

CAN THE INTELLECTUAL PROPERTY- HUMAN RIGHTS FRAMEWORK BRIDGE THE GAP BETWEEN VIETNAM'S LEGAL REALITY AND RHETORIC?

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I. INTRODUCTION

In January 2007, Vietnam joined the World Trade Organization (WTO). It was viewed as a landmark step forward for a country having a free market only since 1986. For Vietnam, gaining membership in the WTO created an obligation to ascribe to the WTO-administered Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS), the multilateral treaty currently guiding international IP law.¹ While Vietnam has now nominally adopted TRIPS-style laws, enforcement of those laws is virtually nonexistent, making Vietnam one of the world's foremost piracy hotspots. Although TRIPS did not create Vietnam's piracy problems, it has done nothing to ameliorate their impact. Furthermore, it has undermined key aspects of Vietnam's development, such as the dissemination of knowledge, access to food and medicine, and respect for the rule of law.

Generally, TRIPS harms less developed countries (LDCs), spurring these countries and Non-Government Organizations (NGO's) to speak out against the regime. However, the WTO and the World Intellectual Property Organization (WIPO), the traditional international IP institution, are deadlocked because of the global growth of Intellectual Property rights (IPR) and subsequent resistance to this growth. Parties intending to weaken the TRIPS regime have turned to other forums to advance their priorities. One such forum is international human rights (HR) law. The convergence of IP and HR holds great promise for rebalancing the international IP system by allowing greater power of self-determination to LDCs. However, the flexibility embraced by the IP-HR framework requires that the unique political, economic, and cultural characteristics of each country be taken into account in developing an IP system. The many differences among LDCs could thus ultimately derail the burgeoning framework.

While a patchwork of bilateral IP agreements and treaties characterized international IP before TRIPS, it is unclear whether such a framework is workable after TRIPS. This paper will use Vietnam as a test case for the nascent IP-HR framework, exploring both the international political climate and particular national characteristics that might prevent the IP-HR framework from achieving success. More specifically, this paper will focus on how Vietnam's Confucian culture, socialist government, potential for economic growth, and eagerness to

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round [hereinafter TRIPS].

court Western investment will stress the developing IP-HR framework and may even prevent the goals of the IP-HR framework from being realized in Vietnam and elsewhere.

Part II discusses Vietnam's path to WTO membership, detailing the opening of the Vietnamese market in 1986, Vietnam's IP and trade relations with the U.S., and the harmful effects on Vietnam of the trade-centric IP prerogative espoused by TRIPS. Part III discusses how the harms caused by TRIPS have spurred LDCs to retaliate by refocusing international IP to incorporate both proprietary and human rights concerns, leading to the development of an alternative IP-HR framework. The origins and current interpretations of the burgeoning IP-HR framework are discussed here as well as current developments emanating from the framework to provide a background for the specific application of the framework to Vietnam. Part IV discusses implications of the IP-HR framework for Vietnam and whether Vietnam would likely welcome the framework's goals, focusing on the country's political, economic, and cultural characteristics. Part V concludes.

II. VIETNAM'S PATH TO THE WORLD TRADE ORGANIZATION

A. *Doi Moi – Embarking on the Path of Economic Reform*

Although a socialist republic, Vietnam liberalized its markets in 1986 as part of *Doi Moi*, the Vietnamese Communist Party's program implementing free market reforms. *Doi Moi*, meaning the "New Age," signaled to the international community that Vietnam was ready to open its long-closed doors to foreign trade. By 1992, commentators were reporting that while economic performance had been unremarkable, a strong market was emerging in the form of private capital, state capital, joint ventures, and privatization.² From that point forward, Vietnam integrated into the world economy at an incredible pace, culminating in Vietnam joining the WTO in January 2007. Vietnam's accession to the WTO required it to adopt laws, including TRIPS, that would protect foreign trade investment. Before TRIPS, Vietnam's open borders allowed piracy to flourish. Although Vietnam adopted strong TRIPS-style IP laws, piracy continued, and perhaps even worsened. The gap between Vietnam's adoption of strong IP laws and the complementary

² Adam Fforde, *The Vietnamese Economy in 1992: Development and Prospects*, in VIETNAM AND THE RULE OF LAW 1, 23-24 (Carlyle A. Thayer & David G. Marr eds., 1993).

B. Trade Relationship with the United States - Bilateral Trade Agreement and the Special 301

Vietnam's journey from fledgling free market to WTO member sheds light on some of the reasons for the gap between Vietnam's nominal IP laws and their actual enforcement. Since the 1980's, the United States Trade Representative (USTR) has published the Special 301, a list of countries that do not adequately protect American IP. In the Special 301, countries are categorized based on degree of IPR violations into the following lists: Priority Watch List, Watch List, and Section 306 monitoring list.⁴ Vietnam first appeared on the Special 301 in 1995 and has since remained on the "Watch List."⁵ Landing on the Special 301 can lead to the U.S. withdrawing trade benefits or imposing duties on a country's goods.⁶ According to the USTR, "Special 301 constitutes a critical policy tool for pinpointing problems, and provides a basis for constructive engagement with U.S. trading partners in order to address these challenges."⁷

However, far from "constructive engagement," the Special 301 may also be characterized as a unilateral and coercive U.S. measure.⁸ Because the U.S. government lacks the resources to conduct the extensive research necessary to compile the Special 301, "[content industries] are happy to offer assistance."⁹ In its early years, the Special 301 was one example of the trade-centric view of IP that eventually led to TRIPS.

³ UNITED STATES TRADE REPRESENTATIVE, SPECIAL 301 REPORT 37 (2007), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf [hereinafter SPECIAL 301 REPORT].

⁴ *Id.*

⁵ INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, HISTORICAL SUMMARY OF SELECTED COUNTRIES' PLACEMENT FOR COPYRIGHT-RELATED MATTERS ON THE SPECIAL 301 LISTS, Appendix E (2007), <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARYFINAL021107.pdf> [hereinafter IIPA HISTORICAL SUMMARY].

⁶ PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM 89 (2002) [hereinafter INFORMATION FEUDALISM].

⁷ Press Release, United States Trade Representative, Special 301, (April 30, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/April/SPECIAL_301_Report.html.

⁸ It should be noted that Japan, Canada, and the EU have all appeared on the Special 301 Watch List. In these and similar situations, where the playing field is more level, Special 301 could be used as a "basis for constructive engagement."

⁹ Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491, 516 (2006). See also INFORMATION FEUDALISM, *supra* note 6, at 97.

"Intellectual property slowly but surely was being placed at the heart of those legislative provisions that guarded U.S. commerce. The simple message, which was repeated again and again on Capitol Hill, was that American commerce was a commerce of ideas and creativity in desperate need of protection from thievery."¹⁰ That trade-centric prerogative demanded strong IP protections, and indeed the standard promulgated by the Special 301 was high. In 1989, the USTR stated that "no foreign country currently meets every standard for adequate and effective intellectual property protection."¹¹ Because the U.S. trade agenda was captured by industry, and a number of large U.S. companies had operations in Vietnam, the U.S. had a clear stake in the installation of strong IPR in Vietnam.¹² Especially when a developing country like Vietnam is subject to Special 301 sanctions, the Special 301 amounts to a "mechanism of economic coercion," by which American industry can impose strong IPR on other countries.¹³

Although the Special 301 is a unilateral measure, it provides leverage for the U.S. to ratchet up IP internationally through bilateral agreements with countries that are unwilling or unable to cope with trade sanctions.¹⁴ In fact, the Special 301 led to a 2000 bilateral trade agreement (BTA) between Vietnam and the U.S., which obligated Vietnam to open its markets to American goods and services and included provisions requiring Vietnam to implement laws to protect American IP.¹⁵ The BTA then led Vietnam to make similar agreements with other developed countries. As a general practice, once the terms of one bilateral agreement were published, other developed countries would demand a similar deal from the LDC, as "the EC made it a practice to obtain a copy of the agreement that the US obtained from Asian countries in its bilateral negotiations and then attempt to get similar terms."¹⁶ The

¹⁰ INFORMATION FEUDALISM, *supra* note 6, at 89 (quoting the USTR).

¹¹ *Id.* at 94.

¹² Some companies that have operations in Vietnam are Nike, General Electric, Citibank, Coca-Cola, Procter & Gamble, Eastman Kodak, Hewlett Packard, Microsoft, and Cargill. "These companies undoubtedly expect to be able to not only use, but also enforce their intellectual property in Vietnam." Cara A. Boyle, *The U.S.-Vietnam Bilateral Trade Agreement: How Vietnam's Efforts to Strengthen Its Trademark and Copyright Laws Signal Its Desire to Join the World Economy*, 14 LOY. CONSUMER L. REV. 4, 7 (2001).

¹³ INFORMATION FEUDALISM, *supra* note 6, at 93.

¹⁴ *Id.* at 89.

¹⁵ Press Release, Office of the President, Fact Sheet: Background on the U.S.-Vietnam Bilateral Trade Agreement (May 29, 2001), <http://www.whitehouse.gov/news/releases/2001/06/20010608-4.html>.

¹⁶ This occurrence is discussed in the context of U.S.-Korea bilateral agreements in the late 1980's spurred by a Special 301 action in INFORMATION FEUDALISM, *supra* note 6, at 104.

global patchwork of bilateral agreements that arose from these practices provided stepping stones toward a harmonized post-TRIPS IP world.

