

# Toward A Human Rights Framework for Intellectual Property

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## INTRODUCTION

The international intellectual property system is on the brink of a deepening crisis. In a widening array of international venues, government officials, civil society groups, and private parties are staking out opposing positions on issues ranging from patented medicines, to biodiversity and traditional knowledge, to digital content and webcasting, to the harmonization of procedural rules. The results are increasingly dysfunctional: acrimonious and unresolved clashes over substantive rules and values, competition among international institutions for policy dominance, and a proliferation of fragmented and incoherent treaty obligations and nonbinding norms.

This ominous state of affairs has evolved fairly rapidly. The last decade has seen a dramatic expansion of intellectual property protection standards, both in their subject matter and in the scope of the economic interests they protect. Advances in technology have engendered demands for new forms of legal protection by businesses and content owners. And with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”),<sup>1</sup> nation states linked intellectual property rights to the world trading system, creating new and robust enforcement opportunities at the international and national levels. These interrelated developments have made intellectual property rights relevant to a broad range of value-laden economic, social,

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<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS— RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs].

and political issues with important human rights implications, including public health, education, food and agriculture, privacy, and free expression.<sup>2</sup>

A recent wave of resistance to this rapid expansion of intellectual property rights has brought the work of the World Trade Organization (“WTO”) and the World Intellectual Property Organization (“WIPO”)—the two most prominent international intellectual property lawmaking venues—to a virtual standstill. In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders’ rights; and the protection of geographical indications have remained unresolved for nearly four years.<sup>3</sup> Negotiations in WIPO are faring little better. Industrialized nations are pressing for new treaties relating to substantive patent rules, audiovisual works, and broadcasters rights. Developing countries and consumer groups have countered with a “development agenda” that calls for a moratorium on new treaty-making and instead demands that WIPO give greater attention to public access to knowledge and to non-proprietary systems of creativity and innovation. These conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents’ proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism.<sup>4</sup>

With forward motion in the WTO and WIPO effectively stalled, both proponents and opponents of intellectual property rights have sought out greener pastures. Developing countries and their like-minded NGO allies have decamped to more sympathetic multilateral venues—most notably the World Health Organization, the Food and Agriculture Organization, and the conferences of the Convention on Biological Diversity—where they have found more fertile soil in which to grow proposals that seek to rollback intellectual property rights or at least eschew further expansions of the monopoly privileges they confer. Developed countries and intellectual property owners too are leaving the field, not for other multilateral organizations but for bilateral and regional trade and investment treaties. The price these countries demand for expanded

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<sup>2</sup> For earlier analyses of these trends, see Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 22 *Netherlands Q. Hum. Rts.* 167, 171-75 (2004); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *Yale Int’l L.J.* 1, 26-45 (2004) [hereinafter Helfer, *Regime Shifting*]; Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, in *Intellectual Property and Human Rights* 19-23 (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the UN High Commissioner for Human Rights) (Nov. 9, 1998), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/>.

<sup>3</sup> See, e.g., Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 *Am. J. Int’l L.* 317, 324-26 (2005); *Scant Progress in GI Discussions*, *Bridges Weekly Trade News Digest*, vol. 9, No. 32 (Sept. 28, 2005); *TRIPs Council Meeting Suspended in Effort to Meet Public Health Deadline*, *Bridges Weekly Trade News Digest*, vol. 9, No. 9 (Mar. 16, 2005).

<sup>4</sup> See, e.g., Daniel Pruzin, *WIPO Members Reach Compromise on Advancing Patent Law Negotiations*, *International Trade Reporter (BNA)*, vol. 22, No. 40 (Oct. 13, 2005) (“The United States and a group of mainly developed countries have been at loggerheads since May 2003 . . . over the future direction and scope of negotiations on WIPO’s proposed Substantive Patent Law Treaty.”); Michael Warnecke, *WIPO Fails to Reach Consensus on Including Webcasts in Broadcasting Treaty*, *Patent Trademark & Copyright J. (BNA)*, vol. 70, No. 1738 (Sept. 30, 2005) (describing disputes over substance and procedure of proposed broadcasting treaty).

For some commentators, this deadlock is a salutary result. See Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 *J. Int’l Econ L.* 279, 312-13 (2004) (calling for a moratorium on additional international intellectual property lawmaking).

market access and foreign investment is adherence to intellectual property rules that equal or exceed those found even in the most protective multilateral agreements.<sup>5</sup>

In this maelstrom of reaction, resistance, and regime shifting, international human rights law is poised to play an increasingly prominent and important mediating role. For more than fifty years, treaties and international custom have protected certain moral and material interests of authors, inventors, and other intellectual property creators. Until very recently, however, the conceptualization of these intellectual property interests as internationally protected human rights was all but unexplored. Intellectual property has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows.<sup>6</sup>

What little can be discerned about the intellectual property provisions of human rights law reveals a concern for balance. Both the 1948 Universal Declaration of Human Rights (“UDHR”) and the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR” or “the Covenant”) recognize the moral and material interests of authors and inventors<sup>7</sup> and the right “to enjoy the arts and to share in scientific advancement and its benefits.”<sup>8</sup> These clauses offer protection to creators and innovators and the fruits of their intellectual endeavors. But they also recognize the public’s right to benefit from the scientific and cultural progress that intellectual property products can engender.

Without elaboration, however, these textual provisions provide only a faint outline of how to develop human rights-compliant mechanisms to promote creativity and innovation. They also invite governments and activists on both sides of the intellectual property

<sup>5</sup> See Brian Knowlton, *U.S. plays it tough on copyright rules*, Int’l Herald Trib., Oct. 3, 2005, available at <http://www.iht.com/articles/2005/10/03/business/iptrade.php> (“So determined is the United States to strengthen copyright and patent protection that it is, in effect, exporting its own standards through free trade agreements reached with countries or regions as diverse as Australia, Singapore and Central America.”); see also *Concerns Raised over Access to Medicines Under Trade Treaties*, Bridges Weekly Trade News Digest, vol. 8, No. 25 (Jul. 14, 2004); GRAIN, *Bilateral agreements imposing TRIPS-plus intellectual property rights on biodiversity in developing countries*, [http://www.grain.org/rights\\_files/TRIPS-plus%20table\\_September\\_2005.pdf](http://www.grain.org/rights_files/TRIPS-plus%20table_September_2005.pdf).

<sup>6</sup> See Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, Panel Discussion on Intellectual Property and Human Rights at 3 (Nov. 8, 1998), available at [www.wipo.org/globalissues/events/1998/humanrights/papers/index.htm](http://www.wipo.org/globalissues/events/1998/humanrights/papers/index.htm) (characterizing intellectual property provisions in the International Covenant on Economic, Social and Cultural Rights as “the most neglected set of the provisions within an international human rights instrument whose norms are not well developed”).

Recently, a few commentators have started to explore in detail specific facets of the intersection between intellectual property law and human rights law, such the relationship between copyright and freedom of expression. See, e.g., *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY* (Paul L.C. Torremans, ed. 2004); *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* (Jonathan Griffiths & Uma Suthersanen, eds. 2005).

<sup>7</sup> Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71, art. 27; International Covenant on Economic, Social and Cultural Rights [ICESCR], adopted Dec. 16, 1966, arts. 15(1)(c) & 15(1)(b), S. Exec. Doc. D, 95-2, at 13, (1997), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) (recognizing the right “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” and to “to enjoy the benefits of scientific progress and its applications”).

<sup>8</sup> UDHR, *supra* note \_\_\_, art. 27(1).

divide to use the rhetoric of human rights to bolster arguments for or against revising intellectual property protection standards in treaties and in national laws.<sup>9</sup> Without greater normative clarity, however, such “rights talk”<sup>10</sup> risks creating a legal environment in which every claim (and therefore no claim) enjoys the distinctive protections that attach to “rights.”<sup>11</sup>

The skeletal and under-theorized intellectual property provisions of human rights law also leave critical questions unanswered. What, for example, is the relationship between the intellectual property clauses of the UDHR and ICESCR and the remaining civil, political, social, and economic rights enshrined in human rights pantheon? And how do human rights law’s intellectual property rules interface with the rules set out in multilateral agreements emanating from WIPO, the WTO, and regional and bilateral trade and investment treaties?

These uncertainties—together with the deepening crisis facing the international intellectual property system—highlight the need to develop a comprehensive and coherent “human rights framework” for intellectual property law and policy. The questions to be answered in constructing such a framework are foundational. They include issues as basic as defining the different attributes of the “rights” protected by each system; whether relevant standards of conduct are legally binding or only aspirational; whether such standards apply to governments alone or also to private parties; and adopting rules to resolve inconsistencies among overlapping international and national laws and policies. A human rights framework for intellectual property must also distinguish situations in which the two legal systems have the same or similar objectives (but may employ different rules or mechanisms to achieve those objectives), from “true conflicts” of goals or values that are far more difficult to reconcile.<sup>12</sup> Finally, the framework must include an institutional dimension, one that considers the diverse international and domestic lawmaking and adjudicatory bodies in which states and non-state actors generate new rules, norms, and enforcement strategies.

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<sup>9</sup> See, e.g., Tom Giovanetti & Merrill Matthews, *Intellectual Property Rights and Human Rights*, Ideas, No. 33 at 2 (Institute for Policy Innovation, Sept. 2005), available at [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/C9B313E68C78B60C862570880056BBDA/\\$File/IPandHumanRights.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/C9B313E68C78B60C862570880056BBDA/$File/IPandHumanRights.pdf?OpenElement) (asserting that “IP protection has long been recognized as a basic human right” and that those who “want to weaken IP protections” are advocating “expropriation of others’ property” and engaging in “ironically, one of the most “anti-human rights” actions governments could take.”); Statement by Third World Network, Third Intersessional Intergovernmental Meeting (July 22, 2005), available at <http://lists.essential.org/pipermail/a2k/2005-July/000539.html> (challenging the assertion that “IP rights have been recognized at human rights” as “a misreading of the existing international conventions. The [ICESCR recognizes] rewarding intellectual contribution but does not specifically mention ‘IP rights.’”); see also Electronic Freedom Foundation Comments on WIPO’S DNS Intellectual Property Proposal, Letter of Nov. 6, 1998, [http://www.eff.org/Infrastructure/DNS\\_control/19981106\\_eff\\_wipo\\_dns.comments](http://www.eff.org/Infrastructure/DNS_control/19981106_eff_wipo_dns.comments) (“We believe that the provision of Internet domain names is fundamentally a human rights issue, not an intellectual property issue.”).

<sup>10</sup> See Mary Ann Glendon, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

<sup>11</sup> See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 *Am. J. Int’l L.* 607 (1984); John H. Knox, *Beyond Human Rights: Developing Private Duties Under Public International Law* 17 (Sept. 2005) (unpublished manuscript on file with author).

<sup>12</sup> Cf. Brainerd Currie, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107 (1963) (distinguishing between false conflicts, which “present no real conflicts problem” and “true conflicts,” which “cannot be solved by any science or method of conflict of laws”).

