



ISSN : 1875-4120  
Issue : Vol. 12, issue 1  
Published : January 2015

This paper is part of the TDM special on "The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century" edited by:



**Prof. W. Shan**  
Xi'an Jiaotong  
University  
[View profile](#)



**Mark Feldman**  
Peking University School  
of Transnational Law  
[View profile](#)

#### Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

© Copyright TDM 2015  
TDM Cover v4.1

# Transnational Dispute Management

[www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)

## The Institutional Fragmentation of International Intellectual Property Law in Pacific Rim: Authority and Legitimacy, Regime Interaction and Future Institutional Development in a "World Society" by A. Zuo

### About TDM

**TDM** (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com) for full Terms & Conditions and subscription rates.

### Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at [info@transnational-dispute-management.com](mailto:info@transnational-dispute-management.com): we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

**TDM** is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

**The Institutional Fragmentation of International Intellectual Property Law in  
Pacific Rim:  
Authority and Legitimacy, Regime Interaction and Future Institutional  
Development in a “World Society”**

Anlei ZUO \*

(Faculty of Law, The University of Hong Kong)

zuoanlei2010law@gmail.com

**Abstract**

Under the context of institutional fragmentation of international IP law in this world society, the international IP law in Pacific Rim is in a flux with various international IP legal actors, including TRIPS, WIPO, CBD, TPP, RECP, FTAAP, etc. With the method of socio-legal analysis emphasizing and basing itself on authority and legitimacy, interaction of IP regimes and future institutional development, this paper investigates the historical evolution of international IP regimes in Pacific Rim and their interactions, paying particular attention to the analysis of two concepts (authority and legitimacy) onto those international IP regimes and their competitive gaming. The present literatures have shed light on some inter-institutional interactions and forum competitions in some subfields of international law (like International Law of the Sea, International Environmental Protection, International Fishery Regulation) as well as some international IP regimes and normative rules specifically, with some descriptive, analytical and interpretative insights unfolded, notwithstanding the lack of deep-going studies focusing on the evolutionary changes and regime competition contextualized from a systematic and structural perspective. After the examination of the current configuration of international IP legal regimes in the Pacific Rim, the core research questions hereinto consist of: how this “institutional fragmentation” would affect the authority and legitimacy of international IP legal regimes and subsequently the international law-making process in international IP law; and what kinds of further implications for future institutional development of international IP law can be deduced. Then predictable trends on the institutional developments and its fragmentation of Pacific Rim’s international IP law, mainly driven forward by China and US, could be deduced.

**Keywords:** Institutional Fragmentation; International IP Law; The Pacific Rim; A World Society; Authority and Legitimacy; Regime Interaction

---

\* Anlei ZUO. PhD Candidate. University of Hong Kong, Faculty of Law. LLM (NUS). The author wishes to thank Associate Professor Yahong Li, Assistant Professor Shahla Ali and Assistant Professor Jianlin Chen in The University of Hong Kong, and Professor Helen Siu from Yale University, for their helpful guidance, comments, suggestions and discussions on the research design, research methods and earlier drafts. But all the errors should be attributed to the author alone. Some parts of this paper have been circulated, presented and discussed in the tutorial “Selected Topics on Inter-Asian Connections: Design and Methods” (April 2014, University of Hong Kong), the “2014 U21 Doctoral Law Forum” (April 2014, Shanghai Jiao Tong University), the “2014 HKU RPG Legal Scholarship Workshop” (May 2014, University of Hong Kong), the 19th Annual UBC Interdisciplinary Legal Studies Graduate Student Conference (May 2014, University of British Columbia), “HKU 14th Annual Research Postgraduate Conference” (May 2014, University of Hong Kong), and the “2014 Social Science Research Questions & Methodological Challenges in the 21st Century” (June 2014, The University of Sheffield). The author appreciates the questions, discussions and suggestions in those conferences. This research is funded by HKU Postgraduate Studentship (2013-2017).

## **Table of Contents**

### **I. Introduction**

### **II. The Institutional Fragmentation of International IP Law**

### **III. International IP Regimes in Pacific Rim: Under the Context of Institutional Fragmentation**

1. Global IP Regimes in Pacific Rim
  - A. WIPO
  - B. WTO TRIPs Agreement
  - C. CBD
2. Regional IP Regimes in Pacific Rim
  - A. TPP
  - B. RECP
  - C. FTAAP
3. Closing Remarks

### **IV. Socio-legal Analysis of the Authorities and Legitimacy of Pacific Rim's International IP Regimes in A World Society**

1. Socio-legal Analysis of International IP Regimes in A World Society
2. Authorities and Legitimacy of Pacific Rim's International IP Regimes in A World Society
  - A. The Concept of "Authority" and "Legitimacy"
  - B. Pacific Rim's Flux of International IP Regimes
3. Future Institutional Development of International IP Law in Pacific Rim

### **V. Conclusion**

*I drift like a cloud,  
Across these venerable eastern lands,  
A journey of unfathomable distances,  
An endless scroll of experiences...  
Lady Zhejiang here we must part,  
For the next province awaits my embrace.  
Sad wanderer, once you conquer the East,  
Where do you go?*

Carter, Tom. *China: Portrait of a People* (2008)

## I. Introduction

International intellectual property law (international IP law), as closely connected to technological progress,<sup>1</sup> cultural development, social change and modernization, international trade and global environmental protection,<sup>2</sup> etc.,<sup>3</sup> is one of the international legal fields in desperate need of systematic research under the backdrop of the globalization and the so-called “fragmentation of international law”. In this so-called global harmonization of intellectual property legal protection rules,<sup>4</sup> international and regional IP regimes play a quite significant role in fueling the march. Due to different law-making authorities and different legal rules embodied in international treaties or executed in corresponding international organizations, the alleged “fragmentation of international IP law” becomes a significant issue in Public International Law and International Economic Law, which has potentials to affect the contemporary construction of international IP regime and the future evolutionary direction of the international community legal system.

Although some scholars assert that different fields of international law reveal the same structure and landscape of international law, it is never agreed to ignore the attributes and particularity of a certain subject.<sup>5</sup> So does intellectual property in international law, and necessarily even more. This sort of case study on the international intellectual property law could likely reveal quite a few glimpses of some deep and easily neglected traits of international law-making and regime interaction, in addition to perceptions on the institutional fragmentation of international IP law specifically.<sup>6</sup> The following are several main considerations to

---

<sup>1</sup> See Ruttan, Vernon W., and Yujiro Hayami. *Toward a Theory of Induced Institutional Innovation*. *The Journal of Development Studies* 20.4 (1984): 203-223.

<sup>2</sup> Although some scholar may argue about the precise degree of IP’s influence on those issues, but IP are always entangled with them. See Barnett, Jonathan M. *Is Intellectual Property Trivial?* *University of Pennsylvania Law Review* (2009): 1691-1742.

<sup>3</sup> See Keith Maskus. *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century*. Washington: Peterson Institute, 2012.

<sup>4</sup> See Coombe, Rosemary J. *Intellectual Property, Human Rights & (and) Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity*. *Ind. J. Global Legal Stud.* 6 (1998): 59.

<sup>5</sup> See Hofmann, Rainer. *Unity and Diversity in International Law*. Ed. Andreas Zimmermann. Duncker und Humblot, 2006, p 218.

<sup>6</sup> Actually, on the other hand, this public international law thinking onto certain subfield of

select the international IP law as the research subject of this thesis.

Firstly, the historical development process of international intellectual property law and its current developmental landscape make it extraordinarily suitable for the study of institutional fragmentation of international law and further on for the understanding of the ontological “ethos”<sup>7</sup> of international legal rules. For example, coexistence of principles of intellectual property protection (for example, the principle of territoriality)<sup>8</sup>, the globalization of private power,<sup>9</sup> and the rapid harmonization of international IP law seem to be paradoxical; and that not only makes the international regulation of IP protection tend to be more controversial and technically fragmented, but also makes it more elusive and captivating. Meanwhile, the landscape of the present international IP law, which is an integrated and dynamic part of international trade law, is relatively clear and organized (with TRIPs and WIPO as the two main pillars, and other potentially evolving multilateral regimes) compared to other fields of international regulation. What are the secrets of international IP law to get ahead so quickly despite that there are always and still many institutional difficulties at different stages? How could it handle the issue of legitimacy when developed and developing countries are having big gaps regarding the regulation modes and protection criteria? How should we understand, evaluate and even appropriately rebuild the link between international IP law and international trade law (also other sub-topics therein)? All those facts and unknowns on the international plane make international IP law worthwhile for comprehensive investigations, contemplations and also theoretically imaginative reconstructions. Secondly, intellectual property’s own unique characteristics and its close interlink with many important issues make the study on international IP law have strong representative role for the study of institutional fragmentation of international law.<sup>10</sup> Taking the public interests and

---

international economic law area not only is quite helpful and necessary for new understanding of the whole landscape of international law, but also could innovatively contribute to the essential “evolution” or “renaissance” of the specific topics, etc. See Schill, Stephan W. W (h)ither Fragmentation? On the Literature and Sociology of International Investment Law. *European Journal of International Law* 22.3 (2011): 875-908. 899, 902. (“International public law thinking thus helps to counter concerns about fragmentation arising out of the specialization of international investment law in two directions: ...”)

<sup>7</sup> ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 14, par. 15.

<sup>8</sup> See Bradley, Curtis A. Territorial Intellectual Property Rights in An Age of Globalism. *Va. J. Int’l L.* 37 (1996): 505.

<sup>9</sup> See Sell, Susan K. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Vol. 88. Cambridge University Press, 2003.

<sup>10</sup> Academics can get a glimpse of the importance and complexity of the topic of intellectual property from the two series of monographs on IP. See “Cambridge Intellectual Property and Information Law” series and “Information Technology and Law” series. Available at <http://www.cambridge.org/us/academic/subjects/law/international-trade-law/series/cambridge-intellectual-property-and-information-law>.

<http://www.cambridge.org/us/academic/subjects/law/law-general-interest/series/information-technology-and-law?options%5B%5D=Unavailable%2Btitles>. (“As its economic potential has rapidly expanded, intellectual property has become a subject of prime legal importance. The roots of the subject have been formed in national laws. Now it is branching out rapidly. It has to reflect today’s technological advances, notably in digitization and genetics, and to secure a central place for intellectual property in world trade. Regional and international law, allied to comparative law studies, have become essential

collective benefit-sharing for instance, IP is closely related to public space and public interests, including the access to information and freedom of speech,<sup>11</sup> access to basic medicine and public health,<sup>12</sup> agriculture and transgenic technology,<sup>13</sup> biodiversity and protection of traditional knowledge,<sup>14</sup> environmental protection and human rights,<sup>15</sup> climate change and transfer of technology,<sup>16</sup> etc.<sup>17</sup> That's because intellectual property is always something about information, technology, their commercial industrialization and public policies. Thirdly and obviously, systematic study on the institutional fragmentation phenomenon of international IP law is almost empty, largely unexplored and still imprisoned.<sup>18</sup> Therefore, theoretical interpretation of historical development of international IP institutions and summary understanding of the logic of international regimes' evolution as well as international law-making, based on empirical investigations and practical conditions, are more than needed.

In general, legal studies of the fragmentation issue are mainly focused on two aspects (institutional and normative conflict). Despite that scholars have quite divergent thoughts on whether and how it could be resolved, the institutional fragmentation aspect is one of the most foundational issues since it is the premise of so many other problems,<sup>19</sup> not to mention that it is tightly linked with the legal jurisdiction and the

---

elements in the rapid legal developments which engulf the subject.”)

<sup>11</sup> For example, see Reichman, J. H., and Jonathan A. Franklin. *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*. University of Pennsylvania Law Review 147.4 (1999): 875. (“How to reconcile freedom of contract with the functional preservation of public good uses of information instead ought to pose a crucial problem for any project to devise a comprehensive set of default rules governing ‘computer information transaction[s]’.”) Also see Reichman, J. H., and Paul F. Uhlir. *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*. Law and Contemporary Problems 66.1 (2003): 315-462. (“However, that inherently dynamic and shifting balance of interests has come under intense pressure in recent years for a number of different reasons. The ‘convergence technologies’ that greatly improve access to information also afford ‘technological means of inhibiting access in ways that were never before practical’.” “The end result has been the collapse of the established lines of demarcation between public and private interests that were codified in the classical patent and copyright paradigms, and the enclosure and transformation of ‘larger and larger portions of the public data ‘commons’ . . . into private monopolies.’”)

<sup>12</sup> For example, see Sell, Susan K. *Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions*, *The Temp. L. Rev.* 77 (2004): 363.

<sup>13</sup> For example, see Merges, Robert P. *Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies*. *Md. L. Rev.* 47 (1987): 1051.

<sup>14</sup> See Biber-Klemm, Susette, and Thomas Cottier. *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives*. Oxfordshire: CABI Pub, 2006.

<sup>15</sup> See Sinjela, Mpazi. *Human Rights and Intellectual Property Rights: Tensions and Convergences*. Leiden: Martinus Nijhoff Publishers, 2007.

<sup>16</sup> See Burlinson, Elizabeth. *Energy Policy, Intellectual Property, and Technology Transfer to Address Climate Change*. *Transnat'l L. & Contemp. Probs.* 18 (2009): 69.

<sup>17</sup> For example, see Keith Maskus. *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century*. Washington: Peterson Institute, 2012. Also see Madhavi Sunder. *From Goods to a Good Life: Intellectual Property and Global Justice*. New Haven: Yale University Press, 2012.

<sup>18</sup> See Prost, Mario. *The Concept of Unity in Public International Law*. Oxford, U.K.: Hart Pub, 2012, p 209.

<sup>19</sup> Dupuy, Pierre-Marie. *Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*. *NYUJ Int'l L. & Pol.* 31 (1998): 791.

international law-making of international regimes.<sup>20</sup> And there are several angles demonstrating the importance and necessity of this study on institutional aspect, as follows. Firstly, from the perspective of normative fragmentation of international IP law or international law, academics tend to pay much more attentions to superficial phenomena, like how to determine the applicable law, how to solve those specific international problems, how is the role and efficacy of Vienna Convention on the Law of Treaties (VCLT) under new contexts with new requirements and momentum. Those concerns are indeed fine and fair, since 21<sup>st</sup>-century international law turns to be more specific-problem-oriented than before and those issues are directly and closely narrative and descriptive of international legal practices. But there are so many abstract perceptions and theoretical inspirations that scholars sometimes spontaneously ignore or just get distracted about things “behind the scenes” and deep big-picture settings,<sup>21</sup> and subsequently get themselves constrained in the traditional conceptual framework.<sup>22</sup> Meanwhile, the actual evolution of international law has already went far ahead,<sup>23</sup> leaving the scholarship with no accurate grasp of the pulse of international (IP) law’s progress and with a lack of comprehensive understanding of how the global development of international institutions reflect the changing structure of international society and international (IP) law.<sup>24</sup> In contrast, the institutional aspect could provide researchers with incisive intelligence and accurate comprehending down deep into those waves and combustions in international law under a world society, and this study on the institutional aspect would definitely try to avoid those risks mentioned above. For example, what does give rise to the substantive question (the splitting up of the law into highly specialized “boxes”)? Certainly, it is the institutional aspect as different regimes have their own legitimate ability and political interests to develop international law.<sup>25</sup> How to understand and

---

<sup>20</sup> Fragmentation is an institutional expression of political pluralism internationally. See Koskenniemi, Martti, and Päivi Leino. *Fragmentation of International Law? Postmodern Anxieties*. *Leiden Journal of International Law* 15.03 (2002): 553-579. Also see ILC. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 13, par. 13. (“The previous paragraph raises both institutional and substantive problems. The former have to do with the competence of various institutions applying international legal rules and their hierarchical relations inter se.”)

<sup>21</sup> For example, Fischer-Lescano, Andreas, and Gunther Teubner. *Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law*. *Mich. J. Int'l L.* 25 (2003): 999, 1002-1003. (“They locate the cause for fragmentation not within the lack of jurisdictional hierarchy, but see norm collisions educing from the underlying conflicts between the ‘policies’ pursued by different international organizations and regulatory regimes. In this political perspective, collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations, who pursue power-driven “special interests” without reference to a common interest and give rise to drastic ‘policy conflicts.’”)

<sup>22</sup> Such as in the VCLT where states are still the dominant actor on the top. Theoretical traditions are never self-evident, especially when they are confronted with new situations.

<sup>23</sup> Zumbansen, Peer. *Transnational Law, Evolving*. In Smits, J. M. Elgar, *Encyclopedia of Comparative Law*. Cheltenham, U.K. Northampton, Mass.: Edward Elgar Publishing, 2012, p 900.

<sup>24</sup> Maybe it’s perceived as a new way or a upgraded perspective to understand the underlying law of international regimes’ and international law’s evolutionary and operational road. But all those rhetorical variations can still reflect that changes or transformations are happening progressively and accumulatively.

<sup>25</sup> See Wouters, Jan, and Bart De Meester. *The UNESCO Convention on Cultural Diversity and WTO*

interpret the function of formal unity in consideration of both theoretical construction and practical fact-situations,<sup>26</sup> in a complex society if fragmentation is just a kind of natural development?<sup>27</sup> Explorations from the perspective of the economic analysis of institutions would be really helpful to support the realistic interests of international regimes rather than utopian assumptions. Secondly, under the backdrop and context of the “law and globalization” and the “world society”, the socio-legal study on the fragmentation of international (IP) law is such a productive and serviceable method that it cannot be overlooked, neither by “omission and a narrowing of one’s gaze”<sup>28</sup> or by any other accidents or preferences. And hence institutional perspective of the fragmentation of international (IP) law is the right lens to be reckoned with, containing many useful perspectives to be developed by international socio-legal research, while at the meantime the ICL’s normative aspect tends to have less and more limited relevance to regimes’ interactions.<sup>29</sup> And thirdly, institutional aspect of the fragmentation phenomenon is set aside by the ICL because it is an “extremely complex issue”,<sup>30</sup> and other scholars tend to avoid this portion as well. And as for international IP law, compared with normative conflicts among various regimes, it is still untouched and ill-defined about how to understand the institutional landscape of international IP law, which could be one of this paper’s potential academic contributions. Besides, this institutional fragmentation perspective enables the use of historical analysis of those international regimes and their interrelation/interaction,<sup>31</sup>

---

Law: A Case Study in Fragmentation of International Law. *Journal of World Trade* 42.1 (2008): 205, 239. (“Even though legal principles and conflict clauses may help to solve these tensions, they will never provide a full solution to this, in essence political, process of balancing values and interests.”) Also see Van Asselt, Harro. *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*. *NYUJ Int’l L. & Pol.* 44 (2011): 1205, 1211-1212. (“[T]he usefulness of legal techniques for resolving potential conflicts between the two legal regimes is constrained because of specific characteristics of international environmental law, namely the overlap in objectives and the important role of treaty body decisions in international environmental lawmaking.”)

<sup>26</sup> See Santos, Boaventura de Sousa, and Boaventura de Sousa Santos. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. London: Butterworths LexisNexis, 2002, p 99-162. Also see ILC. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 15, par. 16. (“In conditions of social complexity, it is pointless to insist on formal unity. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously.”)

