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International Intellectual Property Scholars Series: Intellectual Property and Asian Values

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INTERNATIONAL INTELLECTUAL PROPERTY SCHOLARS SERIES*

INTELLECTUAL PROPERTY AND ASIAN VALUES

PETER K. YU**

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I. INTRODUCTION

In the past few years, many scholars and commentators have explored why the West has been more economically developed and technologically advanced than other parts of the world. In his new book, *Civilization: The West and the Rest*, renowned historian Niall Ferguson identified six “killer applications” that have helped the West achieve its rise to global dominance.¹ In a cautiously titled book, *Why the West Rules—for Now*, archaeologist-historian Ian Morris also questioned why the West has dominated the globe for the past two centuries and whether such dominance would continue amid the rise of China, India, and other emerging powers.² Using a different entry point, *Newsweek International* editor Fareed Zakaria explored the “rise of the rest,” discussing how global powers could shape up in what he called the “Post-American World.”³ Although all of these books carry a mostly positive message, they were all written against a background of growing worries that the West will eventually lose its competitive edge.

Indeed, the release of these books has coincided with the growing attention commentators are now paying to the rise of Asia. While some wonder whether the twenty-first century will be the Asia Century,⁴

1. NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* 13 (2011).

2. IAN MORRIS, *WHY THE WEST RULES—FOR NOW: THE PATTERNS OF HISTORY, AND WHAT THEY REVEAL ABOUT THE FUTURE* (2010).

3. FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008).

4. See, e.g., MARK BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC AND BEYOND* 3 (2008) (noting the “overblown hyperbole about the ‘Asian Century’”); Symposium, *The Asian Century?*, 44 U.C. DAVIS L. REV. 715 (2011) (interrogating whether

others have examined the growing role of the so-called BRICS countries,⁵ which initially included Brazil, China, India, and Russia but have now been generalized to cover other emerging middle-income countries, such as South Africa.⁶ A growing number of books have also looked at the role of China and India in Africa and Latin America.⁷

this century will be the “Asian Century”). Some commentators, however, are more certain. *See, e.g.*, STEVE CHAN, CHINA, THE US AND THE POWER-TRANSITION THEORY: A CRITIQUE ix (2007) (“It is anticipated that by the year 2025, seven of the world’s ten largest economies will be located in Asia.”); ODED SHENKAR, THE CHINESE CENTURY: THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER, AND YOUR JOB (2005) (declaring the twenty-first century as the “Chinese Century”); EDWARD TSE, THE CHINA STRATEGY: HARNESSING THE POWER OF THE WORLD’S FASTEST-GROWING ECONOMY 6 (2010) (stating that “one of the safer predictions for the first half of the twenty-first century is that China’s growth, supported by that of India and several other countries, will make Asia the source of more than half the world’s gross domestic product by around 2030”).

5. *See* Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050* (Goldman Sachs, Global Economics Paper No. 99), available at <http://www2.goldmansachs.com/ideas/brics/book/99-dreaming.pdf> (advancing the concept of the BRICs countries); *see also* PRICEWATERHOUSECOOPERS, THE WORLD IN 2050: THE ACCELERATING SHIFT OF GLOBAL ECONOMIC POWER: CHALLENGES AND OPPORTUNITIES 3 (2011), available at http://www.pwc.com/en_GX/gx/world-2050/pdf/world-in-2050-jan-2011.pdf (“E7 [China, India, Brazil, Russia, Indonesia, Mexico and Turkey] would overtake the G7 before 2040.”).

6. *See, e.g.*, CHIDI OGUAMANAM, INTELLECTUAL PROPERTY IN GLOBAL GOVERNANCE: THE CRISIS OF EQUITY IN THE NEW KNOWLEDGE ECONOMY 221–22 (2012) (expanding BRICS to cover other emerging middle-income economies); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 346 (2008) [hereinafter Yu, *Access to Medicines*] (expanding the BRICS acronym to cover South Africa); Sébastien Hervieu, *South Africa Gains Entry to BRIC Club*, GUARDIAN WKLY. (Apr. 19, 2011, 09:04 AM), <http://www.guardian.co.uk/world/2011/apr/19/south-africa-joins-bric-club> (reporting about the South African president joining his counterparts from Brazil, Russia, India, and China for the third summit meeting of the informal group in China).

7. *See, e.g.*, AFRICAN PERSPECTIVES ON CHINA IN AFRICA (Firoze Manji & Stephen Marks eds., 2007); CHRIS ALDEN, CHINA IN AFRICA: PARTNER, COMPETITOR OR HEGEMON? (Alex De Waal & Richard Dowden eds., 2007); DEBORAH BRAUTIGAM, THE DRAGON’S GIFT: THE REAL STORY OF CHINA IN AFRICA (2009); HARRY G. BROADMAN, AFRICA’S SILK ROAD: CHINA AND INDIA’S NEW ECONOMIC FRONTIER (2007); PÁDRAIG CARMODY, THE NEW SCRAMBLE FOR AFRICA (2011); CHINA AND THE DEVELOPING WORLD: BEIJING’S STRATEGY FOR THE TWENTY-FIRST CENTURY (Joshua Eisenman et al. eds., 2007) [hereinafter CHINA AND THE DEVELOPING WORLD]; CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE (Robert I. Rotberg ed., 2008); CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE (Chris Alden et al. eds., 2008); CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE: IMPLICATIONS FOR LATIN AMERICA AND THE UNITED STATES (Riordan Roett & Guadalupe Paz eds., 2008) [hereinafter CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE]; CHINA’S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE (Dorothy-Grace Guerrero & Firoze Manji eds., 2008) [hereinafter CHINA’S NEW ROLE]; ROBERT EVAN ELLIS, CHINA IN LATIN AMERICA: THE WHATS AND WHEREFORES (2009); KEVIN GALLAGHER & ROBERTO PORZECANSKI, THE DRAGON IN THE ROOM: CHINA AND THE FUTURE OF LATIN

Some even contrast the oft-criticized “Washington Consensus”⁸ with the “Beijing Consensus,” a term coined by former *Time* foreign editor Joshua Ramo.⁹ In March 2011, the Associated Press launched the global economic tracker, examining developments in emerging developing countries.¹⁰ As the press reasoned, these developments are likely to have important global implications ranging from increased prices for

AMERICAN INDUSTRIALIZATION (2010); GEOFFREY KEMP, *THE EAST MOVES WEST: INDIA, CHINA, AND ASIA’S GROWING PRESENCE IN THE MIDDLE EAST* (2010); BEN SIMPFENDORFER, *THE NEW SILK ROAD: HOW A RISING ARAB WORLD IS TURNING AWAY FROM THE WEST AND REDISCOVERING CHINA* (2009); IAN TAYLOR, *CHINA AND AFRICA: ENGAGEMENT AND COMPROMISE* (2006); IAN TAYLOR, *CHINA’S NEW ROLE IN AFRICA* (2009); *THE RISE OF CHINA AND INDIA IN AFRICA: CHALLENGES, OPPORTUNITIES AND CRITICAL INTERVENTIONS* (Fantu Cheru & Cyril Obi eds., 2010).

8. John Williamson, an economist and a senior fellow of the Institute for International Economics, coined the term “Washington Consensus.” John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7 (John Williamson ed., 1990). The Washington Consensus was derived from recommendations in ten different areas: (1) fiscal deficits; (2) public expenditure priorities; (3) tax reform; (4) interest rates; (5) the exchange rate; (6) trade policy; (7) foreign direct investment; (8) privatization; (9) deregulation; and (10) property rights. *Id.*

9. JOSHUA COOPER RAMO, *THE BEIJING CONSENSUS 4* (2004), available at <http://fpc.org.uk/fsblob/244.pdf>. As he explained:

[The Beijing Consensus] is simply three theorems about how to organise the place of a developing country in the world, along with a couple of axioms about why the physics is attracting students in places like New Delhi and Brasilia. The first theorem repositions the value of innovation. Rather than the “old-physics” argument that developing countries must start development with trailing-edge technology (copper wires), it insists that on the necessity of bleeding-edge innovation (fiber optic) to create change that moves faster than the problems change creates. In physics terms, it is about using innovation to reduce the friction-losses of reform.

The second Beijing Consensus theorem is that since chaos is impossible to control from the top you need a whole set of new tools. It looks beyond measures like per-capita GDP and focuses instead of quality-of-life, the only way to manage the massive contradictions of Chinese development. This second theorem demands a development model where sustainability and equality become first considerations, not luxuries. Because Chinese society is an unstable stew of hope, ambition, fear, misinformation and politics only this kind of chaos-theory can provide meaningful organization.

Finally, the Beijing Consensus contains a theory of self-determination, one that stresses using leverage to move big, hegemonic powers that may be tempted to tread on your toes.

Id. at 11–12. For discussions of the Beijing Consensus, see generally *id.*; STEFAN A. HALPER, *THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* (2010).

10. Paul Wiseman, *Developing Nations’ Rise Poses Risks for Rich Ones*, MSNBC.COM (Mar. 30, 2011, 1:44 AM), http://www.msnbc.msn.com/id/42329602/ns/business-world_business/.

raw materials to an accelerated pace of global economic recovery.¹¹

The last time policymakers and commentators paid such an enormous amount of attention to Asia was two decades ago, amid the rise of Japan and other newly industrialized countries. The elevated status of these countries, in turn, led some Asian leaders to declare the need to recognize, promote, and protect the so-called “Asian values,” which they claimed had provided a formula for economic success,¹² or the so-called “East Asian miracle.”¹³ Although today’s discourse seems to be going in the same direction as that of two decades ago, it is actually quite different. The present discourse is not simply about the economic rise of Asia. Rather, it touches on how China, India, and other countries in the region have greatly improved their competitiveness and technological capabilities. To some extent, these countries are now threatening to compete with the West on its home turf while playing its own game.

Indeed, a growing volume of literature has now focused on the role of the BRICS countries in the international intellectual property system¹⁴—an area that was once dominated by Western developed countries. Such literature complements nicely the ever-growing volume of books and articles on intellectual property law developments in China and India.¹⁵ In a recent article, leading international intellectual

11. *Id.*

12. See discussion Part I.A.

13. WORLD BANK, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY (1993). See generally HA-JOON CHANG, THE EAST ASIAN DEVELOPMENT EXPERIENCE: THE MIRACLE, THE CRISIS AND THE FUTURE (2006) (discussing the Asian miracle and the ensuing economic crisis).

14. See, e.g., Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317 (2006); Robert C. Bird & Daniel R. Cahoy, *The Emerging BRIC Economies: Lessons from Intellectual Property Negotiation and Enforcement*, 5 NW. J. TECH. & INTELL. PROP. 400 (2007); Yu, *Access to Medicines*, supra note 6; Rochelle C. Dreyfuss, *The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking* (Int’l Law & Justice, New York University School of Law, Working Paper No. 2009/5, 2009), available at <http://ssrn.com/abstract=1442785>.

15. See, e.g., Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach Is Making Counterfeiting Worse*, 41 GEO. J. INT’L L. 749 (2010); Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L.Q. 1 (2000); Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203 (2006); Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector*, 97 CAL. L. REV. 1571 (2009); Janice M. Mueller, *The Tiger Awakens: The Tumultuous Transformation of India’s Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 U. PITT. L. REV. 491 (2007); Srividhya Ragavan, *Of the Inequals of the Uruguay Round*, 10 MARQ. INTELL. PROP. L. REV. 273 (2006); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in*

property scholar Jerome Reichman questioned whether developing countries should follow the developed countries' lead in adopting their intellectual property system or whether they should lead in the knowledge economy by building their own comparative advantages.¹⁶ As he declared:

To the extent that intellectual property laws do play an ancillary but important role, there are, roughly speaking, two different approaches on the table. One is to play it safe by sticking to time-tested IP solutions implemented in OECD [Organisation for Economic Co-operation and Development] countries, with perhaps a relatively greater emphasis on the flexibilities still permitted under TRIPS (and not overridden by relevant FTAs). The other approach is to embark on a more experimental path . . . that advanced technology countries currently find so daunting.¹⁷

One set of questions commentators have yet to explore concerns whether Asian countries will take unified positions on international intellectual property law and policy. Can we identify any underlying "Asian values," approaches, or practices in the area? Are the developments in Asia homogenous enough to foster common positions within the region? Does it matter whether any of the Asian countries can attain hegemonic status on the continent? If Asia indeed will assume a more dominant global role in the future, as commentators have claimed, which countries will be involved, how will they be involved, and what issues will be found on their policy agendas?

These questions are important for at least two reasons. First, given the growing attention scholars have paid to Asia and the so-called BRICS countries, a systematic analysis of the role these countries will play in future international intellectual property negotiations is likely to provide a better understanding of the international intellectual property

China in the Twenty-first Century, 50 AM. U. L. REV. 131 (2000) [hereinafter Yu, *From Pirates to Partners*]; Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006) [hereinafter Yu, *From Pirates to Partners II*]; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *China Puzzle*].

16. Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1126 (2009).

17. *Id.* at 1126.

system. Second, intellectual property industries have repeatedly criticized China and Southeast Asian countries for their widespread piracy and counterfeiting problems.¹⁸ A better grasp of Asian developments will certainly help anticipate those challenges confronting the international intellectual property system.

Part I of this Article examines intellectual property developments in relation to the decades-old “Asian values” debate. Although the debate began in the human rights context, this Part uses the debate as a starting point to evaluate whether Asian cultures, practices, and conditions can help provide the needed rallying force to help Asia establish unified positions on intellectual property law and policy. This Part further examines the region’s diversity in economic and technological developments and the continuous rivalry among the different regional powers. This Part concludes that one can neither locate any distinct values, approaches, or practices on intellectual property law and policy nor identify any established pan-Asian positions in the area.

Part II explores the role Asian countries will play if these emerging countries exert more influence on the development of the international intellectual property system. Drawing on the earlier discussion concerning how Japan and, to some extent, South Korea are unlikely to team up with other Asian countries to develop a united front for the Asian developing world, this Part contends that Asian countries as a group may not be able to establish a position comparable to that of the European Union or the African Group. Nevertheless, this Part argues that, if China, India, and members of the ASEAN (Association of Southeast Asian Nations)¹⁹ agree to team up to form a “Chindiasean” alliance, the resulting alliance will be a formidable force in future international intellectual property negotiations.

Part III concludes with a discussion of ten key items that will find their way to Chindiasean’s common policy agenda if such an alliance is ultimately established. Because of the alliance’s potential role in shaping global intellectual property norms, Chindiasean is as much a “normative community” as it is a political alliance.²⁰ The first five items

18. See discussion *infra* Part III.A.1.

19. The ten current ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Member Countries*, ASEAN SECRETARIAT, <http://www.aseansec.org/74.htm> (last visited Apr. 4, 2011).

20. SIMON TAY, *ASIA ALONE: THE DANGEROUS POST-CRISIS DIVIDE FROM AMERICA* 150 (2010) (advancing the concept of “Asia’s normative community”). As Professor Tay explained, the development of an Asian normative community would offer at least three benefits:

in the agenda concern traditional issues advanced by less developed countries. The remaining items represent new issues on which the international community has yet to achieve a consensus or formulate a position. Taking a first look at this common policy agenda in the intellectual property literature, this Part seeks to provide insights into issues that will emerge in future international intellectual property negotiations.

II. THE ASIAN VALUES DEBATE

A. Human Rights

The Asian values debate, which began in the human rights area, has been quite controversial. Although it is hard to pinpoint which values are included in these so-called Asian values, commentators have generally defined such values to include “authoritarianism, cooperation, harmony, and order.”²¹ By embracing cultural relativism, critics argue, the Asian values debate “undermine[s] . . . the universality of the human rights regime as an empirical matter and present[s] a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere.”²² The debate has also raised challenging questions about whether Asian countries, including those that have hitherto had a disappointing human rights record, could use Asian values as a “cultural excuse” for transgressions in the area.²³

The first of these is, of course, the solution to the issue [that needs cooperation in Asia]. Another would be to the benefit of the United States and China working alongside each other, but with potential frictions and awkwardness eased in a multilateral setting. The third benefit for ASEAN and other Asians is that, unlike a G-2, they would have a role and be better assured that their fate would not be decided by the two powers without their participation.

TAY, *supra* note 20, at 155.

21. See, e.g., Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109, 109 (1998) [hereinafter Davis, *Constitutionalism and Political Culture*] (noting that Asian values “seem to include authoritarianism, cooperation, harmony, and order as the predominant values of Asian culture”).

22. Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About “Values in Asia,”* 14 IND. INT’L & COMP. L. REV. 1, 7 (2003).

23. See Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 747 (1996) (noting that commentators “suspect that the cultural argument is a pretext to excuse continuing transgressions by repressive governments”); see also Michael Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 3, 22 (Michael C. Davis ed., 1995) [hereinafter HUMAN RIGHTS AND CHINESE VALUES] (“It is important to note that in the Bangkok Declaration Asian governments were formulating a response not only to a Western

Championed by Malaysian and Singaporean leaders,²⁴ the “Asian values” debate reached its climax when Asian countries adopted the Bangkok Declaration at the Asian preparatory conference before the World Conference on Human Rights in Vienna in 1993.²⁵ Although this state-coordinated declaration did not articulate the oft-discussed Asian values, it states explicitly that, “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”²⁶

The position articulated in this declaration was attractive to many participants of the Asian regional conference, many of whom had repeatedly criticized the existing international human rights regime for ignoring non-Western interests. The concern for a lack of cultural sensitivity is not new; it can be traced back to the regime’s inception. When the regime’s founding document, the Universal Declaration of Human Rights,²⁷ was drafted, the American Anthropological Association already sent a long memorandum to the Human Rights

challenge but primarily to the challenge of their own people.”).

24. Cf. MARK BEESON, REGIONALISM AND GLOBALIZATION IN EAST ASIA: POLITICS, SECURITY AND ECONOMIC DEVELOPMENT 135 (2007) [hereinafter BEESON, REGIONALISM AND GLOBALIZATION] (“In Southeast Asia, in particular, a number of prominent figures—including Malaysia’s Mahathir [bin Mohamad] and Singapore’s Lee Kuan Yew—were trumpeting the merits of ‘Asian values’ as an explanation for the region’s economic take-off.”).

25. World Conference on Human Rights, Regional Meeting for Asia, 29 March–2 April 1993, Report of the Regional Meeting for Asia of the World Conference on Human Rights, U.N. Doc. A/Conf.157/PC/59 (Apr. 7, 1993), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9d23b88f115fb827802569030037ed44?Opendocument>.

26. *Id.* ¶ 8. For discussions of Asian values and the Bangkok Declaration, see generally DANIEL BELL, BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT (2006) [hereinafter BELL, BEYOND LIBERAL DEMOCRACY]; DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000) [hereinafter BELL, EAST MEETS WEST]; CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998) [hereinafter DE BARY, ASIAN VALUES]; THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); HUMAN RIGHTS AND CHINESE VALUES, *supra* note 23; HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 208 (James T.H. Tang ed., 1995) [hereinafter HUMAN RIGHTS AND INTERNATIONAL RELATIONS]; Davis, *Chinese Perspectives on Human Rights*, *supra* note 23; Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291 (2000); Peerenboom, *supra* note 22; Tay, *supra* note 23.

27. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. (1948).

