THE NEW DEVELOPMENT AGENDA

Peter K. Yu[*]

Introduction

In a recent article in the *Journal of World Intellectual Property*, Andréa Koury Menescal compared the establishment of the New Development Agenda to that of the Old Agenda. Focusing on the draft resolution Brazil introduced before the United Nations General Assembly in 1961, she highlights the strong resemblances between the two Development Agendas. For example, Jürg Engi of the International Association for the Protection of Intellectual Property ("AIPPI") made the following remarks in 1963:

> This may not sound nice but I might just as well tell you that I am of the opinion that there is a serious countermovement to the present highly desirable trend towards modernizing and strengthening industrial property protection of which I spoke a minute before. As you are aware, a number of attacks on the industrial property system have in the last few years been made, the whole system having encountered severe criticism not only in developing countries but also in highly industrialized countries.
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> This general movement towards undermining industrial property rights has been particularly fierce in the pharmaceutical field . . . but what happens now in one particular technical field may soon extend to other fields.

These remarks strongly echo the statement made online by the U.S. Chamber of Commerce:

> Anti-IP forces are pressing their attacks in the U.S. Congress, in a growing number of key nations, and in multilateral forums like the World Trade Organization, the World Health Organization, and the World Intellectual Property Organization harming both developed and developing countries and their people. . . .

 Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. This Paper was excerpted from Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465 (2009). The present version omits all the footnotes in the original work.

> The U.S. Chamber, as the voice of the broader business community, has launched a comprehensive campaign to rebuild global support for fundamental intellectual property rights.

As Andréa Menescal wrote, the statement uttered by Engi "could easily have been made by someone dissatisfied with the World Trade Organization's *Doha Declaration* of 14 November 2001 . . . or with the proposal presented by Brazil and Argentina . . . in October 2004 calling for the establishment of [the World Intellectual Property Organization ("WIPO") Development Agenda]."

When one gets deeper into the policy demands made by less developed countries and the conceptual tools they used, one could find even more striking similarities between the two sets of development agendas. For example, the TRIPs-minus intellectual property standards less developed countries demand today easily reminds one of the active push for special and differential treatment for less developed countries by Brazil, India, and other less developed countries decades ago. Although the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement") sought to create minimum standards for the protection and enforcement of intellectual property rights, its preamble explicitly recognizes "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base."

Similarly, the commons concept that has been used widely in the free software, open source, free culture, and access to knowledge movements resembles the "common heritage of humankind" concept, which was advanced decades ago in part to "compensat[e] for colonial exploitation." That concept has been used in the past few decades to push for the protection of cultural property, an equitable disposal of materials found in outer space, the joint ownership of seabed resources under the United Nations Convention on the Law of the Sea, the mutually beneficial exploration and development of Antarctica, and the conservation of plant genetic resources.

In sum, commentators are right to point out the strong resemblances between the Old and New Development Agendas. As Debora Halbert reminded us, "the contemporary debates about access to knowledge, traditional knowledge and a development round are in no way new debates. These concerns have been present from WIPO's inception, but thirty-seven years of work have yet to see these issues resolved." According to her, "one of the most depressing realizations of reviewing the debates surrounding WIPO's creation is just how little has changed since 1967." Likewise, Professor Okediji found remarkable resemblances between the New International Economic Order ("NIEO") and the WIPO Development Agenda:

> Like the NIEO, the Development Agenda is framed as a regime of special and differential . . . treatment for [developing and least developed countries]. Initiated by developing countries, with Brazil again at the lead, the proposal for a WIPO Development Agenda challenges the passive orthodoxy that positive welfare gains are inexorably a byproduct of IP protection. Like the Brazil-initiated resolution almost half a century ago, the various proposals focus squarely on the core IP treaties administered by WIPO and the absence of any explicit identification of how IP rights can and will complement the objectives of other international regimes or foster the goals of the global public order with respect to improving the lives of millions around the world. Finally, the WIPO Development Agenda challenges the

> constitutional context of WIPO's institutional isolationism, requiring the Organization to meaningfully integrate the objectives of IP protection with the rights which serve as means to those ends.

In light of the strong resemblances between the Old and New Agendas, this Paper compares the two agendas in terms of their players, fora, and issues as well as the political environment surrounding their development, the level of public awareness of intellectual property issues, and the use of ideas, concepts, and rhetorical frames as a support for these agendas. Such comparison is important for three reasons.

First, it provides insight into the sustainability and future success of the New Agenda. If the agenda simply repeats its failed predecessor without making significant adjustments, this agenda is unlikely to succeed. As Andréa Menescal argued through a comparison of the Old and New Development Agendas:

> The fact that the 2004 proposal reiterates the need "to foster the transfer of technology through foreign direct investment and licensing" for developing countries is evidence that the initiatives from the 1960s onwards brought home less to developing countries than the propagandistic efforts of the AIPPI's and the ICC's experts made the world believe. That such a proposal as the 2004 one was presented at all implies that the 1961 Brazilian Resolution failed and that the influence of private-interest experts linked to the AIPPI and the ICC continued unabashed even after the WIPO became a United Nations specialized agency in 1974.

Thus, if the New Agenda is to be successful, drawing lessons or insights from the Old Agenda is essential. Because the two agendas share many common features, "the latter should be understood in the context of the former's failure." A study of the Old Agenda will also provide helpful lessons and direction for the future development of the New Agenda. As Menescal continued: "A historical perspective can help the new 'countermovement' to measure its opponents and prepare itself for the long and difficult process of changing the rules on IP law and policy. Research and teaching will play a decisive role in this process that may well take decades." Likewise, Surendra Patel, Pedro Roffe, and Abdulqawi Yusuf wrote:

> Although the Code of Conduct negotiations never resulted in a final agreement, and failed to materialize in a concrete legal instrument, they continued to inform, inspire and influence the issues addressed by these later instruments, as well as their approach and content, particularly as regards the positions adopted by developing countries in the course of their elaboration.