C. TRIPS

TRIPS, however, was not the first multilateral IP treaty Vietnam joined. In 2004, Vietnam joined the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).¹⁷ Vietnam has also been a signatory to the Paris Convention for the Protection of Industrial Property (Paris Convention) since 1949.¹⁸ Although Paris and Berne “ushered in the multilateral era of international cooperation in intellectual property,” it was really TRIPS that “forced the world of intellectual property into the global era.”¹⁹ Before TRIPS, both the Berne and Paris Conventions were widely criticized for their ambiguity, incomplete membership, and lack of enforcement procedures.²⁰ When Vietnam joined Berne in 2004, it was clear from the outset that Vietnam (among many other countries) would have trouble enforcing Berne-style intellectual property laws and that the Convention itself provided no effective way to force Vietnam to comply.²¹ Vietnam’s IP laws have long been called “paper tigers” – laws that the public does not obey and the government does not enforce, which Vietnam’s membership in the various multilateral IP conventions discussed above did not change.

¹⁷ Dang The Duc & Ho Tuong Vy, *Vietnam Adopts International Treaty on Copyright Protection*, VIETNAM LAW & LEGAL FORUM, Oct. 28, 2004, http://news.vnanet.vn/vietnamlaw/Service.asp?CATEGORY_ID=13&SUBCATEGORY_ID=3&NEWS_ID=318 [hereinafter *Vietnam Adopts International Treaty*]; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris July 24, 1971.

¹⁸ WORLD INTELLECTUAL PROPERTY ASSOCIATION, PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY CONTRACTING PARTIES (2007), <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/paris.pdf>; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm July 14, 1967.

¹⁹ Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, WIPO PANEL DISCUSSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS 7-8 (1998), available at <http://www.wipo.int/export/sites/www/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>.

²⁰ Lina M. Montén, *The Inconsistency Between Section 301 and TRIPS: Counterproductive with Respect to the Future of International Protection of Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 387, 393 (2005); Michael W. Smith, *Bringing Developing Countries' Intellectual Property Laws to TRIPS Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 222 (1999).

²¹ *Vietnam Adopts International Treaty*, *supra* note 17. The Berne Convention will “pose a great challenge for Vietnam to adhere[sic] the rules of the Convention, in the context that the [sic] copyright piracy is rampant in the country.”

When TRIPS was created in 1994, it was viewed as “the most significant advance in the international protection of intellectual property since the adoption of the Berne and Paris Conventions.”²² It incorporates the main provisions of Berne and Paris “as well as a number of additional obligations in areas where the previous agreements were seen to be inadequate,” namely, dispute settlement procedures.²³ TRIPS was viewed as significant because it covered most forms of IP, including copyright and neighboring rights, trademarks, service marks, geographical indications, industrial designs, and patents. Moreover, TRIPS required that WTO members guarantee that the TRIPS enforcement procedures were available under their own national laws.²⁴ Finally, the TRIPS dispute settlement mechanism was viewed as a major advance from the Berne and Paris Conventions because it provided a means by which IPR holders could force compliance.²⁵

While TRIPS seemed a major advance, the imposition of stronger IP standards on Vietnam has not ameliorated its piracy problems. TRIPS has been both ineffective and unrealistic in LDCs for a number of reasons. First, from the beginning, coercion has played a large part in the signing of TRIPS.²⁶ When the first LDCs signed TRIPS, most “did not have a clear understanding of their own interests and were not in the room when the important technical details were settled.”²⁷ Moreover, LDCs faced the threat of landing on the Special 301 list and possible trade sanctions from the U.S. As a result, many joined TRIPS to lessen international pressure regardless of ability to comply.²⁸ But, the pressure continued to build. Those LDCs that did not initially sign on to TRIPS risked being viewed by foreign investors as centers of piracy. Further, the U.S. offered IP law drafting “assistance” to countries with which it had successfully completed bilateral agreement negotiations.²⁹ Any country that wanted to attract foreign investment and collaterally receive free help from the U.S. had to sign on to TRIPS.

The growth of the TRIPS regime shows no signs of abatement. IPR worldwide have expanded dramatically over the last decade, both in

²² Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 782 (1997).

²³ Smith, *supra* note 20, at 236. It should be noted however, that while TRIPS incorporates the Berne and Paris Conventions, the moral rights provisions of the Berne Convention are not included in TRIPS.

²⁴ Monten, *supra* note 20, at 395.

²⁵ *Id.*

²⁶ INFORMATION FEUDALISM, *supra* note 6, at 192-97.

²⁷ *Id.* at 192.

²⁸ *Id.*

²⁹ *Id.* at 194.

terms of the subject matter they encompass and enforcement.³⁰ One reason for this expansion is the development of new technologies, which has led businesses and content owners to demand new types of protection. Another reason is TRIPS itself. When enacted, TRIPS afforded international IPR new and stronger enforcement mechanisms, including the aforementioned international dispute resolution mechanism.³¹ Before TRIPS, the Special 301 seemed to be a method by which the U.S. could encourage countries to move toward TRIPS standards.³² However, more than 10 years after the enactment of TRIPS, the Special 301 and U.S. bilateral trade arrangements are now key components of the TRIPS-plus regime, a term describing the post-TRIPS practice wherein developed countries establish IP protection stronger than that required by TRIPS through additional agreements.³³ “The typical outcome of [Special 301] investigations has been new legislation in the country in question and/or bilateral agreements in which the countries promise to change their practices.”³⁴

Nevertheless, simply because the process leading toward Vietnam’s accession to the WTO can be characterized as coercive does not mean that, first, Vietnam was unwilling to reap the benefits of international economic participation, and second, that the country has not actually benefited. As early as 1992, Vietnam displayed a willingness to give 100 percent foreign-owned investment ventures the same preferential treatment afforded to joint ventures and also to adopt Western-style IP laws to accommodate foreign investment, under the theory that Vietnam would benefit from foreign investment without having to invest capital or take risks.³⁵ Moreover, foreign investment often came with bilateral agreements that could benefit Vietnamese enterprises abroad. As a result of the BTA, for example, trade between the U.S. and Vietnam from 2001 to 2005 enjoyed “spectacular growth” of 400 percent, to nearly \$8 billion.³⁶ In fact, Vietnam is now one of the fastest growing markets in

³⁰ Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 973 (2007) [hereinafter Helfer, *Human Rights Framework*].

³¹ TRIPS, *supra* note 1, art. 64.

³² “Each bilateral brought that country much closer to [the] TRIPS agreement, so accepting TRIPS was no big deal.” INFORMATION FEUDALISM, *supra* note 6, at 105 (quoting a former U.S. trade negotiator).

³³ “[I]f anything, 301 has acquired a more machine-like efficiency in the post-TRIPS period.” *Id.* at 107.

³⁴ Montén, *supra* note 20, at 407.

³⁵ Ngo Ba Thanh, *The 1992 Constitution and the Rule of Law, in VIETNAM AND THE RULE OF LAW* 81, 94-96 (Carlyle A. Thayer & David G. Marr eds., 1993).

³⁶ Press Release, United States Trade Representative, U.S., Vietnam Conclude Review of Annual Bilateral Trade Agreement (Oct. 23, 2006),

Asia for American goods.³⁷ In May 2006, Vietnam's stock market was the best-performing in the world.³⁸ Not surprisingly, the BTA was a significant part of Vietnam's successful bid for WTO membership.³⁹

The focus on economic benefits over other developmental benefits, however, represents a continuing underlying economic coercion and mischaracterization of interests. As a result of the undemocratic process by which TRIPS was adopted, Vietnam and the other LDCs have been hurt by the increasingly strong IP regime imposed by TRIPS. Because of TRIPS' trade-centric view, the regime is vulnerable to capture by industry and thus often ignores issues such as consumer protection, national self-determination, cultural diversity, ecological sustainability, and human rights.⁴⁰ The unequal bargaining position of LDCs at the TRIPS table is now evident in the great costs shifted to them. For example, because the majority of registered patents are owned by industrialized countries, LDCs bear the increasing costs of product development.⁴¹ The expansion of very broad plant patents has resulted in monopolies on important global crops.⁴² The increasing cost of products is especially grave in the area of medicine. Drugs to treat HIV/AIDS are currently too expensive for infected residents of LDCs, where up to 95% of the world's infected reside.⁴³ Moreover, beyond ignoring human rights, TRIPS may even encourage human rights violations in developing countries. For example, in an effort to show the West its eagerness to eradicate pirates and avoid sanctions, authorities in China have enforced the death penalty on infringers.⁴⁴

In short, the expansion of IPR under TRIPS has upset the balance between the public domain and property rights traditionally sought by IP law. "Where the traditional idea of intellectual property wound a thin layer of rights around a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be

http://www.ustr.gov/Document_Library/Press_Releases/2006/June/US,_Vietnam_Conclude_Review_of_Annual_Bilateral_Trade_Agreement.html.

³⁷ *Id.*

³⁸ Valerie Clemen, *A Briefing for American Businesses Looking to Invest in Vietnam*, 2 HASTINGS BUS. L.J. 507, 507 (2006).

³⁹ Boyle, *supra* note 12, at 4.

⁴⁰ Peter K. Yu, *World Trade, Intellectual Property, and the Global Elites: An Introduction*, <http://www.peteryu.com/globalelites.pdf>, 2 [hereinafter Yu, *Global Elites*].

⁴¹ Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5. J. INT'L ECON. L. 861, 871 (2002).

⁴² *Id.* at 872.

⁴³ *Id.* at 877.