This Essay offers a preliminary foray into these novel and complex issues. Part I begins with a brief overview of the textual and historical foundations of the intersections between human rights and intellectual property, focusing on the underlying legal and institutional factors that have fomented recent conflicts between the two legal regimes. Part II describes the genesis of those conflicts in greater detail, focusing on the rights of indigenous peoples and traditional knowledge and on the UN human rights system's response to the TRIPs Agreement and bilateral and regional intellectual property treaties. Part III turns to an analysis of two documents, recently drafted by the United Nations Committee on Economic, Social and Cultural Rights, which suggest a partial and tentative outline of a human rights framework for intellectual property. I use these documents to flesh out the framework in greater detail and offer a preliminary approach for mediating the two fields of law and policy. Part IV analyzes the rapidly changing institutional environment in which new actors are generating new legal rules relevant to the human rights-intellectual property interface. I focus in particular on recent treaty-making initiatives in UNESCO, the WHO, and WIPO, each of which uses international human rights law in different ways to challenge existing approaches to intellectual property protection and to revise the mandates of intergovernmental organizations.

## I. THE TEXTUAL AND HISTORICAL FOUNDATIONS OF A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

If asked to identify the freedoms and liberties protected as human rights, even the most knowledgeable observers would be unlikely to list the right of authors and inventors to protect the fruits of their intellectual efforts. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of principles than the UDHR includes in its catalogue of rights and freedoms a statement that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>13</sup> The UDHR's drafting history makes clear that the protection of authors' rights was no accident, even if the drafters' precise intentions remain elusive.<sup>14</sup> Support for these rights also finds expression in nearly identical language in the ICESCR, an international

<sup>13</sup> UDHR, *supra* note \_\_, art. 27(2).

<sup>14</sup> J. Morsink, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 220-221 (1999). As one scholar recently observed, although the motivations of governments who favored inclusion of Article 27 in the UDHR are somewhat obscure, the proponents appear to have been divided into two camps:

What we know is that the initial strong criticism that intellectual property was not properly speaking a Human Right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in favour because they felt that the moral rights deserved and needed protection and met the Human Rights standard and those who felt the ongoing internationalization of copyright needed a boost and that this could be a tool in this respect.

Paul Torremans, *Copyright as a Human Right*, in COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY, *supra* note \_\_ at 6. The intentions of the drafters of the analogous provisions of the ICESCR seems equally obscure. See Maria Green, *Drafting history of article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights* at 12-13 (Oct. 9, 2000) (demonstrating that debates over the intellectual property provisions of the ICESCR focused on Cold War issues, and concluding that the Covenant's drafters “did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property. When the question was raised, they tended to dismiss it almost out of hand.”), available at <http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088?Opendocument>.

convention adopted nearly twenty years later that makes the UDHR's economic and social guarantees binding as a matter of treaty law.<sup>15</sup>

Strikingly, human rights law's focus on the rights of creators and inventors has not been reciprocated in the international intellectual property system. No references to "human rights" appear in multilateral treaties such as the Paris, Berne, and Rome Conventions, nor in the more recently adopted TRIPs Agreement. These treaties do, however, repeatedly describe the legal protections for authors, inventors and other intellectual property owners as "rights," "private rights," and "exclusive rights,"<sup>16</sup> phrases that may appear to suggest a commonality of objectives between the two legal regimes.

These linguistic and textual parallels are only superficial, however. References to "rights" in intellectual property treaties serve distinctive structural and institutional purposes. They help to demarcate the treaties as charters of private rather than public international law,<sup>17</sup> that is, as agreements that authorize individuals and businesses to claim legal entitlements against other private parties in national courts under national laws.<sup>18</sup> In addition, use of "rights" language helps to bolster claims of intellectual property owners in foreign legal systems unfamiliar with or skeptical of the entitlements the treaties create for non-nationals. The principal justifications for references to "rights" in intellectual property agreements are thus grounded not in deontological claims about the inherent needs or attributes of human beings, but rather arise from efforts to create mechanisms to realize the putative economic and instrumental benefits of protecting intellectual property products across national borders.

What accounts for the unrequited interest of human rights law in intellectual property? The recent expansion of both intellectual property protection rules and of international human rights law is surely an important part of the answer. International relations scholars have analyzed the tendency for international legal regimes to extend their scope over time, creating dense "policy spaces" in which formerly unrelated and distinct sets of principles, norms, and rules abut against each other in increasingly incoherent and inconsistent ways.<sup>19</sup> Such regime expansions have been especially pronounced in these two areas of international law and policy.

<sup>15</sup> ICESCR, *supra* note \_\_, art. 15(1); see also Green, *supra* note \_\_, at 4-12 (discussing drafting history of Article 15(1)(c)).

<sup>16</sup> See, e.g., TRIPs, *supra* note \_\_, prmb1 ("recognizing that intellectual property rights are private rights"); Berne Convention, art. 9(1) ("Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."); Paris Convention, art. 2 (referring to "the rights specially provided for by this Convention").

<sup>17</sup> See Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 *Yale Int'l L.J.* 125, 192 (2005) (stating that "private international law has traditionally governed relationships and litigation between private parties"). But see Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *Colum. J. Transnat'l L.* 485, 520-21 (2005) (explaining ways in which distinctions between public and private international law are artificial and increasingly eroding).

<sup>18</sup> This structural framework also helps to explain the assertion made by international intellectual property scholars that there is "no international intellectual property law per se; instead intellectual property rights are subject to the principle of territoriality" and "vary according to what each state recognizes and enforces." Andrea Morgan, Comment, *TRIPs to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court*, 23 *Fordham Int'l L.J.* 795, 796 (2000) (collecting authorities).

<sup>19</sup> See Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 264, 266 (Roger B. Porter et al. eds., 2001).

Since its inception in the late 19<sup>th</sup> century, the development of intellectual property protection rules has occurred in a uni-modal international regime confined to intellectual property-specific diplomatic conferences and conventions negotiated under WIPO's auspices. The focus of treaty-making during this formative period was the gradual expansion of protected subject matters and exclusive rights through periodic revisions to the Berne, Paris, Rome and other conventions. With the advent of the TRIPs Agreement in 1994, the regime entered into a bimodal phase in which rule-making competencies were shared between two intergovernmental organizations—WIPO and the WTO.<sup>20</sup> By 2005, however, the international intellectual property system had morphed again, this time into a “conglomerate regime” or a “regime complex”—a multi-issue, multi-venue mega-regime in which governments and NGOs shift norm creating initiatives from one venue to another within the conglomerate, selecting the forum in which they are most likely to achieve their objectives.<sup>21</sup>

The international human rights regime has exhibited similar expansionist tendencies. Although the roots of human rights law date back to the inter-war years, its full flowering first occurred in the years following World War II. During this gestational period, government officials, international bureaucrats, NGOs, and scholars were occupied with foundational issues. Their most pressing goal was to elaborate and codify legal norms and enhance international mechanisms for monitoring compliance by nation states. As treaties, institutions, and jurisprudence evolved, the regime developed a de facto separation of human rights into categories. These categories ranged from a core set of peremptory norms for the most egregious forms of misconduct, to civil and political rights, to economic, social and cultural rights.

The latter group of rights are the most expansive and, for many countries, the most controversial. Whereas civil and political rights are negative liberties that require government officials to refrain from particular actions, economic, social, and cultural rights obligate governments to provide minimum levels of subsistence and well being to individuals and groups. Achieving these goals requires affirmative measures that often have significant financial consequences and require difficult trade-offs among competing categories of rights holders and other claimants.<sup>22</sup> These affirmative obligations also create broad areas of overlap—and of potential conflict—with international intellectual property protection rules, as the next section explains.

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<sup>20</sup> See Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (providing for joint legal and technical assistance to developing countries and information between the two organizations).

<sup>21</sup> Helfer, *Regime Shifting*, supra note \_\_\_, at 16-17.

<sup>22</sup> For thoughtful recent discussions, see Cass R. Sunstein, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); Mark Tushnet, *Enforcing Socio-economic Rights: Lessons from South Africa*, 6 ESR Review 2 (2005), available at <http://www.communitylawcentre.org.za/ser/esr2005/ESRReviewSept2005.pdf> Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, available at <http://www.nyu.edu/gsas/dept/politics/seminars/tushnet.pdf>. For an earlier critical analysis of economic and social rights, see Cass R. Sunstein, *Against Positive Rights*, 1993 E. Eur. Const. Rev. 35 (1993).

## II. INITIAL CONTESTATIONS OVER HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Two events catapulted intellectual property issues onto the agenda of international human rights norm creating bodies. The first was an emphasis on the neglected cultural rights of indigenous peoples. And the second was the linking of intellectual property and trade through the TRIPs Agreement and, more recently, bilateral and regional “TRIPs plus” treaties.<sup>23</sup> These events exposed serious normative deficiencies of intellectual property from a human rights perspective, and they prompted new standard setting initiatives which increased the contestations between the two regimes.

### A. The Rights of Indigenous Peoples and Traditional Knowledge

Beginning in the early 1990s, the UN human rights system began to devote significant attention to the rights of indigenous communities.<sup>24</sup> Among the many claims that these communities sought from nation states was the right to recognition of and control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture. From an intellectual property perspective, traditional knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private ownership rules.<sup>25</sup> By treating this knowledge as effectively un-owned, however, intellectual property law made that knowledge available for exploitation third parties, to be used as an upstream input for later downstream innovations that were themselves privatized through patents, copyrights, and plant breeders’ rights.<sup>26</sup> Adding insult to injury, the financial and technological benefits of those innovations were rarely shared with indigenous communities.<sup>27</sup>

<sup>23</sup> These treaties are referred to as “TRIPs plus” because they contain intellectual property protection rules more stringent than those found in TRIPs, obligate developing countries to implement TRIPs before the end of its specified transition periods, or require such to accede to or conform to the requirements of other multilateral intellectual property agreements. See Peter Drahos, BITs and BIPs, *J. of World Intell. Prop. L.* 794-807 (2002) (describing “TRIPs plus” bilateral agreements negotiated by the United States and the EC with individual developing country governments); GRAIN, “TRIPs-plus” Through the Back Door: How Bilateral Treaties Impose Much Strong Rules for IPRs on Life than the WTO (July 2001) [hereinafter GRAIN, TRIPs plus], <http://www.grain.org/docs/trips-plus-en.pdf> (same); OECD, *Regionalism and the Multilateral Trading System* 111-22 (2003), <http://www1.oecd.org/publications/e-book/2203031E.PDF> (same).

<sup>24</sup> See Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 *Am. Soc’y Int’l L. Proc.* 143, 147 (2001).

<sup>25</sup> See Graham Dutfield, *TRIPs-Related Aspects of Traditional Knowledge*, 33 *Case W. Res. J. Int’l L.* 233, 238 (2001) (“TK [traditional knowledge] is often (and conveniently) assumed to be in the public domain. This is likely to encourage the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely.”).

<sup>26</sup> See Laurence R. Helfer, *INTELLECTUAL PROPERTY RIGHTS IN PLANT VARIETIES: INTERNATIONAL LEGAL REGIMES AND POLICY OPTIONS FOR NATIONAL GOVERNMENTS*, FAO Legislative Study No. 85 (Fall 2004)

<sup>27</sup> See Written statements submitted by International Indian Treaty Council to Commission on Human Rights, E/CN/4/2003/NGO/127 at 3 (Mar. 12. 2003):

The theft and patenting of Indigenous Peoples’ bio-genetic resources is facilitated by [TRIPs]. Some of the plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred ceremonies since time immemorial have already been patented in the United States, Japan and Europe. A few examples of these are ayahuasca, quinoa, and sangre de drago in South America; Kava in the Pacific; turmeric and bitter melon in Asia.

