

Michigan Journal of International Law

Volume 28 | Issue 1

2006

Power, Norms, and International Intellectual Property Law

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POWER, NORMS, AND INTERNATIONAL INTELLECTUAL PROPERTY LAW†

*Tai-Heng Cheng**

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I. INTRODUCTION

Power matters. But power is not all that matters, all the time. Although some international law scholars argue that power is paramount,¹

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1. See generally Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 72-76 (2006) (reviewing theories of realists from the 1940s to the present, arguing that international law "reflects the interests of powerful states"); see also JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005) ("[I]nternational law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.").

and other scholars ignore the role of power entirely,² keen observers of international law acknowledge that power influences, but does not wholly control, international law.³ Few scholars, however, appear to have tested their theories against contemporary international problems that increasingly involve both public and private international law, as well as state and nonstate actors. Many scholars of public international law have acknowledged that private international law and nonstate actors are relevant to international problems, but they continue to develop their theories largely within the limited domain of public international law and interstate processes.⁴ Similarly, many private international law scholars have acknowledged that power is important, but they have not constructed a theory of international law that fully explains the role of power.⁵

This Article begins with the premise that international law is the net result of global processes of interactions among state and nonstate participants in the international system. The Article builds on my previous

2. See generally Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481–83 (2005) (“[I]nterest-based scholars are wrong to assume that states engage only in consequentialist pursuit of objective self-interest.” “[S]tates internalize norms and act in accordance with them because they understand them to be correct or appropriate.”). See also Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633, 640 (2000) (describing creation of norms without referring to power); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895–905 (1998) (describing the creation of norms through persuasion rather than power); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT’L & COMP. L. 445, 458 (2006) (describing participants’ behavior in international law systems as motivated by a desire to validate their identity and not accounting for the role of power).

3. See Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 745, 753 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (“[I]nternational law is a product of the interplay of power and interest conditioned by material conditions and perceptions of need and aspirations.”); Steinberg & Zasloff, *supra* note 1, at 86 (“[International law theories cannot] ignore power, or law, or the state, or civil society, or norms, or language.”) (emphasis in original).

4. See, e.g., Hathaway, *supra* note 2, at 494 (“[T]his account [of international law] places the state at the center of the analysis. . . . The state is, in fact, the primary subject of international law.”); GOLDSMITH & POSNER, *supra* note 1, at 3 (focusing on states in analyzing international law); Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 53 (2004) (arguing that in international intellectual property law the principal actors are still states, but they are assisted by NGOs and officials of intergovernmental organizations).

5. See, e.g., Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT’L L. 391, 411 (2006) (acknowledging role of politics in odious debt issues, but not explicating the relationship between power and international law); Sean Pager, *TRIPS: A Link too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215 (2006) (appraising the use of trade benefits to harmonize international IP law without fully explaining the relationship between international trade strategies and norms).

work⁶ by proposing a theory of international law that fills the interstices between private and public international law. Participants generally deploy power and invoke legal and social norms in pursuit of interests and in response to the strategies of other participants. Eventually, outcomes that reflect both power and norms result, and these outcomes in turn modify norms and reallocate power. New outcomes then follow in future conflicts in an iterative, evolutionary, interactive process.⁷ This Article tests this thesis against the global intellectual property (IP) system. International IP scholarship should account for power and could be enriched by the typology presented in this Article because international IP law lacks a comprehensive set of enforceable legal norms.

IP protections have existed for centuries,⁸ and national systems of IP law are increasingly harmonized.⁹ A number of international,¹⁰ regional,¹¹ and bilateral treaties also relate to IP.¹² Significant disagreements remain,

6. See Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 470 (2005) ("Repeated signaling of proposed investment norms through international agreements and subsequent patterns of compliance with these agreements have stabilized expectations of appropriate state behavior."); TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS 387-92 (2006) (developing typology of power in state successions); Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. (forthcoming Summer 2007).

7. For the purpose of this paper, conflicts are defined as situations in which at least two participants each have different preferred outcomes. The other key concepts in this typology, i.e., participants, interests, power, and norms, are explained in Part II.

8. See Giulio Mandich, *Venetian Patents (1450-1550)*, 30 J. PAT. OFF. SOC'Y 166, 175-76 (1948) (discussing fifteenth-century Venetian patents and a 1474 act to regulate patents).

9. See, e.g., 35 U.S.C. §§ 104(a)(1), 154(a), 271(a) (harmonizing U.S. law with the Agreement on Trade Related Aspects of Intellectual Property Rights).

10. 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, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS]; Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3 [hereinafter WIPO Convention]; Universal Copyright Convention, Sept. 6, 1952, as revised July 24, 1971, available at http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 303; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, 168 Consol. T.S. 185, as revised July 24, 1971, 828 U.N.T.S. 22.

11. See North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1701-1721, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (protecting intellectual property); Convention on the Grant of European Patents, Oct. 5, 1973, 13 I.L.M. 268, available at <http://www.european-patent-office.org/legal/epc/ma1.html> (creating European Patent Office).

12. See generally Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 10 MARQ. INTELL. PROP. L. REV. 205, 209 (2006) ("[B]ilateral agreements typically impose TRIPS-plus standards."). See, e.g., Free Trade Agreement, U.S.-Chile, ch. 17, June 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file912_4011.pdf (protecting intellectual property rights); Treaty Concerning the Encouragement and Reciprocal

however, among global decisionmakers about appropriate norms for IP protection.¹³ Many of the international rules that do exist lack effective enforcement mechanisms.¹⁴ Power therefore plays an important role not only in the development of international legal IP norms, such as strengthening IP protections through the conclusion of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),¹⁵ but also in their enforcement, such as when the United States imposes, or threatens to impose, trade sanctions in an attempt to coerce compliance with its preferred international IP norms.¹⁶

Even with well-developed legal IP norms, power can be deployed to deviate from the behavior those norms demand. As discussed in Part III.A.2, the United States filed a complaint against Brazil in 2001 before the World Trade Organization (WTO) Dispute Settlement Body in an effort to protect U.S. drug patents in Brazil. A view of this dispute that did not account for power would assume the dispute would be resolved by applying the facts of the case to the applicable legal rules contained in TRIPS. Instead, the outcome of the dispute had little to do with legal rules. International human rights nongovernmental organizations (NGOs) successfully exerted pressure on the U.S. government to withdraw the complaint, thereby effectively permitting Brazil to continue its use of generic drugs. Anticipating such outcomes in international IP conflicts requires policymakers, practitioners, and scholars to account for power.

This Article presents its thesis in three parts. Part I discusses the concepts on which the thesis is built: participants, interests, power, and norms. Part II uses the concepts developed in Part I to propose a theory

Protection of Investment, U.S.-El Sal., art. 1, Mar. 10, 1991, S. Treaty Doc. 106-28 (2000) (defining protected investments as including intellectual property).

13. See Frank X. Curci, *Protecting Your Intellectual Property Rights Overseas: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 15 *TRANSNAT'L LAW* 15, 28 (2002) ("The development of, and philosophical basis for, the enactment and enforcement of intellectual property law differs widely from nation to nation."); Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes*, 70 *U. CIN. L. REV.* 569, 634 (2002) ("Historically, developed and less developed states have deep disagreements over the availability, scope, and use of intellectual property rights.").

14. See Allison Cychosz, *The Effectiveness of International Enforcement of Intellectual Property Rights*, 37 *J. MARSHALL L. REV.* 985, 985 (2004) ("Until sufficient enforcement measures are adopted, patent holders will continue to see unchecked abuses against their valid patents."); Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 *TRANSNAT'L LAW* 357, 358 (1996) ("The United States and other western nations exhibit frustration with the current methods of enforcement and protection of intellectual property.").

15. See *infra* Part III.A.1.

16. See Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 *ALB. L.J. SCI. & TECH.* 295, 317 (1996) (noting U.S. threats to impose sanctions on China in an effort to coerce China into protecting U.S. IP).

of international law as it operates in the global IP system. By examining prior international IP conflicts, Part II tests and validates the four key aspects of the theory: (1) outcomes reflect both power and norms; (2) outcomes may modify norms; (3) outcomes may reallocate power; and (4) new outcomes follow from these adjustments of power and norms. Part III discusses how this Article's thesis can help policymakers and corporate officers devise practical strategies to achieve their IP goals.

II. BASIC CONCEPTS

A. Participants

Participants are entities that are affected by and involved in international conflicts and their resolution.¹⁷ Participants populate the international law system, and within that, the IP system. Some scholars have focused narrowly on states as by far the most important participants.¹⁸ In fact, many nonstate participants are affected by outcomes in international conflicts in significant ways, such as farmers in developing states who rely on new crop technologies developed by foreign corporations.¹⁹ Some participants also exert influence over outcomes in international conflicts. These influential participants include corporations and corporate officers,²⁰ international organizations,²¹ national and

17. See Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision-Making*, 19 J. LEGAL EDUC. 253, 262 (1966-67) ("By a participant in constitutive process, as distinguished from the more general effective power process, we mean an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims."). See also Cheng, *Power, Authority and International Investment Law*, *supra* note 6, at 466 n.1 (defining participants in the context of investment law as "parties connected with international investments").

18. See *supra* note 4.

19. See Michael Woods, *Food For Thought: The Biopiracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123 (2002) (discussing the impact of the global patent system on rice farmers in India and Pakistan).

20. See Peter K. Yu, *International Lawmaking in the New Millennium: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1, 3 (2002) ("[T]he international lawmaking process has become increasingly vulnerable to influences from multinational corporations . . ."). See also Michael A. Santoro & Lynn Sharp Paine, *Pfizer: Global Protection of Intellectual Property*, Harv. Bus. Sch. Case Study No. 9-392-073, 6 (Apr. 6, 1995) (noting pharmaceutical company's lobbying of local governments to protect intellectual property); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY 48-49, 173 (2003) (discussing efforts by U.S. corporations to lobby their government to promote their intellectual property interests internationally, noting specifically that TRIPS largely reflected the wishes of the CEOs of twelve American companies).

21. See generally LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 50 (2000) ("International governmental organizations . . . act as distinctive participants in decision making and provide necessary structures of authority for other participants."). See also World Health Organization [WHO],

international tribunals,²² and NGOs.²³ These participants deploy power and invoke norms in support of relevant interests in numerous arenas, such as court proceedings,²⁴ corporate transactions,²⁵ trade discussions among states, and meetings of international organizations.²⁶

B. Interests

A wealth of international law scholarship addresses the varied interests of participants and how internal constituents motivate the actions of such participants.²⁷ This Article explores interests in the more limited context of international IP. As a general matter, participants behaving rationally have an interest in preserving the economic value of their IP and obtaining economic benefits from third-party users through greater

WHO Medicines Strategy: Framework for Action in Essential Drugs and Medicines Policy: 2000–2003, at 36, WHO Doc. WHO/EDM/2000.1 (2000) (noting the role of the WHO in helping developing countries gain access to patented drug technologies).

22. See Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT L. REV. 993, 1013 (2002) (“[N]ational court decisions may of themselves construct (or at least contribute to) international intellectual property law . . .”). See also Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 3.1, WT/DS114/R (Mar. 17, 2000) (finding Canada’s Patent Act to be inconsistent with TRIPS); WIPO Arbitration Award, *Ermenegildo Zegna v. Gerolanda*, Case No. WIPO2003NL1 (Oct. 17, 2003), available at <http://www.wipo.int/amc/en/domains/awards/html/2003/wipo2003nl1.html> (transferring a domain name to plaintiffs’ fashion house because the contested domain name was similar to plaintiffs’ trademark and trade name, and prohibiting defendant from registering similar domain names); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 283–84 (1952) (applying Lanham Act to activities in Mexico involving U.S. trademarks); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 640–44 (2d Cir. 1956), cert. denied, 352 U.S. 871 (1956) (adjudicating a U.S.-Canadian trademark infringement dispute); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939), aff’d, 309 U.S. 390 (1940) (awarding profits for copyright infringements in the United States and Canada).

23. See *SELL*, supra note 20, at 162 (“NGO activists . . . have changed the politics of intellectual property.”); Helfer, supra note 4, at 42 (noting that NGOs and some states “were the principal catalysts for the WHO’s critical review of TRIPs”); Ellen ‘t Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT’L L. 27, 33 (2002) (“NGOs have played a key role in drawing attention to provisions of TRIPS that can be used to increase access to medicines.”); Yu, supra note 20, at 3 (noting that trade associations are influential participants in international IP law).

24. See generally McDougal, Lasswell & Reisman, supra note 17, at 282 (characterizing tribunals as adjudicative arenas).

25. See William L. Keefauver, *Commentary: The Need for International Thinking in Intellectual Property Law*, 37 IDEA 181, 183 (1996–1997) (“If you ever negotiated or looked at a joint venture agreement, you know that a major component is often the intellectual property piece which usually covers patents, trademarks, copyrights, software, and technical information.”).

26. See generally McDougal, Lasswell & Reisman, supra note 17, at 281 (discussing interaction between nation-state elites or their representatives).

27. See generally Hathaway, supra note 2 (surveying interest-based models of international law and proposing that domestic enforcement, transnational enforcement, and “collateral consequences” explain state action in the context of treaties); Steinberg & Zasloff, supra note 1, at 64 (providing historical survey of theories of state interest).

IP protections.²⁸ The ten most industrialized countries—all aggregate IP creators²⁹—are advocates of IP protections.³⁰ In 1995, more than half of global royalties and licensing fees were paid to entities in the United States,³¹ a major technology exporter.³² Japan, one of the main proponents of IP rights at the WTO Uruguay Round of Multilateral Trade Negotiations, has filed 575,000 patents in the United States since 1975.³³

Conversely, participants also have an interest in lowering the cost of using and increasing access to IP created by other parties.³⁴ India and Mexico—each of which is an aggregate IP user, filing fewer than 3,000 patents in the United States since 1975³⁵—have objected to IP rights protections at multilateral trade negotiations.³⁶

28. See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 947 (2003) ("Countries engaged in a large amount of research and development or who otherwise produce a great deal of intellectual property prefer a system of rigorous protection and enforcement of intellectual property rights around the world."); Nabila Ansari, *International Patent Rights in a Post-Doha World*, CURRENTS: INT'L TRADE L.J., Winter 2002, at 57, 60 ("Developed nations have historically employed the highest degree of patent protection . . . to protect their nation's inventions.").

