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# The Tragedy of TRIPS

Peter M. Gerhart

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# THE TRAGEDY OF TRIPS

*Peter M. Gerhart\**

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## ABSTRACT

This Article argues that sound intellectual property policy requires not only that the policymaker establish an appropriate incentive for invention

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but also that the policymaker determine how the cost of that incentive should be distributed across various classes of consumers. It is the distributive dimension of intellectual property policy that makes existing international institutions such an unsound mechanism for determining global rules for intellectual policy—the policymakers are simply not able to make the appropriate kinds of decisions. I suggest some ways in which institutional structures can be modified to achieve a better balance.

#### INTRODUCTION

This Article supports the following claim: the tragedy of TRIPS<sup>1</sup> is that the process of international lawmaking has distorted global policy toward intellectual property by forcing policymaking through an institutional framework that is ill suited to the task. We have an institutional mismatch between the needs of an intelligent global policy for intellectual property and the institutions available for the task. As a result, our vision of the field is distorted, we no longer ask the correct questions, and our conception of intellectual property itself is undergoing a radical and negative transformation. We need to explore, as I do here, new institutional mechanisms for creating and adjusting global policy toward innovation and knowledge goods.<sup>2</sup>

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1. TRIPS is the acronym for the treaty covering the intellectual property obligations of members of the World Trade Organization (WTO). See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. It was included as part of the comprehensive set of treaties that resulted from the WTO's Uruguay Round of Negotiations.

2. Although this Article focuses on TRIPS and the international intellectual property regime made through the WTO, much of what I say is equally relevant to the intellectual property regime administered by the international agency that specializes in intellectual property, the World Intellectual Property Organization (WIPO). My analysis concentrates on the WTO, rather than WIPO, because the WTO has two characteristics that significantly distinguish its policymaking machinery from that of WIPO. First, the WTO has the ability to bargain across sectors, so that one country can agree to change its intellectual property policies for another country's agreement to change policies in a different economic sector. The WTO's ability to embed intellectual property laws in a broad array of policy obligations makes the harmonization of intellectual property law politically feasible and allows the industrial countries to insist that countries accept intellectual property rules in order to get the benefits of WTO membership. WIPO, by contrast, is a single-issue institution and countries can choose which of the WIPO intellectual property treaties to adopt. Second, through its dispute settlement system, the WTO, but not WIPO, can impose costs on countries that do not comply with their treaty obligations. This makes it harder for a country to evade its obligations under TRIPS, whereas in the WIPO regime each country decides for itself whether it complies with the WIPO treaties it has adopted.

This Article confronts the distributive issues that are inherent in the design of intellectual property systems, not only the distributive issues between industrial and developing countries<sup>3</sup> but also the distributive issues within each country. Unlike other commentators, I question the model on which much of the economic analysis of intellectual property policy is based, and I recommend new institutional structures for determining international policy toward intellectual property policy and suggest how and why those structures might be realized.

This Article not only adds important perspectives to the burgeoning literature on international intellectual property, it also adds to the broader literature on international relations and international law. Because my perspective is institutional and policy-oriented, it does not argue from the viewpoint of international law. Nonetheless, the Article seeks to enhance our understanding of international law by enhancing our understanding of how institutional structures make a difference in determining the content of international law. Whereas a public international lawyer might refer to the requirements of international law that relate to the rights of the poor, this Article seeks to find a way to implement those requirements through institutional design. Whereas a human rights lawyer might reference the concepts of justice that require that the poor have access to the products of the intellectual property system, my emphasis is to find a way to build human rights values into the institutional structure that gives rise to international law.

Let me first place this Article in the context of the existing literature on international intellectual property policy, which has grown enormously in the ten years since the TRIPS agreement was adopted.<sup>4</sup> Although the literature is quite diverse, the theoretical, evaluative literature generally revolves around two topics: efficacy and fairness.<sup>5</sup> The efficacy literature

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3. For an important exploration of distributive issues in international intellectual property, see Eyal Benvenisti & George Downs, *Distributive Politics and International Institutions: The Case of Drugs*, 36 CASE W. RES. J. INT'L L. 21 (2005).

4. For recent major contributions to this type of literature, see INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith Maskus & J.H. Reichman eds., 2005) [hereinafter INTERNATIONAL PUBLIC GOODS]; INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH (Carston Fink & Keith Maskus eds., 2005) [hereinafter INTELLECTUAL PROPERTY AND DEVELOPMENT]. For a recent comprehensive review of major trends and literature, see Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323 (2004).

5. A third topic—what we might call rights-based justifications for intellectual property—suggests that owners of intellectual property have a right to profit from their inventive activity, quite apart from an economic or technological rationale for creating the property. See, e.g., ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND DEVELOPMENT (1990) (emphasizing rights of IP owners to be protected against theft or piracy, in addition to the positive benefits of IP for development). For reasons that are made apparent in the text, the rights based literature is unattractive because it yields no basis for determining the opti-

seeks to determine the impact of TRIPS on various indicia of national welfare. It examines, for example, the impact of TRIPS on royalty payments, foreign direct investment, technology transfer, and innovation. Insofar as the literature focuses on developing countries, the debate focuses on whether intellectual property is good for development.<sup>6</sup> Insofar as the literature focuses on industrial countries, it seeks to determine how international systems can be more efficient,<sup>7</sup> and whether international constraints hamper national innovation.<sup>8</sup>

By and large, the literature relies on highly indeterminate evidence.<sup>9</sup> The way an analyst reads and interprets the evidence is quite subjective; it often depends on whether the analyst adopts the perspective of an intellectual property owner or an intellectual property user—which is to say the perspective of a country that exports knowledge goods or of a country that imports knowledge goods.<sup>10</sup>

The fairness literature focuses less on the effects of TRIPS as it pertains to national welfare, and more on the fairness of the bargaining that led to intellectual property harmonization and minimum standards through TRIPS. The critical literature stresses how much developing countries gave up when they accepted TRIPS standards, as well as perceived imperfections

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num scope of protection for intellectual property. Of course, rights-based justifications form a large part of the public discourse about intellectual property, and many people almost reflexively believe that the foreign use of knowledge generated in the United States is theft. This reflexive understanding ignores the fact that intellectual property is itself the product of human invention, requiring reasons for its creation and scope. *See generally* ROBERT L. OSTERGARD, JR., *THE DEVELOPMENT DILEMMA: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS IN THE INTERNATIONAL SYSTEM* (2003).

6. *See, e.g.*, United Nations Development Programme, *Making Global Trade Work for People* (2003), available at <http://www.undp.org/dpa/publications/globaltrade.pdf>.

7. *See, e.g.*, John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 *BERKELEY TECH. L.J.* 685, 693-700 (2002).

8. *See, e.g.*, Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 *J. INT'L ECON. L.* 431 (2004) [hereinafter Dinwoodie & Dreyfuss, *International Intellectual Property*] (analyzing the effects of TRIPS on ability of the United States to preserve open information for research); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 *CASE. W. RES. J. INT'L. L.* 95 (2004) [hereinafter Dinwoodie & Dreyfuss, *TRIPS Dynamics*] (analyzing freedom of a country to decrease protection along one dimension while decreasing protection along a different dimension).

9. The evidence is carefully presented and evaluated in KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000).

10. *See, e.g.*, Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, Report of the Commission on Intellectual Property Rights (2002), available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf) [hereinafter CIPR Report] (assessing international IP systems from standpoint of developing countries).

in the bargaining process.<sup>11</sup> The supportive literature stresses the reciprocal promises that developing countries were given in return for their allegiance to TRIPS.<sup>12</sup> More recently, the central issue has been the attempt by the United States and Europe to go outside the multilateral trading context to embed a “TRIPS plus” regime in a series of unilateral, bilateral, and regional initiatives.<sup>13</sup> The evidence on fairness issues, because it is conflicting, also yields no clear conclusions.

The two literatures are related, of course. The efficacy literature seeks to evaluate the substantive impact of TRIPS and to either support or criticize TRIPS by calculating its impact on some measure of national welfare. The fairness literature seeks to assess the process by which TRIPS standards have been made and revised and to make some claims about the normative quality of that process. Because substance and process are so intertwined, each literature can draw on the other. Evidence of the negative impact of TRIPS supports the notion that the process for negotiating TRIPS was faulty, and evidence of its positive impact supports the notion that the bargaining that led to TRIPS was, at worst, benign.

The two literatures share one perspective. Both the efficacy literature and the fairness literature assume that our normative evaluation of TRIPS can be determined by assessing TRIPS in the context of the nation-state. We think of fairness in terms of whether the TRIPS negotiations were fair to this or that country, and we measure the effect of TRIPS by looking at its impact on this or that country.<sup>14</sup> It is as if we assumed that we could understand TRIPS as the sum of its effects on the nation-states of the world.

In this Article, I hope to supplement our understanding of international intellectual property by focusing on the institutional structure through which global policy is made. In particular, I advocate a global perspective on the

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11. The debate is summarized in Peter M. Gerhart, Special Introduction, *Reflections: Beyond Compliance Theory—TRIPS as a Substantive Issue*, 32 CASE W. RES. J. INT'L L. 357 (2000). For two critical views from political scientists, see SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); MICHAEL RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY (1995). The World Bank suggests that the payoff the developing countries expected from endorsing TRIPS has not been forthcoming. WORLD BANK, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 37-64 (2001).

12. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 152-53 (1995).

13. A TRIPS-plus regime seeks to enhance the international obligations that countries undertake through international treaties. See, e.g., Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 WORLD INTELL. PROP. 791 (2001); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 127 (2004).

14. See, e.g., KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 145 (2005) (referring to studies done in China and Lebanon, and continually basing analysis on circumstances in individual countries).

welfare effects of various alternative intellectual property regimes.<sup>15</sup> Because the current debate assumes that the nation-state is the correct locus for making and implementing global policy, it has missed the important question of whether nation-state interaction can ever achieve an appropriate balance. In other words, the nation-state is the problem underlying TRIPS, not the source of a solution, for any policy made through the existing interaction of nation-states can never achieve the requisite balance. If I am correct that intellectual property made through the nation-state will not achieve the requisite balance, then we need to consider institutional designs that will harness the interests of the nation-state to improve global public policy toward intellectual property.

This Article comes in two parts. Part I, the diagnostic part, supports my claim that international institutions distort global policy toward goods covered by intellectual property that is, knowledge goods. There, I set out a model of intellectual property policymaking in the domestic context and then show how the dynamics of lawmaking through nation-states make it impossible to achieve the requisite balance in the global production and distribution of knowledge goods. Part II, the prescriptive part, suggests institutional changes that would move the system of nation-states into a policymaking role that is more likely to achieve an appropriate balance and explains the forces that might bring about those institutional changes.

#### I. THE DYNAMICS OF INTELLECTUAL PROPERTY POLICYMAKING

My analysis flows from a model of intellectual policymaking at the national level. On the whole, the model is fairly conventional, but I elaborate on the conventional model by pointing out the distributive dimensions of intellectual property that generally are ignored. This conventional model is articulated in Part A, followed by an analysis in Part B of how policymaking distorts important aspects of this model when nation-states seek to make policy for intellectual property across borders.

##### A. National Policymaking

The goal of any intellectual property system is to induce investment in knowledge goods that are valuable to society but that would otherwise not be made because knowledge can so easily be copied and its value appropri-

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15. For a notable effort to model the production of knowledge goods as a global system—one that implicitly takes into account distributive concerns, 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, 309-16 (2004).

ated.<sup>16</sup> The system creates property rights to allow the producer of knowledge goods to recoup investment in the goods by limiting the uncompensated spillover benefits from the knowledge.<sup>17</sup>

Intellectual property policy therefore requires a trade-off between the positive incentive effects of creating and protecting property in knowledge goods and the adverse effects of restricting consumer access to knowledge goods.<sup>18</sup> An appropriate balance requires that access to the knowledge goods be in the control of the property owner up to the point at which the last dollar of return to the innovator from the right to exclude others just equals the marginal value of new innovation that would not otherwise be undertaken.<sup>19</sup> This balance can be achieved by varying the nature of the property along several dimensions:<sup>20</sup> the policymaker can vary the subject matter, the prerequisites for acquiring the property, the length of protection,

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16. See Kenneth W. Dam, *The Economic Underpinnings of Patent Law*, 23 J. LEGAL STUD. 247 (1994).

