

Commission on Intellectual Property Rights

Workshop 8: Process and Constitutional Issues in International Rule Making on Intellectual Property

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Participants: Felix Addor, Claude Burcky, Edward Chisanga, Peter Drahos, Mary Footer, Brewster Grace (morning only), Richard Owens, Piragibe dos Santos Tarragô, Paul Vandoren, Jayashree Watal.

Commissioners: Daniel Alexander (Chair), Carlos Correa, John Barton, Gill Samuels.

Secretariat: Charles Clift, Tom Pengelly, Phil Thorpe, Rob Fitter.

Summary: The workshop focused on how the specific needs of developing countries can be accommodated in international decision making and standard setting in intellectual property and considered what changes could be made to the decision-making processes and institutions to ensure that the voice of poor people and developing countries is better heard and acted upon.

Specifically, the following six sets of questions were addressed:

1. What processes are at work when rules are set multilaterally? Are there important differences between WIPO and WTO, and what are they? Can we think of modifications to the processes that would help developing countries get their points across? How do we deal with divergences of interest within the developing country group?
2. What processes are at work when rules are modified through bilateral agreements? Should developed countries consider whether their negotiating agenda takes sufficient account of the interests of developing countries? Who is involved in setting that agenda? Similarly, how could the negotiating hand of developing countries be strengthened?
3. What do present trends in intellectual property rules and practice mean for developing countries? Such trends include TRIPS implementation, the rapid increase in patent applications, chronic capacity problems and so on. Is there a need to consider more radical changes in systems to address these problems, taking into account the needs of developing countries?

4. Can we think of positive changes in the way the WTO's institutional machinery works that would take greater account of the interests of developing countries? For instance in the TRIPS Council or Dispute Settlement Procedures? What about NGOs?
5. How could WIPO serve better the interests of developing countries, both as a forum for negotiating IP rules, and as a provider of technical assistance services to developing countries?
6. Apart from possible improvements to existing institutions, should one consider other institutional innovations that would help developing countries achieve the aims the IP system is supposed to serve? For example, the promotion of technological innovation and technology transfer to serve development purposes

The Workshop concluded with a list of general comments and recommendations for the consideration of the Commission and national and international policy makers.

Session 1: Overview *and* Session 2: Could the way the rules are set be improved?

Presentation by Peter Drahos

Professor Drahos' presentation traced the history of international intellectual property standard setting in the 1980s and 1990s in terms of a co-ordinated strategy of bilateral and multilateral commercial diplomacy (a "global intellectual property ratchet") by the United States of America (USA). Trade concessions, (offered to developing countries through the Generalized System of Preferences (GSP) scheme) and, conversely, trade sanctions (through threat and/or use of the Super 301 instrument) were the key enforcement tools: a "carrot and stick approach".

In multilateral mode, Professor Drahos argued that the USA used a tactic known as "forum-shifting" to take forward its intellectual property standard setting objectives in different international fora (eg WIPO, WTO, UNESCO). Within these fora, the USA and other powerful developed countries would seek to work with "progressive" developing countries as key allies. Professor Drahos asserted that industry groups in the USA initially favoured the bilateral mode of intellectual property standard setting as this was seen as more effective. However, they later came to see benefit in the wider reach of harmonized international intellectual property standards in a multilateral agreement under the WTO (with its strong enforcement procedures under the Dispute Settlement Body). This was particularly true for the USA's copyright industries, which were concerned about IPR infringement in much broader range of countries than the USA was feasibly able to negotiate bilateral agreements with. This was the context to the negotiation of the WTO TRIPS Agreement.

Professor Drahos then discussed the role of Japan and the European Union (EU) in international intellectual property standard setting and considered whether there was any evidence regarding their exercise of co-coercive pressure on developing countries through the threat and/or use of trade sanctions etc. Professor Drahos asserted that Japan had not pursued intellectual property standard setting objectives through bilateral agreements, preferring the multilateral mode instead. Regarding the EU, Professor Drahos argued that the European Commission did develop a commercial policy instrument similar to the USA's Super 301 instrument, but in practice it was very hard to use this effectively against developing countries as this required a consensus amongst EU member states. The EU did, however, include provisions related to intellectual property protection in bilateral trade agreements with developing countries.

