



Thinking strategically about intellectual property rights

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The paper divides the evolution of protection for intellectual property into three periods; the territorial, international and global periods. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) represents the beginning of the global period. Its consequences are briefly discussed. Developing countries, the paper suggests, have little to gain from TRIPS. This raises the question of what they should do. The second and main part of the paper discusses the following seven strategies: non-compliance; the loophole strategy; the soft law strategy; the strategy of counter-proposal; the economic transparency strategy; the independent umpire strategy; and the hard law strategy. © 1997 Elsevier Science Ltd

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¹Both TRIPS and the WTO Treaty are part of the Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations which was concluded at Marrakesh, 15 April 1994.

²Drahos, P 'Global law reform and rent-seeking: the case of intellectual property' *Australian Journal of Corporate Law* 1996 7 45–61

³The literature is large. For early important work, see F Machlup 'An Economic Review of the Patent System' (Study No. 15 of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee
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Introduction

Control over property rules is foundational to the sovereignty of a state and its people. Property is perhaps the most fundamental instrument which a state can use to plan its own development. By changing definitions of property, creating new rights of property and limiting rights of property the state can decide who owns resources, who can exploit resources, who benefits and who loses.

The processes of trade liberalization have produced an agreement on intellectual property rights that sets uniform standards and enforcement procedures for all states that are members of the Agreement Establishing The World Trade Organization (WTO Treaty). Known as the Trade Related Aspects of Intellectual Property Rights (TRIPS), in effect it globalizes a set of intellectual property standards for the world.¹ Its implications for the developmental future of states are simply not understood. TRIPS was not the product of carefully coordinated economic analysis. Rather it was the manifestation of rent-seeking desires of those multinationals that saw opportunities for themselves in redefining and globalizing intellectual property rights.²

The rest of this paper comes in two parts. The first part contains a brief discussion of the kind of consequences that TRIPS will produce. In the second part of the paper seven strategies for developing countries to deal with TRIPS are proposed. TRIPS is not the unambiguous good that its supporters claim it to be. The literature on the patent system suggests that developing countries have very little to gain from TRIPS and everything to lose.³ This claim is also reinforced by the work being done by the National Working Group On Patent Laws in India.⁴

Nevertheless, TRIPS is a concrete legal reality. It represents hard law in every sense. Concrete realities call for concrete responses. There is too much at stake in TRIPS for silence and inaction to be the response. The Forum of Parliamentarians On Intellectual Property and the National Working Group On Patent Laws have generated an important and

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on the Judiciary, US Senate, 85th Congress, Washington, DC 1958); Penrose, E T 'International Patenting and the Less-Developed Countries' *Economic Journal* 1973 83 766; Väyrynen, R 'International patenting as a means of technological dominance' *International Social Science Journal*, 1978 20 315. For a synthesis of much of the literature see Oddi, A S 'The international patent system and third world development: reality or myth?' *Duke Law Journal* 1987 831; Nogués, J 'Patents and pharmaceutical drugs: understanding the pressures on developing countries' *Journal of World Trade* 1990 24 81. For a discussion of patents in the context of trade and technology policy see Lyons, B 'International trade and technology policy' in Dasgupta P and Stoneman P (eds) *Economic Policy and Technological Performance* Cambridge University Press, Cambridge (1987) 169–205; Subramanian, A 'The international economics of intellectual property right protection: A welfare-theoretic trade policy analysis' *World Development* 1991 19 945–956. For an example of literature that deals with the impact of the patent system on a medium sized country, see *The Economic Implications Of Patents In Australia*, Australian Patent Office, Canberra, 1981; Industrial Property Advisory Committee, *Patents, Innovation And Competition In Australia*, Australia 1984. For a recent critical discussion of intellectual property see Lamberton, D 'Innovation and intellectual property' in Dodgson, M and Rothwell, R (eds), *The Handbook of Industrial Innovation* Elgar, Aldershot (1994) 301–309.

⁴Keayla, B K 'New Patent Regime: Implications for Domestic Industry, Research and Development and Consumers' National Working Group on Patent Laws, 1996. See also 'The New Intellectual Property Regime: Implications for Industry and R and D', *Proceedings Of The 9th National Conference On In-House R & D In Industry*, Department of Scientific and Industrial Research, Government of India, New Delhi, May 1996.