29. See Ansari, *supra* note 28, at 57.

30. Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTEL. PROP. L.J. 47, 77 (2000) ("Western industrialized countries . . . would like to extend intellectual property protection internationally.").

31. RICHARD JOLLY, U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 1999, at 68 (1999). See also SELL, *supra* note 20, at 129 ("[T]he United States has been the most aggressive country in the IP area. It has filed more WTO TRIPS complaints than all other member countries combined.").

32. See *Intellectual Property Crimes: Are Proceeds From Counterfeited Goods Funding Terrorism?: Hearing Before the H. Comm. on Int'l Rel.*, 108th Cong. 20 (2003) (statement of Asa Hutchinson, Under Secretary for Border and Transportation Security, U.S. Department of Homeland Security) ("Copyright-based industries represent over 5% of the country's GDP . . ."); *Impediments to Digital Trade: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 4 (2001) (statement of Hon. Edolphus Towns, H. Rep. N.Y.) ("Intellectual property as a traded good is one of America's greatest assets."); *Trade in Service and E-Commerce: The Significance of the Singapore and Chile Free Trade Agreements: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 45 (2003) (statement of Robert Holleyman, President of Business Software Alliance) ("IT industries generated a trade surplus of \$24 [bn.] in 2002."); Lori A. Trawinski, *U.S. International Transactions, Third Quarter 1994*, SURV. CURRENT BUS., Dec. 1994, at 30, 43 (revealing that copyright industries accounted for six percent of U.S. GDP).

33. See U.S. Patent and Trademark Office, <http://patft.uspto.gov/netahtml/PTO/search-adv.htm>.

34. See Guzman, *supra* note 28, at 947 (noting that developing countries, which are mainly users of intellectual property created by other parties, resisted stronger global IP protections). Cf. Sumner J. La Croix, *The Rise of Global Intellectual Property Rights and Their Impact on Asia*, at 4 (East-West Center, Asia Pacific Issues No. 23, 1995) (stating that a developing country only benefits from intellectual property protections when it is ready to engage in research and development).

35. See U.S. Patent and Trademark Office, *supra* note 33.

36. See, e.g., Communication from India on Standards and Principles Concerning the Availability Scope and Use of Trade-Related Intellectual Property Rights, *Negotiating Group*

Three considerations complicate the analysis of interests in IP conflicts. First is the determination of whether a participant is an aggregate IP creator or IP user. Participants' corresponding interests may be fluid because over time, IP users may become IP creators, or vice versa. For example, the United States supported weaker IP protections when it was an aggregate IP user, but it began to champion stronger IP protections when it became an aggregate IP creator.³⁷ China has begun to protect IP more strongly as it has developed its software industry.³⁸ Thus, any attempt to anticipate the strategies of participants in international IP conflicts must identify whether each participant is an aggregate IP user or creator at the time of that conflict and not merely rely on historical data.

Second, the determination of whether a participant is an IP user or creator is specific to each constituency within that participant and to each IP conflict. A participant may have internal constituencies that are IP users and others that are IP creators. For example, within a music conglomerate, one division that represents the organization's musical copyright library may desire strong IP protections while another division that markets technology used to store and transfer electronic music files may desire weaker protections. Public international law and political science scholars have done the yeoman work of "look[ing] to the political institutions, interest groups, and state actors that shape state preferences to explain state behavior in the international arena."³⁹ The next stage in the development of international legal theory is to anticipate and explain the behavior of nonstate actors, such as corporations, by disaggregating them into their constituent parts and interest groups.

One participant that is ripe for such disaggregation is Microsoft Corporation, creator of the widely used Windows operating system.

on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (NG TRIPS), WTO Doc. MTN.GNG/NG11/W/37 (July 10, 1989) (arguing that negotiations to increase IP protections should be limited); Statement made by the Delegation of Mexico at the Meeting of 17, 18 and 21 October 1988, *NG TRIPS*, WTO Doc. MTN.GNG/NG11/W/28 (Oct. 19, 1988) ("The negotiating objective regarding the improvement of intellectual property rights should not become a barrier to access by developing countries to technologies produced in developed countries.").

37. See SELL, *supra* note 20, at 65 (noting that the United States sought lax enforcement of foreign intellectual property when it was a net technology importer for most of the nineteenth century, but advocated strong intellectual property protections when its firms achieved technological breakthroughs in the later part of the nineteenth century); Endeshaw, *supra* note 16, at 302 ("During the times that it was a net copyright importer, the United States resisted joining any international [copyright] arrangement.").

38. See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 370–71 (2003) (noting increase in IP protections in China as the Chinese have started to become IP stakeholders).

39. Hathaway, *supra* note 2, at 484.

Microsoft is alleged to have used AT&T-patented computer codes in its computer programs.⁴⁰ Microsoft divisions responsible for creating and manufacturing Windows would tend to prefer lower levels of protection for third-party IP incorporated into Windows, while divisions responsible for sales of Windows products would prefer higher levels of protection against software piracy. This hypothesis is borne out by evidence that Microsoft threatened to shift the manufacturing of portions of Windows overseas in an attempt to evade rules barring free use of AT&T software under the Lanham Act, while simultaneously working to reduce piracy of Windows in China and other parts of Asia.⁴¹ An accurate *ex ante* analysis of the strategies of participants in global IP conflicts should therefore account for the interests of internal constituencies and assess each constituency's influence over internal decisionmaking in the particular IP conflict at issue.

Third, any interest in IP protections or access to IP must be considered together with other relevant interests. In many IP conflicts, other interests are at stake beyond the economic benefits or costs derived from control over or access to IP. For example, in an IP conflict concerning access to drug patents in an underdeveloped state, IP-creating states have an interest in protecting their IP, but they may also have an interest in providing the underdeveloped state with life-saving drugs to avert the political and geopolitical instabilities that might follow a public health crisis. The IP-creating state may also have an interest in appeasing domestic constituencies that have a global human rights interest in health care.⁴² Similarly, in multilateral IP negotiations, IP-using states may have interests in the trade benefits that IP-creating states offer in exchange for higher levels of enforcement of IP protections.⁴³ In disputes before the WTO Dispute Settlement Body, a litigant that has violated legal IP norms will often comply with WTO rulings⁴⁴ or negotiate settlements for

40. AT&T Corp. v. Microsoft Corp., No. 01 Civ. 4872, 2003 WL 21459573, at *1–*2 (S.D.N.Y. June 24, 2003) (discussing “speech codes” within Microsoft products that AT&T claimed infringed patents held by AT&T).

41. AT&T Corp. v. Microsoft Corp., 71 U.S.P.Q. 2d (BNA) 1118, 2004 U.S. Dist. Lexis 3340, at *27–*28 (S.D.N.Y. 2004); James M. Sellers, *The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583, 614 (2004) (describing Microsoft's efforts to combat software piracy in China).

42. See *infra* Part III.B.1.

43. See *infra* Part III.A.1.

44. See Request for Consultations by the United States, *Canada—Term of Patent Protection*, WT/DS170/1 (May 10, 1999); Request for Consultations by the European Communities, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/1 (Jan. 12, 1998); Request for Consultations by Australia, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/1 (Apr. 23, 2003); Request for Consultations by the United States, *EC—Agricultural Products*, WT/DS174/1 (June 7, 1999); Request for Consultations by the European Communities, *India—Patent Protection*

multiple reasons.⁴⁵ They have interests in preserving the overall WTO trade system, of which the dispute settlement mechanism is a crucial part and from which they draw benefits. Additionally, they seek to avoid the costs of enforcement measures for noncompliance with rulings, as authorized under the WTO rules.⁴⁶ Any analysis of IP conflicts that fails to appreciate the range of interests at stake runs the risk of missing the forest for the trees.

C. Power

International law scholars have proposed many definitions of power.⁴⁷ This Article adopts a generally accepted definition of the term: the capacity of a participant to deploy resources to influence or coerce other participants into complying with its preferred outcome.⁴⁸ Power

for *Pharmaceutical and Agricultural Chemical Products*, WT/DS79/1 (May 6, 1997); Request for Consultations by the United States, *India—Pharmaceutical Products*, WT/DS50/1 (July 9, 1996); Request for Consultations by the European Communities and their Member States, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/1 (July 15, 1999).

45. See Request for Consultations by the United States, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/1 (June 6, 2000); Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000); Request for Consultations by the United States, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/1 (May 21, 1997); Request for Consultations by the United States, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (May 7, 1998); Request for Consultations by the United States, *European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/1 (Jan. 12, 1998); Request for Consultations by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/1 (May 7, 1998); Request for Consultations by the United States, *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS82/1 (May 22, 1997); Request for Consultations by the United States, *Japan—Measures concerning Sound Recordings*, WT/DS28/1 (Feb. 14, 1996); Request for Consultations by the European Communities, *Japan—Sound Recordings*, WT/DS42/1 (June 4, 1996); Request for Consultations by the United States, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/1 (May 6, 1996); Request for Consultations by the United States, *Portugal—Patent Protection under the Industrial Property Act*, WT/DS37/1 (May 6, 1996); Request for Consultations by the United States, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/1 (June 2, 1997).

46. See *infra* Part III.A.3. See also Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1239–41 (1994) [hereinafter DSU].

47. See generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 155–57 (2005) (discussing different definitions of “power”).

48. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 5 (1991) (“Power . . . refers to the ability of a State to impose its will on others or, more broadly, to control outcomes contested by others.”); Cheng, *Power, Authority and International Investment Law*,

takes diverse forms, including military, economic, political, diplomatic, and psychological power.⁴⁹ For example, a state may exercise its economic power by providing trade benefits or imposing trade sanctions to secure greater IP protections from other states. An NGO may exercise psychological power by drawing public attention to public health crises in developing countries.

The stereotypes of IP producers as powerful and IP users as weak are not necessarily accurate. Some IP producers—including developed states and corporations that are headquartered and incorporated in developed states—are certainly powerful. These IP producers possess the resources necessary for the creation of patents and copyrights, including technology, financial capital, and highly sophisticated inventors. Not surprisingly, “[t]he top ten industrialized countries account for as much as 84% of global resources spent on research and development (R&D) and for 94% of patents granted worldwide.”⁵⁰ Because IP producers tend to have significant resources, they also have immense power to deploy these resources to secure IP outcomes in their favor.

But not all IP producers are powerful. Some formerly powerful IP producers may have lost the ability to innovate due to a cataclysmic event, such as defeat in a war. Creators of artistic works, such as authors and playwrights, may be prolific but weak IP producers because of their limited resources as compared to large corporations or powerful states.

Likewise, some IP users are certainly weak, but not all are. To be sure, small corporations that produce counterfeit goods that infringe on registered trademarks usually do not have the same resources as the conglomerates that created brand value for these trademarks.⁵¹ Some least-developed countries are also weak IP users: in the mid-1990s, developing countries accounted for only four percent of global research

supra note 6, at 469 (“Power refers to the ability of decision-makers to impose their will on other participants to affect outcomes.”); Jason C. Nelson, *The United Nations and the Employment of Sanctions as a Tool of International Statecraft: Social Power Theory as a Predictor of Threat Theory Utility*, 29 *LAW & PSYCHOL. REV.* 105, 124 (2005) (“Power is the ability of some actor A to get some other actor B to do something that B would not otherwise do.”); Miriam Sapiro, *The Politics of International Law and the Law of International Politics: An American Perspective*, 23 *WIS. INT’L L.J.* 49, 50 (2005) (“[Power is] a combination of objective and subjective elements, which culminates in the success with which one state can persuade, cajole, or . . . force another state to do something it would otherwise be unlikely to do.”).

49. SCHACHTER, *supra* note 48, at 5 (“The components of power are military, economic, political and psychological . . .”).

50. See Ansari, *supra* note 28, at 57.

51. See *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 315 F. Supp. 2d 511, 513–14 (S.D.N.Y. 2004), *permanent injunction granted*, 328 F. Supp. 2d 439 (S.D.N.Y. 2004) (finding that defendant, Harvest Wrap, Inc. had infringed Gucci trademarks by supplying counterfeit goods).

and development expenditures,⁵² and most of the patents that the U.S. Patent Office granted in developing countries belonged to residents of industrial economies.⁵³ Some of these developing countries, such as Brazil,⁵⁴ may depend heavily on medicines and agricultural technologies created by other parties. But large multinational corporations that may be licensees of, or distributors for, IP-creating corporations may have significant power. Some developing states that have yet to proceed far enough along the technology curve to become aggregate IP creators may nonetheless have substantial power. For example, although India is economically, diplomatically, and militarily powerful,⁵⁵ it relies on the drug technology of other IP creators.⁵⁶

Regardless of whether a participant is powerful or weak, it may pool its resources with other participants with whom its interests are aligned in an IP conflict. Scholars of public international law and political science have hypothesized that, as a result of international networks and globalization,⁵⁷ states and their officials are able to cooperate or collude against other participants with divergent interests.⁵⁸ This hypothesis applies equally to problems involving both public and private international

52. See JOLLY, *supra* note 31, at 67.

53. See *id.* at 68 (“More than 80% of the patents that have been granted in developing countries belong to residents of industrial countries.”).

54. See Pan American Health Organization, Basic Country Health Profiles for the Americas: Brazil, http://www.paho.org/English/DD/AIS/cp_076.htm (“Brazil is among the greatest consumer markets for drugs, accounting for 3.5 % [sic] share of the world market.”).

55. U.S. Department of State, Bureau of South and Central Asian Affairs, Background Note: India (2006), <http://www.state.gov/r/pa/ei/bgn/3454.htm> (noting that India has the world’s twelfth largest economy, an army of over 1.1 million people, and is a “leader of the developing world” in foreign relations).

56. UNITED KINGDOM COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 20 (2003) (“[India is] a producer and exporter of low cost generic medicines and bulk intermediates.”).

57. See generally MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2 (1996) (“States are embedded in dense networks of transnational and international social relations.”); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 131–65 (2004) (discussing the state of development of transnational networks); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 2 (2002) (“Interdependence among states—the linkages between national economies and societies—has never been higher.”).

58. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS 1, 5 (Thomas Risse & Kathryn Sikkink eds., 1999) (arguing, *inter alia*, that international networks permit domestic and international participants to apply pressure on other participants to catalyze change through socialization); SLAUGHTER, *supra* note 57, at 166–215 (discussing how transnational networks permit cooperation); Raustiala, *supra* note 57, at 26–50 (discussing transgovernmental network cooperation in the fields of securities regulation, competition policy, and environmental regulation).

law.⁵⁹ In international IP disputes, governments may share information with each other and nongovernmental organizations about international counterfeiting operations or use their executive power to enforce domestic IP rules.⁶⁰ Alternately, NGOs may devise and share with each other and with governments strategies to alter existing levels of IP protections.⁶¹ This pooling of power allows participants to promote their interests more strongly than if they act unilaterally.

D. Norms

1. Traditional Concepts of Norms

Norms refer broadly to claims, standards, and expectations that “channel and regularize behavior.”⁶² Domestic law scholars often distinguish between legal rules—that is, law—from nonlegal social norms.⁶³ Because international law is ultimately concerned with all factors that influence decisionmaking, and because the essential function of legal rules is to channel and regularize behavior, this Article considers legal rules to be a subset of legal norms.

Scholars of international law tend to divide law into hard and soft law. According to this classification, legal norms would include both hard and soft norms. Hard norms are legally binding and are found in customary law, treaties, and *jus cogens* (peremptory norms of international law).⁶⁴ In the IP context, hard norms include the legal rules articulated in treaties such as TRIPS or the North American Free Trade Agreement.⁶⁵

59. See CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS, *supra* note 6, at 405 (“Growing interconnectivity of participants has allowed and encouraged unprecedented levels of agreement and collusion between states, corporations, banks, international organizations and individuals.”); Cheng, *Renegotiating the Odious Debt Doctrine*, *supra* note 6.

60. See, e.g., Implementation of the Economic Initiative of June 2005 EU-US Summit: Joint EU-US Work Programme, at 16–17 (Nov. 2005) (noting various forms of collaboration among the European Union, the United States and nongovernmental organizations to enforce IP globally).

61. See, e.g., Ruchi Tripathi, *Post-Doha Scenario Relating to Review of TRIPS Agreement: Regional Seminar on Policies for the Protection of Farmers' Rights in Mountain Regions Titled “Evolving Sui Generis Options for the Hindu Kush Himalayas,”* Mar. 2003 (informing WTO member states and civil society groups about local, national, and international strategies to weaken IP protections).

62. Finnemore & Sikkink, *supra* note 2, at 894.

63. See, e.g., Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 807 (2001) (referring to both “formal legal rules” and “informal social norms”). See also *infra* n.72.

64. Statute of the International Court of Justice art. 38, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>.

65. NAFTA, *supra* note 11, arts. 1701–1721; TRIPS, *supra* note 10.

Soft norms are widely discussed⁶⁶ but not precisely defined.⁶⁷ They

66. See Edith Brown Weiss, *Introduction*, in *INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS* 1, 3 (Edith Brown Weiss ed., 1997) (“[S]ometimes the term ‘soft law’ also refers to the provisions in binding international agreements that are hortatory rather than obligatory.”); Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL’Y J.* 13:1, 13:20 n.106 (“Generally, ‘soft law’ refers to a ‘law’ that is either not yet or not only law.”); Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 *GEO. WASH. INT’L L. REV.* 573, 642 (2005) (“The term soft law refers to instruments that, although not legally binding, can play a part in the creation of a norm.”); Karen Tyler Farr, Note, *A New Global Environmental Organization*, 28 *GA. J. INT’L & COMP. L.* 493, 501 n.60 (2000) (“‘Soft law’ refers to norms that are generally observed by states although they are not obliged to do so.”); Florida Ruth P. Romero, *Legal Challenges of Globalization*, 15 *IND. INT’L & COMP. L. REV.* 501, 532 (2005) (“‘Soft law’ here refers to sets of standards, principles or guidelines, and codes of conduct which may be useful for governments to incorporate into their national law, coupled with a plan or agenda of action.”); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *LAW & SOC’Y REV.* 635, 645 n.15 (2004) (“Soft law refers to international agreements not concluded as treaties and therefore not binding under international law.”); Stanley S. Herr, *The Americans With Disabilities Act: Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 *U. MICH. J.L. REFORM* 305, 308 n.8 (2002) (“‘Soft law’ refers to a body of unformalized but internationally recognized norms that have become so well-accepted that they now constitute enforceable international law, e.g., wartime prohibitions against torture or mistreatment of citizens.”); Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 *SAN DIEGO L. REV.* 635, 646 n.41 (1997) (“‘Soft law,’ here, refers to developing societies’ declared aspirations which are written and found in international organizations’ pronouncements and those countries’ operational codes which may or may not be written.”); Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1867 n.8 (2003) (“The term ‘soft law’ refers to a variety of nonbinding international instruments, ranging from treaties with content too vague or weak to bind the parties to voluntary resolutions and codes of conduct to which states have not agreed to be bound.”); Antonio Herman Benjamín, Cláudia Lima Marques & Catherine Tinker, *The Water Giant Awakes: An Overview of Water Law in Brazil*, 83 *TEX. L. REV.* 2185, 2219 n.238 (2005) (“‘Soft law’ refers to nonbinding declarations of states or statements adopted at multilateral conferences and reports of nongovernmental organizations which advance the development of . . . law.”); Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 *VA. J. INT’L L.* 1, 3 (1998) (“Soft law refers to a set of legal terms or informal duties adopted under formal or informal treaties or multilateral agreements.”); Avi Nov, *The “Bidding War” to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 *VA. TAX REV.* 835, 872 (2006) (“International soft law’ . . . refers to the ability to realize collective values at the global level without legal pressure or law-enforcing institutions.”); Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 *YALE HUM. RTS. & DEV. L.J.* 1, 20 n.111 (2003) (“‘Soft law’ refers to treaties or agreements that do not create binding commitments on the part of governments.”).

67. See A. Neil Craik, *Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law*, 10 *GEO. INT’L ENVTL. L. REV.* 551, 573 (1998) (“While there is no generally accepted definition of soft law, its essential characteristic is that . . . soft law does not create formally binding obligations.”); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 *AM. J. INT’L L.* 443, 443 (1983) (“The concept of ‘soft law’ in international law has been familiar for some years, although its precise meaning is still debated.”); Dinah Shelton, *Normative Hierarchy in International Law*, 100 *AM. J. INT’L L.* 291, 319 (2006) (“There is no accepted definition of ‘soft

are commonly understood to refer to nonbinding or incompletely binding norms that nonetheless are of a legal nature. Soft norms signal to participants, and may secure compliance with, expected standards of behavior.⁶⁸ There are numerous sources of soft norms, including resolutions, declarations, or guidelines of states and international or nongovernmental organizations.⁶⁹ In the IP context, soft norms can be found in “exhortations such as WTO Council Directives, [or] nonbinding statements by other international governmental organizations such as U.N. agencies” that interpret the hard IP rules contained in TRIPS.⁷⁰ Expert committees in the World Intellectual Property Organization (WIPO) also generate soft norms in the form of guidelines for WIPO member states.⁷¹

Social norms, according to mainstream domestic law and economics literature, are not legal in nature.⁷² They are instead patterns of conduct explained by nonlegal motivations, including habit, values, culture,⁷³ and nonlegal sanctions such as shaming.⁷⁴ Likewise, in international law, they are patterns of behavior among participants resulting from habit, shared community expectations about appropriate behavior, or external pressure

law,’ but it usually refers to any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behavior.”).

68. See Shelton, *supra* note 67, at 319 (characterizing soft law as “statements of expected behavior” that “may make it easier to press dissenting states into conforming behavior”). See also *supra* nn.66–67.

69. See Fridolin M.R. Walther, *Internet Gambling Regulatory Questions and Enforcement Problems: A Comparative U.S.-Swiss Perspective*, 2000 STAN. TECH. L. REV. 3, pt. I (describing codes of conduct, corporate policies, awareness programs, and labels as examples of soft laws in the context of professional groups).

70. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2864 (2006).

71. See Helfer, *supra* note 4, at 12.

72. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Linda Hamilton Krieger, *Afterword to Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 478 (2000) (“By social norms, I mean those standards of conduct to which people conform their behavior not because the law requires it, but because conformity is conditioned by . . . social sanction.”); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 546 (1994) (“The legal system provides important norms and usually stipulates sanctions for deviant behavior. But social norms also may be the product of custom and usage, organizational affiliations, consensual undertakings and individual conscience.”).

73. See Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2718 n.17 (2006) (“Social norms are standards that are sufficiently ingrained in the culture so that transgression causes self-censure or condemnation by others.”). See also William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L.J. 1243, 1257 n.80 (2004) (noting individual interests evident in “rational choice” theories); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1109 (2005) (noting social norms develop “within a society’s culture”). But see POSNER, *supra* note 72, at 46 (arguing that “instincts, passions, and deeply ingrained cultural attitudes” do not necessarily explain behavior).

74. See POSNER, *supra* note 72, at 3.

for compliance.⁷⁵ In the international IP context, researchers have explained the widespread copying of compact discs of artistic works for home use around the world as a social norm in which copyright infringement is accepted for noncommercial purposes.⁷⁶

2. A Critique of the Conventional Classification of Norms

Differentiating among hard norms, soft norms, and nonlegal social norms could help organize the occasionally messy universe of behavior-channeling norms in international law. But the utility of this classification should not be overstated.⁷⁷ First, norms in international law cannot always be neatly classified. The UN Charter contains examples of hard norms, yet its preamble affirms a social norm recognizing the “dignity and worth of the human person.”⁷⁸ The status of customary international law as a set of hard norms is codified in Article 38 of the Statute of the International Court of Justice, but customary international law may also be regarded as a set of social norms because it refers to generally held beliefs of acceptable behavior accompanied by general compliance in state practice.⁷⁹ Likewise, *lex mercatoria* developed from (and remains) a body of customary, informal international business norms,⁸⁰ and yet it is frequently invoked as the basis for judicial decisions.⁸¹

Second, social norms may also evolve into soft or even hard norms over time. Janet Koven Levit has shown how social norms in international banking became soft norms through codification as the Uniform Customs and Practice for Documentary Credits and later became hard

75. Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 85–88 (2005) (surveying literature on social norms in international law scholarship and arguing that scholarship on transnational legal process addresses the creation of social norms at the international level).

76. Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 724 (2003); CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, *COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW* 163 (1989).

77. Cf. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 141, 190 (2005) (arguing that classification of hard law and soft law is “arbitrary and perhaps archaic”).

78. U.N. Charter Preamble, para. 2.

79. See generally MALCOLM N. SHAW, *INTERNATIONAL LAW* 303 (5th ed. 2003); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7–10 (6th ed. 2003).

80. See WILLIAM MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 12 (1904) (noting customary nature of *lex mercatoria*); BLACK'S LAW DICTIONARY (8th ed. 2004) (“[*Lex mercatoria* is] a system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century.”).

81. Christopher Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 128–30, n.229 (2000) (discussing and citing decisions based on *lex mercatoria*).

norms through incorporation into the WTO regime.⁸² International lawyers frequently refer to “emerging norms” or “emerging customary international law” to connote norms that are in the process of forming or have some influence over international disputes, but which have not yet crystallized into customary international law. Legal scholars should take care to adopt a flexible, dynamic conception of social and legal norms that accounts for their changing nature.

More fundamentally, classifying norms into well-defined categories does not necessarily help us to anticipate the behavior of participants or anticipate outcomes, conduct policy appraisals of behavior and outcome trends, or recommend strategies to promote relevant global policies.⁸³ Characterizing a norm according to its purported legal pedigree does not, without more, explain or anticipate compliance with that norm.⁸⁴

Enforceable hard norms may not in fact be enforced if the relevant institutions lack the political will to act. One example is the requirement in customary international law of proportionality in the use of force. The UN Security Council may lack sufficient support among its members to issue a resolution under Chapter VII of the UN Charter authorizing international action in response to disproportionate attacks by one state against another. Moreover, even where participants comply with hard law, they may do so to avoid not just legal sanctions for noncompliance, but also other nonlegal costs. For example, hard norms—in the form of customary international law and investment treaties—typically require a state to provide compensation for expropriation of foreign investments.⁸⁵ The legal sanction in an arbitral decision for noncompliance would be an award of damages equivalent to the value of investment.⁸⁶ Because the

82. Koven Levit, *supra* note 77, at 172–73.

83. See Michael Reisman, *Foreword* to CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS, *supra* note 6, at x-xi (noting that international scholarship should analyze past decisions and appraise decision trends against international goals).

84. Koven Levit, *supra* note 77, at 190 (“Yet the practical impact of this line appears largely semantic, for the rules effectively functioned as authoritative and binding on the law-making group (and in some cases others) before they crossed the magical line dividing hard law from other international rules and norms.”).

85. See *Lusitania Cases* (U.S. v. Ger.), 7 R. Int’l Arb. Awards 32, 39 (Nov. 1, 1923). See also Articles on Responsibility of States for Internationally Wrongful Acts art. 31, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, ch.IV.E.1 (2001) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”); *Am. Mfg. & Trading, Inc. v. Zaire* (Award), ICSID (W.Bank) Case No. ARB/93/1, ¶ 6.21 (1997), 36 I.L.M. 1531, 1551 (“[The compensation amount is] the amount of compensation or indemnification required by international law in order to restore to [claimant] the conditions previously existing as if the events had never occurred or taken place.”); NAFTA, *supra* note 11, art. 1110.

86. See Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, at 243–263, U.N. GAOR, 56th Sess. Supp. No. 10, U.N. Doc. A/56/10, ch.IV.E.2 (2001) (citing, *inter alia*, *Am. Int’l Group, Inc. v. Iran*, Award No. 93-2-3,

legal sanction is arguably no more onerous than the rule itself, a state may comply with the compensation rule not to avoid the legal sanction but rather to avoid nonlegal costs, such as damage to its commercial reputation, loss of diplomatic goodwill, and retaliatory trade sanctions.

Similarly, social norms, even if unaccompanied by legal sanctions for noncompliance, may nonetheless be followed due to the high nonlegal costs of noncompliance. Negotiating parties in an international dispute may observe the intricate social norms that govern diplomatic exchanges in order to avoid the perceived diplomatic slights that may delay the conclusion of a settlement based on common interests. Defining social norms as nonlegal in nature ignores the fundamental role of social norms in the resolution of conflicts, skewing the legal analysis, inaccurately anticipating outcomes, and resulting in policy misappraisals and misguided recommendations.

