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# Access to Medicines, BRICS Alliances, and Collective Action

Peter K. Yu<sup>†</sup>

## INTRODUCTION

On December 6, 2005, shortly before the World Trade Organization (“WTO”) Ministerial Conference in Hong Kong, WTO member states agreed to accept a protocol of amendment<sup>1</sup> to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”).<sup>2</sup> This amendment sought to provide a permanent solution to implement paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (“Doha Declaration”).<sup>3</sup> If ratified, the new article 31*bis* of the TRIPs Agreement will allow countries with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.<sup>4</sup>

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<sup>†</sup> Copyright © 2008 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. Earlier versions of this Article were presented at the “Tackling Global Health Issues Through Law and Policy” Symposium at Boston University School of Law, the Second EDGE Network Annual Conference in Vancouver, Canada, and the “Strategies to Implement a WIPO Development Agenda” Workshop at the University of Hong Kong Faculty of Law. The Author would like to thank Kevin Outterson and Jeremy de Beer for their kind invitations; Brook Baker, Shamnad Basheer, Robert Bird, Dan Cahoy, Colleen Chien, Carolyn Deere, Peter Drahos, Richard Gold, Gerald Keusch, Jean-Frédéric Morin, Srividhya Ragavan, Xue Hong, and the participants of these events for their valuable comments and suggestions, and Jonathan Soike for excellent research and editorial assistance.

<sup>1</sup> See General Council, *Amendment of the TRIPs Agreement*, WT/L/641 (Dec. 8, 2005), available at [www.wto.org/english/tratop\\_e/trips\\_e/wtl641\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm) [hereinafter TRIPs Amendment].

<sup>2</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement], available at [www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>3</sup> See World Trade Organization [WTO], Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

<sup>4</sup> Although the initial deadline for ratification was December 1, 2007, the deadline has been recently extended for another two years. William New, *TRIPs Council Extends Health Amendment; Targets Poor Nations’ Needs*, INTELL. PROP. WATCH, Oct. 23, 2007, [www.ip-watch.org/weblog/index.php?p=798](http://www.ip-watch.org/weblog/index.php?p=798). As of this writing, slightly over a quarter of the 151 WTO member states, including the United States, India, Japan, China, and most recently members of the European Communities, have ratified the proposed amendment. Press Release, WTO,

To facilitate the supply of essential medicines to countries with insufficient or no manufacturing capacity, article 31*bis*(3) creates a special arrangement not only for the affected countries, but also for those belonging to a regional trade agreement.<sup>5</sup> Such an arrangement allows less developed countries<sup>6</sup> to aggregate their markets to generate the purchasing power needed to make the development of an indigenous pharmaceutical industry attractive.<sup>7</sup> It also paves the way for the development of regional supply centers,<sup>8</sup> procurement systems,<sup>9</sup> and patent pools and institutions, while facilitating technical cooperation within the region.<sup>10</sup>

Unfortunately, because article 31*bis* specifically requires that least developed countries make up at least half of the membership of any beneficiary regional trade agreement, the provision would benefit only a limited number of less developed countries, predominantly those in Africa.<sup>11</sup> Even worse, the interpretation of the provision remains contested within the WTO. While the European Communities “insisted that the [provision] should be limited to what is effectively sub-Saharan Africa,” less developed countries in Asia, the Caribbean, and South America embrace a much broader interpretation of article 31*bis*(3).<sup>12</sup>

In light of the limited benefits of the proposed amendment to the TRIPS Agreement, this Article explores how greater collaboration among the BRICS countries (Brazil, Russia, India, China, and South Africa) and between these countries and other less developed countries can promote access to essential medicines in the less developed world. Part I introduces the five BRICS countries by offering a brief discussion of each country in the area of international intellectual property protection. This Part explains why South Africa is included along with the four largest emerging economies.

*Countries Accepting Amendment of the TRIPS Agreement* (Aug. 2, 2007), [www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm).

<sup>5</sup> TRIPS Amendment, *supra* note 1, art. 31*bis*(3).

<sup>6</sup> The TRIPS Agreement distinguishes between developing and least developed countries. This Article uses “less developed countries” to denote both developing and least developed countries. When referring to the TRIPS Agreement, however, this Article returns to the terms “developing countries” and “least developed countries.”

<sup>7</sup> See Peter K. Yu, *The International Enclosure Movement*, 82 *IND. L.J.* 827, 848 (2007).

<sup>8</sup> See Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 *J. INT'L ECON. L.* 921, 973–77 (2007) (discussing the potential benefits of pooled procurement strategies and the establishment of regional pharmaceutical supply centers).

<sup>9</sup> See SISULE F. MUSUNGU ET AL., *UTILIZING TRIPS FLEXIBILITIES FOR PUBLIC HEALTH PROTECTION THROUGH SOUTH-SOUTH REGIONAL FRAMEWORKS*, xv-xvi (2004), [www.southcentre.org/index2.php?option=com\\_docman&task=doc\\_view&gid=9&Itemid=68](http://www.southcentre.org/index2.php?option=com_docman&task=doc_view&gid=9&Itemid=68) (advocating the establishment of “regional procurement systems where they would jointly conduct tendering through an entity acting on their behalf and a central purchasing agency managing the purchases on behalf of all the member countries”); see also *id.* at 70–73 (discussing regional procurement systems).

<sup>10</sup> See TRIPS Amendment, *supra* note 1, art. 31*bis* annex ¶ 5.

<sup>11</sup> See *id.* art. 31*bis*(3) (requiring that “at least half of the current membership of [the regional trade agreement] is made up of countries presently on the United Nations list of least developed countries”).

<sup>12</sup> Abbott & Reichman, *supra* note 8, at 945.

Part II then advances the hypothesis that, if the BRICS countries are willing to join together to form a coalition, it is very likely that the resulting coalition will precipitate a negotiation deadlock similar to the historic stalemate between developed and less developed countries before the adoption of the TRIPs Agreement. This Part explains why these five countries collectively would possess such immense power to stop the push by the European Communities and the United States to ratchet up global intellectual property standards while threatening to grind the intellectual property harmonization process to a halt.

Part III questions whether these five countries can build a sustained coalition in light of their very different historical backgrounds; the divergent levels of political, social, economic, and cultural developments; and the well-documented historical failures for less developed countries to build or maintain effective coalitions. Taking these challenges and potential hurdles into account, this Part contends that it may be more realistic for less developed countries to enter into alliances with one or more of the BRICS countries. Although these *partial* alliances will not have the same bargaining leverage as a *complete* BRICS coalition, this Part notes that the resulting alliances will still be quite effective in advancing the interests of less developed countries.

Part IV highlights the role that the BRICS coalition or partial BRICS alliances can play in the international intellectual property regime. It discusses four coordination strategies through which less developed countries can strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decisionmaking in the international intellectual property regime. This Part contends that less developed countries, through collective action and better coordination, can enhance access to essential medicines by establishing an effective negotiation agenda, fostering more coherent positions among less developed countries, and obtaining better bargaining results. Such collaboration will also help develop a more powerful voice for the less developed world in the international debates on public health, intellectual property, and international trade.

Part V concludes with a discussion of the various challenges confronting the creation and maintenance of partial BRICS alliances. Due to the extended length of this article, this Part does not offer proposals to alleviate these challenges. It nevertheless underscores the importance for both the BRICS countries and other less developed countries to take advantage of the alliances when the interests of both groups of countries are still close to each other. The Article ends on an optimistic note—stating that, if less developed countries can use collective action to their advantage, they may be able to not only reduce the ongoing push by the European Communities and the United States to ratchet up global intellectual property standards, but also will enlarge the policy space that can be used to develop their intellectual property, trade, and public health policies.

## I. MEET THE BRICS

In October 2003, two global economists from the investment bank Goldman Sachs published a study entitled *Dreaming with BRICs: The Path to 2050*.<sup>13</sup> Using a term coined in 2001 for a group of fast-growing developing countries by the bank's chief global economist, Jim O'Neill,<sup>14</sup> the study found that the economies of Brazil, Russia, India, and China ("BRIC") are likely to overtake those of many existing developed economies by 2050. As it declared:

In less than 40 years, the BRICs' economies together could be larger than the G6 in US dollar terms. By 2025 they could account for over half the size of the G6. Currently they are worth less than 15% . . . . Of the current G6 (US, Japan, Germany, France, Italy, UK) only the US and Japan may be among the six largest economies in US dollar terms in 2050.<sup>15</sup>

Because of its provocative finding, the study has attracted considerable attention and debate. The study has also sparked further research by both economists within the bank and elsewhere.<sup>16</sup> In a follow-up study, the Goldman Sachs team found that "[t]he BRICs' share of world growth could rise from roughly 20% in 2003 to more than 40% in 2025."<sup>17</sup> In a decade, more than 800 million people across the BRIC economies will have an income of over \$3,000, "a number greater than the population of the US, Western Europe and Japan combined."<sup>18</sup>

To help us better understand the importance of the BRICS countries, and to lay the foundation for the discussion of the BRICS coalition and partial BRICS alliances, this Part offers a brief discussion of each country in the area of international intellectual property protection. It also explains why this Article includes South Africa, even though the Goldman Sachs study omitted the country on the basis of its "significantly smaller" projected economy.<sup>19</sup> This Part discusses the BRICS countries in the following order: Brazil, India, China, Russia, and South Africa. Russia is discussed after the other BRIC countries because it remains outside the WTO, and South Africa is added at the end to create the BRICS acronym used throughout this Article. (If Russia is excluded, due to its lack of WTO membership, the BICS acronym or the "BICS Quad" can be used instead.)

<sup>13</sup> Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050* (Goldman Sachs, Global Economics Paper No. 99), [www2.goldmansachs.com/ideas/global-growth/99-dreaming.pdf](http://www2.goldmansachs.com/ideas/global-growth/99-dreaming.pdf).

<sup>14</sup> GOLDMAN SACHS GLOBAL ECONOMICS GROUP, *BRICS AND BEYOND 5* (2007) [hereinafter *BRICS AND BEYOND*].

<sup>15</sup> Wilson & Purushothaman, *supra* note 13, at 4.

<sup>16</sup> See, e.g., BUILDING A FUTURE WITH BRICS: THE NEXT DECADE FOR OFFSHORING 1, 3 (Mark Kobayashi-Hillary ed., 2008) [hereinafter *BUILDING A FUTURE WITH BRICS*]; EMERGING ECONOMIES AND THE TRANSFORMATION OF INTERNATIONAL BUSINESS: BRAZIL, RUSSIA, INDIA AND CHINA (Subhash C. Jain ed., 2007) [hereinafter *EMERGING ECONOMIES*]; *BRICS AND BEYOND*, *supra* note 14; Dominic Wilson et al., *The BRICs and Global Markets: Crude, Cars and Capital* (Goldman Sachs, Global Economics Paper No. 118, 2004), available at [www.new-frontiers.org/classicdocs/thebricsreport.pdf](http://www.new-frontiers.org/classicdocs/thebricsreport.pdf).

<sup>17</sup> Wilson et al., *supra* note 16, at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11.

## A. BRAZIL

Brazil, which has the world's fifth largest population, is the poster child of the use of—or, more precisely, the threat to use—compulsory licenses to promote access to essential medicines. Although the country has repeatedly obtained concessions from major pharmaceutical firms through these threats, in April 2007 Brazil finally granted compulsory licenses for the non-commercial public use of the patented AIDS drug efavirenz.<sup>20</sup> It remains to be seen how active Brazil will be in using compulsory licenses to promote public health.

Over the years, Brazil has also developed a very successful program to provide free, universal access to the treatment of HIV/AIDS. Its National STD/AIDS Programme “has reduced AIDS-related mortality by more than 50 percent between 1996 and 1999. In two years, Brazil saved \$472 million in hospital costs and treatment costs for AIDS-related infections.”<sup>21</sup> The Programme has been widely recognized as a model for the less developed world.<sup>22</sup>

For decades, Brazil has been a leading voice for less developed countries. During the TRIPs negotiations, it was one of the ten hardliner countries that refused to expand the mandate of the General Agreement on Tariffs and Trade (“GATT”) to cover substantive intellectual property issues.<sup>23</sup> During the Fifth WTO Ministerial Conference in Cancún (“Cancún Ministerial”) in 2003, Brazil choreographed the G-20,<sup>24</sup> whose demands and resistance led to the

<sup>20</sup> See Press Release, Brazilian Ministry of Health, Brasil decreta licenciamento compulsório do Efavirenz (May 5, 2007), available at [portal.saude.gov.br/portal/aplicacoes/noticias/noticias\\_detalhe.cfm?co\\_seq\\_noticia=29717](http://portal.saude.gov.br/portal/aplicacoes/noticias/noticias_detalhe.cfm?co_seq_noticia=29717). As Robert Bird and Daniel Cahoy have noted, “[i]t is likely that the move was at least partially sparked by the desire to obtain the same price Thailand secured following its successful issuance of several compulsory licenses for AIDS and heart drugs.” Robert C. Bird & Daniel R. Cahoy, *The Emerging BRIC Economies: Lessons from Intellectual Property Negotiation and Enforcement*, 5 NW. J. TECH. & INTELL. PROP. 400, 421 (2007) [hereinafter Bird & Cahoy, *Emerging BRIC Economies*].

<sup>21</sup> 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, 32 (2002).

<sup>22</sup> See *id.* (noting that “[t]he Brazil AIDS program serves as a model for some developing countries that are able to produce medicines locally”); COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 43 (2003) (noting that the National STD/AIDS Programme in Brazil “has been widely acclaimed as a possible model for other countries”); John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 85, 96 (John S. Odell ed., 2006) (observing that “[d]eveloping countries looked to Brazil as a beacon of hope in strategies to combat the HIV/AIDS crisis”).

<sup>23</sup> See JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 19 (2001). The other countries were Argentina, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia.

<sup>24</sup> The current members of the G-20 are Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, and Zimbabwe. The website of the G-20 is available at [www.g-20.mre.gov.br](http://www.g-20.mre.gov.br). Notably, the G-20 includes all BRICS countries that are members of the WTO. G-20, *G-20 Members*, [www.g-20.mre.gov.br/members.asp](http://www.g-20.mre.gov.br/members.asp) (last visited Apr. 10, 2008).

collapse of the ministerial conference.<sup>25</sup> A year later, Brazil, together with Argentina, introduced an important proposal to establish a development agenda within the World Intellectual Property Organization (“WIPO”).<sup>26</sup> The proposal was adopted in October 2007, and the Development Agenda now includes “a series of recommendations to enhance the development dimension of the Organization’s activities.”<sup>27</sup> Along with countries in South America and Southeast Asia, Brazil has been very active in supporting the free and open source software movement.<sup>28</sup>

As of this writing, Brazil remains the only less developed country that has ever requested consultations pursuant to the WTO dispute settlement process with any developed country concerning the noncompliance of intellectual property laws with the TRIPs Agreement.<sup>29</sup> Because of Brazil’s aggressive public health positions and its leadership in the less developed world, the United States Trade Representative includes the country annually in its infamous Section 301 List among countries that pose major barriers to U.S. intellectual property exports.

## B. INDIA

India, the world’s largest democracy and second most populous country, is the other important voice for the less developed world. When Brazil requested consultations with the United States through the WTO dispute settlement process, India was the only other country that requested to join those consultations.<sup>30</sup> Indeed, India’s active lobbying on behalf of less developed countries for lower intellectual property protection and special and differential treatment dates back to reforms introduced in the country shortly

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<sup>25</sup> See Elizabeth Becker, *Poorer Countries Pull Out of Talks Over World*, N.Y. TIMES, Sept. 15, 2003, at A1; Editorial, *The Cancun Failure*, N.Y. TIMES, Sept. 16, 2003, at A24 [hereinafter *The Cancun Failure*].

<sup>26</sup> See Press Release, World Intellectual Prop. Org. [WIPO], Member States Agree to Further Examine Proposal on Development (Oct. 4, 2004), available at [www.wipo.int/edocs/prdocs/en/2004/wipo\\_pr\\_2004\\_396.html](http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html).

<sup>27</sup> Press Release, WIPO, Member States Adopt a Development Agenda for WIPO (Oct. 1, 2007), available at [www.wipo.int/pressroom/en/articles/2007/article\\_0071.html](http://www.wipo.int/pressroom/en/articles/2007/article_0071.html).

<sup>28</sup> See Brian Fitzgerald & Nic Suzor, *Legal Issues for the Use of Free and Open Source Software in Government*, 29 MELB. U. L. REV. 412, 422 (2005) (including South Africa, Brazil, Spain, Finland, and India among “examples of governments moving towards open source solutions”); Daniel F. Olejko, Comment, *Charming a Snake: Open Source Strategies for Developing Countries Disillusioned with TRIPs*, 25 PA. ST. INT’L L. REV. 855, 858 (2007) (noting that “[t]he [open source] movement’s strongest support and largest concentration of countries lies in South America where Argentina, Brazil, Chile, Peru, and Venezuela have displayed wide acceptance of open source software in both government and industry”).