⁴⁴ Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AMER. U. L. REV. 131, 174 (2000) [hereinafter Yu, *Pirates to Partners*].

eliminated wherever possible.”⁴⁵ LDCs are further disadvantaged by the TRIPS regime because of WTO institutional defects, such as “the lack of transparency of the institution, limited access by non-members to the dispute settlement bodies, technical and financial difficulties confronting less developed countries in their implementation of the treaty obligations, the insensitivity and undemocratic nature of the decision-making process, and the lack of accountability of policymakers to the global citizenry.”⁴⁶ Despite these and many other costs shifted to LDCs because of TRIPS, these countries are still scrambling to join TRIPS because “jumping on the TRIPS bandwagon [is] in their own interest if they want[] to attract capital and become a knowledge economy.”⁴⁷

This year, the Special 301 report commended Vietnam for its strides toward complying with American IP protection standards.⁴⁸ However, considering that Special 301 is dominated by American business interests, Vietnam’s commendable strides likely come at a high price. While its population is relatively well-educated,⁴⁹ Vietnam’s health care system is in a poor state, lagging in many public health areas, including nutrition, infectious disease, sanitation, population growth, and the regulation of drug sales.⁵⁰ Vietnam will suffer under an IP regime that further weakens its health care system. Moreover, strong IP protections may increase the price of goods in general, putting many other essential items out of the average Vietnamese’s price range.⁵¹ Vietnam’s accession to the WTO is generally viewed as a major step forward. But, while the TRIPS-plus regime may benefit the Vietnamese economy, it also undermines key aspects of the country’s development.

Further, TRIPS’ focus on economic growth presents a self-perpetuating problem for LDCs. Vietnam’s economic growth is only one aspect of Vietnam’s development, but the trade-centric view of IP

⁴⁵ James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 9 DUKE L. & TECH. REV. 1, 2 (2004) [hereinafter Boyle, *Manifesto*].

⁴⁶ Yu, *Global Elites*, *supra* note 40, at 3.

⁴⁷ INFORMATION FEUDALISM, *supra* note 6, at 196.

⁴⁸ SPECIAL 301 REPORT, *supra* note 3, at 37.

⁴⁹ In 1992, 88 percent of the total population was literate. Suki Allen, *Health and the Current Situation and Recent Changes*, in VIETNAM AND THE RULE OF LAW 38, 42 (Carlyle A. Thayer & David G. Marr eds., 1993).

⁵⁰ *Id.* at 42-46.

⁵¹ In 2002, about 28.9% of Vietnam’s 85 million people lived below the national poverty line, which is defined as those who live on less than \$1 (PPP) a day. United Nations Statistics Division, Millennium Development Goals, Poverty (Vietnam), Population below national poverty line, total, percentage (2002), <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=581&crd=>. The per capita earnings for an average Vietnamese in 2003 was 631 US dollars. United Nations Statistics Division, Social Indicators (2003), <http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm>.

espoused by TRIPS casts economic growth as the central aspect of a country's development. It is perhaps this explosive economic growth that has led the U.S. and other developed countries to ignore the near-lack of enforcement of IP laws and the damage caused by the unbalanced regime. While Vietnam has nominally adopted IP laws that largely mirror those of the U.S., it is no secret that enforcement of those laws is notoriously weak. Vietnam is "a haven for trademark and copyright pirates."⁵² Even though the Vietnamese government has recently stepped up its efforts to stop pirating, they may not be effective. For example, after the government raided 77 video stores in Hanoi, Ho Chi Minh City, Haiphon, and Quang Ninh and seized over 30,000 pirated tapes, a shop owner was quoted as saying it was still possible to "[t]ake a walk to a few big video rental stores and ask for Hollywood's latest movies [which] were copied abroad, sent to Ho Chi Minh City and finally reached Hanoi."⁵³ Moreover, according to the International Intellectual Property Alliance, "[j]udges in Vietnam have been reluctant to impose penalties or fines at levels sufficient to deter future infringement, and *ex officio* raids are sporadic at best."⁵⁴

Vietnam's enforcement problem exposes the more general shortcoming created by the universal template provided by TRIPS. TRIPS-laws are "modeled after laws in developed countries and [the laws] fail to take into consideration the socio-economic conditions of less developed countries."⁵⁵ In the rush to integrate Vietnam into the world economy, the imposition of TRIPS has deprived Vietnam of an opportunity to create and tailor IP laws designed to benefit its own people. With respect to the stage theory of development, which postulates that all countries pass through a phase in which copying of products is necessary, both the U.S. and Japan passed through these stages. But, "[t]he countries that now preach the virtues of expansive minimum levels of intellectual property protection did not themselves follow that path of industrial development."⁵⁶ The persistence of widespread piracy in Vietnam indicates that intellectual property piracy is

⁵² Boyle, *supra* note 12, at 8.

⁵³ *Id.* at 20-21, quoting Hung Nguyen, *Crackdown Targets American Knockoffs. Vietnam Govt. Says Copyright Infringement Should Be Prohibited*, VIETNAM INVESTMENT REV., Oct. 12, 1998.

⁵⁴ IIPA HISTORICAL SUMMARY, *supra* note 5.

⁵⁵ Yu, *Global Elites*, *supra* note 40, at 2.

⁵⁶ Boyle, *Manifesto*, *supra* note 45, at 9. "The history of intellectual property law over which WIPO has presided is actually one of considerable change, with a considerable variation in the rules both over time and space, at different moments of economic development. In tune with this history, WIPO needs to be a counterforce to the tendency to impose 'one size fits all' solutions worldwide, not the place where 'TRIPS-plus' standards are to be pursued."

a major contributor to its economy.⁵⁷ Forcing Vietnam to eradicate a major economic contributor at this developmental stage will ultimately undermine its economic growth.⁵⁸ “Within the global trading system, if a country is not economically ready to change its economic behavior, the risky strategy for stronger demands will only turn into tragic legal failure.”⁵⁹ Moreover, while a developed country may have the resources and regulatory framework to absorb the negative impacts of an unbalanced IP system, LDCs are less able to cope with such negative impacts. “Many of these countries lack the national economic strengths and established legal mechanisms to overcome problems created by an unbalanced system. Even if the system is beneficial in the long run, these countries might not have the wealth, infrastructure, and technological base to take advantage of the opportunities created by the system in the short run.”⁶⁰

As long as the TRIPS regime remains unenforceable in Vietnam, a general disregard for the rule of law will persist, which will in turn further decrease the likelihood of TRIPS enforcement. The ambitious imposition of TRIPS-style IP laws on Vietnam may thus serve to worsen Vietnam’s piracy problems in the long-run, accentuating the disconnect between IP law and its theoretical underpinnings. As a product of multilateral international negotiations, TRIPS represents an amalgam of theoretical IP justifications. National courts that have firm pre-existing bases underlying IP protection may be able to interpret TRIPS coherently in line with existing justifications. But, in a country lacking a coherent theoretical foundation for its IP laws, like Vietnam, the nominal adoption of strong IP laws leaves “courts and other interpreters of the law without

⁵⁷ “Counterfeiting and piracy are special types of market transactions, where demand meets supply.” Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?* 32 N.C. J. INT’L L. & COM. REG. 1, 30 (2006).

⁵⁸ “The experience of imitation in China was similar to that of European countries before the emergence of the contemporary notion of authorship in the eighteenth century, as well as the United States in the nineteenth century, and Japan in the twentieth century. China is not alone in its apparent inability to surmount obstacles to effective intellectual property protection, and the IPR enforcement problem in China is not unique. To speed up this process will undermine the developmental bulwark, but beyond a certain point, allowing it to continue will also hinder economic growth.” *Id.* at 30 (internal quotations removed).

⁵⁹ *Id.* at 27. See also John Gillespie, *The Evolution of Private Commercial Freedoms in Vietnam*, in VIETNAM AND THE RULE OF LAW 129, 146 (Carlyle A. Thayer & David G. Marr eds., 1993). “It makes sense that reform of the Vietnamese legal system should be slow and incremental, allowing time for what are essentially Western legal norms to be modified and adapted to suit domestic commercial practice. Otherwise there is a risk that a façade of superficially Western legislation may hide a culturally mismatched and unpredictable legal system.”

⁶⁰ Peter K. Yu, *Currents and Crosscurrents in International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392 (2004) [hereinafter Yu, *Currents and Crosscurrents*].

an important analytical and interpretative tool.”⁶¹ As a result, court-based IP dispute resolutions may never achieve legitimacy as courts are left without *ex ante* justifications or philosophical grounding for the rules they purport to interpret.⁶² The imposition of the overly strong and ill-fitting TRIPS model exposes Vietnam’s problems with respect to the rule of law. Furthermore, the universality of TRIPS does nothing to resolve these important theoretical questions, but rather serves to perpetuate and worsen the problem.

III. EMERGENCE OF THE IP-HR FRAMEWORK

A. Traditional IP Institutions in Gridlock

The coercive and harmful nature of TRIPS has prompted some LDCs and NGOs to push back. LDCs like Brazil and India are leading the charge to scale back the regime. Such countries, however, have been unable to operate in traditional international IP forums because of institutional density and gridlock. WIPO and the WTO have been unable to handle the marked increase in the strength and scope of IPR and the subsequent wave of resistance to the expansion of the regime. While industrialized nations are pushing for new treaties to protect the IP arising from new technologies, LDCs are pushing back, demanding that WIPO pay greater attention to public access and non-proprietary systems to foster innovation and “[t]hese conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents’ proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism.”⁶³ The WTO has experienced a similar deadlock.⁶⁴

With the activities of WIPO and the WTO at a “virtual standstill,”⁶⁵ both sides of the IPR debate have “sought out greener pastures.”⁶⁶ LDCs have moved to more “sympathetic” multilateral venues like the World Health Organization (WHO) and the Food and Agriculture Organization, “where they have found more fertile soil in which to grow proposals that seek to roll back intellectual property rights or at least eschew further expansions of the monopoly privileges they

⁶¹ Birnhack, *supra* note 9, at 525.

