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Response: International Intellectual Property Shelters

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I. INTRODUCTION

In *International Intellectual Property Shelters*,[1] Professor Sam Halabi revives an important conversation about the intersection of

 Professor of Law, Washburn University School of Law. For Is, whose early journey coincided with the development of this piece, and who is one of my two daily reminders that conversations about making the world a better place are worth pursuing. Many thanks to Professor Sam Halabi and the *Tulane Law Review* for the opportunity to engage in a fascinating and immensely important discussion about a topic of global significance. All errors are my own.

intellectual property rights (IPR) protection and economic, cultural, and personal development. The ability of these rights to further development-related goals should be fundamental to any international IPR discussion. However, in a world in which disagreements over the extent of international IPR protection frequently focus on high technology issues affecting rich countries, the core distributive question that scholars and policymakers should be asking often fades from modern international IPR scholarship. Professor Halabi refreshingly reiterates that question: How do the decisions that countries make about IPR protection affect people's lives?

In the article, Professor Halabi argues that countries whose interests may benefit from resistance to strong IPR protection are doing a better job than ever at resisting.[2] Halabi points out that, while much of the recent buzz has focused on the efforts of IPR maximalists in expanding norms at the international level, those less enthusiastic about robust IPR protection have quietly and methodically strung together a series of legal instruments that will help them fight back.[3] In fact, Halabi argues, these countries have developed an under-recognized, cohesive body of law that that may be useful in slowing or abrogating rights holders' expansions.[4] Terming this body of law "international intellectual property shelters," Halabi encourages scholars and policymakers to give greater recognition to these instruments as a strategic and useful portfolio.[5] Using the article to establish the existence of the portfolio, he then previews further scholarship that will explore the shelters' effectiveness, scope, and design.[6]

International Intellectual Property Shelters is a thought-provoking, dense work that tackles a variety of issues affecting the international IPR community. Designed as an introductory piece, it is a sophisticated, helpful analysis of a series of problems that are undertreated in today's international IPR literature. Those problems fundamentally center on the question of intellectual property protection's role in furthering public health and welfare. Many argue that the protection of intellectual property is not only helpful to public health and welfare goals, but is essential. Others disagree, citing

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1. Sam F. Halabi, *International Intellectual Property Shelters*, 90 TULANE L. REV. 903 (2016).
2. *Id.* at 908-09.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 909-10.

barriers to access to medicines driven by patent rights, the ways in which trademark rights are used as excuses to drive up prices on basic goods, or the ways in which copyright law affects access to educational materials.

These disagreements have formed the basis for a "development divide" of sorts in intellectual property circles. Developing countries[7] argue that IPR maximalists—principally represented on the transnational scene by developed countries—inadequately take into account the socioeconomic factors at play in the purchase of products in less developed economies. In so doing, these maximalists price products out of the reach of those who need them and place governments in impossible situations when it comes to honoring intellectual property rights and serving their people. On the other hand, developed countries argue that stringent worldwide IPR protection is essential to the producers' abilities to continue to innovate, that they are reducing prices where they can, and that it is unfair to draw a direct link between intellectual property rights and inadequate public health and welfare measures.

Halabi taps into the heart of this debate, reminding the reader that it remains unsolved, despite all of the time and effort given to transnational IPR negotiations in recent decades. Each of Halabi's areas of focus could form the basis for further work, so his intentions to develop some of the themes of this piece further are fortunate. In this response, I highlight a few themes that Halabi could helpfully develop further in forthcoming work on the subject. These themes include: identifying criteria for selecting and designating instruments as shelters; addressing some of the lacunae that he identifies in the instruments he has selected so far, including issues of adherence, scope, enforcement, and politics; addressing the effectiveness of the instruments in accomplishing the developing countries' stated goals; and asking whether the shelters ultimately can compete on the global stage. Halabi has touched on each of these questions briefly in this introductory piece and, by doing so, has whetted an appetite for deeper treatment of these issues. Ultimately, in further work, I encourage Halabi to tackle what may be a billion dollar question: Can

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7. I recognize that there is not a perfect dividing line between developing and developed countries and that the correlation between development status and enthusiasm about IPR protection is not a perfect one. I nevertheless use "developing countries" here as a proxy for those countries that have been at work forming—or that have benefitted from—the international intellectual property shelters. Likewise, I use "developed countries" as a proxy for those who seek to maximize IPR protection across borders.

these shelters change the international IPR regulatory landscape in any meaningful way?