3. A Policy Approach to Norms

International law scholarship should study all norms, the aggregate consequences that befall participants for compliance or noncompliance, and the resulting behavior of participants. Distinguishing between the purported legal or nonlegal nature of norms frustrates analyses of norm compliance and may suggest false conclusions about how participants react to international problems. Under a policy approach to international law, social norms are part of the international legal system,⁸⁷ and legal norms are a species of social norm.⁸⁸

As a policy matter, norms should be conceptualized not by their legal pedigree, as it were, but by how they secure compliance. Norms are standards of conduct that are accepted by at least some participants in the international system and that secure compliance as a result of three distinct factors. These factors apply in international conflicts with varying intensity and in varying combinations. They are: (1) "compliance pull;" (2) costs and benefits inherent to the norm; and (3) costs and benefits external to the norm.

First, norms secure compliance by exerting an inherent psychological pull towards compliance separate from any benefits of compliance or

4 Iran-U.S. Cl. Trib. Rep. 96 (1983) and *Starrett Hous. Corp. v. Iran*, Award No. 314-24-1, 16 Iran-U.S. Cl. Trib. Rep. 154 (1987), as awards that provide compensation on the basis of "fair market value"; Cheng, *Power, Authority and International Investment Law*, *supra* note 6, at 496-98 (discussing various methods of calculating value of investment).

87. Cf. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS 2* (1999) (arguing that "real law" as opposed to the "law of the state" is found in the interactions of participants in society).

88. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 953 (2005) ("[L]egal rules are a type of social norm, and the forces that strengthen or undermine social norms also strengthen or undermine legal rules.").

costs of noncompliance.⁸⁹ This psychological pull may result from habit or a belief in the moral appropriateness of that norm. States may ratify human rights or environmental treaties even though they may have appalling human rights and environmental protection records.⁹⁰ States may also observe human rights or environmental norms even though it may not be in their interests to constrain their sovereignty. Compliance pull explains the continued vitality of norms with which states comply despite their interests not to comply.

Second, some norms *ipso facto* secure compliance because of costs or withheld benefits *associated with* noncompliance, without any action by other participants or institutions. For example, pilots observe international air traffic rules because ignoring those rules could, without any action from other participants in response, result in accidents. Corporations that are involved in international IP transactions are often contractually bound to share information on the infringement of trademarks owned by or licensed to a joint venture vehicle. They often comply with the contractual rule because withholding that information could deprive them of the benefits that result from successful joint trademark enforcement efforts. In both these examples, the norms themselves secure compliance from a participant independently of any threat of external sanctions that other participants might signal in response to actual or imminent noncompliant behavior.

Finally, compliance with a norm may result when a participant demands it from other participants and deploys power in support of that norm. For example, the United States may demand that China take enforcement measures against copyright infringement in China of artistic works. The United States may use its diplomatic power to communicate its demand and threaten sanctions if China refuses to comply. It may subsequently use its economic power to impose trade sanctions. In such a situation, U.S. power would support the norm against copyright infringement, and the existence of the norm, through its compliance pull, would support the U.S. demand. In other words, power may be deployed in support of a norm, and a norm may legitimize the exercise of power.⁹¹

89. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. INT'L L.* 46, 51 (1992) (explaining normativity in terms of "compliance pull, which is the measure of a rule's legitimacy"); Glennon, *supra* note 88, at 960 (finding that social norms may exert compliance pull).

90. Hathaway, *supra* note 2, at 515–19 (reporting empirical study showing that states with poor human rights and environmental protection records may nonetheless consent to human rights and environmental treaties).

91. Where a norm has inherent costs for noncompliance and benefits for compliance, these considerations would augment the power deployed in support of the norm and the compliance pull of the norm.

Under this concept of norms, a norm is strong in three situations: when it exerts a strong compliance pull, when it inherently provides significant benefits for compliance or imposes significant costs for noncompliance, or when both the compliance pull is strong and the cost-benefit analysis supports compliance. Conversely, a norm is weak when it exerts only limited compliance pull or none at all, and when it inherently fails to provide benefits for compliance or impose costs for deviation. The deployment of power by participants, such as the pursuit of legal or nonlegal enforcement measures against other errant participants, does not determine whether a norm is strong or weak. This is because such power is external to the norm and is contingent upon a participant opting to exercise that power. In other words, availability of legal enforcement measures, counterintuitive as it may seem to some domestic scholars, is not what makes a norm strong. It is instead the inherent compliance pull of a norm, as well as the inherent benefits of compliance and inherent costs of noncompliance.

Finally, while the factors above determine whether a norm is strong or weak, they are not evidence of the power of a norm, in the sense of power as defined in this Article. Power refers to the capacity to deploy resources in support of a preferred outcome.⁹² A norm, being an abstract standard, has neither resources nor the capacity to deploy them. The inherent characteristics of a norm that tend to secure compliance, while important, do not constitute power. Participants have power—norms do not.

III. THEORY OF POWER, NORMS, AND OUTCOMES

International IP law is an evolving phenomenon in which norms, power, and outcomes constantly interact as participants respond to competing claims. In any international IP conflict, a range of outcomes is possible. A participant may unilaterally advocate a particular outcome, or a group of participants with aligned interests may pool their power in support of their claims. In addition to deploying power, participants, acting unilaterally or collectively, may invoke norms that prescribe their preferred outcome in an effort to legitimize and bolster their claims. Opposing participants may deploy their power and invoke opposing norms. Eventually, the conflict is resolved through an outcome that reflects a balance of power and accounts for opposing norms.⁹³ This outcome reallocates power. It may also—either alone or collectively with other outcomes—modify, harmonize, create, or terminate norms. Future con-

92. See *supra* Part II.C.

93. See also CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS, *supra* note 6, at 387–92 (discussing similar typology in state succession).

flicts then lead to new outcomes that reflect these changes in norms and power balances. The following sections discuss each of these stages in the dynamic process of international IP law.

A. Power and Norms Determine Outcomes

Three scenarios explain how the interaction of power and norms determine outcomes in international IP conflicts. In the first category, power is outcome-determinative because the relevant norms are weak. In the second category, both power and norms exert influence over outcomes. This category includes diverse situations in which there is a mix of power vectors and opposing norms. In the third category, norms are outcome-determinative.

1. Outcomes in Which Power is Determinative

The balance of power among participants tends to determine outcomes where norms are weak. Norms may be weak in situations in which no precedent or historical basis for decisionmaking exists. There may be limited compliance pull in these situations, either because participants may not share a common expectation about which existing norms apply to these new situations or because a majority of participants may not draw inherent benefits from complying with proposed norms. For example, power may be outcome-determinative in treaty negotiations concerning IP norms. Participants could invoke preexisting IP norms, but they may not accept these norms universally, and they may acknowledge the lack of consensus on the meaning of these norms during negotiations.

The formation of TRIPS through WTO trade negotiations offers insights into the role of power in international IP negotiations. Developed states sought greater IP protections, and less developed states generally preferred few or no IP protections. Some international norms for the recognition and protection of IP—such as those enumerated in the Berne Convention and the Paris Convention—existed at the time of the TRIPS negotiations, but these norms were weak. They did not exert significant compliance pull because global participants did not universally accept them. IP users, such as developing states, either explicitly rejected such norms or implicitly rejected them by refusing to enforce IP protections domestically. Additionally, developing states did not believe IP protections provided inherent benefits. Rather, they viewed IP protections as increasing the costs of using IP created by other parties and as limiting their access to such IP.

The outcomes in TRIPS negotiations demonstrate how, where IP norms are weak, participants with aligned interests can pool power

against opposing blocs, and how outcomes reflect a balance of power. In 1986, the United States, Japan, and Western European states, which were all IP-creating states, implicitly or explicitly cooperated with each other to include IP protections in multilateral trade negotiations. They applied pressure on other states to accept IP as an agenda item in the Uruguay Round.⁹⁴ When Thailand, Mexico, and Brazil opposed placing IP on the agenda,⁹⁵ the United States deployed economic power and imposed trade sanctions on Brazil under the Omnibus Trade and Competitiveness Act of 1988.⁹⁶ These sanctions signaled to developing states that if they did not agree to multilateral IP engagement, the United States was willing to enter into bilateral IP talks under the threat of trade sanctions.⁹⁷ This strategy played a key role in placing IP on the Uruguay Round agenda.⁹⁸

International and nongovernmental organizations representing IP creators also cooperated to increase IP protections. The Organization for Economic Cooperation and Development invoked the norms contained in the Berne and Paris Conventions, arguing that these norms were universally applicable and should be contained in any agreement concerning IP that emerged from the Uruguay Round.⁹⁹ IP groups from North America, Western Europe, and Japan (such as the Intellectual Property Committee in Washington, the Union of Industrial and Employers Confederation of Europe, and the Japanese Keidanren) applied pressure on

94. See Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. PA. J. INT'L ECON. L. 535, 564 (1998) ("Through U.S. leadership and the cooperation of the governments of Europe, Japan, and some of the developing countries, the GATT Uruguay Round multilateral trade negotiations . . . became in the late 1980s and 1990s the forum for international intellectual property negotiations.").

95. See Statement by Thailand at the Meeting of 12–14 September 1988, *NG TRIPS*, MTN.GNG/NG11/W/27 (Sept. 21, 1988) (expressing concern regarding the agenda); Statement by Mexico, *supra* note 36 (emphasizing that the agenda should focus on trade rather than restructuring the international property regime); Communication from Brazil, *NG TRIPS*, MTN.GNG/NG11/W/57 (Dec. 11, 1989) (emphasizing the need to consider both trade and intellectual property rights).

96. 19 U.S.C. § 2901 (1998).

97. See Ryan, *supra* note 94, at 542, 563. ("The USTR pursued an aggressive Special 301 diplomacy throughout the eight years of the Uruguay Round to keep countries at the table . . . [signaling] that negotiations could go on one-by-one under threat of bilateral trade sanction or could take place within the GATT MTN round, but that they would take place nevertheless.").

98. See *id.* ("The 301 bullying gambit worked . . ."); Adam Issac Hasson, Note, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT'L & COMP. L. REV. 373, 388 (2002) ("TRIPs has been criticized as the direct result of a coercive strategy on behalf of the United States to force underdeveloped countries to pass laws that would protect U.S. patents.").

99. See Ryan, *supra* note 94, at 564 ("The Organization for Economic Development and Cooperation converged toward a consensus that the TRIPs Agreement ought to incorporate the Paris Convention and the Berne Convention.").

their governments' trade negotiators to promote stronger IP protections. In June 1988, these groups produced a draft Basic Framework of GATT Provisions on IP.¹⁰⁰

In response, IP users pooled their power at the Uruguay Round to oppose the stronger IP protections. Some less developed countries formed a group called the "G-10," comprising Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and the Federal Republic of Yugoslavia. The G-10 states were concerted in their opposition to even placing IP on the Uruguay Round agenda.¹⁰¹ Even after consensus was reached with other Uruguay Round participants that IP should be on the agenda, India, representing the G-10, argued that only trademark and copyright counterfeiting should be included in negotiations and that patents and trade secrets should be excluded.¹⁰² In 1988, India and Brazil denounced the draft Basic Framework of GATT Provisions on IP and its proposed patent protections for drugs, food, and chemicals.¹⁰³

The outcome of this conflict reflected the balance of power between IP-producing states and IP-using states. IP-producing states used their economic power to introduce treaties in which they would grant trade benefits in exchange for stronger IP protections. IP-using states had the power to withhold consent to any agreement,¹⁰⁴ and they used this power to extract economic concessions. In 1994, member states of the WTO concluded TRIPS. TRIPS generally recognizes patents for inventions¹⁰⁵ and prohibits the use of patents without the owner's consent.¹⁰⁶ The rules are subject to exceptions such as medical treatments and biological processes for the production of plants and animals,¹⁰⁷ which developing states

100. See *id.* at 565; Gail E. Evans, *Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, WORLD COMPETITION, Dec. 1994, at 165.

101. See Ryan, *supra* note 94, at 562.

102. Evans, *supra* note 100, at 162.

103. See Ryan, *supra* note 94, at 565; Evans, *supra* note 100, at 166.

104. See Marco C.E.J. Bronckers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO*, 2 J. INT'L ECON. L. 547, 548-49 (1999) (arguing that trade concessions were necessary to conclude TRIPS); Guzman, *supra* note 28, at 950 ("The ultimate decision by developing countries to consent to TRIPS was not motivated by a belief that greater protection for IP was in the interest of those countries; but rather by a desire to obtain concessions in other areas.").

105. TRIPS, *supra* note 10, art. 27.1.

106. *Id.* art. 26.

107. *Id.* art. 27.3.

regarded as important.¹⁰⁸ TRIPS also requires member states to provide domestic mechanisms for the enforcement of IP protections.¹⁰⁹

Power may also be outcome-determinative in parallel legal proceedings. In an international conflict over whether a corporation has infringed patents registered in different states by another corporation, TRIPS may not be at issue if each of these states adheres to the minimum standards of IP protection prescribed in TRIPS. If the two corporations seek domestic adjudication under the legal rules of the respective national jurisdictions,¹¹⁰ the rulings of national courts may be binding in the domestic context, but they may not extend to the international arena or other jurisdictions.¹¹¹ Should the parties to the IP conflict pursue litigation in all of these jurisdictions, the courts in each may demand that other courts comply with their decisions, or they may enjoin the litigants from pursuing parallel proceedings.¹¹² Depending on the domestic legal rules regarding comity, issue preclusion, estoppel, and other similar doctrines, other courts may decide to comply with or ignore such demands.¹¹³ Should domestic courts refuse to comply with demands

108. See Peggy B. Sherman & Ellwood F. Oakley, III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 AM. BUS. L.J. 353, 372 (2004) (noting that Brazil sought access to other states' domestically manufactured generic drugs through compulsory license).

109. TRIPS, *supra* note 10, art. 41.1.

110. See, e.g., *Packard Instrument Co. v. Beckman Instruments, Inc.*, 346 F. Supp. 408, 408 (N.D. Ill. 1972) (noting that plaintiff brought patent infringement actions in nine different countries); *Connaught Labs. Ltd. v. Medeva Pharma Ltd.*, No. TT-1578-96, 94 A.C.W.S. (3d) (1999), 1999 A.C.W.S.J. LEXIS 27479 (Can. Fed. Ct. Trial Div.) (noting plaintiff was involved in the patent disputes over the same vaccine in Canada, the United States, the United Kingdom, and Europe).

