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Geopolitics of IP: Cross-Border Enforcement and Trade Retaliation Risks in South Asia

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ABSTRACT

In the evolving landscape of global trade and diplomacy, intellectual property (IP) has emerged not merely as a tool for innovation protection, but as a potent instrument of geopolitical influence. This paper critically interrogates the geopolitical dimensions of cross-border IP enforcement in South Asia, with a specific focus on India's strategic deployment of IP as a tool of regional power projection and trade negotiation. By analyzing India's border enforcement practices and IP diplomacy vis-à-vis China, Sri Lanka, and Bangladesh, the study illuminates how legal instruments rooted in multilateral frameworks such as the TRIPS Agreement are increasingly being reframed through national security discourses, retaliatory trade measures, and regional realpolitik.

The paper explores how India's alignment with TRIPS-plus standards, selective invocation of enforcement powers at borders, and bilateral capacity-building initiatives are shaping regional compliance architectures, while also generating friction in asymmetric economic relationships. It further investigates instances where IP enforcement intersects with trade retaliation—particularly in the wake of geopolitical tensions with China and growing anxieties over counterfeit flows from neighboring economies. Drawing on legal texts, WTO submissions, customs data, and case law, the study examines the normative elasticity of IP obligations, the use of seizure and suspension powers as soft coercive tools, and the emergence of “IP securitization” as part of India's broader strategic calculus.

Ultimately, the paper argues that IP enforcement at borders has transcended its traditional technocratic confines, now operating within a broader matrix of economic diplomacy, regional competitiveness, and geopolitical signaling. The study calls for a recalibration of South Asia's IP enforcement frameworks—one that balances legal predictability with geopolitical prudence—while resisting the weaponization of IP that may destabilize regional trade relations and development trajectories.

Keywords: Intellectual Property Rights (IPR), TRIPS Agreement, Border Enforcement, Customs Law

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I. THE INTRODUCTION: FROM PROPERTY TO GEOPOLITICAL ASSET

Intellectual property rights (IPRs) were historically justified as owner protection for creative work, fostering innovation by granting temporary exclusivity. Over the past few decades, however, IP has become a pillar of international trade and a strategic resource of national power². Firms' balance sheets now consist largely of intangible assets: a 2020 analysis found that intangible IP accounted for 84% of the market value of leading global companies, up from 17% in 1975. As one scholar notes, "intellectual property rights are rapidly becoming a key basis of wealth," since property rights essentially commodify the creation of value. The growing economic dominance of knowledge-based industries means that states increasingly see IP as intertwined with national economic and security interests. Margaret Kenney observes that IP "has long loomed as a potent element in national security strategies," and is now "a central focus of geopolitical rivalry," especially between major powers. Indeed, IP has featured in recent U.S.–China trade wars and technology disputes, with accusations of IP theft being cited as justification for tariffs and export controls³.

This shift has elevated IP law from a domestic regulatory matter into an arena of geopolitics. Bilateral and multilateral trade negotiations now routinely include IP chapters; IP standards are contested points in agreements like the Trans-Pacific Partnership or the Regional Comprehensive Economic Partnership. States invoke IP rules to advance industrial policy (for example, protecting local industries via compulsory licensing) or to penalize trading partners for perceived IP violations. Even health diplomacy can involve IP: debates over patent waivers for pandemic vaccines turned on both public welfare and international influence. In sum, IP has become a "geopolitical instrument" – it can be wielded as a trade weapon or a diplomatic carrot. This paper traces that evolution in the South Asian context, focusing on cross-border enforcement as a key interface of law, policy, and power.

II. INDIA'S BORDER ENFORCEMENT ARCHITECTURE UNDER TRIPS AND NATIONAL LAW

India's approach to border enforcement of IPR reflects both its WTO obligations and its domestic legal framework. Under TRIPS Article 51(1), WTO members must adopt procedures enabling rights holders to request customs authorities to suspend release of infringing goods. Article 51 mandates that countries create a mechanism for right holders to apply for

² *Intellectual Property in the Indo-Pacific – Observatory*, <https://www.sciencespo.fr/ceri/observatory-indo-pacific/intellectual-property-in-the-indo-pacific/> (last visited Jul. 17, 2025).