⁵See Dubey, Muchkund *An Unequal Treaty*, New Age International Limited, New Delhi, 1996; Krishna Iyer, V R, Chinappa Reddy, O, Desai, D A, Sachar, Rajinder *Peoples' Commission On GATT*, Centre for Study of Global Trade System and Development, New Delhi, 1996; Keayla, B K 'New Patent Regime: Implications for Domestic Industry, Research and Development and Consumers' National Working Group on Patent Laws, 1996; Keayla, S B K 'The New Intellectual Property Regime: An Overview' in 'The New Intellectual Property Regime: Implications for Industry and R & D', *Proceedings of the 9th National Conference on in-house R & D in Industry*, Department of Scientific and Industrial Research, Government of India, New Delhi, May 1996, 67–79.

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critical literature on the TRIPS Agreement and its consequences for India and the peoples of the developing world.⁵ The seven strategies proposed in the second part of this paper build on this literature.

Global property and its consequences

In the past, standards of property regulation have been territorial standards. This has been true of intellectual property as much as real property. The protection of intellectual property at an international level can be roughly divided into three periods. The first period, the territorial period, was essentially characterized by an absence of international protection. The second period, the international period, began in Europe towards the end of the 19th century with some countries agreeing to the formation of a Union for the protection of industrial property (Paris Convention) and a similar group agreeing to a Union for the protection of the rights of authors in their literary and artistic works (Berne Convention).⁶ The third period, the global period, has its origins in the linkage that the US began to make between trade and intellectual property in the 1980s, a linkage that emerged at a multilateral level with the signing of the WTO Treaty on 15 April 1994. The dates of the various conventions do not represent a sharp epochal divide. They do mark a significant change in the evolutionary direction of intellectual property protection.

The dominant feature of each period relates to the territorial reach that intellectual property law gives to an owner of intellectual property. In the territorial period, the owner of an abstract object finds that this ownership does not extend beyond the reaches of the territory in which his government is sovereign. The international period is underpinned by the principle of territoriality, but states through the contractual device of treaty-making extend the rights of owners of abstract objects beyond the jurisdictional confines in which the rights of ownership originate. The global period, a period that is just beginning, sees the aspirations of some 19th century jurists for a world system of sorts for intellectual property begin to be fulfilled. A supra-national organization, the World Trade Organization (WTO), is given custody of intellectual property norms. Because of the wide membership of the WTO, its dispute resolution mechanisms, and the sponsorship of the rights of intellectual property owners by the US, the world's last remaining hegemonic power, the creation and enforcement of high standard intellectual property norms world-wide becomes a political and legal reality.⁷ Owners of abstract objects see the dawn of an age in which they enjoy rights that have a global reach.

The global period of intellectual property is marked by a weakening, at least in relation to property, of the principles of territoriality and sovereignty. During the period of globalization three major things happen. First, the range of regulatory standards that states are obliged to implement increases and those standards are characterized by a greater specificity. Thus, to take a quick example, trade secret protection that is not explicitly mentioned in the Paris Convention becomes an explicit regulatory standard of protection to which states that sign the TRIPS agreement must adhere.

Second, adopting regulatory standards becomes mandatory for states. Rather than being permitted to enact certain standards, states are

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⁶The Paris Convention refers to the Paris Convention For The Protection Of Industrial Property of 20 March 1883 as last revised at Stockholm on 14 July 1967 and amended in 1979. The Berne Convention refers to the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 as last revised at Paris on 24 July 1971 and amended in 1979.

⁷Drahos, P. 'Global Property rights in information: The story of TRIPS at the GATT' *Prometheus* 1995 13 6–19

⁸See article 34 of TRIPS.

⁹Under the Paris Convention, states are free to determine criteria of patentability. See Bodenhausen, G H C *Guide to the application of the Paris Convention For The Protection Of Industrial Property* BIRPI, Geneva and Switzerland (1968), p. 15. Under article 27 of TRIPS states cannot exclude from patentability micro-organisms and essentially non-biological and microbiological processes for the production of plants or animals.

¹⁰See, for example, article 5(1) of the Berne Convention and article 2(1) of the Paris Convention.

¹¹For a critical discussion of this see David, P A 'Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History' in Wallerstein, M B, Mogee, M E and Schoen, R A (eds) *Global Dimensions Of Intellectual Property Rights In Science And Technology* National Academy Press, Washington and DC. (1993), 19–61.

¹²In Australia, the economic evidence seems to suggest that Australia has nothing to gain in welfare terms from the globalization of intellectual property. See Industrial Property Advisory Committee, 'Patents, innovation and competition in Australia' Australia (1984); Bureau of Industry Economics, 'The economics of patents' Occasional Paper 18, AGPS, Canberra (1994); Office of Regulation Review, 'An Economic Analysis of Copyright Reform' Commonwealth of Australia (1995); Gruen, N, Prior, G, Bruce, I 'Extending patent life: is it in Australia's economic interests' Industry Commission, Staff Information Paper, June 1996.

