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# I Wanna Design for Somebody (Who Needs Me): The Intersection of Humanitarian Engineering, Choice-of-Law, and Technology Transfer in Kenya

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# I WANNA DESIGN FOR SOMEBODY (WHO NEEDS ME): THE INTERSECTION OF HUMANITARIAN ENGINEERING, CHOICE-OF-LAW, AND TECHNOLOGY TRANSFER IN KENYA

**Abstract:** A significant technology gap exists between developed and developing countries. Though developing countries have started to self-innovate, they do not possess adequate means to fulfill their right to develop, which the UN recognizes as an essential human right. For developing countries to exercise this right, developed countries must transfer technology. Humanitarian engineers have confronted this challenge without any international guidance or regulation, as no uniform system for international technology transfer agreements exists. To remedy this inadequacy, scholars have proposed the characteristic approach, which suggests that the contents of the contract, rather than the parties' locations, should control the choice of law. This proposal, however, fails to consider unintended, harmful consequences on developing countries. This Note analyzes the characteristic approach through a case study of humanitarian engineers in Kenya, a country held back by a lack of infrastructure while standing on the cusp of innovation. The characteristic approach does not present a viable solution for Kenya because it favors the law of developed countries too often. Instead, technology transfer agreements should stipulate that the developing country's law should govern the agreement. Further, when this results in an insurmountable burden on the transferor, a developed country's law should only control if the contract adheres to the policies of Africa's regional economic communities. In the case of humanitarian engineers, academic institutions and international organizations focused on humanitarian engineering have an ethical burden to enforce this standard.

## INTRODUCTION

Kenya, like many developing countries, faces a technology gap.<sup>1</sup> For example, the United States granted 303,049 patents in 2016.<sup>2</sup> In the same

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<sup>1</sup> Kaitlyn Ellison, Note, *Rio+20: How the Tension Between Developing and Developed Countries Influenced Sustainable Development Efforts*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 107, 122–23 (2014) (acknowledging that many developing countries do not have the resources necessary for development, such as the capital needed to sustain infrastructure, while developed countries do); see, e.g., Abdikadir Ismail, *How Can Developing Countries Close the Digital Divide?*, BRIT. COUNCIL (Mar. 11, 2015), <https://www.britishcouncil.org/voices-magazine/how-can-developing-countries-close-digital-divide> [<https://perma.cc/T3TW-FVX4>] (explaining how one rural town in Kenya lacked teachers who knew how to operate a digital lockbox, whereas urban

year, Kenya approved twenty-six.<sup>3</sup> Furthermore, the United States has over 1,650,000 professional engineers, comprising around 0.5% of the U.S. population.<sup>4</sup> Kenya has approximately 10,300, comprising about 0.002% of its population.<sup>5</sup> The American engineers likely graduated from one of over 485 American universities with accredited engineering programs.<sup>6</sup> Kenya has only nine similar institutions.<sup>7</sup> Not only does a technology gap exist be-

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Kenyan schools complete almost all homework online). Significant controversy surrounds the definition of a “developing country.” See Tim Fernholz, *The World Bank Is Eliminating the Term “Developing Country” from Its Data Vocabulary*, QUARTZ (May 17, 2016), <https://qz.com/685626/the-world-bank-is-eliminating-the-term-developing-country-from-its-data-vocabulary> [<https://perma.cc/A6FZ-7F9Y>] (commenting that the lack of a definitive definition for “developing countries” has led the World Bank to stop using the term); Tariq Khokhar & Umar Serajuddin, *Should We Continue to Use the Term “Developing World”?*, THE WORLD BANK: DATA BLOG (Nov. 16, 2015), <http://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world> [<https://perma.cc/5PUH-C2BN>] (analyzing data presented by multiple international organization to recommend against using the term “developing countries”). This Note uses the definition set forth by the International Monetary Fund, as it includes the greatest number of economic factors without allowing countries to self-designate. See IMF, *Subdued Demand Symptoms and Remedies*, World Economic Outlook, 203–04 (Oct. 2016) (explaining the multitude of factors used when considering classifying a country as a developing nation).

<sup>2</sup> World Intellectual Prop. Org. (WIPO), *World Intellectual Property Indicators 2017*, at 27 (2017), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2017.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2017.pdf) [<https://perma.cc/96FB-C36E>] (summarizing the number of intellectual property filings in 2016 for each country). The United States Patent and Trademark Office also examined 932,786 patent applications in 2016, granting about fifty percent of patents to U.S. residents. *Id.* at 27, 94. Furthermore, half of all patent applications filed by non-residents in Australia, Canada, Mexico, Norway, and Turkey came from U.S. residents. *Id.* at 34.

<sup>3</sup> *Id.* at 27. Of the twenty-six patents, only five came from Kenyan residents. *Id.* at 92.

<sup>4</sup> See United Nations Dep’t of Econ. & Soc. Affairs, *World Population Prospects: The 2017 Revision*, U.N. Doc. POP/DB/WPP/Rev.2017/POP/F01-1 (2017) (providing an estimate of the 2015 United States population); Occupational Employment Statistics Query for Engineers in the United States, U.S. DEP’T LAB. BUREAU LAB. STAT., <https://data.bls.gov/oes/#/home> (select one occupation for multiple industries; narrow the industry sector to engineers; choose all sectors in this list; then select all industries in this list) (listing the number of U.S. engineers).

<sup>5</sup> See *World Population Prospects: The 2017 Revision*, *supra* note 4 (providing an estimate of the 2015 Kenyan population); *Challenges Facing Engineering in Kenya*, KENYA ENGINEER (Aug. 17, 2017), <https://www.kenyaengineer.co.ke/challenges-facing-engineering-in-kenya-2> [<https://perma.cc/WAJ4-JURW>] (stating the number of engineers registered with the Engineers Board of Kenya, a necessary membership to practice engineering in Kenya). Of the 10,300 engineers in Kenya, 2,000 practice as professional engineers and 8,300 have graduated with an engineering degree without receiving a professional certification. *Id.*

<sup>6</sup> ABET Accredited Engineering Programs, ACCREDITATION BOARD FOR ENG’G & TECH., <http://main.abet.org/aps/AccreditedProgramSearch.aspx> (search “Engineering” under Program Name; select “All programs containing the term(s): ‘Engineering’”; ensure search is for “bachelor (4-year)” degrees in the United States) (listing all accredited U.S. engineering programs).

<sup>7</sup> *Approved Engineering Programs*, ENGINEERS BOARD OF KENYA, <https://ebk.or.ke/accredited-engineering-programs> [<https://perma.cc/97XL-F44B>] (listing the universities with accredited engineering programs in Kenya).

tween developing and developed countries, but developing countries do not have the resources to start accessing or creating new advancements.<sup>8</sup>

Kenya, however, has started to innovate.<sup>9</sup> Nairobi hosts an array of companies focused on the country's modernization, dubbing the area as the "Silicon Savannah."<sup>10</sup> The technology center iHub, for example, has launched over 170 start-up companies since 2010.<sup>11</sup> This revolution in Kenya has brought new technology to the nation, but innovators still face strong, uncontrollable barriers.<sup>12</sup> Factors such as limited access to clean water, improper sanitation, and gender inequality limit the effectiveness of technology incubators.<sup>13</sup> As a result of the social inequities and infrastructure deficiencies that Kenyans experience, the country cannot achieve the social, political, and economic standards of living enjoyed by developed countries.<sup>14</sup>

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<sup>8</sup> Ellison, *supra* note 1, at 122–23; *see, e.g.*, Ismail, *supra* note 1 (detailing the difference in education between rural and urban Kenya); *see also* G.A. Res. 66/288, annex, The Future We Want, paras. 48, 58(i) (Sept. 11, 2012) (arguing for sustainable economic growth through bridging the gap between developed and developing countries).

<sup>9</sup> Jeremy de Beer et al., *A Framework for Assessing Technology Hubs in Africa*, 6 N.Y.U. J. INTEL. PROP. & ENT. L. 237, 239–40 (2017) (quoting Mark Zuckerberg's claim that "the future will be built in Africa" due to the rise in technology hubs); Bitange Ndemo, *How Kenya Became the Cradle of Africa's Technological Innovation*, NEWSWEEK (Dec. 27, 2016), <https://www.newsweek.com/how-kenya-became-cradle-africas-ict-innovation-534694> [<https://perma.cc/6J8U-Z8ZX>] (describing how Kenya's economy has seen a surge in technology incubators).

<sup>10</sup> Abdi Latif Dahir, *Kenya's Newest Tech Hubs Are Sprouting Outside Its "Silicon Savannah" in Nairobi*, QUARTZ AFR. (Aug. 23, 2017), <https://qz.com/1059305/kenyas-newest-tech-hubs-are-sprouting-outside-its-silicon-savannah-in-nairobi> [<https://perma.cc/V8EN-6M2W>] (explaining the innovation that has stemmed from work in Nairobi).

<sup>11</sup> *Id.* *See generally* iHUB, <https://ihub.co.ke> [<https://perma.cc/4Q65-K3RA>] (detailing the business and ideals of iHub).

<sup>12</sup> *See, e.g.*, *Homes for Africa's Tech Entrepreneurs*, THE ECONOMIST (Mar. 12, 2015), <https://www.economist.com/news/middle-east-and-africa/21646216-tech-hubs-are-expanding-fast-across-africa-homes-africas-tech-entrepreneurs> [<https://perma.cc/7LK6-W5KV>] (noting how African innovators still battle power outages, inconsistent internet, and expensive rent prices for office space).

<sup>13</sup> *See* Food & Agric. Org., *The Community Land Rights of Women and Youth in Tana River and Turkana Counties*, U.N. Doc. 17074EN/1/05.17 (noting that women only own 5% of land in rural Kenya); Elijah Bisung & Susan J. Elliott, *Improvement in Access to Safe Water, Household Water Insecurity, and Time Savings: A Cross-Sectional Retrospective Study in Kenya*, SOC. SCI. & MED., Mar. 2018, at 1, 6 (finding that only a quarter of individuals surveyed collected water from sanitary locations); Sheillah Simiyu et al., *Determinants of Quality of Shared Sanitation Facilities in Informal Settlements: Case Study of Kisumu, Kenya*, BMC PUB. HEALTH, Jan. 11 2017, at 2 (concluding that 65 percent of residents in Kisumu, Kenya do not have proper sanitation).

<sup>14</sup> *See, e.g.*, Susan Wyche & Charles Steinfield, *Why Don't Farmers Use Cell Phones to Access Market Prices? Technology Affordances and Barriers to Market Information Services Adoption in Rural Kenya*, 22 INFO. TECH. FOR DEV. 320, 327 (2016) (determining that factors such as the poor condition of phones, the risk of text messages not sending, and limitations on access to power decreased farmers' use of cell phones); *see also* G.A. Res. 217 (III) A, arts. 13, 17, 25, 28, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] (stating the fundamental rights guaranteed to each individual).

To curb the effects of the technology gap, humanitarian engineers have significantly increased their efforts in developed countries.<sup>15</sup> Humanitarian engineers focus on adapting typical design principles to assist the development of impoverished regions.<sup>16</sup> In academia, universities educate students on the impact of humanitarian engineering on social justice and development.<sup>17</sup> Additionally, investors now see the economic benefit of placing products into developing countries' markets.<sup>18</sup> Companies attempting to profit from developing nations do so by rethinking their design processes to create products that are sustainable in extremely impoverished communities.<sup>19</sup>

The companies, however, still need to transfer the physical technology, technical knowhow, and intellectual property rights to the developing nation.<sup>20</sup> A developed nation can transfer technology to a developing nation

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<sup>15</sup> Syed Imran Ali, *Engineering in Solidarity: Hybridizing Knowledge Systems in Humanitarian and International Development Work*, *PROCEDIA ENG'G*, Dec. 2015, at 11, 11 (explaining the recent growth in humanitarian engineering); see, e.g., *Mission & History*, *ENG'RS WITHOUT BORDERS USA*, <https://www.ewb-usa.org/about-us/mission-and-history> [<https://perma.cc/DYX4-HXMF>] (stating the mission of Engineers Without Borders); see also Christopher A. Mattson & Amy E. Wood, *Nine Principles for Design for the Developing World as Derived from the Engineering Literature*, *J. MECHANICAL DESIGN*, Dec. 2014, at 1, 1 (reporting that the membership of Engineers Without Border increased by 500% between 2005 and 2011).

<sup>16</sup> *Humanitarian Engineering*, *ENCYC. BRITANNICA* (May 29, 2016), <https://www.britannica.com/topic/humanitarian-engineering> [<https://perma.cc/5XR3-3PJM>].

<sup>17</sup> Ali, *supra* note 15, at 13; see, e.g., David LaPorte et al., *Engineering to Help Communities or Students' Development? An Ethnographic Case Study of an Engineering-to-Help Student Organization*, *INT'L J. FOR SERV. LEARNING IN ENGINEERING, HUMANITARIAN ENGINEERING & SOC. ENTREPRENEURSHIP*, Fall 2017, at 103, 105 (presenting a case study on a student organization focused on designing "sustainable engineering projects" in developing nations); *Engineering for Community Development Minor*, *COLO. SCH. MINES* (2018), <https://humanitarian.mines.edu/ecd-minor> [<https://perma.cc/RT5H-XW8G>] (offering the first humanitarian engineering minor). But see *Social, Behavioral, and Economic Science Research: Oversight of the Need for Federal Investments and Priorities for Funding: Hearing Before the Subcomm. on Research and Sci. Educ. of the H. Comm. on Sci., Space, and Tech.*, 112th Cong. 34 (2011) (statement of Dr. Peter W. Wood, President, National Association of Scholars) (advocating for the federal government to end federal funding of humanitarian engineering programs as these programs divert resources from scientific research).

<sup>18</sup> Mattson & Wood, *supra* note 15, at 1 (explaining that developing nations' markets represent a multi-trillion-dollar opportunity); see, e.g., Robin Podmore et al., *Fueling Sustainability: The Exponential Impact of Empowering Off-Grid Communities*, *IEEE ELECTRIFICATION MAG.*, Mar. 2016, at 11, 11–12 (detailing the IEEE Smart Village initiative that trains and organizes individuals in developing nations' rural areas on successful business techniques).

<sup>19</sup> See Amy E. Wood & Christopher A. Mattson, *Design for the Developing World: Common Pitfalls and How to Avoid Them*, *J. MECHANICAL DESIGN*, Mar. 2016, at 1, 2 (providing background on humanitarian engineers, their motives, and potential areas for reform by studying failed Engineers Without Borders projects and finding that common design pitfalls, include lacking cultural competence, focusing exclusively on short-term gains, and overestimating personal abilities, are responsible for the failure of many projects).

<sup>20</sup> See Hans Henrik Lidgard et al., *Framing the Issue*, in *SUSTAINABLE TECHNOLOGY TRANSFER* 1, 6–7 (Hans Henrik Lidgard et al. eds., 2012) (stating the humanitarian need to transfer tech-

through research collaborations, economic initiatives, licensing agreements, and collaborative production of goods.<sup>21</sup> In order for an engineer to profit from a transaction, the jurisdiction into which the engineer transfers the technology must recognize and protect the engineer's intellectual property rights.<sup>22</sup> The engineer's need for protection presents concerns for engineers in developed nations because innovators in developing countries could exploit the technology that the engineers designed.<sup>23</sup> Without the protection of intellectual property laws, engineers may be unable to profit from their concepts.<sup>24</sup> Currently, humanitarian engineers must decide if they are willing to enter a multi-trillion-dollar market unprotected.<sup>25</sup> If these engineers do try to protect their intellectual property rights, they must choose whether to avail themselves of their countries' laws or the local laws in developing countries like Kenya.<sup>26</sup> For instance, engineers who allow Kenyan law to control may face strong political corruption, inaccessible legal standards, and lackluster enforcement of their intellectual property rights.<sup>27</sup> If those

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nology); see also, Hannibal Travis, *WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians*, 16 VAND. J. ENT. & TECH. L. 45, 47 (2013) (showing how the World Intellectual Property Organization serves a dual role of transferring technology between developed and developing countries as well as increasing the enforcement of intellectual property rights). Technology transfer generally refers to the exchange of money, goods, or services or limited exchange of rights for the ability exploit intellectual property. *Technology Transfer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>21</sup> See Zhong Fa Ma, *The Effectiveness of Kyoto Protocol and the Legal Institution for International Technology Transfer*, 37 J. TECH. TRANSFER 75, 87 (2012) (listing potential forms of technology transfer).