111. See *Packard Instrument Co.*, 346 F. Supp. at 410 ("It is not unlikely that courts in the foreign countries whose patents are involved here would disagree with this court's determinations on the validity of patents."); *Sepracor Inc. v. Hoechst Marion Russel*, (1999) F.S.R. 746 (Ch.) (Eng.) (holding claims of infringements of patents of the same drug in twelve foreign countries nonjusticiable).

112. See, e.g., *Creative Tech. Ltd. v. Aztech Sys. Pte. Ltd.*, 61 F.3d 696 (9th Cir. 1995) (declining to hear copyright claims where parallel proceedings had commenced in Singapore); *Johnson & Johnson, Inc. v. Boston Scientific Ltd.*, 2001 F.C.T. 880 (Can. Fed. Ct. 2001) (holding that plaintiffs were estopped from alleging patent infringement in Canada as a result of prior proceedings in England and the Netherlands).

113. Compare *Glaverbel Societe Anonyme v. Northlake Mktg. Supply, Inc.*, 48 U.S.P.Q. 2d (BNA) 1344 (N.D. Ill. 1998) (enforcing the judgment of a Belgian court that a U.S. corporation had violated Belgian patents held by a Belgian corporation) with *Cuno Inc. v. Pall Corp.*, 729 F. Supp. 234 (E.D.N.Y. 1989) (holding that an English court's determination that there was no infringement of a European patent of an invention that was also patented in the United States did not estop the U.S. court from determining whether there was an infringement of the U.S. patent). Compare *Kirin-Amgen, Inc. v. Hoffman-La Roche Ltd.*, [1999] 87 C.P.R. (3d) 1 (holding that Australian and European decisions concerning the same patent dispute had no precedential value in Canada) with *Johnson & Johnson, Inc. v. Boston Scientific Ltd.*, 14 C.P.R. (4th) 512 (holding that plaintiffs were estopped from alleging patent infringement in Canada as a result of prior proceedings in England and the Netherlands). See

made by courts in other jurisdictions, the final international outcome may reflect the relative powers of these courts and the location of the assets of the parties in the IP conflict.

2. Conflicts in Which Both Power and Norms Are Influential

Outcomes may reflect power and norms in IP conflicts where both are influential. Such situations arise when different power blocs back opposing norms. Where there are two strong norms in opposition, the power of participants backing each of those norms may play a role in harmonizing those norms or determining which norm should apply when they cannot be reconciled.

In February 2001, the United States and Brazil disagreed over whether Brazil should be permitted to control the price of Human Immunodeficiency Virus (HIV) drugs that U.S. corporations had patented. The United States brought an action against Brazil before the WTO Dispute Settlement Body claiming that Article 68 of Brazil's Law No. 9,279, its industrial property law, violated TRIPS.¹¹⁴ Article 68 required patent holders to manufacture the patented product in Brazil. If they failed to do so, they could be subjected to compulsory licensing, or Brazil could import generic versions of the patented products.¹¹⁵ Brazil used this law to produce medicines locally and cheaply to treat its half-million patients with HIV or AIDS.¹¹⁶

In this conflict, there were at least two opposing applicable norms. First, the norm of IP protection permitted drug producers to exploit the exclusive rights over their patented drugs. In November 2001, the WTO Ministerial Conference in Doha declared that TRIPS did not prevent member states from taking measures to protect human life, and that TRIPS should be implemented in a manner supportive of public health. At the time of the U.S.-Brazil conflict in February 2001,¹¹⁷ however, the WTO had not limited the TRIPS norm of IP protection in this way. Second, in international law, a more general human rights norm protected

also generally Philip L. McGarrigle, *The Role of Foreign Judgments in Patent Litigation: A Perspective and Strategic Overview*, 39 IDEA 107, 109 (1998) (stating that the law on preclusion as regards patents is unsettled).

114. Request for Establishment of a Panel by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/3 (Jan. 9, 2001).

115. *Id.* (explaining Article 68 of Brazil's industrial property law).

116. See Hoen, *supra* note 23, at 32 (noting Brazil's success in lowering the price of HIV drugs in Brazil through compulsory licensing under Article 68 of its patent law).

117. World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001, ¶ 4, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

the right to health care.¹¹⁸ Some participants claimed that this norm permitted governments facing public health emergencies to distribute medicines widely through measures such as compulsory licensing and the production or importation of generic drugs.

Both sides deployed power to reconcile these two norms. The United States sought to harness the power of the WTO Dispute Settlement Body to determine whether TRIPS provided limitations to IP protection in public emergencies. But before the WTO panel could rule on the matter, international NGOs pooled their power to promote the view that the norm of IP protection should be limited during public health emergencies. They asserted that the U.S. action would undermine Brazil's successful AIDS program and prevent it from serving as a model for other developing states.¹¹⁹ Under such international pressure, the United States withdrew its claim within four months of filing it.¹²⁰ The only concession the United States obtained was Brazil's agreement to consult the United States before implementing any compulsory licensing of patented drugs produced by U.S. corporations.¹²¹ It was thus immaterial whether the United States would have prevailed on its WTO claim because NGO power helped achieve an outcome that prevented the adjustments of the IP norm with the human rights norm through adjudication. In the NGO-engineered outcome, Brazil was effectively permitted to continue its HIV treatment program irrespective of whether the patents for HIV drugs were held by U.S. pharmaceutical corporations.

3. Outcomes in Which Norms Are Determinative

Norms may sometimes control outcomes despite the power of the participants in IP conflicts. This occurs where the norms exert a strong

118. See, e.g., Hoen, *supra* note 23, at 38–39 (noting that the “African Group” claimed that nothing in TRIPS should prevent states from taking measures to protect public health); U.N. Charter Preamble; Universal Declaration of Human Rights, G.A. Res. 217A, at 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); International Convention on Economic, Social and Cultural Rights, G.A. Res. 2200A, art. 12, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (*entered into force* Jan. 3, 1976).

119. See, e.g., Press Release, Médecins Sans Frontières, U.S. Action at WTO Threatens Brazil's Successful AIDS Programme (Feb. 1, 2001), <http://www.accessmed-msf.org/prod/publications.asp?scntid=2182001228232&contenttype=PARA&>; Hoen, *supra* note 23, at 33 (“The U.S. action came under fierce pressure from the international NGO community, which feared it would have a detrimental effect on Brazil's successful AIDS program.”).

120. See Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS/199/4 (July 19, 2001) (notifying the Dispute Settlement Body of reaching a solution and the intention of the United States to withdraw its claim against Brazil). See also Helene Cooper, *U.S. Drops WTO Complaint Against Brazilian Patent Law*, WALL ST. J., June 26, 2001, at B7.

121. Notification of Mutually Agreed Solution, *Brazil—Patent Protection*, *supra* note 120 (noting Brazil's agreement to consult the United States before implementing compulsory licensing of patented drugs produced by U.S. companies).

compliance pull, confer inherent benefits for compliance or impose inherent costs for noncompliance, are backed by external power, or where a combination of these three factors are present.

Although the United States is a powerful participant, in the two IP conflicts in which other states filed and won WTO actions against the United States, it agreed to amend its domestic law to conform to the applicable global IP norms. These global IP norms included two different sets of norms: (1) the substantive IP norms as determined by the WTO tribunals, and (2) the ancillary norm of compliance with the IP decisions of WTO tribunals. In the *United States—Section 110(5) Copyright Act* case, the WTO panel found that Section 110(5)(B) of the Copyright Act, which allowed free amplification of music broadcasts by certain food service and drinking establishments and retail establishments, violated TRIPS Article 13, which provides for only limited exceptions to the exclusive rights of copyrights holders.¹²² The United States then informed the WTO tribunal that it accepted the decision and would implement measures to bring its Copyright Act in conformity with TRIPS. In the *United States—Section 211 Omnibus Appropriations Act of 1998* case, the WTO Appellate Body found that the prohibition by the United States on the registration of trademarks abandoned by Cuban mark holders whose assets and business had been confiscated under Cuban law discriminated against the Cuban mark holders and their successors-in-interest.¹²³ The Appellate Body found that such discrimination violated the national treatment, that is, nondiscrimination, norm in Article 3(1) of TRIPS and Article 2(1) of the Paris Convention as incorporated into TRIPS and the WTO Agreement.¹²⁴ Once again, the United States accepted the decision and agreed to amend its domestic law to conform with it.

That the U.S. government opted to comply with these decisions is testimony to the strength of TRIPS norms. Three factors account for the strength of these norms. First, the U.S. government may, broadly speaking, believe that the substantive IP norms and the adjudicatory norms in TRIPS and the WTO Agreement are normatively desirable, and they therefore exert some compliance pull over the government.

Second, and more importantly, the United States and U.S. entities derive significant inherent benefits from the TRIPS norms and WTO enforcement of them. As of July 30, 2006, the United States had brought

122. Communication from the United States, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/9 (Aug. 31, 2000); Panel Report, *U.S.—Section 110(5) Copyright*, WT/DS160/R (June 15, 2000).

123. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶¶ 268, 354, WT/DS176/AB/R (Jan. 2, 2002).

124. *Id.*

fifteen cases against other states for alleged violations of TRIPS norms, compared with the two in which it was the respondent. The United States settled twelve cases¹²⁵ and won three.¹²⁶ Thus, TRIPS norms and WTO adjudicatory norms secure compliance from the United States because the WTO/TRIPS system provides a platform for the United States to enforce its preferred norms against other states.

Third, under the applicable TRIPS adjudicatory norms, complainants may impose trade sanctions for noncompliance with the decisions of WTO panels. The complainant in both *U.S.—Section 211 Omnibus* and *U.S.—Section 110(5) Copyright* was the European Communities (EC), which certainly had sufficient economic power to enforce TRIPS norms through sanctions.

Thus, the combination of the compliance pull of TRIPS norms, the inherent interests of the United States in supporting TRIPS and WTO adjudication, and the power of the EC to enforce the WTO decisions through trade sanctions explains how TRIPS norms may secure compliance in spite of the power of the United States.

This does not mean, however, that the power of the United States did not influence the outcomes. Quite the contrary. The United States has not exercised its power to deviate openly from TRIPS norms, but it has deployed its power to delay the implementation of TRIPS decisions. Article 21.3

125. See Notification of a Mutually-Agreed Solution, *Portugal—Patent Protection under the Industrial Property Act*, WT/DS37/2 (Oct. 8, 1996); Notification of a Mutually-Agreed Solution, *Japan—Measures concerning Sound Recordings*, WT/DS28/4 (Feb. 5, 1997); Notification of a Mutually-Agreed Solution, *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36/4 (Mar. 7, 1997); Notification of a Mutually-Agreed Solution, *Sweden—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS86/2 (Dec. 11, 1998); Notification of a Mutually-Agreed Solution, *European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/3 (Sept. 13, 2002); Notification of a Mutually-Agreed Solution, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television*, WT/DS125/2 (Mar. 26, 2001); Notification of a Mutually-Agreed Solution, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/2 (Mar. 26, 2001); Notification of a Mutually-Agreed Solution, *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WT/DS83/2 (June 13, 2001); Notification of a Mutually-Agreed Solution, *Brazil—Patent Protection*, WT/DS199/4 (July 19, 2001); Notification of a Mutually-Agreed Solution, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WT/DS171/3 (June 20, 2002); Notification of a Mutually-Agreed Solution, *Argentina—Certain Measures on the Protection of Patents and Test Data*, WT/DS196/4 (June 20, 2002); Notification of a Mutually-Agreed Solution, *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS82/3 (Sept. 13, 2002).

126. See Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997); Panel Report, Attachment 1.1: First Submission by the United States, *Canada—Term of Patent Protection*, WT/DS170/R (May 5, 2000); Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005).

of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* provides that parties shall implement decisions within a “reasonable period of time.”¹²⁷ In practice, the parties will often try to reach agreement on a timetable for implementation, but where consensus cannot be achieved, the parties may seek an arbitral decision on a time limit for implementing the decision. Of the three TRIPS disputes the United States won, the United States and the losing party reached an agreement on the period of time for implementation in two cases.¹²⁸ In the third dispute, the United States obtained an arbitral decision setting the time limit.¹²⁹ The maximum time for implementation in these cases has been fifteen months,¹³⁰ with an average of twelve months.¹³¹ The United States has argued that the losing states should amend their domestic legislation to comply with TRIPS norms within aggressive timelines, and has stated that “the legally binding nature of . . . steps for implementation and their timing, [or] the existence of domestic controversy or ‘contentiousness’ [should] not [be] relevant factor[s]” in determining a reasonable period of time for implementation.¹³²

By comparison, as of July 31, 2006, the United States still had not implemented the decision in the *U.S.—Section 211 Omnibus* case, which was decided on February 2, 2002. Although the United States reached a temporary settlement with the EC in the *U.S.—Section 110(5) Copyright* case for a three-year period commencing on December 21, 2001,¹³³ it had yet to fully implement the WTO panel’s decision. That case was decided on July 27, 2000.¹³⁴ In both these cases, the United States repeatedly promised to implement the decisions by amending its legislation within six to twelve months, but on each occasion that the time period was about to expire, the United States negotiated with the EC and other inter-

127. DSU, *supra* note 46, art. 21.3.

128. *See, e.g.*, Agreement under Art. 21.3(b) of the DSU, *EC—Agricultural Products*, WT/DS174/24 (Jun. 13, 2005); Status Report by India, *India—Pharmaceutical Products*, WT/DS50/10 (Nov. 12, 1998).

129. Arbitration Award, *Canada—Patent Protection*, WT/DS170/10 (Feb. 28, 2001).

130. Status Report by India, *India—Pharmaceutical Products*, *supra* note 128.

131. Agreement under Art. 21.3(b) of the DSU, *EC—Agricultural Products*, *supra* note 128 (interested parties agreement to implementation within eleven months and two weeks was reasonable); Status Report by India, *India—Pharmaceutical Products*, *supra* note 128 (interested parties agreed fifteen months was a reasonable period of time for implementation); Arbitration Award, *Canada—Patent Protection*, *supra* note 129, ¶ 67 (noting the arbitrator decided a reasonable period of time to implement the changes was ten months).

132. *See* Arbitration Award, *Canada—Patent Protection*, *supra* note 129, ¶ 26.

