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Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What Can We Learn from Mediators, Business Strategists, and International Relations Theorists

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TOWARD A NONZERO-SUM APPROACH TO RESOLVING GLOBAL INTELLECTUAL PROPERTY DISPUTES: WHAT WE CAN LEARN FROM MEDIATORS, BUSINESS STRATEGISTS, AND INTERNATIONAL RELATIONS THEORISTS

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All societies, communities, organizations, and interpersonal relationships experience conflict at one time or another in the process of day-to-day interaction. Conflict is not necessarily bad, abnormal, or dysfunctional; it is a fact of life. Conflict and disputes exist when people are engaged in competition to meet goals that are perceived to be, or actually are, incompatible. However, conflict may go beyond competitive behavior and acquire the additional purpose of inflicting physical or psychological damage on an opponent, even to the point of destruction. It is then that the negative and harmful dynamics of conflict exact their full costs.[1]

INTRODUCTION

Countries differ in terms of their levels of wealth, economic structures, technological capabilities, political systems, and cultural tradition.[2] No two countries have identical conditions, needs, and aspirations.[3] As a result, policymakers face different political pressures and make different

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1. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, at xiii (2d ed. 1996).

2. MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 191 (1998); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 239 (2000) [hereinafter Yu, *From Pirates to Partners*]; 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, 84 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*].

3. RYAN, *supra* note 2, at 201; *see also* Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 333 (1994) ("Fundamental differences in concepts of ownership and legal regimes provide at least some explanation as to why it has been so difficult to draft a multilateral intellectual property agreement. A favorable agreement for one country could be unfavorable for another country.").

value judgments as to what would best promote the creation and dissemination of intellectual works in their own countries.[4] These uncoordinated judgments eventually result in a conflicting set of intellectual property laws around the world.

As countries become increasingly interdependent in this globalized economy, these conflicting laws create tension and sometimes result in disputes. To minimize differences and prevent conflicts, countries use a variety of dispute resolution techniques, including self-help, coercion, mutual exchange of information, international agreements, and multilateral regimes. Commentators generally analyze these techniques by focusing on the number of parties involved in resolving an intellectual property dispute.[5] Using a unilateral-bilateral-multilateral trichotomy, commentators suggest that one can infer some general characteristics of a dispute resolution arrangement by counting the number of parties involved in resolving a conflict.

Consider, for example, the differences between a bilateral agreement and a multilateral regime. Commentators generally consider a bilateral agreement more effective in addressing the individual concerns and circumstances facing a particular country,[6] for such an agreement "can take into consideration the particular phases of development confronting each country, and provide for the gradual inclusion of a developing country into the global economy."[7] Indeed, empirical evidence suggests that the bilateral agreements initiated by the United States after it had threatened to impose trade sanctions "ha[d] generally encouraged

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4. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 239.

5. *See* DORIS ESTELLE LONG & ANTHONY D'AMATO, A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY 284 (2000) ("Treaty regimes currently fall into two broad categories—bilateral and multilateral."); PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 95-141 (2001) [hereinafter GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW] (classifying trade principles and processes into multilateral, regional, and bilateral arrangements and unilateral initiatives); INTERNATIONAL INTELLECTUAL PROPERTY LAW 219 (Anthony D'Amato & Doris Estelle Long eds., 1997) (discussing the differences between bilateral and multilateral treaties); Giunta & Shang, *supra* note 3, at 339-40 (discussing the differences between bilateral agreements and multilateral treaties).

6. GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 5, at 139 (noting that the lengthy enforcement action plan annexed to the 1995 China-U.S. Agreement Regarding Intellectual Property Rights "imposed more detailed procedural obligations than could be provided in a multilateral agreement such as TRIPs"); Giunta & Shang, *supra* note 3, at 339 ("Bilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection.").

7. Giunta & Shang, *supra* note 3, at 339; *see also* GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 5, at 139 (noting that the lengthy enforcement action plan annexed to the 1995 China-U.S. Agreement Regarding Intellectual Property Rights "specified particularized enforcement efforts for motion pictures, literary works and software").

speedier and more substantial changes in suspect nations, as failure to comply might result in immediate trade sanctions."[8]

By contrast, a multilateral regime usually results in compromises,[9] which often are shaped by the intergovernmental body responsible for organizing the treaty conference, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO).[10] Nonetheless, "multinational solutions present the advantage of establishing a protection standard binding on a greater number of countries than a bilateral solution."[11] Even when the interests of the signatory countries have changed, multilateral solutions sometimes may be able to continue and persist in their own right.[12]

Although the above comparison provides some helpful insights into the general differences between a bilateral agreement and a multilateral regime, it provides very limited information about the effectiveness and future prospects of the dispute resolution arrangement. After all, a multilateral regime can lead to an ineffective compromise that is considered coercive by one or more signatory countries.[13] On the other hand, despite the lack of reciprocity, a unilateral initiative can lead to further cooperation that results in a longlasting dispute settlement.[14]

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8. Giunta & Shang, *supra* note 3, at 340; *see also* Ashoka Mody, *New International Environment for Intellectual Property Rights*, *in* INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS 203, 225 (Francis W. Rushing & Carole Ganz Brown eds., 1990) ("In the short-run, bilateralism is proving more effective than multilateral efforts in furthering U.S. interests. Bilateralism is quicker and allows more focused and tailored responses.").

9. GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 5, at 223 (noting that "the need to achieve concurrence among so many parties often leads to less stringent standards" and that such standards "may be difficult (if not impossible) to raise through bilateral efforts").

10. *Id.* at 219.

11. *Id.* at 223.

12. *See* Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, *in* INTERNATIONAL REGIMES 115, 138 (Stephen D. Krasner ed., 1983) [hereinafter Stein, *Coordination and Collaboration*] ("Regimes may be maintained even after shifts in the interests that gave rise to them . . . ."). Professor Stein provided four reasons for such persistence: (1) the delays in recalculation or reassessment of interests; (2) sunk costs involved in international institutions; (3) tradition, legitimacy, and the reluctance to damage reputation by breaking with customary behavior; and (4) the changing mindset from self-maximization to joint-maximization. *See id.* at 138-39.

13. *See* 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 vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement]; *see also infra* Part IV.B (discussing the coercive nature and ineffectiveness of the TRIPs Agreement).

14. Examples of such initiatives are available in the form of arms control proposals. *See* BARRY B. HUGHES, CONTINUITY AND CHANGE IN WORLD POLITICS: THE CLASH OF PERSPECTIVES 141-43 (2d ed. 1994) (discussing unilateral initiatives); Charles E. Osgood, *Reciprocal Initiative*, *in* THE LIBERAL PAPERS 155 (James Roosevelt ed., 1962) (proposing graduated reciprocation in tension-reduction (GRIT)). The tit-for-tat strategy proposed by Anatol Rapoport is instructive in understanding why unilateral initiatives can invite

In light of the inadequacy of the unilateral-bilateral-multilateral trichotomy, this Article proposes a new, but companion,[15] analytical framework to examine intellectual property dispute resolution arrangements. Instead of focusing on the number of parties involved, this framework concentrates on the dispute resolution approach used to resolve the conflict. Because countries sometimes use several approaches to resolve complex intellectual property disputes,[16] one may need to focus on the various parts of the dispute resolution arrangement to divine the particular approach used to resolve the conflict.

Part I of the Article outlines the three different approaches commonly used to resolve intellectual property disputes, namely the coercive approach, the adversary approach, and the cooperative approach. This Part argues that the outcome of the cooperative approach will depend on the mindset of the negotiators involved in resolving the dispute.[17] If negotiators have a zero-sum mindset, the approach usually results in compromises in which losses are distributed among the parties.[18] If they have a nonzero-sum mindset, the approach usually results in a forward-looking solution that provides mutual benefits to all the parties involved.[19]

Part II looks at recent developments in the fields of alternative dispute resolution,[20] business competition strategy,[21] and international relations.[22] This Part argues that a nonzero-sum approach has been increasingly embraced as the more preferable means to resolve disputes, compete, and tackle global problems. Drawing on the experiences of mediators, business strategists, and international relations theorists, Part III argues that the nonzero-sum approach is the most preferable means to resolve global intellectual property disputes. This Part further

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reciprocation despite its one-sidedness. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 27-54 (1984) (discussing tit-for-tat strategies). For an excellent overview of game theory written by Professor Rapoport, see generally ANATOL RAPOPORT, FIGHTS, GAMES, AND DEBATES (1960).

15. The analytical framework proposed in this Article seeks to find out the effectiveness and future prospects of a dispute resolution arrangement. However, it does not attempt to find out the general characteristics of that arrangement. To do so, one may still need to use the unilateral-bilateral-multilateral trichotomy.

16. Very often, more than one approach is used in a multilateral treaty involving a large number of signatories, such as the TRIPs Agreement and the WIPO Internet Treaties. *See* TRIPs Agreement, *supra* note 13; WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996).

17. *See* discussion *infra* Part I.C.

18. *See infra* text accompanying notes 106-09.

19. *See infra* text accompanying notes 110-12.

20. *See* discussion *infra* Part II.A.

21. *See* discussion *infra* Part II.B.

22. *See* discussion *infra* Part II.C.

discusses the prerequisites needed for the approach to succeed, situations where the approach is inappropriate or will be ineffective, and the implications of the approach for the rule of law. To illustrate the nonzero-sum approach, Part IV examines recent disputes between the European Union and the United States,[23] developed and less developed countries,[24] and China and the United States.[25]

I. COMMON APPROACHES USED TO RESOLVE INTELLECTUAL PROPERTY DISPUTES

Traditionally, countries have used three different approaches, or a combination of them, to resolve intellectual property disputes. These approaches include (1) the coercive approach, (2) the adversary approach, and (3) the cooperative approach. Sometimes, the nature of the approach is apparent from the dispute resolution arrangement. For example, who would mistake the coercive nature of unilateral trade sanctions or protective tariffs? Likewise, who would second-guess the cooperative nature of technical assistance or the exchange of information between government authorities? Most of the time, however, the nature of the approach is hidden from the dispute resolution arrangement. To divine the approach used to resolve the conflict, one must focus on the various parts of the dispute resolution arrangement. This Part outlines the three different approaches commonly used to resolve intellectual property disputes.

A. Coercive Approach

Under the coercive approach, a party uses its strength or bargaining position to force the other party to do what it otherwise would refuse. This approach has been widely practiced throughout history. During the eighteenth and nineteenth centuries, "Social Darwinism was the order of the day,"[26] justifying overseas expansion with the philosophy that only the strongest nation was fit to survive in a process of natural selection.[27] Driven by nationalism, evangelism, capitalism, and Darwinism,[28] Western nations used their military and economic might to coerce into submission their less powerful neighbors and "new

23. *See* discussion *infra* Part IV.A.
24. *See* discussion *infra* Part IV.B.
25. *See* discussion *infra* Part IV.C.
26. IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 313 (6th ed. 2000).
27. *See id.*
28. *Id.*

discoveries." Such coercion led to expansive colonization in Africa, Asia, the Middle East, and South America.[29] To maximize their economic interests, the Western powers demanded their colonies to trade only with them. They also dictated what the colonies could trade and at what price these colonies could do so.[30]

As time passed, this violent approach had given way to a nonviolent coercive approach. The textbook example of such an approach is section 301 of the Trade Act of 1974[31] of the United States (section 301). Section 301 was developed in response to Congress's dissatisfaction with the outdated General Agreement on Tariffs and Trade[32] (GATT) and the agreement's inability to protect U.S. economic interests.[33] Aiming to eliminate unfair trade practices and open foreign markets,[34] section 301 permits the President of the United States to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States's economic interests.[35]

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29. For excellent discussions of imperialism in the late nineteenth century, see generally CARLTON J.H. HAYES, A GENERATION OF MATERIALISM, 1871-1900 (1941); WILLIAM L. LANGER, THE DIPLOMACY OF IMPERIALISM, 1890-1902 (1950).

30. *See* HUGHES, *supra* note 14, at 306.

31. 19 U.S.C. §§ 2411-2420 (2000).

32. General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188.

33. The legislative history of section 301 states:

> [T]he President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade. Many GATT articles . . . are either inappropriate in today's economic world or are being observed more often in the breach, to the detriment of the United States. . . .
>
> The Committee is not urging that the United States undertake wanton or reckless retaliatory action under section 301 in total disdain of applicable international agreements. However, the Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by the Congress.

S. REP. NO. 93-1298, at 166 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7304; *see also* Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 33 (1995) ("The enacting of § 301 was seen as a direct result of Congressional dissatisfaction with the manner in which U.S. trade was being protected under GATT."); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 40 (1998) ("Section 301 for the Trade Act of 1974 arose from the need perceived by the United States to strike back against unfair trade practices that were not enforced by GATT panel condemnation.").

34. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1, 4 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM].

35. *See* 19 U.S.C. §§ 2411-2420. Section 301 provides for both mandatory and discretionary actions:

> Action must be taken when trade agreements are being violated. Action is not required in five specific circumstances: if (1) a GATT panel concludes there is no unfair trade practice; (2) the USTR believes the foreign government is taking steps to solve the problem; (3) the foreign government agrees to provide compensation; (4) the action could adversely affect the

In 1988, Congress introduced the Omnibus Trade and Competitiveness Act of 1988,[36] which amended section 301 by including two new provisions—Super 301 and Special 301.[37] Super 301,[38] which has since expired,[39] required the United States Trade Representative (USTR) to review the United States's trade expansion priorities and identify priority foreign country practices that posed major barriers to U.S. exports.[40] Unlike the broad Super 301, Special 301 targets only unfair trade practices concerning intellectual property rights and requires the USTR to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access.[41] Upon either identification, the USTR will initiate within thirty days an investigation into the act, policy, or practice of the identified country[42] and will request a consultation with the country regarding its offending practices.[43] If the issues remain unresolved after six months,[44] which may be extended to nine months

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American economy disproportionately to the benefit to be achieved; and (5) the national security of the United States could be harmed through action.

The USTR has discretion to investigate foreign practices and impose sanctions on its own initiative or at the behest of domestic industries that petition for redress. To impose sanctions, the USTR must determine (1) that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce; and (2) that action by the United States is appropriate.

A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 AM. J. INT'L L. 675, 677-78 (1996) (footnotes omitted).

36. 19 U.S.C. §§ 2101-2495.

37. "The new Section 301 of the Omnibus Trade and Competitiveness Act of 1988 is probably the most criticized piece of U.S. foreign trade legislation since the Hawley-Smoot Tariff Act of 1930." Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, *in* AGGRESSIVE UNILATERALISM, *supra* note 34, at 113, 113. See generally AGGRESSIVE UNILATERALISM, *supra* note 34, for an excellent collection of essays discussing Super 301 and Special 301.

38. 19 U.S.C. § 2420(a)(1)(A)-(B).

39. Super 301 expired in 1990, and President Clinton reinstated the provision by an executive order in March 1994. *See* Exec. Order No. 12,901, 59 Fed. Reg. 10,727 (1994). Despite the reinstatement, then-USTR Mickey Kantor did not identify any Super 301 targets. Due to heavy criticism, the Clinton administration did not request the legislative renewal of this controversial provision. *See* Puckett & Reynolds, *supra* note 35, at 681.

40. 19 U.S.C. § 2420(a)(1)(A)-(B).

41. *Id.* § 2242(a)(1)(A).

42. *Id.* § 2412(b)(2)(A).

43. *Id.* § 2413(a)(1); *see also* ABRAM CHAYES & ANOTNIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 107 (1995) ("Under Section 301, the 'defendant' has an opportunity to be heard, but *as a matter of grace, not of right.*") (emphasis added).

44. 19 U.S.C. § 2414(a)(3)(A); *see also* Theodore H. Davis, Jr., *Combating Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT'L L. 505, 519-20 (1991) ("Unlike the more typical section 301 investigation, which has a twelve to eighteen month timetable, a section 301 investigation stemming from a Special 301 priority designation is conducted under a six month 'fast-track' system.").

under certain statutory conditions,[45] the USTR may suspend or withdraw trade benefits, impose duties or other restrictions, or enter into binding agreements that require the offending country to eliminate or phase out its offending practice or to compensate the United States.[46] Since the introduction of Super 301 and Special 301, the U.S. government has used these provisions repeatedly to pressure foreign countries to reform their intellectual property regimes.[47]

However, not all countries can impose, or even threaten to impose, unilateral trade sanctions, for the success of these sanctions largely depends on the economic and military strengths of the imposing country. Thus, less developed countries generally resort to more passive types of protective measures, such as tariffs and subsidies. China is the most notorious example in this respect. Its arsenal of protectionist trade barriers includes quotas, import licensing, import substitution, local content polices, certification and quarantine standards, and export performance requirements.[48] By instituting trade barriers, China has successfully sheltered its domestic industries against foreign competition and coerced its trading partners to grant concessions in exchange for greater market access.

During the post-war period, some less developed countries took a more radical approach. Frustrated by the international trading system, which was biased toward industrialized countries, many less developed countries, especially those in South America, adopted a self-reliant development strategy, practicing import substitution[49] and providing large subsidies to local industries.[50] China took an extreme approach by

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45. The three statutory conditions are as follows:

(i) complex or complicated issues are involved in the investigation that require additional time,

(ii) the foreign country involved in the investigation is making substantial progress in drafting or implementing legislative or administrative measures that will provide adequate and effective protection of intellectual property rights, or

(iii) such foreign country is undertaking enforcement measures to provide adequate and effective protection of intellectual property rights . . . .

19 U.S.C. § 2414(a)(3)(B).

46. *Id.* § 2411(c)(1).

47. *See* Newby, *supra* note 33, at 39-46 (discussing Special 301 actions in Taiwan, China, and Thailand); Yu, *From Pirates to Partners*, *supra* note 2, at 137-38 (discussing the United States's success in using section 301 sanctions to pressure China to reform its intellectual property regime).

48. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 201-05 (discussing China's use of protectionist trade barriers to protect its local industry); *see also* WILLIAM H. OVERHOLT, THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPERPOWER 381 (1993) (discussing China's protectionist trade barriers) ("China is trying to export like a capitalist and import like a communist.") (quoting statement of former Ambassador Arthur Hummel).

49. "Import substitution is a policy of producing domestically as much as possible of that which a country traditionally imported." HUGHES, *supra* note 14, at 374.

50. *See id.*

launching the Great Leap Forward Movement,[51] withdrawing completely from the global economy.[52] By the late 1980s, however, "most countries had concluded that import substitution was not working (or that they had sheltered the nascent industries long enough)."[53] In China's case, the self-reliant development strategy had led to high-cost and ineffective domestic production, and the country remained backward, possessing very limited foreign technology and capital.[54]

As Adam Smith pointed out more than two centuries ago,[55] the biggest problem with the coercive approach is that coercion tends to invite retaliation.[56] Consider unilateral sanctions, for example. Commentators repeatedly point out the lack of evidence that unilateral sanctions can effectuate policy changes in other countries.[57] In fact,

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51. See HSÜ, *supra* note 26, at 655-58 for a discussion of the Great Leap Forward Movement in China.

52. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 198 (discussing China's mistaken withdrawal from the global economy).

53. HUGHES, *supra* note 14, at 374.

54. Yu, *From Pirates to Partners*, *supra* note 2, at 198; *see also* William T. Pendley, *China as International Actor*, *in* BETWEEN DIPLOMACY AND DETERRENCE: STRATEGIES FOR U.S. RELATIONS WITH CHINA 19, 27 (Kim R. Holmes & James J. Przystup eds., 1997) [hereinafter BETWEEN DIPLOMACY AND DETERRENCE] (explaining why China needs to integrate with the global economy).

55. In *The Wealth of Nations*, Adam Smith wrote the following:

> The case in which it may sometimes be a matter of deliberation how far it is proper to continue the free importation of certain foreign goods is, when some foreign nation restrains by high duties or prohibitions the importation of some of our manufactures into their country. Revenge in this case naturally dictates retaliation, and that we should impose the like duties and prohibitions upon the importation of some or all of their manufactures into ours. Nations, accordingly, seldom fail to retaliate in this manner.

2 ADAM SMITH, THE WEALTH OF NATIONS 40 (James E. Thorold Rogers ed., Oxford Univ. Press 1869) (1776).

56. *See* Robert O. Keohane, *The Demand for International Regimes*, *in* INTERNATIONAL REGIMES, *supra* note 12, at 182-83; Scott Fairley, *Extraterritorial Assertions of Intellectual Property Rights in International Trade*, *in* INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 141, 144 (George R. Stewart et al. eds., 1994) ("Unilateralism begets unilateralism."). *But see* Alan O. Sykes, *"Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301*, 8 B.U. INT'L L.J. 301, 313 (1990) (questioning whether any nation sanctioned for a blatant act of cheating would find counter-retaliations to be an optimal strategy).

57. *See* Julia Chang Bloch, *Commercial Diplomacy*, *in* LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 185, 205 (Ezra F. Vogel ed., 1997) [hereinafter LIVING WITH CHINA]; *see also* CHAYES & CHAYES, *supra* note 43, at 22 ("If we are correct that the principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly."); Mark A. Groombridge, *China's Accession to the World Trade Organization: Costs and Benefits*, *in* CHINA'S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT? 165, 178 (Ted Galen Carpenter & James A. Dorn eds., 2000) ("If one looks at the history of using economic sanctions as a weapon . . . , there is a clear and consistent trend: multilateral sanctions sometimes work; unilateral sanctions almost never do."); W. Bowman Cutter et al., *New World, New Deal: A Democratic Approach to Globalization*, FOREIGN AFF., Mar./Apr. 2000, at 80, 92 (arguing that unilateral economic sanctions not only failed to achieve their goals but have cost the United States about $20 billion in lost exports, 200,000 jobs, and the goodwill and trust of its allies abroad). *But see generally* Richard W. Parker, *The Problem with Scorecards: How (and How Not) to Measure the Cost-effectiveness of Economic Sanctions*, 21 MICH. J. INT'L L. 235 (2000) (pointing out the difficulty

most of the time, unilateral sanctions will hurt businesses of the imposing country.[58] Today, goods produced in one country are also produced in another. Thus, unless the imposing country is able to secure cooperation from its key trading partners,[59] the sanctioned country could easily turn to another country for trade. For example, China has repeatedly played both the "Europe Card" and "Japan Card" to ward off trade threats from the U.S. government.[60]

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in measuring the effectiveness of economic sanctions and the methodological challenges confronting empirical studies regarding economic sanctions); *see also* Jagdish Bhagwati, *Trade Linkage and Human Rights*, *in* THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 241, 243 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) [hereinafter URUGUAY ROUND AND BEYOND] (arguing that moral absolutists are willing to suffer economic harm even though the sanctions may not result in any policy changes).

58. For example, a confrontational policy has hurt American businesses in China. Due to the constant use of trade threats by the U.S. government and the uncertain trade relations between the two countries, many risk-aversive American businesses have limited their business in China to avoid risks. Yu, *From Pirates to Partners*, *supra* note 2, at 169. Unreliable as long-term suppliers, some of the American businesses have been replaced by their foreign competitors. OVERHOLT, *supra* note 48, at 381. The trade threats and constant bullying also have sparked a new resurgence of nationalism and xenophobia in China that resulted in "day-to-day bureaucratic actions that hold back, divert, or delay action on U.S. companies' permits, applications, and bids whenever U.S.-China relations sour." Bloch, *supra* note 57, at 209. For discussion of the new resurgence of nationalism and xenophobia in China, see GEREMIE R. BARMÉ, IN THE RED: ON CONTEMPORARY CHINESE CULTURE 255 (1999) (reflecting anti-American sentiments in his book chapter entitled "To Screw Foreigners Is Patriotic"); YONGNIAN ZHENG, DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY AND INTERNATIONAL RELATIONS 2 (1999) (arguing that China may face a new resurgence of nationalism "because a new ideology is necessary as faith in Marxism or Maoism declines, and nationalism, if handled properly, can justify the political legitimacy of the leadership"); Ren Yue, *China's Perceived Image of the United States: Its Sources and Impact*, *in* THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE 247, 251 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) [hereinafter OUTLOOK FOR U.S.-CHINA RELATIONS] (showing a poll that indicates anti-American sentiment); Yu, *From Pirates to Partners*, *supra* note 2, at 169 (discussing evidence of the new resurgence of nationalism and xenophobia in post-Deng China); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 28 (same).

59. *See* Robert P. O'Quinn, *Integrating China into the World Economy*, *in* BETWEEN DIPLOMACY AND DETERRENCE, *supra* note 54, at 45, 80 (explaining that imposing unilateral sanctions without cooperation from the international community tends to isolate the country imposing the sanctions more than the target country); William J. Dobson, *China's Europe Card*, N.Y. TIMES, Apr. 13, 1996, at A21 ("To be effective, America's China policy cannot simply be manufactured in Washington and delivered in Beijing; to some degree, it must be sold in London, Paris and Bonn."); *see also* GREG MASTEL, THE RISE OF THE CHINESE ECONOMY: THE MIDDLE KINGDOM EMERGES 187 (1997) ("With the collapse of the Soviet Union, U.S. allies feel more free than ever to set their own foreign policy independent of U.S. positions."); Bloch, *supra* note 57, at 206 ("[W]here sanctions are concerned, the United States appears increasingly alone.").

60. *See* Bloch, *supra* note 57, at 206 ("[T]he Chinese government will react to sanctions by becoming even more hostile to the United States and by switching from U.S. products to European and Japanese ones."); Tony Walker et al., *Li Peng Backs Trade with "More Lenient" Europeans*, FIN. TIMES, June 11, 1996, at 1, 20 ("If the Europeans adopt more co-operation with China in all areas, not just in economic areas but also in political and other areas, then I believe the Europeans can get more orders from China.") (statement of Chinese Premier Li Peng); *see also* Zhao Haiying, *Sino-U.S. Economic Relations Across Time and Space*, *in* OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 58, at 207, 216 ("Given the current world economic landscape, the United States has to compete with Europe and Japan in the emerging Chinese market, and China has to compete with other developing countries in the U.S. market.").

Even worse, a coercive approach tends to threaten the integrity of the global trading system,[61] including the international intellectual property system that the developed countries have worked so hard to create.[62] A coercive approach may lead to trade wars or even the collapse of the entire system.[63] It also may lead to criticism from other countries, thus alienating the imposing country from its trading partners.[64] Further-

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61. *See* CHAYES & CHAYES, *supra* note 43, at 100 ("The central lesson the drafters [of GATT] took from interwar history was that unilateral action on trade questions and disputes led ultimately to the collapse of the international trading system."); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 297 (1991) (arguing that the bilateral trade-based approach "run[s] counter to U.S. long-term interests for a healthy, stable trade environment" and "tend[s] to fragment the world trading system . . . [by creating] resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism"); Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, *in* AGGRESSIVE UNILATERALISM, *supra* note 34, at 163, 176-77 (arguing that unilateral action will undermine the international trading system and may lead to its eventual breakdown); Stein, *Coordination and Collaboration*, *supra* note 12, at 124 ("When all nations pursue their dominant strategies and erect trade barriers, . . . they can engender the collapse of international trade and depress all national incomes. That is what happened in the 1930s, and what nations wanted to avoid after World War II."). *But see* William Safire, *Smoot-Hawley Lives*, N.Y. TIMES, Mar. 17, 1983, at A23 (arguing that protectionism may be the only solution to unfair competition from foreign countries).

