Power, Norms, and International Intellectual Property Law

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Power matters. But power is not all that matters, all the time. Although some international law scholars argue that power is paramount,
and other scholars ignore the role of power entirely, keen observers of international law acknowledge that power influences, but does not wholly control, international law. Few scholars, however, appear to have tested their theories against contemporary international problems that increasingly involve both public and private international law, as well as state and nonstate actors. Many scholars of public international law have acknowledged that private international law and nonstate actors are relevant to international problems, but they continue to develop their theories largely within the limited domain of public international law and interstate processes. Similarly, many private international law scholars have acknowledged that power is important, but they have not constructed a theory of international law that fully explains the role of power.

This Article begins with the premise that international law is the net result of global processes of interactions among state and nonstate participants in the international system. The Article builds on my previous


3. See Oscar Schachter, The Nature and Process of Legal Development in International Society, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 745, 753 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (“[I]nternational law is a product of the interplay of power and interest conditioned by material conditions and perceptions of need and aspirations.”); Steinberg & Zasloff, supra note 1, at 86 (“[I]nternational law theories cannot ignore power, or law, or the state, or civil society, or norms, or language.”) (emphasis in original).

4. See, e.g., Hathaway, supra note 2, at 494 (“[T]his account of international law places the state at the center of the analysis. . . . The state is, in fact, the primary subject of international law.”); Goldsmith & Posner, supra note 1, at 3 (focusing on states in analyzing international law); Laurence Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 YALE J. INT’L L. 1, 53 (2004) (arguing that in international intellectual property law the principal actors are still states, but they are assisted by NGOs and officials of intergovernmental organizations).

work by proposing a theory of international law that fills the interstices between private and public international law. Participants generally deploy power and invoke legal and social norms in pursuit of interests and in response to the strategies of other participants. Eventually, outcomes that reflect both power and norms result, and these outcomes in turn modify norms and reallocate power. New outcomes then follow in future conflicts in an iterative, evolutionary, interactive process. This Article tests this thesis against the global intellectual property (IP) system. International IP scholarship should account for power and could be enriched by the typology presented in this Article because international IP law lacks a comprehensive set of enforceable legal norms.

IP protections have existed for centuries, and national systems of IP law are increasingly harmonized. A number of international, regional, and bilateral treaties also relate to IP. Significant disagreements remain,

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7. For the purpose of this paper, conflicts are defined as situations in which at least two participants each have different preferred outcomes. The other key concepts in this typology, i.e., participants, interests, power, and norms, are explained in Part II.


however, among global decisionmakers about appropriate norms for IP protection. Many of the international rules that do exist lack effective enforcement mechanisms.

Power therefore plays an important role not only in the development of international legal IP norms, such as strengthening IP protections through the conclusion of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), but also in their enforcement, such as when the United States imposes, or threatens to impose, trade sanctions in an attempt to coerce compliance with its preferred international IP norms.

Even with well-developed legal IP norms, power can be deployed to deviate from the behavior those norms demand. As discussed in Part III.A.2, the United States filed a complaint against Brazil in 2001 before the World Trade Organization (WTO) Dispute Settlement Body in an effort to protect U.S. drug patents in Brazil. A view of this dispute that did not account for power would assume the dispute would be resolved by applying the facts of the case to the applicable legal rules contained in TRIPS. Instead, the outcome of the dispute had little to do with legal rules. International human rights nongovernmental organizations (NGOs) successfully exerted pressure on the U.S. government to withdraw the complaint, thereby effectively permitting Brazil to continue its use of generic drugs. Anticipating such outcomes in international IP conflicts requires policymakers, practitioners, and scholars to account for power.

This Article presents its thesis in three parts. Part I discusses the concepts on which the thesis is built: participants, interests, power, and norms. Part II uses the concepts developed in Part I to propose a theory

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15. See infra Part III.A.1.

of international law as it operates in the global IP system. By examining prior international IP conflicts, Part II tests and validates the four key aspects of the theory: (1) outcomes reflect both power and norms; (2) outcomes may modify norms; (3) outcomes may reallocate power; and (4) new outcomes follow from these adjustments of power and norms. Part III discusses how this Article's thesis can help policymakers and corporate officers devise practical strategies to achieve their IP goals.

II. BASIC CONCEPTS

A. Participants

Participants are entities that are affected by and involved in international conflicts and their resolution.\(^\text{17}\) Participants populate the international law system, and within that, the IP system. Some scholars have focused narrowly on states as by far the most important participants.\(^\text{18}\) In fact, many nonstate participants are affected by outcomes in international conflicts in significant ways, such as farmers in developing states who rely on new crop technologies developed by foreign corporations.\(^\text{19}\) Some participants also exert influence over outcomes in international conflicts. These influential participants include corporations and corporate officers,\(^\text{20}\) national and international organizations,\(^\text{21}\) national and international governmental organizations...
international tribunals, and NGOs. These participants deploy power and invoke norms in support of relevant interests in numerous arenas, such as court proceedings, corporate transactions, trade discussions among states, and meetings of international organizations.

B. Interests

A wealth of international law scholarship addresses the varied interests of participants and how internal constituents motivate the actions of such participants. This Article explores interests in the more limited context of international IP. As a general matter, participants behaving rationally have an interest in preserving the economic value of their IP and obtaining economic benefits from third-party users through greater


23. See SELL, supra note 20, at 162 (“NGO activists . . . have changed the politics of intellectual property.”); Helfer, supra note 4, at 42 (noting that NGOs and some states “were the principal catalysts for the WHO’s critical review of TRIPS”); Ellen ’t Hoen, TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha, 3 CHI. J. INT’L L. 27, 33 (2002) (“NGOs have played a key role in drawing attention to provisions of TRIPS that can be used to increase access to medicines.”); Yu, supra note 20, at 3 (noting that trade associations are influential participants in international IP law).

24. See generally McDougal, Laswell & Reisman, supra note 17, at 282 (characterizing tribunals as adjudicative arenas).

25. See William L. Keefauver, Commentary: The Need for International Thinking in Intellectual Property Law, 37 IDEA 181, 183 (1996–1997) (“If you ever negotiated or looked at a joint venture agreement, you know that a major component is often the intellectual property piece which usually covers patents, trademarks, copyrights, software, and technical information.”).

26. See generally McDougal, Laswell & Reisman, supra note 17, at 281 (discussing interaction between nation-state elites or their representatives).

27. See generally Hathaway, supra note 2 (surveying interest-based models of international law and proposing that domestic enforcement, transnational enforcement, and “collateral consequences” explain state action in the context of treaties); Steinberg & Zasloff, supra note 1, at 64 (providing historical survey of theories of state interest).
IP protections. The ten most industrialized countries—all aggregate IP creators—are advocates of IP protections. In 1995, more than half of global royalties and licensing fees were paid to entities in the United States, a major technology exporter. Japan, one of the main proponents of IP rights at the WTO Uruguay Round of Multilateral Trade Negotiations, has filed 575,000 patents in the United States since 1975.

Conversely, participants also have an interest in lowering the cost of using and increasing access to IP created by other parties. India and Mexico—each of which is an aggregate IP user, filing fewer than 3,000 patents in the United States since 1975—have objected to IP rights protections at multilateral trade negotiations.

28. See Andrew T. Guzman, International Antitrust and the WTO: The Lesson from Intellectual Property, 43 VA. J. INT'L L. 933, 947 (2003) (“Countries engaged in a large amount of research and development or who otherwise produce a great deal of intellectual property prefer a system of rigorous protection and enforcement of intellectual property rights around the world.”); Nabila Ansari, International Patent Rights in a Post-Doha World, CURRENTS: INT'L TRADE L.J., Winter 2002, at 57, 60 (“Developed nations have historically employed the highest degree of patent protection . . . to protect their nation’s inventions.”).

29. See Ansari, supra note 28, at 57.


31. Richard Jolly, U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 1999, at 68 (1999). See also Sell, supra note 20, at 129 (“[T]he United States has been the most aggressive country in the IP area. It has filed more WTO TRIPS complaints than all other member countries combined.”).


34. See Guzman, supra note 28, at 947 (noting that developing countries, which are mainly users of intellectual property created by other parties, resisted stronger global IP protections). Cf. Sumner J. La Croix, The Rise of Global Intellectual Property Rights and Their Impact on Asia, at 4 (East-West Center, Asia Pacific Issues No. 23, 1995) (stating that a developing country only benefits from intellectual property protections when it is ready to engage in research and development).

35. See U.S. Patent and Trademark Office, supra note 33.

36. See, e.g., Communication from India on Standards and Principles Concerning the Availability Scope and Use of Trade-Related Intellectual Property Rights, Negotiating Group
Three considerations complicate the analysis of interests in IP conflicts. First is the determination of whether a participant is an aggregate IP creator or IP user. Participants' corresponding interests may be fluid because over time, IP users may become IP creators, or vice versa. For example, the United States supported weaker IP protections when it was an aggregate IP user, but it began to champion stronger IP protections when it became an aggregate IP creator. China has begun to protect IP more strongly as it has developed its software industry. Thus, any attempt to anticipate the strategies of participants in international IP conflicts must identify whether each participant is an aggregate IP user or creator at the time of that conflict and not merely rely on historical data.

Second, the determination of whether a participant is an IP user or creator is specific to each constituency within that participant and to each IP conflict. A participant may have internal constituencies that are IP users and others that are IP creators. For example, within a music conglomerate, one division that represents the organization's musical copyright library may desire strong IP protections while another division that markets technology used to store and transfer electronic music files may desire weaker protections. Public international law and political science scholars have done the yeoman work of "look[ing] to the political institutions, interest groups, and state actors that shape state preferences to explain state behavior in the international arena." The next stage in the development of international legal theory is to anticipate and explain the behavior of nonstate actors, such as corporations, by disaggregating them into their constituent parts and interest groups.

One participant that is ripe for such disaggregation is Microsoft Corporation, creator of the widely used Windows operating system.
Microsoft is alleged to have used AT&T-patented computer codes in its computer programs.\textsuperscript{40} Microsoft divisions responsible for creating and manufacturing Windows would tend to prefer lower levels of protection for third-party IP incorporated into Windows, while divisions responsible for sales of Windows products would prefer higher levels of protection against software piracy. This hypothesis is borne out by evidence that Microsoft threatened to shift the manufacturing of portions of Windows overseas in an attempt to evade rules barring free use of AT&T software under the Lanham Act, while simultaneously working to reduce piracy of Windows in China and other parts of Asia.\textsuperscript{41} An accurate \textit{ex ante} analysis of the strategies of participants in global IP conflicts should therefore account for the interests of internal constituencies and assess each constituency's influence over internal decisionmaking in the particular IP conflict at issue.

