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Occasional Paper 1

Trade-Offs and Trade Linkages: TRIPs in a Negotiating Context

Notes of a talk given at Quaker House, Geneva, 12 September 2000

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All countries that become part of a future WTO trade negotiation will have to develop a position on intellectual property rights (iprs). This is also true for many countries involved in regional and bilateral trade negotiations. Given the pervasive importance of intellectual property rights in the global economy every state, big or small, must have clear negotiating objectives in relation to iprs.

In entering a trade negotiation on iprs a country faces the complex task of developing a strategy for ipr and integrating it into its overall negotiating strategy. It has to take into account the following:

1. the likely costs and benefits (economic and non-economic) of intellectual property rights for its domestic economy and social institutions;
2. the linkages that other trade negotiators see between intellectual property and others sectors such as investment, agriculture and high technology;
3. the trade-offs that might or might not be possible given the linkages;
4. its own negotiating capacity and power-base and those of others; and
5. the webs of dialogue and webs of coercion that surround intellectual property in a multi-actor world of regulatory standard setting.

The Uruguay Round of trade negotiations contains lessons for all countries on these issues.

I. A Practical Economics of Intellectual Property in a Negotiating Context.

Much of the literature on the economics of intellectual property is concentrated in the area of patents. There is a shortage of empirical work on the actual effects of intellectual property rights. It is hard to generalise about the impact of intellectual property rights since their effects vary across industries and sectors. What is clear from the literature is that one cannot support the proposition that the continued ratcheting up of levels of intellectual property protection will necessarily bring social welfare gains. Indeed, there is a real risk that this will bring with it overall social welfare losses.

Trade negotiators have to show their domestic constituencies that the deals that they bring back will provide tangible gains. When dealing with complex regulatory instruments such as intellectual property rights they should bear in mind the following rules of thumb:

1. **Think in net terms.**

> Intellectual property missionaries who push stronger and stronger models of intellectual property protection often do so by saying that it will assist a given sector within a country eg the film industry, the computer industry and so on. A key question for any country, however, is whether it is a net winner or loser from a given ip regime. For example, a study of copyright royalty flows in Australia in the 1990s revealed that Australia was a net loser from copyright despite the fact that it had strengths in areas such as film-making and software. For example, in 1993-94 Australia paid out $1732 million in royalties to overseas copyright holders but earnt only $380 million from its own copyright.[1]

2. **Think in macro terms.**

> Working out the effect of intellectual property rights in a given industry over time is difficult, because at the micro-economic level many factors operate to affect the decision-making procedures of individuals and firms. The evidence as to the role of intellectual property rights will often be inconclusive. For trade negotiators having to think about these issues it is best to ask macro questions. This means considering whether a country is likely to do better overall if higher rather than lower standards of intellectual property apply, whether it is likely to do better if it makes use of the principle of national treatment as opposed to the principle of reciprocity, or whether it is likely to do better if the principle of national treatment is tied to lower rather than higher standards of intellectual property protection.

[1] See Office of Regulation Review, 'An economic analysis of copyright reform', Commonwealth of Australia, 1995, 39.

3. **Think in terms of concrete gains and losses rather than speculative gains.**

Intellectual property rights for the economist involve a trade off. The grant of a legal monopoly in information allows the holder of the right to put a price on that information at a higher level than obtains in a competitive market. At the same time, however, the legal monopoly provides a producer with the incentive to invest in the creation of the information in the first place. The cost of monopoly, in other words, is being traded off against the gains of invention and innovation.

Generally speaking, proponents of stronger and stronger intellectual property protection tend to over-emphasize the gains and pay little attention to the real-world costs of intellectual property. For trade negotiators it is vital to be aware of the costs of creating and maintaining intellectual property rights and not to be seduced by the promise of utopian innovative futures. For example, one of the effects of TRIPs was to extend the patent term to patents already in existence. After TRIPs had been signed a study of the cost of this to the Australian economy showed that it might be as a high as $3.8 billion.[2] No one had anticipated this kind of number.

It should also be noted that the gains to a company of the patent system are dependent upon that company being able to meet the costs of the patent system and being able to achieve an economy of scale with respect to patenting. IBM, for example, earnt more than $1 billion from its patent portfolio in 1999, but in that same year it also took out 2,756 US patents alone (source IBM, Annual Report, 1999, available at http://www.ibm.com.). Developing, maintaining and defending patent portfolios costs millions of dollars.