<sup>27</sup> See Wight, Martin, Gabriele Wight, and Brian Porter. *International Theory: The Three Traditions*. Leicester: Leicester University Press for the Royal Institute of International Affairs, 1991, p 139. (“The smaller the numerical membership of a society, and the more various its members, the more difficult it is to make rules not unjust to extreme cases: this is one reason for the weakness of international law.”) Also see Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005, p 72.

<sup>28</sup> Zumbansen, Peer. *Transnational Law, Evolving*. In Smits, J. M. Elgar, *Encyclopedia of Comparative Law*. Cheltenham, U.K. Northampton, Mass.: Edward Elgar Publishing, 2012, p 899.

<sup>29</sup> See Van Asselt, Harro. *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*. *NYUJ Int’l L. & Pol.* 44 (2011): 1205, 1274.

<sup>30</sup> Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?* (2007) 40 *Intl L & Politics*, 261.

<sup>31</sup> Here it is not argued specifically that the previous institutional things are the precursors of the institutional landscape as it stands now, but that it is more evident to investigate and define the institutional lineage in considerations of institutional inertia and path dependence. And this paper

which makes the argumentation and reasoning herein more persuasive and methodologically comprehensive.

One interesting and hidden fact is that when the 2006 ILC Report quoted Wilfred Jenks, the report just selectively or incidentally didn't mention anything about the institutional fragmentation part, while actually in Wilfred Jenks's paper, this institutional aspect had been expounded from many angles.<sup>32</sup> So, investigations on this institutional fragmentation are "not only desirable but necessary"<sup>33</sup>, more than any time before and more than the normative aspect of the fragmentation of international law.

When it comes to the methods of this topic, interdisciplinary researches, including sociological study, economic analysis<sup>34</sup> and anthropological research of international IP law, have good potentials and self-evident value. Economists and sociologists have done many researches on how the capitalism reshapes the geographical conception and global structure, such as the global city theory. Also, jurisprudence has similar theories (global law, international social evolution theory). But it is still uncultivated land about how international IP treaties interact within some regional areas with unique elements (like EU and Pacific Rim), how international IP treaties reorganize the connections among people within boundaries from the perspective of state and personhood, in terms of intellectual property protection. Because of the ceasing to existence of the "border" concept as well as gradual embedment of international IP law into national spheres, the territoriality of IP law is ever dissipating. The traditional Westphalia sovereignty state system with "defined physical territories" of states, exclusive and isolated, can no longer be appropriate in the era of globalization.<sup>35</sup> Thus international IP law requires more in-depth empirical research among multiple jurisdictions.

---

agrees that lines of evolution for international legal rules are not that easy and distinct to track. See Craven, Matthew C. R., M. Fitzmaurice, and Maria Vogiatzi. *Time, History and International Law*. Leiden: M. Nijhoff, 2007, p 27-42. Also see Fassbender, Bardo, Anne Peters, Simone Peter, and Daniel Högger. *The Oxford Handbook of the History of International Law*. 2012, p 16.

<sup>32</sup> For example, "In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law. These instruments inevitably react upon each other and their co-existence accordingly gives rise to problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties. This situation is in part a reflection of the present structure of international organization." C. Wilfred Jenks, *The Conflict of Law-making Treaties*, 30 *Brit. Y.B. Int'l L.* 1953, 403.

<sup>33</sup> See C. Wilfred Jenks, *The Conflict of Law-making Treaties*, 30 *Brit. Y.B. Int'l L.* 1953, 407.

<sup>34</sup> For the Economics of Intellectual Property Rights, see Langford, Jock. *Intellectual Property Rights: Technology Transfer and Resource Implications*. *American Journal of Agricultural Economics* (1997): 1576-1583; (specifically in the agricultural sector)

<sup>35</sup> See Anne-Marie Slaughter and William Burke-White. *The Future of International Law Is Domestic (or, The European Way of Law)*. 47 *Harvard J Int'l L* (2006), 327-352. This era has been seeing the rapid development and popularization of Internet, mobile communications technology and extensive application of the international aviation in transportation, and all those make the concept of "border" in traditional international law cease to exist. International law evolves into an era of making legal rules by different authoritative institutions and individuals. Also see Beck, Ulrich. *Power in the Global Age: A New Global Political Economy*. Cambridge: Polity, 2005, p xi.

Thus, this paper tries to use this theme as an entry point for reflective deconstruction and reconstruction of the international law-making in the field of international IP law, with helpful methodological devices and methods, and explore some descriptively and analytically effective perspectives and concepts in terms of logical and innovative correlations within the existing theories of legal studies in international IP law specifically including socio-legal study of international IP law, aiming at signaling core issues for further research agenda. And the analysis of the fragmentation of international IP law rests on several key concepts, including authority and legitimacy, regime interaction and institutional development.

## II. The Institutional Fragmentation of International IP Law

Generally, in the language of the institutional fragmentation of international IP law, there are only some limited investigations in certain related topics: the emergence of a transnational trademark regime (trademark cosmopolitanism);<sup>36</sup> the fragmentation of policy making and the proliferation of bilateral TRIPS-plus agreements;<sup>37</sup> the role of TRIPS in global IP order,<sup>38</sup> global governance of international IP protection between WTO TRIPs Agreement and WIPO,<sup>39</sup> interface between TRIPS and CBD about biodiversity and sustainable development,<sup>40</sup> and also some general legal analysis of existing global IP structure and regimes.<sup>41</sup> And regime shifting is also a heated topic in international IP legal order.<sup>42</sup> Academic writings on one specific international treaty, such as Berne Convention,<sup>43</sup> CBD,<sup>44</sup> WIPO Treaties,<sup>45</sup> Trips,<sup>46</sup> 2012 Beijing

---

<sup>36</sup> Katyal, Sonia. Trademark Cosmopolitanism. 47 U.C. Davis L. Rev. 875.

<sup>37</sup> El-said, Mohammed. The Compatibility of Modern Intellectual Property Protection Norms with Islamic Principles: Lessons from History. W.I.P.O.J. 2012, 4(1), 121-128.

<sup>38</sup> Grosse Ruse-Khan, H. The Role of TRIPS in a Fragmented IP World. IIC 2012, 43(8), 881-884.

<sup>39</sup> Thomas Cottier and Marina Foltea. Global Governance in Intellectual Property Protection: Does the Decision-making Forum Matter? W.I.P.O.J. 2012, 3(2), 139-165. (Authors investigate whether there is any discrepancy in the balance of rights and obligations within multilateral, plurilateral and bilateral IP norm-making avenues, and argue that this balance is better secured under TRIPS Agreement and other multilateral forum, particularly WIPO, and propose greater judicial openness towards the developments in WTO.)

<sup>40</sup> Lekha Laxman, Abdul Haseeb Ansari. The Interface between TRIPS and CBD: Efforts towards Harmonization. J.I.T.L. & P. 2012, 11(2), 108-132.

<sup>41</sup> Oguamanam, Chidi. Intellectual Property in Global Governance: A Development Question. Milton Park, Abingdon, Oxon: Routledge, 2012. Peter K. Yu. The Global Intellectual Property Order and Its Undetermined Future. W.I.P.O.J. 2009, 1(1), 1-15.

<sup>42</sup> See Helfer, Laurence R. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking. Yale Journal of International Law, Vol. 29, 2004, 1.

<sup>43</sup> Seville, Catherine. The internationalization of copyright law: books, buccaneers and the black flag in the nineteenth century. Cambridge: Cambridge University Press, 2006. (It explores the history of international copyright law in the 19th century, and how this history can be relevant to today's cyberspace as empirical evidence when we consider the reform of modern copyright law. The author believes that copyright law has been robust and flexible over several centuries, and it can surely create new balances and continue its legacy, as many of these "new" challenges we encountered now are simply fresh presentations of familiar historical dilemmas.)

<sup>44</sup> Curci, Jonathan. The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property. Cambridge [U.K.]: Cambridge University Press, 2010. Aravind Kumar, and Govind Das. Biodiversity to Biotechnology: Intellectual Property Rights. New Delhi: Narosa Pub. House, 2010.

Treaty on Audiovisual Performances,<sup>47</sup> are abundant. And some articles are specifically focused on the tracing of principles in several follow-up treaties in copyright law,<sup>48</sup> or the historical reviews and comparative studies about the technological developments and the evolution of those international treaties have already been advanced comprehensively, especially under the big picture of the globalization of international IP law and the emergence of international IP regimes.<sup>49</sup> Moreover, specific treatises and monographs in some core and inclusive topics, like WIPO Development Agenda<sup>50</sup>, EU regional intellectual property law,<sup>51</sup> South-North balance of rights and obligations in international IP system,<sup>52</sup> trade and environment<sup>53</sup> as well as the protection of traditional knowledge,<sup>54</sup> are also ubiquitous. But, as for the highly complex and rapidly evolving of the international IP law regimes, potential issues on the fragmentation of international IP law, and the

---

<sup>45</sup> Reinbothe, Jörg, and Silke von Lewinski. *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis*. London: Butterworths LexisNexis, 2002.

<sup>46</sup> For example, Matthews, Duncan. *Globalising intellectual property rights: the TRIPS Agreement*. London: Routledge, 2013. Sell, Susan K. *Private power, public law: The globalization of intellectual property rights*. Cambridge: Cambridge University Press, 2003. Drahos, Peter, and John Braithwaite. *Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context*. *Wis. Int'l LJ* 20 (2001): 451.

<sup>47</sup> Adebambo Adewopo. *WIPO's New Treaty and "New" Copyright for Audio-visual Performers? A Pan-African Perspective*. *W.I.P.O.J.* 2013, 4(2), 206-219.

<sup>48</sup> Catherine Seville. *The Principles of International Intellectual Property Protection: from Paris to Marrakesh*. *W.I.P.O.J.* 2013, 5(1), 95-104. Ulrich Loewenheim. *The Principle of National Treatment in the International Conventions Protecting Intellectual Property*. In Waldeck und Pyrmont, Wolrad, and Joseph Straus. *Patents and Technological Progress in a Globalized World Liber Amicorum Joseph Straus*. Berlin: Springer, 2009, pp 593-599.

<sup>49</sup> For example, Maugham, Robert. *A Treatise on the Laws of Literary Property Comprising the Statutes and Cases Relating to Books, Manuscripts, Lectures, Dramatic and Musical Compositions, Engravings, Sculpture, Maps, &C. : Including the Piracy and Transfer of Copyright, with a Historical View, and Disquisitions on the Principles and Effects of the Laws*. London: Longman, Rees, Orme, Brown, and Green, 1828.

<sup>50</sup> De Beer, Jeremy and Bannerman, Sara. *Foresight into the Future of WIPO's Development Agenda*. *World Intellectual Property Organization Journal*, Vol. 1, No. 2, 2010, pp. 211-231. Netanel, Neil. *The Development Agenda: Global Intellectual Property and Developing Countries*. Oxford: Oxford University Press, 2009. May, Christopher. *The World Intellectual Property Organization: Resurgence and the Development Agenda*. London: Routledge, 2007. Edge Network Workshop on "Strategies to Implement the WIPO Development Agenda". Edge Network Workshop on "Strategies to Implement the WIPO Development Agenda": 16-17-18 March, 2008, at the University of Hong Kong. Hong Kong: University of Hong Kong, 2008.

<sup>51</sup> Seville, Catherine. *EU Intellectual Property Law and Policy*. Cheltenham, UK: Edward Elgar Publishing, 2009. Cook, Trevor M. *EU Intellectual Property Law*. Oxford: Oxford University Press, 2010. Cottier, Thomas, and Pierre Véron. *Concise International and European IP Law: Trips, Paris Convention, European Enforcement and Transfer of Technology*. Alphen aan den Rijn: Kluwer Law International, 2008. (Also have some parts on TRIPs and Paris Convention.) Kamina, Pascal. *Film copyright in the European Union*. Vol. 2. Cambridge: Cambridge University Press, 2002.

<sup>52</sup> See Ruth L. Okediji. *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*. UNCTAD-ICTSD Project on IPRs and Sustainable Development, 2006.

<sup>53</sup> Kevin P. Gallagher, *Handbook on Trade and the Environment*. Cheltenham, UK: Edward Elgar Publishing, 2008.

<sup>54</sup> Oguamanam, Chidi. *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity, and Traditional Medicine*. Toronto: University of Toronto Press, 2006. Antons, Christoph. *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region*. Alphen Aan Den Rijn: Kluwer Law International, 2009.

operational logic and developmental mode of international IP regimes, etc., insights always await to be mined.

Those researches are valuable and fulfilling both in details and in general. But academic issues, including what about the holistic examination of the structure and landscape of institutional fragmentation of international IP law (especially from the perspective of historical evolution, background-driven transformation<sup>55</sup> and contemporary contradictions)<sup>56</sup>, how to understand the practical interaction and interrelationships of those correlative actors (such as, most importantly, the dynamic interaction of WIPO and WTO TRIPs Agreement), what are the underlying implications from this institutional fragmentation of international IP law for future international IP regulation, are rarely elaborated through empirical observation and investigation with accounts of the virtues of the international law-making process, the ontological operating logic of international law and the contemporary evolutionary momentum of international IP law. This absent of systematic assessment and reconstruction of the international IP law is a big flaw and also a huge concern, as scholars and international practitioners are still “navigating the uncharted waters” of international IP law,<sup>57</sup> meanwhile complaining that international intellectual property legal rules have evolved in a much more haphazard way or have gone too far from primary objectives.<sup>58</sup>

Therefore, through this “institutional” approach, “intellectual property” approach, and altogether “institutional fragmentation of international IP law” approach, this remarkable study could be highly expected to provide some interpretations on the institutional fragmentation of international (IP) law on account of international IP law’s spectacularly rapid developments and inherent attributes in this time of flux under world society,<sup>59</sup> where new sub-state/non-state actors pouring into from the

---

<sup>55</sup> For example, according to Arnold Duncan McNair, said in 1962, “the feature of the past half century has been the gradual transformation of international law from a book-law occasionally supplemented by treaties into a case-law constantly supplemented by treaties”. See McNair, Arnold Duncan McNair. *The Expansion of International Law*. Jerusalem: Magnes Press, Hebrew University, 1962, p 54.

<sup>56</sup> How to deal with “the creation, development and clarification of an imposing body of rules of international law of varying degrees of crystallization”? See Lauterpacht, Hersch. *The Development of International Law by the International Court*. London: Stevens, 1958.

<sup>57</sup> Adebambo Adewopo, WIPO’s New Treaty and “New” Copyright for Audio-visual Performers? A Pan-African Perspective, *W.I.P.O.J.* 2013, 4(2), 206-219.

<sup>58</sup> See Stiglitz, Joseph E. *Making Globalization Work*. New York: W.W. Norton & Co, 2006, pp.115–116. Also see Drahos, Peter. *The Global Governance of Knowledge: Patent Offices and Their Clients*. Cambridge [U.K.]: Cambridge University Press, 2010.

<sup>59</sup> Thomas Cottier and Marina Foltea. *Global Governance in Intellectual Property Protection: Does the Decision-making Forum. Matter?* *W.I.P.O.J.* 2012, 3(2), 141. (“IP protection in international law is perhaps the area of law which is most advanced in terms of international standards and norms prescribing the conduct of governments—and often indirectly, of private actors.”) See F.M. Abbott, T. Cottier and F. Gurry. *International Intellectual Property in an Integrated World Economy*. Austin: Aspen Publishers, 2011. (“There is hardly any other field in international economic law where rules on substantive and procedural standards offer a more comprehensive and common set.”) See Peter K. Yu. *The Global Intellectual Property Order and its Undetermined Future*. *W.I.P.O.J.* 2009, 1(1), 1. (“The rapid evolution of digital technologies and the arrival of the internet, new business models and open access arrangements have upset the dynamics within existing intellectual property industries.”) Ruth L. Okediji. *The International Copyright System: Limitations, Exceptions and Public Interest*

bottom.<sup>60</sup> Against the historical background of traditional international legal order built upon the Westphalia system, that topic has also been a virgin land particularly calling for more pervasive and holistic studies with innovative research methods, perspectives and concepts.<sup>61</sup> Thus, this paper exerts itself to advance the study of the basic landscape of international IP law, its institutional fragmentation and future development, therein critically reconciling and reconstructing those prevailing interpretations and understandings in regards to both the institutional fragmentation of international IP law and closely-related sub-issues (legality and legitimacy of international IP regimes and authorities, the international IP law-making process, and further development of international IP law), as well as taking other in-depth researches focusing on specific international legal regimes into consideration.

### **III. International IP Regimes in Pacific Rim: Under the Context of Institutional Fragmentation**

Despite that there are so many different regional and international regimes, institutions, mechanisms and other forum in Pacific Rim that are substantially linked with the international or transnational cooperation of regulating the intellectual property legal affairs, this paper will primarily focus on the following ones: WIPO, TRIPs, CBD, TPP, RECP, FTAAP. That's because firstly those regimes are the main international regimes related to the IP field contemporarily, and secondly those international actors has been interacting frequently and closely on many important intellectual property issues in the last decades. Thirdly, as far as the author is concerned, those international institutions will continue or begin to dominate the future international IP law-making and landscape reconstruction, in spite of different initiator States, emphases and fundamental goals. And also, the analysis of authority and legitimacy, as well as regime interaction, will accordingly be focused on those regimes.

---

Considerations for Developing Countries. UNCTAD-ICTSD Project on IPRs and Sustainable Development, 2006, vii. ("Patents, copyrights, trademarks, utility models, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on such diverse topics as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, the entertainment and media industries. In a knowledge-based economy, there is no doubt that a better understanding of IPRs is indispensable to informed policy making in all areas of human development.")

<sup>60</sup> Gustaaf Geeraerts. *Analyzing Non-State Actors in World Politics*. Pole Paper Series, Vol. 1, No. 4, October 1995. Virginia Haufler. *Crossing the Boundary between Public and Private: International Regimes and Non-State Actors*, in Rittberger, Volker, and Peter Mayer, eds. *Regime Theory and International Relations*. Oxford: Clarendon Press, 1993, 94-111. Bianchi, Andrea. *Non-State Actors and International Law*. Aldershot, Hants, England: Ashgate Pub. Co, 2009. (Discussions on the emergence of non-state actors and its potential role under the changing international legal framework in the globalization of various issues, including environmental protection, human rights, armed conflicts and the reconceptualization of international civil society.) Carty, Anthony. *Philosophy of International Law*. Edinburgh: Edinburgh University Press, 2007, 79-109. Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005, p 3-6, 124-139.

<sup>61</sup> For example, "A more intriguing question is whether to conceive relationships between state and individual as being vertical (sovereign and subject) or horizontal (equal subjects) in kind." See Ole Spiermann. *Twentieth Century Internationalism in Law*. EJIL (2007), Vol. 18 No. 5, 813.