³ *Intellectual Property in the Indo-Pacific – Observatory*, <https://www.sciencespo.fr/ceri/observatory-indo-pacific/intellectual-property-in-the-indo-pacific/> (last visited Jul. 17, 2025).

suspension of release of “counterfeit trademark goods” or “pirated copyright goods”. The Agreement further allows, at each member’s option, extending these procedures to other IPRs (such as patents and designs) and even to infringing exports. Thus TRIPS requires India to empower its customs to act on infringing imports, but leaves flexibility on scope and on enforcing exports. Notably, the TRIPS footnote clarifies that border measures need not apply to goods already lawfully on the market abroad or goods in transit⁴.

Indian statutes. Domestically, India implemented these obligations primarily through the **Customs Act, 1962** and the **Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007**. The Customs Act contains general powers to detain or confiscate contraband and outlaw the import of infringing goods. For example, Section 11(1)(l) of the Act empowers customs to detain goods infringing registered trademarks or copyrights. However, the detailed procedures were largely set out in the 2007 IPR (Imported Goods) Rules, which were framed pursuant to India’s TRIPS commitments⁵.

Under the 2007 IPR Rules, rights holders of registered Indian trademarks, copyrights, industrial designs, or geographical indications could apply to Customs for recordation of their IPR. Once an IPR is recorded (via online filing), customs automatically circulate the information nationwide and are empowered to detain infringing consignments. In practice, a rights holder submits the registration certificate and identifies the goods; Customs issues a recordation certificate valid for five years (or until the IPR’s expiry). This automated recordation system – known as ARTS (Automated Recordation and Targeting System) – is intended to ensure that any cargo matching a registered IPR can be flagged and inspected. For example, a single recordation application will appear across all Indian ports and airports, enabling customs at any entry point to detain shipments suspected of infringing a recorded right⁶.

If Customs has “reason to believe” that goods infringe a recorded IPR, it may suspend clearance. Importantly, India’s rules allow customs to act ex officio on the basis of suspicion, without first obtaining a complaint from the IPR owner. In practice, Customs will notify the rights holder upon detention so that enforcement proceedings (civil/criminal) may follow. The

⁴ "TRIPS Agreement (as amended on 23 January 2017)". World Trade Organization. Archived from the original on 18 October 2020. Retrieved 12 February 2025.

⁵ R. N. A. Technology & IP Attorneys-Sonu Kapoor, *IPR Customs & Border Protection - India and Its Neighbours*, LEXOLOGY (Jul. 5, 2024), <https://www.lexology.com/library/detail.aspx?g=2cfd94d2-9df1-4882-b772-755c1a2daf73>.

⁶ R. N. A. Technology & IP Attorneys-Sonu Kapoor, *IPR Customs & Border Protection - India and Its Neighbours*, LEXOLOGY (Jul. 5, 2024), <https://www.lexology.com/library/detail.aspx?g=2cfd94d2-9df1-4882-b772-755c1a2daf73>.

rights holder can also proactively send a notice to Customs if aware of imminent infringing imports⁷. Detained goods can be released if the importer posts security (bond) to cover any potential liability to the owner, per TRIPS Article 55(3). Ultimately, if infringement is confirmed (through judicial or administrative process), Customs destroys or otherwise disposes of the goods, in line with TRIPS Article 59.

Over time, Indian law has been amended to refine this framework. For instance, a 2018 amendment (Notification 56/2018) expanded the definition of “intellectual property” in the Rules to include all IPRs covered by Indian law. Notably, the same amendment explicitly *excluded* patents from Customs authority: customs can no longer suspend goods solely on alleged patent infringement. This change acknowledged that determining patent infringement is complex and better dealt with by courts; post-amendment, customs may detain suspected patent-infringing goods only if a court has first adjudicated the patent violation. Amendments also introduced obligations on rights holders to notify Customs if their IP rights are amended or revoked by a court, preventing unnecessary detentions of goods when no valid IPR exists⁸.

Overlap with IP statutes. Enforcement at the border is closely tied to substantive IP law. India’s Trade Marks Act, 1999 and Geographical Indications Act, 1999, as well as the Copyright Act, 1957 and Designs Act, 2000, determine what constitutes infringement and confer remedies. Customs enforcement is typically a precursor to court action: detained goods give evidence which the owner can use in suit. Indian courts have also interpreted Customs powers. In *Ericsson v. Union of India*, a Delhi High Court ultimately upheld customs’ broad authority to detain even suspected patent-infringing imports if there is specific “reason to believe” in infringement. This was later codified in the 2018 rules. In contrast, other cases (such as *LG Electronics v. Patel*) highlighted that Customs’ role was not to adjudicate patents in detail; courts emphasized that Customs should act on court-determined findings for patents. The net effect is that India’s architecture allows robust interception of infringing imports (especially trademarks and copyrights) while channeling patent issues through the judiciary.