<sup>22</sup> See TU THANH NGUYEN, *COMPETITION LAW, TECHNOLOGY TRANSFER AND THE TRIPS AGREEMENT* 25 (2010) (noting that technology transfer is only successful when both jurisdictions protect the intellectual property related to the transferred technology).

<sup>23</sup> See LTC HARMS, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A CASE-BOOK* 13 (3d ed. 2012) (explaining the relationship between domestic and foreign intellectual property protections); see, e.g., *Beechman Group PLC v. Triomed (PTY) Ltd.* 2002 (4) All SA 193 (SCA) at para. 7 (S. Afr.) (denying the extension of a United Kingdom patent into South Africa due to each country's differing intellectual property policies).

<sup>24</sup> See HARMS, *supra* note 23, at 13 (explaining how ownership of intellectual property rights can allow the holder to exploit the underlying property); NGUYEN, *supra* note 22, at 25 (arguing that both countries in an international technology transfer agreement must recognize the intellectual property rights to the technology for economically successful technology transfer to occur). This Note does not cover the non-economic topics of intellectual property, such as compulsory licensing. See *infra* notes 40–293 and accompanying text.

<sup>25</sup> See Mattson & Wood, *supra* note 15, at 1 (outlining considerations important to engineers when designing a product for the developing world).

<sup>26</sup> See Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality*, 51 WM. & MARY L. REV. 711, 718 (2009) (detailing ambiguous provisions in international treaties that allow for the right to choose a contract's governing law).

<sup>27</sup> See TRANSPARENCY INT'L, *TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 2016*, at 7 (2017) [https://webforms.ey.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2016/\\$FILE/EY-Transparency-International-Corruption-Perceptions-Index-2016.pdf](https://webforms.ey.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2016/$FILE/EY-Transparency-International-Corruption-Perceptions-Index-2016.pdf) [<https://perma.cc/UX85-C78U>] (ranking Kenya as 145 of 176 on the

engineers do not select Kenyan law as governing the interpretation of technology transfer agreements, they may prevent Kenyans from realizing their right to development.<sup>28</sup>

This Note analyzes how humanitarian engineers should choose the law that governs their technology transfer agreements.<sup>29</sup> Part I begins by describing the history of the right to development and the standards for international and Kenyan intellectual property rights, with Kenyan law serving as a case study representing the current state of law in developing countries.<sup>30</sup> Part I further describes an emerging trend in which contracting parties select a preferred jurisdiction based on the terms of a contract rather than the location of the signers.<sup>31</sup> Part II discusses the potential effects of choosing the law of a developed nation or the law of Kenya on Kenya's right to development.<sup>32</sup> Part II also considers the necessary influence of Africa's regional economic communities.<sup>33</sup> Part III proposes a solution for engineers grappling with a decision that balances a product's economic profits, a nation's right to develop, and the engineers' personal interests when choosing a governing jurisdiction.<sup>34</sup> Part III then proposes a means of implementing and enforcing this decision-making process on an international scale.<sup>35</sup>

This Note argues that an engineer transferring technology to Kenya must favor Kenyan law.<sup>36</sup> An engineer should only choose a developed country's laws when the transfer includes three or more countries.<sup>37</sup> In these situations, the terms of the contract should adhere to the policies of Africa's regional economic communities.<sup>38</sup> To implement this standard, international

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Corruption Perceptions Index); William Ouko et al., *Characteristics of Magistrates' Courts That Impede Access to Justice Within Nairobi County*, 5 PUB. POL'Y & ADMIN. RES. 153, 154, 156 (2015) (detailing how the Kenyan courts have not updated their technological system); *see also infra* notes 173–205 and accompanying text (detailing corruption in Kenya).

<sup>28</sup> *See* G.A. Res. 41/128, annex, Declaration on the Right to Development (Dec. 4, 1986) [hereinafter Declaration on the Right to Development] (stating that each nation has a right to scientific and social progress determined by the public policy of that country); *see also infra* notes 173–205 and accompanying text (explaining the benefits of selecting Kenyan law to control technology transfer agreements).

<sup>29</sup> *See infra* notes 40–293 and accompanying text.

<sup>30</sup> *See infra* notes 40–121 and accompanying text.

<sup>31</sup> *See infra* notes 122–164 and accompanying text.

<sup>32</sup> *See infra* notes 165–239 and accompanying text.

<sup>33</sup> *See infra* notes 232–239 and accompanying text.

<sup>34</sup> *See infra* notes 240–280 and accompanying text.

<sup>35</sup> *See infra* notes 281–293 and accompanying text.

<sup>36</sup> *See infra* notes 240–293 and accompanying text.

<sup>37</sup> *See infra* notes 268–280 and accompanying text.

<sup>38</sup> *See infra* notes 268–280 and accompanying text.

organizations and universities focused on humanitarian engineering should educate their members on and require compliance with this system.<sup>39</sup>

### I. HOW TECHNOLOGY TRANSFER STARTED WITH HUMAN RIGHTS, CREATED DISHARMONY ON AN INTERNATIONAL LEVEL, AND IMPACTED AN IDEAL CASE STUDY

International intellectual property standards have shifted significantly in recent decades.<sup>40</sup> The growth of international regulation and enforcement has directly influenced developing countries' ability to access technology.<sup>41</sup> Given that the changes often favor developed countries, developing countries may be forced to choose between development and maintaining their cultural heritage.<sup>42</sup> This Part explains why international bodies now consider the use of technology a human right and how that definition has led to modern standards for technology transfer between developed and developing countries.<sup>43</sup> Section A highlights how international bodies have facilitated an increased number of technology transfers by deeming the use of scientific improvements a fundamental right.<sup>44</sup> Section B explains recent developments in international intellectual property law since the enactment of the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS") and the current international standards governing those rights.<sup>45</sup> Section C discusses how Kenya, a developing nation, has adapted and created its technology transfer laws.<sup>46</sup> Section D describes the uncertainty surrounding choice-of-law provisions in international licensing agreements and de-

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<sup>39</sup> See *infra* notes 281–293 and accompanying text.

<sup>40</sup> Emir Aly Crowne, *Fishing TRIPS: A Look at the History of the Agreement on Trade-Related Aspects of Intellectual Property*, 2 CREIGHTON INT'L & COMP. L.J. 77, 92–93 (2011) (detailing the mandates and history of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")); see Agreement on Trade-Related Aspects of Intellectual Property Rights pmbl., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement] (updating international intellectual property laws to create minimum protection requirement for all signatory countries).

<sup>41</sup> Matthew Turk, Note, *Bargaining and Intellectual Property Treaties: The Case for a Pro-Development Interpretation of TRIPS but Not TRIPS Plus*, 42 N.Y.U. J. INT'L L. & POL. 981, 1004–05 (2010) (explaining that TRIPS Plus provisions are provisions through which developed countries use trade agreements as leverage to mandate changes to developing countries' national policy, typically requiring protection significantly stricter than the minimum mandate set in TRIPS).

<sup>42</sup> Lois Muraguri et al., *IPRs, Agriculture and Food Security*, in INTELLECTUAL PROPERTY RIGHTS IN KENYA 39, 45–46 (Moni Wekesa & Ben Sihanya eds., 2009) (explaining the importance of communal intellectual property rights in rural communities).

<sup>43</sup> See *infra* notes 48–164 and accompanying text.

<sup>44</sup> See *infra* notes 48–73 and accompanying text.

<sup>45</sup> See *infra* notes 74–107 and accompanying text.

<sup>46</sup> See *infra* notes 108–121 and accompanying text.

scribes a proposed reform for selecting the controlling jurisdiction when disputes arise.<sup>47</sup>

### *A. Declaring the Right to Development as a Human Right*

The international community recognizes that human beings have fundamental rights, such as the right to migrate freely, the right to retain property, and the right to social peace.<sup>48</sup> After the atrocities of the Second World War, the international community sought to create a standard to uphold these ideals.<sup>49</sup> By signing the Universal Declaration of Human Rights, the United Nations (U.N.) member states forged a multinational agreement to protect human rights in a unified effort for the first time in history.<sup>50</sup> The idea of human rights expanded in 1976 to include the right to use advanced discoveries and technologies.<sup>51</sup> In a final advancement, the U.N. added the right to development to the definition of human rights in 1986.<sup>52</sup> The U.N.

<sup>47</sup> See *infra* notes 122–164 and accompanying text.

<sup>48</sup> See Universal Declaration of Human Rights, *supra* note 14, arts. 13, 17, 25, 28 (stating that every individual has certain rights guaranteed at birth which no government or individual can abridge and which member states have an interest in protecting); see also *Human Rights*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining human rights as certain fundamental protections and privileges that every human obtains as a member of their society).

<sup>49</sup> Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 259 (2008) (explaining the influence of Hitler's Germany on the creation Universal Declaration of Human Rights). Many countries, however, had to carefully craft their arguments and demands when negotiating the Universal Declaration of Human Rights because of their overseas territories. *Id.* at 260.

<sup>50</sup> Universal Declaration of Human Rights, *supra* note 14, pmb1.; Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117, 117 (2004) (claiming that no multinational push for human rights existed prior to the 1940s). *Contra* Christopher N.J. Roberts, *Grasping at Origins: Shifting the Conversation in the Historical Study of Human Rights*, 17 CHI. J. INT'L L. 573, 574, 575 n.1 (2017) (explaining that scholars debate whether the origin of human rights starts with ancient texts, colonialism, or the Universal Declaration of Human Rights).

<sup>51</sup> See G.A. Res. 3384 (XXX), Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, paras. 1, 6 (Nov. 10, 1975) [hereinafter Declaration on the Use of Scientific and Technological Progress] (acknowledging access to technology as a human right); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15(1)(b) (Dec. 16, 1966) (entered into force Jan. 3, 1976) (acknowledging individuals' right to benefit from technological advancements); see also G.A. Res. 44/133, para. 1 (Dec. 15, 1989) (upholding the Declaration on the Use of Scientific and Technological Progress).

<sup>52</sup> Declaration on the Right to Development, *supra* note 28, art. 1(1); see World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para. 6, U.N. Doc. A/CONF.157/23 (June 25, 1993) (reaffirming the right to development); Organization of African Unity, *African (Banjul) Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3, arts. 20(1), 22 (June 27, 1981) (adopting a resolution that defined human rights to include the right to development for the first time in history). The Declaration on the Right to Development did not come without controversy, however, as many scholars claimed that the right to development is an economic right rather than a fundamental right. SIOBHÁN MCINERNEY-LANKFORD & HANS-OTTO SANO, *HUMAN RIGHTS INDICATORS IN DEVELOPMENT* 10 (2010) (summarizing critiques against

defined the right to development as a government's affirmative duty to ensure access to "basic resources, education, health services, food, housing, employment and the fair distribution of wealth" regardless of gender.<sup>53</sup>

The U.N., along with other international bodies, has included development as a human right for three primary reasons: prevention of abuse, opportunities for growth, and preservation of life.<sup>54</sup> The imbalance between socially and economically dominant and subordinate communities can lead to a controlling group overpowering subordinate individuals by utilizing technology only accessible to the ruling group.<sup>55</sup> If a minority community cannot access a technology, that community lacks the capacity to develop.<sup>56</sup> For example, in a recent landmark case by the African Commission on Human and People's Rights in 2010, the Commission ruled that the Kenyan government could not evict a local community of people to create a land reserve because doing so would violate the people's right to development by depriving them of property.<sup>57</sup> Though Kenya would greatly benefit from

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including the right to development within the definition of human rights); Arjun K. Sengupta, *Conceptualizing the Right to Development for the Twenty-First Century*, in REALIZING THE RIGHT TO DEVELOPMENT 67, 74 (2013) (explaining why human rights should not include economic rights, such as the collective right to development).

<sup>53</sup> Declaration on the Right to Development, *supra* note 28, art. 8(1).

<sup>54</sup> *Id.* pmbi.; see, e.g., WORLD BANK, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK 2–3 (1998) (stating the World Bank's understanding of its influence on the right to development within the meaning of human rights); Stephen Kim Park, *Talking the Talk and Walking the Walk: Reviving Global Trade and Development After Doha*, 53 VA. J. INT'L L. 365, 384–85 (2013) (showing how the high cost of antiretroviral medicine prolonged the effects of the AIDS epidemic in developing countries by making the drugs inaccessible).

<sup>55</sup> See, e.g., David Arnold, *Europe, Technology, and Colonialism in the 20th Century*, HIST. & TECH., Mar. 2005, at 85, 91–92 (noting how European countries used technologies such as mass transportation and medical advancements to control African and Asian nations by employing these technologies to heighten class divisions between those who could and could not access the advancements); see also Declaration on the Right to Development, *supra* note 28, pmbi. (expressing concerns about repeating previous abuses of human rights, such as apartheid and colonialism). Many colonizing powers implemented an education system that focused on reading and writing skills that emphasized typically Western professions, such as working as clerks and interpreters. See Stephen Ocheni & Basil C. Nwankwo, *Analysis of Colonialism and Its Impact in Africa*, CROSS-CULTURAL COMM., Aug. 2012, at 46, 47, 51 (highlighting the long-term impacts of British colonialism on Kenya). As a result, many African communities abandoned their education systems, lost traditional knowledge, and relied on colonial powers to employ individuals. *Id.*

<sup>56</sup> Declaration on the Use of Scientific and Technological Progress, *supra* note 51, pmbi.; see, e.g., Muhammed Miah & Adnan Omar, *Technology Advancement in Developing Countries During Digital Age*, INT'L J. SCI. & APPLIED INFO. TECH., Mar.–Apr. 2012, at 30, 32 (describing how digital technology can improve literacy in developing countries by diversifying educational resources); see also Amir Dossal, Exec. Dir., U.N. Fund for Int'l Partnerships, Secretary-General's Message to "The Net World Order: Bridging the Global Digital Divide" Conference Hosted by the Business Council for the United Nations (June 18, 2003) (urging high-technology companies in the United States to consider the impacts of communication technology on developing countries).

<sup>57</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/03, African Commission on

the increase in tourism associated with advertising a land reserve previously owned by the Endorois people, the Commission placed the rights of individuals ahead of the state's interest based on the belief that development is a human right that a government cannot infringe for the purposes of economic development.<sup>58</sup> In addition to the social and economic benefits, access to technology can help curb natural disasters by allowing countries to use advanced technology to battle emergencies such as wildfires and disease outbreaks.<sup>59</sup>

Intellectual property rights arguably fall under the right to development because having enforceable protections incentivizes the growth in and transfer of technology to developing countries.<sup>60</sup> Even with the potential for growth, intellectual property rights can reduce creativity and economic growth when the rights become too restrictive.<sup>61</sup> For example, when intellectual property standards protect a broader range of ideas and works, investors become less likely to supply resources to a country for fear of infringing on locally-owned intellectual property.<sup>62</sup> If, however, intellectual property laws do not provide enough protections, designers leave their products

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Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 17, recommendations para. 1 (Feb. 4, 2010), [http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf) [<https://perma.cc/2DRA-U58D>] (holding that the Kenyan government cannot seize land from the Endorois people around Lake Bogoria); see also *Kenya: Landmark Ruling on Indigenous Land Rights*, HUMAN RIGHTS WATCH (Feb. 4, 2010), <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> [<https://perma.cc/QYN6-BFLF>] (explaining how the Commission's ruling favored the indigenous people by upholding the community's property rights over Kenya's desire to convert a nature reserve to a tourist destination).

<sup>58</sup> *Kenya: Landmark Ruling on Indigenous Land Rights*, *supra* note 57; see *Centre for Minority Rights Development*, Afr. Comm'n H.P.R., para. 228 (sustaining the arguments brought by the claimant against the Kenyan government).

<sup>59</sup> See WORLD HEALTH ORG. ET AL., PROMOTING ACCESS TO MEDICAL TECHNOLOGIES AND INNOVATION: INTERSECTIONS BETWEEN PUBLIC HEALTH, INTELLECTUAL PROPERTY, AND TRADE 116 (2012) (noting how a lack of access to medical research permits treatable diseases to propagate in developing countries); Stephen Humphreys, *Perspective: Technology Transfer and Human Rights: Joining Up the Dots*, SUSTAINABLE DEV. L. & POL'Y, Spring 2009, at 2, 2 (arguing that developing countries can only mitigate the effects of climate change if they have access to advanced technologies).

<sup>60</sup> Compare IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 11 (2011) (stating that intellectual property rights can limit a region's creativity by establishing monopolies that limit designers' potential design techniques), with Tu Thanh Nguyen, *Technology Transfer and Competition Law: Options for Developing Countries*, in SUSTAINABLE TECHNOLOGY TRANSFER, *supra* note 20, at 65, 69 (claiming that once intellectual property rights become too monopolistic, anti-competition law will encourage growth).

