USING IP BEST PRACTICES DIALOGUES TO IMPROVE IP SYSTEMS GLOBALLY: THE EXAMPLE OF THE TRADE SECRETS LAW BEST PRACTICES DIALOGUE

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INTRODUCTION

Effective intellectual property ("IP") standards are critical to building innovative economies and promoting worldwide trade that benefits all. In recent years, however, IP systems have become more difficult to improve globally through trade agreements and treaties than in the past. A promising alternative and complementary approach is to establish voluntary public–private dialogues among countries and interested stakeholders to establish detailed principles and guidelines—best practices—for improving national IP laws ("IP Best Practices Dialogues"). The emerging interest in improving trade secret law worldwide provides an important opportunity for trying such principles.

The wealth of nations in modern times is intangible.[1] In contrast to a few decades ago, the value of leading businesses lies overwhelmingly in intangible assets.[2] In the most developed economies, most business investment is in intangibles, and chief among these intangible assets is IP.[3] IP increasingly drives the value of businesses and modern economies.[4]

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[1] WORLD BANK, WHERE IS THE WEALTH OF NATIONS: MEASURING CAPITAL FOR THE 21ST CENTURY 6 (2007), http://siteresources.worldbank.org/INTEEI/214578-1110886258964/20748034/All.pdf.

[2] *See* Carol A. Corrado, Charles R. Hulten & Daniel E. Sichel, *Intangible Capital and U.S. Economic Growth*, 55 REV. INCOME & WEALTH 661, 671 (2009).

[3] *See* Paula Barnes & Andrew McClure, *Investments in Intangible Assets and Australia's Productivity Growth*, AUSTL. GOV'T 73 (Productivity Commission Staff, Working Paper, 2009), http://www.pc.gov.au/research/supporting/intangible-investment/intangible-investment.pdf (comparing Australia's intangible investment to other developed countries in the world).

[4] *Cf.* DOUGLAS LIPPOLDT, DO STRONGER IPRS DELIVER THE GOODS (AND SERVICES) IN DEVELOPING COUNTRIES? 10 (2010), http://ecipe.org/publications/do-stronger-iprs-deliver-goods-and-services-developing-countries/ ("Based on more than a decade of experience, the empirical evidence

The importance of intangible wealth has not gone unnoticed by policy-makers. For the past several decades, there has been a drive to harmonize IP laws and raise global standards for IP protection.[5] This policy agenda achieved a triumphant milestone in 1995 with the establishment of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). TRIPS set minimum standards for IP protection enforceable by the World Trade Organization ("WTO"), the first-time international IP standards were entrusted to a body with significant enforcement capabilities.[6] Entering TRIPS was a condition for joining the WTO, and most of the world's nations, eager to join the world trading system, flocked to TRIPS.[7]

TRIPS was the result of a compelling strategic move that tied improvement of IP standards to trade. Since TRIPS became effective in 1995, tying IP with trade has been fruitful for proponents of greater IP harmonization. Countries continued to press for stronger IP in later bilateral trade agreements.[8] These so-called TRIPS-Plus provisions were present in numerous trade agreements that the United States and European Union entered with their respective trading partners.[9] The strategy continued to be pressed in "next-generation" trade agreements, with IP figuring prominently in both the Trans-Pacific Partnership ("TPP") and the Trans-Atlantic Trade and Investment Partnership ("TTIP").[10]

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indicates that an appropriate degree of IPR protection does help to deliver access in developing countries to goods, services and FDI from abroad, as well as boosting domestic innovation.").

5 *See* David Kappos, Under Sec'y of Commerce & Dir. of the U.S. Patent & Trademark Office, A Global Call for Harmonization, Address at the Managing IP International Patent Forum, London (Apr. 5, 2011), https://www.uspto.gov/about-us/news-updates/global-call-harmonization-0 (discussing ongoing global harmonization efforts, specifically multilateral agreements such as the Patent Coalition Treaty and bilateral relationships such as the Patent Prosecution Highway (PPH)).

6 *See* J.H. Reichman*, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 347 (1995).

7 *See Frequently Asked Questions About TRIPS in the WTO*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (last visited July 10, 2018) [hereinafter *TRIPS FAQ*] (explaining that while TRIPS applies to all members of the WTO, the agreement allows countries different periods of time to delay applying its provisions).

8 *See* Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 216 (Lorand Bartels & Federico Ortino eds., 2006) ("TRIPS should never have been viewed as the final statement on international IPRs, but rather as merely a stage (albeit an important one) in a larger cycle alternating between bilateral, regional, and multilateral forums," and "the world has moved beyond the multilateral phase and into a bilateral phase; a phase which is seeing the negotiation increased IPRs and placing increased obligations on signatories.").

9 *See id.* at 216–17.

10 *See* Chad P. Brown, *Mega-Regional Trade Agreements and the Future of the WTO*, COUNCIL ON FOREIGN RELATIONS 7 (Sept. 29, 2016), https://piie.com/commentary/speeches-papers/mega-regional-trade-agreements-and-future-wto (explaining that new "mega-regional" agreements have focused on issues largely blocked from other multilateral talks, including "the internet and e-commerce, data, privacy, and new issues involving intellectual property rights"). As of this writing, TTIP appears to be dead. *See* Jonathan Stearns, *EU Sours on Reviving Trade-Pact Push with U.S. Amid Tariffs Row*, BLOOMBERG (Mar.

It was in these next-generation trade agreements that the IP-trade tie began to show some weakness. By 2016, both liberalizing trade and improving IP were less easy and less popular than they had been in the mid-1990s. The IP chapter of the TPP was among its most controversial, and it was much derided even before critics knew fully what it contained.[11] Newfound political skepticism of trade agreements led both U.S. presidential candidates in 2016 to promise to oppose the agreement.[12] Indeed, after the election, the United States dropped out of TPP, leaving the remaining nations to carry on without it—and with most of the previously negotiated IP provisions suspended indefinitely.[13]

While the defeat of TPP in the United States and the controversies surrounding it are recent, the difficulties with IP harmonization via trade agreements started long before that.[14] IP harmonization has grown more challenging and controversial.[15] One reason may be that much of the "low-hanging fruit" of IP harmonization was gone after the initial round of agreements.[16] Further progress may require controversial issues to be addressed. Another is that further progress often must address areas such as evidentiary procedures, law enforcement processes, and judicial procedures.[17] All these areas

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30, 2018, 3:56 AM), https://www.bloomberg.com/news/articles/2018-03-30/eu-resists-linking-u-s-metal-tariffs-waiver-to-revival-of-ttip.

11 Samuel Whitesell, *Trans-Pacific Partnership: Why Is the IP Rights Chapter Receiving So Much Criticism?*, LAW STREET (Oct. 28, 2015), https://lawstreetmedia.com/issues/business-and-economics/trans-pacific-partnership-ip-rights/.

12 Mark Abadi, *Where Hillary Clinton and Donald Trump Stand on Obama's Legacy Trade Deal*, BUSINESS INSIDER (Sept. 24, 2016, 10:42 AM), http://www.businessinsider.com/what-is-tpp-2016-9.

13 *See* Ylan Q. Mui, *Withdrawal from Trans-Pacific Partnership Shifts U.S. Role in World Economy*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/business/economy/withdrawal-from-trans-pacific-partnership-shifts-us-role-in-world-economy/2017/01/23/05720df6-e1a6-11e6-a453-19ec4b3d09ba_story.html?utm_term=.89aec6f99c62; William New, *TPP Texts Show Suspended IP Provisions*, INTELL. PROP. WATCH (Nov. 16, 2017), http://www.ip-watch.org/2017/11/16/tpp-texts-show-suspended-ip-provisions/.

14 *See* Sean Pager, *TRIPS: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 216–17 (2006); Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in* Phrma v. Walsh *and the TRIPS Agreement*, 38 U. RICH. L. REV. 777, 777–78 (2004); Daniel Lifschitz, Comment, *The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew*, 34 LOY. L.A. INT'L & COMP. L. REV. 197, 197–99 (2011).

15 *See* Mark F. Schultz & David B. Walker, *How Intellectual Property Became Controversial: NGOs and the New International IP Agenda*, 6 ENGAGE 82, 82–83 (2005); Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1585–86 (2009).

16 Anu Bradford, *When the WTO Works, and How It Fails*, 43 (Chi. Pub. Law & Legal Theory Working Paper Series, No. 300, 2010), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1380&context=public_law_and_legal_theory; STEWART PATRICK, THE SOVEREIGNTY WARS: RECONCILING AMERICA WITH THE WORLD 91 (2018).

17 *See* Howard C. Anawalt, *International Intellectual Property, Progress, and the Rule of Law*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 383, 385, 385 n.15 (2003).

touch on matters of national law that go far beyond IP. As important as IP is, harmonization on these issues for the sake of IP protection may represent a "tail wagging the dog" scenario.

Despite these difficulties, further progress on making IP standards more effective globally need not stall. What we need is a new and different approach that complements existing harmonization efforts, both in their inception and in their implementation.

This Article proposes establishing one or more standing public–private diplomatic dialogues on best practices in drafting and implementing national IP laws—an IP Best Practices Dialogue. This dialogue would be a Track 1.5 Diplomatic Dialogue, which signifies a public–private dialogue with voluntary, nonbinding results.[18] While a nonbinding dialogue might be derided as mere talk, this Article contends that more talk about IP is needed at this juncture. Drafting laws is insufficient if they lack the details to make them effective. Passing laws is insufficient if judges and other officials lack the know-how to implement them. An IP Best Practices Dialogue will make each of these disappointing outcomes less likely, because it will produce expert best-practice recommendations that can lead to both better laws and better implementation. This process would be a valuable complement to existing harmonization efforts, making them more effective.

This Article proposes starting with a Trade Secrets Best Practices Dialogue. In fact, the authors of this Article have already done so, recently convening a group and launching a process.

The need to work on trade secret issues is compelling. As the global economy becomes more integrated, the protection of confidential business information is essential. Along with copyrights, patents, and trademarks, trade secrets make up an increasingly valuable component of the IP bundle, and their security is critical to a vibrant world market.[19] Unfortunately, a fragmented and incomplete international trade secret protection framework is creating challenges for the protection of innovative IP, and a more collaborative effort based on a Best Practices Dialogue is needed to bolster worldwide trade.[20]

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18 *See* Susan Allen Nan & Andrea Strimling, *Track I - Track II Cooperation*, BEYOND INTRACTABILITY (Jan. 2004), https://www.beyondintractability.org/essay/track_1_2_cooperation/?nid=1331; Brian L. Job, *Track 2 Diplomacy: Ideational Contribution to the Evolving Asian Security Order*, *in* ASSESSING TRACK 2 DIPLOMACY IN THE ASIA PACIFIC REGION 112, 122 (Desmond Ball & Kwa Chong Guan eds., 2010).

19 David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1104 (2012); *see also* Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 29, 37–41 (2007).

20 *See* Stephanie Zimmerman, Comment, *Secret's Out: The Ineffectiveness of Current Trade Secret Law Structure and Protection for Global Health*, 29 PENN ST. INT'L L. REV. 777, 784 (2011) (explaining that challenges created by the framework include inconsistent/difficult domestic enforcement, forcing less influential countries to adopt the dominant model of influential countries, and tension between what countries agree to and what they will actually support domestically).

Sometimes referred to as "the other IP right,"[21] trade secrets are broadly described as "some sort of *information* that has *value* because it is not *generally known*."[22] TRIPS defines trade secrets as business information that is secret, has commercial value because of its secret status, and is subject to reasonable efforts to protect that secrecy.[23] According to the WTO, the information must be protected from "being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices."[24]

Despite a shared understanding of what constitutes a trade secret under the TRIPS agreement, countries' legal systems vary as to how to protect this valuable form of IP. Some countries incorporate trade secret protections in their unfair competition or contract laws, while others simply rely on the common law.[25] But in recent years, many countries have recognized the importance of trade secrecy, as evidenced by a wave of reform initiatives that has resulted in increased availability and average effectiveness of protection.[26] Rising economies in Asia have been particularly intent on improving their trade secret laws, with Korea and Taiwan seeing significant reforms.[27]

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21 James Pooley, *Trade Secrets: The Other IP Right*, WIPO MAGAZINE (June 2013), http://www.wipo.int/wipo_magazine/en/2013/03/article_0001.html.

22 *See* Michael Risch, *Empirical Methods in Trade Secret Research*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Peter S. Menell, David L. Schwartz & Ben Depoorter eds., forthcoming), https://ssrn.com/abstract=2658685.

23 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 39.1, 39.2, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement]; *see also* DOUGLAS C. LIPPOLDT & MARK F. SCHULTZ, TRADE SECRETS, INNOVATION AND THE WTO 1 (2014), http://e15initiative.org/wp-content/uploads/2014/11/E15_Innovation_Lippoldt-Schultz_FINAL.pdf ("[F]ollowing TRIPS, this definition has been widely adopted into national laws.").