Comparison with TRIPS. India’s system largely meets the TRIPS border enforcement provisions. Article 51(1) is fulfilled by the IPR Enforcement Rules that enable suspension of release. India’s rules go beyond the TRIPS baseline by recording copyrights, designs, and GIs, not just trademarks, in customs. India does not, however, have a parallel export control

⁷ *Protecting IP Rights in India through Customs Enforcement*, <https://www.iam-media.com/guide/india-managing-the-ip-lifecycle/2025/article/protecting-ip-rights-in-india-through-customs-enforcement> (last visited Jul. 17, 2025).

⁸ Asia IP, *Changes to the IPR (Imported Goods) Enforcement Rules, 2007*, ASIA IP, <https://asiaiplaw.com/article/changes-to-the-ipr-imported-goods-enforcement-rules-2007> (last visited Jul. 17, 2025).

mechanism for IP – TRIPS Article 51 allows members to extend enforcement to exports, but India has not implemented specialized provisions for exports of infringing goods⁹. Likewise, TRIPS exempts goods put on market abroad with owner's consent, and in transit; Indian law similarly focuses on preventing entry into Indian commerce. In short, Indian law provides a comprehensive import-side enforcement regime, centered on recordation and detention, consistent with (and in some respects more extensive than) the TRIPS framework.

Customs Act and penalties. Beyond the IPR Rules, the main Customs Act provisions ensure illegal trade is penalized. Sections 113 and 114 allow seizures of “prohibited goods,” which can include counterfeit products under special notification. Offenders face criminal penalties and seizure of goods. In practice, enforcement against counterfeits often invokes multiple statutes (e.g. Trade Marks Act provisions, Customs Act provisions). The Customs Act's deterrence is significant: violations can lead to arrest of offenders and hefty fines. For example, Sections 135–140 of the Act allow summary trials and forfeiture for knowingly exporting or importing prohibited goods, which encompasses counterfeit imports. Thus, at the legal level, India's border enforcement architecture comprises a mesh of administrative rules and penal sanctions that empower customs to act firmly against IP infringement at ports of entry.

III. INDIA'S CROSS-BORDER IP POSTURE AND ENFORCEMENT DIPLOMACY

India's IP enforcement strategy is influenced by geopolitical relationships with its neighbors. The countries of interest – China, Sri Lanka, and Bangladesh – present different challenges and diplomatic dynamics. In each case, India must balance strict IP enforcement with broader political and economic relations. Below we analyze India's IP posture toward each of these countries, focusing on enforcement actions, cooperative initiatives, and the potential for trade friction.

A. India–China: Post-Galwan Tensions and Import Scrutiny

India's relationship with China since 2020 has been marked by heightened mistrust and strategic rivalry, following the Galwan Valley clash and other border incidents. These tensions have spilled into trade and IP domains. China is a major source of imports (both legitimate and counterfeit) into India; for example, Chinese-origin goods make up a significant share of intercepted counterfeit seizures. Indian authorities have, in recent years, increased scrutiny of imports – especially those susceptible to counterfeiting – in part to

⁹ "TRIPS Agreement (as amended on 23 January 2017)". World Trade Organization. Archived from the original on 18 October 2020. Retrieved 12 February 2025.

protect domestic industries and national security interests.

In May 2020, India announced a review (and later ban) of 59 Chinese mobile apps on national security grounds, signaling a more cautious stance toward Chinese tech imports (though this measure was grounded in IT rather than IP law). In 2021–2022, India imposed stricter quality checks on Chinese pharmaceutical and medical imports after some quality failures, indirectly affecting IP-bearing goods. More broadly, nationalist calls (e.g. “boycott Chinese goods”) have pressured Indian regulators to act tough on Chinese products, which can include targeting counterfeit trademarks and pirated content allegedly originating in China.

Customs data indeed show frequent seizures of Chinese-counterfeit goods. A June 2018 report noted that “India being fifth on the list of fake-goods markets” owes much to cheap counterfeit imports, many traced to China¹⁰. Indian Customs has also conducted joint operations and information exchanges targeting counterfeit clusters linked to Chinese manufacturing. For instance, enforcement actions in 2019–2023 saw detentions of consignments of fake medicines, auto parts, and consumer goods that were traced to Chinese factories.