62. *See* Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 337-38 (1996) (noting that the American coercive trade policy is attempting to destroy what the United States has worked so hard to push intellectual property rights on the international trade agenda); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 874 (arguing that the United States's unilateral actions and its existing approach toward the protection of patents and mask works "ha[ve] raised a significant question of its continued commitment to the principle of national treatment"); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 97 (1997) ("Universal intellectual property standards embodied in the TRIPs Agreement had become enforceable within the framework of a World Trade Organization, largely as the result of sustained pressures by a coalition of powerful manufacturing associations in Europe, the United States, and Japan.").

63. As one commentator cautioned:

> What if the EC was to assert that the U.S. patent system is discriminatory and should be repealed since it takes . . . "first applying, first served" as its basis for dealing with foreigners? What if Central and South American countries were to insist that U.S. restrictions on sugar imports are clear impediments to trade and demand their removal? What if Japan and Taiwan were to claim that the U.S. requirement for voluntary restraints on machine tool exports are harmful to domestic industry and demand compensation? Would the United States enter into negotiations with these trading partners? If the United States decided not to make the required concessions and these countries responded with countermeasures or sanctions against U.S. imports without recourse to GATT procedures, what would become of the world free-trading system?

Makoto Kuroda, *Super 301 and Japan*, *in* AGGRESSIVE UNILATERALISM, *supra* note 34, at 219, 220-21.

64. Julia Cheng, Note, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1979 (1998); *see also* David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 909 (1989) ("It is indeed hard to see why many states should accept new multilateral commitments in [the intellectual property] area if they remain vulnerable to unilateral actions."); *GATT Bill Brings Major Reforms to Domestic Intellectual Property Law*, 11 Int'l Trade Rep. (BNA) 1966, at 1966-67 (Dec. 21, 1994) [hereinafter *GATT Bill Brings Major Reforms*] (noting the dissatisfaction of less developed countries over the United States's ability to impose Special 301 sanctions despite their compliance with TRIPs).

more, if practiced by a leading economic power such as the United States, such an approach might lead to emulation by emerging democracies, which are constantly looking for models and guidance for their transition from a centrally planned to a market economy.[65]

Moreover, a coercive approach is self-deluding in nature and rarely succeeds in the long run,[66] especially in situations requiring a change of domestic beliefs or socio-economic conditions.[67] For example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)[68]—which many regard as coercive[69] and "imperialistic"[70]—succeeds in "achiev[ing] treaties in diplomatically and politically difficult areas in which agreement would otherwise be

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65. *See* ROBERT W. MCGEE, A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM 160 (1994) (arguing that the United States's coercive trade policy may lead to unrevised adoption by emerging democracies); *see also* Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1, 5-6 (1995) ("After the Second World War, however, a new era of global interaction of legal systems developed. U.S. economic dominance reinforced the idea that U.S. legal institutions and, particularly, recent U.S. substantive law, should be considered as normal models for modernization.").

66. Yu, *From Pirates to Partners*, *supra* note 2, at 172.

67. *See* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 118 (1995) (noting that a coercive policy fails to generate the type of domestic rationale and conditions needed to produce enduring change); *see also* CHAYES & CHAYES, *supra* note 43, at 32 ("[T]he experience in the international arena is that unilateral sanctions in the more coercive form of military or economic penalties are but infrequently and sporadically deployed to redress violations of treaty obligations, and are not very effective when they are."); SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 13 (1998) (illustrating the difference between overt coercion and persuasion by comparing the development of antitrust and intellectual property laws in less developed countries); Leaffer, *supra* note 61, at 278 ("A durable agreement must be based on mutual gain and cannot be imposed by the information-producing countries on the developing world.").

68. TRIPs Agreement, *supra* note 13.

69. *See* discussion *infra* Part IV.B.

70. *See* Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, *in* INTELLECTUAL PROPERTY AND ETHICS 195 (Lionel Bently & Spyros M. Maniatis eds., 1998); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 614 (1996) [hereinafter Hamilton, *TRIPS Agreement*] ("If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history."); *id.* at 617 ("TRIPS is nothing less than freedom imperialism."); A. Samuel Oddi, *TRIPS—Natural Rights and a "Polite Form of Economic Imperialism,"* 29 VAND. J. TRANSNAT'L L. 415 (1996); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 813 (1989) ("Imposition of foreign legal standards on unwilling states in the name of 'harmonization' remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism.") (citing 1 STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975)); *see also* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 184 (1996) ("What is universalism to the West is imperialism to the rest."); Susan Strange, *Cave! hic dragones: A Critique of Regime Analysis*, *in* INTERNATIONAL REGIMES, *supra* note 12, at 337, 340 (arguing that the American policy is a form of "nonterritorial imperialism"); Yu, *From Pirates to Partners*, *supra* note 2, at 172 (noting the imperialistic nature of the TRIPs Agreement). Interestingly, as Professor Strange pointed out, one French author titled his book on American foreign policy *The Imperial Republic*. *Id.* (referencing RAYMOND ARON, THE IMPERIAL REPUBLIC: THE U.S. AND THE WORLD, 1945-1973 (1974)).

elusive."[71] However, by linking tariffs on textiles and agriculture with intellectual property rights and restrictions in foreign direct investment,[72] the TRIPs Agreement fails to attack the crux of the piracy and counterfeiting problem.[73] Rather, it masks the significant cultural and ideological differences between developed and less developed countries[74] and postpones these difficult issues for resolution in a later forum.

Finally, a coercive approach creates serious ramifications in the context of human rights and the rule of law.[75] A coercive approach would demonstrate that a country should rely heavily on pressure and ultimata to protect its economic interests, thus discrediting the very important message that governments should respect legal rights and processes.[76] Indeed, the coercive approach would provide the coerced country with "a convenient legitimization" for its repressive measures while simultaneously insulating it from criticism by the coercing country for its lack of rule of law and human rights protection.[77]

Despite these shortcomings, a coercive approach is sometimes effective in facilitating immediate compliance and inducing short-term concessions, especially in situations where the coerced country has failed to fulfill its treaty obligations.[78] After all, a country will ruin its own

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71. RYAN, *supra* note 2, at 12.

72. For background on the history of the TRIPs Agreement, see generally DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (1998); RYAN, *supra* note 2; A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundation*, 23 STAN. J. INT'L L. 57 (1987). For an excellent collection of essays discussing the Uruguay Round, see URUGUAY ROUND AND BEYOND, *supra* note 57.

73. Yu, *From Pirates to Partners*, *supra* note 2, at 173.

74. *See* RYAN, *supra* note 2, at 12; Yu, *From Pirates to Partners*, *supra* note 2, at 173.

75. Yu, *From Pirates to Partners*, *supra* note 2, at 174.

76. *See* William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 143 (1997) [hereinafter Alford, *Making the World Safe for What?*]; Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 42 (1996) ("If the system requires action by the powerful elite within the government, the Party, or both to ensure enforcement, rule of law is replaced by rule of men."); Burrell, *supra* note 70, at 198 ("[The Western approach toward China] suggests that western governments are more concerned with property rights than with the more fundamental rights of China's population."); *see also* 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, 48 (1998) ("Coercion is . . . a delicate, risky, and possibly counterproductive strategy, one that could easily backfire on those governments that succumb to this temptation.").

77. *See* Alford, *Making the World Safe for What?*, *supra* note 76, at 144-45 (noting that the U.S. coercive trade policy provides China with "a convenient legitimization for repressive measures [the Chinese authorities] intended to take in any event while simultaneously constraining America's capacity to complain about such actions").

78. *See* ALFORD, *supra* note 67, at 118; CHAYES & CHAYES, *supra* note 43, at 89 ("On the record, it cannot be said that unilateral economic sanctions imposed by the United States have been uniformly ineffective in inducing other countries to fulfill treaty obligations. In some issue areas they have worked at least moderately well in a fair proportion of cases."); Sykes, *supra* note 56, at 313 ("Section 301 is fairly

reputation in the trading community if it retaliates upon being found cheating on its treaty obligations.[79] Given the lack of a supergovernment in the international system and the limitation of the enforcement and dispute resolution mechanisms,[80] a coercive approach is sometimes necessary to induce compliance with international norms and treaty obligations. Nonetheless, such an approach cannot be used very often and should be primarily employed as a last resort.

B. Adversary Approach

Under the adversary approach, parties confront each other in an adjudicatory proceeding to resolve disputes and differences. The common adjudicatory process in international law is through the International Court of Justice (ICJ), which was included as an optional dispute settlement mechanism in both the Berne Convention for the Protection of Literary and Artistic Works[81] and the Paris Convention for the Protection of Industrial Property.[82] However, because countries are reluctant to use this optional forum,[83] the ICJ offers very limited

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successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights; . . . success is more likely with a GSP beneficiary.").

79. Sykes, *supra* note 56, at 313.

80. *See* discussion *infra* Part I.B (discussing the limitation of the dispute settlement mechanism of the WTO).

81. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, art. 33(1), 25 U.S.T. 1341, 828 U.N.T.S. 221. Article 33(1) of the Berne Convention provides:

> Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

Id.

82. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at Stockholm* July 14, 1967, art. 28(1), 21 U.S.T. 1538, 828 U.N.T.S. 305. Article 28(1) of the Paris Convention provides:

> Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

Id.

83. Professor Schachter explained why countries are reluctant to have their disputes adjudicated in the ICJ:

> Litigation is uncertain, time consuming, troublesome. Political officials do not want to lose control of a case that they might resolve by negotiation or political pressures. Diplomats naturally prefer diplomacy; political leaders value persuasion, manoeuvre and flexibility.

assistance in resolving international intellectual property disputes,[84] thus making the Berne and Paris Conventions virtually unenforceable except by coercion or diplomacy.

The situation improved when the Uruguay Round included in the TRIPs Agreement the dispute settlement procedure of the WTO.[85] Under this mandatory procedure, a member state of the WTO can initiate consultations with another member state that allegedly has breached the treaty obligations.[86] If consultations fail, the parties may pursue good offices, conciliation, or mediation within the WTO.[87] Alternatively, the parties can request the Dispute Settlement Body (DSB), which administers the WTO dispute settlement procedure, to establish a panel to hear the complaint.[88] Following hearings and deliberations, the panel will submit a report to the DSB,[89] which the DSB will automatically adopt unless it makes a consensus decision against adoption or unless a party appeals for review by the Appellate Body.[90] When a party appeals the panel decision, the seven-member Appellate Body will issue a report. Unless the DSB makes a consensus decision to reject that report, the DSB will automatically adopt it, and

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> They often prefer to "play it by ear", making their rules fit the circumstances rather than submit to pre-existing rules. Political forums, such as the United Nations, are often more attractive, especially to those likely to get wide support for political reasons. We need only compare the large number of disputes brought to the United Nations with the few submitted to adjudication. One could go on with other reasons. States do not want to risk losing a case when the stakes are high or be troubled with litigation in minor matters. An international tribunal may not inspire confidence, especially when some judges are seen as "political" or as hostile. There is apprehension that the law is too malleable or fragmentary to sustain "true" judicial decisions. In some situations, the legal issues are viewed as but one element in a complex political situation and consequently it is considered unwise or futile to deal with them separately. Finally we note the underlying perception of many governments that law essentially supports the *status quo* and that courts are responsive to demands for justice or change.

Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 9, 208 (1982).

84. GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 5, at 111 (noting that no member country ever pursued litigation before the ICJ despite the optional dispute resolution provisions in the Berne and Paris Conventions).

85. Article 64 of the TRIPs Agreement requires that all intellectual property disputes arising under the Agreement be settled by the dispute settlement procedure provided in the General Agreement of Trade and Tariffs. TRIPs Agreement, *supra* note 13, art. 64, 33 I.L.M. at 1221. *See generally* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE (1999), for a comprehensive discussion of the dispute settlement procedure of the WTO.

86. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, art. 4, 33 I.L.M. 112, 116 (1994) [hereinafter Dispute Settlement Understanding].

87. *Id.* art. 5.

88. *Id.* art. 6.

89. *Id.* art. 12(7).

90. *Id.* art. 16(4).

the disputing parties have to adopt the report unconditionally.[91] If the member is found to be in breach of its treaty obligations and fails to implement the DSB's recommendations or rulings within a "reasonable period of time,"[92] the complaining party may request negotiations for compensation.[93] If such negotiations fail, the complaining party may request the DSB to authorize the suspension of concessions and other obligations covered by the treaty.[94]

The WTO dispute settlement procedure provides various benefits. By replacing a coercion-based environment with a rule-based system,[95]

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91. *Id.* art. 17(14).

92. *Id.* art. 21(3).

93. *Id.* art. 22(2).

94. *Id.* Article 22(3) delineates in detail the principles and procedures a complaining party must apply in considering what concessions or treaty obligations to suspend. *Id.* art. 22(3).

95. As Professors Dreyfuss and Lowenfeld described:

> [One of the major breakthroughs in the Uruguay Round] was agreement on a strict and binding system of dispute settlement and enforcement. Under the earlier GATT dispute settlement mechanisms, parties to disputes could frustrate the system both at the beginning and at the end. In contrast, the new Understanding on Dispute Settlement, to which all members of the World Trade Organization (WTO) are required to belong, precludes objection by a potential defendant to initiation of a case beyond a short delay, and precludes veto of a decision made by a panel, or, if that decision is appealed, by the Appellate Body. There is also a complex system of enforcement, complete with fairly short deadlines and provision for retaliation, in case a member state does not comply with a decision.

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, 276-77 (1997); *see also* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 76-78 (discussing how an adjudicative system would better promote compliance with GATT rules than would a negotiation/consensus system). Professor John Jackson argued that the rule-based system is particularly important for the governance of international economic affairs:

> Economic affairs tend (at least in peace time) to affect more citizens directly than may political and military affairs. Particularly as the world becomes more economically interdependent, more and more private citizens find their jobs, their businesses, and their quality of life affected if not controlled by forces from outside their country's boundaries. Thus they are more affected by the economic policy pursued by their own country on their behalf. In addition, the relationships become increasingly complex—to the point of being incomprehensible to even the brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their needs and their perceived complaints. The result of this is increasing citizen participation, and more parliamentary or congressional participation in the processes of international economic policy, thus restricting the degree of power and discretion which the executive possesses.
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> This makes international negotiations and bargaining increasingly difficult. However, if citizens are going to make their demands heard and influential, a "power-oriented" negotiation process (often requiring secrecy, and executive discretion so as to be able to formulate and implement the necessary compromises) becomes more difficult, if not impossible. Consequently, the only appropriate way to turn seems to be toward a rule-oriented system, whereby the various citizens, parliaments, executives and international organizations will all have their inputs, arriving tortuously to a rule—which, however when established will enable business and other decentralized decision makers to rely upon the stability and predictability of governmental activity in relation to the rule.

the procedure provides certainty and stability in the international trading system.[96] The procedure also provides a mechanism through which countries can resolve international trade disputes before seeking retaliation. Nonetheless, as with all adversary processes, the dispute settlement procedure creates hostility between the disputing parties.[97] Furthermore, due to the lack of an effective enforcement mechanism in the international trading system, the best redress a country can seek if the offending country refuses to compensate is the suspension of concessions and other treaty obligations[98]—in other words, retaliation.[99]

Since the creation of the WTO, commentators have cited a number of weaknesses of the dispute settlement mechanism,[100] including the lack of transparency of the dispute settlement proceedings,[101] limited access

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JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 111 (2d ed. 1997).

96. *But see* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 364 (1993) ("[I]f the major GATT countries are not ready to change their behavior, these stronger demands will only produce more visible and dramatic legal failures. And if that were to happen, the credibility of GATT legal obligations would almost certainly plunge.").

97. Davey, *supra* note 95, at 70 (arguing that a legalistic approach may be counterproductive "because it poisons the atmosphere in which [diplomatic] contacts take place . . . [and because] economic relations between the contending parties may deteriorate generally as positions in the dispute harden and bad feelings spill over into other areas").

98. *See* Dispute Settlement Understanding, *supra* note 86, at art. 22; *see also* Davey, *supra* note 95, at 70 ("The need to promote negotiated solutions is said to exist because even if a panel report vindicates the complaining party, there is no guarantee that the other party will correct its violation.").

99. Writing in 1987, Professor Davey provided four reasons why the GATT should authorize retaliation more regularly:

> First, the novelty of retaliation will decrease with use and it will eventually be accepted as the normal consequence of an inability to resolve a dispute. This will lessen the poisonous effects that retaliation entails. Second, retaliation would improve the efficiency of the GATT dispute settlement system by encouraging speedy conflict resolution. Third, retaliation is fair because it reestablishes the balance of concessions between the two parties, a balance that is thrown into disequilibrium when one party has violated GATT's rules. Fourth, and most important, retaliation will often occur anyway if disputes are not resolved. Given that this is the case, it would be desirable for GATT to exercise greater control over retaliation when it occurs. Indeed, it is possible that retaliation will become more common, in the future, because of its proven effectiveness in recent U.S.-EC trade disputes. With GATT supervision some control can be exercised, particularly as to the amount of retaliation, which reduces the likelihood that a massive trade war would erupt.

Davey, *supra* note 95, at 101-02.

100. *See generally* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS (Friedl Weiss ed., 2000) for a comprehensive discussion on how to improve the dispute settlement process of the WTO.

101. GAIL E. EVANS, LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION 194 (2000) (noting that "the substantive goals of classical constitutionalism, in particular, adequate lawmaking procedures and transparency of law, are yet to be achieved"); JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 316 (4th ed. 2002) (discussing the transparency problem); *see also* John Jackson, *The Institutional and Jurisdictional Architecture: Reflections on Constitutional Changes to the Global Trading System*, 72 CHI.-KENT. L. REV. 511, 517 (1996) (noting that transparency "has been an enormous weakness

by non-members to the dispute settlement panels and the Appellate Body,[102] technical and financial difficulties confronting less developed countries in implementing their treaty obligations,[103] and the insensitivity and undemocratic nature of the decisionmaking processes.[104] These criticisms were further intensified by the anti-globalization protests in Seattle, Washington, Prague, Quebec, and Genoa and the growing dissatisfaction among less developed countries with the international trading system.[105]

C. Cooperative Approach

Under the cooperative approach, parties work together to resolve disputes and differences. Depending on the mindsets of the negotiators, the cooperative approach can result in two distinctive outcomes.

If negotiators have a zero-sum mindset, *i.e.*, they believe they are playing a zero-sum game in which one country's gain necessarily results in another country's loss, the cooperative approach will result in compromises.[106] For example, the TRIPs Agreement represents a

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of international organizations and structures, partly from several centuries' history of diplomatic discourse, which has strongly stressed negotiation in a context of secrecy, and, in some cases, secrecy in order to prevent their home constituencies from learning what they are doing").

102. EVANS, *supra* note 101, at 209 (noting that "one of the deficiencies with circumscribing the scope of private rights at the transnational level is that individuals have no direct recourse to international dispute settlement"); JACKSON ET AL., *supra* note 101, at 316-17 (discussing the limited participation of non-members).

103. JACKSON ET AL., *supra* note 101, at 335-36 (discussing the difficulties confronting less developed countries).

104. *See* EVANS, *supra* note 101, at 201 (arguing that states signing the Uruguay Round Agreement "have little choice but compliance"); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (criticizing the lack of democratic processes in international trade decision-making); Michael H. Shuman, *GATTzilla v. Communities*, 27 CORNELL INT'L L.J. 527, 530 (1994) (noting that "the most insidious feature of the GATT is that it systematically strips communities of powers they might otherwise use to protect themselves against the adverse effects of the global economy"). *But see* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (discussing the democratic potential of the WTO).

105. *See* Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165 (2000) (discussing the implications of the failed Seattle Ministerial Conference for the future of the TRIPs Agreement); David A. Gantz, *Failed Efforts to Initiate the "Millennium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349 (2000) (discussing the implications of the failed Seattle Ministerial Conference for future global trade negotiations); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001) (arguing that the failed Seattle Ministerial Conference was the eruption of long suppressed issues); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000) (offering a proposal for reconciling the concerns of the protestors in Seattle with the purposes and procedures of the WTO).

106. *See* discussion *infra* Part III.A (discussing the difference between a compromise and a nonzero-sum solution).

compromise between the developed and less developed countries on their different positions regarding the availability, scope, and use of intellectual property rights.[107] The various harmonization directives of the European Union represent compromises among the fifteen member states of the Union on how to protect intellectual property rights.[108] Likewise, the 1996 WIPO Internet Treaties represent compromises of more than 100 WIPO members on the protection of intellectual property in the Internet and concerning new communications technologies.[109]

By contrast, if negotiators have a nonzero-sum mindset, *i.e.*, they believe they are playing a nonzero-sum game in which a country's gain does not necessarily result in another country's loss, the cooperative approach may result in a forward-looking solution that provides mutual benefits to all the parties involved.[110] Such a solution not only resolves the intellectual property dispute, it also preserves hard-earned relationships between the disputing countries. For example, the development of a "constructive strategic partnership" between China and the United

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107. *See* TRIPs Agreement, *supra* note 13; *see also* RYAN, *supra* note 2, at 12 (discussing the linkage bargaining involved in the negotiation of the TRIPs Agreement); Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, *in* PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 39, 46 (Frederick M. Abbott & David J. Gerber eds., 1997) [hereinafter Abbott, *The WTO TRIPS Agreement*] (describing the bargain between the developed and less developed countries in the TRIPs Agreement); Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1289 (1998) (arguing that the whole purpose of the TRIPs Agreement "was to induce the developing world to incur these liabilities in return for other agreements contained in the WTO Treaty, promising reductions in agricultural export subsidies, concessions on the import of tropical products, and a gradual phasing out of textile import quotas in the industrialized world").

108. *See, e.g.*, Council Directive 87/54/EEC of 16 December 1986 on the Legal Protection of Topographies of Semiconductor Products, 1987 O.J. (L 24) 36; Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42; Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61; Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15; Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9 [hereinafter EC Copyright Term Directive]; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L77) 20 [hereinafter EU Database Directive]; Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 [hereinafter EU Information Society Directive]. The European Union is not the only entity that seeks to harmonize its intellectual property laws. There are many regional intellectual property arrangements. For a discussion of these arrangements, see WIPO, INTRODUCTION TO INTELLECTUAL PROPERTY THEORY AND PRACTICE 505-14 (1997).

109. *See* WIPO Copyright Treaty, *supra* note 16; WIPO Performances and Phonograms Treaty, *supra* note 16. For discussion of the 1996 WIPO Diplomatic Conference in Geneva and the formation of the WIPO Internet Treaties, see generally Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

110. *See* discussion *infra* Part III.A (discussing the benefits of the nonzero-sum approach).

States could help resolve the century-old intellectual property dispute between the two countries while preserving their often troubled relationship.[111] Likewise, provisions that facilitate financial and technical assistance and the exchange of information between government authorities will allow countries to tackle a common problem by sharing expertise and information.[112]

Today, increased globalization and the proliferation of new communications technologies have made it difficult for countries to protect intellectual property rights by focusing on their own national borders.[113] Infringing activities in one country can easily inflict losses in another country. Therefore, cooperation is badly needed. Because the cooperative approach can result in two distinctive outcomes, whether countries will compromise or create forward-looking solutions that are mutually beneficial to each other will depend on the mindsets of the negotiators.

II. FROM ZERO-SUM TO NONZERO-SUM APPROACHES

In recent years, people have increasingly applied the nonzero-sum approach[114] to resolve disputes, compete, and tackle global problems. In the legal field, lawyers, clients, jurists, and scholars continue to extol the benefits of using mediation and other nonadjudicatory procedures to resolve disputes.[115] In the business world, corporations and nonprofit organizations aggressively establish corporate alliances and strategic partnerships.[116] Similarly, in the international arena, diplomats and

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111. *See* Yu, *From Pirates to Partners*, *supra* note 2.

112. *See, e.g.*, TRIPs Agreement, *supra* note 13, art. 67, 33 I.L.M. at 1222 (requiring developed countries to provide technical and financial cooperation to less and least developed countries); *id.* art. 69, 33 I.L.M. at 1223 (providing for cooperation among signatory countries regarding the elimination of international trade in pirated and counterfeited goods); Letter from Wu Yi, Minster of Foreign Trade and Economic Cooperation, People's Republic of China, to Mickey Kantor, United States Trade Representative (Feb. 26, 1995), *in* Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881, 885-86 (1995) [hereinafter 1995 Agreement] (delineating the mutual responsibilities of the Chinese and U.S. government in training customs officers and bureaucrats, exchanging information and statistics, and undertaking future consultations).

113. *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (discussing the use of extraterritorial adjudication as a means of developing international copyright norms).

114. In game theory terms, a zero-sum game is a game where a player's gain will result in another player's loss. By contrast, in a nonzero-sum game, a player's gain will not necessarily result in another player's loss. Under a nonzero-sum approach, the decisionmaker assumes that he or she is playing a nonzero-sum game from which mutual benefits can be created, *i.e.*, either both parties will be better off or one party will be better off without making the other party worse off.

115. *See* discussion *infra* Part II.A.

116. *See* discussion *infra* Part II.B.

policymakers are shifting from the balance-of-power approach to the balance-of-interests approach, thus making it possible for the establishment of a large number of international organizations and multilateral regimes.[117] Borrowing from the experience of mediators, business strategists, and international relations theorists, this Part seeks to improve intellectual property dispute resolution by applying what we can learn from these other fields.

A. Mediation

> Discourage litigation . . . . Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good [person].
>
> —Abraham Lincoln[118]

Mediation is "the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."[119] Despite its recent popularity, mediation is not a new conflict resolution technique. Indeed, mediation has very deep historical and cultural roots. "Forms of conflict resolution in which a third party helps disputants resolve their conflicts and come to their own decisions have probably been practiced since the existence of three or more people on earth."[120] For millennia, mediation has been widely practiced in East Asia and Africa by religious organizations and among ethnic and religious minorities.[121]

Commentators generally trace the origin of institutionalized mediation in the United States to early dispute resolution procedures in labor-management relations.[122] Unlike isolated disputes where parties usually

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117. *See* discussion *infra* Part II.C.

118. Abraham Lincoln, *Notes for a Law Lecture*, July 1, 1850, *quoted in* FREDERICK TREVOR HILL, LINCOLN THE LAWYER 102 (The Century Co. 1906).

119. JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7 (1984); *see also* MOORE, *supra* note 1, at 8 (defining mediation as "an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited or no authoritative decision-making power . . . [and who] assists the principal parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute").

120. FOLBERG & TAYLOR, *supra* note 119, at 1.

121. *See id.* at 1-4 (tracing the historical and cultural roots of mediation); MOORE, *supra* note 1, at 20-22 (tracing the history of mediation).

122. FOLBERG & TAYLOR, *supra* note 119, at 4 ("The most familiar model for mediation in the United

have no further dealings with one another, "[l]abor relationships are long-term and depend on future cooperation of the parties."[123] Thus, mediation was needed to solve the disputes while preserving delicate relationships.[124]

Mediation was given a further push in the late 1960s, a period characterized by Vietnam War protests, civil rights struggles, student unrest, growing consumer awareness, reexamination of gender roles, and the statutory creation of many new causes of action.[125] During that period, American society experienced a litigation explosion,[126] and the general public became increasingly disillusioned with the formality, expense, and slowness of judicial proceedings, as well as the denial of access to justice.[127] As a result, the government, public interest organizations, and the general public began to experiment with new, alternative forms of dispute resolution.[128]

In 1980, Congress responded to the growing interest in alternative dispute resolution by enacting the Dispute Resolution Act,[129] which "called for the establishment of alternative dispute resolution programs nationwide to be administered by the Justice Department."[130] Despite the statute, Congress failed to allocate the money needed for the

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States comes from the dispute resolution procedures in labor/management relations.") (citation omitted); MOORE, *supra* note 1, at 23 ("The first arena in which mediation was formally institutionalized in the United States was that of labor-management relations.").

