 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, 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.⁴⁰

Yet with the exception of economic development, the various concepts in the sustainable or human development penumbras have not consistently affected the innovation mandate of intellectual property.⁴¹ The Copenhagen Declaration's invocation of social justice and transparent governance, which

growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development.*") (emphases added).

38 Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 7, 8, Apr. 15, 1994, 33 I.L.M. 1197; 1869 U.N.T.S. 299 [hereinafter TRIPS].

39 Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 Hous. L. Rev. 979 (2009); see also Henning Grosse Ruse-Kahn, *Policy Space for Domestic Public Interest Measures Under TRIPS* (S. Ctr. Research Paper No. 22, 2009), available at <http://ssrn.com/abstract=1542542>.

40 Agreement Between the United Nations and the World Intellectual Property Organization art. 1, Dec. 17, 1974, available at <http://www.wipo.int/treaties/en/agreement/index.html> [hereinafter UN-WIPO Agreement]; see also Convention Establishing the World Intellectual Property Organization para. 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.

41 Democracy as an element of sustainable development has been explored through the relation of fair use and/or of networked digital technologies to copyright. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2009). Environmental protection, including climate change technology, only recently has surfaced consistently in connection with global intellectual property. John Barton, *Patenting and Access to Clean Energy Technologies in*

involve distributional choices, due process and equality norms, is often missing in the intellectual property policy discourse.

As the production of knowledge goods is linked to other global public goods, "[t]he equitable provision of global public goods can be viewed as part of the challenge of achieving global equity — an all-encompassing public good."⁴² Even if promoting creation and innovation is the premier value of intellectual property, the rights-maximizing agenda pursued by intellectual property-exporting states has resulted not only in power asymmetry but arguably in policies that are not welfare-maximizing even for domestic industries within those states.⁴³ Access for the purpose of follow-on innovation — in other words, for maximizing returns on the public good of knowledge itself — is a critical policy component within the overall intellectual property regulatory framework.⁴⁴ Moreover, access to knowledge for purposes of maximizing other global public goods such as basic education, food security and disease control implicates both fairness and growth.⁴⁵

At the same time that many have been observing decentralizing impulses within intellectual property, especially when intellectual property intersects with newer domains such as public health and human rights,⁴⁶ sociolegal scholars have articulated that international law generally is undergoing a pluralistic impetus.⁴⁷ The next Section examines some of these directions in global intellectual property governance.

B. Intellectual Property

In this Section, I sketch a few basic ways in which global intellectual property governance can operate, by way of new actors (such as non-state-based norm entrepreneurs), directions (of norm-setting and interpretation,

Developing Countries, WIPO MAG., Apr. 2009, at 12, available at http://www.wipo.int/wipo_magazine/en/pdf/2009/wipo_pub_121_2009_02.pdf.

42 Richard A. Musgrave & Peggy B. Musgrave, *Prologue* to PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION, at xii, xiv (Inge Kaul et al. eds., 2003).

43 Jerome H. Reichman, *Intellectual Property in the 21st Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 101, 107 (2009).

44 Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 22 (2004).

45 Chon, *supra* note 33, at 2885-86.

46 Helfer, *supra* note 10.

47 Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009); see also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007) [hereinafter Berman, *A Pluralist Approach*].

especially through soft law) and domains (of intellectual property goals other than innovation and creativity).⁴⁸ A caveat: this is not intended to be a post-Westphalian thought experiment. States can and do propose innovative norms, and may work together with other states in fleshing out norms. State actors may implement hybrid hard-soft law best practices that other states might want to emulate.⁴⁹ And of course, states may excel in diplomacy and in coordinating multilateral negotiations in which intersectional norms are discussed and compromises reached. At the end of the day, accountability for overall social welfare resides with states or some other arguably representative form of governance.

The most classic form of intellectual property governance is national-level public ordering in which, at least in the U.S., industries (non-state actors) vie for negotiated compromises within a legal framework monopolized by the state.⁵⁰ Within this traditionally and territorially bounded domestic frame, the traditional policy balance weighs the temporary exclusive rights to induce innovation against access by different non-rights-holders for different purposes, including user-based innovation.⁵¹ In copyright, for example, this balance is famously encapsulated by the section 107 fair use exception to the section 106 rights, which are the basic bundle of exclusive rights in U.S. copyright law.⁵² Fair use is thought to promote goals such as follow-on innovation, as well as to facilitate education, scholarship and scientific research.⁵³ All of these access-facilitated activities promote more, and arguably better, innovation both directly and indirectly.

A slightly more pluralistic but still typical model of intellectual property policy-balancing occurs when intellectual property encounters other legal domains, still within a domestic realm. For example, normative consistency may be disrupted when there is a conflict between copyright protection,

48 Chon, *supra* note 13; Berman, *A Pluralist Approach*, *supra* note 47, at 308 ("[W]e need to focus on how norms articulated by a wide variety of communities end up having important impact in actual practice, regardless of the degree of coercive power those communities wield.").

49 Reichman, *supra* note 43, at 112 (introducing the concept of counter-harmonization).

50 JESSICA LITMAN, *COPYRIGHT, COMPROMISE, AND LEGISLATIVE HISTORY* (1987).

51 Katherine J. Strandberg, *User Innovator Community Norms at the Boundary Between Academic and Industrial Research*, 77 *FORDHAM L. REV.* 2237 (2009).

52 17 U.S.C. § 106 (2006) (e.g., "the owner of the copyright under this title has the exclusive right[] to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies . . ."); § 107: "Notwithstanding the provisions of section[] 106, the fair use of a copyrighted work . . . is not an infringement of copyright."

53 Dreyfuss, *supra* note 44, at 30-31.

on the one hand, and First Amendment-protected free speech, on the other. The norms of free speech, marked by a commitment to political liberty, do not overlap perfectly with the norms of copyright, committed as it often is to the end of economic instrumentalism and the goals of fostering creativity, innovation and the furtherance of knowledge. These pluralistic political and economic commitments are roughly mediated by fair use, still interpreted by the U.S. Supreme Court within the traditional boundaries of intellectual property. In this domestic version of intellectual property pluralism, the normative conflict may be just as contentious as in the global field, and non-state actors (such as industry associations or consumer representatives) may be quite active. Yet because the epistemic and interpretative communities are relatively more connected with a shared domestic constitutional framework and values, incommensurability is treated less frequently as a problem of territorial or disciplinary xenophobia. Other national copyright norms may implicate differing local values of personality, privacy or performance.⁵⁴

The spectrum of possible norm proposals is vast once one concedes that intellectual property has some claim on the domains of global trade and development, or vice versa.⁵⁵ Some commentators have inferred from the reference to sustainable development in the preamble of the WTO, as well as to "socioeconomic and technological development" in Article 8 of TRIPS a mandate for "trade-plus" values, expressed within human rights norms or human development goals.⁵⁶ With the linkage of intellectual property to trade, however, trade agencies such as the United

54 Michael D. Birnhack, *Trading Copyright: Global Pressure on Local Culture*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 363 (Neil Weinstock Netanel ed., 2009) [hereinafter Birnhack, *Trading Copyright*]; Deven Desai, *Property, Persona, and Preservation*, 80 TEMP. L. REV. 67 (2008); Anupam Chander, *Exporting DMCA Lock-Outs*, 54 CLEV. ST. L. REV. 205 (2006); Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491 (2006).