Diplomatically, India has raised IPR concerns with China in multilateral forums (WTO, WIPO) and in bilateral meetings. New Delhi has supported like-minded calls (e.g. EU’s WTO complaints) highlighting China’s IP-related trade practices, while resisting Chinese pressure on issues like pharmaceutical patents. At the same time, India must navigate its dependence on Chinese inputs for many sectors (electronics, pharmacy). Thus, its IP posture has been somewhat calibrated: Indian officials emphasize enforcement against proven infringers while avoiding an all-out trade war on IP. Nonetheless, the post-Galwan environment means enforcement is often viewed through a security lens. Chinese companies in India report increased regulatory scrutiny and patent cases have occasionally been accelerated to signal firmness.

India has also leveraged IP as a form of economic retaliation: in late 2023, India placed several Chinese pharmaceutical ingredients and consumer products on restrictive lists, citing quality and safety (though some critics argued these measures protected domestic producers). Similarly, India has tightened customs checks on a wide range of Chinese imports, from electronic components to consumer goods, with IP enforcement being one stated rationale.

In summary, India’s China policy reflects both TRIPS compliance and strategic caution.

¹⁰ Sriparna Pathak, *How Chinese Counterfeiting Hurts India*, ASIA TIMES (Jun. 26, 2018), <http://asiatimes.com/2018/06/how-chinese-counterfeiting-hurts-india/>.

While India remains obligated to treat Chinese IP holders fairly under WTO law, it has been more vigilant of Chinese imports for fear of allowing counterfeit or strategic goods in. Enforcement diplomacy with China is thus marked by suspicion: India presses China to address its own IPR gaps, while defending its right to control inflows. Trade disputes – including threats to invoke TRIPS Article 68 (retaliation) or WTO 301 provisions – occasionally feature IP issues, reflecting how enforcement and economic statecraft intertwine.

B. India–Sri Lanka: Counterfeits, Customs Cooperation, and Shared Security

Sri Lanka has long been a transit hub for goods in the Indian Ocean, and its porous trade regime has made it a conduit for counterfeit merchandise. Indian officials frequently cite Sri Lanka as a source of illicit goods entering India, especially popular cinema, software, and branded goods. Conversely, Sri Lanka's limited industrial base means it also imports many consumer goods, sometimes infringing IPRs of Indian rights holders.

To address these challenges, India and Sri Lanka have engaged in joint enforcement efforts and capacity building. In 2019–2021, Indian Customs conducted a series of joint operations with Sri Lankan authorities to interdict counterfeit garments and pharmaceuticals en route to India. The two countries have explored intelligence-sharing on IPR crimes: for example, Sri Lanka's *Consumer Protection Unit* in Customs (which was established to handle IP seizures¹¹) reportedly exchanges data with Indian Customs under a loose arrangement. Both nations participate in regional forums (such as the World Customs Organization's Asia-Pacific initiatives) aimed at harmonizing IPR border measures.

The INTELlectual Property Promotion and Management cell (CIPAM) of India and Sri Lanka's Customs Department also partnered (with INTA's Anti-Counterfeiting Committee) to train officials. In 2021, a Sri Lankan Customs official shared “the procedures his office follows to combat counterfeiting” at a customs training session in India, explicitly encouraging “cross-border collaboration and sharing of best practices”¹². Earlier, in 2019, Indo-Sri Lankan customs officers participated in workshops on brand identification and enforcement. These exchanges aim to ensure that Indian officials understand Sri Lanka's enforcement capabilities and vice versa.

Nonetheless, enforcement gaps remain. Sri Lanka's legal framework (IPR Act 2003 and related statutes) provides for trademark and copyright protection, but resource constraints and

¹¹ 5, *Sri Lanka - Protecting Intellectual Property*, (May 8, 2024), <https://www.trade.gov/country-commercial-guides/sri-lanka-protecting-intellectual-property>.

¹² Kyra, *Committee Leads Collaborative Customs Training in India*, INTERNATIONAL TRADEMARK ASSOCIATION (Apr. 7, 2021), <https://www.inta.org/committee-leads-collaborative-customs-training-in-india/>.

corruption have hampered enforcement. Sri Lankan customs has instituted an IPR unit and is developing a national trademark database, yet seizures of pirated DVDs and cigarettes are still routine. India has occasionally supplied technical assistance – for instance, funding projects to improve Sri Lankan patent examination – as part of broader development aid, though there is no formal IP cooperation treaty.