123. FOLBERG & TAYLOR, *supra* note 119, at 4.

124. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 309-25 (1971) (using a collective bargaining agreement between an employer and a labor union as an illustration of the function of mediation); *see also* LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 16 (2d ed. 1994) (noting that "collaborative" negotiation is particularly appropriate "where the parties will continue to deal with one another in the future"); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33 (1982) (noting that mediation can help in "contexts in which the parties have a complex, interdependent relationship").

125. *See* FOLBERG & TAYLOR, *supra* note 119, at 4.

126. *See generally* JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981) (tracing the growth of litigation in American Society). *See also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1995) (arguing that the expansion of legal rights and protection have created greater expectation of justice and recompense).

127. FOLBERG & TAYLOR, *supra* note 119, at 4; *see also* Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 580 (1983) (criticizing the American legal system as "strewn with the disappointed hopes of those who find [it] too complicated to understand, too quixotic to command respect, and too expensive to be of much practical use"); Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972) (noting the need for judicial reforms in light of the heightened sense of legal entitlements and the changing expectations of courts among the American public).

128. FOLBERG & TAYLOR, *supra* note 119, at 4-5; *see also* SINGER, *supra* note 124, at 1-14 (discussing the origins and growth of the dispute settlement movement in the United States); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-9 (3d ed. 1999) (recounting the history of the alternative dispute resolution movement); Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, *in* 1 THE POLITICS OF INFORMATONAL JUSTICE 35 (Richard L. Abel ed., 1982) (providing a historical overview of the delegalization reform movements).

129. 28 U.S.C. app. §§ 1-10 (2000). Appropriations for the Act expired in 1985.

130. FOLBERG & TAYLOR, *supra* note 119, at 5.

implementation of the Act.[131] Fortunately, the congressional initiative was picked up by local and state governments, nonprofit organizations, and the private sector.[132] Those efforts were further supported by scholars, theoreticians, and practitioners who studied alternative dispute resolution mechanisms.[133]

Since then, mediation has become one of the predominant methods of alternative dispute resolution.[134] Indeed, mediation sometimes is considered preferable to formal adjudicatory procedures.[135] In the early 1990s, the American Arbitration Association had faced significant competition from mediation firms before it expanded its mediation department.[136] Today, mediation has been widely used in resolving labor, family, neighborhood, ethnic, business, and environmental disputes.

To see the differences between mediation and adjudicatory processes (such as arbitration and litigation), one must understand the different philosophies behind the two dispute resolution processes.[137] In adjudicatory procedures, all of the disputants are adversaries, competing against each other in a zero-sum game. If one wins, the other must lose.[138] By contrast, in mediation, the disputants do not compete against each other nor do they play a zero-sum game. Instead, all of them benefit[139]

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131. *Id.* at 5-6.

132. *Id.* at 6.

133. *Id.*

134. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION, at xi (1994) (considering mediation practice "as the single most powerful tool in the alternative dispute resolution (ADR) movement").

135. FOLBERG & TAYLOR, *supra* note 119, at xiv ("Mediation is preferable to the alternatives of resolving disputes by coercion or adversarial proceedings."); *id.* at 12-13 (providing statistics in support of the argument that mediation provides a greater sense of satisfaction about the process the participants have undergone than do other dispute settlement techniques). *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing the weaknesses of alternative dispute resolution). As Professor Fiss explained:

> [The courts'] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

Id. at 1085.

136. Ellen Joan Pollock, *Arbitrator Finds Role Dwindling as Rivals Grow*, WALL ST. J., Apr. 28, 1993, at B1 (noting that the number of construction disputes handled by the American Arbitration Association dropped from 5189 in 1991 to 4387 in 1992 whereas a competing mediation firm enjoyed a fifteen- to twenty-percent increase in construction cases in the same year).

137. Riskin, *supra* note 124, at 43-48 (noting that lawyers and mediators employ different philosophical maps).

138. *Id.* at 44.

139. MOORE, *supra* note 1, at xv (noting that mediation aims at cooperative, rather than competitive, problem-solving). See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984), for an excellent article discussing cooperative problem-solving.

through a unique, creative, and forward-looking solution.[140] "[T]he emphasis [of mediation] is not on who is right or wrong or who wins and who loses, but rather upon establishing a workable solution that meets the participant's unique needs. Mediation is [therefore] a win/win process."[141]

Mediation has several advantages over adjudicatory procedures. First, adjudicatory procedures are bound by the rules of procedure and substantive law. They assume that "each conflict can be reduced to findings of fact and cognizable causes of action."[142] By forcing parties into adversary positions, these procedures sometimes ignore more optimal solutions. Unlike adjudicatory processes, mediation "assumes that each conflict is unique and will not necessarily be governed by any rule of general applicability. The process assumes that the participants can discover a mutually advantageous, 'win-win' solution to their conflict."[143] The process therefore encourages the participants to craft solutions based on their interests, values, norms, and principles.[144] It also allows the participants to make decisions without being constrained by precedents set in other disputes nor concerned with the precedent they set for others, or even themselves.[145]

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140. FOLBERG & TAYLOR, *supra* note 119, at 8-9 ("[M]ediation is cognitive and behavioral in perspective rather than existential. It is more concerned with the present and the future than with the past."); *id.* at 9 (noting that the primary focus of mediation is "on the solution of the task and the development of a plan of action for the future").

141. *See* FOLBERG & TAYLOR, *supra* note 119, at 10; *see also* MOORE, *supra* note 1, at xv ("Mediation can teach negotiators . . . how to achieve win-win rather than win-lose outcomes.").

142. Lela Porter Love, *Mediation: The Romantic Days Continue*, 38 S. TEX. L. REV. 735, 738 (1997) [hereinafter Love, *The Romantic Days Continue*]; *see* BUSH & FOLGER, *supra* note 134, at 16 ("Because of its flexibility informality, and consensuality, mediation can open up the full dimensions of the problem facing the parties. Not limited by legal categories or rules, it can help reframe a contentious dispute as a mutual problem.").

143. Love, *Mediation: The Romantic Days Continue*, *supra* note 142, at 738; *see* BUSH & FOLGER, *supra* note 134, at 16 (arguing that "mediation can facilitate collaborative, integrative problem solving rather than adversarial, distributive bargaining").

144. FOLBERG & TAYLOR, *supra* note 119, at 8; Fuller, *supra* note 124, at 308 ("[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."); Riskin, *supra* note 124, at 34 (noting that mediation is "potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants"); *see* BUSH & FOLGER, *supra* note 134, at 16 (arguing that mediation can "produce creative, 'win-win' outcomes that reach beyond formal rights to solve problems and satisfy parties' genuine needs in a particular situation").

145. FOLBERG & TAYLOR, *supra* note 119, at 10; *see also* Fuller, *supra* note 124, at 325-26 (noting that the proper function of mediation is "that of helping them to free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance"). As Professor Riskin explained:

> [A]ll sorts of facts, needs, and interests that would be excluded from consideration in an adversary, rule-oriented proceeding could become relevant in a mediation. Indeed, *whatever a party deems relevant is relevant.* In a divorce mediation, for instance, a spouse's continuing need

Second, mediation does not rely heavily on lawyers or outside authority.[146] Instead, it is a self-empowering process[147] that allows the participants to make their own decisions and craft their own solutions.[148] By doing so, it becomes "a dialogue process designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes."[149] Thus, mediation usually results in a consensual agreement that "will be more acceptable in the long run than one imposed by a court [or an arbitrator]."[150] After all, participants are more likely to support the terms they help create than those of an agreement negotiated or imposed by others.[151] Should

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for emotional support could become important, as could the other party's willingness and ability to give it.

Riskin, *supra* note 124, at 34 (emphasis added).

146. *See* FOLBERG & TAYLOR, *supra* note 119, at 10-11.

147. Standards of Conduct for Mediators ("Self-determination is the fundamental principle of mediation."), *reprinted in* John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 478 (1997); BUSH & FOLGER, *supra* note 134, at 2 (arguing that mediation "restor[es] to individuals of a sense of their own value and strength and their own capacity to handle life's problems"); Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 27 (1996) (arguing that mediation improves the negotiation by facilitating "an increased level of party participation in and control over decisions made in the process"); *see also* Riskin, *supra* note 124, at 34 (noting that "the ultimate authority [in mediation] resides with the disputants"); ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 27 (2d ed. 1991) (emphasizing the need to "give [the other parties] a stake in the outcome by making sure they participate in the process").

In recent years, there has been a great debate between whether mediators should assume an evaluative role. For symposia addressing this debate, see Symposium, *How Will Lawyering and Mediation Practices Transform Each Other*, 24 FLA. ST. U. L. REV. 839 (1997); Symposium, *Alternative Dispute Resolution*, 33 WILLAMETTE L. REV. 497 (1997); Symposium, *The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEXAS L. REV. 375 (1997). For criticism of evaluative mediation, see generally Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) [hereinafter Love, *Top Ten Reasons*]; Lela P. Love & Kimberlee K. Kovach, *An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295.

148. FOLBERG & TAYLOR, *supra* note 119, at 7-8; *see also* Riskin, *supra* note 124, at 33 (noting that mediation can help in contexts in which the parties have "strong incentives to work out their own relationship with minimal reliance upon others").

149. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 1001 (1997).

150. FOLBERG & TAYLOR, *supra* note 119, at 10; Kovach & Love, *supra* note 147, at 98 (noting that mediation results in "a high level of party satisfaction with the process"); *see also* David A. Lax & James K. Sebenius, *Interests: The Measure of Negotiation*, 2 NEGOT. J. 76, 79 (1986) [hereinafter Lax & Sebenius, *Interests*] ("[A]n unpleasant process can dramatically affect future dealings; the supplier who is berated and threatened may be unresponsive when cooperation at a later point would help.").

151. FOLBERG & TAYLOR, *supra* note 119, at 10; SINGER, *supra* note 124, at 13 (citing the finding of a national survey that active participation in solving problems and the opportunity to reach a fair conclusion were more important to disputants than savings in time and cost); Kovach & Love, *supra* note 147, at 98 (noting that mediation results in "impressive levels of party compliance with self-created outcomes"); *cf.* FOLBERG & TAYLOR, *supra* note 119, at 10 ("The lack of self-determination in adversary proceedings helps account for the neverending litigation surrounding some conflicts.").

circumstances change, these participants also may be more willing to renegotiate their agreement.[152]

Third, mediation "push[es] disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives, stories, and arguments. They urge the parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome."[153] By reducing strategic[154] and cognitive barriers,[155] mediation "enriches the information base upon which parties make their decisions and thereby ensures greater understanding between the parties and better resolutions."[156] Even when mediation

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152. SINGER, *supra* note 124, at 14.

153. Love, *Top Ten Reasons*, *supra* note 147, at 939; *see also* BUSH & FOLGER, *supra* note 134, at 2 (arguing that mediation "evo[kes] in individuals of acknowledgement and empathy for the situation and problems of others").

154. "Strategic barriers include the familiar tactics of competitive bargainers: hiding information that might be disadvantageous to claiming value; asserting extreme positions and being inflexible with respect to meaningful concessions; and attempting to distract one's opponent." Kovach & Love, *supra* note 147, at 102; BUSH & FOLGER, *supra* note 134, at 16 ("[B]ecause of mediators' skills in dealing with power imbalances, mediation can reduce strategic maneuvering and overreaching.").

155. Psychological research showed that, "in the cognitive processes by which people assimilate information, there are regular and identifiable 'departures from rationality' that lead to distortion and misinterpretation of the information received." Bush, *supra* note 147, at 9-10. Negotiation scholars generally refer to these "departures" as *cognitive barriers*. Examples of these barriers include loss aversion and reactive devaluation. *Loss aversion* refers to the tendency "to give prospective losses more significance than prospective gains of actually equivalent value." *Id.* at 10; *see id.* at 9-12 (discussing cognitive barriers). *Reactive Devaluation* refers to the tendency to "devalue a proposal received from someone perceived as an adversary, even if the identical offer would have been acceptable when suggested by a neutral or an ally." ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 165 (2000); *id.* at 165-66 (discussing reactive devaluation).

156. Kovach & Love, *supra* note 147, at 101. As Professors Kovach and Love explained:

> In the isolation and polarization created by the adversarial dynamic, parties frequently do not learn about the perceptions, actions, attitudes, interests, and values of the other side. Mediators enhance the informational environment—both in terms of the quantity and the reliability of the information—by using as inducements for openness their own neutrality and the benefits of a mutually advantageous or "win-win" outcome.

Id. at 101-02; *see* Bush, *supra* note 147, at 13 (arguing that "mediators can help parties put more information on the table and ensure that it is more reliable and less suspect than would be the case if the parties negotiated alone"); *see also* MNOOKIN ET AL., *supra* note 155, at 44-68 (discussing the tension between empathy and assertiveness).

Professors Bush and Folger described the social benefits of the transformative function of mediation:

> [Transformation] involves changing not just situations but people themselves, and thus the society as a whole. It aims at creating "a better world," not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world altogether. The goal is a world in which people are not just better off but better: more human and more humane. Achieving this goal means transforming people from dependent beings concerned only with themselves (weak and selfish people) into secure and self-reliant beings willing to be concerned with and responsive to others (strong and caring people). The occurrence of this transformation brings out the intrinsic good, the highest level, within human beings. And with changed, better human beings, society as a whole becomes a changed, better place.

fails to resolve all elements of the dispute, mediation "can educate the participants about each other's needs and provide a personalized model for settling future disputes between them. It can thus help them learn to work together, isolate the issues to be decided, and see that through cooperation all can make positive gains."[157] Thus, some commentators consider the principal goal of mediation as conflict management rather than dispute resolution.[158] Indeed, statistics have demonstrated that participants who are unable to resolve their conflicts during formal mediation are likely to resolve their conflict later on in the post-mediation stage.[159]

Finally, mediation "reduce[s] both the economic and emotional costs of dispute settlement."[160] It also seeks to establish a degree of harmony and is based on assumptions about mutuality, cooperation, and fairness.[161] By encouraging direct communication between the participants, mediation reduces hostility between the disputants,[162] thus facilitating the permanence of a settlement.[163] Moreover, mediation

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BUSH & FOLGER, *supra* note 134, at 29; *see also id.* ("[T]hough satisfying needs and reducing unfairness can make people temporarily better off, only a changed world of changed people can ever really hope to achieve this. In a world in which people remain the same, solved problems are quickly replaced by new ones; justice done is quickly undone.").

157. FOLBERG & TAYLOR, *supra* note 119, at 10; Riskin, *supra* note 124, at 34; *see also* Fuller, *supra* note 124, at 325 ("[T]he central quality of mediation [is] . . . its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."); Bush, *supra* note 147, at 13 (arguing that "mediators can help parties perceive each other—including past and present actions, attitudes, motivations and positions—more fully and accurately than they would if left to themselves").

158. FOLBERG & TAYLOR, *supra* note 119, at 8 (citing JOHN M. HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS (1981)).

159. For example, in the Denver Custody Mediation Project, sixty-five percent of those couples who did not reach agreement during formal mediation reached agreement prior to their court hearings. FOLBERG & TAYLOR, *supra* note 119, at 11.

160. BUSH & FOLGER, *supra* note 134, at 16. As Professors Bush and Folger explained:

> The use of mediation has . . . produced great *private* savings for disputants, in economic and psychic terms. Also, by providing mediation in many cases that would otherwise have gone to court, the mediation movement has also saved *public* expense. It has freed up the courts for other disputants who need them, easing the problem of delayed access to justice. In sum, the movement has led to more efficient use of limited private *and* public dispute resolution resources, which in turn means greater overall satisfaction for individual "consumers" of the justice system.

Id. at 16-17.

161. Riskin, *supra* note 124, at 34.

162. Fuller, *supra* note 124, at 308 (noting that mediation is "directed toward bringing about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the 'social norms' relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problems.").

163. FOLBERG & TAYLOR, *supra* note 119, at 10. Unlike mediation, an adversarial process "tends to focus hostilities and harden the disputants' anger into rigidly polarized positions." *Id.*

may be conducive to creating new relationships, "turn[ing] protagonists into partners."[164] By contrast, adjudicatory procedures "tend to exacerbate dislike and distrust and may tarnish, if not destroy, old relationships and throw up at least apparent, if not solid and substantial, road blocks to the creations of new relationships."[165]

Despite its benefits, mediation is not recommended when "a party's interests can be served only by a complete victory, either in court or by capitulation of the other disputant."[166] Likewise, mediation is not helpful when a party is interested in creating a precedent.[167] For example, in a patent dispute, a company may need to demonstrate the validity of its core intellectual property by wining a judgment in court. Mediation therefore would not serve the purpose.[168] Furthermore, disputants should avoid mediation when they "want[] to establish a reputation that will deter future litigation"[169] or when they seek to use the lawsuit for larger strategic or corporate ends.[170]

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164. DAVID W. PLANT, RESOLVING INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES 22 (1999). Indeed, "[m]ediation offers an effective means of organizing individuals around common interests and thereby building stronger community ties and structures." BUSH & FOLGER, *supra* note 134, at 18. As Professors Bush and Folger explained:

> This is important because unaffiliated individuals are especially subject to exploitation in this society and because more effective community organization can limit such exploitation and create more social justice. Mediation can support community organization in several ways. Because of its capacity for reframing issues and focusing on common interests, mediation can help individuals who think they are adversaries perceive a larger context in which they face a common enemy. As a result, mediation can strengthen the weak by helping establish alliances among them.

Id.

165. PLANT, *supra* note 164, at 22.

166. MNOOKIN ET AL., *supra* note 155, at 107.

167. *Id.*

168. *Id.* Professor Mnookin and others illustrated this point with actions of the Ford Motor Company:

> [F]or several years Ford Motor Company has made one take-it-or-leave it offer to plaintiffs, correlated to Ford's valuation of the plaintiff's claim. If the offer is rejected, Ford litigates. The company would rather defend those lawsuits and establish a reputation for being willing to fight than overpay for frivolous claims. Over time, the company believes its strategy will pay off with lower total legal expenses and payments.

Id.

169. *Id.*

170. *Id.* As Professor Mnookin and others explained:

> In some corporate takeover situations, . . . the target company will file a lawsuit in an attempt to deflect or defend against a hostile takeover bid. The goal is not so much to win the battle as to win the larger war for control of the company. The suit itself may be over some relatively insignificant thing, but the target company uses the suit to drop the share price and block the takeover.

Id.

B. Corporate Alliances and Strategic Partnerships

> Alliances are a big part of this game [of global competition] . . . . They are critical to win on a global basis . . . . The least attractive way to try to win on a global basis is to think you can take on the world all by yourself.
>
> —Jack Welch, Former CEO, General Electric[171]

"The twenty-first century will be the *age of alliances*."[172] So declared the opening of a recent book by a professor at Harvard Business School. To a great extent, corporate alliances and strategic partnerships are designed to deal with the continuous challenge of globalization and to take advantage of the efficiency created by new communications technologies.[173] As Akio Morita, the former chairman of Sony Corporation, has observed: "No company is an island. In an interdependent world, every company has to think in terms of working with others if it wants to compete in the global marketplace."[174] Today, one can easily find strategic partnerships[175] in the airline industry,[176] between multinational corporations,[177] and between nonprofit organizations.[178]

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171. MICHAEL Y. YOSHINO & U. SRINIVASA RANGAN, STRATEGIC ALLIANCES: AN ENTREPRENEURIAL APPROACH TO GLOBALIZATION 3 (1995) (quoting Jack Welch, Former CEO, General Electric, Address at Harvard Business School (Oct. 28, 1997)).

172. JAMES E. AUSTIN, THE COLLABORATION CHALLENGE: HOW NONPROFITS AND BUSINESSES SUCCEED THROUGH STRATEGIC ALLIANCES 1 (2000); *see also* ED RIGSBEE, DEVELOPING STRATEGIC ALLIANCES, at v (2000) (declaring partnering as "the *modus operandi* of the third millennium"); *The Science of Alliance*, ECONOMIST, Apr. 4, 1998, at 69 (describing the web of alliances among McDonald's, Coca-Cola, and Disney and noting that "[a]lliances now account for 18% of the revenues of America's biggest companies").

173. YVES L. DOZ & GARY HAMEL, ALLIANCE ADVANTAGE: THE ART OF CREATING VALUE THROUGH PARTNERING, at xiii (1998); *see also* YOSHINO & RANGAN, *supra* note 171, at ix ("The primary driver of strategic alliances is the emergence of intense global competition, which has rendered simple but time-tested strategies, a staple of major corporations, less effective.").

174. YOSHINO & RANGAN, *supra* note 171, at 3.

175. Although corporate alliances and strategic partnerships are different, the term "strategic partnership" will be used throughout this section to denote the various types of cooperative alliances.

176. STEPHEN M. DENT, PARTNERING INTELLIGENCE: CREATING VALUE FOR YOUR BUSINESS BY BUILDING STRONG ALLIANCES 12-13 (1999).

177. Examples of cooperative alliances between multinational corporations include:

- IBM, Siemens, and Toshiba's cooperating to develop a new generation of memory chips
- DuPont and Sony's working jointly to develop optical memory storage products (which they will market separately)
- Leading semiconductor manufacturers Motorola and Toshiba's allying to exchange vital technologies and information on manufacturing processes and planning a joint venture to produce memory chips and microprocessors (which both will sell)
- General Motors (GM) and Hitachi's working together to develop electronic components and automobiles.

Under a strategic partnership, corporations seek "to realize their objectives through cooperation with other organizations, rather than in competition with them."[179] By doing so, corporations can share unique resources[180] and overcome market barriers, especially those in less developed countries.[181] They also can realize their synergistic potential[182] by taking advantage of economies of scale,[183] building better relationships,[184] and learning from each other.[185]

YOSHINO & RANGAN, *supra* note 171, at 4.

178. *See generally* AUSTIN, *supra* note 172 (discussing how to create and sustain successful strategic partnerships between nonprofit organizations and businesses).

179. JOHN CHILD & DAVID FAULKNER, STRATEGIES OF COOPERATION: MANAGING ALLIANCES, NETWORKS, AND JOINT VENTURES 1 (1998). Professors Child and Faulkner distinguished cooperative strategy from competitive strategy:

> Competitive strategy is concerned with the question of how a firm can gain advantage over its competitors. There are two broad traditions within thinking about competitive strategy. The first emphasizes how superior profits can derive from the structure of the industry in which a firm is located, and from the pursuit of generic strategies—cost leadership, differentiation, or focus—in ways which suit the conditions of that industry. The second tradition draws attention to the competitive advantage that can be gained from a firm's unique competences and resources, which combine to deliver valued products and are difficult to imitate or acquire. A strategy of cooperation with one or more other firms can be a counterpart to the pursuit of competitive advantage in the ways identified by both these traditions of thinking about competitive strategy.

Id. (citations omitted); *see also* DENT, *supra* note 176, at 6 (arguing that "[t]he future prosperity of a business depends on its ability to initiate, sustain, and profit from interdependent relationships").

180. CHILD & FAULKNER, *supra* note 179, at 2 ("Valued competences and resources are often available only from a partner, or from sharing their development with a partner. Alliances may enable firms to gain access to partners' advanced technology or share the high cost of developing new capabilities through research and development.").

181. *Id.* ("Sometimes, entry into an industry or regional sector is only feasible in the first place via a partner. The ability to enter some markets, especially in developing countries or those with invisible entry barriers like Japan, may be possible only through cooperation with a local firm."); *see also* Yu, *From Pirates to Partners*, *supra* note 2, at 221 (discussing the benefits of establishing joint ventures in China).

182. CHILD & FAULKNER, *supra* note 179, at 2 ("Cooperation between firms can also permit the pooling of their complementary strengths so as to secure creative synergies."). DENT, *supra* note 176, at 178 (defining synergy as "two (or more) people or organizations working together to do more than one of them can do alone—even after summing up their individual achievements"); RIGSBEE, *supra* note 172, at 13 (defining synergy as "when the joined alliance equals more than the sum of its separate parts (1 + 1 = 3)"); YOSHINO & RANGAN, *supra* note 171, at 4 (describing a strategic partnership as "a trading partnership that enhances the effectiveness of the competitive strategies of the participating firms by providing for the mutually beneficial trade of technologies, skills, or products based upon them").

183. *The Science of Alliance*, *supra* note 172 (describing how firms need to create strategic partnerships and let outsiders help them if they want to concentrate on what they do best).

184. DENT, *supra* note 176, at 11.

185. YOSHINO & RANGAN, *supra* note 171, at 18 (noting that one of the goals of a strategic partnership is "to augment its strategic competencies through learning from its opposite"); *see also id.* ("Learning is an implicit, if not explicit, strategic objective of every firm that strives to maintain its competitive position. Willingness to learn leads to product and process innovation."); CHILD & FAULKNER, *supra* note 179, at 6 (arguing that strategic partnerships should be established in a structure that promotes organizational learning); DOZ & HAMEL, *supra* note 173, at 80 (emphasizing the importance of creating an interface so that partners can learn from each other).

Despite these advantages, not every organization can form a strategic partnership. To do so, the organization must identify its needs,[186] understand its strengths,[187] and assess its "readiness, willingness, and ability to engage in the [partnership] process."[188] It also must determine the type of partner it needs, evaluate what each partner is likely to bring to the relationship,[189] and assess the potential partner "in terms of the complementarity of [its] assets and skills and the possible synergies" arising from the partnership.[190]

Each organization should "devote sufficient attention to the cultural compatibility between the partners,"[191] for the lack of such attention sometimes may result in the breakdown of the partnership.[192] It also needs to work with the other to decide how their respective contributions "can be valued in a fashion that is fair to both partners, taking note of the downside risks and the upside potential."[193] To bring the partnership to life, the partners must further decide the structure of the alliance and the decisionmaking processes.[194]

Forming the partnership is only the beginning. After the partnership is created, "[c]onscious attempts must be made to cause the alliance to develop if it is to attract the best people, and contribute most to the partner companies."[195] Because each partner is dependent on the other, mutual trust[196] is vital to the success of a strategic partnership.[197] When

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186. DENT, *supra* note 176, at 22 (noting that "[t]he genesis of every partnership is a need that has to be fulfilled").

187. *Id.* at 92 (acknowledging the need for firms to understand what they could offer to their potential partners).

188. *Id.* at 52. Such assessment is important because the partnership process will result in changes and therefore potential stress within the firm. *See id.* at 166.

189. CHILD & FAULKNER, *supra* note 179, at 85.

190. *Id.*

191. *Id.*; DENT, *supra* note 176, at 79 ("Cultural forces influence how well partnerships develop. Each company's management style, whether autocratic or consensus based, may be a factor.").

192. CHILD & FAULKNER, *supra* note 179, at 85.

193. *Id.*; JORDAN D. LEWIS, TRUSTED PARTNERS: HOW COMPANIES BUILD MUTUAL TRUST AND WIN TOGETHER 109-11 (1999) (discussing how to monitor progress of a strategic partnership).

194. CHILD & FAULKNER, *supra* note 179, at 85.

195. *Id.* at 7.

