TRIPS and the Sufficiency of the Free Trade Principles

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INTRODUCTION

The technological revolution was central to the apotheosis of trade and intellectual property. As new technologies became vital to production, powerful proprietary interests pursued the global protection of intellectual property. Intellectual property became a trade issue.[1] In the merger of trade and intellectual property law under the World Trade Organization (WTO), the free trade principles of most-favoured-nation (MFN) and national treatment inform the resulting Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[2] While the national treatment principle prohibits internal trade discrimination, the principle of MFN treatment aims to ensure that any advantage extended to one Member State is equally extended to all other Member States. In their operation, therefore, the free trade principles are basic disciplines, intended to provide a substructure for the transformation of conflict into a mutually beneficial social order.

The Great Depression of the 1930s and World War II provided the philosophical impetus for the multilateral embodiment of the free trade principles under the Havana Charter of the International Trade Organization (ITO). The protectionist measures of the inter-war period, in the form of excessive tariffs and preferential tariff schemes,[3] were linked with social unrest, political extremism and war. Protectionism was perceived as the antithesis of free trade and peace. Liberal trade and freedom for commercial transactions were seen as the best way to promote the public welfare, based

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[1] Gail E. Evans, *Intellectual Property as a Trade Issue: The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 18 World Comp. 2, December 1994, 137–180.

[2] When WTO Member States resolve to engage in substantive international rule-making, a new kind of international legislating is created which sees the merger of private law and public international law: see Gail E. Evans, *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organization*, Dissertation for the Degree of Doctor of Juridical Studies, University of Sydney, June 1999, Chapter 4, at 141, original on file with the author; see also David Kennedy, *The Disciplines of International Law and Policy*, 12 Leiden Journal of International Law 9, (1999) 32–33.

[3] In the inter-war period, increasing tariffs, particularly those enacted in the early 1930s by the Smoot-Hawley Tariff Act in the United States and comparable measures elsewhere, led to sharp declines in imports and exports. Some economic historians go so far as to conclude that these protectionist measures contributed significantly to the Great Depression, causing social unrest, extreme political solutions and ultimately world war: see, e.g. J.H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade*, Bobbs-Merrill, Indianapolis, 1969, 35–57; and J.H. Jackson, *Restructuring the GATT System*, Pinter, London, 1990, 9–17.

on the classical economic theories of comparative advantage and economies of scale.[4] In the event of the demise of the International Trade Organization, the General Agreement on Tariffs and Trade (GATT) 1947 contained the basic disciplines or static principles designed to translate the theory of free trade into law.[5]

Forty-seven years later, their affirmation in GATT 1994[6] and their extension to the TRIPS Agreement not only seek to affirm the philosophy of free trade but to underscore the contemporary relevance of the principles to the universalisation of intellectual property law.[7] The free trade principles are therefore constitutional, not only in the literal sense that they are entrenched in the WTO Charter,[8] but also in the functional sense that the constitution of the WTO utilises these principles to provide a platform from which its lawmaking is delivered.[9] The global reach of the free trade principles can be understood only in the light of the magnitude of WTO membership, which presently stands at more than one hundred and thirty States. In this regard, their influence extends far beyond the Charter in as much as they drive the dissemination and enforcement of law among Member States. Together, they create order, sovereign rights and freedoms in the process of universalising intellectual property rights and the body of substantive commercial law that now constitutes the Charter. Thus, an act or provision of a national legislature may be challenged as invalid on the ground that it contravenes one of these basic cornerstones of the WTO constitution—that Member States are not allowed to

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[4] The theory of free trade is inspired by the arguments of classical economists. See D. Ricardo, *On the Principles of Political Economy and Taxation*, 1821, Chapter VII, in P. Sraffa, ed., *The Works and Correspondence of David Ricardo*, Cambridge University Press, New York, 1953, Vol. I; R. Dornbusch, S. Fischer, and P.A. Samuelson, *Comparative Advantage, Trade and Payment in a Ricardian Model with a Continuum of Goods*, 67 American Economic Review, December 1977.

[5] For a discussion on how the permissive norms of liberal society facilitate the transnationalization of civil society when translated into the constitutional law of States, see J.-P. Robe, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in G. Teubner, ed., *Global law without a State*, Dartmouth Pub., Aldershot, England, 45 at 61–62.

[6] The GATT 1994 consists of the Understandings and Agreements of Annex 1A of the Final Act. Incorporated into the GATT 1994 is the original General Agreement on Tariffs and Trade of 30 October 1947 (GATT 1947) annexed to the Final Act of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The GATT 1994 specifically excludes the Protocol of Provisional Application, but includes the protocols and certifications to tariff concessions, protocols to accession, the listed waivers granted under Article XXV of the GATT 1947 granted before the date the WTO Agreement enters into force, and other decisions of the Contracting Parties of the GATT 1947. Final Act, note 8, Part II, Annex 1A, para. 1, 33 ILM at 1154–55. The GATT 1994 also embraces several Understandings on the Interpretation of Articles II, para. 1(b), XVII, XXIV, and XXVII of the GATT 1994, as well as Understandings on Balance-of-Payment Provisions and in Respect of Waivers of Obligations under the GATT 1994. Id., at 1156–65.

[7] On the fundamental validity and continued relevance of the doctrine of free trade, see J.N. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 NYU J. International Law and Politics, (1993) 219 at 233–234.

[8] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh Agreement Establishing the World Trade Organization, signed at Marrakesh, Morocco, 15 April 1994 (hereinafter WTO Agreement), Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement), reprinted in GATT Secretariat, ed., *The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts*, Geneva, 1994, 1–19, 365–403. Note that the principles of MFN and national treatment may only be amended by the acceptance of all Member States: Article X, WTO Agreement.