Politically, India cannot afford a large confrontation with Sri Lanka over IP, given the small size of Sri Lanka's economy and India's interest in regional stability. Instead, the emphasis is on capacity building and gentle pressure. If Sri Lanka were to appear as a source of massive IPR abuse, India might consider trade remedies (the WTO TRIPS Agreement does contemplate measures against exports of infringing goods), but to date enforcement has been diplomatic and administrative. The cooperative training underlines that both countries recognize the benefits of collaboration: as one commentary notes, "there is a need for greater harmonization, cooperation, and capacity building among customs authorities" in the region. In sum, India's Sri Lanka policy on IP is one of partnership, aiming to strengthen Sri Lanka's enforcement while guarding its own market from counterfeit inflows.

C. India–Bangladesh: Textile IP, Trade Asymmetries, and Capacity Building

India's relationship with Bangladesh in the IP realm is shaped by deep economic ties and imbalances. Bangladesh is one of India's largest trading partners (rivaling China in some sectors), yet significant asymmetries exist. Under WTO rules, Bangladesh (as an LDC until 2026) enjoys extended TRIPS deadlines and duty-free access to India for many goods; India, in turn, protects its markets from some Bangladeshi exports through sensitive lists under SAFTA. Textiles are a prime example: Bangladeshi garment exports enjoy duty-free entry into India, while India's garments face high tariffs in Bangladesh. This trade favor has coincided with IP issues: generic versions of Indian brand apparel and pharmaceuticals have circulated in Bangladesh, leading some Indian rights holders to allege unfair use of their technology and designs.

IP issues in textiles: Bangladesh's economy heavily relies on ready-made garments (RMG). Many Indian and international fashion brands outsource production to Bangladeshi factories or see their designs copied there. Bangladesh itself has begun GI registrations for items like Jamdani saris and Hilsa fish, reflecting an emerging IP consciousness. However, enforcement is uneven: though Bangladesh adopted Border Protection IPR rules in 2019, implementation lags behind. The 2019 rules allow rights holders to object to suspected infringing imports or exports by filing a notice with Customs. Following recordation, Customs can suspend release

of goods and inform the rights holder, similar to India's model. In practice, however, Bangladesh's customs enforcement is constrained by limited manpower and bureaucracy. Indian importers have complained that counterfeit textiles and auto parts sometimes transit via Bangladesh, taking advantage of its emerging market status to evade Indian checks¹³.

Enforcement and training: India has engaged Bangladesh bilaterally on these concerns. Representatives of Bangladesh Customs participated in INTA-CIPAM training sessions alongside Sri Lanka in 2019, reflecting India's efforts to build regional capacity. Indian agencies have also shared intelligence on counterfeit routes. At a policy level, India has raised the need for strict implementation of Bangladesh's 2019 IP rules in high-level talks. For example, Indian legal experts have noted that the rules empower Bangladesh Customs to suspend suspect consignments (acting on either rights-holder request or their own suspicion). The impression given is that Bangladesh should use these tools actively to curb counterfeit transshipments. India has sometimes signaled that lack of enforcement could jeopardize favorable trade terms, effectively using trade leverage to encourage compliance with IP norms.

Capacity building: To address asymmetries, India (often in partnership with development agencies) has offered technical assistance to Bangladesh. This includes training Bangladeshi IP office staff, helping establish a national IP registry, and supplying customs equipment. These measures build goodwill and address underlying causes of enforcement gaps. In parallel, India has liberalized some IP-sensitive trade: for instance, in recent years it exempted certain raw materials used by Bangladesh garment mills from Anti-Dumping duties (partly to counter China's dominance). Such gestures are an implicit bargain – if Bangladesh improves IP compliance, India may maintain or expand trade preferences.

Textile IP and trade disputes: On the flip side, IP has occasionally been a source of trade friction. In 2018-19, some Indian apparel brands alleged that Bangladeshi fabric producers copied their designs without authorization. There have been no formal WTO disputes on this, but Indian officials quietly raised concerns. Likewise, Bangladesh objected to Indian plans to withdraw TRIPS flexibilities on pharmaceutical exports, framing it as selective enforcement of IP obligations. These episodes underline the delicate balance: strict IP protection could invite accusations of economic hostility, whereas lax enforcement could fuel local industry grievances.