Commission, expressing its concern, or even fear, that the Declaration would become an ethnocentric document. As the association put it in the now infamous memorandum, “[t]he primary task’ the drafters faced was to find a solution to the following problem: ‘How can the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?’”²⁸

Notwithstanding these concerns, the Bangkok Declaration was subsequently rejected at the Vienna Conference.²⁹ Commentators have also widely questioned whether Asian values actually exist in the human rights area. As Randall Peerenboom reminded us:

[t]he “Asian values” debate was not a single debate, not only about values in Asia, and not only about universalism versus relativism. Rather it was a series of debates about a range of issues. It is a mistake to reduce the many complex debates to the politically charged and easily resolved issue of whether authoritarian governments (sometimes) have invoked culture to deny citizens in their countries their rights. It does a disservice to the difficulty of the issues and the increasingly sophisticated and nuanced views of those who are trying to take diversity seriously to simply dismiss them as apologists for dictators. Put more bluntly, it is intellectually lazy and emblematic of the arrogant and narrow-minded ethnocentrism that has led many in Asia, and elsewhere, to view the human rights movement as the latest neo-colonial attempt to impose with missionary zeal the values,

28. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* ix (1999) (quoting the 1947 memorandum from the American Anthropological Association to the U.N. Human Rights Commission); JOHN P. HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 29 (1983) (recalling in his memoirs that Chinese delegate Chang Peng-chun “suggested that [he] put [his] other duties aside for six months and study Chinese philosophy . . . [implying] that Western influences might be too great”); *id.* at 32 (“With two exceptions, all [of the draft documents he relied on in putting together his draft outline of provisions in the Universal Declaration of Human Rights (“UDHR”)] came from English-speaking sources and all of them from the democratic West.”). *But see* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1143–44 (2007) [hereinafter Yu, *Reconceptualizing Intellectual Property Interests*] (discussing the diverse cultural and religious backgrounds of delegates participating in the drafting of the UDHR).

29. Michael C. Davis, *Preface to HUMAN RIGHTS AND CHINESE VALUES*, *supra* note 23, at vii, viii.

institutions, and ways of life popular in the West on the Rest.³⁰

Interestingly, although there has been voluminous literature on Asian values, those discussions mostly reflect values in East Asia, as opposed to those found throughout Asia. For example, a considerable amount of literature has focused on both the tension and compatibility between Confucianism and Western human rights.³¹ While Confucianism undoubtedly has some influence in many Asian countries, such as China, Japan, Singapore, South Korea, and Vietnam, it has less relevance to other Asian countries, especially those in South Asia.³² Indeed, it was ironic that the locus of the Confucianism debate was in East Asia, while the Bangkok Declaration was adopted more than two thousand miles away in Thailand.

B. Intellectual Property

In recent years, the debate on Asian values in the human rights area has slowly disappeared. Meanwhile, commentators have paid growing attention to intellectual property developments in Asia, due largely to the region's rapid rise and the increasing interest in intellectual property and technology matters. In light of these developments, this Part undertakes a holistic inquiry into whether any Asian values in intellectual property law and policy actually exist and whether one could identify unified pan-Asian positions in the area. This Part focuses in particular on the region's cultural, economic, technological, and geopolitical developments.

30. Peerenboom, *supra* note 22, at 1–2. As he elaborated:

Descriptive relativism holds that the moral beliefs, standards, values, or principles of individuals, groups or societies conflict in fundamental ways, and thus disagreements will remain in some cases even after all factual and logical disputes are resolved. These fundamental differences may be due to culture; variation in the personality, psychology, or experiences of individuals; or to other factors such as levels of economic development, the relative stability or instability of the state, and the likelihood of civil war or terrorism. Virtually no one denies the truth of descriptive relativism. Broad multi-country studies have found significant regional differences with respect to democratization, labor rights, women's rights and personal integrity rights. Most of the debate therefore is over two other forms of relativism, normative and metaethical relativism, or other related issues.

Id. at 7–8.

31. See, e.g., BELL, BEYOND LIBERAL DEMOCRACY, *supra* note 26; BELL, EAST MEETS WEST, *supra* note 26; CONFUCIANISM AND HUMAN RIGHTS, *supra* note 26; DE BARY, ASIAN VALUES, *supra* note 26; THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 26; HUMAN RIGHTS AND CHINESE VALUES, *supra* note 23.

32. See *infra* discussion Part I.B.1.

1. Cultural Developments

In the past two decades, commentators have used cultural differences to account for the massive piracy and counterfeiting problems in Asia. Very typical are discussions of how Asian cultures, in particular Confucianism, have militated against intellectual property reforms.³³ Similar discussions have also been made of the familial and community values and strong protection of the public interest as embodied in Islam.³⁴ Although the latter discussions focus primarily on countries in the Middle East, they have high relevance to many Muslim-majority countries in Asia, such as Indonesia, Malaysia, and Pakistan.³⁵

As far as Confucianism is concerned, the starting point of most discussions is William Alford's seminal work, *To Steal a Book Is an*

33. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 19–29* (1995) (discussing how the Confucian culture prevented intellectual property protection from taking root in imperial China); R. Michael Gadbaw, *Republic of Korea*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 272, 275 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (“An ‘intellectual property culture’ has yet to be developed in Korea. This cultural gap is typical of many East Asian countries, where the historical attitude toward intellectual property is noticeably different from that in the West.”); Patrick H. Hu, “*Mickey Mouse*” in *China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT’L L.J. 81, 104 (1996) (“[P]unishing copyright violation contradicts traditional Chinese moral standards.”); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1, 16–21 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing Confucianism as a partial impediment to improving intellectual property protection and enforcement in China).

34. See Lise Buranen, “*But I Wasn’t Cheating*”: *Plagiarism and Cross-Cultural Mythology*, in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 63, 66 (Lise Buranen & Alice M. Roy eds., 1999) (discussing how some teachers attribute plagiarism by Middle Eastern students to the emphasis of community and family values in Middle Eastern cultures); Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”?* A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L & COMP. L. 307, 336 (1996) (noting the various cultural arguments that have been advanced to identify a distinctly different Islamic approach to copyright). *But see* Silvia Beltrametti, *The Legality of Intellectual Property Rights Under Islamic Law*, in *THE PRAGUE YEARBOOK OF COMPARATIVE LAW 2009*, at 57 (T. Mach et al. eds. 2010) (“[S]ome basic forms of intellectual property rights can hardly be denied a claim under Shari’a.”). For discussions of the protection of intellectual property rights under Shari’a, see generally Heba A. Raslan, *Shari’a and the Protection of Intellectual Property—The Example of Egypt*, 47 IDEA 497 (2007); Chad M. Cullen, Note, *Can TRIPS Live in Harmony with Islamic Law? An Investigation of the Relationship Between Intellectual Property and Islamic Law*, 14 SMU SCI. & TECH. L. REV. 45 (2010).

35. See KEMP, *supra* note 7, at 241 (“With a population of more than 240 million people, almost 90 percent of which is Muslim, Indonesia is the world’s most populous Muslim country.”).

Elegant Offense.³⁶ Although this provocative book has inspired a whole generation of intellectual property scholars studying developments in East Asia—myself included—it has also attracted some pointed criticisms. For example, Shi Wei questioned whether the book’s catchy title actually created a misleading impression about the cultural values in China, including Confucianism.³⁷ As he wrote:

“To Steal a Book is an Elegant Offense” (*Qie Shu Bu Suan Tou*) . . . is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book *Kong Yi Ji*, written by the famous novelist Lu Xun. In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the “clichés” of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was “a big, pallid man whose wrinkled face often bore scars,” and was made fun of by everybody. He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. “To Steal a Book Is an Elegant Offense” was his argument when he was taunted. His personal character and way of thinking are thus far removed from the Confucian values. . . . Indeed, the phrase “To Steal a Book Is an Elegant Offense” was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book . . . made its debut in the mid 1990s.³⁸

Ken Shao also noted the many developments in China that Professor Alford did not cover.³⁹ Questioning whether Professor Alford had presented an incomplete picture, Professor Shao encouraged us to reassess the impact of Confucianism on intellectual property protection and enforcement in China.⁴⁰ As more research and archival records become available, this spirited debate will only advance even further.

36. ALFORD, *supra* note 33.

37. See Shi Wei, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT’L L. & COM. REG. 1, 11 (2006).

38. *Id.* (footnotes omitted).

39. See Ken Shao, *The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?*, 2010 INTELL. PROP. Q. 341.

40. See *id.*

To fully understand the debate Professor Alford's book has inspired, it is important to distinguish the weak form of his claim from its strong form. The strong form states that Confucianism militates against intellectual property reforms in China. It accounts for the failure of the many reforms pushed by foreign countries and intellectual property rights holders to induce improvements in intellectual property protection and enforcement.

Although provocative, this strong form of the claim is likely not supported by the reality on Chinese soil. As I pointed out in the past, there are striking similarities between Confucianism and what we have in the West regarding the public domain.⁴¹ While copying may be an important living process for a Confucian Chinese to acquire understanding of human behavior, to improve life through self-cultivation, and to transmit knowledge to the posterity,⁴² Chinese poets and literary theorists widely disagreed on the appropriate extent of copying.⁴³ If the Chinese did not subscribe to intellectual property notions, it is only those notions that were derived from a maximalist tradition, where the importance of the public domain is largely ignored.⁴⁴

Moreover, traditional Chinese culture does not always call for verbatim reproduction, the means by which massive piracy and counterfeiting are often conducted. Rather, Confucianism has called for the *transformative* use of preexisting works that is tailored to the user's needs and conditions. As Professor Alford acknowledged, through the editing of the *Classics* and his comments in the *Analects*, Confucius demonstrated that "transmission, far from being a passive endeavor, entailed selection and adaptation if it was to be meaningful to oneself,

41. See Yu, *From Pirates to Partners*, *supra* note 15, at 224–25; see also ALFORD, *supra* note 33, at 20 ("The indispensability of the past for personal moral growth dictated there be based access to the common heritage of all Chinese.").

42. See ALFORD, *supra* note 33, at 28 ("Interaction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture." (internal quotations omitted) (quoting ARTISTS AND TRADITIONS: USES OF THE PAST IN CHINESE CULTURE xi (Christian Murck ed., 1976))). The Chinese believed that "the essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients who lived in a distant, idealized 'golden age.'" *Id.* Subsequent generations thus have to interact thoroughly with the past in order to acquire this understanding to guide their behavior, to improve through self-cultivation, and to transmit such knowledge to the posterity. See *id.* at 25.

43. See *id.* at 26–29 (noting that Chinese poets and literary theorists disagreed on the appropriate use of past works).

44. For a recent discussion of the public domain, see generally JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2010).

one's contemporaries, and one's successors."⁴⁵ Indeed, the ability to make transformative use of preexisting works can demonstrate one's comprehension of and devotion to the core of the Chinese culture as well as the ability to distinguish the present from the past through original thoughts.

To some extent, the need for meaningful transmission in traditional Chinese culture can be analogized to the transformative use doctrine pronounced by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*⁴⁶ In *Campbell*, a music publisher brought a copyright infringement action against the rap band 2 Live Crew for its salacious rap parody of Roy Orbison's "Oh, Pretty Woman."⁴⁷ Emphasizing that transformative works are socially important and exploring whether fair use covers the contested parody, Justice Souter noted the importance of transformative works:

Although . . . transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁴⁸

In the end, the Court suggested that 2 Live Crew's rendition of the song might have constituted fair use and remanded the case to the lower court.⁴⁹

Just as it is important to ask what the Confucian position of copying is, it is equally important to examine the Western position in intellectual property law and policy, if such a position exists at all. Individualism alone, for example, does not fully summarize the Western intellectual property position. In the past decade, intellectual property scholars have widely questioned the narrow and incomplete definition of intellectual property rights advanced by developed countries and their supportive rights holders.⁵⁰ As the West develops more sophisticated

45. ALFORD, *supra* note 33, at 25.

46. 510 U.S. 569 (1994).

47. *Id.* at 572-73.

48. *Id.* at 579 (citations omitted).

49. *See id.* at 594.

50. *See, e.g.,* James Boyle, *Foreword: The Opposite of Property?*, LAW & CONTEMP.

notions of intellectual property rights, it may find that these notions and Confucianism may be more compatible with each other than one has anticipated.⁵¹

Compared with the strong form of Professor Alford's claim, its weak form seems to be more in line with the reality on the ground, although native Chinese scholars continue to disagree with such an assessment.⁵² This weak claim states that Confucianism has prevented Western notions of intellectual property rights from taking root in China.⁵³ Nevertheless, it does not suggest any incompatibility between the two notions. Nor does it contend that Confucianism will militate against

PROBS., Winter/Spring 2003, at 1, 32 (noting the importance of “look[ing] at the opposite of property [which refers to the limitations, negations, inversions and correctives of property] with the same historical care, analytical precision, and occasional utopian romanticism that we display when looking at property”); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 52–144 (2004) (discussing the use of limits in property law to cabin intellectual property rights); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 148 (2004) (stating that “traditional Property rights entail significant concurrent obligations or responsibilities imposed on the proprietary owner as an incident of their Property ownership”); Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 6 (2005) (“Although people tend to focus on the absolute nature of property—the right to exclude in particular—real property law contains many limitations, safeguards, and obligations, such as adverse possessions, eminent domain, easements, servitudes, nuisance, zoning, irrevocable licenses, the Rule Against Perpetuities, and the waste and public trust doctrines.”).

51. See Yu, *From Pirates to Partners*, *supra* note 15, at 223–25 (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 33, at 76–77 (same). Compare XIANFA art. 20 (1982) (“The state promotes the development of the natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions.”), and *id.* art. 47 (“The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.”), with U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

52. See Charles R. Stone, Comment, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 199–200 (2008) (“Chinese scholars continue to aver that China invented at least one kind of protection—copyright—over six hundred years earlier. They also disagree upon the factors that led to the recognition of intellectual property.” (footnote omitted)). Professor Alford did acknowledge the existence of this line of scholarship. Nevertheless, he contended that their enquiries to date “treat[ed] imperial efforts to control the dissemination of ideas as constituting copyright” and ended there. ALFORD, *supra* note 33, at 18.

53. See, e.g., ALFORD, *supra* note 33, at 1 (considering “why intellectual property law, and in particular copyright, has never taken hold in China”); *id.* at 2 (noting that “imperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture”).

intellectual property law reforms. Thus, if reforms are introduced—either internally through the borrowing of foreign ideas or externally in response to foreign pressure and coercive trade policies—such reforms may help China establish an exogenously developed intellectual property system.

In fact, legal transplants from abroad and coercive trade pressure from the United States were the primary means by which the new intellectual property regime was established in China.⁵⁴ It is therefore no surprise that foreign legal transplants were also a key focus of Professor Alford's book.⁵⁵ Although the level of overall intellectual property protection in China has yet to satisfy the United States government and its rights holders, improvements in such protection had been quite significant in the past two decades.

When we go beyond the discussion of Confucianism to locate Asian values, the task becomes even more challenging. Regardless of whether we embrace the strong or weak form of Professor Alford's claim, we have to think seriously about whether it actually makes sense to generalize the Confucianism debate to cover other Asian cultures. There are several reasons.

First, as pointed out earlier, Confucianism only forms the cultural basis of a small number of countries in East Asia. Islam, for example, is important to countries like Indonesia, Malaysia, and Pakistan. Hinduism is very important to South Asia, covering places such as Bangladesh, India, and Nepal. Buddhism is also very important to Southeast Asian countries, such as Cambodia, Laos, Myanmar, Thailand, and Sri Lanka. Indeed, as David Kang observed, “[t]he states of Southeast Asia experienced twin cultural influences, from India and from China.”⁵⁶

Even in China, Confucianism is only one of the three dominant philosophies in traditional Chinese society; Buddhism and Daoism had and continue to have very significant influence.⁵⁷ As one commentator

54. See Yu, *China Puzzle*, *supra* note 15, at 185–88 (discussing the establishment of the intellectual property regime in China in the 1980s and 1990s as a result of external pressure).

55. See ALFORD, *supra* note 33, at 30–55 (discussing foreign transplants in the intellectual property area and how the Chinese “learn[ed] the law at gunpoint”).

56. DAVID C. KANG, *EAST ASIA BEFORE THE WEST: FIVE CENTURIES OF TRADE AND TRIBUTE* 52 (2010); see also BEESON, *REGIONALISM AND GLOBALIZATION*, *supra* note 24, at 49 (“Evidence of the influence of other cultures on Southeast Asia can be seen from the extensive impact of Hinduism and Buddhism, although the historical record of the region’s early development is sketchy and imperfect.”); GEORGE COEDES, *THE INDIANIZED STATES OF SOUTHEAST ASIA* (1996) (tracing India’s influence on Southeast Asian culture).

57. See ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE*

observed, “[t]he bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right.”⁵⁸ Also present in the Chinese territory are many

PEOPLE’S REPUBLIC OF CHINA 11 (3d ed. 2004) (noting that, along with Confucianism, “Taoism and Buddhism were also influential in some periods and in some aspects of life”); ARTHUR F. WRIGHT, *BUDDHISM IN CHINESE HISTORY* 70–85 (1979) (discussing the importance of Buddhism and Daoism in Chinese history); Stone, *supra* note 52, at 226 (noting that “Buddhism and Daoism became quite influential in their own right”); Christoph Antons, *Legal Culture and History of Law in Asia*, in *INTELLECTUAL PROPERTY LAW IN ASIA* 13, 22–23 (Christopher Heath ed., 2003) (noting the importance of Confucianism, Taoism, Buddhism, and Legalism in China); Rollie Lal, *China’s Relations with South Asia*, in *CHINA AND THE DEVELOPING WORLD*, *supra* note 7, at 133, 133 (“China has a long history of relations with India, beginning with cultural and religious contact between the two by 100 CE. Buddhism traveled from India through the Silk Route in Central Asia to China, mixing with the existing Daoist and Confucian philosophies there.”).

58. Stone, *supra* note 52, at 202. As he elaborated:

Although there is no doubt that Confucianism in its various incarnations played a central role in the development of printing and the dissemination of classical texts that, in turn, contributed to the eventual development of Chinese intellectual property, it is probably a mistake to focus all of our attention upon Confucianism in the first place.

It was not for two or three hundred years after the invention of printing that the Confucian classics appeared in print. Chinese historians also note that as early as the turn of the seventh century, Buddhist scriptures reproduced among the populace outnumbered the Confucian classics by thousands of times. The world’s earliest extant complete book on paper is probably the Buddhist text *Parable Sutra* (256). The earliest extant printed text is a Buddhist *dharani sutra* scroll (c. 704–751) discovered in a temple in Korea in 1966; it was probably printed in China. The first complete printed book is probably the Buddhist *Diamond Sutra* (868) discovered by Aurel Stein in Dunhuang during his second expedition of 1907. And when commercial printing arose in the tenth century, the output was unprecedented: “nearly half a million copies of Buddhist books and pictures are known to have been printed in the eastern part of China in one small area alone over a period of less than half a century.”

It is thus no secret that Buddhism is inseparable from the earliest book copying, production, and printing in China. The reproduction of religious texts is uniquely appealing to Buddhists because it is a tenet of that religion that the copying and distribution of its sutras is a way to receive the blessings of its founder. The Buddha, it is said, once remarked, “Whoever wishes to gain power from the *dharani* [charms] must write seventy-seven copies and place them in a pagoda.” The underlying “religious motivation is . . . confirmed by the earliest printings of the *dharani* discovered in Japan and Korea.” Furthermore, because Buddhism ideally required the “austere ideal of renunciation of the world of things,” it is not a philosophy that would naturally be expected to place much value on the concept of “owning” rights to printed texts, especially when these texts were religious and produced for pious motives. Indeed, the concept of “property” is something that Buddhism is unlikely to celebrate, as the material world is itself “a deception, a dream from which we must awaken sooner or later.” In other words, Buddhism is not only inextricably

minority cultures and beliefs, including the Zhuang, Hui, Uygur, Yi, Tibetan, Miao, Manchu, Mongol, and Buyei.⁵⁹

Second, even if we focus only on Confucianism, that philosophy continues to evolve. What we find in Confucianism today is actually quite different from the teachings of Confucius.⁶⁰ From the *Analects* to Neo-Confucianism propounded by Zhu Xi (1130–1200) to the living principles used in modern Asian societies,⁶¹ Confucian teachings have undergone many significant transformations. There are also many

related to all aspects of China's earliest book production, reproductions of its texts were initially made in vastly greater numbers than the Confucian classics, and its underlying philosophy seems uniquely ill-suited to the creation of what we in the West might consider a property right.