17. See Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSP. 3, 4 (1991).

18. These adverse effects include the higher prices that consumers must pay for knowledge goods covered by patents and copyrights and protection “that [can] choke access to upstream information inputs – including scientific and technical data as such – [in ways that] could narrow access to the research commons and limit other transfer mechanisms, with incalculable long-term effects . . . .” Maskus & Reichman, *supra* note 15, at 290-91. See also Rebecca S. Eisenberg, *Bargaining over the Transfer of Proprietary Research Tools: Is this Market Failing or Emerging?*, in EXPANDING BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 9 (Rochelle Dreyfuss et al. eds., 2001). The importance of access to knowledge in order to foster world growth was emphasized in the reports from the World Summit on the Information Society. See World Summit on the Information Society, Declaration of Principles (Dec. 12, 2003), [http://www.itu.int/dms\\_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf).

19. This portrayal of the trade-off is different from that used by many economists. To many economists, the cost of an IP system is the surplus that is foregone because the property owner is allowed to restrict output and raise prices—the so-called deadweight loss. See WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* (1969); F.M. Scherer, *Nordhaus’ Theory of Optimal Patent Life: A Geometric Reinterpretation*, 62 AM. ECON. REV. 422 (1972). In my portrayal, the “cost” of an IP system is the consumer surplus that is transferred from consumers to producers because of the producer’s ability to restrict output. My portrayal thus envisions the intellectual property system as a kind of tax system in which the producer is given a limited opportunity to tax consumers in order to recoup investment costs. See CIPR Report, *supra* note 10 (discussing how “non-exclusive licensing is a tax on users of technology”). Although deadweight loss and transferred consumer surplus are two outcomes from the restriction on output, they will not be the same. Economists who see deadweight loss to be the cost of IP are likely to see lower costs than those who see the cost of the IP system to be higher prices that consumers pay. Naturally, a poorly designed IP system can impose other costs on society, including consumer payments for knowledge goods that would have been produced even in the absence of an IP system, and restrictions on future innovation if broad IP rights preclude the use of important information for future innovation.

20. On the scope of protection, see generally Robert Merges & Richard Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).



the scope of protection (that is, the test for infringement), the test for permissible use of the property (for example, fair use or compulsory licensing), the competitive system within which the property rights are exercised, and the nature of the enforcement system (including penalties and enforcement costs).<sup>21</sup> Within the dimensions that the policymaker has set, the intellectual property system works by harnessing the market system. People who want to use the property pay for it, and their payment registers their preferences for this property over any other property (including savings), given their ability to pay for the property.

The exact intellectual property system that will induce socially appropriate investment without unnecessary distortions depends on two factors: (1) the process for developing and distributing knowledge goods, and (2) the extent to which markets award sufficient first mover advantages (by rewarding those who get to the market first) to induce innovators to develop and distribute knowledge goods even without property protection.<sup>22</sup> Moreover, intellectual property systems are not the only way to induce valuable investment in innovation. Government or charitable subsidy for research is a substitute or supplemental way to induce investment, and over a large range of knowledge goods government funded research is often the source of knowledge that gets incorporated into knowledge goods.<sup>23</sup> A policymaker who wants to address the failure of the market to induce appropriate investment can choose between a property system and a subsidy system.<sup>24</sup> The two systems have unique advantages and disadvantages.<sup>25</sup>

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21. See, e.g., Carlos Correa, *Managing the Provision of Knowledge: The Design of Intellectual Property Laws*, in PROVIDING GLOBAL PUBLIC GOODS 410 (Inge Kaul et al. eds., 2003). The various elements of intellectual property law that make up these several dimensions are described in any good text on intellectual property law. See generally DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW (1992).

22. Intellectual property regimes are often a blunt instrument for achieving this balance because conditions differ across industries and technologies.

23. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

24. This underappreciated point—the substitutability of the two systems of incentives—is a central part of the analysis in Suzanne Scotchmer, *The Political Economy of Intellectual Property Treaties*, 20 J.L. ECON. & ORG. 415, 417 (2004) [hereinafter Scotchmer, *Political Economy*]; Nancy Gallini & Suzanne Scotchmer, *Intellectual Property: When Is It the Best Incentive System?*, 2 INNOVATION POL'Y & ECON. 51 (2002); Stephen M. Maurer & Suzanne Scotchmer, *Procuring Knowledge*, in 15 INTELLECTUAL PROPERTY AND ENTREPRENEURSHIP: ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND GROWTH 1 (2004).

25. A subsidy system spreads the burdens of the system among taxpayers, who may or may not benefit from the investment. The distribution of the burden depends on the tax rate. The subsidy can directly target certain fields for investment but is not subject to any penalty if the investment turns out not to be beneficial. A property system spreads the burdens of the system among those who buy the knowledge goods, and thus spreads the burden based on consumer preferences (given the ability of consumers to pay). It cannot induce

This two-dimensional model—the need to balance incentives and access—presents a fairly standard picture of the choices that inform intellectual property policy. Another important factor, however, is generally not given the recognition that it deserves—namely, distributive values.<sup>26</sup> Because the intellectual property system uses the market to generate the reward for investment in knowledge goods, the system absorbs the market's agnosticism about ability to pay. A two-dimensional property system assumes that ability to pay is not a relevant matter for consideration when the system is designed.

However, the question of what to do with consumers whose need is great but whose ability to pay is limited (that is, the distributive question) is an important part of the design of intellectual property systems. Although we are used to thinking of intellectual property as a system of incentives designed to correct the appropriability problem (and, therefore, as an efficiency-enhancing system), distributive issues are inherent in intellectual property design.<sup>27</sup> Naturally, the initial issue of intellectual property law is how to get the incentives right; but once the appropriate incentives are identified, the distributive question asks who should pay for those incentives and what influence a consumer's ability to pay (that is, existing wealth) should have on choosing who should pay.<sup>28</sup> That distributive question is analytically distinct from the issue of how much incentive we must provide to get an efficient level of investment in inventive activity. In other words, intellectual property design requires a two-step process. First, we must decide how much incentive to provide. Second, we must separately determine whether we obtain that incentive from one group of consumers or another.<sup>29</sup>

As I will argue in a moment, intellectual property law sometimes takes distributive considerations into account by providing access based on ability to pay. However, this is hardly the exclusive means by which policymakers in national systems are influenced by distributive concerns. First, national

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investment that is not projected to yield a profit under current rules of intellectual property but, by punishing those who make non-remunerative investments, enforces a kind of discipline on investment decisions.

26. The discussion of distributive values is drawn from Peter M. Gerhart, *Distributive Values and Institutional Design in the Provision of Global Public Goods*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 69 (Keith Maskus & J.H. Reichman eds., 2005).

27. Economists have recognized that although there is a unique stream of revenue that is associated with an efficient level of investment, there are a large variety of ways that a stream of revenue can be collected. Gene M. Grossman & Edwin L.-C. Lai, *International Protection of Intellectual Property*, 94 *AM. ECON. REV.* 1635, 1637 (2004).

28. See Scotchmer, *Political Economy*, *supra* note 24, at 415.

29. Margaret Chon makes much of the same point by arguing that international intellectual property should be infused with a norm of substantive equality that takes distributional concerns into account. See Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2813, 2821 (2006).

intellectual property systems are enacted against the backdrop of national systems of redistribution that shift the cost of access from poor users to the general community or even to rights owners.<sup>30</sup> This is an obvious point, but one that is often overlooked. In fact, we can go further, speculating that the freedom of policymakers to enact efficient systems for intellectual property, without regard to their distributive values, is enhanced by the knowledge that a strong social protection network will preserve access for those who are unable to pay for the knowledge goods.

Second, in national systems, our choice between a property system and a subsidy system depends not only on the nature of the inventive activity, but also on whether we want taxpayers or users (or both) to pay for the incentive.<sup>31</sup> We can choose publicly supported research when the benefits of the research are likely to be diffuse enough to justify asking taxpayers to fund it. Public support for cancer research is an example. Where the benefits are more focused, we can induce the research by granting property rights in it; this distributes the cost of the research among those who benefit from it. The choice between the two systems therefore turns in part on how we want to distribute the burden of paying the needed incentive.

Third, price discrimination is a way by which distributive concerns can be taken into account. By selling at lower prices to consumers with little wealth and at higher prices to consumers with greater wealth, a property owner can assure that the return will in fact reflect the ability of consumers to pay for the property.<sup>32</sup> Any government policy that facilitates such price discrimination—perhaps by helping the property owner disrupt the

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30. Governments can achieve such redistribution through direct transfer payments, by harnessing governmental purchasing power to drive prices down or by using price controls to guarantee access. Many industrialized countries, for example, impose price controls on patented prescription drugs. See Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 17 U. PA. J. INT'L ECON. L. 1069, 1074 (1996). Even in the United States, the federal government requires drug companies seeking Medicaid payments to provide rebates on Medicaid sales of some drugs. See 42 U.S.C. § 1396(r) (2000). The United States Supreme Court upheld a Maine statute requiring even greater rebates. See *Pharm. Research & Mfgs. of Am. v. Walsh*, 538 U.S. 644 (2003).

31. In the United States, after the Bayh-Dole Act of 1980, 35 U.S.C. §§ 200-204 (2000), there is a mixed system in which the federal government funds much university research but allows the universities to patent these research results for themselves. This is an explicit attempt to distribute some of the cost of the incentive to taxpayers and some of the costs to consumers.

32. Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation*, 1 J. INT'L ECON. L. 607 (1998); Patricia M. Danzon & Adrian Towse, *Theory and Implementation of Differential Pricing for Pharmaceuticals*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY* 425 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

arbitrage possibilities that would make the discrimination costly<sup>33</sup>—is enhancing the ability of the intellectual property system to respond to distributive goals.

Finally, as I have already acknowledged, distributive values are sometimes built into the design of intellectual property systems themselves, for intellectual property law often provides users with access to intellectual property that reflects the user's lack of financial resources relative to need.<sup>34</sup> Compulsory licensing is an obvious attempt to override normal property rights in order to reflect the impact of the denial of access to those who would have difficulty paying. Moreover, intellectual property systems highlight distributive concerns in less dramatic ways. For example, the exhaustion doctrine in copyright law gave us lending libraries and thus supported the distributive goal of providing access to those who could not otherwise pay for copyrighted literary property.<sup>35</sup>

In view of these distributive values, the balance that must be drawn when designing any intellectual property system involves three, not two, variables: the incentive variable (getting the right incentive for the efficient investment in innovation), the access variable (not unduly restricting access by overprotecting the intellectual property), and the distributive variable (determining how to distribute the burden of paying for the innovation among potential users). Moreover, because a subsidy system presents an

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33. Arbitrage occurs when someone buys the products in the low priced market and sells them in the high priced market. This breaks down price discrimination by making it harder to sustain the prices in the high priced market and by reducing the incentive and ability to maintain lower prices in the low-priced market. Arbitrage can be disrupted by any means that keeps the markets separate, including contractual restrictions on resale, product differentiation that make resale expensive, and government prohibitions on resale. In the international arena, the debate over whether countries should allow the importation of knowledge goods legitimately marketed abroad—the so-called exhaustion or parallel import issue—turns on various views about the benefits and detriments of arbitrage in the international system. See CIPR Report, *supra* note 10; Alexander J. Stack, *TRIPS, Patent Exhaustion and Parallel Imports*, 1 J. WORLD INTELL. PROP. 657 (1998); Richard P. Rozek & Richard T. Rapp, *Parallel Trade in Pharmaceuticals: The Impact on Welfare and Innovation*, 7 J. ECON. INTEGRATION 181 (1992); Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333 (2000).