## 1. Global IP Regimes in Pacific Rim

### A. WIPO

The World Intellectual Property Organization (WIPO) is a self-funding global IP regime of the United Nations,<sup>62</sup> established in 1967 by the Convention Establishing the World Intellectual Property Organization. The United International Bureaux for the Protection of Intellectual Property (BIRPI), an International Bureau founded in 1893 for the administration of the Paris Convention and the Berne Convention, was the predecessor of WIPO. It is missioned for “the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all”,<sup>63</sup> by promoting the efficient protection and harmonizing national legislations, performing the administrative tasks of the Unions, agreeing to assume (or participate in) the administration of any other international agreement and encouraging the conclusion of international agreements, etc.<sup>64</sup> And as for its functions and authority, WIPO has defined “intellectual property” with a really large scope and broad spectrum, from literary and artistic works to performances, from industrial designs and integrated circuits to inventions, from trademarks, geographical indications to unfair competition, etc.<sup>65</sup> Also, WIPO has been equally open to almost all countries in the world,<sup>66</sup> committing itself to contribute to better understanding and cooperation among States and Desiring to modernize and render more efficient the administration of the Unions.<sup>67</sup> Up to 2014, WIPO already have 187 member states. More importantly, WIPO particularly welcomes the inclusion of stakeholders (intergovernmental/nongovernmental organizations, interest groups and civil society) as observers at the formal meetings of member states, like EPO, UPOV, ASEAN, EU, WTO, FAO, WHO.<sup>68</sup>

---

<sup>62</sup> See Article 1, Agreement between the United Nations and the World Intellectual Property Organization (entered into effect on December 17, 1974).

<sup>63</sup> See WIPO Official Website. Available at <http://www.wipo.int/about-wipo/en/index.html>. Also see Article 3, Convention Establishing the World Intellectual Property Organization (Signed at Stockholm on July 14, 1967 and

as amended on September 28, 1979), which writes that: “The objectives of the Organization are: (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, (ii) to ensure administrative cooperation among the Unions.”

<sup>64</sup> Article 4, Convention Establishing the World Intellectual Property Organization.

<sup>65</sup> Article 2 (viii), Convention Establishing the World Intellectual Property Organization. Also see WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication, No. 489 (E), Chapter 2 - Fields of IP Protection. Available at [http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo_pub_489.pdf).

<sup>66</sup> Article 5, Convention Establishing the World Intellectual Property Organization. Article 5 provides that membership is open to any state that is: (1) a member of the Paris Union for the Protection of Industrial Property, or member of the Berne Union for the Protection of Literary and Artistic Works; or (2) (i) a member of the United Nations, or of any of the United Nations’ Specialized Agencies, or of the International Atomic Energy Agency, or that is a party to the Statute of the International Court of Justice; or (ii) invited by the WIPO General Assembly to become a member state of the Organization.

<sup>67</sup> See the Preamble, Convention Establishing the World Intellectual Property Organization.

<sup>68</sup> See WIPO, BIG/158/26, ANNEX II. Intergovernmental Organizations Admitted as Observers to the Meetings of the Assemblies of the Member States. Available at <http://www.wipo.int/export/sites/www/members/en/docs/observers.pdf>.

Right now, WIPO is mainly composed of the following global protection system: International Patent System,<sup>69</sup> the International Trademark System,<sup>70</sup> the International Design System,<sup>71</sup> the International System of Appellations of Origin,<sup>72</sup> and the International Copyright System,<sup>73</sup> etc.<sup>74</sup> And those global legal protection networks and regimes are increasingly growing both stronger and broader, geographically and substantively.<sup>75</sup> It is no exaggeration to say that WIPO is a quite effective and well-governed authority with comparatively sufficient political legitimacy in international IP law.

Regarding its relations with other international IP organizations, apart from the basic rule of coordination, cooperation and consultation agreements/arrangements made by the Director General after approved by the Coordination Committee controlled by the

---

<sup>69</sup> It includes: (1) Patent Cooperation Treaty (PCT), Done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001 (as in force from April 1, 2002); (2) Regulations under the Patent Cooperation Treaty (as in force from July 1, 2014); (3) PCT Administrative Instructions (as in force from September 16, 2012).

<sup>70</sup> It consists of (1) Madrid Agreement Concerning the International Registration of Marks; (2) Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks; (3) Common Regulations under the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to that Agreement (in force on January 1, 2013); (4) Administrative Instructions for the Application of the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating Thereto (in force as of January 1, 2008).

<sup>71</sup> It refers to (1) The Hague Agreement Concerning the International Deposit of Industrial Designs (London Act of June 2, 1934; Hague Act of November 28, 1960; Geneva Act of July 2, 1999); (2) Common Regulations Under the 1999 Act and the 1960 Act of the Hague Agreement (as in force on January 1, 2014); (3) Administrative Instructions for the Application of the Hague Agreement (as in force on January 1, 2014).

<sup>72</sup> It is formed from (1) Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as amended on September 28, 1979); (2) Regulations Under the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (as in force on January 1, 2012); (3) Administrative Instructions for the application of the Lisbon Agreement (as in force on January 1, 2010).

<sup>73</sup> It is constitutive of (1) Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979); (2) Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (of October 29, 1971); (3) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Done at Rome on October 26, 1961); (4) WIPO Copyright Treaty (WCT) (adopted in Geneva on December 20, 1996), WIPO Performances and Phonograms Treaty (WPPT) (adopted in Geneva on December 20, 1996); (5) Beijing Treaty on Audiovisual Performances (adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012).

<sup>74</sup> For a complete list of the 26 treaties administered by WIPO and other systems as well as classifications, please see WIPO-Administered Treaties. Available at <http://www.wipo.int/treaties/en/>. Also see WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication, No. 489 (E), Chapter 5 - International Treaties and Conventions on Intellectual Property. Available at [http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/489/wipo_pub_489.pdf).

<sup>75</sup> For example, Canada's ratification of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty on May 13, 2014; Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs [Accession by the Republic of Korea (No 121)]. Also, substantive laws are also boosting, like the Beijing Treaty on Audiovisual Performances (adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012), Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities on June 27, 2013).

states parties,<sup>76</sup> WIPO also encourages the conclusion and participates in the administration of international IP agreements when it is necessary and appropriate.<sup>77</sup> However, specifically about the relationship between WIPO and TRIPs, despite the entering into a cooperation agreement with the WTO,<sup>78</sup> that agreement narrowly provided rules about the mutual accessibility of laws and information-sharing, implementation of Article 6ter of the Paris Convention, and technical assistance and cooperation. Nothing is explicitly assured about how to deal with potential and emerging conflicts of rules, as well as competing and overlapping jurisdictions and competences. Regime interaction between WIPO and TRIPs seems to constantly influence the legitimacy of them as authorities, with different internal operation, evolution strategies and self-positioning.

## **B. WTO TRIPs Agreement**

The Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) is the most comprehensive multilateral IP treaty negotiated in the 1986-94 Uruguay Round under the framework of WTO, covering copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information. It introduced intellectual property into the multilateral trading system for the first time, with minimum standards of substantive protection incorporating treaties previously administered under WIPO by reference,<sup>79</sup> enforcement of intellectual property rights, and WTO dispute settlement procedures.<sup>80</sup> USA and EU dominated this “common ground-rules” model, with basic principles and detailed harmonizing rules,<sup>81</sup> for higher intellectual property protections through this linking IP with international trade law in a package. Thus, the Trips Agreement was born with dual character: built upon established heritage of international IP law and international trade law.<sup>82</sup>

U.S. was frustrated that WIPO was paying too much attention to developing countries and that WIPO had no enforcement mechanisms. With WIPO’s one-state, one-vote rule, U.S. was less able to exert leverage to achieve its desired policies.<sup>83</sup> So, here

---

<sup>76</sup> Article 13, 8, 3, Convention Establishing the World Intellectual Property Organization. Also see Article 2, Agreement between the United Nations and the World Intellectual Property Organization (entered into effect on December 17, 1974).

<sup>77</sup> Article 4, (iii), (iv), Convention Establishing the World Intellectual Property Organization.

<sup>78</sup> Agreement between the World Intellectual Property Organization and the World Trade Organization (December 22, 1995).

<sup>79</sup> Article 2, 9, Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>80</sup> For details of the TRIPs agreement, please see Overview: the TRIPs Agreement. Available at [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm). Also see Correa, Carlos María. *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules*. Cheltenham, UK: Edward Elgar, 2010.

<sup>81</sup> National Treatment, MFN, and Balanced Protection. See *Understanding the WTO: the Agreements - Intellectual Property: Protection and Enforcement*. Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm).

<sup>82</sup> See Taubman, Antony, Hannu Wager, and Jayashree Watal, eds. *A handbook on the WTO TRIPs agreement*. Cambridge University Press, 2012, p xx.

<sup>83</sup> Sell, Susan K. *TRIPs Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP*. *J. Intell. Prop. L.* 18 (2010): 447-478, 450.

comes the WTO TRIPs Agreement. After the TRIPs Agreement came into effect, WTO members, quite a few non-governmental international organizations, academia and the media have expressed many concerns about the damage caused by such a high standard of intellectual property protection to the resolving of other tightly associated issues, such as public health, environmental protection, human rights and also the protection of traditional knowledge. The external consequences of the TRIPs Agreement are to protect the economic interests of developed countries one-sidedly,<sup>84</sup> while the basic human rights of people in developing countries (especially LDCs) are threatened. This reality and an overwhelming wave of oppositions could not be alleviated in the traditional WTO bureaucrats and relatively closed system, and then expanded into a denunciation of the democratic deficits of the TRIPs agreement and even WTO. Their legality and legitimacy are inescapably seriously challenged. All this forced the WTO General Council to make responses and reformations in 2001 on one of the most sensitive and also the most important core issues: public health. The adaptation of the “Declaration on the TRIPS Agreement and Public Health”<sup>85</sup> marks that the WTO, this stiff international trading system, was finally activated from such a long deep sleep and began to address the shortcomings of its own in the settling of great international concerns under a new era, and also indicates that “WTO Development Agenda”<sup>86</sup> has become gradually deepened.<sup>87</sup> However, it should be clearly noted that this declaration is not the end of the criticisms and doubts, nor does developed economies’ attempts to extending this “higher level of protection” to other subfields of IP.<sup>88</sup>

---

<sup>84</sup> Actually, not only the existing provisions of the TRIPs Agreement, but also the future amendments to it will also be dominated by main powers (EU and USA) moving forward in the direction of simply higher protection of IP rather than balanced arrangements linking IP with other important and inseparable topics. For example, the extension of the protection of geographical indications and the requirement to disclose the country of origin of genetic resources and traditional knowledge used in the inventions are two intensely debated issues in 2013 and 2014, but they are treated in a totally different way by developed countries. See WTO General Council - Trade Negotiations Committee - Council for Trade-Related Aspects of Intellectual Property Rights - Special Session, Geographical Indications (Communication from the European Communities), WT/GC/W/547, 14 June 2005. Available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/ip/W11.doc>. Also see WTO General Council - Trade Negotiations Committee, Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPs Agreement to Products Other Than Wines and Spirits and Those Related to the Relationship Between The TRIPs Agreement and the Convention on Biological Diversity (Report by the Director-General), WT/GC/W/591, TN/C/W/50, 9 June 2008. Available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/tn/c/W50.doc>.

<sup>85</sup> WT/MIN(01)/DEC/2, adopted on 14 November 2001.

<sup>86</sup> The Round was officially launched at the WTO’s Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier.

<sup>87</sup> For the Doha agenda, this separate declaration sets two specific tasks. The TRIPS Council has to find a solution to the problems countries may face in making use of compulsory licensing if they have too little or no pharmaceutical manufacturing capacity, reporting to the General Council on this by the end of 2002. (This was achieved in August, 2003, see intellectual property section of the “Agreements” chapter.) The declaration also extends the deadline for least-developed countries to apply provisions on pharmaceutical patents until 1 January 2016. See The Doha Declaration explained. Available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm).

<sup>88</sup> For example, they have been trying to win in the debate of whether relevant provisions of the TRIPS Agreement (mainly Article 23) provide a mandate for extending coverage beyond wines and spirits. See WTO Trade Negotiations Committee, Draft Decision to Amend Section 3 of Part II of the TRIPs

Institutional contexts and historical backgrounds are always important to understand the underlying motivation and necessity for establishing a new international regime.<sup>89</sup> So, why TRIPS was highly pushed forward by developed countries? And why it seemed to be quite successful in its first decades but it cannot be progressively evolutionary now? Compared to WIPO, what are its advantages and disadvantages?<sup>90</sup>

TRIPS Agreement certainly is not the end of the process of establishing an international intellectual property regime, but merely the beginning.<sup>91</sup> The conclusion of TRIPS Agreement did, greatly and effectively, enhance the international protection of intellectual property rights, since it linked IP with international trade and reinforced that with powerful dispute settlement mechanism. Many countries had to amend their domestic laws substantively and accordingly to meet higher standards in TRIPS, indeed harmonizing the domestic IP legal rules fundamentally.<sup>92</sup> This method of “linking” and “package deal” crushed down the obstacles and divergences in the decades’ negotiation, while the economic interests of developed countries were more emphasized and taken into account,<sup>93</sup> and doubts has always been arguably going along with arise of disputes as well as resistance from time to time.<sup>94</sup>

However, TRIPS later suffered from this method and backdrop with which it used to

---

Agreement, TN/C/W/60, 19 April 2011.

<sup>89</sup> See David, Paul A. Why are Institutions the ‘Carriers of History’?: Path Dependence and the Evolution of Conventions, Organizations and Institutions. *Structural Change and Economic Dynamics* 5.2 (1994): 205-220. (“Three main analytical insights into the conditions that give rise to path dependence in economic phenomena generally can be applied to answer the question why history matters so vitally to the form and functioning of human organizations and institutions...”)

<sup>90</sup> This comparative perspective between TRIPS and WIPO seems to be the most classic means for the analysis of the international IP law-making. For example, see Netanel, Neil W. The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement. *Va. J. Int'l L.* 37 (1996): 441. Helfer, Laurence R. Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking. *Yale J. Int'l L.* 29 (2004): 1.

<sup>91</sup> See Doane, Michael L. TRIPS and International Intellectual Property Protection in an Age of Advancing Technology. *Am. UJ Int'l L. & Pol'y* 9 (1993): 465, 484.

<sup>92</sup> See Gin, Elaine B. International Copyright Law: Beyond the WIPO & (and) TRIPS Debate. *J. Pat. & Trademark Off. Soc'y* 86 (2004): 763. (“Although the jurisdiction of national laws stops at the borders, IP - because of its intangible nature - can easily cross borders and be freely infringed in other countries, whose laws may not protect IP. To remedy this, many countries (particularly the developed countries) seek strong protection of IP rights through international harmonization, which include standardization of national IP laws and enforcement procedures. But less developed countries have often resisted such harmonization efforts.”)

<sup>93</sup> See Adede, Adronico O. Origins and History of the TRIPS Negotiations. In Bellmann, Christophe, and Ricardo Melendez-Ortiz, eds. *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability*. Routledge, 2013, p 31. (“They realized that it would not be possible to have a successful outcome to the Uruguay Round without a viable TRIPS agreement being part of the package. In other words, both the developing and the developed countries saw the need to protect the integrity of the Uruguay Round of negotiations to produce its desired needs. This factor became evident to all the negotiations as early as 1989 during the Mid-Term Review of the Uruguay Round.”)

<sup>94</sup> See Chin, Judith C., and Gene M. Grossman. Intellectual Property Rights and North-South Trade. NBER Working Paper w2769 (1991). (“We find that the interests of the North and the South generally conflict in the matter of protection of intellectual property, with the South benefiting from the ability to pirate technology and the North harmed by such actions. A strong system of intellectual property rights may or may not enhance world efficiency.”)

prosper smoothly.<sup>95</sup> That's because this method of "linking" and "package deal" forced forward with the interests and demands of developing countries ignored, forcing developing countries into a dilemma between costly compromise and complete failure, and cunningly pushing the responsibility of potential failure of the multilateral negotiation process onto developing countries.<sup>96</sup> So far, the TRIPs Agreement was born to be like one-time consumption or one-shot deal, despite that it is already good enough for US, at least used to be a good bargain. What's worse, due to the contrast between the enforceability of those specific high standards of IP protection in the developing countries' side and the fuzziness of industrialized countries' corresponding trade-off commitments in the developed countries' side, those ever-increasingly inequality and unfairness make the multilateral approach for intellectual property protection under the WTO framework substantively lose most of mutual trust politically and balance of interests economically, which then gradually eroded this big construction and derogated its legality and legitimacy.<sup>97</sup> In a sense, this is the natural malady and inevitable fate of the existing American-dominated mode and "trade-IP linking"<sup>98</sup>.

From the perspective of cost-benefit analysis of international rule-making, this linking IP with international trade law and forcing forward to prioritizing the developed countries' interests is America's choice of last resort, given the reality of collective action dilemma of the multilateral approach. If US didn't push all the way with this "all or nothing" strategy,<sup>99</sup> the TRIPs Agreement would inevitably be stillborn, or at

---

<sup>95</sup> For example, see Abbott, Frederick M. TRIPs in Seattle: The Not-So-Surprising Failure and the Future of the TRIPs Agenda. *Berkeley J. Int'l L.* 18 (2000): 165-268, 268. ("But high standards of IPRs protection will not by themselves address the tremendous imbalance between the levels of technological development in the industrialized and developing economies. The WTO needs to begin to work more closely with the World Bank, UNCTAD, UNDP, WIPO, WHO and other multilateral institutions to create an environment that promotes the transfer of knowledge and technology in ways that are productive for both industrialized and developing countries.")

<sup>96</sup> See Adede, Adronico O. *Origins and History of the TRIPs Negotiations*. In Bellmann, Christophe, and Ricardo Melendez-Ortiz, eds. *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*. Routledge, 2013, p 29. ("The negotiating system has been criticized by the developing countries, claiming that it tends to place on the negotiating table, proposals and agreements which have been largely negotiated by the major players such as the US, the EU and Japan, for the endorsement by the rest of the membership of the WTO, who are thus excluded from the actual negotiation on the issues.")

<sup>97</sup> See Bellmann, Christophe, and Ricardo Melendez-Ortiz, eds. *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability*. Routledge, 2013. ("An unprecedented surge in the scope and level of intellectual property rights (IPR) protection has been engulfing the world. This globalizing trend has shifted the balance of interests between private innovators and society at large and tensions have flared around key public policy concerns. As developing nations' policy options to use IPRs in support of their broader development strategy are being rapidly narrowed down, many experts are questioning the one-size-fits-all approach to IPR protection and are backing a rebalancing of the global regime.")

<sup>98</sup> That's because the topic of Trade and IP have quite different values as their central theoretical and practical philosophy. For example, see Geller, Paul Edward. *Intellectual Property in the Global Marketplace: Impact of TRIPs Dispute Settlements?*. *The International Lawyer* (1995): 99-115, 114-115. ("TRIPs panels will be focused on trade, while intellectual property laws, though attuned to economic considerations, are motivated by other values as well.")

<sup>99</sup> See Doane, Michael L. *TRIPs and International Intellectual Property Protection in an Age of Advancing Technology*. *Am. UJ Int'l L. & Pol'y* 9 (1993): 465, 476.

least greatly weakened. But on the other hand, from the perspective of balanced protection principle and the interests of developing countries, the TRIPs Agreement was more than demanding and tendentious to them. And Western developed economies' indefinite, non-binding and disproportionate commitments are far from tempting and satisfactory, compared to developing countries' compromises.

To sum up, the TRIPs Agreement was successfully arrived at because (1) the historical backgrounds (demands of global economic growth and integration, the feasibility of a multilateral framework) call for and allow the deepening of international trade liberalization, and all the countries hope that the success of the Uruguay Round of negotiations can bring about a new round of steady growth for the global economy, while the developing countries didn't want to bear the infamy of hindering multilateral process and risk some of their trade-off benefits; (2) the strategy of introducing IP to international trade law, the "all or nothing" package deal, and the method of delinking IP from other associated issues (like human rights and environmental protection) is realistic, effective and rational; (3) US, along with its trade allies, still had the diplomatic capabilities, economic powers and international authoritative prestige to vigorously promote the signing of this "One-Size ('Extra Large') Fits All"<sup>100</sup> package of agreements and dominate the moral high ground and core values.

