

The TRIPS Agreement: A Comment Inspired by Frederick Abbott's Presentation

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It is indeed an honour for me to participate in celebrating Robert Hudec's contributions. Bob and John Jackson have long been the icons of International Trade Law for me. Having interacted with both as a participant in the Bhagwati-Hudec project on Fair Trade and Harmonization, and as an avid reader of Bob's several contributions relating to Developing Countries and the GATT, I have come to appreciate the intellectual rigour and precision of Bob's analyses. Earlier today, there was a reference to the fact that Bob, like John Maynard Keynes who changed his mind on the virtues of free trade several times, changed his mind about the Dispute Settlement Mechanism of the WTO in comparison to that of GATT, from initial skepticism of it to a later much more favourable view. It is said that foolish consistency is the hobgoblin of small minds. But all of us know that Bob's is no small mind!

I received Professor Abbott's Talking Points several weeks ago. Since no formal paper followed, I took the liberty of e-mailing him for it. In response, I received several of his papers on the topic though not a paper written specifically for this event. I read them all and profited from them greatly. I will take this opportunity to reflect on the TRIPS agreement from the perspective of developing countries, rather than comment on his Talking Points directly. My comments draw on his other papers. I agree with many of his views.

I have argued (Srinivasan (1998)) that it was a colossal mistake to have included TRIPS in the WTO, as one of the agreements that was part of the single-undertaking framework of the Uruguay Round agreement, for at least two reasons. First, whatever be the merits of strengthening intellectual property right (IPR) protection around the world, incorporating IPR in the WTO framework by merely asserting that such protection is trade-related, seems primarily for the purpose of legitimizing the use of trade policy instruments to enforce IPR protection. After all there already exists an institution, namely the World Intellectual Property Organization (WIPO), an institution specializing in IPR. It would have been the most appropriate forum to negotiate on IPR issues. The argument that WIPO has no effective mechanism for enforcing agreement, is not persuasive: it only means that its existing enforcement mechanisms have to be beefed up and new ones created, if needed. In an audience full of lawyers, I hesitate to add that WIPO is at present dominated by lawyers and lacks an economic perspective on IPR. Still its weak enforcement capability and the absence of economic expertise do not imply that WTO sanctioned trade policy instruments are the next best enforcement mechanism.

The second, and perhaps the more serious reason is that now that IPR is in the WTO on the ostensible ground of its trade relatedness, the task of keeping labour and environmental standards out of the WTO is becoming increasingly difficult. Developing countries, such as Brazil and India, initially refused even to discuss IPR, let alone consider its inclusion in the negotiating agenda of the Uruguay Round. But they eventually capitulated. Had they agreed to discuss IPR, but insisted on the discussions and possible negotiations taking place in WIPO, perhaps the inclusion of TRIPS in the WTO could have been avoided. In any event, the ongoing and mandated review of TRIPS should be used, if not to agree on taking TRIPS out of WTO altogether, at least to negotiate some of its provisions. Such a reopening is called for since TRIPS has, in effect, imposed without serious examination, a 'quasi-universal set of IPR protection standards' (Abbott, 1998, p.2) of patent and copyright protection. These standards make no allowance for differences across products and processes. Hamilton (1997) suggests that a successful TRIPS will become "one of the most successful vehicles of Western imperialism in this story". Hansen (1997) goes further – he considers the defenders of TRIPS style IPR protection as the analogues of religious missionaries, who, when faced with a poor response by way of "voluntary" conversion on the part of developing countries to their perspective on IPR, would not hesitate to attempt "involuntary" or forced conversions through the threat of trade sanctions!

Abbott (1998) succinctly states the benefits of TRIPS for the developing countries, at least as perceived by the industrial countries "high levels of IPRs protection would . . . strengthen developing country economies. New IPRs infrastructures would encourage local innovation as developing country inventors were enabled to exploit the fruits of their own labor. Foreign enterprises would be more willing to transfer technology as it became protected under local law. Foreign direct investment would increase as local conditions became more technology protection-friendly".