34. TRIPS itself builds in flexibilities in the obligations that WTO members undertake in order to recognize that optimal policies will vary from country to country. See J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11, 28 (concluding that “the TRIPS Agreement leaves developing countries ample ‘wobble room’ in which to implement national policies favoring the public interest in free competition”); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 7 (2001) (highlighting the “constructive ambiguit[ies]” in TRIPS). Because these flexibilities provide countries with enhanced opportunities for access to knowledge goods that often reflect the country's wealth, these flexibilities can be considered distributive.

35. MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 8.13 (4th ed. 2005).

alternative way of dealing with the appropriability problem, the three variables of an intellectual property system must then be compared with the way the variables work themselves out in the alternative system of government subsidy.

Naturally, the balance that any country strikes between these various considerations depends on both the political and the social systems of the country. The political system matters because, in practice, the ability of any stakeholder to influence the outcome of the process depends on that stakeholder's ability to influence the process.<sup>36</sup> The social system matters because the balance of the various factors will depend on the country's capacity for innovation, the quality of the market, the legal system, and so forth.

In general, based on this analysis we can think of the intellectual property balance as the result of a struggle between knowledge producers (who want to increase incentives) and knowledge consumers (who want to preserve access), as well as between various classes of consumers or taxpayers (to determine what portion of the incentive each pays for).<sup>37</sup> Producers and consumers have shared interests in the sense that even knowledge consumers are willing to pay for beneficial innovations that would not otherwise occur, but they diverge when one considers that knowledge consumers do not want to pay any more than is necessary to induce that investment, while knowledge producers want to maximize the returns on their investment. On the distributive front, impecunious consumers would like to pay as little as possible to the producers, and wealthy consumers want to make sure that every consumer that uses the knowledge good contributes a fair share to its production.

Perhaps the best policy analogy, therefore, is to think of an intellectual property system as a form of a tax system. All observers agree that a tax system is a necessary way of financing investment that would not otherwise take place through the market (that is, investment in public goods), but everyone also agrees that the need to finance public goods is finite. And every

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36. The intellectual property field is therefore ripe for public choice theories, which emphasize the inclination of governments to respond more readily to producer interests than consumers' interests and to the interests of institutional consumers more readily than individual consumers. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (2004). It is a common theme in the international intellectual property arena that domestic producers of knowledge goods have "captured" the trade negotiators. See, e.g., Bronwyn H. Hall, *The Global Nature of Intellectual Property: Discussion* (2001), [http://emlab.berkeley.edu/users/bhhall/papers/BHH01\\_Toronto\\_Maskusdiscussion.pdf](http://emlab.berkeley.edu/users/bhhall/papers/BHH01_Toronto_Maskusdiscussion.pdf); Jean O. Lanjouw & Iain M. Cockburn, *New Pills for Poor People? Empirical Evidence After GATT*, 29 *WORLD DEV.* 265 (2001); GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 156, 159 (2003) (commenting on the study of the way that businesses influence decisions about which cases to bring before the WTO).

37. See generally JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* (1999).

tax system must make the distributive choice of how to apportion the financial burden among various classes of taxpayers. Similarly, almost no mature intellectual property system is set up on the premise that the protection of intellectual property (or the reward for innovation) should be unlimited, and every system must determine how to spread the financial burden of the system among potential beneficiaries of the system.

## B. International Policymaking

This search for an appropriate and balanced intellectual property policy has important implications when we move from the domestic to the international front. My claim is that bargaining by nation-states over international intellectual property cannot achieve the balance that any intellectual property system requires. Support for this claim comes from highlighting the ways in which the three relevant variables—incentives, access, and the distribution of burdens—get distorted when we make international intellectual property laws across borders.<sup>38</sup> Consider several characteristics of policymaking in the international system that makes it difficult to reach balanced outcomes.

### 1. *Nation-States Seek Wealth, Not Balance*

In the international arena, countries do not seek balance; they seek to advance their national welfare, usually in the form of wealth.<sup>39</sup> To an international negotiator, what matters is the impact of a proposed regime on the negotiator's country; negotiators from knowledge producing countries seek to maximize the return to their country's knowledge goods.<sup>40</sup> The negotiator values national income from intellectual property, and has no concern

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38. It is relevant to distinguish the analysis here from two other claims about the inadequate process for making international intellectual property policy. First, if the domestic intellectual property policy in major knowledge-producing countries is overly protectionist, then the exportation of that policy to other countries will result in a global system that is out of balance. This is one of the potent criticisms of the international system in Maskus & Reichman, *supra* note 15 at 295-99. The analysis here does not depend on showing that the intellectual property system of any country is unbalanced. Even if each national system has struck the appropriate balance, my claim is that negotiations over the expansion of those systems could not achieve balance. Second, and similarly, my analysis does not depend on showing that domestic producers have captured the domestic machinery for making either national or international intellectual property policy. Even if all relevant policymakers act in the national interest, the resulting international policy will be unbalanced.

39. See generally HOEKMAN & KOSTECKI, *supra* note 12, at 56-57.

40. Scotchmer, *Political Economy*, *supra* note 24, at 416; Maskus & Reichman, *supra* note 15, at 282-83, 287.

for the effects of any policy on foreign consumers.<sup>41</sup> Therefore, the goal is to capture profit abroad while minimizing payments of domestic consumers to foreign innovators. By contrast, negotiators from knowledge importing countries want to minimize payments for intellectual property and have no regard for the interests of foreign producers of knowledge goods.<sup>42</sup>

This tension embodies one of the profound effects of the internationalization of intellectual property. Knowledge producers have always emphasized their need for increased wealth in order to invest in new innovation.<sup>43</sup> In domestic circles, policymakers have always understood that this need must be balanced against the needs of consumers of knowledge goods.<sup>44</sup> With the internationalization of intellectual property, however, the producer's search for increased wealth is supported by nation-states.<sup>45</sup> What is good for Microsoft is now good for the United States, for more income from abroad is unambiguously good for United States' consumers.<sup>46</sup> As a result, the rhetoric by which we understand intellectual property has changed; the production of wealth is now often thought to equate with new investment, which gives intellectual property discourse a new emphasis on wealth rather than incentive. Rather than wealth being a means to an end (that is, to productive innovation), it is an end in itself.<sup>47</sup>

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41. See Scotchmer, *Political Economy*, *supra* note 24, at 416; Maskus & Reichman, *supra* note 15, at 282-83, 287.

42. The text refers to treaty-making through negotiations. Similarly, when countries seek to make new international law by seeking an interpretation through the WTO's dispute resolution system, the decision of whether to bring a case, and what points to argue, will also reflect the wealth that can be generated by securing a particular interpretation. Of course, that tendency can be tempered if the WTO panels and the Appellate Body interpret TRIPS in favor of access and against the creation of wealth. See generally Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INTELL. PROP. 493 (2000) (criticizing the decision in *Canada – Patent Protection for Pharmaceutical Products*, WT/DS114/R, March 17, 2000) (citation omitted), which invalidated a portion of Canadian law that increased access to generic medicines); see also Maskus & Reichman, *supra* note 15, at 308 (suggesting that Article XX of GATT could be interpreted as a general exception to TRIPS, allowing states to protect their reserved welfare powers).

43. See, e.g., SELL, *supra* note 11; RYAN, *supra* note 11, at 153-56.

44. It is inherent that intellectual property rights are limited in time and scope.

45. See SELL, *supra* note 11; RYAN, *supra* note 11, at 153-56.

46. Professors Maskus and Reichman refer to a possible "knowledge cartel" in the combination between private knowledge producers and their governments. See Maskus & Reichman, *supra* note 15, at 295. It should be noted, however, that such a cartel does not depend on traditional public choice theories. The public interest might be identical with the private interest and therefore could be chosen even if the relevant government policymaker is not influenced by the need to get private contributions or electoral support. Because intellectual property generates national wealth from foreign consumers, the interests of the people and the interests of a country's knowledge producers might well coincide.

47. One can also see this tendency in connection with the use of the WTO's dispute settlement system as well. Nation-states bring cases in order to protect the wealth interests of

## 2. *International Lawmaking is by Negotiation, Not Interest Brokering*

The parochial interests that countries bring to international lawmaking are not unlike the parochial interests that producers and consumers of knowledge goods bring to national lawmaking. Producers highlight the need for more incentives; consumers, the need for more access. Accordingly, it is common to model international lawmaking as a struggle between countries that produce knowledge goods and countries that consume knowledge goods. There is, however, another important difference between national and international lawmaking.

In domestic systems, the policymaker is not an advocate but a broker, weighing the interests of consumers and producers to find an appropriate balance. Admittedly, the policymaker's decision will be influenced by the political strength of consumers and producers and by the policymaker's own views and interests. But the policymaker is nonetheless an independent broker with substantial freedom to make decisions that the policymaker believes provide an appropriate balance. By contrast, in international negotiations, no broker makes the law. The policymakers and the interested parties are one in the same, and each policymaker has an incentive to advocate positions that are manifestly parochial and self-interested.

Theoretically, this system of making international policy by direct negotiations between self-interested countries could result in policymaking that reflects appropriate efficiency concerns. Unfortunately, the circumstances under which that might happen are extremely unlikely to occur. Consumers would require perfect information about the circumstances under which their interests coincided with producer interests, and bargaining power would have to be distributed in a way that kept the producers' interests from overreaching.

The most likely result when decisions are made without an independent broker/policymaker, even from an efficiency standpoint, is either under-protection or over-protection of property, depending on whether knowledge producers or knowledge consumers have greater bargaining power.<sup>48</sup> And the result is likely to be different for different knowledge goods. On the one

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their knowledge producers, where national wealth, not a balanced adjustment of the interests of consumers and producers is the goal.

48. The literature tends to move in two directions. On the one hand, many observers feel that developing countries did not make a good deal through TRIPS. See, e.g., Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs*, 36 CASE W. RES. J. INT'L L. 21 (2004); Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765, 779-80 (2002). On the other hand, intellectual property owners often point to leakages in their right when developing countries fail to enforce IP laws as evidence that IP owners got less than they bargained for. See generally ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* (1990).



hand, knowledge consumers could so dominate the negotiations, and so misunderstand their own interest, that the system would yield too few incentives for innovation, and the world would suffer. On the other hand, knowledge producers might dominate the negotiations in ways that resulted in the overprotection of knowledge goods that extract more consumer payments than an efficient system of innovation would require. It is impossible to say, *a priori*, which result might occur, and it is possible that the system might over protect some knowledge goods and under protect other knowledge goods. What we want to recognize at this point is that because international law is based only on negotiations between interested parties, the search for balance before an independent policymaker is not a part of the institutional framework.

### 3. *International Systems Do Not Deal Well with Distributive Issues*

Moreover, even in the unlikely circumstance that an appropriate efficiency balance might be reached through negotiations, the distributive issue—the determination of which consumers in which countries should bear the burden of providing the incentive—is simply not one that can be made in negotiations between countries. By their nature, distributive issues depend on value decisions that cannot reflect self-interest (at least not if self-interest is narrowly and proximately defined). Distributive decisions must reflect either enlightened (long-term) self-interest or a measure of altruism—that is, “other interest.”<sup>49</sup> Those interests are extremely difficult to reflect in direct negotiations that, by their nature, are designed to aggregate narrow self-interest. This is especially true when the issue is which consumers should bear what share of the burden of intellectual property protection. Under any reckoning of distributive justice, some wealthy consumers in poor countries ought to be treated the same as wealthy consumers in rich countries,<sup>50</sup> and that is a difficult distributive goal to achieve when a country is negotiating on behalf of consumers who are both rich and poor.