⁶² *Id.* at 525-26.

⁶³ Helfer, *Human Rights Framework*, *supra* note 30, at 974.

⁶⁴ “In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders’ rights; and the protection of geographical indications have remained unresolved for nearly four years.” *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

confer.”⁶⁷ Industrialized countries have also left the multilateral treaty arena, turning instead to means such as bilateral and regional trade agreements and the Special 301, contributing in turn to the TRIPS-plus regime.⁶⁸

B. *Developing a Coherent Framework*

Recently, the international human rights law arena has arisen as one of the more sympathetic forums for LDCs.⁶⁹ This move by LDCs to the HR forum has been driven by their discontent with TRIPS-plus. First, LDCs feel “threatened by the limited access to affordable drugs despite severe public health crises in their countries; the lack of protection for traditional knowledge and indigenous materials; and the growing lack of access to information, knowledge, and technology transfer”⁷⁰ imposed by the TRIPS-plus regime, and the attendant increase in global intellectual property protection. Moreover, TRIPS is viewed as problematic because the transitional periods it provides are unrealistic and because it concentrates power in information economies as opposed to agricultural or manufacturing economies.⁷¹ While both developed countries and LDCs may currently be reaping the economic benefits offered by TRIPS, such prosperity may not be sustainable in the long term. The increasingly strong protections mandated by TRIPS are likely stifling innovation globally. “At the concrete level it is hard to see how a principle of cultural diffusion is to work, if the practical effect of increasingly stronger intellectual property regimes is to raise the cost of educational, cultural and scientific information. Putting a price on or increasing the price of information necessarily inhibits its diffusion.”⁷²

The international HR forum may offer the solutions to these problems. LDCs and other interest groups are demanding diversification within the IP regime, especially the ability to develop protections suitable for each country’s specific developmental needs. The language of human rights offers potentially useful tools for discussing international IP developmental considerations like public health, access to knowledge, and freedom of speech. The convergence of IP and HR represents a “belated realization that the manner in which creative works, cultural

⁶⁷ *Id.* at 974-75.

⁶⁸ *Id.* at 975.

⁶⁹ *Id.* at 982.

⁷⁰ Yu, *Currents and Crosscurrents*, *supra* note 60, at 382.

⁷¹ *Id.* at 385-386.

⁷² Peter Drahos, *Intellectual Property and Human Rights*, 3 INTELL. PROP. Q. 350, 364 (1999) [hereinafter Drahos, *IP & HR*].

heritage, and scientific knowledge are turned into property rights has implications for human rights as well as economic relationships.”⁷³ Rather than a “belated realization,” the IP-HR framework may also represent a re-realization – a chance to return to the traditional balance previously sought by IP law. The human rights arena may be the right fit to rebalance international IP by allowing countries enough flexibility to develop tailored IP systems. Though ideally and traditionally IP laws are supposed to strike a balance between an author’s proprietary rights and the public domain, the trade-centric view promulgated by TRIPS greatly undervalues non-economic considerations. For opponents of the current international IP regime, human rights “have become the language of emancipation, western intellectual property regimes the medium of oppression.”⁷⁴ Where the TRIPS-plus regime has allowed, and in some cases encouraged, unilateral measures like Special 301 to ratchet up international IPR, some LDCs view the IP-HR framework as a medium by which IP rhetoric can incorporate human rights considerations and thereby refocus the incentives underlying IP law.

The relationship between IP and HR arose not just in reaction to the harmful effects of TRIPS. While recognition of the two fields’ convergence is relatively recent, they share a longstanding and significant history. IPR were recognized at the birth of the international HR movement.⁷⁵ Both Article 27 of the 1948 Universal Declaration of Human Rights (UDHR) and Article 15.1(c) of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR or the Covenant) provide that, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.”⁷⁶ Moreover, human rights rhetoric makes explicit what is only, at best, implicit in the economic IP documents: the importance of the public domain. Another provision of the UDHR Article 27 states that, “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁷⁷ Similarly, the ICESCR recognizes the right of everyone “[t]o take part in cultural life” and “[t]o enjoy the benefits of scientific progress and its applications.”⁷⁸ The ICESCR further provides that “[t]he steps to be taken by the States

⁷³ Chapman, *supra* note 41, at 861.

⁷⁴ Drahos, *IP & HR*, *supra* note 72, at 364.

⁷⁵ Helfer, *Human Rights Framework*, *supra* note 30, at 978.

⁷⁶ Universal Declaration of Human Rights art. 27, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social, and Cultural Rights art. 15.1(c) (Dec. 16, 1966) [hereinafter ICESCR].

⁷⁷ UDHR art. 27.

⁷⁸ ICESCR arts. 15.1(a) & (b).

Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.”⁷⁹ The IP language of the international HR documents recognizes an author’s moral and material rights to his creations and the importance of the public domain.

International HR law, however, does not offer definitive guidelines for fostering creativity and innovation, providing nothing specific beyond the aforementioned provisions, which constitute a “skeletal and under-theorized” framework.⁸⁰ The overlap of the two legal regimes implicates economic, social, and cultural rights, arguably “the least well-developed and the least doctrinally prescriptive” human rights.⁸¹ In the last few years, the UN Committee on Economic, Social, and Cultural Rights (CESCR or the Committee) has moved to endow these rights with greater prescriptive force by providing interpretations of the ICESCR.⁸² Aiming “to identify some of the key human rights principles deriving from the Covenant that are required to be taken into account in the development, interpretation, and implementation of contemporary intellectual property regimes,”⁸³ the Committee stressed that “the realms of trade, finance, and investment are in no way exempt from human rights principles”⁸⁴ and that “international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights.”⁸⁵ The Committee encouraged balanced intellectual property systems: “The end which intellectual property protection should serve is the objective of human well-being, to which international human rights instruments give legal expression.”⁸⁶ The Committee’s interpretations lend powerful support to the legitimacy of the IP-HR relationship.

A closer reading of the text of Article 15.1(c), guided by another Committee-issued General Comment, reveals how the human rights framework for authors’ rights might facilitate a balance between authors’

⁷⁹ ICESCR art. 15.2.

⁸⁰ Helfer, *Human Rights Framework*, *supra* note 30, at 976.

⁸¹ *Id.* at 987.

⁸² *Id.* at 988.

⁸³ U.N. Econ. & Soc. Council (ECOSOC), Comm. On Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 2, U.N. Doc. E/C12/2001/15 (Dec. 14, 2001), available at [http://www.unhcr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/\\$FILE/G0146641.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/$FILE/G0146641.pdf) [hereinafter Committee Comment].

⁸⁴ *Id.* at ¶ 3.

⁸⁵ *Id.*, quoting Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, 26 November 1999 (E/C.12/1999/9).

⁸⁶ *Id.* at ¶ 4.

rights and the public domain. Article 15.1(c) recognizes two distinct rights -- a moral right and a material right. Accordingly, authors' rights as human rights are intended to serve two particular purposes. First, they are meant to "safeguard[] the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage,"⁸⁷ and second, they are meant to protect "basic material interests which are necessary to enable authors to enjoy an adequate standard of living."⁸⁸ These purposes can be contrasted with the purposes of the current intellectual property regime, which "primarily protect business and corporate interests and investments."⁸⁹ The moral and material rights identified in Article 15.1(c) are "core rights"⁹⁰ and any additional intellectual property protection conferred by a state must be balanced with other rights recognized in the Covenant, as well as by public interest considerations.⁹¹

Importantly, the Committee recognized that "the scope of protection of the moral and material interests of the author provided for under article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements."⁹² Accordingly, while corporations and other non-human legal entities are included among the holders of IPR under the existing international IP regimes, "their entitlements, because of their different nature, are not protected at the level of human rights."⁹³ That corporations and other non-human legal entities are excluded from enjoying authors' rights is a "profound departure from Anglo American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products"⁹⁴

C. *Potential Effects of the IP-HR Framework*

Though LDCs are in a position to hope that the injection of HR law into IP will scale back the TRIPS-plus regime, the ways the nascent

⁸⁷ U.N. Econ. & Soc. Council (ECOSOC), Comm. On Econ., Soc. & Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests resulting from Any Scientific, Literary or Artistic Production of Which He is the Author (Art. 15(1)(c))*, ¶ 2, U.N. Doc. E/C.12/2005 (Nov. 21, 2005), available at [http://www.unhchr.ch/tbs/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/03902145eddb797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhchr.ch/tbs/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/03902145eddb797c125711500584ea8/$FILE/G0640060.pdf), [hereinafter General Comment].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Helfer, *Human Rights Framework*, *supra* note 30, at 996.

⁹¹ *Id.*

⁹² Committee Comment, *supra* note 83, at ¶ 6.

⁹³ General Comment, *supra* note 87, at ¶ 7.

⁹⁴ Helfer, *Human Rights Framework*, *supra* note 30, at 993.