Another way in which to think about the issue of real word costs of intellectual property is to imagine that a smooth talking salesman arrives on your doorstep with a black box. He pressures you to buy the black box, explaining that if you install it in your house and feed it money, it will in the future bring many benefits. He is vague as to how exactly the box works, how long the benefits he promises will take to arrrive and even the exact nature of the benefits. The benefits *will* come, he assures you. Do you buy the black box?

II. Knowing the trade gains and losses of intellectual property

One of the features of the Uruguay Round of trade talks was that there was a high degree of ignorance amongst technology-importing countries as to the costs of increasing intellectual property protection. One priority for all countries, especially developing countries is to begin to do a proper costing of intellectual property rights. Rather than trying to model the dynamic efficiency gains of stronger intellectual

[2] See Nicholas Gruen, Ian Bruce and Gerard Prior, 'Extending Patent Life: Is it in Australia's Economic Interests?', Industry Commission, June 1996, Commonwealth of Australia, http://www.indcom.gov.au/research/papers/patents/full.html.

property rights in a global economy, which is a highly complex exercise that is in any case likely to be inconclusive, developing countries should concentrate on systematically collecting data on the measurable costs to them of increasing standards of intellectual property protection. For example, they might quantify -

- royalty flows, licence fees in and out of the their economies,
- levels of import of intellectual property related goods,
- prices of intellectual property related goods in their economy, especially in key sectors such as pharmaceuticals,
- the number of foreign patent registrations,
- the cost of setting up patent offices,
- the cost of setting up the legal infra-structure to allow for enforcement of intellectual property rights, and so on.

If developing countries wish to argue for a relaxation of their obligations under TRIPs eg. through an extension of the transitional provisions, then this argument must be accompanied by persuasive evidence as to costs that were not properly appreciated at the time the agreement was negotiated.

The welfare costs of intellectual property rights can be measured by welfare economics. Developing countries should also gather data from their national industries. A fundamental problem for the economist is that much of the information that is the subject of an intellectual property right is privately traded and in some cases is itself private (eg trade secrets). It is only by consulting extensively with national industries that policy makers in developing countries will be able to ascertain whether intellectual property rights are promoting the kinds of private trading arrangements that are beneficial to an economy. Good consultative structures with national business are fundamental to any evaluation of iprs from a trade perspective.

In Annex 1 of these notes the consultative structure of the US is presented. Annex 2 summarises the role that US business played in the Uruguay Round. The US model of consultation is the most elaborate of any in the world. In the Uruguay Round the Advisory Committee for Trade Policy and Negotiations (ACTN) played a fundamental role in developing the US trade negotiating agenda. ACTN was created in 1974 by Congress under US trade law as part of a private sector advisory committee system. The purpose of this system is to "ensure that U.S. trade policy and trade negotiation objectives adequately reflect U.S. commercial and economic interests".[3] ACTN exists at the apex of this system, its membership in part drawn from the most senior levels of big business within the US. ACTN has reporting obligations to Congress on trade policy. It also has direct access to the United States Trade Representative, because its other crucial function is to advise on US trade negotiating objectives. Out of this business crucible came during the 1980s the crucial strategic thinking on the trade-based approach to intellectual property. It was ACTN that developed a sweeping trade and investment agenda that included the development within the GATT of a broad code on intellectual property.

[3] See Private Sector Advisory Committee System, USTR, 1994 Annual Report, http://www.ustr.gov/reports.

Clearly US consultative structures exercised a deep influence on the US position in the last GATT Round. Developing countries should be looking at their own consultative structures and asking whether they can improved. A structure that produces a real exchange of information within a nation ultimately results in better informed trade negotiators who can operate more effectively.

III. Lessons for developing countries from the last trade round:

1. *The need for detailed strategies*.

Over the years UNCTAD had done a lot of good analytical work in the ipr area as it related to technology transfer issues. Developing countries had information about intellectual property rights, but they did not have a detailed strategy. Their main tactic was the negative one of resisting the inclusion of intellectual property rights in the Uruguay Round, using the argument that there already was a specialist organisation in the field of international standard setting for intellectual property (the World Intellectual Property Organization). This tactic worked for so long as the US and the EC were not fully united on the inclusion of a code on intellectual property in the GATT. Once the US and the EU united, developing countries had no positive strategy for dealing with the ipr issue.