Whereas an efficient outcome can sometimes be achieved with only minimal institutional framework (the history of the General Agreement on

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49. This is the purpose of the Rawls’ theory of justice, which would put people behind a “veil of ignorance”—so that they do not know their particular situation and narrow self-interest—and to ask them what procedures and outcomes they would then value. *See* JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

50. Much of the literature on developing countries fails to recognize that even poor countries have rich members. The presence of rich people among poverty explains why some countries can grow and yet not eliminate poverty. The rich may get richer (allowing the country to grow) even if the wealth does not trickle down effectively. Indeed, it can be argued that poor countries remain poor precisely because their resources are poorly distributed; the correlation between poorly distributed resources and lack of growth seems to be high and several causal explanations can explain the correlations.

Tariffs and Trade (GATT), the World Trade Organization's (WTO's) predecessor, provides ample proof of that),<sup>51</sup> distributive outcomes clearly cannot be achieved without an institution that can find the common interest that transcends the parochial interests.<sup>52</sup> That is why countries set up legislatures to make distributive decisions. Legislatures can reflect the kind of basic values and shared goals that allow distributive policies to be enacted and sustained.<sup>53</sup>

The different institutional mechanisms for achieving efficient and distributive results have several implications for international intellectual property. In implementing national policy, we often create one set of institutions to achieve efficiency goals and another set of institutions to achieve distributive goals. For example, as already noted, we have a patent system for efficient allocation of investment incentives and a system of social safety nets to make access to knowledge goods available to the poor. Indeed, one hallmark of contemporary public policy in the domestic arena is the way we segregate the domain of efficiency goals from the domain of distributive goals. Thus, efficiency goals have come to fully dominate antitrust law,<sup>54</sup> while distributive goals that might have been incorporated into antitrust law have been relegated to policies of direct subsidization.<sup>55</sup> This strategy yields certain advantages institutionally and allows each nation to choose the mix of efficiency and distributive values that matches its preferences and situation.

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51. Generally, freely made exchange agreements enhance efficiency and require public institutional support only to enforce agreements and ensure that the exchanges were, in fact, freely made.

52. See generally Peter M. Gerhart, *Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT'L L. REV. 1045 (2001-02). Efficiency goals can generally be achieved through exchange; each party is made better off by an exchange and each party therefore has an incentive to move toward an efficient outcome through exchange. The only institutional framework that is needed to make exchanges work is one that will preserve the benefits of the bargain between the parties and check opportunistic strategies by one of the parties. Because distributive decisions make some people better off while others are made worse off, the institutional framework for distributive decisions requires greater sophistication in order to find ways of overcoming the objections of those who feel that the distribution decisions make leave them in a worse position.

53. Of course, the executive branch can also make distributive decisions, but given the ease of capturing the executive branch, distributive decisions made by executives alone often result in an increase, not a decrease, in the maldistribution of resources.

54. See, e.g., Mark D. Janis, "Minimal" Standards for the Patent-Related Antitrust Law Under TRIPS, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 774 (Keith Maskus & J.H. Reichman eds., 2005); Eleanor M. Fox, *Can Antitrust Policy Protect the Global Commons from the Excesses of IPRs?*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 758, 768 (Keith Maskus & J.H. Reichman eds., 2005).

55. See Janis, *supra* note 54; Fox, *supra* note 54.

In the international realm, however, we face a different reality. Although we have developed strong international institutions for creating wealth, we have no sound institutional mechanism for determining how that wealth should be distributed.<sup>56</sup> Reaching distributive goals requires a strong sense of shared community values or a belief that distributive goals are important components of efficiency goals. Thus far, no real community of nations has developed, in part because the nation-state stands in its way and in part because international negotiations define success in parochial, rather than communitarian, terms. Moreover, the link between distributive goals and individual or national welfare is blurred by the prevailing ideology that a rising tide lifts all boats and by some uncertainty about how to make redistributive policies work.<sup>57</sup>

As a result, although institutions like the WTO and World Intellectual Property Association (WIPO) promote an efficient system of global trade and investment, we have found no way to tax those who benefit from the efficiency of the global system in order to support those who do not.<sup>58</sup> The World Bank, the United Nations, and other organizations perform helpful functions in redistributing debt capital and channeling voluntary support, but they have not developed mechanisms of redistribution on the scale that is used by national governments.

To see the relevance of this for international intellectual property, just compare the distributive mechanisms that are available within a country to support distributive values<sup>59</sup> with those available across countries. Within countries, but not across countries, social safety nets support the distributive goals of any intellectual property system. Within countries, but not across countries, legislators can easily substitute a subsidy system for the property

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56. See generally Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'*, 6 J. INT'L ECON. L. 3 (2003).

57. See, e.g., WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001). For many, of course, redistribution policy plays no role in international economic matters. For example, the so-called Washington Consensus—that mix of policy advice that provides the outline of policy prescriptions for developing countries—is heavily weighted toward efficiency concerns, with scant attention paid to distributive issues, either within countries or between countries. See generally John Williamson & Stephan Haggard, *The Political Conditions of Economic Reform*, in *THE POLITICAL ECONOMY OF POLICY REFORM* 527 (John Williamson ed., 1994). Similarly, the prevailing globalization ideology that growth will come to countries that follow liberal economic policies leaves little room for redistributive policies. For work that appreciates the importance of distributive values, see DANI RODRIK, *THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK* (1999).

58. In the antitrust example given in the text, policymakers can achieve maximum efficiency for their economies by correctly enforcing antitrust laws and can then alleviate the burdens of a changing economy through worker retraining, unemployment insurance, and job placement.

59. See *supra* text accompanying notes 30-34.

system. Within countries, but not across countries, price discrimination can be used to meet distributive goals. Finally, although TRIPS provides transitional and access rights that can be characterized as distributive, the access rights are based on Western models.

A significant challenge that exists with regard to the provision of global public goods like intellectual property, therefore, is to determine whether a system that promotes efficiency values but not distributive values is sustainable, and we must consider whether long-term welfare might be improved if we could achieve a better mix of efficiency values and distributive values.<sup>60</sup> The issue of affordable medicine and global health policy elucidates the question, even if it does not show us a clear answer.<sup>61</sup> Proposals for a Global Fund for Medicines<sup>62</sup> and for mandatory transfer of technology to poor countries are but two ways of embodying the redistributive ideal by making sure that the international intellectual property system accommodates those who cannot afford access to those knowledge goods that are the foundation for human welfare.<sup>63</sup> Yet the institutional mecha-

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60. Robert O. Keohane made a similar point from the perspective of a political scientist, emphasizing that distributive issues in intellectual property are difficult to address internationally because international institutions are weak and power is distributed asymmetrically. See Robert O. Keohane, *Comment: Norms, Institutions, and Cooperation*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 65 (Keith Maskus & J.H. Reichman eds., 2005).

61. Almost as soon as TRIPS was signed, the AIDS crises focused attention on the fact that the payments for patented medicines that TRIPS would require would hamper the ability of countries to address the health needs of the patients. The international community responded in ways that effectively expanded the room that countries have to use the flexibilities of TRIPS to meet the health needs of their people. See generally Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317 (2005); Frederick M. Abbott, *Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 393 (Keith Maskus & J.H. Reichman eds., 2005); Patricia M. Danzon & Adrian Towse, *Theory and Implementation of Differential Pricing for Pharmaceuticals*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 425 (Keith Maskus & J.H. Reichman eds., 2005).

62. See The Global Fund Summary Report: An International Meeting to Support the Global Fund (2003), <http://www.theglobalfund.org/pdf/paris/summaryreporten.pdf>.

63. See, e.g., Carlos M. Correa, *Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 227 (Keith Maskus & J.H. Reichman eds., 2005); Pedro Roffe, *Comment: Technology Transfer on the International Agenda*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 257 (Keith Maskus & J.H. Reichman eds., 2005); Keith E. Maskus et al., *Patent Rights and International Technology Transfer Through Direct Investment and Licensing*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 265 (Keith Maskus & J.H. Reichman eds., 2005).

nisms for integrating these distributive values into the international system are rudimentary at best.<sup>64</sup>

4. *Positive Externalities are Not Necessarily Disincentives to Investment*

As indicated earlier, designing an intellectual property system is essentially the task of dealing with positive externalities (spillovers). Because knowledge can so easily be appropriated, the benefits generated by new knowledge must sometimes be internalized so that those who produce the benefits can be rewarded for their work. This is what intellectual property does. By creating property rights and giving the property owner the opportunity to charge a price that measures the benefit of the new knowledge to users, intellectual property effectively internalizes enough of the benefits of new knowledge to compensate the entity that developed the new knowledge. Finding the proper balance between incentive and access is essentially the task of determining what proportion of the external benefits

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64. The difficulty of incorporating distributive values in the international system is illustrated by the fact that transborder market mechanisms do not produce the kind of price discrimination that one would expect in a world where some countries are very poor and others are very wealthy. In a world where consumers have disparate incomes, it would be rational for a seller of knowledge goods to try to maximize returns by selling at low prices in poorer countries and at higher prices in wealthier countries (provided that the seller can keep arbitrage from disrupting the scheme). By having prices reflect disparate abilities to pay, markets often induce sellers to engage in the kind of price discrimination that increases access to products for low income consumers. When that occurs, prices reflect ability to pay and thus respond to the preexisting distribution of wealth. Yet studies have shown that in significant market segments, sellers of knowledge goods are not significantly lowering their prices to reflect the poverty of a country, choosing instead to sell fewer units to the (relatively few) customers who can afford to pay more for the product. See Catalin Cosovanu, *Piracy, Price Discrimination, and Development: The Software Sector in Eastern Europe and Other Emerging Markets*, 5 COLUM. SCI. & TECH. L. REV. 3, 13-18 (2003); F.M. Scherer & Jayashree Watal, *Post-Trips Options for Access to Patented Medicines for Developing Countries* 45-46 (Comm'n on Macroeconomics & Health Working Paper No. WG4:1, 2001), available at [http://www.cmhealth.org/docs/wg4\\_paper1.pdf](http://www.cmhealth.org/docs/wg4_paper1.pdf) (presenting evidence concerning patented medicines); Keith E. Maskus & Mattias Ganslandt, *Parallel Trade in Pharmaceutical Products: Implications for Procuring Medicines for Poor Countries*, in THE ECONOMICS OF ESSENTIAL MEDICINES 57 (Brigitte Granville ed., 2003). Producers may keep prices of IP products high because they are afraid that low priced units will be transshipped to other countries where prices are higher (thus eroding the revenue from rich countries) because even low prices are beyond the reach of most consumers, or because they hope that governments will increase investments to suppress piracy, thereby inducing even poor consumers to pay more for the product. See Keith E. Maskus, *Ensuring Access to Essential Medicines: Some Economic Considerations*, 20 WIS. INT'L L.J. 563, 566-67 (2001-02) (analyzing reasons for lack of price discrimination on essential patented medicines). For any of these reasons, the market is often not facilitating the kind of discrimination that would increase access to knowledge goods.

from the investment should be internalized and what proportion of the benefits need not be internalized.

Yet, the appropriate policy framework for addressing external benefits is exceedingly complex. Not all external benefits need to be internalized for efficient investment to take place.<sup>65</sup> Quite the contrary, external benefits that are not required to induce the activity that gives rise to the benefit are normally as free as the air, an unintended but welcome byproduct of the activity that gave the benefits in the first place. Free riding, a potent rhetorical tool for expanding intellectual property, is in fact generally tolerated and encouraged by law and public policy.<sup>66</sup> Intellectual property law is an exception to the general rule that external benefits ought to be in the public domain.<sup>67</sup>

In this regard, some of the international intellectual property literature proceeds from an analytical error because it assumes, as a general proposition, that the existence of external benefits will lead to underinvestment in the production of knowledge goods. Some economists, for example, believe that TRIPS successfully addresses the problem of external benefits because otherwise countries would tend to provide too little incentive because “some of the gains from innovation accrue to consumers and users in other countries, a benefit that framers of [intellectual property rights] would not take into account in setting domestic standards.”<sup>68</sup> Statements such as this express the notion that external benefits must be internalized through the intel-

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65. See generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005); see also Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 624-25 (2003); LANDES & POSNER, *supra* note 23.