¹³For a discussion of international justice, see Beitz C R 'Political Theory and International Relations' Princeton, NJ (1979)

¹⁴For a discussion of the issues, see Kloppenburg Jr, J R (ed) 'Seeds and Sovereignty: The Use and Control of Plant Genetic Resources' Duke University Press and the American Association for the Advancement of Science, Durham and London (1988).

required to adopt certain standards. Often, these standards are foreign to their existing legal tradition. A good example is the reversal of the onus of proof in the case of process patents, something that is contrary to the traditions of, amongst others, Australia.⁸ Another example is that states have less discretion to determine the criteria of patentability.⁹

A third outcome of the global period is that intellectual property owners find that the intellectual property systems around the world begin to converge on the same substantive standards. The international period of intellectual property sees equal treatment but not equal standards. Globalization sees equal treatment according to standards that are the same for all. This is because, in the global period, the principle of national treatment is not abandoned but rather is tied to a higher set of standards of protection for intellectual property. The principle of national treatment, or assimilation as it is sometimes called, simply requires a state to extend to non-nationals the same rights and obligations in respect of intellectual property which it extends to its own nationals.¹⁰ Once states begin to harmonize their national standards of intellectual property protection, the effect of the principle is that the citizens of different states come to possess the same set of rights and obligations as each other. The citizens of Rwanda, for example, just like the teams of genetic engineers working for Pfizer Corporation, have the right to apply for a patent on a genetically engineered micro-organism in the US; and those Pfizer teams have the same right to apply for a patent in Rwanda. Both US and Rwandan patent law must recognize the patentability of microorganisms, and both states must extend those rights to non-nationals. When the principle of national treatment is combined with national laws that have been harmonized the outcome is that the nationals of states find themselves in a position of formal reciprocity, each possessing the same set of rights and obligations in each other's territory. Obviously, the capacity of citizens of different countries to exploit a reciprocally globalized set of duties and rights for intellectual property will vary dramatically.

There are three kinds of consequences of property globalization: efficiency, distributive and moral autonomy consequences. The first type of consequence relates to the likely welfare effects of a set of intellectual property norms that have been unified on a world basis. One question is whether overall global welfare will be raised by such a set of norms.¹¹ Other questions relate to the welfare gains for particular regions or groups of countries, like developing countries or industrialized countries or simply individual countries.¹²

A second set of issues relates to the distributive effects of a globally harmonized intellectual property regime. Even if there are dynamic efficiency gains to be had from a globalized intellectual property regime we may be critical of such a regime, on the basis of some view of international justice.¹³ Such distributive arguments are to be found, for example, in the debates taking place over the role of intellectual property rights in plant genetic resources.¹⁴ Very often, new plant varieties are developed by transnational companies using germplasm, which they have obtained from developing countries. The new varieties are sold back to these countries. There is, in other words, a royalty flow from South to North in relation to products that would not have been possible without the South's contribution.

The third kind of consequence of property globalization is what might be termed the 'moral autonomy' or 'moral sovereignty' consequence.

Global intellectual property standards may force states to adopt regulatory models that are morally repugnant to them. Not every state, for example, will want to issue patents on life.¹⁵

Seven strategies

Non-compliance

India and other developing countries are signatories to the WTO Treaty. Under Article 2 of that agreement, they are bound by the provisions of TRIPS. Part VI of TRIPS provides for transitional arrangements with respect to the implementation dates of the provisions of TRIPS. While these provisions allow developing countries to delay the implementation of TRIPS, at some point, all developing countries will be obliged to implement its provisions.

One option might be to refuse to implement the WTO Treaty. Such an approach might be justified in the case of India, on the ground that the WTO Treaty itself 'is not binding within the Indian Constitutional system'.¹⁶ Arguing that India is not bound by the WTO Treaty because the signing of the treaty was not constitutional is a high risk strategy. Even Indian critics of the treaty concede that it offers some benefits to India.¹⁷ By pursuing this line, India, or any developing country that took a similar line, might be taken to be signalling that it no longer wished to participate in the multi-lateral trading system. Trade isolationism is a dangerous path upon which to set out.

An alternative might be to refuse to implement those parts of TRIPS that did not suit India's stage of economic development. This strategy of selective non-compliance also contains risks. To begin with, it would mean that India was in breach of some of its treaty obligations. This would make it likely that a successful action could be brought against it under the dispute resolution procedures contained in Annex 2 of the WTO Treaty. Apart from bearing the cost of the sanctions under the dispute resolution procedures (suspension of concessions, possibly on a cross-sectoral basis), a country that chose to ignore unfavourable findings against it would also have to bear the reputational costs of defiance. A defiant state might lose credibility within multi-lateral trade fora. The loss of credibility might also make it difficult for such a state to invoke the dispute resolution procedure to protect its own rights. Dispute resolution mechanisms can confer benefits as well as losses. Developing states should fully test the WTO dispute resolution procedures. By doing so, they will reveal, in a public way, the commitment of western states to such procedures, especially in those cases where WTO panels make findings in favour of developing countries.