Second, a better understanding of the Old Agenda will promote a greater appreciation and understanding of the political dynamics involved in the negotiation process and the hard policy choices confronting the participating members and international institutions. Indeed, the self-interests of and concerns about marginalization may have made it more difficult for WIPO and other international organizations to fully embrace a development agenda. Some senior WIPO staff may still have vivid, and perhaps bitter, memories of the shift of the intellectual property standard-setting activities from their organization to the Agreement on Tariffs and Trade ("GATT")/World Trade Organization ("WTO") in the mid-1980s. As Keith Maskus noted colorfully, "WIPO has been hit by a train since TRIPS was concluded." Similar developments have also marginalized UNCTAD and United Nations Educational, Scientific and Cultural

Organization ("UNESCO"), both of which have been highly supportive of the efforts by less developed countries to recalibrate the balance of the international intellectual property system.

In fact, since the creation of the TRIPs Agreement, WIPO seems to have undertaken "a sustained campaign . . . to return the organization to the center of global intellectual property policy making." As Graeme Dinwoodie observed:

> [T]he sudden emergence of the WTO as part of the international intellectual property lawmaking process seemed to energize WIPO, resulting in the conclusion of several new treaties in copyright, patent and trademark law, as well as the reorganization . . . designed to make WIPO fit for the twenty-first century.

Such reemergence provides a more complete picture of the full operation of an international organization. To be certain, WIPO, as a member-driven organization, cannot ignore the mandate given by its membership. However, it may be able to take action in areas when no clear mandate exists. Moreover, as Professor May pointed out, "WIPO does not merely operate on the basis of the clearly articulated interest of a *majority* of its members," citing the development of the WIPO Internet Domain Name Process. According to him:

> WIPO has moved beyond the passive secretariat model in international organizations, to one that is much more proactive. . . . Although the international secretariat of the WIPO would . . . like to deny the claim, the WIPO is a highly politicized organization, and cannot be regarded merely as an agency providing technical services, as the debates around the WIPO Development Agenda have clearly revealed.

Moreover, the World Summit on the Information Society process and the subsequent development of the Internet Governance Forum have shown the ongoing rivalry among the various international institutions that are involved in standard-setting activities concerning the Internet and the new digital environment. Organizations from the International Telecommunication Union to UNESCO have expressed their interest in being considered as the primary forum for developing these new standards. Even more challenging, the development of new technology has ushered in new forms of organizations that have been of growing importance to the international intellectual property regime. The Internet Corporation for Assigned Names and Numbers ("ICANN"), which is now charged with responsibilities for the day-to-day management of the domain name systems and the oversight of the operation of the authoritative root server system, is a private not-for-profit corporation in California that has entered into a contractual arrangement with the U.S. Department of Commerce.

Finally, by underscoring the differences between the two Development Agendas, and the promising developments concerning greater intellectual property activities in other fora and the growing public awareness of the issues, this Paper provides hope for the New Agenda. Such a note of optimism helps generate the grassroots support needed to counter the push for stronger intellectual property protection by powerful countries and their equally powerful industries. The additional support also enables less developed countries and their supporters to work together to develop new negotiation and implementation strategies, to restore the balance in the international intellectual property system, and to develop more balanced concepts of protection and enforcement.

Players

Compared to the New Agenda, the Old Agenda was heavily state-centered—in part due to the fact that the international legal system "historically deferred to states as the guardians of domestic welfare, with the assumption that the appropriate exercise of sovereign power for domestic public interest would inure inevitably to the benefit of the global community." To the extent non-state actors are involved in the Old Agenda, their interests are usually reflected through those state actors that represent them.

For example, the revision of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the Paris Convention for the Protection of Industrial Property ("Paris Convention") was a process dominated heavily by state actors. Although the publishing industries have played important roles in the Conventions' development—in particular, its attempt to defeat the Protocol Regarding Developing Countries to the Berne Convention ("Stockholm Protocol") and Brazil's 1961 draft resolution—their interests were largely represented by their corresponding governments. Likewise, during the negotiation of the International Code of Conduct on the Transfer of Technology ("International Code of Conduct" or "Code"), government officials, rather than corporate executives, were heavily involved in the negotiation process, even though "efforts at finalizing work on the Code have been thwarted by countries with the greatest vested interests in the activities of transnational corporations." To many less developed countries at that time, corporations were mere "agents of transfer" of technology.

In the past few decades, however, private corporations have become more actively involved. Although they still express their views through their national governments, they also have been more aggressive in lobbying the governments in Brussels, Geneva, Tokyo, Washington, and other policy fora. For example, Professor Sell has shown how private corporations were the main proponents behind the push for stronger international intellectual property protection in the TRIPs Agreement. As she pointed out: "What is new in [the TRIPs] case is that industry identified a trade problem, devised a solution, and reduced it to a concrete proposal that it then advanced to governments. . . . In effect, twelve corporations made public law for the world." Their active involvement and their role in driving the development of the TRIPs Agreement therefore have made "[s]tate-centric accounts of the Uruguay Round . . . at best incomplete, and at worst misleading."

The ability of multinational corporations to influence governments is in part derived from their mastery of technical details concerning intellectual property protection and enforcement and partly due to the resources they have vis-à-vis less developed countries. Many of these countries "lack the resources . . . to send delegates to [international] fora and thus have resorted to using nongovernmental organizations . . . to represent their interests." In one instance, the Foundation for International Environmental Law and Development, a London-based environmental NGO, negotiated a deal to represent Sierra Leone before the WTO Committee on Trade and Environment.