196. Professors Child and Faulkner defined trust as "the willingness of one party to relate with another in the belief that the other's actions will be beneficial rather than detrimental to the first party, even though this cannot be guaranteed." *Id.* at 45. Translated in business terms, trust means "having sufficient confidence in a partner to commit valuable know-how or other resources to transactions with it despite the fact that, in so doing, there is a risk the partner will take advantage of this commitment." *Id.*

197. *Id.* ("Cooperation between organizations creates mutual dependence between them and requires trust to succeed."); *id.* at 46 ("Increased trust between alliance partners promises an economic pay-off for each."); DENT, *supra* note 176, at 96 (noting that a strategic partnership "will never attain the peak of synergy envisioned when the alliance was formed" if the partners do not trust each other); *id.* at 199 (considering trust as the "single most important" dynamic involved in partnering); RIGSBEE, *supra* note 172, at 39 (emphasizing the importance of "a relationship of trust" in a strategic alliance); YOSHINO & RANGAN,

the partners trust each other, they will be "more willing to share information and so better inform their actions and decisions."[198] They also will be willing "to invest assets in their alliance which cannot readily be used elsewhere."[199] In addition, due to the goodwill established between them, the partners will have less temptation to take advantage of each other.[200] In sum, trust will "render the cooperation more genuine, reduce the need to spend time and effort checking up on the other partner, and help to direct the partners' attention and energies towards longer-term goals of mutual benefit."[201]

As commentators have pointed out, trust is by nature socially constituted and "tends to be strengthened by cultural affinity between people and can be supported by institutional norms and sanctions."[202] Thus, different types of trust are required at different stages of the development of the partnership.[203] In general, trust can be classified into three categories.[204] *Calculative trust* refers to the trust needed to set up the partnership when the partners notice each other's synergistic potential.[205] As the partners proceed and fulfill their promises, *predictive trust* will be developed[206] partly as a result of cooperative reactions and partly due to "the deepening of trust based on an evolution of its foundations."[207] Finally, *bonding trust* materializes when the partners come to enjoy their collaborative relationship.[208]

In addition to developing trust, partners must constantly exchange information, especially in the early stages of the partnership. "The initial context of an alliance seldom encourages cooperation: the partners generally lack mutual familiarity, understanding, and trust, and

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supra note 171, at 123 (emphasizing the need for "trust within a firm and trust between a firm and its partner"). See generally LEWIS, *supra* note 193, for a detailed discussion of how to build trust between partners in a strategic partnership.

198. CHILD & FAULKNER, *supra* note 179, at 46.

199. *Id.*

200. *Id.*

201. *Id.* at 46-47.

202. *Id.* at 47; *see also id.* at 51-53 (discussing the social constitution of trust); DENT, *supra* note 176, at 53 (acknowledging the need to develop trust and to build the partnership one step at a time).

203. One commentator described the various stages of relationship development as forming, storming, norming, performing. DENT, *supra* note 176, at 47; *see also id.* at 48 (noting that "[r]elationships move between stages in response to outside forces and influences").

204. CHILD & FAULKNER, *supra* note 179, at 48-50 (discussing the various bases of trust).

205. *Id.* at 15.

206. *Id.*

207. *Id.* at 47; *id.* at 50-51 (discussing the development of trust-based relations).

208. *Id.* at 15; *see also* LEWIS, *supra* note 193, at xiii ("Rather than being a matter of blind faith, trust must be constructed, one step at a time.").

the absence of these can easily lead to an adversarial relationship."[209] Thus, partners must communicate with each other extensively to understand the other better and to avoid misperception.[210] They also must be sensitive to the other's national and corporate cultural differences[211] and be willing to view and align their preferences in relation to the other partner.[212] Indeed, "[w]here both . . . partners have the prime objective of learning from each other, the prognosis for the future is much brighter."[213] Moreover, through the realization of the partners' synergistic potential, the partnership may evolve into something that is not foreseen at the outset.[214] Thus, commentators highlight the continuous need for communication by emphasizing that a strategic partnership is a continuing process, rather than an ultimate goal.[215]

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209. DOZ & HAMEL, *supra* note 173, at 146. One alliance manager described the initial suspicion within a strategic partner:

> Let's face it, every alliance is plagued by strong suspicions right from the start. Senior managers in both firms wonder what the true motives of the other firm are. Functional managers wonder what the alliance will do to their jobs. Engineers are wary of what the other guys want. We step into this charged environment. It is our job to make sure that suspicions do not get so out of hand as to impede the alliance and to develop working relationships to ensure to the extent possible that the people in each firm trust those in the other. Believe me, it is not easy.

YOSHINO & RANGAN, *supra* note 171, at 124.

210. CHILD & FAULKNER, *supra* note 179, at 6 ("Strategic alliances, including joint ventures, collaborations, and consortia, are at base all about organizational learning, and should be structured towards that end."); DENT, *supra* note 176, at 108 (noting that "[t]he time [partners] spend getting to know [their] partners will pay off in terms of more trust, less friction, and more productivity in the end"); DOZ & HAMEL, *supra* note 173, at 80 (emphasizing the importance of creating an interface so that partners can learn from each other); LEWIS, *supra* note 193, at 117 (emphasizing the importance of good communication in strategic partnerships).

211. CHILD & FAULKNER, *supra* note 179, at 173; *see also id.* at 7 ("The interface between two (sometimes more) company cultures is the crucible of potential achievement. Sensitivity to each other's cultures is vital to effective joint operation. Its absence leads to a failed alliance, however great the potential economic synergies between the partners."); DOZ & HAMEL, *supra* note 173, at 145 ("The process and norms of interaction between partners also determine alliance success. Intentions are converted into real cooperation through interactions."); LEWIS, *supra* note 193, at 116 (discussing the need to respect the partner's thinking and respond to its interests).

212. *See* CHILD & FAULKNER, *supra* note 179, at 173.

213. *Id.* at 172.

214. *Id.* at 7 ("A successful alliance is one that evolves into something more than was perhaps foreseen at the outset."); DENT, *supra* note 176, at 48 (noting that strategic partnerships "achieve[] goals that often exceed expectations at the outset"); *id.* at 53 (noting that "[t]he success of a partnership depends on what is actually accomplished—not on what was intended or possible"); DOZ & HAMEL, *supra* note 173, at 169 ("[F]ew alliances can succeed by holding fast to their initial plans. Indeed, what separates alliances that last long enough to fulfill their aspirations from those that break apart at the first difficulty is their capacity for learning and adjustment.").

215. DOZ & HAMEL, *supra* note 173, at 32 ("Alliances cannot be crafted and set on 'autopilot.' They require ongoing management of the relationship within a clear strategic framework."); *id.* at 118 ("[A]n alliance cannot be fully designed at the start; we must expect that it will evolve over time."). As Professors Doz and Hamel explained:

> [I]nitial interface should be seen as something to be perfected with time and experience.

Finally, in order to form an effective strategic partnership, the two partners must possess the political will and commitment to make the relationship succeed.[216] They also must treat the other with equality and respect, thus avoiding a relationship in which one partner dominates the other.[217] By doing so, they will produce psychological contracts and will "accept unwritten and largely non-verbalized expectations and assumptions about each other's prerogatives and obligations."[218] This mutual commitment also will help maintain a healthy relationship between the partners should a conflict arise in the future. After all, a partnership will "remain vulnerable to all sorts of destabilizing factors, no matter how well conceived they are strategically."[219] Indeed, because cooperation does not require a partner to pass all proprietary information unchecked to the other partner,[220] partners may "harbor private expectations that they do not share with their allies."[221]

One can sometimes view the cooperation between WIPO and the WTO as a form of strategic partnership. In the Agreement Between the World Intellectual Property Organization and the World Trade Organization,[222] the two organizations agreed to cooperation in the

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> Partners need to continually ask: Does the interface facilitate mutual understanding and trust? Does it allow us to share enough information to make the alliance work? Will it become broader and more open as collaboration develops?

Id. at 138.

216. CHILD & FAULKNER, *supra* note 179, at 6 ("Commitment and trust are the key attitudes most strongly associated with success in alliances. No amount of energy and clear direction will compensate for their absence."); *id.* at 173 (arguing that the success of strategic partnerships requires "strong commitment by top- and lower-level management in the partner companies"); DOZ & HAMEL, *supra* note 173, at 142 ("The strategic context of the alliance allows . . . the partners' wholehearted, fully committed cooperation by shaping the strategic significance and scope each partner assigns to the alliance, by setting the tone of the relationship, and by setting each partner's expectations about the outcome."); *id.* at 33 (emphasizing that "a strong shared commitment to playing as a team is critical" to the success of a strategic partnership); RIGSBEE, *supra* note 172, at 39 ("A strategic alliance must be an institution where individuals, organizations and companies come together to develop a relationship of trust, tolerance, cooperation, commitment, and mutuality.").

217. DENT, *supra* note 176, at 93 (noting the need for equality for partnerships to succeed); Yu, *From Pirates to Partners*, *supra* note 2, at 161 (noting that the word *partnership* "indicates that neither side assumes or intends to assume a dominant position, thus implying equality and mutual respect"); *see also* LEWIS, *supra* note 193, at 88 (discussing the three possible governance arrangements in a strategic partnership).

218. CHILD & FAULKNER, *supra* note 179, at 173.

219. DOZ & HAMEL, *supra* note 173, at 118.

220. CHILD & FAULKNER, *supra* note 179, at 7 ("To cooperate does not mean to allow all proprietary information to pass unchecked to the partner."); *see also* LEWIS, *supra* note 193, at 47 ("Just as friends do not share everything in their personal lives, trusting relationships can be close and constructive without disclosing company secrets.").

221. DOZ & HAMEL, *supra* note 173, at 143.

222. The Agreement entered into force on January 1, 1996. Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) [hereinafter Cooperation Agreement]; *see also* TRIPs Agreement, *supra* note 13, art. 68, 33 I.L.M. at 1223 ("In carrying out its functions, the Council for TRIPS may consult with and seek information from any

notification of, access to, and translation of national legislation;[223] the communication of national emblems and transmittal of objections pursuant to Article 6*ter* of the Paris Convention;[224] and legal-technical assistance and technical cooperation.[225] As with other strategic partnerships, commentators noted "the importance of the synergies that arise between the two organizations as a result of the autonomous activities of WIPO in the full range of its work, whether it is norm-setting or studying, its registration unions or technical cooperation."[226]

However, not every partnership comes from organizations that are nonrival in nature. Some are indeed adversaries, as most people would perceive. Consider for example a strategic partnership between an employer and a labor union. Instead of trying to keep the union weak, one employer provides strategic planning to help the company's union get organized.[227] To many, the employer's action is counterintuitive. Why would an employer be interested in building up a strong labor union that has the potential to challenge the employer later on? Fortunately, the employer does not see the relationship this way. Instead, it creatively believes it is more advantageous to deal with an organized union than with an unorganized union. Because an organized union will know the preferences of its members better, helping the union get organized eventually will speed up the negotiation process and result in an outcome that is more satisfactory to both sides.[228]

C. *International Cooperation*

"Bacon speaks of wars . . . as being the 'true exercise to a kingdom or sovereignty'; Hobbes sees nations 'in the position of gladiators one against the others'; to Bolingbroke, self-love is the determining principle

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source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization."); Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661, 680-82 (1997) (discussing the possibilities for cooperation between WIPO and WTO).

223. Cooperation Agreement, *supra* note 222, art. 2, 35 I.L.M. at 756-57.

224. *Id.* art. 3, 35 I.L.M. at 758.

225. *Id.* art. 4, 35 I.L.M. at 758-59.

226. Adrian Otten, *Implementation of the TRIPs Agreement and Prospects for Its Further Development*, 1 J. INT'L ECON. L. 523, 530 (1998).

227. *See* DENT, *supra* note 176, at 132.

228. When asked why she helped the union get organized, the CEO of the company responded:

> In the next round of negotiations with the union, I want them to know what their members want so we can get down to the critical issues that are facing our industry. Neither side wants to drag out these talks. It's an investment in our management's time to have the union be strategically prepared for these negotiations.

Id.; *see also id.* at 16 ("Management understood that the best way to get to the root causes of employee unrest in the workplace was to get the employee unions to help them make improvements.").

in international relations; and Hamilton declares harmony to be impossible 'among unconnected sovereignties.'"[229] Traditionally, political philosophers, diplomats, policymakers, political scientists, and international relations scholars have embraced the balance-of-power theory. Premised on the anarchic nature of the international system, the theory holds that countries have to balance power with power, through unilateral initiatives or collective means, to protect themselves against foreign aggression and possible extinction.[230]

In recent years, however, scholars and policymakers have increasingly emphasized the need to replace the balance-of-power theory with a balance-of-interests theory for three main reasons.[231] First, the balance-of-power approach to international relations is confrontational by nature; its underlying rationale is "mutual checking, not mutual cooperation."[232] In contrast, the balance-of-interests approach is conciliatory by nature; its underlying rationale is "reciprocal accommodation of the interests of the other."[233] Second, the balance-of-power approach "is precarious, as each side constantly seeks to gain an upper hand vis-à-vis the other."[234] The balance-of-interests approach, however, nurtures cooperation rather than stirs up competition among nations.[235] Such an

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229. ARNOLD WOLFERS, DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS 246 (1962).

230. See generally HANS J. MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed. 1985), for the leading text articulating the Realist worldview of international politics.

231. *E.g.*, Wu Xinbo, *China and the United States: Toward an Understanding on East Asian Security*, *in* OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 58, at 69, 83 ("[A]pproaches to major-power relations should replace the practice of balance-of-power with one of balance-of-interests."); Nabil Fahmy, *Peace Is Still Possible in the Middle East*, N.Y. TIMES, Dec. 10, 2000, § 4, at 15 ("Building a sustainable peace [in the Middle East] means finding a balance of interest, rather than reaching an agreement reflecting the balance of power."); Paul Gillespie, *Bosnai, Somalia Pose New Problem for Peacekeeping*, IRISH TIMES, June 19, 1993, at 11 (quoting that an under-secretary general of the United Nations acknowledged the need to search for mutually acceptable compromises to disputes in the Middle East "on the basis of the balance of interests rather than the balance of power"), *available at* Lexis, News library, ALLNWS File; C. Raja Mohan, *Japan Comes to the Fore*, HINDU, Sept. 20, 1997, at 13 (reporting that China, in opposing the U.S.-Japan pact, "argued that Asia should move away from alliances and look for some form of collective security, and that the notion of 'balance of interests' must replace 'balance of power.'"), *available at* Lexis, News library, ALLNWS File; Michael Parks, *The Malta Summit*, L.A. TIMES, Nov. 29, 1989, at A12 (reporting that the West welcomed Gorbachev's substitution of a "balance of interests" for the old balance of power in the Soviet Union's foreign policy). *See also* ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 197 (3d ed. 2001) ("For international regimes to govern situations of complex interdependence successfully they must be congruent with the interests of powerfully placed domestic groups within major states, as well as with the structure of power among states.").

232. Wu, *supra* note 231, at 83.

233. *Id.*

234. *Id.*

235. *Id.*; *see also* WOLFERS, *supra* note 229, at 205 (noting the need to replace the traditional policy of "going it alone" with a policy of "going it with others").

approach therefore contributes to the stability of the international system.[236] Third, the concept of "spheres of influence" may be outdated in this world of growing interdependence and reduced sovereignty.[237] Instead of creating or expanding their own "turfs" that divide the community and generate conflict, countries should aim at building an international community that benefits all member countries.[238]

To illustrate the shift of focus from the balance-of-power theory to the balance-of-interests theory, it is instructive to look at the growing popularity of international regimes,[239] which are determined primarily by interests rather than the distribution of power.[240] Although the American hegemony is considered a crucial factor in the creation of international regimes,[241] commentators generally attributed the rise of these institutions to market failure in world politics.[242]

"[S]tates are autonomous sovereign entities that 'develop their own strategies, chart their own courses, make their own decisions.'"[243] As self-interested actors, states would be reluctant to cooperate with others unless other countries did the same[244] or unless they would be worse off if they did not cooperate.[245] In fact, most countries would tend to free ride on the others' effort,[246] thus resulting in an underproduction of collective goods.[247]

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236. Wu, *supra* note 231, at 83.

237. *Id.*

238. *Cf. id.*

239. See generally INTERNATIONAL REGIMES, *supra* note 12, for an excellent collection of essays discussing international regimes.

240. Stein, *Coordination and Collaboration*, *supra* note 12, at 135 (noting that "interests determine regimes, and that the distribution of power should be viewed as one determinant of interests"); *see* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 7 (1984) ("Alliance cooperation would be easy to explain as a result of the operation of a balance of power, but system-wide patterns of cooperation that benefit many countries without being tied to an alliance system directed against an adversary would not."); *see also* INTERNATIONAL INTELLECTUAL PROPERTY LAW, *supra* note 5, at 219 (noting that a multilateral treaty would likely focus on a single issue, as compared to the larger number of issues covered by a bilateral agreement); Keohane, *supra* note 56 (discussing the difficulty linking regime issues that are clustered separately).

241. See generally KEOHANE, *supra* note 240, for a comprehensive discussion of the evolution of international regimes as American hegemony eroded.

242. Keohane, *supra* note 56, at 151; Stein, *Coordination and Collaboration*, *supra* note 12, at 123.

243. Stein, *Coordination and Collaboration*, *supra* note 12, at 116 (quoting KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 96 (1976)).

244. *See id.* at 123 (noting that actors would go along as long as others would be similarly coerced).

245. *Id.* at 117 (noting that there is no need for a regime when each state obtains its most preferred outcome by making independent decisions).

246. *Id.* at 123 (discussing the free riding problem).

247. *Id.* at 124 ("[I]nternational collective goods whose optimal provision can only be assured if states eschew the independent decision making that would otherwise lead them to be free riders and would ultimately result in either the suboptimal provision or the nonprovision of the collective good.").

There are two central attributes to this market failure: imperfect information and high transaction costs. In world politics, "information is extremely costly and often impossible to obtain."[248] Thus, countries would be reluctant to reveal to others their preferences unless others did the same. To illustrate this problem, one can turn to the classic example of the prisoner's dilemma, which is usually described as follows:

> Two criminals are arrested, but the district attorney does not have enough evidence to convict either of them for serious charges unless one or both confess to the crime. The district attorney separates the two and makes the following offer to each: "If you confess and your partner does not, I will grant you immunity, and you will walk out free. However, if your partner squeals, and you don't, I'm going to throw the book at you. If neither of you confesses, then I'll have to settle for misdemeanor charges, which will get you each a brief prison term. If you both confess, I'll get you both on felony charges, but I'll argue for shorter sentences than if you do not confess and your partner does. Think about it and tell me what you want to do.[249]

Because the two prisoners—or countries in the context of this discussion—cannot communicate to each other about their choices and have no way to ascertain what choice the other would make, the dominant strategy is to cheat on the other, thus resulting in a Pareto-deficient outcome.[250] As a result, international regimes are needed to correct this market failure.

By facilitating communication between the participants, international regimes improve the quantity and quality of information available to each participant.[251] For example, through the creation of international regimes, countries obtain information that is essential for effective action on cross-border issues, such as the spread of communicable diseases, telecommunications frequencies, pollution of the atmosphere and the oceans.[252] Sometimes, this information might even reveal other substantial shared interests, thus encouraging cooperation on issues that governments might otherwise act unilaterally. Moreover, by making government policies "appear more predictable, and therefore more reliable,"[253] international regimes reduce uncertainty and risk in the

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248. Keohane, *supra* note 56, at 154.

249. JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 78 (1994). For a detailed discussion of the prisoner's dilemma, see ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA (1965).

250. Stein, *Coordination and Collaboration*, *supra* note 12, at 120-21.

251. Keohane, *supra* note 56, at 161-62.

252. KEOHANE & NYE, *supra* note 231, at 291.

253. *Id.*; *see* KEOHANE, *supra* note 240, at 97 (stating that the function of international regimes is "to make human actions conform to predictable patterns so that contemplated actions can go forward with some

international system.[254] They also make it harder for states to evade their obligations when other states could point to clear rules and procedures.[255]

Even if countries can obtain information, "transactions costs, including costs of organization and side-payments, are often very high" in the international system.[256] International regimes are therefore needed to encourage cooperation and to lower the transaction costs. Indeed, "a major function of international regimes is to facilitate the making of specific agreements on matters of substantive significance within the issue area covered by the regime,"[257] especially in situations where "*ad hoc* attempts to construct particular agreements, without a regime framework, will yield inferior results compared to negotiations within the framework of regimes."[258] Furthermore, international regimes can benefit major powers by helping them "keep [their] multiple and varied interests from getting in each other's diplomatic ways,"[259] thus reducing unnecessary tension or even confrontation.

Despite these benefits, international regimes do not dispose of all the risks and uncertainty in the international system.[260] Although international regimes help reduce the uncertainty created by the rapid and often unpredictable changes in world politics, "they create another kind of uncertainty, uncertainty about whether other governments will keep their commitments."[261] Given the fact that countries seek to maximize their self-interests, they will tend to cheat on the others whenever conditions reward such action. Nonetheless, "[f]or reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not

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hope of achieving a rational relationship between means and ends"). Indeed, "international regimes introduce into U.S. foreign policy greater discipline, a quality most critics believe it needs in greater measure. Thus, international rules help reinforce continuity when administrations change. And they set limits on constituency pressures in Congress." KEOHANE & NYE, *supra* note 231, at 292.

254. Keohane, *supra* note 56, at 162; *see also* Arthur A. Stein, *When Misperception Matters*, 34 WORLD POL. 505 (1982) (discussing the conditions and ways in which misperception matters in international politics).

255. Keohane, *supra* note 56, at 162.

256. *Id.*

257. *Id.* at 150; *see also id.* ("Regimes are developed in part because actors in world politics believe that with such arrangements they will be able to make mutually beneficial agreements that would otherwise be difficult or impossible to attain.").

258. KEOHANE, *supra* note 240, at 88.

259. KEOHANE & NYE, *supra* note 231, at 201.

260. Keohane, *supra* note 56, at 167 (noting that "[c]reating international regimes hardly disposes of risks or uncertainty").

261. *Id.*

to."[262] To deter cheating, many international regimes also include rigorous enforcement and review mechanisms.[263]

III. THE NONZERO-SUM APPROACH

Due to the divergent social, political, economic, and cultural conditions that affect the configuration of a country's intellectual property system, conflicts in the intellectual property field are bound to arise. However, conflicts are "not necessarily bad, abnormal, or dysfunctional."[264] In fact, they can be constructive and beneficial,[265] for they enable countries to understand their differences. Such differences may further allow policymakers to understand their national goals and priorities, thus facilitating trade and diplomatic exchange.[266]

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262. KEOHANE, *supra* note 240, at 106. As Professor Axelrod explained:

> What makes it possible for cooperation to emerge is the fact that the players might meet again. This possibility means that the choices made today not only determine the outcome of this move, but can also influence the later choices of the players. The future can therefore cast a shadow back upon the present and thereby affect the current strategic situation.

AXELROD, THE EVOLUTION OF COOPERATION, *supra* note 14, at 12; *see also id.* at 151 (noting that "the stakes of the current situation expand from those immediately at hand to encompass the influence of the current choice on the reputations of the players" when third parties are watching); ROBERT AXELROD, *Promoting Norms: An Evolutionary Approach to Norms*, *in* THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION 44, 62 (1997) (noting that "a violation of a norm is not only a bit of behavior having a payoff for the defector and for others; it is also a signal that contains information about the future behavior of the defector in a wide variety of situations").

263. THOMAS C. SCHELLING, JR., THE STRATEGY OF CONFLICT 143 (1980) (noting that "[a]greements are unenforcible if no outside authority exists to enforce them or if noncompliance would be inherently undetectable"); Keohane, *supra* note 56, at 167 ("Through a set of more or less institutionalized arrangements, members maintain some degree of control over each other's behavior, thus decreasing harmful externalities arising from independent action as well as reducing uncertainty stemming from uncoordinated activity."); Otten, *supra* note 226, at 525 (arguing that the underlying belief of the detailed monitoring and review procedures of the TRIPs Agreement "is that unless there is detailed monitoring of compliance with international commitments, those commitments will be worth much less"); Stein, *Coordination and Collaboration*, *supra* note 12, at 128 (arguing that a regime "must specify what constitutes cooperation and what constitutes cheating" because each actor would require assurances from the other members that they would also eschew their rational choice and would not cheat).

264. MOORE, *supra* note 1, at xiii; *see also* FISHER ET AL., *supra* note 147, at 43 (noting that "[a]greement is often made possible precisely because interests differ"); LEWIS, *supra* note 193, at 42-43 ("Conflict is a natural consequence of having distinct views on important matters. It is healthy if you respond by looking for creative solutions; it can be damaging otherwise.").

265. FOLBERG & TAYLOR, *supra* note 119, at ix (noting that conflict and dispute "provide the impetus for social change and individual psychological development"); FRED E. JANDT, CONFLICT RESOLUTION THROUGH COMMUNICATION 3 (1973) ("[C]onflict is desirable from at least two standpoints. It has been demonstrated that through conflict man is creative. Further, a relationship in conflict *is* a relationship—not the absence of one. Such a relationship may result in creativity because of its intensity."); MOORE, *supra* note 1, at xiii ("[C]onflict can lead to growth and be productive for all parties.").

266. *See* MNOOKIN ET AL., *supra* note 155, at 14 ("Differences set the stage for possible gains from trade, and it is through trades that value is most commonly created"); *id.* at 14-15 (discussing how values can be created from differences in resources, relative valuations, risk preferences, and time preferences); Vilhelm

Nevertheless, mismanaged conflicts usually follow a negative course, inflicting physical and psychological damage on the parties.[267] In some scenarios, such conflicts may even lead to large-scale destruction that affects innocent bystanders.[268] Thus, to manage and resolve conflicts, people are constantly looking for solutions that are efficient—that allow parties to satisfy their interests, minimize suffering, and control unnecessary expenditures of resources.[269] This Part argues that the nonzero-sum approach is the most preferable means to resolve global intellectual property disputes. This Part further discusses the prerequisites for the approach to succeed, situations where the approach is inappropriate or will be ineffective, and the implications of this approach for the rule of law.

A. Nonzero-sum Approach

In Christopher Moore's classic text on mediation, *The Mediation Process: Practical Strategies for Resolving Conflict*,[270] the author provides an excellent diagram about the possible outcomes of a dispute as viewed by a particular party.[271] This diagram, slightly modified, is below:

Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. CONFLICT RESOL. 26, 30 (1963) (noting that opposition of interests may develop into a bargain). As one commentator explained:

> If a vegetarian with some meat bargains with a carnivore who owns some vegetables, it is precisely the *difference* in their known preferences that can facilitate reaching an agreement. No one would counsel the vegetarian to persuade the carnivore of the zucchini's succulent taste. More complicated negotiations may concern several items. Although the parties may have opposing preferences on the settlement of each issue, they may feel most strongly about different issues. An overall agreement can reflect these different preferences by resolving the issues of relatively greater importance to one side more in favor of that side. A package or "horse trade" can be constructed this way so that, as a whole, all prefer it to no agreement.

DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR 92 (1986); *see also* MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973) (discussing the differences between constructive and destructive processes).

267. MOORE, *supra* note 1, at xiii.

268. Notorious examples of these conflicts include the two world wars and various regional ethnic conflicts.

269. *See* MOORE, *supra* note 1, at 3.

270. *Id.*

271. *Id.* at 102.