<sup>29</sup> See Request for Consultations by Brazil, *United States—US Patents Code*, WT/DS224/1 (Feb. 7, 2001). It is important to note that the request was made in response to the United States’ challenge of Brazil’s patent laws before the WTO. As Gregory Shaffer lamented, “Brazil . . . never seriously pursued their claims to advance commercial interests, but rather searched for bargaining chips for a potential settlement of the US and EC complaints.” Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPs and Pharmaceutical Patent Protection*, 7 J. INT’L ECON. L. 459, 471 (2004) [hereinafter Shaffer, *Recognizing Public Goods*].

<sup>30</sup> See Request to Join Consultations by India, *United States—US Patents Code*, WT/DS224/2 (Feb. 19, 2001).

after its becoming an independent state.<sup>31</sup> These reforms included differential treatment for food, medicine, and chemical inventions; the prohibition of patents in pharmaceutical products (as compared to processes used to manufacture those products);<sup>32</sup> and the provision of compulsory licensing to encourage the local working of patents.<sup>33</sup>

During the 1967 Intellectual Property Conference of Stockholm, India and other less developed countries demanded special concessions in the international copyright system in light of their divergent economic, social, cultural, and technological conditions.<sup>34</sup> Although an insufficient number of Berne Union members ratified the Stockholm Act, thus necessitating a renegotiation of the revision text in Paris four years later, the Stockholm Conference led to the creation of WIPO and the inclusion of the Protocol Regarding Developing Countries in the Berne Convention.<sup>35</sup> Both WIPO and the protocol remain vital parts of the current international copyright arrangement.

Along with Brazil and other less developed countries, India also demanded a revision of the Paris Convention for the Protection of Industrial Property<sup>36</sup> in an effort to lower the minimum standards of intellectual property protection as applied to them.<sup>37</sup> The revision process eventually broke down during the 1981 diplomatic conference in Nairobi, following demands by less developed countries for exclusive compulsory licensing of patents and the United States' strong objection to those demands.<sup>38</sup> That stalemate ultimately led to the shift of multilateral negotiations from WIPO to GATT/WTO, the establishment of the WTO and the TRIPs Agreement, and the now-turbulent marriage of trade and intellectual property.<sup>39</sup>

In the past few years India has been listed in the United States Trade Representative's Section 301 Priority Watch List.<sup>40</sup> In 1997, the country

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<sup>31</sup> See Srividhya Ragavan, *Of the Inequals of the Uruguay Round*, 10 MARQ. INTELL. PROP. L. REV. 273, 278-89 (2006) (discussing the Ayyangar Committee Report and early patent reforms in India).

<sup>32</sup> See Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 76 (2004) (noting that "India's success in building a strong pharmaceutical industry was based in large measure upon its recognition of patents for pharmaceutical processes, but not for pharmaceutical products").

<sup>33</sup> See *id.* at 289-92.

<sup>34</sup> See Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1065 (1968). For a detailed discussion of the origin and aftermath of the Stockholm Protocol, see SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 879-963 (2d ed. 2005).

<sup>35</sup> See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 328 (2004) [hereinafter Yu, *Currents and Crosscurrents*].

<sup>36</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at *Stockholm*, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

<sup>37</sup> Watal, *supra* note 23, at 16.

<sup>38</sup> See *id.*

<sup>39</sup> See Yu, *Currents and Crosscurrents*, *supra* note 35, at 357-66.

<sup>40</sup> See IP Justice, United States Trade Representative (USTR) Section 301 Annual Reports (2001-2007), [ipjustice.org/USTR/Section\\_301\\_Table\\_2001-2007.htm](http://ipjustice.org/USTR/Section_301_Table_2001-2007.htm) (last visited Jan. 26, 2008).



became the respondent of the first intellectual property dispute in the WTO process that resulted in the establishment of a dispute settlement panel. In the parallel proceedings of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the United States and later the European Communities successfully challenged the failure by Indian patent law to establish a mailbox system as required under article 70(8) of the TRIPs Agreement.<sup>41</sup>

Shortly before January 1, 2005, the deadline by which the TRIPs Agreement requires all developing countries to introduce protection for both pharmaceutical products and processes, India introduced a new patent law.<sup>42</sup> Although this new law is likely to have a major impact on the development and availability of cheap, generic drugs and related ingredients, it does not affect the production of drugs that have already been developed. The new law also includes specific provisions to allow generic manufacturers to continue to sell drugs that are already developed by paying reasonable royalties to patent holders.<sup>43</sup> Notwithstanding these safeguards, commentators have been particularly concerned about the impact of the new law on the global supply of generic drugs, because India “makes more than a fifth of the world’s generic drugs.”<sup>44</sup>

### C. CHINA

China, the world’s most populous country, is the “new kid on the block” in the WTO. On December 11, 2001, the country formally became the 143rd member of the international trading body.<sup>45</sup> Notwithstanding its recent membership, China’s piracy and counterfeiting problems have been a major issue affecting its bilateral trade with the United States since the mid-1980s.<sup>46</sup> As a result, the country catches the attention of the United States Trade

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<sup>41</sup> Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sept. 5, 1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998). Article 70(8) of the TRIPs Agreement requires those member states that do not offer protection for patents in pharmaceutical and agricultural chemical products to introduce a mechanism to adequately preserve the novelty and priority of applications for the affected patents. TRIPs Agreement, *supra* note 2, art. 70(8). Article 70(9) further requires these member states to establish a system for granting exclusive rights to market the affected products. *Id.* art. 70(9).

<sup>42</sup> For a comprehensive discussion of the recent changes in Indian patent law, see generally Janice M. Mueller, *The Tiger Awakens: The Tumultuous Transformation of India’s Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 U. PITT. L. REV. 491 (2007); Ragavan, *supra* note 31.

<sup>43</sup> See Yu, *The International Enclosure Movement*, *supra* note 7, at 863.

<sup>44</sup> KAMAL NATH, *INDIA’S CENTURY* 110 (2008); see also Colleen Chien, *HIV/AIDS Drugs for Sub-Saharan Africa: How Do Brand and Generic Supply Compare?*, 2 PLOS ONE e278 (2007) (reporting that India provided 85% of generic HIV/AIDS antiretrovirals in Sub-Saharan Africa), available at [ssrn.com/abstract=1009287](http://ssrn.com/abstract=1009287).

<sup>45</sup> Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 2 (2003) [hereinafter Symposium, *China and the WTO*].

<sup>46</sup> For discussions of piracy and counterfeiting problems in China in the 1980s and 1990s, see Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000) [hereinafter Yu, *From Pirates to Partners* ]; Peter K. Yu, *Piracy, Prejudice, and Perspectives: Using Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L. L.J. 1 (2001).

Representative annually—under the Section 301 Watch List, the Priority Watch List, or other special arrangements. Most recently, China became the respondent of the first WTO dispute on intellectual property enforcement that has resulted in the establishment of a dispute settlement panel.<sup>47</sup> A number of countries have since joined the dispute as third parties.<sup>48</sup>

Notwithstanding the considerable piracy and counterfeiting problems in China, there has been noticeable improvement of intellectual property protection in the country's major cities and the coastal areas.<sup>49</sup> There has also been emerging industrial development in the areas of computer programs, movies, semiconductors, and biotechnology. Such developments have led me to suggest elsewhere that the many conflicts and competing interests within China are likely to drive the country's leaders to develop a "schizophrenic" nationwide intellectual property policy.<sup>50</sup> While the country wants stronger protection for its fast-growing industries, it prefers weaker protection in fields related to pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs, due to its huge population, continued economic dependence on agriculture, the leaders' worries about public health issues, and their concerns about the people's overall well-being.

Although China has hitherto maintained a relatively low profile in the WTO,<sup>51</sup> and serves mostly as a respondent in WTO complaints, that position will change as the country develops greater WTO-related expertise and becomes more adept in responding to internal problems caused by the WTO accession. Indeed, despite being a new member, China already provided major support to less developed countries during the Cancún Ministerial. As Sungjoon Cho noted: "[T]he 'China factor' enabled the creation of the G-21 [or the G-20]... [W]ith China in their ranks, the size and impact of this coalition became unprecedented."<sup>52</sup> In the years to come, China is likely to become a very important player in the WTO, even if it does not become as vocal a leader as Brazil or India.

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<sup>47</sup> See Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007).

<sup>48</sup> Constitution of the Panel Established at the Request of the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/8 (Dec. 13, 2007). Third parties involved in this dispute include Argentina, Australia, Brazil, Canada, the European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey. *Id.* ¶ 5.

<sup>49</sup> See Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 975-99 (2006) [hereinafter Yu, *From Pirates to Partners II*] (examining the progress China has made in the intellectual property arena).

<sup>50</sup> See Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 25-26 [hereinafter Yu, *International Enclosure, the Regime Complex*].

<sup>51</sup> See Henry S. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. YB. INT'L L. 1, 29-30 (2007) (explaining why "China has consistently taken a low profile in all WTO activities"); see also Yan Li, *Faint Silhouette: Can China Be a WTO Leader?*, WASH. OBSERVER, Dec. 14, 2005, [www.washingtonobserver.org/en/topic.cfm?topicid=29&charid=3](http://www.washingtonobserver.org/en/topic.cfm?topicid=29&charid=3) (reporting an interview with the Author on China's potential leadership in the WTO).

<sup>52</sup> Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219, 235 (2004).

#### D. RUSSIA

Russia, which has the world's ninth largest population and whose economy is projected to be the smallest among the BRIC countries by 2050, is the leftover Big Brother from the Cold War era. As a major military power with nuclear capabilities, it has an enviable status in world politics and is of great political importance to the European Communities and the United States.<sup>53</sup> It also has very high research-and-development capabilities and a considerable amount of technology-related human capital—two critical elements for the successful development of indigenous intellectual property industries.

As of this writing, Russia is still struggling in its negotiations to enter the WTO—a daunting task that took China more than fifteen years.<sup>54</sup> Although Russia's piracy and counterfeiting problems are as serious as, if not more than, those of China,<sup>55</sup> the country's limited economic growth has made Russia a less attractive market for Western businesses. While Russia is occasionally criticized, such as in the case of the Russia-based downloading website [www.allofmp3.com](http://www.allofmp3.com),<sup>56</sup> the country's piracy and counterfeiting problems have caught less media attention. When Russia finally enters the WTO, it is likely to face similar transitional challenges that currently confront China. In fact, the strong likelihood that Russia will be unable to comply satisfactorily with all WTO standards shortly after its entry into the WTO has made EC and U.S. policymakers very reluctant to allow Russia to join the international trading body.

#### E. SOUTH AFRICA

South Africa is a strong economy that follows the BRIC countries in terms of its economic growth, but from quite a distance. It also has a much smaller population than each of the BRIC countries. As a result, South Africa was left out of the Goldman Sachs study. Nevertheless, in the near future, the country will remain quite powerful vis-à-vis other less developed countries, even though its economy may not compare favorably to that of the BRIC countries.<sup>57</sup>

Having the largest economy in the African continent, the country will have continuing influence over other countries within the continent, and possibly even those in Asia, the Caribbean, and South America. In addition, South Africa has been cited as an example of the wider socio-economic and public health problems caused by high intellectual property standards

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<sup>53</sup> See Bird & Cahoy, *The Emerging BRIC Economies*, *supra* note 20, at 409 (noting that "India lacks the economic power of China and the political importance of Russia in the eyes of the United States").

<sup>54</sup> Symposium, *China and the WTO*, *supra* note 45, at 2.

<sup>55</sup> See INT'L INTELLECTUAL PROP. ALLIANCE, 2007 SPECIAL 301 REPORT 115 (2007) (noting that "Russia's current copyright piracy problem remains one of the worst of any country in the world").

<sup>56</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2007 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 498 (2007).

<sup>57</sup> See Wilson & Purushothaman, *supra* note 13, at 11.

required by the TRIPs Agreement.<sup>58</sup> Along with Brazil and India, South Africa was prominently involved in the negotiations<sup>59</sup> that led to the Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health.<sup>60</sup> It has also been instrumental in putting the access-to-medicines issue on the human rights and public health agendas.<sup>61</sup> Today, South Africa remains very active in the access-to-medicines debate.

In retrospect, one could argue that the campaign on access to drugs, to which South Africa made an important contribution, provides a major turning point in the TRIPs debate.<sup>62</sup> When South Africa enacted a law to allow for compulsory licenses used in the manufacture of generic HIV/AIDS drugs in December 1997, the South African Pharmaceutical Manufacturers Association brought suit to challenge the law before the Pretoria High Court.<sup>63</sup> The United States government backed the industry by putting South Africa on the Section 301 Watch List and announcing the suspension of its Generalized System of Preferences (GSP) benefits.<sup>64</sup> Fortunately for South Africa and the less developed world, the South African government received considerable support from advocacy and minority groups and AIDS activists in the United States. The issue became quickly tied up with American electoral politics and has led to the erection of such politically-damaging banners as "Gore's Greed Kills."<sup>65</sup> The Clinton administration eventually backed away from its original stance, even though it was heavily lobbied by the pharmaceutical industry. Noticing the public outrage over the lawsuit and its weak legal position, the South African Pharmaceutical Manufacturers Association dropped the lawsuit in April 2001.<sup>66</sup>

## F. SUMMARY

In the future, each of the BRICS countries—Brazil, Russia, India, China, or South Africa—is likely to play an important role in the development of the international intellectual property regime. To be certain, all of these countries still have many internal problems, such as limited judicial independence in China, severe infrastructural problems in India, heavy debts in Brazil, and

<sup>58</sup> See, e.g., SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 146–62 (2003); Debra Halbert, *Moralized Discourses: South Africa's Intellectual Property Fight for Access to AIDS Drugs*, 1 SEATTLE J. SOC. JUST. 257 (2002); 't Hoen, *supra* note 22.

<sup>59</sup> See Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483, 496 (2007).

<sup>60</sup> General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health*, WT/L/540 (Sept. 1, 2003), 43 I.L.M. 509 (2004).

<sup>61</sup> See Yu, *The International Enclosure Movement*, *supra* note 7, at 865–66.

<sup>62</sup> See SELL, *supra* note 58, at 181 (observing that "[t]he HIV/AIDS pandemic was a contingency that sped up the revelation of the negative consequences of TRIPs"); Ruth Mayne, *The Global Campaign on Patents and Access to Medicines: An Oxfam Perspective*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 244, 249 (Peter Drahos & Ruth Mayne eds., 2002) (noting that "[t]he South African government's decision to fight the case was a critical factor in generating global media interest").

<sup>63</sup> See SELL, *supra* note 58, at 151.

<sup>64</sup> See *id.* at 152.

<sup>65</sup> See *id.* at 152–53; see also Halbert, *supra* note 58, at 270.

<sup>66</sup> See 't Hoen, *supra* note 21, at 31.

environmental challenges, bureaucratic problems, and corruption in virtually all of these countries.<sup>67</sup> Moreover, because the Goldman Sachs study is based on the latest demographic projections and a model of capital accumulation and productivity growth, it may have been overly optimistic in assuming that the BRIC countries will undertake “reasonably successful development”<sup>68</sup>—that is, these countries will continue to “maintain policies and develop institutions that are supportive of growth.”<sup>69</sup> If the economies of these countries slow down or collapse as a result of internal political unrests, major reform failures, significant demographic changes, financial calamities, public health crises, environmental disasters, or even civil or external wars, these countries are very unlikely to overtake the world’s leading developed economies as the study has forecasted. The authors of the Goldman Sachs study even concede that “there is a good chance that our projections are not met, either through bad policy or bad luck.”<sup>70</sup> After all, that study was originally titled *Dreaming with BRICs*, and the Goldman Sachs team conceded “that dream may not become a reality.”<sup>71</sup>

Nevertheless, even if we discount the potential economic growth in these countries, it is hard to ignore their impact on the international intellectual property regime, especially when they team up to form a coalition. Such a coalition, which will be described as “the BRICS coalition” throughout this Article, will be similar to what Frederick Abbott has called the “Southern Quad”<sup>72</sup> or what Peter Drahos has termed the “Developing Country Quad.”<sup>73</sup> Just based on their total population, the size of their combined markets, and the aggregation of technical, legal, and managerial expertise within those countries, the BRICS coalition is likely to provide enough leverage to rival the European Communities or the United States.

If the coalition is well built and maintained, it can even become an effective counterweight to the trilateral cooperation among the European

<sup>67</sup> For a discussion of the different challenges confronting the BRICS countries, see Jack N. Behrman, *Peak and Pits with the BRICs: Accommodations with the West*, in *EMERGING ECONOMIES*, *supra* note 13, at 513.

<sup>68</sup> Wilson & Purushothaman, *supra* note 13, at 3.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> Wilson et al., *supra* note 16, at 3.