There are some exceptions, however, particularly in the form of so-called bioprospecting agreements between indigenous groups and entities in the developed world. For a discussion of these agreements, see

UN human rights bodies sought to close this hole in the fabric of intellectual property law by commissioning a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples,<sup>28</sup> and Principles and Guidelines for the Protection of the Heritage of Indigenous People.<sup>29</sup> These documents adopt a decidedly skeptical approach to intellectual property protection. On the one hand, the documents urge states to protect traditional knowledge using legal mechanisms that fit comfortably within existing intellectual property paradigms—such as allowing indigenous communities to seek injunctions and damages for unauthorized uses.<sup>30</sup> But the documents also define protectable subject matter more broadly than existing intellectual property laws, and they urge states to deny patents, copyrights, and other exclusive rights over “any element of indigenous peoples’ heritage” that does not provide for “sharing of ownership, control, use and benefits” with those peoples.<sup>31</sup> In short, a human rights analysis of traditional knowledge views intellectual property as one of the problems facing indigenous communities, and, only perhaps, as part of a solution to those problems.

### B. The TRIPs Agreement, “TRIPs Plus” Treaties, and Human Rights

The second area of intersection between human rights and intellectual property relates to the 1994 TRIPs Agreement and “TRIPs plus” treaties. TRIPs adopted relatively high minimum standards of protection for all WTO members, including many developing and least developed countries with little previous interest in protecting patents, copyrights, and trademarks.<sup>32</sup> In addition, unlike previous intellectual property agreements, TRIPs has enforcement teeth. WTO members whose nationals do not receive the protections TRIPs requires in other members’ national legal systems can challenge that non-compliance through the WTO’s dispute settlement system, in which rulings are backed up by the threat of trade sanctions.

The UN human rights system first turned its attention to TRIPs in 2000. In August of that year, the United Nations Sub-Commission on the Protection and Promotion of Human Rights adopted Resolution 2000/7 on “Intellectual Property Rights and Human Rights.”<sup>33</sup>

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Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, Univ. of Washington Occasional Papers 2003 No. 1.

<sup>28</sup> Commission on Human Rights, Draft of United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

<sup>29</sup> See Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur, E/CN.4/Sub.2/1995/26, Annex (June 21, 1995) (initial text draft Principles and Guidelines); Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, U.N. Doc. E/CN.4/Sub.2/2000/26 (2000) (revised text of the draft Principles and Guidelines). The Sub-Commission later adopted the Revised Draft Principles and Guidelines and transmitted them to the Commission for its approval. Sub-Commission on the Promotion and Protection of Human Rights, Decision 2000/107, UN Doc. E/CN.4/Sub.2/DEC/107/2000/107 (2000).

<sup>30</sup> Revised Draft Principles and Guidelines, Guidelines 24(b) (national laws to protect indigenous peoples’ heritage should provide the means for indigenous peoples to prevent and obtain damages for “the acquisition, documentation or use of their heritage without proper authorization of the traditional owners”).

<sup>31</sup> Revised Draft Principles and Guidelines, Guidelines 24(c).

<sup>32</sup> For a review of the changes TRIPs wrought, see J.H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 Case W. Res. J. Int’l L. 441 (2000).

<sup>33</sup> Resolution 2000/7, *supra* note 1. For a discussion of the Resolution’s history, see David Weissbrodt & Kell Schoff, *A Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 Minn. Intell. Prop. Rev. \_\_\_ (2003).

The resolution, which was highly critical of intellectual property protection, stated that “actual or potential conflicts exist between the implementation of the TRIPs Agreement and the realization of economic, social and cultural rights.”<sup>34</sup> These conflicts cut across a wide swath of legal terrain, including: (1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders’ rights and patents for genetically modified organisms; (3) bio-piracy,<sup>35</sup> (4) the protection of the culture of indigenous communities, and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals.<sup>36</sup> To resolve these conflicts, the Sub-Commission urged national governments, intergovernmental organizations, and civil society groups to give human rights “primacy . . . over economic policies and agreements.”<sup>37</sup>

This assertion of normative predominance had no legal force, however, since the Sub-Commission’s resolutions are, by their own terms, non-binding. Nor did the Sub-Commission parse the texts of the relevant (and binding) international agreements or the rules of customary international law to identify which specific human rights protections TRIPs violates. Rather, the resolution’s principal objective was to propose an ambitious new agenda for reviewing intellectual property issues within the United Nations human rights system, an agenda animated by the basic principle of human rights primacy.

In the more than five years since the resolution’s adoption, the response to the Sub-Commission’s invitation has been overwhelming. The actions taken and documents produced by UN human rights bodies are numerous and diverse. They include: (1) annual resolutions by the United Nations Commission on Human Rights on “Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria,” which urge states to ensure such access,<sup>38</sup> (2) an analysis of TRIPs by the UN High Commissioner for Human Rights, which argues that intellectual property laws must promote access to knowledge and innovations, opposes the adoption of “TRIPs plus” treaties, and emphasizes states’ obligation to provide access to affordable medicines to treat HIV/AIDS,<sup>39</sup> (3) a report by two Special Rapporteurs on Globalization, which

<sup>34</sup> Resolution 2000/7, supra note \_\_, preambular ¶ 11.

<sup>35</sup> “Biopiracy” has been loosely used to describe any act by which a commercial entity obtains intellectual property rights over biological resources that are seen as “belonging” to developing states or indigenous communities located within their borders. See CEAS Consultants (Wye) Ltd, Centre For European Agricultural Studies, Final Report for DG TRADE European Commission, Study on the Relationship Between the Agreement on TRIPs and Biodiversity Related Issues 78 (2000).

<sup>36</sup> Id. ¶ 11. See also id. ¶ 2 (identifying conflicts between TRIPs and “the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination”).

<sup>37</sup> Id. ¶ 3.

<sup>38</sup> See Comm. on Hum. Rts. Res. 2003/29 (Apr. 22, 2003); Comm. on Hum. Rts. Res. 2001/33 (Apr. 23, 2001); Comm. on Hum. Rts. Res. 2002/32 (Apr. 22, 2002); see also *Human Rights Commission Calls on States to Use TRIPs Flexibilities*, Bridges Weekly Trade News Digest, vol. 9, No. 13 (Apr. 20, 2005). The first resolution, sponsored by Brazil in 2001, mandates that states, in implementing the right to the highest attainable standard of health, “adopt legislation or other measures, in accordance with applicable international law” to “safeguard access” to such medications “from any limitations by third parties.” Res. 2001/33, supra, at ¶ 3(b).

<sup>39</sup> Report of the High Commissioner, The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, E/CN.4/Sub.2/2001/13 ¶¶ 10-15, 27-58 (June 27, 2001) [hereinafter High Commissioner Report].

asserts that intellectual property protection has undermined human rights objectives;<sup>40</sup> (4) a second resolution by the Sub-Commission that identifies a widening set of conflicts between TRIPs and human rights, including “the rights to self-determination, food, housing, work, health and education, and . . . transfers of technology to developing countries;”<sup>41</sup> (5) an attempt by the High Commissioner for Human Rights to seek observer status with the WTO and participate in the reviews of TRIPs;<sup>42</sup> and (6) a report by the UN Secretary General on intellectual property and human rights based on information submitted by states, intergovernmental organizations, and NGOs.<sup>43</sup>

### III. MEDIATING INTELLECTUAL PROPERTY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE INTERPRETIVE APPROACH OF THE ICESCR COMMITTEE

Several of the reports and documents described in the previous section contain trenchant critiques of TRIPs, of TRIPs plus treaties, and of expansive intellectual property rights more generally. They also provide evidence to document the empirical effects of intellectual property agreements on specific human rights, in particular the right to health in the context of global pandemics such as HIV/AIDS.<sup>44</sup> With few exceptions, however, these studies fail to provide a detailed textual analysis of a human rights framework for intellectual property and how that framework interfaces with existing intellectual property protection rules in national and international law.

This absence of close textual scrutiny is not surprising, given that the principal areas of overlap between the two legal regimes relate to economic, social, and cultural rights. Among human rights law’s diverse categories, these rights are the least well developed and the least doctrinally prescriptive. The ICESCR—the principal international agreement that protects these rights—is a programmatic treaty.<sup>45</sup> Its provisions are drafted in gradualist and ambiguous language that requires each ratifying state to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . .”<sup>46</sup>

Only in the last decade have economic, social, and cultural rights received sustained jurisprudential attention. The United Nations Committee on Economic, Social and

<sup>40</sup> J. Oloka-Onyango & Deepika Udagama, *Globalization and its impact on the full enjoyment of human rights*, E/CN.4/Sub.2/2001/10 ¶¶ 19-34 (Aug. 2, 2001).

<sup>41</sup> Sub-Commission on the Protection and Promotion of Human Rights, Res. 2001/21 on Intellectual Property and Human Rights (Aug. 16, 2001) (identifying “actual or potential conflicts” between human rights obligations and TRIPs, and asserting the “need to clarify the scope and meaning of several provisions of the TRIPS Agreement”).

<sup>42</sup> See High Commissioner Report, *supra* note \_\_ ¶ 68.

<sup>43</sup> Report of the Secretary-General, *Economic, Social and Cultural Rights, Intellectual Property Rights and Human Rights*, E/CN.4/Sub.2/2001/12 (June 14, 2001).

<sup>44</sup> See High Commissioner Report, *supra* note \_\_ ¶ 15 (stressing the need for TRIPs to “be assessed empirically to determine the effects of the Agreement on human rights in practice”).

<sup>45</sup> See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW POLICY AND PROCESS* 88-93 (3d ed. 2001) (explaining that ICESCR establishes programmatic and flexible commitments that are to be achieved over time).

<sup>46</sup> ICESCR, *supra* note \_\_, art. 2(1).

Cultural Rights (“the ICESCR Committee” or “the Committee”) has been the progenitor of a movement to imbue these rights with greater prescriptive force. The Committee is a supervisory body of eighteen human rights experts who interpret the ICESCR and monitor its implementation by its more than 150 member nations.<sup>47</sup>

One of the Committee’s principal functions is to provide these nations with guidance as to the treaty’s meaning. This guidance takes the form of nonbinding “general comments” on specific treaty articles or specific human rights issues.<sup>48</sup> General comments serve as focal points for change in national legal systems and provide a standard against which the Committee can review states’ compliance with the Covenant. Formally, these recommended interpretations are directed only to governments. But their scope is not limited to public laws or the actions of public officials. They extend as well to individuals, business association, and other private parties whose conduct implicates social, economic and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations.<sup>49</sup>

The ICESCR Committee’s first interpretive foray into intellectual property occurred in the Fall of 2001, when it published a “Statement on Human Rights and Intellectual Property.”<sup>50</sup> The statement offered a preliminary analysis of the ICESCR’s intellectual property provisions and their relationship to other economic and social rights in the Covenant. It also set out a new agenda for the Committee to draft general comments on each of the ICESCR’s intellectual property clauses.<sup>51</sup> In November 2004, the Committee debated the first of these general comments, an exegesis on Article 15(1)(c), “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.”<sup>52</sup> After extensive discussions, the Committee adopted a draft text<sup>53</sup> which it is scheduled to debate again in late Fall 2005.<sup>54</sup>

<sup>47</sup> Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 3, 2005), available at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>.

