

INTELLECTUAL PROPERTY AND THE NEW INTERNATIONAL ECONOMIC ORDER

In economic sectors crucial to human welfare – agriculture, education, and medicine – a small number of firms control global markets, primarily by enforcing intellectual property (IP) rights incorporated into trade agreements made in the 1980s onward. Such rights include patents on seeds and medicines, copyrights for educational texts, and trademarks in consumer products. According to conventional wisdom, these agreements likewise ended hopes for a New International Economic Order, under which wealth would be redistributed from rich countries to poor. Sam F. Halabi turns this conventional wisdom on its head by demonstrating that the New International Economic Order never faded, but rather was redirected by other treaties, formed outside the nominally economic sphere, that protected poor countries' interests in education, health, and nutrition and resulted in redistribution and regulation. This illuminating work should be read by anyone seeking a nuanced view of how IP is shaping the global knowledge economy.

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Sam F. Halabi
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Intellectual Property and the New International Economic Order

OLIGOPOLY, REGULATION, AND WEALTH
REDISTRIBUTION IN THE GLOBAL
KNOWLEDGE ECONOMY

SAM F. HALABI

University of Missouri



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Contents

<i>Preface</i>	<i>page</i> vii
<i>Acknowledgements</i>	xvii
Introduction: Global Wealth and the Rise of Intellectual Property	1
PART I MOVEMENTS IN GLOBAL WEALTH CREATION AND REDISTRIBUTION	15
1 Economic Development in Low- and Middle-Income Countries after Decolonization	17
2 The Expansion of International Intellectual Property Protection	30
3 The Merger between International Intellectual Property, Investment, and Trade Law	41
PART II RETHINKING WEALTH: FIRMS, BASIC HUMAN NEEDS, AND TECHNOLOGY	61
4 The Pivot to Basic Human Needs	63
5 The Rise of Supranational Regulation of Global Firms	74
6 Access to Medicines and Vaccines	91
Antiretroviral Medications	98
Cancer and Heart Disease Medications	101
Vaccines	102
7 Food and Agriculture	105

vi	<i>Table of Contents</i>	
8	Consumer Products	119
	Infant Formula	130
	Tobacco	133
9	Educational and Scientific Printed Works	138
	PART III INTERNATIONAL INTELLECTUAL PROPERTY SHELTERS: REDISTRIBUTING WEALTH AND REGULATING OLIGOPOLIES	149
10	Medicines and Vaccines	153
	The Medical Research and Innovation Treaty	159
	The Pandemic Influenza Preparedness Framework	162
11	Biological and Plant Genetic Resources for Agriculture	166
	The Convention on Biological Diversity	167
	The International Treaty on Plant Genetic Resources for Food and Agriculture (International Seed Treaty)	169
	The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization	175
12	Food and Tobacco Trademarks	185
	The International Code of Marketing of Breastmilk Substitutes	186
	The Framework Convention on Tobacco Control	189
13	Limiting Copyright	198
	The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities	200
	PART IV INTERNATIONAL INTELLECTUAL PROPERTY SHELTERS, WEALTH REDISTRIBUTION, AND THE SUPRANATIONAL REGULATION OF GLOBAL FIRMS	207
14	International Intellectual Property Shelters as Mechanisms of Redistribution	209
15	International Intellectual Property Shelters and Supranational Regulation	217
	Conclusion	227
	<i>Index</i>	229

Preface

This is a book about the nature and distribution of global wealth as it has been shaped by the changing dynamics of international political and economic relations over the last 150 years. The end of the ages of formal colonization and empire, accompanied by rapid technological change, have altered the balance between tangible and intangible sources of wealth, the division between public and private spheres in which wealth is created and managed, and the use of international versus national tools of policy to shape the flow of wealth. As the twentieth century neared its end, intangible forms of wealth in the form of intellectual property such as patents, trademarks, and copyrights assumed an unprecedented place in the wealth hierarchy. Derivative and related legal protections such as trade secrets and exclusivity for data submitted for regulatory approvals expanded the potential value of proprietary knowledge traditionally embodied in intellectual property rights. As a result of these trends, international disputes over intellectual property – as with other forms of wealth that preceded them – are now common, increasing, and high-stakes. This book explores those disputes and situates them within the much longer human history of the creation, distribution, and conflict over wealth.