<sup>72</sup> Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 *J. INT’L ECON. L.* 77, 88 (2005). Notably, Professor Abbott did not include Russia in his discussion, because it was not a WTO member. *Id.*

<sup>73</sup> Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 *J. WORLD INTELL. PROP.* 765, 784 (2002) [hereinafter Drahos, *Developing Countries*]. Professor Drahos also excluded Russia. *Id.* Unlike Professor Abbott, however, Professor Drahos included Nigeria, instead of South Africa, in the mix. *Id.* Although South Africa is included in the BRICS acronym used throughout this Article, Nigeria remains of great importance within the African continent. As Chris Alden noted: “Like its South African counterpart, the Nigerian government harbours ambitions to take up the proposed African permanent seat on the UN Security Council . . .” CHRIS ALDEN, *CHINA IN AFRICA: PARTNER, COMPETITOR OR HEGEMON?* 69 (2007). Likewise, in a recent report on the BRIC economies, Jim O’Neill noted: “Nigeria is one country that deserves a special mention, and is certainly a country that has captured my attention. With a population close to three times that of South Africa, Nigeria’s ability to deliver on our dream could be vital for the whole African continent.” *BRICs AND BEYOND*, *supra* note 14, at 6.

Communities, Japan, and the United States, all of which were instrumental in pushing for the adoption of the TRIPs Agreement.<sup>74</sup> This group of countries also has been active in promoting the harmonization of the international patent system,<sup>75</sup> pushing most recently for the rather ill-advised proposal for the adoption of the Substantive Patent Law Treaty.<sup>76</sup> Even if the BRICS coalition is unable to resist the push by this trilateral combination, the countries can at least exploit strategically the growing rifts between and among the European Communities, the United States, and Japan,<sup>77</sup> thus enlarging the policy space of less developed countries. As John Odell noted, a sophisticated negotiation strategy includes not only tactics for building coalitions, but also tactics “for splitting rival coalitions . . . and for defending against efforts by outsiders to break one’s own.”<sup>78</sup>

In sum, it would not be far-fetched to advance the hypothesis that a coalition made up of the BRICS countries can provide an effective countervailing force against the continued push for stronger global intellectual property standards by the European Communities and the United States.<sup>79</sup> The resistance put up by this coalition may even result in a negotiation deadlock that resembles the historic stalemate between developed and less developed countries during the 1981 Diplomatic Conference in Nairobi.<sup>80</sup> For commentators who have called for a “moratorium” on the upward ratchet of global intellectual property standards, like Keith Maskus and Jerome Reichman,<sup>81</sup> a stalemate between developed and less developed countries may be somewhat desirable. At the very least, the stalemate will stop developed countries from pushing for higher intellectual property

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<sup>74</sup> See Yu, *Currents and Crosscurrents*, *supra* note 35, at 363.

<sup>75</sup> For information about trilateral cooperation between the European Patent Office, the Japanese Patent Office, and the U.S. Patent and Trademark Office, see Website of the Trilateral Co-operation, [www.trilateral.net](http://www.trilateral.net) (last visited Apr. 17, 2008).

<sup>76</sup> For a recent critique of the proposed Substantive Patent Law Treaty, see generally Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85 (2007).

<sup>77</sup> See AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT AND WTO 200 (2003) (noting that “[t]he Cairns Group utilized the rift within the US-EC with great skill”); Rolland, *supra* note 59, at 503 (noting the “strategic exploitation of rifts between the United States, the EU, and Japan”); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 406-08 (2006) (noting the need to “explore the tension between the European Communities and the United States”).

<sup>78</sup> John S. Odell, *Introduction to NEGOTIATING TRADE*, *supra* note 22, at 1, 13.

<sup>79</sup> Cf. Mark Kobayashi-Hillary, *Introduction to BUILDING A FUTURE WITH BRICS*, *supra* note 16, at 1, 3 (“If the BRICs were to join together and form a unique trading bloc of countries that are not even geographical neighbors, but complementary in other ways, then they could create a formidable rival to the present world-order and established power structures.”).

<sup>80</sup> See Yu, *Currents and Crosscurrents*, *supra* note 35, at 357.

<sup>81</sup> See Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3, 36-39 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (calling for a “moratorium on stronger international intellectual property standards”).

standards that have yet to be proven economically beneficial for the less developed world.<sup>82</sup>

## II. THE BRICS COALITION

While there is no doubt that the BRICS countries will be economically powerful in the future, the effectiveness of the BRICS coalition is not dependent on the future economic strength of its members or the validity of the economic projections made by the Goldman Sachs global economists or other analysts. To illustrate why the BRICS coalition would succeed at present in promoting greater access to essential medicines in the less developed world, consider Brazil's effective use of its threat to issue compulsory licenses of patented pharmaceuticals. Such a threat has enabled the country to reduce the price of HIV/AIDS antiretroviral drugs by up to 75 per cent per person.<sup>83</sup> Unlike the vague threats made by other less developed countries, which are usually just "rhetorical call[s] for distributive justice,"<sup>84</sup> Brazil's threats are fairly credible.

The credibility of Brazil's threats can be attributed to three preconditions that may be absent from other less developed countries. First, the country has an indigenous capacity to develop and manufacture pharmaceuticals, which in turn has created "a strong negotiating capacity for obtaining low prices from patent holders."<sup>85</sup> This manufacturing capacity is important, because a country cannot force pharmaceutical firms to import drugs against their wishes or to devote resources to develop treatments for neglected diseases that affect its population. Indeed, the introduction of the proposed article 31*bis* was a direct response to the ineffectiveness of the use of compulsory licenses to address public health crises in countries with insufficient or no manufacturing capacity.<sup>86</sup>

For these countries, the nationalization of foreign pharmaceutical firms seems to be the only option, assuming that foreign manufacturing facilities are already present in the country. That option, however, is highly undesirable. While such a move may provide short-term gains in the supply of pharmaceuticals, and perhaps even the transfer of drug-related technologies, the wildly unpopular use of national expropriation measures would result in long-term sacrifices, such as a loss of foreign direct investment, a tarnished international reputation, and potential trade sanctions and embargoes. In fact, these measures are so unpopular that rights holders and developed countries have described compulsory licensing as a

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<sup>82</sup> See Yu, *The International Enclosure Movement*, *supra* note 7, at 897-99 (discussing the need for undertaking empirical research to determine whether the additional intellectual property protection is needed in the first place).

<sup>83</sup> Pedro Roffe et al., *From Paris to Doha: The WTO Doha Declaration on the TRIPS Agreement and Public Health*, in *NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES* 9, 15 (Pedro Roffe et al. eds., 2006).

<sup>84</sup> NARLIKAR, *supra* note 77, at 57.

<sup>85</sup> Joan Rovira, *Creating and Promoting Domestic Drug Manufacturing Capacities: A Solution for Developing Countries*, in *NEGOTIATING HEALTH*, *supra* note 83, at 227, 236.

<sup>86</sup> See generally Yu, *The International Enclosure Movement*, *supra* note 7, at 872-86 (tracing the development of proposed article 31*bis* of the TRIPs Agreement).

form of “expropriation” of intellectual property rights to underscore their strong disapproval.<sup>87</sup>

Second, Brazil contains a lucrative middle class market that multinational pharmaceutical firms cannot afford to lose or alienate. Compared to other less developed countries, Brazil “is less dependent on the U.S. for ... a market for its own exported products.”<sup>88</sup> Indeed, studies have shown that the following conditions are crucial for countries to become internally competitive pharmaceutical manufacturers:

- gross domestic product (GDP) greater than about US\$100 billion;
- population greater than about 100 million;
- sufficient numbers of the population enrolled in secondary and tertiary education;
- competitiveness index (UNIDO) greater than about 0.15; and
- a net positive pharmaceutical balance of trade.<sup>89</sup>

Because the markets in less developed countries are usually very small, it may be virtually unprofitable to develop a local industry that is primarily restricted to the domestic market.<sup>90</sup> Even when the markets of several less developed countries are aggregated to provide economies of scale and scope, as permitted under the proposed article 31*bis*(3) of the TRIPs Agreement, there is no guarantee that the combined market would generate enough purchasing power to make the development of an indigenous pharmaceutical industry attractive.<sup>91</sup>

To make things worse for many less developed countries, the lack of economies of scale or scope has resulted in very high costs of drug development, which includes the costs of clinical studies that may be needed to prove the therapeutic effect of a drug. While large generic manufacturers are able to afford costly bioequivalence studies,<sup>92</sup> the costs of these studies can

<sup>87</sup> See Drahos, *Developing Countries*, *supra* note 73, at 769 (“For the United States, developing country proposals for exclusive compulsory licensing amounted to little more than expropriation of U.S. intellectual property rights.”).

<sup>88</sup> Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs*, 36 CASE W. RES. J. INT’L L. 21, 44 (2004).

<sup>89</sup> Rovira, *supra* note 85, at 234.

<sup>90</sup> See *id.* at 229 (noting that a limited market size “might make unprofitable a local industry restricted to the domestic market”).

<sup>91</sup> See Keith E. Maskus, *Ensuring Access to Essential Medicines: Some Economic Considerations*, 20 WIS. INT’L L.J. 563, 568 (2002) (“[P]urchasing power, even if aggregated across a number of markets, may not be enough to make drug development attractive.”).

<sup>92</sup> As the Federal Food, Drug, and Cosmetic Act stated:

A drug shall be considered to be bioequivalent to a listed drug if—

- (i) the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the listed drug when administered at the same molar dose of the therapeutic ingredient under similar experimental conditions in either a single dose or multiple doses; or
- (ii) the extent of absorption of the drug does not show a significant difference from the extent of absorption of the listed drug when administered at the same molar dose of the therapeutic ingredient under similar experimental conditions



be prohibitively high for small and mid-sized firms. “A study in Colombia [for example] estimated that the requirement of bioequivalence studies for anti-hypertensive and anti-inflammatory drugs would increase the price of domestically manufactured products by a percentage of between 46 and 61 per cent.”<sup>93</sup> A recent study presented at a World Bank forum also noted a lack of evidence to suggest that domestic production will necessarily reduce price and improve the quality of and access to medicines.<sup>94</sup>

Finally, Brazil, or at least the part of the country where drugs are to be manufactured, is not as vulnerable to development-related problems as many other less developed countries. Although the quality of its manufacturing practices is not as high as that of, say, India, Brazil possesses conditions that are conducive to good manufacturing practices, including the “availability of special technologies, reliable supplies of high-quality raw materials, dependable provision of top-quality water, electricity, gas and other utilities ... [and] sufficient human resources, such as experts in pharmaceutical development, quality assurance and regulatory processes.”<sup>95</sup> Regulatory processes are particularly important, because they can affect whether the available drugs are safe and can perform their intended functions. In many less developed countries, insufficient regulatory capacity has resulted in a high percentage of drugs failing quality control tests as well as the wide availability of counterfeit drugs.<sup>96</sup> While drugs may be more accessible and sold at a much lower price, people continue to suffer, innocent lives are lost, the country’s labor and economic outputs remain low, and, the worst of all, healthy people become needlessly sick and therefore have their lives threatened.

Although the above discussion focuses mainly on Brazil, the same arguments can be extended to other BRICS countries, each of which has raw materials, technical capacity, manufacturing conditions, and a sufficiently

in either a single dose or multiple doses and the difference from the listed drug in the rate of absorption of the drug is intentional, is reflected in its proposed labeling, is not essential to the attainment of effective body drug concentrations on chronic use, and is considered medically insignificant for the drug.

21 U.S.C. § 355(j)(8)(B) (2004).

<sup>93</sup> Rovira, *supra* note 85, at 234.

<sup>94</sup> *Id.* (citing W.A. KAPLAN & R. LAING, LOCAL PRODUCTION OF PHARMACEUTICALS: INDUSTRIAL POLICY AND ACCESS TO MEDICINES: AN OVERVIEW OF KEY CONCEPTS, ISSUES AND OPPORTUNITIES FOR FUTURE RESEARCH (World Bank, HNP Discussion Papers, 2005), [siteresources.worldbank.org/HEALTHNUTRITIONANDPOPULATION/Resources/281627-1095698140167/KaplanLocalProductionFinal.pdf](http://siteresources.worldbank.org/HEALTHNUTRITIONANDPOPULATION/Resources/281627-1095698140167/KaplanLocalProductionFinal.pdf)).

<sup>95</sup> Rovira, *supra* note 85, at 233 (quoting World Health Organization, *Manufacture of Antiretrovirals in Developing Countries and Challenges for the Future*, at 1, EB114/15 (Apr. 29, 2004), available at [www.who.int/gb/ebwha/pdf\\_files/EB114/B114\\_15-en.pdf](http://www.who.int/gb/ebwha/pdf_files/EB114/B114_15-en.pdf)).

<sup>96</sup> See GIAN LUCA BURCI & CLAUDE-HENRI VIGNES, WORLD HEALTH ORGANIZATION 188 (2004) (“[E]ven if drugs are available, weak drug regulation may mean that they are substandard or counterfeit.”); MUSUNGU ET AL., *supra* note 9, at 28 (“Many developing countries ... lack the facilities and expertise needed to review the safety, efficacy and quality of drugs destined for their national markets, and remain dependent on foreign authorities to set the necessary standards and do the necessary testing.”); Nitya Nanda & Ritu Lodha, *Making Essential Medicines Affordable to the Poor*, 20 WIS. INT’L L.J. 581, 586 (2002) (“Surveys from a number of developing countries show that between 10 and 20 percent of sampled drugs fail quality control tests.”).

large market. Thus, if the threats made by these countries are combined, the threat will become even more credible. Even if the conditions in some of the BRICS countries are inadequate, the others may possess complementary conditions that help alleviate the shortcomings of the affected countries.<sup>97</sup> In short, the implications for these threats on the international intellectual property regime will be very significant.

In addition, these countries will have the capacity to provide generic versions of many of the drugs needed by both the BRICS countries and other less developed countries. They also will be able to supply active pharmaceutical ingredients that are necessary for the production of generic and on-patent drugs in the less developed world.<sup>98</sup> As Joan Rovira observed, the production of these ingredients "is concentrated in the industrialized world and in a few emerging countries."<sup>99</sup> Indeed, China is currently the leading producer of these ingredients. Other less developed countries that have the capacity to do so "include India, . . . Thailand, Egypt, Brazil, Mexico, Argentina and, to some extent, Yugoslavia and Turkey."<sup>100</sup> The rest of the less developed world either consists of formulators or have insufficient or no manufacturing capacity.

Thus, in a face-off between developed countries and the BRICS coalition, or between developed and less developed countries, the impact of the BRICS coalition on the access-to-medicines debate is likely to be considerable. To be certain, the patent-based pharmaceutical manufacturers could still focus on the developed country markets, which is very substantial and will remain protected by strong intellectual property laws. However, the lack of protection in the less developed world and the possibility for generic drugs to enter and then take over some developed country markets are likely to render this strategy highly ineffective. Moreover, if one believes the pharmaceutical industry's claim that the foreign market is of paramount importance to the industry,<sup>101</sup> a united front set up by the BRICS countries and other less developed markets may be able to threaten the survival of major

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<sup>97</sup> See Dimitry Ponomarev, *Dreaming with BRICs*, in BUILDING A FUTURE WITH BRICS, *supra* note 16, at 87, 89 (noting that the four BRIC countries "perfectly complement each other").

<sup>98</sup> See Karin Timmermans, *Ensuring Access to Medicines in 2005 and Beyond*, in NEGOTIATING HEALTH, *supra* note 83, at 41, 42 (noting that "Indian companies are major suppliers of generic medicines and of the active pharmaceutical ingredients (APIs) necessary for their production to other developing and developed countries").

<sup>99</sup> Rovira, *supra* note 85, at 231.

<sup>100</sup> *Id.*

<sup>101</sup> See Gerald J. Mossinghoff, *Research-Based Pharmaceutical Companies: The Need for Improved Patent Protection Worldwide*, 2 J.L. & TECH. 307, 307 (1987) ("Whether [the commitment of America's research-based pharmaceutical companies] can continue depends greatly upon the extent to which foreign governments allow innovators to be rewarded for their inventiveness, monetary investment, and intellectual labor."); Judy Slinn, *Research and Development in the UK Pharmaceutical Industry from the Nineteenth Century to the 1960s*, in DRUGS AND NARCOTICS IN HISTORY 168, 168 (Roy Porter & Mikul Teich eds., 1995) (noting that "new drugs must be sold worldwide, since no company can fully exploit a patented product, recouping its research and development costs solely in its own home market, even in the two largest national markets, the USA and Japan"), *quoted in* GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A 20TH CENTURY HISTORY 108 (2003).

pharmaceutical manufacturers in the developed world to the point that it would require them to alter their domestic and international lobbying strategies.