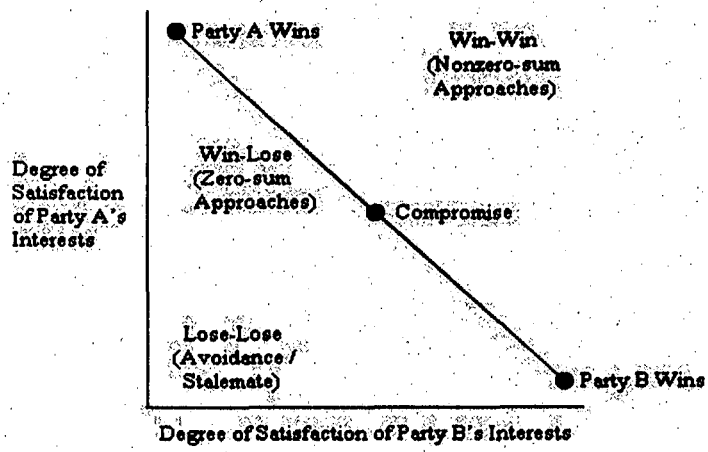

Fig. 1. Possible Outcomes of Intellectual Property Dispute Resolution

In the lower left-hand corner of the diagram is the lose-lose scenario. This scenario occurs when neither party is concerned about the conflict, when both parties try to avoid the conflict for some reasons, or when the interests of the parties are not related.[272] It also occurs when neither party has enough power to force the issue, when one or more of the parties are uncooperative, or when "[t]here is lack of trust, poor communication, expressive emotion or an inadequate resolution process."[273] Typically, a stalemate will occur when two powerful trading partners collide (such as in many EU-U.S. disputes), when two weak countries confront each other (such as in disputes between less or least developed countries), or when countries engage in a trade war (such as in situations when one country uses the coercive approach while the other country retaliates). Under the lose-lose scenario, neither party maximizes its self-interests, and resources are used at a suboptimal level.

In the middle of the diagram is the win-lose curve as seen from the viewpoint of one disputant.[274] Outcomes from both the adversary approach and the zero-sum cooperative approach fall on this curve. When the parties use the adversary approach, which by definition results in a winner and a loser, the outcome usually falls at either end of the curve. If Party A wins, the outcome falls at the upper end of the

272. *Id.* at 103.

273. *Id.*

274. Due to different interests, preferences, values, forecasts, and aversions to risks, each party might come up with a different win-lose curve.

curve. However, if Party B wins, the outcome falls at the lower end of the curve.

Unlike an adversary process, a zero-sum cooperative process usually results in compromises,[275] which split the difference by requiring each party to give up something[276] and share the pain.[277] Thus, the outcomes of the zero-sum cooperative process fall between the two extreme ends of the curve. If the bargaining power is relatively equal, the compromise usually falls in the middle of the curve.

In the upper right-hand corner of the diagram is the win-win scenario, in which all parties benefit or in which one party benefits without making the other party worse off. This scenario only occurs when the parties use the nonzero-sum approach. Under this scenario, resources tend to be used more efficiently than under other approaches. In fact, as the diagram demonstrates, both parties enjoy a very high degree of satisfaction.

Despite the more efficient outcome, not all parties increase their satisfaction to the same degree. For example, Party A might have a greater degree of satisfaction in one scenario, while Party B might have a greater degree of satisfaction in another. Nonetheless, because the party's satisfaction does not come at the expense of the other, both parties will be able to maintain a cordial relationship. In light of the various benefits under this approach, this Article considers the nonzero-sum approach the most preferable approach to resolve global intellectual property disputes.

B. Prerequisites

To succeed under the nonzero-sum approach, the parties must satisfy several prerequisites. Obviously, each party must understand its own

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275. One commentator argued that "[c]ompromise sets up a lose-lose dynamic." DENT, *supra* note 176, at 38. As he explained:

> If you're willing to give up something of value, ultimately it will come back to haunt you. This is because it's important to you. I call compromise lose-lose because both parties lose the energy to resolve the conflict in a collaborative way that will end it. Rather than giving in to the compromise, partners should try to figure out how to use the energy to create a new solution in which both parties win.

Id.; *see id.* at 181 (arguing that "[c]ompromise is useful [only] as a temporary gesture, but it seldom makes either party happy"); *see also id.* at 182 ("Unless a conflict is resolved using a win-win strategy, the aftermath only sets up the conditions for the next conflict.").

276. SINGER, *supra* note 124, at 17.

277. *Id.* (noting that compromise "distributes the pain of losing—and often rewards the more unreasonable bargainer to boot").

needs and interests.[278] However, doing so is not as easy as people would imagine, especially when the parties are in dispute.[279] Indeed, "[n]egotiating parties often misperceive what their interests really are. Misperception may result from external factors, such as law, tradition, or advice from friends, that describes how the negotiation game is to be played and completed, or from confusion in the negotiators themselves."[280] Thus, one of the mediator's roles is to help the participants identify their interests[281] and to reduce strategic and cognitive barriers that might prevent the participants from making a rational decision.

In addition, the parties must understand each other's needs and interests.[282] To facilitate this understanding, the parties must communicate with each other.[283] They also need to empathize with the

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278. PLANT, *supra* note 164, at 81; *see also* LAX & SEBENIUS, *supra* note 266, at 58 (noting that a negotiation would reach an impasse if each party had "an inflated expectation of its alternative").

279. "Parties in dispute rarely identify their interests in a clear or direct fashion." MOORE, *supra* note 1, at 231. Christopher Moore attributed the disputants' lack of clarity to four reasons:

1. [Parties o]ften do not know what their genuine interests are
2. [Parties a]re pursuing a strategy of hiding their interests on the assumption that they will gain more from a settlement if their genuine goals are obscured from the scrutiny of other parties
3. [Parties h]ave adhered so strongly to a particular position that meets their interest that the interest itself becomes obscured and equated with the position and can no longer be seen as a separate entity, or
4. [Parties a]re unaware of procedures for exploring interests

Id.

280. *Id.* at 231-32.

281. *See id.* at 231-43 (discussing how to uncover hidden interests of disputant parties).

282. MNOOKIN ET AL., *supra* note 155, at 48 (noting that the better one can understand the other's thinking, the better one "will be able to anticipate the strategic problems and opportunities that may crop up in the negotiation—and to prepare for them"); PLANT, *supra* note 164, at 81 (noting that each party must understand its adversary's real interests and needs); Lax & Sebenius, *Interests*, *supra* note 150, at 88 (noting that "it goes almost without saying that negotiators should constantly assess their counterparts' interests and preferences").

283. Professor Schelling explained the need for interaction between the parties:

> [In a nonzero-sum game, s]omething has to be communicated; at least some spark of recognition must pass between the players. There is generally a necessity for some social activity, however rudimentary or tacit it may be; and both players are dependent to some degree on the success of their social perception and interaction. Even two completely isolated individuals, who play with each other in absolute silence and without even knowing each other's identity, must tacitly reach some meeting of minds.

SCHELLING, *supra* note 263, at 163; *see also* HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 20 (1997) (noting that "the uncertainty created by incomplete or asymmetric information leads to outcomes that prevent optimal levels of exchange or that foster conflict. In other words, incomplete information leads to inefficient outcomes"); ARTHUR STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 58 (1990) ("[I]t is universally suggested that the result of misconception is conflict that would otherwise have been avoidable. Although international conflicts are often attributed to misperception, international cooperation never is.").

other by understanding the other's needs, interests, and perspectives[284] or by "see[ing] the world through the other [party]'s eyes."[285] One should, however, not confuse *empathy* with *sympathy*, which is "an emotional response to the other person's predicament."[286] "Empathy does not require people to have sympathy for another's plight."[287] Rather, it is a "'value-neutral mode of observation,' a journey in which [a party] explore[s] and describe[s] another's perceptual world without commitment. Empathizing with someone, therefore, does not mean agreeing with or even necessarily liking the other side."[288]

Moreover, the parties must understand the dispute resolution process and the context in which they negotiate. Mediators have repeatedly emphasized the need to discuss the mediation process explicitly at the start of a negotiation.[289] Indeed, the more the parties understand the process, the more efficient the negotiation process will become.[290] Likewise, business strategists have emphasized the importance for managers of strategic partnerships to understand the logic of these alliances[291] and to evaluate the readiness, willingness, and ability of the initiating partner to engage in the partnership process.[292]

The above prerequisites emphasize the parties' need for information—about themselves, about the other, and about the process. However, information sometimes creates tension in the negotiation process. Indeed, some commentators consider this tension a negotiator's dilemma: "[W]ithout sharing information it is difficult to create value, but when disclosure is one-sided the disclosing party risks being taken advantage of."[293]

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284. MNOOKIN ET AL., *supra* note 155, at 46 (defining empathy as "the process of demonstrating an accurate, nonjudgmental understanding of the other side's needs, interests, and perspective").

285. *Id.* at 47. To deepen perspectives and to provide insights into the other party's positions, many negotiation programs require participants to play the other party's role. For example, "[i]n various management programs at Harvard, . . . senior industrialists have been assigned the parts of environmentalists and vice versa." Lax & Sebenius, *Interests*, *supra* note 150, at 88.

286. MNOOKIN ET AL., *supra* note 155, at 47.

287. *Id.*

288. *Id.*; FISHER ET AL., *supra* note 147, at 35 (noting that "[o]ne can at the same time understand perfectly and disagree completely with what the other side is saying").

289. MNOOKIN ET AL., *supra* note 155, at 62 (noting that "it often helps to discuss process explicitly at the start of a negotiation).

290. *See id.* at 25 (discussing how negotiators can reduce transaction costs).

291. YOSHINO & RANGAN, *supra* note 171, at 51 (emphasizing the need for managers to understand the logic of strategic alliances to make these relationships succeed).

292. DENT, *supra* note 176, at 52.

293. MNOOKIN ET AL., *supra* note 155, at 17. Professor Mnookin and others described the negotiator's dilemma:

> Without sharing information, it is difficult to find trades that might create value and potentially make both negotiators better off. But if unreciprocated, openness can be exploited. Disclosing one's preferences, resources, interests, and alternatives can help to

To avoid this dilemma, the participants must trust each other. Trust is very important in the mediation process.[294] Indeed, one of the biggest assets of a mediator is that he or she can cultivate the trust of the disputants.[295] Once the mediator has the trust of the participants, the information environment will be transformed from adversarial to collaborative.[296] Instead of being reluctant to divulge information, the parties will be willing to share information. They also will "confide in the mediator about their priorities, possible options for settlement, and their alternatives to agreement—critical information that they often do not wish to share."[297]

Trust is equally important in the international arena,[298] in particular

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> create value but may pose a grave risk with respect to distributive issues. Negotiators are constantly caught between these competing strategic demands. Ultimately, an individual negotiator is typically concerned with the size of her slice, and only secondarily concerned with the size of the pie as a whole. Indeed, a negotiator who can easily claim a large share of a small pie may wind up with more to eat than one who helps bake a much bigger pie but winds up with only a silver. A skillful negotiator moves nimbly between imaginative strategies to enlarge the pie and conservative strategies to secure an ample slice no matter what size the final pie turns out to be.

Id. at 9.

294. FOLBERG & TAYLOR, *supra* note 119, at 9 ("Trust and confidence by the parties involved, as in any helping relationship, are necessary for an effective mediation process.").

295. Fuller, *supra* note 124, at 326 (noting that the primary function of the mediator is "to induce the mutual trust and understanding that will enable the parties to work out their own rules"); Kovach & Love, *supra* note 147, at 101 ("Mediators cultivate the trust of parties."); *see also* MOORE, *supra* note 1, at 161 (acknowledging the need to "create an atmosphere of trust and cooperation that promotes positive relationships and is conducive to negotiations").

296. As one commentator explained:

> Only after trust in the mediator and in the process begins to mature, will the mediator be able to probe beneath what a party is initially willing to volunteer to the mediator. Only when the parties trust the mediator, will parties and counsel feel comfortable in discussing with the mediator the real interests and needs behind the positions they are urging.

PLANT, *supra* note 164, at 86.

297. SINGER, *supra* note 124, at 20.

298. L.N. RANGARAJAN, THE LIMITATION OF CONFLICT: A THEORY OF BARGAINING AND NEGOTIATION 281 (1985) ("The tightness of coalitions also depends on trust. Even the credibility of threats depends on how the threatener has behaved on past occasions."); BRIGID STARKEY ET AL., NEGOTIATING A COMPLEX WORLD: AN INTRODUCTION TO INTERNATIONAL NEGOTIATION 114 (1999) (noting that negotiation that results in mutually acceptable outcomes "involves the enhancement of communication between the parties and the construction of trusting relationships"); *see also* SCHELLING, *supra* note 263, at 36 ("[T]he threat's efficacy depends on the credulity of the other party, and the threat is ineffectual unless the threatener can rearrange or display his own incentives so as to demonstrate that he would, *ex post*, have an incentive to carry out.").

As the Soviet-U.S. Cold-war relationship demonstrated, even parties with diametrically opposed interests can develop trust. As commentators explained:

> One of the lessons learned from the forty-five-year cold war between the United States and the Soviet Union is that even states with seemingly opposed values can successfully negotiate with one another. The explanation for this apparent inconsistency lies in the dynamic nature of culture and identity as forces in the international system. Cultural differences are not always invoked as reasons to avoid negotiation. Trust can be built regardless of these many

in international regimes. "Co-operation means sacrificing some degree of national independence with a view to co-ordinating, synchronizing, and rendering mutually profitable some of the political, military, or economic policies the co-operating nations intend to pursue."[299] Unless a country can trust other countries, it will be unwilling to give up its national independence for the betterment of the entire community.[300] Furthermore, "[r]eduction in uncertainty and increase in predictability depend crucially on trust, which is built up as a perception of past actions."[301] Due to the lack of judicial enforceability in the international system, each member of an agreement has "to take on trust the word of the others."[302]

Finally, to increase mutual trust, the two parties must be able to stand on an equal footing. "Cooperative strategy . . . means what it suggests, namely the achievement of an agreement and a plan to work together; not the giving of orders down hierarchies."[303] Indeed, in order to have satisfactory results, the process must allow all the participants to get involved. Mediation emphasizes the importance that the participants are making their own decisions.[304] Likewise, literature on strategic partnerships focuses on the tension between corporate managers and the control they exert over the operation of the partnerships.[305] Because a country "will be more likely to adhere to international norms that it has

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differences when objectives are shared. The Americans and the Soviets shared a belief in the strategic doctrine of deterrence—the principle that their mutual willingness to destroy each other was a basis for cooperation. This mutual fear led to a shared value: the need for survival in the face of possible annihilation. This fear is what guided their behavior in such negotiations as SALT and the Strategic Arms Reduction Talks (START).

STARKEY ET AL., *supra*, at 68-69.

299. WOLFERS, *supra* note 229, at 27; Stein, *Coordination and Collaboration*, *supra* note 12, at 120 (noting that regimes will arise because the actors "eschew independent decisionmaking").

300. WOLFERS, *supra* note 229, at 29 ("[T]he most dangerous to the amity between peacetime allies are suspicions concerning the reliability of allied pledges of future assistance; most disruptive in wartime alliances are suspicions that one ally may be contemplating a separate peace with the enemy.").

301. RANGARAJAN, *supra* note 298, at 281.

302. *Id.* As Professor Schelling explained:

> Trust is often achieved simply by the continuity of the relation between parties and the recognition by each that what he might gain by cheating in a given instance is outweighed by the value of the tradition of trust that makes possible a long sequence of future agreement. By the same token, "trust" may be achieved for a single discontinuous instance, if it can be divided into a succession of increments.

SCHELLING, *supra* note 263, at 134-35.

303. *Id.*

304. *See* discussion *supra* Part II.A.

305. *See* CHILD & FAULKNER, *supra* note 179, at 184 (regarding control "as a critical issue for the successful management and performance of strategic alliances"); *see id.* at 184-209 (discussing control within a strategic partnership); *see also* LEWIS, *supra* note 193, at 83-107 (discussing the need for partners to select an appropriate structure that reinforces trust).

helped to shape,"[306] international relations theorists underscore the need to involve a large number of countries in developing international norms and multilateral regimes.

C. Limitations

As with most approaches, the nonzero-sum approach has its limitations. First, the approach does not work well when a party's interests can be served only by a complete victory.[307] "Sometimes a party's interest in public vindication is so strong that it cannot be met without adjudication, and that interest may outweigh whatever tangible settlement options the other party can offer."[308] Likewise, a nonzero-sum approach does not work well if the party has an interest in creating a longlasting precedent and is using the adversary process as a means to that end.[309] After all, the nonzero-sum approach assumes that there will be no eventual winner or loser, and the dispute resolution process does not seek to establish right or wrong. In fact, by assuming that each case is unique, the approach acknowledges that the settlement will be of very limited precedential value.

Second, the approach would be inadequate if the goal of a party were to punish the other party, because the nonzero-sum approach is cooperative by nature and tends to preserve the relationship between the parties. If punishment is what a party is seeking, the adversary approach or the coercive approach may be more appropriate. Due to the lack of constraints as to what a country can do, the coercive approach may be the most effective at punishing the other party. Nevertheless, due to its unilateral nature, such an approach would create costs that would affect the country's international reputation and its relationship with other trading partners, who may be concerned about being similarly coerced in the future.[310]

Third, the nonzero-sum approach creates very limited propaganda value. For example, if a party wants to announce to all its trading partners that it has adopted a new and tougher policy on pirated software or counterfeit audiovisual products, the nonzero-sum approach may not be effective in disseminating this message. Likewise, this

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306. Sam Nunn, *Address to the American Assembly*, *in* LIVING WITH CHINA, *supra* note 57, at 277, 285.

307. *See* MNOOKIN ET AL., *supra* note 155, at 107.

308. *Id.*

309. *Id.*

310. *See* discussion *supra* Part I.A (discussing how the coercive approach would alienate one's trading partners).

approach would not create a reputation that deters similar disputes in the future.[311]

Fourth, the nonzero-sum approach may have limited effectiveness if one is using the confrontation for political or strategic ends.[312] For example, the U.S. government had sometimes used its dealings with China to divert domestic attention and gain "political mileage."[313] By trying to avoid confrontation, a nonzero-sum approach would unlikely serve these types of purposes, for a dispute negotiation or settlement might draw less attention from the mass media and the general public than a full-fledged confrontation.

Fifth, the nonzero-sum approach would be unnecessary for a party having overwhelming power in the negotiation process unless it wants to maintain future relationships with the other party. A party should not use the nonzero-sum approach unless it will make the party better off. If a party can obtain through other approaches, such as unilateral action or adversary processes, an outcome that is superior than the one obtained through the nonzero-sum approach, the party would be much better off using these other approaches.[314] Thus, a party should always keep in mind the no-agreement alternatives and consider these options as what Professors Roger Fisher and William Ury called its BATNA, the "Best Alternative To a Negotiated Agreement."[315] The party should use these options to set its reservation value and establish its bargaining range.[316]

Finally, in a dispute resolution, there is always an essential tension between cooperative moves to create value and competitive moves to claim it.[317] Indeed, most disputes require both zero-sum and nonzero-

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311. *See* MNOOKIN ET AL., *supra* note 155, at 107 ("Sometimes a party may refuse to settle a case because it wants to establish a reputation that will deter future litigation."); *see also* AXELROD, THE EVOLUTION OF COOPERATION, *supra* note 14, at 154 (noting that "[m]aintaining deterrence through achieving a reputation for toughness is important . . . in international politics").

312. *See id.* (arguing that settlement may not be appropriate for cases that are used "for larger strategic or corporate ends").

313. Editorial, *Surprise! A Deal with China*, WALL ST. J., June 18, 1996, at A22 (noting that the last-minute compromise surrounding the 1996 intellectual property agreement between China and the United States had helped the Clinton administration gain "domestic political mileage"); Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 (noting that copyright piracy was "an obvious lever" for the Clinton administration to pull when it wanted to appear tough on China).

314. *See* David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation*, 1 NEGOTIATIONS J. 163, 169 (1985) (noting that "[i]f negotiation is seen as a *means* of doing better by joint action than would be otherwise, it should not be surprising that nonnegotiation courses of action will sometimes prove to be the superior means").

315. FISHER ET AL., *supra* note 147, at 100.

316. LAX & SEBENIUS, *supra* note 266, at 61.

317. *Id.* at 33.

sum dispute resolution approaches.[318] As commentators have explained, "[v]alue creating and value claiming are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarge the pie, it must still be divided; value that has been created must be claimed."[319] Even worse, the tension between the cooperative and competitive moves is further exacerbated by the interaction of the tactics used to create or claim value.[320]

D. Implications of the Nonzero-sum Approach for the Rule of Law

One might wonder whether the nonzero-sum approach would pose any challenge to the rule of law. Commentators generally do not consider cooperative dispute resolution techniques antithetical to civil society.[321] Rather, they consider these techniques consistent with, or complementary to, the values embodied in the rule of law. While some considered cooperative techniques as "an additional pre-trial step,"[322] others considered it "bargaining in the shadow of the law."[323] Indeed, as one commentator has noted, "[b]eing cooperative now means

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318. In *Getting to Yes*, Professors Roger Fisher and William Ury discussed how we could divide an orange without splitting it into half. *See* FISHER ET AL., *supra* note 147, at 73. However, imagine a parent trying to divide ten oranges among his or her two children. How often would a child want only the fruit to eat, while the other want only the peel for baking?

319. LAX & SEBENIUS, *supra* note 266, at 33; *see also* SCHELLING, *supra* note 263, at 4 (noting the simultaneous presence of both common and conflicting interests in international affairs).

320. LAX & SEBENIUS, *supra* note 266, at 34. As David Lax and James Sebenius explained:

> First, tactics for claiming value . . . can impede its creation. . . . Second, approaches to creating value are vulnerable to tactics for claiming value. . . . In tactical choices, each negotiator thus has reasons not to be open and cooperative. Each also has apparent incentives to try to claim value. Moves to claim value thus tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement.

Id. at 34-35.

321. For criticisms of alternative dispute resolution, see, for example, Fiss, *supra* note 135 (arguing that alternative dispute resolution takes away the courts' ability to give force to, and interpret, the values embodied in authoritative legal texts); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (cautioning that alternative dispute resolution may disadvantage minority disputants); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (cautioning that alternative dispute resolution may disadvantage women); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833 (1990) (cautioning that alternative dispute resolution may threaten the effective functioning of the legal system by lowering the quality of the practicing bar); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (cautioning that alternative dispute resolution may undermine the legal system by decentralizing the making of public law).

322. Jonnette Watson Hamilton, *The Significance of Mediation for Legal Education*, 17 WINDSOR Y.B. ACCESS JUST. 280 (1999).

323. MOORE, *supra* note 1, at 279.

adhering to authoritative substantive norms—legal, moral, and political—which form the backdrop of dispute settlement and make its outcomes legitimate and fair. It is no longer enough that bargainers be cordial, predictable, and nice; they must do justice as well."[324]

Indeed, the nonzero-sum approach may help improve the quality of justice by allocating limited dispute resolution resources more efficiently. Consider mediation for example. Commentators have repeatedly described its ability to "free[] up the courts for other disputants who need them, easing the problem of delayed access to justice."[325] Thus, one can easily find the increasing use of alternative dispute resolution in the adversarial court system.[326] Likewise, although commentators and policymakers emphasized the important function of the WTO Dispute Settlement Body, one should not ignore the fact that the WTO dispute resolution mechanism includes other approaches such as consultation,[327] good offices, conciliation, and mediation.[328]

To see why the nonzero-sum approach is complementary to the rule of law, one must understand the interdependence between cooperative dispute resolution techniques and adjudicatory procedures. One also must understand that the success of these techniques always depends on the existence of adjudicatory procedures. As Professor Herbert Kritzer has noted, "without the threat of adjudication, it is unlikely that most of what we think of as civil disputes would lead to *any* agreements."[329] Likewise, in world politics, coercion is needed "to guarantee that no individual would take advantage of another's cooperation by defecting from the pact and refusing to cooperate."[330] Unless countries could resort to coercion or an adversary process, other countries would not have any incentive to cooperate in the first place. In fact, a recent survey of the WTO panel decisions showed that "the vast majority of

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324. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 26 (1992); *see also* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It Anyway?*] ("To charge that settlement is ungoverned by precedent is to be grossly insensitive to the contexts in which settlements occur.").

325. BUSH & FOLGER, *supra* note 134, at 17.

326. *See* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 32 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*] (describing the various uses of alternative dispute resolution in the court system).

327. Dispute Settlement Understanding, *supra* note 86, art. 4.

328. *Id.* art. 5.

329. HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 130 (1991) (citations omitted); *see also id.* at 137 ("The settlement of many (if not most) cases relies upon the adjudication of others; to separate those that settle from those that are adjudicated misses the fundamental reality underlying the working of the system."); Marc Galanter, *The Quality of Settlements*, 55 J. DISP. RESOL. 55, 61-62 (1988) (emphasis omitted).

330. Stein, *Coordination and Collaboration*, *supra* note 12, at 122.

potential [international trade] disputes are settled informally on a bilateral basis without any formal invocation of the [WTO] dispute settlement mechanism, *but against the background of the knowledge that recourse to the mechanism is possible.*"[331]

Because of this interdependence, an overuse of the nonzero-sum approach will limit the available public information that is needed for the disputants to assess their probable outcomes, while scanty use of the nonzero-sum approach will underutilize this highly preferable approach. Thus, although parties should aim at using a nonzero-sum approach, they should be conscious of the limitations of the approach and avoid using it regardless of their needs and situations. After all, parties using a nonadjudicatory procedure need precedents and legal standards to calculate their BATNA and to assess the acceptability or fairness of the outcomes under the nonzero-sum approach.[332] If everybody used the cooperative approaches, there would not be enough norms and precedents for disputants to make their assessments.[333] By reducing bargaining-shadows and adjudicatory authority (and thus the legitimacy of the cooperative solutions), the overuse of the nonzero-sum approach therefore would reduce the effectiveness of the nonzero-sum approach.[334]

In sum, the question should not be whether the nonzero-sum approach would pose challenges to the rule of law, but *when*, *how*, and *under what circumstances* should we use the nonzero-sum approach so that it will strike the right balance between our needs for public information and for efficiency, effectiveness, and satisfaction.[335]

IV. ILLUSTRATIONS

To illustrate the nonzero-sum approach, this Part discusses various examples from three different categories of disputes. The first Section

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331. Otten, *supra* note 226, at 527 (emphasis added).

332. MOORE, *supra* note 1, at 279; *see also* Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 326, at 11 ("The parties may not accurately be able to predict what might happen in court. However, there is some notion that what they are contracting out of—the adjudicated result.").

333. *See id.* at 10 (arguing that "[t]oo much settlement might result in fewer clear-cut rules, thereby clouding probability assessments").

334. *Cf.* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2642 (1995) (noting that "[p]roponents of the problem-solving conception desire the minimum amount of adjudication necessary to create bargaining-shadows and adjudicatory authority").

335. *Cf., e.g., id.* at 2642 (suggesting that "the locus of disagreement [on the expediency of settlement] changes from the question *for or against settlement?* to the question *how much settlement?*"); Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 324, at 2664 (arguing that "the question is not 'for or against' settlement (since settlement has become the 'norm' for our system), but *when, how, and under what circumstances* should cases be settled?").

focuses on recent intellectual property disputes between the European Union and the United States. It argues that the nonzero-sum approach used to resolve the recent EU-U.S. privacy dispute may provide some insight into how one can resolve intellectual property disputes between the two trading partners.[336] The next Section focuses on the continuous disputes between developed and less developed countries. To demonstrate how one should examine the various parts of a complex agreement in order to divine the conflict resolution approaches used to resolve the dispute, this Section focuses on selected provisions of the TRIPs Agreement.[337] The last Section focuses on the perennial intellectual property dispute between China and the United States. Unlike the first two Sections, which analyze disputes occurring at the macro level, this Section discusses disputes occurring at the micro level. In particular, it discusses how U.S. companies can use the nonzero-sum approach to resolve private intellectual property disputes in China.[338]

A. Disputes Between the European Union and the United States

Since its establishment, the European Union has been very aggressive in shaping the global intellectual property debate and in establishing international norms that protect the economic interests of its nationals. In 1993, the European Community enacted the Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights (EC Copyright Term Directive).[339] This directive requires all member states to implement legislation that extends the term of copyright protection to the life of the author plus seventy years.[340] Article 7 of the Directive specifically requires that the term of copyright protection for a work originated from a non-EU country be determined by the term of protection granted under the law of the country from which the work originates.[341] Thus, unless the United States extends the copyright term from life of the author plus fifty years to life of the author plus seventy years, U.S. works will fall into the public domain twenty years earlier than their European counterparts. To create parity between European and U.S. authors,[342] Congress emulated the EC

336. *See* discussion *infra* Part IV.A.