The loophole strategy

Like all legal documents, international agreements have to be interpreted. The loophole strategy involves ascertaining the minimal set of obligations with which a state must comply in order to remain consistent with the provisions of TRIPS. TRIPS is drafted in a way that imposes minimum standards on countries rather than absolute standards (see Article 1.1). This means, for example, that there is nothing to stop a country from adopting a 30-year patent term. TRIPS merely obliges a country to have at least a 20-year term. Clearly then, a state can choose to follow a strategy of rule compliance based on an interpretation of what constitutes

¹⁵Section 18(2) of the *Patents Act 1990* (Australia) declares that human beings and the biological processes for their generation are not patentable inventions. In 1996, a private member's bill to amend the Patents Act was introduced. Its purpose was to prevent the patenting of naturally occurring genes.

¹⁶Krishna Iyer, V R, Chinnappa Reddy, O, Desai, D A, Sachar, Rajinder 'Peoples' Commission On GATT' Centre for Study of Global Trade System and Development, New Delhi (1996) 164.

¹⁷These benefits are primarily in the agricultural sector. See Dubey Muchkund, 'An Unequal Treaty' New Age International Ltd and New Delhi (1996) 12.

the minimum possible set of obligations under TRIPS. Whereas some Indian scholars have articulated the desirability of such a strategy, it is important to bear in mind its limitations.¹⁸ The fundamental problem with the loophole strategy is that the interpretation of an international agreement is *not a unilateral exercise*.¹⁹ India can adopt an interpretation of TRIPS by some act of political fiat. But to do so entails the problem that other states will have their own views as to what obligations the TRIPS provisions impose. India and the US might, for instance, differ as to the scope of patentable subject matter under Article 27 of TRIPS. Such disputes over interpretation would have to go to the Dispute Settlement Body, and under Article 3.2 of the Dispute Resolution Agreement, the clarification of provisions will be done in “accordance with customary rules of interpretation of public international law”.

There is simply no guarantee that India’s view of the text will prevail in the WTO dispute resolution process. Ultimately, India may find it difficult through this strategy to escape the language of the TRIPS text as it stands. The loophole strategy is a lawyer-intensive strategy. It draws one into a mire of legal complexity. It also tends to favour a well-researched opponent like the US which has extensive experience in the trade litigation game. Whereas, it is a strategy worth thinking about, not too much faith should be vested in it, and it cannot be the only strategy.

The soft law strategy

Within international law, a distinction is sometimes drawn between hard and soft law. Soft law can take the form of a declaration, statements of principle, code of conduct, and so on. A soft law norm is generally thought not to have the quality of bindingness associated with hard law.²⁰ A state faced with a soft law norm always has the option of saying that the norm imposes no legal obligation. The distinction between soft and hard law is problematic in all sorts of ways, but this is not the place to pursue the matter.²¹

For present purposes, it is important to observe that soft law can sometimes metamorphose into hard law. There are two areas of international law where soft law norms have led to concrete legal obligations: human rights and the environment. The international environmental law area is populated by hundreds of soft law norms, but there are also a few examples of hard law like the Montreal Protocol of 1987. The fact that soft law can lead to hard law suggests that one strategy of success in the international system is to concentrate on the generation of soft law norms and count on their eventual evolution into hard norms. However, a crucial question, which has been little investigated, is under what conditions will soft law evolve into hard law? What we have termed a ‘soft law strategy’ does not always bring success. For example, developing countries embarked upon what was essentially a soft law strategy in calling for a New International Economic Order (NIEO). The work done under the NIEO did not produce the cooperation that developing countries were looking for in terms of a sharing of resources and technology between North and South. In fact, precisely the reverse has happened. One effect of TRIPS will be that resources and royalties will flow from South to North. TRIPS also lays firmly to rest the idea that technology is the common heritage of mankind and replaces it with the idea that technology is the heritage of the heirs of intellectual property owners.

¹⁸Dubey, Muchkund ‘*An Unequal Treaty*’ New Age International Limited and New Delhi (1996) 135–136.

¹⁹Johnstone, I ‘Treaty interpretation: The authority of interpretive communities’ *Michigan Journal Of International Law* 1991 12 371

²⁰Weil, P ‘Towards relative normativity in international law’ *American Journal of International Law* 1983 77 413

²¹See the section on soft law in D’Amato, A (ed.) ‘*International Law Anthology*’ Anderson Publishing Co. (1994) 149–157.