<sup>61</sup> HARGREAVES, *supra* note 60, at 11; see Nguyen, *supra* note 60, at 68 (noting that the underlying purpose of intellectual property laws—to increase novel and inventive technologies—remains constrained by the effects of exclusive tendencies).

<sup>62</sup> Brett M. Neve, Note, *China, Google, and the Intersection of Competition and Intellectual Property*, 38 N.C. J. INT'L L. & COM. REG. 1091, 1107 (2013) (arguing that domestic law must balance becoming overly restrictive and preventing designers from realizing a return on investment with becoming overly broad and incentivizing forgery).

open to counterfeiting by operating in a jurisdiction.<sup>63</sup> The tension between overly restrictive and overly permissive intellectual property rights can cause disparities between how different nations consider and grant intellectual property rights.<sup>64</sup> Due to the potential for both growth and harm resulting from intellectual property regulation, countries must balance their internal policies so that they do not violate other nation's right to develop while still guaranteeing adequate legal protection to individuals.<sup>65</sup>

In an effort to help guide countries and further individual nations' right to develop, the U.N. passed the Millennium Development Goals in 2000.<sup>66</sup> The Goals aimed to eliminate underdevelopment, defend against curable illnesses, and prevent unhealthy living environments.<sup>67</sup> By the target date in 2015, however, the U.N. had not fulfilled all of its goals.<sup>68</sup> For example, during the fifteen years that the Goals remained in force, developing countries experienced increased access to information and communication technology, but this access often did not improve standards of living.<sup>69</sup> Access to this technology benefits a community by connecting people to greater amounts of information and limits the potential impact of natural disasters, such as widespread famine.<sup>70</sup> These benefits alone, however, did not result

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<sup>63</sup> NGUYEN, *supra* note 22, at 24; *see, e.g.*, John Mwazemba, *How Book Piracy Can Negatively Affect the Lives of Children in Kenya*, DAILY NATION (Apr. 14, 2017), <https://www.nation.co.ke/lifestyle/weekend/Book-piracy-negatively-affect-lives-of-children-in-Kenya/1220-3890196-cfdy82z/index.html> [<https://perma.cc/2EET-D2BL>] (detailing how counterfeit textbooks in Kenya have left schools without sustainable and complete educational resources because the under-market-price text books often lacked proper binding, failed to indicate which version the seller printed, or contained ink that quickly deteriorated).

<sup>64</sup> *See, e.g.*, Ryann Beck, *Farmers' Rights and Open Source Licensing*, 1 ARIZ. J. ENVTL. L. & POL'Y 168, 176 (2011) (illustrating how the divergence in plant patenting regulations in domestic intellectual property rights laws has established a system where developed countries tend to allow for extensive patent protection of plants, while developing countries typically have next-to-no patenting rights applicable to plants).

<sup>65</sup> *See* Neve, *supra* note 62, at 1107 (comparing the benefits and drawbacks of strict intellectual property laws).

<sup>66</sup> MILLENNIUM DEV. GOAL GAP TASK FORCE, TAKING STOCK OF THE GLOBAL PARTNERSHIP FOR DEVELOPMENT: MDG GAP TASK FORCE REPORT 2015, at 6 (2015) [hereinafter MDG GAP TASK FORCE REPORT 2015] (detailing the background and purpose of the Millennium Development Goals); *see also* Lidgard et al., *Framing the Issue*, *supra* note 20, at 5 (stating the Goals' purpose). *See generally* G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000) (reaffirming the U.N. commitment to support underdeveloped countries through a unified, international effort).

<sup>67</sup> MDG GAP TASK FORCE REPORT 2015, *supra* note 66, at xi.

<sup>68</sup> *Id.* at 1–2.

<sup>69</sup> THE MILLENNIUM DEVELOPMENT GOALS REPORT 2015, at 6 (Catharine Way ed., 2015) (noting the increased access to mobile phones and internet worldwide by over 900% and 700%, respectfully). In addition, the cost of internet access in developing countries decreased by almost 500% between 2008 and 2015. MDG GAP TASK FORCE REPORT 2015, *supra* note 66, at 70.

<sup>70</sup> MDG GAP TASK FORCE REPORT 2015, *supra* note 66, at 73; *see, e.g.*, Sendai Framework for Disaster and Risk Reduction 2015–2030, A/CONF.224/CRP.1, para. 17 (Mar. 18, 2015)

in complete success for the Goals because of access discrepancies in rural areas.<sup>71</sup> For example, during natural disasters, some emergency notification systems prioritize notifying individuals with a higher likelihood of survival first, leaving behind the communities facing the greatest danger.<sup>72</sup> Although the international community recognizes the right to development and has taken active steps to support it, many developing countries still do not have access to the technology necessary to fully realize this right.<sup>73</sup>

### *B. The Current Minimum Standard for Enforcing Intellectual Property Rights*

On January 1, 1995, the World Trade Organization (WTO) enacted the TRIPS agreement, which sought to establish a universal system for enforcing intellectual property rights.<sup>74</sup> Up until this point, developing and developed countries had not successfully negotiated a baseline requirement for these rights.<sup>75</sup> Previous international agreements had only considered the

(demonstrating the need to include advanced science to curb the effects felt by natural catastrophes).

<sup>71</sup> MDG GAP TASK FORCE REPORT 2015, *supra* note 66, at 68.

<sup>72</sup> *Id.* at 73.

<sup>73</sup> Declaration on the Right to Development, *supra* note 28, art. 1(1); *see, e.g.*, Jacob Poushter, *Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies*, PEW RESEARCH CTR. 3 (Feb. 22, 2016), [http://www.pewresearch.org/wp-content/uploads/sites/2/2016/02/pew\\_research\\_center\\_global\\_technology\\_report\\_final\\_february\\_22\\_2016.pdf](http://www.pewresearch.org/wp-content/uploads/sites/2/2016/02/pew_research_center_global_technology_report_final_february_22_2016.pdf) [<https://perma.cc/6645-VRU6>] (highlighting the discrepancy in access to the internet between developed and developing countries); *see also* Upendra D. Acharya, Symposium, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 54 B.C. L. REV. 937, 952 (2013) (arguing that countries now support the right to development primarily through the transfer of goods and monetary support).

<sup>74</sup> *See* TRIPS Agreement, *supra* note 40, pmbl. (mandating an international minimum standard for intellectual property rights); *see also* Susy Frankel, *WTO Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 379 (2006) (stating that the motivation behind TRIPS stemmed from inadequate administration of intellectual property rights outside of independent domestic spheres). TRIPS resulted from an international collaboration, the Uruguay Round negotiations, that sought to create a universal standard for all aspects of trade. Crowne, *supra* note 40, at 79; *see Understanding the WTO: The Uruguay Rounds*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) [<https://perma.cc/UAD6-LLA8>] (providing background on the Uruguay Rounds). The Rounds included discussions related to intellectual property after the United States encouraged developed countries to consider the impact of trade-related aspects of intellectual property. Crowne, *supra* note 40, at 80–81.

<sup>75</sup> Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 980 (2009) (stating that TRIPS created minimum requirements for domestic intellectual property laws). The Paris Convention for the Protection of Industrial Property, for example, set forth an international standard for registering trademarks. Paris Convention for the Protection of Industrial Property art. 1, Mar. 20, 1888, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 (detailing the required standard for trademark protection for signatory members). Unlike TRIPS, though, the Paris Convention did not mandate compliance through a judicial body. *See* Thu-Lang Tran-Wasescha & Xavier Groussot, *TRIPS Article 66.2: Between Hard Law and Soft Law?*, in SUSTAINABLE TECH-

needs of developed or developing countries but had never addressed both simultaneously.<sup>76</sup> This landmark agreement gave developing nations a say on what they wanted from the international community.<sup>77</sup> Thus, the push from developing nations to create a uniform system for intellectual property rights became a motivating factor to start the Uruguay Round negotiations.<sup>78</sup>

The developed and developing nations overcame opposing needs to harmonize international intellectual property laws during the Uruguay Round due to one main influence: trade.<sup>79</sup> The Uruguay Rounds presented a unique opportunity for negotiations, as the initiative resulted from individual countries' interests rather than an international organization's mandate.<sup>80</sup> The negotiations, however, pitted the developing countries against the developed countries.<sup>81</sup> The developed nations, led by the United States, expressed a growing concern for the ineffectiveness of the World Intellectual Property Organization (WIPO).<sup>82</sup> In addition, the United States feared an outcome that allowed developing nations to gain too much economic power.<sup>83</sup> On the other hand, developing nations wanted more negotiating power but still needed technology that the developed nations possessed.<sup>84</sup> Fueled by the strong need to resolve these tensions, the Uruguay Round established the WTO and enacted TRIPS by the Round's conclusion in 1995.<sup>85</sup>

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NOLOGY TRANSFER, *supra* note 20, at 13, 19 (showing how agreements prior to the establishment of the WTO lacked a legally enforceable mandate). A lack of international enforcement led to the failure of the Paris Agreement. *See id.* (explaining the importance of the WTO's adjudication system).

<sup>76</sup> Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829, 839 (2017) (detailing the history of attempts to reform international technology transfer agreement standards).

<sup>77</sup> Crowne, *supra* note 40, at 80; *see, e.g.*, TRIPS Agreement, *supra* note 40, art. 31 (allowing for compulsory licensing, a negotiated provisions that strongly benefits developing countries).

<sup>78</sup> Crowne, *supra* note 40, at 79.

<sup>79</sup> *Id.* (explaining how developed countries' fears about developing nations ignoring the developed countries' intellectual property rights motivated them to negotiate, and explaining that the developed countries used technology that developing nations needed as leverage against developing nations).

<sup>80</sup> *Id.* at 79–80.

<sup>81</sup> *Id.* at 79.

<sup>82</sup> *Id.* at 79–80.

<sup>83</sup> *See id.* (explaining that the United States did not want to lose its negotiating power in international bodies through non-participation in the Uruguay Rounds); *see also* Sam F. Halabi, *International Intellectual Property Shelters*, 90 TUL. L. REV. 903, 913–14 (2016) (noting how historical attempts by the United States to increase the protections under intellectual property laws often contradicted the views and practices of other international bodies).

<sup>84</sup> Crowne, *supra* note 40, at 79–80; Yu, *supra* note 76, at 840.

<sup>85</sup> Park, *supra* note 54, at 380; *see* Marrakesh Agreement Establishing the World Trade Organization art. IV(5), Apr. 15, 1994, 1867 U.N.T.S. 154 (creating the Council for TRIPS that oversees the enforcement of TRIPS).

Upon signing the agreement, all current and future members of the WTO became legally bound to its provisions.<sup>86</sup> TRIPS mandated minimum safeguards for intellectual property rights.<sup>87</sup> More specifically, TRIPS set forth compliance standards for copyrights, trademarks, geographic indicators, industrial designs, patents, integrated circuit designs, trade secrets, and monopolistic licensing attempts.<sup>88</sup> Through these provisions, the WTO established an international policy for protecting intellectual property rights.<sup>89</sup>

The enforcement of TRIPS and the required updates to signatories' national law resulted in a controversial outcome for developing countries.<sup>90</sup> For example, TRIPS's mandate to establish a baseline standard for intellectual property rights required developing nations to create domestic adjudicators focused on these protections.<sup>91</sup> This meant that developing nations had to formulate a set of laws and enforcement mechanisms that might contradict how their cultures viewed property.<sup>92</sup> Furthermore, though developing countries negotiated certain provisions that provided them with a greater sense of security from the dominance of developed nations, TRIPS still created barriers for developing countries seeking to utilize these clauses.<sup>93</sup> For example, Article 31 of TRIPS allows non-licensed individuals to use another's intellectual property rights without permission during times of emergency.<sup>94</sup> The individual, however, can only do so if he or she meets the twelve requirements necessary to obtain a compulsory license.<sup>95</sup> Provisions

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<sup>86</sup> Tran-Wasescha & Groussot, *supra* note 75, at 19; *see, e.g.*, Request for Consultations by Brazil, *United States—US Patents Code*, WTO Doc. WT/DS224/1 (Feb. 7, 2001) (requesting the WTO to determine if 35 U.S.C. § 18 complies with the TRIPS Agreement).

<sup>87</sup> TRIPS Agreement, *supra* note 40, art 7.

<sup>88</sup> *Id.* arts. 9–40 (outlining specific mandates for the enumerated categories); *see* Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 280 (1997) (analyzing how TRIPS set forth a protective policy for intellectual property rights as compared to previous agreements). *See generally* *Technology and Intellectual Property*, in DEVELOPMENT, TRADE, AND THE WTO 347, 349–50 (Bernard Hoekman et al. eds., 2002) (summarizing the main provisions of TRIPS).

<sup>89</sup> Kitsuron Sangsuvan, *Separation of Powers in Intellectual Property Rights: Balancing Global Intellectual Property Rights or Monopoly Power in the Twenty-First Century by Competition Law*, 26 N.Y. INT'L L. REV. 1, 4–5 (2013) (summarizing the international legal impact of TRIPS).

<sup>90</sup> Halabi, *supra* note 83, at 915.

<sup>91</sup> Patricia L. Judd, *Towards a TRIPS Truce*, 32 MICH. J. INT'L L. 613, 621–22 (2011) (explaining the influence of TRIPS on individual countries' intellectual property policies).

<sup>92</sup> *See* Muraguri et al., *supra* note 42, at 45–46 (contrasting how Western views of intellectual property rights allow individuals who hold property rights to economically exploit those rights, while developing countries typically disseminate technical know-how freely throughout a community).

<sup>93</sup> Halabi, *supra* note 83, at 917.

<sup>94</sup> TRIPS Agreement, *supra* note 40, art. 31.

<sup>95</sup> *Id.* art. 31(k). The requirements include oversight from a governmental body—the same bodies mandated by the developed countries—to ensure compliance with TRIPS's principles. *Id.*

such as Article 31 grant developing nations the ability to act in their best interest but still bind those nations to the property ideals and legal procedures promoted by developed countries.<sup>96</sup>

The international community has attempted to update TRIPS and mitigate the negative effects felt by developing nations.<sup>97</sup> For example, in its yearly meeting in 2001, the WTO adopted the Doha Declaration, and member states later enacted the Doha Declaration on the TRIPS Agreement and Public Health (“Declaration on the TRIPS Agreement”).<sup>98</sup> The Declaration on the TRIPS Agreement focuses on the relationship between TRIPS, public health, and compulsory licensing.<sup>99</sup> This declaration symbolized a meeting of the minds between developed and developing nations but did little with respect to changing or enforcing international agreements because many countries saw the agreement as non-binding.<sup>100</sup>

Even with the developed countries’ renewed commitment to public health, as shown by Article 7 of the Declaration on the TRIPS Agreement, many developed countries continue to restrict TRIPS provisions aimed at assisting developing countries.<sup>101</sup> Developed countries have created so-called “TRIPS Plus” agreements that require developing nations to enact a heightened level of intellectual property protections in exchange for favorable trade agreements between two countries.<sup>102</sup> These provisions typically

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<sup>96</sup> Halabi, *supra* note 83, at 917; *see* TRIPS Agreement, *supra* note 40, art. 31 (explaining the process for acquiring a compulsory license, which includes oversight by an approved adjudicator).

<sup>97</sup> J. Janewa OseiTutu, *Human Development as a Core Objective of Global Intellectual Property*, 105 KY. L.J. 1, 29–30 (2016) (explaining the meaning of the Doha Declaration); *see, e.g.*, Turk, *supra* note 41, at 1005 (commenting on how TRIPS Plus agreements eliminate the adaptable provisions built into TRIPS for developing countries).

<sup>98</sup> World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2 [hereinafter Declaration on the TRIPS Agreement] (presenting the WTO’s renewed commitment to promote international trade, as originally established in the Marrakesh Agreement that established the WTO); World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

<sup>99</sup> OseiTutu, *supra* note 97, at 29–30. *See generally* Declaration on the TRIPS Agreement, *supra* note 98, para. 5 (acknowledging the use and need for compulsory licenses); Doha Declaration, *supra* note 98, para. 19 (recognizing a need to reevaluate the scope of TRIPS with respect to public health).

<sup>100</sup> *See* Turk, *supra* note 41, at 987, 989 n.33 (noting that the failure of the Doha Declaration resulted from lacking legal mandates); *see also* Declaration on the TRIPS Agreement, *supra* note 98, para. 7 (reaffirming the developed countries’ commitment to assist with the developing nations’ progress).

<sup>101</sup> Turk, *supra* note 41, at 1004; *see, e.g.*, WORLD HEALTH ORG. ET AL., *supra* note 59, at 55 (outlining the process in which developed nations force higher standards on developing nations through mandatory provisions in trade agreements). *See generally* Declaration on the TRIPS Agreement, *supra* note 98 (upholding the developed nations’ dedication to increase access to technology for developing countries).