Third, any interest in IP protections or access to IP must be considered together with other relevant interests. In many IP conflicts, other interests are at stake beyond the economic benefits or costs derived from control over or access to IP. For example, in an IP conflict concerning access to drug patents in an underdeveloped state, IP-creating states have an interest in protecting their IP, but they may also have an interest in providing the underdeveloped state with life-saving drugs to avert the political and geopolitical instabilities that might follow a public health crisis. The IP-creating state may also have an interest in appeasing domestic constituencies that have a global human rights interest in health care.\textsuperscript{42} Similarly, in multilateral IP negotiations, IP-using states may have interests in the trade benefits that IP-creating states offer in exchange for higher levels of enforcement of IP protections.\textsuperscript{43} In disputes before the WTO Dispute Settlement Body, a litigant that has violated legal IP norms will often comply with WTO rulings\textsuperscript{44} or negotiate settlements for

\begin{itemize}
\item \textsuperscript{40} AT&T Corp. v. Microsoft Corp., No. 01 Civ. 4872, 2003 WL 21459573, at *1-*2 (S.D.N.Y. June 24, 2003) (discussing "speech codes" within Microsoft products that AT&T claimed infringed patents held by AT&T).
\item \textsuperscript{42} See infra Part III.B.1.
\item \textsuperscript{43} See infra Part III.A.1.
\end{itemize}
multiple reasons. They have interests in preserving the overall WTO trade system, of which the dispute settlement mechanism is a crucial part and from which they draw benefits. Additionally, they seek to avoid the costs of enforcement measures for noncompliance with rulings, as authorized under the WTO rules. Any analysis of IP conflicts that fails to appreciate the range of interests at stake runs the risk of missing the forest for the trees.

C. Power

International law scholars have proposed many definitions of power. This Article adopts a generally accepted definition of the term: the capacity of a participant to deploy resources to influence or coerce other participants into complying with its preferred outcome.

45. See Request for Consultations by the United States, Argentina—Certain Measures on the Protection of Patents and Test Data, WT/DS196/1 (June 6, 2000); Request for Consultations by the United States, Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, Brazil—Measures Affecting Patent Protection, WT/DS199/1 (June 8, 2000); Request for Consultations by the United States, Denmark—Measures Affecting the Enforcement of Intellectual Property Rights, WT/DS83/1 (May 21, 1997); Request for Consultations by the United States, European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, WT/DS124/1 (May 7, 1998); Request for Consultations by the United States, European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights, WT/DS115/1 (Jan. 12, 1998); Request for Consultations by the United States, Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, WT/DS125/1 (May 7, 1998); Request for Consultations by the United States, Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights, WT/DS82/1 (May 22, 1997); Request for Consultations by the United States, Japan—Measures concerning Sound Recordings, WT/DS28/1 (Feb. 14, 1996); Request for Consultations by the European Communities, Japan—Sound Recordings, WT/DS42/1 (June 4, 1996); Request for Consultations by the United States, Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS36/1 (May 6, 1996); Request for Consultations by the United States, Portugal—Patent Protection under the Industrial Property Act, WT/DS37/1 (May 6, 1996); Request for Consultations by the United States, Sweden—Measures Affecting the Enforcement of Intellectual Property Rights, WT/DS86/1 (June 2, 1997).


48. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 5 (1991) (“Power . . . refers to the ability of a State to impose its will on others or, more broadly, to control outcomes contested by others.”); Cheng, Power, Authority and International Investment Law,
International Intellectual Property Law

takes diverse forms, including military, economic, political, diplomatic, and psychological power.\textsuperscript{49} For example, a state may exercise its economic power by providing trade benefits or imposing trade sanctions to secure greater IP protections from other states. An NGO may exercise psychological power by drawing public attention to public health crises in developing countries.

The stereotypes of IP producers as powerful and IP users as weak are not necessarily accurate. Some IP producers—including developed states and corporations that are headquartered and incorporated in developed states—are certainly powerful. These IP producers possess the resources necessary for the creation of patents and copyrights, including technology, financial capital, and highly sophisticated inventors. Not surprisingly, "[t]he top ten industrialized countries account for as much as 84\% of global resources spent on research and development (R\&D) and for 94\% of patents granted worldwide."\textsuperscript{50} Because IP producers tend to have significant resources, they also have immense power to deploy these resources to secure IP outcomes in their favor.

But not all IP producers are powerful. Some formerly powerful IP producers may have lost the ability to innovate due to a cataclysmic event, such as defeat in a war. Creators of artistic works, such as authors and playwrights, may be prolific but weak IP producers because of their limited resources as compared to large corporations or powerful states.

Likewise, some IP users are certainly weak, but not all are. To be sure, small corporations that produce counterfeit goods that infringe on registered trademarks usually do not have the same resources as the conglomerates that created brand value for these trademarks.\textsuperscript{51} Some least-developed countries are also weak IP users: in the mid-1990s, developing countries accounted for only four percent of global research

\textsuperscript{49.} SCHACHTER, supra note 48, at 5 ("The components of power are military, economic, political and psychological . . . .").

\textsuperscript{50.} See Ansari, supra note 28, at 57.

and development expenditures, and most of the patents that the U.S. Patent Office granted in developing countries belonged to residents of industrial economies. Some of these developing countries, such as Brazil, may depend heavily on medicines and agricultural technologies created by other parties. But large multinational corporations that may be licensees of, or distributors for, IP-creating corporations may have significant power. Some developing states that have yet to proceed far enough along the technology curve to become aggregate IP creators may nonetheless have substantial power. For example, although India is economically, diplomatically, and militarily powerful, it relies on the drug technology of other IP creators.

Regardless of whether a participant is powerful or weak, it may pool its resources with other participants with whom its interests are aligned in an IP conflict. Scholars of public international law and political science have hypothesized that, as a result of international networks and globalization, states and their officials are able to cooperate or collude against other participants with divergent interests. This hypothesis applies equally to problems involving both public and private international

52. See JOLLY, supra note 31, at 67.
53. See id. at 68 ("More than 80% of the patents that have been granted in developing countries belong to residents of industrial countries.").
54. See Pan American Health Organization, Basic Country Health Profiles for the Americas: Brazil, http://www.paho.org/English/DD/AIS/cp_076.htm ("Brazil is among the greatest consumer markets for drugs, accounting for 3.5 % [sic] share of the world market.").
55. U.S. Department of State, Bureau of South and Central Asian Affairs, Background Note: India (2006), http://www.state.gov/r/pa/ei/bgn/3454.htm (noting that India has the world's twelfth largest economy, an army of over 1.1 million people, and is a "leader of the developing world" in foreign relations).
56. UNITED KINGDOM COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 20 (2003) ("[India is] a producer and exporter of low cost generic medicines and bulk intermediates.").
58. Thomas Risse & Kathryn Sikkink, The Socialization of International Human Rights Norms into Domestic Practices: Introduction, in THE POWER OF HUMAN RIGHTS 1, 5 (Thomas Risse & Kathryn Sikkink eds., 1999) (arguing, inter alia, that international networks permit domestic and international participants to apply pressure on other participants to catalyze change through socialization); SLAUGHTER, supra note 57, at 166–215 (discussing how transnational networks permit cooperation); Raustiala, supra note 57, at 26–50 (discussing transgovernmental network cooperation in the fields of securities regulation, competition policy, and environmental regulation).
In international IP disputes, governments may share information with each other and nongovernmental organizations about international counterfeiting operations or use their executive power to enforce domestic IP rules. Alternately, NGOs may devise and share with each other and with governments strategies to alter existing levels of IP protections. This pooling of power allows participants to promote their interests more strongly than if they act unilaterally.

D. Norms

1. Traditional Concepts of Norms

Norms refer broadly to claims, standards, and expectations that "channel and regularize behavior." Domestic law scholars often distinguish between legal rules—that is, law—from nonlegal social norms. Because international law is ultimately concerned with all factors that influence decisionmaking, and because the essential function of legal rules is to channel and regularize behavior, this Article considers legal rules to be a subset of legal norms.

Scholars of international law tend to divide law into hard and soft law. According this classification, legal norms would include both hard and soft norms. Hard norms are legally binding and are found in customary law, treaties, and jus cogens (peremptory norms of international law). In the IP context, hard norms include the legal rules articulated in treaties such as TRIPS or the North American Free Trade Agreement.

59. See Cheng, State Succession and Commercial Obligations, supra note 6, at 405 ("Growing interconnectivity of participants has allowed and encouraged unprecedented levels of agreement and collusion between states, corporations, banks, international organizations and individuals."); Cheng, Renegotiating the Odious Debt Doctrine, supra note 6.


62. Finnmore & Sikkink, supra note 2, at 894.

63. See, e.g., Susan Scafidi, Intellectual Property and Cultural Products, 81 B.U. L. Rev. 793, 807 (2001) (referring to both "formal legal rules" and "informal social norms"). See also infra n.72.


65. NAFTA, supra note 11, arts. 1701–1721; TRIPS, supra note 10.
Soft norms are widely discussed\(^6\) but not precisely defined.\(^7\) They

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are commonly understood to refer to nonbinding or incompletely binding norms that nonetheless are of a legal nature. Soft norms signal to participants, and may secure compliance with, expected standards of behavior. There are numerous sources of soft norms, including resolutions, declarations, or guidelines of states and international or nongovernmental organizations. In the IP context, soft norms can be found in “exhortations such as WTO Council Directives, [or] nonbinding statements by other international governmental organizations such as U.N. agencies” that interpret the hard IP rules contained in TRIPS. Expert committees in the World Intellectual Property Organization (WIPO) also generate soft norms in the form of guidelines for WIPO member states.

Social norms, according to mainstream domestic law and economics literature, are not legal in nature. They are instead patterns of conduct explained by nonlegal motivations, including habit, values, culture, and nonlegal sanctions such as shaming. Likewise, in international law, they are patterns of behavior among participants resulting from habit, shared community expectations about appropriate behavior, or external pressure.