133. Mutually Satisfactory Temporary Arrangement, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2006).

134. *See* Status Report by the United States, *U.S.—Section 110(5) Copyright*, Addendum, WT/DS160/24/Add.19 (July 6, 2006) [hereinafter U.S. Copyright Act Status Report].

ested parties for a further extension in order to pursue legislative amendments in Congress.¹³⁵ On July 7, 2006, the U.S. administration again reported to the WTO that it was continuing to work with the U.S. Congress to resolve these two matters.¹³⁶ This example highlights the vast difference in the time that the United States negotiates for implementation of domestic TRIPS reform in other states and the time the United States insists upon for its own domestic reform. It indicates that even when IP norms are strong enough to secure promises of compliance from a powerful participant, power still matters in crucial ancillary matters, such as the time it takes such participants to meet their promises.

B. Outcomes Shape Norms

The outcomes of IP conflicts that result from the interactions of power and IP norms can create, modify, harmonize, or terminate IP norms. Outcomes may have a constitutive effect on IP norms in a combination of ways. First, a *normatively legitimate outcome* may modify an old norm where participants reach an outcome that deviates from that norm in order to better promote or harmonize relevant global policy goals, and where the old norm does not achieve a relevant policy goal or an optimal balance among policy goals. Examples of such harmonization include the balancing of IP protection against IP access, or the balancing of exclusive rights of IP holders against the human rights of IP users. An inherently legitimate outcome may modify preexisting norms in favor of that outcome if participants accept the modification as normatively desirable, if the new norms promote their interests, or if other participants deploy power in support of the modified norms.

Second, an *institutionally legitimate outcome* may modify norms if the outcome that deviates from or clarifies preexisting norms was prescribed by a participant that other participants consider a legitimate norm-making institution. Such institutions could include the WTO Ministerial Conference, the WTO Dispute Settlement Body, or the European

135. See Modification of the Agreement under Article 21.3 of the DSU, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/12 (Jan. 7, 2003) [hereinafter 211 Omnibus Modification] (extending the time for implementation from December 31, 2002 to June 30, 2003); 211 Omnibus Modification, WT/DS176/13 (July 3, 2003) (extending the time for implementation until December 31, 2003); 211 Omnibus Modification, WT/DS176/14 (Dec. 24, 2003) (extending the time for implementation until December 31, 2004); 211 Omnibus Modification, WT/DS176/15 (Dec. 21, 2004) (extending the time for implementation until June 30, 2005); Recourse by the European Communities to Article 22.2 of the DSU, *U.S.—Section 110(5) Copyright*, WT/DS160/19 (Jan. 7, 2002) (noting that arbitration set the reasonable time for implementation as July 26, 2001, and the Dispute Settlement Body extended that to December 31, 2001).

136. See U.S. Copyright Act Status Report, *supra* note 134; Status Report by the United States, *U.S.—Section 211 Omnibus*, Addendum, WT/DS176/11/Add.44 (July 6, 2006).

Court of Justice (ECJ). An institutionally legitimate outcome may modify preexisting norms if participants accept that the institution's prescriptions apply to future conflicts,¹³⁷ if the global decision-making structure in which the institution is preeminent supports the interests of the participants, or if the institution or other participants deploy power in support of the institution's decisions.

Third, a *repetitive outcome* may modify norms when, in similar types of conflicts over time, each conflict is resolved in the same fashion. If IP outcomes deviate from IP norms and repeatedly tend to cluster around a new outcome, participants may become persuaded that the new outcome is more desirable, and their expectations of conflict resolution may converge around the new outcome. Consequently, the costs of negotiating outcomes that deviate from this new outcome increase in future conflicts. Additionally, participants may deploy their power in support of the repetitive outcome, which makes it more difficult for participants to deviate from the new preferred outcome.¹³⁸ Over time, IP norms supporting the old outcome may be replaced by a norm in support of the new preferred outcome.¹³⁹

The three case studies below illustrate how outcomes in an IP conflict may modify norms through a combination of the three types of outcomes, or, indeed, how a single outcome may in fact fall into all three categories of constitutive outcomes.

1. The Global HIV Crisis

The global response to the HIV crisis in Africa and South America demonstrates how a combination of normatively legitimate, institutionally legitimate, and repetitive outcomes can modify and harmonize norms. Opposing norms in the HIV crisis were, on the one hand, norms

137. See, e.g., Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 13, WT/DS8/AB/R (Nov. 1, 1996) (stating that “adopted panel reports are an important part of the GATT *acquis*” that shape the WTO’s jurisprudence). See also Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 46, WT/DS50/AB/R (Dec. 19, 1997) (deciding a dispute inconsistently with “established GATT/WTO practice”). Cf. GOLDSMITH & POSNER, *supra* note 1, at 161 (“Reliance on judges makes sense when issues are complex and require expertise, independence can be guaranteed, and states anticipate a continuing interest in the maintenance of the regime.”).

138. Cf. Spiro, *supra* note 2, at 458 (“Ideas matter, and at some tipping point—resulting in a norm cascade—states perceive conformity with certain standards as necessary element to their identity as states.”); Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1846 (2002) (“[C]entral to ideationalist theory are ‘norm cascades,’ collections of norm-affirming events that lead states rapidly to conform their conduct to international standards.”).

139. See generally Finnemore & Sikkink, *supra* note 2 (describing the norm “life cycle”).

protecting exclusive use of patented drugs and, on the other hand, norms protecting human life and the right to health care.

When TRIPS came into force in 1994, it did not appear to fully accommodate human rights norms. Instead, it appeared to promote, with few limitations, the norm that IP holders should have exclusive use of their IP, and non-IP holders should not limit this exclusive use through compulsory licensing or the production of generic versions of the IP. One consequence of adhering strictly to this norm was that HIV sufferers in less developed states were denied access to affordable HIV drugs.

Outcomes in HIV-related IP disputes from 1994 to 2001 modified or clarified the IP norms in TRIPS as they had appeared when TRIPS first came into force, ultimately harmonizing them with human rights norms. In 1998, forty multinational pharmaceutical corporations brought a claim before the South African courts against the South African government alleging that the South African Medicines and Related Substances Control Amendment Act, No. 90 of 1997, violated TRIPS by allowing parallel imports and generic substitution of medicines.¹⁴⁰ In response to the Act, the European Union (EU) deployed diplomatic power in urging South Africa to repeal the law,¹⁴¹ and the U.S. government deployed its economic power by withholding aid and threatening sanctions.¹⁴²

However, as HIV/AIDS in South Africa reached epidemic proportions,¹⁴³ it became clear to policymakers and NGOs that, without access to HIV medicines, South Africa would face a debilitating public health crisis.¹⁴⁴ This crisis could have economic and epidemiological contagion effects on neighboring states and could destabilize the African conti-

140. Pharm. Mfrs. Ass'n of S. Afr. v President of the Republic of S. Afr., (4) SA 788 (T.P.D.) at 788–89 (S. Afr.).

141. See Hoen, *supra* note 23, at 31, n.11 (citing letter by the European Commission Vice President to the South African Vice President asserting that South Africa's law violated TRIPS).

142. See Omnibus Consolidated and Emergency Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681 (1999) (withholding aid to South Africa in response to the Act); Simon Barber, *US Withholds Benefits over Zuma's Bill*, BUS. DAY (S. Afr.), July 15, 1998, at 13; Kara M. Bombach, *Can South Africa Fight AIDS? Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement*, 19 B.U. INT'L L.J. 273, 280 (2001) (noting that the United States threatened trade sanctions if South Africa passed the Medicines and Related Substances Act); Hoen, *supra* note 23, at 30–31 (noting the U.S. government's threats to impose trade sanctions supported U.S. pharmaceutical companies in patent litigation in South Africa).

143. See SOUTH AFRICA DEPARTMENT OF HEALTH, NATIONAL HIV AND SYPHILIS SERO- PREVALENCE SURVEY OF WOMEN ATTENDING PUBLIC ANTENATAL CLINICS IN SOUTH AFRICA: 2001 9 (noting that HIV prevalence increased from 0.7% in 1990 to 24.8% in 2001).

144. See Winston P. Nagan, *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 FLA. J. INT'L L. 155, 158 (2002) (noting that South Africa is facing a public health crisis due to HIV/AIDS infections).

ment.¹⁴⁵ The threat of such a cataclysmic event was sufficient to mobilize NGOs and AIDS activists to apply pressure on the U.S. government to moderate its demand for strong drug patent protections. AIDS activists and NGOs heavily criticized the U.S. government and directly attacked presidential candidate Al Gore at his election rallies.¹⁴⁶

As a result of domestic and international pressure created by the broad campaign of the NGOs at the WTO Seattle Conference in 1999,¹⁴⁷ the U.S. government announced that its profit-maximizing policy would be tempered by the need to provide access to life-saving drugs in less developed countries.¹⁴⁸ In May 2000, President Clinton issued an executive order accepting compulsory licensing to increase access to HIV medication in sub-Saharan Africa.¹⁴⁹ The U.S. government and the EU also withdrew support for their corporations' lawsuit in South Africa.¹⁵⁰ The corporations terminated their suit unconditionally in April 2001.¹⁵¹

The outcome of this South Africa conflict harmonized the IP norm with the human rights norm because it was an inherently legitimate outcome. Participants such as NGOs, the EU, and the United States seemed to recognize that as a policy matter it was untenable to protect the drug revenues of pharmaceutical companies if that meant HIV sufferers in underdeveloped states would die. The outcome was also constitutive because the U.S. government and the EU had deployed their considerable power in support of the outcome and signaled, through the

145. See Thomas K. Mirabile, *Aids, Africa, and Access to Medicines*, 11 MICH. ST. U.-D.C.L. J. INT'L L. 175, 218 (2002) (arguing that the prohibitive cost of pharmaceuticals to treat HIV/AIDS was a serious impediment to the treatment and prevention of the spread of AIDS throughout South Africa and the rest of the continent).

146. See Simon Barber, *Activists Accuse the US of Blocking Access to Drugs*, BUS. DAY (S. Afr.), Apr. 19, 1999, at 6; Hoen, *supra* note 23, at 31 (describing attacks on Al Gore).

147. See, e.g., Susan K. Sell, *Post-TRIPs Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 FLA. J. INT'L L. 193, 209-10 (2002) (discussing disruptions of Vice President Gore's campaign appearances by ACT-UP, the U.S. AIDS activist group, in support of the South African Medicines Act and the manufacturing of generic versions of HIV/AIDS drugs for South African AIDS victims); Debora Halbert, *HIV/AIDS and the Global Community: Moralized Discourses: South Africa's Intellectual Property Fight For Access to AIDS Drugs*, 1 SEATTLE J. SOC. JUST. 257, 273 (2002) (describing ACT-UP's efforts in support of South Africa as "especially influential" on the United States' decision to change its approach toward HIV/AIDS patent violations).

148. William J. Clinton, Remarks at a World Trade Organization Luncheon in Seattle, 35 WEEKLY COMP. PRES. DOC. 2494, 2497 (Dec. 1, 1999) ("[T]he United States will henceforth implement its health care and trade policies in a manner that ensures that people in the poorest countries won't have to go without medicine they so desperately need.").

149. See Exec. Order No. 13,155, 65 Fed. Reg. 30,521, §§ 1, 3 (May 10, 2000).

150. See Hoen, *supra* note 23, at 31 ("[S]everal governments and parliaments around the world, including the European Parliament, demanded that the companies withdraw from the case.").

151. *Id.* ("Eventually, the strong international public outrage . . . caused the companies to unconditionally drop the case."); Sell, *supra* note 147, at 213-14.

executive order and other statements, that corporations should accept this outcome. To some observers, this deployment of power “contributed to breaking the taboo on the use of compulsory licensing in the health field.”¹⁵² Indeed, as discussed fully in Part III.A.1, *supra*, the U.S. government terminated its claim against Brazil in July 2001 due to pressure from NGOs, effectively permitting compulsory licensing of HIV drugs in Brazil. This outcome was normatively legitimate for reasons similar to those in the South Africa conflict. It also repeated the South Africa outcome, thereby further strengthening the emerging norm that IP protection should be limited in public health emergencies.

A third institutionally legitimate outcome—the WTO Ministerial Declaration at Doha—reinforced these two normative outcomes. In November 2001, NGOs, international organizations such as the World Health Organization, some developed states such as Canada, and various less developed countries pooled their power in coordinated efforts to lobby other WTO members to formally incorporate human rights norms into the IP-protecting norms in TRIPS.¹⁵³ Under pressure from this broad range of participants, WTO members agreed to a Ministerial Declaration at Doha, which stated: “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health,” and that TRIPS “should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health”¹⁵⁴ The Doha Declaration also extended the deadline for least developed countries to implement drug patent protections from 2006 to 2016.¹⁵⁵ The Doha Declaration was an institutionally legitimate outcome because it was promulgated within the WTO framework. Ministerial Conferences are the apex of decisionmaking within the WTO.¹⁵⁶ Decisions of the Ministerial Conferences are communicated through Ministerial Declarations, and member states support this decision-making structure as legitimate by virtue of having signed the Agreement Establishing the World Trade Organization. In this sense, the Doha Declaration helped integrate the norm of IP protection with human rights norms.

152. See, e.g., Hoen, *supra* note 23, at 35 (“[T]his [U.S.] policy change contributed to breaking the taboo on the use of compulsory licensing in the health field.”).

153. See Ryan, *supra* note 94, at 566; Hoen, *supra* note 23, at 42 (“[D]eveloping country [WTO] Members were extremely well prepared and operated as one bloc.”); Ansari, *supra* note 28, at 60 (“The opposition to TRIPS was led by two major civil society movements: the agricultural life forms patents groups, and the pharmaceutical patents groups.”); Hoen, *supra* note 23, at 34 (discussing NGO efforts to organize the Amsterdam Conference on Increasing Access to Essential Drugs in a Globalized Economy, which resulted in an “Amsterdam Statement” that served as a guide for other public health NGOs); Helfer, *supra* note 4, at 45–50.

154. Doha Declaration, *supra* note 117, ¶ 4.

155. *Id.* ¶ 7.

156. DSU, *supra* note 46, at 1145.

The South Africa, Brazil, and Doha outcomes together contributed to the adjustment of IP norms to accommodate the normative demands of global public health. Although each outcome had some normative impact on preexisting norms, no single outcome alone was constitutive. The South Africa and Brazil outcomes were inherently legitimate outcomes, but they did not have institutional legitimacy because they were not endorsed by an international IP norm-making body. The Doha outcome had institutional legitimacy, but it may not have been reached had the South Africa and Brazil conflicts not precipitated broad support for the application of human rights norms to drug patent conflicts.

