

Advocacy in Intellectual Property Negotiations

Establishing a Frame of Reference for TRIPS Negotiations

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The TRIPS Agreement of the WTO has, since its conception, been the subject of intense lobbying. It was introduced into the negotiating agenda of the Uruguay round of GATT at the behest of US business lobbies that hoped to strengthen patent protection worldwide. Their efforts culminated in TRIPS becoming one of three agreements establishing the WTO in 1995.

Subsequently, in the late 1990s debate on the same agreement was hijacked by developing country governments and NGOs lobbying for loosening intellectual property laws. These groups asked that countries be allowed to use existing flexibilities of the TRIPS agreement to protect public health. This led to the adoption, in 2001, of the Doha Declaration on Public Health.

While the WTO, where the agreement was signed, is a multilateral institution involving state actors, the outcome in both cases was the result of advocacy and lobbying outside the WTO by non-state interest groups. In the first case it was business interests within the USA. In the second, it was global civil society. However, as the US was the strongest proponent of strong IP laws, much of the lobbying was concentrated at formulating US public opinion and policy.

Arguments over TRIPS are not over yet. Intellectual property negotiations continue on a wide range of issues. In particular, the TRIPS Agreement is being reviewed in two areas: patent protection of genetic resources and traditional knowledge and the issuing of patents on life-forms. These discussions are being undertaken under a review of article 27.3(b) of the current agreement.

This paper will look at how advocacy succeeded in the past in changing policy outcomes related to TRIPS. Following the model suggested by Sell & Prakash, this paper then considers the implications for the ongoing negotiations. It will analyze how advocacy and interest group politics may impact the current TRIPS review.

TRIPS Advocacy

In both cases outlined above success in affecting the policy outcome rested on being able to reframe the issue to the advantage of one group, such that it significantly increased the cost to others of opposing their proposals¹. Both interest groups (business and NGO) employed a similar set of strategies, faced similar challenges, and capitalized on several opportunities to set the agenda². This section will summarize the process of reframing.

Policy Crisis

To be successful, advocacy has to capitalize on a crisis to gain maximum attention and support. In the case of business advocacy in the 1980s the crisis was the ‘piracy’ of US intellectual property in the developing world, where IP laws were weaker. Following the TRIPS agreement,

¹ Susan Sell & John Odell, 2003.

² Susan Sell & Aseem Prakash, 2004.

in the mid-1990s, NGO interest groups used the HIV/AIDS epidemic to galvanize support for their cause.

In fighting the AIDS crisis, governments in Brazil and South Africa used TRIPS flexibilities of compulsory licensing and parallel import to reduce the cost of AIDS medications. These actions were aggressively challenged by the US pharmaceutical lobby (PhRMA), creating an international standoff that highlighted the social crisis. In so doing, this policy crisis further strengthened the NGO network against TRIPS.

Normative Framing

From the mid-1980s, the TRIPS Agreement has been many things to many people. During its early years, it was the solution to piracy. The problem, as framed then, was that theft was wrong. In the NGO campaign, however, TRIPS became the cause of countless avoidable deaths due to HIV/AIDS. Now the argument was framed as intellectual property versus public health.

Underlying such reframing is a strategy of linking the issue (intellectual property) with simplified normative frames. Deploying such frames of reference to change the interpretation of information, if not the information itself, has a significant impact on how people act or take decisions in a bounded rational world³.

Framing the argument, however, is not sufficient. To be effective such framing must identify the problem (public health challenge), place blame (IP laws and the pharmaceutical industry), and identify a simple solution (weaker IP protection). Such reframing necessarily oversimplifies complex issues, but increases the constituencies that would support the cause.

Two factors may support reframing efforts by interest groups. Framing involves the presentation of arguments and counter-arguments. In gaining public support, the trust of actors will necessarily be important. NGO networks, therefore, would be in a stronger position, given higher levels of confidence in their work, compared to governments or corporations.

Second, how the issue is reframed is also important. Campaigns involving issues of 'bodily harm to innocents or equality of opportunity' are more likely to be effective⁴. Therefore, the effectiveness of reframing efforts will depend not just on the underlying crisis but also the actors involved as well as the chosen frame of reference.

Convergence of Interests

Both crises brought together a range of individuals and groups into a coalition that shared a common purpose. In lobbying for TRIPS, business interests included the Motion Picture Association of America (MPAA), the PhRMA, and technology companies. They lobbied separately for patents, copyrights, or trademarks, but found a common platform to link them all to multilateral trade.

Similarly, the NGO network brought together a transnational coalition. Key NGO members included the Consumer Project on Technology (CPTech), Medecins sans Frontiers (MSF), and

³ Susan Sell & John Odell, 2003.

⁴ Keck and Sikkink, 1998.

Oxfam. It also included powerful individuals such as Ralph Nader, governments, and generic pharmaceutical manufacturers that hoped to increase their market share (most prominent being Cipla Pharmaceuticals of India).