Although international nongovernmental organizations ("NGOs") that dominated the international intellectual property standard-setting process in the past were primarily corporations and industry groups, civil society organizations have been more active in recent

years. As Andréa Menescal observed, "[t]he most welcome news to emerge from the 2004 [WIPO Development Agenda] debate is that developing countries' governments are no longer alone in opposing an even further strengthening of the IP holders' rights and the prevalence of private interests in the IP field." Likewise, Sisule Musungu and Graham Dutfield consider "[c]ivil society groups . . . the single most important factor in raising the issue of the impact of the international intellectual property standards, especially TRIPS standards, on development issues such as health, food and agriculture."

To be certain, the participation of NGOs in the international debate was not a new phenomenon. Nevertheless, there have been some differences in the nature and degree of their participation in recent years. As Richard Dogson and Kelly Lee wrote in the public health context: "[N]on-state actors have long played an important role in health governance. The difference here lies in the degree, and nature, of that involvement. . . . [T]here are examples of health governance emerging that incorporate non-state actors more intimately and numerously within processes of decision-making." Indeed, many NGOs found themselves "woken up" by the harsh realities brought by the one-sided TRIPs Agreement and the public health crises it has created in the less developed world. Meanwhile, others remain frustrated by the fact that they had been largely excluded from the WTO process. According to Adronico Adede, their exclusion "may explain why they subsequently became so uncompromising towards the WTO, as shown when they helped to paralyse the 1999 Seattle Ministerial Conference, where it was expected that a Millennium Round would be launched."

During the Fifth WTO Ministerial Conference in Cancún in 2003, "high-profile NGOs, such as Greenpeace, Oxfam, and Public Citizen, explicitly backed the developing countries' stand and heavily criticized developed countries, in particular the US and the EU, for a lack of consideration for their poorer trading partners." Likewise, they have increasingly demanded voices and roles in international organizations and processes through the submission of *amici curiae* briefs to the WTO dispute settlement panels as third parties. Although NGOs do not have any right to submit these briefs, and the dispute settlement panels do not have any obligation to consider them, the Appellate Body of the Dispute Settlement Body stated clearly that a dispute settlement panel "has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*."

Similar developments occurred at WIPO. Shortly before the adoption of Argentina and Brazil's proposal for the establishment of a WIPO Development Agenda, civil society organizations put together the Geneva Declaration on the Future of the World Intellectual Property Organization ("Geneva Declaration") to highlight the needs and demands of less developed countries. The declaration, which was circulated over the Internet and signed by more than 600 academics, researchers, inventors, public libraries, nonprofit organizations, and individuals, called for WIPO to undertake the following reforms:

- Express a more balanced view of the relative benefits of harmonization and diversity, and seek to impose global conformity only when it truly benefits all humanity;
- Reject a "one size fits all" system that "leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens";
- Establish a development round to openly discuss these issues;

- Support the mandate from the 1974 U.N./WIPO agreement that WIPO "promote creative intellectual activity and facilitate the transfer of technology related to industrial property";
- Create "a moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge";
- Create standing committees on technology transfer and development issues;
- Support a Treaty on Access to Knowledge and Technology;
- Reform the technical assistance programs and provide developing countries with the ability to implement the Doha Declaration on TRIPs and Public Health.

As the Geneva Declaration reminds us:

> The proposal for a development agenda has created the first real opportunity to debate the future of WIPO. It is not only an agenda for developing countries. It is an agenda for everyone, North and South. It must move forward. All nations and people must join and expand the debate on the future of WIPO.

A year later, the Royal Society for the Encouragement of Arts, Manufactures and Commerce convened an international committee to draft the Adelphi Charter on Creativity, Innovation and Intellectual Property, which sets out eight new principles for the development of intellectual property rights and calls on governments and international community to focus on the public interest. In its first principle, the Charter states that "[l]aws regulating intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves." As the Charter continues: "The public interest requires a balance between the public domain and private rights . . . [and] a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws." The Charter calls on governments to "facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature" and to take into account "developing countries' social and economic circumstances."

The growing participation of NGOs, academics, policy experts, and the media is significant for a number of reasons. First, they help advance the cause of less developed countries by serving as allies within the domestic political contexts. As Gregory Shaffer pointed out, less developed countries can "enhance the prospects of their success if other US and European constituencies offset the pharmaceutical industry's pressure on US and European trade authorities to aggressively advance industry interests."

Second, as in the case of academics and policy experts, they help identify policy choices and negotiating strategies that help less developed countries enhance their development potential. According to Andréa Menescal, "the support of intellectuals, especially legal scholars, is just as crucial as their previous support for an IP system that secured the protection of patent-holders' rights."

Finally, these players, in particular the mass media, help reframe the public debate that makes it more favorable to the cause of less developed countries. As John Braithwaite and Peter

Drahos wrote in the public health context: "Had TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilizing the consensus that US business elites had built around TRIPS." Likewise, Professor Sell reminded us that "grants talk" is preferable to "rights talk" from the standpoint of international development, because it "highlights the fact that what may be granted may be taken away when such grants conflict with other important goals" and is likely to discourage policymakers from focusing on the entitlement of the rights holders.

Acknowledging the growing importance of NGOs and other stakeholders, the United Kingdom Commission on Intellectual Property Rights ("IPR Commission") contended that "WIPO would benefit from drawing a wider group of constituencies with an interest in the IP system into its policy-making process, such as consumer organisations." As the Commission reasoned:

> WIPO has always been responsive to the needs of the industrial sectors which make intensive use of IP. We are less persuaded that it is as responsive to the interests of consumers or users of IP-protected products. It is of crucial importance in this respect that WIPO is not perceived as being receptive primarily to those organisations which have an interest in stronger IP protection.