Professor Drahos then turned to discussing the influence of developing countries in international intellectual property standard setting. While there have been examples of successes achieved by developing countries, the key question according to Professor Drahos was what is meant by "success". For example, the 1967 amendment of the Berne Convention (the inclusion of an Appendix on special provisions regarding Developing Countries) is often cited as a "success" by developing country negotiators but on the other hand, it could be argued that the Appendix was still born as it has been very rarely used by developing countries in framing their domestic copyright legislation).

As important as the influence of developing country governments on international intellectual property standard setting, Professor Drahos argued, was the role played by Non-Governmental Organisations (NGOs), although their influence is exercised in quite different ways (e.g. over the declaration on TRIPS and Public health in at the WTO Ministerial Meeting in Doha last year). Addressing the question of whether NGOs (as opposed to governments) can properly represent people in developing countries, Professor Drahos argued that evidence from policymaking and regulation in the environmental sector suggested that the involvement of NGOs produces better publicly policy and asserted that NGOs perform a useful role by working for under-represented groups. Finally, Professor Drahos noted that participation by NGOs in policy making is a consistent application of the core democratic doctrine of the separation of powers.

Concluding his presentation, Professor Drahos turned to the suggestion of whether it would make sense to have some form of "sustainable development impact assessment" of proposed new international intellectual property standards, along the same lines as the Environmental Impact Assessments (EIAs) which are carried out for new infrastructure investment projects. However, learning from the experience of EIAs, Professor Drahos argued that this suggestion, whilst attractive in principle, begged some important questions in practice: Who would carry out these impact assessments? Which groups of public would have the opportunity to review the documentation? And how would the negotiation process be changed as a result of the findings of the impact assessment?

Discussion

Responding to the paper and presentation by Professor Drahos, the 1st Discussant expressed the view that whilst it may be true that developing countries may not have had much impact on intellectual property standard setting in the past, this will not be the case for the future. This is shown by their prominent role in the proceedings of the WTO TRIPS council in the last 2 years or so, culminating in the Doha declaration decisions on TRIPS and public health and enhanced surveillance of implementation of incentives for promoting technology transfer to LDCs by developed countries under TRIPS Article 66.2. The 1st Discussant noted that the accession of China to the WTO would also further strengthen the influence of developing countries, although China would be more likely to put its national interests first rather than working as part of a developing country bloc in the WTO.

Regarding the analysis presented by Professor Drahos on the process of decision-making in WTO, the 1st Discussant noted that it was inevitable that there are some restricted meetings given that there are now 144 WTO members; likewise, some alliance-making and co-operation between different countries and groups of countries was also to be expected in any international fora whatever the sector of negotiations.

Turning to the inclusion of intellectual property standards in bilateral and regional trade agreements between developed and developing countries the 1st Discussant took the view that this was a legitimate subject for such agreements given that the strong commercial interests at stake (it was a cornerstone of the EU's economic policy, for example, that developing countries and LDCs need to have intellectual property protection and effective enforcement). The 1st Discussant noted, for example, that the EU has favoured the bilateral mode with the EU candidate countries in order fully to align their intellectual property standards as part of preparation for accession.

Taking issue with Professor Drahos' characterization of the U.S. approach to intellectual property policy, it was noted that some developed countries believe that it is entirely legitimate for countries with a comparative advantage in the creation of intellectual property to pursue intellectual policy objectives within their normal commercial diplomacy, as well as enforcement of intellectual property standards to combat the theft of their intellectual property through "judicious use" of a number of commercial policy instruments (including trade sanctions as a last resort).