24 TRIPS Agreement, *supra* note 23, at 4 n.10. "Contrary to honest commercial practices" includes "practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition." *Id.*

25 *See* Mark F. Schultz & Douglas C. Lippoldt, *Approaches to Protection of Undisclosed Information (Trade Secrets)* 7–8 (OECD Trade Policy Papers, No. 162, 2014), http://dx.doi.org/10.1787/5jz9z43w0jnw-en.

26 Peter Lando & Thomas McNulty, *What You Need to Know About the European Trade Secrets Directive*, LAW.COM (June 12, 2018, 2:30 PM), https://www.law.com/corpcounsel/2018/06/12/what-you-need-to-know-about-the-european-trade-secrets-directive/.

27 *See* Keith Menconi, *Progress in Protecting Trade Secrets*, TAIWAN BUS. TOPICS (Oct. 17, 2017), https://topics.amcham.com.tw/2017/10/progress-in-protecting-trade-secrets/ (discussing the enactment of the 2013 Trade Secrets Act that introduced criminal penalties for trade secret violations in Taiwan and strengthened law enforcement agencies' investigative powers in trade secret cases); Myung-Cheol Chang, *Unfair Competition in Korea*, IN-HOUSE COMMUNITY (Mar. 14, 2017), http://www.inhousecommunity.com/article/unfair-competition-korea/.

Well-established economic leaders, such as Japan, have also joined in this wave of reform.[28]

Most recently, even the economies with the most effective IP regimes in the world—the United States and the European Union—have sought to increase economic competitiveness by harmonizing, reforming, and further codifying their trade secret laws. In 2016, the United States passed the Defend Trade Secrets Act, which created a federal civil cause of action and standard for injunctive relief and monetary damages for trade secret misappropriation.[29] That same year, the European Union passed the Trade Secrets Directive, which requires its twenty-eight member countries to provide at least the minimum levels of protections afforded by the directive.[30] These efforts are aimed at harmonizing what, in both the United States and the European Union, had been a patchwork of unfair competition laws, and they represent a greater push toward combating the increasingly global threat of trade secret theft.

In the digital age, vigilance over trade secrets and other forms of IP is critical for multinational corporations. Corporate espionage, cross-border and employee misappropriation, and a variety of cybercrimes are just a few of the threats that companies face as they venture into foreign markets.[31] What makes trade secret protection even more difficult is that the measures available to secure confidential information from loss and the remedies available to victims of IP theft vary from country to country.[32] Perhaps the most pronounced inconsistencies come in evidence gathering and discovery standards, as many countries lack effective provisions for the protection of trade secrets during litigation.[33] These tenuous protection standards often result in

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28 *Focus on: Japan and Trade Secrets*, CTR. FOR RESPONSIBLE ENTERPRISE & TRADE (Feb. 16, 2016), https://create.org/news/focus-japan-trade-secrets/; Holly Emrick Svetz, Note, *Japan's New Trade Secret Law: We Asked For It—Now What Have We Got?*, 26 GEO. WASH. J. INT'L L. & ECON. 413, 416 (1992); *Japan Strengthens Deterrence Measures Against Trade Secret Infringement*, JONES DAY (Feb. 2016), http://www.jonesday.com/files/Publication/2b509a75-1a2e-4a7d-8b32-6c82a6edeb8d/Presentation/PublicationAttachment/b7bb32d1-b712-4021-b090-7c98eceee9b4/Japan_Strengthens_Deterrence_Measures.pdf.

29 *See* Defend Trade Secrets Act of 2016, Pub. L. 114-153, § 2, 130 Stat. 376, 376, 379–80 (codified at 18 U.S.C.A. § 1836 (West 2016)); Anand B. Patel et al., *A Quick Guide Comparing the Defend Trade Secrets Act and the EU Trade Secrets Directive*, PAUL HASTINGS (June 2016), https://www.paulhastings.com/publications-items/details/?id=4071e969-2334-6428-811c-ff00004cbded.

30 *See id.*

31 *See infra* Part III.C.2.

32 *See* Dan Kim, Katherine Linton & Mitchell Semanik, *U.S. International Trade Commission's Trade Secrets Roundtable: Discussion Summary*, J. INT'L COM. & ECON., Nov. 2016, at 1, 7 (explaining that TRIPS does not establish shared standards for protecting trade secrets and that the "[p]rotections and the effectiveness of responses to [trade secret] misappropriation rely on legal systems which vary from country to country").

33 LIPPOLDT & SCHULTZ, *supra* note 23, at 7–8 (noting that the many international variations in legal procedures for investigating trade secret claims are related to the origins of the legal systems and that "[c]ountries with an English legal origin tend to favour some amount of voluntary pre-trial disclosure

the exposure of sensitive information, and without sufficient enforcement mechanisms, there is little to deter theft.[34]

In an attempt to improve the ease of conducting business internationally with respect to trade secrets while reinforcing the incentives for continued innovation and the diffusion of knowledge, this Article proposes a renewed approach to the improvement of international trade secret protection through an open dialogue and the voluntary adoption of best practices guidelines. First, this Article discusses how challenges to existing models of IP harmonization have raised the need for a new, complementary approach to IP harmonization. The Article then describes the necessary characteristics and conduct of an IP Best Practices Dialogue. The Article concludes by describing why trade secrets are important enough to merit their own Best Practices Dialogue and how the authors of this Article are conducting the one they have already launched.

I. THERE IS A NEED TO SUPPLEMENT EXISTING IP HARMONIZATION STRATEGIES AS THEY HAVE BECOME LESS EFFECTIVE

This Article's proposal for a standing IP Best Practices Dialogue is motivated by the limitations of current strategies to improve global IP standards. Current strategies, while effective and important, are facing increasing difficulties. Moreover, there is an increasing need for expert dialogue among countries to supplement and complement current efforts. Here, the authors explain the challenges that motivate their proposal.

A. *The Increasing Challenges Faced by Current IP Harmonization Efforts*

The current era of IP harmonization has been characterized by the successful but increasingly challenging strategy of tying improvements in IP standards to trade agreements. By the late 1980s, progress in IP harmonization stalled in forums such as the World Intellectual Property Organization ("WIPO").[35] At that time, proponents of more effective IP standards began

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of evidence between the parties, outside of the direct supervision and compulsion of the court," but "civil law countries have much more limited, or no, pre-trial discovery," and "[l]ack of discovery may leave a plaintiff unable to prove a case and deter it from bringing a case at all").

34 James Pooley, *The Biggest Trade Secret Loophole You've Never Heard Of*, IPWATCHDOG (May 2, 2018), http://www.ipwatchdog.com/2018/05/02/biggest-trade-secret-loophole/id=96720/ ("In fact, most countries' laws are insufficient to protect trade secret rights in general, and even less so when information is in the hands of courts that have to guarantee public access.").

35 *See* JEROME H. REICHMANN & CATHERINE HASENZAHL, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, NON-VOLUNTARY LICENSING OF PATENTED INVENTIONS:

to frame the lack of effective IP protection as a trade barrier and sought to tie improvements in IP standards to access to markets.[36] This strategy bore fruit in the TRIPS agreement, negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade in 1994 and implemented by the WTO the following year.[37] Adoption of TRIPS was required to join the WTO, and as countries flocked to join the global trading system, they also joined TRIPS.[38] The IP–trade tying strategy was extremely effective, as it succeeded in persuading countries to raise their IP standards by tying IP to trade and imposing real consequences for noncompliance.[39] TRIPS thus greatly strengthened IP laws globally.

TRIPS did not, however, represent the apex of IP laws, resulting in ideal IP protection once and for all. For one thing, less-developed countries were not, in all cases, required to immediately strengthen all their laws.[40] Moreover, TRIPS set minimum standards, but compliance with those minimum standards did not ensure that laws were effectively drafted or enforced.[41] Many observers considered the TRIPS minimum standards too low with respect to many particulars—at least too low to effectuate real, positive change.[42] In addition, regardless of strength, many details were left out of TRIPS. For example, while TRIPS Article 27.1 requires each member to make patents available, it does not (and could not, really) explain how to build a national IP office that can effectively and efficiently examine patents.[43] Finally, a great deal has changed since TRIPS was adopted. Intangible

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HISTORICAL PERSPECTIVE, LEGAL FRAMEWORK UNDER TRIPS, AN OVERVIEW OF THE PRACTICE IN CANADA AND THE USA 12–13 (2003), https://www.ictsd.org/downloads/2008/06/cs_reichman_hasenzahl.pdf (discussing the collapse of the Paris Revision Conference and the subsequent removal of international intellectual property reform efforts from WIPO's agenda).

36 *See* Mary S. White, Note, *Navigating Uncharted Waters: The Opening of Brazil's Software Market to Foreign Enterprise*, 25 STAN. J. INT'L L. 575, 584–85 (1989); Willard Alonzo Stanback, *International Intellectual Property Protection: An Integrated Solution to the Inadequate Protection Problem*, 29 VA. J. INT'L L. 517, 527 (1989).

37 *TRIPS FAQ*, *supra* note 7.

38 As of December 2017, 164 countries are members of TRIPS. *Other IP Treaties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 (last visited Dec. 11, 2017).

39 Ryan Cardwell & Pascal L. Ghazalian, *The Effects of the TRIPS Agreement on International Protection of Intellectual Property Rights*, 26 INT'L TRADE J. 19, 19, 21, 35 (2012).

40 TRIPS imposed a three-tiered system of implementation: Developed nations had to comply almost immediately; developing nations had five years (until January 1, 2000); and least-developed nations originally had ten years. The time for least-developed nations to comply with requirements regarding pharmaceutical patents was extended to 2016, and a number of waivers are also available to them, so it will be some time before they are fully obligated. *See TRIPS FAQ*, *supra* note 7.

41 Reichman, *supra* note 6, at 364–65.

42 *See, e.g.*, Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261 (1997) (contending that TRIPS-compliant provisions would place a country only in the middle ranks of IP systems and would be insufficient to stimulate investment).

43 TRIPS Agreement, *supra* note 23, art. 27.1.

assets are more important than ever, composing a greater portion of the value of businesses.[44] The revolutionary changes wrought by the growth of internet use—and, later, mobile technology—challenged the ability to enforce copyright laws, while new business models created new challenges for the patent regime.[45] Trade secrets became more important but also came under greater threat as information grew more portable and thus easier to misappropriate.[46]

For all these reasons, work to make IP laws more effective did not end upon the adoption of TRIPS. The United States and European Union continued to negotiate bilateral and regional trade agreements that included so-called TRIPS-Plus provisions.[47] For example, the United States–Korea Free Trade Agreement attempted to address gaps in the IP system that TRIPS did not address.[48] WIPO concluded two multilateral treaties in 1996 to address emerging issues raised by the internet—the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty,[49] often referred to as the WIPO Internet Treaties.[50]

While continuing IP harmonization efforts bore fruit, they also became increasingly difficult for a number of reasons. One of those reasons is simply the nature of the IP–trade tie. In the wake of TRIPS and TRIPS-Plus agreements, many nations resented more effective IP systems as an outside imposition rather than embracing them as a way to fulfill domestic needs and goals.[51] Similarly, while making IP a trade issue had both substantive and

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44 *See* Corrado et al., *supra* note 2, at 682–83.

45 *See* Ronald O'Leary*, How Treaties and Technology Have Changed Intellectual Property Law*, 16 J. INT'L BUS. & L. 87, 94–96 (2016).

46 Kim Linton & Semanik *supra* note 32, at 4–5.

47 *See e.g.*, Free Trade Agreement Between the Republic of Korea and the United States of America, U.S.–S. Kor., June 30, 2007, art.11.1–11.20 [hereinafter KORUS], https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

48 *See* KORUS, *supra* note 46, at art.11.1–11.20.

49 *See* WIPO Copyright Treaty, Dec. 20, 1996, arts. 4–5, 11–12 [hereinafter WCT], http://www.wipo.int/treaties/en/text.jsp?file_id=295166; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, arts. 15, 18–19 [hereinafter WPPT], http://www.wipo.int/wipolex/en/details.jsp?id=12743.

50 *See* Barry B. Sookman & James Gannon, *European Union Ratifies WIPO "Internet Treaties," in* 5 MCCARTHY TÉTRAULT CO-COUNSEL: TECH. L.Q., Feb. 11, 2010, at 1, 17, https://s3.amazonaws.com/documents.lexology.com/6a8bb1e8-8985-45fa-a2ef-771baee1e44e.pdf (noting that the ratification of the treaties marked "the first time that the European Union was accorded full Contracting Party in the field of copyright with WIPO, the United Nation's specialized intellectual property agency"). The Internet Treaties require countries to provide a framework of basic rights and ensure that the owners of those rights will be protected when their works fall victim to unauthorized distribution through new technologies. The treaties establish norms among member countries for issues such as anticircumvention and rights management information. *See* WCT, *supra* note 49, arts. 11–12; WPPT, *supra* note 49, arts. 18–19.