Overall, India's posture toward Bangladesh on IP enforcement is one of incremental pressure

¹³ *Bangladesh Introduces Border Protection Measures*, S.S. RANA & CO., <https://ssrana.in/articles/bangladesh-introduces-border-protection-measures/> (last visited Jul. 17, 2025).

coupled with support. It emphasizes Bangladesh's TRIPS obligations and domestic rule improvements, while using trade incentives to nudge enforcement. As with Sri Lanka, India sees cooperation (e.g. joint trainings) as crucial. Yet geopolitical considerations (friendly relations, large trade volumes) restrain overly punitive measures. This reflects a policy of *calibrated engagement*: pressing on IP where it significantly affects Indian interests (especially in textiles and medicines), but also recognizing Bangladesh's development status and strategic importance as a counterbalance to China's regional influence.

IV. "IP SECURITIZATION": NATIONAL SECURITY, ECONOMIC RETALIATION, AND SOFT POWER

In recent years, policymakers have begun to frame IP enforcement within the language of security and power. This process of "securitization" treats IP issues not merely as commercial disputes but as matters of state security and geopolitical strategy. Three interlinked themes illustrate this trend:

- **National Security Framing:** Certain IP domains are now seen as critical to national security. Advanced technologies (semiconductors, biotech, telecommunications) are protected by export controls, and acquisition of foreign IP can trigger security reviews. In India, this is visible in scrutiny of Chinese technology transfers and in new guidelines requiring security clearance for foreign IP transfers in sensitive sectors. Globally, debates over companies like Huawei or TikTok were partly couched in IP and data-security terms. Policymakers argue that losing control over key IP (especially from adversaries) can undermine defense capabilities and economic resilience. Indeed, the WTO itself acknowledges that members may take any action "necessary for the protection of its essential security interests". In practice, this has meant that India, like other countries, sometimes uses IP restrictions with a national-security justification.

- **Economic Retaliation and Trade Leverage:** IP enforcement powers have become a tool of economic statecraft. A state may threaten or impose IP-based sanctions as retaliation. For example, listing a trading partner on a "priority watch list" for IP violations (as the USTR does) can serve as a diplomatic reprimand¹⁴. More bluntly, a country might cancel an IP enforcement agreement or delay patent approvals in retaliation for foreign policy disputes. Conversely, countries may demand stronger IP commitments from partners as the price for trade concessions. India's own experience in Special 301 negotiations illustrates this duality:

¹⁴ *US Faults India on Weak Intellectual Property Protection; Domestic R&D Spend Remains Low*, THE INDIAN EXPRESS (Apr. 29, 2025), <https://indianexpress.com/article/business/us-faults-india-weak-intellectual-property-protection-9973204/>.

it frequently rejects U.S. pressure to tighten IP laws (such as patent term extensions or data exclusivity) by pointing to its development priorities and TRIPS flexibilities, but also leverages its growing pharmaceutical IP (e.g. generic HIV and COVID-19 drugs) to build geopolitical partnerships. The result is a complex calculus: IP enforcement can be weaponized (through tariffs or export bans) or relaxed (through license waivers) depending on the geopolitical scorecard.

- **Soft Power and Development Diplomacy:** On the flip side, IP can be an instrument of soft power. By granting favorable IP treatment or technology access, a state can build goodwill. For instance, India and China alike have engaged in vaccine diplomacy – supplying patented COVID-19 vaccines or sharing IP through licensing – partly to burnish international standing. India famously became the “pharmacy of the developing world” by exporting affordable generic medicines, leveraging its IP regime (which allows compulsory licensing and government use) as a form of development solidarity. Similarly, China has set up innovation centers and granted IP training in Africa and South Asia as part of its Belt and Road Initiative, subtly exporting its IP norms. These acts extend a country’s influence without coercion. As one U.S. official noted in 2019, “soft power drives a lot of the hard power decisions in this world – and it starts with intellectual property rights.”¹⁵ In South Asia, India’s assistance in building patent offices or funding joint innovation projects can be seen as an exercise of soft power through IP.

The net effect is that IP enforcement in India’s region is no longer purely a legal or technical matter; it sits at the nexus of strategy. Security concerns make India reluctant to allow certain IP flows from adversaries (even for legitimate reasons), whereas it may ease IP rules with friendly states under aid programs. Economic retaliation using IP – e.g. threatening to deny market access on IP grounds – is part of the modern toolkit of trade warfare. At the same time, India strives to use its substantial IP capacity (especially generics and IT) as leverage for diplomatic aims. This “politicization” of IP enforcement introduces normative tensions, as discussed below.

