

THE STRATEGIC USE OF ETHICAL ARGUMENTS IN INTERNATIONAL PATENT LAWMAKING

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I. INTRODUCTION

The patent system is, to a large extent, a matter of beliefs, values and faith. Most people assume that patents improve economic efficiency by encouraging invention. Presumably, the consumer costs of exclusive rights for a period of 20 years are socially compensated by an aggregate increase in innovation. While this system might appear rational, it is neither supported nor contested by clear empirical evidence. Notwithstanding the availability of rich literature on the economics of patents, methodological constraints, especially the inability to control all the factors that drive innovation, prevent anyone from clearly establishing what would be the optimal depth and breadth of patent protection.¹ Even if policymakers were omniscient about the economic effects of the patent system, they would still be guided by their own values when determining the appropriate balance between short- and long-term objectives, or private and collective interests.² These scientific uncertainties and political problems lead policymakers to rely, at least partially, on socially constructed norms when drafting what they hope to be an efficient patent system.

¹ The term of 20 years for all inventions, for example, is purely arbitrary. E. Richard Gold *et al.*, “The Unexamined Assumptions of Intellectual Property: Adopting an Evaluative Approach to Patenting Biotechnological Innovation” (2004) 18:4 Public Affairs Quarterly 299 at 304.

² “The world of policy making is not one of transferable and enduring scientific truths and it is not exclusively (or even predominantly) concerned with ‘what works’ and the systematic review movement must adapt accordingly.” Trisha Greenhalgh & Jill Russell, “Reframing Evidence Synthesis as Rhetorical Action in the Policy Making Drama” (2005) 1 Healthcare Policy 31 at 34.

Norms are defined by constructivist theorists as standards of appropriate behaviour for actors within a given identity.³ Because they are socially shared and persistent over time, they structure policy orientation. That being said, they are not perpetual and can be socially constructed or deconstructed through the exercise of framing. Framing is the action of drawing attention to a specific issue, determining how such an issue should be viewed and motivating a specific audience to address the issue.⁴ It could delineate the boundaries between good and evil, or more pragmatically, constrain the range of reasonable solutions to a defined problem. Any effective framing “is one which makes favoured ideas seem like common sense, and unfavoured ideas as unthinkable”.⁵

To successfully frame an issue, one needs to communicate persuasive messages, including convincing ethical arguments. Ethics does not necessarily bring new information into policy debates but offers a method to weigh existing information and assess, for example, the relative importance of the right to protection and the right to access.⁶ In this context, it does not come as a surprise that various stakeholders rely on ethical discourses to promote their favoured norm. This applies even more on the international level, where the economic effects of patent law are less known, and few shared values are firmly established. It is no exaggeration to say, with Graham Dutfield, that “there is a propaganda war going on”⁷ in international fora.

This chapter examines the rhetorical discourse used by non-state actors to influence international patent law.⁸ Following Aristotle, we do not understand the concept of “rhetoric” in a pejorative sense, *i.e.*, as if to

³ Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 *International Organization* 887 at 891.

⁴ Framing can accordingly be divided in diagnostic, prognostic and motivational framing. Robert D. Benford & David A. Snow, “Framing Processes and Social Movements: An Overview and Assessment” (2000) 26 *Annual Review of Sociology* 611 at 615.

⁵ Morten Bøås & Desmond McNeill, “Power and Ideas in Multilateral Institutions: Towards an Interpretative Framework” in Morteh Bøås & Desmond McNeill, eds., *Global Institutions and Development: Framing the World?* (London and New York: Routledge, 2004) at 1.

⁶ Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, “Toward a Psychology of Framing Effects” (1997) 19:3 *Political Behavior* 221.

⁷ Graham Dutfield, *Intellectual Property Rights, and the Life Science Industries* (Aldershot: Ashgate, 2003) at 21.

⁸ Non-governmental organizations and industries are two non-state actors that play an increasing role in the construction of social norms. Ariel Colonomos, “Non-State Actors as Moral Entrepreneurs: A Transnational Perspective on Ethics Networks” in Daphné Josselin & William Wallace, eds., *Non State Actors in World Politics* (New York: Palgrave, 2001) 76.

imply ungrounded or inaccurate claims.⁹ Rather, it refers to an organized set of claims, including ethical assertions, expressed with the objective to convince, frame an issue and eventually construct new social norms.¹⁰ While actors engaged in rhetoric are not prepared to change their own beliefs, the public opinion and policymakers to whom rhetorical discourses are addressed can be convinced by the better argument.¹¹ Under this perspective, the competition of discourses does not simply reflect antagonistic interests, but is itself a battlefield where conflicts take place.¹² In the legitimacy war, ethical arguments can be effectively employed for tactical purposes.

Of course, the ability to frame an issue might not be the main indicator of the influence which a non-state actor has over international patent lawmaking. Power calculated in terms of human and financial resources or in terms of personal connections with the political elite arguably remains the main indicator. For Stephen Gill and David Law, “pure persuasion is very rare, since normally the access to knowledge and funds is unequal”.¹³ Some actors might be privileged enough to finance studies, organize demonstrations and coordinate campaigns that can positively influence the quality and dissemination of their rhetorical discourse. Nevertheless, as Susan Sell and Aseem Prakash established, the actors who favour a strengthening of international patent standards (mainly the

⁹ “The roots of argumentation theory lie in Aristotle’s philosophical treatises on analytic (logical argument using premises based on certain knowledge), dialectic (debating moves to argue for and against a standpoint) and rhetoric (influencing by reference to laws, documents, *etc.* or by appeal to emotions, authority or previously acceded premises). Most modern day scientists (including those in the evidence-based medicine movement) hold that rationality is restricted to analytic argument.” Trisha Greenhalgh & Jill Russell, “Reframing Evidence Synthesis as Rhetorical Action in the Policy Making Drama” (2005) 1 *Healthcare Policy* 31 at 35. See also Aristotle, *Rhetoric*, Book 1, c. 1, available online: Iowa State University Public Homepage Web Server <<http://www.public.iastate.edu/~honeyl/Rhetoric/oneindex.html>>.

¹⁰ Frank Schimmelfennig, “The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union” (2001) 55 *International Organization* 47 at 48.

¹¹ Thomas Risse, “Let’s Argue! Communicative Action in World Politics” (2000) 54 *International Organization* 1 at 9. This does not exclude the possibility that an actor engaged in rhetorical discourse may change his or her own beliefs. While rhetorical claims are often guided by material interest, the perception of one’s interest depends on one’s own normative frame.

¹² “Discourses are expected to be structured largely in terms of binary oppositions ... that, far from being neutral, establish a relation of power such that one element in the binary is privileged.” Jennifer Milliken, “The Study of Discourse in International Relations: A Critique of Research and Methods” (1999) 5 *Eur. J. Int’l Rel.* 225 at 229.

¹³ Stephen Gill & David Law, *The Global Political Economy: Perspectives, Problems, and Policies* (New York: Harvester Wheatsheaf, 1988) at 71-72.

transnational corporations) as well as those who advocate greater flexibility (mainly non-governmental organizations) have sufficient material capacities and connections to influence policy debate over international patent law through their ideas and discourse.