The Commission's recommendation makes great sense in light of the changing political dynamics in the international intellectual property regime. Although state-centric *international* governance dominated the past, there has emerged a new form of *global* governance in which both state and nonstate actors play important roles. As Professor May explained:

> The contemporary idea of global governance seeks to capture something more than the multilateral co-ordination of state activities through the membership of issue-specific organizations. Rather, global governance identifies the emergence and development of political leadership by these organizations, moving beyond their mere enacting of state governmental instructions and interests. Although no international organization has complete autonomy from, and power over, its members, few international organizations remain only agents of state power.

Fora

When the Old Agenda was being negotiated, the intellectual property regime was the main forum for negotiation. As less developed countries emerged out of decolonization, pro-development agencies, such as UNCTAD and U.N. Industrial Development Organization ("UNIDO"), came into existence and began to participate in the intellectual property debate. Nevertheless, the interests of each forum remained narrowly defined, and there was limited overlap between the different interests.

Although countries had been able to "shop" for a forum that would best promote and protect their interests, international forum-shifting activities were the exception rather than the norm. The textbook example of a successful forum shift is the shift of intellectual property negotiations from WIPO to GATT/WTO by developed countries. Other notable examples include the use of UNCTAD by less developed countries to promote their interests through the development of NIEO and the International Code of Conduct as well as UNESCO's

development of the Universal Copyright Convention as an alternative to then Euro-centric Berne Convention.

In the New Agenda, however, there have been a much greater amount of forum-shifting activities. In fact, these shifts are no longer limited to those regimes that concern international trade, intellectual property, and development. Many new fora that are traditionally not considered part of the intellectual property regime have become affected. As I described in an earlier article, there has now emerged an "international intellectual property regime complex" that includes areas such as public health, human rights, biological diversity, food and agriculture, and information and communications. It is for this reason the Development Agenda should be defined broadly to cover important developments in these other regimes.

In addition, in the past couple of years, there has been an active push for the establishment of the Anti-counterfeiting Trade Agreement. As Professor Sell pointed out, "[the] new anti-counterfeiting and enforcement initiatives [in this area] are just the latest mechanisms to achieve the maximalists' abiding goal of ratcheting up IP protection and enforcement worldwide." Although developed countries and their "allies" have discussed the agreement in secret, with the support of their industries, its lack of transparency in the negotiation process thus far has attracted an immense amount of criticisms in not only the less developed world, but also the developed world. Its harm to less developed countries has also raised significant concerns. As Professor Sell reminded us, "[t]he opportunity costs of switching scarce resources for border enforcement of IP 'crimes' is huge . . . [and t]here surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms."

While forum-shifting activities are important, Professor May suggested that a bigger issue—and a direct cause of these activities—is the continuous proliferation of international fora that can be used to discuss intellectual property matters. He therefore considers forum proliferation a more significant concern than forum shifting. Regardless of which development is more alarming, however, the greater use of these fora is likely to result in significant changes in the international intellectual property system that can help or hurt less developed countries.

On the one hand, the greater complexity in the international intellectual property regime will raise the transaction costs for policy negotiation and coordination. These costs are particularly problematic for countries with very limited resources and technical capacity. As Eyal Benvenisti and George Downs pointed out, the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries will ultimately help powerful states preserve their dominance in the international arena.

On the other hand, the forum proliferation phenomenon and growing forum-shifting activities will help create "a 'safe space' in which [governments for both developed and less developed countries can] analyze and critique those aspects of TRIPS that they find to be problematic." This space, in turn, will help "generate the political groundwork necessary for new rounds of intellectual property lawmaking in the WTO and WIPO."

The existence of alternative fora will also help less developed countries generate "counterregime norms" to advance their interests in fora that have yet to be dominated by developed countries or that will ensure success for less developed countries. These norms may

eventually be incorporated into the international intellectual property regime as "revisionist norms." A case in point is the growing intellectual property norms that are being shaped in the areas of human rights and biological diversity. Such norms have been used to justify reforms in the international intellectual property system. Had it not been for increasing action by less developed countries in these other regimes, these countries might not have been successful in pushing for favorable language in the Doha Declaration on the TRIPS Agreement and Public Health.

The potential for forum shifts by developed and less developed countries may also result in greater rivalry and competition among institutions. Such competition helps force these institutions to be more conscious of their goals and missions and to innovate in a way that would help them remain at the forefront of the international debate. As Bernt Hugenholtz and Ruth Okediji pointed out, "using multiple international institutions for the development of [a] new multilateral framework . . . [may promote] norm competition across different fora as well as . . . inter-agency competition and collaboration." Professor May also noted that the establishment of the development agenda may help make WIPO more relevant to its less developed member states:

> Some of the members of the WIPO have recognized that there are clear developmental issues that need to be (re)introduced into the debates around the international protection of IPRs. . . . The advantage for developed country members of the WIPO, in continuing policy deliberation there rather than at the WTO, is that they can take the process forward even if significant resistance is articulated within the organization itself. But, equally for the supporters of the Development Agenda, there interests can *also* be moved forward while some members of the WIPO continue to argue that development should be kept out of the organization's central remit.
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> Therefore we can conclude that the WIPO has benefited from forum proliferation, and has fought hard to retain its position at the center of the global governance of intellectual property.

Issues

Related directly to forum proliferation or increased forum-shifting activities is the increasing expansion and blurring of boundaries between the issue areas that are implicated by intellectual property protection. Indeed, the expansion of intellectual property rights and the creation of new rights were partly the cause of both forum proliferation and the growing overlap between traditionally distinct issue areas. As the Appellate Body suggested in *United States—Standards for Reformulated and Conventional Gasoline*, WTO agreements such as the TRIPs Agreement cannot be "read in clinical isolation from public international law." Likewise, the WTO panel in *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* recognized the TRIPs Agreement as "an integral part of the WTO system." In fact, one could view the WIPO Development Agenda "as a call for the development of a global IP policy that coheres more meaningfully with other international law regimes"—a call to end "WIPO's institutional isolationism."