[9] On the notion of the static and dynamic constitutional principles of the GATT, see W. Fikentscher, *GATT Principles and Intellectual Property Protection*, in F.K. Beier and G. Schricker, eds., *GATT or WIPO? New Ways in the International Protection of Intellectual Property: Symposium at Ringberg Castle*, 13–16 July 1988, VCH Publishers, Cambridge, 1989, 113–119. See also G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 Recueil des Cours (1966) 1–98; and Ernst-Ulrich Petersmann, *Constitutional Functions of Public International Economic Law*, in P. Van Dijk, F. Van Hoof, A. Koers and K. Mortelmans, eds., *Restructuring the International Economic Order: The Role of Law and Lawyers*, Kluwer, Deventer, 1987, 55–64.

discriminate against other Member States or their nationals. Conversely, the credibility of the TRIPS Agreement, and the Charter itself, rests largely on the capacity of these principles to sustain existing laws and to underpin the development of new norms of substantive law. How and to what extent they can do so remains—at least in the case of intellectual property, as we shall see in the following case study of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 1997—a moot point.

Whereas under GATT 1947[10] the free trade principles underpinned intergovernmental law concerning tariffs, customs, quotas and subsidies, under the WTO the same principles are being used to underpin the universalisation of private law. The expression of the MFN treatment with reference to the nationals of Member States within the TRIPS Agreement is an unprecedented development. The expansion of WTO lawmaking into areas of private law should lead us to question the use of the free trade principles of MFN and national treatment as a sufficient underpinning for the universalisation of substantive norms of law. As the history of European economic integration demonstrates, law also has social and cultural dimensions which must ultimately be taken into account as factors affecting compliance. Under the Great Conventions[11] of the nineteenth century, the international harmonisation of intellectual property was supported by the national treatment principle, which allowed for social and cultural differences between States in the expression of laws. By way of complement, the GATT 1947 treated intellectual property as an exception to the disciplines applicable to trade in goods, given its proximity to the national interest in matters affecting society and culture.

Studies in the emergence of legislation emphasise the centrality of economic and financial interests in influencing the shape of law.[12] As new technologies become vital to production, powerful proprietary interests pursue the global protection of intellectual property. So the genesis of TRIPS came from industry and the dominant intellectual-property-owning States.[13] Given the economic supremacy of the United States and the European Union, this means that the expression of the law is informed by Western values and ideals. In the case of TRIPS, this is reflected in kinds of knowledge which should be within the public domain, rather than excluded from it by the imposition of private property rights. Moreover, in so far as TRIPS mandates legally enforceable norms, what we now have is, in effect, a directive to implement minimum standards of protection that, as a result, considerably limit the capacity of State legislatures to respond to discrete social needs and cultural values. The case of *India—Patent Protection*, in which the Appellate Body adopted a narrow interpretation of compliance with TRIPS, makes this only too evident.

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[10] GATT 1994, *supra*, footnote 6.

[11] The Paris and Berne Conventions are also known as the Great Conventions: the *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm in 1967; the *Berne Convention for the Protection of Literary and Artistic Works*, as revised in Paris 1971; see further S.P. Ladas, *Patents, Trademarks and Related Rights: National and International Protection*, 2 vols., Harvard University Press, Cambridge, Mass., 1975, Vol. 1 at 47.

[12] B. Roshier and H. Leff, *Legislation and Society in England*, Tavistock, London, 1980, Chapter 1.

[13] Evans, *supra*, footnote 1, at 137.

The notion of a global law for a single global market aimed at securing intellectual property rights and investor freedoms may serve the needs of transnational business, yet it may also involve a homogeneity that is simply unrealistic and even unnecessary in a community of over one hundred and thirty Member States. With the advent of the information economy, the future of TRIPS will inevitably see adjustments to the notion of uniformity demanded by a WTO that is supporting an ever-increasing number of Member States[14] and regulatory functions.[15] The aim of this article is to stimulate debate concerning the extent to which the TRIPS Agreement may function effectively as a uniform set of minimum standards and yet accommodate some divergence in the expression of those norms among Member States. It argues that, given the merger of the free trade principles with mandatory norms of universal intellectual property protection, it is essential that we also address the issue of justice in a pluralist global society with a co-operative and flexible approach to implementation.

In the exposition of this argument, Part I examines the constitutional role that MFN and national treatment play within TRIPS as they interact to universalise intellectual property law. It puts forward the notion of "substantive MFN" in so far as MFN treatment under TRIPS is linked to a body of mandatory, legally enforceable, substantive provisions. It contrasts the principle role occupied by the national treatment provision under the Great Conventions of the nineteenth century with what is now its relatively supporting role under TRIPS.

Part II offers a case study of the approach to decision making in *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 1997, the first intellectual property dispute to be adjudicated by the WTO, with a view to ascertaining whether the free trade principles can sustain the universalisation of intellectual property given that it is an area of law so closely related to the cultural heritage of Member States. It explains how, in the reasoning of the adjudicators, the free trade principles, underpinned by theories of comparative advantage and wealth maximisation, inform the interpretation of the TRIPS provisions.

As evidenced by the case study, Part III argues that the dominance of the notion of legitimate expectations within the decision-making process only serves to reinforce factors affecting allocative efficiency over considerations of cultural relativity and substantive justice. In the universalisation of intellectual property law within a pluralist global society, it warns of the limits of the trade court's brand of legalism in so far as its ostensible disregard of the dichotomy between legitimacy and justice may ultimately serve to undermine the credibility of WTO law.

Part IV examines the dissonance between intellectual property law and free trade

[14] Signatories to the Final Act of the Uruguay Round, 15 April 1994, comprised one hundred and eight nations. On 20 December 1998, WTO membership rose to one hundred and thirty-three with the accession of the Kyrgyz Republic: «http://www.wto.org». There are currently thirty applicants for accession, including China and Russia: GATT Focus, No. 34, October 1998, at 3–6.