IP-HR framework has been interpreted thus far do not seem to entail a blanket weakening of IPR. In fact, the Committee laid out a stringent test for determining the legality of any government restriction on authors' rights. Under the test, state restrictions on authors' rights must be "determined by law in a manner compatible with the nature of those rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society."⁹⁵ Furthermore, the restrictions must be proportionate, "meaning that the least restrictive measures must be adopted when several types of limitations may be imposed."⁹⁶ This test is much more stringent than the three-step TRIPS test that currently governs limitations and exceptions to rights.⁹⁷ At the same time, however, this framework appears to give individual states considerable freedom in granting or eschewing additional intellectual property protections other than the explicitly named material and moral rights. As a result, the human rights framework for authors' rights is "both more protective and less protective" than the current international intellectual property regime. The human rights framework is more protective in that limitations and exceptions to core rights are subject to a much more stringent standard than the current regime's three-step test. At the same time, however, the human rights framework is less protective in that a state does not need to recognize any intellectual property protections beyond the moral and material rights identified in Article 15.1(c).

While HR law has long recognized IP rights, IP-HR statements remain largely uninterpreted. Further, IPR have not traditionally been viewed as HR.⁹⁸ Because the IP-HR framework is still in its developmental stages, Professor Helfer has called the current time a "window of opportunity" wherein governmental officials, international legal scholars, NGO's, and jurists have an opportunity to influence the framework's procedural rules and substantive content. At this point, however, it is unclear what the ultimate effects of this convergence will be and whether the IP-HR framework can realize its goals. Professor Helfer hypothesizes that the convergence may result in one of three scenarios: the expansion of the IP regime, the use of HR as an external

⁹⁵ General Comment, *supra* note 87, at ¶ 22.

⁹⁶ *Id.* at ¶ 23.

⁹⁷ TRIPS, *supra* note 1, art. 13. "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

⁹⁸ Rosemary J. Coombe, *Intellectual Property, Human Rights, & Sovereignty*, 6 IND. J. GLOBAL LEGAL STUD. 59, 59 (1998). "Although there is a case to be made that intellectual property rights . . . are already human rights, they are rarely approached in this fashion, either by governments or by the holders of such rights." (emphasis in original)

upper limit to the IP regime, or the use of IP instruments to facilitate achieving HR goals.⁹⁹

The ideal version of the framework for LDCs envisions that HR can be used to cap and rebalance the TRIPS-plus regime. HR rhetoric can be used to facilitate a dialogue between developed countries and LDCs. A democratic bargaining process, where all concerns can be voiced, would theoretically be able to achieve the ideal IPR balance in the international arena.¹⁰⁰ Moreover, the HR documents “contain[] important built-in institutional safeguards to protect the poor, the marginalized, and the less powerful.”¹⁰¹ In fact, LDCs have already been using the marriage of IP and HR to advance proposals to roll back the current TRIPS-plus regime. For example, the UN High Commissioner for Human Rights and the WHO have already objected to the TRIPS-plus regime on human rights grounds.¹⁰² In addition, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the WHO Medical Research and Development Treaty, and WIPO’s Development Agenda and Access to Knowledge Treaty are recent treaty-making efforts that represent the early positive results for LDCs of an IP system that takes human rights into consideration.¹⁰³

IV. APPLYING THE IP-HR FRAMEWORK TO VIETNAM

Along with many other LDCs, the ideal effect of the IP-HR regime on Vietnam in the long-term would be to counteract the growing TRIPS-plus regime, thereby allowing Vietnam to develop a more balanced, tailored, and organic IP system. One important feature of the IP-HR regime is the level of flexibility that it promises to inject into the current international IP regime. Recognizing that flexibility, however, also requires recognizing that although LDCs currently share similar interests attendant upon being IP importers, they differ widely in terms of economic development, culture, and political structure. As a Confucian state with a socialist government and great potential for economic growth in the near future, Vietnam raises special challenges for the nascent IP-HR framework. Due to these unique characteristics and other international political considerations, the effects of the IP-HR framework

⁹⁹ Helfer, *Human Rights Framework*, *supra* note 30, at 1015-20.

¹⁰⁰ INFORMATION FEUDALISM, *supra* note 6, at 189.

¹⁰¹ Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. UNIV. L. REV. 709, 745 (2007) [hereinafter Yu, *Ten Questions*].

¹⁰² Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* 5 MINN. J. L. SCI. & TECH. 47, 59 (2003) [hereinafter Helfer, *Conflict or Coexistence*].

¹⁰³ Helfer, *Human Rights Framework*, *supra* note 30, at 1001-14.

on Vietnam and, more generally, whether Vietnam would even be amenable to the goals of the IP-HR framework are unclear.

A. *International Political and Economic Considerations*

On the international scale, the ultimate success of the IP-HR framework may depend on how the framework is received in more traditional IP forums such as WIPO and the WTO. WIPO has already shown signs that it is willing to consider human rights in promulgating IP laws with the creation of a committee dedicated to indigenous peoples, traditional knowledge, and folklore. Moreover, the High Commissioner for Human Rights, the WHO, and other NGOs have been granted observer status to the committee's proceedings.¹⁰⁴ The WTO may be less able to incorporate HR as an IP consideration, given the current international political climate, specifically the growing divide between the information rich and poor. Granted, the TRIPS council of the WTO successfully turned its attention to the lack of access to HIV/AIDS pharmaceuticals in Africa, resulting in the Doha Declaration on the TRIPS Agreement and Public Health and the amendment of TRIPS itself.¹⁰⁵ However, public manifestations of resistance, such as the Seattle 2000 protests during the WTO meeting and the breakdown of trade talks in Mexico in 2003, suggest deepening rifts between developed countries and LDCs that could prevent compromises in the area of human rights.¹⁰⁶ The growing resentment of LDCs toward developing countries and multinational corporations could "spill over" into the IP realm, which may in turn raise serious issues about the legitimacy of the current international trade system.¹⁰⁷

¹⁰⁴ Helfer, *Conflict or Coexistence*, *supra* note 102, at 60; See also WORLD INTELLECTUAL PROPERTY ASSOCIATION, PANEL DISCUSSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS (1998), <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/foreword.html>. "Intellectual property rights have in recent years become increasingly relevant in diverse policy areas, including trade, health, culture and heritage, investment, economic, social and cultural progress of the world's diverse populations. However, the role of intellectual property in development and in related policy areas raises questions that are complex, rapidly evolving, and at times, controversial. Both WIPO and OHCHR are committed, consistent with their mandates, to facilitating discussion of such questions and advancing the understanding and appreciation of the role of the intellectual property system in development."

¹⁰⁵ Doha Declaration on the TRIPS Agreement and Public Health. WTO Doc. WT/MIN(01)DEC/2, Nov. 20, 2001 [hereinafter Doha Declaration]; See also, e.g., Hans Henrik Lidgard and Jeffery Atik, *Facilitating Compulsory Licensing Under TRIPS in Response to the AIDS Crisis in Developing Countries*, Loyola-LA Legal Studies Paper No. 2005-18 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=794228&rec=1&srcabs=300834.

¹⁰⁶ Helfer, *Conflict or Coexistence*, *supra* note 102, at 61.

¹⁰⁷ Yu, *Global Elites*, *supra* note 40, at 2.

It is also possible that the LDC-friendly human rights forum will be captured by American industry as have other forums that were previously viewed as more friendly to the interests of LDCs. In the past, the U.S. has shown great facility in shifting power out of forums unfriendly to American interests in the past:

When UNESCO became a forum where developing countries advanced dangerous visions of knowledge as the common heritage of humankind, it was time for the US to pull out and eliminate funding for UNESCO. Developing country proposals to reform the Paris Convention to suit their own industrial property interests was a reason to pull out of this forum. WIPO was also a forum that gave a platform to advocate from developing countries of lower intellectual property standards. This was the reason that the U.S. shifted the crucial forum for global standard-setting in the 1980s from WIPO to the [GATT]. There, as we have seen, developing country troublemakers would not even be in the room when important decisions were taken.¹⁰⁸

It is possible that the U.S. could similarly disable the HR forum through withdrawal. However, because NGOs and LDCs are currently well-represented within the HR forum, its capture is unlikely to be easy.¹⁰⁹

If developed countries are able to capture the HR forum, one possible result would be further entrenchment of current ideas about the proper level of IP protection and its link to global trade. The international common law of HR primacy provides for the subordination of all other types of claims to those recognized as HR.¹¹⁰ The unguided recognition of all existing IPR as HR “risks creating a legal environment in which every claim . . . enjoys the distinctive protections that attach to human rights.”¹¹¹ As a result, with the addition of HR rhetoric to the IP regime, IPR could be ratcheted up to a level potentially unreachable by any other claims. It is entirely possible that the now-LDC-friendly HR forum could backfire and become yet another tool in the TRIPS-plus arsenal. At its extreme, the rights culture born from the TRIPS-plus regime assumes that

¹⁰⁸ INFORMATION FEUDALISM, *supra* note 6, at 195.

¹⁰⁹ Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1136 (2007) [hereinafter Yu, *Reconceptualizing IP*].

¹¹⁰ Helfer, *Human Rights Framework*, *supra* note 30, at 976.

¹¹¹ *Id.*

because property rights lead to innovation, the more rights, the better. Because of the doctrine of human rights primacy, human rights rhetoric could easily be incorporated into the TRIPS-plus regime to strengthen IP rights culture to the detriment of LDCs.