51 *See* Joseph E. Stiglitz, *How Trade Agreements Amount to a Secret Corporate Takeover*, HUFFINGTON POST, https://www.huffingtonpost.com/joseph-e-stiglitz/trade-agreements-amount-to-corporate-takeover_b_7302072.html (last visited Oct. 17, 2017) ("[Trade] agreements go well beyond trade, governing investment and intellectual property as well, imposing fundamental changes to countries' legal, judicial, and regulatory frameworks, without input or accountability through democratic institutions.").

tactical benefits for the advancement of IP, it turned IP into just one of several items on the trade agenda. As Robert Sherwood observed, it made IP merely another "bargaining chip" in trade negotiations, something to be withheld and never traded freely or cheaply.[52] IP thus became something demanded and negotiated between trading partners rather than a tool of domestic economic development.[53] Another challenge was that as TRIPS was implemented, the global HIV crisis was burgeoning. Because drug companies had just created the first drugs capable of effectively combatting HIV, they were still under patent protection, and a perception arose that patent protection was a barrier to access to medicine.[54] This issue made IP a subject of popular concern and controversy. For all these reasons, improvements in IP regimes have not been seen as win–win propositions but, rather, concessions that must be negotiated painstakingly, step-by-step.

Another challenge to improving IP systems is that skepticism of more effective IP systems gave birth to a large infrastructure of permanent resistance to more effective IP systems as some international organizations, nongovernmental organizations ("NGOs"), and other interested parties began a long-term mission of opposing enhancement of IP laws.[55] These organizations often employ nationalistic rhetoric to claim that efforts to amend developing countries' IP laws are simply a way for more powerful foreign nations and multinational corporations to impose self-serving laws that limit the availability of critical technologies in those countries.[56] This sentiment has gained traction in response to the "bargaining chip" reputation of IP rights, and it exposes one of the limits of well-intentioned harmonization efforts based on the IP–trade tie over the last twenty-five years.

As IP has become more controversial, so has trade. Skepticism of trade has migrated from the fringe to mainstream politics.[57] As the trade agenda

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52 Robert M. Sherwood, *Intellectual Property: A Chip Withheld in Error*, *in* COMPETITIVE STRATEGIES FOR THE PROTECTION OF INTELLECTUAL PROPERTY 73, 73–84 (Owen Lippert ed., 1999) ("The withholding of higher levels of intellectual property protection as a bargaining chip in trade negotiations is being done . . . in the expectation that in future international-trade negotiations, developing countries can gain advantages by withholding and bargaining with this chip.").

53 *See* Mark F. Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries* 97 KY. L.J. 79, 87–88 (2008) (describing how the "linkage" of IP to trade—with its unspoken understanding that "poor countries would receive greater access to developed country markets in exchange for protecting" the IP of those countries—has "reinforced the long–standing view of intellectual property as a North–South issue" only concerned with bargaining and politics).

54 James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261, 269–71, 323, 325 (2002).

55 *NGOs Urge PM to 'Resist Pressure' from U.S. on IPRs*, THE HINDU (June 2, 2016, 11:02 PM), http://www.thehindu.com/business/Industry/NGOs-urge-PM-to-%E2%80%98resist-pressure%E2%80%99-from-U.S.-on-IPRs/article14380443.ece (listing groups that have resisted international IP harmonization efforts, including the Forum Against FTAs, the Centre for Internet and Society, the Third World Network, and the National Working Group on Patent Laws, among others).

56 *See id.*

57 *See* Mui, *supra* note 13.

has become more difficult to advance, the IP–trade tie has become less effective. As a result of these developments, the IP–trade agenda has suffered notable reversals in recent years. The most notable defeat has been the United States' withdrawal from the Trans-Pacific Partnership ("TPP") after the agreement became a lightning rod in the U.S. domestic political debate.[58]

Aimed at strengthening economic ties among a group of countries with a combined population of about 800 million, the TPP built on previous trans-pacific trade agreements by proposing to reduce tariffs and foster trade through the coordination of policies and regulations.[59] In early 2017, the new U.S. presidential administration pulled the country out of the negotiations amid newfound nationalist and isolationist sentiments.[60] And while the remaining participants have worked to salvage the agreement and have proceeded without the United States, the loss of the United States has rendered the partnership far less influential.[61]

Even before the United States withdrew from the TPP, the IP chapter of the agreement had been one of the most controversial parts. Proposed changes to IP included extending the term of copyright to match the longer term provided by the United States and other countries; strengthening market exclusivity for biologics; and strengthening trade secret protection, including protection from misappropriation of trade secrets by state-owned entities and criminal penalties for trade secret theft.[62] Civil society and activist groups criticized the IP provisions throughout the negotiating process. They generated a large volume of research papers, videos, and social media complaining that the negotiations were secret and the IP provisions unknown, while also asserting that the IP provisions were certain to harm internet freedom and access to medicine.[63]

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58 *See id*. ("[C]anceling the TPP was one of the clarion calls of Trump's campaign," but "[e]nding America's involvement in the TPP was also a top priority for Democrats.").

59 *TPP: What Is It and Why Does It Matter?*, BBC NEWS (Jan. 23, 2017), http://www.bbc.com/news/business-32498715.

60 *See* Eric Bradner, *Trump's TPP Withdrawal: 5 Things to Know*, CNN POLITICS (Jan. 23, 2017), https://www.cnn.com/2017/01/23/politics/trump-tpp-things-to-know/index.html; Charles Krauthammer, *Trump's Foreign-Policy Revolution*, NAT'L REV. (Jan. 27, 2017, 1:00 AM), https://www.nationalreview.com/2017/01/trump-foreign-policy-isolationsim-america-first-allies-nato-trans-pacific-partnership/.

61 Motoko Rich, *TPP, the Trade Deal Trump Killed, Is Back in Talks Without U.S.*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html ("The problem is, when you take the United States out, the United States is two-thirds of the TPP . . . [and without U.S. involvement] [w]hat is the point of the deal anymore?" (quoting Jeffrey Wilson, Research Fellow at Perth U.S.–Asia Center, Univ. of Austl.)).

62 *See* Katherine Linton, *The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research,* J. INT'L COM. & ECON., Sept. 2016, at 1, 9.

63 *See e.g.*, Sean M. Flynn, Brook Baker, Margot Kaminski & Jimmy Koo, *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 119 (2012) ("[The TTP] would heighten standards of protection for rights holders well beyond that which the best available evidence or inclusive democratic processes support. It contains insufficient

Finally, as of this writing, the U.S. presidential administration is in the midst of what appears to be a profound reordering of the United States' trade relationships. Long-settled trade agreements are being reconsidered and the US, Mexico, and Canada have already renegotiated the North American Free Trade Agreement.[64] The President has imposed tariffs on steel and aluminum broadly applicable to many U.S. trading partners.[65] The United States is in an escalating trade confrontation with China.[66] At this point, the "Washington Consensus," which led toward ever-greater globalization and integration of markets for the past two generations,[67] is at best endangered or perhaps even dead.[68] It is not a propitious time for trade agreements or for any attempt to achieve IP harmonization through new trade agreements.

While next-generation, IP–inclusive trade agreements such as the TPP have stalled, the potential alternative of multilateral standalone IP treaties has not fared much better. In 2012, the Anti-Counterfeiting Trade Agreement ("ACTA") sought to curb IP piracy and counterfeiting through the establishment of international enforcement standards and greater cooperation among customs authorities and law enforcement.[69] But following internet campaigns and street protests in Europe against a perceived loss of online liberties, ACTA was defeated despite the support of twenty-two EU member states,

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balancing provisions for users, consumers, and the public interest." (footnote omitted)); Joseph E. Stiglitz, *Don't Trade Away Our Health*, N.Y. TIMES (Jan. 30, 2015), https://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html; *INFOGRAPHICS: How Provisions in the TPP Will Hurt Access to Affordable Drugs*, DOCTORS WITHOUT BORDERS (July 12, 2013), https://www.doctorswithoutborders.org/what-we-do/news-stories/news/infographics-how-provisions-tpp-will-hurt-access-affordable-drugs.

64 Office of the U.S. Trade Representative, *United States-Mexico-Canada Agreement,* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement; Will Mauldin & Josh Zumbrun *Conflicting Forces Pull at Trump on Nafta,* WALL STREET J. (June 17, 2018, 6:09 PM), https://www.wsj.com/articles/conflicting-forces-pull-at-trump-on-nafta-1529255916 ("The future of the North American Free Trade Agreement, which binds the economies of the U.S., Canada and Mexico, has rarely looked as murky as it does right now.").

65 Krishnadev Calamur, *Trump Has Already Started Four Trade Wars—and Counting*, THE ATLANTIC (July 6, 2018), https://www.theatlantic.com/international/archive/2018/07/us-china-tariffs/564440/.

66 *See id.*

67 John Williamson, Peterson Inst. for Int'l Econ., The Washington Consensus as Policy Prescription for Development, Lecture in the Series "Practitioners of Development" Before the World Bank, (Jan. 13, 2004), https://piie.com/publications/papers/williamson0204.pdf.

68 *See* Mohamed A. El-Erian, *The Washington Consensus on Global Economic Policy Is Dead,* MARKETWATCH (Mar. 1, 2018, 3:48 PM), https://www.marketwatch.com/story/the-washington-consensus-on-global-economic-policy-is-dead-2018-02-27.

69 *See generally* Ministry of Foreign Affairs of Japan, Anti-Counterfeiting Trade Agreement, arts. 23.1, 24–25, 27 [hereinafter ACTA], https://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

the United States, and many other countries.[70] Other multilateral efforts have faced difficulty getting started, as progress in WIPO standing committees is slow at best.[71] The notable recent exception to these difficulties was the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which the signatories adopted in 2013.[72] This treaty appears to be the exception that proves the rule. It addressed an issue that generated sympathy and support while appealing to IP skeptics and IP owners alike.[73] While it established exceptions and limitations to IP protections, those exceptions were limited and tailored, and they were largely enshrined in many countries' existing law.[74] Multilateral standalone agreements do not appear to be an easy alternative to trade agreements as a way for improving IP standards.

In sum, while the IP–trade relationship has been fruitful, it has become more challenging. IP remains a significant part of the trade agenda and will be in the future as the value of global commerce increasingly lies in intangibles. However, rising skepticism of both IP and trade makes binding trade agreements an increasingly challenging venue for making global IP systems more effective. Nevertheless, the strategy is too useful to abandon, and as such, it might benefit from being supplemented and complemented by other processes.

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70 *Acta: Controversial Anti-Piracy Agreement Rejected by EU*, BBC.COM (July 4, 2012), http://www.bbc.com/news/technology-18704192.

71 Catherine Saez, *Frustrations Show at Slow Progress on Protection of Traditional Knowledge at WIPO*, INTELL. PROP. WATCH (Apr. 21, 2012), http://www.ip-watch.org/2012/04/21/frustrations-show-at-slow-progress-on-protection-of-traditional-knowledge-at-wipo/; Robyn Ayres, *Slow Progress: Report from Geneva on WIPO IGC Meeting 15-24 July 2013*, ARTS L. CTR. AUSTL. (Oct. 1, 2013), https://www.artslaw.com.au/articles/entry/slow-progress-report-from-geneva-on-wipo-igc-meeting-15-24-july-2013.

72 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, U.N.T.C., Reg. No. 54134, [hereinafter Marrakesh Treaty], https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54134/Part/I-54134-080000028049b1ad.pdf.

73 Hayley Tsukayama & Tom Hamburger, *Group Finalizes Treaty to Expand Book Access for World's Blind Community*, WASH. POST (June 26, 2013), https://www.washingtonpost.com/blogs/post-tech/post/group-finalizes-treaty-to-expand-book-access-for-worlds-blind-community/2013/06/26/461311fe-de83-11e2-948c-d644453cf169_blog.html?utm_term=.3799bbe81540; Krista L. Cox, *ARL Urges US to Ratify Marrakesh Treaty, Improve Access to Publications for Visually Impaired*, ASS'N RES. LIBR. (Mar. 15, 2018), http://www.arl.org/news/arl-news/4489-arl-urges-us-to-ratify-marrakesh-treaty-improve-access-to-publications-for-visually-impaired#.WywxKhIzob0; *Frequently Asked Questions on the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, NAT'L FED'N BLIND, https://nfb.org/marrakesh-treaty-faqs (last visited Aug. 14, 2018).

74 *See A.B.A.*, REPORT 1–3 (Aug. 2014), https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2014_hod_annual_100%20Marrakesh.authcheckdam.pdf.