Id. at 227–29 (footnotes omitted). For early texts on Buddhism and Daoism, see generally Lucille Chia, *The Uses of Print in Early Quanzhen Daoist Texts*, in KNOWLEDGE AND TEXT PRODUCTION IN AN AGE OF PRINT: CHINA, 900–1400, at 167 (Lucille Chia & Hilde De Weerdts eds., 2011) [hereinafter KNOWLEDGE AND TEXT PRODUCTION]; Susan Shih-shan Huang, *Early Buddhist Illustrated Prints in Hangzhou*, in KNOWLEDGE AND TEXT PRODUCTION, *supra*, at 135.

59. See JAMES C.F. WANG, CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION 176 (6th ed. 1999) (“The largest of the fifty-six minority groups are the Zhuangs (15.4 million), Hui or Chinese Muslims (8.6 million), Uygur (7.2 million), Yi (6.5 million), Tibetans (4.5 million), Miao (7.3 million), Manchus (9.8 million), Mongols (4.8 million), Bouyei (2.1 million), and Koreans (1.9 million).”).

60. As William Theodore De Bary wrote:

[When questioned “What does Confucianism have to offer today?”] I am . . . obliged to ask: “[w]hose Confucianism are we talking about?” If it is the original teachings of Confucius in the *Analects*, then almost nothing said about Confucianism today speaks to that. Indeed even the anti-Confucian diatribes earlier in [the twentieth] century spoke rarely to Confucius’ own views but only to later adaptations or distortions of them.

WM. THEODORE DE BARY, THE TROUBLE WITH CONFUCIANISM xi (1991); see also DE BARY, ASIAN VALUES, *supra* note 26, at 11 (“Problems of continuity and change in the evolution of major traditions must be considered. Confucianism should not be thought either static or monolithic—that is, taking the sayings of Confucius and Mencius just by themselves, to represent an historically developing, often conflicted, and yet gradually maturing Confucian tradition.”); Liu Shu-hsien, *Confucian Ideals and the Real World: A Critical Review of Contemporary Neo-Confucian Thought*, in CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY: MORAL EDUCATION AND ECONOMIC CULTURE IN JAPAN AND THE FOUR MINI-DRAGONS 92, 92 (Tu Wei-Ming ed., 1996) (noting that the term “Confucianism” “may refer to the philosophical tradition represented by Confucius and Mencius, or it may refer to the institutions and customs that emerged in the long course of Chinese history through the influence of Confucian thought”); Benjamin Schwartz, *Some Polarities in Confucian Thought*, in CONFUCIANISM AND CHINESE CIVILIZATION 3, 3 (Arthur F. Wright ed., 1964) (considering “universal and perennial” questions concerning whether “the original teachings of the founders [of Confucianism] can be extricated from the interpretations of the followers”).

61. See generally T.R. REID, CONFUCIUS LIVES NEXT DOOR: WHAT LIVING IN THE EAST TEACHES US ABOUT LIVING IN THE WEST (2000) (discussing the Confucian principles in modern Asian societies).

different strands of Confucianism. As noted Confucian scholar Theodore de Bary observed, a strong liberal tradition existed in at least one strand of Confucianism, even though Confucianism is generally not publicly identified with liberal theories.⁶² Likewise, Professor Alford reminded us that “approaches rooted in portrayals of culture as essentially impervious to change, whether from within or beyond the society being examined,” run the risk of being unidimensional.⁶³

Furthermore, those Asian countries that adopt Confucianism embrace it for different reasons and to very different extents. As Professor Kang recently noted:

the main secondary states of East Asia chose Confucianism and Chinese ideas more for their own reasons than from Chinese pressure. In Korea, Vietnam, and Japan, the debate about how to organize government and society occurred between warriors and scholars, with the Confucian literati winning in Korea and Vietnam and the warriors ultimately winning in Japan. Although Chinese ideas were deeply embedded from the founding of these states, just as significantly, Chinese ideas were grafted onto what indigenous cultures, and the two coexisted—sometimes uncomfortably—resulting in only partial Sinicization.⁶⁴

Third, by focusing on the discrete values in Asia—whether as Asian values or simply as “values in Asia”⁶⁵—the “Asian values” debate “underestimates both the historical ruptures of colonization and the present forces of global interaction.”⁶⁶ In Michael Davis’ view, “cultural

62. See, e.g., DE BARY, *ASIAN VALUES*, *supra* note 26, at 108–09 (discussing how freedom of expression and association is recognized in “a significant line of Confucian thought”); WM. THEODORE DE BARY, *THE LIBERAL TRADITION IN CHINA* (1983) (deriving the liberal tradition in Confucianism from writings of neo-Confucianist thinkers).

63. ALFORD, *supra* note 33, at 6.

64. KANG, *supra* note 56, at 26; see also LUCIAN W. PYE WITH MARY W. PYE, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY* 55 (1985) (“The East Asian countries of China, Japan, and Korea—and also Vietnam in Southeast Asia—all absorbed and refined Confucian values and concepts of authority. But because of their individual cultural traditions, they also had their separate versions of Confucianism, which increasingly diverged as each country followed a different path to political modernization.”).

65. See BELL, *BEYOND LIBERAL DEMOCRACY*, *supra* note 26, at 54 (noting that the use of the term “values in Asia” “is sensitive to the pluralism of values within Asia yet retains the implication that such values can pose challenges to Western liberal approaches to human rights”); Peerenboom, *supra* note 22, at 7 (noting such a possible distinction in the human rights context but observing the many problems that will arise even with the use of the term “values in Asia”).

66. Tay, *supra* note 23, at 747; see also BEESON, *REGIONALISM AND GLOBALIZATION*,

relativist theories . . . are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse.”⁶⁷ The “Asian values” debate also ignores the fact that “there are different views of human rights voiced in Asia, by opposition politicians, scholars, and non-government organizations.”⁶⁸

A case in point is the Bangkok Non-Governmental Organizations Declaration of March 27, 1993,⁶⁹ which contrasted significantly with the Bangkok Declaration—to be more precise, the Bangkok Governmental Declaration. As Simon Tay reminded us:

[t]he N.G.O. Declaration differs significantly both from the Bangkok Declaration by governments and what . . . has, for convenience, termed the “Asian view”. Th[is] Declaration places a stronger emphasis on civil and political rights than does the Declaration by government representatives. It calls for democracy to be “fostered and guaranteed in all countries” and for Asian governments to “lift constraints on political rights . . . by repealing repressive laws . . . and liberalising the political system.” Like the Bangkok Declaration by the Asian governments, it calls for cultural rights to be recognized on the basis that “[t]here is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures”. The N.G.O. Declaration explicitly stipulates, however, that “cultural practices which derogate from universally accepted human rights . . . must not be tolerated.”⁷⁰

supra note 24, at 50 (“[T]he dominant patterns of relationships that existed before European imperialism transformed the region suggest that things could have developed differently.”). As Professor Kang recounted: “The British colonized Hong Kong, the Malay peninsula, Australia and New Zealand, Burma, India, and deeply influenced Siam [now Thailand]. France colonized much of Indochina, including Vietnam and Cambodia. The Dutch took Indonesia, the Spanish (and then the United States) conquered the Philippines, and the Portuguese possessed Macao.” KANG, *supra* note 56, at 160.

67. Davis, *Constitutionalism and Political Culture*, *supra* note 21, at 110.

68. Tay, *supra* note 23, at 747.

69. The Bangkok NGO Declaration was reprinted in HUMAN RIGHTS AND INTERNATIONAL RELATIONS, *supra* note 26, at 208.

70. Tay, *supra* note 23, at 747 (footnotes omitted); *see also* David Kelly, *The Chinese Search for Freedom as a Universal Value*, in ASIAN FREEDOMS: THE IDEA OF FREEDOM IN EAST AND SOUTHEAST ASIA 93, 114 (David Kelly & Anthony Reid eds., 1998) (“The Bangkok Declaration is seriously at fault . . . in excluding the kind of voices . . . from Liang Qichao to Bao Zunxin . . . in its account of freedom in Asia. This is in itself the most minimal of lists, and says nothing about countries apart from China.”); Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS,

Indeed, the drafters of the Non-Governmental Declaration criticized the Governmental Declaration for “reflect[ing] the continued attempt by many Governments of the Asia-Pacific region to avoid their human rights obligations, to put the state before the people and to avoid acknowledging their obligations to account for their failures in the promotion and protection of human rights.”⁷¹

Fourth, as important as the influence of Confucianism may be in East Asian countries—or for that matter, Islam in the Middle East—one has to wonder whether the discussion of these influences is just based on cultural stereotypes.⁷² Communitarian philosophies are not unique to the Chinese or the Muslims; they can be found in civilizations around the world.⁷³ While most in Western societies would find it misleading or overly simplistic to attribute the massive unauthorized copying problem on the internet in their countries to the communitarian underpinnings of Judeo-Christianity, it is equally problematic to attribute piracy and counterfeiting in Asia to Asian cultures. Simply put, it is just misleading and overly simplistic to describe piracy and counterfeiting as a cultural problem.⁷⁴

supra note 26, at 27, 29 (“[T]he concept of Asian values does not convey Asian voices in their full complexity and diversity, nor does it represent genuine Asian initiatives. Rather, it depends on, or even abuses, the West-centric frameworks that it claims to overcome.”).

71. Nongovernmental Organizations’ Response to the Bangkok Declaration, *reprinted in* HUMAN RIGHTS AND INTERNATIONAL RELATIONS, *supra* note 26, at 211; *see also* TAY, *supra* note 20, at 12 (“While perhaps having some merit, the Asian values argument was suspect because its spokesmen were often politicians or officials associated with more authoritarian governments and regimes. It was suspected to be a relatively sophisticated argument to justify existing power structures.”).

72. Simon Tay made a similar observation. *See* Tay, *supra* note 23, at 747 (“Critics [of the cultural argument] will say the Asian view tends to generalizations and stereotypes of what is ‘Asian.’”).

73. *See* REIN MÜLLERSON, HUMAN RIGHTS DIPLOMACY 87 (1997) (“The West has had its own communitarian phases of development and communitarian ideas and practices can still be found in some sectors of Western society. . . . And currently, many people in the West are thinking of how to put some limits on individualism, which, while being necessary for human liberation and economic development, may become excessive and indeed constitute a threat for both liberty and economic development.”); Aryeh Neier, *Asia’s Unacceptable Standard*, FOREIGN POL’Y, Autumn 1993, at 42, 42 (“Hong Kong’s entrepreneurs, who have made that colony an outstanding economic success, are as individualistic as their Western counterparts. And seminal figures in the development of the West’s rights-based traditions, such as John Locke and Thomas Jefferson, also had their communitarian sides.”).

74. *See* Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT’L & COMP. L. REV. 127, 131–34 (2003) (explaining why copyright piracy is not merely a cultural problem).

2. Economic Developments

Like culture, the economic and technological developments in Asia have been highly diverse and uneven.⁷⁵ As David Llewellyn reminded us in his recent book, *Invisible Gold in Asia*:

The term “Asia” was originally a Western concept to describe the eastern part of the land mass of Eurasia separated from Europe by the Ural Mountains—or, as the ancient Greeks would have said, “everything east of Greece.” It incorporates a number of regions and peoples from vastly varied civilisations. It is likely that the peoples of ancient Asia themselves, such as the Chinese,

75. As Mark Beeson pointed out:

In the Asia-Pacific, . . . there is a far greater range of potential members in terms of their respective levels of economic development and organization, political practices and structures of government, and even in their respective cultural traditions and backgrounds, something that reduces the ability to act in concert as a consequence. There are dramatic differences in the size of the economies of APEC’s members . . . before we even begin to think about the way such economies are organized at the political level or integrated into wider structures of international governance, development and security.

BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 4. Similarly, Yash Ghai noted:

The economic and political systems in Asia show a remarkable diversity, ranging from semi-feudal kingdoms in Kuwait and Saudi Arabia, through military dictatorships in Burma and Cambodia, effectively one-party regimes in Singapore and Indonesia, communist regimes in China and Vietnam, ambiguous democracies in Malaysia and Sri Lanka, to well-established democracies like India. There are similarly differences in their economic systems, ranging from tribal subsistence economies in parts of Indonesia through highly developed market economies of Singapore, Hong Kong and Taiwan and the mixed economy model of India, to the planned economies of China and Vietnam.

Yash Ghai, *Asian Perspectives on Human Rights*, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS, *supra* note 26, at 54, 54–55; *see also* BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at xiv (“[I]f there is one observation that is always made about East Asia it is about its diversity.”); *id.* at 116 (“Heterogeneity may be the leitmotif of East Asia, but the diversity of political systems found in Southeast Asia makes generalization difficult, if not foolhardy.”); ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN ASIAN EMERGING ECONOMIES 3 (2010) (stating that “it is never easy to jumble all Asian nations together and establish their economic and technological needs and how they might resolve any attendant problems”); TAY, *supra* note 20, at 19 (“The region has no single, strong, and enduring history of unity and accepted commonality, whether in polity, culture, language, or religion.”); *id.* at 38 (“Any claim by one Asian country would be met with vehement denials from others. Asia is a region that is not only diverse but divided by tensions and unsettled questions.”); Christoph Antons, *Analyzing Asian Law: The Need for a General Concept*, 13 LAW IN CONTEXT 106 (1995) (discussing the challenges in analyzing Asian law in light of the diverse historical and sociological backgrounds); Christopher Heath, *Intellectual Property Rights in Asia*, in INTELLECTUAL PROPERTY LAW IN ASIA, *supra* note 57, at 3, 5 (noting the lack of common cultures, religions, and colonial backgrounds in Asia).

Indians, Japanese, Persians and Arabs, did not conceive the idea of Asia because they did not view themselves collectively in the way Europeans did.⁷⁶

For analytical convenience, the United Nations Statistics Division divides Asia into five different macro sub-regions: (1) central Asia; (2) eastern Asia; (3) southern Asia; (4) south-eastern Asia; and (5) western Asia. Table 1 lists the different countries included in the U.N. geoscheme. Although the Statistics Division stated explicitly that “[t]he assignment of countries or areas to specific groupings is for statistical convenience and does not imply any assumption regarding political or other affiliation of countries or territories by the United Nations,”⁷⁷ the classification makes salient the challenges in determining at the outset which countries are to be analyzed for the purposes of identifying pan-Asian positions in intellectual property law and policy.

76. DAVID LLEWELLYN, *INVISIBLE GOLD IN ASIA: CREATING WEALTH THROUGH INTELLECTUAL PROPERTY* xiv-xv (2010); accord DE BARY, *ASIAN VALUES*, *supra* note 26, at 2 (“In historical fact, while the diverse cultures of Asia are each to some degree multicultural (that is, the product of long cultural interactions), there was, until modern times, no consciousness among them of a shared Asian identity Traditionally the distinct civilizations of Asia did not identify themselves with a common continental culture, whatever the religious bonds they may have shared with other Asian peoples.”); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 303 (3d ed. 2007) (“Asia may exist more in western thinking than in Asian, and the diversity of Asia is perhaps greater today than it ever has been.”).

77. *Standard Country or Area Codes for Statistical Use*, U.N. STATISTICS DIV., <http://unstats.un.org/unsd/methods/m49/m49.htm> (last revised Feb. 17, 2011).

Central Asia	Eastern Asia	Southern Asia
Kazakhstan Kyrgyzstan Tajikistan Turkmenistan Uzbekistan	China China, Hong Kong China, Macau Democratic People's Republic of Korea Japan Mongolia Republic of Korea	Afghanistan Bangladesh Bhutan India Iran (Islamic Republic of) Maldives Nepal Pakistan Sri Lanka
South-Eastern Asia	Western Asia	
Brunei Darussalam Cambodia Indonesia Lao People's Democratic Republic Malaysia Myanmar Philippines Singapore Thailand Timor-Leste Vietnam	Armenia Azerbaijan Bahrain Cyprus Georgia Iraq Israel Jordan Kuwait Lebanon Occupied Palestinian Territory Oman Qatar Saudi Arabia Syrian Arab Republic Turkey United Arab Emirates Yemen	

Table 1: Composition of Geographical Sub-regions in Asia (As of Feb. 17, 2011)⁷⁸78. *Id.*

Even if we limit our discussion to only eastern, southern, and south-eastern Asia—or even the West-centric Far East—it remains difficult to compare the economic developments in countries in these different sub-regions. Out of all the countries, Japan has the strongest and most sophisticated economy. In Mark Besson’s view, this country is “especially important as an exemplar of a highly successful *Asian* state.”⁷⁹

Although China has recently overtaken Japan to become the world’s second largest economy on an aggregate basis, behind only the United States,⁸⁰ Japan still dominates China dramatically on a per capita basis. With a per capita GDP of 39,738 in 2009, Japan is one of the richest developed countries.⁸¹ In the same period, China, by contrast, has a per capita GDP of only 3,744. It therefore should still be classified as a low-to-middle-income developing country.⁸² Indeed, China’s per capita GDP is lower than that of Malaysia and Thailand, not to mention Japan, Singapore, and South Korea.⁸³

In the area of intellectual property protection, Japan has improved considerably in the last two decades. In the early 1980s, Japan was widely criticized for its limited intellectual property protection, due largely to the United States’ trade deficit with Japan.⁸⁴ By the time the Agreement on Trade-Related Aspects of Intellectual Property Rights⁸⁵ (“TRIPS Agreement”) was negotiated, Japan slowly assumed the role of a key trilateral partner with the United States and the European Communities—thanks in no small part to the push by local and foreign intellectual property industries.⁸⁶ Most recently, Japan was instrumental

79. BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at 106.

80. See David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, at B1.

81. *GDP Per Capita (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Apr. 10, 2011) [hereinafter *GDP Per Capita*].

82. *Id.*

83. *Id.*

84. See MICHAEL P. RYAN, PLAYING BY THE RULES: AMERICAN TRADE POWER AND DIPLOMACY IN THE PACIFIC 16–17 (1995) (providing a list of Section 301 trade disputes involving Japan from 1974 to 1989); JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 24 (2001) (stating that Japan was identified as a priority foreign country under the Super 301 process for providing inadequate market access to U.S. goods and services).

85. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

86. See generally DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY

in driving the negotiation of the Anti-Counterfeiting Trade Agreement (“ACTA”),⁸⁷ a voluntary plurilateral agreement that aims to set a new and higher benchmark for international intellectual property protection and enforcement among like-minded countries.⁸⁸

Unlike Japan, China arrived much later in both the economic and intellectual property scenes; it is the “new kid on the block” of the World Trade Organization (“WTO”).⁸⁹ Nevertheless, it now has successfully established itself as a dominant Asian economic power. Today, China is the world’s largest exporter and second largest economy and trading nation.⁹⁰ It is also one of the world’s largest recipients of foreign direct investment (“FDI”) with capital inflows of about \$50 billion, behind only the United States and the United Kingdom.⁹¹ Its factories “make 70 percent of the world’s toys, 60 percent of its bicycles, half its shoes, and one-third of its luggage. . . . [China also] builds half of the world’s microwave ovens, one-third of its television sets and air conditioners, a quarter of its washers, and one-fifth of its refrigerators.”⁹²

Given China’s geopolitical importance and its immense growth potential, some commentators have linked China to the United States, creating what they have called the G-2 (Group of 2).⁹³ As they argued, G-2 is likely to be crucial to discussions on global matters, which range from economic recovery to climate change. Some economists and commentators also highlighted the growing economic interdependence

RIGHTS: THE TRIPS AGREEMENT 66 (2002) (examining the role of the industries in the TRIPS negotiations); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW* 96–120 (2003) (same).

87. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, *available at* http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf [hereinafter ACTA].

88. *See generally* Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1 (2011) (criticizing the use of the “country club” approach to negotiate ACTA); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) [hereinafter Yu, *Six Secret Fears*] (discussing the serious concerns about ACTA).