In Part II of this response, I briefly recap Halabi's argument, situate it in the current international IPR scholarship milieu, and illustrate the important ways in which Halabi's piece recenters the scholarly international IPR debate. In Part III, I comment on some of the challenges of Halabi's approach and identify aspects of his suggestions that I hope he will develop further in his forthcoming work. Part IV concludes with a reminder that the questions Halabi addresses are difficult ones, and the need continues for earnest scholarly exploration of the issues he discusses.

II. IDENTIFYING AND CONTEXTUALIZING THE SHELTERS

This Part briefly recaps Professor Halabi's identification of particular instruments as international intellectual property shelters. It also situates Halabi's shelter argument in the larger spate of recent international IPR scholarship and policy-making, highlighting the contrast between his focus on unresolved core issues and others' focus on cutting-edge technological issues disproportionately affecting developed countries. Finally, it explains how pieces like Halabi's serve an important role in returning IPR scholars' and policymakers' attention to the crucial questions that remain unanswered after decades of earnest attempts at international IPR regulation.

A. Identifying the Relevant Sectors and Instruments

Professor Halabi's fundamental argument is that developing countries have quietly—almost covertly—put into place a bevy of instruments that push back against what has seemed for more than twenty years to be an unstoppable augmentation of IPR protection at the transnational level.[8] By focusing on discrete areas with the deepest impacts on public health and welfare, Halabi argues, developing countries have fashioned norms that cabin IPR maximalist tendencies in the areas that most impact their core development needs.[9]

Halabi focuses his analysis on a few particular sectors that have a significant impact on public health, especially in developing countries. First, he recounts the debates surrounding patent protections in the food and drug sectors. Beginning with well-established concerns over

8. Halabi, *supra* note 1, at 907.
9. *Id.* at 938-39.

access to medicines, Halabi recaps the major controversies surrounding the development of pharmaceutical products to address particular health threats.[10] He touches both the effects of rigorous patent protection on the availability of commercial medicines in underdeveloped areas and the rising phenomenon of private, charitable funding of pharmaceutical development, especially as such funding focuses on medical conditions disproportionately affecting the developing world.[11] Halabi then expounds upon the debate over agricultural products, noting that the incredibly concentrated commercial agribusiness players are impacting farmers' practices in developing countries.[12] In discussing both pharmaceuticals and the food supply, he orients the reader in the debates surrounding genetic resources and traditional knowledge. In doing so, he highlights the extensive activities undertaken by developing countries to protect their resources from expropriation and preserve benefit sharing options and related commercial ventures.[13]

Second, Halabi turns to trademark protection's impact on specific public health concerns, employing two examples to illustrate the tendencies of powerful industries to use trademark protection as a weapon in fighting regulatory measures designed to maximize public health.[14] The sectors he chooses as examples are the infant formula sector and the tobacco sector, both of which feature debates over the effects of packaging, labeling, and marketing efforts on populations that may lack significant formal education.[15]

In each sector, Halabi has identified a few instruments that he deems international intellectual property shelters. He briefly reviews the provisions in each instrument that, in his estimation, advance developing countries' interests in the intellectual property realm. He also notes some weaknesses of the instruments he identifies.[16] Despite those weaknesses, he argues, the shelters serve to advance the framing of the global IPR discussion in terms that are more balanced than those in the mainstream multilateral IPR instruments.

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10. *Id.* at 923-30.
11. *Id.* at 940-42.
12. *Id.* at 930-31.
13. *Id.* at 945-54.
14. *Id.* at 931-37.
15. *Id.*
16. *See id.* at 946-48 (noting the impact of indeterminate language and undefined terms); *id.* at 953, 956 (noting adherence issues); *id.* at 957 (noting the nonbinding nature of one of the instruments).

B. Situating the Shelters in the International IPR Milieu

Halabi's main concern is that commentators have not yet recognized the norms generated by developing countries in these specific sectors as a cohesive body of law, and he argues that they should do so.[17] One reason for the lack of recognition to date is that these instruments do not arise out of a single institution or even out of discussions that one would term "IPR-focused." Instead, developing countries have used what are largely "non-IPR" negotiations to take steps toward accomplishing their IPR goals.