<sup>48</sup> See M. Craven, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 474 (1995).

<sup>49</sup> For a thoughtful and influential analysis of these issues, see Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996).

<sup>50</sup> Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Follow-up to the day of general discussion on article 15.1(c), Monday, 26 November 2001 (Dec. 14 2001), E/C.12/2001/15, [hereinafter Statement on Human Rights and Intellectual Property], available at [http://www.unhcr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/\\$FILE/G0146641.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf).

<sup>51</sup> Id. at para. 2.

<sup>52</sup> ICESCR, *supra* note \_\_, art. 15(1)(c).

<sup>53</sup> Committee on Economic, Social and Cultural Rights, *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 (art. 15(1)(c) of the Covenant)*, Draft General Comment No. 18 (Nov. 15, 2004) (Reporter: Eibe Riedel) [hereinafter Draft General Comment].

<sup>54</sup> See Note on the 34th session of the Committee on Economic, Social and Cultural Rights, 25 April -- 13 May 2005, and its Pre-Sessional Working Group, 17-20 May 2005 at para. 8, available at <http://www.ohchr.org/english/bodies/cescr/docs/note34.doc>. Given the contentious nature of the issues involved, it is uncertain when the Committee will adopt a final version of the general comment. See D. Ovet, “UN Committee on Economic, Social and Cultural Rights Considers the Impact of Intellectual Property

Taken together, the Committee's 2001 statement and the 2004 draft general comment on "authors' rights"<sup>55</sup> provide a partial blueprint of a human rights framework for intellectual property. In the sections that follow, I review these two documents in detail, expanding upon that outline and analyzing its substantive implications.

#### A. Introducing a "Violations Approach" to Authors' Rights

The Committee's draft general comment reveals the challenges of developing a coherent and detailed interpretation of Article 15(1)(c) from the Covenant's sparse text. In its present form, the draft is a lengthy, densely worded, and somewhat repetitive document of 56 paragraphs divided into six parts: (1) an introductory section that explains the basic's premises of the Committee's analysis; (2) a close textual reading of Article 15(1)(c)'s "normative content"; (3) a section outlining states' legal obligations, including general, specific, core, and related obligations; (4) an analysis of actions or omissions that would violate the Article; (5) a section on how authors' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations.

This organizational structure, and in particular the distinction it creates between "legal obligations" and "violations," is likely to mystify domestic intellectual property lawyers. But the Committee's methodology will be familiar to foreign ministries, human rights scholars, and NGOs who have followed the Committee's past efforts to provide concrete interpretations of the ICESCR's many ambiguous clauses. In particular, the Committee has developed a "violations approach" to interpreting the Covenant that distinguishes "core obligations"—minimum essential levels of each right which all states must immediately implement—from other obligations that may be achieved progressively as additional resources become available.<sup>56</sup> These core obligations include three distinct undertakings—to respect, to protect, and to fulfill. As the Committee explains in the draft general comment on authors' rights:

The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to the protection of the moral and material interests of the author. The obligation to *protect* requires States to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfill* requires States to adopt appropriate legislative, administrative, budgetary,

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Rules on Human Rights" (Dec. 2004), available at <http://lists.essential.org/pipermail/ip-health/2004-December/007209.html>.

<sup>55</sup> The Anglophone phrases "the rights of authors" and "authors' rights" are confusing similar to, but legally distinct from, the Francophone *droit d'auteur*, which refers to legal rights granted to authors and creators in countries that follow the civil law tradition of protection for literary and artistic works. See Alan Strowel, *DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES* (1993) (comprehensively comparing *droit d'auteur* and copyright). By contrast, the references to "authors' rights" and similar phrases in this essay describe the legal entitlements for creators and inventors that are recognized in international human rights law. These legal protections are not coterminous with those of *droit d'auteur*.

<sup>56</sup> General Comment No. 3, *supra* note \_\_ at para. 10. See also Audrey Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 Tenn. L. Rev 389 (1998).

judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).<sup>57</sup>

These three core obligations, although framed in the distinctive language of human rights law, should, upon reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar states from violating authors' material and moral interests themselves, most notably in the form of infringements by government agencies or officials;<sup>58</sup> they mandate "effective protection" of those interests in legislation, including protection of "works which are easily accessible or reproducible through modern communication and reproduction technologies;"<sup>59</sup> and they require states to provide judicial and administrative remedies for authors to prevent unauthorized uses of their works (i.e. injunctions) and to recover compensation for such uses (i.e. damages), and, more broadly, to facilitate authors' participation in and control over decisions that affect their moral and material interests.<sup>60</sup>

These obligations also overlap with several provisions in intellectual property treaties, most notably the Berne Convention's reproduction right and moral rights clauses, the "making available" right in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the enforcement provisions in the TRIPs Agreement.<sup>61</sup> This commonality suggests that states can satisfy their obligations under Article 15(1)(c), at least in part, by ratifying international intellectual property agreements and by enacting national copyright and neighboring rights laws. The ICESCR's state reporting procedures strongly support this claim.<sup>62</sup> Since the early 1990s, member nations have regularly cited to such treaties and laws to demonstrate compliance with the authors' rights provisions in the Covenant.<sup>63</sup>

<sup>57</sup> Draft General Comment, *supra* note \_\_ at para. 31; see also *id.* at paras. 48-50 (discussing actions and omissions that violate these three obligations).

<sup>58</sup> Draft General Comment, *supra* note \_\_ at paras. 33 and 48.

<sup>59</sup> *Id.* at paras. 34 and 49.

<sup>60</sup> See *id.* at paras. 36 and 50.

<sup>61</sup> Berne Convention, arts. 6*bis* & 9; WIPO Copyright Treaty, art. 8; WIPO Performances and Phonograms Treaty, art.10;TRIPs Agreement, arts. 41-51 & 61.

<sup>62</sup> ICESCR, *supra* note \_\_, art. 16 (requiring states to submit periodic "reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized" in the Covenant).

<sup>63</sup> See, e.g., Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Third periodic report: Cyprus" (June 6, 1996), E/1994/104/Add.12 at para. 420, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1994.104.Add.12.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.Add.12.En?Opendocument) (last visited: Aug. 15, 2005), (citing ratification of Berne Convention and domestic copyright legislation to demonstrate compliance with Article 15(1)(c)); Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial report: Israel" (Jan. 20, 1998), E/1990/5/Add.39(3) at paras. 782-88, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/41e674c4a2affbd480256617004768f5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/41e674c4a2affbd480256617004768f5?Opendocument) (last visited: Aug. 15, 2005) (discussing evolution and expansion of copyright legislation and ratification of numerous international agreements to demonstrate compliance with Article 15(1)(c)); Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Second periodic report: Jordan" (July 23, 1998), E/1990/6/Add.17 at para. 151, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7eb0986e8af3f29c802567240056ca4c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7eb0986e8af3f29c802567240056ca4c?Opendocument) (last visited: Aug. 15, 2005) (citing amendments to Copyright Protection Act that conform to international copyright treaties and government's intent to ratify such treaties to demonstrate compliance with Article 15(1)(c)).

Notwithstanding the commonalities between these two legal regimes, the Committee's "core obligations" approach to authors' rights leaves many issues unresolved. Most notably, it does not define the content of the "moral and materials interests" which states are required to "respect, protect, and fulfill." Nor does it specify whether—and if so how—a human rights framework for authors' rights differs from the legal rules contained in intellectual property treaties and domestic legislation. The next section considers the Committee's treatment of these key definitional issues.

## B. Developing a Distinctive Human Rights Framework for Authors' Rights

The draft general comment gives detailed attention to the differences between authors' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the "scope of protection" of authors' rights in Article 15(1)(c) "does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements."<sup>64</sup> But what, precisely, are these differences in scope?

The Committee first compares foundational principles. It notes that "human rights are fundamental as they derive from the human person as such, whereas intellectual property rights are first and foremost a means by which States seek to provide incentives for inventiveness and creativity from which society benefits."<sup>65</sup> Since intellectual property rights are granted by the state, they may also be taken away by the state. They are temporary, not permanent; they may be "revoked, licensed or assigned;"<sup>66</sup> and they may be "traded, amended or even forfeited,"<sup>67</sup> commensurate with the regulation of a "social product [that] has a social function."<sup>68</sup> By contrast, human rights are enduring, "fundamental, inalienable and universal entitlements . . ."<sup>69</sup> These statements reflect a vision of authors' rights that exist independently of the vagaries of state approval, recognition or regulation.

Turning from lofty principles to specifics, the Committee identifies several distinctive features of authors' rights in the Covenant. For example, Article 15(1)(c) applies only to "individuals, and in some situations groups of individuals and communities."<sup>70</sup> Corporations and other legal entities are expressly excluded.<sup>71</sup> This represents a profound departure from Anglo-American copyright laws, which have long recognized

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<sup>64</sup> Draft General Comment, *supra* note \_\_ at para. 2; see also *id.* at para. 3 ("It is . . . important not to equate intellectual property rights with the human rights recognized in article 15, paragraph 1(c).").

<sup>65</sup> *Id.* at para. 1.

<sup>66</sup> *Id.* at para. 2.

<sup>67</sup> *Id.*

<sup>68</sup> Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 4.

<sup>69</sup> *Id.* at para. 6.

<sup>70</sup> Draft General Comment, *supra* note \_\_ at para. 1.

<sup>71</sup> See *id.* at para. 8 (stating that the drafters of ICESCR article 15 "considered authors of scientific, literary or artistic productions to be natural persons"); Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 6 (contrasting human rights approach authors' rights with that of intellectual property regimes which "are increasingly focused on protecting business and corporate interests and investments").

that legal entities can enjoy the status of authors of intellectual property products, for example of works made for hire.<sup>72</sup>

Moreover, the protections provided to these natural persons have a distinctive human rights flavor. Consider the issue of equality. A cornerstone of intellectual property treaties is the “national treatment” of foreign authors and rights owners.<sup>73</sup> A human rights framework for authors’ rights encompasses a rule of equality between domestic and foreign owners of intellectual property products. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for “vulnerable or marginalized groups.”<sup>74</sup> Equality also has process dimension, which requires states to provide authors with information “on the structure and functioning of . . . legal or policy regime[s],” and to facilitate their participation in “any significant decision-making processes with an impact on their rights and legitimate interests,” either directly or through “trade unions and professional associations.”<sup>75</sup>

These distinctive features of a human rights conception of authors’ rights have some surprising consequences. If the moral and material interests of authors and creators are fundamental rights, then the ability of governments to regulate them—either to protect other human rights or to achieve other social objectives—ought to be exceedingly narrow. And in fact, the Committee has developed a stringent test for assessing the legality of state restrictions on social and economic rights,<sup>76</sup> a standard that it reaffirms in the draft general comment on Article 15(1)(c).

According to this test, government restrictions on authors’ rights must be “[1] determined by law, [2] compatible with the nature of these rights, [3] in the interest of the legitimate aims pursued, and [4] strictly necessary for the promotion of the general welfare in a democratic society.”<sup>77</sup> In addition, such limitations “must be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations

<sup>72</sup> See 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright.”).