These a priori arguments are based on the premises, that first, IPR protection of the type imposed by TRIPS is needed to encourage innovation, and second, that foreign enterprises place a significant weight on the strength of IPR protection regime. The theoretical justification for, and even more importantly, the empirical evidence in support of, both these premises is not at all strong.

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IPR patents and copyrights are in fact monopoly rights granted by the state. However the proponents of the “natural rights” view, argue that any “creative act is an extension of an individual’s identity and therefore ought to be controlled by the creator. According to this view, intellectual property rights . . . should rarely if ever trumped by other values, such as economic efficiency or social necessity. In its strongest form, the natural rights argument . . . means that the right to control creative product cannot be taken away by others (including the state) or even sold”(Cohen and Noll, 2000, p.2).

At the opposite end of the spectrum, the communitarian rights view holds, that “only radically novel creative acts are genuinely individual . . . (and other) creature acts are one step in a historical continuum and usually not attributable to a specific person” (ibid).

Although the natural rights argument has deep philosophical underpinnings and the communitarian view is dominant in some cultures, most Western IPR protection regimes on which TRIPS is based, draw their justification from a utilitarian perspective. In such a perspective the benefit from the positive incentive for creative activity by the grant of temporary monopoly rights through patents and copyrights has to be balanced against the negative aspect of any monopoly, viz. monopolists will charge a higher price for their product compared to competitive producers.

Clearly the utilitarian perspective has a broader appeal than the two extremes of natural and communitarian rights perspectives. But it leaves open several important questions to be answered: is the grant of temporary monopoly rights to the creators the optimal way to provide incentives for creative activity? Does the long experience with patents and copyrights suggest that they have been effective in encouraging innovation? If the answers to the first two questions are in the affirmative, how long should be the period of monopoly? Is the optimal length of protection independent of the nature of innovative activity such as it pertains to different products and processes? Since there is a deadweight loss of monopoly, what is its likely incidence on different socio-economic groups in a society? How is the balance between incentives for the innovator and monopoly distortions to be determined, particularly in situations in which most innovators are members of rich nations, and many purchasers of the products produced using the monopolized innovation are in poor societies?

Unfortunately, robust answers to the above questions are not to be found in the large theoretical and empirical literature. I will cite first a few recent examples. Sakakibara and Bransetter (2000) analyze Japanese and U.S. data on 307 Japanese firms since the reforms in 1988 of the Japanese patent law. These reforms expanded the scope of patent rights. Their econometric analysis leads them to conclude that “Japanese firms have adjusted the nature of their patenting by increasing the number of claims per patent, but we find no evidence of our increase in innovative effort or innovative output that could be plausibly attributed to patent reform” (p. 21, emphasis in the original).

Adam Jaffe (1999) surveys “the major changes in (patent policy) and practice that have occurred and review(s) the existing analyses by economists that attempt to measure the impacts these changes have had on the processes of technical change” (p.2). His punch line is that “despite the significance of the policy changes and the wide availability of data relating to patenting, robust conclusions regarding the empirical consequences for technological innovation of changes in patent policy are few” (p. 1). While he finds that patent protection to publicly funded research had a significant impact in increasing technology transfer from this sector, there were otherwise few robust empirical results. He attributes this in part, to the difficulty of discerning statistically significant effects when many things are changing simultaneously, and in part, to the difficulty in measuring patent parameters. I am inclined to believe the alternative view he suggests, namely “that these results confirm what we thought we already knew, which is that patents are not central to appropriating the return to R&D in most industries” (p. 46).

Indeed, the literature refers to the apparent inconsequentiality of patent protection for realizing adequate returns from innovation as the “patent paradox”. In their analysis of this paradox using the semiconductor industry (a survey of whose executives showed that patents were ineffective in protecting R&D), Hall and Ham (1999) find that as patent laws became stronger, firms have patented more aggressively, not for protecting their intellectual property, but for the strategic use of patents as bargaining chips with other firms to access their technology.