89. Yu, *Access to Medicines*, *supra* note 6, at 352.

90. C. FRED BERGSTEN ET AL., *CHINA’S RISE: CHALLENGES AND OPPORTUNITIES* 9 (2009).

91. Daniel Chow, *The Role of Intellectual Property in Promoting International Trade and Foreign Direct Investment*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 187, 198 (Peter K. Yu ed., 2007) [hereinafter *INTELLECTUAL PROPERTY AND INFORMATION WEALTH*].

92. SHENKAR, *supra* note 4, at 2–3.

93. *Compare* BERGSTEN ET AL., *supra* note 90, at 25 (noting the need for China and the United States to “develop a very informal but increasingly effective ‘G-2’ . . . to help guide the global governance process on an increasing number of economic topics”), *with* HALPER, *supra* note 9, at 216–18 (arguing against the elevation of the U.S.-China relations to the bilateral status of a special G2 relationship).

between China and the United States by alluding to “a chain-gang relationship” between the two countries,⁹⁴ or what Niall Ferguson and Moritz Schularick have described as “Chimerica.”⁹⁵

In the intellectual property area, China’s developments have also been quite impressive, especially in major cities and coastal areas.⁹⁶ Today, China is among the top 5 countries filing patent applications through the Patent Cooperation Treaty (“PCT”) under the auspices of the World Intellectual Property Organization (“WIPO”).⁹⁷ In 2010, the number of PCT applications increased by 56.2% to 12,337, moving China to the fourth spot, behind only the United States, Japan, and Germany.⁹⁸

Since 1994, the Chinese Patent Office, which later became the State Intellectual Property Office (“SIPO”), has also been recognized as an international searching authority for PCT purposes.⁹⁹ In Peter Drahos’ view, such recognition made China “a player in the top tier of patent offices that will dominate the emerging system of global patent administration.”¹⁰⁰ It is therefore no surprise that, in 2007, SIPO met with the European Patent Office, the Japanese Patent Office, the Korean Intellectual Property Office (“KIPO”), and the United States Patent and Trademark Office to discuss ways to “improv[e] the efficiency of their examination systems and to harmonize their office

94. Walden Bello, *Chain-Gang Economics: China, the US, and the Global Economy*, in CHINA’S NEW ROLE, *supra* note 7, at 7, 11; *see also* HALPER, *supra* note 9, at 25 (“[T]he American and Chinese economies are heavily interdependent. America has grown addicted to Chinese credit; China has grown equally addicted to American consumption. The depth of this interdependence creates a relationship that is stabilized in a kind of economic version of *mutually assured destruction*.”); ZACHARY KARABELL, *SUPERFUSION: HOW CHINA AND AMERICA BECAME ONE ECONOMY AND WHY THE WORLD’S PROSPERITY DEPENDS ON IT* (2009) (discussing the intertwined economic relationship between China and the United States); Peter K. Yu, *Remember that China, U.S. Need Each Other*, DES MOINES REG., Feb. 22, 2009, at 4OP [hereinafter Yu, *China, U.S. Need Each Other*] (noting this “chain-gang relationship”).

95. Niall Ferguson & Moritz Schularick, ‘Chimerica’ and the Global Asset Market Boom, 10 INT’L FIN. 215 (2007).

96. *See* Yu, *China Puzzle*, *supra* note 15, at 185–88 (tracing the development of the intellectual property regime in China); Yu, *From Pirates to Partners II*, *supra* note 15, at 975–99 (examining the progress China has made in the intellectual property arena).

97. Press Release, World Intellectual Prop. Org. [WIPO], International Patent Filings Recover in 2010, http://www.wipo.int/pressroom/en/articles/2011/article_0004.html (Feb. 9, 2011).

98. *Id.* The 2010 figures for the United States, Japan, and Germany were 44,855, 32,156, and 17,171, respectively.

99. PETER DRAHOS, *THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS* 233 (2010).

100. *Id.*

systems.”¹⁰¹

While piracy and counterfeiting problems remain, China has begun to make a pro-active move from the imitation model to a new innovation model.¹⁰² The State Council’s recently adopted National Intellectual Property Strategy, for example, seeks to strengthen the country’s indigenous and innovative capacities.¹⁰³ The strategy strongly indicates the leaders’ growing understanding of the important role intellectual property protection and enforcement play in driving a country’s economy.¹⁰⁴

Like China, India has very impressive economic and technological developments. Thus far, this other BRICS country has yet to compete effectively against China, in part due to the problems with its poor infrastructure, bureaucratic red tape, and failure to attract a substantial amount of FDI.¹⁰⁵ However, India, which already has the world’s second largest population, is catching up fast and possesses strengths that China may not have—for example, a younger workforce with a good command of English, higher population growth, superior capital efficiency, strong investment growth potential, and entrepreneurship.¹⁰⁶ Some

101. *Id.* at 236.

102. See generally LI YAHONG, IMITATION TO INNOVATION IN CHINA: THE ROLE OF PATENTS IN BIOTECHNOLOGY AND PHARMACEUTICAL INDUSTRIES (2010) (discussing China’s move from an imitation model to an innovation model).

103. See STATE COUNCIL, OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008), available at http://www.gov.cn/english/2008-06/21/content_1023471.htm.

104. See Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1123 (2011) (considering it highly encouraging that China now understands the importance of domestic innovation); see also Yu, *From Pirates to Partners*, *supra* note 15, at 189–96 (noting the need to convince Chinese leaders why intellectual property protection will benefit China).

105. See Pete Engardio, *Introduction to CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS* 27 (Pete Engardio ed., 2006) [hereinafter CHINDIA] (noting “India’s decrepit infrastructure [and] bureaucratic red tape”); *The Rise of India*, in CHINDIA, *supra*, at 45, 49 (“[C]ompared to China with its modern infrastructure and disciplined workforce, India is far behind in exports and as a magnet for foreign investment.”); see also ROBYN MEREDITH, THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA AND WHAT IT MEANS FOR ALL OF US 57 (2007) (“China is winning the sprint, and [India is] going to win the marathon.” (quoting Kamal Nath, India’s minister of commerce and industry)). *But see id.* at 154 (“China has proved so much more efficient than India at development and managing its economy that th[e] scenario [that India’s economy will overtake China’s] is unlikely unless China falls into political turmoil.”).

106. See *Why India May Be Destined to Overtake China*, in CHINDIA, *supra* note 105, at 27 (discussing India’s strengths vis-à-vis China); *The Rise of India*, *supra* note 105, at 50 (noting the “deep source of low-cost, high-IQ, English-speaking brainpower [that] may soon have a more far-reaching impact on the U.S. than China”). As one commentator observed interestingly:

Chinese analysts argue that because India’s salaries are lower, costs are cheaper, thereby making Indian products more competitive. Language is also a

commentators even predicted that India will overtake China economically in the second half of this century.¹⁰⁷

Within the intellectual property area, India has also garnered significant attention. The strength of its software industry speaks for itself.¹⁰⁸ Its generic pharmaceutical industry, which features such companies as Ranbaxy and Dr. Reddy's Laboratories, is also considered one of the most important and sophisticated in the world.¹⁰⁹ Because India "makes more than a fifth of the world's generic drugs"¹¹⁰ and eighty-five percent of generic HIV/AIDS antiretrovirals in Sub-Saharan Africa,¹¹¹ commentators have noted the significant impact a reduced supply of Indian generic drugs will have on the global access to essential medicines in the less developed world.¹¹²

In December 2007, India finally joined China, Japan, and South Korea in having its patent office designated as an international searching authority.¹¹³ As of this writing, India has yet to conclude an

factor. Chinese businessmen fear that U.S. businesses will prefer Indian products because of the Indian facility with English. In a strange turn of events, the Chinese population is now asking whether their market is likely to be flooded with cheap Indian goods.

Lal, *supra* note 57, at 141.

107. See, e.g., *The Rise of Chindia*, in CHINDIA, *supra* note 105, at 13, 14 ("Until now, China has attained dramatically higher growth. But some experts believe India's superior capital efficiency, higher population growth, and younger workforce mean growth is more sustainable and will enable India to surpass China in economic growth in the coming decades."); *Why India May Be Destined to Overtake China*, *supra* note 106, at 27 (discussing the different factors that may enable India to surpass China).

108. See generally Suma S. Athreya, *The Indian Software Industry*, in FROM UNDERDOGS TO TIGERS: THE RISE AND GROWTH OF THE SOFTWARE INDUSTRY IN BRAZIL, CHINA, INDIA, IRELAND, AND ISRAEL 7-40 (Ashish Arora & Alfonso Gambardella eds., 2006) (discussing the rise and growth of the Indian software industry).

109. See generally SUDIP CHAUDHURI, THE WTO AND INDIA'S PHARMACEUTICALS INDUSTRY: PATENT PROTECTION, TRIPS, AND DEVELOPING COUNTRIES 180-221 (2005) (discussing the growth and prospects of generic drug exports from India).

110. KAMAL NATH, INDIA'S CENTURY 110 (2008).

111. Colleen Chien, *HIV/AIDS Drugs for Sub-Saharan Africa: How Do Brand and Generic Supply Compare?*, 2 PLOS ONE e278 (2007), available at <http://ssrn.com/abstract=1009287>.

112. See, e.g., Kenneth C. Shadlen, *Is AIDS Treatment Sustainable?*, in THE GLOBAL GOVERNANCE OF HIV/AIDS: INTELLECTUAL PROPERTY AND ACCESS TO ESSENTIAL MEDICINES (Obijiofor Aginam, John Harrington & Peter K. Yu eds., forthcoming 2012) ("[I]t is estimated that more than half of those receiving AIDS treatment in the developing world are treated with generic [antiretrovirals] produced in India."); Yu, *Access to Medicines*, *supra* note 6, at 388-89 (noting that the picture "may change as generic manufacturers in the BRICS countries, such as those in India, become more active in developing on-patent drugs, partly as a result of the TRIPs Agreement").

113. Press Release, Ministry of Commerce & Industry, India Recognised as

agreement with the International Bureau of WIPO. In the future, India is likely to join China, Japan, and South Korea to become countries with a large volume of PCT applications.

If these accomplishments are not enough, India, along with Brazil, has been the undisputed leader of the developing world in international intellectual property discussions.¹¹⁴ For example, before the adoption of the TRIPS Agreement, India demanded the revision of both the Berne Convention for the Protection of Literary and Artistic Works¹¹⁵ and the Paris Convention for the Protection of Industrial Property,¹¹⁶ the two leading international intellectual property conventions.¹¹⁷ The goodwill and leadership they developed in this early period continue even today. Although it remains unclear whether “India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did,”¹¹⁸ India is likely to continue to feature prominently in regional and international intellectual property debates.¹¹⁹

Outside these three powerful Asian economies, Hong Kong, Singapore, South Korea, and Taiwan are in a league of their own. Commentators have described these countries and regions as newly industrialized economies, the “four little dragons,” or the “four Asian tigers.”¹²⁰ Consider South Korea, for example. The country already has a highly successful home electronics industry that produces many innovative products; Samsung remains a household name in the West. In 2007, “Korea ranked fourth in the . . . International Patent Applications statistics, occupying 4.47% of global patents. . . . Korea

International Searching Authority and International Preliminary Examining Authority, <http://pib.nic.in/newsite/erelease.aspx?relid=34113> (Dec. 18, 2007).

114. See Yu, *Access to Medicines*, *supra* note 6, at 350–51 (discussing India’s historical role as a leader in the less developed world and its active lobbying on behalf of these countries for lower intellectual property protection and special and differential treatment).

115. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971).

116. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

117. See Yu, *Access to Medicines*, *supra* note 6, at 351 (discussing India’s demands for special concessions in the international copyright and patent systems).

118. Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765, 765 (2002) [hereinafter Drahos, *Developing Countries*].

119. See Yu, *Access to Medicines*, *supra* note 6, at 351 (“[M]any of [the BRICS] countries, like China and India, are still very eager to take up the role of regional power, if not a world power. So, there is still a very good chance that their interests in geopolitics may spill over into the politics of intellectual property rights.”).

120. See, e.g., ALFORD, *supra* note 33, at 5; LLEWELLYN, *supra* note 76, at 137.

[also] had the highest number of resident patent applications filed per billion dollars of GDP and per million dollars of R&D expenditures.”¹²¹

Moreover, KIPO has been very active in recent years. With the Japanese Patent Office and China’s SIPO, KIPO formed the Asian Trilaterals, which regularly engage in policy dialogues among Asian patent offices.¹²² KIPO now “has superhighway arrangements in place with the Japanese Patent Office . . . and the [U.S. Patent and Trademark Office], and it is also moving into a superhighway arrangement with the Danish [Patent Office].”¹²³ Most recently, South Korea completed a free trade agreement with the United States, which is pending Congressional approval.¹²⁴ Included in the agreement is an extensive intellectual property chapter that seeks to align the country’s intellectual property standards with those of the United States.¹²⁵

Like South Korea, Singapore has entered into a free trade agreement with the United States.¹²⁶ In fact, Singapore was one of the first Asian countries to enter into such a bilateral agreement. Singapore’s emphasis on the development of a knowledge-based economy is understandable. Being a small, but highly urbanized¹²⁷ city state that focuses primarily on foreign investment,¹²⁸ exports of high-

121. Ji-Hyun Park, *South Korea, in* INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS 259, 275 (Paul Goldstein & Joseph Straus eds., 2009) [hereinafter INTELLECTUAL PROPERTY IN ASIA] (footnote omitted). *See generally* Keun Lee & Yee Kyoung Kim, *IPR and Technological Catch-Up in Korea, in* INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY 133 (Hiroyuki Odagiri et al. eds., 2010) [hereinafter INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP] (examining how South Korea caught up in the field of intellectual property and technological development).

122. DRAHOS, *supra* note 99, at 233.

123. *Id.* at 239 (footnote omitted).

124. Press Release, Office of the United States Trade Rep., Signed Legal Texts Related to U.S.-Korea Trade Agreement, <http://www.ustr.gov/about-us/press-office/press-releases/2011/february/signed-legal-texts-related-us-korea-trade-agreeme> (Feb. 10, 2011).

125. Korea–United States Free Trade Agreement, S. Korea-U.S., ch. 18, May 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf [hereinafter KORUS FTA].

126. United States–Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf [hereinafter USSFTA].

127. *See* ASIAN DEV. BANK, ASIAN DEVELOPMENT OUTLOOK 2010 UPDATE: THE FUTURE OF GROWTH IN ASIA 71 (2010), available at <http://www.adb.org/documents/books/ado/2010/update/ado2010-update.pdf> (noting that “more than 80% of the population live in urban areas” in Hong Kong, Singapore, and South Korea).

128. *See* BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at 165 (“The essence of the strategy the Singaporean government adopted was to make itself an attractive

technology products,¹²⁹ and a reliance on service industries,¹³⁰ intellectual property rights play a very important role in the country's future economic development. While Singapore has a high per capita GDP¹³¹ and very high levels of intellectual property protection and enforcement, it is also a founding member of the ASEAN, a regional group that includes some of the weakest economies in Southeast Asia. If it continues to stay within the group and assumes greater leadership, it is likely to play a very important role in the development of intellectual property law and policy in Asia.

Within ASEAN, the divergence in economic and technological developments is the most blatant. While Singapore is no doubt the economic leader in the pack,¹³² Indonesia, the Philippines, and Vietnam are included in what the Goldman Sachs analysts have termed the N-11

investment location for mobile international capital.”); LLEWELLYN, *supra* note 76, at 157 (“Up to the late 1980s the principal driver for [Singapore’s] spectacular growth was foreign direct investment in manufacturing for companies based overseas, particularly in electronics, engineering, chemicals, and pharmaceuticals.”); Ng-Loy Wee Loon, *Singapore, in INTELLECTUAL PROPERTY IN ASIA*, *supra* note 121, at 233, 235 (Paul Goldstein & Joseph Straus eds., 2009) (“The strategy [for Singapore] was to embark on an industrialization programme that was export-oriented. Foreign investors were actively wooed to develop their manufacturing operations in Singapore for export to world markets—both in low-technology, labour-intensive industries (e.g., textile, garment, and toy factories were set up by Hong Kong and Taiwanese businesses) and in higher-technology industries.”); *see also* BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at 164 (“In Singapore’s case, its geographical location at the cross-roads of Asian trade and its historical role as a crucial entrepôt of the British empire meant that it was well placed to take advantage of the expanding world economy.”); Alban Kang, *Singapore, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA* 323, 323 (Alan S. Gutterman & Robert Brown eds., 1997) (noting Singapore’s historical role as “a trading outpost for the British” during colonial times).

129. *See High-Technology Exports (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/TX.VAL.TECH.CD> (last visited Apr. 10, 2011) [hereinafter *High-Technology Exports*] (reporting that high-technology exports accounted for 51% of exports manufactured in Singapore in 2008).

130. *See Trade in Services (% of GDP)*, WORLD BANK, <http://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS> (last visited Apr. 10, 2011) (reporting that trade in services accounted for 95.1% of Singapore’s GDP in 2009); Ng-Loy, *supra* note 128, at 240 (“Singapore’s economic planning for the 1990s included strategies to promote the service sector together with manufacturing, to deepen the technology base, and to create an ‘external’ economy through globalization. The idea behind the strategy to deepen the technology base in Singapore was to move Singapore up the value-chain in manufacturing, especially in emerging fields such as biotechnology, and to attract research and development (R&D) activities.”).

131. *GDP Per Capita*, *supra* note 81.

132. *See* Dean A. DeRosa, *US Free Trade Agreements with ASEAN*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* 117, 163 (Jeffrey J. Schott ed., 2004) (“Singapore is economically the strongest ASEAN country, but unlike its ASEAN partners it is not an agriculture-exporting country.”).

(Next Eleven) countries, along with other Asian economies such as Bangladesh, Iran, Pakistan, and South Korea.¹³³ Like the BRICS countries, this group of large developing countries has the potential to pose considerable challenge to major developed economies.¹³⁴ Meanwhile, Cambodia, Laos, and Myanmar, the three new ASEAN members, remain least developed countries—similar to such other Asian neighbors as Afghanistan, Bangladesh, Bhutan, Nepal, and Timor-Leste.¹³⁵ The ASEAN-China Free Trade Area (ACFTA), for example, will not be fully implemented in Cambodia, Laos, Myanmar, Vietnam until 2015, five years after the full implementation in the ASEAN-6 countries (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand).¹³⁶ The ASEAN members have also received benefits under the Early Harvest Program in ACFTA, which provides for the early opening of markets for specific goods and services in China.¹³⁷

In sum, there are significant differences over the economic and technological developments within Asia. Table 2 further identifies the considerable variations in technological developments and innovation capabilities. Because economic developments have heavily influenced the state of intellectual property protection and enforcement, the wide diversity of regional developments virtually guarantees the non-existence of any established consensus on intellectual property law and

133. See Jim O'Neill et al., *How Solid Are the BRICs?* 7–8 (Goldman Sachs, Global Economics Paper No. 134, 2005) (advancing the concept of the N-11 countries in response to questions concerning whether there are more “BRICs” out there).

134. See *id.* at 7.

135. *Landlocked Developing Countries and Small Island Developing States, Least Developed Countries—Country Profiles*, U.N. OFFICE OF THE HIGH REP. FOR THE LEAST DEVELOPED COUNTRIES, <http://www.unohrrls.org/en/ldc/related/62/> (last visited Apr. 11, 2011). Laos and Myanmar joined ASEAN on July 23, 1997, while Cambodia joined on April 30, 1999. *About ASEAN*, ASEAN SECRETARIAT, http://www.aseansec.org/about_ASEAN.html (last visited Apr. 10, 2011).

136. Dorothy-Grace Guerrero, *China's Rise and Increasing Role in Asia*, in CHINA'S NEW ROLE, *supra* note 7, at 191, 193.