Halabi argues that the disparate nature of these instruments should not impact recognition that they work in harmony to achieve the basic public policy objectives of the developing countries.[18] He further argues that other commentators have focused too much on the IPR expansionist tactics employed in the trade and investment contexts, while largely ignoring the more discrete instruments—often outside the trade and development spheres—that developing countries use in achieving their goals.[19]

Halabi correctly identifies the tendencies of recent IPR scholarship to focus on new initiatives employed by wealthy countries to overcome the perceived inadequacies of the older international IPR instruments in addressing digital issues and technological advancements.[20] The primary trade instrument addressing IPR protection, the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[21] is underperforming, and there has been far too little focus on how to make it perform better.[22] Instead, policymakers and scholars have

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17. *Id.* at 908.
18. *See id.*
19. *See id.*
20. *See, e.g.*, Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559 (2011); Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011).
21. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].
22. *See generally* Patricia L. Judd, *Retooling TRIPS*, 55 VA. J. INT'L L. 117 (2014) (arguing that parties have ignored key mechanisms in the TRIPS Agreement that could improve the Agreement's performance in meeting the needs of both developed and developing countries); Patricia L. Judd, *The TRIPS Balloon Effect*, 46 N.Y.U. J. INT'L L. & POL. 471 (2014) (arguing that TRIPS was set up for failure by its mandate to address "trade-related intellectual property rights" and that a reinterpretation of the meanings of the key terms in the mandate is imperative to solving TRIPS performance issues).

focused on emerging trade instruments like the Anti-Counterfeiting Trade Agreement,[23] the Trans-Pacific Partnership Agreement,[24] and other bilateral and plurilateral initiatives, meant to address cutting-edge norms on which TRIPS is silent.[25] The problem with negotiating cutting-edge norms is that the cutting edge is a moving target, and international legal instruments are notoriously ill equipped to move quickly. Furthermore, most of the new initiatives lack enforceability and buy-in,[26] calling into question their long term viability and potential impact.

Meanwhile, the focus on the cutting edge arguably has distracted the international IPR policy community from meeting the challenge of ensuring that IPR norms and development goals coexist. A longtime staple of international IPR scholarship has been the difficult quest to fashion a system of supranational IPR regulation that is efficient, effective, and fair. On all three scores, policy makers have largely failed so far, and it is vitally important that scholars keep asking why they are failing. I thank Professor Halabi for reminding the international IPR community that while tackling new problems may be a worthy cause, the community still has not solved the old ones.

Professor Halabi's piece not only returns the debate to its core principles, but also offers an important contribution that could move the debate ahead. Much of the turning away from concepts of IPR protection and social justice in the international arena stems from a sense of fatalism and stagnation. In short, there seems to be a belief that international IPR has failed to advance social justice, that efforts to recalibrate international IPR regulation to better serve development goals have stymied, and that not much can be done to change the current condition. With that, many scholars have simply left the current condition where it is and moved on to something that seems less intransigent.

Not so fast, says Halabi. There is movement here. Halabi encourages the international IPR community not to give up on the quest for social justice in the international IPR context. The

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23. Anti-Counterfeiting Trade Agreement, MINISTRY FOREIGN AFF. JAPAN, http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Feb. 21, 2017).

24. Trans-Pacific Strategic Economic Partnership Agreement, July 18, 2005, 2592 U.N.T.S. 225 [hereinafter TPP Agreement].

25. *See, e.g.*, Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447 (2011); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209 (2011).

26. Judd, *The TRIPS Balloon Effect*, *supra* note 22, at 534-35.

frequently bemoaned inability of developing countries to further their goals for supranational IPR regulation is overstated, he says. In fact, developing countries have done quite well in advancing their interests in a series of under the radar contexts, and the mainstream IPR commenting community would be well served to pay attention.

By identifying the tools of progress where progress is hard to find, Halabi does more than rehash an old debate. Indeed, he gives new hope that the global IPR community can yet address its unsolved problems, pointing out that the well-worn paths of trade and investment may not be the only paths to success. In short, Halabi opens a conversation about using a broader lens to view supranational regulation of IPR, in hopes that broadening the boundaries of the picture will lend more contour to the discussion. As one who has long urged the international IPR community not to give up on minimizing the development divide, I find Halabi's approach refreshing.

III. ANALYZING THE SHELTERS

This Part discusses discrete aspects of the instruments that Professor Halabi identifies as international intellectual property shelters and raises a few questions about his implication that the instruments can successfully advance the developing countries' cause. Any attempt to characterize the shelters as a cohesive and effective regime needs to include an assessment of the instruments' adherence, scope, and enforcement mechanisms. Such an attempt also needs to address a few political and structural questions that accompany any attempt to denote effective strides toward balance in international IPR regulation. Since it is clear that Professor Halabi intends this piece as the first of a series highlighting and expounding upon the shelter phenomenon, I raise a number of questions that I hope Professor Halabi will consider in his future works on this subject.