But after almost two decades, the TRIPs Agreement has lost its shiny halo now,<sup>101</sup> with both tides of criticism from emerging developing countries and America's turning to other useful and promising new regimes.<sup>102</sup> Actually, this is the normal logic and rational cycle of the development and proliferation of international IP regimes in a world society without overarching hierarchy, which incidentally and consequently leads to the so-called institutional fragmentation of international IP law. Every international IP regime has its own unique historical global backgrounds, special purposes for its creation and accordingly inherent lifecycle. In other words, its declining and getting abandoned is the natural evolution of the international legal system after the completion of its historic mission, and this is the "ethos" of international (IP) law-making.<sup>103</sup> WIPO is a good precedent for TRIPs, since the United States intended to ratify the TRIPs Agreement since WIPO was not

---

<sup>100</sup> Boyle, James. A Manifesto on WIPO and the Future of Intellectual Property. *Duke L. & Tech. Rev.* 2004 (2004): 9-15.

<sup>101</sup> This "one size fits all" attitude has been widely condemned, in both the developed and developing world. See Boyle, James. A Manifesto on WIPO and the Future of Intellectual Property. *Duke L. & Tech. Rev.* 2004 (2004): 9-15.

<sup>102</sup> Such as ACTA, TPP, etc. See Sell, Susan K. TRIPS was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP. *J. Intell. Prop. L.* 18 (2010): 447.

<sup>103</sup> See Ole Spiermann. Twentieth Century Internationalism in Law. *EJIL* (2007), Vol. 18 No. 5, 785-814. (Regarding this new understanding of the institutional fragmentation and the "ethos" of international law, Ole Spiermann contends that many international lawyers still persist in conceiving and judging international law against a background colored by national legal traditions, and they did not overcome the optimist and evolutionary tradition based on the assumption that international law is but an ever closer approximation of national legal systems.) For similar arguments about international lawyers' understanding of 21st century international law, see Prost, Mario. *The Concept of Unity in Public International Law*. Oxford, U.K.: Hart Pub, 2012, p 191-192.

incompetent, based on the prevailing circumstances at that time. What's more, WIPO is an excellent example of how an international IP regime can transfigure with glory and upgrade itself through accurate grasp and understanding of international intellectual property protection trends,<sup>104</sup> through analyzing the comparative advantages and disadvantages of those international IP regimes with forward-looking visions and cleverly compensating the drawbacks of existing IP regimes, notwithstanding that inherent ethos of the regime decide those outcomes to a great extent. Under the circumstance of little attentions and powerful connections for WIPO, it re-boards the main stage for international intellectual property regimes.<sup>105</sup> WIPO always takes the multilateral-led and all members participatory mode with a certain degree of self-independence, and also doesn't deliberately try to link IP with other issues, thus making it more efficient on the long run under the economic analysis regarding the international IP law-making, the balance of interests among different party members, and the legality and legitimacy of international IP legal rules.

Then, is it possible for TRIPs to start a similar self-redemption and self-revolution? On all accounts, it doesn't seem to be the correct prediction or solution for cognitive challenges of the present era to attempt to conduct a simple historical analogy. The practical and operational contexts of those institutions are entirely different, and accordingly it is quite different when concluding the future fate of TRIPs. But in reference to the characteristics of the WTO TRIPs Agreement itself and the bigger overall framework mechanism, it is argued here that it is difficult for TRIPs to achieve this reversal and revival. Firstly, in relation to the overall context, TRIPs incorporates the intellectual property topic into trade agreement under the WTO framework. This link inevitably leads to relatively small independence for TRIPs, and the need to update or upgrade it would be placed under the development of the overall trade framework, which makes it far from easy to reverse the existing paradigm.<sup>106</sup> Right now, multilateral free trade agreement negotiations and further development of WTO Trade Law has almost become a dead end, making it almost impossible to have an informed and democratic debate about the trajectory we are on. Secondly, in terms of this particular agreement under the WTO framework, the national trade interests within TRIPs agreement lead to largely restricted potentials for further upgrading of the mechanism, as developed and developing countries have big divergences

---

<sup>104</sup> For example, see Ramcharan, Robin. *International Intellectual Property Law and Human Security*. TMC Asser Press, 2013, p 217-243. ("WIPO has recognized that the organization has a role to play in human security, specifically in enhancing the development of its Member States. Whereas it has traditionally seen its role as a technical-legal one to assist Member States to apply existing IP laws, WIPO has embraced a development-oriented agenda and work plan that recognize the human security concerns of the vast majority of its membership and the need for a more flexible and balanced IP regime.")

<sup>105</sup> See Boyle, James. *A Manifesto on WIPO and the Future of Intellectual Property*. *Duke L. & Tech. Rev.* 2004 (2004): 9-15. (In this Manifesto, Professor Boyle claims that there are systematic errors in contemporary intellectual property policy and that WIPO has an important role in helping to correct them.)

<sup>106</sup> See Boyle, James. *A Manifesto on WIPO and the Future of Intellectual Property*. *Duke L. & Tech. Rev.* 2004 (2004): 9-15. ("Trade negotiations have become the preferred arena for expanding rights still further.")

concerning enormous economic benefits on intellectual property topic, not to mention other difficulties to achieve the upgrading goal. Developed countries' credit to achieve benefits exchange and win-win mechanism in multilateral negotiation and international IP law-making has went bankruptcy, and emerging powers' ambitions to develop more fair and balanced International IP rules as well as bargaining mechanism have already been undoubtedly exposed. Under this context of chaotic regime competition and disordered international IP governance,<sup>107</sup> short-term development of international IP regimes would undergo an age of "Tale of Two Cities", when it is "the best of times" with promising embraces and "the worst of times" with uncharted rocks.<sup>108</sup> Thirdly, as for the specific enforcement mechanism of TRIPs agreement, the law-making practices of the Panel and Appellate Body can surely promote the rule to advance with the times and constantly absorb the dynamic changes of new landscape of interests and new demands of rule-making to some extent, but the limited impact of this case law cannot meet the requirements of the new texture and paradigm of international IP law-making in this time.<sup>109</sup>

### C. CBD

CBD started primarily with several experts meeting organized by UNEP Governing Council, particularly the 14/26<sup>110</sup> and 15/34<sup>111</sup> decisions in late 1980s. It was found that existing international regimes were inadequate for the biodiversity protection against growing threats: the World Heritage Convention covered limited cultural and natural heritage sites;<sup>112</sup> CITES only covered threats to endangered species;<sup>113</sup> the

---

<sup>107</sup> See Abbott, Frederick M. Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance. *Journal of International Economic Law* 3.1 (2000): 63-81. ("The producer-driven governance model is not suited to the highly integrated international society of the 21st century. The WTO governance structure should be adapted to account for more diverse interests, including those of marginalized developing countries, NGOs, and individuals. One aspect of this adaptation should involve more highly integrated relations between the WTO and other multilateral institutions.")

<sup>108</sup> Dickens, Charles, and Andrew Sanders. *A Tale of Two Cities*. Oxford: Oxford University Press, 1988, p 1. ("It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.")

<sup>109</sup> See Gin, Elaine B. *International Copyright Law: Beyond the WIPO & (and) TRIPs Debate*. *J. Pat. & Trademark Off. Soc'y* 86 (2004): 763, 791. ("TRIPs' reliance on sanctions and economic incentives may only work in the short term to ameliorate the North-South conflict, although it has significantly helped to bridge the gap between the civil and common law countries. Because copyright law is so fundamentally entrenched with social values, such as aesthetics, culture and freedom of expression, WIPO's long-term approach focused on norm-setting may be better in helping developing countries along the 'learning curve' concerning copyright law.")

<sup>110</sup> UNEP, Rationalization of International Conventions on Biological Diversity (decision 14/26). Report of the Governing Council on its Work of its Fourteenth Session, 17 June 1987. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=100&ArticleID=1659&l=en>.

<sup>111</sup> UNEP, Preparation of an International Legal Instrument on the Biological Diversity of the Planet (decision 15/34). Report of the Governing Council on its Work of its Fifteenth Session, 25 May 1989. Available at

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=71&ArticleID=963&l=en>.

<sup>112</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted at the

Ramsar Convention covered wetlands and their resources.<sup>114</sup> But none of them satisfied the global needs to conserve biodiversity worldwide. And the working group believed that a new global treaty on biodiversity conservation was urgently needed in the form of a framework treaty, building upon existing conventions.<sup>115</sup> So, after the adoption and opening for signature in 1992, the convention entered into force in December 1993. Up to now, there are 194 Parties (168 Signatures).<sup>116</sup>

CBD marks an historic commitment and a dramatic step by states to conserve biological diversity and to ensure that biological resources are used sustainably, with fair and equitable benefit-sharing provisions.<sup>117</sup> While other conventions cover some portions of biodiversity, the convention on biological diversity is the first all-encompassing international agreement to cover all genes, species and ecosystems.<sup>118</sup> But there are also some negative views about this CBD, arguing that lack of clarity, policy vacuum, domestic bureaucracy and high transaction costs are cannot-be-neglected concerns and drawbacks.<sup>119</sup> While the CBD and ABS laws are good-intentioned and well-balanced in theory, it is quite different and inefficient to practically implement, monitor and enforce them in different state parties. What's worse, the relationship between IP rights and the implementation of access and benefit-sharing arrangements is delicate and subtle,<sup>120</sup> despite that it is widely acknowledged that IP system can adapt itself to accommodate this.<sup>121</sup> And this is

---

General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris, at its seventeenth session, 16 November 1972.

<sup>113</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., on 3 March 1973; amended at Bonn, on 22 June 1979. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

<sup>114</sup> The Convention on Wetlands of International Importance. The Ramsar Convention is the only global environmental treaty that deals with a particular ecosystem. The treaty was adopted in the Iranian city of Ramsar in 1971.

<sup>115</sup> See Convention on Biological Diversity, E&D File, Vol. 1 No. 4, Feb 1995.

<sup>116</sup> See CBD Official Website. List of Parties. Available at <http://www.cbd.int/information/parties.shtml>. Also see United Nation Treaty Collection. CHAPTER XXVII ENVIRONMENT, 8. Convention on Biological Diversity. Available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-8&chapter=27&lang=en#1](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&lang=en#1).

<sup>117</sup> CBD. Article 1. Objectives; Article 15. Access to Genetic Resources.

<sup>118</sup> Groves, Craig. *Drafting a Conservation Blueprint: A Practitioner's Guide to Planning For Biodiversity*. Island Press, 2003, p 15-16. Also see Glowka, Lyle. *Bioprospecting, Alien Invasive Species, and Hydrothermal Vents: Three Emerging Legal Issues in the Conservation and Sustainable Use of Biodiversity*. *Tul. Env'tl. LJ* 13 (2000): 329-471.

<sup>119</sup> Laird, Sarah A. *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*. London: Earthscan Publications, 2002, p 373-374.

<sup>120</sup> This kind of doubt arises not only in CBD but also in other forums like WIPO, such as in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. See WIPO/GRTKF/IC/1/3, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, First Session, Geneva, April 30 to May 3, 2001, par.68, p.22.

<sup>121</sup> For example, Ad Hoc Open-ended Working Group on Access and Benefit-sharing. First meeting, Bonn, 22-26 October 2001. Report on the Role of Intellectual Property Rights in the Implementation of Access and Benefit-sharing Arrangements. UNEP/CBD/WG-ABS/1/4, 10 August 2001, para. 17. ("It has been argued that traditional intellectual property rights regimes are not appropriate for the protection of traditional knowledge. However, it has also been suggested that such regimes could be adapted to accommodate traditional knowledge. In addition, sui generis systems for the protection of

vividly demonstrated in the tangled and chaotic relationship among CBD and WTO, WIPO and Food and Agriculture Organization of the United Nations.<sup>122</sup>

## 2. Regional IP Regimes in Pacific Rim

### A. TPP

The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement initiated by 4 Pacific countries (Chile, New Zealand, Singapore, and Brunei, known as the Pacific-4) and joined by US later in 2008. It is currently negotiated by twelve countries throughout the Asia-Pacific region, and several countries have shown their interest. And this US-oriented TPP trade agreement was joined by more countries (including Canada and Japan), to reach the objective of “shaping a high-standard, broad-based regional pact”<sup>123</sup>. So, representing nearly 40 percent of global GDP and about one-third of all world trade, TPP is an ambitious 21st-century regional trade and investment agreement. Despite that states had set targets for the settlement of negotiations in 2011, it is still under fierce negotiation and complex interest-balance to “achieve a comprehensive and transformative agreement with broadly shared benefits”,<sup>124</sup> validating the TPP’s high-standard approach as a promising pathway to a Free Trade Area of the Asia Pacific.<sup>125</sup> The 20th formal round negotiation was held in Ottawa, Canada on 3 - 13 July, 2014. Besides, the most notable country not involved in the negotiations is China, and China has reacted by accelerating its own trade initiatives in Asia.<sup>126</sup> Some other assert that U.S. has repeatedly welcome China’s joining into TPP negotiation or other kinds of participation, and thus the

---

traditional knowledge could be developed.”)

<sup>122</sup> See COP 5. Decision V/26, Access to Genetic Resources. (A 15: “(d) Invites relevant international organizations, including the World Intellectual Property Organization, to analyze issues of intellectual property rights as they relate to access to genetic resources and benefit-sharing, including the provision of information on the origin of genetic resources, if known, when submitting applications for intellectual property rights, including patents; (e) Requests relevant international organizations, for example, the World Intellectual Property Organization and the International Union for the Protection of New Varieties of Plants, in their work on intellectual property rights issues, to take due account of relevant provisions of the Convention on Biological Diversity, including the impact of intellectual property rights on the conservation and sustainable use of biological diversity, and in particular the value of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”)

<sup>123</sup> Office of the United States Trade Representative. Trans-Pacific Partnership Announcement, 14 December 2009. Available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement>.

<sup>124</sup> For example, The Real News. Wikileaks TPP Revelations Prove US in “Left Field” With Trade Deal. 15 December 2013. (“WikiLeaks recently released documents which shed light on the status of ongoing TPP negotiations. The revelations demonstrate deep disagreement between the United States and negotiating parties on the issues of intellectual property, agricultural subsidies, and financial services.”)

<sup>125</sup> 2013 Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders. October 8, 2013. Available at <http://www.ustr.gov/sites/default/files/tpp%20trade%20ministers%20report%20to%20leaders%2010082013.pdf>.

<sup>126</sup> Mireya, Solis. The Containment Fallacy: China and the TPP. Brookings Institute. May 24, 2013. Available at <http://www.brookings.edu/blogs/up-front/posts/2013/05/24-china-transpacific-partnership-solis.a>

exclusion of China is not true. But it is evident that those diplomatic parables are totally different from actual consideration of interests in international politics and international relations. TPP's standards and proposed provisions are not acceptable to China and it is not feasible to accommodate the needs of both China and America with this set of norms, which is the actual exclusion of China from potential international law-making of this regional trade regime. On the whole, the exclusion of China,<sup>127</sup> the possible US Congress's not approval, and potential opposition from Asian-pacific developing countries to "new issues and new members"<sup>128</sup> as well as other factors all cast shadows on the ratification and entering into force of TPP.<sup>129</sup>

As for the intellectual property protection chapter, leaked draft texts of the agreement show that the IP chapter would have extensive negative ramifications for users' freedom of speech, right to privacy and due process, and hinder peoples' abilities to innovate.<sup>130</sup> The provisions relating to the enforcement of patents and copyrights, alleged to be present in the US proposal, have been criticized as being excessively restrictive, going beyond those in the Korea-US trade agreement and Anti-Counterfeiting Trade Agreement (ACTA).<sup>131</sup> Also, TPP IP Chapter substantially reinforces and further develops the existing WTO TRIPs Agreement, so as to ensure "an effective and balanced approach"<sup>132</sup> to intellectual property rights and "set the bar" for future agreements. All those were attempted by being based on TRIPs and borrowing heavily from ACTA,<sup>133</sup> and also US domestic laws and US FTAs.<sup>134</sup>

---

<sup>127</sup> See Armstrong, Shiro. Australia and the Future of the Trans-Pacific Partnership Agreement. No. 23135. East Asian Bureau of Economic Research, 2011. ("[C]omplications will arise with a TPP to which China is not party.") Also see Lim, C. L., Deborah Kay Elms, and Patrick Low. The Trans-Pacific Partnership A Quest for a Twenty-First Century Trade Agreement. Cambridge: Cambridge University Press, 2012, p 78("China will still hold considerable market power, and the 'China gap' will cast serious doubt on the feasibility of the 'regional agreement' concept.")

<sup>128</sup> See Lim, C. L., Deborah Kay Elms, and Patrick Low. The Trans-Pacific Partnership A Quest for a Twenty-First Century Trade Agreement. Cambridge: Cambridge University Press, 2012, p 78-79. ("Another interesting feature of the TPP is the idea of a 'living agreement', which is designed to the updating of the agreement as appropriate to address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries.")

<sup>129</sup> See Flynn, Sean M., et al. US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement. American University International Law Review 28.1 (2012): 105-205, 203. ("The problems for the United States can be described in terms of balance, inclusion, and democratic process.")

<sup>130</sup> See Electronic Frontier Foundation. Trans-Pacific Partnership Agreement. Available at <https://www.eff.org/issues/tpp>.

<sup>131</sup> Flynn, Sean; Kaminski, Margot E.; Baker, Brook K.; and Koo, Jimmy H.. Public Interest Analysis of the US TPP Proposal for an IP Chapter (2011). PIJIP Research Paper Series. Paper 21. Available at <http://digitalcommons.wcl.american.edu/research/21>.

<sup>132</sup> Office of the United States Trade Representative. Outlines of the Trans-Pacific Partnership Agreement. November 12, 2011. Available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

<sup>133</sup> See Sager, Carrie Ellen. TPP vs. ACTA - Line by Line. Infojustice. March 27, 2012. Available at <http://infojustice.org/archives/9256>. (By a comparison of the copyright enforcement provisions in the U.S. proposal for a TPP Chapter on IP with those in ACTA, it is concluded that the TPP is more restrictive than ACTA in many of the other areas where ACTA was controversial, including blocking circumvention of technological protection measures, criminalizing rights infringement, and allowing

In summary, from the perspective of its actual effects and strategic intents, TPP is attempting to expand and build up a set of much higher IP rights protection standards, grounded on WIPO Treaties, TRIPs, ACTA and US laws. This accumulative and progressive manner of international law-making is common and effective for international law,<sup>135</sup> but the legality and legitimacy of those international IP rules are intensely questioned and doubted.<sup>136</sup> This reveals that international intellectual property lawmaking arena has grown ever more congested and complex, both horizontally across many international institutions and vertically from multilateral, bilateral and regional actors. This “forum shifting and regime complexity”<sup>137</sup> offers many potential opportunities and risks to international IP lawmaking.