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for compliance.\textsuperscript{75} In the international IP context, researchers have explained the widespread copying of compact discs of artistic works for home use around the world as a social norm in which copyright infringement is accepted for noncommercial purposes.\textsuperscript{76}

2. A Critique of the Conventional Classification of Norms

Differentiating among hard norms, soft norms, and nonlegal social norms could help organize the occasionally messy universe of behavior-channeling norms in international law. But the utility of this classification should not be overstated.\textsuperscript{77} First, norms in international law cannot always be neatly classified. The UN Charter contains examples of hard norms, yet its preamble affirms a social norm recognizing the "dignity and worth of the human person."\textsuperscript{78} The status of customary international law as a set of hard norms is codified in Article 38 of the Statute of the International Court of Justice, but customary international law may also be regarded as a set of social norms because it refers to generally held beliefs of acceptable behavior accompanied by general compliance in state practice.\textsuperscript{79} Likewise, \textit{lex mercatoria} developed from (and remains) a body of customary, informal international business norms,\textsuperscript{80} and yet it is frequently invoked as the basis for judicial decisions.\textsuperscript{81}

Second, social norms may also evolve into soft or even hard norms over time. Janet Koven Levit has shown how social norms in international banking became soft norms through codification as the Uniform Customs and Practice for Documentary Credits and later became hard

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\item \textsuperscript{75} Rex D. Glensy, \textit{Quasi-Global Social Norms}, 38 \textit{CONN. L. REV.} 79, 85–88 (2005) (surveying literature on social norms in international law scholarship and arguing that scholarship on transnational legal process addresses the creation of social norms at the international level).
\item \textsuperscript{76} Tim Wu, \textit{When Code Isn’t Law}, 89 \textit{VA. L. REV.} 679, 724 (2003); \textit{CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW} 163 (1989).
\item \textsuperscript{77} Cf. Janet Koven Levit, \textit{A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments}, 30 \textit{YALE J. INT’L L.} 141, 190 (2005) (arguing that classification of hard law and soft law is "arbitrary and perhaps archaic").
\item \textsuperscript{78} U.N. Charter Preamble, para. 2.
\item \textsuperscript{80} See \textit{WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT} 12 (1904) (noting customary nature of \textit{lex mercatoria}); \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004) ("[\textit{Lex mercatoria} is] a system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century.").
\item \textsuperscript{81} Christopher Drahozal, \textit{Commercial Norms, Commercial Codes, and International Commercial Arbitration}, 33 \textit{VAND. J. TRANSNAT’L L.} 79, 128–30, n.229 (2000) (discussing and citing decisions based on \textit{lex mercatoria}).
\end{itemize}
norms through incorporation into the WTO regime. International lawyers frequently refer to “emerging norms” or “emerging customary international law” to connote norms that are in the process of forming or have some influence over international disputes, but which have not yet crystallized into customary international law. Legal scholars should take care to adopt a flexible, dynamic conception of social and legal norms that accounts for their changing nature.

More fundamentally, classifying norms into well-defined categories does not necessarily help us to anticipate the behavior of participants or anticipate outcomes, conduct policy appraisals of behavior and outcome trends, or recommend strategies to promote relevant global policies. Characterizing a norm according to its purported legal pedigree does not, without more, explain or anticipate compliance with that norm.

Enforceable hard norms may not in fact be enforced if the relevant institutions lack the political will to act. One example is the requirement in customary international law of proportionality in the use of force. The UN Security Council may lack sufficient support among its members to issue a resolution under Chapter VII of the UN Charter authorizing international action in response to disproportionate attacks by one state against another. Moreover, even where participants comply with hard law, they may do so to avoid not just legal sanctions for noncompliance, but also other nonlegal costs. For example, hard norms—in the form of customary international law and investment treaties—typically require a state to provide compensation for expropriation of foreign investments. The legal sanction in an arbitral decision for noncompliance would be an award of damages equivalent to the value of investment. Because the

82. Koven Levit, supra note 77, at 172–73.
83. See Michael Reisman, Foreword to Cheng, State Succession and Commercial Obligations, supra note 6, at x-xi (noting that international scholarship should analyze past decisions and appraise decision trends against international goals).
84. Koven Levit, supra note 77, at 190 (“Yet the practical impact of this line appears largely semantic, for the rules effectively functioned as authoritative and binding on the lawmaking group (and in some cases others) before they crossed the magical line dividing hard law from other international rules and norms.”).
legal sanction is arguably no more onerous than the rule itself, a state may comply with the compensation rule not to avoid the legal sanction but rather to avoid nonlegal costs, such as damage to its commercial reputation, loss of diplomatic goodwill, and retaliatory trade sanctions.

Similarly, social norms, even if unaccompanied by legal sanctions for noncompliance, may nonetheless be followed due to the high nonlegal costs of noncompliance. Negotiating parties in an international dispute may observe the intricate social norms that govern diplomatic exchanges in order to avoid the perceived diplomatic slights that may delay the conclusion of a settlement based on common interests. Defining social norms as nonlegal in nature ignores the fundamental role of social norms in the resolution of conflicts, skewing the legal analysis, inaccurately anticipating outcomes, and resulting in policy misappraisals and misguided recommendations.

3. A Policy Approach to Norms

International law scholarship should study all norms, the aggregate consequences that befall participants for compliance or noncompliance, and the resulting behavior of participants. Distinguishing between the purported legal or nonlegal nature of norms frustrates analyses of norm compliance and may suggest false conclusions about how participants react to international problems. Under a policy approach to international law, social norms are part of the international legal system, and legal norms are a species of social norm.

As a policy matter, norms should be conceptualized not by their legal pedigree, as it were, but by how they secure compliance. Norms are standards of conduct that are accepted by at least some participants in the international system and that secure compliance as a result of three distinct factors. These factors apply in international conflicts with varying intensity and in varying combinations. They are: (1) "compliance pull;" (2) costs and benefits inherent to the norm; and (3) costs and benefits external to the norm.

First, norms secure compliance by exerting an inherent psychological pull towards compliance separate from any benefits of compliance or

4 Iran-U.S. Cl. Trib. Rep. 96 (1983) and Starrett Hous. Corp. v. Iran, Award No. 314-24-1, 16 Iran-U.S. Cl. Trib. Rep. 154 (1987), as awards that provide compensation on the basis of "fair market value"); Cheng, Power, Authority and International Investment Law, supra note 6, at 496-98 (discussing various methods of calculating value of investment).

87. Cf. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS 2 (1999) (arguing that "real law" as opposed to the "law of the state" is found in the interactions of participants in society).

88. See Michael J. Glennon, How International Rules Die, 93 Geo. L.J. 939, 953 (2005) ("[L]egal rules are a type of social norm, and the forces that strengthen or undermine social norms also strengthen or undermine legal rules.").
costs of noncompliance.\footnote{See Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am. J. Int’l L. 46, 51 (1992) (explaining normativity in terms of “compliance pull, which is the measure of a rule’s legitimacy”); Glennon, supra note 88, at 960 (finding that social norms may exert compliance pull).} This psychological pull may result from habit or a belief in the moral appropriateness of that norm. States may ratify human rights or environmental treaties even though they may have appalling human rights and environmental protection records.\footnote{Hathaway, supra note 2, at 515–19 (reporting empirical study showing that states with poor human rights and environmental protection records may nonetheless consent to human rights and environmental treaties).} States may also observe human rights or environmental norms even though it may not be in their interests to constrain their sovereignty. Compliance pull explains the continued vitality of norms with which states comply despite their interests not to comply.

Second, some norms \textit{ipso facto} secure compliance because of costs or withheld benefits \textit{associated with} noncompliance, without any action by other participants or institutions. For example, pilots observe international air traffic rules because ignoring those rules could, without any action from other participants in response, result in accidents. Corporations that are involved in international IP transactions are often contractually bound to share information on the infringement of trademarks owned by or licensed to a joint venture vehicle. They often comply with the contractual rule because withholding that information could deprive them of the benefits that result from successful joint trademark enforcement efforts. In both these examples, the norms themselves secure compliance from a participant independently of any threat of external sanctions that other participants might signal in response to actual or imminent noncompliant behavior.

Finally, compliance with a norm may result when a participant demands it from other participants and deploys power in support of that norm. For example, the United States may demand that China take enforcement measures against copyright infringement in China of artistic works. The United States may use its diplomatic power to communicate its demand and threaten sanctions if China refuses to comply. It may subsequently use its economic power to impose trade sanctions. In such a situation, U.S. power would support the norm against copyright infringement, and the existence of the norm, through its compliance pull, would support the U.S. demand. In other words, power may be deployed in support of a norm, and a norm may legitimize the exercise of power.\footnote{Where a norm has inherent costs for noncompliance and benefits for compliance, these considerations would augment the power deployed in support of the norm and the compliance pull of the norm.}
Under this concept of norms, a norm is strong in three situations: when it exerts a strong compliance pull, when it inherently provides significant benefits for compliance or imposes significant costs for noncompliance, or when both the compliance pull is strong and the cost-benefit analysis supports compliance. Conversely, a norm is weak when it exerts only limited compliance pull or none at all, and when it inherently fails to provide benefits for compliance or impose costs for deviation. The deployment of power by participants, such as the pursuit of legal or nonlegal enforcement measures against other errant participants, does not determine whether a norm is strong or weak. This is because such power is external to the norm and is contingent upon a participant opting to exercise that power. In other words, availability of legal enforcement measures, counterintuitive as it may seem to some domestic scholars, is not what makes a norm strong. It is instead the inherent compliance pull of a norm, as well as the inherent benefits of compliance and inherent costs of noncompliance.

Finally, while the factors above determine whether a norm is strong or weak, they are not evidence of the power of a norm, in the sense of power as defined in this Article. Power refers to the capacity to deploy resources in support of a preferred outcome.\textsuperscript{92} A norm, being an abstract standard, has neither resources nor the capacity to deploy them. The inherent characteristics of a norm that tend to secure compliance, while important, do not constitute power. Participants have power—norms do not.

III. THEORY OF POWER, NORMS, AND OUTCOMES

International IP law is an evolving phenomenon in which norms, power, and outcomes constantly interact as participants respond to competing claims. In any international IP conflict, a range of outcomes is possible. A participant may unilaterally advocate a particular outcome, or a group of participants with aligned interests may pool their power in support of their claims. In addition to deploying power, participants, acting unilaterally or collectively, may invoke norms that prescribe their preferred outcome in an effort to legitimize and bolster their claims. Opposing participants may deploy their power and invoke opposing norms. Eventually, the conflict is resolved through an outcome that reflects a balance of power and accounts for opposing norms.\textsuperscript{93} This outcome reallocates power. It may also—either alone or collectively with other outcomes—modify, harmonize, create, or terminate norms. Future con-

\textsuperscript{92} See supra Part II.C.

\textsuperscript{93} See also CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS, supra note 6, at 387–92 (discussing similar typology in state succession).
flicts then lead to new outcomes that reflect these changes in norms and power balances. The following sections discuss each of these stages in the dynamic process of international IP law.

A. Power and Norms Determine Outcomes

Three scenarios explain how the interaction of power and norms determine outcomes in international IP conflicts. In the first category, power is outcome-determinative because the relevant norms are weak. In the second category, both power and norms exert influence over outcomes. This category includes diverse situations in which there is a mix of power vectors and opposing norms. In the third category, norms are outcome-determinative.

