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APPENDIX A

JOURNAL OF INTERNATIONAL LAW

INTELLECTUAL PROPERTY SYMPOSIUM

THE CONCEPTUAL FRAMEWORK

Our symposium focuses on intellectual property law to examine how and why nations, and private parties within nations, change in response to evolving international standards, and how those international standards are in turn influenced by the compliance experiences of nations. Because the TRIPS obligations become mandatory for 70 developing countries next year, and because preparation for the millennium round of new trade negotiations includes intellectual property issues, analyzing the forces that influence the shape of private, national, and international standards will help us understand how intellectual property rights are likely to evolve.

OUTCOMES

We anticipate several concrete outcomes from this symposium. From an academic perspective, we hope to forge a stronger link between the field of intellectual property, on the one hand, and more general theories from international law, economics, and political science about why and how nations and private parties comply with law. We expect this cross-fertilization to enrich both disciplines. For example, we anticipate that the symposium will bring new insights into international compliance analysis by adding perspectives about intellectual property to the compliance literature from other subject areas. For intellectual property scholars, we hope that the symposium will provide insight about how legal regimes in other fields work to bring about compliance, and how institutions and norms affect compliance.

From a practical standpoint, we expect all entities in the international intellectual property field to find helpful insights through the symposium.

Rights holders should discover workable strategies for maximizing compliance, allowing them to choose, for example, between strategies built on enforcement and those built on education.

Potential holders of newly devised rights should find strategies that link compliance to evolving standards.

Intellectual property consumers and competitors should better understand the effective limits of intellectual property rights.

Government officials responsible for intellectual property systems should get insight that helps them understand, and maneuver within, the domestic and international pressures they face.

FRAMEWORK FOR THE SYMPOSIUM

Our primary interest is in identifying the forces that shape the development of national regimes and private conduct in the light of evolving international standards. In short, we seek to identify the variables that cause a nation or an individual to comply with international intellectual property standards.

We have developed this framework document to suggest the essential considerations that we believe underlie the symposium, to articulate the various forces that might be at work, and to provide an integrating framework that we hope will allow disparate perspectives to be related to one another. It is our hope that the authors and commentators for the symposium can relate their work to this framework and improve our understanding of the framework and the underlying relationships.

The framework is built around three central characteristics that we find in intellectual property law, and two perspectives that we think must be brought to bear in organizing analysis in this field.

Three Central Characteristics of Intellectual Property Enforcement

The three central characteristics are the following:

1. States create intellectual property rights, and create the enforcement machinery that defines and vindicates those rights, including institutions and processes that facilitate private enforcement. However, by and large states have not taken an active role in enforcing rights. The sheriff is available to seize counterfeit goods when they are identified, but few law enforcement agencies have a mandate or a plan for intercepting and suppressing counterfeit or infringing goods. (One possible exception to this characteristic is that governments are taking an increasingly proactive stance to interdict the international theft of trade secrets of great national value. And if a state agency is the thief, special problems of state responsibility arise.)

2. Even in developed countries, enforcement is left up to private parties. Generally, rights holders (or organizations of rights holders) bear the expense of monitoring infringement, initiating action, and directing the dispute resolution process. The degree of enforcement in any system is therefore related to the incentive that a rights holder has to enforce its rights, the cost of that enforcement, and the benefits of enforcement. In all countries, many violations of intellectual property rights go unaddressed because rights holders do not find it worthwhile to bear the cost of detection and prosecution.

3. Compliance is enhanced when private parties internalize the values that underlie the norms. Self-enforcement occurs when private parties accept the obligation to comply and adjust their conduct accordingly, even when the threat of sanctions for non-compliance is not significant. When a professor thinks about how much copyrighted material to copy for class, the professor is responding to an internal law enforcement impulse that enhances compliance.

These three factors suggest an uneasy relationship between international law and national responsibility, one that is driven by the difference between compliance by nations and compliance by private parties. Does state responsibility stop with setting up the rights and the machinery of enforcement (which is now required by TRIPS)? Or, should the state also be responsible for lowering the cost of private enforcement, initiating state enforcement, or effectuating the norm internalization of private parties within the country? In short, what should be the state's responsibility for private conduct concerning intellectual property?