As a prelude, I question one of Professor Halabi's starting premises: that the tension between developed and developing countries regarding IPR protection is escalating.[27] The high water mark for development-related IPR tensions arguably came twenty years ago in the immediate aftermath of the TRIPS Agreement's negotiations.[28] After fighting over TRIPS for years, each side of the debate has now retreated to its own web of separate instruments—

27. Halabi, *supra* note 1, at 905 (calling the tensions a "geopolitical flashpoint").

28. Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165 (2000).

developed countries to the bilateral and plurilateral trade and investment realms, and developing countries to the instruments that Halabi identifies. This retreat may actually signify a decrease in direct conflict. It is as if both sides have given up on solving the IPR development divide in the multilateral realm and have decided to work around it.

The retreat to the corners is a most unfortunate phenomenon. The TRIPS Agreement—for all of its faults—at least brought intellectual property policymakers who disagree with one another to the same table for negotiations. Fighting about TRIPS meant that the two sides were talking to one another. I have argued elsewhere that TRIPS remains the best forum within which to negotiate the important balance that intellectual property regulation must produce.[29] However, the TRIPS waters are tepid, and policymakers' approaches to solving continued problems are characterized by some degree of resignation.

This resignation at the multilateral level is important to highlight because it reveals the international intellectual property shelters as a second-best solution to meaningful change in the multilateral realm. The opinion that the shelters are second best does not mean that they are unimportant, or that Halabi's identification of them is anything but innovative and helpful. Indeed, Halabi has noted some ways in which the shelters have already provoked conversations or encouraged voluntary compliance with amended norms or approaches, and indeed a fragmented regulatory approach can be helpful in this respect.[30] There is room for incredible innovation in the second-best realm when the preferred realm has broken down. However, Halabi and others lauding the developing countries' new approach to making inroads in the IPR regulatory agenda need to explore critically to what extent that approach is likely to be effective in begetting real change. The instruments that Halabi identifies suffer from significant shortcomings in the international IPR regulatory scheme, including adherence issues, enforcement issues, and political power issues that could hinder their quest to compete on the global IPR stage.

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29. *See generally* Judd, *Retooling TRIPS*, *supra* note 22; Patricia L. Judd, *Toward a TRIPS Truce*, 32 MICH. J. INT'L L. 613, 615 (2011) (arguing "that TRIPS is neither as one-sided nor as endangered as many assume it to be").

30. *See, e.g.*, Halabi, *supra* note 1, at 942 (noting the role of the Doha Declaration on the TRIPS Agreement and Public Health in spurring relationships between pharmaceutical companies and developing country ministries of health).

A. Can the Shelters Compete?

Professor Halabi uses this piece to argue for recognition of the international intellectual property shelters as a cohesive body of law. In future work on the subject, I encourage Professor Halabi to examine in greater depth what impact those shelters actually have in balancing the global IPR regulatory mechanism. In an incredibly comprehensive and broadly focused piece, Halabi only briefly addresses the tensions between the body of supranational regulation that he calls international intellectual property shelters and the reigning supranational regulatory web that the shelters are meant to counter. A critical examination of the shelters' placement in the global hierarchy of regulatory instruments is crucial to the determination of whether the shelters can effectively reconcile IPR protection with developing countries' public health concerns.

Halabi recognizes that the instruments that constitute the shelters have limitations.[31] First, many of the instruments that he identifies do not include key developed country signatories.[32] Lack of adherence to these instruments from a cross-section of global economies minimizes their importance when compared to large multilateral instruments like the TRIPS Agreement. Further, many of the instruments Halabi references are soft law without binding force, even as to those economies that are signatories.[33] Thus, while the instruments may have strategic or persuasive value, it is hard to argue that they can compete with the behemoths in the trade world when it comes to fire power.

Furthermore, the shelters that Halabi identifies are rife with indeterminate language.[34] Indeterminacy, of course, is a phenomenon that characterizes most international instruments, including the TRIPS Agreement and other mainstream IPR instruments.[35] While indeterminacy can be an advantage in certain ways, and is likely a necessity of international instrument negotiation, it leaves the resulting text open to a range of interpretations and implementation

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31. *See id.* at 946-48 (noting the impact of indeterminate language and undefined terms); *id.* at 953, 956 (noting adherence issues); *id.* at 957 (noting the nonbinding nature of one of the instruments).

32. *See id.* at 953, 956 (noting adherence issues).

33. *See id.* at 957 (noting the nonbinding nature of one of the instruments).