66. Professor Lemley notes that:

Positive externalities are everywhere. We couldn't internalize them all even if we wanted to. Areeda and Hovenkamp offer numerous examples of uncompensated positive externalities. They conclude that ‘free riding on the positive externalities created by others is everywhere, and society does little to eliminate it.’ And as noted above, there is no reason we should particularly want to do so. If ‘free riding’ means merely obtaining a benefit from another’s investment, the law does not, cannot, and should not prohibit it. If the marginal social cost of benefiting from a use is zero, prohibiting that use imposes unnecessary social costs.

Lemley, *supra* note 65, at 1049 (internal citations omitted).

67. See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (identifying a privilege to compete when copied elements are not protected by intellectual property law); *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968) (noting privilege to use another’s name in a descriptive sense to compete); *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909) (endorsing the privilege to take another’s customers by competition).

68. Maskus & Reichman, *supra* note 15, at 285. See, e.g., Phillip McCalman, *National Patents, Innovation, and International Agreements*, 11 J. INT’L TRADE & ECON. DEV. 1, 4 (2002); Scotchmer, *Political Economy*, *supra* note 24, at 417. The desire to capture these external benefits was, of course, an important part of the argument by the United States for the geographic expansion of intellectual property. See generally U.S. INTERNATIONAL TRADE COMMISSION, *FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE* (1988).

lectual property system in order to get the right amount of investment in innovation.

As a general matter, this view is erroneous.<sup>69</sup> One cannot deny, of course, that an innovator's difficulty in capturing the benefit of an invention may discourage investment. A country with a small market is unlikely to be able to support innovation for that market unless it can also capture the benefits that occur in other markets by internalizing them.<sup>70</sup> And we know that investment in cures for certain diseases is systematically deficient when the market for those cures is too small to support research.<sup>71</sup> These are both instances in which it is accurate to claim that external benefits must be captured. But this does not mean that *all* external benefits must be internalized if appropriate incentives are to be given, or that the existence of external benefits necessarily discourages investment.

In this respect, external benefits must be distinguished from external costs. Costs make people worse off, and therefore must be allocated so that they can be minimized; benefits, however, make people better off, so there is no reason, at least in principle, why they need to be reduced or rationed.<sup>72</sup> When a driver hits a pedestrian, we cannot avoid asking whether the loss should be borne by the driver or the pedestrian, which is the same as asking whether the cost should be internalized to the activity of driving or to the activity of walking.<sup>73</sup> But when a person plants a flower garden in front of her home and the benefit she receives outweighs the cost of the planting, there is no reason to ask whether others who enjoy the beauty of the flower garden should pay for it.<sup>74</sup> The enjoyment by others is not something that

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69. The important point often missed in the discussion of external benefits, and one particularly missing from the discussion of international intellectual property, is that the value of the benefits that are conferred on others is an independent source of demand for the product; it should not be treated as a part of cumulative demand. If the demand that represents how much people would pay for the external benefits is less than the demand that the seller faces, the seller will provide the external benefits simply by meeting the demand of those who are willing to pay the seller for the non-excludable benefits.

70. See Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution,"* 3 CHI. J. INT'L L. 47 (2002).

71. *Id.*

72. See Lemley, *supra* note 65.

73. In other words, when losses occur we cannot avoid deciding whether the losses should lay where they fall or whether they should be allocated to another person. That is the function of tort law. The losses are an externality that must be allocated to either driving or to the injured pedestrian. In general, if the defendant is negligent the losses are allocated to the defendant (they become an externality of driving) if not, the losses remain with the victim (and are therefore internalized to the act of walking). See, e.g., *Hammontree v. Jenner*, 97 Cal. Rptr. 739 (Cal. Ct. App. 1971) (holding victim of driver who had a seizure must bear the loss and cannot seek compensation).

74. This is true whether the benefit to the homeowner is derived from the homeowner's personal satisfaction, from the reputation value of being well-thought-of, or from the

must be rationed, and the fact that others enjoy the garden is not an externality of the garden that needs to be considered when assessing incentives to plant flowers.

In other words, a person's incentive to invest in an activity whose benefits can be appropriated by others is not necessarily deterred from engaging in profitable investment just because benefits are bestowed on others.<sup>75</sup> This is true even if the person doing the appropriation is a potential competitor of the person doing the investing.<sup>76</sup> Consider the flower farmer who can increase his yield by investing in bees to pollinate his flowers. He knows that his neighbor, also a flower farmer, may benefit from his investment if bees stray into the neighbor's flower fields. What factors does the farmer consider when deciding whether to invest in more bees and what influence does the external benefits have on his decision? Naturally, the farmer considers the costs and benefits of the bees to him and will invest in the bees whenever the expected private benefits exceed the expected private costs. He will not automatically consider the benefits to the neighbor to be a deterrent to making the investment, as long as his private benefits exceed his private costs. To him, the benefit to others is not relevant to whether he makes the investment.

Admittedly, if the benefit to the neighboring farmer allows the neighbor to have a competitive advantage (because the neighbor can free ride on the bees), that benefit becomes a cost that the first farmer must consider. If that cost is high enough, the farmer who is thinking of investing in bees may decline to make the investment, and as a result both farmers will be worse off. But whether that occurs is an empirical issue, and even benefits that give a neighbor a competitive advantage will not necessarily deter the initial investment.<sup>77</sup> The benefit to the neighbor may indeed become a cost to the first farmer, but the total cost of the investment to the first farmer may still be less than his total benefit. When it is, the first farmer will make the investment. Businesses make investments all the time that they know will benefit their competitors, and businesses are not necessarily deterred from making the investment simply because their investment bestows benefits on others.<sup>78</sup>

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homeowner's knowledge that others will enjoy the garden (that is, from the pleasure of giving pleasure to others).

75. See Lemley, *supra* note 65.

76. *Id.*

77. *Id.*

78. We need look no further than intellectual property law itself to see this. Investment in innovation is made even when the investor knows that after the period of protection the investor will not capture the external benefits of the investment, and even knowing that exceptions to the property rights may allow some users to capture the external benefits of the knowledge. Outside of intellectual property law, of course, the general rule is that competitive imitation is privileged, and yet firms make investments knowing that the benefits of the



The factors that influence the public policy toward external benefits have important implications for our discussion of international intellectual property law. Under this analysis, countries with large markets are not necessarily deterred from increasing investment in innovation just because the innovation will benefit people in other countries. For example, knowledge producers in a country like the United States are not deterred from investing in remedies for high cholesterol or impotence just because the research may benefit people in other countries who do not have to pay for the investment. The United States market is large enough so that the benefits to the United States citizens who must pay for those knowledge goods can fully compensate those who invest in producing the knowledge goods. That incentive for investment is not diminished by the fact that consumers in countries without patent systems can free ride on that investment.

It is therefore a mistake to suggest that external benefits will necessarily deter investment, or that external benefits will deter the countries of the world from reaching optimum incentives for investment in knowledge goods.<sup>79</sup> In a number of instances, the appropriate incentives will emerge simply because countries determine that the private (domestic) benefits of such investment outweigh the private (domestic) costs.<sup>80</sup> Some extraterritorial incentive to invest may be required when markets are not large enough to support optimal investment,<sup>81</sup> but one must remember that overinvestment can be as inefficient as under investment.

The same point can be made another way—by inverting the normal intellectual property paradigm. The conventional paradigm stresses those instances in which external benefits must be internalized to enhance efficient markets, but the paradigm can easily be restated in terms of what should not be protected. Because many external benefits are benign and do not deter efficient investment, one can view the goal of any intellectual property system to be to maximize the external benefits of innovation, consistent with generating enough reward for the producers of knowledge goods to stimulate investment that would not otherwise take place. As a

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investment will be shared with competitors. A firm may lower its prices to see whether sales go up; if sales go up, competitors imitate the behavior and reap some of the benefit of the investment the firm made in lower prices. *See generally* Reichman, *supra* note 34.

79. *See* Lemley, *supra* note 65.

80. This is especially true given the huge markets that are bound together by harmonized intellectual property law in North America, Europe, and Japan—a harmonization that evolved relatively naturally.

81. This is the general but narrow point made in Sykes, *supra* note 70. Moreover, one prominent group of experts concluded that because markets in poor countries are unlikely to support research and development costs even if a property rights solution were available, the only effective way of insuring investment in orphan drugs is through public support for relevant research. *See* CIPR Report, *supra* note 10, at 29-52.

society, we should celebrate the generation of external benefits and not denigrate them, for external benefits mean increased consumer welfare.

5. *The Exchange Model Does Not Work for International Intellectual Property*

Thus far, I have made four general points: (1) in international negotiations each nation seeks to maximize its own wealth or welfare, (2) international policymaking is done without an external decision-maker, (3) distributive issues are ignored in international negotiations, and (4) large countries are not deterred from adopting efficient investment policies just because people in other countries benefit from the investment. In light of those factors, negotiations over intellectual property using the traditional forums of the WTO cannot achieve the right balance between producer incentives and consumer benefits.

The WTO makes international policy through reciprocal exchanges between countries.<sup>82</sup> One country gives up a policy (say high tariffs) that is detrimental to a second country, and the second country gives up a policy (*its* high tariffs) that is detrimental to the first country. This exchange model works reasonably well when dealing with tariff and non-tariff barriers. Through the exchange, inefficient policies are bargained away and both countries are, for that reason, made better off. Global efficiency is increased, which is a benefit to everyone.

However, this exchange model is ill-suited for the task of making international intellectual property policy.<sup>83</sup> One reason that the WTO exchange is a poor mechanism for making global policy for knowledge goods is that bargaining power at the WTO is unevenly distributed.<sup>84</sup> Countries with large markets have more to offer than countries with small markets and therefore can exact better terms in any exchange.<sup>85</sup> Countries with such power also have the ability to break up countervailing coalitions of small countries by using bilateral and regional agreements to leverage their pow-

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82. See generally Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 12-17 (2003) (describing WTO functions).

83. Professors Maskus and Reichman have noted the irony of incorporating a system regulating property rights within a system that is designed to free global trade from government restrictions. See Maskus and Reichman, *supra* note 15, at 292. Although a well-designed intellectual property system is consistent with a well-designed market system (because both are designed to enhance efficient resource allocation), the institutional mechanisms by which competition is promoted are not necessarily appropriate mechanisms for determining when competition should be curtailed.

84. See Maskus & Reichman, *supra* note 15, at 294 (referring to both the knowledge gap and the power gap between developed and developing countries).

85. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 55 INT'L ORG. 339, 341-47 (2002).

er.<sup>86</sup> They can use preferential access to leverage their power.<sup>87</sup> They can use the promise of reciprocal treatment to leverage their power.<sup>88</sup> This allows large countries to hold on to their bargaining power longer than would otherwise be possible. When bargaining over new forms of wealth is influenced by the existing wealth of a country, the exchange model may merely perpetuate wealth disparities.<sup>89</sup>

I do not rest my case only on the problem of disparate bargaining power, though. My argument is that even if bargaining power were more evenly distributed, the exchange model is not appropriate for intellectual property policymaking.

As we have seen, in any negotiation over intellectual property, each country is negotiating to increase its own wealth from knowledge goods.<sup>90</sup> In this respect, negotiations over intellectual property give the appearance of being just like negotiations over tariff and non-tariff barriers, though they are quite different. In tariff negotiations, each country is made better off by the exchange because its export opportunities increase and its consumers

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86. See Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79 (2004); Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53 (2004); Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765 (2002); Peter Drahos, *BITS and BIPS: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791 (2001); Keith E. Maskus, *Strengthening Intellectual Property Rights in Lebanon*, in CATCHING UP WITH THE COMPETITION: TRADE OPPORTUNITIES AND CHALLENGES FOR ARAB COUNTRIES 251 (Bernard Hoekman & Jamel Zarrouk eds., 2000); Okediji, *supra* note 13, at 125; DAVID VIVAS-EUGUI, QUAKER UNITED NATIONS OFFICE, REGIONAL AND BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE FREE TRADE AREA OF THE AMERICAS (FTAA) 3 (2003), available at <http://www.quono.org/geneva/pdf/economic/Issues/FTAs-TRIPS-plus-English.pdf>.

87. Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L L. & COM. REG. 515 (2005).

88. Non-reciprocal provisions extend intellectual property protection to citizens of other countries whether or not those countries give reciprocal treatment to the first country. Reciprocal provisions extend national treatment obligations only to citizens of countries that give citizens of the first country reciprocal rights. Powerful countries can therefore use the promise of national treatment, and the denial of national treatment status, to induce other countries to grant its citizens rights in order to earn the reciprocal rights from the powerful country for their citizens. The use of reciprocal leverage in intellectual property is reviewed in Yu, *supra* note 4, at 375-81.

89. See PETER DRAHOS & JOHN BRATHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002); Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, in INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 243 (Adam D. Moore ed., 1997). The notion that negotiations may perpetuate wealth disparities is at odds with the dominant picture of the WTO as an organization built on principles of reciprocity, mutual benefit, and the rule of law. See, e.g., JOHN H. JACKSON, THE WORLD TRADING SYSTEM 109-11 (2d ed. 1997).

90. See *supra* text accompanying notes 42-47.

benefit from lower import prices. The negotiation is therefore a positive sum game with net winners on both sides. In intellectual property negotiations, however, an increase in one country's wealth from knowledge goods is a decrease in another country's wealth from knowledge goods. This is because once the knowledge is produced and encapsulated as property, it must be rationed through the market system.<sup>91</sup> This marketing, in turn, makes the decision to create property rights a zero sum game.<sup>92</sup> Producers of knowledge goods win, while consumers of knowledge goods lose.

In other words, the purpose of intellectual property negotiations is to determine how much of the knowledge already generated in the world should be encapsulated in a property regime. That decision is necessarily a decision to shift wealth from consumers to producers without necessarily creating any new knowledge (for the knowledge has already been created), and the negotiation is necessarily over how to split a fixed pie rather than negotiations over how to make the pie bigger.

Admittedly, if the decision to shift wealth from consumer to producer increases the level of innovation in an efficient direction, then the negotiation is not over a zero sum output, and the negotiation would increase global welfare. But that is not what negotiators are trying to achieve: when the United States goes to the negotiations, it is seeking to increase the wealth *from* its portfolio of knowledge goods, not to increase the portfolio *of* its knowledge goods. It simply wants to capture a larger share of the benefits its innovations create as a goal in itself rather than as the means to increasing investment in innovation. The goal is to induce other countries to pay more for knowledge already generated rather than to pay for investment in new knowledge.

To see this, consider the following thought exercise: when the United States, with its large market, adopts an intellectual property regime that it thinks will induce an efficient level of domestic investment, a level that matches the benefit of additional investment against the higher prices generated by intellectual property protection. It sets that policy without regard to external benefits to other countries, for as has been shown, in the great majority of cases those benefits are irrelevant to decisions about domestic policy. What it tries to achieve through international negotiations is to increase the returns to its knowledge goods by convincing other countries to

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91. See Scotchmer, *Political Economy*, *supra* note 24, at 426-35.

92. The market system generally yields positive sum results because the exchange of money for goods (or even goods for goods) makes both parties better off. Because the information that is encapsulated in property would otherwise be free, market transactions in intellectual property make one person pay for something that would otherwise be available for nothing. See Peter S. Menell, *Intellectual Property: General Theories*, in 2 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 129 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

pay for them (by adopting intellectual property systems). That strategy makes perfect sense from a domestic standpoint, for the increased revenue is a benefit to the United States even if it does not lead to an increase in investment in new knowledge goods. It occurs because, as we have said, when the United States is acting in the international arena, it is trying to maximize its wealth, not find the right balance between incentive and access.

The mistake is to assume that because the United States has increasing revenue from knowledge goods it will have an efficient increase in investment in new knowledge goods. This is to confuse necessity with sufficiency. It is, of course, necessary to provide a stream of income to knowledge producers in order to induce them to invest in new knowledge. But providing a stream of income does not guarantee that investments in innovation will be efficient. It is not true that the more revenue one provides to knowledge producers the greater the level of efficient investment. By the hypothesis that underlies the intellectual property model, the additional revenue may lead to investment that is wasteful rather than efficient. Were it otherwise, patents would be of unlimited duration and geographic scope. The fact that the intellectual property paradigm is one of limited property rights shows that throwing money at the problem of knowledge creation is not sufficient for efficient knowledge creation.<sup>93</sup> Access to knowledge and competition over knowledge goods also matter.

To put the matter another way, as the geographic (or any other) dimension of intellectual property protection grows, some other dimension of intellectual property protection should shrink in order to keep the system at the correct balance. The United States will erect a system for producing knowledge goods that is well balanced for the market that its knowledge producers can serve. If the United States is then able to expand that market for knowledge goods by inducing other countries to protect intellectual property, its revenues will increase. Given the assumptions that we have already made, however, those additional revenues do not induce efficient investment because the system was already producing sufficient revenue to induce an efficient level of investment (otherwise it would have been changed domestically).<sup>94</sup> The additional revenue is simply a transfer from

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93. Lemley, *supra* note 65, at 1058-65 (explaining the problems of overcompensating investment in knowledge).

94. Alan Deardorff has made the point that establishing intellectual property in only one part of the world can maximize the incentive to invest in innovation. Alan V. Deardorff, *Welfare Effects of Global Patent Protection*, 59 *ECONOMICA* 35 (1992). There is, in other words, a unique stream of revenue that is associated with an efficient level of investment. Whether that revenue comes from one group of countries or another group of countries is a separate choice that must be made. There are a large variety of combinations of countries that could provide the appropriate revenue. See Gene M. Grossman & Edwin L. C. Lai, *International Protection of Intellectual Property*, 94 *AM. ECON. REV.* 1635, 1637 (2004).

consumers (foreign) to producers (United States). This is a benefit to the United States, not to global efficiency in investment in knowledge goods.

Contrast this scenario with what should happen when the geographic scope of protection (or any other dimension of intellectual property protection) increases. An increase in the foreign revenue to United States producers of knowledge goods should allow the United States to decrease the domestic revenue from the sale of knowledge goods. The revenue from greater geographical protection should be offset by the decrease in revenue from domestic protection (perhaps by lowering the length of protection domestically, for example). That does not happen, of course, because there is no institutional mechanism for matching the costs and benefits of new innovation and assessing costs based on benefits. Producers of knowledge goods in the United States get to keep the extra revenue for greater geographic protection without generating any efficient new innovation.

All of this is to say that the design of intellectual property systems requires very careful attention to distributive issues, and those distributive issues are difficult to address when law is made by exchanges between nation-states. Not only does the system tend to overprotect intellectual property, but the system has no way of determining how much of the necessary contribution to the innovative enterprise should be paid by one group of consumers over another. The “one size fits all” nature of intellectual property, without a method of adjusting the contribution to reflect the ability to pay or some other basis for assigning costs, inevitably leads to too much protection and too little access for those who need the knowledge goods.

## II. REALIGNING INTERNATIONAL INSTITUTIONS

Thus far, I have argued that the tragedy of TRIPS is the attempt to make global policy toward intellectual property through the interaction of heterogeneous nation-states using an exchange model.<sup>95</sup> My basic argument is that an exchange model makes it impossible to find the balance between the interests of knowledge producers and knowledge users, taking into account the need to distribute the burdens and benefits of the system among consumers with different levels of wealth, both within and across nation-states. Under an exchange model, nation-states seek to improve their individual wealth, while intellectual property policy requires an institutional framework that can achieve balance between the necessary incentive and access (that is, between private and public domain property), and accomplish a distribution of the burdens and benefits of the system that reflects appropriate distributive values.

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95. See *supra* text accompanying notes 83-94.

The question remains: what institutional redesign might bring us closer to the ideal?<sup>96</sup> I am happy to offer some suggestions. When looking for new institutional designs, however, we run into a dilemma. No machinery exists for making international policy other than through the interaction of nation-states, and that interaction has already led to the institutional framework that I criticize. It will, in other words, take the community of nation-states, the very group that supports the present institutional arrangement, to design better institutional arrangements, and it is not clear why they would be inclined to do so. As a result, proposals designed to restore balance to the international intellectual property system are likely to look impractical or merely hortatory. If the problems stem from the inadequacy of policy made by bargaining between nations, what would cause the countries that drive the system to recognize different incentives or give up bargaining power?

I propose to address this dilemma by considering institutional design at two levels. First, I propose particular institutional arrangements that would respond to the problems already identified, and thereby reduce the distortions in the current system. Second, I propose to discuss factors that would induce countries to move toward the designs that are available. The first discussion shows how institutional arrangements might be set up to address the current distortions. The second discussion shows why nation-states, responding to changing conditions, might find those institutional arrangements attractive.

At the outset, it might be helpful to discuss, at a general level, the relationship between the existing problems, the proposed solutions, and the reasons why the nation-states of the world might, over time, find the solutions to be palatable. Broadly speaking, the major problems are distributive problems—that is, questions of who should bear the costs of inducing efficient investment in innovation and problems of how we bargain for efficient allocations of investment when bargaining is based on national, not global, interests.<sup>97</sup> Accordingly, the recommended solutions are distributive solutions—namely, institutional mechanisms that take into account distributive values or that compensate for the ill effects of existing maldistributions of wealth.

Because I am seeking distributive solutions to distributive problems, the practical question of implementation through the community of nation-states resolves itself into determining whether nation-states will incorporate distributive values into their policymaking. The source of current distor-

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96. The recent call by two of the most knowledgeable international IP scholars for a “moratorium on stronger international intellectual property standards” would set the framework for a reconsideration of the institutional mechanisms through which we make international intellectual property policy. See Maskus & Reichman, *supra* note 15, at 312.

97. See *supra* text accompanying notes 27-34.

tions is that each nation-state identifies its interests separately from the interests of other nation-states, without appreciating the effect of its position on other nation-states. By contrast, distributive solutions assume that nation-states begin to understand the ways in which their interests depend on advancing the interests of other nation-states, so that each nation is willing to look beyond its narrow self interest and sacrifice on behalf of the collective. When they do, distributive values will begin to shape the institutional design of the international system.

Of course, that does not imply that international institutions are bereft of any mechanism for considering distributive values.<sup>98</sup> Instead, this merely shows that distributive values are neither well-entrenched nor well-specified in international institutions. Before outlining some of the ways in which distributive values inherent in intellectual property law can be given a more central focus in international institutions, it might be helpful to briefly summarize existing mechanisms that give international law a distributive element.

First, of course, foreign aid can be explicitly redistributive, especially when it is not tied to the narrow self-interests of the donor country.<sup>99</sup> The Millennium Development Goals have been supported by contributions from wealthy countries that seek to increase global redistribution.<sup>100</sup> In the intellectual property arena, some of the aid that is given for capacity building—that is, aid that is intended to help developing countries negotiate or imple-

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98. I have argued that the WTO negotiations are sometimes capable of making distributive choices. See Gerhart, *supra* note 52. I have also argued that the Appellate Body is capable of taking distributive values into account. See Gerhart & Kella, *supra* note 87. And, of course, institutions like the United Nations and international non-profit organizations perform distributive functions.