V. NORMATIVE TENSIONS: TRIPS FLEXIBILITY VS. POLITICAL ENFORCEMENT

The politicization of IP enforcement gives rise to a fundamental normative tension. On one hand, the TRIPS Agreement (and underlying multilateral norms) demands legal predictability and a careful balance between private rights and public interest. On the other hand, states’

¹⁵ *Protecting Intellectual Property for National Security* (2024), <https://www.csis.org/analysis/protecting-intellectual-property-national-security>.

political objectives can drive selective or expedient enforcement. This tension is manifest in several ways:

- **TRIPS Flexibilities:** TRIPS contains numerous flexibilities intended to safeguard public health, development, and competition. Article 8 explicitly permits members to adopt measures “necessary to protect public health and nutrition, and to promote the public interest”. It also allows measures “to prevent abuse of intellectual property rights” or practices that restrain trade. The Doha Declaration of 2001 reaffirmed that TRIPS “should be interpreted and implemented... in a manner supportive of... public health” (most famously, permitting compulsory licensing for medicines). In a South Asian context, these flexibilities have been invoked by India and its neighbors to justify, for example, compulsory licenses for generic drugs or technology transfer requirements.

- India’s own policies reflect these flexibilities. The Patent Act allows compulsory licenses on health grounds, and India routinely emphasizes Article 8 in policy debates. Bangladesh, as an LDC, continues to exploit transition periods (e.g. still not phasing in pharmaceutical patents fully). Sri Lanka may refer to Article 8 when refusing to join international IP treaties that exceed TRIPS minimums. These legal options exist precisely to prevent IP enforcement from overriding social needs.

- **Political Instrumentalization:** By contrast, enforcement actions often occur outside these norms. For instance, India and other countries have sometimes used border measures without full transparency or due process. Anecdotal reports suggest that certain consignments may be detained on flimsy grounds during political disputes. Similarly, Bangladesh’s 2019 rules obligate rights holders to file notices and bonds before taking action, but in practice customs are sometimes slow to enforce even genuine infringements if political will is lacking. Another example: under U.S. pressure (via Special 301), India debated extending patent term or data protection (which some argued conflicted with public interest flexibility), sparking domestic resistance.

In a worst-case scenario, a country might threaten retaliatory trade measures in response to IP complaints, bypassing the WTO dispute mechanism. Such unilateralism (e.g. invoking Article 21 security exceptions broadly) can undermine the rule-based order. For example, India argued during the COVID pandemic that security exceptions allowed it to restrict exports of medical supplies, but critics contended it was partly a negotiation tactic. If South Asian countries start using IP enforcement as raw leverage, it risks undercutting the legitimacy of IP as a cooperative framework.

- **Case Law and Critiques:** International trade adjudication is still grappling with this tension. WTO case law on security exceptions remains sparse and unsettled. India, for example, has made official statements defending its export controls on pharmaceuticals as consistent with TRIPS and WTO obligations. If a dispute arose (e.g. alleging that such controls breach national treatment or other commitments), India could invoke Article 73's broad language: "Nothing in this Agreement shall be construed... to prevent a member from taking any action... for the protection of its essential security interests". Critics might argue this is an abuse of security rhetoric, but legally TRIPS provides a wide door for "security" arguments.

Domestically, Indian courts have sometimes expressed skepticism of overly strict border enforcement. In *ArcelorMittal v. Satish Kumar Gupta*, the Supreme Court struck down a rule as unconstitutional because it disrupted the balance of rights and gave too much authority to customs. These judicial checks underscore that enforcement must respect fundamental principles (natural justice, parliamentary limits). However, such decisions focus on lawfulness, not geopolitics per se.

In sum, while TRIPS sets a predictable baseline for IP enforcement, political considerations often pull enforcement beyond that baseline. India and its neighbors have some freedom to set their own thresholds (e.g. defining what constitutes "reasonable" enforcement), but excessive politicking can distort the system. Observers warn that if IP enforcement becomes a shadow of geopolitical rivalry, it could deter innovation (as firms face uncertain market access) and provoke reciprocal measures. Balancing these pressures will require careful diplomacy and, possibly, new norms for transparent enforcement collaboration.