137. See Michael A. Glosny, *Stabilizing the Backyard: Recent Developments in China's Policy Toward Southeast Asia*, in CHINA AND THE DEVELOPING WORLD, *supra* note 7, at 150, 173 (“Initiatives like the [ASEAN-China Free Trade Area] and Early Harvest Program . . . were designed to give ASEAN states a preferential opportunity to penetrate the China market.”); Guerrero, *supra* note 136, at 193 (“[The Early Harvest Program] grants three-year duty-free entry for ASEAN goods into the Chinese markets. After this, China's manufactured goods will have full free tariff access to Southeast Asian markets.”); Wang Jiangyu, *Association of Southeast Asian Nations—China Free Trade Agreement*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES 192, 198 (Simon Lester & Bryan Mercurio eds., 2009) (discussing the Early Harvest Program in the ASEAN-China Free Trade Area).

policy in Asia. Indeed, intellectual property developments vary significantly within Asia. As Professor Llewellyn observed:

Countries around Asia feature in every different category of IPR development: from the advanced relying on its own innovation and creativity (Japan), to those moving—at varying speeds—from imitator to innovator (China, India, Taiwan and South Korea); those aiming to use in the development of their own Invisible Gold the technology and known-how introduced by foreign investors (Singapore, Indonesia, Malaysia and Thailand); to the newly industrialising countries . . . still highly dependent on foreign technology and assistance (Vietnam, Cambodia and Laos).¹³⁸

138. LLEWELLYN, *supra* note 76, at 117.

Countries	GDP (US\$mil) ¹³⁹	GDP p capita (US\$) ¹⁴⁰	Domestic Pat Apps ¹⁴¹	Domestic TM Apps ¹⁴²	R&D Expend. (%GDP) ¹⁴³	High-tech Exports (US\$m) ¹⁴⁴	Researchers in R&D (mil) ¹⁴⁵	S&T Journal Articles ¹⁴⁶
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139. As the World Bank explained:

GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars. Dollar figures for GDP are converted from domestic currencies using single year official exchange rates. For a few countries where the official exchange rate does not reflect the rate effectively applied to actual foreign exchange transactions, an alternative conversion factor is used.

GDP (Current US\$), WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited Apr. 10, 2011).

140. As the World Bank explained:

GDP per capita is gross domestic product divided by midyear population. GDP is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current U.S. dollars.

GDP Per Capita, *supra* note 81.

141. "Patent applications are worldwide patent applications filed through the Patent Cooperation Treaty procedure or with a national patent office for exclusive rights for an invention. . . ." *Patent Applications, Residents*, WORLD BANK, <http://data.worldbank.org/indicator/IP.PAT.RESD> (last visited Apr. 10, 2011).

142. "Trademark applications filed are applications to register a trademark with a national or regional Intellectual Property . . . office. . . . Direct resident trademark applications are those filed by domestic applicants directly at a given national IP office." *Trademark Applications, Direct Resident*, WORLD BANK, <http://data.worldbank.org/indicator/IP.TMK.RESD> (last visited Apr. 10, 2011).

143. "Expenditures for research and development are current and capital expenditures (both public and private) on creative work undertaken systematically to increase knowledge, including knowledge of humanity, culture, and society, and the use of knowledge for new applications. R&D covers basic research, applied research, and experimental development." *Research and Development Expenditure (% of GDP)*, WORLD BANK, <http://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS> (last visited Apr. 10, 2011).

144. "High-technology exports are products with high R&D intensity, such as in aerospace, computers, pharmaceuticals, scientific instruments, and electrical machinery. Data are in current U.S. dollars." *High-Technology Exports*, *supra* note 129.

145. "Researchers in R&D are professionals engaged in the conception or creation of new knowledge, products, processes, methods, or systems and in the management of the projects concerned. Postgraduate PhD students . . . engaged in R&D are included." *Researchers in R&D (Per Million People)*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.SCIE.RD.P6> (last visited Apr. 10, 2011).

146. "Scientific and technical journal articles refer to the number of scientific and engineering articles published in the following fields: physics, biology, chemistry, mathematics, clinical medicine, biomedical research, engineering and technology, and earth and space sciences." *Scientific and Technical Journal Articles*, WORLD BANK, <http://data.worldbank.org/indicator/IP.JRN.ARTC.SC> (last visited Apr. 10, 2011).

Countries	GDP (US\$mil)	GDP p capita (US\$)	Domestic Pat Apps	Domestic TM Apps	R&D Expend. (%GDP)	High-tech Exports (US\$M)	Researchers in R&D (mil)	S&T Journal Articles
Japan	4,552,200	35,627	367,960	114,015	3.33	122,679	5,531	55,502
China	2,256,902	1,731	93,485	593,382	1.33	214,245	853	41,604
S. Korea	844,863	17,551	122,188	99,435	2.98	83,526	3,780	16,396
India	837,195	765	4,521	73,308	0.80	3,382	137	14,635
Indonesia	285,868	1,304	234	30,734	0.05	6,571	N/A	205
Thailand	176,351	2,674	891	24,275	0.23	22,479	311	1,249
Malaysia	137,848	5,378	522	10,479	N/A	57,650	N/A	615
Singapore	125,417	29,401	569	5,067	2.30	105,077	5,575	3,611
Philippines	98,823	1,156	210	7,050	0.12	25,997	81	178
Vietnam	52,426	631	180	12,884	N/A	869	N/A	221
Cambodia	6,454	465	N/A	464	N/A	N/A	N/A	21
Laos	2,723	463	N/A	N/A	N/A	N/A	N/A	9

Table 2: Indicators on Technological Developments and Innovation Capabilities in 2005¹⁴⁷

3. Geopolitical Rivalries

While culture does not provide the underlying intellectual property values, and the region's highly uneven economic and technological developments have made it difficult to achieve a consensus, geographical rivalries—and the lack of a regional hegemon¹⁴⁸—have made it difficult for Asia to develop unified positions on intellectual property law and policy. Indeed, such rivalries continue to dominate

147. 2005 was selected to maximize the amount of data available for comparison purposes. It is important to remember that, in the past few years, technological and innovation capabilities have increased dramatically in many fast-growing Asian countries such as China and India.

148. Regional hegemony is important because it gives countries the power to shape regional laws, policies, and developments according to its own interests. Nevertheless, commentators remain skeptical that any Asian country can become a hegemon in the region. See KANG, *supra* note 56, at 171 (“Given the changes in the international system and the central place of the United States there is almost no chance that China will become the unquestioned hegemon in East Asia.”); see also Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 1022 (2011) (noting that the development of a unified Asian position down the road is rather unlikely).

the interactions among countries within the region.

Since the explosion of the Chinese economy, commentators have suggested a growing rivalry in Asia between China and Japan.¹⁴⁹ This rivalry is not new; it dates back to at least the nineteenth century. Nevertheless, China was fairly weak in the twentieth century, following repeated attacks by imperialist powers. Mao's autarky, self-reliance, and import substitution policies also made China backward, leaving the country with limited foreign technology and capital while isolating it from the international community.¹⁵⁰

In recent years, however, the rivalries between China and Japan have become more apparent, thus raising concerns among their Asian neighbors. A case in point is the disagreement between the two countries over the acceptable participants of the 2005 East Asian Summit.¹⁵¹ This disagreement foreshadowed the growing rivalry and a deepening conflict between China and Japan. Other early signals of this rivalry include

Beijing's blockage of the possibility of Japan having a permanent seat on the UN Security Council; their competing claims to petroleum deposits and islands in the East China Sea; and China's irritation at the visits of former Prime Minister Koizumi to the Yasukuni Shrine, where Japan's war dead, 14 of whom are regarded as war criminals by China and South Korea, were buried.¹⁵²

Despite this rivalry, the ongoing push for initiatives under ASEAN+3 (an ad hoc group that includes ASEAN, China, Japan and South Korea), ASEAN+6 (an ad hoc group that includes ASEAN+3, Australia, New Zealand, and India), and the proposed China–Japan–South Korea free trade agreement seems to suggest that “China understands that the future of the region depends upon a constructive relationship between China and Japan.”¹⁵³

149. For a discussion of China's relations with Japan, see generally ROBERT G. SUTTER, *CHINA'S RISE IN ASIA: PROMISES AND PERILS* 125–50 (2005). For a timely collection of essays on the implications of China's rise for the balance of influence in Asia, see generally *CHINA'S RISE AND THE BALANCE OF INFLUENCE IN ASIA* (William W. Keller & Thomas G. Rawski eds., 2007) [hereinafter *BALANCE OF INFLUENCE IN ASIA*].

150. See Yu, *From Pirates to Partners*, *supra* note 15, at 198.

151. See Guerrero, *supra* note 136, at 192 (“The rift in the first [East Asian Summit] was the tip of the iceberg that is the Sino-Japanese conflict.”).

152. *Id.* at 192.

153. Zhang Yunling & Tang Shiping, *China's Regional Strategy*, in *POWER SHIFT*:

Regardless of whether China can work closely with Japan, the wide differences in economic and technological developments in the two countries will continue to make it difficult for them to reach a consensus over issues related to intellectual property law and policy. It is one thing to have no major conflict between these two countries, but it is quite another thing to have the two countries coordinating their positions on intellectual property law and policy.

India also plays a very important role in Asia's future development. As Robert Kagan put it, "In Asia . . . it is a three-way, not a two-way, competition."¹⁵⁴ Indeed, the rapidly-changing dynamics in the Indian economy and the country's domestic industries¹⁵⁵ have presented some interesting twists to the future position of this traditional vanguard of the developing world. India has also been actively establishing bilateral and regional trade agreements¹⁵⁶ while being instrumental in the

CHINA AND ASIA'S NEW DYNAMICS 48, 55 (David Shambaugh ed., 2006).

154. ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS* 41 (2009); see also BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC*, *supra* note 4, at 88 ("[B]oth India and China have the potential to redefine the balance of influence and power within any grouping of which they are a part and the very definition of the region any new institution claims to represent."); see also Jason Burke, *India's Deals with Sri Lanka Heighten Stakes in 'Great Game' with Beijing*, *GUARDIAN* (London) (June 9, 2010, 11:45 AM), <http://www.guardian.co.uk/world/2010/jun/09/sri-lanka-india-china-great-game> ("China wants to be the pre-eminent power in Asia and whether Asia ends up multipolar or unipolar will be determined by what happens in the Indian Ocean. Currently there is a power vacuum there and the Chinese want to fill it." (quoting Brahma Chellaney, Professor of Strategic Studies, Centre for Policy Research, New Delhi)).

155. See, e.g., Dwijen Rangnekar, *Context and Ambiguity in the Making of Law: A Comment on Amending India's Patent Act*, 10 *J. WORLD INTELL. PROP.* 365, 379-80 (2007) (discussing the changing dynamics of the Indian pharmaceutical industry).

156. As one commentator observed:

The Indian government has negotiated a framework agreement with ASEAN whose ambition and scope resemble the China-ASEAN agreement. It has also negotiated an economic cooperation agreement with Singapore, which could be a launching pad of sorts for an India-ASEAN FTA. An FTA with Thailand is also joining the list. Thanks to these and other diplomatic efforts, New Delhi now holds its own annual summit meeting with ASEAN in an "ASEAN + 1" arrangement, and India was included in the December 2005 East Asian Summit.

Ellen L. Frost, *China's Commercial Diplomacy in Asia: Promise or Threat?*, in *BALANCE OF INFLUENCE IN ASIA*, *supra* note 149, at 95, 99 (footnote omitted); see also Julia Ya Qin, *China, India and WTO Law*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER* 167, 196 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010) ("It was not until recent years that India began to enter into regional free trade arrangements with others, mostly its neighbouring countries."); Wang Jiangyu, *The Role of China and India in Asian Regionalism*, in *CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER*, *supra*, at 333, 356-58 (discussing India's regional trade initiatives). *But see* TAY, *supra* note 20, at 64 ("[India] has negotiated a free trade agreement with ASEAN, but this was subject to much haggling that showed not just economic differences but also that India has not observed and

continued development of the IBSA trilateral cooperation, featuring India, Brazil and South Africa.¹⁵⁷

Asian countries increasingly see the benefits of having India embraced a greater role in regional policy. Some countries, for example, found it desirable to include India in the East Asian Summit to “provide a ‘hedge’ against Chinese dominance.”¹⁵⁸ Many Asian countries have also been frustrated by the “influx of cheap Chinese consumer goods, competition for export markets, . . . growing trade deficit[s],”¹⁵⁹ and diversion of FDI.¹⁶⁰ Indeed, “Malaysian and Indonesian workers are [now] complaining about jobs being lost to Chinese workers because of the closing of enterprises that are losing orders to China.”¹⁶¹

Finally, one cannot ignore the important role the United States has

absorbed the social norms prevailing in ASEAN, and perhaps does not want to. As a result, India remains peripheral relative to others.”)

157. As stated in IBSA’s website:

Established in June 2003, IBSA [the India–Brazil–South Africa Dialogue Forum] is a coordinating mechanism amongst three emerging countries, three multiethnic and multicultural democracies, which are determined to contribute to the construction of a new international architecture, to bring their voice together on global issues and to deepen their ties in various areas. IBSA also opens itself to concrete projects of cooperation and partnership with less developed countries.

IBSA Trilateral Official Website: About IBSA, <http://www.ibsa-trilateral.org/> (last visited Dec. 8, 2011).

158. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 88; *see also* TAY, *supra* note 20, at 89 (“More and more are talking not of a ‘Chindia’ of interdependence but of a new Cold War between China and India.”); Guerrero, *supra* note 136, at 192 (“Japan and ASEAN members that were wary of an East Asia Co-Prosperty Sphere under China’s leadership responded to Beijing’s diplomatic offensive by proposing the inclusion for India, Australia and New Zealand.”).

159. Joshua Eisenman, *China’s Post-Cold War Strategy in Africa: Examining Beijing’s Methods and Objectives*, in CHINA AND THE DEVELOPING WORLD, *supra* note 7, at 29, 42; accord ELLIS, *supra* note 7, at 1 (noting the “concern at increasing volumes of competitively priced Chinese goods, both contraband and legitimate, that are beating out the goods of Latin American producers in their own countries and displacing them in their traditional export markets”); Chris Alden, *China’s New Engagement with Africa*, in CHINA’S EXPANSION INTO THE WESTERN HEMISPHERE, *supra* note 7, at 213, 226 (noting the “concern posed by the arrival of low-cost consumer goods [from China], which have enabled Africans to purchase basic items formerly beyond their reach but that threaten local manufacturing capacity”); Glosny, *supra* note 137, at 156 (“ASEAN states are worried that with China’s low-cost and increasingly efficient manufacturing sector, cheaper Chinese goods will flood their domestic markets and compete effectively with Southeast Asian-produced goods in other markets.”); *see also* TAYLOR, CHINA’S NEW ROLE IN AFRICA, *supra* note 7, at 63–86 (discussing the impact of cheap Chinese goods in Africa).

160. *See* Glosny, *supra* note 137, at 159–60 (discussing ASEAN’s concerns over diversions of foreign direct investments).

161. Guerrero, *supra* note 136, at 194.

historically played in Asia, even though the country is not on the continent.¹⁶² In the last few years, the Obama administration has shown a greater interest in Asia than its predecessor. Secretary of State Hillary Clinton, for instance, set the precedent by choosing to visit Asia over Europe or the Middle East in her first overseas trip.¹⁶³ In a speech in Tokyo, President Obama also described the United States as an “Asia Pacific nation.”¹⁶⁴ As he declared: “As a[n] Asia Pacific nation, the United States expects to be involved in the discussions that shape the future of this region, and to participate fully in appropriate organizations as they are established and evolve.”¹⁶⁵

In fact, there have now been growing discussions about the potential rivalry in Asia between China and the United States. Nevertheless, if such rivalry intensifies, it is very likely that Asian countries will be highly reluctant to enter into situations where they have to pick between the two countries. As David Shambaugh pointed out:

[H]aving to choose between Beijing and Washington as a primary benefactor is the nightmare scenario for the vast majority of Asian states. . . . It is not an exaggeration that all Asian states shall seek to have sound, extensive, and cooperative relations with both the United States and China, and thus will do much to avoid being put into a bipolar dilemma.¹⁶⁶

Despite these concerns, there is no denying that if there is a power shift between the China and the United States, Asian countries will have “a critical role [to play] in deciding whether such a shift in the relative standing of the world’s two largest economies will be orderly or

162. Cf. TAY, *supra* note 20, at 6 (“Despite increased trade and economic integration among Asian countries, . . . the United States remains the final market for as much as 60 percent of Asian production.”).

163. See Yu, *China, U.S. Need Each Other*, *supra* note 94; see also BERGSTEN ET AL., CHINA’S RISE, *supra* note 90, at ix (noting that Clinton’s trip to Asia “is the first time in decades that the maiden foreign trip by the Secretary of State in a new administration was to Asia and signaled the importance the Obama administration attaches to relations with the region”).

164. Remarks by President Barack Obama at Suntory Hall in Tokyo, Japan (Nov. 14, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>.

165. *Id.*

166. David Shambaugh, *Introduction: The Rise of China and Asia’s New Dynamics*, in POWER SHIFT, *supra* note 153, at 1, 17; accord Frost, *supra* note 156, at 105 (noting that Asian countries “do not wish to be forced to choose between Beijing and Washington”).

traumatic.”¹⁶⁷

In sum, the uncertainty within the region and the continuous rivalry among the Asian powers—or Asia Pacific powers, if the United States is included¹⁶⁸—have made it difficult for Asian countries to foster pan-Asian positions on intellectual property law and policy. In the near future, Asian countries are very unlikely to play a role that is similar to that of the European Union or the African Group.

III. CHINDIASEAN

Although Part I has shown that distinct values, approaches, or practices unlikely exist in the area of intellectual property protection and enforcement, questions remain regarding whether Asian countries will eventually develop unified positions on intellectual property law and policy. While the existence of Asian values, approaches, or practices may help develop such positions, such development does not depend on the existence of those values, approaches, or practices. The question, therefore, is not whether those values, approaches, or practices exist, but whether intellectual property values, approaches, or practices can be Asianized.¹⁶⁹

To date, countries in different parts of the world have taken coherent positions as a regional group. The textbook examples are the African Group and the European Union. Thus far, the wide-ranging regional diversity has made it difficult for Asian countries to foster common positions. For example, Japan was instrumental in establishing the TRIPS Agreement and remains a key player in the push for plurilateral or multilateral efforts in the international intellectual property arena. It also advanced the proposal for ACTA and now

167. BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 92; *cf.* AMITAV ACHARYA, CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER 224 (2001) (“The rise of China has led to prospects that ASEAN might either resort to balancing against, or bandwagoning with, China, the two postures commonly found in a realist understanding of responses to rising powers.”); Frost, *supra* note 156, at 116 (“Non-Chinese Asians welcome China’s new role [in Asia], but they have no desire to be dominated by China—or by Japan or India, for that matter. They see an actively engaged United States as a balancing and stabilizing presence that expands their room to maneuver and their freedom to choose.”).

168. *Cf. id.* at 16 (noting that the question over whether it is East Asia or the Asia Pacific “presents initial problems of organizational and analytical coherence that are not as pronounced” in other region).

169. This question, to some extent, reminds us of what Mahathir bin Mohamad, Malaysia’s former prime minister, sometimes called the “Asianization of Asia.” BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 76.

serves as the agreement's depository.¹⁷⁰ Meanwhile, Singapore and South Korea have entered into free trade agreements with the United States.¹⁷¹ Because these high-income countries will benefit from stronger intellectual property protection and enforcement, they, with the exception of the ASEAN-affiliated Singapore, are unlikely to team up with their poorer neighbors to develop pan-Asian positions on intellectual property law and policy.