### III. PARTIAL BRICS ALLIANCES

Although the BRICS coalition will provide the needed resistance to the growing protection of pharmaceutical products, the maintenance of such a coalition over a sustained period of time proves to be a major challenge. As noted above, each of the BRICS countries is currently confronted with many internal problems—or, as one corporate advisor puts it, many “bricks” within the BRICS.<sup>102</sup> In addition, the levels of protection vary according to the relevant economic and technological sectors. The stakeholders in the intellectual property system in these countries are also quite different.

Even more problematic, these countries, due to their vast sizes and complexities, have experienced very uneven economic development. As two World Bank researchers recently observed in the cases of China and India:

Concerns are being expressed about the distributional impacts of the growth processes in both countries. The domestic debate about growth-promoting reforms has become increasingly contentious. It is widely felt that the gains from growth have been spread too unevenly, with some segments of the populations left behind in relative and even absolute terms. Yes, the Giants are awakening from their economic slumber, but they still are only partially awake in that segments of their societies remain (relatively and absolutely) dormant.<sup>103</sup>

In the case of China, there remain widespread disparities at both the regional and sectoral levels, and these disparities have made it virtually impossible for China to adopt a nationwide intellectual property policy that would work well for the country's different parts.<sup>104</sup> With respect to India, Kamal Nath, India's minister of commerce and industry, has made a similar observation: “[T]here are many Indias, and some of them are changing faster than others, depending on the capacities of individual segments of society to absorb and utilize change.”<sup>105</sup> Likewise, Amartya Sen noted, “The frustrating thing about India is that whatever you can rightly say about India, the

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<sup>102</sup> Mark Kobayashi-Hillary, *Conclusion*, in *BUILDING A FUTURE WITH BRICS*, *supra* note 16, at 185, 186.

<sup>103</sup> Shubham Chaudhuri & Martin Ravallion, *Partially Awakened Giants: Uneven Growth in China and India*, in *DANCING WITH GIANTS: CHINA, INDIA, AND THE GLOBAL ECONOMY* 175, 175–76 (L. Alan Winters & Shahid Yusuf eds., 2007) [hereinafter *DANCING WITH GIANTS*].

<sup>104</sup> See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* 173, 198–209 (Daniel J. Gervais ed., 2007); see also Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, in *INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH* 295, 322–23 (Carsten Fink & Keith E. Maskus eds., 2005) (noting the “large regional differences in the shares of R&D performed by various organizations” in China).

<sup>105</sup> NATH, *supra* note 44, at 151.

opposite is also true.<sup>106</sup> Indeed, Brazil, Russia, and South Africa are not that much different from China and India, because they also experience wide disparities in wealth, resources, economic development, socio-economic barriers, and research-and-development capabilities.

Within the pharmaceutical sector, manufacturers within each BRICS country may have very different interests and goals. For example, as Brook Baker pointed out in his comments on this article at the Symposium, while India is the world's leading generic producer and is eager to export its pharmaceuticals, Brazil has a relatively large internal market and has occasionally supplied HIV/AIDS antiretrovirals to other less developed countries.<sup>107</sup> Although China has yet to be as aggressive as India in exporting drugs or as successful as Brazil in promoting public health within the country, it already is the world's largest producer of active pharmaceutical ingredients and is likely to be a very important player in the generic market. As a result, the intellectual property position taken by each BRICS country will vary according to the benefits accrued to its pharmaceutical sectors.

When intellectual property issues are linked to trade, new issues may also arise.<sup>108</sup> As these new issues are being incorporated into the larger policy debate, the dynamics of the debate are likely to be very different. For example, the new issues may enlarge the existing regional or sectoral disparities within the country. The arrival of new players and issues also precipitate new disputes among the stakeholders while aggravating preexisting ones that have already been brewing before new issues are being incorporated into the debate.

Eventually, the widely divergent interests within each BRICS country and the different priorities the country places on these interests will make it very difficult for the BRICS countries to build a successful coalition. As Professor Cho noted, shortly after the proven success of the G-20 during the Cancún Ministerial:

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<sup>106</sup> ROBYN MEREDITH, *THE ELEPHANT AND THE DRAGON: THE RISE OF INDIA AND CHINA AND WHAT IT MEANS FOR ALL OF US* 126 (2007).

<sup>107</sup> Thanks to Brook Baker for providing detailed and informative comments on the development of the pharmaceutical sectors in the BRICS countries.

<sup>108</sup> See Yu, *International Enclosure, the Regime Complex*, *supra* note 50, at 16-17.

One could not confidently predict that [the collective stance taken by the G-20] will remain as solid in the future as it was in Cancún. Interests of [these countries] are not homogenous. For instance, while India still wants to protect domestic agricultural industries, Brazil, a member of the Cairns Group consisting of agricultural product exporters, wants to further liberalize trade in this area. Moreover, we witnessed other groups of developing countries, such as the G-33, which advocated the inclusion of strategic products and a special safeguard mechanism in the agriculture negotiation; the coalition of the African Union, the African, Caribbean, and Pacific countries, and the LDCs . . . which collectively want the preservation of current preferential treatment in addition to G-33 demands.<sup>109</sup>

Professor Cho's skepticism was well supported by the history of less developed countries, which hitherto have only limited success in using coalition-building efforts to increase their bargaining leverage. As Professor Abbott reminded us:

Over the past 50 years, there have been a number of efforts to achieve solidarity or common positions among developing countries in international forums. At the broad multilateral level there was (and are) the Group of 77, and the movement for a New International Economic Order. At the regional level, the Andean Pact in the early 1970s developed a rather sophisticated common plan to address technology and IP issues (ie Decisions 84 and 85). Yet these efforts were largely unsuccessful in shifting the balance of negotiating leverage away from developed countries. In fact, developing country common efforts to reform the Paris Convention in the late 1970s and early 1980s are routinely cited as the triggering event for movement of intellectual property negotiations to the GATT.<sup>110</sup>

Their lack of success was perhaps caused by the fact that these coalitions were usually too ambitious; they were set up to include a broad mandate, diverse membership, complex issues, and incompatible interests. As Amrita Narlikar has shown, issue-based coalitions work best for small and very specialized economies with common profiles and interests, but not as well for

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<sup>109</sup> Cho, *supra* note 52, at 236 (footnotes omitted). Similarly, Sonia Rolland observed the different positions on agriculture taken by Brazil and India:

Brazil had a liberal approach to further its export interest, whereas India maintained conservative positions with respect to liberalization of the agriculture sector and had a protectionist stance. Brazil's shift toward a more aggressive stance on agriculture corresponded to its liberalization of the agricultural sector and the increased pressure by domestic investors on the government on this issue both in negotiating rounds and in dispute settlement (particularly in disputes with Europe and the United States).

Rolland, *supra* note 59, at 495.

<sup>110</sup> Frederick Abbott, *The Future of IPRs in the Multilateral Trading System, in TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY* 36, 42 (Christophe Bellmann et al. eds., 2003) [hereinafter Abbott, *Future of IPRs*].

larger, more diverse, and often internally-conflicting economies, like those of the BRICS countries.<sup>111</sup> Such coalitions also do not work well for a large bloc of less developed countries that have various strengths, sizes, and interests and that are only linked together in an ad hoc fashion.<sup>112</sup>

The lack of success by less developed countries to build or maintain coalitions can be further attributed to their “high[] dependen[ce] on the developed countries as the source of capital, whether it is provided through the IMF or World Bank, or through investment bankers and securities exchanges.”<sup>113</sup> Such independence was further aggravated by the lack of stability in the economies of less developed countries—for example, in India during the TRIPs negotiations<sup>114</sup> and in South America during the negotiation of the draft International Code of Conduct on the Transfer of Technology.<sup>115</sup>

In light of the lack of likelihood of success in building a sustained coalition among the BRICS countries, this Part proposes a more realistic option: the creation of alliances between some of the BRICS countries<sup>116</sup> and, more importantly, between less developed countries and one or more of the BRICS countries. These alliances will be described throughout the Article as “partial BRICS alliances.” Although most of the arguments concerning partial BRICS alliances are valid for either type of alliance, this Article focuses mainly on the latter, because those alliances are more important to promoting access to essential medicines in countries with insufficient or no manufacturing capacity.

While each partial alliance does not provide the same bargaining leverage as the BRICS coalition, it still possesses a number of attractive features. By teaming up other less developed countries with one or more of the BRICS countries, the group will have leverage that does not exist for each less developed country alone. The costs of maintaining a partial alliance is also significantly lower than what would be required to maintain a complete coalition. Moreover, like the BRICS coalition, partial BRICS alliances can be used strategically to help less developed countries develop their own voice. If multiple partial alliances are set up, these alliances, partial as they are, may result in the creation of a web of alliances that has immense synergistic potential.

Indeed, the rationales behind the effectiveness of these partial alliances are quite similar to those behind the effectiveness of the BRICS coalition. Each of the BRICS countries will have the raw materials and technical capacity needed to develop and manufacture many on-patent or generic pharmaceuticals demanded by other less developed countries. They also

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<sup>111</sup> See NARLIKAR, *supra* note 77, at 176.

<sup>112</sup> See Rolland, *supra* note 59, at 510 (noting that “groups of members sharing common profiles and common interests . . . are better candidates for institutional and legal support than ad hoc issue-based coalitions”).

<sup>113</sup> Abbott, *Future of IPRs*, *supra* note 110, at 42.

<sup>114</sup> See NATH, *supra* note 44, at 49–61 (discussing the economic problems and reforms in India in the early 1990s).

<sup>115</sup> See Peter K. Yu, *A Tale of Two Development Agendas*, 34 OHIO N.U. L. REV. (forthcoming 2008).

<sup>116</sup> For a discussion of collaborative initiatives between the BRIC countries, see Behrman, *supra* note 67, at 528–31.

possess the market conditions for the development of a regional, pro-development, or pro-poor pharmaceutical industry. Unlike the major pharmaceutical manufacturers in the developed world, manufacturers in the BRICS countries, like Ranbaxy or Dr. Reddy's Laboratories in India or Zhejiang Huahai Pharmaceutical in China, are less likely to be bound by a business model that focuses on the development of a blockbuster drug.<sup>117</sup> As a result, pharmaceutical manufacturers in the BRICS countries may be able to devote more energy to the development of drugs for neglected diseases.<sup>118</sup> These companies may also be more eager to develop traditional medicines or drugs that are compatible with the use of such alternative medicines.<sup>119</sup> Thus, by linking the BRICS countries with other less developed countries that have insufficient or no manufacturing capacity, the partial alliances will make the indigenous development of pharmaceuticals feasible and financially attractive. They will enable a more efficient and effective supply of the needed medicines.

If regional alliances are set up—such as through regional economic integration; the institution of regional organizations, mutual recognition systems, or procurement systems; the facilitation of regional cooperation in research and development; or the creation of regional competition enforcement mechanisms—there may be even more benefits.<sup>120</sup> As Sisule Musungu and others have noted in a South Centre study:

From an economic and public health standpoint, a regional approach can provide incentives for establishing or developing regional pharmaceutical production and help expand research capabilities. In addition, higher effective demand for the same medicines due to climatic conditions and other geographical reasons, as well as cultural aspects, will result in lower consumer drug prices due to increased economies of scale in procurement and distribution. Other important benefits include: the costs associated with adapting medicines to the region may be offset/lowered due to increased economies of scale; stronger local technological capacities/domestic innovation resulting from the pooling of adequate resources including financing, and human capital and physical capital will be stimulated. Finally, a regional approach can also help to improve cross-border disease control.<sup>121</sup>

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<sup>117</sup> See Yu, *The International Enclosure Movement*, *supra* note 7, at 842–43.

<sup>118</sup> For a discussion of neglected diseases, see sources cited *id.* at 841–43.

<sup>119</sup> See *id.* at 900 (noting the importance of exploring alternative proposals that “can be compatible with existing treatments in less developed countries, such as the use of traditional medicine”); Obijiofor Aginam, *From the Core to the Peripheries: Multilateral Governance of Malaria in a Multi-Cultural World*, 3 CHI. J. INT’L L. 87, 93 (2002) (“Ethnomedical knowledge of plants by indigenous people across societies and cultures has ‘long served as [a] crucial source[] of medicines either directly as [a source of] therapeutic agents, as [a] starting point[] for the elaboration of more complex semi-synthetic compounds or as synthetic compounds.”); Nanda & Lodha, *supra* note 96, at 586 (“In developing countries, up to 80 percent of the population relies on traditional medicine to meet its health-care needs. Such medicine is not only affordable, but it is also widely available and trusted.”).

<sup>120</sup> For a comprehensive discussion of these regional initiatives, see MUSUNGU ET AL., *supra* note 9.

<sup>121</sup> *Id.* at 35–36.

In addition, as Robert Bird and Dan Cahoy pointed out recently, the creation of alliances among less developed countries will help many less developed countries combat the external pressure each country will face on a one-on-one basis from the European Communities, the United States, or other powerful trading partners. As Professors Bird and Cahoy noted:

Through the use of a collective action mechanism, it may be possible for a country with a certain level of immunity to share the protection with one or several countries more susceptible to FDI economic retribution. The use of coordinated behavior may bring about a more equitable result, so long as one is aware of the legal limits of such mechanisms and the antcoordination strategies that may be employed by opponents of the system.<sup>122</sup>

In another article, they also acknowledged that the BRIC countries will have a good opportunity to become significant players if waivers based on the proposed article 31*bis* become more widely applied.<sup>123</sup>

Moreover, many BRICS countries—notably Brazil and India, and gradually China—have been active participants of the WTO dispute settlement process.<sup>124</sup> As of January 1, 2008, Brazil has served as a complainant in twenty-three disputes (including one on patent rights in inventions made with U.S. federal assistance).<sup>125</sup> It was also a respondent in fourteen disputes (including one on the local working requirement in the Brazilian patent system).<sup>126</sup> Likewise, India has served as a complainant in seventeen disputes and as a respondent in nineteen disputes (including two disputes on the mailbox system).<sup>127</sup> Within a short span of less than six years, China has already served as a complainant in two disputes and as a respondent in eight disputes (including the most recent one over intellectual property enforcement).<sup>128</sup> By virtue of their repeated participation in the WTO dispute settlement process, Brazil, India, and China will have considerable knowledge and expertise that can be shared with other less developed countries. By making strategic use of such knowledge and expertise, countries within the coalition or partial alliances can better defend their laws and practices before a WTO dispute settlement panel, explore the

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<sup>122</sup> Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 317 (2008) [hereinafter Bird & Cahoy, *The Impact of Compulsory Licensing*].

<sup>123</sup> See Bird & Cahoy, *The Emerging BRIC Economies*, *supra* note 20, at 421 (footnote omitted).

<sup>124</sup> For a detailed assessment of the participation of Brazil and India in the WTO dispute settlement process, see William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 40-45 (2005) [hereinafter Davey, *WTO Dispute Settlement System*].

<sup>125</sup> See Request for Consultations by Brazil, *United States—US Patents Code*, WT/DS224/1 (Feb. 7, 2001).

<sup>126</sup> See Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000).

<sup>127</sup> See Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (1998).

<sup>128</sup> See Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).



flexibilities provided by the TRIPs Agreement, or even challenge non-compliant laws in developed countries.

Finally, if these partial BRICS alliances are supported by framework agreements that include detailed and concrete technology transfer provisions, those alliances may satisfy the needs of many less developed countries. Since their emergence as independent countries after the Second World War, less developed countries have made repeated calls for the transfer of technology from their developed trading partners. These calls, unfortunately, have been met with limited success and usually result in the creation of vague, hortatory, and often preambular language in international intellectual property, trade, and investment agreements.

Article 66 of the TRIPs Agreement, for example, requires developed countries to provide incentives for their businesses and institutions to help create “a sound and viable technological base” in least developed countries by promoting and encouraging transfer of technology.<sup>129</sup> However, it is unclear how least developed countries can enforce article 66, even with the assistance of the mandatory WTO dispute settlement process. Likewise, “[a]lthough the Doha Declaration is full of verbal commitments and plans for capacity building, it is silent about how to fund the ambitious technical assistance programs. Furthermore, its legal nature as a ‘work program’ is vague.”<sup>130</sup>

During the discussion of solutions to implementing paragraph 6 of the Doha Declaration, some less developed countries underscored the importance of building local manufacturing capacity.<sup>131</sup> Their demands eventually created tension within the less developed world. While the African Group “believe[d] that the ultimate solution to the paragraph 6 problem [wa]s to build domestic manufacturing capacity and that this should be explicitly agreed and mentioned in the solution,”<sup>132</sup> other less developed countries, like Brazil and India, already had manufacturing capacity and therefore believed otherwise. Fortunately for the less developed world, the two groups of countries were able to set aside their differences and join together to battle the developed world. Their cooperation made great pragmatic sense: countries lacking in manufacturing capacity are likely to continue to import new drugs from countries like Brazil, India, and China for a number of years before they develop their own production capacity.<sup>133</sup>

Compared to the TRIPs Agreement or other existing arrangement in the international trading system, partial BRICS alliances are likely to result in the transfer of *more* technology from the BRICS countries to other less developed countries. Because of the lower overall economic disparity between the BRICS countries and other less developed countries and the strong likelihood that a large segment of population in the BRICS countries live in similar

<sup>129</sup> TRIPs Agreement, *supra* note 2, art. 66(2).