337. *See* discussion *infra* Part IV.B.

338. *See* discussion *infra* Part IV.C.

339. EC Copyright Term Directive, *supra* note 108.

340. *Id.* art. 1(1).

341. *Id.* art. 7(1).

342. *See Hearing Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 105th Cong. 44 (1998) (statement of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks) ("[Copyright extension] will not only bring us into parity with the European Union and a number of other countries which have recently extended the term of

Copyright Term Directive by enacting the Sonny Bono Copyright Term Extension Act,[343] which extended the copyright term for twenty additional years.[344] Commentators have heavily criticized this extension,[345] and the U.S. Supreme Court will examine its constitutionality in the upcoming term.[346]

A few years after the enactment of the EC Copyright Term Directive, the European Union promulgated the European Parliament and Council Directive on the Legal Protection of Databases (EU Database Directive).[347] This directive requires all member states to implement legislation that grants sui generis protection to databases created as a

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protection for copyright, but will protect some of our most important copyrighted exports.").

343. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304 (2000)).

344. 17 U.S.C. § 304.

345. For discussions of copyright term extension, see generally Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 U. FLA. L. REV. 989 (2000); Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 170-75 (1999); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT'L L. 595 (1996); Dennis S. Karjala, *The Term of Copyright*, *in* GROWING PAINS: ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY (Laura N. Gasaway ed., 1997); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 70-74 (2001); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996); L. Ray Patterson, Eldred v. Reno: *An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223 (2001); J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625 (1995) [hereinafter Reichman, *Duration of Copyright*]; Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long*, 18 CARDOZO ARTS & ENT. L.J. 651 (2000); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315 (2000).

346. On February 19, 2002, the United States Supreme Court granted certiorari in *Eldred v. Ashcroft*, which was formerly known as *Eldred v. Reno*. *See* Eldred v. Ashcroft, 239 F.3d 372 (D.C. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3514 (U.S. Feb. 19, 2002) (No. 01-618). For legal documents concerning *Eldred*, see OPENLAW: Eldred v. Ashcroft, *at* http://eon.law.harvard.edu/openlaw/eldredvashcroft/. *See also* Marci Hamilton, *Bringing the People into the Copyright Arena: How the New Awareness of Copyright Law Issues Can Help in Guarding the Public's Domain*, FINDLAW'S WRIT: LEGAL COMMENTARY, *at* http://writ.news.findlaw.com/hamilton/20010329.html (Mar. 29, 2001) [hereinafter Hamilton, *Bringing the People into the Copyright Arena*] (discussing the difficulties of the *Eldred* litigation).

347. EU Database Directive, *supra* note 108. For discussions of the EU Database Directive and recent development concerning U.S. database legislation, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. CIN. L. REV. 151 (1997) [hereinafter Ginsburg, *Copyright, Common Law*]; Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999); Reichman & Samuelson, *supra* note 62; J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999); Peter K. Yu, *Evolving Legal Protection for Databases*, GIGALAW.COM, *at* http://www.gigalaw.com/articles/2000/yu-2000-12.html (Dec. 2000). *See also* McManis, *supra* note 107, at 1294-96 (discussing the tension between the EU Database Directive and the TRIPs Agreement).

result of "substantial investment" by database producers.[348] Under the Directive, databases are protected against unauthorized extraction and reutilization for a renewable term of fifteen years regardless of their eligibility for copyright protection.[349] To the detriment of U.S. database producers, the Directive includes a reciprocity provision that denies protection to databases produced in non-EU countries that do not offer comparable protection to databases.[350] As a result of this provision, databases produced by U.S. companies become vulnerable to foreign competition and piracy in European markets.

Despite the Directive's adverse economic impact, the United States has been reluctant to introduce laws offering comparable protection to databases. To understand why databases receive very limited protection in the United States, one must look at *Feist Publications, Inc. v. Rural Telephone Service Co.*[351] In *Feist*, the United States Supreme Court held that the white pages of a telephone directory did not constitute a sufficiently original work of authorship to qualify for copyright protection.[352] As the Court reasoned, a compilation does not warrant copyright protection unless information is selected, coordinated, or arranged in an original manner.[353] Pointing out that "[o]riginality is a constitutional requirement,"[354] the Court firmly rejected the "sweat of the brow" theory of copyright protection.[355] Thus, nonoriginal, noncreative databases do not qualify for copyright protection, no matter how much labor and capital have been expended to create them.

Shortly after the passage of the EU Database Directive, the United States submitted a draft treaty proposal to WIPO,[356] which has yet to

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348. EU Database Directive, *supra* note 108, art. 7(1).

349. *Id.* art. 10.

350. *Id.* art. 11.

351. 499 U.S. 340 (1991).

352. *Id.* at 364.

353. *Id.* at 362.

354. *Id.* at 346.

355. *Id.* at 352-54. "Sweat of the brow" theory is the notion that industrious collection of facts is rewarded with copyright protection. For discussions of *Feist* and the constitutional originality requirement, see generally Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885 (1992); Leo J. Raskind, *Assessing the Impact of* Feist, 17 U. DAYTON L. REV. 331 (1992); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993); Russ VerSteeg, *Sparks in the Tinderbox:* Feist, *"Creativity," and the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549 (1995).

356. Modeled after the EU Directive, the United States's draft treaty proposal to WIPO called for the protection of databases created as a result of substantial investment by database producers in the collection, assembly, verification, organization, or presentation of information. The term of protection was twenty-five years and could be renewed indefinitely upon showing of substantial changes in the database. Instead of reciprocity, the treaty proposal mandated national treatment. For a discussion of the U.S. draft treaty proposal to WIPO, see Reichman & Samuelson, *supra* note 62, at 102-10; Samuelson, *supra* note 109, at 422-23.

adopt the draft database treaty.[357] Similar resistance confronts legislation proposed in Congress. Although there have been a large number of legislative proposals on database protection,[358] commentators have widely criticized these proposals,[359] and Congress has yet to adopt any of them. As commentators have pointed out, sui generis database protection would confer far broader and stronger exclusive rights on database contents than is necessary to provide the needed incentives for database producers.[360] Such protection also would raise serious constitutional questions under the Commerce Clause, the Copyright Clause, and the First Amendment.[361] Moreover, sui generis protection may be unnecessary in light of the significant protection currently enjoyed by database producers under state contract and misappropriation laws and nonlegal, technological protective devices.[362] In fact, many database producers, who are also database users, would unlikely

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357. *See* Samuelson, *supra* note 109, at 419-27 (discussing the events surrounding the draft database treaty in the 1996 WIPO Diplomatic Conference in Geneva).

358. These proposals include, to name a few, Collections of Information Antipiracy Act of 1999, H.R. 354, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998); Consumer and Investor Access to Information Act, H.R. 1858, 106th Cong. (1999); and Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996).

359. See sources cited *supra* note 347 for criticism of the U.S. database legislative proposals. *See also* Marci Hamilton, *Should U.S. Intellectual Property Rights Change to Fit World Norms?*, FINDLAW'S WRIT: LEGAL COMMENTARY, *at* http://writ.news.findlaw.com/hamilton/20010524.html (May 24, 2001) (arguing that the United States should not yield easily to global pressure without considering the strengths of its intellectual property system).

360. By granting database producers a monopoly over their collected data, the proposals would allow private entities to lock up information that is essential to basic scientific research and future creative endeavors. *See* Reichman & Samuelson, *supra* note 62, at 113-24 (discussing the adverse impact of sui generis database protection on scientific research and education); Reichman & Uhlir, *supra* note 347, at 796-821 (discussing the adverse impact of database protection laws on scientific, technical, and educational users of factual data and information). The proposals also would create an anti-competitive environment that makes it difficult for valued-added products and services to enter the market, thus making information products more expensive. Benkler, *supra* note 347, at 562-65 (discussing the anti-competitive nature of database protection laws); Reichman & Samuelson, *supra* note 62, at 124-30 (discussing how sui generis database protection would frustrate competition in the market for value-added products and services).

361. *See* Benkler, *supra* note 347 (discussing the constitutional limits of Congress's power to create exclusive private rights in information); Hamilton, *A Response to Professor Benkler*, *supra* note 347, at 619-28 (discussing the constitutional deficiencies of U.S. database legislation); Pollack, *supra* note 347, at 50-89 (discussing the constitutional constraints on database protection). *See also* Paul J. Heald, *The Extraction/Duplication Dichotomy: Constitutional Line-drawing in the Database Debate*, 62 OHIO ST. L.J. 933, 935 (2001) (arguing that Congress "could rely on the Commerce Clause to grant thin protection to unoriginal collections of information, but is constitutionally constrained from prohibiting the extraction and use of facts contained in a compilation, regardless of whether the compilation is original").

362. *See* Jonathan Band & Makoto Kono, *The Database Protection Debate in the 106th Congress*, 62 OHIO ST. L.J. 869, 869-70 (2001); Ginsburg, *Copyright, Common Law*, *supra* note 347, at 176; *see also* eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) (recognizing claims of "trespass to chattels" over the unauthorized extraction of information from an Internet website); NBA v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997) (prohibiting copying of "hot news" or time-sensitive materials for competition purposes).

support any legislation unless they were certain that the legislation strikes the right balance between the production of databases and the use of collected information.[363]

Given the significant resistance confronting U.S. legislative proposals on database protection, the United States will not likely offer sui generis database protection in the near future. The differing protection between the European Union and the United States, therefore, will create tension, and possibly conflicts, between the two trading partners.[364] In fact, database protection is only one of the many issues that are troubling trans-Atlantic intellectual property relations. Other issues include the protection of moral rights,[365] fair use,[366] the first sale doctrine,[367] the

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363. Yu, *Evolving Legal Protection for Databases*, *supra* note 347. So far, the database industry has failed to provide substantial factual information as to how it would be harmed had the legislative proposal not been adopted. It only succeeded in making generalized claims of potential foreign competition and piracy in the European markets. Benkler, *supra* note 347, at 591-92; Reichman & Samuelson, *supra* note 62, at 70; *see also* Pollack, *supra* note 347, at 92-93 (noting that the American database industry is booming). These claims ring hollow when only one of the three major database industry stakeholders, McGraw-Hill, is an American company. Benkler, *supra* note 347, at 592. Reed-Elsevier is a European company and Thompson is a Canadian company. *Id.*

364. The more favorable environment of producing database in the European Union also would attract businesses to set up offices in, or even relocate to, the European Union, thus chipping away the United States's competitive edge in the information revolution. Yu, *Evolving Legal Protection for Databases*, *supra* note 347.

365. For discussions of the tension between U.S. copyright and moral rights in Europe, see, for example, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTTENBERG TO THE CELESTIAL JUKEBOX 165-96 (1994); Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86-101 (1996). *Cf.* Visual Artists Rights Act, 17 U.S.C. § 106A (providing limited moral rights to visual art); CAL. CIV. CODE § 987 (West 1998) (California Art Preservation Act); N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984) (New York Artists' Authorship Rights Act).

366. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 87 (2000) (arguing that "an international fair use doctrine does not currently exist in the international law of copyright and that such a doctrine is vital for effectuating traditional copyright policy in a global market for copyrighted works as well as for capitalizing on the benefits of protecting intellectual property under the free trade system"); Tyler G. Newby, Note, *What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633 (1999) (discussing the distinctiveness of the fair use doctrine under U.S. copyright law). *Compare* Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (holding that reverse engineering for the purpose of gaining an understanding of the unprotected functional elements of a computer program qualifies as fair use), *with* EC Computer Program Directive, *supra* note 108, art. 6(1) (permitting reverse engineering only for the purpose of "obtain[ing] the information necessary to achieve the interoperability of an independently created computer program with other programs").

367. *See* Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000) (discussing the disagreement over the exhaustion issue during the negotiation of the TRIPs Agreement).

work-made-for-hire arrangement,[368] and protection against private copying in the digital environment.[369]

To examine how the United States could resolve its intellectual property disputes with the European Union, one may draw insights from the recent development concerning the EU-U.S. dispute over the protection of personal data. In 1995, the European Union enacted the European Parliament and Council Directive on the Protection of Individuals with Regards to the Processing of Personal Data and on the Free Movement of Such Data (EU Privacy Directive).[370] This directive requires all member states to implement legislation to protect the right to privacy with respect to the collection, processing, storage, and transmission of personal data.[371] By harmonizing privacy laws among the fifteen member states,[372] the EU Privacy Directive seeks to promote

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368. Reichman, *Duration of Copyright*, *supra* note 345, at 631 (noting that "[a] more substantial discrepancy between American copyright law and that of other Berne Union countries stems from the greater reliance of the former on the work-made-for-hire doctrine in general and on the principle of corporate authorship in particular"); *see id.* at 631-33 (discussing the United States's distinctive reliance on the work-made-for-hire doctrine and corporate authorship).

369. Joseph S. Papovich, *NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended?—A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 259 (1997) ("Blank tape levies have been a matter of dispute for several years between the United States and some European countries . . . ."); *see also* Gary S. Lutzker, *Dat's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 182-83 (1992) (discussing how foreign countries protect against unauthorized private copying). *Compare* Audio Home Recording Act of 1992, 17 U.S.C. §§ 1000-1009 (2000), *with* EU Digital Copyright Directive, *supra* note 108.

370. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter EU Privacy Directive]. For an overview of the Directive, see Peter K. Yu, *An Introduction to the EU Directive on the Protection of Personal Data*, GIGALAW.COM, *at* http://www.gigalaw.com/articles/2001/yu-2001-07a.html (July 2001) [hereinafter Yu, *An Introduction to the EU Directive*]. See generally Symposium, *Data Protection Law and the European Union's Directive: The Challenge for the United States*, 80 IOWA L. REV. 431 (1995), for an excellent symposium on the EU Privacy Directive.

371. EU Privacy Directive, *supra* note 370, art. 1(1). The Directive broadly defines "personal data" as "any information relating to an identified or identifiable natural person." *Id.* art. 2(a). It further defines "processing of personal data" as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction." *Id.* art. 2(b). The Directive, however, makes an exception for processing operations that fall outside the scope of EU law, such as those concerning public security, defense, state security, and law enforcement, and processing operations that are performed "by a natural person in the course of a purely personal or household activity." *Id.* art. 3(2).

372. The fifteen member states are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Before the EU Privacy Directive entered into force, several member states had broad statutes protecting privacy rights. These states included Austria, France, Germany, Ireland, Luxembourg, Sweden, and the United Kingdom. Fred H. Cate, *The EU Protection Directive, Information Privacy, and the Public Interest*, 80 IOWA L. REV. 431, 431 (1995); *see also* Spiros Simitis, *From the Market to the Polis: The EU Directive on the Protection of Personal Data*, 80 IOWA L. REV. 445, 451 (1995) (discussing the differences among data protection laws enacted by the various EU member states).

a high level of data privacy and the free flow of personal data within the European Union.[373]

To prevent circumvention of the Directive and creation of "data havens" outside the European Union, the Directive further prohibits the transfer of personal data to non-EU countries that do not meet the European "adequacy" standard for data protection.[374] Such a prohibition is particularly alarming, for it could cut off all personal data flows from the European Union.[375] This disruption would affect a large

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373. EU Privacy Directive, *supra* note 370, art. 1(2) ("Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded [under the Directive]."). *But see* Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1351 (2000) [hereinafter Reidenberg, *International Data Privacy Rules*] (noting the elusiveness of full harmonization of European data privacy laws).

374. EU Privacy Directive, *supra* note 370, art. 25(1). Article 25(1) of the EU Privacy Directive provides:

> The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection." *Id.* Whether a country meets the European "adequacy" level will depend on "all the circumstances surrounding a data transfer operation or set of data transfer operations." *Id.* art. 25(2). Particular consideration will be given to "the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

Id.

Notwithstanding the strict prohibition under article 25(1), the Directive allows member states to transfer data to a third country that does not meet the European "adequacy" standard under the following conditions:

> (a) the data subject has given his consent unambiguously to the proposed transfer; or
> (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
> (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
> (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
> (e) the transfer is necessary in order to protect the vital interests of the data subject; or
> (f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

Id. art. 26(1). In addition, the Directive allows data transfer to a non-EU country that does not meet the European "adequacy" standard "where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights." *Id.* art. 26(2).

375. *See generally* Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flow*, 80 IOWA L. REV. 471 (1995) (noting that the EU Piracy Directive creates a new kind of coercive international legal action known as "the data embargo order"). As defined by Professor Schwartz, "a data embargo order

variety of trans-Atlantic business activities, including personal banking and brokerage transactions, airline and hotel reservations, Internet sales, credit checks, credit card purchases, and inter-office communication between EU and non-EU branches of a multinational corporation.[376]

To protect its businesses, the United States has three options. The United States could adopt a coercive approach. Such an approach is sometimes used to deter and punish countries that discriminate against U.S. products. For example, Congress could pass a section 301-type law mandating sanctions on any countries that deny U.S. companies fair or equitable access to information needed for business operations.[377] U.S. companies also could decide not to trade with any European companies that deny them necessary personal data.

Nonetheless, such an approach would hurt both U.S. and EU companies. For U.S. companies, the European Union is a very important market.[378] Having personal data cut off from European sources would therefore mean a significant reduction of business. Furthermore, with the advent of the Internet and new communications technologies, such an approach would be almost impossible. Commerce has developed to a stage where personal data can no longer be classified under territorial boundaries. Even a small company in an obscure town can have customers from countries all over the world.

For the European Union, insisting on a legislative approach that is unique to its legal tradition and business practice is unwise and counterproductive. The United States provides a very lucrative market for European Internet and e-commerce businesses. If the European

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is a command forbidding a planned international data export or limiting the conditions of the export." *Id.* at 488; *see also id.* at 488-92 (discussing the data embargo order).

376. Stephen R. Bergerson, *E-Commerce Privacy and the Black Hole of Cyberspace*, 27 WM. MITCHELL L. REV. 1527, 1550 (2001). As Professor Cate pointed out:

> U.S. businesses have good reason to be worried. The first prohibition on transnational data transfer by the British Data Protection Registrar under national law forbade a proposed sale of a British mailing list to a United States direct mail organization. France, acting under French domestic law, has prohibited the French subsidiary of an Italian parent company from transferring data to Italy because Italy did not have an omnibus data protection law. The French Commission nationale de l'informatique et des libertes has required that identifying information be removed from patient records before they could be transferred to Belgium, Switzerland, and the United States.

Cate, *supra* note 372, at 438-39.

377. It is questionable whether such a law would survive challenge before the Dispute Settlement Body of the WTO. For discussions of how the Dispute Settlement Body would rule on the EU Privacy Directive, see discussion *infra* text accompanying notes 379-85.

378. "The European Union is the U.S.'s largest trading partner and the site of most U.S. foreign investment. In 1997, the United States exported $253.6 billion of goods and services to the European Union and imported $270.3 billion of goods and services from the European Union." Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 39 (2000).

Union imposed sanctions on U.S. companies, it would jeopardize its own economy and e-commerce development. Indeed, such sanctions would hurt the European Union as much as it would hurt the United States.

Alternatively, the United States could adopt an adversary approach—for example, by taking the dispute to the Dispute Settlement Body of the WTO.[379] So far, commentators disagree as to whether the United States would prevail in the dispute.[380] Although the General Agreement on Trade in Services[381] prohibits restrictions on transborder data flows,[382] it makes exceptions for privacy-related restrictions.[383] Thus, unless the EU Privacy Directive is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail[] or a disguised restriction on trade in services,"[384] the United States could not prevail.[385]

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379. PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 189 (1998) (quoting an official from the Clinton administration saying that the United States would go to the WTO if it had to); *see also id.* (noting that the WTO may be "a useful forum for resolving disagreements about data protection rules"); *id.* at 194 (noting that the WTO could "provide an international forum for harmonizing the legal treatment of privacy protection"); Julia M. Fromholz, *The European Union Data Privacy Directive*, 15 BERKELEY TECH. L.J. 461, 483 (2000) ("Only if a wide array of nations, possibly acting through a body such as the WTO or the United Nations, arrives at an agreement on the appropriate level of data protection will a truly global solution be possible."); Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1354 (discussing the increasing importance of WTO as a forum for the protection of personal data); *id.* at 1359-62 (discussing the need for a General Agreement on Information Privacy). *But see* SWIRE & LITAN, *supra*, at 195 (cautioning that negotiations in the WTO are sometimes hard to predict and may result in a more law-centered approach, as compared to the sectoral and self-regulatory approach which the United States preferred); *id.* at 196 (noting the difficulties in expanding the scope of WTO to "complex issues such as privacy protection that are only modestly related to free trade and protectionism").

380. *See* SWIRE & LITAN, *supra* note 379, at 189 ("Data protection laws at the national or EU level may violate the free trade rules administered by the World Trade Organization."); *id.* at 191-92 (relating skepticism of trade experts about whether the European position on data protection would survive WTO scrutiny); Fromholz, *supra* note 379, at 474 (arguing that the EU Privacy Directive would survive WTO review); Shaffer, *supra* note 378, at 46-49 (discussing claims that the EU Privacy Directive would violate the rules of the WTO); *id.* at 49-52 (explaining why the EU Piracy Directive would survive WTO review).

381. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1168 (1994).

382. *Id.* art. XVII, 33 I.L.M. at 1180 (requiring countries to give national treatment to other signatories).

383. *See id.* art. XIV(c)(ii), 33 I.L.M. at 1177.

384. *Id.* art. XIV, 33 I.L.M. at 1177.

385. Professor Shaffer listed three reasons why a WTO challenge to the EU Privacy Directive would fail. First, although there are arguably some protectionist motives behind the EU Piracy Directive, the Directive, on its face, applies equally to transfers to all countries, including member states of the European Union. Shaffer, *supra* note 378, at 49-50. Second, the Directive seeks to promote a legitimate public policy objective, *i.e.*, to protect the privacy of EU residents. Such an objective is explicitly included in Article XIV of the General Agreement on Trade in Services. *Id.* at 50. Third, "[u]nder media scrutiny, WTO dispute settlement panels would prefer to refrain from engaging in a close balancing of competing trade and privacy

In the end, the United States adopted a nonzero-sum approach, which resulted in a win-win solution for both itself and the European Union. Shortly after the EU Privacy Directive entered into force in 1998,[386] the United States negotiated with the European Commission, the governing body of the European Union, to develop a "safe harbor" privacy framework.[387] Under the framework, companies decide for themselves whether they want to participate in the safe harbor.[388] To qualify for the safe harbor, a business must notify the Department of Commerce in writing annually and declare publicly in its published privacy statements that it adheres to the Safe Harbor Privacy Principles.[389] The Department of Commerce will maintain and make publicly available a list of all organizations that have self-certified.[390] If a business that has self-certified persistently fails to comply with the Safe Harbor Privacy Principles, the Department of Commerce will indicate on the list the business's noncompliance and thus its ineligibility for safe harbor benefits.[391] In July 2000, the European Commission approved of the safe harbor framework[392] and issued a decision that the framework satisfies the European "adequacy" standard for data protection.[393]

Before one can learn why the safe harbor framework is a win-win solution, one must understand the significant differences between the European Union and the United States in their approaches to data

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interests, and rather review the process by which the European Union takes account of foreign privacy protections." *Id.* at 51.

386. The EU Privacy Directive entered into force on January 1, 1998. EU Privacy Directive, *supra* note 370, art. 16(1).

387. For documents detailing the safe harbor privacy framework, see U.S. Dep't of Commerce, Safe Harbor Documents, *available at* http://www.export.gov/safeharbor/sh_documents.html. See also U.S. Dep't of Commerce, Safe Harbor Overview, *available at* http://www.export.gov/safeharbor/sh_overview.html; Yu, *An Introduction to the EU Directive*, *supra* note 370, for an overview of the safe harbor framework.

388. U.S. Dep't of Commerce, Safe Harbor Overview, *supra* note 387.

389. The Safe Harbor Privacy Principles include the following seven principles: notice, choice, onward transfer, security, data integrity, access, and enforcement. *Id.* There are two ways to adhere to these principles. A business can develop its own self-regulatory privacy program that conforms to the principles. Alternatively, it can participate in a self-regulatory privacy program that adheres to the principles. For a detailed description of the safe harbor principles, see U.S. Dep't of Commerce, Safe Harbor Privacy Principles, *available at* http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm.

390. U.S. Dep't of Commerce, Safe Harbor Overview, *supra* note 387.

391. *Id.* Such noncompliance also may lead to sanctions under section 5 of the Federal Trade Commission Act, which prohibits unfair and deceptive trade practices. 15 U.S.C. § 45(a)(1) (2000).

392. Article 25(6) of the EU Privacy Directive confers upon the European Commission the power to find that a third country satisfies the European "adequacy" standard for data protection by reason of its domestic law or of the international commitments into which it has entered. EU Privacy Directive, *supra* note 370, art. 25(6).

393. Commission Decision of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbour Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce, 2000 O.J. (L 215) 7 (Commission Decision C(2000) 2441).

protection. First, the term "privacy" has different meanings in the United States and the European Union. In the United States, privacy "serves as a catch-all term, protecting a variety of interests ranging from government intrusion into the bedroom to the inviolability of telephone communications."[394] Despite the importance of these privacy interests, many Americans believe in the free market and are constantly suspicious of government intrusions. Thus, prevailing U.S. opinion prefers "a sectoral approach that relies on a mix of legislation, regulation and self-regulation."[395]

Second, the First Amendment to the U.S. Constitution imposes limits on the government's ability to regulate the flow of information, including personal data.[396] Comprehensive legislation like the EU Privacy Directive would undermine significant interests protected by the First Amendment.[397] In fact, U.S. privacy laws tend to be carefully drafted so that they are narrowly tailored to the type of information, victims, and businesses the laws are designed to regulate.[398]

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394. Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 498 (1995) [hereinafter Reidenberg, *Setting Standards*].

395. U.S. Dep't of Commerce, Safe Harbor Overview, *supra* note 387; *see also* Fromholz, *supra* note 379, at 471 (noting that the United States holds "a very different view [from the European Union] of both privacy and the role of government"); Robert M. Gellman, *Fragmented, Incomplete, and Discontinuous: The Failure of Federal Privacy Regulatory Proposals and Institutions*, 6 SOFTWARE L.J. 199 (1993) (explaining why the United States failed to enact comprehensive privacy legislation); Arthur R. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089 (1969) (examining the challenges facing the development of privacy laws in the United States); Reidenberg, *Setting Standards*, *supra* note 394, at 507-11 (arguing that the American society has a desire to disperse standards setting); *see also id.* at 498 (noting the differences in the meaning of "privacy" between the European Union and the United States).

396. *See* U.S. CONST. amend. I.