This chapter does not ask which rhetorical discourse is the most accurate when confronted with empirical evidence. In the economy of discourse, the value of an assertion is not gauged by its truth but by its capacity for circulation among actors, for giving the impression of truth and for establishing power relations.¹⁴ Thus, this chapter analyzes major competing discourses related to international patent law by studying their normative foundations, their evolution and their policy outcomes. It suggests that challenging discourses that successfully contribute to the establishment of norms do not promote radically new ideas but reinterpret existing core ethical claims of the dominant discourse. New framings need to resonate with existing belief systems.

The next part of this chapter (section II) briefly outlines the evolution of key discourses in the history of the international patent regime. The part thereafter (section III) focuses more specifically on the clash of two forms of proprietary visions at the TRIPs Council, especially in regard to the biodiversity debate. Section IV discusses references to fairness in the debate over access to medicine in developing countries. This will lead to concluding remarks in section V that explain the effectiveness of some discourses over others in framing international patent debates.

II. DISCOURSES IN THE INTERNATIONAL PATENT REGIME

“It is probable enough that the patent laws will be abolished ere long” hopefully predicted *The Economist* in June 1869.¹⁵ Today, this prediction seems quite odd. Not only have patent systems been adopted around the world, but the few people who dare to advocate the complete abolishment of patent laws are perceived, at best, as eccentrics. The apparent unanimity about the future of patent laws today thus contrasts sharply with raging debates of the third quarter of the 19th century. At that time, the international effects of patent laws were starting to be seriously

¹⁴ See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon Books, 1980).

¹⁵ Quoted in Graham Dutfield, *Intellectual Property Rights, and the Life Science Industries* (Aldershot: Ashgate, 2003) at 49.

questioned and criticized despite the fact that they had already been in force for centuries in some countries.

At the peak of the period known as the First Globalization, international trade was a driving motor for world economy. The editors of *The Economist*, as many other free trade advocates, criticized patents as an outdated system, a reminiscence of the mercantilist system. They argued that patent laws were protectionist measures against foreign competition.¹⁶ In the name of free trade, they condemned patents as unjustified interventionism by individual states. Particularly receptive to this liberal discourse, Switzerland rejected the introduction of a patent system, and the Netherlands abolished the system it had already established.

The two classical discourses that underpin modern patent law since the 17th century were revitalized to respond to these liberal claims. The first, often called proprietarianism, considers that the protection of private property should be a priority that comes before any other policy objective.¹⁷ Its radical version is inspired by John Locke's labour justification for property. It puts forth that private property of one's own creation is a natural right which, in that respect, should be protected from state intervention. Lysander Spooner, an icon of radical proprietarianism of the 19th century, even argued for absolute and perpetual patents: "If men have a natural right of property, in their intellectual productions, it follows, of necessity, that that right continues at least during life."¹⁸

The second classical discourse that responded to liberal claims was utilitarianism.¹⁹ On the one hand, it recognized that patents are policy tools that need to be balanced with other public objectives, including free competition. On the other hand, it postulated that their social benefits, in terms of innovation and dissemination of knowledge, exceeded the social costs. This is the argument made in 1848 by John Stuart Mill in his defence of the patent system: "An exclusive privilege, of temporary duration is preferable [as a means of stimulating invention] because the reward conferred by it depends upon the invention's being found useful,

¹⁶ For example, until 1836, only American citizens were allowed to be granted an American patent. Fritz Machlup & Edith Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10 *The Journal of Economic History* 1 at 3-5.

¹⁷ Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth: Aldershot, 1996) at 41-68 and 200-201.

¹⁸ Lysander Spooner, *The Law of Intellectual Property or an Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas* (Boston: Bela Marsh, 1855), online: Lysander Spooner <http://www.lysanderspooner.org/bib_new.htm>.

¹⁹ Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth: Aldershot, 1996) at 213-23.

and the greater the usefulness, the greater the reward.²⁰ Although utilitarianism might appear as less ideologically driven than proprietarianism, it was also based on hypothetical beliefs, such as the assumption that innovation is an individual and independent process primarily driven by material rewards.

The revitalization of proprietarianism and utilitarianism probably did less to convince free trade advocates than did the adoption of the first multilateral treaty on patent law. The 1883 Paris Convention made domestic patents more tolerable by prohibiting certain protectionist measures and opportunistic behaviours. Among other things, article 2 provides that foreigners shall enjoy the same advantages as those granted to nationals, and article 5(1) specifies that the importation of the patented products shall not entail forfeiture of the patent. By setting up a minimum level playing field for international competition, the Paris Convention contributed to mitigating debates about the preservation of national patent systems.

With the decline of international trade in the first half of the 20th century, debates on international patents became less controversial. Patents were internationally perceived as a technical rather than an ideological subject matter, interesting only a restricted number of specialists. This lull allowed the creation of a cohesive epistemic community in developed countries. An epistemic community could be defined as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain”.²¹ This capacity to produce authoritative claims, that Pierre Bourdieu would call symbolic capital, is a significant source of power.²² In the patent regime, the dominant epistemic community is the closed and restricted circle of patent attorneys, agents, examiners and civil servants specialized in the technical, complex and obscure field of patent law. They share a common legal culture, including a technical language and general positive feelings about the established laws and institutions that provide the framework for their professions. As Susan Sell observed, they are “socialized to promote the protection of IP, and uphold the

²⁰ John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (Indianapolis: Hackett Pub., 2004) at 25.

²¹ Peter M. Haas, “Epistemic Communities and International Policy Coordination” in Peter M. Haas, ed., *Knowledge, Power, and International Policy Coordination* (Columbia: University of South Carolina, 1996) at 3. On the patent community, see Marney L. Cheek, “The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime” (2001) 33 *Geo. Wash. Int’l L. Rev.* 277.

²² Pierre Bourdieu, *Ce que parler veut dire: l’économie des échanges linguistiques* (Paris: Fayard, 1982) at 68.

ideology of private property rights”.²³ Although other actors, such as scientists and consumers, were also interested in patent law and may have had different views, they did not have recognized expertise and institutionalized influence. To a certain extent, patent law “is reminiscent of the Catholic Church when the Bible was exclusively in Latin: IP lawyers are privileged purveyors of expertise as was the Latin-trained clergy”.²⁴ Governments rely on these experts to translate the complexities of patent law into policy options. As a result, the patent community’s discourse has been internalized in most developed countries’ administrations and, arguably, by the World Intellectual Property Organization’s bureaucracy. Their ideas, allegedly more technical than ideological, have been institutionalized in social norms and became conventional wisdom.

Starting in the 1970s, when the ratio of world trade to world GDP reached the level of that at the end of the 19th century, international patent law became once again a controversial issue. Developing countries were calling for a New International Economic Order that would be a radical departure from what they perceived as a structural deterioration of the terms of trade. Supported by the United Nations Conference on Trade and Development and later by a number of transnational non-governmental organizations (“NGOs”), they argued that the national treatment principle of the Paris Convention hides an institutionalized strengthening of stronger countries at the expense of weaker countries.²⁵ To ensure that the two groups of countries could compete on the same level in world markets, a differentiated treatment would be needed for countries that are structurally disadvantaged.

From 1970 to 1980, international negotiations on patent law avoided major confrontational debates by focusing on procedural rather than substantial issues. The Patent Cooperation Treaty (1970), the Strasbourg Agreement (1971) and the Budapest Treaty (1977) were successfully adopted. However, the revision of the Paris Convention initiated in 1980 revealed fundamental disagreements between developed and developing countries.