B. *Current IP Harmonization Efforts Need More Complementary Processes*

Although trade agreements and treaties have been and continue to be effective in improving IP standards, there are limits to what treaties and harmonization can achieve. Harmonization simply cannot address all issues, given the fundamental differences in legal systems and other circumstances on the ground. Many details are, and should be, left to implementation. Finally, the negotiation process itself is not conducive to exploring issues and discussing solutions openly and flexibly. For all these reasons, additional supplementary processes might greatly benefit existing harmonization efforts.

Differences in local circumstances and legal systems impose limits on what can be achieved in a trade agreement or treaty. In many instances, further improvement in IP systems may require working within, or adjusting, a country's nonsubstantive civil and administrative procedures (e.g., provisions regarding access to evidence in litigation).[75] These sorts of improvements are difficult to mandate by treaty, as they tend to be unique to each country and implicate parts of the legal system that govern far more than IP. Other circumstances differ with respect to criminal procedure, cultural preferences for the use of lawyers, resources available for different processes, and more.[76] To be clear, this Article is not making the increasingly discredited claim that some cultures are incapable of respecting IP[77] but rather acknowledging the reality that certain institutional contexts differ greatly and will not change simply for the sake of IP harmonization. For example, countries with a French versus English legal heritage, with the resulting difference between the civil code and the common law, will inevitably approach lawmaking and judicial processes differently. Similarly, the world will never adopt the U.S. pretrial discovery system, and lawyers around the world would recoil in horror at the very suggestion.[78] Another example lies in resources available for IP administration; there are always going to be differences

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75 For data on differences in the law of privilege internationally, see Keith Slenkovich & Roman Krupenin, *Privilege in Multinational IP Litigation* (Dec. 15, 2017), https://www.law.berkeley.edu/wp-content/uploads/2017/12/15-Privilege-in-Multinational-IP-Litigation.pdf. For a discussion of differences in copyright standards internationally, see O'Leary*, supra* note 45, at 89.

76 *See* Marshall A. Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, 29 (1998).

77 *Compare* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY IN CHINESE CIVILIZATION 19–22 (1995) (contending that copying is endemic to Chinese culture due to Confucian ethics), *with* Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT'L L. & COM. REG. 1, 12 (2006) (contending that American IP scholars have misunderstood Chinese history and ethics and that departures from Confucian ethics promoting social order and ethical behavior, along with other historical and economic circumstances, are to blame for China's IP issues in the 1990s and early 2000s).

78 Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 308 (2002).

between the resources that a large, wealthy country such as the United States or Japan can devote to administering an IP office versus a smaller country, whether wealthy or not. Nevertheless, there is no need to give up on improving IP because of such differences. While universal treaty obligations may be unsuitable for certain details, countries with similar legal heritages or similar resources can learn from one another and reform their IP systems accordingly.

In other instances, treaty provisions will have their intended effect only when implemented appropriately, which no treaty can guarantee. Effective implementation requires capable and educated judges and officials who understand the new laws. Where they have discretion, which they inevitably do, they can benefit greatly from successful models in other countries that produce precedents and recommendations that they can apply to the facts of their cases. For example, constructing appropriate injunctive relief in an IP case can require a nuanced understanding of how to balance the interests of the parties. Capacity–building efforts must be focused on both changes to the law and subsequent successful application to ensure that a treaty accomplishes its purpose.[79]

Finally, the buildup to a treaty negotiation often makes open, candid, and creative discussion difficult. When statements are made in anticipation of an official negotiation leading to a binding agreement in the background, the parties, their constituents, and other stakeholders take care not to indicate any interest or willingness to change that might cede bargaining power. Discussion of creative or novel solutions may best be avoided, lest the parties be "stuck" with them in a binding agreement.[80] Such reticence applies not just between parties but also to discussions between governments and their own nations' businesses and NGOs in this context. While no diplomatic process will allow for complete candor, the discussions leading to the IP provisions in a trade agreement or multilateral IP treaty are particularly constrained by their nature.[81] Less formal dialogues may be better suited to identifying new approaches and building support for proposals that can later be implemented unilaterally by several countries or eventually incorporated into more formal agreements.

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79 *See* C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 855–56 (1989); Elizabeth Tamale, *Challenges Facing LDCs with Regards to Trips Implementation: The Case of Uganda*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Sept. 24, 2014), https://www.ictsd.org/bridges-news/bridges-africa/news/challenges-facing-ldcs-with-regard-to-trips-implementation-the-case; PEDRO ROFFE, CTR. FOR INT'L ENV'T, INTELLECTUAL PROPERTY, BILATERAL AGREEMENTS AND SUSTAINABLE DEVELOPMENT: THE CHALLENGES OF IMPLEMENTATION 9–11 (2007), http://www.ciel.org/Publications/FTA_ImplementationPub_Jan07.pdf.

80 Daniel Benoliel & Bruno Salama, *Towards an Intellectual Property Bargaining Theory: The Post-WTO Era*, 32 U. PA. J. INT'L. L. 265, 271 (2010).

81 *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 24 (2004); Joseph Farrell, *Intellectual Property as a Bargaining Environment*, *in* 9 INNOVATION POLICY AND THE ECONOMY 39, 40–41 (Josh Lerner & Scott Stern eds., 2009).

A new approach that focuses on nonbinding, expert dialogue among private parties and officials could overcome many of these challenges. It could identify useful solutions to IP enforcement issues that might work for groups of similar countries, even if not universally applicable. It could support more effective implementation of laws by documenting and sharing best practices. It can set the stage for later, better-informed unilateral or multilateral IP reform by engendering a more open and candid dialogue earlier in the process. In the next Part, this Article discusses the authors' proposal for such a dialogue.

II. A MULTILATERAL, VOLUNTARY, DIALOGUE-BASED PROCESS IS A PROMISING WAY FORWARD

To make further progress on improving global IP systems, we need new approaches that complement existing methods while avoiding some of the downsides. The authors of this Article propose establishing standing diplomatic dialogues that include both government officials and the private sector to discuss and document best practices for drafting and implementing IP laws and procedures. These IP Best Practices Dialogues will determine the elements needed in law and procedure to make particular IP rights function effectively while allowing for differences in the legal systems and needs of diverse countries. The dialogues will be voluntary, and the results will be nonbinding.

While nonbinding dialogues about global IP standards occur frequently in both official and unofficial venues, the authors envision an IP Best Practices Dialogue as a more formal, although voluntary, process than previous nonbinding discussions regarding global IP standards. This proposal is not for "mere" talk but rather is designed to deliver detailed recommendations through focused engagement. In the terminology of international diplomacy, the authors propose to initiate a Track 1.5, or "hard" Track 2, diplomatic dialogue that includes experts, national representatives, and stakeholders with direct experience of the challenges of commercializing and enforcing IP rights.[82] Such dialogues lie between the official processes of bilateral or multilateral negotiations and exclusively private, nonbinding dialogues among civil society organizations. A Track 1.5 process can complement implementation of existing agreements as well as enhance discussions leading up to new agreements. It can also provide greater substance and richer detail for discussions that occur continually in a variety of other intergovernmental and international forums, including WIPO standing committees, the WTO TRIPS Council, the Trans-Atlantic IP Dialogue, and the Asia-Pacific Economic Cooperation forum ("APEC"), to name a few.

This Part details how the authors envision IP Best Practices Dialogues working, the functions they would fulfill, and their benefits. This Part

82 *See* Nan & Strimling, *supra* note 18; Job, *supra* note 18, at 122.

provides a general description of the proposal, while the following Part provides a specific example of how this proposal would work in practice by describing the Trade Secrets Best Practices Dialogue that the authors, working with others, have already launched.

A. *Envisioning the IP Best Practices Dialogue*

An IP Best Practices Dialogue will be a nonbinding, expert-driven, focused discussion that includes many perspectives. It should take cues from previous IP dialogues but should be modeled on the more directed model provided by existing Track 1.5 dialogues regarding other issues. This Part explains the necessary characteristics of an IP Best Practices Dialogue and how it would function and compare it to existing precedents.

1. Characteristics of an IP Best Practices Dialogue

To be effective, an IP Best Practices Dialogue should have at least the following characteristics:

(1) the results of the Dialogue should be *voluntary*;

(2) the Dialogue should address *diverse perspectives*;

(3) the Dialogue should focus *on expert and experienced* views;

(4) the subject matter of the dialogue should be *detailed, practical, and focused*; and

(5) the Dialogue should result in *concrete recommendations for best practices*.

a. *Voluntary*

An IP Best Practices Dialogue should be a true discussion rather than a negotiation. It should be entered in a spirit of exploration, with the goal of discussing and identifying best practices. No single country has a system that is the best in all respects. Whether it is through the substance of laws, the administrative or court procedures, or the IP office practices, to name a few examples, countries can learn from one another. An open dialogue will facilitate this learning, so an IP Best Practices Dialogue will be voluntary, with respect to both participation and application of results. This Article sees

groups of willing and interested parties from several nations coming together to learn from one another.

b. *Diverse Perspectives*

The best dialogue will include representation from diverse legal systems, countries, and actors. One of the reasons the authors see a dialogue as necessary (as discussed further below) is that different types of legal systems often require different procedures. For example, common law systems have different procedures for gaining access to proof than civil law systems.[83] An IP Best Practices Dialogue would be incomplete without representatives from both types of systems who could share knowledge of effective procedures between and within each type of system. Similarly, IP systems include many actors who each bring knowledge to the table as to what is necessary, practical, and effective. Ideally, the dialogue should include diverse innovators, creators, and businesses who rely on IP as a commercial asset, the attorneys who represent them, experts from national IP offices, judges, and other key stakeholders. In addition, diversity would also be helpful with respect to geography and economic circumstances, including both leaders in innovation and those who aspire to lead.

c. *Expert and Experienced*

An IP Best Practices Dialogue should primarily occur among those who have direct knowledge of what actually works and does not work with respect to drafting and implementing IP laws. Government officials and diplomats likely will play key roles as conveners, facilitators, organizers, and champions, but discovering best practices requires hearing most from those who have expertise and direct experience with IP. This focus on experts and affected parties may be a key difference between an IP Best Practices Dialogue and a trade or treaty negotiation. In the latter context, some countries are fortunate to have representatives who are experts in both negotiation and subject matter.[84] In any event, countries often consult experts and affected parties.[85] Countries may include them in their delegations, but a negotiation that binds a sovereign nation or sets policy requires government representatives

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83 Gillian K. Hadfield, *The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law* 10–11 (Univ. S. Cal. CLEO, Research Paper No. C07-3, 2006).

84 *See, e.g.*, 19 U.S.C. § 2171(b)(2) (2012) (stating that the Office of the United States Trade Representative includes a presidentially appointed Chief Innovation and Intellectual Property Negotiator).

85 *See, e.g.*, *Advisory Committees*, USTR.GOV, https://ustr.gov/about-us/advisory-committees (last visited Sept. 5, 2018) (listing the Office of the U.S. Trade Representative's multiple advisory committees it consults about trade negotiations).

to play the central role.[86] By contrast, an IP Best Practices Dialogue seeks to discuss and identify best practices rather than to engage in the give-and-take, and finality, of binding negotiations. In this instance, those who are experts, IP owners, and other stakeholders can and should play a leading role.

d. *Detailed, Practical, and Focused*

An IP Best Practices Dialogue should be focused on a relatively fine level of detail rather than on general principles. In many instances, one can find general principles, along with some level of detail, in existing international agreements, but the *how* is often absent and, indeed, must be absent from a mandatory agreement.[87] For example, one can say that patent applications should be processed expeditiously, but doing so is a great challenge for many IP offices.[88] Similarly, access to evidence is a key issue for trade secret protection, but high-level principles or obligations cannot and do not help a country determine how to provide it, especially if legal systems diverge greatly. This Article envisions an IP Best Practices Dialogue addressing key issues, topic by topic, with sufficient consideration and detail to identify well-tested practical solutions and useful new ideas for making IP laws effective.

e. *Concrete Recommendations for Best Practices*

Finally, and essentially, an IP Best Practices Dialogue should result in concrete recommendations set forth in a nonbinding, detailed report that identifies the best solutions to the problems discussed, with real-world examples. The recommendations should address diverse circumstances by identifying best practices for particular circumstances, such as for civil versus common law systems.

2. Conducting a Best Practices Dialogue

An IP Best Practices Dialogue could be convened and conducted by any combination of governments, international organizations, intergovernmental organizations, NGOs, or others. But to be effective, an IP Best Practices

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86 *See* William Davidson & Joseph Montville, *Foreign Policy According to Freud*, 45 FOREIGN POLICY, Winter 1981–82, at 145, 154–55.

87 For good reason, as discussed in Part II.A.3.

88 MARK SCHULTZ & KEVIN MADIGAN, THE LONG WAIT FOR INNOVATION: THE GLOBAL PATENT PENDENCY PROBLEM 8–9 (2016), https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2016/10/Schultz-Madigan-The-Long-Wait-for-Innovation-The-Global-Patent-Pendency-Problem.pdf. While there are many bilateral discussions of this topic and many good ideas for improvement, *see id.*, discussions leading to a set of best practices could be quite helpful.

