The Rule of Law and the Problem of Asymmetric Risks in TRIPS

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The WTO has just finished two and one half years of negotiations on the TRIPS Agreement and Public Health, with an additional tranche of negotiations scheduled to commence soon. Over this period developing countries have made significant strides in integrating and co-ordinating their trade negotiating positions. Despite divisive efforts by powerful developed Members, developing countries stuck together during recent negotiations better than the average family, and in the end resisted the harshest demands placed on them.

Without discounting the continuing large-scale problem posed by asymmetric political and economic power in the trade negotiation process, it is time now to focus on the next phase in WTO trade diplomacy, that is, the process of implementation.

This is where even greater threats and risks await, and where the WTO as an institution must ultimately be held to account. WTO Director-General Supachai (echoed by US Ambassador Linnet Deily and EC Commissioner for Trade, Pascal Lamy) has publicly hailed the Decision on Implementation of Paragraph 6 of the TRIPS Agreement and Public Health[1] as proof positive that "the WTO system is working and can produce important results on critical issues of particular interest to developing countries".[2] This time around, such statements must be more than the mere rhetorical flourishes that accompanied the close of the Uruguay Round and the adoption of TRIPS, but must instead be understood as commitments on behalf of the WTO as an institution to defend the interests of its weaker Members. It is here that a detour into the past will bring us to the road ahead.

What brought us here?

Why did the Doha Declaration on the TRIPS Agreement and Public Health come about? South Africa accepted to implement the TRIPS Agreement as a developed Member of the WTO. It brought its national intellectual property legislation into compliance. It also adopted a National Drug Policy (1996) and legislation to implement it, the Medicines and Related Substances Control Amendment Act of 1997. The Act authorised the Health Minister to prescribe rules for the parallel importation of patented medicines, it introduced rules to promote competition and price reductions through generic substitution, and it allowed for the development of a single exit price mechanism for private sector drugs to discourage discrimination against the poor. This legislation was subject to vehement attack from the United States, and later the European Union, for being inconsistent with South Africa's TRIPS obligations, as well as large-scale litigation by 39 pharmaceutical companies seeking to prevent the government from implementing a progressive health care plan to benefit the poor.

But there was nothing inconsistent with TRIPS in this legislation, a fact readily apparent to anyone familiar with the subject, including the United States and EU trade authorities. The South African government came under attack for its implementation of the flexibilities in the TRIPS Agreement, which it was clearly permitted to do. There was a powerful message inherent in that attack: We can agree to TRIPS but reserve the right to breach our commitment.

As we now face the implementation of the Decision on Paragraph 6 in national law, it should be matter of grave concern that the lessons have not been learned, that the new rules will stand as window dressing, and that the strong will not be barred from preying upon the weak.

Concerns on implementation

A number of developing country WTO Members have expressed concern over the Decision because it includes procedural requirements involving provision of information to the TRIPS Council, and the issuance of licenses. These may not be the easiest set of rules to follow, but neither are they the hardest. They call for fairly routine administrative processes. From a legal standpoint, the obligation to provide information is a formality that should add virtually nothing to the transaction cost of using the mechanism.

So why are these countries worried? Is this some form of governmental paranoia? No. It is a deadly serious concern that the powerful actors will use the information as a reason for a visit to the national capital to explain that the rules are not actually intended to be used, and that their use may regrettably lead to the loss of market access or denial of IMF loans. If the concern is that developing country Members will be threatened on the basis of agreed-upon rules, no set of rules will be adequate.[3] And because commercial actors and governments are very wary of acting in the absence of agreed-upon rules, the solution is not the absence of rules. The absence of rules would neither act as a deterrent[4] nor create an environment conducive to addressing public health needs.

Possible responses

There are a number of ways that the problem of threats might be addressed, some already ongoing. *First* is leadership by the economically and politically stronger of the developing Members, coupled with collective political support from other developing and developed Members. Brazil has taken on this task of leadership several times already, and it is currently exercising this important role. Very shortly after adoption of the Decision on Implementation of Paragraph 6 Brazil took measures to import under compulsory licence and is bargaining with patent holders for price reductions on medicines. Although its action is not specifically under Paragraph 6 because it appears to be planning to import medicines that while on-patent in Brazil are off-patent in the supplying country, it is nonetheless apparent that Brazil's action will have the effect of demonstrating that compulsory licensing, including under Paragraph 6, can be used effectively.