[15] The TRIPS Council has commenced preparations to report on electronic commerce issues related to TRIPS to the General Council in July 1999: World Trade Organization, Electronic Commerce and the Role of the WTO, Special Studies 2 (1998) at 53–54.

theory. It submits that, in the singular case of intellectual property—an area of commercial law with a discrete social dimension—the allocative and distributive arguments underlying free trade theory need to be matched by strategies and techniques which bring flexibility to the decision-making structure. With respect to possible legal means, the author suggests that the principle of subsidiarity has the capacity to accommodate the need for a concept of social accountability or responsibility at the global level. In conclusion, in cases concerning the implementation of TRIPS in developing Member States, the author calls for the WTO to openly avow a concern for equity by employing principles which take account of factors related to the level of economic development and cultural relativity.

I. THE TRIPS AGREEMENT AND THE ROLE OF THE FREE TRADE PRINCIPLES

A. FROM HARMONISATION TO UNIVERSAL MINIMUM STANDARDS OF INTELLECTUAL PROPERTY PROTECTION

The cornerstone of the Great Conventions of the latter nineteenth century was the principle of national treatment.[16] It was on the basis of national treatment that the demand by European nations for protection against the pirating of intellectual property[17] was met with a multilateral exchange of privileges between States.[18] Equality is formal; that is, it depends entirely on the treatment Member States accord to their own nationals. The equality obtained by national treatment is simply an absence of discrimination. Thus, national treatment *per se* means that the protection of intellectual property in foreign jurisdictions is dependent on the willingness of countries of import to recognise and enforce the intellectual property rights of foreigners.[19] Consequently, where the level of protection is low or non-existent, the foreign rightholder will derive little benefit from the Conventions.

In TRIPS, the linkage of trade law and intellectual property is clearly manifest in the incorporation of MFN in combination with the national treatment principle. In Article 3, national treatment requires that:

"Each Member shall accord to the nationals of other Members treatment no less favourable

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[16] As the national treatment obligation is expressed in Article 2(1) of the Paris Convention, Members of the Union "shall have the same protection as [nationals] and the same legal remedy against any infringement of their rights". Article 5(1) of the Berne Convention similarly provides that "authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."

[17] The term "piracy" has no settled meaning in international law. It is used here in its broadest sense to connote intentional and systematic mis-appropriation of intellectual property. The term "pirate nation" refers to a country where organized piracy occurs. These countries either tolerate or encourage piracy or do not enforce the law satisfactorily. The term "problem nation" is used to connote those countries in which intellectual property laws do not confer an adequate level of protection: see J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 Vanderbilt Journal of Transnational Law (1989) 747 at 770–80.

[18] Ladas, *supra*, footnote 11.

[19] On the need to overcome territorial limitations on intellectual property rights, given the globalisation of the means of production, see Paul E. Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlement?* 29 International Lawyer (1995) 99 at 100–103.

> than that it accords to its own nationals with regard to the protection of intellectual property ..."[20]

In Article 4, MFN requires that:

> "... any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."

In TRIPS, the expression of national treatment departs from that of the Paris Convention in so far as it is expressed in terms of "treatment no less favourable" than that given to nationals. The use of this expression, one commonly applied in MFN clauses, has two implications. As a general obligation, TRIPS national treatment requires each Member accord to any other Member treatment equal to that which it grants to its own nationals. Although the national treatment obligation does not require Member States accord to any other Members treatment more favourable than that extended to its own nationals, in principle, at least, Members are not prevented from granting nationals of other Members additional favours and advantages beyond those extended to their own nationals. However, the provision according most-favoured-nation treatment would *prima facie* prevent Member State A from offering a higher standard of intellectual property protection than is required to nationals of Member State B and then denying similar advantages to the nationals of other WTO Member States.

MFN, the foundational principle of a free trading system, has a long mercantile history. In the twelfth century, Italian merchants, having failed to gain monopolies in the markets of the Levant, resolved to settle for MFN or treatment no less favourable than that given to competitors. However, the traditional expression of MFN, like that of national treatment, suffers from a lack of substantive content. According to treaty practice, MFN is considered to be purely optional and consensual in character, in that a State remains free to adopt the clause as it stands, or subject to modifications. Consequently, to be legally binding under international law, MFN clauses require a grant of MFN treatment by a unilateral act.[21] Furthermore, with respect to its content, the benefits received under the MFN standard are said to constitute merely the counterpart of the advantages granted by the promisor. In this respect, MFN traditionally appears to be no more than a shell with variable and continuously varying contents.

B. TRIPS AND THE INTERPOLATION OF SUBSTANTIVE CONTENT

Under TRIPS, we find that both the MFN and national treatment principles are

[20] For the purpose of Article 3(1) as well as Article 4, that of the MFN treatment, "protection" is broadly defined to include "matters affecting ... availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as ... matters affecting the use of [such] rights specifically addressed" in the TRIPS Agreement: Article 3(1). However, as per the TRIPS Agreement, Articles 1(3) and 3(1), the requirement of national treatment is subject to exceptions provided in the Paris and Berne Conventions; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961; and the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989.

[21] Schwarzenberg, *supra*, footnote 9.

given content by virtue of the interpolation of substantive provisions. The detailed substantive provisions of the TRIPS Agreement render MFN considerably more than an empty shell with a variable content.[22] Comprehensive and detailed substantive provisions provide for the creation, maintenance and exploitation of intellectual property rights. Part II of the Agreement provides minimum standards based on the existing Conventions,[23] supplemented as necessary by new provisions not only for copyright, patents, trade marks and industrial designs but also for rights neighbouring copyright in performance, broadcasting and sound recording, geographical indications, integrated circuits and confidential information.

