Access to Knowledge: Time for a Treaty?

Peter Drahos

Knowledge underpins everything, including economies. As the World Bank observes: 'We now see economic development as less like the construction business and more like education in the broad and comprehensive sense that covers knowledge, institutions, and culture'.[1]

Despite the importance of knowledge, few key multilateral organisations are seriously addressing the issue of how institutions of knowledge might be better designed to meet the goals of achieving basic freedoms and economic development for the world's poor. The current work of the WTO on intellectual property is modest to say the least. The meandering discussion on the relationship between intellectual property rights, biodiversity and traditional knowledge continues in WIPO and the WTO. Reports from the CBD about the progressive extinction of traditional people and the loss of traditional knowledge come and go.[2] The WTO's agreed text on what is ironically called the paragraph 6 solution to the problem of compulsory licensing and access to medicines is full of the kind of uncertainties in which lawyers delight and which commercial people avoid.[3] Developing country claims receive symbolic attention and soft law solutions wrapped in the polite language of false concern. Western powers solve their problems through hard treaty law that is born of realist maneuverings in a world where commercial and security interests have been united.

But profound shifts in the governance of knowledge are taking place. Bilateral agreements on intellectual property, services and investment are securing standards that would have been thought unattainable during the course of the Uruguay Round (1986-1993). This process is making use of the efficiency savings of the MFN principle. Each new bilateral agreement that sets higher standards of intellectual property is picked up by Article 4 (the MFN clause) of the Agreement on the Trade-Related Aspects of Intellectual Property Rights. The savings of MFN become significant as more states enter into agreements with the US. With, for example, thirty states only 29 bilateral agreements are needed to spread the same IP standards amongst all the states. Without MFN, 435 agreements would be needed. A set of US-EU defined standards of intellectual property protection are rapidly encircling the globe.

Developing country resistance to this emerging paradigm of globalised intellectual property rights is essentially a story of failure. International organisations in which developing countries have been influential such as UNCTAD and UNESCO have not been able to make significant gains in terms of international treaty making on key developing country issues such as technology transfer, the control of anticompetitive conduct or, more broadly, an economic framework that addresses the deep structural inequalities of the world economy.[4] Political landmarks of the 1970s like the New International Economic Order have drifted into the footnotes of history. Comparatively modest multilateral gains like the Doha Declaration on TRIPS and Public Health have all too easily been bilaterally given away. A different concrete world order has come striding out of the shadows of globalisation, one in which developing countries continue to remain bit players.

The table opposite – on the G-20, ex-G-20, the Cairns Group members that have FTAs with the US – shows that the Roman maxim, *divide et impera* has lost none of its truth for the practice of empire. Two observations are particularly worth noting. First, the leaders of the G-20 (the countries in bold) that proved to be an effective oppositional force to the US and the EU at the WTO Cancun Ministerial in 2003 are being progressively isolated. Second, the terms of a possible deal on agriculture in the WTO are being shaped by a series of FTAs in which leaders of agricultural exporting nations like Australia are willingly participating.

Key factors that explain the negotiating failures of developing countries are a lack of trust amongst developing country groups, a myopic focus on single issues rather than the game in aggregate, insufficient political support from the capitals for negotiators, inadequate technical analyses of issues, a failure of co-ordination across and within bilateral and multilateral fora and, finally, a lack of boldness of vision.[5]

All of these factors can, of course, be changed. Of those on the list it is perhaps the last that needs to be addressed first. Whatever the deep determinants of radical change, rarely in history is it not accompanied by an act of inscription in which words carry visionary ideals in defiant flight of established authority. Martin Luther's writings did not cause the Reformation and Thomas Paine did not through his writings cause America to achieve independence, but

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Country	G-20	Ex G-20	Cairns Group	FTA with US?
Argentina	Y		Y	
Australia			Y	Y
Bolivia	Y		Y	Proposed
Brazil	Y		Y	
Canada			Y	Y (NAFTA)
Chile	Y		Y	Y
China	Y			
Colombia		Y	Y	Proposed
Costa Rica		Y	Y	Y (CAFTA)
Cuba	Y			
Ecuador		Y		Proposed
Egypt	Y			
El Salvador		Y		Y (CAFTA)
Guatemala		Y	Y	Y (CAFTA)
Honduras				Y (CAFTA)
India	Y			
Indonesia	Y		Y	
Malaysia			Y	Proposed
Mexico	Y			Y (NAFTA)
New Zealand			Y	
Nicaragua		Y		Y(CAFTA)
Nigeria	Y			
Paraguay	Y		Y	
Pakistan	Y			
Peru		Y		Proposed
Philippines	Y		Y	
South Africa (SACU)	Y		Y	Being negotiated
Tanzania	Y			
Thailand	Y		Y	Being negotiated
Uruguay	Y		Y	
Venezuela	Y			
Zimbabwe	Y			
	20	**7**	**17**	

both helped to inspire people to talk about and fight for independence of different kinds.