At that time, the U.S. trade deficit was reaching an unprecedented peak, which was seen as a manifestation of the alleged decline of the U.S. hegemony. A number of transnational corporations blamed counterfeiting

²³ Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003) at 99.

²⁴ *Ibid.*

²⁵ United Nations Conference on Trade and Development, *Le rôle du système des brevets dans le transfert des techniques aux pays en voie de développement*. TD/AC.11/19/Rev.1 (1975) at 51.

activities in foreign countries for the loss in U.S. competitiveness. This is what the former chairman and president of Pfizer International Barry MacTaggart did when he published an op-ed in the *New York Times* in 1982:

In recent days many people have been shocked that Japanese businessmen might have stolen computer secrets from IBM. The allegations are the latest twist in the tense worldwide struggle for technological supremacy, but few businessmen, especially those involved in high-technology, research-based industries, can be very surprised. ... It is in acquiring the knowledge to make new products — computers, pharmaceuticals, telecommunications equipment, chemicals and others — that American companies have been so good. And it is this knowledge that is being stolen by the denial of patent rights.²⁶

In order to quantify the effect of counterfeiting activities on U.S. competitiveness, the International Trade Commission (“ITC”) conducted its own study in 1988. It estimated annual intellectual property losses at \$23 billion for 432 corporations alone, representing 16 per cent of U.S. trade deficit.²⁷ Although the methodology used by the ITC was later criticized, the Reagan administration came to the conclusion that there was a direct link between foreign practices and U.S. trade woes.²⁸ As Susan Sell observed, this normative linkage was appealing for policymakers, since they “were spared the arduous task of evaluating the extent to which US trade problems were the product of either its own or its firms’ bad choices”.²⁹ Thus, when Clayton Yeutter was appointed United States Trade Representative (“USTR”) by Ronald Reagan, he realized that patent protection in foreign countries had become an unavoidable priority of his agenda:

When I left government with the Ford Administration in 1977, we were not talking about intellectual property at all. ... But when I came back into the government a little over two years ago, everybody was talking about the piracy that exists around the world in intellectual property and the need to do something about it.³⁰

²⁶ Barry MacTaggart, “Stealing from the Mind” *The New York Times* (July 9, 1982) A25.

²⁷ U.S., International Trade Commission, *Foreign Protection of Intellectual Property Rights and Its Effect on US Industry and Trade — Report to the US Trade Representative* (Investigation No. 332-245, Publication No. 2065) (Washington: International Trade Commission, 1988) viii.

²⁸ Harvey J. Winter, “A View From the US State Department” in Charls E. Walker & Mark A. Bloomfield, eds., *Intellectual Property Rights and Capital Formation in the Next Decade* (Lanham: University Press of America, 1988) at 101.

²⁹ Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003) at 50.

³⁰ Clayton Yeutter, “Negotiating Intellectual Property Rights Protection” in Charls E. Walker & Mark A. Bloomfield, eds., *Intellectual Property Rights and Capital Formation in the Next Decade* (Lanham: University Press of America, 1988) at 110.

Transnational corporations did more than simply convince the U.S. government that American competitiveness was directly linked to international patent law. With the objective of launching negotiations for a broad and extensive agreement on intellectual property, they also convinced other key developed countries. Initially, both the European Community and Japan advocated a modest project of establishing a counterfeiting code and opted to strategically minimize conflicts with developing countries on the sensitive issue of agricultural subsidies. To counter this initial lack of enthusiasm, 12 transnational corporations united their voices and created the Intellectual Property Committee ("IPC"). As James Enyart from Monsanto revealed, "once created, the first task of the IPC was to repeat the missionary work we did in the US in the early days [but] this time with the industrial associations of Europe and Japan to convince them that a code was possible".³¹ According to Carol Bilzi, a lobbyist on intellectual property issues, the IPC mission succeeds in coordinating the positions of developed countries:

Largely as a result of private sector involvement, the area of intellectual property has evolved in the Uruguay Round from an obscure issue that was not widely recognized as a proper topic for the GATT prior to the September 1986 Punta del Este meeting³² to one of the most significant and closely watched issues in the Round.³²

The Uruguay Round led to the adoption in 1994 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs") as one of the WTO agreements. When compared with the Paris Convention, it provided detailed and restrictive rules on patent law. The fact that it was adopted under the umbrella of an organization devoted to world free trade "legalizes the marriage of convenience of trade law with IP law at an international level".³³

While transnational corporations did not themselves negotiate the TRIPs, they certainly act as "norm entrepreneurs", in the sense that they construct the initial cognitive framing of "issues by using language that names, interprets and dramatizes them".³⁴ They convince a critical mass of states (norm leaders) that embrace and institutionalize their frame. This is

³¹ James R. Enyart, "A GATT Intellectual Property Code" (1990) 25 *Les Nouvelles* 53 at 54.

³² Carol J. Bilzi, "Toward an Intellectual Property Agreement in the GATT: View from the Private Sector" (1989) 19 *Ga. J. Int'l & Comp. L.* 343.

³³ Robert M. Sherwood & Carlos A. Primo Braga, *Intellectual Property, Trade, and Economic Development: A Road Map for the FTAA Negotiations* (Miami: North-South Center, 1996) at 4.

³⁴ Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *International Organization* 887 at 897.

exactly how James Enyart, from Monsanto, perceived the contribution of industry to the negotiation of the TRIPs:

Industry has identified a major problem in international trade. It crafted a solution, reduced it to a concrete proposal and sold it to our own and other governments. ... The industries and traders of world commerce have played simultaneously the role of patients, the diagnosticians and the prescribing physicians.³⁵

Transnational corporations are not the only non-state actors involved in current international negotiations on patent law. During the last decade, an increasing number of NGOs have also acted as norm entrepreneurs in the patent regime. Contrary to transnational corporations, they generally benefit from a favourable predisposition (justified or not) in public opinion. They are often seen as carrying a moral authority and they are (wrongly or not) less suspected of promoting private interests.³⁶ Many of them, including the International Centre for Trade and Sustainable Development, Oxfam and Third World Network, finance research on specific issues, publish books and specialized newsletters, draft detailed model law, organize training sessions for negotiators or lead targeted campaigns during electoral periods. One of their claimed successes was the adoption of the 2001 Doha Declaration on Public Health, which recognized that the TRIPs Agreement can be interpreted and implemented in a manner supportive of the WTO members' right to promote access to medicines. According to Ellen't Hoen, from Médecins sans frontières ("MSF"), NGOs were the first to normatively link the TRIPs Agreement and the HIV/AIDS crisis:

The first international meeting specifically on the use of compulsory licensing to increase access to AIDS medicines took place in March 1999 at the Palais des Nations in Geneva and was organized by Consumer Project on Technology, Health Action International and MSF. Later that year, the same group of NGOs organized the Amsterdam Conference on Increasing Access to Essential Drugs in a Globalized Economy, which brought together 350 participants from 50 countries on the eve of the Seattle WTO ministerial conference.³⁷

To articulate effective rhetorical discourses, both transnational corporations and NGOs had to do much more than impart their favoured norms to key negotiators. Justifying "selfish interests on the basis of

³⁵ James R. Enyart, "A GATT Intellectual Property Code" (1990) 25 *Les Nouvelles* 53 at 56.