Additional protection with respect to copyright includes the requirement that Members extend copyright protection to computer programs and databases;[24] that the authors of computer programs and cinematographic works and the producers of phonograms be given the right to authorise or prohibit the commercial rental of their works to the public;[25] and that performers receive protection from the unauthorised recording and broadcast of live performances.[26] With respect to patents, provisions additional to the Paris Convention include a twenty-year term of protection for almost all inventions—whether of products or processes—in all fields of technology.[27] With respect to trade marks, the provisions of the Paris Convention are supplemented by requirements concerning the eligibility for protection of signs,[28] the term of their protection,[29] the minimum rights to be conferred on owners of registered trade marks, and the requirements for use, licensing and assignment.

Part III of the Agreement also sets out the obligations of Member States to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced by foreign rightholders and nationals alike. In contrast to the Paris Convention, which expressly reserves judicial and administrative procedures from the ambit of the national treatment obligation, the TRIPS Agreement contains substantive provisions in respect of the procedural, administrative and remedial measures necessary to the enforcement of intellectual property rights.[30] According to the Agreement, civil and administrative procedures should not only permit effective action against infringement of intellectual property rights but also be fair and equitable, not unnecessarily complicated or costly, and not entail unreasonable time limits or unwarranted delays.[31]

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[22] WTO Agreement, *supra*, footnote 8.

[23] Concerning the relationship between the MFN principle and the Great Conventions, note that the Paris and Berne Conventions are generally immunized from the MFN clause under a grandfather provision within the TRIPS Agreement: see J.H. Reichman, *Universal Minimum Standards of Intellectual Property under the TRIPS Component of the WTO Agreement*, in C.M. Correa and A.A. Yusuf, eds., *Intellectual Property and International Trade—The TRIPS Agreement*, Kluwer, Deventer, The Netherlands, 1998, at 26; see further, TRIPS Agreement, Article 4(b) and 4(d).

[24] TRIPS Agreement, Article 10.

[25] Ibid., Articles 11 and 14.

[26] Ibid., Article 14(1).

[27] Ibid., Article 33.

[28] Ibid., Article 15.

[29] Ibid., Article 18.

[30] Ibid., Part III.

[31] Ibid., Article 41(2).

C. THE CONSTITUTIONAL PRINCIPLES OF FREE TRADE AND THE UNIVERSALISATION OF INTELLECTUAL PROPERTY PROTECTION

It is submitted that under the WTO multilateral agreements—GATT, the General Agreement on Trade in Services (GATS) and TRIPS—MFN and national treatment have evolved to the point where they operate as constitutional principles which require Member States comply with a comprehensive body of substantive law. In combination with the substantive provisions, the obligatory implementation clause in TRIPS, Article 1, addresses former concerns about lack of content. It binds Member States to legislate for universal minimum standards of protection in the following terms:

> "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

It is submitted that, under the WTO constitution, the free trade principles provide a platform for the universalisation of minimum standards of intellectual property protection. Code-conditional MFN was a forerunner of what may be called the "substantive MFN" of the Uruguay Round Agreement—that is, MFN linked to a body of substantive rules accompanied by an obligation to implement them in domestic law. An augmented, substantive MFN operates as a means of restraint on the sovereign and territorial power of Member States. MFN acts to limit their legislative power in so far as States are required to comply with an extensive body of substantive laws for the protection of intellectual property. Similarly, the principle of national treatment operates as a restraint on the legislative power of States in so far as they are required to refrain from internal measures which would discriminate against the intellectual property of nationals of other Member States.

Both principles are therefore instrumental in removing private law, such as intellectual property, from its traditional territorial foundation and aligning it with the free trade principles of international trade law in so far as they:

- aim to ensure that domestic laws do not discriminate against either Member States or their nationals, providing the basis on which trade liberalisation proceeds or international markets are "opened up"; and
- serve to limit the exercise of national sovereignty, as Member States are only able to make law and policy consistent with these principles.

While sovereignty is still important as a means of delimiting and apportioning rights, as we saw with the designation of nationals as the beneficiaries of national treatment, its relative importance has diminished with reference to the extent of substantive lawmaking or public legislating. This is reflected in the changing role of national treatment within the TRIPS Agreement. National treatment, by reference to a body of substantive law so extensive that it effectively codifies the law, appears to be a

contradiction in nature. In this regard, the role of the national treatment principle reflects the erosion and re-conceptualisation of the traditional notion of sovereignty. In contradistinction, the centrality of the MFN principle, a principle for non-discrimination between States, has increased in proportion to the need to globalise law. Under the WTO Agreements, MFN therefore assumes the status of an absolute principle capable of providing a framework for the universalisation of commercial law.

In the final analysis, the broader question is whether the principles of free trade, as embodied in the WTO Agreements, can provide the core values necessary to underpin an extended legislative agenda inclusive of areas of law touching social and cultural policy, such as intellectual property rights.[32] In its classic operation, national treatment has proved acceptable to States in as much as they retain their sovereign freedom to make law in accordance with cultural differences and national economic policy. The limited substantive provisions of the Great Conventions largely allowed States to determine law and policy in accordance with their national interest.[33] They allowed a margin for social and cultural differences between Member countries. However, the operation of the free trade principles raises the question of the extent to which the substantive provisions of TRIPS envisage uniform intellectual property rights for transnational business and investment.

II. THE FREE TRADE PRINCIPLES AS A FRAMEWORK FOR DECISION MAKING

Case Study: *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, 1997*

A. BACKGROUND

The following case study of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, 1997*, demonstrates how, in the reasoning of the adjudicators, the free trade principles, underpinned by theories of comparative advantage and wealth maximisation, informed the interpretation of the TRIPS provisions, ultimately serving to coerce India's compliance with certain requirements for filing patent applications.

The case concerned a complaint by the United States that India had failed to comply with certain patent provisions of the TRIPS Agreement. In May 1996, the United States lodged a complaint claiming that India had failed to comply with Article 70 of the TRIPS Agreement. Article 70.8 required every Member country, including developing countries, to have in place, as of January 1995, a means by which patent applications for pharmaceutical and agricultural chemical products could be filed. These applications go into a box known as a mailbox, and if a patent is eventually granted, the

[32] As Paul Edward Geller points out, intellectual property laws, although attuned to economic considerations, are motivated by other values as well: see *supra*, footnote 19, at 114–115. Concerning the question whether the principles of free trade are inimical to notions of distributive justice see *supra*, footnote 7, at 227–231.