Dialogue must include both private actors and government officials. This combination is essential, as IP laws are private laws that facilitate private transactions but also have substantial public policy consequences for economic and innovation policy. IP issues often present multifaceted problems, requiring input from both private actors and public entities. Such problems call for multidimensional responses that emphasize transparency and voluntary participation with roles for, and cooperation among, the private sector, governments, and international organizations.[89] It is possible that private and public actors could work in parallel in a multitrack process or together in a single process. This Article proposes that the dialogue be concentrated largely in a single track, with private parties working with government officials participating in a nonofficial capacity. Such a process is often referred to as a Track 1.5 dialogue, which lies between what is called Track One and Track Two Diplomacy.[90]

In diplomatic nomenclature, the difference between Track One and Track Two Diplomacy is a divide between government-to-government relations and relations between private parties from different nations.[91] Track One Diplomacy encompasses official action by governments in bilateral or multilateral settings. "Track One [Diplomacy is] traditional—policy statements by the president and secretary of state, for example, or official visits and meetings. Government officials would draft their statements and position papers with the guidance of the full dimensional analyses . . . provided by their staffs."[92] By contrast, Track Two Diplomacy is conducted between private parties outside official channels. "Track two diplomacy is unofficial, non-structured interaction . . . . Scientific and cultural exchanges are examples of track two diplomacy."[93] In recent decades, the popularity of Track Two dialogues has grown, as they are recognized as an important complement to Track One efforts.[94] Today, the concept encompasses dialogues among NGOs, business-to-business discussions, and "[u]nofficial, nongovernmental, analytical, policy-oriented, problem-solving efforts by skilled,

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89 *See* Roy Kamphausen, *New Collaborative Approaches to IP Protection* 1–3 (Nat'l Bureau of Asian Research, Working Paper, 2014), http://nbr.org/downloads/pdfs/eta/New_Collaborative_Approaches_to_IP_Protection.pdf.

90 *See* Nan & Strimling, *supra* note 18; Job, *supra* note 18, at 122. Southeast Asia has blurred meanings where Track 2 is closer to what we mean by 1.5, and while some commentators, notably the Institute for Multi-Track Diplomacy, refer to multiple tracks, that has not caught on.

91 Davidson & Montville, *supra* note 86, at 155–57.

92 *Id.* at 154–55; *see also* Joseph V. Montville, *The Arrow and the Olive Branch: A Case for Track Two Diplomacy*, *in* 1 THE PSYCHODYNAMICS OF INTERNATIONAL RELATIONSHIPS: CONCEPT AND THEORIES 161, 162 (Vamik D. Volkan, Demetrios A. Julius & Joseph V. Montville eds., 1990) (description of Track Two Diplomacy by the scholar credited with originating the term).

93 Davidson & Montville, *supra* note 86, at 155.

94 *See* John W. McDonald, *Further Exploration of Track Two Diplomacy*, *in* TIMING THE DE-ESCALATION OF INTERNATIONAL CONFLICTS 201–20 (Louis Kriesberg & Stuart J. Thorson eds., 1991).

educated, experienced and informed private citizens interacting with other private citizens."[95]

Track 1.5 Diplomacy brings together both officials and private parties, as the name implies. Unlike in Track One Diplomacy, government officials do not negotiate or take official positions. Their participation is deemed informal.[96] Either governmental actors or private actors may convene Track 1.5 dialogues, with the agenda set by either or both working together.[97] The mixed nature of a Track 1.5 process has distinct benefits. While some Track Two dialogues and institutions are closely allied with Track One institutions,[98] it is often difficult to bridge the gap between Track One and Track Two. The problem lies on both sides of the divide, as officials may not be sufficiently aware of and invested in Track Two dialogues to bring their results into official policy discussions, while Track Two participants may lack full knowledge of the priorities and practical needs of government officials.

Thus, an IP Best Practices Dialogue could function well as a Track 1.5 dialogue. Relevant participants would include leaders and experts from national IP offices; officials with responsibility for economic, innovation, and trade policy; trade associations and business representatives with IP interests; think tank experts; academic experts; and other civil society representatives.

In terms of process, this Article envisions establishing a standing dialogue with regular meetings focused in detail on practical issues, with the goal of producing reports of best practices. These meetings should be something more than mere conferences or seminars. While such meetings have their place, the purpose of the IP Best Practices Dialogue is to discover best practices for drafting, implementing, and administering national IP laws. On the other hand, given its nature as a Track 1.5 dialogue, an IP Best Practices Dialogue would not be a negotiation toward an official agreement. While the intended result is to document concrete, practical, and useful recommendations, which might later serve as the basis for either unilateral or multilateral action, the IP Best Practices Dialogue would not itself be a negotiation.

A few other aspects of the process should ensure that the IP Best Practices Dialogue results in useful recommendations. The agenda will be determined by a steering group of representative participants, with input and feedback on future issues obtained at each of the regular meetings. Expert rapporteurs will report on the outcome of the dialogue, producing best practices recommendations that, while nonbinding, will be detailed and well supported. The reports of best practices recommendations will be disseminated

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95 *Id.* at 204.

96 *See* Job, *supra* note 18, at 122.

97 *See* Oliver Wolleh, *Track 1.5 Approaches to Conflict Management: Assessing Good Practice and Areas for Improvement*, BERGHOF FOUND. FOR PEACE SUPPORT 2 (Mar. 2007), https://peacemaker.un.org/sites/peacemaker.un.org/files/Track1.5ApproachestoConflictManagement_BerghofFoundation2007.pdf.

98 *See* Job, *supra* note 18, at 122.

widely and promoted and explained through op-eds, blog posts, and social media.

3. Precedents for the IP Best Practices Dialogue

This Article's proposal is neither new nor unprecedented, as it has roots in existing international IP dialogues as well as prior Track 1.5 Diplomatic initiatives regarding other topics. What this Article proposes is to bring IP into this format of discussion. Examining some of these precedents helps show what an IP Best Practices Dialogue can add to existing discussions.

Currently, there are several transatlantic and bilateral IP dialogues that include Japan, China, the European Union, and the United States. For example, the Transatlantic Economic Council Intellectual Property Rights Working Group (previously known as the U.S.–EU IPR Working Group) has met annually since 2005.[99] This group holds government-to-government talks and consults with stakeholders from both business and NGOs.[100] It focuses on "engagement on IPR issues in third countries, customs cooperation, and public-private partnerships."[101] The goals and format provide a useful basis for ongoing consultation and cooperation among governments and stakeholders, but they do not include the focused, in-depth, expert discussions envisioned for the IP Best Practices Dialogue.

A more focused dialogue was recently conducted by APEC, which published *Best Practices in Trade Secret Protection and Enforcement Against Misappropriation* in 2016 ("APEC Best Practices Principles").[102] The APEC Best Practices Principles are relatively detailed, particularly for an intergovernmental document, and they represent an excellent starting point for what the authors propose.[103]

Nevertheless, the APEC Best Practices Principles still lack the sort of detail that an IP Best Practices Dialogue could provide. For example, one of the APEC Best Practice Principles includes a statement on procedural measures, one of which is that APEC economies should provide that "trade secrets may be protected from disclosure during enforcement proceedings,

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99 *See Transatlantic Economic Council (TEC) IPR Working Group*, EXPORT.GOV (July 16, 2016), https://www.export.gov/article?id=Transatlantic-Economic-Council-TEC-IPR-Working-Group.

100 *See* WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, U.S.–EU TRANSATLANTIC ECONOMIC COUNCIL JOINT STATEMENT 1 (Dec. 10, 2017), https://obamawhitehouse.archives.gov/the-press-office/2010/12/17/transatlantic-economic-council-joint-statement.

101 *See* U.S. DEP'T OF STATE, BUREAU OF EUROPEAN & EURASIAN AFFAIRS, TRANSATLANTIC ECONOMIC COUNCIL: ANNEXES TO THE TEC JOINT STATEMENT (Nov. 29, 2011), http://www.state.gov/p/eur/rls/or/178419.htm#ipr.

102 *Best Practices in Trade Secret Protection and Enforcement Against Misappropriation*, ASIA-PAC. ECON. COOPERATION 1, 1 (Nov. 2016), https://ustr.gov/sites/default/files/11202016-US-Best-Practices-Trade-Secrets.pdf.

103 *See id.* at 1–3.

such as through the use of protective orders and measures limiting access to sensitive materials."[104] This is an important principle, as the ability to protect trade secrets during litigation has emerged as a key issue in improving trade secret laws globally. For example, the European Union's recent Trade Secrets Directive[105] includes, in Article 9, a provision requiring member countries to protect the confidentiality of trade secrets in the course of legal proceedings.[106] Although Article 9 of the Trade Secrets Directive is considerably more detailed than even the APEC Best Practices Principle regarding the same topic, it still does not, and cannot, really provide the needed guidance to courts unfamiliar with providing such protective measures. As the authors of the APEC Best Practices Principles observed in forums discussing the provision,[107] experts from the EU noted uncertainty as to how courts in member states without such experience would implement the obligation and the need for guidance on that point.[108] An IP Best Practices Dialogue could fill such gaps in knowledge. For example, the discussion could include judges and lawyers familiar with court proceedings that effectively protect secrecy from diverse jurisdictions. It could address procedures that courts use to balance the plaintiff's need to protect its secrets with the defendant's need and right to obtain sufficient evidence to understand the accusations and prepare a defense. The resulting report could distill best practices and provide helpful examples.

B. *Functions and Benefits of the IP Best Practices Dialogue*

An IP Best Practices Dialogue will fulfill three roles that are lacking in current processes. First, an IP Best Practices Dialogue can complement existing agreements and obligations, filling in the details that are necessary to make the minimum standards imposed by existing agreements effective and optimal for national policy goals. Second, a Dialogue can serve as the basis for later official actions. The flexibility afforded by the Dialogue is useful here, as official action could be unilateral, multilateral, or "bundled" unilateral actions (several nations working in concert but not subject to a multilateral agreement). Third, an IP Best Practices Dialogue could make progress on issues where there is concern about the binding, one-size-fits-all nature of multilateral agreements. The nonbinding, nonofficial nature of the Dialogue makes it easier to discuss sensitive issues. Also, its ability to provide diverse recommendations that account for context and different circumstances may

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104 *Id.* at 3.

105 2016 O.J. (L 157) 1, 1.

106 *Id.* at 12.

107 *See e.g.*, Patent & Trade Secrets Law, Panel at the Twenty-Fourth Annual Conference International Intellectual Property Law & Policy, Fordham University School of Law (Mar. 31, 2016) (transcript on file with authors).

108 *Id.* at 11.

make parties more willing to address topics that otherwise cannot be broached in Track One dialogues.

While a voluntary dialogue might sound less effective than trade negotiations or standalone agreements, considering the context reveals its potential strengths. In the past few decades, minimum standards have been set, many of which are likely as detailed as possible for a multilateral agreement. Further progress in building effective systems requires filling in the details, and such detailed work needs to be more nuanced, subtle, and technical. For example, countries vary widely with respect to evidentiary and procedural rules. Convergence on these issues is unrealistic and often undesirable, given enduring differences in legal systems among countries, such as the difference between civil and common law systems. Nevertheless, there are sufficient similarities among groups of countries such that best practices can be identified for those in similar circumstances. By understanding and appreciating differences, principles can be developed to improve national laws and eventually serve as the bases for later multilateral agreements.

In essence, the time is right for such work. Thirty years ago, voluntary discussions may have led to endless talk. Today, mandatory minimum IP standards coupled with an increasing recognition in some countries that innovation is key to economic growth means discussions with a clear goal of producing best practices principles can lead to improvements.

III. A DIALOGUE ON TRADE SECRET LAW AS THE FIRST IP BEST PRACTICES DIALOGUE

This Article proposes that the first IP Best Practices Dialogue focus on improving the substance and implementation of trade secret laws globally. Such a Dialogue would provide an excellent proof of concept, as evidenced by the successful launch of such a Dialog by this Article's authors. This Part describes the increasing importance of trade secrets, makes the case for a Track 1.5 Trade Secrets Best Practices Dialogue, and then describes some of the key features of the Dialogue that this Article's authors are in fact developing.