It will be important for Brazil to receive political support from fellow WTO Members, both developing and developed, so that any counter-measures by Members representing patent holders might be undertaken only at serious political, and even economic, risk to those Members.

Collective response during previous leadership by Brazil included pursuit of supporting resolutions at the UN Human Rights bodies. In this instance, since the incoming Director General of the WHO has announced that his preference to address HIV-AIDS is to pursue the Brazilian model, institutional support for Brazil from the WHO would be very important and welcome. The effective response by the WHO to the SARS outbreak has created a large measure of international public trust and support for WHO, and its voice will be taken very seriously in the international media and public. NGOs will also play an important role with their demonstrated ability to mobilise world public opinion.

A *second* potential mechanism for countering intimidation tactics is the prospect for the organisation of collective support by multilateral institutions, developing and developed Members, and public interest groups concerned with access for smaller less powerful states in taking advantage of TRIPS flexibilities. Here one might envisage UNCTAD, the World Bank, WHO, UN High Commissioner on Human Rights and other institutions providing expertise and financial support for a series of undertakings intended to demonstrate to smaller economies the viability of using the measures that are lawfully permitted under the TRIPS Agreement. I would hope that DG Supachai and other people in the WTO leadership would on these occasions drop the reluctance to stand behind the measures that were specifically adopted to protect developing Members, and stand behind the words that they have used in the media to provide legitimacy to the WTO as an institution.[5] The failure of the WTO to support its smaller and less powerful Members would send a strong adverse message about the political basis of the organisation.

When smaller economies begin to act, and if they are subject to counter-measures from the more powerful patent holder Members, it is even more important that collective support be forthcoming. Perhaps the most desirable form of collective action will be for several smaller economy states in different parts of the world to act together, with collective support coming from a set of regional actors.

The problem of threats from more economically powerful Members is fundamentally a political problem requiring leadership and collective action. It is important to recall here that the WTO works on consensus principles, and the TRIPS Council cannot take steps without support of developing Members. This does not mean, however, that lawyers and legal rules cannot and should not play an increasing role in countering abuse of patents by WTO Members and their constituents so as to establish a true rule of law-based WTO system.

A legal response

How can lawyers approach this? How can we prevent repeats of South Africa? How can we force Members of the WTO to play by the rules they have agreed upon?

Some authorities have suggested that making public the behaviour of governments might be enough to create a disincentive to abuse. I am not inclined to agree because I think the powerful actors are generally content to ignore bad publicity.

The broad answer would appear to be the establishment of real and effective disincentives for non-compliance with those rules. By this I mean sanctions or penalties for bad faith behaviour or abuse of the rules. Although I am only at the early stages of developing these ideas, I would raise here the question of how the WTO legal system can create a concrete and effective threat of penalty (or retaliation) against a Member that, on behalf of an industrial client, threatens another Member.

A private patent holder does not have a recognised power or authority to threaten a government with the withdrawal of trade privileges or withholding of funds from multilateral institutions. The prevailing pattern is for the patent holder (or patent holder industry group) to request its home government to make such threats. The abuse of patents is indirect. Targeted governments are in an extremely difficult position. They cannot take steps to protect themselves against the patent holder without also jeopardizing their full range of economic interests in confronting the patent holder's home government.

Patent holders are subject to sanction under generally accepted principles of competition law for abuse of dominant position. The TRIPS Agreement recognises the right of Members to take measures "to prevent the abuse of intellectual property rights by rightholders".[6] Conceptually, threats against governments lawfully preparing to take action under the TRIPS Agreement might be treated as a form of abuse of dominant position, and remedial measures taken under national law against the patent holders that instigate the threats. Thus, for example, a threat instigated under Section 301 in the United States might act to initiate a government action in the targeted country for abuse of dominant position by the patent holder (or its industry association). The presence of a credible competition law-based response creating real economic risk for patent holders might to some extent begin to reduce the frequency and intensity of threats. Yet this potential solution presents a problem similar to that which it seeks to cure. If a Member will not act to lawfully grant a compulsory license because it is threatened with governmental retaliation, will it be any more willing to initiate a proceeding for abuse of dominant position?