While historically relevant primarily around “technology transfer” debates during most of the twentieth-century discussions about global wealth disparity, intellectual property protection is now at the core of wealth distribution controversies. Intellectual property protection has dominated international trade and investment negotiations for the last thirty years, playing a critical role in the success, delay, controversy, or termination of agreements such as the World Trade Organization (WTO), the Trans-Pacific Partnership Agreement, and the Anti-Counterfeiting Trade Agreement, to name only the broadest multilateral agreements.¹ Industrialized states successfully tied intellectual property protections they

¹ Sam Foster Halabi, *Multipolarity, Intellectual Property, and the Internationalization of Public Health Law*, 35 MICH. J. INT’L. L. 715 (2014).

desired to the reductions in tariffs and other barriers to imports of foreign agricultural, clothing, and textile goods sought by many developing countries, formalized in the WTO's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).² Thousands of bilateral investment treaties, largely forged between developed states and developing states in negotiations where conditions strongly favored the former, include strong protections for intellectual property rights that frequently exceed those in existing international agreements, and certainly beyond those typically found in local and national laws that developed in most countries over time.³ This network of agreements has generated a wide range of enforcement mechanisms that reach beyond the slow diplomatic methods that characterized international intellectual property protection from the 1880s onward.⁴ Proprietary, intangible knowledge has now become one of the most important sources of wealth – and conflict – in the world.

This project has two origins, one theoretical, one practical. Between 2003 and 2005, I served as a Teaching Fellow at Harvard University for two popular courses – Globalization and Its Critics (led by Thomas Friedman, Michael Sandel, and Larry Summers) and Ethics and International Relations (led by Stanley Hoffmann). Those courses – which together analyzed globalizing forces from the time of St. Thomas Aquinas to the aftermath of the post–September 11, 2001 attacks on the World Trade Center in New York City – demonstrated, for me, the persistent, inevitable confrontation between the security of human beings within their communities and the insecurity caused by communities' interactions with one another. Those interactions, over history, were rarely equal. Conquest and subjugation were far more typical. The most interesting questions were how subordinated communities, peoples, nations, and tribes emerged after conquest: diaspora, dispersion, extinction, integration, resistance, and rebellion.

Five years later, I found myself an international lawyer working within a research and advocacy institute housed at Georgetown University Law Center. While providing legal assistance to low- and middle-income countries, we received a request for assistance on behalf of the South American republic of Uruguay – which, under the leadership of a cardiologist president, had adopted some of the strongest tobacco control measures in the world. The Uruguayan government faced a demand for arbitration from two Swiss corporate entities controlled by Philip Morris

² Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

³ Burton Ong, *The Trademark Law Provisions of Bilateral Free Trade Agreements*, in Graeme B. Dinwoodie & Mark D. Janis (eds), *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 230 (2008).

⁴ Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L. L. 345 (1998).

International, which, in turn, held local trademarks through a local Uruguayan subsidiary. The measures at issue – precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family and requiring that graphic warnings cover 80 percent of tobacco packaging – brought into conflict the firms’ asserted rights to use their trademarks to market their products for the benefit of a distant European parent company and the massive costs tobacco consumption imposed on the Uruguayan state and people.⁵ That the claimants were Swiss nationals (even if intangibly so), and that the claims themselves were a legal fiction, was what made the lawsuit possible: a treaty concluded twenty years before had given Swiss nationals rights to protect investments in Uruguay, inclusive of intellectual property rights such as patents, copyrights, and trademarks. Uruguay eventually won the suit, in substantial part because its measures were determined to be sound public health policies supported by an international treaty, the World Health Organization’s Framework Convention on Tobacco Control, which had authorized tight restrictions on trademarks appearing on tobacco packaging and labeling.