Even if developed countries are unable to capture the HR forum or shift forums, the success of an LDC movement toward the IP-HR regime may depend largely on LDCs' ability to form a coalition. "[L]ess developed countries are likely to be in a stronger bargaining position as a group than as individual countries given the current geopolitical environment."¹¹² TRIPS was ratified in its current form because LDCs were fractured and had not fully realized their common interests. Just as the wide publicity received by the HIV/AIDS drug situation in Africa led to the Doha Declaration, the recent more widespread acknowledgement of the causes of indigenous people, access to education, and self-determination may compel LDCs to work together in the future.

Despite being grouped together as LDCs, countries like Brazil and India (those leading the IP-HR movement) and Vietnam are markedly different with respect to their level of development. While India, for example, possesses a pharmaceutical industry poised for explosive growth, Vietnam has no comparable industry. India can thus campaign against the traditional information economies – the US, the EU, and Japan – knowing that it has an independent means to support its own economy. Vietnam, as one of the largest markets for American goods in Asia, is heavily dependent on both American investment and its own comparative advantage in providing cheap labor. To keep production costs low, Vietnam may be more willing to adopt, for show, IP laws that are unenforceable rather than adopt realistic IP laws that would destroy its comparative advantage. For Vietnam, the risk of alienating American investment may simply be too high.

More generally, because of the many bilateral agreements the U.S. and other information economies have with LDCs and the somewhat surprising force of the unilateral Special 301 after TRIPS, developed countries may have already preempted any LDC-led attempts at scaling back the TRIPS-plus regime. Because of the importance of the U.S. as a trading partner, Vietnam may be unwilling to speak out against the U.S. and other developed countries. Further, with tools like the BTA and the Special 301, the U.S. has considerable leverage outside the multilateral realm over Vietnam. Considering that the Vietnamese and Americans are working together to develop stronger economic relations,¹¹³ at this point,

¹¹² Yu, *Currents and Crosscurrents*, *supra* note 60, at 415.

¹¹³ SPECIAL 301 REPORT, *supra* note 3, at 37.

Vietnam may not be willing to forego short-term economic growth for long term balanced intellectual property protection and thus may be unwilling to join an LDC coalition adverse to American interests.

At the same time, the coercive IP policies of developed countries invite retaliation. TRIPS was ratified at a time when the economic and military might of the U.S. was unparalleled. But more recently, “the growth prospects for the U.S. economy . . . have become increasingly dependent on exports” and “a confrontational policy will hurt American businesses. . . .”¹¹⁴ China, for example, has already retaliated against American trade sanctions with counter-actions of its own such as buying European and Japanese products instead of American goods.¹¹⁵ The coercive economic policies that spawned TRIPS and are spurring its expansion could instead lead to the regime’s weakening and perhaps ultimate collapse.¹¹⁶ While Vietnam is currently in no position to challenge U.S. policy, the international political environment shows signs of shifting.

B. National Political Considerations

The rapid growth of the Vietnamese free economy after 1986 raised the question of whether Vietnam would be able to cope with this chaotic growth without accompanying political evolution. Rather than aiming for democracy, the Vietnamese government has expressed the aim of achieving true socialism by implementing capitalist structures and institutions:

Unlike a number of Eastern European countries that are making the transition to the free market, the adoption of free-market principles in Vietnam is not predicated on an outright rejection of socialism. It rather represents formulation by the Vietnamese state of a strategy for developing the country economically. Under the economic renovation, Vietnam is still to maintain socialism as its long-term goal, but prior to reaching socialism, it must first embrace the market in order to

¹¹⁴ Yu, *Pirates to Partners*, *supra* note 44, at 168-69 (internal quotations removed).

¹¹⁵ *Id.* at 166-69.

¹¹⁶ *Id.* at 169-70. “At the global level, a coercive policy will threaten the integrity of the international trading system and may even lead to its collapse. . . . The United States has taken a tremendous effort to create the TRIPS Agreement and to build an international intellectual property system. Ironically, its foreign intellectual property policy is attempting to destroy what it has worked so hard to achieve.”

develop certain areas of the economy by using decentralized planning techniques associated with the free market.¹¹⁷

This strategy is unique in that Eastern European countries and the Soviet Union, unlike Vietnam, at least nominally adopted democratic capitalism rather than naming pure socialism as an ultimate goal.¹¹⁸

China is following the same developmental plan, but Vietnam's long-term state development plan is largely unguided by precedent. It is unclear (and perhaps doubtful) then, whether moving toward socialism while adopting capitalist structures is possible. For example, Vietnam enjoyed a foreign investment boom in the early to mid-1990's but then suffered a major decline in investment in 1999 due to the "massive red tape of the Hanoi bureaucracy," and rampant corruption.¹¹⁹ Vietnam has recognized the uniqueness of its political goals and the attendant need for incremental political change. As stated by Vo Chi Cong, chairman of the Committee to amend the 1980 Constitution:

As time passes, we better understood that there will be no ready model for us to copy on our way to socialism, since the transitional period in our country has its specific character. Surely, we need time and transitional steps, measures and methods which should be sought for and tested in reality...Objective law requires that the new can emerge only when there are enough prerequisites for its emergence.¹²⁰

The VCP's understandable caution regarding political reform should be contrasted with its large-scale welcoming of massive economic change. While embracing radical economic change, the Vietnamese government has eschewed large-scale political reform.

¹¹⁷ Ngo, *supra* note 35, at 91-92.

¹¹⁸ *Id.* "Unlike a number of Eastern European countries that are making the transition to the free market, the adoption of free-market principles in Vietnam is not predicated on an outright rejection of socialism. It rather represents a formulation by the Vietnamese state of a strategy for developing the country economically. Under the economic renovation, Vietnam is still to maintain socialism as its long-term goal, but prior to reaching socialism, it must first embrace the market in order to develop certain areas of economy by using decentralized planning techniques associated with the free market."

¹¹⁹ Boyle, *supra* note 12, at 5, quoting Andrew J. Pierre, *Vietnam's Contradictions*, FOREIGN AFFAIRS, Nov/Dec 2000, at 78.

¹²⁰ Ngo, *supra* note 35, at 100.

That is not to say, however, that political reform has not occurred in Vietnam over the past decade. While a capitalist democracy is of course not the Vietnamese government's stated goal, the opening of the market in 1986 is evidence that the country has also "embarked on the path of political reform."¹²¹ Political reform in Vietnam has thus far included increased freedom of expression, campaigns against corruption, and calls for improving the efficiency of state agencies.¹²² "The existing political evolution is substantial, and the emergence of a relatively autonomous technocratic group is starting to become arguable."¹²³ Furthermore, there are signs that now may be an optimal time to implement further political reform. First, in recent years, the VCP has increasingly received internal and external criticism. "Vietnam's communist regime is not in danger of being overthrown from within by a disgruntled peasantry or outraged working class responding to appeals by emigres abroad. It is, however, beset by criticism from Vietnam's intelligentsia both within and outside the party."¹²⁴ Vietnamese political reform may be inevitable in light of economic change, but its inevitability has not prevented the VCP from intense opposition to such change. For example, Vietnam's political reform has experienced some major setbacks. After communism collapsed in Eastern Europe and the Soviet Union, the Vietnamese government banned any discussions of political pluralism.¹²⁵

However, the IP-HR framework and political reform, specifically the development of democracy, may be inseparable. The emergent IP-HR framework may allow Vietnam enough leeway in spite of TRIPS to build a balanced IP regime, and in particular, a balanced copyright regime that could lay the foundation for a culture that respects democratic principles such as freedom of speech. A balanced copyright system is neither necessary nor sufficient for achieving democracy, but it can be one of many factors that contribute to the development of democracy in that it engrains basic democratic principles in an implementing society, by encouraging the dissemination of knowledge, fostering a pluralist, non-state communications media and underscoring the value of individual contributions to public discourse.¹²⁶

¹²¹ Carlyle A. Thayer, *Recent Political Development: Constitutional Change and the 1992 Elections*, in *VIETNAM AND THE RULE OF LAW 50, 50* (Carlyle A. Thayer & David G. Marr eds., 1993).

¹²² *Id.*

¹²³ Fforde, *supra* note 2, at 30.

¹²⁴ Thayer, *supra* note 120, at 75.

¹²⁵ *Id.* at 50.

¹²⁶ Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217, 220 (1998).

In short, because the VCP is arguably at its weakest, the door is open for the more balanced IP system promised by an IP-HR framework to foster the development of democracy in Vietnam. By the same token, however, the specter of radical political change may be another reason for Vietnam to refuse to join any LDC coalition advocating an IP-HR regime. Further, overly protective IPR may actually impede democratization, giving the VCP incentive actively to oppose the IP-HR movement.¹²⁷ Given the VCP's opposition to political development that would displace the Party, the push toward democratization inherent in the IP-HR framework may serve as a major obstacle to the framework's success in Vietnam.

Vietnam is one of the few remaining socialist countries in the world and one of even fewer socialist countries with a free market. The VCP's aversion to political change that could lead to its displacement is understandable. However, it may be ironic that the VCP opposes the IP-HR framework because of its potential to effect political change. The perpetuation of only nominally adopted laws in Vietnam propagates a further disregard for the rule of law, in turn undermining the legitimacy of the VCP – an institution already riddled with legitimacy problems. Commentators who have suggested that a more balanced IP regime may facilitate democracy have emphasized that it is neither necessary nor sufficient to lead to that outcome. Assuming that Vietnam's goal of a socialist republic with a wholly free market is possible, the IP-HR framework could help the VCP usher in such a system. Specifically, scaling back the universal TRIPS mold to allow Vietnam to implement an IP system that it could actually enforce would lend credence to the Party's power and allow it better to lead the country.