<sup>73</sup> See, e.g., S. Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*. (London: Centre for Commercial Law Studies, Queen Mary College, 1987), 981 at 17-38; D. Vaver, ‘The National Treatment Requirements of the Berne and Universal Copyright Conventions’ (1986), 17 *International Review of Industrial Property and Copyright Law* 577.

<sup>74</sup> Draft General Comment, *supra* note \_\_ at para. 41(d); see also Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 7 (stating that “human rights instruments place great emphasis on protection against discrimination,” and that the rights guaranteed in the Covenant “must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

<sup>75</sup> Draft General Comment, *supra* note \_\_ at paras. 21(b) and 36. For an analysis of the draft general comment’s implications for government regulation of collective rights organizations, see Laurence R. Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* (Daniel J. Gervais, ed., Kluwer Law International) (forthcoming 2006).

<sup>76</sup> See Committee on Economic, Social and Cultural Rights, “General Comment No. 14—The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)” (November 8<sup>th</sup>, 2000), E/C.12/2000/4 at para. 28, available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (last visited: August 16<sup>th</sup>, 2005) (discussing government’s burden to demonstrate legality of limitations on the right to health).

<sup>77</sup> Draft General Comment, *supra* note \_\_ at para. 26 (bracketed numbers added).

are available.”<sup>78</sup> This multipart test is an intellectual property owner’s dream. And it is far more constraining than the now ubiquitous “three step test”<sup>79</sup> used to assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws.<sup>80</sup>

Yet if restrictions on authors’ rights are to be so rigidly scrutinized (and, presumably, so rarely upheld), how, then, are governments to strike a balance between authors’ rights on the one hand and the public’s interest in access to knowledge on the other—a balance that the Committee views as a key element of Article 15(1)(c) and that it emphasizes throughout the draft general comment and in its 2001 statement?<sup>81</sup> On this point, the Committee’s analysis is unclear, which is perhaps understandable given that the general comment is still a work in progress. Even in its preliminary form, however, a close parsing of the draft offers hints of how the Committee may ultimately construct a distinctive human rights framework for intellectual property.

The key to understanding this framework is to identify the purposes of recognizing authors’ moral and material interests *as human rights*. According to the Committee, such rights serve two essential functions. First, they “safeguard[] the personal link between authors and their creations and between people or other groups and their collective cultural heritage.”<sup>82</sup> And second, they protect authors’ “essential economic interests in their works, necessary for them to secure . . . an adequate standard of living by engaging in scientific research and creative activity.”<sup>83</sup>

<sup>78</sup> *Id.* at para. 27 (bracketed numbers added).

<sup>79</sup> See, e.g., TRIPs, *supra* note \_\_, art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”); *id.* art. 30 (“Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”); WIPO Copyright Treaty, *supra* note \_\_, art. 10(1) (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”).

<sup>80</sup> See Jane Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions*, 187 *Revue Internationale du Droit d’Auteur* 3 (2001); Mihaly Ficsor, *How Much of What?: The “Three-Step Test” and Its Application in Two Recent WTO Dispute Settlement Cases*, 192 *Revue Internationale du Droit d’Auteur* 110 (2002).

<sup>81</sup> See, e.g., Draft General Comment, *supra* note \_\_ at paras. 26 (“The right to the protection of moral and materials interests in one’s scientific, literary and artistic productions is not an unlimited rights and must be balanced with the other rights guaranteed in the Covenant . . . .”); *id.* para. 37 (“States parties are . . . obligated to strike a balance between their obligations under article 14, paragraph 1(c), on the one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting all human rights, including the full range of rights guaranteed in the Covenant.”); Statement on Human Rights and Intellectual Property, *supra* note \_\_ at para. 4 (“intellectual property rights must be balanced with the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications”) (footnote omitted); *id.* at para. 17 (“Article 15 of the Covenant sets out the need to balance the protection of public and private interests in knowledge.”)

<sup>82</sup> *Id.* at para. 2. This “personal link” is protected by legislation that enables authors “to claim authorship for their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their works, which would be prejudicial to their honour or reputation.” *Id.* at para. 41(b). The Committee’s language closely tracks the moral rights provisions in Article 6*bis* of the Berne Convention and in many national laws.

<sup>83</sup> *Id.* at para. 2. In the current draft, the phrase “at the very least” appears in brackets before the obligation to provide sufficient rights to secure authors an adequate standard of living. *Id.* The brackets likely indicate

These two statements, which recur throughout the document,<sup>84</sup> suggest the existence of an irreducible core of rights—a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential requisites for any free society.<sup>85</sup> Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But those protections are not required under Article 15 of the Covenant and, as a result, they are not subject to the restrictive test quoted above.

Stated differently, once a country guarantees authors and creators these two core rights—one moral, the other material—any *additional* intellectual property protections the country provides “must be balanced with the other rights guaranteed in the Covenant,” and must give “due consideration” to “the public interest in enjoying broad access to new knowledge.”<sup>86</sup> The ICESCR thus gives each of its member states the discretion to eschew these additional protections altogether or, alternatively, to shape them to the particular economic, social, and cultural conditions within their borders.<sup>87</sup>

Seen from this perspective, a human rights framework for authors’ rights is both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws. It is also less protective, however, in that a state need not recognize any authors’ rights lying outside of this zone or, if it does recognize such additional rights, it must give appropriate weight to other social, economic, and cultural rights and to the public’s interest in access to knowledge.

### C. First Steps Toward a Balanced Regime of Intellectual Property Protection

In the draft general comment on Article 15(1)(c)—which by definition focuses only the paragraph of Article 15 that protects the rights of creators and inventors—the Committee offers few details of how states are to achieved a balanced, human rights-complaint rules of intellectual property protection. Its most informative statement appears in a single paragraph of the general comment—paragraph 37—which, as described below, sets forth an interpretive principle and three specific recommendations.

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an area of disagreement among the members of the ICESCR Committee over whether this level of rights is only a minimum standard or the objective toward which governments should strive. They also reveal that the economic interests to which the Committee refers are only roughly analogous to the exclusive rights in national copyright and neighboring rights laws.

<sup>84</sup> The Committee repeats variants of the “personal link” language a total of five times, and it reasserts the “adequate standard of living” formulation no less than ten times—repetitions that suggest the importance of these concepts to its analysis.

<sup>85</sup> Cf. Torremans, *supra* note \_\_\_ at 5 (drafters of UDHR believed that the best way to avoid recurrence of abuses of science, technology, and copyrighted propaganda that occurred during Second World War would be “to recognize that everyone had a share in the benefits and that . . . those who made valuable contributions were entitled to protection”).

<sup>86</sup> Draft General Comment, *supra* note \_\_\_ at paras. 26 and 37. See also *id.* at para. 15 (stating that nothing in Article 15.1(c) prevents states parties from “adopting higher protection standards” in intellectual property treaties or national laws, “provided that these standards do not disproportionately impede the enjoyment by others of their Covenant rights”).

<sup>87</sup> See *id.* at para. 21 (stating that “the precise application” of authors’ and inventors’ moral and material interests “will depend on the economic, social and cultural conditions prevailing in a particular State party”).

At the level of principle, states must ensure that “legal and other regimes” for the protection of intellectual property “constitute no impediment to their ability to comply with their core obligations in relation to the right to health, food, education culture, or any other right set out in the Covenant.”<sup>88</sup> Seen from one perspective, this statement is simply an innocuous reminder that states must reconcile all of their treaty commitments and avoid derogating from one set of treaty rules when satisfying another. But the reference to compliance with the ICESCR’s “core obligations” masks a deeper structural understanding of how the Committee believes governments should reconcile human rights and intellectual property.

First, such a reference acknowledges, albeit indirectly, that states may have difficulty reconciling treaty-based intellectual property protection rules with the Covenant’s *non-core* obligations—those more expansive aspects of economic, social, and cultural rights that go beyond the Covenant’s “minimum essential levels” of protection<sup>89</sup> and that states may permissibly recognize over time and as constrained by their limited resources. This suggests that governments retain—at least in the near term—a fairly broad “margin of appreciation”<sup>90</sup> within which to reconcile human rights guarantees, intellectual property protection rules, and other policy objectives, and that the calibrations needed to achieve such a reconciliation may permissibly vary from one country to another.<sup>91</sup>

Second, by referencing “core obligations”—a phrase that appears nowhere in the text of the ICESCR and that is instead a product of the Committee’s own general comment jurisprudence—the Committee has arrogated to itself the power to determine which rights are “core” and thus could be violated by a government’s adoption of expansive intellectual property rules.<sup>92</sup> The Committee has thus linked violations of the ICESCR to an evolving legal standard that its members will develop in future general comments identifying the core aspects of specific Covenant rights, including the public’s right “to enjoy the benefits of scientific progress and its applications.”<sup>93</sup>

In the interim, however, the Committee offers three specific prescriptions for member states. First, it opines that states “have a duty to prevent . . . unreasonably high license fees or royalties for access to essential medicines, plant seeds, or other means or food production, or to schoolbooks and learning materials, [from] undermin[ing] the rights of

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<sup>88</sup> Id. at para. 37.

<sup>89</sup> Statement on Human Rights and Intellectual Property, *supra* note \_\_\_ at para. 12.

<sup>90</sup> The term “margin of appreciation,” refers to a doctrine of judicial deference developed by the European Court of Human Rights. It describes “the degree of discretion that [a human rights tribunal] is willing to grant national decision makers who seek to fulfill their . . . obligations under [a human rights] treaty. 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 (1998). The doctrine provides states with “a modicum of breathing room in balancing the protection of [specific human rights] against other pressing societal concerns.” Id.; see generally HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996) (analyzing the doctrine’s origins and operations).

<sup>91</sup> See Draft General Comment, *supra* note \_\_\_ at para. 51 (noting to the “considerable margin of discretion” that each state possesses to determine “[t]he most appropriate measures to implement” Article 15(1)(c) and stating that these measures “will vary significantly from one State to another”).

<sup>92</sup> Id. at para. 12 (explaining that “the Committee has *begun to identify* the core obligations arising from the minimum essential levels in relation to the rights to health, food and education”) (emphasis added).

<sup>93</sup> ICESCR, *supra* note \_\_\_, art. 15(1)(b).

large segments of the population to health, food and education.” Second, it recommends that states “prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health, personal freedom and privacy,” for example “by excluding inventions from patentability[] whenever their commercialization would jeopardize the full realization of these rights,” and by “consider[ing] to what extent the patenting of the human body and its parts would affect their obligations under the Covenant.”<sup>94</sup> Finally, it urges states to “consider introducing human rights impact assessments prior to the adoption of[,] and after a period of implementation of[,] legislation for the protection of” authors’ rights, and, in a provision placed in brackets to indicate its contested status, “to include human rights criteria among the requirements for the grant of patents or other intellectual property rights, as appropriate.”<sup>95</sup>

These detailed recommendations have uncertain consequences for states that have ratified TRIPs Agreement and other intellectual property treaties. Inasmuch as general comments are only nonbinding interpretations of the ICESCR, governments could reasonably interpret the Committee’s prescriptions as nothing more than aspirational goals. And, indeed, several recommendations in paragraph 37 are formulated merely as suggestions for governments to consider.