<sup>130</sup> Cho, *supra* note 52, at 226 (emphasis omitted).

<sup>131</sup> See Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 334 (2005) [hereinafter Abbott, *WTO Medicines Decision*].

<sup>132</sup> Council for Trade-Related Aspects of Intellectual Prop. Rights, *Communication from Kenya, the Coordinator of the African Group, Elements of a Paragraph 6 Solution*, IP/C/W/389, ¶ 15(a) (Nov. 14, 2002).

<sup>133</sup> Cf. Abbott, *WTO Medicines Decision*, *supra* note 131, at 334.

conditions as the conditions of those living in other less developed countries, BRICS countries will more readily provide assistance to other less developed countries—either because they understand better the plight of their less developed partners or because the BRICS government leaders have to respond to political constituencies that are sympathetic to the plight of other less developed countries.<sup>134</sup>

So far, there have been only “a few reported initiatives on South-South technology transfer.”<sup>135</sup> While Thailand offered to help Ghana and Zimbabwe to set up factories to produce HIV/AIDS antiretrovirals,<sup>136</sup> “Brazil ... offered a cooperation agreement, including technology transfer, to developing countries for the production of generic ARV drugs.”<sup>137</sup>

In recent years, China has also been very active in initiating trade agreements with members of the ASEAN (Association of Southeast Asian Nations), with the goal of creating the China-ASEAN Free Trade Area.<sup>138</sup> China is also exploring greater economic cooperation with India, with the hope of eventually developing a regional trade agreement.<sup>139</sup> In addition, it has a growing presence in Africa. As Chris Alden noted:

Two-way trade, which stood at less than US\$10 billion in 2000, had surged to over US\$50 billion by the end of 2006, making China the continent’s third-largest trading partner after the United States and France. In the same period China’s share of Africa’s exports jumped from 2.6 to over 9.3 per cent and it has become the leading trading partner for several of the continent’s commodity-based economies.<sup>140</sup>

These efforts have earned China considerable goodwill and soft power in Africa.<sup>141</sup> Some commentators, nevertheless, have questioned the underlying intentions of these efforts,<sup>142</sup> especially with respect to “resource acquisition and commercial opportunism.”<sup>143</sup> Others have also pointed out that many China-initiated agreements did not seek to increase the collective bargaining

<sup>134</sup> As discussed below, nongovernmental organizations in developed countries may serve similar functions. However, from the standpoint of domestic policymaking, a push by domestic constituencies is usually more persuasive than a push by nongovernmental organizations headquartered outside the country.

<sup>135</sup> Rovira, *supra* note 85, at 235.

<sup>136</sup> *See id.*

<sup>137</sup> ‘t Hoen, *supra* note 22, at 32.

<sup>138</sup> *See C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER* 114 (2006).

<sup>139</sup> *See Jim Yardley, Indian Leader in China Urges Closer Ties*, N.Y. TIMES, Jan. 16, 2008, at A8. For interesting discussions of Indo-China relations, see JAIRAM RAMESH, MAKING SENSE OF CHINDIA: REFLECTIONS ON CHINA AND INDIA (2006); WAHEGURU PAL SINGH SIDHU & JING DONG YUAN, CHINA AND INDIA: COOPERATION OR CONFLICT? (2003).

<sup>140</sup> ALDEN, *supra* note 73, at 8.

<sup>141</sup> *See JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD* (2007).

<sup>142</sup> For a discussion of China’s activities in Africa, see CHRIS ALDEN, CHINA IN AFRICA (2007); HARRY G. BROADMAN, AFRICA’S SILK ROAD: CHINA AND INDIA’S NEW ECONOMIC FRONTIER (2007).

<sup>143</sup> ALDEN, *supra* note 73, at 8.

position in the less developed world, but rather sought to respond to China's WTO accession agreements.<sup>144</sup>

In sum, partial BRICS alliances, if structured properly, will possess many attractive features. They not only will provide less developed countries with the additional support against developed countries, but they will also help ensure greater access to essential medicines in these countries. By helping less developed countries build their capacity through technology transfer and technical assistance, these partial alliances may also provide a long-term solution to the access-to-medicines problem—a solution that has been craved by the African Group from the beginning of the Doha Development Round of Trade Negotiations (“Doha Round”).

#### IV. COORDINATION STRATEGIES

To highlight the role that the BRICS coalition or partial BRICS alliances can play in the international intellectual property debate, this Part discusses four coordination strategies through which less developed countries can work together to strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decisionmaking in the international intellectual property regime. These strategies include (1) the initiation of South-South alliances; (2) the facilitation of North-South cooperation; (3) joint participation in the WTO dispute settlement process; and (4) the development of regional or pro-development fora. These strategies will allow less developed countries to shape a pro-development agenda, articulate more coherent positions, or even enable these countries to establish a united negotiating front. The coalition-building strategies will also help these countries establish a powerful voice in the international debates on public health, intellectual property, and international trade. In doing so, less developed countries will be able to develop treaties and policies that promote access to essential medicines in the less developed world. Because these four strategies are not intended to be mutually exclusive, countries seeking to strengthen their bargaining position are encouraged to maximize the impact by combining these strategies together.

Collective bargaining is particularly important for four reasons. First, the WTO has dominated current international intellectual property discussions, and group representation of less developed countries is particularly deficient in this international trading body. As Sonia Rolland recently noted:

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<sup>144</sup> As one commentator noted: “China . . . appears to be developing an interesting strategy consisting of pressing for regional free trade agreements, not so much as a way to improve its bargaining capacity, but rather to foster its case for market economy status, a crucial element in anti-dumping actions.” Rolland, *supra* note 59, at 498.

Although the organization operates on a one-country-one-vote basis and on a consensus mechanism (which formally also considers members on an equal basis), the reality of negotiations and of the decision-making process is much more complex and susceptible to the arbitrage of economic power. . . . Despite their increased number and activity in the WTO, developing countries still find themselves in a relatively marginalized position and experience difficulties in linking their development agenda to multilateral trade negotiations.<sup>145</sup>

Second, there is a rare, unprecedented opportunity for less developed countries to reshape the intellectual property debate. At the recent WTO Ministerial Conferences in Doha, Cancún, and Hong Kong, these countries have built a considerable momentum in pushing for reforms that would recalibrate the balance of the international trading system. During the Cancún Ministerial, for example, the African Group and least developed countries together “accounted for two-thirds of the proposals synthesized in the Chairman’s document.”<sup>146</sup> Greater collaboration, therefore, would help less developed countries take advantage of the ongoing momentum while protecting the gains they already obtained in recent negotiations.

Third, which is related to the second, greater collaboration among less developed countries is needed in light of the impending closure of the Doha Round. Without the urgency brought about by September 11 and the anthrax attacks and the United States’ general interest in having greater cooperation with the less developed world, one has to wonder whether the Doha Round could be negotiated as far as it got.<sup>147</sup> If less developed countries need to protect the gains they made in the Doha Round, they need to increase their collective bargaining leverage.

Finally, the international intellectual property regime has become increasingly complex, creating what I have termed the “international intellectual property regime complex.”<sup>148</sup> Because of its complexity, this conglomerate regime is likely to harm less developed countries more than they harm developed countries. As Eyal Benvenisti and George Downs described, the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries has helped powerful states to preserve their dominance in the international arena.<sup>149</sup> The growing complexities have also upset the existing coalition dynamics between actors and institutions within the international trading system, thus threatening to

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<sup>145</sup> Rolland, *supra* note 59, at 483; accord NARLIKAR, *supra* note 77, at 2 (noting that “GATT officials reiterated the operation of ‘consensus’-based decision-making procedures, and refused to acknowledge the existence of some well-entrenched coalitions”).

<sup>146</sup> Rolland, *supra* note 59, at 503.

<sup>147</sup> See, e.g., Louise Amoore et al., *Series Preface* to NARLIKAR, *supra* note 77, at xiii (noting that the launch of the Doha Round was “assisted to a large degree by the conciliatory international political climate that followed the September 2001 terrorist attacks in New York and Washington”).

<sup>148</sup> Symposium, *The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1.

<sup>149</sup> See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

reduce the bargaining power and influence the less developed world has obtained through past coalition-building initiatives.<sup>150</sup>

#### A. SOUTH-SOUTH ALLIANCES

Since the failure of the Cancún Ministerial, the United States has initiated a divide-and-conquer strategy that seeks to reward countries that are willing to work with the United States while undermining efforts by Brazil, India, and other G-20 members to establish a united negotiating front for less developed countries.<sup>151</sup> Although the United States has begun negotiating new bilateral and regional trade agreements before the failed ministerial conference, these agreements have been increasingly used as a means to isolate uncooperative less developed countries. As Robert Zoellick, the former United States Trade Representative, wrote in the *Financial Times* shortly after the conference, the United States will separate the can-do countries from the won't-do countries and "will move towards free trade with [only] can-do countries."<sup>152</sup>

This isolation strategy was not new; it was used by the United States to increase its bargaining leverage during the TRIPs negotiations. When the TRIPs Agreement was being negotiated, the United States used section 301 sanctions to isolate major opposition countries, like Argentina, Brazil, India, Japan, Mexico, South Korea, and Thailand.<sup>153</sup> South Korea, for example, was threatened with sanctions for inadequate protection for computer programs, chemicals, and pharmaceuticals and in the copyright, patent, and trademark areas. As Jayashree Watal recounted:

An important subsidiary objective . . . was to separate Korea from joining developing country opposition to the GATT initiative on IPRs. Korea was a soft target not only because of its dependence on exports and more particularly on the US, but because it had already reached a certain level of development and could make the transition to strengthened IPR protection more easily.<sup>154</sup>

Watal's observation concurred with that of Clayton Yeutter, the former United States Trade Representative, who "stated publicly that the Section 301 investigation of South Korea in 1985 was intended to send a message to GATT Members."<sup>155</sup> Indeed, five of the ten hardliner countries that refused to expand the GATT mandate to cover substantive intellectual property issues—Argentina, Brazil, Egypt, India, and Yugoslavia—found their name on the United States Trade Representative's Section 301 Priority Watch List or Watch List.<sup>156</sup>

If less developed countries are to counterbalance the United States' divide-and-conquer strategy, lest more TRIPs-plus standards be developed at

<sup>150</sup> See Yu, *International Enclosure, the Regime Complex*, *supra* note 50, at 17-18.

<sup>151</sup> See Yu, *TRIPs and its Discontents*, *supra* note 77, at 403.

<sup>152</sup> Robert B. Zoellick, *America Will Not Wait for the Won't-Do Countries*, *FIN. TIMES* (London), Sept. 22, 2003, at 23.

<sup>153</sup> See Yu, *Currents and Crosscurrents*, *supra* note 35, at 413.

<sup>154</sup> WATAL, *supra* note 23, at 18 (footnote omitted).

<sup>155</sup> Drahos, *Developing Countries*, *supra* note 73, at 774.

<sup>156</sup> *Id.*

both the multilateral and regional levels, they need to initiate a combine-and-conquer strategy. Simply put, they need to build more coalitions within the less developed world—such as the BRICS coalition, partial BRICS alliances, or various forms of South-South alliances. A recent successful example was the development of the G-20 during the Cancún Ministerial. Although its success was short-lived, the Group was instrumental in preventing the WTO member states from reaching agreement on such issues as investment, competition policy, government procurement, and trade facilitation.<sup>157</sup> Its success eventually led to the premature ending of the ministerial conference and the Bush administration's change of focus from multilateral negotiations to bilateral or regional agreements.

Today, there is a tendency to view bilateral or regional agreements with skepticism, partly as a result of their wide and controversial uses by the European Communities and the United States to ratchet up global intellectual property standards.<sup>158</sup> However, these agreements are not always destructive to the international intellectual property regime, and they remain an effective way to build coalitions within the less developed world. At times, they may even help promote multilateralism by fostering common positions among participating countries.

As Professor Cho pointed out, “regionalism may contribute to multilateralism under certain circumstances through a ‘laboratory effect’.” After experiencing trial and error as well as learning-by-doing in the regional level, countries may feel confident in ratcheting these regional initiatives up to the multilateral forum.<sup>159</sup> Likewise, during the heated debate on the U.S.-Japan trade policy in the 1980s, Senator Max Baucus highlighted the many benefits of bilateral agreements, which he claimed might “provide at least a partial model for a future multilateral agreement.”<sup>160</sup> As he explained:

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<sup>157</sup> See Becker, *supra* note 25; *The Cancun Failure*, *supra* note 25.

<sup>158</sup> See Yu, *Currents and Crosscurrents*, *supra* note 35, at 392-400 (discussing the growing use of bilateral and regional trade agreements).

<sup>159</sup> Cho, *supra* note 52, at 238 (footnote omitted); see also John Braithwaite, *Methods of Power for Development: Weapons of the Weak, Weapons of the Strong*, 26 MICH. J. INT'L L. 297, 313 (2004) (noting that bilateral trade agreements “progressively lock more States into the preferred U.S. multilateral outcome until the point is reached where the United States can attempt to nail that multilateral agenda again”); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 127, 143 (2004) (noting that “multilateral efforts to harmonize intellectual property norms should be anticipated by developing countries once the network of bilateral agreements is sufficiently dense to warrant a mechanism to consolidate and (perhaps improve) the gains from bilateralism”); Rolland, *supra* note 59, at 519 (“Regionalism is sometimes seen as a stepping stone toward multilateralism; given institutional and economic difficulties in developing countries such an intermediate step could be highly beneficial to the improved integration of these members in the WTO.”).

<sup>160</sup> Max Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT'L L.J. 1, 21-22 (1989).

By opening markets on a bilateral basis, otherwise insoluble political problems can be attacked incrementally; bilateral agreements might break the political ice for multilateral agreements. Once the first steps have been taken to eliminate a trade barrier or solve an economic problem for one nation, political problems appear less formidable and it is easier to reach similar agreements with other nations. For example, opening the Japanese construction market to the entire world might be extremely difficult politically for Japanese officials. Opening it only to the United States might be somewhat easier. Once the market is opened partially and the Japanese industry and government become accustomed to the new situation, further liberalization will be easier to achieve. Far from derailing the GATT, bilateral agreements can blaze a trail that the GATT can follow.<sup>161</sup>

Moreover, regional trade agreements hold a unique place in the WTO system. Because “the GATT and the WTO recognize regional trade groups and give them certain rights[,] ... being a party to a recognized [regional trade agreement may be] the only way to gain legal status as a group of members in the WTO.”<sup>162</sup> Given the importance of these agreements in the WTO, it is, therefore, important to distinguish South-South agreements from their unpopular counterparts—North-South agreements, such as those free trade agreements pushed by the United States and economic partnership agreements initiated by the European Communities. As Sisule Musungu and others noted in the context of developing South-South regional frameworks:

A regional approach to the use of TRIPS flexibilities will enable similarly situated countries to address their constraints jointly by drawing on each others' expertise and experience and by pooling and sharing resources and information. This approach has several advantages. First, it creates better policy conditions for addressing the challenges of implementing TRIPS flexibilities, which can be daunting for each individual country. Second, a common approach to improve access to essential medicines will enhance the efforts by developing countries to pursue common negotiating positions at the WTO and in other multilateral negotiations such as those on a substantive patent law at the World Intellectual Property Organization (WIPO). In addition, a regional approach coincides with the objective of enhancing South-South cooperation on health and development.

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<sup>161</sup> *Id.* at 22.

<sup>162</sup> Rolland, *supra* note 59, at 497. Nevertheless, there has been growing recognition of groups within the WTO. As Amrita Narlikar noted: “More recently, the Doha Development Agenda made explicit references to groups such as Small and Vulnerable Economies group and the LDC group. References to coalitions such as the Cairns Group and the ASEAN can be easily found on the WTO website.” NARLIKAR, *supra* note 77, at 52.

Consequently, if strategically utilized, regional South-South frameworks will significantly help developing countries devise ways by which national constraints in the use of TRIPS flexibilities can be overcome.<sup>163</sup>

Likewise, two political scientists have noted that “[s]hared historical experiences among states of a particular region develop over time . . . , and the cultural affinities which facilitate commerce are more likely with neighbouring peoples than with those from afar.”<sup>164</sup> It is, therefore, no surprise that Amrita Narlikar found “coalitions that utilize regionalism as a springboard for bargaining . . . [to be] ‘natural coalitions.’”<sup>165</sup>

Nevertheless, it is important to ensure that these South-South agreements will not further divide the less developed world. After all, as Professor Cho aptly noted, “the *Guild* nature of [bilateral and regional agreements] tends to materialize mercantilist outcomes among their members at the expense of non-members.”<sup>166</sup> By separating the more economically developed members from the less economically developed members—or, worse, the can-do countries from the won’t-do countries—South-South agreements can deepen the plight of the weaker members of the less developed world just the same way as the unpopular North-South bilateral or regional trade agreements.