In the Old Agenda, there were two main issues. First, greater intellectual property protection might not be appropriate for less developed countries. Special and differential treatment therefore was warranted for enabling these countries to promote internal economic, social, cultural and technological development and to facilitate efforts to catch up with countries

in the developed world. Second, as revealed in the negotiation of the International Code of Conduct, the transfer of technology is important, and the use of intellectual property rights can be abused. Norms therefore are needed to be established to reduce this abuse and to ensure the balance in the intellectual property system.

By contrast, the issues involved in the New Agenda are more diverse. First, the New Agenda is filled with many internal inconsistencies that can hardly be resolved at a doctrinal level. On the one hand, the development agenda calls for greater respect of sovereignty and autonomy other countries need to develop their intellectual property system. Similar to those advocating the Old Agenda, the proponents of the New Agenda demanded greater calibration and reduced protection within the international intellectual property regime—partly in response to the vastly different local conditions of less developed countries. The underlying premise is that countries need wide policy space and flexibilities to develop an innovation system that is tailored to their local conditions.

On the other hand, the New Agenda seeks to create new forms of protection for those in less developed countries and facilitate greater harmonization or universalization in areas that benefit those countries, such as the protection of traditional knowledge and cultural expressions. Like the agenda advanced by both the TRIPs Agreement and the TRIPs-plus bilateral and regional trade agreements, less developed countries are now advancing their own version of the TRIPs-plus agenda that focus on their needs, goals, and interests.

Article 29*bis*, for example, can be seen, from the standpoint of developed countries, as a TRIPs-plus provision that requires developed countries to offer protection based on the interests of less developed countries. To be fair to the latter, if given a choice between lower intellectual property standards and a lack of protection for traditional knowledge, these countries are likely to pick the former. One may even suggest that their desperation over ever-expanding intellectual property rights has driven them to demand intellectual property protection of its own—or the protection of what Michael Finger and Philip Schuler have termed "poor people's knowledge." However, from a doctrinal standpoint, it is hard to reconcile this proposal with the other demands of less developed countries for greater autonomy, policy space, and flexibilities.

Second, because of the significant gap between the rich and the poor and the fact that countries can be less developed, yet technologically proficient, many middle-income developing countries—most notably, Brazil, China, and India—have interests that conflict significantly with each other. As I pointed out in the past, these countries now have developed "schizophrenic" nationwide intellectual property polices. While they may want stronger protection for their fast-growing industries and highly economically developed regions, they want weaker protection in the remaining areas. The economies of these countries, indeed, are highly complex, and the profound sub-regional disparities in socio-economic conditions and technological capabilities have made it very difficult to implement nation-based intellectual property standards.

Third, the positions taken by developed and less developed countries remain in flux. As the technological capacity of less developed countries increases, their positions and support for the New Agenda may change. As Professor May observed:

> [A]s the balance of technical leadership starts to move, perhaps accelerated by the impact of the recession on research and innovation in the most-developed countries (the US, Europe, and Japan), it is not clear that those states that previously argued for robust protection of IPRs will necessarily find themselves so advantaged by the current settlement. . . . [In fact, i]f the global downturn does consolidate and accelerate the shift in technological leadership in the global system, we are likely to see national negotiating teams from the most developed countries at WIPO being less all-encompassing in their support for the global intellectual property system.

With new issues comes the formation of new allies. For example, the proposals for stronger protection of traditional knowledge and cultural expressions may attract the unanticipated support of corporate rights holders, who have a strong "need to establish clear lines of ownership and reduce the risks of unenforceable contracts with suppliers of creative outputs, rather than any recognition of the rights of indigenous creators and innovators." Likewise, as Professor Okediji pointed out:

> [i]n a digital era, the interests of developing countries ironically overlap with those of consumers in developed countries. Consequently, one of the notable paradigm shifts in the negotiation of international copyright agreements has been the tremendous rise in non-governmental organizations, private corporations and other non-state entities which have participated in alliance-building with developing countries to curtail the aggressive expansion of proprietary interests in information works and other copyrighted objects.

Thus, although development issues are generally considered issues of importance to less developed countries, "the social and economic costs of an even greater protection of intellectual property rights . . . have been felt in developing and developed countries alike, and have come to be viewed as a question of human development in general, no matter of North or South." As Andréa Menescal observed:

> Public-interest issues now include the free flow of information in research and the promotion of innovation and creativity world-wide. The increasing tendency of the "capitalization of knowledge" or the "commercialization of science" has been regarded with apprehension by many academics, especially publicly financed researchers. This tendency refers both to the patenting of research results by academics themselves and to the (private) appropriation of public scientific information and knowledge by industry at the expense of commons and of science itself.

Political Environment

The political environments surrounding the two development agendas are very different. When the Old Agenda was being negotiated, many less developed members of the Berne and Paris Conventions only emerged out of decolonization. The cold war also loomed heavily in the background, making non-political discussion very difficult. As Sam Ricketson and Jane Ginsburg recounted, the "highly charged" atmosphere and the "considerable mutual mistrust" among the participants during the time in the run-up to the Intellectual Property Conference of Stockholm "was simply a reflection of what had been happening in other international forums for a number of years."