³⁶ Thomas Risse, "Let's Argue! Communicative Action in World Politics" (2000) 54 *International Organization* 1 at 22.

³⁷ Ellen't Hoen, "Public Health and International Law: TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha" (2002) 3 *Chicago J. Int'l L.* 27 at 33.

egoistical reasons is nearly impossible in the public sphere”.³⁸ Transnational corporations would not have been convincing about the need to raise international patent standards simply by relying on the need of developed countries to redress their trade deficit. Similarly, NGOs could justify an interpretative declaration recognizing policy space for public health simply by underlining the interest of developing countries for technological transfers. Every stakeholder of the patent regime who wants to frame his or her ideas as solutions to policy problems must translate his or her material interests into the language of universalistic values or commonly accepted norms. As the next section will show, one of these values used in rhetorical discourses, both by the advocates and opponents of strong international standard, is the respect for property rights.

III. THE CLASH OF PROPRIETARIANISMS

During the Uruguay Round, advocates of strong international standards could hardly rely on utilitarian discourse as they did during the 19th century. Contrary to the Paris Convention, which was initially negotiated between countries sharing a similar level of development, the TRIPS negotiation involved low-income countries for whom the costs of exclusive rights could obviously not be compensated by an increase in domestic innovation. Comparatively, “the logic of Locke’s labour theory of property is more universal”.³⁹

Proprietarianism offers not only a universal scope, but also major strategic implications. As noted by Richard Gold, “the conception of property as having absolute dominion, although supplanted, continues to inform our understanding of how property rights interact with other rights”.⁴⁰ The holder of a property right is seen as being entitled to do anything with respect to his or her property, unless specifically prohibited to protect public interests. The burden of persuasion is then automatically reversed. It is the third parties that have to demonstrate that these public interests are sufficiently strong to justify restriction to property rights.⁴¹

³⁸ Thomas Risse, “Let’s Argue! Communicative Action in World Politics” (2000) 54 *International Organization* 1 at 22.

³⁹ Edwin Cameron, “Patents and Public Health: Principle, Politics and Paradox” in David Vaver, ed., *Intellectual Property Rights: Major Writings (Critical Concepts in Law)* (London & New York : Routledge, 2005) at 443.

⁴⁰ Richard Gold, “Owning our Bodies: An Examination of Property Law and Biotechnology” (1995) 32 *San Diego L. Rev.* 1167 at 1230.

⁴¹ Joseph William Singer, “Sovereignty and Property” (1991) 86 *Nw. U.L. Rev.* 1.

Considering these strategic advantages of proprietarianism, it is not surprising that, during the Uruguay Round, the patent community of developed countries relied more on proprietarianism than on utilitarianism.⁴² This is how a similar discourse that was used at the end of the 19th century against the criticism of free-trade advocates was paradoxically used one century later to support the TRIPs Agreement as a pillar of global liberalization. Like its predecessor, the contemporary version of proprietarianism elevates the goal of the protected private property above other public policy considerations. Owen Lippert from the Fraser Institute, a Canadian think tank advocating for free markets and free trade, offers a good example. With other contemporary advocates of liberalization, he portrays the intellectual property right as a fundamental right:

The power of convention is such that even though intellectual property rights may not have begun as property rights, they have evolved towards that identity. That is that their nature as property rights has been discovered gradually over time. This begs the question what then are rights? Simply put, they are protections of behaviour and property which a society decides at some point to place outside of a cost to benefit analysis.⁴³

Contrary to the radical version of proprietarianism, the contemporary discourse rarely refers explicitly to natural law to justify the primacy of property right protection over other public issues. It rather considers that the protection of private property is a precondition for a liberal economic order.⁴⁴ Since no invention could be marketed or shared before being first invented and owned, they elevate the goal of private property protection above those of pure free trade and access to technology. Patents become “the heart and core of property rights, and once they are destroyed, the destruction of all other rights will follow automatically, as a brief postscript”.⁴⁵ Thus, according to Barry MacTaggart from Pfizer, countries committed to liberalism and benefiting from the global liberal order should embrace a uniform conception of property right protection:

⁴² Samuel Oddi, “TRIPS-Natural Rights and a Polite Form of Economic Imperialism” (1996) 29 *Vand. J. Transnat'l L.* 415.

⁴³ Owen Lippert, “One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights Though the Free Trade Area of the Americas” (1998) 9 *Fordham I.P. Media & Ent. L.J.* 241 at 255.

⁴⁴ Paul Steidlemeier, “The Moral Legitimacy of Intellectual Property Claims: American Business and Developing Country Perspectives” (1993) 12 *Journal of Business Ethics* 157 at 159. See also Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth: Aldershot, 1996) at 200.

⁴⁵ Ayn Rand, *Capitalism: The Unknown Ideal* (New York: New American Library, 1966) at 128.

Through political and legal dealings, many governments, including Brazil, Canada, Mexico, India, Taiwan, South Korea, Italy and Spain, to name a few, have provided their domestic companies with ways to make and sell products that under proper enforcement and honourable treatment of patents would be considered the property of the inventors. ... That is the very reason the United States should insist more than ever that the principle underlying the international economic system be respected and upheld.⁴⁶

To be more convincing on its proprietary claim, the patent community repeatedly used the metaphor of piracy.⁴⁷ This metaphor evokes the indignation raised by the brutal violation of someone else's property rights. Like many other rhetorical discourses used by social movements, it identifies the victims to be protected from a given injustice and amplifies their victimization.⁴⁸

It was used to describe counterfeiting activities, but also activities performed in foreign countries that fully respect national and international laws. An article written by Constantine Clemente, a former vice-president of Pfizer, is eloquent in that respect:

Why is it that another government can base a policy of helping the consumers in their country to steal foreign owned technology? If we went back to the days when countries engaged in piracy, wouldn't it have been ludicrous to say, "Well, Brazil owes the United States a great deal of money, so we cannot stop their pirates from boarding our ships because, after all, they obtain a great deal of revenue from this, and gold, and silver, et cetera." Obviously, that's absurd. It's really not too different when we're talking about intellectual property; that kind of stealing is just as bad.⁴⁹

Who would dare to be opposed to robbery and piracy? If patents are seen as exceptional privileges or protectionist measures, one can legitimately be suspicious about their holders' behaviours. However, if patents are perceived as a fundamental right under a liberal order, "pirates" are

⁴⁶ Barry MacTaggart, "Stealing from the Mind" *The New York Times* (July 9, 1982) A25.

⁴⁷ Robert Weissman, "A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries" (1996) 17 *J. Int'l Econ. L.* 1069 at 1088; Assafa Endeshaw, "The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot" (2002) 10 *Cardozo J. Int'l. & Comp. L.* 47 at 69.

⁴⁸ Robert D. Benford & David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment" (2000) 26 *Annual Review of Sociology* 611 at 615.

⁴⁹ Constantine Clemente, "A Pharmaceutical Industry Perspective" in Charles E. Walker & Mark A. Bloomfield, eds., *Intellectual Property Rights and Capital Formation in the Next Decade* (Lanham: University Press of America, 1988) at 132.

moved to a defensive position and bear the burden of justifying their actions. In most cases, being opposed to the protection of patent holders in their fights against piracy would appear immoral.