## B. NORTH-SOUTH COOPERATION

Although the WTO and the international intellectual property regime remain heavily state-centered, the participation of non-state actors (such as multinational corporations and nongovernmental organizations) and sub-state agents has grown considerably. During the Cancún Ministerial, “most high-profile [nongovernmental organizations], such as Greenpeace, Oxfam, and Public Citizen, explicitly backed the developing countries’ stand and heavily criticized developed countries, in particular the US and the EU, for a lack of consideration for their poorer trading partners.”<sup>167</sup> While “[s]ome operated as think tanks in supporting the agenda of developing countries[, o]thers issued statements expressing political support for the demands of the G20.”<sup>168</sup>

In addition, sub-state agents have become increasingly active. As Chris Alden noted with respect to China’s government and business ties in Africa, Chinese provincial and municipal authorities have undertaken major initiatives to establish formal and informal ties in South Africa, the Democratic Republic of Congo, Namibia, Angola, and Nigeria.<sup>169</sup> In recent years, there has also

<sup>163</sup> MUSUNGU ET AL., *supra* note 9, at xiv.

<sup>164</sup> William D. Coleman & Geoffrey R.D. Underhill, *Introduction: Domestic Politics, Regional Economic Co-operation, and Global Economic Integration*, in REGIONALISM AND GLOBAL ECONOMIC INTEGRATION: EUROPE, ASIA AND THE AMERICAS 1, 1 (William D. Coleman & Geoffrey R.D. Underhill eds., 1998).

<sup>165</sup> NARLIKAR, *supra* note 77, at 155.

<sup>166</sup> Cho, *supra* note 52, at 238.

<sup>167</sup> *Id.* at 235.

<sup>168</sup> Andrew Hurrell & Amrita Narlikar, *A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations*, 20 GLOBAL SOC’Y 415, 424 (2006).

<sup>169</sup> See ALDEN, *supra* note 73, at 29.



been an interesting emergence of non-national systems, such as the adoption of the Uniform Domain Name Dispute Resolution Policy<sup>170</sup> (UDRP) in October 1999 by the Internet Corporation for Assigned Names and Numbers (ICANN), a private not-for-profit corporation in California.<sup>171</sup>

Thus, instead of focusing on state-to-state relationships, less developed countries need to better understand the importance and challenges for working with nongovernmental organizations and sub-state agents and within non-national systems. They also “need to work consistently with U.S. and European political allies to alter the U.S. and European domestic political contexts.”<sup>172</sup> In doing so, these allies will be able to obtain support within the domestic deliberative processes in developed countries that is similar to the support they have already received within their own countries or in the less developed world. As Gregory Shaffer elaborated:

Domestic and international non-governmental advocates, such as ACT UP, Doctors Without Borders, and Oxfam, ... raise fundamental moral issues to hold US and EC political leaders accountable. They also harness the public’s self-interest over the cost of prescription drugs and public officials’ struggles to finance health care commitments within the United States and Europe themselves.<sup>173</sup>

Indeed, “when TRIPS issues become politicized domestically within the United States and Europe, developing countries retain greater leeway to formulate intellectual property policies to fit their own needs.”<sup>174</sup>

Even if these countries are unable to obtain their desirable policy outcomes through the political processes in the developed world, their foreign allies may be able to significantly reduce the political pressure developed countries will exert upon their less developed counterparts. As Professor Shaffer continued:

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<sup>170</sup> Internet Corp. for Assigned Names & Numbers, *Uniform Domain-Name Dispute-Resolution Policy* (Aug. 26, 1999), [www.icann.org/udrp/udrp.htm](http://www.icann.org/udrp/udrp.htm).

<sup>171</sup> See Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 73, 88–91 (Peter K. Yu ed., 2007) (including the creation of non-national systems as a response to Internet disputes as one of the five disharmonizing trends in the international intellectual property regime).

<sup>172</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 479; see also Antonio Ortiz Mena L.N., *Getting to “No:” Defending Against Demands in NAFTA Energy Negotiations*, in *NEGOTIATING TRADE*, *supra* note 22, at 177, 212 (noting the need to “[e]xploit opportunities offered by [the negotiating] partner’s political system to monitor and change its negotiating positions”); J.P. Singh, *The Evolution of National Interests: New Issues and North-South Negotiations During the Uruguay Round*, in *NEGOTIATING TRADE*, *supra* note 22, at 41, 47 (noting that “divisions in the ranks of the domestic constituencies of the North can be exploited by developing countries to their benefit or can make effective agenda-setting and coalition-building difficult for the North”).

<sup>173</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 480; see also Cho, *supra* note 52, at 240 (noting that the support less developed countries obtain from international and nongovernmental organizations “is likely to have a ripple effect even in the domestic political realm”).

<sup>174</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 481.

If developing countries cannot neutralize the clout of large pharmaceutical firms in the formation of US and European positions, then developing countries will face the full brunt of US and European coercion in the negotiation and enforcement of pharmaceutical patent rights. In a world of asymmetric power, developing countries enhance the prospects of their success if other US and European constituencies offset the pharmaceutical industry's pressure on US and European trade authorities to aggressively advance industry interests.<sup>175</sup>

Despite the importance of cultivating allies in other countries, this point is sometimes lost on less developed countries, whose "domestic lobbies have played a much smaller role in determining foreign economic policy than in the developed democracies."<sup>176</sup>

To date, there has been significant collaboration between policymakers in less developed countries and nongovernmental organizations in both developed and less developed countries. Intergovernmental and nongovernmental organizations that have been active in the public health area include ACT UP!, Health Action International, Health GAP, the International Centre for Trade and Sustainable Development (ICTSD), Knowledge Ecology International (formerly the Consumer Project on Technology), Médecins Sans Frontières (MSF), Oxfam, the South Centre, the Third World Network, the Trade Law Centre for Southern Africa (tralac), and the Treatment Action Campaign, among others. As these North-South alliances are built and strengthened, they will be able to push for policies that will support greater access to essential medicines in less developed countries.

Academics and the media in the North can also play very important roles. The ability of academics and their institutions to help identify policy choices and negotiating strategies and to develop technical capacity in less developed countries have been widely noted. From the law and development movement to the wide variety of legal and constitutional reforms introduced in the "new" republics in Eastern and Central Europe, academics have been very active in offering advice and assistance—sometimes to the disappointment of the local populace.<sup>177</sup> However, the importance of the media in the international debate has been rarely discussed until recently. As John Odell and Susan Sell have noted:

[A] developing country coalition seeking to claim value from dominant states in any regime will increase its gains if it captures the attention of the mass media in industrial countries and persuades the media to reframe the issue using a reference point more favorable to the coalition's position, other things equal.<sup>178</sup>

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<sup>175</sup> *Id.* at 479–80.

<sup>176</sup> NARLIKAR, *supra* note 77, at 4.

<sup>177</sup> See Yu, *From Pirates to Partners I*, *supra* note 46, at 219 (noting the need to provide "regular training programs that provide the basic understanding of intellectual property rights and general expertise in the drafting, implementation, and enforcement of intellectual property laws . . . [and] advanced seminars that help people keep pace with the new legal and technological developments in the country and abroad").

<sup>178</sup> Odell & Sell, *supra* note 22, at 87.

The importance of framing was further underscored by John Braithwaite and Peter Drahos. As they declared: “Had TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilizing the consensus that US business elites had built around TRIPS.”<sup>179</sup>

In addition, commentators have underscored the need to design and stimulate alliances between generic manufacturers in the developed and less developed worlds. With caution, cooperation between brand name and generic manufacturers can also be beneficial, although commentators are generally wary of such cooperation. If developed properly, such alliances “can provide efficiencies, foster dynamic competition, enhance their competitive ability and benefit consumers.”<sup>180</sup> To obtain maximum benefits, these alliances can be set up not only within the less developed world, but also between the developed and less developed worlds—perhaps with the assistance of intergovernmental and nongovernmental organizations. It may also be helpful for public authorities in less developed countries to coordinate strategies with private generic pharmaceutical sector.<sup>181</sup>

Finally, North-South cooperation can go beyond a specific field. For instance, it may be useful to develop cross-discipline cooperation linkages between health and medical experts in the North and intellectual property offices in the South. As commentators have noted, the participation of health officials and ministries in trade negotiations is scant and inadequate.<sup>182</sup> In Professor Drahos’s contribution to this Symposium, he advocated coordination between patent offices and health and medical experts in making assessment of an invention’s contribution to innovation and health welfare.<sup>183</sup> Drawing on experience of ANVISA, the Brazilian National Health Surveillance Agency, he explained that these experts are likely to be in a much better position than patent examiners to make such an assessment. While there is no doubt that the Brazilian model and greater cooperation between patent offices and health experts will benefit many less developed countries, such a model is not limited to the country or the region. Greater cooperation between intellectual property offices in the South and health and medical experts and related nongovernmental organizations in the North is likely to be equally, or if not more, fruitful.

### C. THE WTO DISPUTE SETTLEMENT PROCESS

One of the major features of the WTO is its mandatory dispute settlement process. While the United States and the European Communities have dominated the process in the first few years of existence of the WTO, especially when the disputes involved the TRIPs Agreement, less developed

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<sup>179</sup> JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 576 (2000).

<sup>180</sup> Barbara Rosenberg, *Market Concentration of the Transnational Pharmaceutical Industry and the Generic Industries: Trends on Mergers, Acquisitions and Other Transactions*, in *NEGOTIATING HEALTH*, *supra* note 83, at 65, 76.

<sup>181</sup> See Shaffer, *supra* note 29, at 481.

<sup>182</sup> See MUSUNGU ET AL., *supra* note 9, at 77.

<sup>183</sup> See Peter Drahos, “Trust Me”: *Patent Offices in Developing Countries*, 34 *AM. J.L. & MED.* 151 (2008).

countries have had more frequent use of the process in recent years.<sup>184</sup> Since the turn of the millennium, Brazil and India—two of the BRICS countries—have made much more frequent and extensive use of the process. While they initially have used the process primarily against less powerful WTO member states, such as Argentina, Turkey, Mexico, Peru, and Poland, they have started to use the process more aggressively against powerful WTO member states, like the European Communities and the United States.

Because globalization and international trade have deeply affected domestic policies, participating in the WTO dispute settlement process is now of paramount importance. Such participation will allow countries to develop WTO jurisprudence in a way that, in turn, would shape the ongoing negotiations in the areas of international trade, intellectual property, and even public health. This is what Professor Shaffer has described as negotiation “in the shadow of” the WTO dispute settlement process.<sup>185</sup> As he explained:

Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems. The difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds. Because of the complex bargaining process, rules often are drafted in a vague manner, thereby delegating de facto power to the WTO dispute settlement system to effectively make WTO law through interpretation.

As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law’s interpretation and application over time.<sup>186</sup>

Such an approach makes a lot of sense. After all, there is no indication that the WTO dispute settlement panels are biased toward stronger protection of intellectual property rights. In the decisions issued thus far, the panelists have focused narrowly on the language of the TRIPs Agreement, taking into consideration the recognized international rules of interpretation, the context of the TRIPs negotiations, and the past and subsequent developments of

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<sup>184</sup> See Davey, *WTO Dispute Settlement System*, *supra* note 124, at 17 (“The first half of [the first ten years of operation of the WTO dispute settlement process]—from 1995 through 1999—was characterized by extensive use of the system by the United States initially, and later by the EU.”); *id.* at 24 (noting that “the US and the EC no longer were as dominant as complainants in the system” and that “developing country use of the system increased dramatically” in the second half of the first decade of operation of the WTO dispute settlement process).

<sup>185</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 477; see also Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in *NEGOTIATING TRADE*, *supra* note 22, at 219, 220 (arguing that “the use of legal adjudication allows developing countries to gain better outcomes in negotiations with their powerful trade partners than they could in a bilateral negotiation outside of the institution”).

<sup>186</sup> *Id.* at 470.

treaties governing the areas. In *Canada—Patent Protection of Pharmaceutical Products*, the panel even referred favorably to the limitations and public interest safeguards contained in the TRIPs Agreement.<sup>187</sup> As the panel declared: “Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when [examining the words of the limiting conditions in article 30] as well as those of other provisions of the TRIPs Agreement which indicate its object and purposes.”<sup>188</sup> This decision was particularly important, because it was issued before the conclusion of the Doha Declaration. As Frederick Abbott reminded us:

In late 1999, the political pressures resulting from aggressive US and EC policies on TRIPs were building up, but public antipathy towards that conduct had not yet manifested itself at the level surrounding the Medicines Act trial in South Africa. The Doha Declaration on the TRIPs Agreement and Public Health was about two years off.<sup>189</sup>

Moreover, as I noted elsewhere in the context of the United States’ ongoing WTO dispute with China over the lack of intellectual property enforcement, the European Communities and the United States did not win all of the disputes “litigated” before the Dispute Settlement Body.<sup>190</sup> In June 2000, for example, the United States lost its dispute with the European Communities over section 110(5) of the U.S. Copyright Act, which enables restaurants and small establishments to play copyrighted music without compensating copyright holders.<sup>191</sup> In a subsequent ruling, section 211(a)(2) of the U.S. Omnibus Appropriations Act of 1998, which prohibited the registration or renewal of trademarks previously abandoned by trademark holders whose business and assets have been confiscated under Cuban law, was found to be inconsistent with the TRIPs Agreement.<sup>192</sup>

In addition, the WTO panel curtailed the ability of the U.S. administration to pursue retaliatory actions before exhausting all remedies permissible under the WTO rules, even though it nominally upheld sections 301–310 of the Trade Act of 1974.<sup>193</sup> Most recently, the Caribbean islands of Antigua and Barbuda successfully challenged U.S. laws on Internet and telephone gambling.<sup>194</sup> In *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, an arbitration panel determined

<sup>187</sup> Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000).

<sup>188</sup> *Id.* ¶ 7.26.

<sup>189</sup> Frederick M. Abbott, *Bob Hudec as Chair of the Canada—Generic Pharmaceuticals Panel—The WTO Gets Something Right*, 6 J. INT’L ECON. L. 733, 736 (2003).

<sup>190</sup> See Yu, *From Pirates to Partners II*, *supra* note 49, at 939–40.

<sup>191</sup> See Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000).

<sup>192</sup> Report of the Appellate Body, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002).

<sup>193</sup> See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

<sup>194</sup> Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

that “the annual level of nullification or impairment of benefits accruing to Antigua is US\$21 million.”<sup>195</sup>

While many of the United States’ losses came from its archrival, the European Communities, the WTO dispute settlement process is not reserved for use by powerful WTO member states. The last dispute has shown that, in the WTO process, even two tiny Caribbean islands can prevail over a trading giant like the United States. One can imagine how effective the use of this process can be when less developed countries team up with one or more of the BRICS countries—as co-complainants or third parties—or when the BRICS countries join together. On the one hand, this collective effort can pull together scarce economic and legal resources to defend laws that seek to exploit the flexibilities provided by the TRIPs Agreement and explicitly affirmed by the Doha Declaration.<sup>196</sup> On the other hand, less developed countries can use these resources to design effective strategies to challenge non-TRIPs-compliant legislation in developed countries.

Compared to the uncoordinated arrangement where each country has to file a separate complaint, or join the complainant as a third party, the collaborative strategy has at least five benefits. First, countries will be able to significantly reduce the costs of WTO litigation, thus lowering the threshold for determining whether it would be worthwhile to file a WTO complaint. In his earlier analysis, Professor Shaffer showed how it might not be worthwhile for a small or poor country to file a WTO complaint even when there was a high economic stake. Based on 2004 figures, he found that “an average WTO claim costs in the range of US\$300,000–400,000 in attorneys’ fees.”<sup>197</sup> While \$200,000 of potential loss in trade may be highly important to the economy of a small, poor country, such a loss does not always justify taking the case to the WTO Dispute Settlement Body or defending it there. Instead, these countries often give up their valid claims.<sup>198</sup> If they are sued, they often settle

<sup>195</sup> Recourse to Arbitration by the United States Under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.189, WT/DS285/ARB (Dec. 21, 2007).

<sup>196</sup> Paragraph 5 of the Doha Declaration specifically recognizes the following flexibilities:

- a. In applying the customary rules of interpretation of public international law, each provision of the TRIPs Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
- b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- d. The effect of the provisions in the TRIPs Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Doha Declaration, *supra* note 3, ¶5.

<sup>197</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 473.