A. *The Increasing Importance of Trade Secrets*

Weaknesses in trade secret regimes are consequential because trade secrets play an increasingly important role in business and global trade. Businesses, policymakers, and scholars have directed their attention to trade secrets in recent years, recognizing that they not only hold substantial economic value but also contribute significantly to innovation and influence knowledge

diffusion.[109] And while the value of trade secrets—because of their confidential nature—is not always easy to measure,[110] the world's top economies understand that economic strength is driven by these intangible assets and that protection is essential to maintaining their value.[111]

Trade secrets are often recognized as the "crown jewels" of companies' intellectual capital, with years of research dedicated to their development.[112] This prominent and growing reliance on trade secrets is evidenced by a 2010 survey of Australian, European, and U.S. companies, which found that trade secrets make up an average of two-thirds of the value of firms' information portfolios.[113] Moreover, the share of trade secrets in an IP portfolio rises to between 70 and 80% when evaluating knowledge-intensive industries such as manufacturing, information services, and scientific and high-tech services.[114] For U.S. companies alone, a 2014 report estimated the value of trade secrets owned to be $5 trillion.[115]

Trade secret protection serves a number of economic functions. First, the security it provides to investments in R&D spurs firms to invest in developing and commercializing technology because they are secure in the knowledge that they have at least some protection against that investment being undermined by misappropriation.[116] This reassurance supports the work of "training and developing employees, attracting financing, establishing joint ventures, and supporting business relationships."[117] It also allows firms to avoid overinvesting in security measures and, thus, use their

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109 *See* David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1104–06 (2012); Peter C. Pappas, *Protecting Our Trade Secrets Is Vital to Economic Growth*, THE HILL (Jan. 21, 2016, 7:00 AM), http://thehill.com/blogs/congress-blog/economy-budget/266472-protecting-our-trade-secrets-is-vital-to-economic-growth; Jennifer Brant & Sebastian Lohse, *Trade Secrets: Tools for Innovation and Collaboration*, *in* ICC INNOVATION AND INTELLECTUAL PROPERTY SERIES 11–12 (Research Paper 3, 2014).

110 *See* Risch, *supra* note 22, at 1–3; Linton, *supra* note 62, at 2 ("Precisely because they are secret in nature, empirical research on trade secrets has been difficult to conduct. International trade policy making, which often relies on supporting empirical research, is in early stages as well.").

111 *See* Schultz & Lippoldt, *supra* note 25, at 12 n.8 ("[B]arriers to accurate quantification include issues such as lack of internationally standardized valuation methodology for undisclosed information and reluctance of many firms to identify publicly the value of their secret assets.").

112 *See* Karl F. Jorda, *Trade Secrets and Trade-Secret Licensing*, *in* INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES 1043, 1046 (A. Krattiger et al. eds., 2007).

113 FORRESTER CONSULTING, THE VALUE OF CORPORATE SECRETS 4–5 (Mar. 2010), https://www.nsi.org/pdf/reports/The%20Value%20of%20Corporate%20Secrets.pdf.

114 *Id.*; U.S. CHAMBER OF COMMERCE, THE CASE FOR ENHANCED PROTECTION OF TRADE SECRETS IN THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 10 (2014), https://www.uschamber.com/sites/default/files/legacy/international/files/Final%20TPP%20Trade%20Secrets%208_0.pdf.

115 *Id.*

116 *See* Schultz & Lippoldt, *supra* note 25, at 11.

117 Kim, Linton & Semanik, *supra* note 32, at 12.

resources more cost-effectively.[118] Additionally, trade secrets create value by facilitating the diffusion of knowledge through the secure sharing of information and are "particularly well suited to current approaches to innovation, which emphasize incremental change and collaboration."[119] Effective trade secret protection thereby complements the underlying value of confidential business information by enabling companies to avoid wasted resources and lost opportunities to collaborate.[120]

The value of trade secrets is also indicated by the extensive and costly harm their theft can have on the economy. A recent report on the theft of U.S. IP by the Center for Responsible Enterprise and Trade estimated that the annual cost of trade secret theft is between one and three percent of GDP, or between $180 billion and $540 billion of the $18 trillion U.S. economy.[121] The report explains that in addition to the immediate harm companies experience when innovative information is stolen, these numbers do not account for indirect effects on the economy such as IP protection costs, which have risen significantly in response to cyber-enabled IP theft.[122] Additionally, there is a greater long-term effect when IP theft discourages firms from investing in new research and innovative efforts that could benefit the company, consumers, and the economy.[123]

Trade secrets are often relied on to secure innovation that cannot be protected by more conventional forms of IP, such as patents or copyrights, or when an IP owner cannot afford these other forms of protection. A pair of recent reports by the U.S. International Trade Commission surveyed thousands of U.S. firms to study the economic effects of trade and industrial policies in India and China on their business operations. The results reveal a clear appreciation of the importance of trade secrets.[124] Of the survey respondents, 56% of internationally engaged firms considered trade secrets "very important," compared to 48% for trademarks, 37% for patents, and 31% for copyrights.[125] Demonstrating an understanding of the significant loss

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118 *See* Risch, *supra* 22, at 42.

119 Brant & Lohse, *supra* note 109, at 11.

120 *Id.*

121 *Economic Impact of Trade Secret Theft: A Framework for Companies to Safeguard Trade Secrets and Mitigate Potential Threats*, CTR. FOR RESPONSIBLE ENTER. & TRADE, PRICEWATERHOUSECOOPERS 1, 3 (2014) [hereinafter TRADE SECRET THEFT], https://create.org/resource/economic-impact-oftrade-secret-theft.; *GDP (Current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US (last visited Aug. 14, 2018).

122 TRADE SECRET THEFT, *supra* note 121, at 21–22.

123 *Id.* at 20–22.

124 U.S. INT'L TRADE COMM'N, PUB. NO. 4501, TRADE, INVESTMENT, AND INDUSTRIAL POLICIES IN INDIA: EFFECTS ON THE U.S. 140, 144–45 (2014) [hereinafter USITC, Policies in India]; *see also* U.S. INT'L TRADE COMM'N, PUB. NO. 4226, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY 3–21 n.61 (2011) [hereinafter USITC, China: Effects].

125 USITC, Policies in India, *supra* note 124, at 140.

of value attributable to trade secret theft, these firms identified stolen trade secrets as their top IP concern, ahead of lost sales, damage to their brands, and the costs of IP enforcement.[126]

A 2017 report by the National Bureau of Asian Research explains that, in an era when IP theft can be difficult to detect or obtain legal redress for in the event of misappropriation, firms are now more likely to rely on trade secrets than other forms of IP protection to avoid public disclosure.[127] Unlike patents and trademarks, trade secrets do not have to be filed with an administrative agency and are not subject to review or disclosure before becoming effective, prompting a "do-it-yourself" designation by some scholars.[128] Trade secret protection also may be especially attractive for projects with potentially significant commercial value in the early stages of research and development that do not yet qualify for patent protection.[129] Additionally, unlike patents, which have a limited term of protection, "the lifecycle of trade secrets depends upon their secrecy," so their protection can exist in perpetuity.[130] Trade secrets can also be licensed indefinitely, and a licensee can be required to pay royalties even when the information is in the public domain.[131]

Small and medium-sized enterprises across the globe find trade secrets to be particularly important. A 2012 government report that surveyed the research and development activities of U.S. firms found that 56.2% of U.S. firms with less than 500 employees considered trade secrets "very important," compared to 45.4% for patents, 37.8% for trademarks, and 25.6% for copyrights.[132] Similar results have been found in surveys of European firms, which have shown a preference for trade secrets to patents, with the

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126 *Id.* at 144.

127 NAT'L BUREAU OF ASIAN RESEARCH, UPDATE TO THE IP COMMISSION REPORT, THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES 2 (2017), http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf.

128 *E.g.*, Linton, *supra* note 62, at 2 (citing the internal measures, such as contract and security procedures, of firms to protect trade secrets, rather than waiting for government protection). Of course, where both trade secret and patent protection are available for confidential business information, there may be certain disadvantages of opting for trade secret protection over a patent. If the innovative information is embodied in a product available to the public, the product could be reverse-engineered and the secret lost. Unlike patent protection, trade secret law does not provide an exclusive right to exclude a third party from making commercial use of the information if independently discovered or gleaned through reverse-engineering. Once the proverbial cat is out of the bag, anyone may access and make use of the innovative information with no recourse available to the original developer or owner.

129 *Id.* at 3.

130 R. Mark Halligan, *Trade Secrets v. Patents: The New Calculus*, LANDSLIDE, July/Aug. 2010, at 1, 1, http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJuly2010_halligan.authcheckdam.pdf.

131 *Id.*

132 NAT'L SCI. FOUND., NAT'L CTR. FOR SCI. & ENG'G STATISTICS, DETAILED STATISTICAL TABLES NSF 16-301, BUSINESS RESEARCH AND DEVELOPMENT AND INNOVATION: 2012 164–72 (2015), http://www.nsf.gov/statistics/2016/nsf16301/.

preference strongest among smaller businesses.[133] Trade secrets are perhaps the most important form of IP for the most innovative and trailblazing U.S. startups, protecting more than 90% of new technologies.[134] Additionally, more than 80% of licensing and technology transfer agreements involve trade secrets in some way, prompting international IP expert Bob Sherwood to dub them the "workhorse of technology transfer."[135] This recognition of the significance of trade secret protection by firms with fewer resources reflects an IP security mechanism with fewer up-front costs and obstacles to overcome before protection is effective.

Due to their concentrated reliance on trade secrets, small firms are also often more acutely threatened by trade secret theft than larger businesses.[136] This is in part due to their lack of diverse assets that would allow them to withstand the loss of IP, but it also stems from the fact that there is a greater amount of turnover in these young companies, adding to the risk of employees leaving with sensitive proprietary information.[137] For these reasons, effective trade secret laws are crucial for the sustainability of startups and the innovations they contribute to world economic growth.

More generally, trade secrets can facilitate and encourage national innovative activity and trade flows between countries. A recent study that one of the authors of this Article coauthored for the Organization for Economic Co-operation and Development ("OECD") found a positive association between the strength of trade secret protection and economic performance.[138] In particular, it found a positive relationship between increased trade secret protections and key indicators of innovation and international economic flows, such as R&D spending, foreign direct investment, and trade in goods and services.[139] The report stated, "Through such relationships, trade secrets protection may have positive implications for developments in domestic innovation, international technology transfer and access to technology-intensive inputs and related products."[140]

In sum, trade secrets are an increasingly important form of IP protection. They are key to the business strategies of both large and small companies. They foster investment in innovation, foreign direct investment, and

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133 Anthony Arundel, *The Relative Effectiveness of Patents and Secrecy for Appropriation*, 30 RESEARCH POLICY 611, 612–13 (2001).

134 EDWARD KAHN, INNOVATE OR PERISH: MANAGING THE ENDURING TECHNOLOGY COMPANY IN THE GLOBAL MARKET 63 (2007) (describing patents as "but the tip of the iceberg in an ocean of trade secrets").

135 *Id.*

136 David S. Almeling, *Four Reasons to Enact a Federal Trade Secrets Act*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 769, 786–88 (2009).

137 *See id.*

138 OECD, ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT 184 (2015), http://www.oecd.org/sti/ieconomy/KBC2-IP.Final.pdf.

139 *Id.*

140 *Id.*

commercial activity. And they are increasingly the targets of misappropriation, causing enormous losses.

C. *The Case for a Track 1.5 Trade Secrets Dialogue*

Despite the large and growing importance of trade secrets, a number of gaps in trade secret law persist that a Track 1.5 IP Best Practices Dialogue can effectively address. While recent efforts toward improvement and harmonization have gathered steam,[141] trade secrets are a relatively recent focus of efforts to make IP rights more effective.[142] One reason is that the issue is a relative newcomer to international IP treaties, with fewer details worked out than for other IP rights.

1. Trade Secrets: A Relative Newcomer to the International IP Scene

TRIPS was the first multilateral agreement to specifically protect trade secrets or "undisclosed information."[143] TRIPS Article 39 addresses the protection of undisclosed information, drawing from the preexisting unfair competition laws of the Paris Convention for the Protection of Industrial Property, which WIPO administered.[144]

Article 39 defines a trade secret as information that (1) is secret; (2) has commercial value because it is secret; and (3) has been subject to reasonable steps to keep it secret.[145] This definition mirrored many countries' practices and was widely embraced by jurisdictions in the process of shaping their own IP laws.[146] TRIPS requires WTO members to implement systems to protect trade secrets against theft and unfair competition, and members comply with this mandate in a variety of ways.[147]

While TRIPS defines the scope of trade secrets and lists the types of abuses in which misappropriation might occur, a number of details remain to be worked out. One of the authors of this Article coauthored an OECD study comparing national trade secret regimes for a diverse sample of countries,

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141 *See* Randy Kahnke, Kerry Bundy, Tyler Young & Elsa Bullard, *Key Trade Secret Developments of 2016: Part I*, LAW360 (Dec. 14, 2016, 4:56 PM), https://www.law360.com/articles/872712/key-trade-secret-developments-of-2016-part-1.

142 *See infra* Part III.C.1.