Two Analytical Perspectives

To recognize the interrelationship between state and private responsibility for intellectual property compliance, we envision that two analytical perspectives will be helpful.

The first analytical perspective is cost-benefit analysis. Under this view, a country will adjust its regime when the perceived costs of doing so are less than the perceived benefits. This perspective seeks to identify the various costs and benefits that a country will face when deciding its policy toward intellectual property. This framework, which is applicable primarily to analyzing state conduct, forces us to articulate the variables that determine how states act to fulfill their responsibility and assess the relative weight of the variables. A cost-benefit perspective could also be applied to international standards and private conduct.

The second analytical perspective is what we might call the "internalization" perspective. The internalization perspective requires greater attention in the compliance literature. It relates initially to compliance by private actors. This perspective seeks to identify the factors that determine whether and how international and national standards become internalized and guide private conduct. Why do individual agents comply with the law and what factors enhance their compliance? What is it about a standard that makes people want to comply with it? Under what circumstances do they see compliance as beneficial and in what circumstances is compliance a matter of coercion? This perspective looks at private compliance, but it can also enrich our understanding of standards at the national and international levels. At an international level, we might consider acceptance of the fundamental models of intellectual property to be significant in the process of negotiating the scope of rights. At the state level, internalization implicates issues of state responsibility. What is the

state's responsibility with regard to helping private entities internalize norms? What is the relationship between domestic law and the way it is enforced that promotes self-enforcement of law by private parties?

These two perspectives – the cost-benefit perspective and the internalization perspective—are interlinked and potentially complementary. We have tried to capture that interlinkage by integrating issues of norm internalization with our list of costs and benefits of intellectual property. The ability of a country to have a strong intellectual property regime may vary with the acceptance of intellectual property norms by the people of the country. Acceptance or internalization by powerful political constituencies therefore becomes a benefit of (or a lower cost of) intellectual property to the state. Analogously, the strength of private norm internalization may depend on the message that private parties receive from the state through legislation, enforcement, or political leadership. The state may therefore be instrumental in lowering opposition to intellectual property by showing its benefits, which changes the cost-benefit analysis for the state.

OUTLINE OF THE COMPLIANCE FACTORS

Below we suggest the costs and benefits of compliance in a general form and in a way that integrates notions of private internalization with traditional measures of costs and benefits to the state. We have organized the outline to reflect an external/internal distinction. External (or transnational) forces are those forces outside a country that provide (or are thought to provide) opportunities for compliant states or that impose costs on non-compliant states. For example, countries face costs from the prospect that foreign countries will close their markets if laws are not changed. Conversely, countries face potential external benefits from enhanced intellectual property protection, including, perhaps, enhanced international stature, the ability to attract investment, and greater bargaining power in future negotiations.

The internal dimension includes those factors inside a country that shape its willingness or ability to meet or exceed international standards. This includes things like the monetary costs of compliance, the political power of internal constituencies that will either benefit or be harmed by regime changes, and the institutional structure for political decision-making.

Although we have organized our framework around an external/internal distinction, we are aware that each of the forces should be seen through additional analytical dimensions. Time analysis would emphasize that the costs or benefits will appear differently depending on whether an actor takes a long-term or a short-term view. Institutional analysis would recognize that the costs and benefits become mediated and understood through institutional structures, so that, for example, political forces within a country will have either more or less impact depending on

how political institutions are set up to respond to them. All of the cost and benefits have social and cultural underpinnings.

Here then is a summary of the costs and benefits that we conjecture as relevant variables.

A. *External Forces*

1. Costs

a. Threat of WTO Sanctions

How great are the costs imposed by WTO dispute resolution, considering:

-Likelihood of enforcement (who has incentive to bring action, how will targets be picked, will DSU system become overtaxed, will incentive to sue be blunted by the threat of countersuits?)

-Likelihood of adverse findings (how will obligations be interpreted; what maneuvering room is allowed under the obligations?)

Will absorbing sanctions be cheaper than compliance with dispute resolution recommendation?

b. Threat of Unilateral Sanctions

What will be the role of unilateral threats of sanctions by IP exporting countries in controlling compliance, considering:

-possibility that DSU limits effectiveness of threats?