Nevertheless, the middle- and low-income Asian countries still have strong incentives to team up with each other to strengthen their own positions. As I mentioned earlier, the establishment of South-South alliances can be highly beneficial. These alliances, for example, "will allow less-developed countries to shape a pro-development agenda, articulate more coherent positions, or even enable these countries to establish a united negotiating front. The[y] . . . will also help these countries establish a powerful voice in the international debates on public health, intellectual property, and international trade."¹⁷²

Once Japan and South Korea are taken out, the most powerful alliance will arise when China, India, and the ASEAN members team up to foster common positions for the Asian developing world. Such an alliance can be described either as the China-India-ASEAN triangle or, in shorter form, Chindiasean.¹⁷³ Chindiasean is unique, as it unites two leading middle-income developing countries with an Asia-based regional group. (Although Singapore is a developed economy that may not benefit from positions taken by this regional alliance, its founding membership and growing leadership in ASEAN and such noneconomic considerations as security are likely to ensure Singapore to remain part of the alliance.¹⁷⁴)

170. ACTA, *supra* note 87, art. 45.

171. See KORUS FTA, *supra* note 125; USSFTA, *supra* note 126.

172. Yu, *Access to Medicines*, *supra* note 6, at 370.

173. Chindiasean builds on what Pete Engardio and his colleagues at *Business Week* described as Chindia. CHINDIA, *supra* note 105. An identical combination has also been advanced in the form of the Asian Economic Community. See Michael Ewing-Chow & Edrick Gao, *The Asian Economic Community: ASEAN—A Building or a Stumbling Block for China and India Economic Cooperation*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 156, at 387, 387 ("At the first East Asia Summit . . . held in Kuala Lumpur on 14 December 2005, the Indian Prime Minister, Manmohan Singh, outlined his vision of an emerging Asian Economic Community . . . as including ASEAN, India and China.").

174. See JURGEN HAACKE, ASEAN'S DIPLOMATIC AND SECURITY CULTURE: ORIGINS, DEVELOPMENT AND PROSPECTS 7 (2009) ("Singapore's leaders have long associated a major potential security risk with the consequences of a breakdown of the normative framework governing sub-regional order in Southeast Asia."). See generally *id.* at

From the standpoint of international intellectual property politics, the existence of both China and India, the two so-called BRICS countries, are important. Since the 1960s, Brazil and India have served as the twin leaders of the developing world in international intellectual property negotiations.¹⁷⁵ Although China until recently has not become active in the international community, it has since picked up tremendous momentum. The existence of China and India in Chindiasean, therefore, allows the alliance to be prominently featured in future international intellectual property negotiations. In fact, given the immense power of both China and India, which can only grow, any Asian alliance that excludes them is unlikely to succeed.¹⁷⁶

Moreover, ASEAN can benefit from access to the Chinese and Indian markets as well as the influx of foreign direct investment from these two countries. Although ASEAN was constituted as a group, its constituent countries compete more against than complement each other. As Assafa Endeshaw noted recently:

Besides the economic structures of Indonesia, Malaysia, Philippines and Thailand are “more competitive than complementary . . . ASEAN economies are more complementary to the industrial countries (as well as to the Asian [newly industrialized economies]) than to each other. And each ASEAN country wants to protect its domestic industries from competition from neighbors”. The overall consequence is that ASEAN countries, except Singapore, are “not markets for each other’s primary products. And they cannot supply each other’s needs for technology and capital goods”

The disparity in levels of industrialization and the competitive standing of ASEAN economies inevitably translates into reluctance “to share markets” but an urge to protect “domestic industries from regional cooperation”. The less developed of them tend to be more inward-looking and

214 (“ASEAN’s diplomatic and security culture has been meant to mediate estrangement and insecurity in Southeast Asia.”); TAY, *supra* note 20, at 51 (“[O]ne of the earliest achievements of ASEAN was to avoid further confrontation among its members.”).

175. See, e.g., Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 505–07 (2009) (discussing Brazil and India’s role in pushing for reforms in the international patent system).

176. Cf. Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT’L ECON. L. 219, 235 (2004) (“[T]he ‘China factor’ enabled the creation of the G-21 [now commonly referred to as the G-20] [W]ith China in their ranks, the size and impact of this coalition became unprecedented.”).

preoccupied with the basic development problems of unemployment, poverty and income inequality. They fear that premature competition for their industries will result in benefits biased in favour of the more developed members; the industrial competence of the latter will enable them to pre-empt the high value added industries and process if industrial location is left to market forces under free trade.¹⁷⁷

The existence of ASEAN in Chindiasean is equally important. As mentioned in Part I.C, China and India are likely to be top competitors in Asia in the future. In fact, tension may rise when the Indian economy begins to catch up with that of China.¹⁷⁸ As a result, ASEAN will play its much-needed role in serving as a mediator between the two countries, taking advantage of its wide experience in building consensus.¹⁷⁹ The inclusion of ASEAN will also build on its wide experience in intellectual property cooperation developed through the 1995 ASEAN Framework Agreement on Intellectual Property Cooperation.¹⁸⁰

177. ASSAFA, *supra* note 75, at 66 (footnotes omitted).

178. See Lal, *supra* note 57, at 142 (“[A]s India continues to grow, if China shows reluctance to accord the country status as a peer in the international arena, the resulting friction could lead to renewed tensions.”).

179. See ACHARYA, *supra* note 167, at 79 (“The ASEAN Way . . . is a claim about a *process* of regional interactions and cooperation based on discreteness, informality, consensus building and non-confrontation styles which are often contrasted with the adversarial posturing, majority vote and other legalistic decision-making procedures in Western multilateral negotiations.”); BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 2 (describing the “ASEAN Way” as an “informal, consensus-based approach to international cooperation”); HAACKE, *supra* note 174, at 7 (“ASEAN’s diplomatic and security culture comprises six core norms: sovereign equality, non-recourse to the use of force and the peaceful settlement of conflict, non-interference and non-intervention, non-involvement of ASEAN to address unresolved bilateral conflict between members, quiet diplomacy, and mutual respect and tolerance”); BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at 219 (noting that there is “very little chance of regional elites losing ‘face’” in processes conducted the ASEAN Way). See generally ACHARYA, *supra* note 167 (providing an excellent discussion of ASEAN’s distinctive approach to political and security co-operation). But see *id.* at 78 (conceding that the “ASEAN Way” is “a loosely used concept whose meaning remains vague and contested”); BEESON, INSTITUTIONS OF THE ASIA-PACIFIC, *supra* note 4, at 22 (discussing criticism that “the ASEAN way of voluntarism and consensus . . . has made it primarily an organization dedicated to conflict avoidance rather than resolution”); BEESON, REGIONALISM AND GLOBALIZATION, *supra* note 24, at 88 (“ASEAN is primarily a mechanism for sidelining problems regional leaders consider politically too difficult or sensitive.”).

180. ASEAN Framework Agreement on Intellectual Property Cooperation, Dec. 15, 1995, available at <http://www.asean.org/5179.htm>. For a discussion of the Framework Agreement by its drafter, see generally Weerawit Weeraworawit, *The Harmonisation of Intellectual Property Rights in ASEAN*, in INTELLECTUAL PROPERTY LAW IN ASIA, *supra*

Moreover, as China and India continue to grow, their positions may be closer to those of developed countries than their less developed counterparts. Some commentators have already wondered whether the emerging BRICS countries can continue to serve as leaders of the less developed world as they once did.¹⁸¹ The addition of ASEAN in Chindiasean, therefore, is highly important, as the positions taken by ASEAN are likely to be more moderate than those of the two BRICS countries. Such moderation also resonates well with the large poor populations within China and India, thus allowing the Chinese and Indian governments to work closely with their ASEAN neighbors.¹⁸²

To be certain, questions remain regarding whether ASEAN countries can become equal partners with China and India. Most of the ASEAN members are economically weak. Those that are strong on a per capita basis, like Singapore, have a small economy. Indeed, one of the main concerns for any partnerships between a BRICS country and other less developed countries is the bargaining disparity between and among the parties.¹⁸³ If the arrangement is unfair, the ultimate alliance is unlikely to be more attractive than what the weaker countries already get under the existing multilateral system.

Nevertheless, by combining its ten members and having an economy comparable to that of China and India,¹⁸⁴ ASEAN may be able to

note 57, at 247.

181. See, e.g., Drahos, *Developing Countries*, *supra* note 118, at 765 (“It is . . . not clear that India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did.”).

182. Cf. Yu, *Access to Medicines*, *supra* note 6, at 389 (“[T]he wide gap between the rich and the poor and the growing regional disparities in the BRICS countries have induced their government leaders to develop policies to work more closely with their poorer trading partners.”).

183. As I noted earlier:

[T]he impending challenge for these countries concerns how to set up an alliance in a way that would prevent the BRICS countries from dominating their much weaker and more dependent partners. After all, the former are more powerful and possess more human capital, technical knowledge, and legal expertise. Without adequate protection, the BRICS countries may abuse their leadership roles at the expense of others. Thus, if the partial BRICS alliances are to be successful, it is important to build safeguards into the alliances to protect the weaker members and to allow them to retain their autonomy and identity. It is also important to develop trust among the participating members so that they can work together closely without worrying about potential exploitation.

Id. (footnote omitted).

184. See *ASEAN, China and India: Comparative Economic Performance, Issues and Implications* (ASEAN Secretariat, Studies Unit Paper No. 09–2006, 2006), available at <http://www.aseansec.org/19006.pdf> (comparing ASEAN’s economic performance and growth with that of China and India).

provide the much-needed political and economic clout to balance either China or India. The regional group also provides a multitude of votes that are important to both countries in a “one country, one vote” system under the United Nations—for example, in WIPO and UNESCO.¹⁸⁵

To China and India, the support of ASEAN members may become even more important, as the coalition with ASEAN members would strengthen their clout in negotiations with the United States and the European Union.¹⁸⁶ The combination of China, India, and ASEAN may also provide an effective countervailing force against the continued push for stronger global intellectual property standards by the trilateral partnership of the European Union, Japan, and the United States.¹⁸⁷ Even if it fails to resist this push, Chindiasean can strategically exploit the growing rifts among the three countries,¹⁸⁸ thus enlarging the policy space of the less developed world. As John Odell noted, a sophisticated negotiation strategy includes not only tactics for building coalitions, but also tactics “for splitting rival coalitions . . . and for defending against efforts by outsiders to break one’s own.”¹⁸⁹

185. See Yu, *Access to Medicines*, *supra* note 6, at 388 (“[N]umbers matter in a ‘one country, one vote’ system, like WIPO and the United Nations. There are only five BRICS countries, but many more less developed countries.”).

186. See Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 317 (2008) (“Through the use of a collective action mechanism, it may be possible for a country with a certain level of immunity to share the protection with one or several countries more susceptible to FDI economic retribution. The use of coordinated behavior may bring about a more equitable result, so long as one is aware of the legal limits of such mechanisms and the antioordination strategies that may be employed by opponents of the system.”); Yu, *Access to Medicines*, *supra* note 6, at 367 (“[T]he creation of alliances among less developed countries will help many less developed countries combat the external pressure each country will face on a one-on-one basis from the European Communities, the United States, or other powerful trading partners.”).

187. Cf. Yu, *Access to Medicines*, *supra* note 6, at 356 (“If [a coalition among the BRICS countries] is well built and maintained, it can even become an effective counterweight to the trilateral cooperation among the European Communities, Japan, and the United States, all of which were instrumental in pushing for the adoption of the TRIPs Agreement.”).

188. See AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT AND WTO 200 (2003) (noting that “[t]he Cairns Group utilized the rift within the US-EC with great skill”); Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT’L L.J. 483, 503 (2007) (noting the “strategic exploitation of rifts between the United States, the EU, and Japan”); Peter K. Yu, *TRIPs and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 406–08 (2006) (noting the need to “explore the tension between the European Communities and the United States”).

189. John S. Odell, *Introduction to NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 1, 13 (John S. Odell ed., 2006).

Within Asia, an alliance with the ASEAN members would further strengthen their positions vis-à-vis Japan, a still dominant economic power in the region.¹⁹⁰ For India, such an alliance would steer the discussion away from ASEAN+3 or East Asian Community.¹⁹¹ For China, such an alliance would be at least as attractive as ASEAN+3, although the resulting alliance would go in a rather different direction. Teaming up with Japan and Korea is quite different from having an alliance with India and ASEAN.

Notwithstanding these many benefits, there remain some unavoidable challenges. For example, there exist “IP-irrelevant factors”¹⁹² that would make it difficult for these countries to cooperate with each other, such as xenophobia, nationalism, racism, mistrust, and resentment.¹⁹³ As I noted earlier, “[n]o matter how much more globalized and interdependent the world has become, some countries will always remain reluctant to cooperate with others, either because of historical conflicts, border disputes, economic rivalries, cultural differences, or spillover issues from other areas.”¹⁹⁴ Indeed, the historical record of cooperation among less developed countries has been far from promising.¹⁹⁵

190. Cf. Guerrero, *supra* note 136, at 191, 193.

191. See *id.* at 192 (discussing the developments regarding ASEAN+3, the East Asia Community, the East Asia Co-Prosperity Sphere, and the East Asian Summit).

192. “IP-irrelevant factors” are those factors that are largely unaffected by intellectual property protection. See Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 852–53 (2007).

193. See Yu, *Access to Medicines*, *supra* note 6, at 393. The tension between China and India provides a good example. See Muthucumaraswamy Sornarajah & Wang Jianguo, *Introduction and Overview*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER, *supra* note 156, at 1, 12 (“China still claims the area that is Arunachal Pradesh and India claims that some 38,000 square mile on its border are occupied by Chinese forces.”); see also Frost, *supra* note 156, at 98 (“Indian officials remain suspicious of China’s intentions and hope to track and if possible match its initiatives.”).

194. Yu, *Access to Medicines*, *supra* note 6, at 393.

195. See *id.* at 388 (“[C]oalition-building efforts put up by less developed countries historically have failed.”); Jean Touscoz, *A Changing Policy Landscape*, in INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT 287, 288 (Surendra J. Patel et al. eds., 2001) (“[T]he ‘big five’ non-members of OECD (Russia, China, Brazil, India and Indonesia) do not always act in concert; the least developed countries themselves do not present a common front.”). As Frederick Abbott elaborated:

Over the past 50 years, there have been a number of efforts to achieve solidarity or common positions among developing countries in international forums. At the broad multilateral level there was (and are) the Group of 77, and the movement for a New International Economic Order. At the regional level, the Andean Pact in the early 1970s developed a rather sophisticated common plan to address technology

Moreover, ASEAN members continue to compete with China and India. As Lee Kuan Yew, Singapore's founding leader, observed in 2004, "[w]hat will pull [ASEAN] together is the need to be sufficiently competitive against two huge countries now in the World Trade Organisation and wanting to industrialise and join the export markets: India and China."¹⁹⁶ There are also additional questions concerning whether the region will have "enough political and ideological internal coherence to allow it to facilitate and encourage the underlying economic integration that has already occurred,"¹⁹⁷ including regional harmonization in the intellectual property area.¹⁹⁸

Nonetheless, on balance, Chindiasean seems to be beneficial to all parties. First and foremost, such an alliance allows China, India, and ASEAN to achieve what they alone cannot. In the near future, the positions of China, India, and ASEAN would also remain quite close to each other. In the area of technology transfer and technical assistance, for example, this group of countries would "serve as worthy allies at least until their interests grow further apart from those of their less developed partners."¹⁹⁹

Thus, it is not surprising that China and India have already begun to coordinate their positions to maximize leverage and effectiveness of their international negotiations. In the June 2010 meeting of the TRIPS Council, for example, the two countries joined hands in raising concerns about the development of TRIPS-plus enforcement trends.²⁰⁰ Their

and IP issues (ie Decisions 84 and 85). Yet these efforts were largely unsuccessful in shifting the balance of negotiating leverage away from developed countries. In fact, developing country common efforts to reform the Paris Convention in the late 1970s and early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.

Frederick Abbott, *The Future of IPRs in the Multilateral Trading System*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY* 36, 42 (Christophe Bellmann et al. eds., 2003).

196. LLEWELLYN, *supra* note 76, at 121–22.

197. BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC*, *supra* note 4, at 16.

198. See ASSAFA, *supra* note 75, at 66 ("[G]iven the wide disparity in levels of industrialization and the competitive standing of the ASEAN economies, any IP harmonization will clash with some of the member states' policies of maintaining protection of local markets and industries. This is simply because harmonization of IP will have the inevitable effect of breaking down some of the barriers.").

199. Yu, *Access to Medicines*, *supra* note 6, at 392.

200. Council for Trade-Related Aspects of Intellectual Property Rights [TRIPS Council], *Minutes of Meeting ¶¶ 248–73*, IP/C/M/63 (Oct. 4, 2010) [hereinafter *TRIPS Council Minutes*]; see also Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 518–21 (2011) (discussing China and India's interventions at the TRIPS Council); *The Problems with the "TRIPS plus" Enforcement Trend: China's View*, S. BULL., 28 July 2010, at 13 (collecting the

important interventions were a direct response to the release of the draft text of the Anti-Counterfeiting Trade Agreement as well as the growing concern over the systematic problems created by the high intellectual property enforcement standards established through bilateral, plurilateral, and regional trade agreements.²⁰¹ A few years earlier, China and India also served as cosponsors of the proposal to introduce a new article *29bis* in the TRIPS Agreement,²⁰² which would create an obligation to disclose in patent applications the source of origin of the biological resources and traditional knowledge used in patent-seeking inventions.²⁰³

IV. AGENDA

While the previous Part focuses on the establishment of Chindiasean as a geopolitical alliance, this Part turns to its ability to shape global intellectual property norms. To a large extent, Chindiasean could serve as an alternative locus of intellectual property norm making.²⁰⁴ It could also become what Professor Tay described as “Asia’s normative community.”²⁰⁵ The development of such a community is important, because a coherent common policy agenda will help the Chindiasean member states achieve a more powerful voice, greater political leverage, and more desirable bargaining outcomes. The shared regional norms will also help bind the members together, notwithstanding the challenges mentioned earlier in the previous Part.

If Chindiasean is to pursue a coherent policy agenda, one has to wonder what items this agenda will contain. To help identify these

speech for China’s intervention); see also TRIPS Council, *Communication from India, Intervention on TRIPS plus Enforcement Trends* (June 9, 2010), reprinted in *Why “IPR Enforcement” in ACTA & FTAs Harm the South*, S. BULL., 28 July 2010, at 10 (collecting the speech for India’s intervention).

201. See *TRIPS Council Minutes*, *supra* note 200, ¶¶ 250, 264.

202. See *Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania*, Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity, WT/GC/W/564/Rev.2 (July 5, 2006) [hereinafter Article *29bis* Proposal].

203. See *id.* ¶ 2 (requiring patent applicants to “disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin”).

204. Cf. Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?*, 34 B.C. INT’L & COMP. L. REV. 27, 28–29 (2011) (noting that the Trans-Pacific Partnership Agreement has the potential to “provide an alternative power center within Asia-Pacific Economic Cooperation (APEC) in ways that are distinct from the models that have been jockeying for favor the past several years” (footnote omitted)).

205. TAY, *supra* note 20, at 150–58 (discussing Asia’s normative community).

potential items, this Part examines issues that are of great importance to China, India, and ASEAN. Part III.A focuses on traditional issues that are already under discussion in the international intellectual property arena. Part III.B discusses new issues that have only emerged recently and on which Chindiasean could have a major impact.

A. Traditional Issues

1. Enforcement

Enforcement will remain a key issue for many Asian countries in at least the next decade. As I noted elsewhere, the enforcement mechanisms available under the TRIPS Agreement are rather weak.²⁰⁶ In the view of developed countries and intellectual property right holders, the mechanisms are just primitive, obsolete, and inadequate.²⁰⁷ To some extent, Part III of the TRIPS Agreement can be seen as the Agreement's "Achilles' heel."²⁰⁸ There remain many historical, economic, tactical, disciplinary, and technological challenges to improving enforcement within the WTO—or in the present context, within Asia.

Moreover, many Chindiasean members are now on the United States Trade Representative's Section 301 watch list or priority watch list (see table 3). Due to such constant external pressure, these countries have a strong need to develop a collective response,

206. See generally Yu, *TRIPS and Its Achilles' Heel*, *supra* note 200, at 483–504 (discussing the weakness of the TRIPS enforcement provisions).