55 Dinwoodie & Dreyfuss, *supra* note 16, at 1214-33; Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement*, 13 MICH. TELECOMM. & TECH. L. REV. 445, 450 (2007); Frederick M. Abbott, *The Political Economy of the WIPO Development Agency*, in JOHN BARTON, FREDERICK M. ABBOTT, CARLOS M. CORREA, JOSEF DREXL, DOMINIQUE FORAY & RON MARCHANT, VIEWS ON THE FUTURE OF THE INTELLECTUAL PROPERTY SYSTEM 7 (Int'l Ctr. for Trade & Sustainable Dev. Selected Issue Briefs No. 1, 2007), available at <http://www.iprsonline.org/ictsd/docs/Views%20Future%20IP%20System.pdf>.

56 Yu, *supra* note 39; see also Ruse-Kahn, *supra* note 39; Chon, *supra* note 33.

States Trade Representative (USTR) are increasingly driving intellectual property policy, so that instrumentalist trade policy increasingly subsumes traditional intellectual property norms.⁵⁷ Non-state actors, specifically private industry associations, worked in conjunction with state actors to facilitate TRIPS at the international level, and ultimately expand the global minimum standards of intellectual property — by now this is an oft-told tale.⁵⁸ Although global intellectual property has always been an exotic flavor of international economic law, the brute fact is that the WTO is a trade treaty rather than a specialized treaty dealing with "industrial property" or "literary and artistic works."⁵⁹ Thus we now have the unfamiliar phenomenon of trade economists weighing in on the intellectual property relatedness of TRIPS and finding it lacking by economic welfare measures.⁶⁰ However, much of the discourse of international trade law or trade economics has not crossed over into the mainstream intellectual property space.⁶¹ As observed recently, "although key advocates in the field [of access to knowledge] seem to believe that [intellectual property] does not belong in the trade regime, they are paradoxically far less likely to make this claim than are mainstream economists and academics unconnected with the movement."⁶²

Appropriate messages about exploiting existing flexibilities within the WTO TRIPS framework or preserving policy space within national laws when implementing TRIPS mandates are certainly important — and typically discussed with respect to developing countries rather than the norms of

57 Peter Gerhart, *Why Lawmaking for Global Intellectual Property Is Unbalanced*, 22 EUR. INTELL. PROP. REV. 309, 309-13 (2000).

58 Burris et al., *supra* note 24.

59 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).

60 JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT 11-46 (2005).

61 Denis Borges Barbosa, Margaret Chon & Andrés Moncayo von Hase, *Slouching Towards Development in International Intellectual Property*, 2007 MICH. ST. L. REV. 71, 81-83.

62 Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 17 YALE L.J. 804, 876 (2008).

industrialized countries such as the U.S.⁶³ The constructive ambiguities⁶⁴ or normative elasticities⁶⁵ inherent in both soft and hard law play important roles in these creative approaches to norm-setting and interpretation within the international intellectual property regime complex. The flexibility of soft law in particular may contribute to greater expansion of the policy flexibilities within TRIPS. The vast majority of legal proposals, however, respond to the WTO DSB's current preference for textual arguments and hard-law approaches over policy-based and soft-law norms.⁶⁶ Still, even within the international framework, the basic goals safeguarded by a robust public domain — such as encouraging user-based innovation, facilitating scientific research, education and scholarship, and supporting access to less expensive knowledge goods whenever consistent with the reasonable protection of intellectual property — are an essential aspect of the policy balance within intellectual property governance.⁶⁷

Some of the current norms regarding intellectual property could be viewed as pluralistic simply because they are offered by nontraditional agents — norm entrepreneurs in the form of public interest NGOs⁶⁸ in conjunction with intergovernmental organizations (IGOs),⁶⁹ regional organizations,⁷⁰ and states — or as stand-alone proposals by academics.⁷¹ This is true both at the national

63 See, e.g., International Trade Committee of the European Parliament, *Access to Essential Medicines: Lessons Learned Since the Doha Declaration on the TRIPS Agreement and Public Health, and Policy Options for the European Union*, EXPO/B/INTA/2007/14, PE 381.392 (June 2007) (prepared by Frederick M. Abbott & Jerome Reichman).

64 JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 7 (2001).

65 Daniel Gervais, *IP, Trade and Development: The State of Play*, 74 *FORDHAM L. REV.* 505, 528-34 (2005) (suggesting that developing countries utilize the "normative elasticity" of TRIPS to formulate policy responsive to their needs).

66 As mentioned several times, one exception is Dinwoodie & Dreyfuss, *supra* note 16, at 1214-33.

67 Pam Samuelson, *Challenges for the World Intellectual Property Organisation and the Trade-Related Aspects of Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age*, 21 *EUR. INTELL. PROP. REV.* 578, 590-91 (1999).

68 Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 *CHI.-KENT L. REV.* 1369, 1379 (2007).

69 EUROPEAN PATENT OFFICE, *SCENARIOS FOR THE FUTURE* (2007), available at http://www.marcaspatentes.pt/files/collections/pt_PT/1/178/EPO%20Scenarios%20For%20The%20Futur e.pdf (interview with Vera Franz).

70 International Trade Committee of the European Parliament, *supra* note 63.

71 International Association for the Advancement of Teaching and Research in

implementation level as well as at other levels. These norm-entrepreneurial efforts tie into global regulatory models proposed by Drahos, and others. In these alternative network models,

nodal governance . . . generat[es] . . . rules and standards of best practice. An insight of the theory of nodal governance is that the tying together of different networks produces nodal concentrations in power and knowledge. This is a form of governance that weak as well as strong players can utilize in the world system.⁷²

Non-state actors and non-lawyers inserted through "nodes" have suggested non-intellectual property norms — and increased the normative landscape. These nodal governance networks will be discussed in more detail in the next Part.