The episode followed a wave of intellectual property disputes that had pitted European and North American firms (and in many cases their sponsoring governments) against low- and middle-income countries seeking to protect their citizens’ health and welfare: patent monopolies that had caused high prices for medicines and disrupted traditional forms of agriculture; copyrights that had limited access to books, films, and literature; and robust protections for trademarks that had favored rights to market over regulatory interests in safeguarding illiterate or semiliterate consumers from misleading or confusing images. The dynamics behind those disputes were similar: bilateral, regional, or multilateral trade and investment agreements gave firms legal claims against governments that had been negotiated between governments with unequal bargaining capacity. Moreover, the agreements appeared to reflect historical strategies adopted decades before over more familiar forms of property and investment. They also reflected the geopolitical dynamics behind those strategies. The overwhelming majority of bilateral investment treaties – the kind that allowed Philip Morris International to sue Uruguay – are between one rich country and one poor one.

The dispute between Philip Morris International and Uruguay prompted me to undertake a broad, historical examination of the ways in which countries had worked with each other and with their major corporations (which until the mid-nineteenth century had been established to carry out specific functions relevant to the state) to ensure favorable economic environments abroad over time: the commerce-promoting underpinnings of nineteenth-century international law;

⁵ This is a simplification of both the corporate character and identity of Philip Morris International. It is formally incorporated under the laws of Virginia in the United States and maintains regional operational headquarters in Hong Kong, Lausanne, and New York City. Its brands and trademarks are licensed to subsidiaries and affiliates across the world.

investment agreements between European and North American firms and host governments in Africa, Asia, and South America; the influence of multilateral lending institutions on regulatory approaches in low- and middle-income countries; and the change over time between Friendship, Commerce, and Navigation treaties and their more contemporary manifestations as bilateral investment treaties, which included broader protections for intellectual property assets mostly held by multinational firms. What became clear through the analysis were certain continuities in the creation, expansion, and maintenance of markets abroad by formerly European colonial powers and some non-European ones that nevertheless regarded the international economic climate for their firms as primary geopolitical interests. Similarly, *resistance* to the policies behind those continuities in formerly colonized states or states formed out of former colonial spheres of influence showed signs of similarity and continuity over time. These trends fundamentally revolved around the European-inspired nation-state as the unit of measurement for wealth and its distribution. From the Spanish colonization of North and South America to the present, the flow of wealth has been overwhelmingly *from* what are now characterized as low- and middle-income countries *to* the wealthier countries of Europe and North America, with occasional interruptions mostly in the form of nationalizations undertaken in unpredictable and sometimes revolutionary waves from the period of the South American decolonization forward.⁶

In 1974, formerly colonized states and states within colonial spheres of influence called for a global plan to redistribute wealth and transfer technology to remedy in part the effects of “colonial and alien domination” – a New International Economic Order.⁷ This New International Economic Order is slowly materializing. As analyzed through gross domestic product (GDP) change over time, growth in mean incomes within individual countries, and global distribution of income, global wealth inequality as measured by the unit of the European-inspired nation-state has in fact *decreased* in the past decade or so, even if it will remain large for the foreseeable future.⁸ Within societies, of course, inequality continues to grow and, in fact, appears to be accelerating [Figure P.1].⁹ Because the overwhelming scholarly consensus had determined that the call for a New International Economic Order by low- and middle-income states had achieved little of its stated agenda, the question was: *Why* had inequality between wealthier and poorer states narrowed?

⁶ Amy Chua, *The Privatization-Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

⁷ Declaration on the Establishment of a New International Economic Order, Gen. Ass. Res. 3201 (S-VI), May 1, 1974; International Development Strategy for the Second United Nations Development Decade, Gen. Ass. Res. 2626 (XXV), Oct. 24, 1970.

⁸ Max Roser, *Global Economic Inequality* (2017) available at <https://ourworldindata.org/global-economic-inequality>.

⁹ THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013); Economist, *For Richer, For Poorer* (Oct. 13, 2012) available at <http://www.economist.com/node/21564414>.