Since this proprietary discourse successfully brings a normative foundation to the TRIPs Agreement, it does not come as a surprise that a similar discursive strategy was used by the opponents to the patentability of life forms. The ethical, religious, environmental and economic arguments against the patentability of plants and animals were pushed to the back burner, behind the proprietary ones. As the patent owners did during the TRIPs negotiation, their opponents portrayed themselves as vulnerable victims whose fundamental property rights were threatened.⁵⁰ To do so, they articulated the rhetorical discourse of “biopiracy”.

The powerful concept of “biopiracy” was coined in 1993 by a Canadian environmental NGO named the Rural Advancement Foundation International (“RAFI”). It refers to the use of genetic resources, often in conjunction with traditional knowledge, without the authorization of the community where they were initially collected. It implicitly assumes that local communities acquired fundamental property rights over their cultural and natural heritage by conserving and developing it for generations. Accordingly, *in situ* genetic resources and traditional knowledge should not be freely accessible to potential users, including biotech corporations searching for new chemical compounds. With the rise of the biotech sector in the 1990s, some activists, including Vandana Shiva, came to suggest that biodiversity-rich countries were being plundered of their “green gold” by biotechnology-rich countries, accused of “biocolonialism” and “bioimperialism”:

The United States has accused the Third World of piracy. [However], if the contributions of Third World people are taken into account, the roles are dramatically reversed: the United States would owe Third World countries \$302 million in agriculture royalties and \$5.1 billion for pharmaceuticals.⁵¹

These numbers are as empirically suspicious as the estimates provided by transnational corporations on their losses due to foreign counterfeiting. In fact, the biopiracy discourse usually rests less on the quantitative measurement of genetic resource flows than on a limited

⁵⁰ Hanne Svarstad, “Reciprocity, Biopiracy, Heroes, Villains and Victims” in Hanne Svarstad & Shivcharn S. Dhillon, eds., *Bioprospecting: From Biodiversity in the South to Medicines in the North* (Oslo: Spartacus Forlag, 2000) at 19.

⁵¹ Vandana Shiva, *The Plunder of Nature & Knowledge* (Boston: South End Press, 1987) at 56.

number of controversial patents granted to American corporations for inventions derived from resources originating from developing countries. Among them, the turmeric, the basmati rice and the neem tree cases are probably the most publicized by NGOs, and the most commonly used as alleged examples of biopiracy.

The biopiracy discourse also frequently refers to the rights conferred under the Convention on Biological Diversity (“CBD”) as a normative foundation and as evidence of its legitimacy. Signed in Rio in 1992, this convention recognizes “the sovereign rights of States over their natural resources” and provides that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”.⁵² If biotech corporations want access to *in situ* genetic resources, they should not only obtain the prior informed consent of the provider countries, but also share with these countries, on mutually agreed terms, “the results of research and development and the benefits arising from the commercial and other utilization of genetic resources”.⁵³ Nothing in the CBD indicates that the benefit-sharing principle is applied to communities’ natural property rights of the tangible and intangible components of their genetic resources. Under a utilitarian view, it might simply be seen as a redistributive mechanism to finance the conservation of biological diversity. Nevertheless, some NGOs allege that the right to control access to genetic resources is fundamentally incompatible with the patentability of micro-organisms provided in article 27(3)(b) of the TRIPs Agreement. The Spanish-based GRAIN was one of the most active NGOs on this issue: “Implementation of TRIPs in developing countries should be challenged and suspended on the basis of its irreconcilable conflict with the CBD.”⁵⁴ Similar claims were raised by a number of developing countries at the TRIPs Council, including Kenya and India, who strongly advocate the revision of article 27(3)(b) in light of the CBD.⁵⁵

This clash of proprietary claims over genetic material significantly affected the development of the TRIPs Agreement. In 1994, most biotech corporations were dissatisfied that article 27(3)(b) allows the exclusion of plants and animals from patentability, and waited for its review, scheduled for 1999 in the text of the agreement itself, to correct this flaw. However,

⁵² *Convention on Biological Diversity*, June 5, 1992, 1760 U.N.T.S. 143, art. 15(1).

⁵³ *Ibid.*, art. 15(7).

⁵⁴ “TRIPs versus CBD: Conflicts Between the WTO Regime of Intellectual Property Rights and Sustainable Biodiversity Management”, online: GRAIN <<http://www.grain.org/briefings/?id=24>>.

⁵⁵ WTO, *Communication from India*, WTO Doc. IP/C/W/195 (2000); WTO, *Communication from Kenya on behalf of the African Group*, WTO Doc. IP/C/W/163 (1999).

the biopiracy discourse became so threatening that, according to the International Chamber of Commerce, the industry was “extremely concerned with the ... politicization of the patent law harmonization efforts”.⁵⁶ The Pharmaceutical Research and Manufacturers of America explicitly called “into question the current value of the WTO as a venue for improving the worldwide protection of intellectual property”.⁵⁷ After the WTO Conference held in Seattle in 1999, the U.S. government seriously worried that the reopening of the Pandora’s box of article 27(3)(b) could lead to a weakening rather than a strengthening of biotech patentability. Thus, it stopped calling for the reopening of negotiations and, since 1999, has been defending the status quo.

The U.S. policy shift might be considered a success for those who were afraid that the TRIPs could be amended to reflect U.S. law more directly and to provide that “everything under the sun that is made by man”⁵⁸ can be patented. However, the confrontational approach of the biopiracy discourse was unsuccessful in convincing WTO members of the need to modify the TRIPs to take the CBD principles into account. At the 2001 Doha Conference, WTO members agreed to *examine* the relationship between the TRIPs and the CBD but did not foresee any revision of the controversial article 27(3)(b). In that respect, the discourse on fairness and the access to medicine campaign seemed to have been more efficient.

IV. THE SUCCESS OF FAIRNESS CLAIMS

Although discourses on property and fairness are often associated, they are rooted in different foundations. While the former usually refers to individual rights and claims for the protection of those seen as victims of trespassing behaviours, the latter refers to relational objectives and claims for the protection of those perceived as structurally disadvantaged. In international debates surrounding patent law, the notion of fairness is usually understood as the outcome of distributive justice.⁵⁹ However, the notion of distributive justice should be distinguished from egalitarian

⁵⁶ International Chamber of Commerce, *Current and Emerging Intellectual Property Issues for Business: A Roadmap for Business and Policy Makers*, 6th ed. (Paris: International Chamber of Commerce, 2005) at 18.

⁵⁷ PhRMA, *2004 Special 301 Submission*, appendix B, p. B-3.

⁵⁸ *Diamond, Commissioner of Patents and Trademarks v. Chakrabarty*, 447 U.S. 303, 206 U.S.P.Q. 193 (1980).

⁵⁹ On other fairness discourses used at the WTO, see Amrita Narlikar, “Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO” (2006) 29 *The World Economy* 1005.

principles under which the parties should receive identical rewards and burdens. Rather, a fair regime fulfilling the criterion of distributive justice is seen as a level playing field, obtained by offering additional benefits to most disadvantaged parties.