## B. RECP

The Regional Comprehensive Economic Partnership (RCEP) is a proposed FTA between ASEAN member states<sup>138</sup> and ASEAN’s 10+1 FTA partners (including Australia, China, India, Japan, Korea and New Zealand). The RCEP was announced by the ASEAN Leaders in 2011 at the 19th ASEAN Summit. The negotiations for the RCEP were formally launched in November 2012 and aim to conclude by end-2015.<sup>139</sup> The agreement is between 16 countries, making up 45% of world population and contributing 1/3 of the world’s GDP in total.<sup>140</sup> RCEP would be “a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement establishing an open trade and investment environment in the region to facilitate the expansion of regional trade and investment and contribute to global economic growth and development”.<sup>141</sup> Similar to the TPP, the RCEP is also another

---

substantial civil fines for infringement.)

<sup>134</sup> Such as the United States – South Korea Free Trade Agreement.

<sup>135</sup> Every IP treaty is just a beginning and not an endpoint. “While many countries believed that they were negotiating a ceiling on intellectual property rules, they quickly discovered that they actually had negotiated only a floor.” See Sell, Susan K. *Private power, public law: the globalization of intellectual property rights*. Vol. 88. Cambridge University Press, 2003, p 48.

<sup>136</sup> Especially about the transparency and secrecy of the negotiation, the potential damages of those rules to the balance of interests in IP laws, the protection of public interests and public space in the sphere of IP laws. As for other specific analysis on the doubts of TPP IP Proposal, see Flynn, Sean M., et al. *US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*. *American University International Law Review* 28.1 (2012): 105-205.

<sup>137</sup> See Helfer, Laurence R. *Regime shifting: the TRIPS agreement and new dynamics of international intellectual property lawmaking*. *Yale J. Int'l L.* 29 (2004): 1, 6-9. (describing bilateral agreements as part of “regime shifting” strategies of the United States and the European Union, both dissatisfied with the limitations of TRIPS)

<sup>138</sup> Ten member states of the Association of Southeast Asian Nations (ASEAN): Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam.

<sup>139</sup> *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*. Available at <http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf>.

<sup>140</sup> Ministry of Trade and Industry Singapore. *What is the Regional Comprehensive Economic Partnership (RCEP)?* November 2012. Available at [http://www.fta.gov.sg/press\\_release%5CFACTSHEET%20ON%20RCEP\\_final.pdf](http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf).

<sup>141</sup> See the Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership.

possible pathway to the construction of a free trade area across the Asia-Pacific.<sup>142</sup> The TPP and RCEP, as both mutually-reinforcing and comparatively competitive parallel tracks for regional integration, offer an excellent example for the study of institutional fragmentation of International IP Law and International Law. But RCEP is not working on a pre-determined membership. Instead, this arrangement is open to any other external economic partners.

In accordance with the “Joint Declaration on the Launch of Negotiations for the RCEP”<sup>143</sup> on 20 November 2012 and the “Guiding Principles and Objectives for Negotiating the RCEP”<sup>144</sup> endorsed by RCEP Ministers on 30 August 2012, the RCEP negotiations will aim to do the following in the field of intellectual property:

*“The text on intellectual property in the RCEP will aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights.”*

And a working group on intellectual property was established at the third round of the Regional Comprehensive Economic Partnership (RCEP) Negotiations on 20–24 January 2014. Although it is still not quite clear or certain about what degree of IP protection standards RCEP would like to incorporate in the final trade agreement, it is greatly likely that more emphases would be put on issue like the balance of interest, development agenda in international IP protection, the compromise of provisions from CBD, WIPO and TRIPs; and that those treaty articles would go in a direction different from TPP and ACTA. That’s because firstly, state parties to RCEP always pay more attention to take a more balanced approach towards IP protection both in domestic legislations and international lawmaking processes, such as India and Australia.<sup>145</sup> And New Zealand prefers the affirmation of the TRIPs standards.<sup>146</sup>

---

<sup>142</sup> Ministry of Trade and Industry Singapore. What is the Regional Comprehensive Economic Partnership (RCEP)? November 2012. Available at [http://www.fta.gov.sg/press\\_release%5CFACTSHEET%20ON%20RCEP\\_final.pdf](http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf).

<sup>143</sup> Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership. Available at <http://www.meti.go.jp/press/2012/11/20121120003/20121120003-2.pdf>.

<sup>144</sup> Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership. Available at <http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf>.

<sup>145</sup> India has always taken a firm position against too high-standard IP protection, such as in the UPOV. And Australia pays attention to the balanced protection of interests, such as in the copyright system, although it has to raise standards under US’s pressure. See Sahai, Suman. India’s Plant Variety Protection and Farmers’ Rights Act, 2001. *Current Science* 84.3 (2003): 407-412; Drahos, Peter, et al. Pharmaceuticals, Intellectual Property and Free Trade: the Case of the US–Australia Free Trade Agreement. *Prometheus* 22.3 (2004): 243-257. Also see Armstrong, Shiro. Australia and the Future of the Trans-Pacific Partnership Agreement. No. 23135. East Asian Bureau of Economic Research, 2011, p 4. (“Australia’s Trade Minister, Craig Emerson, adopted many of the recommendations of the Productivity Commission’s report including a recommendation that changes to the Australian pharmaceutical benefits scheme will not be negotiated in trade agreements, intellectual property rights (IPR) will not be strengthened through trade agreements and investor-state dispute settlement will not be included in trade agreements.”)

Secondly, some specific issues are the common and main concerns of RECP negotiators, such as access to genetic resources and benefit-sharing, public health and right to medicine, etc. So, the RECP IP text should be quite conservative towards US-led ever-increasing IP protection standards.

To sum up, RECP is a good international regime for developing countries, emerging powers and also developed economies to come up with a solution unlike the “over-expansion of one-size-fits-all intellectual property laws”<sup>147</sup> mode, so as to accommodate different policy goals without threats to numerous vital social and economic objectives.

### C. FTAAP

At their annual summit in Vietnam in November 2006, the leaders of the 21 members of the Asia Pacific Economic Cooperation (APEC) forum agreed to “seriously consider”<sup>148</sup> negotiating a Free Trade Area of the Asia Pacific (FTAAP) and FTAAP would be by far the best available “Plan B” to restart widespread trade-liberalizing momentum if the WTO Doha Development Agenda (DDA) fails in Geneva.<sup>149</sup> In 2007, Leaders endorsed the Regional Economic Integration (REI) Report to allow for a true trans-Pacific integration, providing for further ways and means to promote regional economic integration, including a Free Trade Area of the Asia-Pacific (FTAAP) as a long-term prospect.<sup>150</sup> Despite that there are already different patterns of economic restructuring and the approaches of implementation of REI or FTAs in Asia Pacific, in 2010 (in Japan), APEC Leaders concretized the vision by outlining “pathways to FTAAP”.<sup>151</sup> And these pathways must be of high-standard to lead to a

---

<sup>146</sup> See Lim, C. L., Deborah Kay Elms, and Patrick Low. *The Trans-Pacific Partnership A Quest for a Twenty-First Century Trade Agreement*. Cambridge: Cambridge University Press, 2012, p 157, 159, 169. (“Arguably, TRIPs is higher than is optimal, for some developing countries in particular.”)

<sup>147</sup> See Flynn, Sean M., et al. *US Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*. *American University International Law Review* 28.1 (2012): 105-205, 108. Also see Mizaras, Vytautas, and Annette Kur. *The Structure of Intellectual Property Law: Can One Size Fit All?* Cheltenham, U.K.: Edward Elgar, 2011, pt. IV, *International IP Law: One Size Does Not Fit All*.

<sup>148</sup> See APEC. 14th APEC Economic Leaders’ Meeting 2006 - Ha Noi Declaration, 2006/AELM/DEC, 2006/11/18. Available at <http://mddb.apec.org/Pages/search.aspx?setting=ListMeeting&DateRange=2006/11/01%2C2006/11/18&Name=14th%20APEC%20Economic%20Leaders%20Meeting%202006>. (“We shared the APEC Business Advisory Council’s (ABAC) views that while there are practical difficulties in negotiating a Free Trade Area of the Asia-Pacific at this time, it would nonetheless be timely for APEC to seriously consider more effective avenues towards trade and investment liberalization in the Asia-Pacific region.”)

<sup>149</sup> See Bergsten, C. Fred. *Toward a Free Trade Area of the Asia Pacific*. *Estudios Internacionales* (2007): 159-162. And of course, there are different views about the prospects and feasibility of FTAAP, for example, (“[A]lthough such an agreement may well be beneficial from a narrowly economic standpoint, the reality of U.S. trade politics, of relations between Northeast Asian economies, and of APEC’s relative institutional weakness make it highly unlikely that an FTAAP will come to fruition in the short to medium term, regardless of whether the Doha Round of the World Trade Organization (WTO) is successful or not.”)

<sup>150</sup> See APEC. *Identifying Convergences and Divergences in APEC RTAs/FTAs*. 20th APEC Ministerial Meeting

Lima, Peru, 19-20 November 2008, 2008/AMM/010.

<sup>151</sup> See APEC. 18th APEC Economic Leaders' Meeting 2010 - Pathways to Free Trade Area of the

credible and meaningful FTAAP. The goal of FTAAP is to be “comprehensive, high quality and incorporate and address ‘next generation’ trade and investment issues”.

Discussions on the possible pathways to an FTAAP continue and enhance the clarity as well as feasibility with potential roadmaps to the final realization of FTAAP. Identifying challenges to FTAAP and finding possible ways to overcome them can significantly facilitate the implementation of the “Action Plan Framework for REI Capacity Building Needs Initiative”,<sup>152</sup> and the promotion of high-quality RTAs and FTAs (particularly here, the FTAAP) is a key element of the “Busan Roadmap towards the Bogor Goals”.<sup>153</sup> Over the past several years, APEC has discussed the full range of issues relevant to the prospect of an FTAAP,<sup>154</sup> and has conducted a significant body of analytic work related to an FTAAP, especially including the multi-year study on “convergences and divergences in APEC FTAs”<sup>155</sup>. Recently, the APEC Business Advisory Council (ABAC) have also expressed concern that Free Trade Area of the Asia Pacific (FTAAP) would be the most effective means for achieving the Bogor Goals and APEC should take greater strategic leadership to bring the FTAAP into reality starting with a roadmap.<sup>156</sup>

Widely and always, it is believed that regional architectures like the ASEAN Economic Community (AEC), the Pacific Alliance, the RCEP, and the TPP are all mutually reinforcing pathways to the FTAAP. Competition between different

---

Asia-Pacific (FTAAP). Yokohama, Japan. 14 November 2010. 2010/AELM/DEC/2 (“Based on the results of this work, we have agreed that now is the time for APEC to translate FTAAP from an aspirational to a more concrete vision. To that end, we instruct APEC to take concrete steps toward realization of an FTAAP, which is a major instrument to further APEC's Regional Economic Integration (REI) agenda.” “We believe that an FTAAP should be pursued as a comprehensive free trade agreement by developing and building on ongoing regional undertakings, such as ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership, among others.” “In implementing the above, the following considerations should be taken into account: the changing contours of the global economic and trade architecture, particularly the proliferation of Free Trade Agreements and Regional Trade Agreements in the Asia-Pacific region;”)

<sup>152</sup> 2012 CTI Report to Ministers. Appendix 1, Action Plan Framework for REI Capacity Building Needs Initiative, April 2, 2012.

<sup>153</sup> See APEC. 2005 Leaders' Declaration, Busan Declaration - Towards One Community: Meet the Challenge, Make the Change. Busan, Korea, 18 - 19 Nov 2005. Available at [http://www.apec.org/Meeting-Papers/Leaders-Declarations/2005/2005\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2005/2005_aelm.aspx). Also see APEC. 2005 APEC Ministerial Meeting, Joint Statement - Towards One Community: Meet the Challenge, Make the Change. Busan, Korea, 15 - 16 Nov 2005. Available at [http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2005/2005\\_amm.aspx](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2005/2005_amm.aspx).

<sup>154</sup> For example, the Leaders' Agenda to Implement Structural Reform toward 2010 (LAISR 2010), the Report on Socio-Economic Disparity in the APEC region, and the APEC-OECD Integrated Checklist on Regulatory Reform.

<sup>155</sup> See APEC. Identifying Convergences and Divergences in APEC RTAs/FTAs. 20th APEC Ministerial Meeting  
Lima, Peru, 19-20 November 2008, 2008/AMM/010.

<sup>156</sup> APEC Business Advisory Council (ABAC). Asia Pacific Business Leaders to Urge APEC to Intensify Work to Realize the FTAAP. Seattle, United States, 11 Jul 2014. Available at [http://www.apec.org/Press/News-Releases/2014/0711\\_FTAAP.aspx](http://www.apec.org/Press/News-Releases/2014/0711_FTAAP.aspx). (ABAC was created by APEC Leaders in 1995 to be the primary voice of business in APEC. Each economy has three members who are appointed by their respective Leaders. They meet four times a year in preparation for the presentation of their recommendations to the Leaders in a dialogue that is a key event in the annual Leaders Meeting.)

international forums does help promote negotiations, and ensure the “natural selection” and “market de-selection” mechanism works to get the best balancing of interests, thus in a sense reducing the negative effects of monopolistic and asymmetric bargaining of big powers. But still, the proliferation of too many FTAs, REI plans and other similar initiatives would potentially damage the integrity of the multilateral trading system and increase the transaction costs, institutional losses and governance crisis of international trade. The existing and proposed agreements are poised to result in a veritable noodle bowl of RTAs, while the most ambitious plan is the FTAAP that envisions including all APEC members or some subset thereof.<sup>157</sup> It is therefore timely for conversations on ensuring that multiple avenues to trade liberalization are complementary, cohesive and effective; and as for confirming a “future integration strategy that leverages the wave of reforms and RTAs”<sup>158</sup>, FTAAP seems to better suit than others.

When it specifically comes into the IP issue, up to now, among those 30 RTAs/FTAs within APEC, only 3 ones (NAFTA, Australia - US FTA, and Korea - US FTA) have a IP chapter.<sup>159</sup> Those 3 FTAs entered into force at different times, but were all concluded with US. So, it seems that this IP topic is particularly emphasized by US while other parties are fine with the existing international IP rules in WTO and other regimes. Undoubtedly, FTAAP surely cannot overlook this important international trade-related topic if it really wants to be the leading actor of Asian Pacific REI nowadays.<sup>160</sup> And an independent IP chapter in the final text of FTA Agreement would be an indispensable part, especially for US and China.

When China and U.S. used to have quite intense IP diplomatic battle both bilaterally and multilaterally, China seemed to be a firm supporter of developing countries camp. So did India. But right now, it is much more notable that this two big economies has much more common interests on the protection of IP, and thus it is imperative to develop IP rules in FTAAP to balance and construct Asian IP rules as well as regimes. And compared to TPP’s seemingly “anyone but China”<sup>161</sup> Strategy and accordingly its negative externalities,<sup>162</sup> FTAAP can better accommodate those conflicts of

---

<sup>157</sup> See APEC. Identifying Convergences and Divergences in APEC RTAs/FTAs. 20th APEC Ministerial Meeting, Lima, Peru, 19-20 November 2008, 2008/AMM/010, p 11, 19. (“The Asia-Pacific region’s RTAs spree has followed and in some cases paralleled the regional economies’ overall economic and multilateral trade liberalization strategies, and has brewed into an increasingly dense regional noodle bowl of agreements.”)

<sup>158</sup> See APEC. Identifying Convergences and Divergences in APEC RTAs/FTAs. 20th APEC Ministerial Meeting, Lima, Peru, 19-20 November 2008, 2008/AMM/010, p 19.

<sup>159</sup> See APEC. Identifying Convergences and Divergences in APEC RTAs/FTAs. 20th APEC Ministerial Meeting, Lima, Peru, 19-20 November 2008, 2008/AMM/010, p 78-79.

<sup>160</sup> Regarding the importance of IP in today’s international trade, see Lim, C. L., Deborah Kay Elms, and Patrick Low. *The Trans-Pacific Partnership A Quest for a Twenty-First Century Trade Agreement*. Cambridge: Cambridge University Press, 2012, p 95.

<sup>161</sup> See David Pilling. It won’t be Easy to Build an “Anyone but China” Club. *Financial Times*, May 22, 2013. Available at <http://www.ft.com/intl/cms/s/0/08cf74f6-c216-11e2-8992-00144feab7de.html#axzz37iOnpAre>.

<sup>162</sup> See Lim, C. L., Deborah Kay Elms, and Patrick Low. *The Trans-Pacific Partnership A Quest for a Twenty-First Century Trade Agreement*. Cambridge: Cambridge University Press, 2012, p 276. (“Latin

different interests and goals with APEC's trade liberalization and regional economic integration attended to.

### 3. Closing Remarks

Many of the failures or malfunctions of international legal rules, both in terms of the institutional frameworks developed for their implementation and in terms of their judicial interpretation,<sup>163</sup> have always had more to do with political willingness and international relation rather than pure legal obligations.<sup>164</sup> National economic interests and big-power politics are more talked and advocated,<sup>165</sup> as if they were in some way natural and inevitable.<sup>166</sup>

But when we can hardly overlook the importance of contemporary as well as future national interests, geographical relationship and international politics in the negotiation of international agreements, we should also be aware that other factors and conceptions also play critical roles in the construction of international regimes in today's trade rounds, such as the working/formation of those rules and regimes. Realism is no longer the dominant doctrine in the studies of international relation, and constructivism, along with other social theories, are frequently borrowed into legal studies to better understand the formation, ratification and function of legal rules.<sup>167</sup>

---

American countries participating in this process or considering joining it must be fully aware of its strategic backdrop, where Latin America plays a relatively minor role. In particular, they should be mindful of the potential implications on their relations with China of being part of an initiative that has sometimes been characterized as aimed at curbing China's influence in the Asia-Pacific. Within this context, they should pragmatically decide on their participation and positioning in the talks, according to their own national interests.”)

<sup>163</sup> Coombe, Rosemary J. Intellectual Property, Human Rights & (and) Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity. *Ind. J. Global Legal Stud.* 6 (1998): 59.

<sup>164</sup> See Leckie, Scott. Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights. *Human Rights Quarterly* (1998): 81-124.

<sup>165</sup> See Leckie, Scott. Violations of Economic, Social and Cultural Rights. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, SIM Special 20. (“Even when action is taken by human rights bodies or other criticism of violators is forthcoming, this is too frequently no match for what are increasingly perceived as larger State interests, in particular those linked to trade.” “Translating the provisions and positive forces of human rights law into concrete actions, however, remains one of the greatest challenges facing the human rights movement and the community of nations.”)

<sup>166</sup> UN, E/CN.4/SR.233, 2 July 1951, p 15. Also see Sigrun I. Skogly. Extra-national Obligations towards Economic and Social Rights. The International Council on Human Rights Policy, Council Meeting, Background Paper, 2002. (“After all, the Commission had to face up to the fact that a number of different political systems existed in the world, and to recognize that each of them had been built up for positive and not for evasive purposes.”)

<sup>167</sup> See Byers, Michael. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge University Press, 1999, p 24. (“Waltz's rejection of international law as a structural element within the international system might be regarded as a step away from a possible reconciliation between the discipline of international relations and international law. Nevertheless, the idea of structural or systematic controls on the exercise of unequal powers did leave open the possibility of incorporating international law into a more sophisticated realist conception of international relations. Although the absence of an overarching sovereign is clearly an important aspect of modern international society, it is not evident that the absence of an overarching sovereign should imply the absence of normative controls.”)