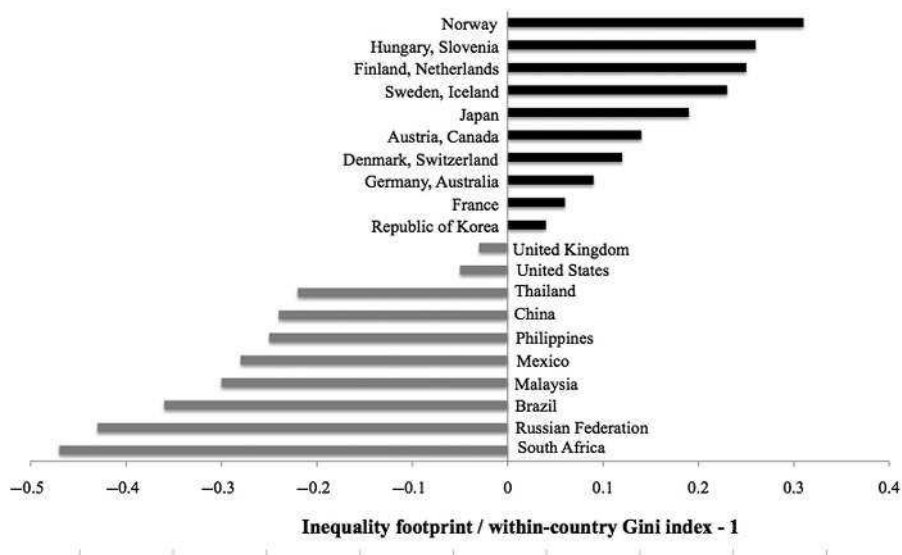


FIGURE P.1 The world’s top and bottom countries in terms of the disparity between their inequality footprint and within-country inequality¹⁰

The answer lies in both how the conception of wealth has changed, especially since the close of the twentieth century, and how low- and middle-income states have resisted and altered their approaches to the global redistribution of wealth. With respect to the latter, the historically wealthy and developed states of Europe, North America, and Asia have not diminished their commitment to growing their national wealth through promotion of friendly economic and political environments abroad. Low- and middle-income countries have, rather, turned their priorities from explicit calls for redistribution of wealth to the establishment and promotion of international institutions and policies that reach effectively the same result. In some contexts this shift in emphasis has been subtle and latent – like calls for access and benefit sharing under the 1992 Convention on Biological Diversity – and in others explicit and pronounced, like Chinese and Indian objections to hard caps on carbon emissions for the reason that such caps would effectively threaten their own growth agendas.¹¹

With respect to the former, sources of wealth are increasingly tied to human thought and creative effort, for which intellectual property rights are regularly asserted. Intellectual property-intensive industries contribute more than \$6 trillion

¹⁰ Ali Alsamawi, Joy Murray, Manfred Lenzen, Daniel Moran, & Keiichiro Kanemoto, *The Inequality Footprints of Nations: A Novel Approach to Quantitative Accounting of Income Inequality*, 9(10) PLoS ONE (Oct. 29, 2014) available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0110881>.

¹¹ JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY 27 (1982).

to the US GDP alone.¹² “Across a broad range of industries and geographies, intellectual property rights now constitute a significant fraction of enterprise value.”¹³ Approximately 70–80 percent of firms’ market capitalization is in the form of intangible assets, which include “patents, trademarks, copyrights, and other business knowledge and know-how.”¹⁴ The increasing relevance of intellectual property to firm value has resulted in a corresponding effort by those firms to strengthen intellectual property protections in bilateral, regional, and multilateral trade and investment agreements.

While there is a large and growing body of mostly disputed and inconclusive evidence that strong intellectual property protections benefit low- and middle-income countries as well, their overall position toward stronger intellectual property protections has been to a significant extent antagonistic. Strong intellectual property protections for products and processes relevant to agricultural production, access to medicines, and public health measures have generated acrimonious disputes from the beginning of the modern free trade regime that, from 1995, has incorporated strong intellectual property protections. In 1998, pharmaceutical firms holding patents for HIV/AIDS medications brought suit against the South African government for its efforts to use parallel imports and price controls to expand access to treatment for its exploding HIV/AIDS population.¹⁵ Their suit was based in significant part on the failure of the government to duly regard intellectual property provisions of the new international trade law.¹⁶ Agriculture and seed companies based in the United States and Europe have regularly clashed with both farmers in developing countries and their governments over attempts to interrupt agricultural practices with patent infringement claims. In 2007, Indonesia withheld samples of a highly infectious avian influenza strain from the World Health Organization on the basis that it was the practice of developing countries to share their biological resources only to have them exploited, patented, and generated into commercial products priced out of the reach of consumers in the originating country, a particular problem in the context of medicines and vaccines.¹⁷ Activist Vandana Shiva