Similarly, public-health norms, whether linked to human rights (the right to health), referenced through TRIPS Article 8, or standing alone, have impacted intellectual property through trade linkage.⁷³ The spirited public debate that gave rise to the Doha Declaration on TRIPS and Public Health⁷⁴ and its progeny illustrates the unexpected consequences of linkage bargaining with respect to plural norms as they infiltrate and affect intellectual

Intellectual Property [ATRIP], Agreement on Trade-Related Aspects of Intellectual Property Rights: Synopsis of Original Version and Proposals for Amendment (Sept. 4-6, 2006) (paper presented at the International Association for the Advancement of Teaching and Research in Intellectual Property, Parma meeting 2006), *available at* <http://www.atrip.org/upload/files/activities/Parma2006/Kur%20synopsis.pdf>; *see also* ATRIP, TRIPS Amendments (Work in Progress) — Background and Explanations (Sept. 4-6, 2006) (paper presented at the International Association for the Advancement of Teaching and Research in Intellectual Property, Parma meeting 2006), *available at* <http://www.atrip.org/upload/files/activities/Parma2006/Kur%20AMENDMENT.pdf>.

⁷² Peter Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights*, 1 AUSTRIAN J. DEV. STUD. 1 (2005), *available at* <http://ssrn.com/abstract=850751>; *see also* Burris et al., *supra* note 24.

⁷³ TRIPS, *supra* note 38, art. 8; *accord* Simon Walker, *A Human Rights Approach to the WTO's TRIPS Agreement*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 145, 171, 176 (Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier eds., 2006); *see also* Frederick M. Abbott, *The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS*, in HUMAN RIGHTS AND INTERNATIONAL TRADE, 279, 279-83 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi Bonanomi eds., 2005).

⁷⁴ World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

property.⁷⁵ Norm entrepreneurs advocating for public health and other trade linkages to global intellectual property have pushed for supranational- and national-level norms that would tilt the global prices so as to favor access to patented pharmaceuticals through compulsory licensing provisions.⁷⁶ Non-state actors continually collaborate with states to advocate for an understanding of intellectual property's mandate that includes promotion of health as a goal.⁷⁷ The dialectical interactions of plural norms are illustrated by the knitting together of the domains of health and human rights to trade and intellectual property. This public health-intellectual property hybridization has also highlighted the significance of soft law. Numerous analyses about the 2001 Doha Declaration on TRIPS and Public Health and the subsequent 2003 General Council decision⁷⁸ have articulated their relationship vis-à-vis previous "hard law" decisions of the WTO. The compulsory licenses themselves are a type of hybrid private/public soft-law mechanism for encouraging the production of certain global public goods.

II. CONSTRUCTING DEVELOPMENT THROUGH GLOBAL INTELLECTUAL PROPERTY GOVERNANCE

The WIPO Development Agenda (WIPO DA), now in the process of being implemented through its Committee on Development and Intellectual Property (WIPO CDIP), is a prime terrain with which to explore the multiple and multidirectional interactions of global governance norms. Developing country member states partnered with public interest non-governmental organizations (NGOs) to suggest new norms for intellectual property and development through the vehicle of the WIPO DA.⁷⁹ The WIPO General

75 Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 317-58 (2005).

76 *Id.*; see also Cynthia M. Ho, *A New World Order for Addressing Patent Rights and Public Health*, 82 CHI-KENT L. REV. 1469 (2007); Cynthia M. Ho, *Unveiling Competing Patent Perspectives*, 46 HOUS. L. REV. 1047 (2009).

77 MARGARET LEE, CTR. FOR INT'L ENVTL. LAW, PUTTING HEALTH ON THE FAST TRACK: COMPLIANCE WITH THE DOHA DECLARATION ON PUBLIC HEALTH AS A PRINCIPAL NEGOTIATING OBJECTIVE FOR TRADE PROMOTION AUTHORITY (2007), http://www.ciel.org/Publications/Lee_DohaUSTR_25July07.pdf.

78 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); see Cynthia M. Ho, *Patent Breaking or Balancing? Separating Strands of Fact from Fiction Under TRIPS*, 34 N.C. J. INT'L L. & COM. REG. 371 (2009).

79 World Intellectual Property Organization [WIPO], *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO in Document*, WIPO

Assembly then adopted forty-five DA recommendations and subsequently established the WIPO CDIP. The General Assembly's endorsement of these soft law recommendations and a committee within WIPO to integrate development with intellectual property seem to signal a formal commitment to a more pluralistic approach to norm-setting and technical assistance.⁸⁰ Yet, unlike some other intergovernmental IGOs, WIPO's core institutional identity is not as a development agency. While the development mandate currently being pursued by the WIPO CDIP has given rise to some specific activities, including a WIPO work program within the domain of intellectual property,⁸¹ it is still relatively unaffected by development domains outside of intellectual property. It is not clear from the recommendations how intellectual property's mandates of promoting the production of knowledge will intersect with the production of other global public goods such as increased public education or health. Moreover, while these recommendations reflect certain beneficial characteristics such as malleability,⁸² at most they "constitute 'soft law,' which is not binding on individuals, organizations, or states."⁸³ As Jeremy de Beer points out, "[t]here are nine references to the need for 'appropriate' actions in different contexts. The principle of 'balance' is cited four times. More fundamentally, there are nearly twenty invocations of the concept of development, yet there is no consensus on its connotation. Only twice do the recommendations state expressly that economic, social, and cultural development are important objectives."⁸⁴ In other words, key terms within these recommendations have been left undefined.

WIPO historically has suffered from its lack of enforcement ability, and the

Doc. WO/GA/31/11 (Aug. 27, 2004) [hereinafter *AB Proposal*]; see also WIPO, *Report on the Thirty-First (15th Extraordinary) Session in Document*, WIPO Doc. WO/GA/31/15, 33-7 (Oct. 5, 2004) (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).

80 Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES*, *supra* note 54, at 1, 25-29.

81 WIPO Comm. on Dev. & Intellectual Prop. [CDIP], *Initial Working Document for the Committee on Development and Intellectual Property*, annex III at 25, WIPO Doc. CDIP/1/3 (Mar. 3, 2008) [hereinafter *CDIP Working Document*].

82 Jeremy de Beer, *Defining WIPO's Development Agenda*, in *IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA* 1, 9-17 (Jeremy de Beer ed., 2009), available at http://www.idrc.ca/en/ev-139311-201-1-DO_TOPIC.html.