In this modern world society, international IP legal rule has its own unique way of making, and also a unique way of truly entering into force and become effective in their subsequent years or decades. And this “ethos” of International IP law is stressed against not only domestic laws but also other norms or phenomena. Next section will deliberate on the “authority” and “legitimacy” of Pacific Rim’ international IP regimes as well as rules in this world society.

#### **IV. Socio-legal Analysis of the Authorities and Legitimacy of Pacific Rim’ International IP Regimes in a World Society**

##### **1. Socio-legal Analysis of International IP Regimes in A World Society**

It is widely acknowledged that law has never been either autonomous or self-grounded in society, and so do international law and international IP law. For example, as for the implementation of international IP treaties, Deere, Carolyn’s book explores and details the political context of the TRIPs implementation in developing countries, and attributes the variation therein to the interplay between global IP politics and the implementation of IP reforms, with historic analyses and examples.<sup>168</sup> Also, it is believed that the remoter and more general aspects of the law are those that give it universal interest. And it is through them that a researcher not only becomes a great master in his/her calling, but also connects his/her subject with the universe and catches an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.<sup>169</sup> “[I]t is important to take a holistic view and bring in interdisciplinary perspectives to illuminate the vast areas that are related to, but technically fall outside, the intellectual property field”, and “the more interdisciplinary and holistic the discussion is, the more beneficial the debate will become.”<sup>170</sup> Undoubtedly, amidst those, the method of socio-legal analysis stands out as an effective and indispensable interdisciplinary and multi-angle means. For example, historical study is a useful method as an exploration of the historical aspect of the social context in the study of legal pluralism.<sup>171</sup> Seeing contemporary legal pluralism in historical context, moreover, offers the potential to produce general insights about the evolution of official legal systems (of various types) in terms of social expansion and institutional differentiation; it generates insights about how these official legal systems interact with other normative systems circulating within society; and it also evokes insights about how strategic actors negotiate these complexes of coexisting normative systems.<sup>172</sup>

---

<sup>168</sup> Deere, Carolyn. *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. Oxford: New York, 2009.

<sup>169</sup> Oliver Wendell Holmes, Jr. *The Path of the Law*. 10 *Harvard Law Review* 457 (1897).

<sup>170</sup> Peter K. Yu. *The Global Intellectual Property Order and its Undetermined Future*. *W.I.P.O.J.* 2009, 1(1), 10.

<sup>171</sup> For example, see Mosler, Hermann. *The International Society as a Legal Community*. Alphen aan den Rijn, the Netherlands: Sijthoff & Noordhoff, 1980, p 1. (“International law is the result of historical development. It did not exist from the very beginning of social relations between human beings.”)

<sup>172</sup> Tamanaha, Brian Z. *Understanding Legal Pluralism: Past to Present, Local to Global*. Sydney L.

Fitzpatrick Peter<sup>173</sup> proposes that law is derived from and constitutive of social existence and cultural context, by investigating the nature and grounds of law all the way from Enlightenment to 21<sup>st</sup> century with concepts evolving from nationalism, imperialism and globalism. Modern rule of law, with stability and ultimacy of determination, is debated to be ever-responsive and indeterminate, an isomorphic and mutually prehensile relationship which means both compatible and contrary with society, by deriving grounds from dynamics of modernity and exceed them.<sup>174</sup> Law, used to be assumed as a parasitic existence, makes itself self-founding with determination and responsiveness, as a cutting into the infinite variety into society with denials and sacrifices.<sup>175</sup> As for the role of law in nationalism and globalization, the dual making as well as configuration of law and nation<sup>176</sup> take place not only within singular nation but also among nations, along with disjunction of modern imperialism and law, as well as the factuality of universally inclusive and mutually compensatory globalism.<sup>177</sup> So, law existed in-between these two existential demands, and are always oriented towards both but never assuredly settled in either. There is a distinct positioning of law in the integral relation between determination and responsiveness: each demand went beyond the other but, in its incompleteness, it had ever to return to that other.<sup>178</sup> In other words, the evolution of legal rules and regimes, whether domestic or international, need to make compromise between certainty and responsiveness, considering their distinct positioning and integral relation. Law sometimes needs to be responsive and pre-active, with simultaneous attention to certainty and sustainability; and sometimes it is required to be determinant and stable, with involvement of social change and creativity.<sup>179</sup>

---

Rev. 30 (2008): 410.

<sup>173</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001.

<sup>174</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001, P 4-5.

<sup>175</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001, P 6.

<sup>176</sup> Nation combines those two dimensions (determinant and responsive) together.

<sup>177</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001, P 7, 107.

<sup>178</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001, P 218.

<sup>179</sup> Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge, UK: Cambridge University Press, 2001, P218. "The capability of human rights to sustain this seeming dissonance may be found in their legal quality. Modern law was shown in the first part of this book as incapable of 'being' either in a determinate particularity or in a responsive-ness to all that 'universally' lay beyond the determinate. Law existed, rather, in-between these two existential demands, always oriented towards both and never assuredly settled in either. There was, however, a distinct positioning of law in the integral relation between the two demands, each demand went beyond the other but, in its incompleteness, and it had ever to return to that other. Like any legal artifact, then, human rights can always be otherwise than what they are. They exist not just in a determinate particularity but also in an illimitable responsiveness—nursing the 'unconquerable hope'. In that lies their involving promise, yet also their seductive oppressions."

Another book by Rodríguez Garavito, César A., and Boaventura de Sousa Santos, titled “*Law and Globalization from Below: Towards a Cosmopolitan Legality*”,<sup>180</sup> combines both empirical research method and innovative socio-legal perspectives to explore the role of legal rules and politics under the big picture of law, social justice, and globalization, with a bottom-up angle borrowed from sociology and multi-sited case studies path imported from anthropology, to analyze and examine the meanings and utilities of invisible counter-hegemonic concept, subaltern cosmopolitan legality and their implication for the evolution of international governance, domestic and global democratic politics.<sup>181</sup> Acknowledging the merits of governance approach of socio-legal analysis of hegemony and power in legal globalization,<sup>182</sup> aiming at a “more realist understanding for the production of the production of the new international economic and political order”,<sup>183</sup> namely the regimes as they are, this writing provides counter-hegemonic socio-legal investigation to unveil how and why they evolve, and the structure as it ought to be.<sup>184</sup> But as mainly focused on the distinction between bottom-up and top-down approaches, this book is not able to stretch itself to some potential arguments that can be done merely pages away, such as how to understand and evaluate the bottom-up approach’s potential impacts on the redistribution or allocation of international authorities, what are the influences of this subaltern cosmopolitan legality on the operation of existing legal rules/regimes and the future international law-making or even the whole structure of international legal community, how about its theoretical revelation and practical effects on the interaction horizontally among international legal regimes and vertically between

---

<sup>180</sup> Rodríguez Garavito, César A., and Boaventura de Sousa Santos. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge, UK: Cambridge University Press, 2005.

<sup>181</sup> And the case study topics of three thematic areas related to counter-hegemonic globalization (construction of a global economy of solidarity, reformation of international human right regimes and reconfiguration of human rights, local experiments in domestic/international participatory democracy and law-making) include: (1) comparison between subaltern cosmopolitan legality and neoliberal global governance, international labor rights against transnational anti-sweatshop coalitions in the Americas, TNCs’ corporate social responsibility and potential cooperate-friendly supervisory regimes, collision between right to antiretroviral medicines and TRIPs agreement, the gray zone of new immigrants’ housing right between legality and illegality, labor rights and immigrant rights as sites for cosmopolitan legality in South United States; (2) the role of Indian Supreme Court to protect the rights of families in dam constructions, gradual shift of property right systems in Brazil related to the Movement of Landless, collective and indigenous rights in Columbia against oil exploration, The potential of two counter-hegemonic international legal framework (the “defensive” ICC and “oppositional” common heritage of human regime); (3) “gender budgeting” movement in Tanzania for gender justice and participatory democracy, the “participatory budgeting” counter-hegemonic initiative in Brazil and its success-building factors and inner tensions, the bottom-up practices of rights against state authorities concerning the vulnerability and survival in Indian constitutional law, case study of Portuguese environmental law regarding grassroots participation and crisis of former “community consultation”. Rodríguez Garavito, César A., and Boaventura de Sousa Santos. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge, UK: Cambridge University Press, 2005, p 1-18.

<sup>182</sup> Rodríguez Garavito, César A., and Boaventura de Sousa Santos. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge, UK: Cambridge University Press, 2005, p 12.

<sup>183</sup> Yves Dezalay, Bryant G. Garth Dezalay, *Legitimizing the New Legal Orthodoxy*, p 306-334, *The Production, Exportation, and Importation of a New Legal Orthodoxy*, edited by Yves, and Bryant G. Garth. Ann Arbor: University of Michigan Press, 2002.

<sup>184</sup> As Austin and Bentham did, on the separation of law as it is and law as it ought to be. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, *Harvard Law Review*, Vol. 71 (1958), p 593-529.

domestic legal rules and international law, what about the concepts of legality and legitimacy of international legal rules, etc..

And on the other hand, the lack of socio-legal analysis in the study of some topics of international law would be a regrettable flaw, which makes the whole theoretical argument and case studies in futility. For example, in “*Trading fish, Saving Fish: the Interaction between Regimes in International Law*”,<sup>185</sup> without systematic application of the socio-legal study method and reference from other related disciplines regarding “regime”,<sup>186</sup> this topic-structured argument seems to be not persuasive and comprehensive enough in terms of the goal, which is how the regimes interact and should interact. When the framework of regime interaction concerning the fragmentation and legitimacy of international law, and also the multiple (procedural and substantive) bases of regime interaction among and within regimes are deliberated, it seems not able to proceed deeply into the investigation without concepts and research approaches imported from socio-legal study of international law.<sup>187</sup>

Just as Sebastian Haunss and Kenneth C. Shadlen argued:

*“Most studies [of intellectual property policy-making] focus on national and international IP laws. But while laws are solidified results of social struggles and political conflicts, understanding the law itself tells us little about the social processes that lay behind laws and even less about the social dynamics that will eventually challenge and often change them. Laws establish opportunities for action, and strictly legal perspectives in most cases say little about different actors’ motivations and capacities to exploit these opportunities and how the motivations and capacities change over time.”*<sup>188</sup>

Peer Zumbansen had also said as follows about the globalization and transnational law:

*“Seen from that angle, TL is an illustration of law’s attempt to reposition itself in relation to the depictions of a globalizing world offered by disciplines such as political science, sociology, economics, geography or anthropology. At the same*

---

<sup>185</sup> Margaret A. Young. *Trading fish, Saving Fish: the Interaction between Regimes in International Law*. New York: Cambridge University Press, 2011.

<sup>186</sup> For example, see Rittberger, Volker, and Peter Mayer. *Regime Theory and International Relations*. Oxford: Clarendon Press, 1993.

<sup>187</sup> See Margaret A. Young. *Trading fish, Saving Fish: the Interaction between Regimes in International Law*. New York: Cambridge University Press, 2011, Part III, Towards Regime Interaction. For example, if we expand the discussion in chapter 7 (the bases and legitimacy of regime interaction) with the concept of “allocation of authority” in mind, more empirically general and positive-law conclusions can be expected.

<sup>188</sup> Sebastian Haunss and Kenneth C. Shadlen. Introduction: Rethinking the Politics of Intellectual Property. In Haunss, Sebastian, and Kenneth C. Shadlen, eds. *Politics of Intellectual Property: Contestation Over the Ownership, Use, and Control of Knowledge and Information*. Cheltenham, U.K.: Edward Elgar Publishing, 2009.

*time it builds on a longstanding inquiry into the role of law in the context of differentiated, modern societies. From that perspective, then, thinking about law in a transnational dimension becomes woven into conceptualizations of the nature and role of law in society. Society is now understood as ‘world society’, that is, as a society which as the subject of investigation not only transgresses and deconstructs the confining space of a particular jurisdiction or nation-state, but also questions the attempt to position society in a bi-polar relation vis-à-vis the state. What follows from these observations, even in a cursory treatment of the subject such as in the present context, is the recognition that transnational law presents an important opportunity to reflect on law and its connections with ongoing investigations into local and global forms, institutions and processes of governance.”<sup>189</sup>*

*“In the term’s long history, its variances can be attributed mostly to the different doctrinal and theoretical backgrounds of those employing it. This...will introduce the grand strands of discussion in different branches of legal doctrine and theory by way of visiting and revisiting the places and times of TL in the historical and legal consciousness.”<sup>190</sup>*

Also, specifically, as for the socio-legal analysis and other sociological research methods used in the studies of jurisprudence, lately there are two books (superlatively about the study of Constitution and the formation process of EU) that can provide some references and guidance to this paper.<sup>191</sup> And the Cambridge University Press has published a series of books on the “Studies in Law and Society”, which is absolutely compelling.<sup>192</sup>

## **2. Authorities and Legitimacy of Pacific Rim’ International IP Regimes in A World Society**

### **A. The Concept of “Authority” and “Legitimacy”**

The modern international legal studies have changed a lot with a turnaround from the 19<sup>th</sup> century, since philosophical controversies have given their way to pragmatic discipline as well as problem solving; and the most basic doctrinal and philosophical underpinnings for international law are eroded, rejected and replaced by new attitudes that are concrete and disciplinary in the studies of modern international law.<sup>193</sup> The

---

<sup>189</sup> Zumbansen, Peer. *Transnational Law, Evolving*. In Smits, J. M. Elgar, *Encyclopedia of Comparative Law*. Cheltenham, U.K. Northampton, Mass.: Edward Elgar Publishing, 2012, p 899.

<sup>190</sup> Zumbansen, Peer. *Transnational Law, Evolving*. In Smits, J. M. Elgar, *Encyclopedia of Comparative Law*. Cheltenham, U.K. Northampton, Mass.: Edward Elgar Publishing, 2012, p 903.

<sup>191</sup> Chris Thornhill. *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*. Cambridge: Cambridge University Press, 2013, P 1, 3. Mikael Rask Madsen and Chris Thornhill. *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*. Cambridge: Cambridge University Press, 2014.

<sup>192</sup> Cambridge University Press, *Cambridge Studies in Law and Society*. Available at <http://www.cambridge.org/us/academic/subjects/law/socio-legal-studies/series/cambridge-studies-law-and-society>.

<sup>193</sup> See Kennedy, David. *International Law and the Nineteenth Century: History of an Illusion*. Nordic

old fashioned legal formalism has also given its way to a modern legal science of context, process and value, moving from absolute to relative norms, from a disembodied and autonomous legal culture to one engaged with other fields; and modern international law has attuned to the needs of real-world problems with pragmatic attitudes and disciplinary attentions to what is effective, functional, and what are the real actors and sites.<sup>194</sup> All those are not implying that theories, hypothetical deductions and reasoning are not useful any more, but are emphasizing that development of theoretical researches must firmly grasp the so-called “key and soul” in the reality of the practice of international laws, constantly trying to use more accurate, more tangible concepts and theories to describe the generation, application and innovation of international law in this world society. Professor Bodenheimer Edgar said that “[An] explanation of concepts, unaccompanied by a thorough consideration of the social factors which may justify an expansion, contraction or re-formation of the concept, cannot be regarded as a great step forward...”<sup>195</sup>, and Professor H. L. A. Hart agreed with the need for further elucidation to understand our own apparatus and stay away from predicaments: We may know how to use these concepts, but we cannot say how or describe how we do this in ways which are intelligible to others and indeed to ourselves.<sup>196</sup>

Particularly here in international law, situating concepts, processes and also reasoning under the broad context of world society is accepted as a brilliant method to get more dynamic and concrete interpretations and understandings of phenomena. For example, much in transnational law turns on the relationship between law and the states with new looks, or investigate law and society in a more comprehensive sense, whereas in this understanding of “world society”<sup>197</sup> with “distinct constituency of world society”<sup>198</sup>, “the state does not sit ‘on top’ of society (or the market), but is part of society”.<sup>199</sup> Also, scholars are totally aware of “a degree of normative integration between international law and world society”.<sup>200</sup> So, we need to extend the argument of the institutional fragmentation of international (IP) law under the context of this “world society”, and use terminologies of socio-legal studies different from the

---

Journal of International Law 65.3 (1996): 385-420. Also see Charles DeBenedetti. *Origins of the Modern American Peace Movement, 1915-1929*. KTO Press, 1978, p 27-29.

<sup>194</sup> See Kennedy, David. *International Law and the Nineteenth Century: History of an Illusion*. Nordic Journal of International Law 65.3 (1996): 387.

<sup>195</sup> Bodenheimer, Edgar. *Modern Analytical Jurisprudence and the Limits of Its Usefulness*. U. Pa. L. Rev. 104 (1955): 1080, 1083.

<sup>196</sup> Hart, H. L. A. *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*. U. Pa. L. Rev. 105 (1956): 953-975, 964.

<sup>197</sup> Luhmann Niklas. *The World Society as a Social System*. International Journal of General Systems, Volume 8, Issue 3, 1982, 131-138. Also see Luhmann Niklas. *Globalization or World Society: How to Conceive of Modern Society?* International Review of Sociology: Revue Internationale de Sociologie, Volume 7, Issue 1, 1997, 67-79.

<sup>198</sup> How to understand the “the distinct constituency of world society”? See Ian Clark. *International Legitimacy and World Society*. Oxford. New York: Oxford University Press, 2007.

<sup>199</sup> Zumbansen, Peer. *Transnational Law, Evolving*. In Smits, J. M. Elgar, *Encyclopedia of Comparative Law*. Cheltenham, U.K. Northampton, Mass.: Edward Elgar Publishing, 2012, p 899-900.

<sup>200</sup> See Ian Clark. *International Legitimacy and World Society*. Oxford. New York: Oxford University Press, 2007.

previous legal studies on international law and national legal systems to depict and exposit the empirically practical interactions and logically casual relationships, which are in the center of this topic.

But to clarify, this paper is not entirely for (actually, it tends to be skeptical and critical towards) the “more or less”<sup>201</sup> criterion and “normative continuum”<sup>202</sup> theory with respects to the normativity in international (IP) law, despite that socio-legal analysis seems to include more factors and angles apart from legal texts. All those clarifications and demonstrations are meant to capture the latest dynamic essences in the contemporary development of international law, and meanwhile only a small part of the theories of international legal studies are confronted with tiny amendment or adjustment. Taking account of the shared risks that those “not entirely new” manifestations may grow “extremely diverse, fragmented and of an unprecedented degree”<sup>203</sup>, it is also concerned whether those new phenomena and accordingly adapted interpretations should be or could be regarded as the reflection of a healthy legal pluralism and a daunting fragmentation.<sup>204</sup>

But, one noteworthy problem right here is that the discussion of “institutional fragmentation of international IP law” is somehow already fragmented and diversified with various theories, emphases, suggestions and designs,<sup>205</sup> to an extent that the fundamental landscape and basic operational nature of international IP law is never clearly investigated and shapely inspected, even tending to be overlooked and covered in the darkness for another while.<sup>206</sup> Although we have been separately talking about the normative and institutional aspects of fragmentation and pluralism so that our arguments could be more targeted and responsive, some scholar points out that technical account (normative) and jurisdictional understanding of legal authority (institutional) are problematic as it cannot capture the full impact of fragmentation

---

<sup>201</sup> See Koskeniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge, UK: Cambridge University Press, 2005, p 393. (It argues that the tendency of international law-making to move from treaty into instruments of the most varied kinds such as decisions, recommendations, reports etc., has put strains on the ascertainment of valid law. Its normativity has become a matter of “more or less”, an evaluation which traditional methods of law-ascertainment are not well equipped to deal with.)