[33] Concerning Australia's historic lack of protection for famous marks, see Gail E. Evans, *The Protection of International Business Reputation in Australia under the Registered Trade Mark System*, 22 Australian Business Law Review, (1994) 347–369.

patent term "will be counted from the filing date". TRIPS, Article 70.9, provides that when such a patent application has been received, exclusive marketing rights shall be granted for a period of five years.[34]

India argued that, under Article 1 of the TRIPS Agreement, States were free to determine the means by which patent applications could be filed. Accordingly, it had complied with Article 70.8 using administrative, not legislative, means. However, the Dispute Settlement Panel took the view that in this case the administrative means provided did not constitute adequate compliance. It concluded that:

(a) India had not complied with its obligations under TRIPS, Article 70.8(a), to establish "a means" that adequately preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional periods provided for in Article 65 of the TRIPS Agreement; and
(b) India had not complied with its obligations under Article 70.9 of the TRIPS Agreement with respect to the grant of exclusive marketing rights.[35]

B. INTERPRETING THE TRIPS AGREEMENT

The Panel addressed the general interpretative issue, that is the standards applicable to the interpretation of the TRIPS Agreement. The Panel argued that, in accordance with Article 31(1) of the Vienna Convention[36] as well as GATT jurisprudence, an interpretation in "good faith" requires the protection of Members' legitimate expectations derived from the protection of the intellectual property rights provided for in the TRIPS Agreement.[37] Based upon the context and the purpose of the Agreement, this means that exporting Members can legitimately expect that market access and investments would not be frustrated by the actions of importing Members.[38] In support of their argument, the Panel further noted that the protection of legitimate expectations

[34] Article 70.9 provides that when such a patent application has been received, "exclusive marketing rights shall be granted ... for a period of five years after obtaining market approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that ... a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such Member."

[35] *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*—Report of the Panel, 5 September 1997, WT/DS50/R, para. 8.1.

[36] Article 31(1) of the Vienna Convention provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[37] The Panel cited the report of the Appellate Body in *Japan—Alcoholic Beverages*, to the effect that adopted Panel Reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute": Appellate Body Report on *Japan—Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS13/AB/R, at 14.

[38] The Panel based its view on the *Underwear* Panel Report: Panel Report on *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, adopted on 25 February 1997, WT/DS24/R, para. 7.20.

of Members regarding the conditions of competition is a well-established GATT principle underlying the national treatment obligation.[39]

The Panel acknowledged that the disciplines formed under GATT 1947 were primarily directed at the treatment of international trade in goods, whereas the TRIPS Agreement is mainly concerned with the treatment of the nationals of other Members. Nevertheless, the Panel had no difficulty in finding that the notion of protecting Members' legitimate expectations could also apply by analogy in so far as TRIPS was concerned with the competitive relationship between the nationals of the various Member States.[40] In support of this contention, the Panel referred to the Preamble to the TRIPS Agreement, which recognises the need for new rules and disciplines concerning "the applicability of the basic principles of GATT 1994". The Panel boldly concluded that, when interpreting the text of the TRIPS Agreement, the legitimate expectations of WTO Members concerning the TRIPS Agreement must be taken into account, as well as standards of interpretation developed in past panel reports laying down the principle of the protection of conditions of competition flowing from multilateral trade agreements.

C. FRAMING THE INQUIRY AND SELECTING THE TERMS OF REFERENCE

Applying these principles to Article 70.8(a) of the TRIPS Agreement, the Panel framed its inquiry in terms of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate expectations of other WTO Members as to the competitive relationship between their nationals and those of other Members by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications.[41] The Panel found that, in order to achieve the object and purpose of Article 70.8, India had to have a mechanism to preserve the novelty of pharmaceutical and agricultural chemical inventions for the purposes of determining their eligibility for patent protection.[42] The Panel then returned to the broader question of whether the current Indian system for the receipt of mailbox applications could sufficiently protect the legitimate expectations of WTO Members by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications. In finding against India, it emphasised that predictability in the regulation of intellectual property was essential not only to

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[39] *India—Patent Protection*, *supra*, footnote 35, Paras. 7.20 and 7.30. According to the *Superfund* Panel, the rationale of the national treatment obligation in GATT, Article III, is to protect the expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. The *Superfund* Panel stated that: "The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties": Panel Report on *United States—Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

[40] *India—Patent Protection*, *supra*, footnote 35, Para. 7.21.

[41] Ibid., Para. 7.34.

[42] Ibid., Para. 7.18.

protect current trade but also to create the conditions necessary to the planning of future trade and investment.

Although India was unsuccessful on appeal,[43] the Appellate Body nevertheless approved its argument that the concept of predictability of competitive relationships could not be unquestioningly imported into the TRIPS Agreement in respect of Article 70.8. Their reasoning was based primarily on the ground that, by invoking the concept of the "legitimate expectations", the Panel had incorrectly fused the legally distinct bases for "violation" and "non-violation" complaints under Article XXIII of the GATT 1994 into one uniform cause of action. The doctrine of protecting the legitimate expectations of contracting parties was developed in the context of non-violation complaints brought under Article XXIII:1(b) of the GATT 1947.[44] However, the case in question concerned a violation complaint.[45]

III. THE IMPACT OF THE FREE TRADE PRINCIPLES ON IMPLEMENTATION AND COMPLIANCE WITH TRIPS

A. "LEGITIMATE EXPECTATIONS" AND THE PERSISTENCE OF CLASSICAL ECONOMIC THEORY

The notion that the protection of legitimate expectations is central to creating security and predictability in the multilateral trading system reveals the persistence of neo-classical free trade theory as the basis of law and decision making in the WTO. The reasonable expectations theory is generally attributed to the classical economics of Adam Smith, as expounded in *The Wealth of Nations*.[46] According to this school of thought, the economic agent acts out of self-interested motives in the pursuit of his own utility. Given the right institutions of justice, this competition between individuals is

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[43] Appellate Body Report, 19 December 1997, WT/DS50/AB/R.

