I suggested a few weeks ago that India and the United States might try foster climate cooperation by having India agree to use climate-friendly technology and the United States asgree not to pursue any legal actions under the Trade-Related Aspects of Intellectual Property treaty.

But of course there is a catch: at some point inventors of climate-friendly technology have to get compensated. Otherwise they won't have the proper incentives to innovate. That might be particularly important with "clean coal" technology (which really should be called "cleaner coal" technology), because developing nations such as India and China figure to be its major consumers: coal plants in the US are on the way out.

What to do? One notion that is beginning to be developed in the literature is the so-called "compulsory license," where the intellectual property rights holder get compensated at an automatic rate instead of being free to negotiate for his preferred price among potential users. In other words, rights holders would be protected by a "liability rule" (damages set by a court) instead of a "property rule" (receipt of an injunction with the rights-holder then negotiating the price out with potential buyers).

As it turns out, there is a lively literature (at least for legal scholarship) on this issue in intellectual property generally. Dan's and Holly's colleague Robert Merges seems to be the leading advocate for the property rule. I am still working my way through his very well-done articles on the matter, but his essential points seem to be that 1) legislatures, who usually set the royalty rates for compulsory licenses, are subject to lobbying, and then outdated rates are locked in to statutes; and 2) the extensive bargaining required by property rules is less of a problem if inventors can put together voluntary pools, such as composers do with organizations like ASCAP and BMI in the music copyright field.

So what does this have to do with climate technology? At this point, I think that the case for the compulsory license (liability rule) is much stronger in the climate area for one important reason: many of the benefits of climate technology cannot be captured by the target market. Put another way, climate technology creates large positive externalities that bargaining will systematically underestimate.

If you're trying to sell coal technology to India, asking them to pay for the premium that the carbon reduction/mitigation will cost is probably not going to work, for political reasons if nothing else. India is still very bitter about TRIPs, because it has severely damaged its generic drug industry and has created huge problems in getting antiretrovirals to AIDS patients. If, on the other hand, you went with a compulsory license, India could crow that it defeated the evil westerners because TRIPs is seen (perhaps inaccurately) as making such

licenses impossible, and the United States could establish a market for American technology producers.

There are other complexities, which I will keep trying to work out. But a key element of the US-India TRIPs accord would be establishing the proper compulsory license framework.

Lots of people talk about "technology transfer" and assume it's easy. It's anything but that. It's going to need some creative lawyering for it. Too bad the Administration just lost its best one. But somehow I imagine they can find some more.