<sup>202</sup> See Wolfrum, Rüdiger and Volker Röben. *Developments of International Law in Treaty Making*. Berlin: Springer, 2005, p 409-416.

<sup>203</sup> Aspremont, Jean d'. *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*. Oxford: Oxford University Press, 2011, p 2, 81-82, 114.

<sup>204</sup> See Martineau, Anne-Charlotte. *The Rhetoric of Fragmentation: Fear and Faith in International Law*. *LEIDEN J. INT'L L.* 22 (2009): 1-28. Also see Mario Prost. *All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation*. *17 Finnish Yearbook of International Law* (2006), 131-159.

<sup>205</sup> See Bailliet, Cecilia. *Non-State Actors, Soft Law, and Protective Regimes: From the Margins*. Cambridge [UK]: Cambridge University Press, 2012, p 148.

<sup>206</sup> For example, in “Fragmentation(s) of International Law: On Normative Integration as Authority Allocation”, Dr Tomer Broude argues that the “fragmentation” discourse is itself fragmented, with problems of norm fragmentation (e.g., conflicting rules) discussed separately from those relating to the fragmentation of authority (e.g., competing jurisdiction). This is complementary and critical to the ILC Report since the latter didn't talk about the jurisdiction conflicts. Lapidoth, Ruth, Tomer Broude, and Yuval Shany. *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth*. Oxford: Hart, 2008, p 8.

and plurality, and theoretical approaches should be paid more attention before going specifically into details.<sup>207</sup> The institutional fragmentation of international (IP) law can never be truly understood without investigation on specific normative issues. And vice versa. Besides, an “uninhibited, robust and wide-open debate”<sup>208</sup> can never be arrived at except when we have grasped our topic “based on empirical research, historical and comparative analyses, interdisciplinary insights and holistic perspectives”<sup>209</sup>. And by all those, with exploration of main aspects of international IP regimes including (but not limited to) the legal framework, institutional dynamics, and their interactional mechanism, this paper attempts to present the “lost heaven” scenery in regards to the interpretation of the institutional fragmentation of international IP law. The core part of this paper’s argument is to grasp, sort out and then reorganize those befitting perspectives and legal concepts in the narratives of the institutional fragmentation of international IP law.

Then, the question turns out to be: what is the structure for those appropriate perspectives, and more specifically, what are the core concepts in this argument that can be the starting points as well as theoretical bearers of this demonstration? And this paper considers that “authority” and “legitimacy” should be the core concepts and significant pillars of this argument.

The first question is: why is authority, other than sovereignty, power or other concepts, so indispensable in the researches of this institutional fragmentation of international (IP) law? That’s because authority has always been closely related to “jurisdiction” in the legal studies of both procedurally dynamic interactions and substantively structural/relational changes of those international regimes on the one hand, and on the other hand it is closely related to the sociological investigation and interpretation of the fragmentation of international (IP) law.<sup>210</sup> And that is much more true and pertinent for the institutional fragmentation phenomenon as these multiple, coexisting and overlapping regimes are essentially competing sources of authority.<sup>211</sup>

Some academics have already conducted excellent researches on the concept of “authority” from the perspective of the fragmentation of international law. Firstly, one

---

<sup>207</sup> See Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 3-5. Also see Shaunnagh Dorsett and Shaun McVeigh. *Questions of Jurisdiction*. In McVeigh, Shaun, eds. *Jurisprudence of Jurisdiction*. Abingdon [England]: Routledge-Cavendish, 2007, p 3-18.

<sup>208</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>209</sup> Peter K. Yu. *The Global Intellectual Property Order and its Undetermined Future*. *W.I.P.O.J.* 2009, 1(1), 2.

<sup>210</sup> Despite that different authors and academic writings use this concept of “authority” from various perspectives with different connotations, it is acknowledged that this analytical concept is quite useful, and also quite controversial at the same time, in legal studies. See Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press, 2009, p 3. (“There is no surprise that the notion of authority is one of the most controversial concepts found in the armoury of legal and political philosophy. Its central role in any discussion of legitimate forms of social organization and of legitimate forms of political action makes the indefinite continuation of this controversy inevitable.”)

<sup>211</sup> Tamanaha, Brian Z. *Understanding Legal Pluralism: Past to Present, Local to Global*. *Sydney L. Rev.* 30 (2008): 375.

symposium edited by Lapidoth, Ruth, Tomer Broude, and Yuval Shany<sup>212</sup> is enlightening in that it inspects the fragmentation of international law from the perspective of its making source — allocation of “authority” in international law, which enables us examine many notions like functional state sovereignty, international authority, efficacy and legitimacy, interaction and coordination, and the structure of international legal system, with totally new approaches and entry points.<sup>213</sup> This volume focuses on three legal concepts (sovereignty, supremacy and subsidiarity) to examine the tensions between the traditional concept of sovereignty and the modern shifting allocation of decision-making authority to international regimes (including international organizations, courts and other international actors). It confirms the importance of the concept of sovereignty along with acknowledgements towards multi-level governance, horizontal and vertical allocation of authority in international law.<sup>214</sup> And it is also concerned with that the uncoordinated nature of the shifts in the allocation of authority in modern international law would encourage potentially conflicting decision-making processes, resulting in incompatible norm-promulgation, norm-interpretation and dispute resolution.<sup>215</sup> Namely, “who should decide what” in this international system that formally lacks a central authority? It is a question that lies at the very heart of the political legitimacy of international law as a system of governance, which is essentially a question of international constitutional dimensions. Normative fragmentation and the shifting allocation of authority all goes to our question at hand: the institutional fragmentation of international law.

Furthermore, Roughan Nicole’s book in 2013 “*Authorities: Conflicts, Cooperation, and Transnational Legal Theory*”<sup>216</sup> pays special attention to the concept of “authority” itself, situated under the challenge posed by fragmentation and pluralism in international society with so many overlapping and conflicting purported authorities, and it constructs a theory of “relative authority” to explain the generating texture and preconditions, the interrelationship and interaction of those authorities, and how that influences their legitimacy. This writing is really useful to the research

---

<sup>212</sup> Lapidoth, Ruth, Tomer Broude, and Yuval Shany. *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth*. Oxford: Hart, 2008.

<sup>213</sup> Lapidoth, Ruth, Tomer Broude, and Yuval Shany. *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth*. Oxford: Hart, 2008, p 1-15.

<sup>214</sup> “Sovereignty may have shrunk, indeed it has become much more ‘functional’ than formal, as Prof Lapidoth herself has surmised in several different contexts, but it is far from gone. And there are significant reasons to retain it as an organizing principle in the face of globalizing pressures, not least of which is the need for political legitimacy of national and international governance measures.” Lapidoth, Ruth, Tomer Broude, and Yuval Shany. *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth*. Oxford: Hart, 2008, p 14.

<sup>215</sup> Lapidoth, Ruth, Tomer Broude, and Yuval Shany. *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity; Essays in Honour of Professor Ruth Lapidoth*. Oxford: Hart, 2008, p 5.

<sup>216</sup> Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013.

of the institutional fragmentation of international (IP) law since it goes directly to the headwater of fragmentation and pluralism of international law: the legislative authority of international regimes.<sup>217</sup> More importantly and more unusually, Roughan Nicole focuses on theoretically arguing about the role of the concept of “authority” in interpreting fragmentation and legal plurality without result-tendencies and countermeasure-preferences, without being technically entangled with specific rules or any strategic case studies. Thus, by trying to provide a persuasive theory of authority and legitimacy and expounding its illumination on the interaction of authorities and pluralism/fragmentation, this book condenses puzzles of plurality and multiple authorities into the relative authority with a relational approach. Roughan Nicole particularly exposit the use of relative authority in public international law and transnational law, re-conceptualizing the concepts of state, sovereignty, international law’s fragmentation, and legitimacy.<sup>218</sup> The most important and innovative point therein is the relationship-seeking approach and this interactive/inter-dependent analysis of international regimes and actors,<sup>219</sup> considering the relationship as part of some “system”<sup>220</sup> and meanwhile taking authority and legitimacy as the core structure in this socio-legal study. Although there may be disagreement among lawyers and scholars about the systemic relationship or the international/transnational law as a certain “system”, it is widely agreed that it is one of the tasks of international law’s legal reasoning to establish it.<sup>221</sup> And Roughan Nicole claims that although these institutions might be functionally distinct, respectively constituted, and independently authorized by diverse founders and member states, the legitimacy of their authority is interactive, interdependent and conditional upon their justified interrelationships.<sup>222</sup>

Scholars indicate that “the question of jurisdiction engages with the fact that there is law, and with the power and authority to speak in the name of the law. It encompasses

---

<sup>217</sup> Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 3. (“[T]he practical problem is not plurality of law in itself, but confusion over law’s authority”.)

<sup>218</sup> See Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 173-180.

<sup>219</sup> See Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 173-175. (“In this process (through which lawyers go about interpreting and applying formal law), legal rules rarely if ever appear alone, without relationship to other rules.”)

<sup>220</sup> See ILC. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 23, par. 32.

<sup>221</sup> See ILC. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 23, par. 33. And Hart’s “primitive” structure viewpoint of international law, which is that international law do not form a “system” but merely an aggregate of (primary) rules that States have contracted, is already outdated with little explanatory power of today’s international law, despite that it does have “something to say to us” and is more than “a museum piece”. See Hart, H. L. A. *The Concept of Law*. Oxford: Clarendon Press, 1961, p 208-231. Richard A. Posner. *The Path Away from the Law*, 110 *Harvard Law Review* 1039 (1996), 1039.

<sup>222</sup> See Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 179.

the authorization and ordering of law as such as well as determinations of authority within a legal regime. Emile Benveniste has drawn out the inaugural character of the etymology of jurisdiction.”<sup>223</sup> Also, to some extent, the fragmentation phenomenon comes into existence because the traditional exclusive and dominant subject of international law, states, is actually on the decline and in return is further weakening recognized international regimes controlled or driven by states.<sup>224</sup> This argument on authority is innovative and enlightening, since it breaks from the traditional state-centered approach/conception into this new “world society”<sup>225</sup> and gets rid of the negative constraints of “sovereignty” on the understanding of the dimension, structure and ethos of international law.<sup>226</sup> And this close relationship between “jurisdiction” legally and “authority” sociologically can provides quite many potentials to be looked forward.<sup>227</sup> “As a part of a discourse of moral authority, jurisdiction takes its place as an embodiment of value, or as a partial step towards value. Such approaches risk losing the questions of ‘why law?’ or ‘why this law?’ and with them the question of the authority and form of law. To address such questions ties jurisprudence back to the diction or speech of law and returns the process of jurisdiction both to a structure (or metaphysics) of law and to a history of the institutions that carry the meaning of legal life.”<sup>228</sup>

So, questions related to authority, states and the structural turn of international law are always in the central arguments of the institutional fragmentation of international law. For example, do those international law-making regimes really have their own/ autonomous “authority” after their initial formation or the coming into force of the establishment treaties, and whether there is any change to this degree of authority later in the interaction of related regimes? Is there a difference between some

---

<sup>223</sup> See Shaunnagh Dorsett and Shaun McVeigh. Questions of Jurisdiction. In McVeigh, Shaun, eds. Jurisprudence of Jurisdiction. Abingdon [England]: Routledge-Cavendish, 2007, p 3.

<sup>224</sup> See Fassbender, Bardo, Anne Peters, Simone Peter, and Daniel Högger. The Oxford Handbook of the History of International Law. 2012, p 68.

<sup>225</sup> For example, “The key question then becomes whether it is possible for states to alter the claims they make for their legal norms, from claiming authority for their legal norms to claiming something else.” See Michael Giudice. Global Legal Pluralism: What’s Law Got To Do With It?. Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), 589–608, 608. (“[C]osmopolitan pluralism asks for a radically revisionist understanding of the nature of law’s claim to authority.”)

<sup>226</sup> There are many other useful literatures about the fragmentation of international law with a particular attention to the concept of “authority”. See Benvenisti, Eyal, and George W. Downs. The Empire's New Clothes: Political Economy and the Fragmentation of International Law. Stanford Law Review (2007): 595-631. Hafner, Gerhard. Pros and Cons Ensuing from Fragmentation of International Law. Mich. J. Int'l L. 25 (2003): 849-1349. Prost, Mario and Clark, Paul Kingsley. Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter? Chinese Journal of International Law, 2006, Vol. 5(2), 341-370.

<sup>227</sup> For example, “the technologies of law that establish authority are understood as descriptions of bare action or fact-technical commentary on the determination of forum and the recognition and enforcement of judgments. In all this, the character of jurisdiction as an instrument is frequently occluded.” See Shaunnagh Dorsett and Shaun McVeigh. Questions of Jurisdiction. In McVeigh, Shaun, eds. Jurisprudence of Jurisdiction. Abingdon [England]: Routledge-Cavendish, 2007, p 5. Also see Shany, Yuval. Regulating Jurisdictional Relations between National and International Courts. Oxford: Oxford University Press, 2007, p 107-121. (Such as “fragmentation and jurisdictional interaction”)

<sup>228</sup> See Shaunnagh Dorsett and Shaun McVeigh. Questions of Jurisdiction. In McVeigh, Shaun, eds. Jurisprudence of Jurisdiction. Abingdon [England]: Routledge-Cavendish, 2007, p 4.

executing agencies (like the Secretariat) and the empowering of quasi-judicial mechanism? How to understand the “interdependent with necessary connections, and self-autonomous with inner ethos” interrelationship of international IP regimes,<sup>229</sup> from the perspective of authority in social interactionism as well as social governance?

The second question is: why is the concept of “legitimacy” so significant in the discussion of this institutional fragmentation of international (IP) law?

The concept of “legitimacy” is a core notion in the studies of international law, like conflict of rules and international governance in world society, while sometimes it is indescribable but ubiquitous.<sup>230</sup> And legitimacy is a quite useful analytical concept for international lawyers, which can have profound practical implications for the reach and application of international law.<sup>231</sup> What’s more, this concept of “legitimacy” helps a lot to break through traditional dichotomy and connect the normative aspect of international law and the powers in international politics.<sup>232</sup> And that’s why in this paper, “legitimacy” is more descriptively socio-legal than normative.

*“Structural realists considered systems theory to be unsatisfactory because it involved the regulation of actors through systems which those actors had themselves created. They favored instead what was in effect a new systems theory which focused on the larger system, or structure, within which actors operate. For Waltz, this larger structure included an ordering principle, the specialization of the functions of differentiated units, and the distribution of capacities across those units. Although it is conceivable that Waltz could have included international law among those structural elements which determine how actors in the international system behave, he argued instead that unequal states engage each other in a system, the defining structural aspect of which is anarchy. Anarchy – the absence of an overarching sovereign – was by definition incompatible with law.”*

---

<sup>229</sup> Besson, Samantha. The Authority of International Law: Lifting the State Veil. *Sydney Law Review*, Vol. 31, pp. 343-380, 2009, 380. Also see Roughan, Nicole. *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press, 2013, p 181-182.

<sup>230</sup> Jan Klabbers and Touko Piiparinen, *Normative Pluralism and International Law: Exploring Global Governance*. Cambridge, NY: Cambridge University Press, 2013, P 1, 7.

<sup>231</sup> See Thomas, Christopher A. The Uses and Abuses of Legitimacy in International Law. *Oxford Journal of Legal Studies* (2014): 1-30. (“Legitimacy is generated in a social sense through the creation of communities of practice in which adherence to the criteria of legality generates shared understandings about the law. These understandings carry with them a sense of moral obligation to comply with the law. Moreover, the fulfillment of these criteria is argued to have moral worth, in that it entails a ‘commitment to autonomous actor choices and diversity’ as well as to processes of communication.”)

<sup>232</sup> See Scott, Shirley V. International Law as Ideology: Theorizing the Relationship between International Law and International Politics. *Eur. J. Int'l L.* 5 (1994): 313. (“The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics.”)

*“Waltz’s rejection of international law as a structural element within the international system might be regarded as a step away from a possible reconciliation between the discipline of international relations and international law. Nevertheless, the idea of structural or systematic controls on the exercise of unequal powers did leave open the possibility of incorporating international law into a more sophisticated realist conception of international relations. Although the absence of an overarching sovereign is clearly an important aspect of modern international society, it is not evident that the absence of an overarching sovereign should imply the absence of normative controls.”*<sup>233</sup>

There are several significant reasons as follows regarding why we should and we need to take “legitimacy” as an essential point in the reasoning and argument of the institutional fragmentation of international (IP) law. Firstly, the concept of “legitimacy” has already got its firm foothold in the studies of international law and is replacing the principle of effectiveness rapidly,<sup>234</sup> in the interpretation and understanding of politics and social norms and particularly here the international law’s creation and operation.<sup>235</sup> And concomitantly, the definitions and connotations of legitimacy regarding international legal rules and topics should be examined, and polished up in many issues from time to time to make sure that those issues are tackled in a right way.<sup>236</sup> Secondly, it is really crucial to have a consistently clear and, more importantly, universal concept of legitimacy in international law.<sup>237</sup> Scholars are always arguing and analyzing about different topics in international law to get a consistent concept of legitimacy upwards on the one hand, and apply the concept of legitimacy downwards to various subfields to test and refine it on the other hand.<sup>238</sup> Thirdly, legitimacy is also closely interrelated and tangled with the concept of

---

<sup>233</sup> See Byers, Michael. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge University Press, 1999, p 24.

<sup>234</sup> See Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005, p 76. (“This anomalous situation results from the clash of two conflicting principles: the old principle of effectiveness and the new principle of withholding legitimacy to facts and situations inconsistent with the general values of the present world community.”)

<sup>235</sup> See Buchanan, Allen E. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, 2004, 145-161.

<sup>236</sup> See Stumpf, Christoph A. *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations*. Walter de Gruyter, 2006, p 209-214. (The legitimacy of war) See Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005, p 60, 371. (The legitimacy on the using of power and military reprisals) See Buchanan, Allen E. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, 2004, p179. (The legitimacy of the international legal system)

<sup>237</sup> Besson, Samantha. *The Authority of International Law: Lifting the State Veil*. *Sydney Law Review*, Vol. 31, pp. 343-380, 2009.

<sup>238</sup> Related literatures include: Meyer, Lukas H. *Legitimacy, Justice and Public International Law*. Cambridge, UK: Cambridge University Press, 2009. Føllesdal, Andreas, Johan Karlsson Schaffer, and Geir Ulfstein. *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*. Cambridge: Cambridge University Press, 2014. Clark, Ian. *Legitimacy in International Society*. Oxford University Press, 2005.

“legality” and “authority”.<sup>239</sup> All of those can provide us macro-insights about the international law-making and the creation, development, dominance, maintenance and ultimate collapse of international rules and regimes.

## **B. Pacific Rim’s Flux of International IP Regimes**

Here in this paper, these two concepts of “authority” and “legitimacy” are more socio-interactive, in-between, dynamic and descriptive, rather than individual, internal, static and normative.<sup>240</sup> From the perspective of specific and microscopic investigation, “authority” reconstructs the concept and connotations of rule-making regime in international law. There are so many various international legal regimes, as interactive authorities with different degrees of practical powers, effects and roles. As long as those international institutions are legally established and functionally operating, gravity-like interactions and mutual-impacting reactions are taking place all the time, just like those celestial bodies and stars in the universe. And regimes in a certain sub-field of international law may interact more extensively with others in small systems like the solar system, while action principles and processes are all interlinked and connected. Those stars in diverse shapes are of different qualities, and always in evolution and changes. Also, the gravity of different regimes depends on their mastery capability to corresponding jurisdictions and issues. Legitimacy is actually an important aspect of that evaluation.