[44] This Article allows Member States to bring a complaint in the WTO Dispute Settlement Body if they think their rights have been impaired even if an Agreement has not been violated. Under TRIPS, non-violation complaints are not allowed until the end of 1999.

[45] TRIPS, Article 64.2, known as the "non-violation clause", provides that only the "failure of another [WTO Member] to carry out its obligations under the Agreement" may be invoked during the first five years after 1 January 1995, i.e. until 1 January 2000: "Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under the TRIPS Agreement for a period of five years from the date of entry into force of the WTO Agreement." Thus, the only cause of action permitted under the TRIPS Agreement during the first five years after the entry into force of the WTO Agreement is a "violation" complaint under Article XXIII:1(a) of the GATT 1994. Therefore, at present, only "literal" violations of the TRIPS Agreement can be brought before a dispute settlement panel. However, under normal rules, a Member may invoke the fact that any benefit is being "nullified or impaired" or that the attainment of any objective of the Agreement is being impeded as the result of (a) the application by another [Member] of any measure, whether or not it conflicts with the provisions of [the] Agreement, or (b) the existence of any other situation. In the latter case—"any other situation"—one usually speaks of "situation complaints", rather than "non-violation" complaints, but such "situations" are seldom if ever invoked: see *GATT Analytical Index*, Vol. II, at pp. 668 *et seq.* Generally speaking, until 1 January 2000, a WTO Member has to show a direct conflict between the provisions of a Member's laws and regulations and the TRIPS, including an omission. The test is close to *prima facie* nullification or impairment, a well-known standard in WTO law: see *GATT Analytical Index*, Vol. II, at pp. 655 *et seq.* This period of five years after entry into force may be renewed by consensus among WTO Members. This question of whether or not to extend the prohibition is likely to be hotly debated. Already, Canada has submitted a paper to the TRIPS Council in favour of an extension.

[46] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 2 vols., Liberty Fund, Inc., New York, 1981, Vol. I, Book IV.

economically efficient because it maximises the consumable wealth of all societies, provided, of course, there is free trade among nations. What Adam Smith referred to as a nation's wealth, and what Richard Posner refers to as efficiency,[47] is an important social value among Western nations.

Since adjudicators are not in a position to engage directly in wealth distribution, they are far more likely to address a goal which they can achieve, such as wealth maximisation. In the new-found legalism of WTO dispute settlement, adjudicators are constrained by the demands of the received legal reasoning and discourse. The choice before them as to the correct "legal" outcome is clear. The weight of text and precedent and the requirements of precision, clarity, and determinacy in rule interpretation tend to leave little space for sufficient consideration of the potentially serious social or political consequences attendant on one of the proposed readings of a textual provision.

B. THE LIMITS OF LEGALISM

The limits of a legalism based upon the model of an efficient market are clear. The chief disadvantage of a formalist approach is that the outcome is obtained only by a conscientious application of legal rules. Substantive conceptions of justice may thereby be excluded from legal reasoning. In particular, with regard to intellectual property, we are dealing with private rights that have a social dimension. Yet there is no theoretical underpinning that either reflects the impact of patenting on a predominantly rural society or gives any consideration of issues pertaining to cultural relativity.

Economic efficiency is influential because the competing goals involved in decision making are controversial as well as difficult to achieve with the limited tools that adjudicators have at their disposal. These competing goals concern controversial ideas about the distribution of wealth in international society—ideas about which no meaningful consensus has yet been formed despite the call by post-colonial nations for a New International Economic Order and the growth of a considerable body of development law.[48] In this regard, it is not surprising that India, as a developing nation, might perceive the U.S. demand for the patent protection of its pharmaceutical and agricultural products in India as another manifestation of imperialism.

C. LEGITIMACY *VERSUS* JUSTICE IN A PLURALIST GLOBAL SOCIETY

For the time being, the combination of an economic approach to problem solving and a legalistic style of decision making helps the trade court and Member States alike avoid problems of legitimacy. The co-existence of radically different concepts of justice within an emerging global secular system is made possible by emphasising the manifest

[47] R. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L.R. (1980) 487–507; R. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. Legal Studies (1979) 140.

[48] In 1974, the UN General Assembly adopted the Declaration on the Establishment of a New International Economic Order (GA Res. 3201 (S-VI)) and the Charter of Economic Rights and Duties of States (GA Res. 3281 (XXIX)).

legitimacy of secular rules while deliberately postponing considerations of justice.[49] However, as Professor Thomas Franck points out, legitimacy and justice are discrete phenomena.[50] Legitimacy is important in the international legal system, because otherwise there could be no normative system and transnational civil society would not have the means to collectively meet the challenges of technology and globalisation. Nevertheless, compliance with rules is not the sole or ultimate goal of any deserving social structure, including the global one.[51] If the rules are in a sense unjust, reflecting global society's yet imperfectly realised social values, Member States will consider that they have just cause for non-compliance.[52]

A time of testing must come, when the actions of the trade court are no longer legitimated by a respondent obeying its rulings. Professor Hudec has previously referred to the risk of so called "wrong" cases having the effect of bringing the dispute settlement system into disrepute,[53] a "wrong" case being one that is initiated in respect of an issue on which the international community has either not yet reached a consensus or on which past consensus has broken down. In such cases, the parties show extreme reluctance to accept the Panel's decision. It is then that the paucity of the trade court's theoretical underpinning will be revealed.