The view was also expressed that Professor Drahos' paper had not sufficiently highlighted the fact that intellectual property standards were considered by most developing and least developed countries to be in their long-term development interests. If the whole value of intellectual property, particularly with respect to development, was being questioned, this was wrong. There was ample economic analysis to the contrary, including the recent study by Keith Maskus. All WTO Members had re-enforced their commitment to the WTO TRIPS Agreement and the value of intellectual property protection in the Doha Ministerial Declaration on the

TRIPS Agreement and Public Health. It was noted that certain developing countries were not providing the leadership they once did against the development of intellectual property standards because some within these countries believe that they have something to gain from parts of the intellectual property regime. The reasons why this might be the case needed to be discussed, recognizing the extent to which they had developed intellectual property-dependent industries that were central to their economic growth.

The 1st Discussant went on to argue that commercial policy is properly conducted by nations through both bilateral and multilateral modes so as to be fully effective (so the “global intellectual property ratchet” is a natural and predictable phenomenon). Likewise, it was also natural for intellectual property standard setting to progress at different speeds in different negotiating fora. The 1st Discussant expressed surprise at the assertion by Professor Drahos that WIPO habitually encouraged developing countries to adopt TRIPS+ provisions in their domestic laws: but if this was the case, he agreed this would be inappropriate.

The 2nd Discussant expressed his agreement with much of the paper and presentation made by Professor Drahos. He emphasized the point that effective influencing of international intellectual property rule making by developing countries requires active participation at all stages of the standard setting process, even at the level of specialized technical working groups, where he observed that NGOs cannot participate, with the consequence that they have little influence on the detailed crafting of international rules and standards.

Turning to the experience and influence of developing countries in WIPO, the 2nd Discussant observed that the organisation has “shown itself not to be completely deaf to developing country interests”, citing the establishment of the WIPO inter-government committee work programme on access to genetic resources, traditional knowledge and folklore as an example of this. The 2nd Discussant noted, however, that there is scope for improvement: for example WIPO could deepen its collaboration with WTO and other UN agencies, such as WHO.

Concluding his remarks, the 2nd Discussant noted that Professor Drahos had not commented on the important issue of the relationships between developing country government negotiators and their domestic industry lobbies. A related point was that Professor Drahos had not evaluated the value of the “quid pro quo benefits” developing countries were offered by developed countries (e.g. through GSP scheme concessions) for adoption of higher intellectual property standards. Summing up, the 2nd Discussant expressed the view that the key issue for LDCs was still to be fully addressed: how can IPR regulation be best designed to contribute to the transfer of the technology and to promote economic development.

In the subsequent general discussion, some participants raised questions about the methodology and evidence base for Professor Drahos’ work, including the objective verification of evidence presented. In response, Professor Drahos drew attention to the fact that this work was based heavily on substantial research he had made for

an earlier publication entitled “*Global Business Regulation*” which he had co-authored.

Some participants flagged the need to distinguish carefully between developing countries in term of both their different policies towards intellectual property protection and their different levels of capacity for participation in international standard setting. It was further noted that it may also be helpful to distinguish between rule-making for different forms of intellectual property rights (copyright, industrial property etc) as there may be important differences in the relevant standard setting processes, as well as in the issues involved for developing countries.

Regarding the negotiations of the WTO TRIPS Agreement in particular, it was argued by some participants that developing countries were engaged in defensive rear-guard actions, as the developed countries were the demandeurs on TRIPS. It was asserted that developing countries didn't see it as appropriate or necessary to negotiate TRIPS in WTO: they believed this was being adequately done in other fora (eg reform of the Paris convention in WIPO). Crucially, however, in the early 1990s there was a sea change in political leadership and economic policy orientation (e.g. trade liberalization, became more outward looking and export focused) in many key developing countries and this meant a more positive attitude to including TRIPS within the overall deal of the Uruguay Round. It was claimed that the standards in TRIPS were essentially defined by the Quad (EU, USA, Canada and Japan) and then negotiated with the developing countries, who eventually accepted these in anticipation of concessions in other areas of the Uruguay Round agreement (e.g. textiles and agriculture).