Even in this hortatory form, however, these recommendations may produce meaningful legal and political change.<sup>96</sup> For example, they create opportunities for the Committee, aided by information provided by sympathetic NGOs, to question officials about license fees and patent eligibility rules when governments submit reports on the steps they have taken, and the difficulties they have encountered, to implement Article 15.<sup>97</sup> The recommendations also provide a template for countries whose governments already oppose expansive intellectual property protection standards to implement more human rights-friendly standards in their national laws.<sup>98</sup> And they may influence the jurisprudence of WTO dispute settlement panels, which are likely to confront arguments

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<sup>94</sup> Draft General Comment, *supra* note \_\_ at para. 37. It bears noting that the TRIPs Agreement already permits member states to exclude from patentability “animals other than micro-organisms.” TRIPs, *supra* note \_\_, art. 27(3)(b).

<sup>95</sup> Draft General Comment, *supra* note \_\_ at para. 37. For an insightful discussion of whether additional patent eligibility requirements would violate TRIPs, see Nuño Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPs Agreement: The Problem and the Solution*, 2 Wash. U. J.L. & Pol’y 371, 386-89 (2000) (reviewing text and negotiating history of TRIPs and concluding that the imposition of additional disclosure or benefit-sharing requirements as a condition of patent protection for biodiversity-related innovations would be inconsistent with the treaty).

<sup>96</sup> Scholars have recently emphasized the importance of non-binding norms, or soft law, as a method to promote international cooperation. See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dina Shelton ed., 2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000); see also C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 856-59 (1989) (discussing different ways in which soft law evolves into customary international law).

<sup>97</sup> ICESCR, *supra* note \_\_, arts. 16-17 (setting forth reporting obligations of states parties to the ICESCR).

<sup>98</sup> These countries may include developing countries who have proposed a new “Development Agenda” at WIPO. See Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WO/GA/31/11 (Aug. 27, 2004), available at [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/wo\\_ga\\_31\\_11.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf). For a more detailed discussion of the WIPO Development Agenda, see *infra* Part \_\_\_\_.

that the TRIPs Agreement should be interpreted in a manner that avoids conflicts with nonbinding norms and harmonizes the objectives of the international intellectual property and international human rights regimes.<sup>99</sup>

These changes are likely to evolve incrementally over the course of years. A more immediate response to the Committee's analysis and recommendations, however, may occur in other intergovernmental negotiating fora. In the general comment's concluding section, the Committee expressly seeks to expand its influence and create a broader audience for its ideas. In discussing the obligations of actors other than states parties, the Committee states that "members of international organizations such as WTO, WIPO, UNESCO, FAO, and WHO have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant."<sup>100</sup> It calls on these specialized UN agencies "to contribute to the effective progressive implementation of article 15, paragraph 1(c)." And it singles out WIPO and UNESCO for special mention, urging the two organizations "to intensify their efforts to include human rights concerns in their work."<sup>101</sup>

These entreaties are overt attempts to expand the Committee's distinctive human rights framework for the intellectual property to other international venues where intellectual property treaty making and standard setting is underway. The next part of this Essay explores these developments, taking up specific lawmaking initiatives underway or recently completed in UNESCO, the WHO, and WIPO.

#### **IV. RECENT TREATY-MAKING IN OTHER INTERGOVERNMENTAL ORGANIZATIONS RELEVANT TO A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY**

In the last two years, intellectual property issues have risen to the top of the agendas of several international organizations. Work in these venues involves not only the creation of new nonbinding norms but, more compellingly, new international agreements. The approaches to intellectual property contained in these treaties, both those that have recently been adopted and those still in draft form, are closely aligned with the human rights framework for intellectual property reflected in the ICESCR Committee's recent interpretive statements. Several of these agreements expressly draw support from human rights law. In addition, they all include provisions that are skeptical of expansive intellectual property protection standards and appear to conflict with the obligations in TRIPs, TRIPs plus treaties, and other intellectual property agreements.

##### **A. UNESCO: The Convention on the Protection and Promotion of the Diversity of Cultural Expressions**

On October 20, 2005, UNESCO adopted a new international agreement, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("Cultural

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<sup>99</sup> For a prediction of how WTO dispute settlement jurists are likely to address these arguments, see Helfer, *Regime Shifting*, *supra* note \_\_, at 77-79.

<sup>100</sup> Draft General Comment, *supra* note \_\_ at para. 63.

<sup>101</sup> Draft General Comment, *supra* note \_\_ at para. 62.

Diversity Convention”).<sup>102</sup> The Convention, which is a product of two years of intensive negotiations by government officials and meetings of independent experts, builds upon the Universal Declaration on Cultural Diversity which UNESCO’s members unanimously adopted in 2001.<sup>103</sup> The Convention’s birth was significantly more contentious than that of its nonbinding parent, however. The United States in particular expressed vociferous opposition.<sup>104</sup> Fighting a losing battle to amend the draft treaty during the final rounds of negotiations, the head of the US delegation branded the final document as “deeply flawed and fundamentally incompatible with [UNESCO’s] obligation to promote the free flow of ideas,” and voted (with Israel) to oppose its adoption by 148 other nations.<sup>105</sup>

The Convention responds to the belief among many governments that the increasingly fluid movement of cultural goods and services across national borders is endangering cultural diversity and domestic cultural industries. A coalition of mainly Francophone industrialized and developing countries promoted the new treaty as a way to combat this threat and preserve their distinctive national cultures.<sup>106</sup> Asserting that cultural diversity is a “common heritage of humanity,”<sup>107</sup> the Convention reaffirms states’ “sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions” within its territory.<sup>108</sup> A series of “guiding principles” informs how states are to achieve this objective. These principles include

<sup>102</sup> See Preliminary Report by the Director-General Setting Out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, [http://portal.unesco.org/culture/en/file\\_download.php/2962532f35a06baebb199d30ce52956233C23\\_Eng.pdf](http://portal.unesco.org/culture/en/file_download.php/2962532f35a06baebb199d30ce52956233C23_Eng.pdf) [hereinafter Aug. 2005 Convention]. [update with final text of Oct. 2005 Convention when published]. For a brief overview of the Convention’s drafting history and its associated documents, see Towards a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=11281&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>103</sup> Universal Declaration on Cultural Diversity, available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

<sup>104</sup> See UNESCO Overwhelmingly Approves Cultural Diversity Treaty, BRIDGES Weekly Trade News Digest, vol. 9, no. 36 (Oct. 26, 2005) (describing the “all-out diplomatic offensive by Washington to modify the accord or delay its approval, including a letter from US Secretary of State Condoleezza Rice warning governments that the accord would ‘sow conflict rather than cooperation’”).

<sup>105</sup> See Julio Godoy, CULTURE: UNESCO Adopts Convention to Protect Diversity, Interpress Service News Agency (Oct. 20, 2005), available at <http://www.ipsnews.net/news.asp?idnews=30714>. The final vote on the treaty’s adoption was 148 votes in favor, two against, and four abstentions (Australia, Honduras, Liberia, and Nicaragua). See General Conference adopts Convention on the protection and promotion of the diversity of cultural expressions, available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=29078&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=29078&URL_DO=DO_TOPIC&URL_SECTION=201.html); Lawrence J. Speer, *UNESCO Culture Convention Approved, Despite Objections From United States*, WTO Reporter, vol. 22, No. 42 (Oct. 21, 2005).

<sup>106</sup> The countries in the coalition were Canada, France, Germany, Greece, Mexico, Monaco, Morocco and Senegal. They were supported by the Francophone member states of UNESCO. See Jan Wouters & Bart De Meester, *UNESCO’s Convention on Cultural Diversity and WTO Law: Complementary or Contradictory?*, Institute for International Law Working Paper No. 73 at 3 n.6 (Apr. 2005), available at <http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP73e.pdf>.

<sup>107</sup> Aug. 2005 Convention, supra note \_\_\_, preamble, para. 2.

<sup>108</sup> Id. art. 5(1). This sovereign right must be exercised “in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments.” Id.; see also Wouters & Meester, supra note \_\_\_, at 8 (“the Convention puts forward only one main right: the State’s right to adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.”).

refraining from actions that “hinder respect for human rights,” such as “freedom of expression, information and communication,” and a “principle of openness and balance,” which seeks an accommodation between protecting local culture and “promot[ing], in an appropriate manner, openness to other cultures of the world.”<sup>109</sup>

A major point of contention among the treaty’s drafters was how to define “cultural expressions,” “cultural industries,” and “cultural activities, goods and services,”<sup>110</sup> given the overlap between these terms and free trade and intellectual property agreements. Ultimately, the drafters adopted capacious definitions of these phrases,<sup>111</sup> creating significant conflicts with several the WTO Agreements. In particular, the Cultural Diversity Convention authorizes its member states to give preferential treatment to the production, distribution, dissemination, and consumption of domestic cultural industries,<sup>112</sup> a preference that is inconsistent with the national treatment rules in GATT, GATS, and TRIPs.<sup>113</sup> According to some observers, these provisions are also intended to slow the United States’ effort to negotiate bilateral trade treaties that require developing countries to “give up their rights to preserve and support their own unique audiovisual and information services, including film, television and music.”<sup>114</sup>

Although early commentary on the new treaty has stressed its clash with international trade rules, the Convention’s relationship to intellectual property protection standards has an even more troubled history. One might reasonably expect a treaty on cultural diversity to contain an extensive treatment of these standards. Remarkably, the

<sup>109</sup> Aug. 2005 Convention, *supra* note \_\_\_, arts. 2(1) and 2(8).

<sup>110</sup> *Id.* art. 4 (defining each of these terms).

<sup>111</sup> See *id.* art. 4(3) (defining “cultural expressions” as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”); *id.* art. 4(4) (defining “cultural activities, goods and services” as including “those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have”); *id.* art. 4(5) (defining “cultural industries” as “industries producing and distributing cultural goods or services as defined in paragraph 4 above”).

<sup>112</sup> The “measures” that states “may” adopt to protect and promote the diversity of cultural expressions within their respective territories include, most notably, the following:

measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for their creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services; [and] measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services.

*Id.* arts. 6(2)(b) and 6(2)(c).

<sup>113</sup> See Wouters & Meester, *supra* note \_\_\_, at 18 (identifying numerous inconsistencies between WTO Agreements and an earlier version of the Cultural Diversity Convention, including provisions that appear in the final text, and stating that “measures that reserve certain space for domestic cultural goods . . . are a clear violation of the principle of national treatment”); see also Lawrence J. Speer, *U.S. Totally Isolated at UNESCO Meeting As Cultural Diversity Treaty Gets Approved*, *WTO Reporter*, vol. 22, no. 41 (Oct. 20, 2005) (quoting statement by United States Ambassador to UNESCO that “[u]nder the provisions of the convention as drafted, any state, in the name of cultural diversity, might invoke the ambiguous provisions of this convention to try to assert a right to erect trade barriers to goods or services that are deemed to be cultural expressions”).

<sup>114</sup> Godoy, *supra* note \_\_.