Generally speaking, a soft law strategy will only work where there is an institutional or rule vacuum in a particular area. Soft law can fill that vacuum. A soft law strategy is unlikely to work where no such vacuum exists. Hard law, we might say, always trumps soft law. TRIPS represents hard law. In practical terms, this means that organizations like UNCTAD should devote less energy to new soft law activities. As human rights scholars have pointed out, the excessive use of soft law in the human rights arena has cheapened the currency of soft law forms. Furthermore, soft law forms tend to be high on principle, but weak on institutionalization, implementation and enforcement.²²

One of the striking features of international regulation in the last two decades has been the almost exponential growth in NGO activity. This activity takes the form of lobbying, networking, publicizing, and educating. NGOs both shape and are shaped by social movement politics. Within developing countries NGOs have been at the forefront in pointing out the implications of western intellectual property regulatory models for developing countries, particularly on topics like seed rights, farmers' rights and the patenting of biological and genetic resources. A declaration is a typical conference result where NGOs participate.²³ Such declarations can be thought of as soft norms (to distinguish them from soft law). They are soft norms because NGOs are not law making bodies, nor are they a source of international law (they may indirectly influence state conduct but that is a separate issue). This soft norm activity is vitally important because it symbolizes the emergence of a coalition against the extension of intellectual property. This coalition is slowly becoming a global one as consumer and environmental organizations in the west begin to understand the negative impact of TRIPS on their own constituencies.

To sum up, soft law strategies are only likely to have limited success in the intellectual property arena because of the presence of hard law. Soft norm strategies are vital to the building of a coalition against the extension of the intellectual property paradigm.

The strategy of counter-proposal

Experienced activists know that changing something through criticism alone is difficult. Policy-makers need to be able to see what the alternatives are and they need to see that the alternatives are plausible ones. By placing an alternative on the table, its proponent can at least start a debate and perhaps elevate previously neglected issues.²⁴ One of the reasons that proponents of global intellectual property protection have been successful is because of the way they have framed the debate. There is a phenomenon, well known to psychologists, called 'framing bias'. Basically, the psychological studies show that, when people have to choose between equally risky alternatives, their choice is very much affected by whether the alternatives are presented as a loss or a gain.²⁵ In other words, it is the manner in which the issues are presented, rather than the substantive probabilities, that affects individual decision-making. On a more macro scale, there appears to be a great deal of framing bias of one kind or another going on in intellectual property. A deep irrationality pervades policy-making in intellectual property. In field work carried out by Braithwaite and Drahos, senior policy makers from many countries expressed support for the globalization of intellectual property, even though their own country was a net intellectual property importer and could, in all probability, never hope to be a net exporter.²⁶

²²Schachter, O 'Recent trends in international law making' *The Australian Year Book of International Law*, Faculty of Law, ANU, Canberra (1992) 12 1–15, 14.

²³The International Conference On TRIPS, MAI And Spread Of Global Dominance Of MNCS, organized by the Forum of Parliamentarians On Intellectual Property and National Working Group On Patent Laws, New Delhi, 14 and 15 November, 1996 culminated in a declaration.

²⁴Braithwaite, J 'A sociology of modeling and the politics of empowerment' *British Journal of Sociology* 1994 45 445–479

²⁵Tversky, A and Kahneman, D 'The framing of decisions and the psychology of choice' *Science* 1981 211 453–458

²⁶Fieldwork for project on global business regulation, funded by the National Science Foundation and the Australian Research Council.

When confronted by their status as net importers, they could offer no real justification for their belief, except to suggest that, perhaps one day, they would be exporters.

The framing bias in intellectual property works in favour of stronger protection. Strong intellectual protection has been identified with efficiency gains, more innovation, more jobs and a stronger economy, whereas weak intellectual property protection has been linked to dynamic efficiency losses, lack of innovation and a loss of creativity. If people are told that strong intellectual protection is necessary to protect and stimulate the economy, they will probably be sympathetic to the proposal. If they are told that intellectual property rights are not property rights at all, but monopoly privileges that will result in, for example, much higher public health care costs or higher CD prices, they will probably ask why, in a deregulatory era, should some companies be given the privilege of a shield from competition?²⁷

The strategy of counter-proposal in relation to intellectual property has two basic elements. The first is to bring about a discourse change. This entails a shift away from the modern tendency to think about intellectual property as a form of property right and a return to the medieval way of thinking about intellectual property as a state-created privilege. The language of privilege will have the effect of engendering a healthy scepticism about the use of intellectual property as a tool of economic management. The second part of the strategy is to link intellectual property to other regulatory issues such as competition policy, freedom of speech and public health care. The idea is to reframe intellectual property as a public health care issue or a freedom of speech issue, rather than allowing it to be presented as an indispensable tool of modern economic management.²⁸ There are already counter-regulatory models to draw on. The Center for Study of Responsive Law in the US, for example, has done a lot of work on the nexus between intellectual property and health care. It has developed regulatory proposals designed to improve expenditure on pharmaceutical R and D that do not depend on globalizing one set of intellectual property standards.²⁹