143 *Overview: The TRIPS Agreement*, WORLD TRADE ORG. (last visited Aug. 5, 2018), https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

144 *See* Schultz & Lippoldt, *supra* note 25, at 6. The Paris Convention entered into force on April 26, 1970. *Id.* at 9 n.5.

145 TRIPS Agreement, *supra* note 23, art. 39.2.

146 Schultz & Lippoldt, *supra* note 25, at 7.

147 *See infra* notes 149–54 and accompanying text.

which found significant divergence between countries and is detailed in the next subsection.[148]

2. Gaps in Existing Laws

Great differences persist with respect to trade secret protection. While some countries have adopted standalone trade secret statutes, others incorporate trade secret protections into their unfair competition statutes, or piecemeal across several statutes.[149] Still others have incomplete laws, relying on breach of contract at best.[150] More importantly, many countries have gaps in their laws or provisions that undermine what might otherwise be sufficient.[151] These shortcomings call for further work.

As noted earlier, one of the authors of this Article, Mark Schultz, coauthored extensive studies for the OECD on trade secret law.[152] These studies showed the need for more effective trade secret laws in many countries and helped inspire and inform the Trade Secrets Best Practices Dialogue proposed here as well as other recent reform efforts worldwide.[153] As such, the studies are worth some detailed examination.

To compare trade secret protection among countries using an objective standard, the author, with coauthor Douglas Lippoldt, developed the Trade Secrets Protection Index ("TSPI").[154] The TSPI is structured on five main components:

(1) definitions and coverage;

(2) specific duties and misappropriation;

(3) remedies and restrictions on liability;

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148 *See infra* Part III.C.2.

149 Linton, *supra* note 62, at 3.

150 Schultz & Lippoldt, *supra* note 25*,* at 8.

151 *See id.* at 17–20.

152 *Id.* at 5; Douglas C. Lippoldt & Mark F. Schultz, *Uncovering Trade Secrets – An Empirical Assessment of Economic Implications of Protection for Undisclosed Data*, (OECD Trade Policy Paper No. 167, 2014), http://dx.doi.org/10.1787/5jxzl5w3j3s6-en.

153 *See* Linton, *supra* note 62, at 8 (discussing recent studies on trade secrets and explaining that "qualitative evidence suggests that there may be demand for strengthening trade secret protections in developing countries").

154 Schultz & Lippoldt, *supra* note 25, at 22 ("[T]he index's function is descriptive, not normative, and the scores it produces are thus neither grades nor ratings. Rather, the score is strictly a measure of stringency of protection. As a measurement tool, the TSPI simply measures. Additional empirical work or subjective assessment will determine whether a particular measurement is associated with particular outcomes or should be assigned a particular adjective.").

(4) enforcement, investigation, and discovery; data exclusivity; and

(5) system functioning and related regulation.[155]

"The approach to scoring provides up to one point for each of the five main components of the index and a maximum total score for the index of five points."[156] "The index captures objective, verifiable information on the stringency of available protections in a manner that is internationally comparable and non-normative."[157] In other words, the index is "descriptive, not normative."[158] It was not developed to "name-and-shame" particular countries but rather to enable detailed comparisons and economic analysis.

As Schultz and Lippoldt noted, the index was designed to be a meaningful, useful, and objective indicator.[159] The elements were chosen to enable objective scoring based on "yes" or "no" questions about observable, verifiable facts, such as laws on the books.[160] The ability to verify facts was important—an element in a legal system had to be clear enough to guide a business making an investment decision.[161]

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155 *Id.* at 23.

156 *Id.* The five index components are scored based on thirty-seven underlying indicators. *See id.* at 27–29. These are primarily empirical indicators employing objective criteria that can be independently verified. Some dimensions concerning system operation take into account peer-reviewed expert opinion. *See, e.g.*, *id.* at 201. For details on the scoring and structure, see Schultz & Lippoldt, *supra* note 25, at 27–29.

157 *See* LIPPOLDT & SCHULTZ, *supra* note 23, at 3. The TSPI is an innovative effort to create an objective index facilitating international comparisons of legal systems' trade secret protections. Similar indices compare other types of intellectual property and national trade secret laws. For example, Park and Lippoldt include indices measuring protection of patents, trademarks, and copyright. Walter G. Park & Douglas Lippoldt, *Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries* (OECD Trade Policy Paper No. 62, 2008), https://www.oecd-ilibrary.org/docserver/244764462745.pdf?expires=1540832730&id=id&accname=guest&checksum=B3D3750136CBB6938AA0021914000B44. The U.S. Chamber of Commerce releases an annual empirical index of the strength of IPR protection. *U.S. Chamber Releases Sixth Annual International IP Index*, U.S. CHAMBER OF COMMERCE (Feb. 8, 2018, 10:15 AM), https://www.uschamber.com/press-release/us-chamber-releases-sixth-annual-international-ip-index. Professor Png developed an indicator measuring trade secret protection between the states in the United States. I.P.L. Png, *Law and Innovation: Evidence from State Trade Secrets Laws*, 99 REV. ECON. & STAT. 167, 167–68 (2017).

158 Schultz & Lippoldt, *supra* note 25, at 22.

159 *Id.* at 14–15.

160 *See id.* at 14.

161 *Id.* at 22 ("The TSPI can be disaggregated into its components if a focus on certain aspects is helpful for a particular discussion.").

The index is transparent, with scores accompanied by a text chart for each country and by references to the primary sources and the relevant literature.[162] Users are able to draw their own conclusions from the information presented or even reinterpret or rescore it if they wish to do so.

"The assessment presented in the paper is based on a diverse global sample of 37 economies from around the world, covering where possible the time period from 1985 to 2010 with observations at five-year intervals."[163] It is, of course, not entirely balanced as it does not cover all economies in all periods. The underlying database also includes detailed textual data on the different dimensions of trade secret protection, "prepared in a structured and standardized fashion."[164]

"Figure 1 presents the TSPI scores by country and component for the full sample of 37 economies for which data are available."[165] "The Figure presents the sample economies in rank order based on the total TSPI scores for each economy as of 2010," while Chart 1 and Annex Table A.1 present the scores for each of the components of the TSPI.[166] "Even for economies with similar scores, various combinations of component scores can be found. For example, Malaysia and Thailand have similar scores (3.48 and 3.42, respectively)."[167] "Yet, Malaysia arrives at that level in part through comparatively strong *Enforcement, investigation and discovery* provisions (e.g. including emergency search, which Thailand lacks), whereas Thailand has comparatively strong *Definition and coverage* provisions (including coverage of trade secrets in criminal law, which Malaysia lacks)."[168]

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162 Schultz & Lippoldt, *supra* note 25, at 12.

163 Douglas C. Lippoldt & Mark F. Schultz, *The Protection of Undisclosed Information in Asia – Legal Rules and Economic Implications*, *in* EMPLOYEES, TRADE SECRETS AND RESTRICTIVE COVENANTS 199, 203 (Christopher Heath & Anselm Kamperman Sanders eds., 2017); Lippoldt & Schultz, *supra* note 152, at 29.

164 Lippoldt & Schultz, *supra* note 163, at 203; Schultz & Lippoldt, *supra* note 25, at 26.

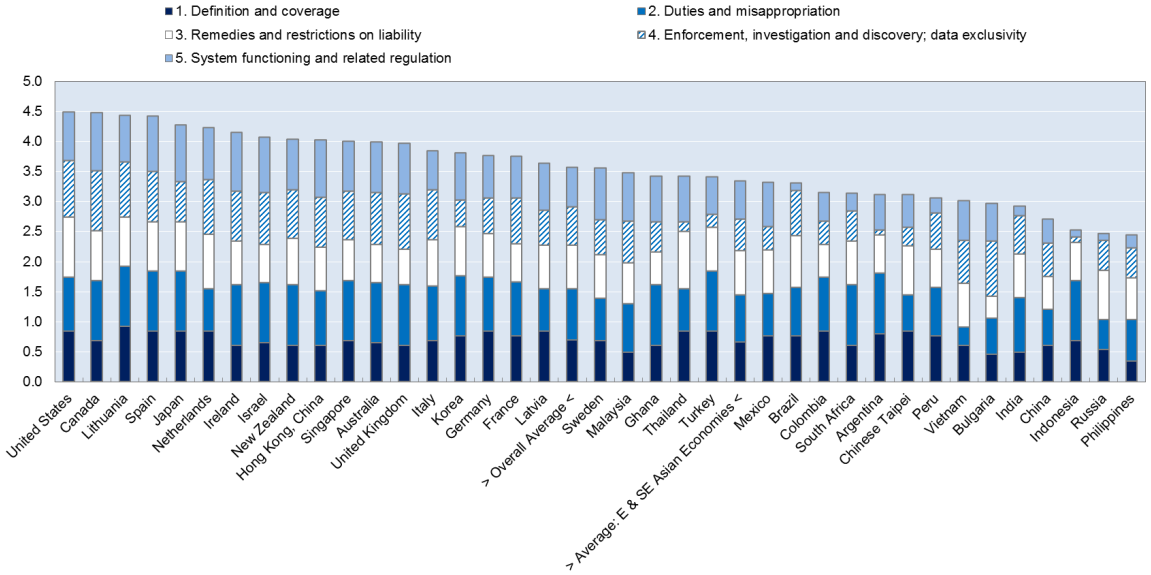
165 Lippoldt & Schultz, *supra* note 163, at 203. Economies covered only in a qualitative manner are not included in Figure 1 or other parts of the quantitative analysis. Lippoldt & Schultz, *supra* note 152, at 31.

166 Lippoldt & Schultz, *supra* note 163, at 203; *see also* Lippoldt & Schultz, *supra* note 152, at 21–23, 156–61.

167 Lippoldt & Schultz, *supra* note 163, at 205; *see also* Lippoldt & Schultz, *supra* note 152, at 28.

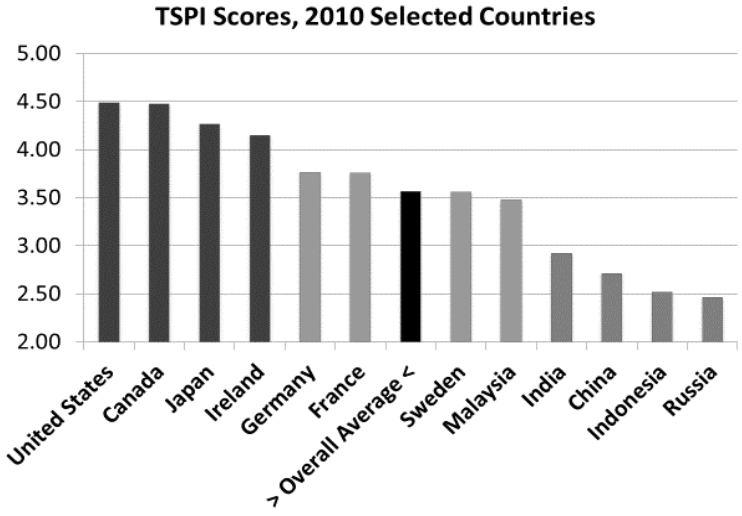
168 Lippoldt & Schultz, *supra* note 163, at 205.

[Figure 1 Trade Secrets Protection Index, By Economy and Component, 2010][169]



To provide a more comprehensible sense of ranking, Figure 2 presents a selected group of countries composing the top, lower, and middle ends of the scale.