397. FRED H. CATE, PRIVACY IN THE INFORMATION AGE 55 (1997) ("Just as the First Amendment protects the privacy of every person to think and to express thoughts freely, it also fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals."); Fromholz, *supra* note 379, at 471 ("The First Amendment's free-speech guarantee imposes limits on the ability of the government to regulate the flow of information, including personal data."); Reidenberg, *Setting Standards*, *supra* note 394, at 501-07 (arguing that American society has a desire to minimize restrictions on information flows).

398. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 551-554 (2000) (protecting privacy of cable subscribers); Children's On-line Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (2000) (regulating the collection and use of data from children aged thirteen and under); Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (2000) (regulating the disclosure of driver's license records); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2501 (2000) (providing for privacy in electronic communications); Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693(r) (2000) (requiring financial institutions to notify customers before disclosing the customers' records to third parties); Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681-1681t (2000) (regulating credit reporting); Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified as amended in scattered sections of 12 and 15 U.S.C.) (regulating data practices of financial institutions); Privacy Act of 1974, 5 U.S.C. § 552a (2000) (regulating government data processing); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2000) (protecting piracy of video rental customers). *See also* SWIRE & LITAN, *supra* note 379, at 43 (noting the

Third, the United States does not have a specific government data protection agency.[399] Instead, data privacy is supervised by a large and diverse array of government agencies, including the Department of Commerce, the Department of Health and Human Services, the Department of Transportation, the Federal Reserve Board, the Federal Trade Commission, the Internal Revenue Service, the National Telecommunications and Information Administration, the Office of the Comptroller of the Currency, the Office of Consumer Affairs, the Office of Management and Budget, and the Social Security Administration.[400]

By contrast, in the European Union, the term "privacy" refers to a narrower and more distinct interest, that of "maintaining the integrity of personal information and fairness to the individuals about whom the data relates."[401] Because the European Union treats this distinct interest as a fundamental human right,[402] it considers comprehensive legislation as the most appropriate means to protect personal information.[403] Such an approach therefore requires the creation of government data protection agencies, registration of databases with those agencies, and approval before the processing of personal data.[404]

"complex web of privacy laws").

399. Despite the lack of such an agency, pressure from the EU Privacy Directive has induced the United States to establish a new position of Chief Counselor for Privacy within the Office of Management and Budget. Shaffer, *supra* note 378, at 62. The primary responsibilities of this new position are "to coordinate U.S. domestic policy on 'public and private sector' data processing practices and to 'serve as a point of contact on international privacy issues,' such as the negotiations with EU authorities." *Id.* The first Chief Counselor for Privacy is Professor Peter Swire of Ohio State University.

400. *See id.* at 26; Letter from Robert Pitofsky, Chairman, Federal Trade Commission, to John Mogg, Director, DG XV, European Commission (July 14, 2000), *available at* http://www.export.gov/safeharbor/FTCLETTERFINAL.htm; Letter from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceeding, Department of Commerce, to John Mogg, Director, DG XV, European Commission (July 14, 2000), *available at* http://www.export.gov/safeharbor/DOTLETTERFINAL.htm; Memorandum from the Department of Commerce on Damages for Breaches of Privacy, Legal Authorizations and Mergers and Takeovers in U.S. Law (July 14, 2000), *available at* http://www.export.gov/safeharbor/PRIVACYDAMAGESFINAL.htm; *see also* Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1334 (noting that different countries have adopted different data protection supervisory agencies); *id.* at 1335 ("[T]he United States has repeatedly rejected an agency enforcement model for privacy oversight, favoring industry self-regulation.").

401. Reidenberg, *Setting Standards*, *supra* note 394, at 498.

402. *See* EU Privacy Directive, *supra* note 370, art. 1(1) (declaring that the EU Privacy Directive "protect[s] the fundamental rights and freedoms of natural persons"); *see also* Cate, *supra* note 372, at 439 ("[W]hen we speak of data protection within the European Union, we speak of the necessity to respect the fundamental rights of the citizens. Therefore, data protection may be a subject on which you can have different answers to the various problems, but it is not a subject you can bargain about.") (quoting Spiros Simitis, a former data protection commissioner in the German state of Hesse and chair of the Data Protection Experts Committee of the Council of Europe).

403. *See* Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1347 ("[F]or Europe, the choice is clear: privacy protection is an exclusive issue of law.") (quoting Louise Cadoux, former Vice President of the French National Commission on Data Processing and Liberties).

404. *See* EU Privacy Directive, *supra* note 370, arts. 18-19 (stipulating the data processor's obligation

Given the above differences, the safe harbor framework is particularly helpful, for it allows both the EU and U.S. regulatory approaches to coexist. By doing so, it enables the European Union and the United States to promote data flow and privacy protection through coordination and cooperation.[405] It also paves the way for further cooperation between the two trading partners in other protection that sits uneasily with either country's cultural or constitutional tradition.[406]

Furthermore, the framework is particularly well-equipped to address privacy issues in the online environment.[407] Without committing to the EU legislative approach or the U.S. sectoral approach, the safe harbor framework creates an environment that is conducive to the development of technical rules and default settings. As Professors Lawrence Lessig and Joel Reidenberg maintain, technical standards and default settings will be particularly helpful in protecting fundamental values in cyberspace.[408] These standards and settings even may establish new

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to notify the supervisory authority); *id.* art. 20 (requiring the supervisory authority to investigate data processing operations that are "likely to present specific risks to the rights and freedoms of data subjects"); *id.* art. 21(2) (requiring the supervisory authority to maintain and make publicly available a register of notified processing operations); *id.* art. 28(1) (requiring the establishment of a supervisory authority).

405. *Cf.* Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1370 (articulating the need for a theory for coregulation that allows for strategies and methods for data protection authorities to promote international data flows through multinational coordination and cooperation).

406. The safe harbor framework provides several benefits to U.S. businesses. It provides predictability and continuity for companies that transmit personal information from Europe. It also eliminates the need for prior approval of data transfers from the European Union. In addition, it benefits small and medium enterprises by offering a simpler and cheaper means of complying with the EU Privacy Directive. U.S. Dep't of Commerce, Safe Harbor Overview, *supra* note 387.

407. This is especially important, considering the fact that the EU Privacy Directive was drafted more than ten years ago. The Directive was drafted initially in 1990. *See* Proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data, 1990 O.J. (C 277) 3. To some extent, it was outdated even before it entered into force. Using terms such as "controller" and "data subject," the Directive assumes a top-down architecture that is more applicable to big corporations and mainframe computers than to individuals, small and medium enterprises, and a network of personal computers and laptops. SWIRE & LITAN, *supra* note 379, at 50-53; *see also* Fromholz, *supra* note 379, at 475; Julia Gladstone, *The U.S. Privacy Balance and the European Privacy Directive: Reflections on the United States Privacy Policy*, 7 WILLAMETTE J. INT'L L. & DISPUTE RESOL. 10, 20 (2000). Thus, it will be interesting to see how the Directive evolves in light of the Internet, the e-commerce explosion, and the proliferation of automated data-transfer devices such as cookies and web "bots." Yu, *An Introduction to the EU Directive*, *supra* note 370.

408. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) ("*Code is law* . . . . We can build, or architect, or code cyberspace to protect values that we believe are fundamental, or we can build, or architect, or code cyberspace to allow those values to disappear."); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 898 (1996) (discussing the use of technology as a tool to regu-late behavior and facilitate compliance with legal norms); Joel R. Reidenberg, *Governing Networks and Rule-making in Cyberspace*, 45 EMORY L.J. 911, 929 (1996) ("State governments can and should be involved in the establishment of norms for network activities, yet state governments cannot and should not attempt to expropriate all regulatory power from network communities."); Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1331 ("Technical rules and default settings establish data privacy norms."); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 555 (1998) (arguing that policymakers must "understand, consciously recognize, and encourage" the set of

privacy norms that accommodate the divergent interests of the various members of the international community.[409]

One might wonder whether the nonzero-sum approach would be more appropriate and attainable for abstract issues like privacy and civil liberties than for economic issues like intellectual property and international trade. Such an argument, however, overlooks the intertwined relationships between intellectual property and democratic society[410] and between intellectual property and cultural policy.[411] Indeed, the nonzero-sum approach not only is appropriate in the intellectual property arena, but might provide promising solutions to resolving difficult disputes concerning the protection of folklore and traditional knowledge[412] and the access to AIDS drugs in less developed countries.[413]

B. Disputes Between Developed and Less Developed Countries

Historically, developed and less developed countries have deep disagreements over the availability, scope, and use of intellectual property rights. Developed countries consider intellectual property

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rules for information flows imposed by technology and communication networks known as "Lex Informatica"); Joel R. Reidenberg, *Rules of the Road for Global Electronic Highways: Merging the Trade and Technical Paradigms*, 6 HARV. J.L. & TECH. 287, 296-301 (1993) (discussing the use of technology to protect the integrity and interoperability of information networks).

409. *See* Reidenberg, *International Data Privacy Rules*, *supra* note 373, at 1331; *id.* at 1344 ("The absence of law . . . encourages the rise of information policy rules through technical code. These technical rules embed information privacy decisions, or more often privacy violations, in network architecture.").

410. *See* Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 278 (1998) (arguing that the fundamental purpose of copyright law is to promote democratic society); Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 YALE L.J. 283, 288 (1996) (proposing a democratic paradigm for copyright law).

411. *See* Reichman, *Duration of Copyright*, *supra* note 345 (noting the close ties between copyright and cultural policy); Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 187, 187 (1997) (exploring the importance of the cultural exception and arguing that each country "has a right—even a duty—to protect and develop its own culture" despite the need to protect intellectual property).

412. For discussions of the interplay of intellectual property and traditional knowledge, see generally Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001); David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001).

413. For discussions of the tension between intellectual property protection and the access to AIDS drugs, see generally James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable Aids Drugs to Low-End Consumers*, 53 U. FLA. L. REV. 727 (2001).

rights important to economic development.[414] According to these countries, intellectual property rights will attract foreign investment,[415] increase taxes,[416] create new jobs,[417] and facilitate technology transfer.[418] By contrast, less developed countries regard intellectual property rights as exploitative devices that drain scarce resources[419] and slow down their

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414. *See* Robert M. Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World* [hereinafter Sherwood, *Why a Uniform Intellectual Property System Makes Sense*], *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 68, 83 (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS] ("Strong intellectual property safeguards seem likely to speed rather than retard progress toward world-class achievement."); Yu, *From Pirates to Partners*, *supra* note 2, at 220 (noting the importance of intellectual property rights to a country's strategy of economic development); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 62 (arguing that China overlooked the importance of intellectual property rights to its economic development).

415. *See* EDWIN MANSFIELD, INTELLECTUAL PROPERTY PROTECTION, FOREIGN DIRECT INVESTMENT, AND TECHNOLOGY TRANSFER (1994); Antonio Medina Mora Icaza, *The Mexican Software Industry*, *in* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 414, at 232, 236 ("Intellectual property rights protection in a country is a way to seek the trust of foreign investors in the country that will allow its economy to grow."); Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, *in* PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 7, 8 (Mary L. Riley ed., 1997) (listing the loss of foreign investment and know-how as a cost of counterfeiting); Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COM., Mar. 7, 1996, at 1C (reporting on a World Bank survey that demonstrates the correlation between intellectual property rights and foreign investment); A.R.C. Westwood, *Preface to* GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 414, at v, vi ("Clearly, a company will not be enthusiastic about doing business in a country unwilling to provide protection for the intellectual content of its products—a concern now facing U.S. businesses as they evaluate opportunities in the former Soviet Union."); Yu, *From Pirates to Partners*, *supra* note 2, at 192 (noting that effective intellectual property protection can attract foreign investment); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 63 (same); *see also* Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) (using foreign investment as one of the variables in measuring intellectual property protection in a less developed country); *Mickey Mouse Back in China*, N.Y. TIMES, June 3, 1993, at D4 (reporting that Disney brought Mickey Mouse back to China after a self-imposed four-year absence due to copyright infringements). *But see* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 849 ("In the complex decisionmaking process of whether to invest in a foreign country, the availability of patent protection seems unlikely to be a determinative factor."); McManis, *supra* note 107, at 1289 (noting the lack of "empirical support for the proposition that increased levels of intellectual property protection in the developing world will necessarily lead to increased levels of foreign investment in developing countries").

416. *See* Lagerqvist & Riley, *supra* note 415, at 9; PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY 4 (1998) (estimating that a sixty-percent decrease in piracy would translate into more than $466 million in tax receipts).

417. *See* Lagerqvist & Riley, *supra* note 415, at 9; Yu, *From Pirates to Partners*, *supra* note 2, at 192 (noting that effective intellectual property protection can create jobs); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 63 (same); *see also* PRICEWATERHOUSECOOPERS, *supra* note 416, at 4 (1998) (estimating that a sixty-percent decrease in piracy would translate into more than 79,000 jobs).

418. *See* MANSFIELD, *supra* note 415, at 20 ("[T]he strength or weakness of a country's system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country."); SELL, *supra* note 67, at 214 (arguing that an operational intellectual property regime will promote technology transfer); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 175-76 (1994) (same); Yu, *From Pirates to Partners*, *supra* note 2, at 192 (noting that effective intellectual property protection can facilitate technology transfer); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 63 (same).

419. Giunta & Shang, *supra* note 3, at 331 ("As with the importation of capital, developing countries

catchup processes.[420] Under this perspective, intellectual property rights "will lead to or embed a stratification and concentration of [intellectual property rights] ownership" in enterprises based in industrialized countries.[421] They may even facilitate the transfer of valuable cultural resources out of the country.[422]

With the creation of the TRIPs Agreement, developed and less developed countries finally came to a compromise. Although the compromise is interesting and instructive in understanding international trade negotiations, this section does not discuss how the two groups of countries reached such a compromise.[423] Instead, it focuses on the various provisions of the TRIPs Agreement. By doing so, it hopes to demonstrate how one can divine the conflict resolution approach used to resolve a complex intellectual property dispute.

From the standpoint of the less developed countries, those provisions of the TRIPs Agreement that delineate the minimum standards of intellectual property protection are apparently coercive. As Professor Marci Hamilton pointed out, the TRIPs Agreement was not designed only to correct the international balance of trade or to lower customs

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often view the importation of intellectual property as a means of dominating and exploiting the economic potential of the importing country. Paying for imports or royalties is thus seen as an economic burden fostering a negative balance of trade.").

420. *But see* Robert P. Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 246 (1990) (noting the growth of the Hong Kong recording industry and the Indian software industry after improved copyright protection); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 414, at 72 (noting a large increase of patent applications filed by Mexican nationals after Mexico reformed its patent law in 1991); *id.* (noting that since Colombia started providing copyright protection to software in 1989, "[m]ore than 100 Colombian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered"); Yu, *From Pirates to Partners*, *supra* note 2, at 192 (noting that effective intellectual property protection will promote the development of indigenous industries and technologies); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 63 (same).

421. Abbott, *The WTO TRIPS Agreement*, *supra* note 107, at 46.

422. *See* Bellagio Declaration, *reprinted in* JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 192-95 (1996) (declaring that contemporary intellectual property laws deny protection to people who do not fit the author-centered model, such as "custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties"); *see also* BOYLE, *supra*, at 2 (arguing that Western intellectual property systems tend to disproportionately favor industrialized countries while ignoring the interests of less developed countries which supplied the indigenous cultural materials); Yu, *From Pirates to Partners*, *supra* note 2, at 241 (emphasizing the importance of granting protection to rare and irreplaceable raw materials like folkloric works, works of cultural heritage, and biological and ecological know-how of traditional peoples); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 86 (same). *But see* 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, 271 (1998) (contending that "copyright laws can form the first line of defense in protecting indigenous culture and still comply with TRIPS standards").

423. For discussions of how the developed and less developed countries came to a compromise, see generally sources cited *supra* note 72.

trade barriers.[424] Rather, the Agreement sought to "remake international copyright law in the image of Western copyright law."[425] Due to its coercive nature, the Agreement is illusory and largely ineffective.[426] So far, the primary reasons for the lack of intellectual property protection in less developed countries are the lack of understanding in and public awareness of intellectual property rights,[427] the belief that intellectual property rights would not benefit the economic development of the country,[428] and the lack of belief in individualism, reward, and commodification.[429] Without increasing the public awareness of intellectual property rights and effectively nurturing the political values needed to sustain an operational intellectual property system, the TRIPs Agreement was doomed to fail from the very beginning.

To understand why the creation of political values is needed for the success of the new intellectual property system, one can compare the development of the system with that of antitrust laws in less developed countries. In the early 1980s, the economic crisis in less developed countries led to the emergence of politically powerful domestic constituencies favoring new anticompetition policies.[430] These constituencies not only encouraged their governments to actively seek out information and assistance in pursuing the new policies, they also helped foster a change of mindset among the local people favoring this new direction.[431] As a result, a different politico-social environment developed, and a new and sustained antitrust regime became possible.

Although the TRIPs Agreement is coercive by nature, it contains provisions reflecting other approaches. Article 64 of the Agreement embraced the adversary approach by mandating that disputes arising under the Agreement be settled by the dispute settlement procedure of the WTO.[432] Thus, countries can resort to a rule-based mechanism for

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424. Hamilton, *TRIPS Agreement*, *supra* note 70, at 614; *see also* Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, *in* VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 305, 316 (Stephen B. Brush & Doreen Stabinsky eds., 1996) (arguing that TRIPs "universalize[s] the U.S. system of intellectual property rights").

425. Hamilton, *TRIPS Agreement*, *supra* note 70, at 614.

426. *See supra* text accompanying notes 68-74.

427. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 213.

428. *See id.*; Yu, *Privacy, Prejudice, and Perspectives*, *supra* note 2, at 24-28 (discussing the skepticism of the Chinese people about intellectual property rights).

429. *See* Hamilton, *TRIPS Agreement*, *supra* note 70, at 617; *see also* Yu, *From Pirates to Partners*, *supra* note 2, at 211 ("To believe in intellectual property rights, one must accept, at least, some version of individualism, reward, and commodification.").

430. *See* SELL, *supra* note 67, at 177-78.

431. *Id.* at 178.

432. TRIPs Agreement, *supra* note 13, art. 64, 33 I.L.M. at 1221.

resolving intellectual property disputes covered by the TRIPs Agreement. Such a mechanism will provide predictability and stability to the international intellectual property system and will deter signatory countries from cheating on the other member states.[433]

For example, in a recent dispute between the European Union and the United States,[434] the Dispute Settlement Panel of the WTO adjudicated whether the Fairness in Music Licensing Act of 1998[435] (FIMLA) violated the United States's obligations under the TRIPs Agreement.[436] Enacted as a compromise between copyright holders and small business enterprises,[437] the FIMLA amended section 110(5) of the United States Copyright Act by exempting restaurants, bars, and retail stores from royalties for using "homestyle" audio and video equipment to play broadcast music.[438]

In 1999, the European Union challenged the FIMLA and the homestyle exemption of the United States Copyright Act[439] under the dispute settlement procedures of the WTO.[440] In a sixty-nine-page report, the dispute settlement panel found that the FIMLA, but not the homestyle exemption,[441] violated articles 11*bis*(1)(iii) and 11(1)(ii) of the

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433. *See* discussion *supra* Part I.B.

434. For excellent discussions of the dispute, see generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001); Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000).

435. Pub. L. 105-298, § 202, 112 Stat. 2830-31 (1998) (codified at 17 U.S.C. §§ 101, 110(5)(B), 504, 513 (2000))

436. United States—Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R (June 15, 2000) [hereinafter Panel Decision], *available at* http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf (finding that the FIMLA violated the TRIPs Agreement).

437. Helfer, *supra* note 434, at 102 (noting that the FIMLA "split the difference between business interests who wanted a total exemption for secondary uses of broadcast music and [performing rights organizations] and copyright owners who opposed any relaxation of the homestyle exemption").

438. 17 U.S.C. § 110(5)(B) (2000).

439. 17 U.S.C. § 110(5)(A).

440. As Professor Helfer recounted:

> Within days of the law's entry into force in January 1999, the fifteen-member European Community ("EC") challenged both the FIMLA and the homestyle exemption under the dispute settlement procedures of the World Trade Organization ("WTO"). The EC is acting on a complaint by the Irish Music Rights Organization that the FIMLA is causing its members to lose $1.36 million annually in licensing royalties. Canada, Australia and Switzerland soon joined the EC in seeking formal consultations with the United States, alleging that their songwriters and music publishers will also be denied foregone performance royalties.

Helfer, *supra* note 434, at 99 (footnote omitted).

441. Panel Decision, *supra* note 436, ¶ 7.1(a):

> Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus consistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

Berne Convention as incorporated into the TRIPS Agreement.[442] In view of this violation, the panel recommended that "the Dispute Settlement Body request the United States to bring [the FIMLA] into conformity with its obligations under the TRIPS Agreement."[443]

Ironically, despite a negative finding in the WTO panel decision, the United States refused to amend its copyright law and, instead, entered into an agreement with the European Union to submit to binding arbitration as permitted under article 25 of the Dispute Settlement Understanding.[444] In November 2001, the arbitration panel awarded EU copyright holders about $1.4 million per year for lost revenues caused by the FIMLA.[445] Although questions remain as to how the U.S. government will fund the settlement and distribute the penalty money,[446] the manner in which this dispute was resolved will undeniably have longlasting implications for the development of the dispute resolution mechanism under the WTO.

Finally, the TRIPs Agreement includes provisions that reflect the cooperative approach. However, not all of these "cooperative" provisions result in a win-win solution. Instead, some result in mere compromises in which losses are allocated between the various parties. For example, Article 65 of the Agreement provides less developed and transitional countries with a five-year transitional period.[447] Likewise, Article 66 provides least developed countries with an eleven-year transitional period.[448] To help create "a sound and viable technological base" in these countries, Article 66 further requires developed countries

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442. *Id.* ¶ 7.1(b):

> Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

443. *Id.* ¶ 7.2.

444. Dispute Settlement Understanding, *supra* note 86, art. 25 (permitting arbitration as a means to dispute settlement); *see also* Phil Hardy, *WTO Arbitrators Rule That US Should Pay $1.4m a Year to EU Copyright Owners*, MUSIC & COPYRIGHT, Nov. 7, 2001, *available at* Lexis, News Library, ALLNWS File (providing background for the WTO arbitration decision).

445. United States—Section 110(5) of the US Copyright Act: Recourse to Arbitration Under Article 25 of the DSU ¶ 5.1, WT/DS160/ARB25/1 (Nov. 9, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/160arb_25_1_e.pdf (determining the award at € 1,219,900 per year); *see also* Hardy, *supra* note 444 (discussing the abitration decision).

446. *See* Hardy, *supra* note 444. For discussion of events occurring after the arbitration decision, see *International Development*, ENT. L. REP., Mar. 2002, *available at* Lexis, News Library, ALLNWS File; *Settlement Between European Union and United States of WTO Fairness in Music Licensing Case Appears to Have Fallen Apart*, ENT. L. REP., Feb. 2002, *available at* Lexis, News Library, ALLNWS File.

447. TRIPs Agreement, *supra* note 13, art. 65(1)-(3), 33 I.L.M. at 1222.

448. *Id.* art. 66(1), 33 I.L.M. at 1222.

to provide incentives for their businesses and institutions to promote and encourage technology transfer to least developed countries.[449]

Despite these provisions, there is no guarantee that less developed countries will develop a more effective intellectual property system or the political values needed to sustain the system during the transitional period. There is also no guarantee that the benefits deriving from the transitional arrangement would compensate for the economic and cultural losses caused by the implementation of the TRIPs Agreement. Even worse, as many less developed countries are concerned, the transitional provisions do not prevent their more powerful trading partners, such as the European Union, Japan, and the United States, from imposing unilateral sanctions on them.[450]

Fortunately, the TRIPs Agreement includes several provisions that allow countries to enable the more preferable nonzero-sum approach. Article 67 of the Agreement requires developed countries to provide technical and financial cooperation to less and least developed countries "on request and on mutually agreed terms and conditions."[451] Such cooperation includes "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 . . . support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."[452]

In addition, all the signatory countries agree to cooperate with each other to eliminate international trade in intellectual property-infringing goods by establishing and notifying contact points in their governments, exchanging information on trade in infringing goods, and promoting cooperation between their customs authorities.[453] To allow for further cooperation and coordinated decisionmaking, the Agreement requires the Council for TRIPS to review the implementation of the Agreement at two-year intervals after the expiration of the transitional period and in light of any relevant new developments that might warrant modification or amendment of the agreement.[454] Because "[r]egimes

449. *Id.* art. 66(2), 33 I.L.M. at 1222.

450. *GATT Bill Brings Major Reforms*, *supra* note 64, at 1966-67; *see also* Hartridge & Subramanian, *supra* note 64, at 909 (querying the need for less and least developed countries to accept the TRIPs Agreement "if they remain vulnerable to unilateral actions").

451. TRIPs Agreement, *supra* note 13, art. 67, 33 I.L.M. at 1222.

452. *Id.*, 33 I.L.M. at 1222-23.

453. *Id.* art. 69, 33 I.L.M. at 1223.

454. *Id.* art. 71(1), 33 I.L.M. at 1224.

are maintained so long as the patterns of interest that gave rise to them remain,"[455] such review is particularly important.

C. *Disputes Between China and the United States*

Since the reopening of China in the late 1970s, U.S. companies have experienced significant problems caused by the lack of intellectual property protection in China.[456] To protect their economic interests, they have heavily lobbied the U.S. government to adopt a coercive approach. In the past two decades, the United States has repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to entry into the WTO.[457] Such threats eventually led to compromises by the Chinese government and the signing of intellectual property agreements in 1992,[458] 1995,[459] and 1996.[460]

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455. Stein, *Coordination and Collaboration*, *supra* note 12, at 137.

456. For discussions of U.S.-China intellectual property disputes, see ALFORD, *supra* note 67; Alford, *Making the World Safe for What?*, *supra* note 76; Berkman, *supra* note 76; Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081 (1996); Patrick H. Hu, *"Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81 (1996); Tiefenbrun, *supra* note 33; Yu, *From Pirates to Partners*, *supra* note 2; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2.

457. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 137-38 (describing the United States's use of section 301 sanctions and various trade threats to induce China to protect intellectual property rights). On November 10, 2001, the WTO member states approved the proposal to admit China to the international trading body in the Doha Ministerial Conference. *See* Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47; Joseph Kahn, *World Trade Organization Admits China, Amid Doubts*, N.Y. TIMES, Nov. 11, 2001, at 1A. After fifteen years of exhaustive negotiations, China formally became the 143rd member of the WTO on December 11, 2001. For discussions of the ramifications of China's entry into the WTO, see generally SUPACHAI PANITCHPAKDI & MARK CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE (2002); Peter K. Yu, *The Ramifications of China's Entry into the WTO: Will the Global Community Benefit?*, FINDLAW'S WRIT: LEGAL COMMENTARY, Dec. 4, 2001, *at* http://writ.news.findlaw.com/commentary/20011204_yu.html.

458. Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995); *see also* Yu, *From Pirates to Partners*, *supra* note 2, at 142-44 (discussing the 1992 Memorandum of Understanding). Pursuant to the 1992 Memorandum of Understanding, China amended the 1984 Patent Law, Patent Law of the People's Republic of China, *translated in* INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW 66-79 (1996), promulgated new patent regulations, Implementing Regulations of the Patent Law of the People's Republic of China, *translated in* INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra*, at 83-116, and acceded to the Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231. China also acceded to the Berne Convention for the Protection of Literary and Artistic Works, *supra* note 81, and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309. In addition, China amended the Copyright Law, Copyright Law of the People's Republic of China, *translated in* INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra*, at 128-42, updated its trademark law, and adopted a new unfair competition law that affords protection to trade secrets.