2. *The need for genuine technical expertise.*

The inclusion of intellectual property in the Uruguay Round trade agenda left all countries with the problem of finding negotiators with expertise in intellectual property. The US solved this problem by

(i) getting trade negotiators and intellectual property experts to inform each other of foundational concepts in their respective disciplines,
(ii) sending teams to the negotiations that were made up of experts drawn from both fields; and
(iii) having experts in the corridors who could be consulted at crucial times.

Developing countries sent individuals who often were not expert in intellectual property at the juridical level. Those individuals were left to carry on with very little in the way of support structures. There was in the words of one negotiator a lot of reliance on ‘cable traffic’.

3. *The problem of ‘development rhetoric’*

During fieldwork interviews for their study *Global Business Regulation* (Cambridge University Press, 2000), Braithwaite and Drahos were informed by a number of those interviewed that elements of UNCTAD were out of touch with changes taking place in economies around the world and the

regulatory agendas that were being developed in the light of those changes. Thus while UNCTAD diplomats were delivering speeches about technology as the common heritage of mankind, US business was planning the enclosure of the intellectual commons. The results speak for themselves.

4. *The problem of getting 'dudded', 'suckered' etc*

Developing countries were promised that if they signed off on TRIPs -

- they would get the benefit of transitional provisions.

What actually happened: After the signing of TRIPs the US began immediately to pressure developing countries into an early adoption of TRIPs, because US business took the view that the transitional provisions were unacceptably long.

- that US unilateralism under section 301 of its Trade Act would cease and that there would be a rule-governed multilateral dispute resolution procedure.

What actually happened: The US, as annual USTR reports make clear, has increased the number of countries under 301 surveillance.

A WTO panel concluded that the existence of the 301 process was not inconsistent with US obligations under the WTO.

- that there would be benefits to their industries.

What has happened: Clearly we will know more when all countries have implemented TRIPs. In developing countries with a strong generics pharmaceutical industry a rationalisation of the industry is occurring with the price implications for consumers as yet unclear.

- that they would be eventual winners from TRIPs.

What has happened: to date nothing very much. This is a monumental empirical claim which we will be in a position to evaluate in about 20 years.

6. *The problem of disunity*

Ultimately the level of co-operation between developing countries on TRIPs was not very great, even as between developing country leaders such as India

and Brazil. This fact becomes even more obvious when one compares to it to the level of co-ooperation achieved by developed countries using groups such as the Quad and the Friends of Intellectual Property Group.

Developed countries, despite their ideology of liberal individualism, were able to operate collectively on the ip issue. Developing countries, despite their greater commitment to communitarian values, operated individualistically on the ip issue.

7. *Managing a trade negotiation - the role of the Quad (US, EU, Japan, Canada)*

The Quad was crucial to the delivery of TRIPs. In a nutshell, the Quad was the place where the key agenda-setting took place. Once a consensus was achieved within the Quad, they built support by expanding the circle of countries, kept working on confidence-building with all countries (even India - telling them they would cease being a closed country (true) and what about their film and software industries; appeals to images of modernity - 'ip rights are part of any sophisticated modern information economy'). The circle would be narrowed again for the hard issues and then expanded again when there was consensus. All the time countries on the outside of the circle were worked on. Those issues on which a consensus could not be reached were excluded from the final set of agreements to be dealt with at a later stage (eg the exclusion of the parallel imporation issue from TRIPs and the exclusion of the audio-visual sector from GATS).

IV. What future for TRIPs?

1. *US Position*

For the time being the US is concentrating on the implementation of the standards in TRIPs. There is little point in arguing for higher and higher standards of protection unless other countries actually implement and enforce those standards. The US is employing four basic strategies to consolidate its gains under TRIPs.

(a) It continues to monitor countries under its 301 process.

(b) Bilaterally, it continues to negotiate intellectual property agreements with states, sometimes beginning two separate negotiations (eg one on investment and one on ip) and then subsequently linking them.

(c) It uses a litigation strategy going to the WTO dispute resolution process, if it thinks countries are in breach.

(d) It uses TRIPs Council processes and TRIPs reviews to put pressure on countries with respect to implementation.

2. Developing Country Position

Developing countries will have to develop a series of strategies on TRIPs including -

1. the identification of developed country partners with whom to work on TRIPs issues. The most likely source for such partners is Europe.

2. building within their countries strong and permanent consultative links with national business and other producers of knowledge (eg indigenous groups and farmers) who are likely to be affected by TRIPs issues.