207. See, e.g., EUROPEAN COMMISSION, DIRECTORATE GENERAL FOR TRADE, STRATEGY FOR THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES 3 (2005), available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf ("Violations of intellectual property rights (IPR) continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement."); TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS 4 (2008) (noting that "it has become apparent to some national governments and regional organizations that the 'aggressive' enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods"); Timothy P. Trainer, *Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?*, 8 J. MARSHALL REV. INTELL. PROP. L. 47 (2008) (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional free trade agreements in the area of border enforcement).

208. See J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11, 34 (1998); Yu, *TRIPS and Its Achilles' Heel*, *supra* note 200.

coordinate negotiation and litigation strategies, and establish a forum for sharing experience, knowledge, and best practices. A more coordinated regional approach toward intellectual property enforcement therefore will benefit all Chindiasean members.

Country	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Brunei									WL	WL	WL
China	306	306	306	306	OCR	PWL	PWL	PWL	PWL	PWL	PWL
India	PWL	PWL	PWL	PWL	PWLL	PWL	PWL	PWL	PWL	PWL	PWL
Indonesia	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL	PWL	PWL
Malaysia	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Pakistan	WL	WL	WL	PWL	PWL	WL	WL	PWL	PWL	PWL	PWL
Philippines	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	WL	WL	WL
S. Korea	PWL	WL	WL	PWL	WL	WL	WL	WL			
Taiwan	PWL	PWL	PWL	PWL	WL	WL	WL	WL			
Thailand	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL
Vietnam	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL

WL="Watch List" PWL="Priority Watch List" 306=Section 306 Review OCR=Out-of-Cycle Review

Table 3: United States Trade Representative's Special 301 Actions²⁰⁹

2. Traditional Knowledge and Cultural Expressions

The protection of traditional knowledge and cultural expressions is of great importance to many Asian countries. India, for example, is concerned about protecting its traditional knowledge, cultural heritage, and genetic resources.²¹⁰ Its biodiversity law remains one of the most comprehensive and well-drafted laws in the region.²¹¹ Meanwhile, China

209. The data were taken from the annual Special 301 reports issued by the Office of the United States Trade Representative.

210. See COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 76 (2002) (discussing the controversies over patent protection involving turmeric and the neem tree).

211. See Tanuja Garde, *India, in INTELLECTUAL PROPERTY IN ASIA*, *supra* note 121, at 55, 78 n.108 (stating that the 2002 National Biodiversity Act "addresses access to genetic resources and associated knowledge by foreign entities to provide for benefit sharing from the use of the resources, and also establishes the National Biodiversity Authority").

pays considerable attention to protecting traditional herbal medicines.²¹² It has also recognized the importance of protecting intangible cultural heritage. In February 2011, China adopted a new intangible cultural heritage law.²¹³ Apart from China and India, ASEAN countries also have important traditional knowledge and cultural expressions to protect.²¹⁴ Examples include “headbands and skirts made from paperbark by Dayak groups in the interior of Borneo or in the complicated designs and weaving techniques for silk textiles, *batik*, brocade weaving and embroidery in countries like Thailand and Indonesia.”²¹⁵

In July 2006, a group of less developed countries advanced the proposal for a new article 29*bis* of the TRIPS Agreement.²¹⁶ Out of the nine sponsors, five of them are from Asia (Brazil, China, India, Pakistan, and Thailand).²¹⁷ Although it is unclear how long it will take the WTO membership to adopt this proposal, considering the large number of countries that have yet to ratify the protocol to amend the TRIPS Agreement in the public health area,²¹⁸ the discussion of protection for traditional knowledge and genetic resources within the TRIPS context underscores the view that the TRIPS Agreement and the existing international intellectual property system provide inadequate protection to non-Western interests.²¹⁹

It is also worth noting the momentum created by the recent adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair

212. See LI, *supra* note 102, at 35–36 (discussing the protection of traditional Chinese medicines); Li Xuan & Li Weiwei, *Inadequacy of Patent Regime on Traditional Medicinal Knowledge—A Diagnosis of 13-Year Traditional Medicinal Knowledge Patent Experience in China*, 10 J. WORLD INTELL. PROP. 125 (2007) (examining the protection of traditional Chinese medicines).

213. Intangible Cultural Heritage Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 25, 2011, effective June 1, 2011) (P.R.C.), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=215503.

214. See Draft ASEAN Framework Agreement on Access to Biological and Genetic Resources, reprinted in INTELLECTUAL PROPERTY LAW IN ASIA, *supra* note 57, at 261.

215. Christoph Antons, *What Is “Traditional Cultural Expression”?*—*International Definitions and Their Application in Developing Asia*, 1 WIPO J. 103, 105–06 (2009).

216. Article 29*bis* Proposal, *supra* note 202.

217. *Id.*

218. See *Members Accepting Amendment of the TRIPS Agreement*, WTO, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (Jan. 5, 2012).

219. See Bellagio Declaration, reprinted in JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192, 193 (1996) (noting the lack of protection for “custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties”).

and Equitable Sharing of Benefits Arising from Their Utilization.²²⁰ Adopted on October 29, 2010, this new protocol aims to promote fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and the sustainable use of biological diversity.²²¹ Like the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization,²²² this new protocol will further strengthen Chindiasean's position with respect to greater disclosure in patent applications of the traditional knowledge and genetic resources used in patent-seeking inventions.

3. Geographical Indications

The protection of geographical indications is quite important to many Asian countries. These countries continue to be dissatisfied with the fact that geographical indications are protected in a manner that favor primarily developed countries. For example, articles 22–23 of the TRIPS Agreement provide substantial protection to geographical indications for wines and spirits.²²³ Yet, they ignore the needs of many Asian developing countries, such as the need for stronger protection for geographical indications of food products grown primarily on their soil.²²⁴

220. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, Oct. 29, 2010, *available at* <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

221. *Id.* art. 1.

222. As stated in the Bonn Guidelines:

Contracting Parties with users of genetic resources under their jurisdiction should take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted. These countries could consider . . . [m]easures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights . . .

Secretariat of the CBD, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization 16(d)(2) (2002), *available at* <http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>; *see also* BRYAN BACHNER, INTELLECTUAL PROPERTY RIGHTS AND CHINA: THE MODERNIZATION OF TRADITIONAL KNOWLEDGE 22–23 (2009) (noting that the Bonn Guidelines were “approved by the CBD’s Conference of Parties . . . with a view to help countries that were drafting Access and Benefit Sharing . . . legislation”).

223. TRIPS Agreement arts. 23–24.

224. *See* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 239 (2000) (“[T]he evolving language in TRIPS on geographical indications remains largely . . . confined to wines and spirits, while many developing countries point to

In recent years, many Asian countries have begun to notice the vast benefits of geographical indications.²²⁵ As a means to resolve the impasse over geographical indications, Hong Kong advanced “an alternative model for the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits under Article 23.4 of the TRIPS Agreement.”²²⁶ Together with other WTO members, India, Pakistan, Sri Lanka also called on the WTO to extend the protection of geographical indications from wines and spirits to all products.²²⁷ If the discussion of the protection for traditional knowledge and cultural expressions is eventually tied to that for geographical indications—arguably the most practical compromise to link the European Union with the African Group—Asian countries are likely to play a rather important role in establishing greater protection for geographical indications.

4. Access to Essential Medicines

Since the expiration of the transitional period for developing countries in the TRIPS Agreement on January 1, 2005, access to essential medicines has been a major agenda item for any intellectual property discussions involving the developing world. The discussion of such access eventually culminated in the adoption of the Doha

food products that could be protected to their advantage, such as Basmati rice and Darjeeling tea.”).

225. See, e.g., PHILIPPE CULLET, INTELLECTUAL PROPERTY PROTECTION AND SUSTAINABLE DEVELOPMENT 333–37 (2005) (discussing how geographical indications can serve as a tool for protecting traditional knowledge); Dwijen Rangnekar, *Indications of Geographical Origin in Asia: Legal and Policy Issues to Resolve*, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 273, 273 (Ricardo Meléndez-Ortiz & Pedro Roffe eds., 2009) (noting that geographical indications “are increasingly being seen as useful intellectual property rights for developing countries”); Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS., Spring 2007, at 97, 110 (“Mysore silk sarees . . . have had a makeover since obtaining a geographical indication, updating [their] look with trendy new (but interestingly, natural) colors . . . and ‘contemporary’ designs inspired by temple architecture and tribal jewelry.”).

226. TRIPS Council, *Communication from Hong Kong, China, Multilateral System of Notification and Registration of Geographical Indications Under Article 23.4 of the TRIPS Agreement* ¶ 3, TN/IP/W/8 (Apr. 23, 2003).

227. See TRIPS Council, *Proposal from Bulgaria, Cuba, the Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Liechtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey and Venezuela* ¶ 20, IP/C/W/247/Rev.1 (May 17, 2001) (“The extension of the level of protection of geographical indications for wines and spirits to geographical indications for all other products is in the best interest and to the benefit of all WTO Members . . .”).

Declaration on the TRIPS Agreement and Public Health²²⁸ and the protocol to amend the TRIPS Agreement.²²⁹ If ratified by two-thirds of the WTO membership,²³⁰ the protocol will add a new article 31*bis* to the TRIPS Agreement, which will allow countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.²³¹

The debate on access to essential medicines is of particular importance to India, which has a very strong generic pharmaceutical industry.²³² It is also important to China and Thailand, which are now major producers of active pharmaceutical ingredients and have taken on a growing role in the generic market, not to mention the ongoing public health needs in these countries and their Asian neighbors.²³³ To the disappointment of the multinational pharmaceutical industry, Thailand, along with Brazil, introduced compulsory licenses to increase access to needed pharmaceuticals.²³⁴ If its efforts continue and spread to other countries, the discussion of compulsory licensing arrangement in the

228. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

229. General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm [hereinafter TRIPS Amendment].

230. Although the initial deadline for ratification was set at December 1, 2007, it has been extended three times to December 2013. *Countries Accepting Amendment of the TRIPS Agreement*, *supra* note 218. As of this writing, more than a third of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Union, have ratified the proposed amendment.

231. See TRIPS Amendment, *supra* note 229; see also Yu, *The International Enclosure Movement*, *supra* note 192, at 872–86 (tracing the development of proposed article 31*bis* of the TRIPS Agreement).

232. See CHAUDHURI, *supra* note 109, at 180–221.

233. See Yu, *Access to Medicines*, *supra* note 6, at 363 (“Although China has yet to be as aggressive as India in exporting drugs or as successful as Brazil in promoting public health within the country, it already is the world’s largest producer of active pharmaceutical ingredients and is likely to be a very important player in the generic market.”); see also LI, *supra* note 102, at 54 (“Some Chinese researchers believe that China has advantages in producing ‘me too’ drugs because its capacity to conduct organic synthesis is very strong after many years of China’s being the target for outsourced MPC [multinational pharmaceutical companies] business.”); ELLEN F.M. ’T HOEN, *THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER: DRUG PATENTS, ACCESS, INNOVATION AND THE APPLICATION OF THE WTO DOHA DECLARATION ON TRIPS AND PUBLIC HEALTH* 67 (2009) (“[M]iddle-income developing countries are important not only for the size of their markets but also because they have the production capacity to supply generic medicines in the developing world.”).

234. See *id.* at 44–50 (discussing Brazil and Thailand’s use of compulsory licenses and government use orders); Yu, *The International Enclosure Movement*, *supra* note 192, at 843–49 (discussing the use of compulsory licenses in Brazil).

public health context and ways to promote innovation in the pharmaceutical area is likely to feature prominently on Chindiasean's policy agenda.

5. Internet and Other New Technologies

When the TRIPS Agreement was established in the mid-1990s, just shortly before the internet and electronic commerce entered the mainstream, its substantive standards were set at what Daniel Gervais described as “the highest common denominator among major industrialized countries as of 1991.”²³⁵ As a result, the Agreement failed to address challenges created by new technologies that emerged after the completion of its primary draft,²³⁶ including the technological change brought about by the internet and information revolution.²³⁷

To date, the internet, new communications technologies, and file-sharing networks have posed significant challenges to intellectual property enforcement in the digital environment.²³⁸ While internet-related enforcement problems can be found everywhere, Asian countries play a critically important role in the larger debate, for at least three reasons.

First, China already has the world's largest internet population, which amounted to over 513 million users in December 2011 according

235. Daniel J. Gervais, *The TRIPS Agreement and the Doha Round: History and Impact on Economic Development*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra* note 91, at 23, 43.

236. *See id.* at 29 (“The 1992 text was not extensively modified and became the basis for the TRIPS Agreement adopted at Marrakesh on April 15, 1994.”).

237. *See* Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 614–15 (1996) (“Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.”); *see also* J.H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 766 (1995) (“[The principal weakness of the TRIPS Agreement] stems from the drafters' technical inability and political reluctance to address the problems facing innovators and investors at work on important new technologies in an Age of Information. The drafters' decision to stuff these new technologies into the overworked and increasingly obsolete patent and copyright paradigms simply ignores the systemic contradictions and economic disutilities this same approach was already generating in the domestic intellectual property systems.” (footnote omitted)).

238. For discussions of the massive unauthorized copying problem created by peer-to-peer technology, see generally Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005).

to official statistics.²³⁹ If the growth continues, internet-related developments in China are likely to overwhelm that of the world. As I have noted often, the important question about the internet in China is not only how the internet will change China, but also how China will change the internet.²⁴⁰

Moreover, according to Internet World Stats, in December 2011, India already has a population of over 121 million, exceeding that of Japan.²⁴¹ For the same period, Chindiasian made up for more than a third of the world's internet population and has already exceeded that of the United States and the European Union combined (see table 4). If the growth trend continues, it is only a matter of time before Chindiasian makes up half of the world's internet population.

239. See CHINA INTERNET NETWORK INFORMATION CENTER, 29TH STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 4 (2012), available at <http://www1.cnnic.cn/uploadfiles/pdf/2012/2/27/112543.pdf> [hereinafter CNNIC SURVEY REPORT].

240. See, e.g., Yu, *Six Secret Fears*, *supra* note 88, at 1046.

241. Internet Usage in Asia, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats3.htm> (last visited Apr. 11, 2011).

Country	Internet Population	Penetration Rate
China	513,100,000	38.4%
India	121,000,000	10.2%
Brunei Darussalam	318,900	79.4%
Cambodia	449,160	3.1%
Indonesia	55,000,000	22.4%
Laos	527,400	8.1%
Malaysia	17,723,000	61.7%
Myanmar	110,000	0.2%
Philippines	29,700,000	29.2%
Singapore	3,658,400	77.2%
Thailand	18,310,000	27.4%
Vietnam	30,516,587	33.7%
CHINDIASEAN VS WORLD / UNITED STATES / EUROPEAN UNION		
Chindiasian	790,413,447	25.18%
World	2,267,233,742	32.7%
United States	245,203,319	78.3%
European Union	359,530,110	71.5%

Table 4: Internet Population (As of Dec. 31, 2011)²⁴²

Second, due to late economic development and technological backwardness, a substantial portion of internet users are school- or college-age students.²⁴³ In China, for example, internet users aged below thirty made up close to sixty percent of the total internet population.²⁴⁴ Thus, any law and policy relating to the internet is likely to have a substantial impact on the future pillars in the country.²⁴⁵ As far as internet-related law reforms are concerned, the stakes may be higher

242. The data was taken or calculated from Internet World Stats, which is available at <http://www.internetworldstats.com>.

243. See Wei Yanliang & Feng Xiaoqing, *Comments on Cyber Copyright Disputes in the People's Republic of China: Maintaining the Status Quo While Expanding the Doctrine of Profit-Making Purposes*, 7 MARQ. INTELL. PROP. L. REV. 149, 150–51 (2003) (discussing how most online infringers in China are poor students).

244. CNNIC SURVEY REPORT, *supra* note 239, at 19.

245. See Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 705 (2010) [hereinafter Yu, *Digital Copyright Reform*] (discussing how criminalizing online file sharing can adversely impact “a large number of individuals, including youngsters who are the future pillars of society”).

than that of other type of intellectual property law reforms.

Third, many Asian countries, which range from China to Malaysia to Singapore, continue to control the flow of information within society. While human rights activists and commentators have heavily criticized the censorship regimes within these countries,²⁴⁶ these regimes ironically may provide the infrastructure needed to strengthen enforcement in the digital environment. These countries therefore may provide alternative models that may not exist in Western countries, although it remains to be seen whether such models would be compatible with free speech, free press, and privacy values found in other countries.²⁴⁷

B. New Issues

1. Climate Change

One of the hottest issues in the international intellectual property policy arena concerns the use of intellectual property law and policy to respond to global climate change. Although it remains unclear what responses countries can come up with, China and India—two powerful countries that have significant carbon emissions—undoubtedly will play very important roles in any international climate change negotiations. The Copenhagen Summit already provides a very good example of the important role China can play in environment-related discussions.²⁴⁸ Capabilities for the development of climate change technology have also emerged in China, India, and other Asian countries.²⁴⁹

246. See ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 155–65 (Ronald Deibert et al. eds., 2008) (examining internet filtering in Asia); see *id.* at 240–44, 263–71, 286–99, 325–28, 338–59, 364–74, 390–94, 420–24 (documenting internet filtering in Afghanistan, China, India, Iran, Malaysia, Myanmar, Nepal, North Korea, Pakistan, Singapore, South Korea, Thailand, and Vietnam).

247. See Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1401–02 (2010) (discussing how the graduated response system would undermine the protection of free speech, free press, and privacy); Yu, *Digital Copyright Reform*, *supra* note 245, at 715 (discussing how the proposed disclosure and retention mechanism in Hong Kong’s digital copyright reform would chill speech).

248. See Steve Charnovitz et al., GLOBAL WARMING AND THE WORLD TRADING SYSTEM 93–94 (2009); Peter K. Yu, *What Copenhagen Could Signal About U.S., China, DES MOINES REG.*, Dec. 17, 2009; see also TAY, *supra* note 20, at 154 (“It is clear that Asia’s continuing economic growth, while important for many, can have negative impacts on the environment and climate change for the planet.”).

249. See EUR. PATENT OFFICE, U.N. ENV’T PROGRAMME & INT’L CTR. FOR TRADE & SUSTAINABLE DEV., PATENTS AND CLEAN ENERGY: BRIDGING THE GAP BETWEEN EVIDENCE AND POLICY: FINAL REPORT 32 (2010) (“In the photovoltaic sector, for example, China has one of the largest producers and manufacturers, while India has one of the leading producers and manufacturers in wind technology. Meanwhile Thailand has significant activity

Moreover, because climate change discussions can lead to new innovation solutions that did not exist in the past, Chindiasean can also play a very important role in shaping the ongoing policy debate. As Peter Drahos pointed out, the increasing demands for policy adjustment to the global climate change requires “the US and China . . . to think about [the climate change, energy, and intellectual property rights regimes] in an integrated way.”²⁵⁰ By linking intellectual property law and policy to environmental law regimes, Chindiasean may be able to come up with new practical home-grown solutions that will receive more buy-in from China and India at the international level.

Those solutions are likely important to many Asian countries, which have significant population and resources in areas that are vulnerable to floods, hurricanes, typhoons, tsunamis, severe droughts, or desertification.²⁵¹ If the intellectual property system is not better managed to address climate change, those countries may suffer significantly. The tsunamis in Thailand, Indonesia, and other coastal areas in December 2004 and the vast damage resulting from such catastrophes remain vivid memories for many Asians.²⁵²

2. Alternative Innovation Models

Although the existing intellectual property system focuses primarily on pathbreaking creations and innovations, many Asian countries have embraced sequential and cumulative innovations.²⁵³ For example, utility

in the sectors of both photovoltaic and wind technologies.”); *id.* at 34 (“In geothermal technology China has made a significant entry into the field, virtually matching the patenting rates of the UK, Sweden and Italy. If these trends continue, China is likely to emerge as a key patenting country in these fields.”).