99. To the extent that donor countries condition their foreign aid on the recipient country agreeing to conditions that benefit the donor country, the altruistic, distributive character of the aid may be reduced. See Gerhart & Kella, *supra* note 87. It is helpful to consider the impact of various conditions on the nature of the distribution that aid really confers. Sometimes, the conditions on which foreign aid is given are designed to ensure that the aid is used in the interest of the recipient country, rather than being siphoned away through corruption by the recipient country's government. At other times, conditions on which foreign aid is given benefit the donor country without hurting the recipient country. This occurs, for example, when the foreign aid requires the recipient country to purchase goods from the donor country, a condition that may bind the recipient country but that also creates a "win-win" situation that may make the donation possible in the first place. To the extent that conditions put on foreign aid hurt the recipient country, of course, the redistributive impact of the aid is diminished.

100. See Abdel Hamid Bouab, *Financing for Development, The Monterrey Consensus: Achievements and Prospects*, 26 MICH. J. INT'L L. 359 (2004) (reviewing the 2002 conference on assisting developing countries, including more aid).



ment agreements more wisely—is a form of redistribution.<sup>101</sup> Although one may be skeptical of the amount or effectiveness of such aid, its existence suggests that redistribution is possible.

Second, implicit redistribution goes on through regime shifting.<sup>102</sup> This occurs because some international institutions, such as the World Health Organization or various human rights agencies, have an explicitly distributive agenda. Their concern for those in need serves as an international counterbalance to institutions like the WTO that focus more clearly on international efficiency. As scholars have shown, by shifting select portions of the international intellectual property agenda from WIPO and the WTO to the other institutions, developing countries and others interested in the rights of intellectual property users have successfully broadened the agenda for international intellectual property to include non-efficiency values.<sup>103</sup>

Of course, redistribution of a kind occurs when developing countries insist that obligations they had previously undertaken be rolled back. When, at the start of the Doha Round, developing countries refused to negotiate until developed countries had refined and broadened rights of access available under TRIPS, they were successful in getting at least some additional flexibility in the obligations they had previously undertaken.<sup>104</sup> If the poor countries of the world could find a basis for forming coalitions to negotiate for greater access, their access to intellectual property or for the recognition of distributive coalitions would likely be improved.<sup>105</sup>

Finally, transition periods that allow poor countries greater latitude in complying with TRIPS obligations are a form of redistributive policymak-

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101. The WTO capacity building programs and their funding are described at World Trade Organization, Doha Development Agenda, Trade Capacity Building Database, <http://tcdbd.wto.org/> (last visited June 10, 2007).

102. See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) [hereinafter Helfer, *Regime Shifting*] (describing redistribution through regime shifting); Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123 (2004). See also JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 564-71 (2000) (detailing ability of powerful states to leverage their power by shifting the agenda from one international forum to another). For other discussions of the nature of the repeat negotiating process that leads to international intellectual property, see Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT'L & COMP. L. 315 (2003); Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004).

103. *Id.*

104. Gerhart, *supra* note 52, at 1074-81.

105. See Maskus & Reichman, *supra* note 15, at 311 (suggesting that developing countries could be “defenders of the competitive ethos” by representing the interests of both consumers and follow-on inventors).

ing, since they explicitly take into account a country's poverty in determining what share of the incentive for the production of knowledge goods the country must bear.<sup>106</sup> In a similar vein, when one country implicitly or explicitly tolerates violations of TRIPS by another country, it is acquiescing to behavior that reduces the burden of that country to contribute to the global incentive for innovation.<sup>107</sup> To the extent that this toleration is based on the other country's poverty, it can be taken to be redistributive.

The world is therefore not bereft of distributive values. The important element is to capitalize on these humanitarian but largely donative instincts and build better international institutions for redistribution. Let us turn first to possible solutions, followed by a discussion of trends that may turn those possible solutions into practicable ones.

#### A. The Possible Solutions

Building on these initial moves toward formulating distributive values within the international policymaking system, more systemic ways of thinking about institutions for making intellectual property law may cast future proposals in a more refulgent light. I offer thoughts about two types of solutions: the first is directed at the distributive values that are important in achieving balance in any intellectual property system, and the second is directed at the problem of bargaining power that distorts the efficiency of the international system for intellectual property.

##### 1. *The Redistributive Solutions*

The keys to any distributive solution are to: (1) recognize that international cooperation creates winners and losers; (2) identify the winners and losers; and then (3) find a way to shift some of the gains of cooperation from winners to losers. Because the winners have to buy into this system, it is important that the winners be able to keep a large portion of their gains while also understanding that their long-term interests require some sacrifice of their short-term gains. The winners are, after all, the beneficiaries of the system, and must recognize that as beneficiaries they have a special interest in the system's growth and prosperity. When they recognize that their self-interest and their interests in systemic success are identical, sharing is possible.

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106. See Gerhart, *supra* note 52, at 1076.

107. *Id.* at 1086.

## a. A Redistributive Tax

The easiest option is to tax the increased wealth of those who gain from the international intellectual property system and then use that revenue to meet the distributive goals of the system. Naturally, such a system seems to be particularly far-fetched. Attention to several important features of any such system would not only increase acceptance of the system, but would also serve to address concerns that naturally arise in implementing redistributive systems. First, the system should impose a tax only on increases in wealth generated by the international system. The tax, in other words, should be based not on the wealth of those who gain from the system, but instead on the increases in wealth that the system generates for them. In that way, incentive distortions would be minimized, and those who gain from the system would recognize that their contributions to the redistributive aspects of the system would be measured by the extent to which the system increased their welfare.

Second, to insure accountability, policymakers would have to carefully establish the institution that would determine how the tax proceeds would be distributed.<sup>108</sup> Such a redistributive tax would work best if the distributions were geared to specific goals with measurable outcomes (so that all institutions could be held accountable) and if the distributions could be steered around governments, where corruption might impose an additional tax on the proceeds, and directly to recipients who could put the money to work.<sup>109</sup> Finally, such a system would work best if the entities that paid the tax might also benefit in some indirect way from the disbursements to needy recipients. That would not only reduce resistance to such a system, but would also increase the sense of shared commitment to a common goal.

Consistent with these guidelines, one can imagine the following kind of arrangement. The international system could impose a tax on increases in transnational royalty payments for pharmaceuticals between developed countries. This tax would be paid only on annual increases on transnational patent royalties, and only by companies in countries that could distribute the burden of the tax internally (so that poor consumers adversely affected by the tax could be compensated with internal transfers). Individuals or health ministries in countries that could not otherwise afford the medicines would

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108. The discussion here is meant to counter the frequent suggestion that distributive policies do not work effectively because too little of the money gets to those who need it. This is a frequent criticism, for example, of foreign aid. EASTERLY, *supra* note 57, at 25-44. These criticisms are being countered by those who think that giving aid directly to people, and by-passing governments, can be done effectively. See, e.g., JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005).

109. This is one of the attractions of micro-finance, which provides small loans to individuals. See the Microfinance Gateway, Frequently Asked Questions, What is Micro-finance?, <http://www.microfinancegateway.com/section/faq#Q1> (last visited June 10, 2007).

then use the proceeds to subsidize the purchase of pharmaceuticals.<sup>110</sup> Appropriate protections would insure that the medicines actually got to the people who needed them, and the results of the plan could be measured in quantifiable terms relating either to the decrease in disease or the increase in medicine usage. Under this plan, pharmaceutical companies would, in effect, be acting as the conduit for transfer payments from consumers in wealthy countries to consumers in poor countries.<sup>111</sup> This is an entirely appropriate way of integrating distributive values into a system designed to induce and reward innovation.

b. An International Fund for Innovation

One should not underestimate the power of self-interested partnerships that exist between entities affected by the international intellectual property system, for these partnerships provide the basis for additional strategies of redistribution. Some, indeed, are already being implemented.<sup>112</sup>

Consider, for example, the interests of vaccine manufacturers. Because economies of scale and scope limit their markets, it is often unprofitable for vaccine manufacturers to produce vaccines unless they can expand their market.<sup>113</sup> They must sell enough to get their average costs down, and this occurs only at very large volumes of production. Moreover, because vaccines must be cooled throughout the distribution process, wide geographical distribution often requires expensive distribution channels or mul-

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110. This program could thus supplement the work already being done by the Global Fund for Medicines. See The Global Fund Summary Report, *supra* note 62.

111. As the example in the text shows, the struggle is not really between multinational pharmaceutical companies and poor countries, the struggle is really between various classes of customers of the pharmaceutical companies. The real issue is which group of consumers should provide the incentive for the development of the pharmaceuticals and which group of consumers should have below cost access. The pharmaceutical companies do not have a stake in the outcome of that debate as long as their incentive to make efficient investments in new products is not impaired.

112. Particular proposals for helping poor countries buy medicines are put forward in Mattias Ganslandt et al., *Developing and Distributing Essential Medicines to Poor Countries: The Defend Proposal*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 207 (Carston Fink & Keith Maskus eds., 2005), and Jeffrey Sachs et al., *The Case for a Vaccine Purchase Fund* (Center For Int'l Development, Harvard Univ., Working Paper, June 1999), available at <http://www.cid.harvard.edu/malaria/malaria.htm>.

113. See Global Information, Inc., the-infoshop.com, The vertical markets research portal, Global vaccines market (2006), <http://www.the-infoshop.com/study/fs37177-vaccines.html> (last visited June 10, 2007).

tiple production facilities.<sup>114</sup> As a result, vaccines frequently go unmade even though the inventive phase of development has been completed.<sup>115</sup>

Under these circumstances, the vaccine companies are the natural allies of non-government and intergovernmental organizations that seek to help the people who need the vaccines but cannot afford them. Moreover, vaccine companies have the ability to induce governments that have the wherewithal to help those who cannot afford vaccines to provide the funding. It is in the self-interest of countries in which vaccine manufacturers are located to provide the funds that ultimately will help their companies. In other words, providing the poor with money to buy the vaccines helps both the poor and the vaccine companies; the former get the medicine they need and the latter get the profits that would not be available if the poor were not helped to buy the vaccines.

There is a kind of collective action problem here; synergies exist only if the correct coalitions can be put together. A legitimate role for an international institution would be to broker deals between the various stakeholders in order to find synergies between the interests of the poor and the interests of those who seek to serve the poor, including those who want to help the poor for altruistic reasons and those who stand to benefit if the purchasing power of the poor is increased.<sup>116</sup>

## 2. *The Bargaining Solutions*

Reforming bargaining processes to adjust for maldistributions of bargaining power is never easy. In the international sphere it seems nearly impossible. In domestic systems, policymakers may address maldistributions in bargaining power in several ways. One way is to help those with little power (perhaps by subsidizing their participation in bargaining). They may also facilitate coalitions designed to remedy bargaining power problems (for example, by recognizing the right to collective, rather than individual, bargaining).<sup>117</sup> Finally, they may constrain the outcome of bargaining (for example, by making unconscionable agreements unenforceable).<sup>118</sup>

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114. Path.org, Improving Service Delivery, [http://www.path.org/vaccineresources/service\\_delivery.php](http://www.path.org/vaccineresources/service_delivery.php) (last visited June 10, 2007).

115. Path.org, PATH: Making Injections Safer, [http://www.path.org/projects/making\\_injections\\_safer.php](http://www.path.org/projects/making_injections_safer.php) (last visited June 10, 2007).

116. The World Health Organization and World Bank already perform this kind of coalition-building function. See, e.g., The World Bank, [worldbank.org](http://worldbank.org) (search "Vaccines Projects") (describing some of the World Bank partnership projects).

117. This is the purpose of labor laws, for example, which facilitate collective action by giving it legitimacy and preventing some acts that would impede collective action.

118. This is, of course, a source of constrained bargaining in contract law. Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, in PERSPECTIVES ON CONTRACT LAW 300-05 (Randy E. Barnett ed., 1995).