For developing countries the coming century of knowledge-based growth raises two basic development priorities. The first is that these countries must give more urgent attention to encouraging investment in human capital and this essentially translates into investment in health and education. The second basic priority is to think creatively about models of governance for the production of knowledge that maximise the participation of developing countries in the processes of innovation, that maximise the spillover benefits of knowledge and that minimise the social cost of accumulating knowledge.

One strategy for meeting the second priority is to draft a framework agreement that contains guiding principles on access to knowledge.[6] Framework agreements have proved to be surprisingly effective over the decades as means of getting states to agree to general principles that then evolve into more specific and enforceable obligations.[7]

A framework treaty on access to knowledge would be a tough test of developing country cooperation over the long distance of an international negotiation. Intellectual property rights along with terrorism, narcotics and people trafficking are the four key targets for the US in any international negotiation. On intellectual property the US has only been prepared to negotiate higher standards of protection. Calls by organisations like the World Bank to 'rebalance' TRIPS have been drowned out in US corridors of power by the footfalls of corporate lobbyists bearing cheques for campaign re-election. With their epicenter in Washington, waves of intellectual property protection race like distant tsunamis towards the shores of developing countries.

Despite the projection of US invincibility on the issue of intellectual property a framework treaty on access to knowledge is still worth fighting for. Such a treaty would at least offer developing countries some longer term vision of their development interests, as well as an opportunity to build a coalition around the issue of knowledge and development. Developing countries have numbers, but not unity and co-ordination. Creating another opportunity for these two things to emerge is in itself a worthwhile goal.

An initiative to produce a draft of a treaty on access to knowledge is currently being led by a coalition of civil society actors. This initiative flows out of a WIPO General Assembly decision to examine proposals for a development agenda that were put forward by Argentina and Brazil in 2004.[8] A treaty on access to knowledge was a key part of those proposals. Civil society actors have pushed the treaty initiative along by suggesting some topics that the treaty should cover.[9] In February 2005 a meeting of interested parties in Geneva had a wide-ranging discussion about the standards that such a treaty might contain. Out of the discussions thus far have come a variety of proposals on matters such as the implementation of the Doha Declaration on TRIPS and Public Health, the need for entrenched exceptions in copyright and patent law to ensure access for various groups and rules for the promotion of access to publicly funded research.

As the civil society coalition around the draft treaty builds, more and more proposals will find their way into the draft. The treaty might end up taking the form of a comprehensive and detailed set of rules written from multiple perspectives and goals. Detailed intellectual property rules typically create winners and losers and so veto coalitions are more or less certain to form. There is also the complication that as states become parties to an increasing number of treaties that cover intellectual property their capacity to entrench treaty-based exceptions to higher standards of intellectual property lessens. Finally, there is the basic geo-political reality that the US and EU have concentrated and influential industry interests that benefit from increased intellectual property protectionism and so both have reasons to support protectionist intellectual property policies.

A detailed rules-based treaty is not, of course, the only option. Another possibility is to draft a simple treaty containing a few general principles built around the rights to health and education and the commitment to open source innovation. This part of the treaty could essentially be declarative in nature, drawing on the existing human rights framework and restating principles already widely accepted.

The many complex issues raised by intellectual property, public goods, research and development and innovation could each become the subject of an annex in the treaty. So, for example, there could be an Annex on technical standards and intellectual property, an Annex on open source innovation in software, an Annex on education, libraries and copyright, an Annex on open source innovation in the life sciences, an Annex on technology transfer and so on.

The responsibility for the development of the standards in each annex would rest with a group of technical experts in the relevant field. Representation in these groups would not be state-based, but rather based on a commitment to a genuine evidence-based approach to development and intellectual property. This last criterion is vital since what has passed for intellectual property policy and development over the decades has in the main consisted of organisations like WIPO sending missionaries to convert the 'uncivilised' economies of the South. The time to end this faith-based approach has well and truly arrived.

The standards in each annex could, at least in the beginning, simply be issued in the form of recommended practices. (The International Civil Aviation Organisation, for example, issues some of its standards as recommended practices.) This would leave states with the freedom to choose those standards that were consistent with their overall treaty obligations. It would also provide them with expert guidance as to the kind of norm-setting they should be contemplating in order to maximise their chances of innovation-based growth and the social welfare of their populations. This softer approach would be one way of maximising support for the treaty process. Over time the recommended practices might become binding standards by means of, for example, an opt out procedure in which the standards applied to a state unless it opted out. The binding nature of the treaty's standards, in other words, is something that could be built over time.