34. *See id.* at 946-48 (noting instances of indeterminate language and undefined terms).

35. *See generally*, Judd, *Toward a TRIPS Truce*, *supra* note 29.

techniques.[36] Such lack of definition in the text makes consistent implementation of the instruments' terms a challenging proposition.

Finally, even if the instruments are binding on the right parties and contain language that one can be determine and define, many of the shelters have no enforcement mechanisms. Without enforcement mechanisms, the binding or nonbinding nature of the instruments becomes largely a technicality. In practice, there are no consequences for violation of the instruments' terms. When compared with the robust enforcement mechanisms featured in the trade and investment arenas, one has to question the ability of unenforceable instruments to actively counter norms contained in the mainstream instruments. Thus, while Halabi rightly highlights the immense efforts by developing countries to negotiate norms that can help rebalance international IPR regulation, I question the ability of these norms to have a significant impact on the global IPR status quo.

In other words, I would like to see more from Professor Halabi on how the shelters compare with—and to what extent they have the ability to change—the current IPR regulatory structure that is already in place. In forthcoming work, I hope Halabi will tackle the billion dollar question: Can these international intellectual property shelters compete on the global stage?

B. Are the Shelters Necessary?

Implicit in Professor Halabi's analysis is an assumption that the trade and investment frameworks do not present a viable path to success for developing countries. Inherent in his exploration of the shelters is a conviction that the shelters are necessary. Halabi's defense of this conviction would benefit from a more robust explicit comparison between the shelters' offerings and the mechanisms for furthering development interests contained in the mainstream agreements, such as TRIPS. Halabi perfunctorily states that the latter are inadequate in addressing developing countries' concerns,[37] while I have argued elsewhere that the mainstream mechanisms simply are underutilized and undertested.[38] This divide in opinion is useful to explore, as it speaks to the optimal channeling of resources moving forward.

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36. Halabi, *supra* note 1, at 964.
37. Halabi, *supra* note 1, at 916-17.
38. Judd, *Retooling TRIPS*, *supra* note 22.

The TRIPS Agreement contains a number of provisions that ostensibly are designed to promote development interests. These provisions, traditionally termed "flexibilities," leave room for TRIPS parties to maneuver within the Agreement's terms in order to ensure the preservation of their economic, social, cultural, and individual goals.[39] These flexibilities include broadly worded language reserving some key substantive and procedural implementation decisions to sovereign nations,[40] specific provisions for limiting or overriding IPR protection to maintain public order and health priorities,[41] limitations on IPR that parties can assert under the Agreement,[42] and transition periods for implementation by developing countries.[43] Halabi briefly mentions a few of these flexibilities, dismissing them as weak—almost meaningless—attempts at balance.[44] However, these flexibilities arguably have the capacity to play a huge role in cabining the IPR maximalist tendencies of the TRIPS Agreement; indeed, some would argue that they undermine the Agreement's effectiveness in accomplishing the IPR maximalists' goals.[45] I have argued that these provisions, at a minimum, are underutilized and that they have yet-untapped potential to balance the supranational regulatory marketplace.[46]

Others—possibly including Professor Halabi—may disagree with me on the potential of TRIPS to balance itself. And certainly, TRIPS lacks some of the substantive provisions contained in the instruments Halabi discusses. However, TRIPS does have some distinct advantages, in adherence, scope, and enforceability, over the shelters that Halabi identifies. Given these advantages, Halabi's framework would benefit from earnest analysis as to how the shelters compare with TRIPS provisions that ostensibly could accomplish many of the same goals. Contextualizing the shelters through deliberate comparisons with the IPR regulatory framework currently recognized would strengthen the discussion that Halabi wishes to have.

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39. *See* Judd, *Retooling TRIPS*, *supra* note 22 (discussing the underexplored power of TRIPS flexibilities); Judd, *Toward a TRIPS Truce*, *supra* note 29.

40. TRIPS, *supra* note 21, arts. 1, 27, 41 ¶ 5.

41. *Id.* arts. 7-8.

42. *Id.* arts. 13, 17, 30.

43. *Id.* arts. 66-67.

44. Halabi, *supra* note 1, at 916-17.

45. *See* Sell, *supra* note 25 (noting dissatisfaction with TRIPS from both sides of the development divide).

46. *See* Judd, *Retooling TRIPS*, *supra* note 22 (discussing the underexplored power of TRIPS flexibilities); Judd, *Toward a TRIPS Truce*, *supra* note 29.