1. Outcomes in Which Power is Determinative

The balance of power among participants tends to determine outcomes where norms are weak. Norms may be weak in situations in which no precedent or historical basis for decisionmaking exists. There may be limited compliance pull in these situations, either because participants may not share a common expectation about which existing norms apply to these new situations or because a majority of participants may not draw inherent benefits from complying with proposed norms. For example, power may be outcome-determinative in treaty negotiations concerning IP norms. Participants could invoke preexisting IP norms, but they may not accept these norms universally, and they may acknowledge the lack of consensus on the meaning of these norms during negotiations.

The formation of TRIPS through WTO trade negotiations offers insights into the role of power in international IP negotiations. Developed states sought greater IP protections, and less developed states generally preferred few or no IP protections. Some international norms for the recognition and protection of IP—such as those enumerated in the Berne Convention and the Paris Convention—existed at the time of the TRIPS negotiations, but these norms were weak. They did not exert significant compliance pull because global participants did not universally accept them. IP users, such as developing states, either explicitly rejected such norms or implicitly rejected them by refusing to enforce IP protections domestically. Additionally, developing states did not believe IP protections provided inherent benefits. Rather, they viewed IP protections as increasing the costs of using IP created by other parties and as limiting their access to such IP.

The outcomes in TRIPS negotiations demonstrate how, where IP norms are weak, participants with aligned interests can pool power
against opposing blocs, and how outcomes reflect a balance of power. In 1986, the United States, Japan, and Western European states, which were all IP-creating states, implicitly or explicitly cooperated with each other to include IP protections in multilateral trade negotiations. They applied pressure on other states to accept IP as an agenda item in the Uruguay Round.94 When Thailand, Mexico, and Brazil opposed placing IP on the agenda,95 the United States deployed economic power and imposed trade sanctions on Brazil under the Omnibus Trade and Competitiveness Act of 1988.96 These sanctions signaled to developing states that if they did not agree to multilateral IP engagement, the United States was willing to enter into bilateral IP talks under the threat of trade sanctions.97 This strategy played a key role in placing IP on the Uruguay Round agenda.98

International and nongovernmental organizations representing IP creators also cooperated to increase IP protections. The Organization for Economic Cooperation and Development invoked the norms contained in the Berne and Paris Conventions, arguing that these norms were universally applicable and should be contained in any agreement concerning IP that emerged from the Uruguay Round.99 IP groups from North America, Western Europe, and Japan (such as the Intellectual Property Committee in Washington, the Union of Industrial and Employers Confederation of Europe, and the Japanese Keidanren) applied pressure on


95. See Statement by Thailand at the Meeting of 12–14 September 1988, NG TRIPS, MTN.GNG/NG11/W/27 (Sept. 21, 1988) (expressing concern regarding the agenda); Statement by Mexico, supra note 36 (emphasizing that the agenda should focus on trade rather than restructuring the international property regime); Communication from Brazil, NG TRIPS, MTN.GNG/NG11/W/57 (Dec. 11, 1989) (emphasizing the need to consider both trade and intellectual property rights).


97. See id. ("The USTR pursued an aggressive Special 301 diplomacy throughout the eight years of the Uruguay Round to keep countries at the table ... [signaling] that negotiations could go on one-by-one under threat of bilateral trade sanction or could take place within the GATT MTN round, but that they would take place nevertheless.").

98. See id. ("The 301 bullying gambit worked ... "); Adam Issac Hasson, Note, Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization, 25 B.C. Int’l & Comp. L. Rev. 373, 388 (2002) ("TRIPs has been criticized as the direct result of a coercive strategy on behalf of the United States to force under-developed countries to pass laws that would protect U.S. patents.").

99. See Ryan, supra note 94, at 564 ("The Organization for Economic Development and Cooperation converged toward a consensus that the TRIPS Agreement ought to incorporate the Paris Convention and the Berne Convention.").
their governments’ trade negotiators to promote stronger IP protections. In June 1988, these groups produced a draft Basic Framework of GATT Provisions on IP.\footnote{See id. at 565; Gail E. Evans, Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights, WORLD COMPETITION, Dec. 1994, at 165.}

In response, IP users pooled their power at the Uruguay Round to oppose the stronger IP protections. Some less developed countries formed a group called the “G-10,” comprising Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and the Federal Republic of Yugoslavia. The G-10 states were concerted in their opposition to even placing IP on the Uruguay Round agenda.\footnote{See Ryan, supra note 94, at 562.} Even after consensus was reached with other Uruguay Round participants that IP should be on the agenda, India, representing the G-10, argued that only trademark and copyright counterfeiting should be included in negotiations and that patents and trade secrets should be excluded.\footnote{Evans, supra note 100, at 162.} In 1988, India and Brazil denounced the draft Basic Framework of GATT Provisions on IP and its proposed patent protections for drugs, food, and chemicals.\footnote{See Ryan, supra note 94, at 565; Evans, supra note 100, at 166.}

The outcome of this conflict reflected the balance of power between IP-producing states and IP-using states. IP-producing states used their economic power to introduce treaties in which they would grant trade benefits in exchange for stronger IP protections. IP-using states had the power to withhold consent to any agreement,\footnote{See Marco C.E.J. Bronckers, Better Rules for a New Millenium: A Warning Against Undemocratic Developments in the WTO, 2 J. INT’L ECON. L. 547, 548–49 (1999) (arguing that trade concessions were necessary to conclude TRIPS); Guzman, supra note 28, at 950 (“The ultimate decision by developing countries to consent to TRIPS was not motivated by a belief that greater protection for IP was in the interest of those countries; but rather by a desire to obtain concessions in other areas.”).} and they used this power to extract economic concessions. In 1994, member states of the WTO concluded TRIPS. TRIPS generally recognizes patents for inventions\footnote{TRIPS, supra note 10, art. 27.1.} and prohibits the use of patents without the owner’s consent.\footnote{Id. art. 26.} The rules are subject to exceptions such as medical treatments and biological processes for the production of plants and animals,\footnote{Id. art. 27.3.} which developing states
regarded as important. TRIPS also requires member states to provide
domestic mechanisms for the enforcement of IP protections.

Power may also be outcome-determinative in parallel legal proceed-
ings. In an international conflict over whether a corporation has
infringed patents registered in different states by another corporation,
TRIPS may not be at issue if each of these states adheres to the mini-

mum standards of IP protection prescribed in TRIPS. If the two
corporations seek domestic adjudication under the legal rules of the re-
spective national jurisdictions, the rulings of national courts may be
binding in the domestic context, but they may not extend to the interna-
tional arena or other jurisdictions. Should the parties to the IP conflict
pursue litigation in all of these jurisdictions, the courts in each may de-
mand that other courts comply with their decisions, or they may enjoin
the litigants from pursuing parallel proceedings. Depending on the
domestic legal rules regarding comity, issue preclusion, estoppel, and
other similar doctrines, other courts may decide to comply with or ignore
such demands.

108. See Peggy B. Sherman & Ellwood F. Oakley, III, Pandemics and Panaceas: The
World Trade Organization’s Efforts to Balance Pharmaceutical Patents and Access to AIDS
Drugs, 41 AM. BUS. L.J. 353, 372 (2004) (noting that Brazil sought access to other states’
domestically manufactured generic drugs through compulsory license).

109. TRIPS, supra note 10, art. 41.1.

110. See, e.g., Packard Instrument Co. v. Beckman Instruments, Inc., 346 F. Supp. 408,
408 (N.D. Ill. 1972) (noting that plaintiff brought patent infringements actions in nine differ-
ent countries); Connaught Labs. Ltd. v. Medeva Pharma Ltd., No. TT-1578-96, 94 A.C.W.S.
involved in the patent disputes over the same vaccine in Canada, the United States, the United
Kingdom, and Europe).

111. See Packard Instrument Co., 346 F. Supp. at 410 (“It is not unlikely that courts in
the foreign countries whose patents are involved here would disagree with this court’s deter-

746 (Ch.) (Eng.) (holding claims of infringements of patents of the same drug in twelve for-

eign countries nonjusticiable).

112. See, e.g., Creative Tech. Ltd. v. Aztech Sys. Pte. Ltd., 61 F.3d 696 (9th Cir. 1995)
(declining to hear copyright claims where parallel proceedings had commenced in Singapore);
(holding that plaintiffs were estopped from alleging patent infringement in Canada as a result
of prior proceedings in England and the Netherlands).

2d (BNA) 1344 (N.D. Ill. 1998) (enforcing the judgment of a Belgian court that a U.S. corpo-
ration had violated Belgian patents held by a Belgian corporation) with Cuno Inc. v. Pall
Corp., 729 F. Supp. 234 (E.D.N.Y. 1989) (holding that an English court’s determination that
there was no infringement of a European patent of an invention that was also patented in the
United States did not estop the U.S. court from determining whether there was an infringe-
C.P.R. (3d) 1 (holding that Australian and European decisions concerning the same patent
dispute had no precedential value in Canada) with Johnson & Johnson, Inc. v. Boston Sci-
entific Ltd., 14 C.P.R. (4th) 512 (holding that plaintiffs were estopped from alleging patent
infringement in Canada as a result of prior proceedings in England and the Netherlands). See
made by courts in other jurisdictions, the final international outcome may reflect the relative powers of these courts and the location of the assets of the parties in the IP conflict.

2. Conflicts in Which Both Power and Norms Are Influential

Outcomes may reflect power and norms in IP conflicts where both are influential. Such situations arise when different power blocs back opposing norms. Where there are two strong norms in opposition, the power of participants backing each of those norms may play a role in harmonizing those norms or determining which norm should apply when they cannot be reconciled.

In February 2001, the United States and Brazil disagreed over whether Brazil should be permitted to control the price of Human Immunodeficiency Virus (HIV) drugs that U.S. corporations had patented. The United States brought an action against Brazil before the WTO Dispute Settlement Body claiming that Article 68 of Brazil’s Law No. 9,279, its industrial property law, violated TRIPS. Article 68 required patent holders to manufacture the patented product in Brazil. If they failed to do so, they could be subjected to compulsory licensing, or Brazil could import generic versions of the patented products.

Brazil used this law to produce medicines locally and cheaply to treat its half-million patients with HIV or AIDS.

In this conflict, there were at least two opposing applicable norms. First, the norm of IP protection permitted drug producers to exploit the exclusive rights over their patented drugs. In November 2001, the WTO Ministerial Conference in Doha declared that TRIPS did not prevent member states from taking measures to protect human life, and that TRIPS should be implemented in a manner supportive of public health. At the time of the U.S.-Brazil conflict in February 2001, however, the WTO had not limited the TRIPS norm of IP protection in this way. Second, in international law, a more general human rights norm protected

also generally Philip L. McGarrigle, The Role of Foreign Judgments in Patent Litigation: A Perspective and Strategic Overview, 39 IDEA 107, 109 (1998) (stating that the law on preclusion as regards patents is unsettled).