[Figure 2][170]

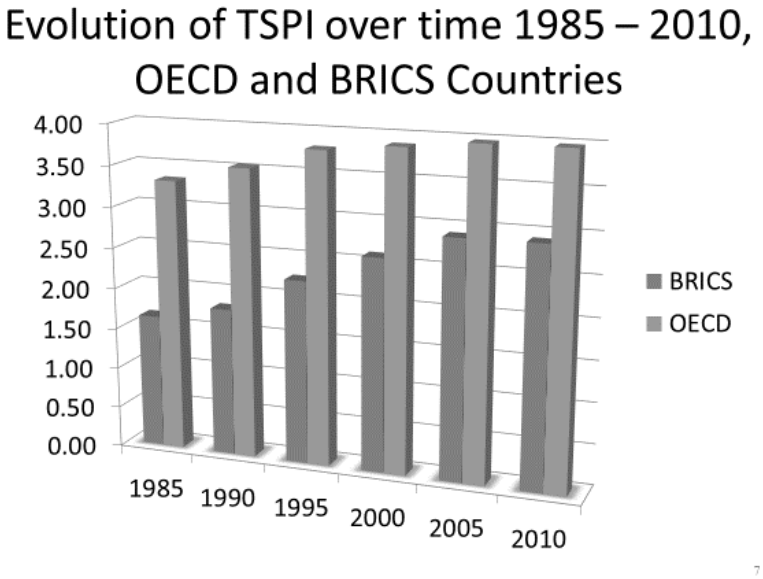


169 Figure 1 is based on data compiled from Lippoldt & Schultz, *supra* note 163.

170 Figure 2 is based on data compiled from Lippoldt & Schultz, *supra* note 163.

Finally, to provide a sense of the evolution of trade secret protection over time as measured by the TSPI, Figure 3 presents the average strength of protection in the sample over time for OECD and BRICS[171] countries. "As can be seen, the period around the entry into force of the WTO TRIPS Agreement in 1995 witnessed an increase in the average strength of protection of trade secrets for most countries."[172]

[Figure 3][173]



The authors found several particular important issues on which countries often differed.[174] Where countries scored lower, they often lacked provisions addressing:

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171 Lippoldt & Schultz, *supra* note 152, at 29; *The BRIC Countries: Brazil, Russia, India, China*, ECON. WATCH (June 29, 2010), http://www.economywatch.com/international-organizations/bric.html; J. P. P., *Why Is South Africa Included in the BRICS?*, THE ECONOMIST (May 29, 2013), https://www.economist.com/the-economist-explains/2013/03/29/why-is-south-africa-included-in-the-brics. The BRICS countries include Brazil, Russia, India, China, and South Africa, and they represent emerging economies that are widely recognized as most likely to dominate the global economy in the twenty-first century. The BRIC acronym—South Africa was not added until 2010—was first used by Jim O'Neill in 2001 to convey that much of the world's wealth would soon be attributed to these countries. *Id.*

172 Lippoldt & Schultz, *supra* note 163, at 207; Lippoldt & Schultz, *supra* note 152, at 29.

173 Figure 3 is based on data compiled from Lippoldt & Schultz, *supra* note 163.

174 Of course, the OECD study was not the only one to find gaps in trade secret protection. Such gaps were identified within Europe by the European Commission, resulting in the Trade Secrets Directive. BAKER MCKENZIE, STUDY ON TRADE SECRETS AND CONFIDENTIAL BUSINESS INFORMATION IN THE INTERNAL MARKET 3–10 (Apr. 2013), http://ec.europa.eu/internal_market/iprenforcement/docs/

∗ criminal penalties for trade secret misappropriation;

∗ protection against third-party misappropriation (i.e., corporate espionage, rather than misappropriation by an employee or business partner);

∗ availability of preliminary injunctions;

∗ differences in access to evidence in litigation; and

∗ protection of the confidentiality of trade secrets during litigation.[175]

In addition, lower-scoring countries naturally tended to have more gaps in their laws, and in addition to the gaps identified above, those gaps often included:

∗ narrower definitions of trade secrecy, which typically set additional requirements such as documentation and marking of trade secrets;

∗ lack of obligations for former employees to keep secrets after they leave employment; and

∗ technology transfer requirements, which enable the government to alter the terms of license and confidentiality agreements to void or limit confidentiality in the name of enabling technology transfer from foreign companies.[176]

One common and notable characteristic of many of these gaps is that they are not easily redressed with a requirement in a trade agreement or treaty. Criminal protection can be added, but without capacity building, prosecutors and courts may find it difficult to administer. Differences in access to evidence stem from fundamental differences in legal systems discussed in the previous subsection[177] and thus cannot be addressed with simple one-size-

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trade-secrets/130711_final-study_en.pdf. Other studies have been performed by a variety of organizations, including the U.S. Chamber of Commerce and the U.S.-China Business Council. U.S. CHAMBER OF COMMERCE, *supra* note 114, at 3–4; US-CHINA BUSINESS COUNCIL, RECOMMENDATIONS FOR STRENGTHENING TRADE SECRET PROTECTION IN CHINA 1 (Sept. 2013), https://www.uschina.org/sites/default/files/2013.09%20USCBC%20Recommendations%20for%20Strengthening%20Trade%20Secret%20Protection%20in%20China_0.pdf.

175 *See* BAKER MCKENZIE, *supra* note 174, at 13–16; U.S. CHAMBER OF COMMERCE, *supra* note 114, at 22–23; US-CHINA BUSINESS COUNCIL, *supra* note 174, at 3–4, 6–9.

176 *See* BAKER MCKENZIE, *supra* note 174, at 4–5, 9–10, 13.

177 *Supra* Part II.A.1.b.

fits-all requirements. Courts that have little experience with providing adequate confidentiality protection in litigation may encounter difficulty balancing a plaintiff's interest in security and a defendant's interest in access to evidence. Narrower definitions of trade secrecy sometimes stem from strict pleading requirements, and here, once again, courts may face difficulty in balancing the needs of plaintiffs to avoid detailed public description of the secret allegedly taken versus a defendant's need to know the accusations against it. All these issues would benefit greatly from an IP Best Practices Dialogue, in which they could be examined in detail from diverse perspectives with flexible recommendations made.

Another recurring challenge has been cross-border enforcement of trade secrets as well as cooperation between countries on cross-border trade secret theft. As one of the authors of this Article, Roy Kamphausen, said in a prior report, "a country's ability to reach across boundaries to redress bad behavior is quite limited."[178] This lack of effective cross-border trade secret protection is making it difficult to address increasingly prominent cross-border trade secret misappropriation. As Kamphausen explained in his article on collaborative IP initiatives, this lack of international uniformity enables trade secret theft, and it is a "collective-action problem" faced by multinational corporations and national governments that cannot be remedied by international trade agreements alone.[179] According to Kamphausen, essential to creating an effective cross-border trade secret protection framework is transparency and "voluntary participation in which there are proper and agreed roles for the corporate sector, government-to-government channels, and international organizations."[180] Applying these characteristics to international trade secret efforts would utilize a more collegial approach while employing "moral suasion and public accountability as tools for corrective action."[181] By moving away from routine treaty protocols and instead focusing on shared interests and transparency, Kamphausen believes a collective action approach would help deter bad actors while advancing trade secret protections worldwide.

Given these challenges, a Trade Secrets Best Practices Dialogue could make effective progress where a more conventional multilateral treaty negotiation might not. A focused, voluntary, nonbinding dialogue among experts, officials, and stakeholders could address pressing questions, including how

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178 Roy Kamphausen, *New Collaborative Approaches to IP Protection* 7 (Nat'l Bureau of Asian Research, Working Paper, 2014), http://nbr.org/downloads/pdfs/eta/New_Collaborative_Approaches_to_IP_Protection.pdf.

179 *Id.* at 2 ("Although national implementation of international trading agreements serves important and useful functions, these measures are inadequate by themselves to provide the robust protections required, especially for trade secrets, in large part because they focus on the actions of states and not the perpetrators of theft.").

180 *Id.* at 2–3. For dealing with the worst actors, Kamphausen suggests an approach similar to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, an arms control treaty that stresses a voluntary, government-led, multilateral structure and focuses on accountability, transparency, and threat-based information sharing. *Id.* at 12–13.

181 *Id.* at 12.

to provide access to evidence in diverse legal systems and facilitate cross-border cooperation. The next Part describes how the Trade Secrets Best Practices Dialogue is in fact being set up and how it might be structured going forward.

D. *Conducting a Trade Secrets Best Practices Dialogue*

One good thing about a Track 1.5 Diplomatic Dialogue is that a group of interested and determined private parties need not wait around for an official body to act but can simply launch one, provided that they can obtain the support and participation of the necessary stakeholders. That is exactly what the authors of this Article have done. After generating interest and support among stakeholders, the authors launched a Trade Secrets Best Practices Dialogue at the end of 2016.[182] So far, the authors have held two meetings. In December 2016, they convened a first proof-of-concept meeting, which brought together a private-sector coalition of businesses in support of trade secrets with participating government officials from the United States, Japan, Korea, and several other countries.[183] In May 2018, they held their first expert consultation, which focused on access to evidence in trade secret cases.[184] This meeting of the Dialogue brought together experts from the United States, Europe, and Asia, as well as representatives from several countries' governments.[185] As of this writing, the authors are in the process of establishing a permanent institutional home for the Trade Secret Best Practices Dialogue and planning future meetings.[186]

This Article details the goals and conduct of the Trade Secrets Best Practices Dialogue. This Article's authors have structured the Trade Secrets Best Practices Dialogue based on the principles set forth in Part II. The Dialogue is being built as a Track 1.5 Diplomatic Dialogue. It is voluntary; addresses diverse perspectives; focuses on expert and experienced views; is detailed, practical, and focused; and is aimed at producing concrete recommendations.

As a voluntary public–private dialogue, the authors first set out to build a diverse coalition of businesses and countries interested in trade secrets. The authors persuaded several businesses and trade associations from several

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182 The Global Protection of Trade Secrets: Strengthening National Best Practices and Collaborative Approaches, *Agenda of Meeting* (Dec. 2, 2016).

183 Email from Andy Nguyen, Prof. Assoc. for Trade, Economic & Energy Affairs, to Speakers at a Conference Hosted by Nat'l Bureau of Asian Research & Ctr. for the Protection of Intell. Prop. (Dec. 1, 2016, 11:22 AM) (on file with the author).

184 Best Practices Dialogue on Drafting and Implementing National Trade Secret Laws, *Agenda of Meeting* (May 10–11, 2018).

185 Email from Mark Schultz, Professor at S. Ill. Univ. School of L., to Johanna DeLony, Clara Gillspie & Andy Nguyen (May 9, 2018) (attendee list attached) (on file with the author).

186 *See* INSTITUTE FOR IP RESEARCH, http://www.iipresearch.org/ (last visited Oct. 16, 2016).

countries that a dialogue would be valuable and productive. The National Bureau of Asian Research, which has a strong track record of convening Track 1.5 Dialogues and good relations with officials from many countries, reached out to officials to persuade them to send representatives to participate in the dialogue. The presence of businesses from several countries was helpful in gaining the interest of those businesses' home countries.

The authors further made sure that the dialogue would include diverse perspectives. The businesses and trade associations involved in planning the dialogue include businesses from high tech, materials manufacturing, the chemical industry, pharmaceuticals, and others. [187] Countries represented include both civil and common law jurisdictions, with diverse regional representation and a variety of economic circumstances. One commonality among actors is an interest in improving trade secret protection. As a voluntary dialogue, contributions should be willing and productive.

The authors also included expert and experienced views. Participants include academic experts, leading trade secret lawyers, and businesses with experience and challenges with enforcing trade secret laws.[188] Future dialogues will likely include judges, prosecutors, corporate counsel, and trial lawyers with relevant experience.

The Dialogue will indeed be detailed, practical, and focused, with the aim of producing concrete recommendations. Over the next year, the authors plan to devote individual meetings to issues such as access to evidence and the protection of secrets in litigation. After hearing a variety of expert views at each meeting, a rapporteur will convene a committee to draft a set of detailed best practices. This Article's authors will submit the drafts to the working group for comments and revisions. The Dialogue will continue to explore a series of topics in trade secret law, as directed by the participants, while issuing periodic best practices reports.

In the long run, the authors expect that the reports from the Trade Secrets Best Practices Dialogue will serve as a basis for the improvement of trade secret law and implementation. The authors' aim is to provide expert, useful information for national governments drafting new laws and to their judges and officials. Through collaboration with international organizations, the reports can serve as the basis for capacity-building efforts and, potentially, later multilateral action to improve trade secret protection.

CONCLUSION

Trade secrets are one of the most valuable forms of IP in the world today. Once considered secondary to the conventional triumvirate of patents, copyrights, and trademarks, trade secrets are increasingly relied on to protect

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187 Email from Mark Schultz, Professor at S. Ill. Univ. School of L., to Johanna DeLony, Clara Gillspie & Andy Nguyen (May 9, 2018, 1:13 PM) (attendee list attached) (on file with author).

188 *Id.*

important confidential business information in an era when misappropriation is a constant threat. This newfound preference is reflective of trade secret protection's broad coverage and low cost, as well as its ability to secure assets without registration or government approval. And in addition to being an attractive way to protect intangible assets for both large, multinational corporations and small and medium-sized enterprises, trade secrets support global economic and innovative progress by facilitating the diffusion of knowledge and facilitating robust trade.

Notwithstanding increased awareness and appreciation of the value of trade secrets, establishment of an effective international protection policy has been hindered by complications that have come with tying improvements in IP standards to trade agreements. Though TRIPS has led to the development of trade secret laws in member countries, spotty implementation and enforcement have resulted in widespread disparities in the strength of trade secret protection. Additionally, skepticism over the motives behind treaty advocacy has resulted in IP being seen as just another bargaining chip in international agreements that will ultimately favor more developed countries.

Promoting a Best Practices Dialogue may seem like a retreat from efforts to implement binding international treaties such as the TRIPS agreement, but it has potential to do work that has been difficult to accomplish in other forums. A voluntary system of shared objectives can establish accepted norms and lay the groundwork for progress in discussions and agreements in the future, while encouraging immediate uniformity among those who commit to it. A Best Practices Dialogue may be the most useful way to maintain momentum in the development of global trade secret protection, and it could be integral to building an effective system that will elevate innovative and economic progress.