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Some form of collective response might insulate the threatened Member acting in its own defence. Such collective response might be possible under the umbrella of a regional organisation. It might also take the form of a joint inter-governmental investigation into abuse of dominant position. Neither the TRIPS Agreement nor WTO law prevents such collective action.

Another possibility is the idea of mutual responsibility. The TRIPS Agreement is the only WTO agreement that purports to establish private rights. Yet in establishing private rights, it leaves the question of liability under WTO rules to Members. There is a fundamental asymmetry. Might a remedy for abuse of the TRIPS Agreement apply not only to a Member, but also to the private party that is the real party in interest in the abuse? There is nothing so unique about private industrial actors playing significant roles in the WTO legal system. Some of the most notable dispute settlement cases are referred to by private actors or their interests: "Kodak-Fuji" as the name for a dispute between the United States and Japan; "Havana Club" for a trademark dispute between the European Union and United States.

Given the unique characteristic of the TRIPS Agreement in which private rights in patents and other IPRs are given express legal protection by the WTO system, might it not then create a preferred symmetry if a private IPRs holder could be joined with a Member abusing the rules as a complained against party, and with the potential for suffering direct economic loss for its conduct? So, for example, the Appellate Body and DSB might recommend a monetary remedy against the patent holder, or that a compulsory license be issued on a patent, or (in egregious cases) the forfeiture or revocation of a patent, as a remedy for privately instigated abuse. A persistent violator would face the most serious repercussions. Though the recommendation would not, as with other WTO remedies, be directly effective, implementation of a remedy such as compulsory licensing of the patent could be framed to authorise a wide territorial scope of use.

While it may be premature to offer concrete suggestions, WTO Members should begin thinking about real and concrete mechanisms to create disincentives to extra-legal threats. At present, the risks are entirely asymmetric. A pharmaceutical patent holder may encourage its government to threaten a foreign country with economic harm, and face little or no risk from engaging in this behaviour. The patent holder is riding the shirt-tails of its government. But if patent holders are accorded rights under WTO law, they should also accept obligations, and failure to comply with those obligations must entail real and effective risk.

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A challenge to the WTO

The WTO claims to be an institution based on the rule of law. It has in the past failed to support the rule of law on behalf of its economically weaker Members. It is imperative that the institution assure that the Paragraph 6 agreement can be used in good faith by those who desire to use it, and not allow it to become a baseline for intimidation. If the WTO is going to succeed in its mission as a rule of law-based framework for the conduct of international trade, it must put in safeguards to protect the rights and interests of its less economically and politically powerful Members. If it does not, the institution will face an accelerating crisis of legitimacy.

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ENDNOTES

[1] Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540)

[2] Address by Dr. Supachai Panitchpakdi, Director General, WTO Ministerial Conference (Cancun), Fifth Session, 10 Sept. 2003, WT/MIN(03)/10.

[3] Though, logically, a rule that would effectively penalise threats and end the practice would be adequate.

[4] This fact is well supported by the historical record. As example, the initiation and conclusion of negotiations on the TRIPS Agreement took place against the backdrop of a series of actions by the United States under Section 301 and Special 301 of the Trade Act of 1974 (as amended) to compel its trading partners to adopt and enforce higher standards of intellectual property protection. When the U.S. Congress approved the Uruguay Round Agreements, it amended Section 301 and Special 301 to permit actions against countries "notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related aspects of Intellectual Property Rights" (19 USC § 2411(d)(3)(B)(II) & 19 USC § 2242(d)(4)).

[5] There is no simple way to define the circumstances in which the WTO leadership should publicly speak out on behalf of less powerful Members that are subject to unwarranted threats, as distinguished from intervening in more ordinary good faith disputes concerning the interpretation of rules. An analogy might be trying to define the circumstances in which the Secretary General of the United Nations should appeal to UN Members to abide by the rule of law enshrined in the UN Charter.

[6] And also expressly allows measures to address "the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology" (Article 8.2, TRIPS Agreement). See Frederick M. Abbott, *Report: Are the Competition Rules in the WTO Agreement on Trade-Related Intellectual Property Rights Adequate?* in Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO (E-U Petersmann ed. 2003 forthcoming).