Inherent in any discussion of multiple regulatory mechanisms operating in the same sphere is an exploration of the role of fragmentation in international governance. Others have highlighted the increasing fragmentation evident in international IPR regulation.[47] Halabi's approach to the shelters is interesting in this respect. His article's core goal is to take seemingly fragmented approaches to regulation and tie them together into a cohesive, strategic whole. However, even in Halabi's presentation of seemingly disparate attempts at regulation as a cohesive body, it is evident that the instruments he highlights only further contribute to fragmentation in international IPR regulation.

Fragmentation may have its place, and Halabi's piece identifies ways in which a fragmented approach to regulation may benefit parties who would be politically outmatched in a single-avenue forum. However, political realities and power structures exist not only with respect to the negotiations within large fora, but also with respect to the hierarchy of instruments in a fragmented system. The reality remains that some international instruments are mightier than others, and reality works against the shelters in assessments of long-term effectiveness.

To summarize, recognizing the shelters, as Professor Halabi encourages scholars and policymakers to do, is only the beginning of the game. Significant unanswered questions remain as to the shelters' place in the regulatory structure and their ultimate contributions to that structure. It may be that encouraging cross-development collaboration within the existing power structure is the optimal solution to overcoming the development divide in IPR regulation. To the extent that the shelters can contribute to the mainstream arena debate, they are helpful. However, expecting them to bring about meaningful change in isolation from the trade and investment machine may be too much. To this end, I look forward to Halabi's further exploration of the shelters' place in international regime design.

C. Assessing Scope

Stepping away from the regime design arguments, this subpart comments on the substantive scope of the international intellectual

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47. GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 143-174 (2012).

property shelters. First, the subpart identifies the need for further elaboration as to the criteria employed in selecting shelters. Apart from Halabi's comment that shelters tend to arise in areas of significant market concentration, he does not clarify what attributes or qualities an instrument must possess to qualify as a shelter. Given the disparate nature of the instruments identified and Halabi's argument that the international IPR community should recognize these instruments as a cohesive whole, his analysis would benefit from an attempt to define with greater particularity the characteristics that bind the instruments together.

Second, the subpart asks whether shelters housed in one particular genre of intellectual property rights are more effective than those housed in other genres. Patent law is the natural category winner, with its obvious, well-documented link to health issues. Halabi's arguments that the trademark instruments are effective shelters seem more tenuous, and potential issues in copyright are omitted from his piece altogether. Halabi's construct would benefit from some attention to the questions of whether all intellectual property shelters are created equal, what the differentiations among them may be, and how those differentiations may work to the advantage or disadvantage of the parties employing them.

1. Eligibility as an International Intellectual Property Shelter

Fighting for recognition of a body of law as a cohesive whole necessitates identifying the defining characteristics of that cohesive body. In naming particular instruments as international intellectual property shelters, Halabi's work does not tease out the specific qualifications that instruments must have in order to qualify. The instruments that he has highlighted in this piece are widely disparate, in kind, origin, governance, and approach to tackling the issues of import to developing countries. The wide range of instruments opens questions about the criteria employed in characterizing an instrument as an international intellectual property shelter.

The only defining factor made explicit in Halabi's initial piece is focus on a market sector that is extremely concentrated. Halabi gives some reasons why developing countries have especially targeted markets dominated by a few global firms in their efforts to date, and he hints that the shelters may be most effective in such concentrated sectors.[48] More elaboration on this point would add value, along with

48. Halabi, *supra* note 1, at 966-68.

an assessment of whether market concentration is necessary to the formulation of an international intellectual property shelter.

Furthermore, Halabi would do well to set forth a framework for future characterization, especially given his belief that other potential shelters are in the pipeline.[49] Apart from targeting concentrated sectors, what kinds of qualities should an instrument have in order to be considered a shelter? Certainly, enforceability does not seem to be a criterion, nor does an instrument even necessarily have to be in effect.[50] An instrument's binding or nonbinding nature does not seem to matter, nor does its status as a regional or multilateral initiative.[51] If Halabi's primary assertion is that this body of law should be recognized as such, what are the characteristics of the body? Why should international IPR scholars and policymakers recognize such disparate instruments as a unified whole? Is there a downside to being too restrictive in interpretations of what constitutes a shelter? Is there a danger in being too liberal? All of these are questions that would benefit from further analysis.