<sup>102</sup> Turk, *supra* note 41, at 1004; *see, e.g.*, Agreement on the Establishment of a Free Trade Area, para. 5, Jordan-U.S., Oct. 24, 2000, 41 I.L.M. 63 [hereinafter U.S.-Jordan Trade Agreement]

require developing countries to either form a more inclusive intellectual property rights standard or reinterpret the country's understanding of the TRIPS provisions.<sup>103</sup> For example, in a 2000 treaty between Jordan and the United States, the two countries established a free trade area on the condition that Jordan complied with the United States' mandatory intellectual property law updates.<sup>104</sup> Both TRIPS and the Declaration on the TRIPS Agreement allow for TRIPS Plus agreements by permitting member states to determine the best method for protecting intellectual property rights.<sup>105</sup> Developed countries interpret this flexibility to permit TRIPS Plus agreements.<sup>106</sup> These practices require developing countries to comply with developed countries' systems and minimize aspects of TRIPS that favor developing nations.<sup>107</sup>

### *C. Case Study: How Kenya Has Quickly Adapted to a Mandated International Minimum for Intellectual Property Rights*

TRIPS further complicated Kenya's longstanding tension with intellectual property rights.<sup>108</sup> Kenya's intellectual property laws trace their development to colonialism.<sup>109</sup> After the British Empire colonized Kenya in 1920, Kenya had to comply with the British legal system.<sup>110</sup> Even though Kenya gained its independence in 1963, Kenya remained completely dependent on the British intellectual property system until 1989.<sup>111</sup> In 1989, Kenya ratified the Industrial Property Act (1989) and formed the Kenya

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(requiring Jordan to eliminate the patentability of mathematical formulae to create a free-trade agreement between Jordan and the United States).

<sup>103</sup> Turk, *supra* note 41, at 1004–05.

<sup>104</sup> U.S.-Jordan Trade Agreement, *supra* note 102, para. 5.

<sup>105</sup> Declaration on the TRIPS Agreement, *supra* note 98, para. 4; TRIPS Agreement, *supra* note 40, art. 1(1); see WORLD HEALTH ORG. ET AL., *supra* note 59, at 55 (describing how TRIPS allows TRIPS Plus agreements because TRIPS only mandates a minimum standard).

<sup>106</sup> Turk, *supra* note 41, at 1004.

<sup>107</sup> Crowne, *supra* note 40, at 96; Turk, *supra* note 41, at 1005.

<sup>108</sup> Moni Wekesa, *An Overview of the Intellectual Property Rights (IPRs) Regime in Kenya*, in INTELLECTUAL PROPERTY RIGHTS IN KENYA, *supra* note 42, at 7.

<sup>109</sup> Crowne, *supra* note 40, at 77; see Eugene Cotran, *The Development and Reform of the Law in Kenya*, 27 J. AFR. L. 42, 42 (1983) (stating that British law controlled the Kenyan colony after the enactment of the East Africa Order in Council 1897).

<sup>110</sup> Cotran, *supra* note 109, at 42.

<sup>111</sup> Wekesa, *supra* note 108, at 7; see Maurice N. Amutabi, *Political Interference in the Running of Education in Post-Independence Kenya: A Critical Retrospection*, INT'L J. EDU. DEV., Mar. 2003, at 127, 128 (stating Kenya's independence year). See generally The Industrial Property Act (1989, repealed 2001) Cap. 509 § 3(1) (Kenya) (establishing an independent Kenyan law regulating intellectual property). Kenya granted its first patent in 1932 while under the British system. George M. Sikoyo et al., INTELLECTUAL PROPERTY PROTECTION IN AFRICA 1, 18 (Judy W. Wakhungu ed., 2006).

Industrial Property Office (“KIPO”), a body controlled solely by the Kenyan government.<sup>112</sup>

Later, as a WTO founding member state, Kenya again updated its laws to comply with the new TRIPS regulations.<sup>113</sup> Kenya accomplished this by ratifying the Industrial Property Act (2001).<sup>114</sup> The major revisions included removing seeds from patentability, implementing a patent system for industrial designs, and reforming KIPO to the Kenya Industrial Property Institute, among other standardizing practices.<sup>115</sup>

Another major development was Kenya’s adoption of a new constitution in 2010.<sup>116</sup> Kenya’s previous constitution did not mention intellectual property or the protection of intangible rights.<sup>117</sup> The new constitution, however, references intellectual property multiple times and includes intellectual property in the definition of property and as a means to protect culture.<sup>118</sup> Though the inclusion of intellectual property in the 2010 constitution caused some concern, the addition of these clauses represented a historic shift in Kenya’s view of intellectual property.<sup>119</sup> Kenya’s definition of intellectual property changed from a community-based necessity to a pri-

<sup>112</sup> The Industrial Property Act (1989, repealed 2001) Cap. 509 § 3 (Kenya) (creating the Kenya Industrial Property Office that served to establish intellectual property rights; validate technology transfer contracts; educate Kenyans on intellectual property rights; and advance research and scientific progress in Kenya).

<sup>113</sup> See TRIPS Agreement, *supra* note 40, art. 1(1) (requiring member states to reform national law to comply with TRIPS); *Kenya and the WTO*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/countries\\_e/kenya\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm) [<https://perma.cc/QXF9-3GU9>] (identifying Kenya as a member of the WTO since Jan. 1, 1995).

<sup>114</sup> The Industrial Property Act (2001) Cap. 510 § 121(1) (changing Kenya’s intellectual property laws to comply with the standards set forth in TRIPS).

<sup>115</sup> Sikoyo et al., *supra* note 111, at 42; Wekesa, *supra* note 108, at 7–9. See generally The Industrial Property Act (2001) Cap. 510 § 3 (establishing the Kenyan Industrial Property Institute). The Industrial Tribunal at Nairobi in *Pfizer Inc. v. Cosmos Ltd.* in 2006 ruled that patents granted with the African Regional Intellectual Property Organization must comply with Kenyan law, thus cementing the Industrial Property Act’s jurisdiction. Wekesa, *supra* note 108, at 7.

<sup>116</sup> CONSTITUTION arts. 263–264 (2010) (Kenya); see *Kenya President Ratifies New Constitution*, BBC (Aug. 27, 2010), <https://www.bbc.com/news/world-africa-11106558> [<https://perma.cc/6XCC-VYJP>] (commenting on how the new constitution resulted from twenty years of negotiations).

<sup>117</sup> See generally CONSTITUTION (1969, amend. 1997) (Kenya) (stating Kenya’s overall legal policies prior to 2010).

<sup>118</sup> CONSTITUTION arts. 11(1), 11(2)(e), 260 (2010) (Kenya).

<sup>119</sup> Victor Nzomo, *Constitutional Protection of Intellectual Property in Kenya*, IP KENYA (Jan. 9, 2011), <https://ipkenya.wordpress.com/2011/01/09/constitutional-protection-of-intellectual-property-in-kenya> [<https://perma.cc/272G-TBSZ>] (explaining the change in policy that occurred as a result of the inclusion of intellectual property rights in the new Kenyan constitution); Edwin Sudi, *New Dawn for Intellectual Property in Kenya*, STANDARD DIGITAL (Oct. 19, 2010), <https://www.standardmedia.co.ke/business/article/2000020629/new-dawn-for-intellectual-property-in-kenya> [<https://perma.cc/CB4A-TU8J>] (acknowledging the potential benefit of including intellectual property in the constitution and questioning if Kenya would benefit from the changes).

vately-held, exploitable idea.<sup>120</sup> By passing legislation like the Industrial Property Act 2001 and adopting its new constitution, Kenya has reformed its national law to fit the theory of property underlying Western intellectual property rights.<sup>121</sup>

*D. Removing the Uncertainty: A Proposal for a Uniform Choice-of-Law Standard Based on Contract Considerations*

The lack of a uniform technology transfer standard has caused international confusion.<sup>122</sup> Policy think tanks and academics, however, have started to propose solutions to this unpredictable system.<sup>123</sup> Subsection 1 explores how the complexity of intellectual property agreements cannot easily conform to typical choice-of-law analyses.<sup>124</sup> Subsection 2 discusses a proposed standardized, international system to determine governing law in technology transfer disputes.<sup>125</sup>

### 1. The Complexity of International Technology Transfer Agreements

Currently, no international standard for technology transfer contracts exists.<sup>126</sup> The U.N. previously attempted to mitigate differences in technol-

<sup>120</sup> Sudi, *supra* note 119; *see, e.g.*, Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 779 (1999) (discussing how Kenyans commonly rely on traditional knowledge, a type of intellectual property, to sustain knowledge necessary for survival through multiple generations).

<sup>121</sup> Wekesa, *supra* note 108, at 10; *see* Muraguri et al., *supra* note 42, at 44–45 (reasoning how intellectual property rights root in Western understandings of property law); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 365 (1988) (claiming that the origins of intellectual property originate with either Lockean or Hegelian philosophies).

<sup>122</sup> Paul Torremans, *Cross-Border Licensing in the Absence of a Choice of Law: Is There a Way Forward?*, in INTELLECTUAL PROPERTY AT THE CROSSROADS OF TRADE 25, 27 (Jan Rosén ed., 2012) (proposing a new system for determining a controlling jurisdiction in international technology transfer agreements); Jacques de Werra, *The Need to Harmonize Intellectual Property Licensing Law: A European Perspective*, in INTELLECTUAL PROPERTY AT THE CROSSROADS OF TRADE, *supra*, at 90, 91 (highlighting the lack of international law controlling cross-border intellectual property agreements).

<sup>123</sup> *E.g.*, EUROPEAN MAX PLANCK GRP. ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY pmbl. (2011) [hereinafter PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY] (proposing a new standard for determining governing law in international technology transfer agreements); de Werra, *supra* note 122, at 91 (suggesting a reform for the European Union's consideration of intellectual property contracts). *The Principles on Conflict of Laws in Intellectual Property* presents a uniform system for how to create and interpret choice-of-law clauses in intellectual property transactions. PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra*, pmbl.

<sup>124</sup> *See infra* notes 126–151 and accompanying text.

<sup>125</sup> *See infra* notes 152–164 and accompanying text.

<sup>126</sup> Torremans, *supra* note 122, at 27; *see* de Werra, *supra* note 122, at 91 (advocating for international reform based on the lack of universal processes for technology transfer agreements).

ogy access between developed and developing nations in the 1970s and 1980s during the United Nations Conference on Trade and Development.<sup>127</sup> The conference proposed the International Code of Conduct on the Transfer of Technology, which attempted to create a uniform standard for technology transfer.<sup>128</sup> If adopted, the Code of Conduct would have set forth a strong obligation for U.N. member states to comply with a universal technology transfer system.<sup>129</sup> The agreement failed, however, due to the tension between developed and developing nations.<sup>130</sup> During the negotiations, developing countries sought additional economic power, but the developed countries did not want to lose their international control.<sup>131</sup>

The lack of an international standard has forced parties to individually negotiate each technology transfer agreement.<sup>132</sup> These negotiations must balance the parties' interests in cost, access to the technology, and mutual economic benefits.<sup>133</sup> Statutes controlling contract law, however, may restrict these interests.<sup>134</sup> For example, international and domestic contract law have a well-established system for determining the law governing a contract: either the stipulated jurisdiction or, in the absence of a chosen jurisdiction, the court-chosen jurisdiction.<sup>135</sup> If the parties do not select a con-

<sup>127</sup> Nguyen, *supra* note 60, at 70.

<sup>128</sup> U.N. Conference on Trade and Development, Draft International Code of Conduct on the Transfer of Technology, Note by the UNCTAD Secretariat to the U.N. Conference on an International Code of Conduct on the Transfer of Technology, Ch. 2.1, U.N. Doc. TD/CODE TOT/47 (1985) (proposing an international standard for cross-border technology transfer agreements).

<sup>129</sup> *Id.* ch. 3.1; Nguyen, *supra* note 60, at 70 (explaining how the Code forbid signatory countries from implementing fourteen licensing techniques).

<sup>130</sup> Nguyen, *supra* note 60, at 70; *cf.* Yu, *supra* note 76, at 841–42 (noting the positions taken by the developed and developing countries during the TRIPS negotiations).

<sup>131</sup> Nguyen, *supra* note 60, at 70; Yu, *supra* note 76, at 841–42.

<sup>132</sup> See Torremans, *supra* note 122, at 27 (explaining the complexity of technology transfer agreements).

<sup>133</sup> See David M. Driesen, *Contract Law's Inefficiency*, 67 SYRACUSE U. COLLEGE L. FACULTY SCHOLARSHIP, Summer 2012, at 1, 1 (stating an overarching contract policy of minimizing transaction costs); Lars Meyer, *Soft Law for Solid Contracts? A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization*, 34 DENV. J. INT'L L. & POL'Y 119, 122–23 (2006) (advocating for uniform contract standards to decrease confusion between parties).

<sup>134</sup> Nguyen, *supra* note 60, at 66; see Emile Loza de Siles, *Intellectual Property Licensing: More Pervasive Than You Might Imagine*, THE ADVOCATE, June 2005, at 18, 18 (2005) (reasoning that questions arising from intellectual property rights must consider contract law).

<sup>135</sup> *E.g.*, Convention on the Law Applicable to Contractual Obligations arts. 3(1), 4(1), 1980 O.J. (L 266) [hereinafter Rome Convention] (allowing contracting parties to choose a controlling jurisdiction and stipulating a rule in the absence of the parties' choice); U.C.C. § 1-301(a)-(b) (AM. L. INST. & UNIF. L. COMM'N 2017) (permitting parties to designate and determine controlling law by showing that the chosen jurisdiction has a reasonable relationship to either party or to the jurisdiction where the transaction occurs).

trolling jurisdiction, litigation costs will increase and contract law precedent and policy will dictate which laws control.<sup>136</sup>

Intellectual property agreements add to the complexity of negotiations because intellectual property rights vary by jurisdiction.<sup>137</sup> Even when parties stipulate a jurisdiction, that jurisdiction may not have the ability to preside over a matter because the jurisdiction may not recognize the right.<sup>138</sup> In addition, intellectual property rights constantly change as national and international tribunals interpret intellectual property statutes.<sup>139</sup> This process increases in complexity with international contracts because of differing systems of law, such as Kenyan law, which derives from common, tribal, and Islamic law.<sup>140</sup>

As an example of how choice-of-law creates international uncertainty, in 2015 the Permanent Court of Arbitration (PCA)<sup>141</sup> in *Philip Morris Asia Ltd. v. Australia*, ruled that Australia, rather than the PCA, had jurisdiction over a matter concerning the potential violation of a treaty between Australia and Hong Kong.<sup>142</sup> In 2011, Australia passed the Tobacco Plain Packaging Act 2011, which required tobacco companies to package and sell products that comply with decorative restrictions, such as no artistic borders or colored adhesives.<sup>143</sup> The claimant then sued the Australian government in

<sup>136</sup> John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 632–33 (2017) (detailing the fundamental aspects of and policies for choice-of-law clauses); see, e.g., Rome Convention, *supra* note 135, arts. 3(1), 4(1) (setting forth a process to determine governing law based on party's intent); U.C.C. § 1-301(a)-(b) (applying a reasonable-relationship examination to determine the applicable law).

<sup>137</sup> See Peter Picht, *Collateralizing IP Licenses: Present Deficiencies and Proposals for Reform*, 41 AIPLA Q.J. 423, 460 (2013) (explaining the territorial variability of intellectual property protections).

<sup>138</sup> *Id.* (explaining that the nation that granted an intellectual property right maintains jurisdiction over matters concerning that right because only that tribunal has recognized the right).

<sup>139</sup> See, e.g., *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2360 (2014) (disallowing the patenting of claimant's invention and thus significantly heightening the standard for patenting computer software).

<sup>140</sup> See Tom Ojienda & Leonard Obura Aloo, *Researching Kenyan Law*, GLOBALEX, <http://www.nyulawglobal.org/globalex/Kenya.html> [<https://perma.cc/5L5M-SNTE>] (discussing the background of Kenya's legal system).

<sup>141</sup> See generally 1899 Convention for the Pacific Settlement of International Disputes (Hague I) arts. 20, 21, July 29, 1899, 32 Stat. 1779 (establishing the PCA). The PCA, founded in 1899 and resurrected in 1991, focuses on resolving international conflicts inappropriate for national tribunals. U.N. Conference on Trade and Development, *Dispute Settlement*, 5, 7, U.N. Doc. UNCTAD/EDM/Misc.232/Add.26 (2003) (detailing the purpose and goals of the PCA). The PCA resolves conflicts through arbitration rather than litigation. *Id.* at 7.