For example, while Western countries pushed aggressively for the recognition of private property in, say, the human rights area, the Eastern bloc expressed their concern about

"strengthening the protection of private property and the potential interference with 'government control over science and art, and scientists and artists."' As a result, many of the existing international human rights treaties were originally negotiated along cold war fault lines. While the West supported the International Covenant on Civil and Political Rights, the Socialist countries preferred the International Covenant on Economic, Social and Cultural Rights. Even more interestingly, socialist countries seemed to be more concerned about the potential objections to whether governments could control science and art than about whether such protection would hurt development in their countries.

Likewise, during the negotiation of the International Code of Conduct, Turkey was grouped with the Group B developed countries by virtue of its membership in the NATO Alliance, even though the country was a less developed country. The negotiations were further colored by the 1973 Arab-Israeli War and the oil crisis, which helped precipitate the development of NIEO.

Indeed, such development was as much about political change as it was about economic change. In the early 1970s, less developed countries were increasingly frustrated by the extant international economic system, under which they remained economically and technologically backward. Although they had tried import substitution—by producing domestically those products they traditionally imported—they "felt they had exhausted the possibilities of [such an industrialization] strategy." As a result, they began to "adopt[] the view that significant government intervention was required to ensure autonomous domestic economic growth." As Chantal Thomas explained:

> The origins of [the momentum to establish NIEO] lay in three changes to the international order in the postwar era: first, the "massive expansion of international organization for cooperative purposes"; second, the "growing importance of states representing non-Western civilizations" in the wake of decolonization and independence movements; and third, "the growing gap between the economically developed and the economically less developed countries."

To complicate matters, NIEO was developed at a time when some less developed countries had developed much more quickly than the others. As Fred Bergsten elaborated:

> The calls for [NIEO] derive from two contemporary developments. One is the continued poverty of the countries of the Fourth World, which comprises mainly South Asia and most of Sub-Saharan Africa . . . . The explicit or implicit purpose of most of the policy proposals has been to help the poorest countries. Thus the bulk of the analysis and suggestions for change have been economic. . . . But the emergence of the NIEO as a serious international issue derives primarily from the rapidly growing strength of the countries of the Third World, which comprises virtually all of Latin America and the Middle East and most of East and Southeast Asia. Their interests in seeking a NIEO are at least as much political as economic. The Third World wants a greater participatory role in managing the world economy, both for reasons of status and because it believes that only through such a larger decision-making role can its interests be protected on an ongoing basis. It is demonstrably willing to link its rising economic power to political objectives to promote its demands.

Unfortunately, the interests of these so-called Third World and Fourth World countries—or in WTO's parlance, developing and least developed countries—did not coincide with each

other. While the Third World countries "focus[ed] largely on acquiring new economic opportunities: access to the markets of the industrialized countries for their exports of manufactured goods, access to international capital markets, access to modern technology," the Fourth World countries "continue[d] to stress its need for resource transfers through the traditional medium of foreign aid." Moreover, with the failure of the Latin American economies (and therefore greater reliance on developed countries for debt assistance and reduced leverage in demanding adjustment to the international economic system) in the 1980s, many less developed countries "set out to liberalize their economic policies"—often as a condition for debt relief. NIEO failed as a result.

Today, however, the cold war has ended, and the dynamics of the negotiations have changed significantly. As one commentator observed, "[i]n the contemporary post-Cold War world the assumptions underlying the Charter of Economic Rights, as well as those of the draft Code, are bound to appear outdated." Although the United States and the European Communities remain powerful, there have emerged a growing number of middle-income developing countries, such as Brazil, China, and India. It remains to be seen what role these countries will play and whether they can work together to rival the trilateral alliance set up by the European Communities, Japan and the United States.

After all, less developed countries are more divided than is beneficial to them. Historically, they have had very limited success in using coalition-building efforts to increase their bargaining leverage. As Professor Abbott reminded us:

> Over the past 50 years, there have been a number of efforts to achieve solidarity or common positions among developing countries in international forums. At the broad multilateral level there was (and are) the Group of 77, and the movement for a New International Economic Order. At the regional level, the Andean Pact in the early 1970s developed a rather sophisticated common plan to address technology and IP issues (ie Decisions 84 and 85). Yet these efforts were largely unsuccessful in shifting the balance of negotiating leverage away from developed countries. In fact, developing country common efforts to reform the Paris Convention in the late 1970s and early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.

Even today, "the 'big five' non-members of OECD (Russia, China, Brazil, India and Indonesia) do not always act in concert; the least developed countries themselves do not present a common front."

Public Awareness

When the Old Agenda was developed, intellectual property was not considered a major issue. In fact, intellectual property issues, in the past, were considered arcane, obscure, complex, and highly technical. Professor Sell, for example, has analogized intellectual property issues to "the Catholic Church when the Bible was in Latin." As she elaborated: "IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy. IP law is highly technical and complex, obscure even to most general attorneys. . . . [The US IP lobby's] possession of technical and juristic knowledge was an important source of its private authority." Likewise, the *Gowers Review of Intellectual Property* ("*Gowers Review*") states: "For many citizens,

Intellectual Property . . . is an obscure and distant domain—its laws shrouded in jargon and technical mystery, its applications relevant only to a specialist audience."

Today, however, the intellectual property debate is no longer as isolated as it was in the past. From Mickey Mouse to Barbie Dolls to software patents, the intellectual property issues have reached the consciousness of the public at large. The dot-com boom (and its subsequent crash) and the adoption of digital lifestyle have also made intellectual property issues increasingly relevant to everyday life. It is, indeed, not unusual to find the mass media reporting about intellectual property matters.