That being said, there are considerable disagreements about how to apply the criterion of distributive justice and how to identify disadvantaged parties in the international patent regime. As Nancy Kokaz observed, “what is often at stake in disputes over fairness is not a contest between efficiency and fairness, as is often supposed, but rather a clash of rival conceptions of fairness that are not always fully articulated by the disputants”.⁶⁰ Some consider that it is the inventors who are structurally disadvantaged in the world trade system because they have to finance the investment made to develop their invention. To justify their stance, pharmaceutical corporations often underline that it takes hundreds of millions of dollars to market a new medicine. Under this perspective, the criterion of distributive justice is fulfilled through the proportionality principle, “which holds that resources should be allocated in proportion to relevant input”.⁶¹

The U.S. government has been supporting this view for a long time. As early as 1930, Congress adopted protectionist measures against “unfair acts” in importation, which included the importation of products that presumably infringed a valid patent.⁶² These measures, which provided more burdensome procedures on imported products than on domestic products, were later recognized as discriminatory by a GATT panel.⁶³ Thus, at that time, a fair trade regime was clearly not considered as synonymous with a free trade regime.

In the 1970s and 1980s, other measures related to patent law were adopted by Congress in the name of fairness. This time, the objective was not to protect the American market from foreign competition but to protect American products in foreign markets. The most widely known of these measures is probably the *Super 301*, under which the USTR has to take action against countries that deny “fair market access” to Americans who rely on intellectual property protection.⁶⁴ Implicit in the *Super 301* is the idea that a level playing field for free trade should include a standardized

⁶⁰ Nancy Kokaz, “Theorizing International Fairness” (2005) 36 *Metaphilosophy* 68 at 73.

⁶¹ Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge: Cambridge University Press, 2001) at 10.

⁶² Tariff Act of 1930, 19 U.S.C. § 1337 (1930).

⁶³ GATT, *Report by the Panel adopted on 7 November 1989 on Section 337 of the Tariff Act of 1930, L/6439-36S/345*, online: SICE <<http://www.sice.oas.org/dispute/gatt/87tar337.asp>>.

⁶⁴ Trade Act of 1974, 19 U.S.C. § 2411(a) (1974).

patent law. Under this conception of fairness, strong patent protection is portrayed as a liberal rather than a protectionist measure. This is exactly what Harvey Bale, from Hewlett-Packard, argued in 1988:

Intellectual property protection is the only valid type of protectionism being pushed in Washington now because it is really not traditional protectionism at all. Instead, it is at the heart of an open trading system, and those companies that support the strengthening of the trading system and oppose protectionist approaches are the same ones that need and support better intellectual property protection.⁶⁵

President Ronald Reagan went even further by systematically combining the notion of free trade and fair trade. In one of his few speeches on trade policy, he underlined that, “above all else, free trade is, by definition, fair trade”.⁶⁶ On patent law, he explicitly said that “when governments permit counterfeiting or copying of American products, ... it is no longer free trade”.⁶⁷ The protection of intellectual property was then progressively internalized in what Stephen Gill called the “new constitutionalism”, defining what is acceptable and appropriate under a global liberal order.⁶⁸

The adoption of the TRIPs Agreement symbolized this liberal conception of fairness in patent law. The level playing field is guaranteed by identical rules that must be applied by every WTO member. Developing countries could take advantage of transitional periods but ultimately will have to fulfil the same obligations as developed countries. As Donald Richards observed, “The incorporation of TRIPs into the formal institutional multilateral trading system GATT/WTO, operates to lend the IPR agreement a mantle of moral authority and historical necessity.”⁶⁹

Under an alternative conception of fairness, trade relations would imply that a special and differentiated treatment is offered to developing countries in order to compensate their structural disadvantages and allow them to compete on a level playing field with developed countries. Here, distributive justice is not obtained through the application of the

⁶⁵ Harvey Bale, “A Computer and Electronics Industry Perspective” in Charls Walker & Mark Bloomfield, eds., *Intellectual Property Rights and Capital Formation in the Next Decade* (Lanham: University Press of America, 1988) at 101.

⁶⁶ Ronald Reagan, “US Trade Policy” in Sloan Irving, ed., *Ronald W. Reagan 1911-: Chronology, Documents, Bibliographical Aids* (Dobbs Ferry: Oceana, 1990) at 215.

⁶⁷ *Ibid.*

⁶⁸ Stephen Gill, *Power and Resistance in the New World Order* (New York: Palgrave Macmillan, 2003) at 132.

⁶⁹ Donald G. Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPs Agreement* (Armonk: M.E. Sharpe, 2004) at 132.

proportionality principle but through the needs principle. A fair TRIPs Agreement should provide a different set of rules for countries that need better access to technological products, ensuring a universal basic level of well-being.

It is under this alternative conception of fairness that a coalition of NGOs, including Health Global Access Project, Médecins sans frontières, Consumer Project on Technology, Oxfam, Third World Network and Essential Action led the Access to Essential Medicines Campaign.⁷⁰ Contrary to Ronald Reagan, who assumed that free trade is by definition fair trade, this coalition advocated to “make trade fair”.⁷¹ According to the coalition, the “formula for fairness” was to put “patient rights before patent rights”.⁷² A failure to do so “would undermine future trust in the fairness of the trading system”.⁷³

The campaign’s advocacy objectives were founded on the assumption that patents act as a barrier to access to essential medicines. It reformulated the previous paradigm that “patents = free trade = economic growth” with the paradigm that “generics = lower prices = life”.⁷⁴ Just as the transnational corporations took advantage of the trade deficit crisis to transmit their ideas in the 1980s, the transnational NGOs capitalized on the HIV/AIDS crisis of the 1990s to leverage the public health consequences of stringent IPR rights. While other health issues needed to be addressed, pharmaceutical patents quickly became the symbol of the fight against the HIV/AIDS pandemic.

Frames are likely to be successful to the extent that they can be grafted on to previously accepted norms. Accordingly, “agents intentionally try to

⁷⁰ As Meir Perez Pugatch observed, the debate on patented medicines was framed in terms of benefits and cost to the public (innovation vs. access), while the battle was really between commercial interests (research-based industry vs. generic industry). Because both sides used the melodramatic language of fairness, Pugatch considered their rhetoric quite similar. Meir Perez Pugatch, “Political Economy of Intellectual Property Policy-Making — An Observation from a Realistic (and Slightly Cynical) Perspective” (2006) 7 *Journal of World Investment and Trade* 272.

⁷¹ Oxfam, *The Trade Report: Rigged Rules and Double Standards*, online: Oxfam <<http://www.maketrade4fair.com/assets/english/report%20chapter%208%20english.pdf>>.

⁷² Oxfam, *Preventing the Cure: Corporate Lobbying and Fair Access to Medicines*, online: Oxfam <http://www.oxfam.org.uk/what_we_do/issues/health/downloads/cb_pfizer.pdf>.

⁷³ Letter from Health Global Access Project, Médecins sans frontières, Consumer Project on Technology, Oxfam, Third World Network and Essential Action to Members of the TRIPs council (January 28, 2002), online: WTO <http://www.wto.org/English/forums_e/ngo_e/joint_trips.doc>.