459. 1995 Agreement, *supra* note 112; *see also* Yu, *From Pirates to Partners*, *supra* note 2, at 145-46

Despite these agreements and the reforms they induced, the U.S. intellectual property policy toward China has been largely unsuccessful,[461] partly due to its failure to take into account China's different political, social, economic, cultural, and ideological conditions.[462] In fact, this ill-advised policy had cost the United States credibility[463] and helped China improve its ability to resist American

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(discussing the 1995 Agreement). The 1995 Agreement summarized the enforcement measures China had undertaken in the past and those it would undertake in the near future. It included a pledge to improve market access for American products and to promote transparency by publishing all laws, rules, and regulations concerning limitation on imports, joint ventures, and other economic activities. The Agreement also delineated the mutual responsibilities that would be undertaken by both countries, such as training customs officers and bureaucrats, exchanging information and statistics, and undertaking future consultations. In addition, the 1995 Agreement provided a series of short-term and long-term remedial measures, including the establishment of the State Council Working Conference on Intellectual Property Rights; the creation of Enforcement Task Forces; the adoption of a copyright verification system that protects compact discs, laser discs, and CD-ROMs; the requirement for title registration of foreign audiovisual products and computer software in CD-ROM format; and the intensification of border control by customs officers. Finally, the Agreement provided for a six-month "special enforcement period," during which intensive efforts would be undertaken to crack down on major infringers of intellectual property rights and to target regions in which infringing activity was particularly rampant at the time of the Agreement.

460. People's Republic of China Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., *available at* http://www.mac.doc.gov/TCC/DATA/index.html (last visited Mar. 6, 2001); *see also* Yu, *From Pirates to Partners*, *supra* note 2, at 149 (discussing the 1996 Accord). The terms of the 1996 Accord include the closing of pirate plants, criminal prosecution for those who violate intellectual property regulations, a special enforcement period where police assume responsibility for the investigation of piracy, improved border surveillance by customs officers, and a registration system for compact disc manufacturers.

461. *See* Yu, *From Pirates to Partners*, *supra* note 2 (criticizing the ineffectiveness of the American coercive intellectual property policy toward China). The failure of the coercive policy is evident from the cycle of futility the policy had created. The cycle goes as follows: The United States begins by threatening China with trade sanctions. In response, China retaliates with countersanctions of a similar amount. After several months of bickering and posturing, both countries come to an eleventh-hour compromise by signing a new intellectual property agreement. While intellectual property protection improves during the first few months immediately after the signing of the agreement, the piracy problem revives once international attention is diverted and the foreign push dissipates. Within a short period of time, American businesses again complain to the U.S. government, and the cycle repeats itself. See *id.* at 154 for a discussion of this cycle.

462. *See* Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 16 (arguing that China's political, social, economic, cultural, and ideological differences with the West militate against intellectual property law reforms in China); *see also id.* at 16-37 (discussing China's differences with the West).

463. *See* Greg Mastel, *Piracy in China: No Mickey Mouse Issue*, WASH. POST, Feb. 15, 1996, at A27 ("The United States has threatened China with trade sanctions for its many trade sins a half-dozen times in recent years without making good on its threats. In the eyes of the Chinese, continued empty U.S. threats have little credibility."); *see also* JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON 311 (2000) ("Clinton's retreat on human rights made matters worse than if he had never imposed his MFN conditions . . . . [I]t had shown that America would back down from the threats it made about human rights and democracy in cases where its commercial and strategic interests were jeopardized."); James Lilley, *Trade and the Waking Giant—China, Asia, and American Engagement*, *in* BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS 36, 53 (James R. Lilley & Wendell L. Willkie II eds., 1994) ("President Clinton does not seem entirely credible to foreign leaders because he has made threats without following up on them."); James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS

demands.[464] The continuous threats and bullying also created hostility among the Chinese people, making the government more reluctant to adopt Western intellectual property law reforms.[465] Even worse, the bilateral policy backfired on the United States's foreign trade and human rights policies.[466]

Today, intellectual property piracy and counterfeiting remain rampant throughout China, in particular at the grassroots level[467] and in rural areas.[468] In the past few years, the United States has continually

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77 (David A. Lake & Robert Powell eds., 1999) (emphasizing the importance of credibility in international relations).

464. *See* RICHARD BERNSTEIN & ROSS H. MUNRO, THE COMING CONFLICT WITH CHINA 83 (Vintage Books 1998) (noting China's success in inverting the United States's coercive approach); Yu, *From Pirates to Partners*, *supra* note 2, at 133-34.

465. Yu, *From Pirates to Partners*, *supra* note 2, at 174.

466. *See id.* at 169 (describing how the U.S. intellectual property policy toward China threatened the integrity of the global trading system); *id.* at 174 (describing how U.S. intellectual property policy toward China has backfired on its longstanding interests in promoting the protection of human rights and civil liberties in China); Alford, *Making the World Safe for What?*, *supra* note 76, at 144-45 (noting that the U.S. coercive trade policy provides China with "a convenient legitimization" for its repressive measures while constraining the United States's capacity to complain about such actions).

467. OFFICE OF USTR, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) [hereinafter 2000 NTE REPORT] (reporting that significant problems exist with the enforcement of intellectual property laws at the grassroots level in China); *see also* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 11 (2000) ("Although the level of copyright piracy seems to have decreased recently in China due to aggressive campaigning by copyright owners, trademark counterfeiting continues to increase.").

468. Corruption and local protectionism are particularly problematic in the rural areas. *See* 2000 NTE REPORT, *supra* note 467, at 50 (considering corruption and local protectionism as some of the biggest problems of enforcing intellectual property rights in China); *see also* CHINA DECONSTRUCTS: POLITICS, TRADE, AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994) (examining the regional disparities in China); DONG SHIZHONG ET AL., TRADE AND INVESTMENT OPPORTUNITIES IN CHINA: THE CURRENT COMMERCIAL AND LEGAL FRAMEWORK 196 (1992) ("In China, local governments are highly protective of their own interests. A well-known expression in China sums up the protectionist attitudes of local governments: 'The central government has policies but the local governments have policy-proof devices.'"); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM 240 (1997) ("Government bureaux are still linked to production facilities and foreign trading corporations. When licenses or permits are needed, . . . the administrative organ with jurisdiction to handle the matter will only grant the license or permit to the extent that it does not threaten a domestic interest . . . ."); Berkman, *supra* note 76, at 17 ("While Beijing's directives generally are implemented without question, protection of intellectual property rights may be one area where Beijing's support is not alone sufficient."); Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 401 (1996) ("Today it is often hard to implement a national plan without local governments' consent and cooperation."); Gerald Segal, *China's Changing Shape: The Muddle Kingdom?*, FOREIGN AFF., May/June 1994, at 43, 58 ("[F]oreigners who want to trade with China are best advised to think in terms of provinces or localities. It is [the local authorities] who can guarantee the transparency of global trading regulations or resolve disputes over intellectual property."); Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 448 (1996) (noting that piracy problems "arise from flaws in the Chinese legal system, which allows for local protectionism both in the adjudication process and the enforcement process"); *id.* at 448-49 ("[P]articipation by local Chinese authorities generally is needed to enforce People's Court orders, which they might be unwilling to offer if doing so would be

lost more than $2 billion in revenue annually due to intellectual property piracy in China.[469] As the Chinese economy and the demand for intellectual property-based products grow, these losses will be unlikely to decrease despite the government's increasing effort to crack down on piracy and counterfeiting and the general public's increased awareness of intellectual property rights.[470]

The repeated failure of the United States's approach to solve the Chinese piracy and counterfeiting problem has led scholars, policymakers, the mass media, and the American public to debate whether the United States should reformulate its intellectual property policy toward China. In fact, many U.S. companies have switched from a coercive approach to an adversary approach by litigating in courts.[471] However, given the lack of the rule of law in China, courts are of limited effectiveness[472] and are marred by various structural problems, such as "the limited independence of the judicial branch, the intertwining relationship between the court and the Chinese Communist Party, the court's vulnerability to outside influence, the judges' susceptibility to bribery and corruption, underfunding, abuse of government officials, and local protectionism."[473] There is also an acute shortage of lawyers, in particular intellectual property lawyers, in China.[474] Because of this

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detrimental to their authority, especially if the judgment comes from a jurisdiction outside the scope of such officials' authority.").

469. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2001 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA (2001), *available at* http://www.iipa.com/rbc/2001/2001SPEC301CHINA.pdf; *see also* Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 (estimating the United States's trade losses due to piracy in China at more than $2 billion).

470. Yu, *From Pirates to Partners*, *supra* note 2.

471. Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 255 (Mark A. Cohen et al. eds., 1999). See *id.* for a discussion of those issues potential litigants in the Chinese courts have to be aware of when considering whether to seek enforcement of their intellectual property rights through the Chinese courts.

472. *See* Berkman, *supra* note 76, at 24-25 ("The court system as an institution generally lacks the political muscle to stare down powerful, local officials who may wish to impede law enforcement."); Lagerqvist & Riley, *supra* note 415, at 28 ("In China, administrative enforcement is occasionally seen as more cost effective than either civil or criminal proceedings against counterfeiters."). *But see id.* at 32 ("Due to the more public nature of a court action, there is somewhat less likelihood that a judge will give in to local pressure."); Li, *supra* note 468, at 414-15 (noting that courts are more powerful than administrative agencies and may institute preliminary measures against the infringer no matter where it is located).

473. Yu, *From Pirates to Partners*, *supra* note 2, at 217-18.

474. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 37 (1998); William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers* [hereinafter Alford, *Tasselled Loafers for Barefoot Lawyers*], *in* CHINA'S LEGAL REFORMS 22, 30 (Stanley Lubman ed., 1996); Berkman, *supra* note 76, at 29; Yu, *From Pirates to Partners*, *supra* note 2; Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 149 (1994); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 71. This shortage may alleviate once China lifts the geographic ban on overseas lawyers and opens up the legal profession to foreign law firms, as it joins the WTO. "So far, branches of overseas law firms have been set up in only eight

shortage, businesses and individuals cannot obtain competent legal advice and services to protect and enforce their intellectual property rights in lawsuits and administrative proceedings. Furthermore, given the adversarial nature of a lawsuit and the hostilities it will breed, "it may be difficult for foreign firms which plan to continue doing business in China to sue because doing so may wreck their 'guanxi'—personal contacts or favors—that are integral for doing business in [China]."[475]

To alleviate these problems, U.S. companies should consider taking the nonzero-sum approach. To illustrate this approach, this section focuses on the various difficulties confronting U.S. companies in their attempts to protect intellectual property rights in China.

First, the Chinese leaders are reluctant to promote intellectual property rights because these rights tend to benefit foreigners at the expense of the local people.[476] For example, in 1992, foreigners obtained two-thirds of all invention patents granted in China, even though the Chinese people filed eleven times more applications.[477] However, Chinese leaders may change their minds if they are convinced that intellectual property protection benefits the domestic population and contributes to the economic growth of the country. Thus, U.S. companies should adopt a cooperative strategy that assists the Chinese, in particular their independent sector,[478] to develop a local intellectual property industry.[479] They also should consider cooperating with

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cities including Beijing and Shanghai among all the 15 Chinese cities which have government permission to hold overseas law firms." *China: Geographic Restrictions on Lawyers to Be Lifted After WTO*, CHINA BUS. INFO. NETWORK, May 4, 1999, *available at* 1999 WL 17728683.

475. Kolton, *supra* note 468, at 451.

476. This discussion is also valid in other less developed countries, whose leaders are equally concerned about the fact that intellectual property rights tend to benefit foreigners at the expense of the local people.

477. *See* ALFORD, *supra* note 67, at 84. As one commentator explained:

> Because developed countries create a majority of the patentable inventions and technology, most of the patents granted in developing countries are issued to foreigners. The largest proportion of inventions covered by patents are thus induced, not by the availability of patent protection in the developing countries, but rather by the domestic patent system of the holder or in conjunction with patent systems in other developed countries. As a result, a developing country cannot expect that implementation of a patent regime will induce foreign innovators to focus their development efforts on new products and technologies that meet the special needs of the developing nations.

INTELLECTUAL PROPERTY LAWS OF EAST ASIA 20-21 (Alan S. Gutterman & Robert Brown eds., 1997).

478. In China, the public and private sectors are not always distinguishable. *See* William Alford, *Underestimating a Complex China*, CHI. TRIB., May 24, 1994, at 23 ("The businesses that American media celebrate as private or at least non-state-owned, including in particular the much-touted township/village enterprises, in many instances actually are owned in significant measure by the government or the Communist Party."); MARGARET M. PEARSON, CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM 40 (1997) (noting the difficulty in distinguishing in post-Mao China between what is within the Party-state and what falls outside of it).

479. *See* Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 471, at 165, 167

Chinese companies to facilitate legitimate intellectual property exchange.[480] Furthermore, they could help local Chinese intellectual property holders develop a lobby that aims to protect their own interests.[481] After all, "the strongest voices in China are always Chinese, and the most convincing arguments for development and enforcement of strict [intellectual property] protocols in China have come from those Chinese organizations which are starting to discover that they have intellectual property worth protecting."[482] It is therefore a good strategy to seek out or help create Chinese organizations that share similar interests.[483]

Second, many Chinese leaders, in particular those in the rural areas, are concerned about the unemployment problem created by the closure of pirate factories.[484] Such concerns are further heightened by the Asian

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("China's [intellectual property rights] regime will become self-sustaining only when it sees that protecting technology, films, music, and software advances its own core economic interests."); *id.* at 208 (arguing that intellectual property agreements became self-sustaining in Korea and Taiwan "when both countries began developing indigenous innovative technologies, and thus a stake in effectively wielding [intellectual property] laws to protect domestic economic interests"); Yu, *From Pirates to Partners*, *supra* note 2, at 221 (noting that it is important for the United States to encourage and assist China to develop its local intellectual property industry); Michael Schrage, *In China, Start with Human Rights to Stop the Software Pirates*, WASH. POST, Feb. 10, 1995, at D3 ("Today, all the economic incentives in China dictate that piracy is a business model that makes sense. The best way to change that is to help China and its entrepreneurs develop their own intellectual property industries, protected by intellectual property laws that make sense."); *see also* SELL, *supra* note 67, at 216 ("The sustainability of the new direction in developing countries will depend on both the emergence of politically powerful domestic constituencies committed to the new direction, and the ability of interested private parties to mobilize these constituencies to uphold and enforce these policies."); Butterton, *supra* note 456, at 1118 (explaining the economics behind the need to develop a local intellectual property industry); Gary M. Hoffman & George T. Marcou, *Combating the Pirates of America's Ideas*, 7 COMPUTER L. 8, 12 (1990) ("The local recording industry in Indonesia, for example, helped significantly in convincing the Indonesian government to pass an effective copyright law.").

480. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 220; *see also* Kolton, *supra* note 468, at 458-59 (describing a joint intellectual property exchange between China and the United States held in Xian in August 1995).

481. *See* Yu, *From Pirates to Partners*, *supra* note 2, at 220; *see also* Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 72 ("Without a well-organized intellectual property lobby, China lacks the essential domestic constituencies that are needed to push for and to sustain continuous intellectual property law reforms and enforcement efforts.").

482. John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 471, at 409, 417.

483. *Id.*; *see* MILNER, *supra* note 283, at 239 (arguing that the legislature will be more likely to adopt a proposal that it does not fully understand when it can depend on one or more informed domestic groups to signal it about the proposal); *see also* Giunta & Shang, *supra* note 3, at 331 ("[U]nlike Western countries, developing countries have few strong lobbies of inventors, authors or companies that would benefit from strict intellectual property laws or the enforcement thereof."); Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 191 (1998) ("Intellectual property is simply too new a concept within China to have any strong lobbies of inventors, authors, or companies.").

484. Yu, *From Pirates to Partners*, *supra* note 2, at 221.

financial crisis and increased unemployment resulting from the downsizing of state-operated enterprises.[485] Once again, a cooperative strategy will help. For example, American businesses could establish joint ventures with local companies,[486] thus creating immediate economic incentives for the Chinese to enforce intellectual property rights.[487] They also could consider manufacturing products in China, thus making use of the local labor force, raw materials, and distribution channels.[488] Indeed, some commentators have suggested cooption of pirate factories as a solution to the piracy problem.[489] Nonetheless, real-

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485. *See* Frank Long, *Joint Ventures: Different Kind of Union Protection*, ARIZ. BUS. GAZETTE, Mar. 27, 1997, at 11 [hereinafter Long, *Joint Ventures*]; *see also* Simon P. Cheetham, *Protection of Intellectual Property Rights in Luxury Goods*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 471, at 385, 385 (stating that the local economies are concerned about "the employment, foreign exchange, and increased industrial development provided by counterfeiting factories").

486. For discussions of joint ventures in China, see generally Walter Sterling Surry et al., *Joint Ventures in China: The First Water Stop*, 21 TEX. INT'L L.J. 221 (1986). *See also* Pitman B. Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control*, *in* CHINA'S LEGAL REFORMS 155 (Stanley Lubman ed., 1996) (reviewing the structure and performance of foreign investment law and policy in China).

487. Cheng, *supra* note 64, at 2010 ("The business structure of joint ventures may even move potential Chinese pirates to the opposite side of the infringement equation."). Establishing joint ventures with Chinese companies creates other benefits to U.S. companies. For example, it facilitates market access for international trade partners, *id.*, and helps protect businesses against losses due to intellectual property piracy. *See* Keshia B. Haskins, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1169 (1999) ("In joint ventures, United States investors work with local partners in foreign countries who gain 'economic interest[s] in keeping the intellectual property safe from loss.'") (quoting Long, *Joint Ventures*, *supra* note 485) (explaining how American exporters use joint ventures to protect their intellectual property). Joint ventures also assist foreign businesses in overcoming local protectionism. As one commentator explained:

> The Chinese partner is more likely to have a better understanding of the nuances of political life in China, be more aware of impending upheavals, and maintain the proper government contacts to safeguard joint venture's investments. Also, a local government is more willing to take action when a foreign investor has a government-linked partner and the government's own interest is at stake.

Cheng, *supra* note 64, at 2010; *see also* Haskins, *supra*, at 1169 ("[Joint ventures] can protect foreign investors against loss '[i]n countries where political risk[s are] high.'" (quoting Long, *Joint Ventures*, *supra* note 485)). Finally, joint ventures allow American investors to bridge their cultural differences, obtain access to the distribution network of their local partners, and take advantage of the personal connections, or *guanxi*, that are essential to commercial success in China. Cheng, *supra* note 64, at 2010 (quoting Long, *Joint Ventures*, *supra* note 485, at 11).

488. *See* RYAN, *supra* note 2, at 81; Yu, *From Pirates to Partners*, *supra* note 2.

489. *See* Clifford J. Shultz II & Bill Saporito, *Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets*, 31 COLUM. J. WORLD BUS. 18, 22-23 (1996); Griffin, *supra* note 483, at 188. Cooption serves two purposes:

> First, it effectively "shuts down" the bogus operation while keeping manufacturing capacity "employed." The production of legitimate, quality goods is achieved and a counterfeit operation has been eliminated with little incentive to start others. Second, a strategy that employs the local work force is good public relations, politically expedient and well received by local governments and can be leveraged for future interests.

Shultz & Saporito, *supra*, at 23.

life experiences suggest that cooption has limited success in eradicating the piracy problem, except in cases where very costly equipment is involved.[490]

To help win the acceptance and goodwill of local leaders and the Chinese people, American businesses also should invest some of their profits back into the local community in the form of cultural or educational benefits.[491] Such investment not only would demonstrate to local officials the benefits of adequate intellectual property protection, but also would allow local officials to benefit from the success of foreign intellectual property businesses.[492] The mutual benefits resulting from such investment would further alleviate the xenophobic sentiments among the Chinese people and their widespread skepticism toward Western institutions.

Third, U.S. companies have constantly complained about the reluctance of Chinese courts to impose heavy fines on local pirates or counterfeiters, thus reducing their deterrent effect.[493] However, these companies tend to ignore the fact that the Chinese authorities impose heavier fines when intellectual property infringement implicates the health and well-being of the general public.[494] Thus, a cooperative approach would be helpful to promote understanding of the two countries and their different sense of values and to facilitate exchange between academics, policymakers, government officials, and business

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490. *See* Mark A. Groombridge, *The Political Economy of Intellectual Property Rights Protection in the People's Republic of China, in* INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS 11, 36 (Clarisa Long ed., 2000) ("All too often it is the authorized manufacturer who is involved in the infringing activities.").

491. "For example, under the auspices of Project Hope, Motorola has contributed funds to assist in the construction of local primary schools throughout China." Doris Estelle Long, *China's IP Reforms Show Little Success: IP Enforcement Remains Problematic, but Clever Owners Can Beat the Odds*, IP WORLDWIDE, Nov.-Dec. 1998, at 1, 6 [hereinafter Long, *China's IP Reforms*]; *see also* R. Michael Gadbaw & Timothy J. Richards, *Introduction to* INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 1, 27 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (arguing for the investment of a portion of the benefits the United States would gain from the elimination of piracy).

492. Long, *China's IP Reforms*, *supra* note 491.

493. *See* OFFICE OF USTR, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 57 (2001) (noting that "criminal and civil penalties for most kinds of counterfeiting remain too low to deter counterfeiting"); Butterton, *supra* note 456, at 1104 ("[F]ines did not appear to be applied broadly enough to act as an effective deterrent; nor were they substantial enough in every case to deter repeat offenses by those pirates whose ill-gotten gains may have made them comparatively affluent."); Lagerqvist & Riley, *supra* note 415, at 16 ("Another type of problem is the low level of damage awards so far meted out in cases that have been reported. Low damage awards do not have a deterrent effect.").

494. For example, to protect consumers, China has enacted laws and regulations containing statutory warranties of the quality of goods manufactured or sold. If the infringing product is of inferior quality, "selling it under trade mark is an offense, as is advertising it or selling it directly to a consumer." Mary L. Riley, *Strategies for Enforcing Intellectual Property Rights in China, in* PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 415, at 70. Thus, U.S. companies should consider not only intellectual property laws, but also other legal theories that may result in a stronger likelihood of success and possibly a larger fine.

executives.[495] In addition, as demonstrated by the example concerning investment of profits back into the local community, the court may be less reluctant to impose fines if those fines are reinvested into the local community in the form of education and training programs. Such programs are badly needed to promote public awareness of intellectual property rights. Yet, despite their paramount importance, foreign governments and intellectual property industries are reluctant to commit their resources to these programs.[496]

Finally, many Chinese companies are reluctant to protect intellectual property rights of their foreign joint venture partners. Having limited understanding of intellectual property rights, the Chinese partners are understandably suspicious of the intentions behind what their foreign partners are attempting to do. However, they may change their perception and position once they learn more about intellectual property rights. For example, in one joint venture, the Chinese manufacturer was unwilling to allocate a portion of the joint venture profits to the foreign partner for design charges.[497] Although the foreign

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495. *See* Ding Xinghao, *Basis for a Constructive Strategic Partnership Between China and the United States*, *in* OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 58, at 157, 167 (arguing that both China and the United States should encourage more exchanges at every level of government and society, especially educational and cultural exchanges, to help better understand the other); Gregory P. Fairbrother & Gerard A. Postiglione, *Teaching About China in America: Shaping the Perspectives of a New Generation*, *in* OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 58, at 267, 281-82 (arguing for the incorporation of China-related content in the U.S. social-studies curriculum); Yu, *From Pirates to Partners*, *supra* note 2 (arguing that China and the United States need to foster exchanges (in particular educational and cultural ones) between academics, professionals, and government officials to promote better understanding between the two countries); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 2, at 82-83 (same); *see also China: Sino-US Seminar on Intellectual Property Rights Closes*, CHINA BUS. INFO. NETWORK, Sept. 21, 1998, *available at* 1998 WL 13494566 (reporting the joint seminar between Chinese and U.S. experts in Chongqing exploring the relations between the protection of intellectual property rights and economic development); *China Fair of Inventions, New Technologies Opens in US*, CHINA BUS. INFO. NETWORK, Sept. 2, 1999, *available at* 1999 WL 17730900 (reporting on the China Fair of Inventions and New Technologies, an event co-sponsored by the State Intellectual Property Office of China and the US-China Council for International Exchange, Inc. to promote better understanding and cooperation between the United States and China in the intellectual property area).

496. Alford, *Making the World Safe for What?*, *supra* note 76, at 142 ("For all its much ballyhooed expressions of concern, neither the U.S. government nor many of the companies driving [the American foreign intellectual property] policy . . . have made any substantial attempt . . . to communicate to the Chinese why better intellectual property protection would be in their interest . . . ."); Chow, *supra* note 467, at 46 (noting that "brand owners are reluctant to commit the amount of resources necessary to achieve these goals or to risk seriously offending the Chinese government"); *see also* Hu, *supra* note 456, at 111 ("[A]ctive involvement by U.S. companies and lawyers, for example through special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media, will expedite the training process.").

The lack of resources committed to education and awareness programs is attributable to two reasons. First, the American political system tends to reward short-term results, rather than long-term results. Yu, *From Pirates to Partners*, *supra* note 2, at 223. Thus, policymakers are reluctant to focus on long-term policies such as providing education at the grassroots level. Second, education is a public good. Most companies tend to free ride on each other's efforts without incurring any substantial investment. *Id.*

497. *See* Donaldson & Weiner, *supra* note 482, 420.

partner insisted on those charges, it helped the manufacturer determine the cost of its own design processes. After the manufacturer learned that it could charge separately for its design work, it began actively lobbying the local regulators for the right to design fees.[498]

CONCLUSION

In the eighteenth and nineteenth centuries, the theory of natural selection provided the major intellectual impetus for fierce competition, aggressive expansion, and overseas colonization. As we begin the New Millennium, however, nonzero-sum approaches seem to have received widespread acceptance as the more preferable approach. In a recent provocative, yet insightful, bestseller,[499] Robert Wright argues that natural evolution is a goal-seeking process that follows the logic of a nonzero-sum game.[500] Although one may disagree or have reservations about his theory and conclusion, one can hardly deny that nonzero-sum cooperation has captured the hearts of many policymakers, scholars, and members of the public.

Today, the world has become increasingly globalized and interdependent. A confrontational approach not only would limit our synergistic potential, but also would result in unnecessary waste of resources. Borrowing from the experiences of mediators, business strategists, and international relations theorists, this Article seeks to explain why policymakers should aim at playing a nonzero-sum game when they try to resolve intellectual property disputes. Only by doing so can they promote the development of science and technology, create mutual benefits for all the parties involved, and preserve delicate trading relationships.

With the advent of the Internet and the proliferation of new communications technologies, the world has become increasing borderless. A dispute resolution approach that seeks to identify gains and losses with territorial boundaries no longer makes sense. In fact, as nobody can predict the future of cyberspace, one solution would arguably be as good as another.[501] Unless policymakers can devise a win-win solution whereby all parties benefit, insisting on one's own values without considering another's interests will lead one down a very dangerous path.

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498. *Id.*

499. ROBERT WRIGHT, NONZERO: THE LOGIC OF HUMAN DESTINY (Vintage Books 2001).

500. *Id.* at 323.

501. Lawrence Lessig, *Foreword*, 52 STAN. L. REV. 987, 999 (2000) ("But this is cyberspace, where no one has the right to declare truth is on their side; and where no one should claim the right to condemn.").