2. Patent, Trademark, and Copyright—Equally Situated?

Naturally linked to the question of what should qualify as a shelter is the question of whether shelters should be more liberally used or accepted in one genre of intellectual property law than another. In other words, are shelters in one genre more likely to accomplish their goals than shelters in another genre? Halabi's piece does not include value judgments as to the effectiveness of the shelters he identifies. However, in defining the characteristics necessary for an instrument to qualify as a shelter, it may become necessary to engage in substantive critiques of contenders, and critical judgments of effectiveness in achieving development goals may be a beneficial tool in this analysis. From Halabi's initial assessment, I am not convinced that trademark tools are as effective in achieving public welfare goals as patent tools.

Given Professor Halabi's focus on public health, his arguments about inroads in patent-related sectors are his most persuasive. Halabi's patent analysis has the benefit of being grounded in decades

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49. *Id.* at 964-65.

50. *See id.* at 942-45 (discussing the proposed Medical Research and Innovation Treaty).

51. Indeed, many of the instruments that Halabi discusses are nonbinding declarations or similar, and few of them have attained any sort of signatory status that would deem them multilateral.

of debate over the effects of patent rights on pharmaceutical development and global access to medicines. The concerns on which Halabi bases his analysis are well-established in the literature.[52] Pharmaceutical patents play a direct role in access to medicines at the global level. Yet, even with the well-developed connection, controversies remain over whether tempering patent rights would really result in the public health benefits that developing countries seek. Critics of the focus on patents point out that issues of corruption, infrastructure, education and literacy, and sanitation may prevent adequate dissemination of crucial medications even if patent interests are tempered or removed.[53] Halabi should assess with more granularity the degree to which the shelters provide impetus for addressing these issues, thereby effectively addressing the public health problems about which he is concerned.

Likewise, Halabi mentions a possible augmented role for private funding of pharmaceutical development in lieu of strong patent protection.[54] However, it is unclear from his analysis whether such funding is available to an extent that would obviate the need for patents, and whether such funding would be adequate to provoke development of crucial medicines. Any exploration of severe limitations on patent rights needs to acknowledge that curtailing patent protection may also have a downside. I encourage Professor Halabi to elaborate as to how he would propose to minimize the potential downsides to substituting private funding for strong intellectual property rights.

In the agricultural discussion, Halabi devotes a great deal of attention to the conversations surrounding protection and exploitation of genetic resources.[55] Instruments devoted to treatment of genetic resources and related traditional knowledge attempt to walk a tightrope, balancing goals of environmental and cultural preservation with the economic interests of the sovereign state in exploitation of those resources and that knowledge.[56] Also inherent in those

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52. Cynthia M. Ho, *A New World Order for Addressing Patent Rights and Public Health*, 82 CHI.-KENT L. REV. 1469 (2007); Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way From Seattle to Doha*, 3 CHI. J. INT'L L. 27 (2002).

53. *See, e.g.*, Bryan Mercurio, *Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines*, 5 NW. J. INT'L HUM. RTS. 1 (2006).

54. Halabi, *supra* note 1, at 940-42.

55. *Id.* at 945-57.

56. *Id.* at 947-48.

discussions is an attempt to evaluate the degree to which states parties actually represent their constituents well, and indeed Halabi notes that direct treatment of farmers' rights is missing or minimized in many of the state-negotiated instruments he mentions.[57] The frequent tensions between national governments and minority groups—including indigenous peoples—exacerbate the already extant problems of representation. Ripe for further development in a conversation about Halabi's shelters is an assessment of their treatment of constituent groups that may not be well-represented by those at the negotiating table.

Halabi's identification of certain trademark instruments as shelters is less compelling than his patent discussion. Halabi asserts that the trademark shelters he identifies further the *IPR-related* goals of the countries negotiating them. In so doing, he does not cast judgment on whether those IPR-related goals actually further the *public welfare* goals to which they are tied. However, Halabi's analysis seems to be premised on a presumption that the pushing back against the IPR maximalist agenda is coextensive with the furtherance of the stated development goals. This connection is less persuasive with respect to the trademark instruments Halabi identifies than with respect to the patent instruments he discusses.

Halabi's discussion of developing countries' efforts in the trademark realm raises an important point: trademark holders may use their intellectual property rights to try to combat regulatory measures that they deem disadvantageous. Halabi's discussions about labeling and marketing controversies in the infant formula and tobacco sectors are profoundly moving, and they highlight the need for appropriate mechanisms to curb trademark holders' abuses. However, the discussion about the instruments that Halabi identifies as international intellectual property shelters would benefit from careful scrutiny as to how those instruments operate to accomplish their goals, and—perhaps more importantly—at what cost those instruments accomplish their goals.