¹² U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: 2016 Update* ii (2016) available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

¹³ William W. Fisher III and Felix Oberholzer-Gee, *Strategic Management of Intellectual Property*, 55 CALIF. MANAGEMENT REV. 157 (2013).

¹⁴ Joseph G. Hadzima, Jr., *How to Tell What Patents Are Worth*, FORBES (June 25, 2013) available at <https://www.forbes.com/sites/forbesleadershipforum/2013/06/25/how-to-tell-what-patents-are-worth/#5be044fa6e5b>.

¹⁵ Ellen F. M. ‘t Hoen, *TRIPS, Pharmaceutical Patents and Access to Essential Medicines*, 3 CHI. J. INT’L. L. 27–46 (2002).

¹⁶ William Fisher & Cyrill Rigamonti, *The South Africa AIDS Controversy: A Case Study in Patent Law and Policy* (Feb. 10, 2005) available at <http://cyber.law.harvard.edu/people/tfisher/South%20Africa.pdf>

¹⁷ David Fidler, *Influenza Virus Samples, International Law, and Global Health Diplomacy*, 14(1) EMERG. INFECT. DIS. 88–94 (2008).

declared of the international intellectual property protection regime that “the seed wars, trade wars, patent protection, and intellectual property rights [at the World Trade Organization] are claims to ownership through separation and fragmentation. If the regime of rights being demanded . . . is implemented, the transfer of funds from poor to rich countries will exacerbate the Third World crisis ten times over.”¹⁸

While a wide range of activists, advocates, scholars, and critics have analyzed the bilateral and multilateral trade and investment treaties responsible for the expansion of international intellectual property rights worldwide, they have neglected to fully appreciate the strength and form that opposition to international intellectual property expansion has taken. This book argues that while low- and middle-income countries have mounted resistance from within the agreements that expanded and strengthened intellectual property rights worldwide, they have also adopted a parallel effort to redistribute intellectual property-related gains through international agreements ostensibly aimed at expanding access to medicines, preserving biodiversity, protecting the rights of indigenous peoples, establishing evidence in support of public health policies, and facilitating access to nutritious food. This book is the first to argue that these international agreements – what are herein described as “International Intellectual Property Shelters,” often couched within the language of biodiversity, public health, and food security – represent a body of international economic law that should be understood as a single, cohesive phenomenon that has emerged in response to intellectual property protections expanding through trade and investment agreements. More specifically, that body of law has developed in order to regulate the firms that promoted the incorporation of intellectual property rights into investment and trade agreements and now aggressively assert claims under them.

Within the context of international economic history, the latter agreements are the newest wave of developed countries’ efforts to establish, expand, and protect the flow of wealth from poorer countries to richer ones while international public interest agreements aim to reduce or even reverse their impact. From the Doha Declaration on TRIPS and Public Health to the World Health Organization’s Pandemic Influenza Preparedness Standard Material Transfer Agreements, to the Framework Convention on Tobacco Control, to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, international intellectual property shelters put at their core the fundamental distributive questions strong intellectual property rights raise. These agreements fundamentally restructure the relationship between innovation, intellectual property, and access otherwise envisioned in international trade and investment agreements. They effectively call for the redistribution of wealth from richer countries to poorer ones.

Their redistributive objectives are only half their purpose. While low- and middle-income countries have successfully advocated establishment of international

¹⁸ VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* 56 (1999).

intellectual property shelters in the food security and population health fields, they have also done so through mechanisms that target sectors where a small number of knowledge-intensive firms dominate global markets. The WHO Pandemic Influenza Preparedness Framework, for example, is directly supported by the dominant manufacturers of seasonal influenza vaccines who must also promise to make either intellectual property or end-use products available to poor countries. The Framework Convention on Tobacco Control implicitly authorizes the invalidation of certain classes of trademarks – tobacco firms’ overwhelmingly most important asset – and explicitly authorizes measures that curtail the others held by five firms that control global markets outside China. The UNICEF-WHO International Code of Marketing of Breastmilk Substitutes similarly restricts the trademarks of the world’s five major infant formula producers and in particular its leader, Nestlé.