83 *Id.* at 11.

84 *Id.* at 9.

reason for linking intellectual property to the trade framework was precisely to harden the global intellectual property governance regime.⁸⁵ The vaunted dynamism and flexibility of soft law — characterized by a lack of formal sanctioning mechanisms, a tolerance of space between current reality and future ideal, a realistic assumption of differing national capacities to attain global policy goals, an ability to move forward concertedly in the face of disagreement among key decision-making authorities or political weakness, and lack of explicit coercion that might be interpreted as oppressive by weaker states⁸⁶ — are particularly intriguing in the context of this new initiative then. Within dominant global governance frameworks, human development and human rights have historically appeared to be orthogonal or parallel endeavors, rather than part of the same field as intellectual property.⁸⁷ Among the forty-five recommendations adopted by the WIPO General Assembly, however, are nineteen items immediately implemented due to lack of financial or human resource constraints, including:

CLUSTER B: Norm-setting, flexibilities, public policy and public domain 15. Norm-setting activities shall:

be inclusive and member driven;

take into account different levels of development;

take into consideration a balance between costs and benefits;

be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations and non-governmental organizations; and

be in line with the principle of neutrality of the WIPO Secretariat.

16. Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.

17. In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs.

85 Dinwoodie & Dreyfuss, *supra* note 16, at 1204.

86 Lobel, *supra* note 3, at 393-94. Some proposals were prepared by developed countries after several initial proposals were tabled during sometimes contentious debate.

87 Laurence R. Helfer & Graeme W. Austin, *Human Rights and IP: Mapping the Global Interface* (Ariz. Legal Studies Discussion Paper No. 10-18, 2011), available at <http://ssrn.com/abstract=1612362>.

18. To urge the IGC [WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore] to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

19. Initiate discussions on how, within WIPO's mandate, to further facilitate access to knowledge and technology for developing countries and LDCs in order to foster creativity and innovation, and to strengthen such existing activities within WIPO.

...

21. WIPO shall conduct informal, open, and balanced consultations, as appropriate, prior to any new norm-setting activities, through a member-driven process, promoting the participation of experts from Member States, particularly developing countries and LDCs.⁸⁸

The remaining twenty-six recommendations (out of the forty-five) require further discussion by the CDIP because they involve a financial or human resources commitment. These include the following:

22. WIPO's norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.

23. The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: (a) safeguarding national implementation of intellectual property rules (b) links between IP and competition (c) IP-related transfer of technology (d) potential flexibilities, exceptions and limitations for Member States and (e) the possibility of additional special provisions for developing countries and LDCs.⁸⁹

⁸⁸ WIPO, *Report of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA)*, annex 2-3, WIPO Doc. A/43/13 Rev. (Sept. 17, 2007). I excerpt Cluster B only, although items in all Clusters were included in the group of nineteen as well as the second group of forty-five recommendations.

⁸⁹ *Id.* In addition, the WIPO Secretariat has proposed a "thematic project" approach to these recommendations for increased efficiency. Jeremy de Beer & Sara Bannerman, *Implementing the WIPO Development Agenda: Providing an Analytical Baseline 3* (Apr. 27, 2010) (unpublished manuscript, on file with author) (citing to WIPO/CDIP/3/4 and WIPO/CDIP/3/4 add.1).

And the WIPO CDIP's mandate includes: to

- (i) develop a work-program for implementation of the adopted recommendations;
- (ii) monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose it shall coordinate with relevant WIPO bodies;
- (iii) discuss intellectual property and development related issues as agreed by the Committee, as well as those decided by the General Assembly.⁹⁰

Given the WIPO CDIP's charge, it may be productive to return to the initial question posed at the beginning of this Article: What exactly is meant by "development" within this new hybrid realm of intellectual property? While the DA was not the first concerted effort by developing country member-states to effect structural change within the global intellectual property regime,⁹¹ it is the most recent and most obvious example. Indeed, in this area, more than in the environmental or human rights areas where they may be viewed as critics or adversaries,⁹² NGOs have worked effectively with developing countries and industry associations to advance specific norms and proposals.⁹³ Thus the goal of "development" within intellectual property provides an opportunity to approach norm-setting and norm interpretation within intellectual property from a relatively non-state-centric perspective, consistent with the newer governance paradigm.

The nonbinding and non-enforceable aspect of the WIPO recommendations is also consistent with newer directions in intellectual property lawmaking, marked by less emphasis on treaty law or positive law reform, increasingly difficult to obtain in the multilateral context. All countries are more savvy about their short-term interests, if not the longer-term trajectories. The collective interests of developing countries or industrialized countries may not align with those of others within the same blocs. However, when "development" is invoked, it is often used to signify very different approaches to intellectual property. Development is an extremely malleable term and

⁹⁰ *Id.* at 3.

⁹¹ Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465 (2009); Pedro Roffe & Gina Vea, *The WIPO Development Agenda in a Historical and Political Context*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES, *supra* note 54, at 79.

⁹² Matthews, *supra* note 68, at 1379.

⁹³ Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 346 (2008).

these WIPO recommendations are among the softest forms of law.⁹⁴ As such, under what circumstances can and will these recommendations "harden" into institutional practices or even national or international public laws? Might this occur under arguably coercive conditions, as has arguably happened with WIPO's trademark recommendations?⁹⁵ What is the distance between law "in action" and law "on the books," as mediated by WIPO or other IGOs? As norms are interpreted and even implemented, what are the checks and balances to make sure that they are intact not only within WIPO, but at the national level as well?⁹⁶

Of course, achieving consensus on these forty-five recommendations would clearly bring numerous benefits. Chief among them is the avoidance of having to reach consensus on a multilateral "hard law" instrument clearly outlining the specific relationship of intellectual property to development. But there are also some possible risks to a soft law "add-on" to the WIPO treaty mandates. Some developing countries may lack the capacity to follow up on these recommendations and/or may be utterly dependent on WIPO or developed countries for technical assistance of a particular kind. As with other IGOs or powerful NGOs, there may be a strong tendency to defer to expertise, although some emerging economies, such as Brazil or India, may be able to counteract that tendency by playing leadership roles within the developing country bloc, in a counter-harmonization modality.⁹⁷ Early evidence suggests that a subset of member states — specifically transitional economies — are taking a leading role in the implementation of the Development Agenda, rather than the full spectrum of industrialized countries, developing countries and least-developed countries.⁹⁸

WIPO has had other experiences with soft-law recommendations, most successfully set and implemented in the realm of trademarks and domain names. For example, it has promulgated recommendations through its Standing Committee on the Law of Trademarks, Industrial Designs and

94 de Beer, *supra* note 82.