Some of the trademark holders' arguments against the regulatory mechanisms that Halabi highlights may be compelling, namely, the concerns about the dangers of counterfeiting and the need for a strong market presence by the large international firms targeted by the measures. If the developing countries' goal in promulgating

57. *See id.* at 948 (discussing the omission of farmers' rights from the Convention on Biological Diversity).

restrictive labeling and marketing regulations is to increase public health, the very consolidated firms those countries are regulating, and perhaps alienating, may indeed be best-situated to guard that public health. A decision by the large, regulated firms to leave the market opens the door for unregulated counterfeiters who may do more harm. Imagine the dangers of counterfeit infant formula, and the possible contamination in an unregulated supply of cigarettes.

Likewise, the very multinational conglomerates targeted by the shelters may be best-situated to overcome societal obstacles to public health. Who has the resources to educate women about proper feeding of infants? Nestle does.[58] Likewise, assuming smokers continue to demand tobacco products, being able to obtain a product from a highly regulated company like Philip Morris may be safer for the population than the alternative. Discouraging those firms' investments in the market, and abrogating the strength of their trademarks, may not be the paths to public health that the developing countries hope to forge.

If Halabi's goal in identifying the shelters is simply that—*identification of instruments that the developing countries are using to push back against intellectual property protection*—then no substantive analysis of whether that push back is worthy need follow. However, if Halabi's claim is that the shelters are *effective instruments that accomplish public welfare-related goals*, an evaluation of that claim necessitates a hard look at whether the intellectual property right being fought is responsible for hindrance of the goal. That case is less convincing in the trademark examples that Halabi uses than it is in the patent examples.

Finally, I encourage Halabi to consider the extent to which his analysis is transferable to the copyright realm, and, in light of the criticisms above about the trademark instruments, how the shelters may operate differently in that realm. Halabi's initial piece focuses on health and food issues and thus justifiably involves primarily patent and trademark law. However, Halabi could easily build from his initial focus by addressing copyright debates. The controversies surrounding the availability of textbooks, contextualized in the access to knowledge debate, is one arena in which many of Halabi's

58. In the end, as Halabi recognizes to be the case in more developed economies, the goal should not be to promote breast feeding at all costs, but rather to feed babies well at all costs. And thus, these countries should want those best equipped to feed babies well to be maximally incentivized to be active in their markets. Without them, women who will not or cannot breastfeed have fewer and less attractive options.

observations may be helpful.[59] Halabi might also usefully explore the arguments surrounding the human right to Internet access,[60] as well as the economic and cultural impacts of local music, movie, and publishing industries.[61] One or more of these issues likely could benefit from the sort of attention that Halabi has given discrete public health sectors in this piece.

IV. CONCLUSION

One of the things that Professor Halabi's piece does wonderfully is turn the conversation in international intellectual property law back to its roots. In a time period in which earnest discussion of the core social and cultural development values of international IPR protection has stagnated, Halabi's piece refreshingly stirs the waters. The longstanding question of how to make the international IPR regulatory machine efficient, effective, and fair, remains an important one. If one objective of international IPR scholarship is to keep the discussions about international IPR regulation ethically sound, we cannot afford to lose focus on the service and disservice of intellectual property with regard to the most basic needs of the world. Halabi has returned international IPR discussion to the core of what it needs to be about, and to a problem that it needs to solve.

In *International Intellectual Property Shelters*, Halabi has highlighted the valiant efforts by developing countries to inject their objectives into the larger regulatory structure in ways that have the greatest impact on their health priorities. This is exactly the sort of insightful analysis that a noted health law scholar like Professor Halabi can bring to the intellectual property arena. In future work, I hope that Professor Halabi will continue to address the issues of regime design raised by his identification of this body of law. I also hope that he will take further steps to contextualize the international intellectual property shelters in the current international IPR regulatory structure by tackling head-on the comparisons between the instruments identified as shelters and the extant regulatory structure with which those instruments try to compete. Finally, I hope that he will define the contours of the category that he has created by exploring the ways that different intellectual property legal standards

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59. Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U. CAL. DAVIS L. REV. 803 (2007).

60. Molly Beutz Land, *Protecting Rights Online*, 34 YALE J. INT'L L. 1 (2009).

61. Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79 (2008-2009).

impact the operation of the shelters in each genre and analyzing with more particularity what criteria an instrument must meet in order to be brought into the fold. No doubt, Halabi has opened a fascinating and insightful dialogue about the ongoing quest for social justice in international IPR regulation, and I look forward to reading his future work on the subject.