The economic transparency strategy

As any economist knows, there are costs to intellectual property protection. These costs include the transaction costs of transferring the rights, the costs of protection and enforcement (it costs a lot to set up a patent office), the costs of failing to diffuse useful information (it costs lives not to diffuse drug information) and rent seeking costs (lots of companies spend money chasing ideas that would have been discovered over time anyway).³⁰ One of the basic problems with TRIPS is that we have very little understanding of the real world costs of such an agreement. From the patents literature one suspects that these costs will be very high. An Australian study carried out by the Industry Commission showed that the cost to Australia of the extension of the patent term (required under TRIPS) could possibly amount to \$3.86 billion in net present value terms.³¹

It is a striking feature of the Uruguay Round of trade talks that most countries went into those talks without any real understanding as to what TRIPS might cost them. One obvious strategy is to begin to gather data on the real world costs of TRIPS. This work should be carried out by the

²⁷On the impact of patents on the prices of drugs in India see Keayla, B K 'New Patent Regime: Implications for Domestic Industry, Research and Development and Consumers' National Working Group on Patent Laws 1996 21–22; For the impact of copyright on CD prices in Australia see Prices Surveillance Authority, *Inquiry Into The Prices Of Sound Recordings*, Australia (1990).

²⁸On the link between intellectual property and communication see Drahos, P 'Decentring communication: the dark side of intellectual property' in Campbell T and Sadurski W (eds) *Freedom Of Communication* Dartmouth, Aldershot (1994).

²⁹See Love, J 'Patents vs People' *Multinational Monitor*, June 1994, Love, J P 'Background documents on health care and intellectual property rights', prepared for the international conference on TRIPS, MAI and spread of global dominance of MNCS, New Delhi, India, 14–15 November, 1996.

³⁰See Bureau of Industry Economics, Working Paper 104, *The Economics of Intellectual Property* May 1995, 18–20.

³¹Gruen, N, Prior, G and Bruce, I 'Extending patent life: is it in Australia's economic interests' Industry Commission, Staff Information Paper, June 1996.

WTO and provided to all the member states, so that, in any future negotiations over TRIPS, members will know what they stand to gain or lose.

The preamble to the TRIPS Agreement recognizes that intellectual property protection has public policy objectives “including developmental and technological objectives” and Article 7 states that intellectual property should contribute to, amongst other things, “the transfer and dissemination of knowledge”. Article 68 of TRIPS states that the Council for TRIPS “shall carry out such other responsibilities as assigned to it by the Members”.

Member states should direct the Council for TRIPS to establish a Cost Review Mechanism. The express purpose of this mechanism would be to track the costs to states of implementing TRIPS, the effects on consumers in terms of increased prices, the anticompetitive effects of TRIPS and so on. The Cost Review Mechanism would be one way in which to ensure that the language to be found in TRIPS— about the needs of developing countries (Part IV), the desire that intellectual property rights contribute to the dissemination of technology (Article 7) and the right of members to adopt measures necessary to protect public health and nutrition and to prevent the abuse of intellectual property rights (Article 8)—amount to genuine principles that guide the development of TRIPS, rather than just remaining a rhetorical flourish.

International reporting mechanisms are to be found in a number of international conventions, including the Vienna Convention for the Protection of the Ozone Layer, the Convention on Biological Diversity and various International Labour Organization Conventions. There is a precedent for the establishment of such a mechanism within the WTO context. Annex 3 of the WTO Agreement establishes a Trade Policy Review Mechanism to contribute to the improved adherence by members to the WTO Treaty. A Cost Review Mechanism established under the TRIPS Agreement would help to secure *all* the stated objectives of the TRIPS Agreement. It would provide a public good for all members of TRIPS. It would also be consistent with the principle of transparency that is enshrined in the WTO Agreement.

The independent umpire strategy

During the course of their US fieldwork involving interviews on the internationalization of business regulation, Braithwaite and Drahos found that a number of people expressed confidence in the WTO dispute resolution process. This is probably not surprising, since options like cross-sectoral retaliation favour countries that are large markets for other countries. The US has other reasons to be confident about the WTO dispute resolution process. The Office of the US Trade Representative has publicly been articulating its views of what TRIPS entails in terms of obligations for other countries. This outpouring of views may have a significant influence on the direction in which WTO Dispute Resolution panels develop a trade-related jurisprudence of intellectual property.