3. the proliferation of credible alternative models of regulation to deal with different contingencies. For example, if the patent system continues to expand and strengthen despite developing country opposition, developing countries should argue that those countries that gain the most revenue from patent-based income should be required to contribute a small fraction of it to a global R&D fund that could be used to fund research of importance to developing countries. UNCTAD over the years has done a considerable amount of work on issues such as this and could function as an analytical resource for the development of concrete models.

3. creating a developing country counter-weight to the Quad. In the last round developing countries had no equivalent to the Quad, meaning that they had no counter-weight to the agenda-setting powers of the Quad or its capacity to manage the crucial stages of a trade negotiation.

Annex 3 contains a possible model for such a counter-weight. The essential idea is that four developing country leaders (for example, India, Brazil, Nigeria and China) would form a group that would represent developing country interests in the hard or final stages of a multilateral trade negotiation (MTN). Each of these countries could chair a working group on some of the key negotiating issues of a given MTN. In the example given in Annex 3 there would be a group on Services and Investment, a group on Intellectual Property and Biotechnology, a group on Agriculture and Goods and another on Competition, Environment and Labour (or whatever emerging issues there were in that trade round). Other developing countries could join one of these four groups, perhaps with some taking responsibility for forming a working party on some aspect of the negotiations for which that group had overall responsibility (eg an African country could take responsibility for forming a working group on intellectual property and biodiversity within the Intellectual Property and Biotechnology Group). The advantage of this structure would be that the expertise of developing countries would be pooled, thereby reducing the capacity problems that they faced in the last round.

The argument that developing countries are too diverse to form such a group overlooks the fact that the Quad itself was able to operate during the Uruguay Round despite the fact that -

- there was an intense patent war between the US and Japan,
- US and Europe had strong differences of view on agriculture; and
- many countries within Europe were, at least in the eyes of the US, intellectual property pirates (eg Italy and Spain).

Despite their differences, developing countries have strong common interests on issues such as intellectual property, agriculture and textiles, investment and the regulation of multinationals within a global economy.

The view that the Quad will be less important in any future negotiation because of a different dynamic caused by factors such as China's entry into the WTO underestimates the benefits to Quad countries of acting collectively. China's presence in the WTO will very likely increase the unity of Quad so as to ensure that it retains its agenda-setting capacities. Moreover, Quad members will be especially keen to ensure that China accepts and internalises WTO norms rather than playing outside WTO rules (much as the US did with respect to international treaties at the end of the nineteenth and first half of the twentieth centuries). This means that there is an added incentive for the Quad to continue their collaboration in any future MTN.

Annex 1

PRIVATE SECTOR CONSULATION -THE US MODEL

PRESIDENT'S ACTN
(45 MEMBERS)

SEVEN POLICY ADVISORY COMMITTEES

1. Investment and Services Policy Advisory Committee
2. Intergovernmental Policy Advisory Committee
3. Industry Policy Advisory Committee
4. Agricultural Policy Advisory Committee
5. Labor Advisory Committee
6. Trade and Environment Policy Advisory Committee
7. Defense Policy Advisory Committee on Trade

THIRTY TECHNICAL, SECTORAL, FUNCTIONAL ADVISORY COMMITTEES
For Example Committees on Textiles, customs, standards

ROUGHLY 1000 PRIVATE SECTOR INDIVIDUALS PROVIDING ADVICE TO PRESIDENT, CONGRESS, USTR AND OTHER GOV DEPTS.

Annex 2

ROLE OF US BUSINESS IN A TRADE NEGOTIATION

1. SETS OBJECTIVES
(eg. ACTN's role in developing a trade investment agenda that included ip)

2. SETS PRIORITIES
(eg. the message by US business - 'No IP, No Round')

3. DETERMINES STRATEGIES
(eg. the targetted use of trade sanctions under US trade law against developing country leaders like India and Brazil)

4. PROVIDES NEGOTIATING ASSISTANCE
(eg. members of the Intellectual Property Committee (IPC - a private sector ip lobby group based in Washington) accompanied the US delegation to the Ministerial meeting at Punta del Este in 1986)

5. DOES SOME NEGOTIATING
(eg. informal negotiations that took place between key US and EU business players over trade in the audio visual sector)

6. BUILDS CONSENSUS
(eg. the trilateral consensus that was forged on a trade approach to intellectual property by the IPC with the Union of Industrial and Employers' Confederations of Europe and the Japan Federation of Economic Organisations)

7. PROVIDES TECHNICAL EXPERTISE
(eg. the use of corporate intellectual property specialists to critique developing country proposals on ip)

Annex 3

A QUAD COUNTERWEIGHT IN THE WTO?