<sup>142</sup> See *Philip Morris Asia Ltd. v. Australia*, Award on Jurisdiction and Admissibility, PCA Case No. 2012-12, paras. 585, 588 (Perm. Ct. Arb. 2015) (dismissing a claim for arbitration due to a lack of jurisdiction and thus allowing litigation to presume in Australia).

<sup>143</sup> See *Tobacco Plain Packaging Act 2011* (Cth) s 3, 18 (Austl.) (establishing minimum requirements for packaging tobacco in Australia); see also Christopher Knaus, *Philip Morris Cigarettes Charged Millions After Losing Plain Packaging Case Against Australia*, THE GUARDIAN (July

the PCA for violating the claimant's intellectual property rights, which were protected and outlined by a 1993 treaty.<sup>144</sup> In order for the PCA to have jurisdiction over the matter, the tribunal recognized that a claimant must show both *ratione temporis* and no abuse of rights.<sup>145</sup> First, the PCA had *ratione temporis* jurisdiction because the claimant's investment occurred before Australia passed the Tobacco Packaging Act.<sup>146</sup> The PCA determined, however, that the claimant abused its rights under the treaty because the claimant knew Australia would pass the Plain Packaging Act 2011 before the claimant restructured their corporation.<sup>147</sup> As such, Australia retained proper jurisdiction.<sup>148</sup>

Although the *Philip Morris Asia* ruling shows an international tribunal's willingness to give jurisdiction to a sovereign state, tribunals have not been consistent in this regard.<sup>149</sup> For example, in *Philip Morris Brands SÀRL v. Oriental Republic of Uruguay*, the International Centre for Settlement of Investment Disputes (ICSID) held that it had jurisdiction over a lawsuit relating to a copyright issue in a treaty between Switzerland and

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9, 2017), <https://www.theguardian.com/business/2017/jul/10/philip-morris-cigarettes-charged-millions-after-losing-plain-packaging-case-against-australia> [<https://perma.cc/P7KR-V72J>] (explaining how the Plain Packaging Act 2011 applied stricter standards to cigarette packaging than the laws of many other nations).

<sup>144</sup> *Philip Morris Asia*, Award on Jurisdiction, PCA Case No. 2012-12 para. 183. See generally Agreement for the Promotion and Protection of Investments, Austl.-H.K., art. 1(e)(iv), Sept. 15, 1993, 1748 U.N.T.S. 385 (defining investment to include the rights guaranteed through intellectual property protections).

<sup>145</sup> *Philip Morris Asia*, Award on Jurisdiction, PCA Case No. 2012-12 para. 527; see Renée Rose Levy & Grencitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17, Award, para. 182 (Jan. 9, 2015) (explaining the difference between a *ratione temporis* and abuse of right assertion as requiring a *ratione temporis* claim to precede an abuse of right objection). *Ratione temporis* requires a court to have jurisdiction over a matter when the matter occurred. *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *jurisdiction ratione temporis* as a requirement for a court to have jurisdiction over a claim when the events occurred for the court to hear the matter).

<sup>146</sup> *Philip Morris Asia*, Award on Jurisdiction, PCA Case No. 2012-12 para. 533.

<sup>147</sup> *Id.* para. 569.

<sup>148</sup> *Id.* para. 588. The PCA later required the claimant to pay respondent's legal fees, showing how uncertainty can increase the cost of enforcing an agreement. See *Philip Morris Asia Ltd. v. Australia*, Final Award Regarding Costs, PCA Case No. 2012-12, para. 105 (Mar. 8, 2017) (requiring the claimant to pay a specified, redacted percentage of the respondent's legal fees); see also Knaus, *supra* note 143 (claiming that the respondent's legal expenses to be paid by Philip Morris could be around \$50 million AUD).

<sup>149</sup> Compare *Philip Morris Asia*, Award on Jurisdiction, PCA Case No. 2012-12 para. 588 (finding that the PCA lacked jurisdiction over a matter stemming from a treaty between Australia and Hong Kong), with *Philip Morris Brands SÀRL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, para. 236 (July 2, 2013) (finding jurisdiction over a matter regarding a treaty dispute between Switzerland and Uruguay).

Uruguay.<sup>150</sup> Though both cases resulted from a similar claim, fact pattern, and alleged violation, an international tribunal only found jurisdiction in one case, demonstrating the unpredictability in this area.<sup>151</sup>

## 2. A Proposed Reform: The Characteristic Test

As a result of outcomes like *Philip Morris Asia* and an overall lack of uniformity, scholars have called for reform in international technology transfer agreements to increase certainty when contracting.<sup>152</sup> An emerging trend calls for an analysis of the terms of the contract, referred to as the characteristic test.<sup>153</sup> First, under the characteristic test, the parties may stipulate a controlling jurisdiction.<sup>154</sup> A court can, however, disregard such stipulations if they are not explicit.<sup>155</sup> If a contract does not stipulate a jurisdiction, the court must determine which set of laws applies based on the agreement's characteristics.<sup>156</sup>

In the absence of a choice-of-law stipulation, a court utilizing the characteristic test must start by considering both parties' intents and then determine the jurisdiction with the closest relationship to the contract.<sup>157</sup> This results in an analysis based on the terms binding the licensee and licensor individually.<sup>158</sup> The location of the party with the higher burden imposed by

<sup>150</sup> *Philip Morris Brands SÀRL*, ICSID Case No. ARB/10/7 paras. 235, 236 (permitting jurisdiction over a matter brought by the claimant because hearing the matter in a national tribunal would lead to useless litigation).

<sup>151</sup> Compare *Philip Morris Asia*, Award on Jurisdiction, PCA Case No. 2012-12 para. 588 (declining to find jurisdiction based on a foreseeability issue under an abuse of rights doctrine), with *Philip Morris Brands SÀRL*, ICSID Case No. ARB/10/7 para. 236 (finding jurisdiction in a matter because of the potential for unnecessary litigation in Uruguayan courts).

<sup>152</sup> E.g., PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, pmbl. (calling for international reform with regards to the standards for cross-border technology transfer agreements); de Werra, *supra* note 122, at 91 (suggesting that the European Union reform the standard for intellectual property contracts).

<sup>153</sup> PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, arts. 3:501–502; see Torremans, *supra* note 122, at 36–37 (expressing support for the principles proposed by the European Max Planck Group in PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY); cf. Picht, *supra* note 137, at 426 (arguing that licensing agreements should mirror secured transactions regulations to decrease inefficiencies).

<sup>154</sup> PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:501(1).

<sup>155</sup> See *id.* (mandating that parties explicitly state the chosen jurisdiction).

<sup>156</sup> Torremans, *supra* note 122, at 35.

<sup>157</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(1)-(2) (presenting the analysis to determine what governing law should control the contract). Through this type of analysis, the established jurisdiction choice is based on a consideration of the protected subject matter's role rather than purely on the parties' location. See *id.* art. 3:502(2) (detailing the process for determining the governing law in the absence of an explicit clause).

<sup>158</sup> *Id.* art. 3:502(2).

the contract will determine the governing law.<sup>159</sup> If a court cannot easily determine a jurisdiction through these considerations and the license concerns use in a single state, then the state where the licensed product goes into use will control the dispute.<sup>160</sup> If the license permits use in multiple states, the court will apply the law of the place where the transferor resides at the signing of the agreement.<sup>161</sup>

This test breaks from the standard practice of focusing solely on the parties' locations.<sup>162</sup> The characteristic test offers a uniform standard under which parties will know which authority will control a contract dispute, with the potential exception of multi-state licensing agreements.<sup>163</sup> Even with these benefits, the test does not directly consider how choice of jurisdiction negatively affects developing nations, even though use of the test may increase technology transfer.<sup>164</sup>

## II. HOW CHOICE-OF-LAW IN TECHNOLOGY TRANSFER CONTRACTS IMPACTS KENYA

Jurisdictions have consistently recognized the right of parties to stipulate a controlling jurisdiction in contracts.<sup>165</sup> In order to choose the appropriate law, however, the contracting parties must understand the potential

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* art. 3:501(3).

<sup>161</sup> *Id.* art. 3:501(2). *The Principles on the Conflict of Laws in Intellectual Property* does not clarify the means to establish the location of the licensor. *See id.* *But cf.* U.C.C. § 9-307 (AM. L. INST. & UNIF. L. COMM'N 2017) (providing a method for determining the legal location of a debtor in a secured transaction).

<sup>162</sup> Compare Rome Convention, *supra* note 135, art. 4(2) (stipulating that for contracts without a choice-of-law clause, the location of the signer who obtains an obligation to act will dictate the controlling law unless the contract considers immovable property), and *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610 (1990) (upholding the U.S. standard of granting jurisdiction based on a party's physical existence in a jurisdiction), with PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(1)-(2) (focusing on the terms presented in the contract rather than the residence of either party).

<sup>163</sup> Torremans, *supra* note 122, at 35 (explaining how the enactment of the European Max Planck Group's principles will increase efficiency and confidence in licensing transactions).

<sup>164</sup> *See* PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, pmb1. (omitting a reference to the impact on developing countries); *see also* Torremans, *supra* note 122, at 35 (explaining how the enactment of the European Max Planck Group's principles will increase efficiency and confidence in licensing, but not discussing the impacts on developing nations).

<sup>165</sup> *E.g.*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS art. 2(1) (2015) (detailing how a court should interpret a choice-of-law provision or lack thereof); U.C.C. § 1-301(a)-(b) (AM. L. INST. & UNIF. L. COMM'N 2017) (stating the process for determining the controlling legal authority); *see also* Coyle, *supra* note 136, at 632-33 (illustrating how the use of choice-of-law agreements resulted from unnecessary and costly litigation determining which set of laws should apply).

impact of precedent and regulations in that jurisdiction.<sup>166</sup> If an engineer wants to transfer technology to Kenya, for example, the contract must choose a jurisdiction or leave a costly dispute over governance to the courts, which will only focus on the parties' location.<sup>167</sup> As a result of the agreements, Kenya may either benefit from the internal development of its intellectual property law or face undue influence from developed countries' legal systems and philosophies.<sup>168</sup> This Part addresses this concern.<sup>169</sup> Section A discusses the benefits of hosting disputes in Kenya.<sup>170</sup> Section B analyzes the impacts of foreign countries overseeing controversies regarding technology transfer agreements.<sup>171</sup> Section C seeks to resolve potential conflicts that engineers will face by proposing a solution focused on Africa's regional economic communities.<sup>172</sup>

### A. The Case for Kenya Hosting Technology Transfer Disputes

The characteristic-based approach favors the transferee's jurisdiction as a result of two main factors: profit and burden.<sup>173</sup> When considering profit, the test assumes that only one country will economically benefit from the technology as a result of the transferee's executing the rights granted under the agreement.<sup>174</sup> The test recognizes that a transferor, as a removed party, should not control disputes arising from the contract because the controversies would stem from actions in only the transferee's jurisdiction.<sup>175</sup> This analysis, however, does not consider whether the affected location would

<sup>166</sup> Coyle, *supra* note 136, at 633. In many cases, however, parties do not conduct proper due diligence in researching the chosen jurisdiction's laws. *Id.* at 633–34.

<sup>167</sup> *Id.* at 632–33.

<sup>168</sup> See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495–96 (2011) (outlining how the liberal admission of lawsuits in American courts has led to an increase in international dispute settlements in U.S. jurisdictions); see also *infra* notes 173–239 and accompanying text (discussing the benefits of engineers selecting Kenyan law to govern technology transfer agreements).

<sup>169</sup> See *infra* notes 173–239 and accompanying text.

<sup>170</sup> See *infra* notes 173–205 and accompanying text.

<sup>171</sup> See *infra* notes 206–231 and accompanying text.

<sup>172</sup> See *infra* notes 232–239 and accompanying text.

<sup>173</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(2)(a) (detailing the factors required to determine the controlling authority by examining the agreement's characteristics).

<sup>174</sup> See *id.* (favoring the transferee's country because the profit results from the work of the transferee rather than a less-involved transferor).

<sup>175</sup> See *id.* (listing factors favoring the transferee); see, e.g., Kristen Elisabeth Bollinger, Note, *A New Hope for Copyright: The U.K. Supreme Court Ruling in Lucasfilm Ltd. v. Ainsworth and Why Congress Should Follow Suit*, 20 J. INTELL. PROP. L. 87, 102–03 (2012) (analyzing the 2012 U.K. Supreme Court's ruling in *Lucasfilm Ltd. v. Ainsworth* to show the court's acceptance of the idea that a domestic court should not preside over a claim originating from actions in a foreign country).

benefit from governing the contract—a question of particular importance with respect to developing countries like Kenya.<sup>176</sup>

As an example of how Kenya could benefit from hosting disputes, Kenya has existing laws that recognize intellectual property rights and adhere to the mandatory TRIPS provisions.<sup>177</sup> Kenya, however, still struggles with political corruption in enforcing these laws.<sup>178</sup> The court system is not immune from the widespread bribery and exploitation the country struggles to control.<sup>179</sup> Corruption and knock-off goods will force engineers to consider the long-term economic viability of their product because these factors are economic barriers that are not as prevalent in developed nations.<sup>180</sup> Moreover, if their product suffers from counterfeiting or illegal reproduction, a widespread practice in Kenya, choosing to resolve the dispute through the Kenyan courts will likely lead to few positive outcomes.<sup>181</sup> Kenya's economy will feel the positive impact of regulated goods entering

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<sup>176</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(2)(a) (presenting an ideal standard for applying a choice-of-law provision without referencing developing nations in need of technology necessary to develop).

<sup>177</sup> *E.g.*, Official Secrets Act (2016) Cap. 187 (Kenya) (detailing trade secret standards in Kenya); Copyright Act, 2001 (2014) Cap. 130 §§ 22–34 (Kenya) (setting the standard for copyright protection in Kenya); Trade Marks Act (2012) Cap. 506 §§ 4–19 (Kenya) (outlining requirements for trademark infringement in Kenya); *see also* TRIPS Agreement, *supra* note 40 (binding all member states of the WTO to comply with TRIPS).

<sup>178</sup> *See, e.g.*, Maya Gainer, *How Kenya Cleaned Up Its Courts*, FOREIGN POL'Y (July 9, 2016), <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts> [<https://perma.cc/3WW5-WB63>] (noting that corruption exists in forty-three percent of Kenyan cases).

<sup>179</sup> Nancy Agutu, *Policy, Lands Ministry, and Judiciary Most Corrupt in Kenya—Bribery Index*, THE STAR, KENYA (Aug. 31, 2017), [https://www.the-star.co.ke/news/2017/08/31/police-lands-ministry-and-judiciary-most-corrupt-in-kenya-bribery\\_c1627065](https://www.the-star.co.ke/news/2017/08/31/police-lands-ministry-and-judiciary-most-corrupt-in-kenya-bribery_c1627065) [<https://perma.cc/WD7J-2L2R>] (reporting that almost fifty percent of all judicial proceedings have some sort of judicial extortion). A common maxim in Kenya asks, “Why hire a lawyer when you can buy a judge?” Gainer, *supra* note 178. This Note assumes that engineers will act ethically and not engage in bribery or pay-off schemes. *See Humanitarian Engineering, supra* note 16 (defining humanitarian engineering to include individuals who want to positively develop an impoverished community).

<sup>180</sup> Conceição Castro & Pedro Nunes, *Does Corruption Inhibit Foreign Direct Investment?*, 51 POLÍTICA REVISTA DE CIENCIA POLÍTICA, Jan.–July 2013, at 61, 76 (Chile) (demonstrating a negative correlation between corruption and foreign direct investment); Carsten Fink et al., *The Economic Effects of Counterfeiting and Piracy: A Review and Implications for Developing Countries*, 31 WORLD BANK RES. OBSERVER, Feb. 2016, at 1, 2 (finding that increases in violations of intellectual property rights hinders economic growth).