The real question is whether other countries, and developing countries in particular, should have any confidence in the WTO dispute resolution mechanism. Here there are grounds for developing countries to be sceptical. US business representatives will probably continue to tell the US Congress that the US 301 and Super 301 procedures remain “the indispensable trade weapon”.³² Moreover, even if a WTO panel were to

³²See ‘The Indispensable Trade Weapon: 301/Special 301’ a commentary and appraisal by Jack Valenti, President and CEO. Motion Picture Association of America, Senate Finance Committee, Washington DC (1992). Under the US Trade Act of 1974 as amended the United States Trade Representative is authorized to take unilateral action against states which in some way act adversely to US intellectual property interests. These statutory processes are known as ‘Regular 301’, ‘Special 301’ and ‘Super 301’. See Getlan, M ‘TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution’ *Columbia Journal Of Transnational Law* 1995 34 173, 178–184.

declare that the use of 301 procedures were illegal in a given case, this illegality may not bother the US. Many US trade retaliations under the GATT prior to the WTO were almost certainly illegal.³³

In the light of this, developing countries are right to be suspicious of the WTO dispute resolution process; but there is a deeper issue. A complex multilateral international trading system requires, for its long-term stability, a genuine commitment to the rule of law. To the extent that states operate outside of dispute resolution mechanisms for short-term gains, they undermine the achievability of that long term goal.

One possibility here is to start thinking about increasing the involvement of the International Court of Justice (ICJ) in trade matters. It might be thought that the International Court should not sully its hands with trade matters and that such matters should be left to the WTO. This is wrong for this reason. Trade matters will increasingly come to determine the economic fate of sovereign states. Through the principle of linkage, trade issues will continue to become enmeshed in issues of morality and justice. Allowing WTO panels to determine such issues on the basis of a free trade mythology simply will not build confidence in the multilateral trading system.

An alternative is to begin thinking about how to involve the ICJ in the construction of a public and internationally spirited jurisprudence that attends to the trade and other complex interdependencies to be found in relations between peoples and states. More specifically, countries like India should begin a debate about the need to reform the ICJ, expanding its compulsory jurisdiction, changing the European character of the court, and relocating its venue in Asia somewhere.³⁴ By starting such a debate in the context of the emerging world trade order India may well attract the support of other countries that see their interests best served through the rule of law.

A hard law strategy

Trade respects power. The case of intellectual property suggests that trade also follows power. The US was able to increase trade in its intellectual property rights through the use of economic coercion. Economic coercion is only possible if a relationship of dependency exists between states. The US was able to use its 301 process because it had integrated many developing countries into its economy through the Generalized System of Preferences (ironically, the GSP had been first devised by UNCTAD to assist developing countries). Through their dependence on the US market, developing countries became vulnerable to US threats.

What follows is a suggestion for a counter-coercive strategy. Its starting point is the observation made by scholars in developing countries that many of the abstract objects on which Western economies depend or are likely to depend are to be found in the cultural, social and biological resources of developing countries.³⁵

The basic idea starts with the creation of a *sui generis* regime for indigenous knowledge that is favourable to developing countries. Creating *sui generis* regimes has been a strategy employed with great success by the US to protect its own industries in the global economy. The case of semiconductor chip legislation provides a good example. Under the patent regime, US chip makers very often could not obtain patent protection because their chips did not jump the patent hurdles of

³³See Hudec, R E 'Dispute Settlement' in Schott, J J (ed) *Completing the Uruguay Round* Institute for International Economics, Washington DC (1990) 180, 198.

³⁴See Palmer, G 'The ICJ in the Asia Pacific Region' Australian and New Zealand Society of International Law, *Proceedings of the Fourth Annual Meeting* Australian National University, Canberra 1996 225–250.

³⁵See Shiva, V *Protecting our Biological and Intellectual Heritage in the Age of Biopiracy* Research Foundation for Science and Technology and Natural Resource Policy (1996).

novelty and inventiveness. The industry persuaded the US Congress to pass the Semiconductor Chip Protection Act of 1984. Naturally, this US Act did not apply to other countries, but the US was able to globalize its semiconductor chip regime by offering protection to foreign chip-makers on a reciprocal basis. Those countries that wanted access to the US market agreed to protect US semiconductor chips in their own country in return for protection of their own chips in the US. The US strategy was a strategy that made use of the principle of reciprocity, and it worked because of conditions of market dependence.

