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A Hybrid Legal and Economic Development Model that Balances Intellectual Property Protection and Economic Growth: A Case Study of India, Brazil, Indonesia, and Vietnam

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INTRODUCTION

Industrialized countries are using the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS")1 to harmonize international intellectual property rights ("IPR")2 regimes. Their goal is to make it easier and more affordable for their own domestic corporations to operate globally without fear of rampant piracy or the burden of meeting different requirements for IPR protection in every new market.3 Often found leading the charge, the pharmaceutical industry dedicates substantial resources toward lobbying industrialized governments to enforce the terms of TRIPS in developing and least developed countries ("LDC").4 In particular, the United States pharmaceutical industry has long been among the chief proponents for using Section 301 of the Trade Act of 1974 ("Special 301") to pressure developing countries into strengthening their IPR regimes.5 Although dozens of countries have been placed on the Special 301 Watch List6 over the years, countries with emerging domestic pharmaceutical industries that have the potential to challenge the U.S. pharmaceutical industry; such as India, Brazil, Indonesia, and Vietnam; have been the primary targets of sanction threats.7

…The cases of India, Brazil, Indonesia, and Vietnam illustrate the potential outcomes of different responses to the tension between international obligations, IPR regime strength, and economic growth. India successfully resisted decades of international pressure to implement a stronger IPR regime and emerged as a world-leading supplier of affordable generic drugs.13 Meanwhile, both Brazil and Indonesia bowed to international pressure to implement stronger IPR protections, and both countries continue to struggle to maintain their once promising domestic pharmaceutical industries.14 Vietnam currently stands on the cusp of rapid economic transition.15 Prematurely implementing stronger IPR protections will significantly impact the success or failure of that transition.16 These cases highlight the importance of properly balancing economic growth and IPR regime strength for LDC and developing countries currently pursuing entry into the global economic order.
(pp. 87-90)

…This paper seeks to contribute to the growing body of legal and economic research on the subject by combining insights from both disciplines to create a hybrid model that examines the relationship between the strength of a country's IPR protections and its level of economic development over time.
(p. 91)

…From the early part of the twentieth century until 1969, **Brazil** maintained a fairly robust patent regime over many sectors of its economy.172 MNEs dominated many industries, including pharmaceuticals, and domestic economic growth was slow, but steady throughout the dissemination stage…173

…Brazil entered the U-shaped curve with a low level of economic development and a high level of intellectual property protection. When it transitioned to the absorption stage, Brazil exhibited values that were strikingly similar India's. As a result the hybrid model predicts that Brazil was economically ready to make the transition from the dissemination stage to the absorption stage in roughly 1969. In 1969, Brazil signaled its intent to transition into the absorption stage of economic development by eliminating its patent protections for the pharmaceutical industry.

…The hybrid model predicts that an imbalance between the strength of an IPR regime and the level of economic development would negatively affect a country's ability to innovate. Brazil's values show that it prematurely lowered its IPR restrictions before it reached the proper level of economic development. Instead of transitioning through the absorption stage when it abolished its IPR protections, Brazil entered a stagnation stage.188 This stage substantially elongated the time that Brazil would spend in the absorption stage. In this case, Brazil's economy lacked both the structural and behavioral incentives for innovation that a country needs to successfully transition through the absorption stage.189 Consequently, instead of growing under the protection of a weaker IPR regime, the pharmaceutical industry turned to imitation and other illegitimate methods of technology transfer.190 Although the Brazilian government attempted to take a direct hand in the management of the pharmaceutical industry, its actions only damaged the industry further.191MNEs continued to dominate the pharmaceutical industry in Brazil, but they reduced their FDI and technology transfers because of the lack of patent protection.192

The hybrid model's values193 show that Brazil's economy began to recover and grow again in the late 1980s and early 1990s, after remaining in a stagnation stage for nearly twenty years. The hybrid model predicts this growth because the stagnation stage is not permanent; it only results in a substantial elongation of the current stage of economic development. In 1994, as Brazil continued to transition through the middle of the absorption stage, Brazil signed the TRIPS Agreement.194 In 1997, under pressure from the U.S. commercial pharmaceutical industry, Brazil instituted a TRIPS-compliant IPR regime that included new provisions for patents on the pharmaceutical industry (despite the fact that under TRIPS, Brazil had until January 1, 2005, to comply).195

…The adoption of a TRIPS-compliant IPR regime typically indicates that a country has moved into the innovation stage. For this transition to be successful, the hybrid model's values should place the country near the top right of the U-shaped curve, with strong IPR protections and advanced levels of economic development. However, if a country adopts a strong IPR regime before it reaches the proper level of economic development, it risks entering a stagnation stage that will keep the country in the absorption stage. In this case, Brazil nearly doubled its economic activity between 1985 and 1995. Yet, after implementing a TRIPS-compliant IPR regime, Brazil lost almost every trace of new economic activity by the year 2000 and the country entered another stagnation stage. This shows that Brazil's economy was still in the absorption stage and unable to support the strong IPR regimes that characterize the innovation stage.

…3. Analysis

In summary, **because Brazil had incredible, built-in competitive advantages as the world's fourth-largest pharmaceutical market, with vast natural resources and an educated populace, it gained an economic head start in the 1960s.205** Yet, over the last fifty years, Brazil acted to change its economy, pharmaceutical industry, and IPR protections out of sync with each other.

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205 Salama & Benoliel, supra note 168, at 641-43; Mayer, supra note 24, at 397-98; **Lawrence A. Kogan, Brazil's IP Opportunism Threatens U.S. Private Property Rights, 38 U. MIAMI INTER-AM. L. REV. 1, 4-5 (2006).**
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