⁷⁴ Susan K. Sell & Aseem Prakash, “Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights” (2004) 48 *International Studies Quarterly* 143 at 145.

connect new normative ideas to established ideas when they construct persuasive messages”.⁷⁵ While the “patent discourse” used the GATT legacy, and the “biopiracy” discourse used the normative foundation of the Convention on Biological Diversity, the discourse articulated for the Access to Medicines Campaign relies on the right to life and right to medical care provided in the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*.⁷⁶ The Sub-Commission on the Promotion and Protection of Human Rights itself explicitly supported the NGO campaign by declaring that, “there are apparent conflicts between the intellectual property rights regime embodied in the TRIPs Agreement, on the one hand, and international human rights law, on the other”.⁷⁷

To be more convincing about the unfairness of substantial patent rules, the NGOs frequently underlined what they consider unfair procedures used by the advocates of strong patent protection.⁷⁸ They reject the idea that the TRIPs is the result of a contractual bargaining under which developing countries agreed to the patentability of pharmaceuticals against better access to the markets of developed countries for textiles and agricultural products. They favour a second narrative, under which the patentability of pharmaceuticals was externally dictated by economic coercion. As Peter Gerhart synthesized, the “coercion story portrays the United States as systematically threatening to close its borders to countries that would not agree to minimum intellectual property standards”.⁷⁹

The NGOs also present disputes around the implementation of the TRIPs Agreement as fights between David and Goliath. One of these disputes was the lawsuit filed by 39 powerful pharmaceutical companies against the South African government for its law favouring compulsory licences and parallel imports. It was reported around the world as a lawsuit in which powerful and rich transnational corporations defending

⁷⁵ Rodger A. Payne, “Persuasion, Frames and Norm Construction” (2001) 7:1 *European Journal of International Relations* 37 at 39.

⁷⁶ Patrick Wojahn, “A Conflict of Rights: Intellectual Property Under TRIPS, the Right to Health, and AIDS Drugs” (2001) 6 *UCLA J. Int’l L. & Foreign Aff.* 463.

⁷⁷ *Intellectual Property Rights and Human Rights*, Sub-Commission on Human Rights Resolution 2000/7, NU, 2000, UN Doc. E/CN.4/sub.2/Res/2000/7, para. 2, online: Office of the High Commissioner for Human Rights <http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2000-7.doc>.

⁷⁸ On the notions of procedural and substantive legitimacy, see Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) at 7-8.

⁷⁹ Peter M. Gerhart, “Reflections: Beyond Compliance Theory — TRIPS as a Substantive Issue” (2000) 32 *Case W. Res. J. Int’l L.* 357 at 368. On TRIPs narratives, see also Peter K. Yu, “TRIPs and its Discontents” (2006) 10 *Marq. Intell. Prop. L. Rev.* 369.

excessive profit margins opposed a weak state defending human life and personified by two Nobel Peace Prize Laureates, namely Nelson Mandela and Médecins sans frontières. Supporters of the pharmaceutical companies, including the presidential candidate Al Gore, were soon accused of having “unadulterated greed”.⁸⁰ Influential newspapers even associated the lawsuit with apartheid policies, claiming that black people were left to die for the profit of white people.⁸¹ Under this normative frame, the lawsuit became a public relations nightmare for the pharmaceutical industry. As Oxfam Policy Adviser Ruth Mayne acknowledged, “the South African court case ... did more than other previous events to raise public awareness about the impact of global patent rules”.⁸²

Another widely publicized dispute was the complaint filed by the U.S. government over a Brazilian law allowing a compulsory licence when the invention is not a local manufacture. According to Médecins sans frontières, “The US complaint threatens the Brazilian AIDS policy, which includes providing free drugs to HIV infected people.”⁸³ The U.S. government, however, challenged these public health objectives:

Certain countries try to justify use of protectionist measures by associating these measures with the AIDS crisis when no such linkage exists. This behavior diverts countries, and other interested parties, from focusing on areas of real concern. Indeed, local production requirements can also cost the jobs of American workers.⁸⁴

As in the story of David against Goliath, the weakest but most virtuous opponents win the battle. In April 2001, 39 powerful pharmaceutical corporations yielded to pressure and dropped their lawsuit against the South African government. Three months later, the U.S. government announced that it decided to withdraw its WTO case against Brazil over pharmaceutical patent issues on the first day of the first UN General Assembly Special Session addressing the HIV/AIDS crisis. With these

⁸⁰ Mark Weisbrot, “A Prescription for Scandal” *Baltimore Sun* (March 21, 2001) A17.

⁸¹ Chris McGreal, “AIDS: South Africa’s New Apartheid” *The Guardian* (November 30, 2000), online: The Guardian <<http://www.guardian.co.uk/aids/story/0,7369,405587,00.html>>; Martine Bulard, “Apartheid of Pharmacology” *Le Monde Diplomatique* (January 2000) 11; Salih Booker & William Minter, “Global Apartheid” *The Nation* 273(2) (July 9, 2001) 11.

⁸² Ruth Mayne, “The Global Campaign on Patents and Access to Medicines: An Oxfam Perspective” in Peter Drahos & Ruth Mayne, eds., *Global Intellectual Property Rights Knowledge, Access and Development* (New York: Palgrave Macmillan, 2002) at 249.

⁸³ Médecins sans frontières, Press Release, “US action at WTO threatens Brazil’s successful AIDS program” (February 1, 2001), online: MSF <<http://www.accessmed-msf.org/prod/publications.asp?scntid=2182001228232&contenttype=PARA&>>.

⁸⁴ U.S., United States Trade Representative, *2001 Special 301 Report* (Washington: USTR, 2001) at 5.

actions, advocates of high international patent standards implicitly recognized that a strict enforcement of the TRIPs Agreement could restrain access to medicine in developing countries and that they have a moral responsibility to refrain from doing harm.

Nevertheless, pharmaceutical corporations and the U.S. government kept denying that they have a responsibility of justice and that the TRIPs Agreement should be amended.⁸⁵ This denial was mainly based on arguments over contribution and capacity to act. They argue that “IP protection is not the cause of the present lack of access to medicines in developing countries”.⁸⁶ According to them, the real cause of a health crisis faced by developing countries is “inadequate infrastructure, cultural barriers to care, and mismanaged health care systems”.⁸⁷ Under this perspective, an amendment to TRIPs would not significantly contribute to a better access to medicine. For David Rosenberg of GlaxoSmithKline, “what is really needed in the access field is more funding generally, because these are poverty problems”.⁸⁸ To demonstrate their commitment to behave morally responsibly and, arguably, to deviate the debate away from any TRIPs amendment, pharmaceutical corporations significantly increased the amount of drugs donated to developing countries.⁸⁹ Similarly, the U.S. government initiated an ambitious development program to assist developing countries facing the HIV/AIDS crisis.⁹⁰

These manifestations of moral responsibility were apparently not sufficient to convince developing countries and NGOs that the TRIPs Agreement does not need to be amended. After intense negotiations, WTO members came to a decision in August 2003 to authorize the export of cheaper generic drugs produced under compulsory licences to countries that

⁸⁵ Christian Barry & Kate Raworth, “Access to Medicines and the Rhetoric of Responsibility” (2002) 16:2 *Ethics & International Affairs* 57 at 58.

⁸⁶ Quoted in Keith E. Maskus, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (London: Commission on Intellectual Property Rights, 2002) at 29.

⁸⁷ PhRMA, *Health Care in the Developing World*, online: PhRMA <<http://world.phrma.org/exec.summary.html.html>>.

⁸⁸ David Rosenberg, “Commentary on TRIPs” in Hugh C. Hansen, ed., *International Intellectual Property Law & Policy*, vol. 6 (Yonkers, London: Juris Publishing, Sweet & Maxell, 2002) 833.

⁸⁹ PhRMA, *Global Partnerships: Humanitarian Programs of the Pharmaceutical Industry in Developing Nations*, online: PhRMA <<http://world.phrma.org/global.partnership.2003.pdf>>.