<sup>198</sup> *See id.* at 472 (“When large developed countries, such as the United States and EC, can absorb high litigation costs by dragging out a WTO case, while imposing them on

the claims by either abandoning legal or policy experiments that are permissible under the WTO agreements or by transplanting laws from abroad against their wishes and benefits.

This is particularly problematic from the standpoint of the TRIPs negotiations. One of the primary reasons why less developed countries reluctantly agreed to increase intellectual property protection is the ability to use the WTO dispute settlement process as a bulwark against developed countries' coercive, and often unilateral, tactics. As some less developed countries claimed at the time of the TRIPs negotiations, it would be pointless for them to join the WTO if the United States was able to continue imposing unilateral sanctions despite their membership.<sup>199</sup> Unfortunately, the high start-up costs required by the WTO dispute settlement process have made it very difficult for less developed countries to benefit from their hard-earned bargains through the WTO negotiations.

More problematically, the lack of participation by some less developed countries in the WTO dispute settlement process can hurt the protection of other less developed countries. As Professor Shaffer reminded us: "Who participates in the institutional process affects which arguments will be presented, which, in turn, affects how the competing concerns over patent protection, public health, and market competition will be weighed."<sup>200</sup> Thus, if the WTO rules are to be shaped to advance the interests of the less developed world, greater participation by less developed countries in the WTO dispute settlement process is needed.

Second, less developed countries can benefit from the additional expertise and resources provided by other less developed countries. Instead of spending a substantial amount of money on outside counsel, or spending even more in developing local expertise,<sup>201</sup> less developed countries can take advantage of the cost-sharing arrangement and devote the saved resources to improving the living standards of their nationals.<sup>202</sup> If the BRICS coalition or partial BRICS alliances are involved, less developed countries can benefit from even more sophisticated expertise. Some of the BRICS countries, like Brazil, India, and China, have been active litigants in the WTO dispute settlement process. Over the years, they have developed considerable expertise that can be used by or shared with other less developed countries. Even South Africa, which is relatively quiet in the WTO dispute settlement process, and Russia, which remains outside the WTO, have more experience in resolving international trade disputes than most less developed countries.

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developing country parties, they can enhance developing countries' incentives to settle a dispute unfavorably.").

<sup>199</sup> See Yu, *TRIPs and Its Discontents*, *supra* note 77, at 372. For a discussion of the bargaining narrative concerning the origins of the TRIPs Agreement, see *id.* at 371-73.

<sup>200</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 465.

<sup>201</sup> See *id.* at 475 ("Because of developing countries' less frequent use of the WTO system and their lack of local legal capital, the alternative for a developing country to train internal lawyers with WTO expertise is typically worse than hiring expensive US or European outside legal counsel.").

<sup>202</sup> See *id.*

Third, as repeat players in WTO litigation, less developed countries will benefit from the economies of scale in deploying legal resources.<sup>203</sup> They are also more likely to possess the mindset of planning legal strategies that will help them advance the interests of the less developed world and to strengthen their overall legal positions, rather than strategies that seek to win only one case at a time.<sup>204</sup> In doing so, these countries can use the WTO dispute settlement process effectively to shape both the judicial interpretation and the future negotiation of the TRIPs Agreement in a pro-development manner. They may even be able to regain the momentum less developed countries lost during the TRIPs negotiations due to their limited understanding of intellectual property rights and weak bargaining power. Thus far, the European Communities and the United States are able to advance their commercial interests through the WTO dispute settlement process, due partly to their predominant use of this process.<sup>205</sup> However, greater strategic use of the process by less developed countries may greatly curtail the ability by developed countries to advance those interests.

Fourth, as a group, less developed countries do not need to worry as much about the backlashes they will receive when they alone file a complaint against the European Communities or the United States before the WTO Dispute Settlement Body. As William Davey noted, when countries do not face each other often as adversaries in the WTO process, "initiation of a complaint would be something of a slap in the face. The ignominy of a loss would also loom larger."<sup>206</sup> By taking collective action, many otherwise infrequent players in the WTO dispute settlement process will become more frequent players. As they become involved in more complaints against the European Communities or the United States, and as each of these parties has its share of wins and losses, the impact of a WTO dispute on diplomatic relations will be greatly reduced.<sup>207</sup>

Finally, as commentators have rightly questioned, less developed countries may not "have the diplomatic or economic muscle to ensure that the decision is implemented" even if they win their case.<sup>208</sup> Indeed, as Professor Davey has pointed out, there is a good chance that "even massive retaliation by a small country would be unnoticed by a larger one."<sup>209</sup> Thus, by uniting together, less developed countries may be able to have more leverage at the enforcement level by increasing the economic impact of trade countermeasures permitted by the WTO dispute settlement panel.

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<sup>203</sup> See *id.* at 474.

<sup>204</sup> See *id.* at 470.

<sup>205</sup> See *id.*

<sup>206</sup> William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 71 (1987).

<sup>207</sup> See Yu, *From Pirates to Partners II*, *supra* note 49, at 945.

<sup>208</sup> Davey, *Dispute Settlement in GATT*, *supra* note 206, at 90.

<sup>209</sup> *Id.* at 102; see also Rolland, *supra* note 59, at 544 (noting that "one of the problems often mentioned with respect to the WTO's dispute settlement procedure is the insufficient leverage of developing countries at the enforcement level due to their limited potential for trade countermeasures against large economies").



## D. REGIONAL OR PRO-DEVELOPMENT FORA

Regional or pro-development fora are particularly effective means for coordinating efforts by less developed countries in the areas of public health, intellectual property, and international trade. These fora will provide the much-needed focal points for countries to share experience, knowledge, and best practices and to coordinate negotiation and litigation strategies.<sup>210</sup> Through these fora, less developed countries could “(i) raise political awareness of certain members . . . ; (ii) help define the agenda, prior to the actual negotiations . . . ; and (iii) achieve particular regulatory outcomes on a particular issue or economic sector or sub-sector . . . and defend interests in dispute settlement.”<sup>211</sup>

In addition, these fora allow countries to reframe issues “in a way that eases impasses,”<sup>212</sup> thus providing a mechanism to balance interests internal to the group while resolving conflicts or negotiation deadlocks before enlarging the negotiations to include some developed countries or the entire developed world.<sup>213</sup> They also facilitate “a pooling of organisational resources, and enable countries will ill-defined interests to avail themselves of the research efforts of allies and a possible country-wise division of research and labour across issue areas.”<sup>214</sup>

Through these fora, the interests of the participating countries would be better and more symmetrically represented.<sup>215</sup> The fora would also “help build capacity for the group’s members as they would gain leverage through access to a more central and streamlined channel of information (through the group representation) and in turn be able to better formulate their own policy positions.”<sup>216</sup> These functions are especially important, considering the fact that some less developed countries have given up their participation in international fora due to a lack of financial resources or political circumstances.

As commentators have pointed out, many less developed countries lack the resources . . . to send delegates to these fora and thus have resorted to

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<sup>210</sup> See Shaffer, *Recognizing Public Goods*, *supra* note 29, at 478 (“Regional centers could create benchmarks for policy, provide a forum for the sharing of experiences, and identify best practices. Regional centers could also better coordinate training of developing country officials and non-governmental representatives.”); accord MUSUNGU ET AL., *supra* note 9, at xiv-xv (noting the need to develop mechanisms that serve “as a central feature of an institutionalized approach to regional research and innovation including essential health research and, in particular, as a focal point for training, research, information exchange and political coordination in the use of TRIPS flexibilities for public health promotion and protection”); NARLIKAR, *supra* note 77, at 206 (noting “the significance of a sustained process that allows coalition members to meet frequently and further develop and revise their agenda”).

<sup>211</sup> Rolland, *supra* note 59, at 499.

<sup>212</sup> Odell, *supra* note 78, at 16.

<sup>213</sup> See *id.* at 501 (“A common agenda may not exist in a form strong enough to provide a platform for negotiations with third parties but a discussion group may help bring participants’ positions closer or assist in overcoming negotiation deadlocks.”).

<sup>214</sup> NARLIKAR, *supra* note 77, at 14.

<sup>215</sup> See Rolland, *supra* note 59, at 512.

<sup>216</sup> *Id.*

using nongovernmental organizations . . . to represent their interests.<sup>217</sup> In one instance, the Foundation for International Environmental Law and Development, a London-based environmental nongovernmental organization, negotiated a deal to represent Sierra Leone before the WTO Committee on Trade and Environment.<sup>218</sup> Even if countries are willing to send delegates, they may have become formally inactive due to their failure to pay dues for a certain period of time. In the WTO, for example, their inactive status would prevent them from chairing any bodies within the organization.<sup>219</sup> Many delegations are also affected by their limited institutional capacity, delegation size, geopolitical capital, and overall expertise.<sup>220</sup>

In addition, regional or pro-development fora could help improve the human capital and WTO know-how of less developed countries by “better coordinat[ing] training of developing country officials and non-governmental representatives.”<sup>221</sup> As one commentator noted:

Regional seminars play an important role in the WTO’s training activities, with seventy sessions offered during the year [2007] (compared with single-digit numbers of sessions for other types of training activities). The Technical Assistance Plan acknowledges that regionally based activities “allow WTO . . . to reach a homogeneous audience based in the region and interested in the same subject matter . . . . It also facilitates exchange of information, sharing of experiences and networking among participants” at the regional level. These programs, particularly those for government officials, give priority to topics under negotiation and are meant to be immediately useful to participants in regional and international trade negotiations. Similarly, regional trade policy courses explicitly aim at “build[ing] capacity at the regional level.”<sup>222</sup>

Coordination at the regional level and among less developed countries is also important in light of the proliferation of bilateral and regional trade agreements initiated by the European Communities and the United States. Because those agreements tend to transplant laws based on models developed in their home countries,<sup>223</sup> they are notorious for ignoring the local needs,

<sup>217</sup> John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 557 n.256 (2000).

<sup>218</sup> See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 62–63 (2001).

<sup>219</sup> See NARLIKAR, *supra* note 77, at 15.

<sup>220</sup> See Rolland, *supra* note 59, at 529 (noting that “in practice [the participation of member states in WTO working groups] would largely be constrained by the member’s institutional capacity and delegation size”).

<sup>221</sup> Shaffer, *Recognizing Public Goods*, *supra* note 29, at 478.

<sup>222</sup> Rolland, *supra* note 59, at 507 (footnotes omitted).

<sup>223</sup> As the Trade Act of 2002 stated:

The principal negotiating objectives of the United States regarding trade-related intellectual property are . . . to further promote adequate and effective protection of intellectual property rights, including through . . . ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property

national interests, technological capabilities, institutional capacities, and public health conditions of less developed countries. Even worse, these agreements sometimes call for a higher level of protection than what is currently offered in the developed world.<sup>224</sup> If the European Communities or the United States does not see it beneficial to have higher protection, one has to wonder why protection needs to be strengthened in countries that have even more limited resources and that do not possess adequate safeguards and correction mechanisms.

If that is not problematic enough, less developed countries may be “induced” into signing conflicting agreements with both the European Communities and the United States.<sup>225</sup> While these two trading powers are interested in having strong global intellectual property standards, there remain a large number of intellectual property conflicts between the two. In the copyright context, for example, they take different positions on “the protection of moral rights, fair use, the first sale doctrine, the work-made-for-hire arrangement, and protection against private copying in the digital environment.”<sup>226</sup> They also approach the patent filing process differently and greatly disagree on how to protect geographical indications.<sup>227</sup> Indeed, had the United States refused to include geographical indications in the proposed GATT treaty, the European Communities’ initial ambivalent position toward the creation of the TRIPs Agreement might not have changed.<sup>228</sup>

In view of these differences, conflicts may arise if less developed countries sign the trade agreements supplied by both the European Communities and the United States without appropriate review and modification. To be certain, it is not the fault of these trading powers that policymakers in less developed countries are unable to review or modify the agreement; oftentimes, it is the result of a lack of resources, expertise, leadership, negotiation sophistication, or bargaining power. Many policymakers in less developed countries are also blinded by the benefits their countries *may* receive in other trade areas under a package deal—or, worse, they are just too eager to appease, or develop “friendship” with, the trading powers. Nevertheless, it is still highly lamentable that these countries would enter into conflicting agreements that could be avoided with more caution, coordination,

rights that is entered into by the United States reflect a standard of protection similar to that found in United States law . . . .

19 U.S.C. § 3802(b)(4)(A)(i)(II) (2004).

<sup>224</sup> See Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT’L L. 79, 93 (2004); Peter K. Yu, *Anticircumvention and Anti-Anticircumvention*, 84 DENV. U. L. REV. 13, 41 (2006).

<sup>225</sup> See Yu, *TRIPs and Its Discontents*, *supra* note 77, at 407.

<sup>226</sup> Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 625–26 (2002) [hereinafter Yu, *Toward a Nonzero-sum Approach*] (citations omitted).

<sup>227</sup> See Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R (Mar. 15, 2005).

<sup>228</sup> See WATAL, *supra* note 23, at 23 (noting that the European Communities began to root for a GATT treaty “perhaps after a decision among developed countries to include the subject of geographical indications”).

and information. It is bad enough to be forced to sign a bilateral agreement that does not meet local conditions. It is even worse to be put in a position where they have to juggle two conflicting agreements that do not meet local conditions and that are impossible to honor.

Fortunately for less developed countries, regional or pro-development fora may provide the much-needed institutional response to the growing use of bilateral and regional trade agreements to push for stronger intellectual property standards and to further reduce the policy space needed for the development of intellectual property, trade, and public health policies. While the always short-staffed Advisory Centre on WTO Law provides legal advice and support in WTO matters and trains government officials in WTO law, they do not provide assistance in coordinating political, judicial, and forum-shifting strategies in an increasingly complex international intellectual property lawmaking environment.<sup>229</sup> They also provide very limited assistance in developing negotiating strategies concerning the bilateral or regional trade agreements initiated by the European Communities and the United States.

By bringing countries together, these fora would allow policymakers in less developed countries to share their latest experience and lessons concerning these agreements. In doing so, the participating countries would have more information to evaluate the benefits and drawbacks of the potential treaties. They would also be able to anticipate problems and potential side-effects created by these treaties. They might even be able to better design prophylactic or correction mechanisms that would become handy should the treaties prove to be unsuitable for their countries.

Finally, as Sonia Rolland pointed out, "the ability or inability of developing countries to form and sustain effective coalitions in the WTO depends not only on the coalitions' inherent characteristics and the political environment, . . . but also on the institutional and legal framework in which they operate."<sup>230</sup> Except for supranational entities like the European Communities, special classifications like least developed countries, or recognized regional trade agreements, the WTO offers very limited support for formal representation by groups in policy deliberation. Thus, if less developed countries can use these regional or pro-development fora to develop strategies to push for greater legal or structural changes within international organizations that will make group representation easier to obtain and the institution more coalition-friendly, they are more likely to be able to increase their bargaining leverage and to develop a stronger voice for the less developed world. After all, "the ability to sustain developing country coalitions depends in part on the WTO's legal structure . . . [M]embers whose interests might be more effectively served if they are promoted by a group strategy could [also] benefit from a legal framework that better supports developing country coalitions or groupings."<sup>231</sup>

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<sup>229</sup> See Shaffer, *Recognizing Public Goods*, *supra* note 29, at 478.

<sup>230</sup> Rolland, *supra* note 59, at 505.

<sup>231</sup> *Id.* at 485.

## V. CHALLENGES

Although both the BRICS coalition and partial BRICS alliances can play important roles in the international intellectual property regime and the use of coordination strategies can help less developed countries strengthen their collective bargaining position, there are some remaining challenges, however. As discussed earlier, coalition-building efforts put up by less developed countries historically have failed. Such failure, indeed, was one of the primary reasons why I find it more realistic to encourage less developed countries to enter into partial BRICS alliances, as compared to forming the complete BRICS coalition.

Despite their limited success, the past coalition-building efforts have provided important lessons for the development of future cooperative endeavors. There have also been *some* success stories. As Amrita Narlikar, Sonia Rolland, and others have shown, issue-based coalitions for small and very specialized economies with common profiles and interests, such as those “small island economies with similar geographic/strategic endowments, concentrated interests in tourism exports, and travel imports,” have been fairly successful.<sup>232</sup> The high-profile Cairns Group, a crossover coalition that sought to include agriculture in the GATT system, brought together both developed and less developed countries<sup>233</sup> and “became a ‘model’ for other coalitions—the Food Importers’ Group, the Friends of Services, and several other later coalitions.”<sup>234</sup> In addition, the G-20 helped less developed countries establish a united negotiating front during the Cancún Ministerial.<sup>235</sup>

One may wonder why the BRICS countries would be willing to team up with their less powerful trading partners.<sup>236</sup> After all, it seems that the strength, wealth, and sophistication of the BRICS countries would make collective action less attractive to them than to other less developed countries. There are several reasons. First, numbers matter in a “one country, one vote” system, like WIPO and the United Nations. There are only five BRICS countries, but many more less developed countries. Second, the latter may provide attractive markets for pharmaceutical manufacturers in less developed countries, which may not be burdened by the blockbuster drug model and the high profit threshold. This picture, nevertheless, may change as generic manufacturers in the BRICS countries, such as those in India,

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<sup>232</sup> NARLIKAR, *supra* note 77, at 122-23.