A possible *sui generis* strategy for developing countries is this. Each developing country should legislate for a *sui generis* form of protection for indigenous knowledge within its borders. Indigenous knowledge should be construed as widely as possible. It should include not just knowledge about genetic resources but also indigenous art and traditions. It should be deliberately defined in an open-ended way to include the knowledge of a people, practices, places and things. The key idea would be to devise an all-embracing model of protection for the physical, cultural and social resources of indigenous peoples. This would have to be done in consultation with indigenous peoples and their NGO organizations. It should be added that there are regulatory models to draw on. African states, for example, worked through WIPO in the 1960s to launch an initiative for the protection of folklore, an initiative that led to the drafting of some model laws.³⁶

The second stage of this *sui generis* strategy would be to link the national statutory regimes of developing countries that were participating in the process. That is to say, that each developing country would recognize the indigenous knowledge regime of another country on a reciprocal basis. Ideally, developing countries would have formed, through a process of consultation and cooperation, a common set of standards for the protection of indigenous knowledge. An individual country would only be able to gain protection for the indigenous knowledge of its inhabitants in another country provided it extended protection to the indigenous knowledge belonging to peoples in other countries. Once a significant number of developing countries agreed to participate in such an arrangement and had demonstrated its feasibility, at least some Western countries would be likely to join. In this way, a regulatory model for the protection of indigenous knowledge could be networked and globalized.

The real power of this proposal comes from the possibility of a strategic alliance on the issue of indigenous knowledge between key developing countries. Imagine the power of a reciprocal arrangement between, say, India, China and Indonesia. Unity of attitude and approach would be absolutely crucial to this proposal. The US was not able to succeed in its TRIPS objectives without the assistance of Japan and Europe. The strategy being outlined here would only succeed if developing countries were prepared to cooperate in the creation of a standardized statutory regime for indigenous knowledge. In the longer term, developing countries could work towards the creation of a multilateral treaty on indigenous knowledge. If it suited their purposes, they could contemplate incorporating such a treaty into the TRIPS Agreement.

There is every reason to think that developing countries could come together on this strategy. The Chinese Intellectual Property Office in recent times has become interested in the protection of folklore, realizing the threats that globalization poses to traditional Chinese culture.³⁷ The

³⁶A copy of the model law is contained in volume 10(2) of the *Copyright Bulletin* UNESCO (1976).

³⁷See paper by Xu Chao, Director, National Copyright Administration of China, 'Legal Protection for Folklore in China' given at the International Conference on Artistic and Cultural Expressions, Traditional Knowledge, and Protection Of Heritage, University of Queensland, Brisbane, 27-29 September 1996.

regime being proposed here, of course, would seek to protect all kinds of indigenous knowledge, not just artistic or cultural knowledge.

This strategy is also perfectly consistent with existing intellectual property conventions. Most indigenous knowledge falls outside the scope of protection offered by standard intellectual property regimes. Developing countries could, as a matter of sovereign right, adopt a scheme of protection for indigenous knowledge without breaching any of their international treaty obligations in the field of intellectual property.³⁸ If there are no property rights in indigenous knowledge, then, for many countries, such knowledge will simply remain a free input of production. The absence of property rights will not change the status of indigenous knowledge as an economically valuable resource. The presence of property rights in such knowledge will affect the direction of wealth transfer.

To sum up the creation of a *sui generis* regime for indigenous knowledge would make possible the existence of a countervailing power. Carried out properly, this strategy offers the possibility of successful action against the prevailing intellectual property elite. Developing countries, in protecting their indigenous people and their knowledge, would also be protecting themselves.

³⁸The Convention on Biological Diversity recognizes the interests of indigenous communities in their knowledge and practices and obliges members to act in ways which are consistent with those interests (see, for example, Articles 8(j) and 10(c)). Article 29 of the UN Draft Declaration on the Rights of Indigenous Peoples provides that indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. The TRIPS agreement does not preclude states from creating *sui generis* schemes of protection for indigenous knowledge, since this subject matter falls outside of the scope of the agreement. Moreover, article 27 of TRIPS explicitly recognizes the right of states to create a *sui generis* system for plant varieties.

Conclusion

This paper deliberately avoids ranking the strategies according to some set of criteria. Each of the strategies may, at some point, have a use. The strategy of non-compliance may, for instance, have some short-term value. The strategies can also be combined in various ways. The loophole strategy and the strategy of counter-proposal might be combined to produce a health care proposal for the manufacture of generic drugs that is consistent with TRIPS and acceptable to developing countries. Some strategies, like the independent umpire strategy and the hard law strategy, are clearly longer term and rely on the cooperation of other states.

Finally, these seven strategies do not constitute an exhaustive list. There are many ways of working towards freedom. The proposals here simply add to and build on the suggestions that scholars, activists and others in developing countries have been discussing and pursuing.