<sup>181</sup> *See* Fredrick Oduol Oduor, *The Internet and Copyright Protection: Are We Producing a Global Generation of Copyright Criminals?*, 18 VILL. SPORTS & ENT. L.J. 501, 513–14 (2011) (commenting on the rampant software copyright infringement in Kenya). For example, fraudulent software costs companies operating in Kenya a cumulative loss of about 12.8 billion Kenyan Shillings, approximately \$125 million USD, due to a lack of enforcement against piracy in the country as of 2016. Brian Ngugi, *Software Piracy in Kenya Costs Firms Sh12.8bn*, BUS. DAILY (Apr. 6, 2016), <https://www.businessdailyafrica.com/corporate/Software-piracy-in-Kenya-costs-firms-Sh12-8bn/539550-3149112-9jxk3az/index.html> [<https://perma.cc/5WR8-MTSF>] (analyzing the economic effect of software piracy in Kenya). Approximately seventy-eight percent of all software in Kenya originates from illegal operations. *Id.*

the market, but requiring engineers to choose Kenyan law based on the characteristic test will jeopardize the engineers' chance of profiting from their design.<sup>182</sup> If international law adopts the characteristic test for venue selection, the problems with the Kenyan legal system will deter investment, hinder technology trade, and ultimately diminish Kenya's capacity to develop because fewer engineers will invest in the country.<sup>183</sup>

Even if governmental reform can create more predictable results in the Kenyan judiciary, a lack of resources within the legal system will hinder access to the courts.<sup>184</sup> Within the courts, the dramatic backlog of active cases and a lack of current technology delays the settlement of cases.<sup>185</sup> As a result, a lawsuit filed in Kenya takes a significant amount of time to resolve.<sup>186</sup> Additionally, because of the slower court process, the opposing party may continue to disregard their contractual obligations.<sup>187</sup> This timeframe increases given the physical inaccessibility of Kenyan courts.<sup>188</sup> The distant courts with outdated technology provide few incentives for Kenyans to travel to court-houses and lose precious work time.<sup>189</sup> The difficult legal process may decrease an engineer's desire to transfer technology to Kenya, as the engineer

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<sup>182</sup> See Lidgard et al., *supra* note 20, at 6–7 (suggesting that developed and developing countries have a mutual, symbiotic role in international development and technology transfer); Chris Rojek, *Counterfeit Commerce: Relations of Production, Distribution and Exchange*, CULTURAL SOC., June 2016, at 28, 29, 33 (commenting that illegal goods constitute five to seven percent of international trade with developing countries feeling the largest negative impact from these goods).

<sup>183</sup> See Lidgard et al., *supra* note 20, at 6–7 (stating that technology transfer must occur to relieve poverty in developing countries); Fink et al., *supra* note 180, at 2 (noting that significant occurrences of intellectual property rights violations result in poor economic conditions because high counterfeiting rates lead to decreases in innovation and corporate investment).

<sup>184</sup> See Ouko et al., *supra* note 27, at 153–54 (explaining how Kenya, unlike some other developing countries, has not updated its case management system and the lack of a small claims system unnecessarily clumps all proceedings together to create a significant buildup of active disputes).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 153.

<sup>187</sup> See *In re Estate of M'Rutere M'Munyange* (2011) eKLR (HC) 3 (Kenya) (upholding the standard for a preliminary injunction and further noting that the court only sparingly grants preliminary injunction motions). If the plaintiff in a suit cannot receive a preliminary injunction, or even a hearing for a preliminary injunction, then the defendant can continue the offending activity, regardless of the impact on the plaintiff. *Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining injunction); see, e.g., *In re Estate of M'Rutere M'Munyange* (2011) eKLR (HC) 3 (Kenya) (granting a motion for preliminary injunction because the plaintiff successfully showed that the potential harm exceeds monetary damages).

<sup>188</sup> See Ouko et al., *supra* note 27, at 153 (noting that many individuals view the Kenyan courts as inaccessible due to the time needed to access them); Aparna Polavarapu, *Expanding Standing to Develop Democracy: Third-Party Public Interest Standing as a Tool for Emerging Democracies*, 41 YALE J. INT'L L. 105, 132–33 (2016) (highlighting the vast distance separating non-urban communities and physical court buildings).

<sup>189</sup> See Ouko et al., *supra* note 27, at 156 (reporting that almost three-quarters of surveyed Kenyans find the judicial system ineffective at providing adequate assistance).

will have too high a risk of exploitation without comprehensive remedies.<sup>190</sup> Selecting Kenyan courts in a choice-of-law clause will deter an engineer and, in turn, negatively influence Kenya's right to development.<sup>191</sup> Though Kenyan courts present significant uncertainties and hardships, choosing Kenyan law may provide powerful motivation for humanitarian engineers: allowing Kenya to develop on its own terms.<sup>192</sup>

Litigating disputes arising from choice-of-law clauses in Kenya will force the country to modernize and adapt its judicial proceedings.<sup>193</sup> In addition, challenges to technology transfer agreements will provide Kenya the opportunity to shape intellectual property rights to adhere to the country's view of property.<sup>194</sup> Textually, Kenya adheres to the provisions set forth in agreements such as TRIPS.<sup>195</sup> Adjudicating Kenya's laws in Kenya will allow the country to determine what the treaties mean in the Kenyan context.<sup>196</sup>

This provides a long-term incentive for engineers to litigate in Kenya and develop a body of predictable Kenyan intellectual property law.<sup>197</sup> By

<sup>190</sup> See André O. Laplume et al., *The Politics of Intellectual Property Rights Regimes: An Empirical Study of New Technology Use in Entrepreneurship*, TECHNOVATION, Dec. 2014, at 807, 815 (2014) (correlating the access to democracy in a country to the amount of investment in that region).

<sup>191</sup> See *id.* (commenting on the necessity of democracy to obtain financial investments); Lidgard et al., *supra* note 20, at 6–7 (suggesting a need to transfer technology to curb human rights abuses); Ouko et al., *supra* note 27, at 153 (noting individuals' dissatisfaction with the Kenyan judiciary due to ineffective administration and unnecessary physical distance to courts).

<sup>192</sup> Cf. Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1163 (2006) (reviewing LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005)) (explaining that academics believe that Delaware gained a favorable national reputation in bankruptcy proceedings because of the court's background, knowledge, and skill). *But cf.* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 292 (2016) (arguing that Delaware's race to attract bankruptcy cases created a system of poor legal standards).

<sup>193</sup> Cf. Zywicki, *supra* note 192, at 1163 (describing the process that gave Delaware a specialized-but-respected bankruptcy system).

<sup>194</sup> See Sudi, *supra* note 119 (questioning whether Kenya's new constitution will positively impact the role of intellectual property protection in the country); see also Nzomo, *supra* note 119 (noting how the 2010 Kenyan constitution denotes the first time a Kenyan constitution included intellectual property rights).

<sup>195</sup> See, e.g., Official Secrets Act (2016) Cap. 187 (Kenya) (establishing Kenyan trade secret laws); Copyright Act, 2001 (2014) Cap. 130 §§ 22–34 (Kenya) (stating Kenya's copyright protections); Trade Marks Act (2012) Cap. 506 §§ 4–19 (Kenya) (providing the standards for trademark regulation in Kenya); see also TRIPS Agreement, *supra* note 40, arts. 65–66 (mandating adherence to the provisions of TRIPS).

<sup>196</sup> Cf. Zywicki, *supra* note 192, at 1163 (illustrating how a court system can gain a competitive advantage by becoming the first jurisdiction to interpret laws, thus using their first-impression rulings to develop disputes in a manner beneficial for both state policy and legal precedent).

<sup>197</sup> Cf. Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 740–41 (2013) (showing how factors such as high judicial competen-

litigating in Kenya, engineers from all countries must adhere to provisions determined by only one jurisdiction.<sup>198</sup> Instead of returning to their home countries during disputes, engineers will have to negotiate agreements that positively develop Kenya's legal system and, in turn, technology access.<sup>199</sup> The initial proceedings will likely result in unnecessary delays and losses.<sup>200</sup> As the system adjudicates more cases, though, predictability and clarity will arise.<sup>201</sup> The development of Kenyan law will create increased certainty for humanitarian engineers because every technology transfer to Kenya will abide by the same set of laws.<sup>202</sup> By choosing Kenyan law, engineers will build a more sustainable system for technology transfer agreements.<sup>203</sup>

Overall, even if the characteristic test favors choosing Kenyan law, engineers will need to consider negative factors such as corruption and accessibility.<sup>204</sup> If they choose Kenyan law, however, they may have the opportunity to develop a system of law that allows Kenya to dictate how it wants to develop.<sup>205</sup>

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cy, reactive legislation, and academic foresight created a strong litigant preference for a single jurisdiction).

<sup>198</sup> Cf. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1100 (2013) (showing how Delaware has gained a dominance in American corporate law through litigants' continual preference to try cases in that jurisdiction). *But cf.* Stephen Kiebzak et al., *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, RES. POL'Y, Feb. 2016, at 218, 230 (finding that as the number of patent challenges in a jurisdiction increases, the amount of investment in the area decreases).

<sup>199</sup> See Nzomo, *supra* note 119 (explaining how Kenya's new constitution will allow for unique development in the country's intellectual property rights).

<sup>200</sup> See Ouko et al., *supra* note 119, at 156 (listing Kenyan courts' physical limitations); Agutu, *supra* note 179 (explaining corruption in Kenya's judiciary).

<sup>201</sup> Cf. Sara Lewis, Note, *Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 199 (2008) (noting a trend of plaintiffs wanting to avoid the Delaware corporate court due to the efficient and determinable case outcomes).

<sup>202</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(2)(a). *But cf.* Lewis, *supra* note 201, at 199 (showing how over-certainty in Delaware has caused plaintiffs to avoid the state's jurisdiction).

<sup>203</sup> Cf. Fisch, *supra* note 197, 740–41 (discussing how Delaware has embraced its role as a leader in corporate law by adapting both its judicial and legislative systems); Sudi, *supra* note 119 (noting the potential future of Kenya's intellectual property regulations).

<sup>204</sup> See TRANSPARENCY INT'L, *supra* note 27, at 7 (noting Kenya's high rate of corruption); Torremans, *supra* note 122, at 27 (outlining the many factors a court must consider when determining the applicable law for a technology transfer agreement); Ouko et al., *supra* note 27, at 156 (commenting on Kenyans' discontent with the physical inaccessibility of Kenya's courts).

<sup>205</sup> See Nzomo, *supra* note 119 (explaining how Kenya's 2010 constitution noted a shift in Kenya's view of intellectual property because the new constitution included intellectual property as a means to protect culture, a first for the country); see, e.g., Fisch, *supra* note 197, at 740–41 (2013) (explaining the power that the quick adaptation of law can have on a jurisdiction, as seen through the dominance of Delaware).

*B. Why Engineers Cannot Justify Selecting Their Jurisdiction to Control Despite the Drawbacks of Relying on Kenyan Law*

Allowing Kenyan courts to preside over contract disputes arising from technology transfer agreements may benefit the country's development but could also deter engineers from placing products in the country.<sup>206</sup> Taking the chance on Kenyan law may impose too great a burden on engineers.<sup>207</sup> The characteristic test addresses this concern.<sup>208</sup> The test favors the transferee's jurisdiction when the transferee experiences the greater burden.<sup>209</sup> If, however, the contract places a greater weight on the transferor, then the test recommends applying the law of the transferor's location.<sup>210</sup> For the engineer, this means access to updated courts and a well-developed system of law.<sup>211</sup> Engineers must, however, balance certainty and accessibility against forcing a foreign philosophy on Kenya.<sup>212</sup> Because of the potential for long-lasting, negative effects on Kenya's right to development, engineers should only select their country's law when the convenience of their law outweighs the burden on Kenya.<sup>213</sup> This section explores the two main benefits of choosing a developed country's law: the ability to avoid the institutional barriers in Kenya and the option to create uniform licensing agreements for transfers in multiple countries.<sup>214</sup>

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<sup>206</sup> See Lidgard et al., *supra* note 20, at 6–7 (commenting on developed countries' potential to alleviate economic hardship in developing countries); Sudi, *supra* note 119 (questioning whether Kenyan's constitutional inclusion of intellectual property will benefit Kenya); *supra* notes 173–205 and accompanying text (discussing the potential benefits of Kenyan law controlling technology transfer agreements).

<sup>207</sup> See Ouko et al., *supra* note 27, at 156 (explaining the lack of resources in Kenyan courts); Laplume et al., *supra* note 190, at 815 (concluding that when high levels of corruption exist in a country, the country becomes less likely to adapt innovative technologies).

<sup>208</sup> PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(2)(b).

<sup>209</sup> *Id.* art. 3:502(2)(a); *supra* notes 173–205 and accompanying text.

<sup>210</sup> PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(2)(b); see Torremans, *supra* note 122, at 35 (detailing situations in which the default law should be that of the transferor's location's jurisdiction).

<sup>211</sup> Cf. Zywicki, *supra* note 192, at 1163 (commenting on how Delaware has gained specific competence in bankruptcy proceedings due to the large number of cases filed in the jurisdiction). *But see* Klerman & Reilly, *supra* note 192, at 292 (reasoning that Delaware's race to be the first jurisdiction to rule on a matter has resulted in prematurely decided law).

<sup>212</sup> See Torremans, *supra* note 122, at 35 (noting the necessity to select the transferor's location when the contract concerns multiple jurisdictions); Lidgard et al., *supra* note 20, at 6–7 (advocating for the transfer of technology); Ouko et al., *supra* note 27, at 153 (noting the physical inaccessibility of Kenyan courts).

<sup>213</sup> See Lidgard et al., *supra* note 20, at 6–7 (suggesting that developed countries have an obligation to transfer technology to developing countries); Ocheni & Nwankwo, *supra* note 55, at 47, 51 (highlighting how the British reshaped Kenya's education system to become dependent on foreign nations).

<sup>214</sup> See *infra* notes 215–231 and accompanying text.

First, by using the laws of the developed country, contracting parties can avoid much of the corruption in Kenya.<sup>215</sup> For example, three of the top four patent-producing countries, according to the Corruption Perceptions Index, have corruption scores of seventy-four, seventy-two, and fifty-three out of one hundred.<sup>216</sup> Compared to Kenya, with its score of twenty-six, developed countries are much less likely to experience corruption.<sup>217</sup> In addition, the Kenyan court system lacks the technology needed for complex, multinational litigation.<sup>218</sup> By utilizing the legal standards and court technology of developed countries, both parties can access legal precedent regardless of location.<sup>219</sup> These factors, overall, allow for a higher likelihood of a fair judicial proceeding.<sup>220</sup>

Even if transferees can clear the accessibility hurdle, they must also understand the law.<sup>221</sup> A Kenyan lawyer will have a distinct disadvantage

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<sup>215</sup> See TRANSPARENCY INT'L, *supra* note 27, at 6–7 (assessing the United States as seventy-four and Kenya a twenty-six out of one hundred for political corruption); see Gainer, *supra* note 178 (detailing judicial corruption in Kenya). Transparency International determines the Corruption Perceptions Index ranking based on an annual compilation of expert analyses. TRANSPARENCY INT'L, *supra* note 204, at 1.

<sup>216</sup> TRANSPARENCY INT'L, *supra* note 27, at 6. The countries, the United States, Japan, and the Republic of Korea, rank 18th, 20th, and 52nd of 176, respectively. *Id.* This Note does not include the fourth country, China, because, although it has one of the world's largest economies, the World Bank still considers China a developing nation. *The World Bank in China*, WORLD BANK (Sept. 26, 2018), <http://www.worldbank.org/en/country/china/overview> [<https://perma.cc/Y5G3-F5BE>]; see also TRANSPARENCY INT'L, *supra* note 27, at 6 (rating China as 79th on the Corruption Perceptions Index with a score of forty).

<sup>217</sup> See TRANSPARENCY INT'L, *supra* note 27, at 7 (listing the corruption index score for developed countries and Kenya).

<sup>218</sup> See WORLD BANK, INITIATIVES IN JUSTICE REFORM 1992–2012, at 21–22 (2012) (reporting on two World Bank projects aimed at improving Kenya's judicial system through financing technological upgrades); Ouko et al., *supra* note 27, at 156 (explaining how Kenya's limited adoption of technology in the judicial system has prolonged cases).

<sup>219</sup> See Leesi Ebenezer Mitee, *The Right of Public Access to Legal Information*, 18 GER. L.J. 1429, 1434, 1436 (2017) (claiming that many developing countries do not have access to legal documents due to a lack of motivation on the part of their governments rather than a lack of available technology); Kevin P. Brady & Justin M. Bathon, *Education Law in a Digital Age: The Growing Impact of the Open Access Legal Movement*, 277 ED. LAW. REP. 589, 590 (2012) (showing that ninety-six percent of American legal researchers use internet-based databases). Dr. Brady continues to argue that, through the open source movement, the cost of legal research has declined, which has allowed for increased global access. Brady & Bathon, *supra*, at 591. Mitee, however, shows that in the United States, many government entities charge large amounts of money to access official documents, placing limitations on access to information similar to those faced by attorneys in developing countries. Mitee, *supra*, at 1436.