The session concluded with a more detailed discussion regarding the role played by NGOs in international rule making on intellectual property. It was pointed out that there is a very wide diversity within the NGO sector (e.g. in terms of the interests they represent, the balance of activities in advocacy or research; and how vocal they are in representing their interests). At the same time, the NGO phenomenon is real and is not going to go away: in fact, it appears to be increasing in importance, particularly in Geneva. The key issue seemed to be how to ensure that the role played by NGOs is constructive, especially in relation to inter-governmental organizations which currently may have only very limited scope to include such groups at a formal level.

The point was also made that developing countries are very selective in their consumption of NGO services and products. Many see awareness raising about intellectual property and development issues as the key benefit from NGOs. Some developing countries do also want technical advice from NGOs, where they have the capacity to give it. Finally, it was argued that the problem of NGOs acting as “proxy representatives” for developing country governments in international fora is overstated: a more real problem is that NGOs may over-tax the time of busy developing country delegates and over-burden them with demands to attend meetings, etc. It was also important to recognize that NGO objectives are not always the same as

those of developing and least developed countries and an effort must be made to assist countries in understanding these differences.

The view was expressed that the role of NGOs in the run-up to the WTO Qatar Ministerial Conference and the Declaration on TRIPS and Public Health was particularly instructive of the positive contribution NGOs make to promote developing country concerns. The public awareness campaigns by development and health NGOs were important factors in encouraging developing country negotiators, especially African, to insist on a Ministerial Declaration. Other NGOs were then able to provide legal assistance in the drafting of a declaration for the WTO Ministerial Conference.

Session 3: Could the way the institutions work be improved?

The discussion in this session focused on the operation of WTO and WIPO from the perspective of developing countries, and the differences and interaction between the two organisations. The first point that was made was that WTO is a more rigidly member driven organisation, whereas WIPO has a more interventionist secretariat. A second point made was that the standard setting done in WIPO usually involves delegates and officials from a much narrower (e.g. legal) professional background than in WTO. Finally, it was observed that the WIPO secretariat has much greater depth of expertise on a wide range of intellectual property subjects compared to WTO (which has only 5 professionals in the intellectual property division of its secretariat), and also has the financial resources to bring experts together from around the world to discuss the issues.

A related point here made by one of the participants was that UNCTAD also publishes various expert papers and gives technical support on the TRIPS negotiations to developing countries. This was very valuable in supplementing the often-limited analytical capacities available in developing countries and in considering intellectual property subject from a sustainable development perspective.

Regarding interaction between WTO and WIPO, a number of participants expressed the view that it would be helpful to deepen collaboration and co-ordination between the two organisations more generally, especially as they are often talking about similar issues and interests of similar constituencies. One participant expressed the view that WIPO had been very slow in recognizing the significance to its own mission of the WTO TRIPS Agreement and, by extension, its relationship with the WTO as a rule-making organisation. At the same time, it was argued that WIPO has changed considerably in the last few years and was now trying to act more positively regarding “the new era” in intellectual property standard setting, heralded in by the TRIPS Agreement, for example by initiating new modes of development co-operation and new discussion related to subjects such as traditional knowledge, folklore and bio-diversity.

Summing up, one participant observed that little in the discussion so far or in the work of Professor Drahos cited specific problems caused by the institutional decision-making processes of the organisations. It was therefore difficult to discuss possible changes needed without clearly identifying what the problems are. From this perspective, the key issue for developing countries was that they to develop greater technical negotiating capacity and better organisation amongst themselves in order to use more effectively the institutional mechanisms that are there. Another participant expressed the view that the Doha declaration on TRIPS and public health reflected the fact that developing countries were able to present carefully developed, specific proposals to achieve their objectives that could be accommodated in WTO rule making work. One implication of this was that developing countries need to be more involved in making concrete proposals in WIPO standard setting (where most intellectual property standards are developed before they come to WTO).

The session concluded with a detailed discussion regarding Article 66.2 of the WTO TRIPS Agreement concerning the obligation for developed countries to provide incentives for technology transfer to LDCs. There were differing views on the question of whether the TRIPS Agreement was the appropriate vehicle to pursue more effective technology transfer to LDCs. Some participants took the view that Article 66.2 has not been implemented in the manner envisaged in the TRIPS Agreement. For example, it was pointed out that some developed countries provide incentives schemes which are either not LDC-specific and/or have been in operation for more than 50 years so it is hard to justify these as measures taken towards implementation of Article 66.2 *per se*. On the other hand, it was pointed out that developed countries like the EU and USA have made submissions to the TRIPS Council as to what incentives they have provided, and, as technology transfer is private sector-led, there was little more that developed country governments could do.