C. *Human Rights Considerations*

As a related matter, it is unclear that Vietnam would be willing or able to implement an IP framework based on human rights. Though the UDHR has a "tremendous and worldwide impact" and "exerts a moral, political, and legal influence far beyond the hopes of many of its drafters," the UDHR is still not binding on UN member states.¹²⁸ Further, although the UDHR is widely regarded as customary international law, the rights described in the UDHR are regarded as tools

¹²⁷ *Id.* at 222. With overly-strong copyright protection, "authors would be severely fettered in their ability to participate in public discourse, whether by building upon literary or artistic traditions, laying bare the contradictions in venerable cultural icons, or challenging prevailing modes of thought." *Id.* at 229.

¹²⁸ Birnhack, *supra* note 9, at 531.

for Western imperialism in some quarters, including Vietnam.¹²⁹ Vietnam, though a UN member state, is among the worst human rights offenders in the world. The government controls all media outlets, including domestic newspapers, television, and radio stations.¹³⁰ Direct criticism of the Communist Party is forbidden.¹³¹ Similarly, the internet is censored, blocking content that is thought to disturb national security and social order, or offend the traditional national way of life.¹³² In fact, several dissidents have been arrested and tried on criminal charges for promulgating criticism of the government or calling for multi-party government.¹³³ Other human rights issues include lack of freedom of religion, arbitrary arrests, torture, wiretapping, and unfair trials that are not open to the public or press.¹³⁴ Vietnam's membership in the world economy and its blatant human rights violations constitute yet another gap between Vietnam's legal rhetoric and reality. "Since Vietnam joined the World Trade Organization, it wants to be seen as a reforming, law-abiding nation, but arresting, 'disappearing,' and harassing dissidents and their family members [show] that the rhetoric doesn't match reality."¹³⁵

The IP-HR framework is an avenue wherein LDCs can potentially voice their concerns and advance their developmental priorities in the international IP agenda. However, given the state of human rights in Vietnam, it is unclear whether Vietnam would be willing or able to operate in this forum. Furthermore, Vietnam's explosive economic growth may serve to obscure Vietnam's human rights violations by encouraging foreign investors to turn a blind eye to human rights violations. Notably, the violations most often cited by Human Rights Watch concern political and civil liberties. Vietnam has displayed a willingness to allow for economic freedoms without allowing for the concurrent development of political liberties. Moreover, such

¹²⁹ Do Muoi, VCP Secretary General (1992): "[W]hat is the respect of human rights, if not the guarantee of the right of people to live in peace, independence and freedom, to be the master of the country, society and themselves, to lead a plentiful, equal and happy life? Respect for the rights of each person must relate to respect for the right to equality of all nations free from imposition by any country." Ngo, *supra* note 35, at 105.

¹³⁰ HUMAN RIGHTS WATCH, KEY HUMAN RIGHTS ISSUES IN VIETNAM (2005), available at <http://hrw.org/english/docs/2005/06/17/vietna11151.htm> [hereinafter KEY HUMAN RIGHTS ISSUES IN VIETNAM].

¹³¹ *Id.*

¹³² *Id.* See also Minky Worden, *Vietnam's Road Show*, THE NEW YORK SUN, June 23, 2005, available at <http://www.nysun.com/article/15958>.

¹³³ KEY HUMAN RIGHTS ISSUES IN VIETNAM, *supra* note 129.

¹³⁴ *Id.*

¹³⁵ Press Release, Human Rights Watch, authored by Sophie Richardson, Vietnam: End Attacks on Year-Old Democracy Movement (April 6, 2007), available at <http://hrw.org/english/docs/2007/04/06/vietna15664.htm>.

development is not unique within the region.¹³⁶ Similar developments in China have caused some to raise the question of whether free markets require respect for civil liberties. However, Article 27 of the UDHR concerns only the “moral and material interests” of an author and it is theoretically possible for Vietnam to recognize this right while, for example, continuing to heavily censor news outlets. Whether such a rights structure is viable in the long-term remains to be seen, though the sheer amount of money funneled into countries like China and Vietnam by foreign investors may facilitate the perpetuation of economic rights and the simultaneous suppression of political and civil rights. Finally, given the dire state of the rights to food, health, and self-determination, to name a few, in Vietnam, IP-focused human rights could be viewed as a relatively low priority.¹³⁷

D. *Cultural Considerations*

Much has been written about the differences between the Western and Confucian conceptions of property, particularly whether IP as it is understood in the Western sense will ever be adopted in Confucian countries like China and Vietnam. China, despite nominally strong IP laws, is frequently criticized for its failure to enforce those laws. Cultural differences between Western and Confucian cultures are often cited to explain China’s enforcement problems.¹³⁸ Confucian values are also “quite significant” in modern Vietnamese culture,¹³⁹ resulting in:

cumbersome vestiges of a feudal colonial regime with disregard for the rule of law, avoidance of open conflict through non-adversarial dispute resolution by conciliation outside the orbit of the law, [favoritism], corruption, arbitrary intervention through family connections with power [centers], which are by-products of the so-called

¹³⁶ Press Release, Human Rights Watch, Vietnam: Crackdown on Dissent in Wake of WTO and APEC (March 9, 2007), available at <http://www.hrw.org/en/news/2007/04/05/vietnam-end-attacks-year-old-democracy-movement>

¹³⁷ Yu, *Reconceptualizing IP*, *supra* note 108, at 1148. “Nevertheless, there remains a considerable challenge concerning whether less developed countries and indigenous communities would be able to consider the right to the protection of interests in intellectual creations as important as such other human rights as the right to food, the right to health, the right to education, the right to cultural participation and development, the right to the benefits of scientific progress, and the right to self-determination (notwithstanding the universal, indivisible, interdependent, and interrelated nature of human rights). There also remain continuous tension between human rights protection and economic development.”

¹³⁸ Shi, *supra* note 57, at 2.

¹³⁹ Ngo, *supra* note 35, at 83

“Asian way of life” which definitely reduce the reliability of the legal framework.¹⁴⁰

Of course, cultural differences alone are not sufficient to explain why enforcement remains such a problem in either China or Vietnam. For example, as one commentator argues, China’s enforcement shortcomings may stem in part from a political system that cannot cope with rapid but still inadequate economic development and resulting social instability.¹⁴¹ Nonetheless, while not the only explanation for Vietnam’s lack of enforcement, the differences between Confucianism and Western notions of property are undeniably a factor in Vietnam’s enforcement problems. Further, the one-sided nature of TRIPS has allowed developed countries to cast the conflict between Confucianism and Western values as a sort of morality play, featuring the “evil pirates of the East” and the “original genius of Western inventors and authors.”¹⁴² The mere acknowledgment that Vietnam’s enforcement problems stem in part from its Confucian roots is as far as TRIPS-based discussions of Vietnamese culture seem willing to go. Vietnam ascribes to TRIPS yet does not obey its provisions. By this logic, then, Vietnam is in the wrong. But TRIPS obscures more than it illuminates the complex cultural considerations that lead to Vietnam’s enforcement problems.¹⁴³ “In fact, the Agreement [TRIPS] masks the significant cultural and ideological differences between developed and less developed countries and has created an illusion that these differences can be easily solved.”¹⁴⁴ Coupled with the undemocratic bargaining process that begat TRIPS, the ability of Western TRIPS proponents to cast violators as categorically bad has resulted in the unsurprising conclusion from non-Western camps that TRIPS is a tool for Western imperialism that cannot comport with non-Western cultures.

Similarly, HR law has been criticized as only articulating and reinforcing Western values.¹⁴⁵ Professor Yu argues, however, that the drafting history of the UDHR suggests that rather than being just another tool designed to impart Western values on the rest of the world, the UDHR actually embodies universal values.¹⁴⁶ While the UDHR was being drafted, the American Anthropological Association sent a now famous memorandum to the Human Rights Commission asking whether

¹⁴⁰ *Id.*

¹⁴¹ See Shi, *supra* note 57.

¹⁴² Yu, *Pirates to Partners*, *supra* note 44, at 175, quoting James Boyle, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 123 (1996).

¹⁴³ Yu, *Pirates to Partners*, *supra* note 44, at 175.

¹⁴⁴ *Id.* at 173.

¹⁴⁵ Yu, *Reconceptualizing IP*, *supra* note 108, at 1141.

¹⁴⁶ *Id.*

it would be possible to draft a universally-applicable document, rather than one that imposed Western values on other countries.¹⁴⁷ According to Professor Yu, the drafting history of the UDHR thus “strongly suggests” that the drafters were aware that they had to create a universal document that was not tailored to any political or economic system and the document was in fact the product of many different minds, legal systems, and ideologies.¹⁴⁸ Further, the fact that some Western countries, including the U.S., were reluctant to adopt some of the provisions of the UDHR shows that the document may not be completely biased in favor of Western countries.¹⁴⁹ Finally, because the UDHR is widely considered customary international law, IPR based on the language of the UDHR may enjoy more universal acceptance than those based on TRIPS.¹⁵⁰ Yu’s conclusion, then, is that because the UDHR embodies universal values, the IP-HR framework may overcome arguments based on cultural relativism. Yu’s examination of the UDHR’s drafting history importantly sheds light on the process that led up to the creation this international common law document. However, as we have seen in the case of the TRIPS talks, simply having a diverse bargaining table does not necessarily equal democracy; and considerations that are more difficult to document such as equal information and equal bargaining power suggest that the UDHR drafting process was likely not ideally democratic.