The adjustment of IP norms in response to the HIV crisis is not complete. The adjustments that have occurred and continue to occur take place within a global project to harmonize IP norms with other norms, including trade norms. Following Doha, some participants have continued to resist the weakening of IP protections.¹⁵⁷ The consensus at Doha was not repeated at the 2003 Cancun Ministerial Meetings, during which talks broke down.¹⁵⁸ Although member states reaffirmed their commitment to the Doha Declaration at the Hong Kong Ministerial Conference in 2005,¹⁵⁹ Doha trade talks were suspended in July 2006 because the United States was unable to agree with other states on the issue of farming subsidies.¹⁶⁰ In this manner, disputes over other trade norms in the Doha Declaration prevented the further refinement of IP norms contained in TRIPS. Against this backdrop of trade negotiations, the WTO General Council reached a decision in December 2005 to amend TRIPS to explicitly permit the compulsory licensing of drugs under certain circumstances. WTO member states have until December 1, 2007, to consent to this amendment,¹⁶¹ which requires the support of two-thirds of WTO members for entry into force.¹⁶²

157. See *TRIPS and Health Talks Deadlock in the WTO as U.S. Takes Hard Line*, INSIDE U.S. TRADE, Nov. 29, 2002, at 16 (noting U.S. objections to proposals to amend TRIPS to allow exports of generic drugs to any countries suffering a public health emergency).

158. See Helfer, *supra* note 4, at 68 (“[The collapse of trade talks at the Cancun ministerial meeting in September 2003] . . . has considerably slowed the pace of negotiations and . . . may even cast into doubt the successful conclusion of the Doha Round.”)

159. See World Trade Organization, Ministerial Declaration of 18 December 2005, ¶¶ 1, 40, 47, WT/MIN(05)/DEC (2005).

160. See Peter Mandelson, EU Trade Commissioner, Statement to the Press on the Suspension of WTO Doha Negotiations (July 24, 2006), http://www.europa-eu-un.org/articles/en/article_6133_en.htm.

161. General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 6, 2005).

162. *Id.*

2. Three-Head Rotary Shavers

From 1997 to 2004, a number of disputes arose within the EU about whether three-head rotary shavers could be trademarked. Through the resolution of these disputes, a norm emerged reflecting a consensus that such shavers could not be trademarked unless the three-head design served a purely aesthetic function. This norm resulted from a series of outcomes before courts that were both institutionally legitimate and repetitive.

Koninklijke Philips Electronics N.V. (Philips) had registered its three-head rotary shaver design as a trademark in several jurisdictions within the EU and subsequently brought enforcement actions in these jurisdictions against Remington for infringing its trademarks. A common issue in these actions was whether Philips' three-head design was a registrable trademark. Philips argued that although its design served the novel technical function of achieving a closer shave, it was also a distinctive design deserving trademark protection.

Initially, the national courts reached inconsistent outcomes. A majority of the Stockholm District Court held that a design that achieved a technical purpose could nonetheless be trademarked if this technical purpose could also be achieved by some other design,¹⁶³ and that Philips' three-head design was a valid trademark because a closer shave could be achieved by other designs. By comparison, the English High Court adopted with slight modification the Stockholm court's minority view that a design that in substance achieved solely a technical result could not be trademarked.¹⁶⁴

In 2002, the conflict reached the ECJ after the Court of Appeal of England and Wales referred the ECJ the question of whether a design that served a technical result could be protected as a trademark. The ECJ held that a design was not a registrable trademark if "the essential functional features of that shape are attributable only to the technical result."¹⁶⁵ It also held that this outcome could not be avoided by merely showing that "there are other shapes which allow the same technical result to be obtained."¹⁶⁶ The decision therefore favored the English view and not the Swedish view.

The ECJ decision clarified or created a norm against the protection of technical designs as trademarks. In conflicts before other national

163. Case T7-1316-94, T7-249-97, *Ide Line Aktiebolag v. Philips Electronics. N.V.*, [1997] E.T.M.R. 377 [Stockholm Dist. Ct.] (Swed.).

164. *Philips Electronics N.V. v. Remington Consumer Prods. Ltd.*, [1998] R.P.C. 283, 308 [Pat. Ct.] (Eng.).

165. Case C-299/99, *Koninklijke Philips Electronics N.V. v. Remington Consumer Prods. Ltd.*, 2002 E.C.R. I-5475, 5518.

166. *Id.*

courts of EU member states, judges applied the ECJ norm and reached outcomes consistent with it. In 2004, the Swedish Court of Appeal explicitly referred to the ECJ opinion in overturning the Stockholm District Court ruling.¹⁶⁷ Likewise, the French, German, Italian, and Spanish courts also cancelled Philips' three-head design trademarks following the ECJ's decision.¹⁶⁸ When Philips subsequently claimed trademark protection of a three-head shaver faceplate with an additional clover leaf design in the English High Court, the Court declared, on the basis of the ECJ judgment, that the trademark of Philips' clover leaf faceplate was invalid because the clover leaf was not a separate feature with its own aesthetic purposes.¹⁶⁹

The ECJ decision created or clarified the trademark norm within the EU because the court is an institutionally legitimate participant. Under the Treaty on European Union, the ECJ is the ultimate judicial arbiter for issues of EU law,¹⁷⁰ and member states and their judiciaries are required to accept ECJ decisions as final interpretations of EU law.¹⁷¹ The various national courts facing similar conflicts after the outcome of the case in the ECJ applied the ECJ decision as a norm that controlled subsequent conflicts, which strengthened the norm through the repetition of outcomes. Additionally, each of these national courts was institutionally legitimate within its national jurisdiction and had powers of enforcement. Thus, application of the ECJ-created norm helped that norm, as a practical matter, penetrate national legal systems within the EU and control the outcomes of conflicts that occurred within national territories.

3. Repetition of International IP Transactions

The repetition of IP transactions between firms may have a constitutive effect on IP norms. To be sure, individual transactions may not modify norms because they may or may not be inherently legitimate from a global policy standpoint, and private corporations may not have the same institutional legitimacy as supranational bodies such as the WTO and the ECJ. But international IP transactions may indirectly alter substantive IP norms if they repeatedly use the laws of a small group of states as the laws governing the transactions. Over time, the substantive

167. Case T691-97, *Koninklijke Philips Electronics N.V. v. Rotary Shaver Sweden AB*, [2005] E.T.M.R. 1214, 1214-16 [Ct. App.] (Swed.).

168. See *Koninklijke Philips Electronics N.V. v. Remington Consumer Prods. Ltd.*, [2004] E.W.H.C. 2327 (Ch.), paras. 15-48 (Eng.) (discussing EC member state decisions).

169. *Id.* para. 147 (finding that clover leaf design did not have a separate aesthetic purpose, and invalidating the trademark).

170. Consolidated Version of the Treaty on European Union art. 35, Nov. 1, 1993, 2002 O.J. (C 325) 24-25.

171. Case 26/62, *Van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 1; Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585.

standards of the selected domestic laws become internationalized because they control the international IP outcomes that flow from each of these transactions. The alternative norms found in domestic legal systems that prescribe different levels of IP protection may correspondingly fall into disuse at the international level, becoming increasingly weaker until, finally, they may be eradicated.

Private IP transactions may also channel and regularize behavior in other ways. By imposing contractual commitments on transacting parties to undertake enforcement measures, repetitive IP transactions encourage the development of a norm of vigorous enforcement of contractual commitments by private entities, independently of state action.

IP transactions may also regularize dispute resolution behavior between the transacting parties. Repeated selection through arbitration clauses of the arbitration centers in North America and Western Europe will strengthen the institutional legitimacy of these arbitral bodies as compared to other arbitral centers or domestic courts. Additionally, the increased use of arbitration awards to resolve IP disputes may prompt domestic courts to adjust their norms concerning the review and enforcement of arbitral awards.¹⁷²

The norms that result from IP transactions may not initially be formalized in laws or even the guidelines of international organizations. They may certainly be influential, however, if powerful corporations with substantial resources (and battalions of lawyers) at their disposal tend to conform to the standards and patterns of behavior prescribed in the repetitive IP transactions. Additionally, as with the evolution of *lex mercatoria* and the Uniform Customs and Practice for Documentary Credits, customary business behavior among corporations regarding IP may become formalized in guidelines issued by expert technocratic or managerial groups in international business organizations, such as WIPO or the UN International Institute for the Unification of Private Law. These norms may also be incorporated into treaties such as TRIPS if business lobby groups influence their government representatives at international trade negotiations.¹⁷³

A detailed empirical study of IP transactions is needed to determine conclusively whether IP transactions by multinational corporations do, in fact, repeatedly prescribe similar IP outcomes. But it is reasonable to expect that some repetition of IP transactions is likely because transnational networks of large law firms use similar proprietary model

172. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (discussing policy reasons for judicial support of international arbitration awards). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (discussing policy reasons for not permitting commercial parties to contract out of U.S. antitrust laws through an arbitration agreement).

173. Cf. *supra* Part II.D.2 (discussing hardening of other business norms).

agreements for different transactions, and corporate counsels share information on effective methods (or in business management parlance, “best practices”) of IP protection.¹⁷⁴ Leading *Fortune* 500 companies and the law firms that represent them have institutional legitimacy within the global business community if these corporations and law firms are perceived as credible market leaders that exercise sound business judgment. When other firms regard these transactions as well-designed business deals, they may copy these transactions in their own deals in order to achieve similar business goals and lower their legal fees in IP transactions by avoiding drafting deal documents from scratch.¹⁷⁵

Based on anecdotal evidence, it appears that IP transactions designed by leading law firms are emulated and repeated in deals for different corporate clients. In a high-value transaction negotiated by a leading New York law firm, a Netherlands registered corporation purchased an English designer’s brand and installed her as the creative director of the joint venture vehicle, “Newco,” which was created to design, market, and sell her clothes.¹⁷⁶ Through a Trademark Agreement, the Dutch corporation subscribed to fifty percent of Newco’s share capital,¹⁷⁷ and the fashion designer assigned her trademarks to Newco.¹⁷⁸ The Trademark Agreement set forth the countries in which the trademarks at issue had been registered.¹⁷⁹ The agreement provided for worldwide enforcement against third-party violations before courts and required use of “all commercially reasonable efforts” to police infringers.¹⁸⁰ Finally, the

174. See, e.g., Am. Ass’n of Corporate Counsel, Intellectual Property Committee Mission Statement, <http://www.acca.com/php/cms/index.php?id=198> (“ACC’s Intellectual Property Committee’s goals are to provide important information and resources about strategic corporate intellectual property protection, acquisition, and enforcement to the ACC membership.”).

175. This phenomenon has occurred in non-IP transactions. For example, the “poison pill” that was first designed by the New York law firm Wachtell Lipton Rosen & Katz was subsequently adopted widely by corporations defending themselves from hostile takeovers. See RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 740–41 (2d ed. 1995).

176. See Agreement by and among [Fashion Designer], Newco and [Netherlands corporation] (2001) [hereinafter Trademark Agreement], preamble (redacted to protect confidentiality) (on file with author).

177. *Id.* § 2.02.

178. *Id.* §§ 2.01, 7.01.

179. *Id.* § 4.01(e).

180. *Id.* § 7.04 stated:

(a) Newco shall have the sole right to apply for, reserve, register, prosecute, maintain and renew the [Designer’s] Trademarks worldwide at Newco’s expense. Newco shall use all commercially reasonable efforts to maintain the validity of all registrations and applications included in the [Designer’s] Trademarks

agreement indicated that disputes would be resolved by International Chamber of Commerce arbitration in New York¹⁸¹ under New York law.¹⁸²

In this fashion, the corporations and their lawyers coordinated other decisionmakers' actions and marshaled the corpus of national and international IP laws to support certain international IP decisions. The Trademark Agreement favored the registration and recognition of trademarks under national systems, reinforced the protection of trademarks against third-party infringers worldwide, and suggested that courts and tribunals could be involved in reinforcing the standards it enumerated.

The law firm that prepared and negotiated the Trademark Agreement subsequently designed a patent transaction in which a pharmaceutical company organized under Swedish law ("Drug Company A") licensed a medical patent to a pharmaceutical company incorporated under Delaware law ("Drug Company B"). This patent transaction repeated three IP outcomes that resulted from the Trademark Agreement.

First, like the Trademark Agreement, the drug patent transaction also favored the registration and recognition of IP under national systems. Through an IP License Agreement, Drug Company A granted Drug Company B a license to market and sell products containing Drug Company A's patents in the United States and Canada, while retaining ownership of these patents and their related know-how.¹⁸³ The License Agreement provided that New York law governed the contract and that disputes would be resolved through International Chamber of Commerce (ICC) arbitration in Sweden.¹⁸⁴ The companies' lawyers also issued opinions that the transaction complied with Swedish and New York law.¹⁸⁵

Second, the patent transaction repeated the IP decision in the Trademark Agreement to protect IP against third-party infringers. The Intellectual Property License Agreement promoted the protection of these patents by requiring Drug Company A to deliver to Drug Company B all nonprivileged correspondence between the U.S. and Canadian patent offices and WIPO relating to the validity, scope, and enforceability of

(b) [Designer] agrees to notify Newco promptly after she becomes aware of any actual or threatened material infringement, dilution or other violation of [Designer's] Trademarks. Newco shall decide whether to assert or file an Action against such activities, in its good faith discretion

181. *Id.* § 10.14.

182. *Id.* § 10.10.

183. Intellectual Property License Agreement Among [Drug Co. A] and [Drug Co. B], §§ 2.1, 2.3 [hereinafter Intellectual Property License Agreement] (on file with author).

184. *Id.* §§ 11.2, 12.3.