<sup>233</sup> *See id.* at 128-47 (discussing the rise, success, and limitations of the Cairns Group); *see also* Rolland, *supra* note 59, at 491 (“The Cairns Group gained significant weight leverage during the round, leverage which has endured because it brought together developed and developing countries that were likely to help bridge the gap between the most extreme negotiating positions.”).

<sup>234</sup> NARLIKAR, *supra* note 77, at 8.

<sup>235</sup> For an explanation of the success of the coalitions less developed countries built at the Cancún Ministerial, see Amrita Narlikar & Diana Tussie, *The G20 and the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO*, 27 *WORLD ECON.* 947 (2004).

<sup>236</sup> Thanks to Robert Bird and Dan Cahoy for pushing me to focus on this important question.

become more active in developing on-patent drugs, partly as a result of the TRIPs Agreement.

Third, historically, countries like Brazil and India have taken leadership roles in the development of intellectual property policies. Although “[i]t is . . . not clear that India and Brazil are prepared to provide the general leadership on intellectual property issues that they once did,”<sup>237</sup> many of these countries, like China and India, are still very eager to take up the role of regional power, if not a world power. So, there is still a very good chance that their interests in geopolitics may spill over into the politics of intellectual property rights.

Finally, as I explained earlier, the wide gap between the rich and the poor and the growing regional disparities in the BRICS countries have induced their government leaders to develop policies to work more closely with their poorer trading partners. The fear of domination by either the European Communities or the United States also created “common enemies” that help rally the BRICS countries to the side of other less developed countries.

The difficult question for less developed countries, therefore, may not be how they can attract the BRICS countries to set up an alliance with them. There will be many reasons for the BRICS countries to engage in collective action with other less developed countries, even though it is hard to pinpoint the reasons behind such engagement. Rather, the impending challenge for these countries concerns how to set up an alliance in a way that would prevent the BRICS countries from dominating their much weaker and more dependent partners.<sup>238</sup> After all, the former are more powerful and possess more human capital, technical knowledge, and legal expertise. Without adequate protection, the BRICS countries may abuse their leadership roles at the expense of others. Thus, if the partial BRICS alliances are to be successful, it is important to build safeguards into the alliances to protect the weaker members and to allow them to retain their autonomy and identity. It is also important to develop trust among the participating members so that they can work together closely without worrying about potential exploitation.

This is particularly important in light of the rapidly growing economic interests of pharmaceutical manufacturers in the BRICS countries and the eagerness of these countries to serve as regional research-and-development or supply centers, especially when such regional setups make great economic sense by allowing the BRICS countries to exploit their comparative advantages. One may still remember the remark by PhRMA representative Tom Bombelles where he suggested “South Africa was a pawn used by India and Argentina to undermine TRIPS.”<sup>239</sup> Although this remark sought to “shift

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<sup>237</sup> Drahos, *Developing Countries*, *supra* note 73, at 765.

<sup>238</sup> As Amrita Narlikar noted:

[W]hile sharing of organisational resources is an asset for the weak, it is accompanied by the risk that the powerful in the group will use their organisational skills and resources to dominate the agenda and perhaps even structure the interests of the weak. Coalitions increase certainty in international affairs through reliability of allies, but also reduce the policy flexibility of countries and thereby eat into the already limited negotiating space of the weakest of developing countries.

NARLIKAR, *supra* note 77, at 16.

<sup>239</sup> Halbert, *supra* note 58, at 267.

the focus [unfairly] away from the enormous health crisis in Africa,<sup>240</sup> it does signal a problem when the debate becomes whether the BRICS countries or the developed countries will be able to sell medication to other less developed countries.

Because generic manufacturers in the BRICS countries may benefit from the continued lack of manufacturing capacity in other less developed countries, they may even lobby against efforts to help less developed countries develop local manufacturing capacity or to transfer technology from the BRICS countries to other less developed countries (although they may not achieve as much success as their patent-based counterparts in the developed world).<sup>241</sup> If the interests of the weaker alliance members are to be protected, a clear alliance agreement and a carefully designed benefit-sharing arrangement may need to be put in place when the alliance is set up.

Another challenge concerns the rapid economic growth of the BRICS countries and the dynamic development of the pharmaceutical sector in those countries. As Dwijen Rangnekar noted recently:

[I]n 1999 [there emerged] a new configuration of pharmaceutical firms, the Indian Pharmaceutical Alliance (the Alliance), consisting of firms like Cipla, Dr Reddy's Laboratories, Lupin Laboratories and Ranbaxy that collectively account for 30% of domestic production and 33% of Indian exports. The Alliance is composed of pharmaceutical firms with mixed interests and areas of expertise: "[the Alliance] . . . is perhaps a little schizophrenic about where its members' interests lie. On the one hand many of them, such as Ranbaxy, wish to develop as research based companies and see the value of strong patent protection to achieve that. On the other hand, the overwhelming majority of their revenues remain derived from generic production, and accordingly they share many of the concerns of [the Indian Drug Manufacturers' Association, a key domestic group of generic manufacturers]."<sup>242</sup>

As the economy of these countries matures, the structure of the pharmaceutical sector may change substantially. In fact, this process of change has been greatly accelerated by the recent partnerships set up between brand name and generic manufacturers. In 2007, for example, "Merck partnered with Advinus Therapeutics, an Indian company, to develop drugs for metabolic disorders, with Merck retaining the right to advance research

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<sup>240</sup> *Id.* at 267-68.

<sup>241</sup> I suspect, however, that these manufacturers would be unlikely to achieve as much success and influence as their patent-based counterparts in the developed world. For a discussion of why the BRICS alliances are conducive to technology transfer from the BRICS countries to other less developed countries, see *supra* text accompanying *supra* note 134.

<sup>242</sup> Dwijen Rangnekar, *Context and Ambiguity in the Making of Law: A Comment on Amending India's Patent Act*, 10 J. WORLD INTEL. PROP. 365, 379-80 (2007) (quoting COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, NOTES ON THE INDIA FIELD-TRIP (2001) (citation omitted)).

into late-stage clinical trials. GlaxoSmithKline and Ranbaxy have also teamed up.<sup>243</sup>

As the world becomes more globalized and the volume of international trade increases, some countries will grow much faster than others. Indeed, in many areas of international trade, “medium-income developing countries which have gained relatively more than their poorer counterparts from the multilateral trade process have increasingly found themselves adopting positions divergent from those of [their counterparts] on the question of preferential access to rich country markets.”<sup>244</sup> If history repeats itself, the BRICS countries eventually will want stronger intellectual property protection once they become economically developed.

Among the BRICS countries, China and India—or Chindia, as some politicians, commentators, and researchers have called them collectively<sup>245</sup>—are most likely to be the quickest to reach a crossover point at which stronger intellectual property protection will be in the country’s self-interests. This is not surprising, considering the fact that both countries were the two largest economies in the world before the Industrial Revolution.<sup>246</sup>

Since the late 1980s, the Chinese economy has been growing at an enviable average annual rate of about ten per cent.<sup>247</sup> China’s imports “tripled from \$225 billion in 2000 to \$600 billion in 2005,” and the country “accounted for about 12 percent of the growth of global trade,” an impressive jump from only 4 per cent in 2000.<sup>248</sup> Because of its ability to lower production costs and to attract considerable foreign direct investment, China has become one of the world’s largest surplus countries and possesses one of the world’s most sizeable foreign exchange reserves.<sup>249</sup> As the Goldman Sachs study forecasted, “[i]n US dollar terms, China could overtake Germany in the next four years, Japan by 2015 and the US by 2039.”<sup>250</sup> Although China today is considered the world’s manufacturing capital, producing shoes, clothes, toys, household products, and low-cost electronic goods, the country eventually will move into the world’s high-end market while continuing to dominate its low-end market.<sup>251</sup>

<sup>243</sup> NATH, *supra* note 44, at 102.

<sup>244</sup> Rolland, *supra* note 59, at 536.

<sup>245</sup> See, e.g., CHINDIA: HOW CHINA AND INDIA ARE REVOLUTIONIZING GLOBAL BUSINESS (Pete Engardio ed., 2006) [hereinafter CHINDIA]; RAMESH, *supra* note 139; see also DANCING WITH GIANTS, *supra* note 103; MEREDITH, *supra* note 106.

<sup>246</sup> See MEREDITH, *supra* note 106, at 160 (citing Angus Maddison, professor emeritus at the University of Groningen); see also Angus Maddison, *Historical Statistics for the World Economy: 1-2003 AD (2007)*, www.gdcd.net/maddison/Historical\_Statistics/horizontal-file\_03-2007.xls.

<sup>247</sup> BERGSTEN ET AL., *supra* note 138, at 18. Some early research has placed China’s annual growth rate at a more modest rate of seven to eight per cent. See Symposium, *China and the WTO*, *supra* note 45, at 3.

<sup>248</sup> BERGSTEN ET AL., *supra* note 138, at 73.

<sup>249</sup> See *id.* at 4.

<sup>250</sup> Wilson & Purushothaman, *supra* note 13, at 4.

<sup>251</sup> See Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 208 (2006) (“China’s ambitions are vast: China seeks to maintain its dominance in labor-intensive sectors, to gain and maintain dominance in low-technology sectors, and to eventually dominate trade in high-technology sectors.”); Pete Engardio, *Introduction to CHINDIA*, *supra* note 245, at 4 (noting that “[t]he idea that China will



India is not far behind, however. As the Goldman Sachs study stated, "India has the potential to show the fastest growth over the next 30 and 50 years," and its "economy could be larger than all but the US and China in 30 years."<sup>252</sup> Growing at a steady rate of above five percent, India was estimated "to raise its US dollar income per capita in 2050 to 35 times current levels."<sup>253</sup> In fact, some analysts have predicted that India will eventually overtake China in the latter half of the twenty-first century. As Pete Engardio, the Asia correspondent for *Business Week*, noted, India might eventually become a stronger economic power than China, due to its growth in workforce, fixed investment, and productivity.<sup>254</sup> Likewise, Huang Yasheng and Tarun Khanna observed: "China and India have pursued radically different development strategies. India is not outperforming China overall but it is doing better in certain key areas. That success may enable it to catch up with and perhaps even overtake China."<sup>255</sup>

Thus, the interests of the BRICS countries may eventually become quite far apart from those of other less developed countries, just as the interests of the less developed world are currently far apart from those of the developed world. The growing divergence between these two groups of countries is indeed highly plausible. Nor would the economic emergence of these countries become a major concern for development experts. After all, most policymakers, international bureaucrats, and development experts would rather design policies that enable *some* less developed countries to catch up economically and technologically and become more advanced than policies that would ensure *all* less developed countries stay economically weak and technologically backward.

While it remains unclear whether the growth of the BRICS countries will raise concerns down the road, the analysis of both the economies of the BRICS countries and the positions they have been taking at the international level seem to suggest that the interests of the BRICS countries and other less developed countries are quite close at present. Many less developed countries remain dependent on the leadership supplied by the BRICS countries, in particular Brazil, China, and India. Thus, in light of the potential for increased bargaining leverage, greater technology transfer, and active technical assistance, BRICS countries can serve as worthy allies at least until their interests grow further apart from those of their less developed partners. The important question for the weaker partners at the moment, therefore, is

continue to assemble low-end products while high-end manufacturing will always remain in advanced countries . . . is becoming outdated"); Peter K. Yu, *Trade Barriers Won't Contain China's Cars*, DETROIT NEWS, Oct. 25, 2007, at 15A (discussing China's growing interest in the American car market and its eagerness to set up "its own national champion automaker").

<sup>252</sup> Wilson & Purushothaman, *supra* note 13, at 4.

<sup>253</sup> *Id.* at 10.

<sup>254</sup> See Pete Engardio, *Why India May Be Destined to Overtake China*, in CHINDIA, *supra* note 245, at 27; see also MEREDITH, *supra* note 106, at 57 ("China is winning the sprint, and [India is] going to win the marathon." (quoting Kamal Nath, India's minister of commerce and industry)). *But see id.* at 154 ("China has proved so much more efficient than India at development and managing its economy that th[e] scenario [that India's economy will overtake China's] is unlikely unless China falls into political turmoil.").

<sup>255</sup> Yasheng Huang & Tarun Khanna, *Can India Overtake China?*, FOREIGN POLY, July/Aug. 2003, at 74, 81.

how they can take advantage of the alliances when the interests of the alliance members are still close to each other. If they are able to do so, they might build up their manufacturing capacity and shape the international intellectual property system in a way that would better advance their interests and protect their negotiation agendas.

Finally, there are other “IP-irrelevant factors”<sup>256</sup> that would make it difficult for the BRICS countries to cooperate among themselves and with other less developed countries, such as xenophobia, nationalism, racism, mistrust, and resentment. No matter how much more globalized and interdependent the world has become, some countries will always remain reluctant to cooperate with others, either because of historical conflicts, border disputes, economic rivalries, cultural differences, or spillover issues from other areas. The existence of these barriers, however, does not doom the alliance project. In fact, it demonstrates how coalition building is always a work in progress that requires care, vision, and continuous attention between and among the various parties.

It also suggests the importance of using regional approaches to alleviate the impact of these factors. For example, it may be fruitful to develop several regional networks—one for Africa, one for East Asia, one for Eastern and Central Europe, one for South America, and one for South Asia.<sup>257</sup> Interestingly, the BRICS countries would fit very well in this arrangement by taking up leadership roles in each of these networks: Brazil for South America, Russia for Eastern and Central Europe, India for South Asia, China for East Asia, and South Africa for Africa. As they work more closely with their fellow members, they may open up new possibilities for cross-region collaboration, thus resulting in the web of alliances I suggested earlier.

In sum, there are many benefits to developing alliances between the BRICS countries and other less developed countries. There are also many remaining challenges. If the countries are to work together to develop successful alliances, they need to clearly articulate their goals, understand each other better, and work out mutually beneficially arrangements. As I described elsewhere about the development of strategic partnerships:

[To form a successful strategic partnership, the initiating party] must identify its needs, understand its strengths, and assess its “readiness, willingness, and ability to engage in the [partnership] process.” It also must determine the type of partner it needs, evaluate what each partner is likely to bring to the relationship, and assess the potential partner “in terms of the complementarity of assets and skills and the possible synergies” arising from the partnership.

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<sup>256</sup> “IP-irrelevant factors” are those factors that are largely unaffected by intellectual property protection. See Yu, *The International Enclosure Movement*, *supra* note 7, at 852–53.

<sup>257</sup> Cf. Rolland, *supra* note 59, at 524 (suggesting the development of the following geographical-based groups: “a bloc including the Americas, an African bloc, two Asian groups (one including China and Eastern Asian countries and the other one comprising South Asian and Central Asian countries), and a Middle Eastern bloc, and possibly a bloc of industrialized members and an LDC bloc”).

Each [partner] should “devote sufficient attention to the cultural compatibility between the partners,” for the lack of such attention sometimes may result in the breakdown of the partnership. It also needs to work with the other to decide how their respective contributions “can be valued in a fashion that is fair to both partners, taking note of the downside risks and the upside potential.” To bring the partnership to life, the partners must further decide the structure of the alliance and the decisionmaking processes.<sup>258</sup>

If both the BRICS countries and other less developed countries can use collective action to their advantage, the development of partial BRICS alliances, or maybe even the complete BRICS coalition, is not a mere hope, but a realistic goal. These alliances may eventually be able to reduce the ongoing push by the European Communities and the United States to ratchet up global intellectual property standards. The alliances will also help enlarge the policy space less developed countries need to have in order to develop their intellectual property, trade, and public health policies. With greater coordination and leverage, they may even be able to establish, shape, and enlarge a pro-development negotiating agenda that would recalibrate the balance of the international intellectual property system.

## CONCLUSION

Since the TRIPs Agreement entered into effect in 1995, less developed countries have been confronted with massive public health crises within their borders. Although these countries successfully pushed for reforms within the international intellectual property system during the Doha Round, the proliferation of bilateral and regional trade agreements and the growing enclosure of the policy space needed for the development of intellectual property, trade, and public health policies have significantly reduced their ability to respond to public health crises within their borders. Fortunately for these countries, the emergence of fast-growing BRICS economies has provided a timely, yet unprecedented opportunity. Hopefully, this Article will help convince policymakers in less developed countries and nongovernmental organizations in both the developed and less developed worlds to seize the opportunity to promote access to essential medicines in less developed countries.

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<sup>258</sup> Yu, *Toward a Nonzero-sum Approach*, *supra* note 226, at 599 (footnotes omitted).