

PROTECTION FOR TRADITIONAL KNOWLEDGE

PROF. YU: One issue commentators rarely address is the choice of forum in which governments negotiate the protection of traditional knowledge. The terms of a treaty, such as its definitions, the scope of protection, and the enforcement mechanism, are often shaped by the intergovernmental body responsible for organizing the treaty conference. For example, a treaty negotiated under the WTO regime will be very different from one sponsored by the WIPO, even if the participants and issues are the same.

Thus, if governments want to extend the protection of traditional knowledge beyond the intellectual property field, a treaty solely sponsored by the WIPO will be highly unsatisfactory. Likewise, if governments want to create protection gradually and to limit initial protection to specific intellectual property rights, negotiating the treaty in the WTO might invite further complication of this already very difficult issue by allowing governments to link intellectual property rights with other trade-related items.

The other point commentators tend to under-emphasize is that the success of a negotiation often depends on the mindsets of the negotiators--in particular, whether they believe they are playing a zero-sum game or a nonzero-sum game. In game theory terms, a zero-sum game is a game in which a player's gain must result in another player's loss. By contrast, in a nonzero-sum game, a player's gain will not necessarily result in another player's loss. Thus, negotiators having the mindset of playing a zero-sum game will be more likely to split the difference through accommodation and compromises, while those having the mindset of playing a nonzero-sum game are more interested in creating forward-looking solutions that provide mutual benefits to all the parties involved.¹

Finally, scholarship on alternative dispute resolution has discussed in depth the various cognitive barriers a decisionmaker might face during the negotiation process.² These barriers are particularly relevant to our discussion here. Consider our first example, loss aversion. People tend to attach more weight to prospective losses than to prospective gains of an equal value. Thus, governments might be more receptive to proposals that protect traditional knowledge if they focus on the potential benefits of those proposals, rather than the potential costs.

¹ See generally Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. (forthcoming 2002).

² See, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 156-72 (2000) (discussing psychological and cultural barriers); Robert A. Baruch Bush, "What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 9-12 (1996) (discussing cognitive barriers).

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Reactive devaluation is another example. People tend to devalue proposals offered by their adversaries even though they will accept identical proposals put forward by their allies or neutral parties. Thus, if the less developed countries perceive the developed countries as their adversaries, they will tend to undervalue whatever proposals the developed countries offer. By the same token, if the developed countries perceive the less developed countries as their adversaries, and consider the protection of traditional knowledge an unjustified enlargement of the Southern development agenda, they also will undervalue whatever proposals the less developed countries offer.

In sum, the choice of forum, the mindsets of the negotiators, and the extent and impact of psychological barriers on the policymakers will play major roles in determining whether governments can create a mutually beneficial solution, whether they can promote cultural diversity, and whether they can establish a harmonized regime that effectively protects traditional knowledge.