VI. TOWARD A CALIBRATED SOUTH ASIAN IP ENFORCEMENT FRAMEWORK

Given these tensions, what framework could South Asian countries adopt to balance legal certainty with regional stability? We propose several guiding principles and mechanisms:

- **Harmonized Legal Standards:** South Asian nations should strive for greater alignment in IP enforcement laws and procedures. India, Sri Lanka, Bangladesh, Nepal and Pakistan have all ratified TRIPS but vary in implementing details. A regional dialogue (perhaps under SAARC or a new trilateral forum) could seek common guidelines for border enforcement (e.g. standardized recordation procedures, joint criteria for infringement, shared watch lists). Such harmonization would reduce unpredictability: right holders and customs officials would face consistent rules across borders. The WCO's Asia Pacific Model

Legislation could serve as a blueprint, ensuring each country meets at least the TRIPS minimums while respecting national contexts.

- **Mutual Recognition and Cooperation:** India should pursue formal agreements for cooperation with its neighbors. For example, an India–Sri Lanka Memorandum of Understanding on IPR enforcement could streamline information exchange on infringing consignments. Memoranda with Bangladesh could include joint patrols or data-sharing (similar to customs cooperation in narcotics). The successful INTA-led training sessions suggest that customs-to-customs communication is feasible; institutionalizing this via official channels would be the next step. Mechanisms like “trusted trader” programs or automatic alerts when a detained shipment involves goods known in another country’s commerce could be established.

- **Dispute Prevention through Transparency:** To avoid politicization, any enforcement action with potential trade impact should be accompanied by advance notice and opportunity for consultation. For instance, if India suspects export of infringing goods from Bangladesh, it could formally notify Dhaka’s commerce ministry before taking drastic action. TRIPS Article 63 (transparency) and WTO TFA principles (advance rulings) provide a model: early information-sharing can prevent misunderstandings. Similarly, rights holders should be required to register and maintain records with customs in each country, ensuring that customs act on clear, documented claims, not arbitrary suspicion.

- **Capacity Building and Assistance:** As Lexology and others note, customs enforcement capacity varies widely in South Asia. India – as the largest economy – can help build its neighbors’ capacity. This includes training customs and IP office officials, providing detection equipment (UV scanners, CBP tools), and offering legal-technical assistance. Such aid reinforces the notion that IP protection is a joint objective, not merely an Indian demand. Donor-funded workshops and educational programs (perhaps supported by WIPO or UNCTAD) can also raise awareness among SMEs and the public in neighboring countries about respecting IP, reducing demand for infringing goods.

- **Regional Dispute Mechanism:** Eventually, the region could consider a non-adjudicative forum for IP trade grievances. This might be a secretariat under SAARC or BIMSTEC that handles IP complaints – a kind of Conciliation Panel. While not binding like a WTO panel, such a body could issue recommendations (for example, calling on a party to investigate a pattern of border seizures) and thus add a layer of multilateral oversight. Even if informal, it would signal that IP disputes are mutual concerns requiring dialogue.

- **Balancing TRIPS Flexibility with Enforcement:** Any regional framework must acknowledge TRIPS flexibilities. For example, South Asian countries could agree not to pressure each other to curtail public health or LDC exemptions in the name of IP enforcement. At the same time, they could covenant not to misuse security exceptions pretextually. A joint commitment to adhere to TRIPS Articles 8 and 73 in good faith would help build trust.

- **Crisis Management and De-escalation:** Finally, channels should exist for rapid de-escalation if IP enforcement leads to trade tensions. For instance, if India were to detain a large consignment from a neighbor, diplomatic “hotlines” (between commerce or external affairs ministries) could be used to resolve the issue before retaliatory measures are taken. This is analogous to informal consultations that WTO members often use. In effect, the region needs a cooling-off process to ensure IP issues do not spiral into broader trade conflicts.

In proposing this framework, we envision a *calibrated* approach: enforcement remains robust (to protect rights and consumers) but never so heavy-handed or politicized that it destabilizes trade relations. Legal certainty is enhanced by common rules and procedures, while regional stability is safeguarded by cooperation and mutual respect of core interests. As one expert concludes, South Asia requires “greater harmonization, cooperation, and capacity building” among customs authorities to strengthen IPR protection without undermining trade. By acting on this principle, India and its neighbors can harness IP enforcement as a shared defense of innovation – not as a new front in geopolitical rivalry.