<sup>220</sup> See TRANSPARENCY INT'L, *supra* note 27, at 6–7 (ranking the United States as significantly less corrupt than Kenya); Brady & Bathon, *supra* note 219, at 591 (showing how technological advancements increase access to legal precedent).

<sup>221</sup> See Mitee, *supra* note 219, at 1436 (explaining how the costly fees necessary to access American law and regulations prohibit significant public access); Richard A. Posner, *Legal Research and Practical Experience*, 84 U. CHI. L. REV. 239, 239, 243 (2017) (commenting on how an understanding of law comes through practice rather than pure research). *But see* Brady & Ba-

when challenging a developed-country attorney due to a lack of experience in that country's law and legal-research infrastructure.<sup>222</sup> Because of this lack of experience, the selection of a transferor's country as the proper legal forum benefits the engineer but may harm long-term development in Kenya.<sup>223</sup>

Second, if an engineer creates a product and places the device in multiple countries, the engineer will likely want a uniform contract.<sup>224</sup> Instead of each contract adhering to a different set of laws in different jurisdictions with different government structures, stipulating the licensor's location will allow for easier transactions.<sup>225</sup> Not only does this decrease long-term costs, but it also increases the engineer's ability to transfer the technology to multiple communities.<sup>226</sup> Because the engineer only needs to produce a single contract, the engineer can transfer a product with little work required to maintain compliance.<sup>227</sup>

As a trade-off, by stipulating their home jurisdiction to govern technology transfer agreements, engineers will take away Kenya's ability to choose how it wants to develop its understanding of intellectual property.<sup>228</sup> Adhering to a developed country's standard may ease the burden on the engineer, but will also indirectly force Kenya to adhere to the intellectual property rights of the developed country.<sup>229</sup> This means Kenya will have no direct power over the contracts related to intellectual property.<sup>230</sup> Instead of

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thon, *supra* note 219, at 591–92 (commenting on how more American legal information has become accessible online without any paywall).

<sup>222</sup> See Deborah J. Cantrell & Kenneth Sharpe, *Practicing Practical Wisdom*, 67 *MERCER L. REV.* 331, 345 (2016) (acknowledging that the sole way to gain practical knowledge comes through direct exposure); Posner, *supra* note 221, at 239, 243 (addressing the author's experience that the best means to understand the law comes through experience).

<sup>223</sup> See Cantrell & Sharpe, *supra* note 222, at 345 (arguing that expertise can only develop through direct practice); Posner, *supra* note 221, at 243 (noting that expertise in the practice and reshaping of law best results from practice in that area).

<sup>224</sup> See Torremans, *supra* note 122, at 35 (explaining the difficulty in selecting a jurisdiction in international intellectual property agreements); Picht, *supra* note 137, at 463 (advocating for parties to choose a governing law that allows for the highest amount of simplicity and clarity).

<sup>225</sup> Torremans, *supra* note 122, at 35.

<sup>226</sup> See *id.* (noting that one contract cannot adhere to standards set by multiple jurisdictions).

<sup>227</sup> See *id.* (commenting on the difficulty of multinational contracts).

<sup>228</sup> See *PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY*, *supra* note 123, art. 3:502(2)(b) (placing the transferor's location as superior to the transferee's location because of the encumbrances placed on the transferor); *supra* notes 192–205 and accompanying text (explaining why Kenyan law should control technology transfer agreements).

<sup>229</sup> See Torremans, *supra* note 122, at 35 (noting the impossibility of one contract adhering to multiple jurisdiction's laws); see also *PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY*, *supra* note 123, art. 3:502(2)(b) (taking the power away from the transferee's location by suggesting the transferor's location should control the governing law).

<sup>230</sup> See Torremans, *supra* note 122, at 35 (arguing for the transferor's location to determine relevant authority). *But see* TRIPS Agreement, *supra* note 40, arts. 65–66 (enforcing a minimum standard that all member states of the WTO must meet). Kenya does, however, still have some

controlling intellectual property within its borders, Kenya will have to watch as the developed world redefines Kenya's historical, communal understanding of property.<sup>231</sup>

### *C. How Focusing on Africa's Regional Economic Communities Can Solve a Humanitarian Engineer's Dilemma*

Even though placing technology in multiple countries while licensing it under the law of the engineer's country benefits the engineer and harms Kenya, the engineer can mitigate the negative effects of this jurisdiction selection by looking towards regional economic organizations that include Kenya.<sup>232</sup> Individual countries dictate the intellectual property rights within their borders, but the regional economic communities provide guidance on best practices.<sup>233</sup> The African Union, which includes Kenya, formally recognizes four regional economic communities in which Kenya participates.<sup>234</sup> The communities provide for the flow of technology, resources,

power due to its membership in the WTO. TRIPS Agreement, *supra* note 40, arts. 65–66 (allowing signatory parties to set an international standard for intellectual property). Though Kenya does not have the ability to dictate a developed country's intellectual property standard, it has already agreed to a minimum standard legally enforceable through the WTO. *Id.*

<sup>231</sup> See Torremans, *supra* note 122, at 35 (suggesting that contracting parties select the jurisdiction of the transferor's location to control the agreement's terms); see, e.g., Nzomo, *supra* note 119 (commenting on the importance of the inclusion of intellectual property rights in the new Kenyan constitution).

<sup>232</sup> See, e.g., Treaty for the Establishment of the East African Community art. 103(1)(i), Nov. 30, 1997, 2144 U.N.T.S. 255 (creating the East African Community ("EAC") that focuses on creating an economic and political coalition between Uganda, Kenya, and Tanzania); Agreement on the Creation of the African Regional Intellectual Property Organization art III, Dec. 9, 1976, (available at [http://www.wipo.int/edocs/lexdocs/treaties/en/ap001/trt\\_ap001\\_001en.pdf](http://www.wipo.int/edocs/lexdocs/treaties/en/ap001/trt_ap001_001en.pdf) [<https://perma.cc/6VED-UR5KJ>]) (establishing the ideals of the African Regional Intellectual Property Organization to form a continental body focused on universalizing the intellectual property standards within Africa). The African Union, formed in 2000, seeks to establish a continent-wide system focused on harmonizing the laws and promoting the advancement and development of Africa. Constitutive Act of the African Union art. 3, July 11, 2000, 2158 U.N.T.S. 3 (entering into force Apr. 27, 2001); Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365, 372 (2002) (summarizing the goals and purpose of the African Union).

<sup>233</sup> See, e.g., COMMON MKT. FOR E. & S. AFR., COMESA POLICY ON INTELLECTUAL PROPERTY RIGHTS *passim* (2013) (stating the views of intellectual property held by the Common Market for Eastern and Southern Africa's ("COMESA")); E. AFR. CMTY., REGIONAL INTELLECTUAL PROPERTY POLICY ON THE UTILISATION OF PUBLIC HEALTH-RELATED WTO-TRIPS FLEXIBILITIES AND THE APPROXIMATION OF NATIONAL INTELLECTUAL PROPERTY LEGISLATION 11 (2013) (stating that the overall objective of the report is to assist member states in developing their intellectual property laws).

<sup>234</sup> *Regional Economic Communities (RECs)*, AFR. UNION, <https://au.int/en/organs/recs> [<https://perma.cc/TG8E-SPG8>] (listing the formally recognized regional economic communities in Africa and their purposes); see, e.g., Treaty for the Establishment of the East African Community, *supra* note 232, art. 103(1)(i) (forming the East African Community). This structure has created a three-level governance system: the African Union overseeing the regional economic communities, which overlook member states. Craig Jackson, *Constitutional Structure and Governance Strate-*

and goods between signatory parties.<sup>235</sup> Though the organizations do not mandate member states' intellectual property laws, the charters and regulations can provide insight into the values of member states.<sup>236</sup> Following the policies established by these economic alliances allows engineers to create generic licensing agreements based off of a developed country's law while simultaneously allowing Kenya to retain some control over intellectual property regulations in the country.<sup>237</sup> Adhering to these policies lowers transaction costs because parties will not need to negotiate individual contracts for each country and, in turn, will support Kenya's right to develop by encouraging more technology transfer agreements.<sup>238</sup> The insights provided by the economic communities decrease the potential for engineers to repeat the harmful consequences experienced when uninformed engineers place technologies into countries in the hopes of facilitating development.<sup>239</sup>

### III. WHY KENYAN LAW SHOULD CONTROL UNLESS AN ENGINEER PRESENTS A STRONG SHOWING OF HARMS THEY WOULD EXPERIENCE

Humanitarian engineers have many options when deciding choice-of-law: they may elect to use the laws of their jurisdiction, the laws of the place

*gies for Economic Integration in Africa and Europe*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 139, 154 (2003); *Regional Economic Communities (RECs)*, *supra* (detailing the African Union's governance structure).

<sup>235</sup> See, e.g., COMESA Social Charter arts. II, III, Feb. 24, 2014, (available at <http://programmes.comesa.int/attachments/article/82/Comesa%20Social%20Charter%20Final%20-%20ENGLISH.pdf> [<https://perma.cc/49RR-DWRA>]); Agreement Establishing the Inter-Governmental Authority on Development (IGAD) arts. 3(a), 13A(n), Mar. 21, 1996, IGAD/SUM-96/AGRE-Doc (stating a motivation of increasing access to technology throughout the economic region).

<sup>236</sup> See, e.g., COMMON MKT. FOR E. & S. AFR., *supra* note 233, paras. 15–20 (requiring member states of the COMESA to assist in the transfer of intellectual property within the economic region); see also TRIPS Agreement, *supra* note 40, pmb1. (providing background to the enactment of TRIPS).

<sup>237</sup> See Torremans, *supra* note 122, at 35 (detailing when the transferor's location should control an international technology transfer agreement). Compare COMMON MKT. FOR E. & S. AFR., *supra* note 233, *passim* (detailing COMESA's position on intellectual property rights), with Protocol on the Establishment of the East African Community Common Market art. 43, Nov. 20, 2009, (the Protocol is available at <http://eacj.org/wp-content/uploads/2012/08/Common-Market-Protocol.pdf> [<https://perma.cc/7G6N-3RLL>]) (outlining the EAC's position on the promotion of intellectual property between member states).

<sup>238</sup> See Laplume et al., *supra* note 190, at 815 (establishing a negative correlation between a region's amount of corruption and international investment); see also PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, pmb1. (stating a desire to decrease the confusion surrounding technology transfer agreements by increasing the certainty in contracting).

<sup>239</sup> See, e.g., Arnold, *supra* note 55, at 91–92 (illustrating how technologies such as railroads and telegraphs allowed colonists to maintain power); Ocheni & Nwankwo, *supra* note 55, at 47, 51 (showing how colonialists used education and technology to reshape the colonies' independent economies).

where their products will go, or any stipulated standard.<sup>240</sup> Because of the jurisdictional restrictions of intellectual property, however, technology transfer agreements limit the options to either the location of the transferor or the location of the transferee.<sup>241</sup> The choice of law will depend on whether the engineer wants to transfer technology into one or more than one country.<sup>242</sup> If the engineer only places the product in Kenya, the engineer must prioritize Kenyan law instead of favoring their own jurisdiction as current law permits.<sup>243</sup> In situations where the engineer will transfer the technology to Kenya and another region, however, the engineer should select their own law as long as it does not conflict with a recognized regional economic community's policies.<sup>244</sup> Section A proposes an analysis for when Kenyan law should control.<sup>245</sup> Section B then recommends a course of action for unique circumstances when an engineer can stipulate that a developed country's laws should govern.<sup>246</sup> Section C suggests that organizations and institutions focused on humanitarian engineering should enforce this policy.<sup>247</sup>

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<sup>240</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:501 (allowing parties to select a governing jurisdiction); see also Rome Convention, *supra* note 135, art. 3(1) (stipulating a freedom-of-choice with regards to selecting the governing law); U.C.C. § 1-301 (AM. L. INST. & UNIF. L. COMM'N 2017) (providing parties with the ability to select the governing law).

<sup>241</sup> See NGUYEN, *supra* note 22, at 25 (explaining how technology transfer agreements rest on assuming that adequate intellectual property protections exist in both jurisdictions); Torremans, *supra* note 122, at 34 (stating that intellectual property transfer agreements only occur when the jurisdiction recognizes the intellectual property rights at issue). *But see* Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 28, 1979, 102 Stat. 2853 (forcing all signatory countries to respect copyrights protected in the jurisdiction the work originated in).

<sup>242</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502; Torremans, *supra* note 122, at 34–35 (explaining factors relevant when selecting a controlling jurisdiction).

<sup>243</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(a) (advocating for the transferee's location to govern the contract due to the burden placed on the singular jurisdiction receiving the technology); *supra* notes 192–205 and accompanying text (commenting on the long-term benefit of prioritizing Kenyan law); *infra* notes 248–267 and accompanying text (arguing for humanitarian engineers to adhere to Kenyan law in technology transfer agreements).

<sup>244</sup> See PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(b) (providing factors that favor selecting a transferor's location as the controlling jurisdiction); *infra* notes 268–280 and accompanying text (stating the role of regional economic communities in forming national intellectual property policies).

<sup>245</sup> See *infra* notes 248–267 and accompanying text.

<sup>246</sup> See *infra* notes 268–280 and accompanying text.

<sup>247</sup> See *infra* notes 281–293 and accompanying text.

*A. An Engineer Has a Duty to Select Kenya When the Technology Transfer Only Concerns Kenya*

Choosing the law of a developed country permits an engineer to rely solely on that country's law without the burden of a complex, multijurisdictional agreement.<sup>248</sup> This choice, however, has too many negative consequences for Kenya.<sup>249</sup> For a designer focused on humanitarian engineering, these harms must be considered.<sup>250</sup> An engineer cannot profit from activity in a developing country without considering the potential impacts on that country.<sup>251</sup>

The idea of property, both physical and intellectual, is strongly tied to Kenya's philosophy of community and national identity.<sup>252</sup> Kenya has historically relied on a communal idea of intellectual property.<sup>253</sup> Without this philosophy, many small and rural villages would not survive because knowledge related to agriculture and medicine would no longer be readily accessible.<sup>254</sup> The communal view of intellectual property began to change when the British occupied the country and mandated a new judicial system.<sup>255</sup> Kenya no longer controlled its laws but instead had to follow legal structures that conflicted with its cultural heritage.<sup>256</sup> Though Kenya gained independence in 1964, the impacts of colonial rule still dominate the re-

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<sup>248</sup> See Torremans, *supra* note 122, at 35 (highlighting the complexity of multinational agreements).

<sup>249</sup> See, e.g., Ocheni & Nwankwo, *supra* note 55, at 51 (explaining how colonial powers reshaped Kenya's education and manufacturing systems to benefit developed countries); Cathy Mpathia, *Intellectual Property Rights in Africa Date Back to Colonial Period*, BUS. DAILY (June 16, 2013), <https://www.businessdailyafrica.com/Intellectual-property-rights-date-back-to-colonial-period/539444-1884724-dcar1d/index.html> [<https://perma.cc/EV3V-FV6G>] (noting how colonial powers in Kenya empowered European settlers through strict intellectual property laws).

<sup>250</sup> See Ali, *supra* note 15, at 13 (explaining how humanitarian engineering relates to community development); Ocheni & Nwankwo, *supra* note 55, at 51 (illustrating how the British reshaping of Kenya's education and economic systems created a country dependent on the colonial power).

<sup>251</sup> See Mattson & Wood, *supra* note 15, at 1 (showing how product design can negatively affect the communities receiving the technology).

<sup>252</sup> See CONSTITUTION arts. 11(1), 11(2)(e) (2010) (Kenya) (stating the role of intellectual property in Kenyan legal policy); see, e.g., COMMON MKT. FOR E. & S. AFR., *supra* note 233, para. 1 (noting how intellectual property can protect many cultural identities).

<sup>253</sup> See, e.g., Kuruk, *supra* note 120, at 779 (defining folklore as a specific type of intellectual property that includes information and knowledge historically spread throughout a society).

<sup>254</sup> See *id.* (showing how communities must pass down traditional knowledge, especially with regards to agriculture, to maintain themselves).

<sup>255</sup> Crowne, *supra* note 40, at 77; Mpathia, *supra* note 249.