⁹⁰ James Thuo Gathii, “The Structural Power of Strong Pharmaceutical Patent Protection in US Foreign Policy” (2003) 7 *J. Gender Race & Just.* 267 at 299.

do not have the industrial capacity to manufacture them domestically.⁹¹ In December 2005, they agreed on the specific wording of the amendment to the TRIPs, which became the first WTO agreement to be amended.⁹² Thus, unlike the NGOs' reinterpretation of traditional proprietary claims that never led to the proscription of the patentability of life forms, the NGOs' reinterpretation of traditional fairness claims was successful in transforming ideas into norms.

V. CONCLUSION: EXPLAINING THE SUCCESS AND EFFECTIVENESS OF RHETORICAL DISCOURSES

This chapter reviewed rhetorical discourses in international debates over patent law as attempts to frame the debates, build new social norms and influence policymakers. Although far less studied than power distribution or asymmetry of interests, rhetorical discourses play a fundamental role in the evolution of the international patent regime. International law is largely determined by socially constructed norms, which have to be founded on moral arguments that appear universal and cannot be easily rejected.

In fact, not only are rhetorical claims expressed to justify specific measures related to patent law, but they can also serve as normative foundations for strategic linkages with other international regimes. Linkage, one of the most commonly used strategies in international negotiations, makes it possible to bring in external actors and to transfer bargaining power from one issue-area to another.⁹³ As David Leebron observes, "pure strategic linkage, without any substantive argument, is not generally accepted in multilateral contexts".⁹⁴ Linkages need to be grounded on a normative relation between two issue-areas.

This study identified two strategic linkages that were supported by rhetorical discourses. The first is the linkage established in the 1980s between the patent regime and the free-trade regime, which was based on a specific understanding of the notions of property and fair trade relations.⁹⁵

⁹¹ WTO, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (2003), online: WTO <http://www.wto.org/English/tratop_e/trips_e/implem_para6_e.htm>.

⁹² WTO, *Amendment of the TRIPs Agreement*, WT/L/641 (2005), online: WTO <http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm>.

⁹³ Ernst B. Haas, "Why Collaborate? Issue-Linkage and International Regimes" (1980) 32 *World Politics* 357 at 373.

⁹⁴ David W. Leebron, "The Boundaries of the WTO: Linkages" (2002) 96 *A.J.I.L.* 5 at 14.

⁹⁵ Susan K. Sell, "The Origins of a Trade-Based Approach to Intellectual Property Protection" (1995) 17 *Science Communication* 163.

Patent protection had to be seen as a liberal rather than a protectionist measure (as it was perceived during the 19th century) in order to justify the establishment of minimum international standards at the WTO. Once established, this normative linkage allowed the U.S. to use its domestic market as a negotiating tool to convince other WTO members to raise their patent standards.

The second linkage, between the patent regime and the development regime, was based on an alternative understanding of the notion of property and fairness.⁹⁶ Patents were portrayed as obstacles to fundamental rights, such as communities' property rights over genetic resources and the human right to health care. This second linkage strengthened developing countries' negotiating power by bringing into the debate a large number of NGOs and international organizations that support the views of developing countries.

That being said, some rhetorical discourses are more efficient than others at convincing policymakers and contributing to the establishment of new social norms. While the proprietary discourse on biological diversity failed to introduce substantial modifications in the patent regime, the fairness discourse on access to medicines succeeded in amending the TRIPs Agreement. Of course, a wide range of other factors contribute to explain these different outcomes. But the intrinsic characteristics of respective discourses are most likely one of them, even more so when we consider the policy implication of discourses. Indeed, the proprietary discourse on biological diversity initially suggested major changes in the regime, such as the mandatory exclusion of living life forms from patentability for all WTO members. On the other end of the spectrum, the Access to Medicine Campaign repeatedly expressed the opinion that patents were an essential part of the solution, but that more flexibility was needed for specific developing countries. The discourse supporting the Access to Medicine Campaign was more balanced and legally informed than revolutionary and doctrinal. Apparently, if policy objectives are defined in terms of incremental steps rather than radical departure, it decreases the perceived threat and favours positive response. This observation reinforces the conclusion made by Morten Bøås and Desmond McNeill:

For an idea to make an impact in a multilateral institution it must be possible to adapt or distort that idea in accordance with the dominant knowledge-system, the collective institutional identity formed around this

⁹⁶ Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 *Yale J. Int'l L.* 1.

knowledge system, and the power relationships in the world political economy that maintain them.⁹⁷

Interestingly, the debate around the relation between the Convention on Biological Diversity and the TRIPs Agreement is progressively leaving aside proprietary arguments to consider more seriously the norm of fairness. Today, fewer NGOs and developing countries claim that there is a fundamental conflict between the two treaties that needs to be addressed. The emerging idea is that a synergistic relation between the two regimes would be desirable.⁹⁸ By requiring the disclosure of the origin of genetic resources in patent applications, the patent system could be used to favour the monitoring of the Convention on Biological Diversity, and more specifically, the principle of fair and equitable sharing of the benefits arising out of genetic resources.

This new approach, based on the notion of fairness, focusing on a specific legal measure, and normatively recognizing the legitimacy of intellectual property over living life forms, is quite well received by a number of policymakers. An increasing number of European countries have modified their patent law to require the disclosure of the origin of genetic resources.⁹⁹ Switzerland even suggested modifying the Patent Cooperation Treaty regulations to take into account the objectives of the Convention on Biological Diversity.¹⁰⁰ This positive reaction suggests that, from the perspective of those criticizing the established regime, a rhetorical discourse based on fairness, which by definition claims to be balanced, rather than a discourse based on property rights, which uses the language of exclusion, could be more convincing. Although it may not contribute to a regime revolution, it can favour a regime evolution.

⁹⁷ Morten Bøås & Desmond McNeill, "Power and Ideas in Multilateral Institutions: Towards an Interpretative Framework" in Morten Bøås & Desmond McNeill, eds., *Global Institutions and Development: Framing the World?* (London and New York: Routledge, 2004) 217; see also Doug McAdam, "The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement" in Doug McAdam, John McCarthy & Mayer Zald, eds., *Comparative Perspective on Social Movements: Political Opportunities, Mobilizing Structures and Cultural Framings* (Cambridge: Cambridge University Press, 1996) 340.

⁹⁸ David Vivas-Eugui, "Requiring the Disclosure of the Origin of Genetic Resources and Traditional Knowledge: The Current Debate and Possible Legal Alternatives" in Christophe Bellman, Graham Dutfield & Ricardo Meléndez-Ortiz, eds., *Trading in Knowledge, Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan, 2003) 196 at 201-202.

⁹⁹ Jean-Frédéric Morin, "La divulgation de l'origine des ressources génétiques : une contribution du droit des brevets au développement durable" (2005) 17 C.P.I. 131.

¹⁰⁰ WTO, Council for Trade-Related Aspect of Intellectual Property Rights, *Revision of the Communication from Switzerland: Article 27.3(b), the Relationship Between the TRIPS Agreement and the CBD, and the Protection of Traditional Knowledge*, IP/C/W/400/Rev1 (2003), online: WTO <<http://docsonline.wto.org/DDFDocuments/t/IP/C/W400R1.doc>>.