It would appear that patent protection as a spur to innovation does not appear to be powerful in the real world. And the cost to the general public of restricting access to new technology through patenting may be high. The Committee on Intellectual Property Right and the Emerging Information Infrastructure of the U.S. National Research Council, in its report (National Academy, 2000) argues that “three technological trends – the ubiquity of information in digital form, the widespread use of computer networks, and the rapid proliferation of the World Wide Web – have profound implications for the way Intellectual Property is created, distributed and accessed by virtually every sector of society. The stakes are high in terms of both ideology and economics” (p.199). The Committee finds that “Public access, and the social benefits that arise from it, may be an

undervalued aspect of our current social processes on mechanisms""(p. 201.) Although the Committee was talking about the U.S. only, it would seem that at a global level, that the public access aspect of IPR did not get adequate attention in the TRIPS.

In spite of the nonexistence of firm empirical evidence on the need for patent protection for encouraging innovation, let alone any theoretical empirical support for a uniform patent life, Article 33 of TRIPS mandates a patent life of at least 20 years from the filing date, and Article 27 dictates that patents shall be available for all inventions, whether products or processes in all fields of technology (with some exceptions permitted under its paragraphs 2 and 3). These articles have to be reviewed and renegotiated.

Voluntary trade in goods and services involves benefits to both parties regardless of any difference in their income levels. Leaving aside its mercantilist connotations, reciprocal exchange of tariff concessions in multilateral trade negotiations (orchestrated by the GATT) yields benefits to all the parties involved. There is no such clear mutually beneficial exchange in TRIPS. On the contrary, full implementation of TRIPS will involve an estimated transfer of \$8.3 billion to just six developed countries (of which \$5.8 billion accrues to the U.S. alone) from the rest of the world (Maskus, 2000, Table 6.1).

The conventional argument in favour of unilateral liberalization of trade in small open economies in goods is that gains from liberalization outweigh losses, so that, in principle, a transfer scheme within each economy can be devised that will compensate the losers from liberalization. Most of the gainers from TRIPS are in rich developed countries and only a few, if any, in poor countries. This being the case, even if gains outweigh losses, international transfers would be needed to compensate losers. No such transfers from gainers to losers are envisaged as part of TRIPS. Besides, TRIPS, unlike tariff reductions on products sold in competitive world markets, involves the creation or strengthening the monopoly position of developed country producers in the markets of poor countries. Thus, TRIPS creates a distortion of monopoly in developing countries, the rents from which accrue to the rich. Besides any acceleration of innovative activity, which is the only rationale for granting monopoly rights, if it comes about at all, will take place mostly in rich countries. Whether some of the benefits from any acceleration of innovation in the rest of the world will accrue to poor countries, is arguable. In any case the benefits, if any, are uncertain and in the future, but the costs to developing countries are concrete and in the present.

Concerns about the price effects of patent protection through TRIPS have come to international media attention in respect of life prolonging drugs such as those associated with the treatment for AIDS. Although the TRIPS agreement could be interpreted to accommodate compulsory licensing and domestic production of such drugs which are covered by patents held by foreign multinationals, the drug producers oppose such an interpretation. Further, TRIPS agreement does not address the question of exhaustion of patent rights - if the rights are exhausted at the first sale of a patent protected product anywhere in the world, a common world market price will emerge. Such a price may, though not necessarily, be beyond the reach of poor consumers. On the other hand, if the rights are country specific, then price discrimination is possible if parallel imports, that is the imports of a protected product into a market from another country where it is cheaper, are prohibited. Again TRIPS does not address the issue. Drug companies argue that national, rather than global, exhaustion of patent rights coupled with a ban on parallel imports would lower prices for consumers in poor countries, as compared to those that would prevail in a globally integrated market. This result depends on assumptions about price elasticities and the size of demand in poor countries. Not much is known empirically on how valid these assumptions are.

It has been suggested that developed countries by agreeing to TRIPS which benefited the rich countries got in exchange the phase-out of Multifibre Arrangement (MFA) and a few other "concessions" from which they stand to benefit. I have argued (Srinivasan 2000) that this bargain was unbalanced. The TRIPS agreement as well as other commitments that poor countries undertook as part of the Uruguay Round agreement was more costly to them than the uncertain gains from the concession of the developed countries including the MFA phase out.

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