95 Graeme Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 10 MARQ. INTELL. PROP. L. REV. 205 (2006) (discussing bilateral treaties as a means to harden the WIPO Standing Committee on Trademarks recommendations regarding the protection of well-known marks); see also Maxim Grinberg, *The WIPO Joint Recommendation Protecting Well-Known Marks and the Forgotten Goodwill*, 5 CHI.-KENT J. INTELL. PROP. 1 (2005) (same).

96 Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT'L L. 179 (2002) (discussing "soft law" as a means of norm creation and the role of WIPO in rulemaking).

97 Reichman, *supra* note 43, at 112.

98 de Beer & Bannerman, *supra* note 89, at 19.

Geographical Indications (SCT), including the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (Well-Known Marks) in 1999;⁹⁹ the Joint Recommendation Concerning Trademark Licenses in 2000;¹⁰⁰ and the Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet in 2001.¹⁰¹ Of these three sets of recommendations, the Recommendations on Well-Known Marks have garnered the most commentary and controversy. The U.S. has entered into a number of bilateral agreements requiring both parties to adhere to the standards within the recommendations.¹⁰² Because it was independent of consumer confusion, the provision regarding dilution within the recommendations was controversial enough that several of the members of the SCT refused to join this particular recommendation.¹⁰³ This experience has partly led Dinwoodie and Dreyfuss to recommend that in evaluating the normative persuasiveness of a WIPO document subject to elevation to possible hard-law status, it first be subject to assessment along criteria such as "degree of transparency accorded to interested parties (including civil society); the diversity of the input; the extent to which state delegations participated; how states, commentators,

99 WIPO & Paris Union for the Protection of Industrial Property, *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks*, WIPO Doc. 833(E) (Sept. 29, 1999), available at http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm [hereinafter *Well-Known Marks Recommendation*].

100 WIPO & Paris Union for the Protection of Industrial Property, *Joint Recommendation Concerning Trademark Licenses in 2000*, WIPO Doc. 835E (Oct. 3, 2000).

101 WIPO & Paris Union for the Protection of Industrial Property, *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet in 2001*, WIPO Doc. 845 (Oct. 3, 2001).

102 Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation State*, 41 HOUS. L. REV. 885, 924 (2004); see also Ilanah Simon, *Dilution in the U.S., Europe, and Beyond: International Obligations and Basic Definitions*, 1 J. INTELL. PROP. L. & PRAC. 406 (2006).

103 Article 4(1)(b) states that a "mark shall be deemed to be in conflict with a well-known mark where the mark . . . constitutes a reproduction . . . and where . . . at least one of the following conditions is fulfilled: the use of that mark is likely to impair or dilute in an unfair manner the distinctive character of the well-known mark." *Well-Known Marks Recommendation*, supra note 99, art. 4(1)(b); see also Dinwoodie & Dreyfuss, supra note 16, at 1228 (citing to WIPO Director General, *Memorandum on the Joint Resolution Concerning Provisions on the Protection of Well-Known Marks*, P8, WIPO Doc. A/34/13 (Aug. 4, 1999), available at http://www.wipo.int/edocs/mdocs/govbody/en/a_34/a_34_13.pdf).

and practitioners reacted to the instrument; and how many WIPO members formally adopted the conclusions (and under what circumstances)."¹⁰⁴

Assessed against the Dinwoodie/Dreyfuss criteria, the WIPO DA recommendations should be normatively persuasive. The entire WIPO General Assembly endorsed these recommendations in September 2007 after numerous public meetings involving robust debates among member states and civil society organizations. Indeed, these recommendations are considered a core aspect of a pro-development global intellectual property framework, which should be "mainstreamed" throughout WIPO, according to Francis Gurry, the organization's Director General.¹⁰⁵ Gurry has also stated to the CDIP that the "development dimension must be taken into account horizontally across [WIPO] . . . [and] that the appropriate budgetary resources would be made available to support the implementation of proposals contained in the Development Agenda."¹⁰⁶ Whether and how they will be further mainstreamed into a global governance framework through hard law instruments, as is occurring with the joint recommendation on well-known marks is, however, an open question.

One early example of the normative flux around the interpretation and implementation of the WIPO DA recommendations is illustrative. The CDIP Working Document includes numerous references to "flexibilities." In reference to recommendation 17 in Cluster B, the WIPO Secretariat states:

Flexibilities regarding the scope and exercise of copyright and related rights vary from one country to another. Being based on the particular social or economic needs of each country, the diversity of exceptions to copyright has been permitted, and even promoted at [the] international level, notably by the standards provided under the Berne and Rome Conventions and, more recently, the WCT [WIPO Copyright Treaty] and the WPPT [WIPO Performances and Phonograms Treaty].¹⁰⁷

Notably, in the CDIP's Second Session, held in July 2008, a vigorous debate took place over the precise meaning and scope of the term "flexibilities" in connection with recommendation 12 ("To further mainstream development considerations into WIPO's substantive and technical assistance activities

¹⁰⁴ Dinwoodie & Dreyfuss, *supra* note 16, at 1226-27.

¹⁰⁵ Videotape: Francis Gurry, Meeting with Civil Society Groups (Third World Network, 2008), available at <http://video.google.com/videoplay?docid=5335079108122076983&hl=en>.

¹⁰⁶ WIPO, CDIP Second Session, Geneva, July 7-11, 2008, Summary by the Chair, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_2/cdip_2_summary.pdf.

¹⁰⁷ CDIP Working Document, *supra* note 81, annex III at 26.

and debates, in accordance with its mandate."). The WIPO Secretariat has documented that it is implementing this recommendation in part through "[l]egislative assistance on the use of flexibilities to implement . . . specific public policies designated by Member States, such as access to pharmaceutical products, promotion of a competitive environment, encouragement of small, incremental inventions, etc."¹⁰⁸ In the CDIP discussion of this part of WIPO's activities and work program, the U.S. delegation stated that "[d]iscussing flexibilities without the context of rights and obligations has all the rhythm of one hand clapping," while the Indian delegation stated that "[t]he focus should be on flexibilities, and not have it include rights and obligations. We want to build awareness on flexibilities, and [we] understand that the background is of rights."¹⁰⁹ Similar skirmishes took place over the concept of the "public domain" and its relationship to traditional knowledge, in connection with recommendation 20.¹¹⁰ Thus intellectual property's role in global development, which was the subject of vigorous disagreements during the early DA meetings, continues to be debated within the CDIP as it is implemented from a soft law base to (possibly) something harder.