Convention's final text contains only a single express reference on intellectual property—a statement of “the importance of intellectual property rights in sustaining those involved in cultural creativity”—which is buried near the end of a twenty-one paragraph preamble.<sup>115</sup> In addition, the treaty contains three citations to the Universal Declaration on Human Rights or to “universally recognized human rights instruments.”<sup>116</sup> These references highlight the importance of certain rights protected by those documents, such as “freedom of expression, information and communication,” and “freedom of thought.”<sup>117</sup> Yet they make no mention of the documents' authors' rights provisions.

The Convention's sparse references to intellectual property are a profound departure from earlier versions of the treaty, most notably a March 2005 “composite text” produced by a group of intergovernmental experts charged with writing a preliminary draft of the Convention.<sup>118</sup> The preamble set the tone of the composite text, emphasizing “the vital role of the creative act . . . and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights.”<sup>119</sup> This was followed, in the draft treaty's definitions section, with a list of the characteristics of “cultural goods and services,” which recognized that such goods and services “generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation.”<sup>120</sup> The composite text also included, in unequivocal and forceful language, an affirmative obligation to protect intellectual property. This obligation extended to intellectual property rights recognized in “existing international instruments to which States are parties”<sup>121</sup> as well as “traditional . . . cultural contents

<sup>115</sup> Aug. 2005 Convention, *supra* note \_\_\_, preamble, para. 17. This single reference is especially surprising given that the Universal Declaration on Cultural Diversity advocates the “the full implementation of cultural rights as defined in Article 27 of the [UDHR] and in Articles 13 and 15 of the [ICESCR].” Universal Declaration on Cultural Diversity, *supra* note \_\_\_, art. 5.

<sup>116</sup> Aug. 2005 Convention, *supra* note \_\_\_, preamble, para. 5; arts. 2(1) and 5(1).

<sup>117</sup> *Id.* preamble, para. 12; arts. 2(1)

<sup>118</sup> UNESCO, Preliminary Report of the Director-General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, CLT/CPD/2005/CONF.203/6, App. 1 (Mar. 3 2005) [hereinafter “March 2005 Composite Text”]. Intellectual property rights are also emphasized in a July 2004 draft of the Convention:

States Parties shall also ensure:

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

UNESCO, *Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, CLT/CPD/2004/CONF-201/2 art. 7(2) (July 2004).

<sup>119</sup> March 2005 Composite Text, *supra* note \_\_\_, preamble, para. 10.

<sup>120</sup> *Id.* art. 4(3).

<sup>121</sup> *Id.* art. 7(3) (“[States Parties] shall ensure [intellectual property rights] are [fully respected and enforced] according to existing international instruments to which States are parties, particularly through the development [or strengthening] of measures against piracy.”) (footnotes omitted).

and expressions,”<sup>122</sup> with a particular focus on preventing piracy, misappropriation, and “the granting of invalid intellectual property rights.”<sup>123</sup>

Finally, in recognition of the need to harmonize the draft Convention with preexisting treaties, the composite text included two “savings clauses” that specified which treaty obligations were to take precedence in the event of a conflict between agreements.<sup>124</sup> The first clause specified that the provisions of the draft Cultural Diversity Convention were subordinate to “any existing international instrument relating to intellectual property rights” to which the Convention’s member states were also parties.<sup>125</sup> The second paragraph carved out a narrow exception to this hierarchy, however, recognizing that “[t]he provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.”<sup>126</sup> Inspired by a similar provision in the Convention on Biological Diversity which has yet to be authoritatively interpreted, this savings clause would have subordinated trade and intellectual property obligations to those of Cultural Diversity Convention in the event that a member state could demonstrate such damage.<sup>127</sup>

In comparison to the March 2005 composite text, the final Convention manifests near antipathy to intellectual property protection standards. The drafters removed all of the clauses described above and replaced them with far weaker commitments.<sup>128</sup> When protecting and promoting the diversity of cultural expressions, member states now “may” adopt “measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions.”<sup>129</sup> And they need only “endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions.”<sup>130</sup> By contrast, states may also achieve the Convention’s goals by “promot[ing] the free exchange and circulation of . . . cultural

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<sup>122</sup> Id. art. 7(4) (“[States Parties] undertake to ensure in their territory [protection against unwarranted appropriation] of traditional and popular [cultural contents and expressions], [with particular regard to preventing the granting of invalid intellectual property rights].”) (footnotes omitted).

<sup>123</sup> Id.

<sup>124</sup> For a discussion of savings clauses between trade and environmental protection agreements, see Sabrina Saffrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 33 Am. J. Int’l L. 606, 614-18 (2002).

<sup>125</sup> March 2005 Composite Text, supra note \_\_\_, art. 19, Option A, para. 1.

<sup>126</sup> Id. art. 19, Option A, para. 2.

<sup>127</sup> Convention on Biological Diversity, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC5/4, 31 I.L.M. 818 (1992), art. 22.1 (“The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”); see also Wouters & Meester, supra note \_\_\_, at 29 (analyzing savings clauses in the March 2005 composite text).

<sup>128</sup> The removal of these clauses appears to have occurred in early April 2005 at a meeting of UNESCO officials and government negotiators held in Cape Town, South Africa. See UNESCO, *Report by the Director-General on the Progress Achieved During the Third Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, 172 EX/20 at 11 (Aug. 11, 2005).

<sup>129</sup> Aug. 2005 Convention, supra note \_\_\_, art. 6(2)(g).

<sup>130</sup> Id. art. 7(2).

expressions and cultural activities, goods and services”<sup>131</sup>—a provision that could be read as sanctioning promotional efforts that disregard intellectual property protection rules required by TRIPs and other international agreements.

Finally, the savings clause contained in the Convention differs substantially from the earlier draft described above. In place of hierarchical rules, the clause adopts a posture of studied ambiguity. On the one hand, it stresses the need to “foster mutual supportiveness between th[e] Convention and other treaties” and specifies that none of its provisions “shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”<sup>132</sup> But the savings clause also emphasizes that the Cultural Diversity Convention is not “subordinate[e] . . . to any other treaty.” And it directs member states to take into account the Convention’s provisions when “interpreting and applying the other treaties to which they are parties or when entering into other international obligations.”<sup>133</sup> How states will reconcile these clauses, and whether they will enable states to protect cultural diversity in ways that violate trade and intellectual property agreements, cannot be determined until after the Convention enters into force following its thirtieth ratification.<sup>134</sup>

## B. WHO: The Medical Research and Development Treaty

In February 2005, a collation of more than 150 NGOs, public health experts, economists, and legal scholars called on the World Health Organization to consider a proposal for a Medical Research and Development Treaty (“MRDT”).<sup>135</sup> The treaty aims to establish a new legal framework to promote research and development for pharmaceuticals and other medical treatments that functions as an alternative to patents and the monopoly drug pricing they engender. The treaty’s proponents argue that expansive intellectual property protection rules have created numerous problems, including restricting access to essential medicines, costly and wasteful marketing of drugs and medical products, and skewing investment away from innovations needed to treat diseases that afflict individuals throughout the developing world.<sup>136</sup>

The core objectives of the MRDT include encouraging investments in medical innovation responsive to the greatest global need, fairly allocating the costs of such innovation among governments, and sharing the benefits of medical innovation, including new drugs and medical technologies, with developing countries. The treaty achieves these goals by setting minimum financial obligations for qualifying research and development based upon each nation’s gross domestic product. Member states can meet those

<sup>131</sup> Id. art. 6(2)(e). This clause also appeared in earlier drafts of the Convention. See March 2005 Composite Text, *supra* note \_\_, art. 6(2)(d).

<sup>132</sup> Aug. 2005 Convention, *supra* note \_\_, art. 20(1)(a) and 20(2).

<sup>133</sup> Id. art. 20(1) and 20(1)(b).

<sup>134</sup> Id. art. 29 (specifying procedures for Convention’s entry into force).

<sup>135</sup> Medical Research and Development Treaty, Discussion draft 4 (Feb. 7, 2005) [hereinafter MRDT], available at <http://www.cptech.org/workingdrafts/rndtreaty4.pdf>.

<sup>136</sup> See Letter to Ask World Health Organization to Evaluate New Treaty Framework for Medical Research and Development (Feb. 24, 2005) hereinafter [hereinafter NGO Letter to WHO], available at <http://www.cptech.org/workingdrafts/rndsignonletter.html>; see also Nicoletta Dentico & Nathan Ford, *The Courage to Change the Rules: A Proposal for an Essential Health R&D Treaty*, 2 PLoS Medicine 96 (Feb. 2005).

obligations by funding qualifying research projects within their own borders. But they can also funding eligible research in other countries through a system of tradable credits that resembles the emissions trading mechanism created for environmental agreements such as the Kyoto Protocol.<sup>137</sup> According to the treaty's proponents, the result of these provisions will be a new legal paradigm that "provide[s] the flexibility to reconcile different policy objectives, including the promotion of both innovation and access, consistent with human rights and the promotion of science in the public interest."<sup>138</sup>

The MRDT's intellectual property provisions are both novel and controversial. The treaty requires all member states to adopt "minimum exceptions to patents rights for research purposes" within five years of ratification.<sup>139</sup> (The current draft does not specify the content of these exceptions, however.) It also includes an commitment to forego patent applications for a yet-to-be-specified period of time for inventions based upon data from certain open or "public goods databases."<sup>140</sup> In the area of copyright, related rights, and databases, the treaty envisions the adoption of "a best practices model for exceptions" in national laws.<sup>141</sup> It does not explain, however, how these exceptions further the treaty's medical research goals.

To protect the MRDT's distinctive alternative framework for medical research and innovation, including its intellectual property provisions, the MRDT's proponents needed to specify the treaty's relationship to other international agreements. The drafters adopted a distinctive approach to this important legal issue. Unlike other recently-adopted treaties whose provisions plausibly conflict with preexisting trade or intellectual property agreements, the MRDT does not contain a clause specifying its relationship to those agreements. Rather, with respect to a defined class of medical research and development products,<sup>142</sup> the MRDT's signatories agree "to forgo dispute resolution cases" that concern (1) the TRIPs provisions protecting patents and undisclosed test data, or (2) the "pricing of medicines."<sup>143</sup> They also agree to forgo such dispute settlement, as well as sanctions, "in regional or bilateral trade agreements or unilateral trade policies."<sup>144</sup> This forbearance is not absolute, however. Rather, it applies only "in areas where compliance with the terms of the Treaty provides an alternative and superior framework for supporting innovation."<sup>145</sup>

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<sup>137</sup> See Andrew Jack, WHO Members Urged to Sign Kyoto-Style Treaty, *Fin. Times*, 2005 WLNR 2823253 (Feb. 24, 2005); William New, *Medical R&D Treaty Debated At World Health Assembly*, IP Watch (May 30, 2005), available at <http://www.ip-watch.org/weblog/index.php?p=60>.

<sup>138</sup> NGO Letter to WHO, *supra* note \_\_, at 1.

<sup>139</sup> MRDT, *supra* note \_\_, art. 14.2.

<sup>140</sup> *Id.* art. 14.1

<sup>141</sup> *Id.* art. 15.

<sup>142</sup> The products defined as "qualified medical research and development" include: "i. Basic biomedical research; ii. Development of biomedical databases and research tools; iii. Development of pharmaceutical drugs, vaccines, medical diagnostic tools; iv. Medical evaluations of these products, and v. the preservation and dissemination of traditional medical knowledge." *Id.* art. 4.1.