Agenda Setting

The final step in successful advocacy is to use the coalition to direct the public policy debate, by communicating the new frame of reference. Several elements beyond the existence of a crisis are necessary for this.

Institutional Access

In reframing an issue lobby groups must have access to the institutions that direct public policy. In the context of TRIPS these include international organizations such as the WHO and WTO. However, given the immense importance of national governments, particularly the US government, access to domestic political institutions within the US was also necessary.

In general, business has the upper hand in gaining access to the US government. Through intense lobbying and close association with the US Trade Representative (USTR), business interests introduced TRIPS into the WTO. Subsequent USTR action threatening Brazil on use of compulsory licensing was also the result of lobbying by the PhRMA.

Powerful individuals and the presence of the political process can, however, impact this balance in the favor of NGO networks. The coalition on TRIPS and Public Health benefited from support by Ralph Nader during the 2000 presidential election. Similarly, the ability to change public opinion for or against politicians is indirect access to these institutions, as was demonstrated by pressuring Al Gore in the same campaign. The result was a reversal of US policy by Bill Clinton.

Policy Entrepreneurs

Beyond institutional access and domestic support, Sell and Prakash also identify the necessity of vocal and important individuals during the process of agenda setting. These 'policy entrepreneurs' are at least partly responsible for identifying and disseminating information supporting the group's cause. They also may be responsible for directing responses to challenges by opposing groups, as well as for identifying domestic political opportunities for lobbying. In the past, both sides benefited from such policy entrepreneurs.

Advocacy in Ongoing Negotiations

The introduction of TRIPS into the Uruguay round package of agreements is not surprising. That round pitted powerful business and government (USTR) interests against weak developing country governments in trade negotiations. However, what is surprising is the substantive policy outcome achieved by the coalition of TRIPS and Public Health in 2001. That coalition, and the NGO networks that supported it, managed to significantly change the spirit, if not the letter, of the TRIPS Agreement.

The following section attempts to draw parallels between the past and what may occur in the future with regard to the current TRIPS negotiations. This is useful both for NGO networks

hoping to change the course of policy debate, as well as for business interests looking to avoid previous mistakes or preempt NGO action.

It is important to note that in the public eye, business is currently on the defensive on any discussion related to TRIPS. Having become the poster-child of greed and exploitative corporate practices, the pharmaceutical and chemical industries in particular, will struggle to find a positive association with the TRIPS Agreement. This does not have immediate implications on the negotiations, which involve state actors. However, it does mean that business interests will be at a disadvantage to direct the policy debate on future TRIPS negotiations, as they suffer from a lack of trust.

Policy Crisis

The developing world has claimed that genetic resources and traditional knowledge, largely found in the South, is being or can be exploited by western industry, without paying compensation for their use. Some incidents where plant material or traditional medicine has been patented is cited as evidence of this ‘bio-piracy’, and this crisis has galvanized the current coalition on TRIPS reform. Strengthening the cause of the poor is the loss of a potential economic asset, essential for development of these countries.

In response, a set of developing countries led by Brazil and India have called for reform of intellectual property law within TRIPS and WIPO. They demand that patent applications should support protection of such knowledge, and patent applicants must be required to disclose use of genetic resources as well as prove existence of contracts establishing benefit sharing. African countries go further, asking that life forms such as plants not be patentable.

Interestingly, this crisis has several parallels to the original threat to US intellectual property claimed by business lobbies in the 1980s. However, it does not have the emotional appeal that goes with issues such as public health and HIV/AIDS. The response of mainstream media, individuals, and NGOs, to gather into a coalition has therefore been slow.

For a coalition to be successful it must enjoy broad domestic support. Thus far, this has not happened. However, there are efforts to link this TRIPS review with other issues, to overcome the inherent weakness of the ‘crisis’, through imaginative normative framing. Another trigger that could result in a stronger support would be evidence of massive ‘bio-piracy’ by western industry. Such exploitation would turn this from being a scientific matter, as it is now, into one of survival of the poor, energizing the legions of anti-poverty and anti-globalization activists in the developed world.

Normative Framing

As in the past, the search for a persuasive frame of reference for the current negotiations continues. Efforts have been made by developing country governments and NGOs to link the issue of genetic resources to equity and sharing of benefits. However, several alternative linkages have also been proposed. These propositions indicate that there is an ongoing struggle within the NGO coalition itself, over the frame of reference.

The issue of patenting plant varieties has been linked to the basic human right to food security. Apart from the WIPO and WTO, patenting issues are now even being discussed in the UN Office of the High Commissioner on Human Rights (OHCHR).

Protection of traditional knowledge and genetic resources has been linked with economic development. More recently, it has been associated specifically with poverty. In so doing, this campaign may now be able to find common ground with other networks working on poverty in Africa. In particular, with UK Prime Minister Tony Blair's push for making poverty history, a successful reframing in these terms would increase costs within the UK of opposing such patent reform as proposed by the South.