Beyond the UDHR’s drafting history, however, the document itself contains provisions allowing for progressive realization and self-determination that could at least remove the IP debate in Vietnam from the oversimplified East/West binary. This aspect of the IP-HR regime is critical and may actually be the most attractive for Vietnam. The aspects of the IP-HR regime that allow countries to develop tailored IP laws are not radical and are in fact, rather conservative, as they move away from the one-size-fits-all TRIPS model. As Professor Drahos points out, it is significant that the declarations set forth by groups wishing to scale back the TRIPS regime via the IP-HR framework do not call for the total abandonment of international IP for the sake of cultural identity.¹⁵¹ On

¹⁴⁷ Yu, *Ten Questions*, *supra* note 101, at 748.

¹⁴⁸ *Id.* at 749. The government delegates had diverse cultural and religious backgrounds, and a large array of governments, intergovernmental and nongovernmental organizations, and private entities participated in the drafting process. Even when countries, in particular those in the Eastern Bloc, abstained from voting for the final adoption of article 27 of the UDHR and article 15 of the ICESCR, they were able to influence the outcome by joining the discussions; submitting comments, drafts, and amendments; and participating in some of the preliminary voting.” (internal citations omitted).

¹⁴⁹ *Id.* at 750-751.

¹⁵⁰ See, e.g., Birnhack, *supra* note 9, at 531.

¹⁵¹ Drahos, *IP & HR*, *supra* note 72, at 365.

the contrary, for example, indigenous peoples are seeking a regime that allows them to use intellectual property beyond its profit-making function:

They want property to function in a way that allows them to control the use of cultural information which in some deep sense is part of them, to which they are attached, cultural information they do not necessarily want to become the subject of global processes of commodification and appropriation. For them, intellectual property should first and foremost function to preserve their way of life.¹⁵²

In this way, the IP-HR framework calls for a traditional rebalancing of the proprietary and public domain considerations of IPR.

Just as indigenous peoples' groups have advocated a new IP regime to advance their own powers of self-determination and sovereignty, the IP-HR regime can be used to achieve the same ends for Vietnam. Vietnam is of course eager to welcome Western foreign investment but, owing to its colonial history, likely possesses a certain skepticism toward Western influence, which would tend to undermine Vietnamese eagerness to implement and enforce Western-style law.¹⁵³ This skepticism might be eliminated by allowing Vietnam the flexibility to develop its own system of IP laws, particularly ones which allow for the protection of Vietnam's indigenous cultural forms and traditional knowledge.¹⁵⁴ Southeast Asia has a rich history of traditional knowledge,

¹⁵² *Id.*

¹⁵³ Yu, *Pirates to Partners*, *supra* note 44, at 189, discussing China: "Since China's defeat in the Opium War in the mid-nineteenth century, the Chinese officials have viewed the West with a paradox of admiration and skepticism. On the one hand, the Chinese admire the military prowess and technological advancement of the Western powers and believe modernization is the solution to China's backwardness and socio-economic problems. On the other hand, these people entertain skepticism toward Western institutions and sometimes wonder whether these institutions are Trojan horses that help the West contain, if not control China."

¹⁵⁴ "The countries of Asia and the Pacific region are very rich in their cultural heritage, including, but not limited to, folk-literature, folk arts and crafts, music, visual arts, ceremonies, folk beliefs, folk-architecture associated with particular sites, as well as forms of traditional knowledge related to folk medicine and folk-medicinal practices, agriculture, and conservation and sustainable use of biological diversity." WORLD INTELLECTUAL PROPERTY ORGANIZATION, REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1999), <http://www.wipo.int/export/sites/www/tk/en/tk/ffm/report/final/pdf/annex.pdf>.

but countries in the region have little or no legislation protecting it.¹⁵⁵ Moreover, “conventional international intellectual property law does not, at least adequately, protect the traditional knowledge of indigenous and local peoples.”¹⁵⁶ By invoking international HR, WIPO has “recognized that there is a need to devise new regimes or enlarge existing ones to accommodate the protection of traditional knowledge.”¹⁵⁷ Furthermore, though a small developing country, Vietnam has displayed a willingness to forge new paths toward development. Considering that the IP-HR framework underscores a country’s sovereignty and self-determination, the IP-HR framework may be viewed as a favorable venue for Vietnam’s unique goals.

When TRIPS was ratified, it represented the ultimate move toward international IP harmonization. But the uniformity may have been short-lived, as TRIPS may actually have fostered movement away from the multilateral IP system.¹⁵⁸ TRIPS is just one result of globalization phenomena that initially raised questions about the possibility of preserving particular culture traditions in the modern world. But, the IP-HR movement represents one distinct reaction against TRIPS uniformity. The reemergence of a patchwork system of IP after TRIPS may well be a coming trend in international IP. Such a patchwork system would enable the proprietary ends sought by the TRIPS system while accommodating human rights ends like education, medicine, self-determination, and freedom of speech. Cultural concerns, such as China’s and Vietnam’s Confucian roots, which once stood as obstacles to the modern TRIPS system are poised as possible hallmarks of a postmodern IP system that embraces alterity.¹⁵⁹ The IP-HR framework this has the potential to allow

¹⁵⁵ J.J. Disini, *Survey of Laws on Traditional Knowledge in Southeast Asia*, OPEN KNOWLEDGE NETWORK (Oct. 2003), <http://cyber.law.harvard.edu/openeconomies/okn/asiatk.html>. “In Vietnam’s WIPO Survey Response (Vietnam), it was reported that there are very few legislative efforts in the area of genetic resources and almost none in the protection of traditional knowledge. The view was expressed that existing IP laws extend some form of protection to TK. Geographical indications protect traditional knowledge to some extent as in the case of “Phu Quoc”, a fish soya sauce, and “Shan Tuyet Moc Chau”, a variety of tea. Patent protection also exists for a traditional preparation of medicinal plants used in assistance in stopping drug-addiction while a trademark has been registered for a traditional balm made of medicinal plants (“Truong Son”).”

¹⁵⁶ John Mugabe, *Intellectual Property Protection and Traditional Knowledge*, WIPO PANEL DISCUSSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS 25 (1998) available at <http://www.wipo.int/export/sites/www/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ See Yu, *Currents and Crosscurrents*, *supra* note 60.

¹⁵⁹ ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 298 (1998). “Our legal institutions must abandon universalisms that prohibit the emergence and expression of alterity. . . . Rather than give priority to any given systems of identity and their internal boundaries, the cultivation of a

Vietnam not only to strengthen its powers of self-determination but also influence international IP. However, while a patchwork international IP system existed before TRIPS, it is unclear if a return is possible after TRIPS harmonization.

V. CONCLUSION

Discussions of economic, political, and cultural issues that could hinder the success of the IP-HR framework in Vietnam reveal a common conflict between short-term and long-term development. The expansion and globalization of trade, facilitated in large part by TRIPS, have allowed Vietnam to enjoy major economic growth. However, the explosive economic growth Vietnam has enjoyed in recent years and will likely continue to enjoy has masked the extent to which TRIPS is a mismatched legal transplant. Vietnam's economic prosperity has led the country to allow for free market reforms without attendant political reforms, the enactment of ambitious Western-style laws without hope of enforcement, and the further propagation and strengthening of IP laws that not only fail to promote the development of local IP, but also undermine local health, education, rule of law, and human rights.

A long-term view of the benefits offered by the IP-HR regime for Vietnam is critical. Indeed, short-sightedness and mischaracterization of interests factored into promulgating the unbalanced TRIPS regime in the first place. Vietnam is one of many LDCs that joined TRIPS out of economic pressure. Further, coercion has led to more coercion. Because of its TRIPS obligations, bilateral trade agreements, and the Special 301, Vietnam is in no position to challenge TRIPS and thus cannot campaign for the benefits offered by a balanced IP regime promised by the IP-HR framework. The result is that Vietnam is held to IP enforcement obligations that, first, are impossible for a country in Vietnam's developmental position to uphold, and second, serve to perpetuate Vietnam's problems with local innovation, creation, and respect for the rule of law, possibly leading to entrenchment as an LDC. Although potential solutions to these problems lie in the IP-HR framework, because of Vietnam's strong desire for economic growth and relations with developed countries, and its notable aversion to political reform, Vietnam will not likely lead the charge for an IP-HR regime. In fact, because of

the VCP's aversion to political change and its human rights track record, Vietnam may become one of the nascent framework's fiercest opponents.

But coercion can also invite retaliation. TRIPS' coercive nature could also lead to its collapse. With the weakening of U.S. military power and developed countries' increasing dependence on LDCs, the international political environment is changing rapidly. The harmonization achieved by TRIPS has spawned crosscurrents against that very harmonization that could result in the return to a patchwork of more tailored bilateral and regional IP agreements, rather than a single overarching multilateral treaty. The IP-HR framework is an early intimation of this scenario. In the TRIPS era, Vietnam's Confucian culture and socialist government seem like obstacles to Vietnam's integration into the world economy. But, it is these unique characteristics that may grant Vietnam the opportunity to lead the charge toward an international IP regime that not only accounts for, but also fosters, cultural, economic, and political differences. Currently, however, the economic power of the U.S., other IP-producing countries, and the TRIPS regime in general, remain undeniable. Vietnam will likely not be willing to forego or postpone the current economic boom for the longer-term goal of achieving a more balanced IP system and its attendant benefits. For now, without a structured movement scaling back the growing TRIPS-plus regime, both Vietnam's development and foreign IP producers will likely continue to suffer from the growing gap between Vietnam's IP rhetoric and reality.