250. Peter Drahos, *The China-US Relationship on Climate Change, Intellectual Property and CCS: Requiem for a Species?*, 1 WIPO J. 125, 130 (2009).

251. See Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1535 (2009).

252. See Robert D. Mcfadden, *Walls of Water Sweeping All in Their Path: Families, Communities, Livelihoods*, N.Y. TIMES, Dec. 27, 2004, at A10 (reporting about the tsunamis in Asia); Amy Waldman, *Thousands Die as Quake-Spawned Waves Crash onto Coastlines Across Southern Asia*, N.Y. TIMES, Dec. 27, 2004, at A1 (same).

253. See Hiroyuki Odagiri et al., *IPR and the Catch-Up Process in Japan*, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, *supra* note 121, at 95, 126 (“In indigenous sectors with mostly tiny firms [in Japan], many innovations occur in the form of practical devices rather than pure inventions.”); Reichman, *supra* note 16, at 1124 (distinguishing between “cumulative and sequential innovation” and “path-breaking innovation” and noting that “how to protect cumulative and sequential innovation—as distinct from path-breaking innovation—becomes an ever more pressing problem as more small- and medium-sized firms acquire a taste and capacity for such innovation”); see also SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 127–59 (2004) (discussing sequential

models or petty patents remain an important feature of the intellectual property systems in many of these countries.²⁵⁴ As Assafa Endeshaw described:

[Within Asia, t]here are different approaches towards minor inventions and their terms of protection as well as that for patents. Thus Indonesia accords protection to small product improvements through a “Simple Patent” (obviously a “petty patent”) for one time of five years. Vietnam, on the other hand, grants protection for “Utility Solutions” for six years. By contrast, Malaysia recognizes “Utility Innovations” for a period of five years but renewable for a further five. The Philippines recognizes design patents (which include utility models) and protects them for five years, too, but with a possibility of renewals for two consecutive periods of five years.²⁵⁵

In recent years, a *shanzhai* culture emerged in China, raising challenging questions about the acceptable boundaries of sequential and cumulative innovation.²⁵⁶ While many intellectual property rights holders and commentators consider the *shanzhai* phenomenon highly undesirable, *shanzhai* products do offer some benefits, especially when the products provide improvements that otherwise would not occur. In a world where intellectual property rights holders are sometimes reluctant to undertake innovation, *shanzhai* products may provide the much-needed work around to advance technological developments. *Shanzhai* products, indeed, may provide an efficient means for Asian countries to catch up with their more developed trading partners. It may also allow nationals of those countries to appropriate the consumers’ surplus.²⁵⁷

innovation and the need to protect cumulative innovators).

254. See, e.g., Preston M. Torbert & Zhao Jia, *People’s Republic of China*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra* note 128, at 233, 238 (discussing utility models and designs in China); Jacinto D. Jimenez, *Philippines*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra* note 128, at 270 (discussing designs and utility models in the Philippines); Joon K. Park, *South Korea*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra* note 128, at 337, 337 (noting the adoption of the Utility Model Act in South Korea); Michael F. Fedrick, *Taiwan*, in INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra* note 128, at 389–90 (discussing the utility model patent protection in Taiwan).

255. ASSAFA, *supra* note 75, at 73.

256. “Originally, *shan zhai* was used to refer to a bandit stronghold outside government control [in imperial China]; today it is shorthand for a multitude of knockoffs, fakes, and pirated products. These include everything from mobile phones to medicine and movies to makeup, and they permeate China’s consumer markets.” TSE, *supra* note 4, at 79.

257. See Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 12 (2010)

More importantly, the continued development of *shanzhai* products may suggest the existence of an alternative path to innovation.²⁵⁸ Like the Beijing Consensus,²⁵⁹ China's innovation models may attract the attention of other countries that are working hard to catch up with developed countries. Indeed, commentators have begun to appreciate the different forms of innovation that are slowly emerging in China. While Zeng Ming and Peter Williamson discussed what they called "cost innovation,"²⁶⁰ Tan Yinglan focused on "process innovation."²⁶¹

Dan Breznitz and Michael Murphree went even further in their recent book, *Run of the Red Queen*.²⁶² As they pointed out, "China's innovation capabilities are not solely in process (or incremental) innovation but also in the organization of production, manufacturing techniques and technologies, delivery, design, and second-generation innovation."²⁶³ Interestingly, the authors concluded that these other forms of innovation can complement the breakthrough innovation embraced by the United States and other developed countries.²⁶⁴ As Breznitz and Murphree insightfully observed:

China needed Apple to develop the concept and definition of the iPod and the iPhone, but Apple cannot produce and sell these products without China. In the world of flexible mass production, the Red Queen country [referring to China or countries with a similar innovation model] needs the novel-

("Because the infringing goods in these situations are of the same standard, or close to that standard, the unauthorised production of those goods may actually result in a consumers' surplus: consumers are now getting the same products for a much lower price.").

258. See TSE, *supra* note 4, at 79 ("The best *shan zhai* firms, which have established themselves not through thievery but through knockoffs and imitations, have also disrupted the status quo by inventing new and ingenious business strategies tailored specifically to local markets."); *id.* at 80 (noting that *shanzhai* firms "have short cycle times for new product introductions").

259. See generally RAMO, *supra* note 9 (advancing the concept of the Beijing Consensus); see also HALPER, *supra* note 9 (discussing the Beijing Consensus).

260. See generally ZENG MING & PETER J. WILLIAMSON, DRAGONS AT YOUR DOOR: HOW CHINESE COST INNOVATION IS DISRUPTING GLOBAL COMPETITION (2007) (advancing the concept of cost innovation and discussing its global implications).

261. TAN YINGLAN, CHINNOVATION: HOW CHINESE INNOVATORS ARE CHANGING THE WORLD xii (2011).

262. DAN BREZNITZ & MICHAEL MURPHREE, RUN OF THE RED QUEEN: GOVERNMENT, INNOVATION, GLOBALIZATION, AND ECONOMIC GROWTH IN CHINA 4 (2011).

263. *Id.* at 4.

264. See *id.* at 206 ("[T]hanks to the fragmentation of production, the rise of China need not be seen as a zero-sum game by policy makers inside and outside the country.").

product innovators to keep churning out new ideas, and the novel-product-innovating countries need the Red Queen country to keep innovating on almost every aspect of production and delivery.²⁶⁵

3. Special and Differential Treatment

In the past, special and differential treatment was developed to enable less developed countries to promote internal economic, social, cultural, and technological developments and to facilitate efforts to catch up with countries in the developed world. Although the TRIPS Agreement sought to build a super-size-fits-all template, by now it has been clear that such a template does not work well in the less developed world. It is also worth noting that the proponents of reforms to strengthen intellectual property protection and enforcement sometimes have ignored both the preamble²⁶⁶ and objectives of the TRIPS Agreement.²⁶⁷

Indeed, the problems created by the TRIPS Agreement and the international intellectual property system have led to the establishment of many new development agendas at the WTO, WIPO, and in other forums governing public health, human rights, biological diversity, food and agriculture, and information and communications.²⁶⁸ At the WTO, for example, the Doha Development Round of Trade Negotiations was launched in November 2001 to facilitate greater cooperation between developed and less developed countries.²⁶⁹ Of notable importance was the adoption of the Doha Ministerial Declaration (“Ministerial

265. *Id.* at 18.

266. See TRIPS Agreement pmb., recital 6 (explicitly recognizing “the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base”); Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT’L L. REV. 726, 747–48 (2011) (discussing the portion of the preamble of the TRIPS Agreement that focuses on the interests of less developed countries).

267. See TRIPS Agreement art. 7 (“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”); see also Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1000–08 (2009) [hereinafter Yu, *Objectives and Principles*] (discussing article 7 of the TRIPS Agreement).

268. See Yu, *A Tale of Two Development Agendas*, *supra* note 175, at 511–40.

269. See, e.g., Louise Amoore et al., *Series Preface* to NARLIKAR, *supra* note 188, at xiii (noting that the launch of the Doha Round was “assisted to a large degree by the conciliatory international political climate that followed the September 2001 terrorist attacks in New York and Washington”).

Declaration”),²⁷⁰ the Doha Declaration,²⁷¹ and a new protocol to amend the TRIPS Agreement.²⁷²

At WIPO, Argentina and Brazil also called for the establishment of a Development Agenda.²⁷³ Together with other less developed countries and civil society organizations, they successfully demanded reforms that sought to both enhance the development dimension of WIPO and restore the balance in the international intellectual property system.²⁷⁴ The agenda, which was adopted at the WIPO General Assembly in October 2007,²⁷⁵ now includes forty-five recommendations for action that range from technical assistance and capacity building to norm setting and public policy and from technology transfer to assessment, evaluation, and impact studies.²⁷⁶

To some extent, the ongoing demands for special and differential treatment in the international intellectual property system are similar to the push for a greater “margin of appreciation” within the international human rights regime.²⁷⁷ These demands, indeed, recall many of the

270. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). Paragraph 19 of the Ministerial Declaration specifically instructed the TRIPS Council “to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore.” *Id.* ¶ 19.

271. Doha Declaration, *supra* note 228; *see also* Yu, *The International Enclosure Movement*, *supra* note 192, at 872–74 (discussing the Doha Declaration).

272. TRIPS Amendment, *supra* note 229; *See* Yu, *The International Enclosure Movement*, *supra* note 192, at 881–86 (discussing the proposed article 31*bis* of the TRIPS Agreement).

273. WIPO, *Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document*, WO/GA/31/11, IIM/1/4 (Apr. 6, 2005), available at http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf.

274. *See* Yu, *A Tale of Two Development Agendas*, *supra* note 175, at 519–20 (discussing the two lines of reforms that were included in the WIPO Development Agenda).

275. Press Release, WIPO, Member States Adopt a Development Agenda for WIPO (Oct. 1, 2007), available at http://www.wipo.int/pressroom/en/articles/2007/article_0071.html; *see also* Ruth L. Okediji, *History Lessons for the WIPO Development Agenda*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 137, 152 (Neil Weinstock Netanel ed., 2009) (noting that “the Development Agenda is framed as a regime of special and differential . . . treatment for [developing and least developed countries]”).

276. *See The 45 Adopted Recommendations Under the WIPO Development Agenda*, WIPO, <http://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited July 6, 2008) (listing all the 45 recommendations). The six different clusters include: (1) technical assistance and capacity building; (2) norm-setting, flexibilities, public policy and public domain; (3) technology transfer, information and communication technologies and access to knowledge; (4) assessment, evaluation and impact studies; (5) institutional matters including mandate and governance; and (6) other issues. *Id.*

277. As Laurence Helfer explained:

relativist discussions prevalent in the “Asian values” debate.²⁷⁸ As intellectual property and human rights become increasingly linked to each other in international policy discussions, the right to development²⁷⁹ and the right to culture,²⁸⁰ the two rights to which Asian

The doctrine is essentially the degree of discretion that the ECHR is willing to grant national decision makers who seek to fulfill their human rights obligations under the treaty. Although initially framed as requiring a decision in favor of a state where a government’s decision to declare a public emergency (and thus to suspend most of its human rights obligations) was “on the margin” of compatibility with the treaty, the margin of appreciation doctrine has, over time, become a more limited tool by which the Court permits states a modicum of breathing room in balancing the protection of civil and political liberties against other pressing societal concerns. What is most striking about the margin of appreciation is that it expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states. Although partially in tension with autonomous and effective interpretations of the treaty, the doctrine has become an essential ingredient of the ECHR’s success in fashioning an effective system of adjudication. Given that most of the rights and freedoms protected by the European Convention are not protected unconditionally, but rather expressly permit states to impose restrictions for specified reasons and under certain conditions, the Court must be sensitive to the fact that different acts of national balancing may be compatible with the treaty. Thus, although the effectiveness principle requires that restrictions on protected liberties must be construed narrowly, the ECHR has held that states “enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary.” Only after granting such discretion will the Court exercise its independent “European supervision” to the relevant legislation and the decisions applying it.

Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 404–05 (1998) (footnotes omitted).

278. See discussion *supra* Part I.A.

279. Article 2(3) of the Declaration on the Right to Development, for example, provides:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Declaration on the Right to Development art. 2(3), G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

280. With respect to the protection of intangible cultural heritage, an issue that is of great importance to many less developed countries in Asia, article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples further declares:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and

countries have paid special attention, are likely to become important features of the future international intellectual property debate.²⁸¹

4. Uneven Economic and Technological Developments

Uneven development is a major characteristic of the less developed world, in particular the rapidly-growing emerging countries such as China and India and those with a significant gap between the rich and the poor. As I noted elsewhere in the case of China, the many conflicts and competing interests within China are likely to drive the country's leaders to develop a "schizophrenic" nationwide intellectual property policy.²⁸² While the country wants stronger protection for its fast-growing industries, it prefers weaker protection in fields related to

traditional cultural expressions.

United Nations Declaration on the Rights of Indigenous Peoples art. 31(1), U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

281. In chronological order, the recent U.N. documents addressing the interface between intellectual property and human rights include: *Intellectual Property Rights and Human Rights*, Sub-Comm'n on Human Rights Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>; The High Commissioner, *Report of the High Commissioner on Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*, delivered to the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/\\$FILE/G0114345.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.pdf); Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1(c), of the Covenant)*, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edb797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edb797c125711500584ea8/$FILE/G0640060.pdf). For a discussion of these documents, see Yu, *A Tale of Two Development Agendas*, *supra* note 175, at 522–27. For discussions of the interface between human rights and intellectual property, see generally WILLEM GROSHEIDE, *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX* (2010); LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011); *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (Paul L.C. Torremans ed., 2008); WIPO, *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (1998); Audrey R. Chapman, *Core Obligations Related to ICESCR Article 15(1)(c)*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 305, 315 (Audrey Chapman & Sage Russell eds., 2002); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. (forthcoming 2012); Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 28; Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2007).

282. Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 25–26.

pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs, due to its huge population, continued economic dependence on agriculture, the leaders' worries about public health issues, and their concerns about the people's overall well-being.²⁸³

Interestingly, the challenges confronting China can be found in other similarly-situated countries, which range from India to Indonesia. As Fareed Zakaria observed, "India might have several Silicon Valleys, but it also has three Nigerias within it—that is, more than 300 million people living on less than a dollar a day. It is home to 40 percent of the world's poor and has the world's second-largest HIV-positive population."²⁸⁴ Indeed, "many middle-income developing countries . . . may want stronger protection for their fast-growing industries and highly economically developed regions, they want weaker protection in the remaining areas."²⁸⁵ Given the complexity of the various economies in Chindiasian, the group may be able to draw on their own experience and problems to develop solutions that address the uneven development problems. Such solutions may be useful for the other less developed countries outside the regional alliance, such as Brazil and South Africa.

5. Abuse of Rights and Restraint on Trade

Less developed countries, most notably Brazil and India, have long held positions that call for the provision of safeguards against the abuse of intellectual property rights and restraints on trade. As Brazil declared in a submission to the TRIPS Negotiating Group:

When one speaks of "rights" of intellectual property owners, one is automatically bound to deal with the subject of "obligations" of these owners.

The objective of such obligations which deserves priority attention is to allow greater access to technological innovation for IPR users. If the whole attention of the discussions is centered on the interests of IPR owners, the balance of the entire IPR system is not taken into account.²⁸⁶

283. *See id.* at 25.

284. ZAKARIA, *supra* note 3, at 133; *see also* VINAY RAI & WILLIAM L. SIMON, THINK INDIA: THE RISE OF THE WORLD'S NEXT SUPERPOWER AND WHAT IT MEANS FOR EVERY AMERICAN 211 (2007) ("One India wants. The Other India hopes. One India leads. The Other India follows." (italics omitted)).

285. Yu, *A Tale of Two Development Agendas*, *supra* note 175, at 559.

286. Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods [TRIPS Negotiating Group], *Submission from Brazil* ¶

During the TRIPS negotiations, India further reminded the delegates that “it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade.”²⁸⁷

With China and India as its key constituents, Chindiasean is likely to call for a recalibration of the balance in the international intellectual property system by demanding a greater emphasis on not only rights but also responsibilities. For example, they could demand greater protection against the abuse of rights and restraints on trade. Such positions are well supported by the text and the negotiating history of the TRIPS Agreement, which already includes many provisions targeting abuse of rights or process and restraints on trade or competition.²⁸⁸ The preamble of the TRIPS Agreement memorialized the negotiators’ desire to “reduce distortions and impediments to international trade . . . and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”²⁸⁹ Article 8.2 further states that “[a]ppropriate measures . . . may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.”²⁹⁰

C. Summary

In sum, many issues can find themselves on to Chindiasean’s policy agenda. Some of these issues are traditional issues advanced by less developed countries, many of which were under negotiation before even the establishment of the TRIPS Agreement.²⁹¹ Others, however, are new issues on which the international community has yet to achieve a consensus or about which countries have not formulated a position.

12, MTN.GNG/NG11/W/30 (Oct. 31, 1988).

287. TRIPS Negotiating Group, Meeting of Negotiating Group of 12–14 July 1989: Note by the Secretariat ¶ 4, MTN.GNG/NG11/14 (Sept. 12, 1989).

288. See, e.g., TRIPS Agreement pmb., recital 1; *id.* arts. 8.2, 40.1, 40.2, 41.1, 48.1, 50.3, 53, 63.1, 67.

289. *Id.* pmb., recital 1.

290. *Id.* art. 8.2 (emphasis added); see also Yu, *Objectives and Principles*, *supra* note 267, at 1016–18 (discussing article 8.2 of the TRIPS Agreement).

291. See Yu, *A Tale of Two Development Agendas*, *supra* note 175, at 468–511 (discussing the demands of less developed countries as they relate to the development of the Stockholm Protocol Regarding Developing Countries, the formation of WIPO as a specialized agency of the United Nations, the adoption of the draft International Code of Conduct on the Transfer of Technology, and the revision of the Paris Convention).

Because it remains unclear whether these issues will actually be negotiated along the divide between developed and less developed countries, Chindiasean would have an opportunity to shape the negotiation of many of these issues.

Even more interestingly, because the Chindiasean members have very diverse backgrounds, technological capabilities, and innovation paths, the positions they take are likely to be quite different from those of developed countries. As I noted in the inaugural issue of *The WIPO Journal*, “[I]t is premature to assume that less-developed countries, once developed, will always want the existing international intellectual property system. There is a good chance that they may want or *need* something rather different!”²⁹² In effect, Chindiasean may set alternative paths that provide other less developed countries, including those outside Asia, with some attractive policy choices. The positions Chindiasean takes therefore may help provide the much-needed momentum for reforms within the existing international intellectual property system, similar to the role played by Brazil and India a few decades ago.

V. CONCLUSION

This Article has shown that, in the area of intellectual property law and policy, one can neither locate any underlying distinct values, approaches, or practices nor identify established pan-Asian positions. Nevertheless, the middle- and low-income Asian countries may be able to work together to foster regional positions to influence future international intellectual property negotiations. While Japan and, to some extent, South Korea are unlikely to join other Asian countries in taking a strong pro-development stand for Asia, China, India, and ASEAN could team up to maximize their leverage and voice in the international intellectual property arena. They could help shape the development of a powerful regional normative community.

Although the positions and interests of the twelve members of Chindiasean continue to differ, developing a united front for these countries most certainly will help ensure a more desirable bargaining outcome in areas that range from the reshaping of global intellectual property enforcement norms to the protection of traditional knowledge and cultural expressions to the promotion of access to essential medicines. Having unified positions among these countries may also set

292. Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 15 (2009).

alternative paths for other less developed countries outside Asia. Thus, from the standpoint of international intellectual property policymaking, the growing intellectual property developments in Asia deserve our greater scholarly attention, even if this century does not end up becoming an Asian century.