Among other things, successful human development focuses on primary levels of education,¹¹¹ encourages creative models of educational access,¹¹² and nurtures innovation capacity through educational preparedness, including teacher-student training through systems of knowledge transmission.¹¹³ An interesting question is how the WIPO DA recommendations, as interpreted and implemented by the CDIP, will interface with longstanding hard-law norms such as those in the Berne Convention. The WIPO CDIP should address a multilateral translation exception to digital rights, in order to address this

108 *Id.* at 19.

109 WIPO, Notes of CDIP Second Session, July 7-11, 2008 (unpublished notes on file with author).

110 *Id.*

111 Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

112 William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* (Berkman Ctr. Research Publication No. 2006-09, 2006), available at <http://ssrn.com/abstract=923465>.

113 Graciela Rabajoli & Mónica Báez, *Uso tecnologías y producción contenidos educativos digitales en el Plan CEIBAL [Use of Technologies and Production of Digital Educational Content in the Plan CEIBAL]* (Mar. 2, 2009) (Uruguayan educators' report on the use of XO computers, presented at the First Regional Dialogue of Educators on the Implications of Copyright, Mar. 2-3, 2009) (PowerPoint presentation on file with author).

particular omission of the Berne Appendix. In the realm of "soft" law, WIPO also could encourage the use of "open" rather than "closed" standards for new digital content creation (such as Creative Commons licenses or open source code), as well as create best practices for exceptions and limitations in the context of open educational resources.¹¹⁴ Finally, the WTO and WIPO could coordinate stakeholders around specific amendments to TRIPS to focus on specific human capabilities aspects of IP, including minimum exceptions and limitations for education — a hardening of soft-law norms.¹¹⁵ Along these lines, some countries have adopted a fair use-style provision similar to that of the U.S. and it would be an important project in the future to trace how this is being used to further educational access.¹¹⁶

III. (DE)CONSTRUCTING DEVELOPMENT THROUGH GLOBAL INTELLECTUAL PROPERTY GOVERNANCE

The benefits of global governance include the possibility of a more democratic, flexible, grassroots and nimble governance structure. The risks are that the rise of non-state actors to the forefront of narratives of legal reform, heralded by some as a harmonious orchestration of civil society with markets and government, is also consistent with a world in which the private sector problematically replace state-based efforts to address inequality. Accompanying this risk is that soft law could lack due process of law.

114 CTR. FOR SOC. MEDIA 2009, AMERICAN UNIV. SCH. OF COMM'N, CODE OF BEST PRACTICES IN FAIR USE FOR OPENCOURSEWARE (2009), <http://www.centerforsocialmedia.org/files/pdf/10-305-OCW-Oct29.pdf>.

115 Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459; P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON EXCEPTIONS AND LIMITATIONS TO COPYRIGHT: FINAL REPORT (2008), http://www.ivir.nl/publications/hughenoltz/limitations_exceptions_copyright.pdf.

116 Copyright Law, 2007, § 19, S.H. 38 (Isr.); Brazil's Approach on Anti-Circumvention: Penalties for Hindering Fair Dealing, <http://www.michaelgeist.ca/content/view/5180/125/> (July 9, 2010). According to Professor Paranaguá, "Art. 46 of Brazil's draft copyright bill sets forth a non-exhaustive 'user's rights' . . . open provision for educational purposes and for other uses not foreseen on the previous items." E-mail from Pedro Paranaguá to Margaret Chon (Sept. 8, 2010). The draft copyright bill is available at Law No. 9610 of 19 February 1998, on Copyright and Neighbouring Rights Consolidated with the Bill in Public Consultation Since 14 June 2010 (July 26, 2010), http://www.gpopai.usp.br/blogs/files/2010/08/brazilian_copyright_bill_consolidated_june_2010.pdf.

Scholars have documented processes by which intellectual property hard law can be effected by stealth, either through extremely soft lead-up mechanisms such as public reports, diplomatic speeches and/or unofficial comments¹¹⁷ or through "policy laundering" strategies of negotiating for terms in international treaties as end-runs around difficult domestic debates.¹¹⁸ Arguably, soft law can be an even more suitable vehicle for such policy laundering mechanisms than ambiguous treaty law provisions. In some forms, it can provide the appearance of consensus, inclusiveness, notice and transparency without the accompanying reality of these critical components of due process and public debate that should accompany robust forms of public law-making.¹¹⁹ This is not to say that the WIPO Development Agenda recommendations can be criticized on these grounds, but only that all significant soft law initiatives should be assessed for these possible risks.

Overall, the forty-five recommendations of the WIPO DA could be characterized as representing the political compromise that was necessary for consensus among WIPO states that vary widely in their levels of development. They reinforce the central idea that innovation *per se* is the primary goal and value of intellectual property (with the correlative commitments to a robust public domain as a stimulus to innovation, and to knowledge as an input to further knowledge). Intellectual property first principles such as attention to the public domain were advocated by norm entrepreneurs during the three years of discussions of the WIPO DA, and are now being scrutinized through the aegis of the WIPO CDIP as well as WIPO's Standing Committee on Copyright and Related Rights (SCCR).

Prior to the adoption of the forty-five WIPO CDIP recommendations, WIPO's primary development approach arguably emphasized the strengthening of intellectual property legal infrastructure, offices, capacity building, and human resources to better enhance the promotion of intellectual property and economic growth.¹²⁰ Its agreement with the

117 Birnhack, *Trading Copyright*, *supra* note 54, at 388-90 (describing "foreign leverage").

118 Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1248 n.60 (2009) (describing policy laundering); *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA* 35, 63 SMU L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1624813> (same).

119 I am indebted to Dean Niva Elkin-Koren for this observation made at the NYU Innovation Policy Colloquium on February 4, 2010.