In the international system, no external body exists to implement such solutions. No court can rule an agreement to be one-sided, no legislature can encourage coalitions among the powerless, and no institution is in charge of subsidizing those who, by their knowledge or resources, cannot bargain effectively. In the international system, if such techniques are to be used to redress bargaining power problems, the techniques must originate from the parties themselves, the very parties who have bargaining power and who have an incentive to use it.<sup>119</sup>

Nonetheless, the techniques for addressing bargaining power imbalances are not difficult to understand in abstract terms. Putting to one side the question of why a country would agree to them, one must examine what techniques might work in the context of international intellectual property. One technique is to ask countries to bargain first over the goals and principles of the system, rather than over how the goals will be implemented.<sup>120</sup> One of the characteristics of TRIPS is that negotiations took place over the specific rules rather than over the goals of the system. This meant that negotiators failed to focus on, or get agreement on, what they were trying to accomplish or on the basic principles by which they could determine whether they were successful.<sup>121</sup> This, in turn, precluded the sense of a shared destiny and values that are important to positive sum outcomes.

Where, by contrast, negotiators focus on the goals to be achieved through the negotiations and the principles that will be followed in constructing the new regime, the dynamics of the negotiation change. First, there is a sense of shared destiny and values. This would help to create a negotiation in which even zero-sum outcomes begin to be regarded as positive sum outcomes. Second, when such negotiations occur, the parties in their negotiations can then appeal to the agreed upon goals and principles when they work out the details of the implementation. This occurs in trade negotiations in the form of a common norm of openness and reciprocal benefits.<sup>122</sup> In effect, the goals and principles become constraints against which the negotiations are conducted, restricting the opportunism and self-interest that might otherwise skew the results of the negotiations.

Admittedly, even negotiations over goals and principles are not likely to significantly constrain the use of bargaining power. Negotiators who are

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119. Peter M. Gerhart, Special Introduction, *Reflections: Beyond Compliance Theory—TRIPS as a Substantive Issue*, 32 CASE W. RES. J. INT'L L. 357, 371 (2000).

120. Keohane, *supra* note 60, at 67.

121. To be sure, TRIPS contains a preamble and set of principles that seek to define the purposes of the agreement. TRIPS Agreement, *supra* note 1, pmb1 & art. 1. The principles are not consistent with each other however, and one gets the impression that they were drafted simply to reduce resistance to the agreement rather than to provide a guide for the negotiations.

122. PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* 29 (1993) (discussing notions of fair trade and reciprocity in GATT negotiations).

attuned to their self-interest know of the goals and principles that will advance their self-interest. Results-oriented bargaining will still occur. Nonetheless, the subtle difference between goal negotiation and implementation negotiation is likely to exert an influence that moderates the exercise of bargaining power, allows the development of a community of values, and equips the powerless to argue their case more persuasively.

Moreover, an agreed upon statement of guiding goals and principles can constrain the negotiations in another way. If, as is true at the WTO, the institutional design includes independent judicial review, then goals and principles can serve as a legal constraint on overreaching through bargaining. Such goals and principles would allow the WTO's judicial branch (the Appellate Body) to interpret the treaties in a way that would be guided by the goals and values, overturning any application of the treaties that seemed to deviate from them.<sup>123</sup>

A separate technique would involve delegating additional lawmaking authority to international dispute resolution. One such proposal, for example, would allow an institution like the Court of International Justice to take cases that sought to reconcile various principles of international law when law made in different regimes seems to clash.<sup>124</sup> This would effectively subject policy made in the WTO to review under norms generated by regimes that are friendlier to the needs of intellectual property users in international law.<sup>125</sup> Such a proposal could therefore be seen to limit the range of rules that could be adopted through WTO forums.

## B. The Practicality of Solutions

The institutional design suggestions in Subsection II.A.1 require negotiating countries to reorient their approaches to incorporate the system's redistributive needs. It is one thing to recommend new institutional designs; it is quite another thing to implement them. Is there reason to believe that the nation-states of the world would accept such new and redistributive institutional arrangements?

As was discussed above, designing institutions for distributive purposes depends on inducing those countries that influence institutional design to recognize that their individual interest depends on the welfare of other countries. Countries that define their interests exclusively in terms of consumers

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123. See, e.g., Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 8, 1998) (stating that GATT obligations are to be understood in the context of evolving environmental values).

124. See generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003) (introducing a theory of how to bring coherence to various norms on international law).

125. *Id.*

and producers in their own country will necessarily be parochial and non-distributive. Their negotiating positions will necessarily ignore the impact of the policies they propose on other countries and on people in other countries, and will therefore emphasize either positive sum outcomes (with shared gains) or gains from zero-sum outcomes (that benefit themselves). On the other hand, countries that understand how their interests also must take into account the interests of those outside the country are likely to embrace redistributive solutions.

Several trends suggest that policymaking for international intellectual property is likely to become more distributive over the coming decades. First, it is becoming apparent that international intellectual property regimes have important feedback effects on countries.<sup>126</sup> International intellectual property harmonization increases national wealth for knowledge producers, to be sure, but it also binds national discretion and makes it more difficult to achieve a domestic intellectual property balance that is acceptable to both consumers and producers. Recent scholarship, for example, has shown how the evolving international regime may well inhibit even countries that excel in knowledge production from achieving an appropriate balance in their domestic laws.<sup>127</sup>

When that occurs, consumers of knowledge goods in the domestic market may well recognize that their interests are aligned with consumers of knowledge goods in other countries.<sup>128</sup> For example, United States scientists who object to the commoditization of factual information are likely to recognize that scientists in Europe and China share their concern.<sup>129</sup> When they do, their interests are no longer the parochial interests of their country, but the transnational interests of other consumers of knowledge goods. To the extent that those scientists have an impact on domestic policy toward international intellectual property, a country's policy position is likely to be less parochial and more global.

Second, large industrialized countries are not just producers of knowledge goods; they also consume knowledge goods. To the extent that they follow their interests as producers of knowledge goods, countries advocate higher protection; but as consumers of knowledge goods, countries

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126. Donald P. Harris, *TRIPS' Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet Back Against the United States*, 25 NW. J. INT'L L. & BUS. 99, 110 (2004).

127. See, e.g., Dinwoodie & Dreyfuss, *International Intellectual Property*, *supra* note 8 (analyzing the effects of TRIPS on ability of the United States to preserve open information for research); Dinwoodie & Dreyfuss, *TRIPS Dynamics*, *supra* note 8 (analyzing freedom of a country to decrease protection along one dimension while decreasing protection along a different dimension).

128. See Rochelle Cooper Dreyfuss, *TRIPS – Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21 (2004).

129. Maskus & Reichman, *supra* note 15, at 295.



worry that higher protection may in fact reduce their own room to innovate and decrease their national wealth by requiring large transfer payments to other countries. A system that at one time looked to be advantageous because it increased national wealth may in fact come to be disadvantageous because it begins to decrease national wealth. When that happens, a country's perspective will change, and it will begin to see the international regime through systemic, not parochial, lenses.

Recent scholarship has pointed out, for example, that the very international regime that the United States influenced in order to maximize its wealth from knowledge goods may in fact come to stifle the innovation on which the country's future wealth depends.<sup>130</sup> If that is true, and if it is recognized and projected into international arenas, then the United States may come to identify its interests not with the wealth that existing innovation can produce, but with the wealth that comes from remaining on the innovative cutting edge. The United States may therefore become less parochial and more system-conscious in its orientation.

Third, we have already seen how partnerships between knowledge producers and advocates for knowledge consumers can help to form alliances that pressure governments to find a better balance in international intellectual property law. New forms of coalitions seem to be evolving in ways that may reduce the gaps between production and use.<sup>131</sup> What is needed is the institutional framework within which such partnerships can flourish. Those frameworks are likely to grow as globalization, by spreading information, increases awareness of the possibilities and decreases the distrust that keeps the partnerships from emerging.

Finally, an important offshoot of globalization has been to begin a subtle refocus of individual identity from a national to a transnational orientation. Communications and transportation technology changes the sense of community, decreasing actual and virtual distance between "us" and "them." This makes it possible for individuals to identify with people who just a few decades ago would have been strangers, if they were even known at all. Although most people still identify primarily with their nation-state on important issues, communications technologies are changing communities of interest so that an individual may identify more with the welfare of people in other countries than with neighbors in her own country.

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130. See *id.* at 295-99 (suggesting that an over-regulated IP market may reduce the level of knowledge goods that can be produced in the future).

131. The developing country agenda at WIPO, for example, has been endorsed as part of the agenda at WIPO. See Press Release, WIPO, Member States Agree to Further Examine Proposal on Development, WIPO Doc. WIPO/PR/2004/396 (Oct. 4, 2004), [http://www.wipo.int/edocs/prdocs/en/2004/wipo\\_pr\\_2004\\_396.html](http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html) (last visited June 10, 2007). The agenda of NGO is contained in the Geneva Declaration on the Future of the World Intellectual Property Organization, <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

This is, indeed, the lesson of the controversy over access to affordable medicines. It will be recalled that as soon as TRIPS was adopted, the AIDS crises focused attention on the fact that the payments for patented medicines that TRIPS required would hamper the ability of countries to address the health needs of the patients.<sup>132</sup> The international community responded in ways that effectively expanded the room that countries have to use the flexibilities of TRIPS to meet the health needs of their people. Although this effective revision in TRIPS resulted in part from international pressure and humanitarian instincts, it also reflected the ways that communities of interest are being redefined from national to transnational levels. AIDS activists in the United States identified with AIDS patients abroad, and the pressure that they put on the United States government to relax some of the TRIPS obligations was instrumental in shifting the political balance within the United States, and thus the position that the United States took on the relevant TRIPS issues.<sup>133</sup>

#### CONCLUSION

This Article suggests that the WTO negotiating forums are ill suited to make international intellectual property law because they cannot achieve an appropriate balance between the interests of innovators and consumers, taking into account disparities in wealth, both within countries and between countries. The Article also outlines ways in which international institutions might be redesigned to achieve a better balance, and the reasons for believing that institutions might, over time, evolve in the recommended direction.

We must focus on institutional design because international policy necessarily depends on the institutional arrangement that is used to make it. We therefore need to see whether our institutions of international lawmaking are congruent with the goals to which they should be directed. We need, in other words, to focus on the relationship between process and goals, with the goals fully specified to account for a complete measure of human welfare.

In the case of intellectual property, the reality diverges from the ideal because intellectual property has been perceived too often to be a matter of efficiency only—that is, it is perceived to be only a matter of getting the incentives right. Even on this basis, there is much to criticize in terms of the efficiency of international lawmaking. However, this Article broadens the criticism in a new direction by arguing that the design of intellectual property systems must necessarily take into account distributive, as well as efficiency, values. Once we recognize that distributive issues are implicit in

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132. See *supra* note 61.

133. See *generally* Gerhart, *supra* note 52, at 1075.

intellectual property design, the gap between the actual and the ideal is larger than even the critics of TRIPS recognize.

Understanding the distributive issues buried in intellectual property design shows why the present institutional design for international policy-making is unsatisfactory. The institutional arrangement used to make international intellectual property policy has been one that is geared to increasing the efficiency of the international system—one where cooperation necessarily makes everyone better off. For intellectual property, cooperation does not make everyone better off. Some wealth must be shifted from consumers to producers and some consumers must end up as net losers, while other consumers are net winners. The only way that balance between winners and losers can be struck is to explicitly recognize the distributive decisions that must be made and design institutions that are equipped by institutional mandate to make those decisions.

Because the international system relies on each country to identify its interest in intellectual property and to advocate that interest in international negotiations, the search for balance *in* the system is replaced by a search for gains *from* the system. That distorts intellectual property policymaking from a system designed to achieve balance to one designed to maximize returns. In a system where bargaining power is not equally distributed, that has been a lethal formula.

The only way in which this system can be changed toward the ideal is to redirect the interests of individual countries from parochial to systemic interests, so that each country recognizes that one of its interests is to take the interest of other countries into account. This would shift the attention of countries from an exclusive focus on efficiency concerns to a focus on distributive values as well. If that shift in focus were to be made, the institutional arrangement for making global policy could easily be transformed into one that is better able to match the real with the ideal.