115. Id. (explaining Article 68 of Brazil’s industrial property law).

116. See Hoen, supra note 23, at 32 (noting Brazil’s success in lowering the price of HIV drugs in Brazil through compulsory licensing under Article 68 of its patent law).

the right to health care. Some participants claimed that this norm permitted governments facing public health emergencies to distribute medicines widely through measures such as compulsory licensing and the production or importation of generic drugs.

Both sides deployed power to reconcile these two norms. The United States sought to harness the power of the WTO Dispute Settlement Body to determine whether TRIPS provided limitations to IP protection in public emergencies. But before the WTO panel could rule on the matter, international NGOs pooled their power to promote the view that the norm of IP protection should be limited during public health emergencies. They asserted that the U.S. action would undermine Brazil's successful AIDS program and prevent it from serving as a model for other developing states. Under such international pressure, the United States withdrew its claim within four months of filing it. The only concession the United States obtained was Brazil's agreement to consult the United States before implementing any compulsory licensing of patented drugs produced by U.S. corporations. It was thus immaterial whether the United States would have prevailed on its WTO claim because NGO power helped achieve an outcome that prevented the adjustments of the IP norm with the human rights norm through adjudication. In the NGO-engineered outcome, Brazil was effectively permitted to continue its HIV treatment program irrespective of whether the patents for HIV drugs were held by U.S. pharmaceutical corporations.

3. Outcomes in Which Norms Are Determinative

Norms may sometimes control outcomes despite the power of the participants in IP conflicts. This occurs where the norms exert a strong

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121.  Notification of Mutually Agreed Solution, Brazil—Patent Protection, supra note 120 (noting Brazil’s agreement to consult the United States before implementing compulsory licensing of patented drugs produced by U.S. companies).
compliance pull, confer inherent benefits for compliance or impose inherent costs for noncompliance, are backed by external power, or where a combination of these three factors are present.

Although the United States is a powerful participant, in the two IP conflicts in which other states filed and won WTO actions against the United States, it agreed to amend its domestic law to conform to the applicable global IP norms. These global IP norms included two different sets of norms: (1) the substantive IP norms as determined by the WTO tribunals, and (2) the ancillary norm of compliance with the IP decisions of WTO tribunals. In the United States—Section 110(5) Copyright Act case, the WTO panel found that Section 110(5)(B) of the Copyright Act, which allowed free amplification of music broadcasts by certain food service and drinking establishments and retail establishments, violated TRIPS Article 13, which provides for only limited exceptions to the exclusive rights of copyrights holders.122 The United States then informed the WTO tribunal that it accepted the decision and would implement measures to bring its Copyright Act in conformity with TRIPS. In the United States—Section 211 Omnibus Appropriations Act of 1998 case, the WTO Appellate Body found that the prohibition by the United States on the registration of trademarks abandoned by Cuban mark holders whose assets and business had been confiscated under Cuban law discriminated against the Cuban mark holders and their successors-in-interest.123 The Appellate Body found that such discrimination violated the national treatment, that is, nondiscrimination, norm in Article 3(1) of TRIPS and Article 2(1) of the Paris Convention as incorporated into TRIPS and the WTO Agreement.124 Once again, the United States accepted the decision and agreed to amend its domestic law to conform with it.

That the U.S. government opted to comply with these decisions is testimony to the strength of TRIPS norms. Three factors account for the strength of these norms. First, the U.S. government may, broadly speaking, believe that the substantive IP norms and the adjudicatory norms in TRIPS and the WTO Agreement are normatively desirable, and they therefore exert some compliance pull over the government.

Second, and more importantly, the United States and U.S. entities derive significant inherent benefits from the TRIPS norms and WTO enforcement of them. As of July 30, 2006, the United States had brought

124. Id.
fifteen cases against other states for alleged violations of TRIPS norms, compared with the two in which it was the respondent. The United States settled twelve cases\(^\text{125}\) and won three.\(^\text{126}\) Thus, TRIPS norms and WTO adjudicatory norms secure compliance from the United States because the WTO/TRIPS system provides a platform for the United States to enforce its preferred norms against other states.

Third, under the applicable TRIPS adjudicatory norms, complainants may impose trade sanctions for noncompliance with the decisions of WTO panels. The complainant in both \textit{U.S.—Section 211 Omnibus} and \textit{U.S.—Section 110(5) Copyright} was the European Communities (EC), which certainly had sufficient economic power to enforce TRIPS norms through sanctions.

Thus, the combination of the compliance pull of TRIPS norms, the inherent interests of the United States in supporting TRIPS and WTO adjudication, and the power of the EC to enforce the WTO decisions through trade sanctions explains how TRIPS norms may secure compliance in spite of the power of the United States.

This does not mean, however, that the power of the United States did not influence the outcomes. Quite the contrary. The United has not exercised its power to deviate openly from TRIPS norms, but it has deployed its power to delay the implementation of TRIPS decisions. Article 21.3

\(^{125}\text{ See Notification of a Mutually-Agreed Solution, Portugal—Patent Protection under the Industrial Property Act, WT/DS37/2 (Oct. 8, 1996); Notification of a Mutually-Agreed Solution, Japan—Measures concerning Sound Recordings, WT/DS28/4 (Feb. 5, 1997); Notification of a Mutually-Agreed Solution, Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS36/4 (Mar. 7, 1997); Notification of a Mutually-Agreed Solution, Sweden—Measures Affecting the Enforcement of Intellectual Property Rights, WT/DS86/2 (Dec. 11, 1998); Notification of a Mutually-Agreed Solution, European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights, WT/DS115/3 (Sept. 13, 2002); Notification of a Mutually-Agreed Solution, Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television, WT/DS125/2 (Mar. 26, 2001); Notification of a Mutually-Agreed Solution, European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs, WT/DS124/2 (Mar. 26, 2001); Notification of a Mutually-Agreed Solution, Denmark—Measures Affecting the Enforcement of Intellectual Property Rights, WT/DS83/2 (June 13, 2001); Notification of a Mutually-Agreed Solution, Brazil—Patent Protection, WT/DS199/4 (July 19, 2001); Notification of a Mutually-Agreed Solution, Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WT/DS171/3 (June 20, 2002); Notification of a Mutually-Agreed Solution, Argentina—Certain Measures on the Protection of Patents and Test Data, WT/DS196/4 (June 20, 2002); Notification of a Mutually-Agreed Solution, Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights, WT/DS82/3 (Sept. 13, 2002).}

of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides that parties shall implement decisions within a "reasonable period of time." In practice, the parties will often try to reach agreement on a timetable for implementation, but where consensus cannot be achieved, the parties may seek an arbitral decision on a time limit for implementing the decision. Of the three TRIPS disputes the United States won, the United States and the losing party reached an agreement on the period of time for implementation in two cases. In the third dispute, the United States obtained an arbitral decision setting the time limit. The maximum time for implementation in these cases has been fifteen months, with an average of twelve months. The United States has argued that the losing states should amend their domestic legislation to comply with TRIPS norms within aggressive timelines, and has stated that "the legally binding nature of . . . steps for implementation and their timing, [or] the existence of domestic controversy or 'contentiousness' [should] not [be] relevant factor[s]" in determining a reasonable period of time for implementation.

By comparison, as of July 31, 2006, the United States still had not implemented the decision in the U.S.—Section 211 Omnibus case, which was decided on February 2, 2002. Although the United States reached a temporary settlement with the EC in the U.S.—Section 110(5) Copyright case for a three-year period commencing on December 21, 2001, it had yet to fully implement the WTO panel’s decision. That case was decided on July 27, 2000. In both these cases, the United States repeatedly promised to implement the decisions by amending its legislation within six to twelve months, but on each occasion that the time period was about to expire, the United States negotiated with the EC and other inter-

127. DSU, supra note 46, art. 21.3.
128. See, e.g., Agreement under Art. 21.3(b) of the DSU, EC—Agricultural Products, WT/DS174/24 (Jun. 13, 2005); Status Report by India, India—Pharmaceutical Products, WT/DS50/10 (Nov. 12, 1998).
130. Status Report by India, India—Pharmaceutical Products, supra note 128.
131. Agreement under Art. 21.3(b) of the DSU, EC—Agricultural Products, supra note 128 (interested parties agreement to implementation within eleven months and two weeks was reasonable); Status Report by India, India—Pharmaceutical Products, supra note 128 (interested parties agreed fifteen months was a reasonable period of time for implementation); Arbitration Award, Canada—Patent Protection, supra note 129, ¶ 67 (noting the arbitrator decided a reasonable period of time to implement the changes was ten months).
133. Mutually Satisfactory Temporary Arrangement, United States—Section 110(5) of the US Copyright Act, WT/DS160/23 (June 26, 2006).
ested parties for a further extension in order to pursue legislative amendments in Congress. On July 7, 2006, the U.S. administration again reported to the WTO that it was continuing to work with the U.S. Congress to resolve these two matters. This example highlights the vast difference in the time that the United States negotiates for implementation of domestic TRIPS reform in other states and the time the United States insists upon for its own domestic reform. It indicates that even when IP norms are strong enough to secure promises of compliance from a powerful participant, power still matters in crucial ancillary matters, such as the time it takes such participants to meet their promises.

B. Outcomes Shape Norms

The outcomes of IP conflicts that result from the interactions of power and IP norms can create, modify, harmonize, or terminate IP norms. Outcomes may have a constitutive effect on IP norms in a combination of ways. First, a normatively legitimate outcome may modify an old norm where participants reach an outcome that deviates from that norm in order to better promote or harmonize relevant global policy goals, and where the old norm does not achieve a relevant policy goal or an optimal balance among policy goals. Examples of such harmonization include the balancing of IP protection against IP access, or the balancing of exclusive rights of IP holders against the human rights of IP users. An inherently legitimate outcome may modify preexisting norms in favor of that outcome if participants accept the modification as normatively desirable, if the new norms promote their interests, or if other participants deploy power in support of the modified norms.

Second, an institutionally legitimate outcome may modify norms if the outcome that deviates from or clarifies preexisting norms was prescribed by a participant that other participants consider a legitimate norm-making institution. Such institutions could include the WTO Ministerial Conference, the WTO Dispute Settlement Body, or the European


136. See U.S. Copyright Act Status Report, supra note 134; Status Report by the United States, U.S.—Section 211 Omnibus, Addendum, WT/DS176/11/Add.44 (July 6, 2006).
Court of Justice (ECJ). An institutionally legitimate outcome may modify preexisting norms if participants accept that the institution’s prescriptions apply to future conflicts, if the global decision-making structure in which the institution is preeminent supports the interests of the participants, or if the institution or other participants deploy power in support of the institution’s decisions.