120 KAMIL IDRIS & HISAMITSU ARAI, WIPO, *THE INTELLECTUAL PROPERTY-CONSCIOUS NATION: MAPPING THE PATH FROM DEVELOPING TO DEVELOPED*

WTO¹²¹ reinforces this view of development as being directed towards an improved understanding of intellectual property and greater participation in the global intellectual property system. WIPO's development efforts prior to the Development Agenda debate were development-friendly, but within a particular model of development, emphasizing economic growth. This model cannot, however, tell the whole story of development, at least not in terms of intellectual property, because it deemphasizes the important variable of an appropriate educational and scientific infrastructure, as well as local knowledge, in generating the kind of innovation and growth led by intellectual property.¹²² This is not to discount the importance of economic growth, but to emphasize that multiple development models are optimal. Explicit consideration of social and environmental facets of development is arguably more consistent with global frameworks, as explained in earlier Sections. Thus the three years of open debate within the WIPO multilateral IGO structure, giving rise to the soft law recommendations now being implemented by the WIPO CDIP, is somewhat more structured and arguably more inclusive of public interest concerns than a pure "peer-production" or market-based model of governance.

As I have written elsewhere, swinging from public to private ordering has wrought some victories for unrepresented or vulnerable populations, but private decentralized approaches may be too scattershot to address systematic global inequities.¹²³ As Elkin-Koren's contribution in this volume suggests, for example, terms of service in Facebook may not contain clear access rules for follow-on innovators and users.¹²⁴ Indeed, it is banal to observe that the public law aspects of copyright are an increasingly

20-29 (2006), available at http://www.wipo.int/export/sites/www/about-wipo/en/dgo/wipo_pub_988/pdf/wipo_pub_988.pdf; see also SISULE F. MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) (Quaker U.N. Office TRIPS Issues Papers No. 3, 2003), available at [http://www.geneva.quino.info/pdf/WIPO\(A4\)final0304.pdf](http://www.geneva.quino.info/pdf/WIPO(A4)final0304.pdf).

121 Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996). This is despite the 1974 UN-WIPO Agreement that clearly references "social and cultural development" in addition to economic development. See UN-WIPO Agreement, *supra* note 40.

122 Jeffrey Sachs, *The Global Innovation Divide*, 3 INNOVATION POL'Y & ECON. 131, 131-32 (2003); Michael Trebilcock, *Between Institutions and Culture: The UNDP's Arab Human Development Reports 2002-2005* (May 9, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1131309>.

123 Chon, *supra* note 13.

124 Elkin-Koren, *supra* note 23.

smaller piece of the regulatory puzzle with respect to copyright-protected knowledge goods. Yet it is an open question whether states can or will step decisively into an increasingly privatized regulatory environment to effectuate through public law a social welfare balance between the content owners, technology innovators, consumers/users and other stakeholders. Hope, Nicol and Braithwaite have argued optimistically that "[o]pen-source style . . . patent licences and material transfer agreements represent just one of a range of devices that might be used to flip markets in vice to markets in virtue in the context of biotechnology."¹²⁵ But it is not clear whether such private law interventions — even if widely adopted — can ameliorate the more inflexible and structurally embedded aspects of public law frameworks.

And of course, there is an inherent indeterminacy in defining the public interest.¹²⁶ The term "public" in "public interest" or "public domain" or "public good" is not a trump card in favor of development norms; at the end of the day, these terms are socially constructed. This observation dovetails with the longstanding concern that the public/private division must be critically rethought in what has become a heavily propertized or privatized global neoliberal framework.¹²⁷ As Brett Frischmann has argued, rather than thinking about the fundamental intellectual property policy balance as between exclusive rights and access, we may want to reconceptualize it as allocations between private and public rights in knowledge goods, or the allocation of externalities.¹²⁸

This conceptual conundrum is further complicated through what has been described as "cross-cutting" relationships between and among intergovernmental agencies, both domestically and globally. On the multilateral front, in addition to the WTO and WIPO (which became

¹²⁵ Hope et al., *supra* note 3, at 113-14.

¹²⁶ Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938, 984-85 (2007) ("Although 'public interest law' was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes. This growth in conservative advocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy.").

¹²⁷ Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 20 COLUM. J.L. & ARTS 101 (2007).

¹²⁸ Brett Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007) (arguing that the balance might be better understood as that between (1) allocating public versus private rights; (2) promoting and internalizing externalities; and (3) promoting commercially valued and socially valued activities).

a UN agency in 1974), many other UN agencies are implicated in shaping intellectual property norms¹²⁹ (even though, before TRIPS, WIPO had successfully cast itself as the premier, if not the only, legitimate intellectual property standard-setting organization). Other relevant IGOs with specific mandates include the Convention on Biological Diversity (CBD), which oversees the intellectual property-related work on access and benefit-sharing (ABS);¹³⁰ the World Health Organization (WHO), which recently approved a "Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property;"¹³¹ the International Telecommunications Union (ITU), which administers the work of the World Summit on Information Society (WSIS);¹³² and UNESCO, which is the administering agency for the 1952 Universal Copyright Convention, as well as the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.¹³³ Still other UN agencies, such as the Food and Agriculture Organization, or the UN High Commission on Human Rights, may view their mandates broadly as intersecting with the intellectual property norm-setting mandates of WIPO.¹³⁴ Nonetheless, these other organizations are still ancillary to the intellectual property norm-setting regime, which is currently dominated by the WTO and WIPO. The crosscutting aspect of governance emphasizes the multi-directionality of normative flows among public law-making nodes, including ones that may be more sympathetic to the non-innovation goals of development.

At the same time, a somewhat more capacious approach to

129 SISULE F. MUSUNGU, *RETHINKING INNOVATION, DEVELOPMENT AND INTELLECTUAL PROPERTY IN THE UN: WIPO AND BEYOND* (Quaker U.N. Office TRIPS Issues Papers No. 5, 2005), available at <http://www.qiap.ca/pages/documents/TRIPS53.pdf>.

130 *Id.* at 34; see also Kaitlin Mara, "Great Achievement" on Biodiversity Access and Benefit Sharing, INTELL. PROP. WATCH, May 30, 2008, <http://www.ip-watch.org/weblog/2008/05/30/great-achievement-on-ip-issues-at-convention-on-biological-diversity-summit/>.

131 U.N. World Health Organization, 61st Sess., 8th plen. mtg., U.N. Doc. A/61/VR.8 (May 24, 2008), available at http://www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf.

132 MUSUNGU, *supra* note 129, at 29.

133 Jeremy F. de Beer & Michael A. Geist, *Developing Canada's Intellectual Property Agenda*, in *CANADA AMONG NATIONS* 164 (Jean Daudelin & Daniel Schwanen eds., 2007) ("UNESCO's more recent Convention (2005) on the Protection and Promotion of the Diversity of Cultural Expressions addresses publications, movies and broadcasts, which are matters also dealt with under agreements governed by WIPO.").