A point where many participants agreed was that there was a need to conduct more research in developing countries where successful technology is taking place and also where it isn't in order to learn lessons for the future. Important questions that would need to be examined in such studies were: What is the proper role of governments in promoting technology transfer? And how important is adequate intellectual property protection in developing countries, amongst other factors, for technology transfer to take place?

Session 4: Key issues and recommendations for the Commission

The following key issues and recommendations for the Commission were highlighted by the participants:

- How do developing countries bargain better in international rule making? The answer could be to work collectively and to elicit high levels of co-operation and co-ordination - for example, formation of something like a "developing country quad", as proposed by a paper by the United Nations Quaker

organisation. Perhaps a broader coalition than just a “quad” of four countries would be even more effective, covering the different geographical regions.

- Key issue for most developing countries is the lack of technical expertise and within their delegations in international negotiations and in terms of the technical backstopping available in developing country capitals. This is crucial in getting good, concrete and detailed proposals onto the negotiating table. To be sure, the situation in this respect has changed in last few years (particularly in larger developing countries and those in the Americas) but developing countries still need continuous access to such good quality expertise.
- Commission should revisit the work that the Commonwealth Secretariat did in 1995 with African countries in relation to implementation of TRIPS Agreement.
- There is a need for better monitoring and evaluation of impact of technical co-operation programmes to ensure that they are fully effective in building the required capacities in developing countries.
- The Commission should focus on how to improve the capabilities of developing countries rather than examining the commercial diplomacy practiced by developed countries in bilateral and multilateral negotiations. Developed countries do have development policy considerations in mind, but commercial policy objectives are likely to be the priority for all countries in trade negotiations.
- Although the Commission can look at the process of decision-making, on the other hand, it is also necessary to consider the political realities behind the process of international intellectual property standard setting.
- The Commissions should encourage governments to realize that intellectual property standard setting needs to transcend the normal commercial diplomacy practice of pursuing national interests.
- Developing countries attach considerable importance to the assistance they receive from UNCTAD and the role that it plays in assisting them to participate in the standard setting process. UNCTAD should be given more resources to enable them to do this more effectively.
- Addressing issues of technology transfer could be more effectively considered outside of the context TRIPS Article 66.2, looking at the evidence of what has worked and what hasn't in the field, and bearing in mind that this is voluntary for the private sector. Possibly a role here for UNCTAD (e.g. re-examination of the voluntary code of conduct on technology transfer, which

were originally conceived in the 1970s, primarily in the context of inward-oriented economies in developing world).

- Before looking at changing the TRIPS Agreement, the Commission should carefully consider how development objectives could be better accommodated within the framework of the existing provisions and the flexibilities therein.
- Commission should encourage negotiators to move away from practice of “defending positions”, and instead adopt “integrative bargaining” where parties first seek to understand all parties’ ultimate goals (as opposed to say narrow objectives regarding specific provisions in the text of agreements) which underlie their negotiating position, and move towards outcomes which deliver these in a balanced way.
- [Following on from above point] For example, the WTO TRIPS council and other negotiating meetings tend to be set pieces rather than genuine brainstorming of possible options that could deliver the required overall outcomes. Looking at other format options (such as use of small, representative groups and deployment of facilitators are now essential to consider, given the size of WTO membership. In fact, some facilitators (the “Friends of the Chair”) were used in Doha meeting.
- If developing countries would like to change any areas of the TRIPS agreement this is going to be very difficult because there is no interest from the major trading nations. That said, it maybe possible to add elements into TRIPS (e.g. protection of traditional knowledge) and to give more effective implementation of key TRIPS articles for developing countries (e.g. Articles 7,8, 67, 66.2).