<sup>143</sup> *Id.* art. 16(d).

<sup>144</sup> *Id.* art. 16(d) and art. 2.3.

<sup>145</sup> *Id.* art. 2.3.

The MRDT's future remains uncertain. A meeting of experts attending the World Health Assembly in May 2005 debated the treaty's provisions and underlying philosophy, and advocates at that meeting have proposed that the Assembly establish a committee of member states to consider the draft treaty sometime in 2006.<sup>146</sup>

### C. WIPO: The Development Agenda and Access to Knowledge Treaty

Since its creation in the late 1960s, the World Intellectual Property Organization (WIPO) has engaged in broad array of activities consistent with its mandate of "promot[ing] the protection of intellectual property throughout the world."<sup>147</sup> To assist member states in negotiating international agreements, the WIPO Secretariat hosts periodic diplomatic conferences, shares information, and provides expert advice. WIPO also provides technical assistance and training to national governments and to their intellectual property offices, especially in developing countries. More recently, the organization has created standing, expert, and intergovernmental committees which examine specific intellectual property topics and create nonbinding guidelines and recommendations.<sup>148</sup>

Over the last decade, WIPO and its member states have been exceptionally active in negotiating new intellectual property treaties relating to copyrights, patents, and trademarks, and in undertaking an ambitious program of soft lawmaking. Although these activities have generated new intellectual property protection standards, those standards have not unambiguously favored the interests of industrialized countries. Although some initiatives have benefited states with well-resourced and influential intellectual property industries, developing countries have retained considerable influence in the organization to shape treaty obligations and soft law norms.<sup>149</sup>

Just over a year ago, however, the political winds shifted in favor of governments and civil society groups which favor refocusing WIPO's mandate away from generating new intellectual property protection standards toward economic development and non-proprietary approaches to promoting human innovation and creativity. In October 2004, the WIPO General Assembly adopted a proposal from Argentina and Brazil to establish a new Development Agenda for the organization.<sup>150</sup> This proposal reflected a collaboration between like-minded developing countries (known as the "friends of

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<sup>146</sup> See New, *supra* note \_\_; Tim Hubbard, *Reply to the comments requested by CIPIH and WHO to the CPTech proposal for a Medical Research and Development Treaty (MRDT)* (Aug. 15, 2005), available at <http://www.who.int/intellectualproperty/submissions/SubmissionsHubbard.pdf>.

<sup>147</sup> Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended on Sept. 28, 1979), art. 3(i).

<sup>148</sup> See Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT'L L. 179, 192 (2002) (discussing resolutions and recommendations that comprise "the new 'soft law initiative' at WIPO").

<sup>149</sup> For a more detailed discussion of these trends, see Helfer, *Regime Shifting*, *supra* note \_\_, at 25-26.

<sup>150</sup> See Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WO/GA/31/11 (Aug. 27, 2004), available at [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/wo\\_ga\\_31\\_11.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf); General Assembly Decision on a Development Agenda (Oct. 4, 2004); available at <http://www.cptech.org/ip/wipo/wipo10042004.html>.

development”)<sup>151</sup> and civil society groups, the latter of which had issued the “Geneva Declaration on the Future of WIPO” prior to the General Assembly meeting.<sup>152</sup>

The Geneva Declaration was a brilliant example of using core institutional principles to foment institutional reform. Although the convention establishing WIPO speaks of promoting intellectual property protection on a global basis, there is authority for interpreting the organization’s mandate much more capaciously. In 1974 WIPO entered into an agreement designating it as a specialized agency of the United Nations. Adopted during a period when pressure by newly-independent developing countries for a New International Economic Order was at its zenith,<sup>153</sup> the agreement states that WIPO is responsible for “promoting creative intellectual activity and facilitating the transfer of technology . . . to developing countries in order to accelerate economic, social and cultural development.”<sup>154</sup>

The Geneva Declaration’s drafters seized upon this long-forgotten treaty language to articulate a revised mission for WIPO. Proceeding from the premise that “[h]umanity faces a global crisis in the governance of knowledge, technology and culture,”<sup>155</sup> the Declaration demands that WIPO eschew any additional uncritical expansions of monopoly privileges.<sup>156</sup> Instead, it urges the organization to devote greater attention to issues such as (1) the social and economic costs of intellectual property protection, (2) reforms of existing intellectual property rules; and (3) non-proprietary systems of creativity and innovation, such as “Wikipedia, the Creative Commons, GNU Linux and other free and open software projects, as well as distance education tools and medical research tools.”<sup>157</sup>

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<sup>151</sup> The Friends of Development are comprised of the following countries: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela. See Proposal to Establish A Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, First Session, IIM/1/4, Annex at 2 (Apr. 6. 2005).

<sup>152</sup> Geneva Declaration on the Future of the World Intellectual Property Organization [hereinafter Geneva Declaration], available at <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

<sup>153</sup> As Peter Yu has recently stated, “[t]he New International Economic Order sought to bring about fundamental changes in the international economic system by redistributing power, wealth, and resources from the developed North to the less developed South.” Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 Loy. L.A. L. Rev. 323, 409 n.392 (2004) (citing Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 527, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974)).

<sup>154</sup> Agreement between the United Nations and the World Intellectual Property Organization, art. 1, available at [http://www.wipo.int/treaties/en/agreement/pdf/un\\_wipo\\_agreement.pdf](http://www.wipo.int/treaties/en/agreement/pdf/un_wipo_agreement.pdf).

<sup>155</sup> Geneva Declaration, supra note \_\_\_, at 1.

<sup>156</sup> Id. at 2 (“‘A one size fits all’ approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.”).

<sup>157</sup> Id at 1. For more detailed discussions of the objectives of the Development Agenda’s proponents; see *Humanizing Intellectual Property: Developing Countries Launch New Initiative*, Third World Resurgence Magazine (Special Issue) (Nov-Dec 2004), available at <http://www.twinside.org.sg/focus.htm>; see also James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 Duke L. & Tech. Rev. 9, available at [www.law.duke.edu/journals/dltr/articles/2004dltr0009.html](http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html) (arguing that WIPO must reverse the “maximalist rights culture” that the international intellectual property regime currently embodies and that is detrimental to global development).

Among the many items on the Development Agenda is a proposal for a Treaty on Access to Knowledge (colloquially referred to as the “A2K Treaty”). Although the A2K Treaty has recently received the backing of influential developing countries such as Brazil and India, its origins are firmly rooted in civil society. In fact, the treaty’s genesis resembles the decentralized, open source collaboration models that its text endorses. A diverse group of non-government organizations, whose members include medical researchers, educators, archivists, disabled people, and librarians from industrialized and developing nations, drafted and circulated numerous suggestions for provisions to be included in the treaty.<sup>158</sup> In February 2005, representatives of these groups met in Geneva to discuss the proposals and to hammer out a comprehensive text.<sup>159</sup>

The current draft of the A2K Treaty bears the telltale fingerprints of multiple authors with diverse (if not divergent) interests. It includes a dozen articles on limitations and exceptions to copyright and related rights; provisions on patent protection intended to “expanding and enhancing the knowledge commons;” measures to promote open standards and control anticompetitive practices; and a hodge podge of miscellaneous and unfinished clauses on technology transfer, copyright collecting societies, and financial obligations.<sup>160</sup>

Several common threads connect these varied provisions. First, according to observers at the Geneva meeting, the treaty’s proponents strongly support the view that “access to knowledge is a basic human right, and that restrictions on access ought to be the exception, not the other way around.”<sup>161</sup> Although the draft text does not expressly mention human rights nor cite to the ICESCR or the UDHR, many of its provisions echo the human rights framework for intellectual property described in this Essay. For example, the treaty’s preamble highlights the need for a balanced regime of protection, emphasizing both the importance of “protecting and supporting the interests of creative individuals and communities” and “enhanc[ing] participation in cultural, civic and educational affairs, and sharing of the benefits of scientific advancement.”<sup>162</sup>

A second thematic link among the A2K Treaty’s diverse clauses is that both subject matter exclusions from, and exception and limitations to, intellectual property protection standards are mandatory rather than permissive. In the area of inventions, for example, the treaty contains a lengthy list of exclusions from patentable subject matter, including, most controversially, computer programs and business methods.<sup>163</sup> With respect to copyright, the treaty states that “[f]acts and works lacking in creativity, should not be subject to copyright or copyrightlike protections,”<sup>164</sup> a rule that appears to preclude *sui*

<sup>158</sup> For a list of supporting civil society organizations, see NGO Group Statement Supporting the Friends of Development Proposal, available at [http://www.ipjustice.org/WIPO/NGO\\_Statement.shtml](http://www.ipjustice.org/WIPO/NGO_Statement.shtml). Proposals for inclusion in the A2K Treaty circulated through an “A2K” listerv. The A2K Archives, available at <http://www.cptech.org/a2k/>.

<sup>159</sup> See William New, *Experts Debate Access To Knowledge*, IP Watch (Feb. 15, 2005), available at <http://www.ip-watch.org/weblog/index.php?p=19&res=1024&print=0>.

<sup>160</sup> A2K Treaty, *supra* note \_\_\_, at 1-2 (listing various treaty provisions).

<sup>161</sup> New, *Experts Debate Access To Knowledge*, *supra* note \_\_\_, at 1.

<sup>162</sup> A2K Treaty, *supra* note \_\_\_, at pmb1. paras. 1 and 4.

<sup>163</sup> *Id.* art. 4.1(c) (stating that “patent rights shall not be granted for, *inter alia*, “programs for computers,” “presentations of information,” and “methods of teaching and education”).

<sup>164</sup> *Id.* art. 3.7.

*generis* protection for unoriginal databases. It also contains a lengthy list of exceptions and limitations, which (in the case of copyrighted works) are presumed to satisfy the “three-step test” for such restrictions set out in the TRIPs Agreement.<sup>165</sup>

The A2K Treaty's subject matter exclusions and its exceptions and limitations parallel similar provisions found in some—but by no means all—national laws. For states that ratify the A2K Treaty, however, these exceptions will become compulsory. The treaty thus endorses maximum standards of intellectual property protection to counterbalance the “minimum standards” approach that intellectual property agreements have followed for more than a century.<sup>166</sup>

Under that approach, multilateral intellectual property treaties establish a floor of protection. But nothing in the treaties prevents governments from enacting more expansive intellectual property rules in their domestic laws or from entering into subsequent agreements that achieve the same result. Indeed, the treaties expressly contemplate that governments may gravitate toward such higher standards.<sup>167</sup> By placing a mandatory ceiling on how high these standards can rise, the proponents of A2K Treaty are attempting to counteract the upward drift of intellectual property rules that has accelerated over the past few decades and to establish a balance regime of protection that is fully consistent with a human rights framework for intellectual property.

## CONCLUSION

[to be added later]

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<sup>165</sup> Id. art. 3.1(a); see *supra* note \_\_ (discussing three-step test for TRIPs-compatibility of exceptions and limitations to copyright and patent protection).

<sup>166</sup> See, e.g., TRIPs, *supra* note \_\_, art. 1 (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement.”); see also J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 Int'l Law. 345 (1995).

<sup>167</sup> See, e.g., Berne Convention *supra* note \_\_, art. 19 (“The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”); Paris Convention, *supra* note \_\_, art. 19 (“It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.”).