As Peter Drahos and John Braithwaite reminded us, many of intellectual property-related developments and existing standards are not new. The Berne and Paris Conventions, for example, date back to the 1880s, around the time when colonial powers explored how they could further divide Africa during their infamous "Scramble for Africa." However, with greater use of technology-based products, intellectual property standards and their continuous expansion begin to "affect basic goods such as seeds, services and information flows in a global trading economy that their full costs to citizens and business in general are coming to be appreciated." Indeed, as Andréa Menescal pointed out:

> [B]oth the "WIPO Development Agenda" and the public interest concerns on IP are no longer an issue only for developing countries, activists and NGOs calling for the prevalence of social and health issues over trade and profit with IP rights. Rather, they are of significant concern to an international network of public-interest NGOs, academics and consumers from both developing and developed countries.

Moreover, the anti-globalization protests in Seattle, Washington, Prague, Quebec, Genoa, and other major cities have helped provide the needed background and momentum to the push for reforms in the international intellectual property system. The growing activism through civil society organizations has also helped raise the consciousness of intellectual property developments. As Amy Kapczynski recently wrote:

> Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with "something like the reverence that earlier generations displayed in talking about social or racial equality"? Or that advocates of "farmers' rights" could mobilize hundreds of thousands of people to protest seed patents and an IP treaty? Or that AIDS activists would engage in civil disobedience to challenge patents on medicines? Or that programmers would descend upon the European Parliament to protest software patents?

In sum, the growing awareness of intellectual property issues may make the outcome of the New Agenda somewhat different from that of the Old Agenda. As Professor Halbert observed, what is new and promising about the New Agenda, as compared to the Old Agenda, "is the increased attention and resistance by the general public to these issues and the development of civil society organizations intent upon seeing the problems associated with the protection of intellectual property at the global level addressed."

Finally, some developed countries have become increasingly concerned about the plight of less developed countries. Most notably, the IPR Commission took the unusual position that stronger intellectual property protection may not sit well with economic development in less developed countries—a position that is particularly unusual in light of the positions British

delegations have taken in past international intellectual property negotiations. As the Commission stated in its final report:

> Analysis of the available evidence on the impact of IPR regimes on developing, or developed countries, is a complex task. . . . [W]e do not wish to focus on IPRs as an end in themselves, but on how they can contribute to development and the reduction of poverty. We believe that a prerequisite for sustainable development in any country is the development of an indigenous scientific and technological capacity. This is necessary to allow countries to develop their own process of technological innovation, and to enable them to absorb effectively technologies developed abroad. It is obvious that the development of such capacity is dependent on a large number of elements. It requires an effective education system, particularly at the tertiary level, and a network of supporting institutions and legal structures. It also requires the availability of financial resources, both public and private, to pursue technological development. There are many other factors that contribute to what are often known as "national systems of innovation".

Likewise, the recently-published *Gowers Review* advanced many helpful recommendations that sought to recalibrate the balance in the existing intellectual property system. These recommendations are currently being explored and evaluated by many countries, especially those in the British Commonwealth. In light of these developments, one has to wonder whether there are internal developments at the private sector within this country that have helped transform the intellectual property debate.

Rhetoric

In international intellectual property negotiations, rhetoric and principles are always important. As John Braithwaite and Peter Drahos reminded us, "[r]hetoric, 'the art of persuasive communication', has a place in international negotiations and lobbying affecting business regulation." Thus far, developed countries, rights holders, and industry groups have deployed rhetorical strategies in two directions.

First, by linking intellectual property protection to such issues as economic growth, increased trade, and an influx of foreign direct investment, they managed to make intellectual property protection attractive while at the same time increasing the priority of such protection on the national policy agenda. As Daniel Gervais recounted, developed countries and the lobbies that pushed for stronger intellectual property protection believed that "TRIPS was a difficult but essential measure to jumpstart global economic development." Less developed countries therefore "were told to overlook the distasteful aspects of introducing or increasing intellectual property protection and enforcement in exchange for longer-term economic health."

Second, the proponents of strong intellectual property rights have used words such as "theft," "piracy," and "free riding" to condemn those countries that have failed to offer strong intellectual property protection. James Boyle compared their condemnation efforts to the writing of a morality play, which can be summarized as follows:

> For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of *Presumed Innocent* or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries—led by the United States—have decided to take a stand.

> What's more, . . . the United States is standing up for more than just filthy lucre. It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo.

By "implying that infringers should be thought of like the pirates, slave traders and torturers of the past, . . . [the use of the term allows advocates of strong intellectual property rights] to establish the parallel with more violent assaults on human rights."

In recent years, rights holders, industry groups, and policymakers have added "security" to provide rhetorical effect. The use of this new rhetorical frame plays unfortunately to the widespread sentiments developed in the wake of the September 11 tragedies. Government officials, for example, have repeatedly described how terrorists have used piracy and counterfeiting to fund their operations. As Professor Sell explained, "[i]ntroducing a security frame for IP has allowed these IP maximalists to enlist new actors, law enforcement agencies, in their cause. Law enforcement agencies have become eager recruits to the IP maximalists' network."

Although less developed countries turned their attention to development, fairness, moral assistance, and common ownership in the past, their strategies have been more diverse in recent years. Together with civil society organizations, critics of intellectual property rights have problematized those terms used by rights holders and industry groups. For example, Richard Stallman, the founder of the Free Software movement and a leading critic of the term "intellectual property," considers the term an "unwise generalization" that is biased and confusing. By bringing together different sets of rights that originated differently, protect different subject matter, and raise different policy questions, the term, he argued, encourages simplistic thinking that ignores the different characteristics and limitations of copyrights, patents, trademarks, trade secrets, and other forms of intellectual property rights.

Moreover, by including the word "property," the term "intellectual property" glosses over the difference between abstract ideas and physical objects, thereby perpetuating the misunderstanding that one can develop property entitlements in ideas and information. As Mark Lemley warned us, the property label may tempt courts, lawyers, and commentators to continue the trend of treating intellectual property just like real property. By underscoring the property aspects of intellectual property rights, judges in civil law countries may also become worried that limiting intellectual property rights would raise difficult constitutional questions concerning government takings of private property.