Third, a repetitive outcome may modify norms when, in similar types of conflicts over time, each conflict is resolved in the same fashion. If IP outcomes deviate from IP norms and repeatedly tend to cluster around a new outcome, participants may become persuaded that the new outcome is more desirable, and their expectations of conflict resolution may converge around the new outcome. Consequently, the costs of negotiating outcomes that deviate from this new outcome increase in future conflicts. Additionally, participants may deploy their power in support of the repetitive outcome, which makes it more difficult for participants to deviate from the new preferred outcome. Over time, IP norms supporting the old outcome may be replaced by a norm in support of the new preferred outcome.

The three case studies below illustrate how outcomes in an IP conflict may modify norms through a combination of the three types of outcomes, or, indeed, how a single outcome may in fact fall into all three categories of constitutive outcomes.

1. The Global HIV Crisis

The global response to the HIV crisis in Africa and South America demonstrates how a combination of normatively legitimate, institutionally legitimate, and repetitive outcomes can modify and harmonize norms. Opposing norms in the HIV crisis were, on the one hand, norms

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137. See, e.g., Appellate Body Report, Japan—Taxes on Alcoholic Beverages, 13, WT/DS8/AB/R (Nov. 1, 1996) (stating that “adopted panel reports are an important part of the GATT acquis” that shape the WTO’s jurisprudence). See also Appellate Body Report, India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, 46, WT/DS50/AB/R (Dec. 19, 1997) (deciding a dispute inconsistently with “established GATT/WTO practice”). Cf. Goldsmith & Posner, supra note 1, at 161 (“Reliance on judges makes sense when issues are complex and require expertise, independence can be guaranteed, and states anticipate a continuing interest in the maintenance of the regime.”).

138. Cf. Spiro, supra note 2, at 458 (“Ideas matter, and at some tipping point—resulting in a norm cascade—states perceive conformity with certain standards as necessary element to their identity as states.”); Laurence Helfer, Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes, 102 COLUM. L. REV. 1832, 1846 (2002) (“[C]entral to ideationalist theory are ‘norm cascades,’ collections of norm-affirming events that lead states rapidly to conform their conduct to international standards.”).

139. See generally Finnemore & Sikkink, supra note 2 (describing the norm “life cycle”).
protecting exclusive use of patented drugs and, on the other hand, norms protecting human life and the right to health care.

When TRIPS came into force in 1994, it did not appear to fully accommodate human rights norms. Instead, it appeared to promote, with few limitations, the norm that IP holders should have exclusive use of their IP, and non-IP holders should not limit this exclusive use through compulsory licensing or the production of generic versions of the IP. One consequence of adhering strictly to this norm was that HIV sufferers in less developed states were denied access to affordable HIV drugs.

Outcomes in HIV-related IP disputes from 1994 to 2001 modified or clarified the IP norms in TRIPS as they had appeared when TRIPS first came into force, ultimately harmonizing them with human rights norms. In 1998, forty multinational pharmaceutical corporations brought a claim before the South African courts against the South African government alleging that the South African Medicines and Related Substances Control Amendment Act, No. 90 of 1997, violated TRIPS by allowing parallel imports and generic substitution of medicines. In response to the Act, the European Union (EU) deployed diplomatic power in urging South Africa to repeal the law, and the U.S. government deployed its economic power by withholding aid and threatening sanctions.

However, as HIV/AIDS in South Africa reached epidemic proportions, it became clear to policymakers and NGOs that, without access to HIV medicines, South Africa would face a debilitating public health crisis. This crisis could have economic and epidemiological contagion effects on neighboring states and could destabilize the African conti-

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141. See Hoen, supra note 23, at 31, n.11 (citing letter by the European Commission Vice President to the South African Vice President asserting that South Africa’s law violated TRIPS).
143. See SOUTH AFRICA DEPARTMENT OF HEALTH, NATIONAL HIV AND SYPHILIS SEROPREVALENCE SURVEY OF WOMEN ATTENDING PUBLIC ANTENATAL CLINICS IN SOUTH AFRICA: 2001 9 (noting that HIV prevalence increased from 0.7% in 1990 to 24.8% in 2001).
The threat of such a cataclysmic event was sufficient to mobilize NGOs and AIDS activists to apply pressure on the U.S. government to moderate its demand for strong drug patent protections. AIDS activists and NGOs heavily criticized the U.S. government and directly attacked presidential candidate Al Gore at his election rallies. As a result of domestic and international pressure created by the broad campaign of the NGOs at the WTO Seattle Conference in 1999, the U.S. government announced that its profit-maximizing policy would be tempered by the need to provide access to life-saving drugs in less developed countries. In May 2000, President Clinton issued an executive order accepting compulsory licensing to increase access to HIV medication in sub-Saharan Africa. The U.S. government and the EU also withdrew support for their corporations' lawsuit in South Africa. The corporations terminated their suit unconditionally in April 2001.

The outcome of this South Africa conflict harmonized the IP norm with the human rights norm because it was an inherently legitimate outcome. Participants such as NGOs, the EU, and the United States seemed to recognize that as a policy matter it was untenable to protect the drug revenues of pharmaceutical companies if that meant HIV sufferers in underdeveloped states would die. The outcome was also constitutive because the U.S. government and the EU had deployed their considerable power in support of the outcome and signaled, through the


148. William J. Clinton, Remarks at a World Trade Organization Luncheon in Seattle, 35 Weekly Comp. Pres. Doc. 2494, 2497 (Dec. 1, 1999) ("[T]he United States will henceforth implement its health care and trade policies in a manner that ensures that people in the poorest countries won't have to go without medicine they so desperately need.").


150. See Hoen, supra note 23, at 31 ("[S]everal governments and parliaments around the world, including the European Parliament, demanded that the companies withdraw from the case.").

151. Id. ("Eventually, the strong international public outrage . . . caused the companies to unconditionally drop the case."); Sell, supra note 147, at 213-14.
executive order and other statements, that corporations should accept this outcome. To some observers, this deployment of power “contributed to breaking the taboo on the use of compulsory licensing in the health field.” Indeed, as discussed fully in Part III.A.1, supra, the U.S. government terminated its claim against Brazil in July 2001 due to pressure from NGOs, effectively permitting compulsory licensing of HIV drugs in Brazil. This outcome was normatively legitimate for reasons similar to those in the South Africa conflict. It also repeated the South Africa outcome, thereby further strengthening the emerging norm that IP protection should be limited in public health emergencies.

A third institutionally legitimate outcome—the WTO Ministerial Declaration at Doha—reinforced these two normative outcomes. In November 2001, NGOs, international organizations such as the World Health Organization, some developed states such as Canada, and various less developed countries pooled their power in coordinated efforts to lobby other WTO members to formally incorporate human rights norms into the IP-protecting norms in TRIPS. Under pressure from this broad range of participants, WTO members agreed to a Ministerial Declaration at Doha, which stated: “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health,” and that TRIPS “should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health . . . .” The Doha Declaration also extended the deadline for least developed countries to implement drug patent protections from 2006 to 2016. The Doha Declaration was an institutionally legitimate outcome because it was promulgated within the WTO framework. Ministerial Conferences are the apex of decisionmaking within the WTO. Decisions of the Ministerial Conferences are communicated through Ministerial Declarations, and member states support this decision-making structure as legitimate by virtue of having signed the Agreement Establishing the World Trade Organization. In this sense, the Doha Declaration helped integrate the norm of IP protection with human rights norms.

152. See e.g., Hoen, supra note 23, at 35 (“[T]his [U.S.] policy change contributed to breaking the taboo on the use of compulsory licensing in the health field.”).
153. See Ryan, supra note 94, at 566; Hoen, supra note 23, at 42 (“[D]eveloping country [WTO] Members were extremely well prepared and operated as one bloc.”); Ansari, supra note 28, at 60 (“The opposition to TRIPS was led by two major civil society movements: the agricultural life forms patents groups, and the pharmaceutical patents groups.”); Hoen, supra note 23, at 34 (discussing NGO efforts to organize the Amsterdam Conference on Increasing Access to Essential Drugs in a Globalized Economy, which resulted in an “Amsterdam Statement” that served as a guide for other public health NGOs); Heifer, supra note 4, at 45–50.
155. Id. ¶ 7.
156. DSU, supra note 46. at 1145.
The South Africa, Brazil, and Doha outcomes together contributed to the adjustment of IP norms to accommodate the normative demands of global public health. Although each outcome had some normative impact on preexisting norms, no single outcome alone was constitutive. The South Africa and Brazil outcomes were inherently legitimate outcomes, but they did not have institutional legitimacy because they were not endorsed by an international IP norm-making body. The Doha outcome had institutional legitimacy, but it may not have been reached had the South Africa and Brazil conflicts not precipitated broad support for the application of human rights norms to drug patent conflicts.

The adjustment of IP norms in response to the HIV crisis is not complete. The adjustments that have occurred and continue to occur take place within a global project to harmonize IP norms with other norms, including trade norms. Following Doha, some participants have continued to resist the weakening of IP protections. The consensus at Doha was not repeated at the 2003 Cancun Ministerial Meetings, during which talks broke down. Although member states reaffirmed their commitment to the Doha Declaration at the Hong Kong Ministerial Conference in 2005, Doha trade talks were suspended in July 2006 because the United States was unable to agree with other states on the issue of farming subsidies. In this manner, disputes over other trade norms in the Doha Declaration prevented the further refinement of IP norms contained in TRIPS. Against this backdrop of trade negotiations, the WTO General Council reached a decision in December 2005 to amend TRIPS to explicitly permit the compulsory licensing of drugs under certain circumstances. WTO member states have until December 1, 2007, to consent to this amendment, which requires the support of two-thirds of WTO members for entry into force.

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158. See Helfer, supra note 4, at 68 ("[The collapse of trade talks at the Cancún ministerial meeting in September 2003] ... has considerably slowed the pace of negotiations and ... may even cast into doubt the successful conclusion of the Doha Round.")


161. General Council, Amendment of the TRIPS Agreement, WT/L/641 (Dec. 6, 2005).

162. Id.
2. Three-Head Rotary Shavers

From 1997 to 2004, a number of disputes arose within the EU about whether three-head rotary shavers could be trademarked. Through the resolution of these disputes, a norm emerged reflecting a consensus that such shavers could not be trademarked unless the three-head design served a purely aesthetic function. This norm resulted from a series of outcomes before courts that were both institutionally legitimate and repetitive.