<sup>256</sup> Cotran, *supra* note 109, at 45 (demonstrating how the British established a legal system controlled by settlers that furthered the settlers' personal objectives while forcing compliance on locals); Mpathia, *supra* note 249.

gion.<sup>257</sup> Intellectual property transformed Kenya by requiring dependence on a system that benefited a faraway land.<sup>258</sup>

As trade becomes more globalized and the need for technology transfer increases, Kenya has had to reshape its view of property.<sup>259</sup> With agreements such as TRIPS and subsequent TRIPS Plus provisions, Kenya has lost the ability to define what intellectual property means for the country.<sup>260</sup> Humanitarian engineers seek to help the development of a country, but allowing their contracts to ignore Kenyan law furthers harms created by developed nations.<sup>261</sup> Engineers must recognize this.<sup>262</sup>

Because of the potential harm to Kenya that could prolong the impact of colonialism, engineers should select Kenya as the governing jurisdiction when transferring technology into the country.<sup>263</sup> Engineers may face corruption, fewer legal resources, and increased complexity due to a lack of transparency.<sup>264</sup> As individuals who devote their careers to furthering Ken-

<sup>257</sup> See, e.g., Ocheni & Nwankwo, *supra* note 55, at 47, 51 (explaining how the Industrial Revolution allowed the British to import new technology into Kenya, create a manufacturing system that provided raw material for industrialization, and then leave the country with an economy dependent on foreign markets).

<sup>258</sup> See *id.* (explaining historical areas of abuse with respect to technology transferred to developing countries from colonial powers); Crowne, *supra* note 40, at 79 (detailing how developed countries like the United States joined the TRIPS negotiations to hinder developing country's power); Nzomo, *supra* note 119 (claiming that Kenya's recent constitution represents a fundamental change in the country's relationship with intellectual property).

<sup>259</sup> Nzomo, *supra* note 119; see CONSTITUTION arts. 11(1), 11(2)(e) (2010) (Kenya) (stating the role and meaning of intellectual property in Kenya).

<sup>260</sup> See TRIPS Agreement, *supra* note 40, art. 1 (mandating that WIPO member states adhere to TRIPS's provisions); Tran-Wasescha & Groussot, *supra* note 75, at 19 (detailing the process by which a TRIPS signatory can force conformity through WTO proceedings); Turk, *supra* note 41, at 1004 (outlining the process for creating TRIPS Plus agreements).

<sup>261</sup> See Ali, *supra* note 15, at 13 (commenting on the academic understanding of humanitarian engineering); see, e.g., Ocheni & Nwankwo, *supra* note 55, at 47, 51 (explaining the long-lasting influence of British colonialism on Kenya). As an example of a failed product, PlayPump International created a pumping system in which children spinning on a merry-go-round would pump water into a remote tank. Michael Hobbes, *Stop Trying to Save the World*, NEW REPUBLIC (Nov. 17, 2014), <https://newrepublic.com/article/120178/problem-international-development-and-plan-fix-it> [<https://perma.cc/K47Z-TSQV>] (detailing the impact of humanitarian engineering in Africa). Though this product showed great promise and the pumps failed to provide a consistent water supply, lacked an easily operable system, required significant maintenance, and ignored community requests. Ralph Borland, *Radical Plumbers and PlayPumps: Objects in Development* (2011) (unpublished Ph.D. dissertation) (on file with author).

<sup>262</sup> Mattson & Wood, *supra* note 15, at 1–2.

<sup>263</sup> See Declaration on the Right to Development, *supra* note 28, art. 10 (stating the right of countries to choose how to develop); see, e.g., Ocheni & Nwankwo, *supra* note 55, at 47, 51 (showing how British colonialism left Kenya dependent on the empire even after gaining independence).

<sup>264</sup> TRANSPARENCY INT'L, *supra* note 27, at 7; Mitee, *supra* note 219, at 1434, 1436 (claiming that the lack of access to technology in developing countries results from political barriers rather than technology availability); Ouko et al., *supra* note 27, at 156.

ya's growth, however, humanitarian engineers must prioritize Kenya's right to development over their personal profits.<sup>265</sup> Choosing Kenya allows for the country to finally gain control of its own growth and advancement.<sup>266</sup> Doing otherwise will destroy Kenya's ability to access a fundamental human right: the right to develop.<sup>267</sup>

*B. An Engineer Should Only Use a Developed Country's Law in Multijurisdictional Contracts When the Agreement Adheres to the Policies of the Regional Economic Communities*

Though extreme harm can result from diverting power from Kenya, certain situations present too much complexity to avoid stipulating another jurisdiction.<sup>268</sup> A humanitarian engineer has the right, and in some cases, the duty, to place a product in multiple countries.<sup>269</sup> Similarly, an engineer has the capacity to benefit multiple countries' right to development through a singular agreement, but a multi-state agreement creates significant hardship for contract negotiations.<sup>270</sup> A single agreement should not have to comply with multiple laws in multiple jurisdictions.<sup>271</sup> Instead, engineers should

<sup>265</sup> See Ali, *supra* note 15, at 13 (defining a humanitarian engineer's role and purpose); see, e.g., Hobbes, *supra* note 261 (highlighting the human rights violations that result from not only PlayPump but also international development projects in general).

<sup>266</sup> See Sudi, *supra* note 119 (expressing concern for Kenya's ability to benefit from the new constitution's inclusion of intellectual property); cf. Fisch, *supra* note 197, at 740–41 (claiming that Delaware's quick judicial and legislative response to business transactions has reinforced Delaware's dominance over other jurisdictions as a venue for corporate governance disputes). *But cf.* Klerman & Reilly, *supra* note 192, at 292 (advancing the idea that the quickness with which the Delaware courts operate has formed an inefficient system with poor legal standards).

<sup>267</sup> See Declaration on the Right to Development, *supra* note 28, art. 1 (stating that the definition of human rights includes the right to development); Universal Declaration of Human Rights, *supra* note 14, pmb1. (defining human rights and pledging an international commitment to protect them).

<sup>268</sup> See Torremans, *supra* note 122, at 35 (noting that a transferor's location can control when a single contract impacts more than two jurisdictions); see also PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, art. 3:502(b) (providing a list of factors favoring the transferor's location to control an agreement's governing law).

<sup>269</sup> See Lidgard et al., *supra* note 20, at 6–7 (explaining why developed countries should engage in technology transfer with developing countries); Ellison, *supra* note 1, at 122 (commenting on developing countries' overall approval of technology transfer).

<sup>270</sup> See Lidgard et al., *supra* note 20, at 6–7 (noting the potential benefit that developing countries can receive through technology transfer with developed countries); Torremans, *supra* note 122, at 35 (noting how a single contract cannot adhere to the policies of multiple jurisdictions); see, e.g., Patrick K. Lewis et al., *An Engineering Design Strategy for Reconfigurable Products that Support Poverty Alleviation*, in PROCEEDINGS OF THE ASME 2010 INTERNATIONAL DESIGN ENGINEERING TECHNICAL CONFERENCE & COMPUTERS AND INFORMATION IN ENGINEERING CONFERENCE 2 (2010) (proposing a design method that balances economic benefit with poverty alleviation).

<sup>271</sup> Torremans, *supra* note 122, at 35.

allow their countries' laws to govern.<sup>272</sup> Engineers can only select their countries' laws if an agreement's terms adhere to the policies set forth by the regional economic communities.<sup>273</sup> These organizations pull together the views and opinions of many different countries.<sup>274</sup> When placing a product in a region, as compared to a single country, an engineer should determine which community encompasses the greatest number of countries.<sup>275</sup> Then, the parties should base the terms of the agreement on the ideals of the community.<sup>276</sup>

This approach balances the burdens of both contracting parties.<sup>277</sup> Under this proposed framework, Kenya still has some control because Kenya participates in the drafting of the regional community's resolutions, even though dispute resolutions under these agreements would occur in a developed country.<sup>278</sup> By adhering to these provisions, engineers can use their location to control contracts with less concern about negatively impacting Kenya.<sup>279</sup> This proposed system protects Kenya's right to development, fa-

<sup>272</sup> *Id.*; see PRINCIPLES ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *supra* note 123, arts. 3:501–502 (supporting the choice of governance through the location of the transferor because of the higher burden the transferor bears).

<sup>273</sup> See COMMON MKT. FOR E. & S. AFR., *supra* note 233, *passim* (detailing the COMESA's beliefs regarding intellectual property, including how it wants member states to adapt their policies); see, e.g., Hobbes, *supra* note 261 (explaining how a well-intentioned product led to significant, negative impacts on African communities).

<sup>274</sup> COMMON MKT. FOR E. & S. AFR., *supra* note 233, *passim* (expressing the overall intellectual property policy goals for the economic community consisting of Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe); Constitutive Act of the African Union art. 3, 11 July, 2000, 2158 U.N.T.S. 3 (entering into force Apr. 27, 2001) (setting forth the objectives and goals for the African Union, an economic coalition of the entire African continent); Treaty for the Establishment of the East African Community, *supra* note 232 (charting the EAC, which includes Uganda, Kenya, and Tanzania).

<sup>275</sup> See Torremans, *supra* note 122, at 35 (explaining the inevitable difficulty in choosing a jurisdiction to control a contract dispute when the agreement concerns more than two countries). See generally UNITED NATIONS ECON. COMM'N FOR AFR., AFRICA REGIONAL INTEGRATION INDEX REPORT 2016 (2016) (presenting an analysis of the successes, drawbacks, and potential areas of growth for Africa's regional economic communities).

<sup>276</sup> See Wood & Mattson, *supra* note 19, at 1 (describing how designs typically fail when engineers do not consider the cultural impacts of their products and introducing nine common errors engineers engage in when designing products); see, e.g., COMMON MKT. FOR E. & S. AFR., *supra* note 233, *passim* (presenting standards, objections, and beliefs about intellectual property).

<sup>277</sup> See COMMON MKT. FOR E. & S. AFR., *supra* note 233, *passim* (stating COMESA's view of intellectual property); Torremans, *supra* note 122, at 35 (noting that some agreements require selecting the transferor's jurisdiction).

<sup>278</sup> E.g., Treaty for the Establishment of the East African Community, *supra* note 232, art. 103(1)(i) (noting Kenya's involvement in the EAC); Constitutive Act of the African Union, *supra* note 232, art. 3(m) (establishing the African Union, which includes all African countries).

<sup>279</sup> See Mattson & Wood, *supra* note 15, at 1–2 (presenting nine principles for humanitarian engineers to abide by to mitigate negative effects of products meant for use in developing coun-

cilitates easier international technology transfer, and provides incentives for engineers to design for the developing world.<sup>280</sup>

### *C. Enforcement of This Solution Must Come Through Humanitarian Engineering Organizations*

Despite decades of attempts, international organizations have not passed any uniform regulations for choice-of-law clauses in technology transfer agreements.<sup>281</sup> Most proposals fail because of the tensions between developing and developed countries.<sup>282</sup> Even international arbitrators remain inconsistent in their approach to selecting a governing law.<sup>283</sup> These failures and inconsistencies suggest that organizations and universities that focus on humanitarian engineering must enforce a policy that complies with this proposal.<sup>284</sup>

For example, Engineers Without Borders could implement this standard by mandating a new requirement for technology transfer contracts.<sup>285</sup> In 2016, the U.S. branch of Engineers Without Borders had 190 active projects on five continents that impacted 590,000 people.<sup>286</sup> Given the breadth of this and similar organizations, humanitarian engineering organizations re-

tries); see, e.g., COMESA POLICY ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 233, *passim* (outlining how member states should develop their intellectual property laws).

<sup>280</sup> See Declaration on the Right to Development, *supra* note 28, art. 1 (defining the right to development); Lidgard et al., *supra* note 20, at 6–7 (commenting on how technology transfer can alleviate the effects of underdevelopment); see also Mattson & Wood, *supra* note 15, at 2 (providing a guide for humanitarian engineers to employ to efficiently and effectively design products for the developing world).

<sup>281</sup> See Yu, *supra* note 76, at 839 (explaining the difference between developing and developed countries' interests in creating an international technology transfer agreement standard); see also *supra* notes 126–131 and accompanying text (detailing the history and complexity of international standards for technology transfer agreements).

<sup>282</sup> See, e.g., Nguyen, *supra* note 60, at 70 (noting the history of the U.N.'s *Draft International Code of Conduct on the Transfer of Technology* where dissent between developing and developed countries led to the failure to enact the agreement).

<sup>283</sup> Compare Philip Morris Asia Ltd. v. Australia, Award on Jurisdiction and Admissibility, PCA Case No. 2012-12, paras. 585, 588 (Perm. Ct. Arb. 2015) (finding that the PCA did not have jurisdiction over a case relating to copyright), with Philip Morris Brands SÀRL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, para. 236 (July 2, 2013) (ruling that ICSID does have jurisdiction over a case regarding copyright).

<sup>284</sup> See LaPorte et al., *supra* note 17, at 105 (noting the growth of humanitarian engineering organizations and programs); *Mission & History*, *supra* note 15 (stating a mission to implement engineering practices to assist in the development of extremely impoverished communities).

<sup>285</sup> See *Mission & History*, *supra* note 15 (explaining a need to design for the benefit of developing nations, thus highlighting a potential need for beneficial technology transfers).

<sup>286</sup> TIFFANY MARTINDALE, ENG'RS WITHOUT BORDERS USA, 2016 ICP MONITORING REPORT 6, 8 (2017) (describing the statistical impact of Engineers Without Borders' international projects).

quiring compliance with this proposal could dramatically impact how technology transfer agreements handle the choice of law.<sup>287</sup>

Engineers Without Borders, however, focuses on non-profit work with the primary intent of assisting the development of impoverished areas.<sup>288</sup> The specific focus may leave engineers who seek financial gains from humanitarian designs immune from following the proposed system.<sup>289</sup> To curb the effects of this gap, universities have the onus to educate their students on choice-of-law agreements.<sup>290</sup> Programs that focus on including social justice and beneficial community development must also educate students on the potential effects of selecting the wrong governing law.<sup>291</sup> Adding information in lectures on the impact of choice-of-law will encourage the implementation of this proposal where many international organizations lack the capacity to do so.<sup>292</sup> By allowing individuals and organizations focused on humanitarian engineering to adopt this policy, countries like Kenya can start developing at a quicker rate without unnecessary control from developed countries.<sup>293</sup>

## CONCLUSION

The international community has long recognized each country's right to development. The transfer of technology between developed and developing countries, especially through humanitarian engineers, seeks to promote this process. The dynamic between developing and developed coun-

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<sup>287</sup> See Lidgard et al., *supra* note 20, at 6–7 (commenting on the role of developing countries in technology transfer); Mattson & Wood, *supra* note 15, at 1 (highlighting the role and influence of humanitarian engineers).

<sup>288</sup> *Mission & History*, *supra* note 15.

<sup>289</sup> See, e.g., Hobbes, *supra* note 261 (noting the consistent failure of products sold into northern Africa).

<sup>290</sup> See Ali, *supra* note 15, at 13 (providing a background and definition of humanitarian engineering); see, e.g. *Humanitarian Engineering Minor (HUMENG-MN)*, OHIO STATE UNIV. (Feb. 2016), [https://engineering.osu.edu/sites/engineering.osu.edu/files/uploads/he\\_minor.pdf](https://engineering.osu.edu/sites/engineering.osu.edu/files/uploads/he_minor.pdf) [<https://perma.cc/M2B9-7LKE>] (seeking to educate students on the interaction between social justice and engineering).

<sup>291</sup> See Ali, *supra* note 15, at 13 (showing how academia ties together social awareness, technical development, and engineering design when educating students on humanitarian engineering principles); see, e.g., Hobbes, *supra* note 261 (showing how the PlayPump resulted in women and children spending long hours turning a merry-go-round to pump water for the community).

<sup>292</sup> See Ali, *supra* note 15, at 13 (explaining how universities educate students on humanitarian engineering); see, e.g., *Engineering for Community Development Minor*, *supra* note 17 (stating the requirements for an Engineering for Community Development minor at the Colorado School of Mines).

<sup>293</sup> Lidgard et al., *supra* note 20, at 6–7 (detailing how technology transfer from developed countries to developing countries can alleviate significant economic hardships in developing nations); Mattson & Wood, *supra* note 15, at 1, 2 (showing how engineers can positively impact a community when using the authors' proposed design principles).

tries' views of intellectual property threatens this right. Developed countries have forced developing countries to reshape their views of property to enable developed countries to profit at the expense of developing countries. Kenya has fallen victim to these mandates.

Humanitarian engineers can stop this process. The choice-of-law clause in international licensing agreements can place the power to control internal development in the hands of Kenya. By choosing the law of a developed country, an engineer robs a developing country of the opportunity to control development. Because of this, Kenyan law must control. When engineers place products in Kenya, they have a duty to select Kenyan law. If a single agreement allows for transfer in multiple countries, the developed country's law can govern if the contract follows the policies set by regional economic communities. Furthermore, international organizations and academic institutions have an obligation to enforce this policy. By following this system, engineers can realize sustainable profits while curbing the dominance of developed countries over the developing world and promoting Kenya's right to development.

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