185. Opinion of [Drug Co. A's Counsel]; Opinion of [Drug Co. B's Counsel] (on file with author).

their drug patents.¹⁸⁶ Echoing the Trademark Agreement's provision for the use of "all commercially reasonable efforts" to police infringers, the agreement also called for a broad response to patent violations, stating that the drug companies would "use protective measures that are commercially reasonable and in no event less stringent than those used by such Party within the Party's own business to protect its comparable know-how."¹⁸⁷

Third, the patent transaction reflected a decision to seek the assistance of tribunals in resolving IP conflicts. The Intellectual Property License Agreement provided that disputes would be resolved in accordance with the Rules of Arbitration of the ICC.¹⁸⁸ A related Supply Agreement, in which Drug Company A agreed to supply, and Drug Company B agreed to purchase, specified quantities of the patented drug,¹⁸⁹ provided for ICC dispute resolution in Sweden under English law.¹⁹⁰

These two typical IP transactions illustrate how corporate transactions could collectively shape international IP law. The use and protection of IP internationally among corporations tends to be coordinated by contracts that consolidate expectations of appropriate behavior according to the norms of states with strong IP protections. Where the international regime effectively coordinates information about the ownership of IP rights, such as through national and international patent registries, corporate transactions may rely on this international regime to discover material information regarding the IP rights at issue. Corporations may agree to enforce IP rights against third parties under national laws and in national courts, and to use applicable international mechanisms if they are commercially reasonable. The repetition of such corporate transactions could promote norms in favor of stronger IP recognition, protection, and enforcement.

C. Outcomes Allocate Power

Outcomes of IP conflicts allocate several different forms of power over different periods of time. The purpose of this Section is not to itemize every way in which outcomes might allocate power. Its more modest goal is to provide a few illustrations of this phenomenon.

186. Intellectual Property License Agreement, *supra* note 183, § 3.6.

187. *Id.* § 9.3.

188. *Id.* § 10.2.

189. Supply Agreement between [Drug Company A] and [Drug Company B] (2004), preamble (redacted to protect confidentiality) (on file with author).

190. *Id.* §§ 12.5, 12.6.

A piece of IP at its core is an idea or a piece of knowledge. When an outcome allocates the use of IP, it effectively allocates the power that comes with the ability to use or sell that idea or piece of knowledge. For example, in the ongoing conflict between the United States and the People's Republic of China regarding software piracy in China, China's continued failure to take enforcement measures against software piracy siphoned \$1.27 billion in software revenues away from U.S. entities in 2005.¹⁹¹ This is a substantial drain on the economic power of the U.S. business sector and on the United States in general.

Additionally, when an outcome controls access to IP, it also controls which participants may use that IP to create new IP, such as through the incorporation of a patented software program into a more sophisticated operating system, which could, in turn, increase power over other participants who seek access to that new operating system. In the long run, the allocation of IP can have even wider effects on power balances. For example, access to life-saving medicines prevents population decimation in some less developed states and protects their military and economic power, which is determined in part by the population of able-bodied men and women. Affordable access to copyrighted books may promote education in a state and increase the pool of literate workers.

D. Changes to Power and Norms Lead to New Outcomes

In the dynamic evolution of the international IP system, the changes to power and norms that result from outcomes, in turn, lead to new outcomes. The various case studies in this Article illustrate this phenomenon. The ECJ's clarification of the norm limiting trademark protection of functional designs caused national courts throughout the EU to overturn previously inconsistent outcomes and to prescribe new outcomes consistent with the EU norm.¹⁹² Arbitration agreements in IP transactions may, should the parties subsequently enter into an IP conflict requiring third-party dispute resolution, compel the parties in that transaction to pursue international arbitration. Absent that agreement, they would have to seek domestic judicial resolution of their conflict.

The strengthening of norms providing IP protection in TRIPS, which reflected the balance of power in the Uruguay Round, has spawned numerous outcomes in WTO dispute settlements in which member states have generally complied with norms that previously were not as widely

191. U.S. TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT 17, available at http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html [hereinafter USTR SPECIAL 301 REPORT].

192. See *supra* Part III.B.2.

observed.¹⁹³ Additionally, the TRIPS outcome endowed WTO member states with the power to impose trade sanctions on other member states to enforce TRIPS norms.¹⁹⁴ This new ability to deploy economic power in support of IP protection has been a pivotal factor in securing compliance with IP-protecting norms once a WTO panel has adjudicated an IP dispute.¹⁹⁵

The Doha Declaration also integrated a public health norm into TRIPS. This adjustment of norms provided the basis for a further outcome: the 2006 decision of the WTO General Council to amend TRIPS itself and put this amendment to a vote of WTO member states.¹⁹⁶ Additionally, the Doha Declaration increased the diplomatic power of less developed states by strengthening the basis for their claims that there is, or should be, a public health exception to TRIPS protections for patented drugs. In this fashion, both the adjustment of power and norms in the Doha outcome played a key role in the 2006 General Council decision to amend TRIPS.

IV. STRATEGIC RECOMMENDATIONS

The typology of international law presented here assists participants in devising strategies to achieve their IP policy goals. By appreciating how power, norms, and outcomes interact, participants can determine strategically which conflicts will affect power and norms most drastically and require their greatest attention. A private IP transaction may not in itself affect norms, and corporations usually are not concerned about the transactions beyond their immediate business goals. But precedent-setting litigation before an institutionally legitimate body such as a WTO panel or the ECJ may very well adjust norms and allocate power, and corporations or state litigants should deploy significant resources to achieve their desired outcome. Additionally, the Doha experience demonstrates that norm-creating treaty arrangements may be the thin end of the wedge that supporters of the norms contained in those arrangements may use to widen the scope and application of the norms

193. See *supra* Part III.A.3.

194. Compare TRIPS, *supra* note 10, art. 50, and DSU, *supra* note 46, art. 22.2, with WIPO Convention, *supra* note 10, Universal Copyright Convention, *supra* note 10, Paris Convention for the Protection of Industrial Property, *supra* note 10, and Berne Convention for the Protection of Literary and Artistic Works, *supra* note 10.

195. Cf. Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, U. CIN. L. REV. 1283, 1286 (“The TRIPS Agreement is unquestionably the most important development in international intellectual property law”); JOLLY, *supra* note 31, at 67 (describing TRIPS as “the most far-reaching multilateral agreement on intellectual property”).

196. See *supra* Part III.B.1.

in future trade negotiations. For this reason, participants need to deploy power even at the early stages of international treaty negotiations to obtain outcomes that adjust norms in their favor.

In addition to helping participants prioritize their IP conflicts, the typology of international law presented in this Article helps participants devise strategies in these conflicts. By understanding how power and norms determine outcomes, participants will be able to align power and norms in support of their preferred outcomes. Participants may consider three broad recommendations: (1) harness the power of NGOs, (2) leverage the internal constituents of participants, or (3) capitalize on conflicts in which interests are at odds with previously stated positions.

Harness the Power of NGOs. The global HIV crisis has demonstrated the immense collective power of NGOs. Their increasing role in global disputes raises questions about whether there are sufficient control mechanisms to prevent abuses of their power. Nonetheless, in an international IP conflict, participants could consider mobilizing NGOs that are sympathetic to their interests. A less developed state might sponsor, through indirect entities, NGOs that could draw global media attention to the human rights imperatives of that state. It could also provide informal links between NGOs so they can coordinate their efforts to increase the access of the less developed state to IP. Conversely, an IP-creating corporation could join a business association that lobbies its government to champion its IP interests in trade negotiations.

Leverage the Internal Constituencies of Participants. Corporations and governments tend to have internal constituencies with divergent interests.¹⁹⁷ In an IP conflict, when a participant faces the opposition of a powerful corporation or government, that participant may leverage the internal constituencies of the corporation or government that would support that participant's preferred outcome. Take, for example, the ongoing IP conflict between the United States and China. In 1995, even while the U.S. government and IP-related corporations in the United States applied pressure on China to improve its IP protections, U.S. aerospace companies were concerned that the U.S. strategy contemplating sanctions would provoke retaliatory sanctions by China, limiting their access to the Chinese aerospace market.¹⁹⁸ As the United States came close to impos-

197. See *supra* Part II.B.

198. See Endeshaw, *supra* note 16, at 319–20 (noting that the U.S. aerospace industry's resistance to the U.S. strategy of sanctions to secure intellectual property protections from China weakened the U.S. negotiating position); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union: A Comparison*, 46 *BUFF. L. REV.* 1, 31 (1998) (noting that China exploited the divergence in trade goals of U.S. high-technology and aerospace industries in its intellectual property negotiations with the United States); Evelyn Iritani, *Boeing Likely Loser if U.S.-China Talks Fail*, *L.A. TIMES*, Feb. 24, 1995, at D1 (noting that

ing sanctions on China for its IP record, it also sent a delegation of seventy representatives to conclude thirty-four contracts and twenty-four joint ventures on energy worth twelve billion dollars.¹⁹⁹ Chinese policy-makers who sought to lower IP protections could have offered U.S. corporations lucrative joint investments in China in exchange for efforts to lobby the Senate and the U.S. administration to moderate the U.S. Trade Representative's demands for stronger IP enforcement in China. Conversely, the U.S. Trade Representative could urge Chinese IP-creating companies with strong ties to influential Chinese government officials to lobby these officials to increase IP protections in regions of China where rampant IP infringement occurs.²⁰⁰

Capitalize on Changes in a Participant's Interests Over Time. A participant may win over the support of other participants who would normally oppose its preferred outcome by capitalizing on situations in which those other participants' interests are at odds with their previously stated positions. For example, an IP user may increase its access to third-party IP by emphasizing to the third-party IP creator the situations in which the third party itself required, or will require in the future, the IP created by others. In 2001, the United States and Canada nearly became the victims of the TRIPS regime they had worked so hard to build. In that year, anthrax-laced letters were circulated in the United States and Canada. Fearing widespread anthrax attacks, both states sought to stockpile the anthrax cure, Ciprofloxacin. Ciprofloxacin was an expensive drug produced by the German company Bayer, which was the sole patent holder for the drug in the United States and Canada. Thus, Canada and the United States both became IP users of Ciprofloxacin. In order to reduce the costs of Ciprofloxacin, Canada contracted with a Canadian company, Apotex, to produce generic Ciprofloxacin at half the price Bayer charged Canada.²⁰¹ The United States similarly threatened to

Boeing stood to lose a share of the Chinese aerospace industry to Airbus if the U.S. imposed sanctions for China's intellectual property record and China retaliated with similar sanctions).

199. See Endeshaw, *supra* note 16, at 317 (noting U.S. contracts were concluded with China even when intellectual property-related sanctions seemed imminent). See also Tiefenbrun, *supra* note 198, at 31 (noting that the U.S. policy of pursuing greater access to the Chinese market while demanding more intellectual property protection continued into the 1990s); Steven Mufson, *American Battle, Bargain with Chinese*, WASH. POST, Feb. 24, 1995, at A17 (noting agreements on contracts even as Sino-U.S. tensions flared over intellectual property disputes).

200. See USTR SPECIAL 301 REPORT, *supra* note 191, at 21-22 (noting that IP infringement was particularly rampant in Beijing, Guangdong Province, Zhejiang Province, and Fujian Province).

201. See Debates of the Senate, 139 HANSARD 1428 (2001) (statement of Hon. Sharon Carstairs) (Can.) ("I can confirm to all honorable senators that [Ciprofloxacin] has been purchased [from Apotex]."). See also Amy Harmon & Robert Pear, *A Nation Challenged: The*

import affordable Ciprofloxacin from other sources or produce its own Ciprofloxacin.²⁰² Faced with a breach of its patent by a powerful state—Canada—and the potential breach by another, even more influential state—the United States—Bayer agreed to reduce the price of Ciprofloxacin to less than the price Apotex would charge Canada.²⁰³

In dealing with their own public health emergencies, the United States and Canada became much more receptive to finding a public health exception to IP protection under international law. After the Anthrax experience, Canadian legislators began to increase their support for a public health exception to TRIPS provisions.²⁰⁴ It may also be more than mere coincidence that since the Anthrax scare in 2001, the United States has clarified that the IP provisions in its free trade agreements (FTAs) with various states “do not affect the ability of the United States and its FTA partners to take necessary measures to protect public health by promoting access to medicines [in] epidemics as well as circumstances of extreme urgency or national emergency.”²⁰⁵

At its core, international law—perhaps all law—continually adjusts to and accommodates human interactions.²⁰⁶ In human interactions, and in the international law that results from these interactions, legal rules are not all that matter. Power, interests, and norms—broadly conceived—also matter. If one of the duties of the legal academy is still, as it was over fifty years ago, to “blaze trails which public policy may later

Treatment; Canada Overrides Patent for Cipro to Treat Anthrax, N.Y. TIMES, Oct. 19, 2001, at A1.

202. See 148 CONG. REC. S4308–02 S4283 (May 14, 2002), (“After the Anthrax scare . . . the United States raised the possibility of issuing a compulsory license for Cipro [sic]”); Zita Lazzarini, *Access to HIV Drugs: Are We Changing the Two World Paradigm?*, 17 CONN. J. INT’L L. 281, 293 (2002); Harmon & Pear, *supra* note 201, at A1.

203. See Debates of the Senate, 139 HANSARD 1630 (2001) (statement by Noël A Kinsella) (Can.) (noting that Bayer eventually sold Ciprofloxacin cheaply to both Canada and the United States).

204. See Debates of the Senate, 139 HANSARD 1315 (2001) (statement of Svend Robinson) (Can.) (“We have seen the spectacle of the Minister of Health recently being prepared to override patent rights of the Bayer corporation in a minute because of a possible threat of anthrax in Canada [and yet the] government . . . is prepared to defend the multinational pharmaceutical companies under the TRIPS agreement when they try to say they need the right to protect their patents on drugs to fight HIV and AIDS.”).

205. USTR SPECIAL 301 REPORT, *supra* note 191, at 11–12.

206. See REISMAN, *supra* note 87, at 2 (“Real law is generated, changed and terminated continually in the course of almost all of human activity. . . . [and] part of every decision is concerned . . . with the structure of decision-making itself.”). Cf. MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 360 (2006) (“[T]he deepest truth about how constitutional law develops is that constitutional law is connected to politics, and what happens in the wider political system”).

follow,”²⁰⁷ then scholars should explicate not only how international conflicts are resolved, but also how the conflict resolution process itself is constituted and what the aggregate consequences of outcomes may be in this process. This Article’s theory of power, norms, and international law, as applied to global IP, is a modest contribution to this enterprise.

207. Memorandum from Walton H. Hamilton to Charles Seymour, Yale University Provost (June 16, 1941) *partially reprinted in* HISTORY OF THE YALE LAW SCHOOL 116 (Anthony Kronman ed., 2004).