Koninklijke Philips Electronics N.V. (Philips) had registered its three-head rotary shaver design as a trademark in several jurisdictions within the EU and subsequently brought enforcement actions in these jurisdictions against Remington for infringing its trademarks. A common issue in these actions was whether Philips’ three-head design was a registrable trademark. Philips argued that although its design served the novel technical function of achieving a closer shave, it was also a distinctive design deserving trademark protection.

Initially, the national courts reached inconsistent outcomes. A majority of the Stockholm District Court held that a design that achieved a technical purpose could nonetheless be trademarked if this technical purpose could also be achieved by some other design, and that Philips’ three-head design was a valid trademark because a closer shave could be achieved by other designs. By comparison, the English High Court adopted with slight modification the Stockholm court’s minority view that a design that in substance achieved solely a technical result could not be trademarked.

In 2002, the conflict reached the ECJ after the Court of Appeal of England and Wales referred the ECJ the question of whether a design that served a technical result could be protected as a trademark. The ECJ held that a design was not a registrable trademark if “the essential functional features of that shape are attributable only to the technical result.” It also held that this outcome could not be avoided by merely showing that “there are other shapes which allow the same technical result to be obtained.” The decision therefore favored the English view and not the Swedish view.

The ECJ decision clarified or created a norm against the protection of technical designs as trademarks. In conflicts before other national

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166. Id.
courts of EU member states, judges applied the ECJ norm and reached outcomes consistent with it. In 2004, the Swedish Court of Appeal explicitly referred to the ECJ opinion in overturning the Stockholm District Court ruling.\(^\text{167}\) Likewise, the French, German, Italian, and Spanish courts also cancelled Philips' three-head design trademarks following the ECJ's decision.\(^\text{168}\) When Philips subsequently claimed trademark protection of a three-head shaver faceplate with an additional clover leaf design in the English High Court, the Court declared, on the basis of the ECJ judgment, that the trademark of Philips' clover leaf faceplate was invalid because the clover leaf was not a separate feature with its own aesthetic purposes.\(^\text{169}\)

The ECJ decision created or clarified the trademark norm within the EU because the court is an institutionally legitimate participant. Under the Treaty on European Union, the ECJ is the ultimate judicial arbiter for issues of EU law,\(^\text{170}\) and member states and their judiciaries are required to accept ECJ decisions as final interpretations of EU law.\(^\text{171}\) The various national courts facing similar conflicts after the outcome of the case in the ECJ applied the ECJ decision as a norm that controlled subsequent conflicts, which strengthened the norm through the repetition of outcomes. Additionally, each of these national courts was institutionally legitimate within its national jurisdiction and had powers of enforcement. Thus, application of the ECJ-created norm helped that norm, as a practical matter, penetrate national legal systems within the EU and control the outcomes of conflicts that occurred within national territories.

3. Repetition of International IP Transactions

The repetition of IP transactions between firms may have a constitutive effect on IP norms. To be sure, individual transactions may not modify norms because they may or may not be inherently legitimate from a global policy standpoint, and private corporations may not have the same institutional legitimacy as supranational bodies such as the WTO and the ECJ. But international IP transactions may indirectly alter substantive IP norms if they repeatedly use the laws of a small group of states as the laws governing the transactions. Over time, the substantive


\(^{169}\) Id. para. 147 (finding that clover leaf design did not have a separate aesthetic purpose, and invalidating the trademark).


standards of the selected domestic laws become internationalized because they control the international IP outcomes that flow from each of these transactions. The alternative norms found in domestic legal systems that prescribe different levels of IP protection may correspondingly fall into disuse at the international level, becoming increasingly weaker until, finally, they may be eradicated.

Private IP transactions may also channel and regularize behavior in other ways. By imposing contractual commitments on transacting parties to undertake enforcement measures, repetitive IP transactions encourage the development of a norm of vigorous enforcement of contractual commitments by private entities, independently of state action.

IP transactions may also regularize dispute resolution behavior between the transacting parties. Repeated selection through arbitration clauses of the arbitration centers in North America and Western Europe will strengthen the institutional legitimacy of these arbitral bodies as compared to other arbitral centers or domestic courts. Additionally, the increased use of arbitration awards to resolve IP disputes may prompt domestic courts to adjust their norms concerning the review and enforcement of arbitral awards.  

The norms that result from IP transactions may not initially be formalized in laws or even the guidelines of international organizations. They may certainly be influential, however, if powerful corporations with substantial resources (and battalions of lawyers) at their disposal tend to conform to the standards and patterns of behavior prescribed in the repetitive IP transactions. Additionally, as with the evolution of lex mercatoria and the Uniform Customs and Practice for Documentary Credits, customary business behavior among corporations regarding IP may become formalized in guidelines issued by expert technocratic or managerial groups in international business organizations, such as WIPO or the UN International Institute for the Unification of Private Law. These norms may also be incorporated into treaties such as TRIPS if business lobby groups influence their government representatives at international trade negotiations.  

A detailed empirical study of IP transactions is needed to determine conclusively whether IP transactions by multinational corporations do, in fact, repeatedly prescribe similar IP outcomes. But it is reasonable to expect that some repetition of IP transactions is likely because transnational networks of large law firms use similar proprietary model


173. Cf. supra Part II.D.2 (discussing hardening of other business norms).
agreements for different transactions, and corporate counsels share information on effective methods (or in business management parlance, "best practices") of IP protection. Leading Fortune 500 companies and the law firms that represent them have institutional legitimacy within the global business community if these corporations and law firms are perceived as credible market leaders that exercise sound business judgment. When other firms regard these transactions as well-designed business deals, they may copy these transactions in their own deals in order to achieve similar business goals and lower their legal fees in IP transactions by avoiding drafting deal documents from scratch.

Based on anecdotal evidence, it appears that IP transactions designed by leading law firms are emulated and repeated in deals for different corporate clients. In a high-value transaction negotiated by a leading New York law firm, a Netherlands registered corporation purchased an English designer’s brand and installed her as the creative director of the joint venture vehicle, “Newco,” which was created to design, market, and sell her clothes. Through a Trademark Agreement, the Dutch corporation subscribed to fifty percent of Newco’s share capital, and the fashion designer assigned her trademarks to Newco. The Trademark Agreement set forth the countries in which the trademarks at issue had been registered. The agreement provided for worldwide enforcement against third-party violations before courts and required use of “all commercially reasonable efforts” to police infringers. Finally, the agreements for different transactions, and corporate counsels share information on effective methods (or in business management parlance, “best practices”) of IP protection. Leading Fortune 500 companies and the law firms that represent them have institutional legitimacy within the global business community if these corporations and law firms are perceived as credible market leaders that exercise sound business judgment. When other firms regard these transactions as well-designed business deals, they may copy these transactions in their own deals in order to achieve similar business goals and lower their legal fees in IP transactions by avoiding drafting deal documents from scratch.

Based on anecdotal evidence, it appears that IP transactions designed by leading law firms are emulated and repeated in deals for different corporate clients. In a high-value transaction negotiated by a leading New York law firm, a Netherlands registered corporation purchased an English designer’s brand and installed her as the creative director of the joint venture vehicle, “Newco,” which was created to design, market, and sell her clothes. Through a Trademark Agreement, the Dutch corporation subscribed to fifty percent of Newco’s share capital, and the fashion designer assigned her trademarks to Newco. The Trademark Agreement set forth the countries in which the trademarks at issue had been registered. The agreement provided for worldwide enforcement against third-party violations before courts and required use of “all commercially reasonable efforts” to police infringers.

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174. See, e.g., Am. Ass’n of Corporate Counsel, Intellectual Property Committee Mission Statement, http://www.acca.com/php/cms/index.php?id=198 ("ACC’s Intellectual Property Committee’s goals are to provide important information and resources about strategic corporate intellectual property protection, acquisition, and enforcement to the ACC membership.").

175. This phenomenon has occurred in non-IP transactions. For example, the “poison pill” that was first designed by the New York law firm Wachtell Lipton Rosen & Katz was subsequently adopted widely by corporations defending themselves from hostile takeovers. See RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 740-41 (2d ed. 1995).

176. See Agreement by and among [Fashion Designer], Newco and [Netherlands corporation] (2001) [hereinafter Trademark Agreement], preamble (redacted to protect confidentiality) (on file with author).

177. Id. § 2.02.

178. Id. §§ 2.01, 7.01.

179. Id. § 4.01(e).

180. Id. § 7.04 stated:

(a) Newco shall have the sole right to apply for, reserve, register, prosecute, maintain and renew the [Designer's] Trademarks worldwide at Newco's expense. Newco shall use all commercially reasonable efforts to maintain the validity of all registrations and applications included in the [Designer's] Trademarks...
agreement indicated that disputes would be resolved by International Chamber of Commerce arbitration in New York under New York law. In this fashion, the corporations and their lawyers coordinated other decisionmakers' actions and marshaled the corpus of national and international IP laws to support certain international IP decisions. The Trademark Agreement favored the registration and recognition of trademarks under national systems, reinforced the protection of trademarks against third-party infringers worldwide, and suggested that courts and tribunals could be involved in reinforcing the standards it enumerated.

The law firm that prepared and negotiated the Trademark Agreement subsequently designed a patent transaction in which a pharmaceutical company organized under Swedish law ("Drug Company A") licensed a medical patent to a pharmaceutical company incorporated under Delaware law ("Drug Company B"). This patent transaction repeated three IP outcomes that resulted from the Trademark Agreement.

First, like the Trademark Agreement, the drug patent transaction also favored the registration and recognition of IP under national systems. Through an IP License Agreement, Drug Company A granted Drug Company B a license to market and sell products containing Drug Company A's patents in the United States and Canada, while retaining ownership of these patents and their related know-how. The License Agreement provided that New York law governed the contract and that disputes would be resolved through International Chamber of Commerce (ICC) arbitration in Sweden. The companies' lawyers also issued opinions that the transaction complied with Swedish and New York law.

Second, the patent transaction repeated the IP decision in the Trademark Agreement to protect IP against third-party infringers. The Intellectual Property License Agreement promoted the protection of these patents by requiring Drug Company A to deliver to Drug Company B all nonprivileged correspondence between the U.S. and Canadian patent offices and WIPO relating to the validity, scope, and enforceability of

(b) [Designer] agrees to notify Newco promptly after she becomes aware of any actual or threatened material infringement, dilution or other violation of [Designer's] Trademarks. Newco shall decide whether to assert or file an Action against such activities, in its good faith discretion . . . .