Moreover, the legitimate expectations theory bases the obligation to honour an agreement on the reasonable expectations induced by the undertakings therein and the disappointment of those obligations by breach. However, the raising of reasonable expectations *per se* is neither sufficient nor necessary for the existence of the agreement.[54] Whether one believes, like Hume, that an obligation assumed by a promise has a moral weight determined by its justice, or, like Grotius, that in so far as *pacta sunt servanda* its gravity derives from the formal process of commitment, it does not follow that either moral impetus to compliance is dependent on the other.[55] Thus, a rule regarding the recognition of a property interest in a patent application may render justice to patent holders, yet may not necessarily be regarded as legitimate if it has been wrung from a party by market-opening inducements.[56] If global secular security is to accommodate States at varying stages of economic development as well as diverse ethnic communities of differing moral principles, the secular rules must find a way to accommodate differing notions of justice and legitimacy.

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[49] Thomas Franck, *The Power of Legitimacy among Nations*, Oxford University Press, New York, 1990, at 236.
[50] Ibid., at 210.
[51] Id.
[52] On rethinking development policy in cultural, political and institutional terms, see Kennedy, *supra*, footnote 2, at 111–133.
[53] Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 2nd ed., Butterworths Legal Publishers, Salem, 1990.
[54] Attributed to Adam Smith, the reasonable expectations theory includes the obligation to perform a contract on the reasonable expectations induced by a promise, and the disappointment of those obligations by breach: see *supra*, footnote 46. Further, concerning the notion of legitimate expectations as a qualification on the exercise of power in the exercise of international relations and customary international law, see Michael Byers, *Custom, Power and the Power of Rules*, Cambridge University Press, 1999, at 124–126.
[55] Franck, *supra*, footnote 49.
[56] Reichman, *supra*, footnote 23 at 23.

IV. FREE TRADE THEORY AND UNIVERSAL NORMS OF INTELLECTUAL PROPERTY: ACCOMMODATING THE NEED FOR A CONCEPT OF SOCIAL ACCOUNTABILITY

A. ALLOCATIVE EFFICIENCY *VERSUS* CONSIDERATIONS OF CULTURAL RELATIVITY

The decision in *India—Patent Protection* suggests that it is time we gave due consideration to the values that should guide the interpretation of, and decision making under, the TRIPS Agreement. The free trade principles are underpinned by the arguments of classical economists. Their theoretical basis invokes the allocative and distributive arguments for free trade that Adam Smith formulated and David Ricardo elaborated as follows:

> "Under a system of perfectly free commerce each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and economically ..."[57]

It is instructive to compare and contrast the concepts and values inherent in classical economics with those underlying the intellectual property regime. On the one hand, trade lawyers might immediately observe the contradiction in the arguments for free trade or open competition and the creation of monopoly interests, albeit limited ones, in intellectual property. While the two are indeed antithetical, their novelty lies in their recent juxtaposition at the international level within the WTO Agreements. There is, in fact, nothing new *per se* in this inter-relationship when translated to the domestic level where anti-competition and intellectual property laws co-exist, if somewhat uneasily.[58] The apparent antithesis is based on the same rationale—that the granting of statutory monopolies in intellectual property is in the longer term promotion of industry and society as a whole. In this respect, there is a certain consonance between Ricardo's belief, that by rewarding individual ingenuity we stimulate industry, and the Lockean theory of natural rights.[59]

On the other hand, note the dissonance with the classical intellectual property regime, which duly recognises the connection between knowledge and culture. In so doing, it seeks not only to reward the individual creator but also to advance the general public interest in the promotion of the arts and scientific progress. The classical doctrines of copyright, patent and trade mark law, each with their distinct requirements that the subject-matter should be innovative, recognise that knowledge is also a public good and as such is a unique resource—one that in significant measure stands apart from crude notions of economic efficiency and allocative distribution.

Prior to the TRIPS Agreement, intellectual property was effectively exempted from

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[57] Ricardo, *supra*, footnote 4, at 1817, Chapter VII.

[58] In Australia, there is a proposal to remove s 51(3) from the Trade Practices Act (Cth) 1974: see «http://www.accc.gov.au», (8.7.99).

[59] Wendy J. Gordon, *Property Right in Self-Expression*, 102 Yale L.J. (1993) 1533 at 1578.

the ambit of the trade regime[60] on the basis that the regulation of subject-matter so intrinsically linked with a nation's cultural heritage was a matter for domestic policy. By opening intellectual property to the discipline of free trade principles, knowledge products also will be subject to allocative efficiency. In gross measure, the results of this are already plain to see as certain European and Eastern States with distinctive cultural identities attempt to resist the onslaught of popular entertainment products embodying the seductive culture of Hollywood. Far less perceptible, however, is the influence the free trade principles have on the exegesis of doctrine and the interpretation of intellectual property rules.

Far less perceptible, also, is the promotion and pervasion of Western values throughout a global business civilisation. From the time of the Italian Renaissance and the development of Humanism, we in the West have accepted the intrinsic importance and value of the individual within society.[61] We know that this is not the case in many Eastern cultures, notably that of China.[62] Clearly, the core notion of the pursuit of individual advantage being linked to the welfare of human society, however deserving, is a discretely Western value. The free trade principles that underpin the TRIPS Agreement make the assumption that each Member State and its citizens are willingly seeking to dedicate their energy and resources to a system which rewards individual initiative in the name of social progress. Without wishing to open debate on the merits of either approach, the author wishes to draw attention to the implications of cultural bias for the universal implementation of intellectual property rights.