International intellectual property shelters are not, therefore, only redistributive efforts led by low- and middle-income countries; they are a nascent and increasingly effective form of supranational regulation over firms that dominate markets closely tied to key redistributive objectives such as improvement of population health. In the class of approaches identified and analyzed in this book, negotiators from developed and low- and middle-income countries target areas of overreach or defectiveness in existing intellectual property protections and draft entirely new agreements that aim to curtail expansive intellectual property rights or impose more rigid regimes to force sharing of innovations and other benefits.

This book endeavors to identify a cycle in the political-economic movements behind global wealth creation, flow, and redistribution, rather than build a normative case for any particular analytical or even policy approach to national or global growth and redistribution questions. That cycle is fundamentally shaped by the primacy of the European-style nation-state as the unit by which global wealth is measured. As of this writing, populist waves across the globe suggest the model remains robust: British voters demanded the reprioritization of state prerogatives over those issued by the EU (so-called Brexit), while US voters similarly (at least under the archaic rules of its presidential election system) installed Donald J. Trump in substantial measure for his promises to reconstruct the relationship between patriotism and economic policy.

The analysis elaborated herein is aimed at enriching the academic debate in two overlapping disciplines: international relations and economics. With respect to the former, the book demonstrates that popular and scholarly declarations that the New International Economic Order failed or disappeared are wrong.¹⁹ Relatedly, the conflict over distribution of global wealth remains a critical factor explaining international diplomatic and economic relations. Multinational firms (which broadly share capital and governance features no matter where established), for

¹⁹ Vinod K. Aggarwal & Steve Webber, *The New New International Economic Order*, HARV. BUS. REV., 2 (Apr. 18, 2012).

decades at the center of a wide range of disputes between wealthy and poor countries, remain so.²⁰ While the relationship between those firms and their supporting governments has been made more complicated by the rise of intellectual property's role in firm value (the manipulation of intellectual property assets' domicile and transfer pricing for tax minimization purposes has pitted many firms against both their own and foreign governments), the relationship between the formal, public sphere attributed to "the state" and the commercial, enterprising drive of the "firm" in the private sphere has, at least since the time of the chartered company, ebbed and flowed. Assertions or implications that at some point in time (the 1950s, the 1970s, the 1990s, etc.) either the "state" or the "firm" retreated were only inflection points in a more complex system of agents that endeavor to write, influence, or revoke international rules for their own benefit. The international competitive states' system means that states and firms will always work as agents for each other under circumstances that may change rapidly.

With respect to economics, at least since Schumpeter, there has been a robust if unresolved debate as to the relationship between research-and-development-intensive industries and market concentration.²¹ While that debate has largely centered on the conditions most likely to promote innovation, it has inevitably implicated the reach and importance of competition (or antitrust) law to regulate markets. This book suggests two possibilities for enriching the analysis of this question. First, the variable of the competitive states' system has been infrequently factored into analyses of the innovation-concentration question. As this book explains, international competition between states may need to be a central, starting point of analysis rather than a marginal, infrequently considered variable. Concentration in global markets for broad classes of agrochemical products and seeds and narrower product categories of pharmaceuticals and consumer goods discussed in this book began with efforts by state foreign policy and commerce bureaucracies endeavoring to secure markets against one another (even if influenced by firms). Second, the structure of regulatory regime likely to emerge as a result of conclusions about this question (even if made under conditions of uncertainty) is too narrow both as to the source of regulatory regime and to its scope. As markets concentrate at the global level in research-and-development-intensive industries, the source of regulation is as likely to be supranational as national and involve redistribution of noncompetitively produced products as much or more than market-shaping management.

²⁰ REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF-GEORG RINGE, & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW* 5 (2004).

²¹ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 89 (1942).

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