134 MUSUNGU, *supra* note 129. Other IGOs include UNCTAD and South Centre.

intellectual property norm- setting is evident throughout the WIPO DA recommendations. According to one recommendation, for example, WIPO is to consider the viewpoints of a variety of norm entrepreneurs — including accredited public IGOs and NGOs. The detailed initial working document of the CDIP suggests that the "WIPO [already] acts as a facilitator helping to maintain an ongoing dialogue between all stakeholders."¹³⁵ A sanguine view is that developing countries are increasingly taking the lead as *demandeurs* and norm entrepreneurs outside of the WIPO CDIP, both nationally and internationally.¹³⁶ According to Benvenisti and Downes, who are critical of regime fragmentation generally, this can lead to the ability of developing democratic states to engage in "soft balancing . . . [which is] designed to produce a gradual shift in practices and eventually outcomes that will benefit weaker states in the long run."¹³⁷

As Benvenisti and Downes have also written, however, pluralism or regime fragmentation creates these ever-multiplying venues, and thus can prevent consensus among diffuse interests, allowing the powerful member-states to exit to other venues, and mask the asymmetric nature of power within the overall global governance structure.¹³⁸ Less resourced member-states may then have difficulty simply showing up at these fora in which development and intellectual property norms are being debated and implemented. Whether these alternatives touted within global governance theory will offset the other structural tendencies and ultimately aid and abet the less powerful or more powerful member-states is still an open question. For example, a self-selected group of major industrialized states has been discussing a plurilateral Anti-Counterfeiting Trade Agreement (hereinafter ACTA) since 2007.¹³⁹ This ad hoc plurilateral forum represents a newer governance actor attempting to reinforce the exclusive rights perspectives

135 CDIP Working Document, *supra* note 81, annex III at 25.

136 Reichman, *supra* note 43; *see also* Janice Mueller, *Taking TRIPS to India — Novartis, Patent Law, and Access to Medicines*, 356 NEW ENG. J. MED. 541 (2007); Janice Mueller, *The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 PITT. L. REV. 491 (2007) (describing the new Indian patent law, which is being studied and possibly emulated by other developing countries).

137 Benvenisti & Downes, *supra* note 28, at 621.

138 *Id.* at 597-98.

139 Participants in the most recent negotiations included Australia, Canada, the European Union, represented by the European Commission, the EU Presidency (Spain, then Belgium on July 1, 2010) and EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States. Press Release, Office of the U.S. Trade Representative, Statement of ACTA Negotiating Partners on Recent ACTA Negotiations

and enforcement aspects of global intellectual property rights holders. It has done so in a way that is less than transparent and inclusive, for example, by not releasing public versions of its negotiated text until April 2010, and by not involving states that would be likely to raise objections to the provisions under negotiation. This raises troubling questions with regard to accountability and other process issues under a global governance framework, including the spectre of policy laundering.¹⁴⁰

WIPO continues to need to demonstrate its legitimacy and relevance as a multilateral institution committed to development, and it can do this in conjunction with the WTO. For example, the WIPO CDIP could recommend that norms generated pursuant to the recommendations in Cluster B then fall presumptively within the three-step test of TRIPS Article 13.¹⁴¹ Another possibility is to borrow some of the global governance criteria developed by Keohane (in the different context of fragmented governance regimes with respect to climate change), and apply them to soft-law norm setting, interpretation and implementation in intellectual property.¹⁴² As Dinwoodie and Dreyfuss have suggested, there may be a way to link TRIPS Article 67¹⁴³ to the WIPO CDIP Work Program.¹⁴⁴ Soft law is not only for possible end-runs

(July 1, 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/june/office-us-trade-representative-releases-statement-act>; *see also* American Univ. Program on Information Justice & Intellectual Prop., Text of Urgent ACTA Communique, June 23, 2010, <http://www.wcl.american.edu/pijip/go/acta-communique>; Over 75 Law Professors Call for Halt of ACTA (Oct. 28, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/over-70-law-profs-call-for-halt-of-acta-negotiation>.

¹⁴⁰ McManis, *supra* note 118.

¹⁴¹ I am indebted to Rochelle Dreyfuss for this suggestion, made at the NYU Innovation Policy Colloquium on February 4, 2010.

¹⁴² Keohane, *supra* note 32, at 23 (developing the criteria of coherence, accountability, effectiveness, determinacy, sustainability, and epistemic quality). I suggest an additional criterion of innovation.

¹⁴³ TRIPS, *supra* note 38, art. 67: "Technical Cooperation. In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."

¹⁴⁴ Dinwoodie & Dreyfuss, *supra* note 16, at 1231.

around public policy debates but also for nuanced and localized approaches critical to development. As Tamanaha has written about law and development:

"Context matters," "local conditions are crucial," "circumstances on the ground shape how things work," — variations of this insight [have] been repeated so often it is nearly a cliché. What stymies law and development projects time and again is the "extreme interrelatedness of everything with everything else in a society." For sake of convenience, I will call this the "connectedness of law principle."¹⁴⁵

CONCLUSION

I have attempted to nuance a little further our understandings of global intellectual property governance, a project still very much under construction. The focus here is on nontraditional actors working in partnership with states, and on softer forms of law being implemented within a multilateral intergovernmental organizational framework. Ultimately, what kinds of norms with respect to development are likely to be articulated more persuasively and powerfully by these various mechanisms?¹⁴⁶ It is surely not possible now (if it ever was) to compartmentalize intellectual property from the cultural, political, social as well as technological dimensions of what economists call public goods. Demands are now being made upon intellectual property to respond to human development goals such as education and health — that is, a whole plethora of global public goods aside from creativity and innovation per se, which has been the recent primary focus of intellectual property. In tandem with the production of these other global public goods, a greater focus on governance technologies other than positive law and on governance agents other than states can point to dynamic and innovative methods to re-invent intellectual property — itself a technology of regulation (or even arguably a public good) for dynamic innovation. In this Article, I have tried to elaborate upon newer actors as well as forms and directions of law without either over-romanticizing them or minimizing their risks.

145 Brian Z. Tamanaha, *The Primacy of Society and the Failure of Law and Development* 5 (Wash. Univ. Sch. of Law Working Paper No. 10-03-02, 2009), available at <http://ssrn.com/abstract=1406999>.

146 Dominique Foray, *Patents and Development in the Knowledge Economy*, in VIEWS ON THE FUTURE OF THE INTELLECTUAL PROPERTY SYSTEM, *supra* note 55, at 3, 5-6 (arguing in favor of patents as "one solution among many" to help markets encourage the production of knowledge); Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSP. 121, 134-36 (2005) (outlining various business models in a world without copyright).