B. RECONCILING CLAIMS FOR FREE TRADE WITH THE SOCIAL DIMENSIONS OF INTELLECTUAL PROPERTY LAW

For those States with a common-law heritage, the TRIPS Agreement does not form an automatic part of the national legal order; it depends on national implementation. According to TRIPS, Article 1, Member States are mandated to "give effect to the provisions of [the] Agreement", but they are "free to determine the appropriate method of implementing the provisions of [the] Agreement within their own legal system and practice". It is arguable that, if the choice of precise method rests with the national system, then the precise model whereby obligations are vindicated will vary State by State, albeit within the framework shaped by the minimum standards of the TRIPS Agreement. Assuming this to be the case, as India attempted to argue, some States might enforce standards by legislative means while others might prefer administrative control. According to the open-textured wording of Article 1, such different choices would appear permissible, provided that the obligation of effective implementation is met. Of course, by "implementation", much more is involved than putting the law in place on

[60] GATT, Article XX.

[61] Joseph A. Mazzeo, *Renaissance and Revolution*, University Paperbacks, Methuen, London, 1969, 3–46.

[62] Alice Erh-Soon Tay, *People's Republic of China: From Confucianism to the Socialist Market Economy*, in Poh-Ling Tan, ed., *Asian Legal Systems*, Butterworths, Sydney, 1997, Chapter 2.

paper. In particular in developing Member States, effective implementation also involves empowering agencies, providing budgets, and securing the support of national officials.

The TRIPS Agreement is a vulnerable form of law in so far as it is dependent on national and local structures and attitudes.[63] Although legally enforceable, in the event developing countries perceive TRIPS rules to be unduly inflexible there is certainly scope for nuances of resistance. When States are rumoured to be engaged in implementation tactics designed to minimise the domestic impact of TRIPS rules, the atmosphere of resentment may undermine the credibility of the uniform legal framework on which the WTO is based.

Thus far, TRIPS scholarship has been slow to recognise the need for ways and means, both legal and extra-legal, to address the gap between the law on paper and its practical implementation within an economically disparate and pluralist world society.[64] To some extent, this is institutionally recognised in the creation and work of the TRIPS Council. However, it is simply not feasible for the TRIPS Council to track the practical application of the Agreement at every stage in the national system. Indeed, this only serves to emphasise the need for active co-operation at national level by way of both public and private initiatives.[65]

C. BUILDING FLEXIBILITY INTO THE TRIPS RULE-MAKING STRUCTURE

1. *Core Elements of Implementation*

What is required, it is submitted, are ways and means which attempt to feed more flexibility into the TRIPS rule-making structure. In order to overcome the rigid technical specification evidenced by *India—Patent Protection*, we might consider strategies that incorporate the essentials or core elements of implementation. That is not to say that States ought to be permitted to depart unilaterally from TRIPS standards. As a matter of policy, purely political phenomena should not justify differentiation. However, economic and social differences, in principle at least, should do so. The difference in treatment has to be proportionate to the differences in the factual situations. The aim should be to achieve an appropriate balance while not losing the common legal framework within which economic integration is addressed under the WTO Charter.

2. *Transnational Governance and the Principle of Subsidiarity*

With its diverse cultural mix, the European Union represents an analog of global

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[63] See J.H. Reichman and D. Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiative to Facilitate Worldwide Intellectual Property Transactions*, 9 Duke Journal of Comparative & International Law (1999) 13 at 14–21.

[64] See, however, ibid., at 13–67, demonstrating the genesis of such a literature.

[65] Ibid., at 51–62.

economic integration under the WTO.[66] One of the ways in which the Community institutions have adopted a more flexible approach to the pre-emption of national law is by utilising the principle of subsidiarity.[67] This involves an assessment, *inter alia*, of whether objectives are better achieved at the State or Community level. It allows for a concept of individual State self-determinism only where decisions can be more effectively taken by groups which are subsidiary to the State. Admittedly, within the EC the principle is chiefly applied to the social programme. However, whether or not it is explicitly adopted at the global level, the principle has the capacity to constitute an underlying theme, shaping the evolution of WTO/TRIPS jurisprudence where the implementation or interpretation of law touches social and cultural issues. In as much as the WTO now constitutes a system of multi-level governance, in which States share key political powers, the principle of subsidiarity would protect the autonomy of Member States in appropriate circumstances. Such a principle would accommodate the need for a concept of social accountability or responsibility at the global level, since, within the distribution of powers, the collectivity of States would have a responsibility for the well-being of the individual State.

CONCLUSION

The foregoing analysis indicates that, under the TRIPS Agreement, an augmented MFN operates in conjunction with the principle of national treatment to underpin the universalism of substantive norms of intellectual property. However, the character and tenor of the reasoning in *India—Patent Protection* indicates that the free trade principles *per se* are insufficient to underpin the implementation of intellectual property rights. The global protection of intellectual property poses a challenge for the international legal system. The TRIPS Agreement mandates comprehensive, detailed, substantive provisions re-inforced by a coercive system of law enforcement for over one hundred and thirty Member States. With the emergence of a positivist rule system under the constitution of the WTO, the policy choices and bargaining positions open to governments are considerably diminished. Although TRIPS, Article 1, allows Member States discretion as to the manner of implementation, it appears from *India—Patent Protection* that its scope is to be narrowly circumscribed. As a result, the need for lawmakers to take account of the pluralist nature of world society has become a compelling issue. The foregoing analysis suggests that, in cases concerning developing Member States, the credibility of the law will falter unless the inherent antithesis between the justice and legitimacy of intellectual property rules is addressed with a flexible and co-operative approach to their implementation. Such an approach calls for

[66] S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford, 1995, Chapter 1: J. Shaw, *European Community Law*, Macmillan Press, London, 1993, Chapter 1.

[67] Weatherill, *supra*, footnote 66, at 169–182.

the WTO to openly avow a concern for equity by employing principles which take account of factors related to the level of economic development and cultural relativity. Moreover, in as much as the TRIPS Agreement embodies an expression of transnational constitutional power, such an approach at its broadest must also embrace an educative function in the principles and practice of good governance.[68]

[68] Cf. Reichman and Lange, *supra*, footnote 63, at 63–67.