Critics have also pointed out how the word "piracy" has been repeatedly misused by rights holders and industry groups to cover all forms of unauthorized copying. As Peter Drahos and John Braithwaite wrote:

> Piracy remains a powerful evaluative word. To be called an intellectual property pirate is to be condemned. In a world where attention spans are divided by the media into ten-second sound bites it is the perfect word to use on TV, videocassettes, newspaper headlines and the radio. The received folk memory of "pyrates and rovers" on the sea does the rest.

To make things worse, the word piracy has now been used widely regardless of whether limitations and exceptions exist in the intellectual property system. For example, even though

some sound recordings have fallen into the public domain in Europe, the U.S. recording industry insists that those recordings would be considered pirated if they appear on the U.S. market. Likewise, as Kevin Outterson and Ryan Smith pointed out, "counterfeit" drugs as defined by the pharmaceutical industry have included not only fake or counterfeit products, but also "safe and effective drugs from Canada"!

Interestingly, the increased awareness of intellectual property issues in recent years has allowed these critics to take new approaches to respond to the rhetorical moves taken by developed countries, industry groups, and rights holders. First, as Professor Kapczynski pointed out, the advocates in the free software, open source, free culture, and access to knowledge movements have "generate[d] new theories of their shared interests (in, say, the 'information commons' and 'access to knowledge') and new challenges to the legitimacy of exclusive rights in information." These new concepts, theories, terminologies, and collective frames, in turn, have allowed different groups to "theorize their interests, build alliances, mobilize support, and discredit their opponents," and explore a common agenda. As Professor Kapczynski described:

> Access-to-medicines campaigners could use the human rights frame to create connections with human rights organizations and institutions in Geneva and New York. Farmers' rights campaigners' arguments about sustainable development linked them to environmental groups. Claims for protection of traditional knowledge were framed in a way that drew connections to indigenous rights claims. Thus, each of these groups mobilized frames that made certain alliances and political arguments possible.

The development of these concepts, theories, terminologies, and collective frames is important. As Professor Boyle reminded us:

> [A] successful political movement needs a set of (popularizable) analytical tools which reveal common interests around which political coalitions can be built. Just as "the environment" literally disappeared as a concept in the analytical structure of private property claims, simplistic "cause and effect" science, and markets characterized by negative externalities, so too the "public domain" is disappearing, both conceptually and literally, in an intellectual property system built around the interests of the current stakeholders and the notion of the original author. In one very real sense, the environmental movement invented the environment so that farmers, consumers, hunters and birdwatchers could all discover themselves as environmentalists. Perhaps we need to *invent* the public domain in order to call into being the coalition that might protect it.

Moreover, some critics of intellectual property rights have managed to redefine those terms or get us to rethink their usage. As Peter Jaszi aptly observed, "[o]ne might say that one nation's 'piracy,' [sic] is another man's 'technology transfer.'" Piracy, after all, is in the eyes of the beholder. Similarly, activists have developed a "rhetoric of resistance" as a counterpoint to the rhetoric used by rights holders and intellectual property industries.

Critics of intellectual property rights have also managed to turn the term on its head—as exemplified by the coinage of the term "biopiracy." As Professor Sell described, "[b]iopiracy is seen as a new form of Western imperialism in which global seed and pharmaceutical corporations plunder the biodiversity and traditional knowledge of the developing world. Biopiracy is the unauthorized and uncompensated expropriation of genetic resources and traditional knowledge." Carrying the baggage of the word "piracy," the term biopiracy brings

with it the massive energy industry groups and rights holders have built over the years. As Philippine activist Roberto Verzola lamented:

> If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor. Don't rich countries pirate poor countries' best scientists, engineers, doctors, nurses and programmers? When global corporations come to operate in the Philippines, don't they pirate the best people from local firms? If it is bad for poor countries like ours to pirate the intellectual property of rich countries, isn't it a lot worse for rich countries like the US to pirate our intellectuals?
>
> In fact, we are benign enough to take only a copy, leaving the original behind; rich countries are so greedy that they take away the originals, leaving nothing behind.

In the context of the lack of protection for indigenous heritage, Suzan Harjo, former head of the National Congress of American Indians, has also made a similarly poignant remark: "[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There's little left that's tangible. Now they're taking what's intangible." It is therefore understandable why commentators and policy experts, especially those who live in, work for, or are sympathetic to less developed countries, have actively documented the problems of biopiracy. Using this trope, less developed countries and their supporters have pushed actively for the protection of traditional knowledge and cultural expressions.

Conclusion

The Old and New Development Agendas are similar to each other, but they are also different in many respects. Through their comparison, this Paper highlights the risks and challenges of the present agenda. It also shows that the agenda provides many strategic opportunities, which are further enhanced by the momentum less developed countries have built since the establishment of the Doha Development Round of Trade Negotiations. Whether the present agenda will succeed will depend on whether less developed countries and their supporting governments and NGOs can mobilize in time before they lose the momentum.

Although it is too early to assess the present agenda, it is important to remember that this agenda is unlikely to be the last set of agendas the international intellectual property regime will ever see. Commentators have reminded us how the TRIPs Agreement should not be treated "as a crowning point of international intellectual property regulation." The same is true for this present agenda, which should not be seen as the pinnacle of the pro-development movement in the intellectual property field.

In the near future, a new set of development agendas is likely to be established. Under this scenario, one could only hope that the present agenda will provide the needed foundations to ensure even greater success. If the present agenda could pave the way for the future agendas, it would be "a far, far better thing . . . than [it has] ever done."