181. Id. § 10.14.
182. Id. § 10.10.
184. Id. §§ 11.2, 12.3.
their drug patents.\textsuperscript{186} Echoing the Trademark Agreement's provision for the use of "all commercially reasonable efforts" to police infringers, the agreement also called for a broad response to patent violations, stating that the drug companies would "use protective measures that are commercially reasonable and in no event less stringent than those used by such Party within the Party's own business to protect its comparable know-how."\textsuperscript{187}

Third, the patent transaction reflected a decision to seek the assistance of tribunals in resolving IP conflicts. The Intellectual Property License Agreement provided that disputes would be resolved in accordance with the Rules of Arbitration of the ICC.\textsuperscript{188} A related Supply Agreement, in which Drug Company A agreed to supply, and Drug Company B agreed to purchase, specified quantities of the patented drug,\textsuperscript{189} provided for ICC dispute resolution in Sweden under English law.\textsuperscript{190}

These two typical IP transactions illustrate how corporate transactions could collectively shape international IP law. The use and protection of IP internationally among corporations tends to be coordinated by contracts that consolidate expectations of appropriate behavior according to the norms of states with strong IP protections. Where the international regime effectively coordinates information about the ownership of IP rights, such as through national and international patent registries, corporate transactions may rely on this international regime to discover material information regarding the IP rights at issue. Corporations may agree to enforce IP rights against third parties under national laws and in national courts, and to use applicable international mechanisms if they are commercially reasonable. The repetition of such corporate transactions could promote norms in favor of stronger IP recognition, protection, and enforcement.

\textbf{C. Outcomes Allocate Power}

Outcomes of IP conflicts allocate several different forms of power over different periods of time. The purpose of this Section is not to itemize every way in which outcomes might allocate power. Its more modest goal is to provide a few illustrations of this phenomenon.

\begin{itemize}
\item \textsuperscript{186} Intellectual Property License Agreement, \textit{supra} note 183, § 3.6.
\item \textsuperscript{187} \textit{Id.} § 9.3.
\item \textsuperscript{188} \textit{Id.} § 10.2.
\item \textsuperscript{189} Supply Agreement between [Drug Company A] and [Drug Company B] (2004), preamble (redacted to protect confidentiality) (on file with author).
\item \textsuperscript{190} \textit{Id.} §§ 12.5, 12.6.
\end{itemize}
A piece of IP at its core is an idea or a piece of knowledge. When an outcome allocates the use of IP, it effectively allocates the power that comes with the ability to use or sell that idea or piece of knowledge. For example, in the ongoing conflict between the United States and the People's Republic of China regarding software piracy in China, China's continued failure to take enforcement measures against software piracy siphoned $1.27 billion in software revenues away from U.S. entities in 2005.  

This is a substantial drain on the economic power of the U.S. business sector and on the United States in general.

Additionally, when an outcome controls access to IP, it also controls which participants may use that IP to create new IP, such as through the incorporation of a patented software program into a more sophisticated operating system, which could, in turn, increase power over other participants who seek access to that new operating system. In the long run, the allocation of IP can have even wider effects on power balances. For example, access to life-saving medicines prevents population decimation in some less developed states and protects their military and economic power, which is determined in part by the population of able-bodied men and women. Affordable access to copyrighted books may promote education in a state and increase the pool of literate workers.

D. Changes to Power and Norms Lead to New Outcomes

In the dynamic evolution of the international IP system, the changes to power and norms that result from outcomes, in turn, lead to new outcomes. The various case studies in this Article illustrate this phenomenon. The ECJ's clarification of the norm limiting trademark protection of functional designs caused national courts throughout the EU to overturn previously inconsistent outcomes and to prescribe new outcomes consistent with the EU norm. Arbitration agreements in IP transactions may, should the parties subsequently enter into an IP conflict requiring third-party dispute resolution, compel the parties in that transaction to pursue international arbitration. Absent that agreement, they would have to seek domestic judicial resolution of their conflict.

The strengthening of norms providing IP protection in TRIPS, which reflected the balance of power in the Uruguay Round, has spawned numerous outcomes in WTO dispute settlements in which member states have generally complied with norms that previously were not as widely

192. See supra Part III.B.2.
observed. Additionally, the TRIPS outcome endowed WTO member states with the power to impose trade sanctions on other member states to enforce TRIPS norms. This new ability to deploy economic power in support of IP protection has been a pivotal factor in securing compliance with IP-protecting norms once a WTO panel has adjudicated an IP dispute.

The Doha Declaration also integrated a public health norm into TRIPS. This adjustment of norms provided the basis for a further outcome: the 2006 decision of the WTO General Council to amend TRIPS itself and put this amendment to a vote of WTO member states. Additionally, the Doha Declaration increased the diplomatic power of less developed states by strengthening the basis for their claims that there is, or should be, a public health exception to TRIPS protections for patented drugs. In this fashion, both the adjustment of power and norms in the Doha outcome played a key role in the 2006 General Council decision to amend TRIPS.

IV. STRATEGIC RECOMMENDATIONS

The typology of international law presented here assists participants in devising strategies to achieve their IP policy goals. By appreciating how power, norms, and outcomes interact, participants can determine strategically which conflicts will affect power and norms most drastically and require their greatest attention. A private IP transaction may not in itself affect norms, and corporations usually are not concerned about the transactions beyond their immediate business goals. But precedent-setting litigation before an institutionally legitimate body such as a WTO panel or the ECJ may very well adjust norms and allocate power, and corporations or state litigants should deploy significant resources to achieve their desired outcome. Additionally, the Doha experience demonstrates that norm-creating treaty arrangements may be the thin end of the wedge that supporters of the norms contained in those arrangements may use to widen the scope and application of the norms.

193. See supra Part III.A.3.
195. Cf Charles R. McManis, Intellectual Property and International Mergers and Acquisitions, U. CIN. L. REV. 1283, 1286 ("The TRIPS Agreement is unquestionably the most important development in international intellectual property law . . . "); JOLLY, supra note 31, at 67 (describing TRIPS as "the most far-reaching multilateral agreement on intellectual property").
196. See supra Part III.B.1.
in future trade negotiations. For this reason, participants need to deploy power even at the early stages of international treaty negotiations to obtain outcomes that adjust norms in their favor.

In addition to helping participants prioritize their IP conflicts, the typology of international law presented in this Article helps participants devise strategies in these conflicts. By understanding how power and norms determine outcomes, participants will be able to align power and norms in support of their preferred outcomes. Participants may consider three broad recommendations: (1) harness the power of NGOs, (2) leverage the internal constituents of participants, or (3) capitalize on conflicts in which interests are at odds with previously stated positions.

**Harness the Power of NGOs.** The global HIV crisis has demonstrated the immense collective power of NGOs. Their increasing role in global disputes raises questions about whether there are sufficient control mechanisms to prevent abuses of their power. Nonetheless, in an international IP conflict, participants could consider mobilizing NGOs that are sympathetic to their interests. A less developed state might sponsor, through indirect entities, NGOs that could draw global media attention to the human rights imperatives of that state. It could also provide informal links between NGOs so they can coordinate their efforts to increase the access of the less developed state to IP. Conversely, an IP-creating corporation could join a business association that lobbies its government to champion its IP interests in trade negotiations.

**Leverage the Internal Constituencies of Participants.** Corporations and governments tend to have internal constituencies with divergent interests. In an IP conflict, when a participant faces the opposition of a powerful corporation or government, that participant may leverage the internal constituencies of the corporation or government that would support that participant’s preferred outcome. Take, for example, the ongoing IP conflict between the United States and China. In 1995, even while the U.S. government and IP-related corporations in the United States applied pressure on China to improve its IP protections, U.S. aerospace companies were concerned that the U.S. strategy contemplating sanctions would provoke retaliatory sanctions by China, limiting their access to the Chinese aerospace market. As the United States came close to impos-

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197. See supra Part II.B.
ing sanctions on China for its IP record, it also sent a delegation of seventy representatives to conclude thirty-four contracts and twenty-four joint ventures on energy worth twelve billion dollars. Chinese policymakers who sought to lower IP protections could have offered U.S. corporations lucrative joint investments in China in exchange for efforts to lobby the Senate and the U.S. administration to moderate the U.S. Trade Representative's demands for stronger IP enforcement in China. Conversely, the U.S. Trade Representative could urge Chinese IP-creating companies with strong ties to influential Chinese government officials to lobby these officials to increase IP protections in regions of China where rampant IP infringement occurs.

Capitalize on Changes in a Participant's Interests Over Time. A participant may win over the support of other participants who would normally oppose its preferred outcome by capitalizing on situations in which those other participants' interests are at odds with their previously stated positions. For example, an IP user may increase its access to third-party IP by emphasizing to the third-party IP creator the situations in which the third party itself required, or will require in the future, the IP created by others. In 2001, the United States and Canada nearly became the victims of the TRIPS regime they had worked so hard to build. In that year, anthrax-laced letters were circulated in the United States and Canada. Fearing widespread anthrax attacks, both states sought to stockpile the anthrax cure, Ciprofloxacin. Ciprofloxacin was an expensive drug produced by the German company Bayer, which was the sole patent holder for the drug in the United States and Canada. Thus, Canada and the United States both became IP users of Ciprofloxacin. In order to reduce the costs of Ciprofloxacin, Canada contracted with a Canadian company, Apotex, to produce generic Ciprofloxacin at half the price Bayer charged Canada.

The United States similarly threatened to
import affordable Ciprofloxacin from other sources or produce its own Ciprofloxacin. Faced with a breach of its patent by a powerful state—Canada—and the potential breach by another, even more influential state—the United States—Bayer agreed to reduce the price of Ciprofloxacin to less than the price Apotex would charge Canada.

In dealing with their own public health emergencies, the United States and Canada became much more receptive to finding a public health exception to IP protection under international law. After the Anthrax experience, Canadian legislators began to increase their support for a public health exception to TRIPS provisions. It may also be more than mere coincidence that since the Anthrax scare in 2001, the United States has clarified that the IP provisions in its free trade agreements (FTAs) with various states "do not affect the ability of the United States and its FTA partners to take necessary measures to protect public health by promoting access to medicines [in] epidemics as well as circumstances of extreme urgency or national emergency." 

At its core, international law—perhaps all law—continually adjusts to and accommodates human interactions. In human interactions, and in the international law that results from these interactions, legal rules are not all that matter. Power, interests, and norms—broadly conceived—also matter. If one of the duties of the legal academy is still, as it was over fifty years ago, to "blaze trails which public policy may later
follow,\textsuperscript{207} then scholars should explicate not only how international conflicts are resolved, but also how the conflict resolution process itself is constituted and what the aggregate consequences of outcomes may be in this process. This Article's theory of power, norms, and international law, as applied to global IP, is a modest contribution to this enterprise.

\textsuperscript{207} Memorandum from Walton H. Hamilton to Charles Seymour, Yale University Provost (June 16, 1941) \textit{partially reprinted in History of the Yale Law School} 116 (Anthony Kronman ed., 2004).