Although the treaty proposal arises in the context of an emerging development agenda for WIPO, its future course is not necessarily tied to what happens there. In one view, WIPO is an organisation that has been irredeemably compromised by western powers bent on making trade gains from intellectual property. If WIPO proves an inhospitable forum then developing countries should consider an alternative, even if it means using the treaty to constitute a new one. There is much to gain from the adoption of a deep US cultural value – self-reliance. A remarkable historical opportunity is presenting itself. If one looks at the technologies of the 19th and 20th centuries such as radio, telephone and telegraph, standards-setting was dominated by the US government regulated private monopolies such as ATT and the public monopolies of the European post, telephone and telegraph system. Developing countries were simply not players in international organisations like the International Telecommunication Union. Open source innovation is about networked innovation by a geographically distributed community that works with a technology and seeks to build collectively a better technology. That approach to innovation is inherently more participatory and one that advantages developing countries that have low-cost, highly-trained knowledge workers.

Finally, it should be said that the success of a treaty on access to knowledge depends profoundly on the involvement of business, especially that segment of business entrepreneurship that sees in open source innovation the possibility of business models that will drive the knowledge markets of the 21st century. Much of that new entrepreneurship resides in the US. A treaty on access to knowledge should, through its committees of technical experts, draw on the insights of that entrepreneurship and foster the growth of networks that stretch across developed and developing countries.

The fate of the treaty will depend heavily on the leadership of a few. The moral strength and determination of Nelson Mandela strides across the landscape of the twentieth century, a brilliant reminder of what a real leadership of values can accomplish against injustice. If developing countries are to take a stand on the governance of knowledge and make laws that address the structural injustices of the present regime, much will depend on the creative energies of Brazil and President Lula and thoughtful multilateral diplomacy of the kind practiced by Norway. Even more important will be China's beliefs about the rights and duties of owners of knowledge.

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ENDNOTES

[1] Joseph Stiglitz in Gerald M. Meier, 'Introduction: Ideas for Development', Gerald M. Meier, Joseph E. Stiglitz (eds), Frontiers of Development Economics, OUP, Oxford, 2001, 1,2.

[2] See Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity, UNEP/CBD/WG8J/3/4, p.6.

[3] See Brook K. Baker, 'Arthritic Flexibilities for Accessing Medicines: Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', 14 (2004) Indiana International & Comparative Law Review, 613.

[4] P. Drahos, 'Developing Countries and International Intellectual Property Standard-Setting', ' 5 (2002) Journal of World Intellectual Property, 765.

[5] For a general discussion see P. Drahos, 'When the Weak Bargain with the Strong: Negotiations in the World Trade Organisation', (2003) 8 International Negotiation, 79.

[6] A proposal for a draft treaty is to be found in P. Drahos, 'The Global Ratchet for Intellectual Property Rights: Why it Fails as Policy and What Should be Done About It'.

[7] J. Braithwaite and P. Drahos, Global Business Regulation, Cambridge University Press, Cambridge, 2000, 620.

[8] See General Assembly Decision on a Development Agenda, October 4, 2004. The proposal by Argentina and Brazil is in document WO/GA/31/11, August 27, 2004.

[9] See Civil Society Coalition Statement on WIPO General Assembly Decision on a Development Agenda, October 4, 2004 available at http://www.cptech.org/a2k/

CAFTA Update

The Bush Administration is aiming to submit the US-Central America/Dominican Republic Free Trade Agreement (CAFTA-DR) to Congressional vote in late May. April House and Senate hearings indicated continued strong opposition from many Democrats to the agreement's labour provisions, which they consider too lax, as well as bi-partisan opposition from key sugar producing states. While the sugar industry has been presenting the CAFTA as having 'devastating' effects on US producers, the combined sugar quotas of the six countries involved amount to less than one percent of US sugar consumption.

Among those rooting for CAFTA's passage are many processed food manufacturers, grain farmers, textiles importers and companies that sell raw materials to Central American apparel makers, as well as pharmaceutical exporters. Under CAFTA, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua agreed to protect clinical test data for pharmaceutical products for five years after it had been submitted (data for agricultural chemicals is protected for 10 years). A number of Democrats have criticised the data exclusivity provisions, saying they could delay the introduction of affordable generic versions of brandname drugs.

US-CAN Update

Negotiators for the Andean Free Trade Agreement between the US, Colombia, Ecuador and Peru are yet to resolve major outstanding issues, including telecommunications, intellectual property rights and agriculture.

In addition, the negotiating partners are still waiting for Ecuador's new President Alfredo Palacio to confirm the country's official position toward the FTA amid reports of the new government's planning to conduct a review of the agreement's public policy implications and submit the continuation of the process to a popular referendum.