-relationship between IP and other bilateral issues?

-likelihood of unilateral action (how will targets be chosen;

how is

information gathered?)

c. Role of Informal Surveillance by TRIPS Committee or Trade Policy Review Committee

Review Committee

d. Role of Informal Surveillance by National Trade Agencies

e. Role of Surveillance by Private Organizations (NGOs)

2. Benefits

a. Role of Reputation in International Community

b. Role at Millennium Round Bargaining Table

c. Role of External Aid

-training

-financial assistance

d. Role in Attracting Investment

e. Role in Facilitating Transfer of Technology

B. Internal Forces

1. Benefits

- a. Enhance Indigenous Knowledge Industries
- b. Lead to Country Specific IP (development of drugs for local disease or art for local tastes)
- c. Protect Indigenous Cultures
- d. Attract Investment
- e. Attract Licensed Technology
- f. Advantages of Property/Rights Economy

2. Costs

- a. Contextual Costs
 - loss of local control
 - perceived loss of sovereignty
 - perceived neo-colonialism; holdover from old colonialism
- b. Costs to Consumers
- c. Costs to Counterfeiters
 - possibility of co-opting them through favorable licensing
 - addressing their political muscle
- d. Systemic Costs
 - diverting resources
 - training
 - developing property/rights consciousness
 - developing new processes and remedies

Based on this articulation of the costs and benefits of intellectual property regimes, we can begin to suggest several hypotheses for evaluation in the symposium. For example, we can hypothesize that intellectual property regimes are likely to be "stronger" in countries that already have developed property and rights systems built on private remedies, where a local industry perceives that it can benefit from stronger protection and can translate that benefit into effective political and judicial action, where domestic industries that will lose from intellectual property protection can be isolated from political or judicial influence, and where intellectual property is not thought to be a foreign import. They will also be stronger in countries where external forces have the greatest to gain from TRIPS enforcement, and where outsiders with something to gain are able to incite their national governments to take action.

By contrast, intellectual property systems are likely to be weaker in countries where private rights and property are not culturally accepted, where private judicial remedies are undeveloped, where there is little local industry to support intellectual property, and where counterfeit industries are well-entrenched or politically powerful. This does not, of course, exhaust the range of possibilities, but it is indicative of the combination of factors that are probably relevant.

THE FEEDBACK EFFECT

Finally, we are conscious that the nature of compliance with international obligations, and the cost of compliance, will have a feedback effect on how intellectual property standards evolve. Here, two characteristics of the international intellectual property system are noteworthy. First, the norms in TRIPS and WIPO treaties are both ambiguous and indeterminate, requiring continuing rearticulation as part of the enforcement process. Second, new norms are negotiated, and old norms renegotiated, as part of a comprehensive series of negotiations over many subjects. Even the dispute resolution process of the WTO is in a sense an invitation to a new round of negotiations, because compliance measures will lead to new issues to be resolved (or settled) and because a country can offer compensation instead of changing its intellectual property regime.

Hence, the costs of compliance become an incentive to readjust the standards to either make the standards less costly or to seek some additional countervailing benefit. Undoubtedly then, the nature and cost of compliance will influence the rights, and responsibilities, that shape intellectual property law in the future. In this connection, we will examine the process by which standards are formulated, how states form their negotiating strategy, and how non-government organizations, institutional structures, and other trade issues affect negotiations.

Call for Input:

Given this framework we seek papers and comments that can be added to our web site in the following subject areas:

Papers that seek to refine the variables we have identified and assess them in the context of the experience that particular countries and regions have had in implementing intellectual property systems. We hope that these papers in applied compliance will give a good comparative basis for understanding the context in which variables either enhance or deter compliance.

Papers that amplify the institutional, cultural, social, and political aspects of these variables in ways that allow us to assess the weight they will bear in causing regimes to change.

Papers that discuss state responsibility for private conduct.

Papers that suggest how compliance and compliance issues are likely to affect the process of dispute resolution under TRIPS and the agenda for new negotiations over intellectual property.