As for “legitimacy”, it is examined and looked more from the perspective of external evaluation and accreditation in some time nodes during the interaction, and also from the perspective of bigger context concerning regimes’ future construction and development, rather than the normative provisions and effects.<sup>241</sup> The legitimacy of a certain regime depends on the quality of those specific rules therein, regime’s inclusion of the issues into its jurisdiction,<sup>242</sup> and also regime’s ability to respond and correspondingly evolve forward, three of which are closely linked and mutually influenced.<sup>243</sup> Apart from this perspective of individual regime’s development, from

---

<sup>239</sup> For example, Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2005, p 13. Hurd, Ian. *Legitimacy and Authority in International Politics*. *International Organization* 53.2 (1999): 379-408.

<sup>240</sup> For the descriptive and normative use of the concept of “legitimacy”, see Buchanan, Allen. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law: Moral Foundations for International Law*. Oxford University Press, 2003, p 235.

<sup>241</sup> See Besson, Samantha. *The Authority of International Law: Lifting the State Veil*. *Sydney L. Rev.* 31 (2009): 343, 345. (“Importantly, the existence of international law’s moral right to rule is the result of an objective evaluation: international law may have legitimate authority whether or not its subjects think it does and whether or not they have consented to its authority. It is not therefore, the perceived or sociological legitimacy of international law this article is concerned about, but its normative legitimacy.”) Also see Franck, Thomas M. *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*. *Am. J. Int’l L.* 100 (2006): 88.

<sup>242</sup> It can be indicated from the suggestions made by some scholars. For example, see Bergsten, C. Fred. *China and Economic Integration in East Asia: Implications for the United States*. No. PB07-3. Peterson Institute for International Economics, 2007. (“Another part of the US strategy should be to strengthen the substantive capabilities and political legitimacy of the global economic institutions, especially the World Trade Organization and the International Monetary Fund, to minimize the need for (and appeal of) new Asia-only regional compacts.”)

<sup>243</sup> See Byers, Michael. *Custom, Power and the Power of Rules: International Relations and*

the other perspective of those regimes' interaction and development on a whole in this "universe of stars", the legitimacy of them, as both individual authorities and an integrated system,<sup>244</sup> is interdependent and conditional upon their justified interrelationships.<sup>245</sup> Furthermore, all branches of international law, and even the whole system of international law, can be explained by such a conceptual framework and analysis mode, thus getting a better understanding of how international legal rules and regimes are created, maintained and repealed.<sup>246</sup>

Specifically addressed onto the international intellectual property regimes in Pacific Rim, these concepts could be innovative and enlightening to interpret the phenomena of regime competition and mutual interactive containment in international IP law. And the competitions and containments among different regimes are bound to bring about tangible changes and effects on the creation of regimes and function of the rules, which is about the legitimacy of those regimes as international IP authorities.

Firstly, the negotiation of the establishment or the upgrading of an international (IP) regime is likely to be more prolonged and flexuous in the existing power-oriented negotiation paradigm. Meanwhile, a strong leadership, by some certain big power(s) with decisive negotiation skills and bargaining powers, is expected to emerge to keep the quasi-legislative international rule-making round moving forward, given the reality that the paradigm is not easily reversed but seems to be reinforced in the absence of previous "somehow effective"<sup>247</sup> landscape.<sup>248</sup> And only when the

---

Customary International Law. Cambridge University Press, 1999, p 24. ("For Waltz, this larger structure included an ordering principle, the specialization of the functions of differentiated units, and the distribution of capacities across those units.")

<sup>244</sup> This net of regimes, just like the texture of the universe, is similar to the interpretation of rules in a systematic way in the ILC Report and also the systematic vision of international law. See ILC. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 (13 April 2006), p 206, par. 410. (The "principle of systematic integration") Also see Benvenisti, Eyal. The Conception of International Law as a Legal System. German Yearbook of International Law 50 (2008): 393-405.

<sup>245</sup> See Roughan, Nicole. Authorities: Conflicts, Cooperation, and Transnational Legal Theory. Oxford: Oxford University Press, 2013, p 179.

<sup>246</sup> See Buchanan, Allen. Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law: Moral Foundations for International Law. Oxford University Press, 2003, p 289, 300. ("It appears that this general conception of legitimacy should apply to any set of institutions for the exercise of political power. So it should serve as well for the international legal system as for a particular state.")

<sup>247</sup> It means that despite there are many criticism about the previous inequality in the international rule-making processes, such as the dominance in the negotiation of IP treaties, those international law-making progresses are not possibly achieved under a more decentralized structure. This argument is not arguing that the previous structure is good, not to mention better, since a more balanced and equal international economic order seems to do more good to the development of human being. Rather, without any consideration of those values, it just says that the previous one can do things more effectively, which indicates that this power-oriented paradigm continues to be a long-known secret that cannot be told. See Slaughter, Anne-Marie. International Law in a World of Liberal States. Eur. j. Int'l L. 6 (1995): 503. ("Liberalism and Realism proceed from different fundamental assumptions about the international system: assumptions about the identity of the primary actors in that system, the relationship of those actors to State institutions, and the primary determinants of State relations with one another. International lawyers seeking to develop integrated theories of international law and

participating countries have good assessments of the potential costs-benefit analysis could relevant international regimes be probably established. Afterwards, the legitimacy of those regimes depends on its bigger context within a structural system and also its capacity to control the international law-making framing points, such as the balance of the south-north conflict of interests in international IP protection, the basic human rights concerns in developing countries, some overlapping or interdisciplinary IP themes,<sup>249</sup> and other potential trade-offs on the negotiation table. And the other way around, the increase or the decrease of those regimes' legitimacy interactively and altogether affects the backdrop and framework of international law-making and temporal international politics.<sup>250</sup> That was what happened in the negotiation of TRIPs, and that's what we are hoping for right now in the negotiation of TPP.<sup>251</sup>

Secondly, in the process of the operation and actual functioning of those regimes and rules, impacts and shock waves of the authority and legitimacy from other regimes and sub-systems are always tangible; and they are directly reflected in many ways, such as whether evasion of law is tactically used by Member states as a strategy, whether the Member States support or abandon rules' further developments and more extensive uses.<sup>252</sup> It also ultimately determines whether a regime that is generated

---

international relations must take the Liberal critique seriously, examining the ways in which Liberal assumptions conflict with assumptions underlying traditional international law.”)

<sup>248</sup> The “realism” and “neo-realism” theory in international relation is always a reminder for our understanding and the theoretical construction of international law-making processes. For example, see Waller, Spencer Weber. *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*. U. Kan. L. Rev. 42 (1993): 557. (Arguing that “a neo-realist approach to harmonizing international economic law ... applies much of the teaching of the legal realism movement in American jurisprudence to identify the values and governance norms underlying technical rules of competition law”). Also see Slaughter, Anne-Marie. *International Law in a World of Liberal States*. Eur. j. Int'l L. 6 (1995): 503. (“Both of these approaches were developed in response to ongoing work in political science. The young discipline of international relations surged to respectability on the tide of Realism, proffering a hard-boiled code of conduct for the Cold War and disdaining the dangerous moralism of international law. International lawyers thus faced the ‘Realist challenge’: the claim that law was simply irrelevant to international politics. McDougal and his disciples offered a theoretical response; international legal process scholars sought to establish more empirical connections between international legal rules and foreign policy decision-making.”)

<sup>249</sup> Such as the protection of traditional knowledge in TRIPs and the benefit-sharing of genetic resources in CBD, as well as other topics in the protection of IP and culture prosperity, IP and the protection of the environment.

<sup>250</sup> See Scott, Shirley V. *International Law as Ideology: Theorizing the Relationship between International Law and International Politics*. Eur. J. Int'l L. 5 (1994): 313. (“The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics.”)

<sup>251</sup> See Findlay, Christopher. *Mega-regionalism in Asia Pacific*. *Estudios internacionales* (Santiago) 45.175 (2013): 111-118. (“[B]oth the Trans Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP) can be complementary, if the US is willing to lower the TPP threshold, while the RCEP should raise its threshold to become more meaningful for the region to participate. Only then the most maximum results can be achieved for the benefit of the region.”)

<sup>252</sup> Such as the protection of geographical indications in TRIPs. Based on Article 22 (Protection of Geographical Indications) and 23 (Additional Protection for Geographical Indications for Wines and Spirits) of WTO TRIPs Agreement, two issues are debated in the TRIPS Council under the Doha mandate, with support particularly from European Countries: creating a multilateral register for wines and spirits; and extending the higher (Article 23) level of protection beyond wines and spirits. See

through difficult negotiations may be very short-lived, rapidly invalid, or not. This occasion happened between WIPO and WTO TRIPs Agreement, and it may happen again among TRIPs, TPP/RECP and other potential regimes in Pacific Rim. The systematic or structural perspective, with legitimacy as its essential pillar, is exactly one of the connotations of the concept of legitimacy of those IP authorities in this world society.<sup>253</sup>

Thirdly, the proliferation of authorities and big powers in Pacific Rim will significantly reduce the possibility of reaching an agreement on IP and related trade issues, unless several core big powers among the states reach a certain sort of compromise and work together to establish a new leading partnership. The decentralization of authorities exacerbate the proliferation of regimes and rule systems, as more authorities tend to grasp the right to international law-making other than just follow rules made by other stakeholders, while former dominant states don't want to let go their scepter.<sup>254</sup> This probably lead to higher overall "transaction costs" in the cost-benefit analysis, while every state tries to maximize its own input-output ratio.<sup>255</sup> Meanwhile, the emergence of more regimes and rules could lead to two possible outcomes: one is that more various systems appear, and the differentiation and specialization of regimes tend to be more fierce; the second possible result is that those adverse consequences, as a result of this proliferation, make countries recognize the significance of interdependence in this symbiotic era of globalization, and stakeholders reach a big compromise and convergence is realized.<sup>256</sup>

---

WTO. Draft Decision to Amend Section 3 of Part II of the TRIPs Agreement. TN/C/W/60, 19 April 2011. Another example is about the protection of traditional knowledge in TRIPs Article 27.3b and the protection of biodiversity in CBD. See WTO Official Website. Article 27.3b, Traditional Knowledge, Biodiversity. Available at [http://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm).

<sup>253</sup> See Byers, Michael. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge University Press, 1999, p 24.

<sup>254</sup> See Gordon, Bernard K. *Trading Up in Asia: Why the United States Needs the Trans-Pacific Partnership*. *Foreign Aff.* 91 (2012): 24. ("If the TPP negotiations bear fruit, the United States will become far stronger, economically and politically, over the next generation. A deal that included Japan would essentially result in a free-trade agreement between Washington and Tokyo, representing the long-sought "third opening" of Japan and the affirmation of U.S. power in the Pacific region. More broadly, the United States hopes that the TPP will cement a system of open, interconnected trade based on mutually-agreed-on rules.") Also see Piccone, Ted, Steven Pifer, and Thomas Wright, eds. *Big Bets and Black Swans 2014: A Presidential Briefing Book*. Brookings Institution Press, 2014, p 3. ("Successful negotiation and passage of the TPP will help strengthen the image of an American that is deepening its engagement in a rules-based system.")

<sup>255</sup> See Bergsten, C. Fred. *China and Economic Integration in East Asia: Implications for the United States*. No. PB07-3. Peterson Institute for International Economics, 2007. ("An essential pillar of a US strategy toward East Asian integration is acceptance of the legitimacy and desirability of that process.")

<sup>256</sup> See Yamazawa, Ipeei. *New IAP Peer Review Process toward FTAAP*. In *APEC Study Center Consortium Conference*, San Francisco, CA. 2011. ("TPP and ASEAN+3 and +6 will continue to be prepared in parallel for the time-being. But each conflicts with other. TPP excludes China, while ASEAN+3 and +6 exclude the United States, which will cause difficulty in merging them in future.") Also ee Baldwin, Richard. *The US is Painting Itself into a Corner on 21st Century Trade Policy*. In Baldwin, Richard E., and Simon J. Evenett, eds. *Why World Leaders Must Resist the False Promise of Another Doha Delay*. Centre for Economic Policy Research, 2011, p 63-70. (Arguing that "America's best chance at getting better access to the world's fastest growing economies is on the table – it is called the Doha Round. The US should push hard for a conclusion as the alternatives are much worse. The US faces great domestic and foreign problems in pursuing the regionalism alternative. In particular,

### 3. Future Institutional Development of International IP Law in Pacific Rim

It is always not easy and sometimes risky to predict the future development of those international IP regimes. As for the competition and coexistence of so many different international IP regimes in Pacific Rim, this paper considers that the following arguments are likely to be appropriate and anticipated.

Firstly, China will not accept or accede to the TPP's high standards on IP protection right now. TPP's IP protection standards are still too high for China's present needs, notwithstanding that it is argued by some scholars that China also need international IP protection system to safeguard its national interests of overseas investment and international competition. Although it is still full of variables and X factors on whether those negotiating parties could come up with a successful TPP agreement and whether China is interested in joining TPP, China is likely to continue to build up its own "home court" to compete with TPP, and this is the basic roadmap and strategic cards before any possible "big compromise". The decentralization of authorities and the longstanding lack of legitimacy of high protection rules (on IP and other related trade topics), particularly from the perspective of developing countries, and also China's huge economy size, have rendered China enough bargaining powers.

Secondly, TPP will not be able to succeed and sustain without China's participation.<sup>257</sup> Given the sensitiveness of those negotiation issues and the sharp increase of China's strength, any similar economic integration plan without China in Pacific Rim is in big lack of legitimacy and authority.<sup>258</sup> Here, the "succeed and sustain" of TPP does not simply mean its craft and passage, but more from the perspective of US's strategic demands: TPP is a template of next generation's international trade and IP protection treaties; and TPP represents US's global influences in Asia and Pacific Rim, both economically and politically. It is argued here that TPP seems to be incompetent for US's ambitions and China's possible participation, whether in the form of "big compromise" with US or the "all or nothing" gambling mode. That's because an absence of China and consequentially a lack of legitimacy would do fundamental damages to the inclusiveness and authority of TPP, leaving the future grand blueprint envisaged by US wiped out. Namely, the participation of China, Japan and US is the basic elements for a possible Pacific

---

US faith in the Trans-Pacific Partnership seems to be based on unclear thinking about political constraints at home and political reactions abroad.")

<sup>257</sup> See Schott, Jeffrey J. Roadmap for the FTAAP: Take the TPP Turnpike. Presentation at APEC JAPAN 2010 Symposium, Sponsored by Peterson Institute for International Economics, Tokyo, December. Vol. 9. 2009. ("Whither China? Key to whether TPP becomes vehicle for Asia - Pacific integration.")

<sup>258</sup> See Schott, Jeffrey J. Getting to the FTAAP via the TPP Turnpike. Presentation to the Peterson Institute for International Economics-Japan Economic Foundation Conference, A Trans-Pacific Partnership and the Future of the Asian Region. Vol. 25. 2010. ("Ultimately, FTAAP needs to include China to be credible link for Asia-Pacific integration.")

Rim integration arrangement.<sup>259</sup> As for the Sino-US relation, both particularly here on the international IP law-making and generally to global governance, neither “losing China again” nor “isolation from the world” is an acceptable option for US and China.

Thirdly, in the Pacific Rim’s integration progress, China and the U.S. should abandon the competitive posture of confrontation, and instead try to share the “authority” and enhance their collaboration. Future opportunities for the development of international IP law is on how US, China and EU share and balance their interests and leadership. And for China, joining the big-power club and gaming is the best option; and international norms embodying consistent interest and values, and rules containing sense of identity are desirable and necessary.

Fourthly, great pain before the “big compromise” is inevitable and enduring; and there are full of many variables in the reach of that compromise, such as the time, contents, and turning points under the bigger context of globalization, power-rebalancing and multi-polarization.<sup>260</sup> Any structural changes or substantial moves in the fundamentals of the international economic order and international politics in Pacific Rim will be clearly reflected in Pacific Rim’s international IP law-making and corresponding regime interactions.<sup>261</sup>

## V. Conclusion

Under the context of institutional fragmentation of international IP law in this world society, the international IP law in Pacific Rim is in a flux with various international IP legal actors, including TRIPS, WIPO, CBD, TPP, RECP, FTAAP, etc. With this new method of socio-legal analysis, this paper investigates the historical evolution of international intellectual property regimes in Pacific Rim and their interactions, paying particular attention to the analysis of authority and legitimacy of those

---

<sup>259</sup> See Sugawara, Junichi. *The FTAAP and Economic Integration in East Asia: Japan's Approach to Regionalism and US Engagement in East Asia*. Vol. 12. Mizuho Research Institute, 2007.

<sup>260</sup> This happens again and again to the establishment of any regime and also by any initiative of a new regime. For example, FTAAP, see Sugawara, Junichi. *The FTAAP and Economic Integration in East Asia: Japan's Approach to Regionalism and US Engagement in East Asia*. Vol. 12. Mizuho Research Institute, 2007. (“For APEC members, although an FTAAP is only ‘a long-term prospect’, the FTAAP proposal provided a chance to reassess their strategies for economic integration in East Asia, the US engagement in the region, the achievement of the Bogor Goals and APEC reform. Some members may confirm and accelerate their strategies. Others may choose to change their strategies and build new ones.”)

<sup>261</sup> For example, see Terada, Takashi. *The Origins of ASEAN+ 6 and Japan's Initiatives: China's Rise and the Agent-structure Analysis*. *The Pacific Review* 23.1 (2010): 71-92. (The paper asks: Why is Japan so interested in promoting ASEAN+6 as an ‘expanded’ East Asian regional concept, despite the existence of ASEAN+3? And it considers how changes in the US-led structure have influenced Japan as the agent in which regional integration within the ASEAN+6 framework was generated, by focusing on the process by which consideration of a countermeasure to the rise of China. And “this article finally examines the more recent changes in the structure, highlighted by the US initiative in the promotion of the Free Trade Area of the Asia-Pacific and the re-emergence of ASEAN+3 triggered by China's aggressive regional financial initiatives, and asserts these events have dimmed the prospects for ASEAN+6, since these changes meant the transformation of the preconditions behind the birth of ASEAN+6 in Japan.”)

international IP regimes. Socio-legal research intends to view legal rules and regimes as embedded in their social, political, economic and cultural contexts; and it draws on new methods and concepts to enrich the legal studies to be more firmly rooted and persuasive. Through socio-legal analysis of the international IP regimes, this study analyzes the institutional fragmentation of international IP law, and examines the future institutional development of international IP regimes in the Pacific Rim.

And compared to some conclusions and specific narratives here, this perspective and conceptual framework are more important and also maybe more innovative for a better understanding of the making, remaking and unmaking of international regimes and legal rules, under the language of institutional fragmentation of international (IP). With more extensive and more vigorous competition between China and US undergoing in Pacific Rim and beyond, this research on International IP law is only a start. And more comprehensive study and deep-going case study in international law should and could be expected, with elaborations concerning the concepts of authority and legitimacy under the context of institutional fragmentation of international law.