Finally, in international debates African countries have asked that patents on all living material be banned. The argument is being framed as one of right-to-life. A 2001 statement by NGOs titled "Re-Thinking Trips in the WTO"⁵ had the support of Christian Aid, UK, and United Church of Christ, USA. Such association could have significant repercussions given the power of domestic conservative and religious lobbies within the US, and the susceptibility of the current US administration to these lobbies. In these terms, a successful NGO effort would attempt to collaborate with these interest groups, for instance working with churches to galvanize public opinion.

For business, the search for an appropriate frame for their arguments has been more difficult. So far their arguments have been diffuse. For instance, their response to the public health criticism was to place blame on a diffuse set of actors and circumstances (governments, poverty, and lack of infrastructure). In the absence of a single villain or a solution to target the problem, this response failed to move public opinion. It was also successfully countered by the NGO coalition, with response coming from CPTEch.

Yet, business too can employ similar frames of reference. For instance, pharmaceutical companies could collaborate with domestic right-to-life campaigns, as the industry's stated mission is to eradicate disease. Unfortunately, business must accept that it is being responsive and defensive in its search for a normative reference that would move public opinion.

Convergence of Interests

The above struggle over a frame of reference is a precursor to building a powerful coalition. While the two do not necessarily follow each other, a critical mass is necessary before a coalition can be effective. Given the varied interests currently mobilizing on the issue of IP and GRTK, the final direction is uncertain.

Within the WTO, the chosen normative frame is that of development and equity. However, that is the position of some national governments, and there are several variations. It would not be surprising to see that frame change, should the NGO coalition manage to galvanize around another alternate frame.

⁵ Third World Network, 2001.

Agenda Setting

Finally, what current conditions allow or hinder either interest group from leading the agenda setting process?

In terms of institutional access, business as before has the upper hand in domestic US politics. In contrast, NGO networks have chosen not to give this issue the highest priority, with organizations such as MSF and Oxfam not being very active. On the issue of biodiversity protection the most active organizations are ICTSD, Quakers, South Centre, and Center for International Environmental Law (CIEL).

These NGOs lack large domestic constituencies within the US and Europe. Instead, they have been very active at the international level on research and advocacy. As a result, their tactics for agenda setting are different from groups such as Oxfam or MSF. Instead, of direct public opinion formulation they work on information dissemination, legal and policy advice.

These and other organizations have been indirectly involved in representations to the WIPO and WTO, but their access has been limited. Instead, NGOs are more involved in other forums, such as OHCHR, FAO, and UNESCO. Few of these organizations can have direct impact on patent law. However, parallel developments make it more difficult for business to predict or preempt opposing action. It also makes it easier for NGO coalitions to initiate non-binding action on this issue. This has the potential of deepening the original crisis, if for instance a company finds it must abide by codes of conduct at UNESCO that it had no role in formulating.

The current negotiations lack key policy entrepreneurs on both sides of the debate. In the US, James Love of CPTech, who was a vociferous activist of the coalition on TRIPS and Public Health, has continued to work on this issue. However, the argument of CPTech has often been for less, not more patent protection. This has reduced the possibility of finding common ground between that particular NGO and the developing world governments that call for protection of genetic resources through the patent regime.

The final step to effective agenda setting is proper communication. In this case, both groups are hindered by the technical nature of biodiversity, biotechnology, and patents. Finding a simplified framing will be important to gathering widespread support.

Finally, both groups draw on strengths in different media channels. In getting their message across business lobbies tend to depend heavily on representation within the government. In the US this may be through representation at the USTR, within the Senate, or in an advisory role to government commissions. By contrast, NGO networks draw heavily on strengths in using mass media and the internet to communicate their message. Within the US they must therefore account for the conservative nature of public television. As a result, a conservative message such as right-to-life is more likely to be covered, than is something generic like benefit sharing or justice.

What are the key political events that could change this dynamic of agenda setting? One already mentioned is UK Prime Minister Tony Blair's emphasis on Africa. In his efforts to leave a legacy before his last term, he will have many issues to choose from to champion for Africa. This could certainly be one of those.

Similarly, actions by industry that support NGO arguments (more bio-piracy) could have a catalyzing effect. Also important are calls within the US for patent reform. These calls have been prompted by the proliferation of the open source software (OSS) movement. Linkages between that movement and international calls for patent reform could affect the agenda in unpredictable ways.

Conclusion

Interest group strategies discussed above apply to both the NGO and business world, and provide defensive and offensive tactics for both. The TRIPS Agreement is still undergoing heated debate and continues to be the focus of a struggle over reform of intellectual property rights. In this context, the Doha Declaration of 2001 demonstrated that bargaining power is not the only variable in determining policy outcomes. Advocacy, clearly, can overcome bargaining power imbalances, if applied within the correct environment and context.

Analyzing attempts at reframing the discussion on intellectual property rights, genetic resources, and traditional knowledge is not simple. There are several issues being discussed with multiple reframing possibilities. Developing countries themselves have varying positions on these issues and are backed by or drawing support from different NGO constituencies. Attempts at reframing reflect a struggle to choose which constituency will provide the final normative reference.

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