



Global Law Reform and Rent-Seeking: The Case of Intellectual Property

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National law reformers increasingly look to overseas models for guidance. States are also finding that their sovereign capacity to adjust their economic laws is constrained by the international conventions of which they are members. States are increasingly becoming law takers rather than law makers. This paper, using intellectual property as a case study, argues that global law reform processes hold real dangers for states. Sophisticated power elites can capture such processes and use them to tilt the playing field to their advantage as well as to extract economic rents. The story of how this was done in relation to intellectual property is told in detail.

Introduction

Law reform usually aspires to bring about an improvement of some kind. An account of why a particular reform proposal is an improvement has to, at base, rely on a social principle of some kind. Bentham's principle of utility (the greatest happiness of the greatest number), for example, provides the philosophical justification for much of the law reform activity that has taken place in many parts of the English speaking world from Bentham's time onwards.¹

Following Bentham one broad characterisation of the goal of law reform might be that it should aim to deliver a welfare improvement of some kind. Law reform sometimes fails to fulfil this goal. Economic theory provides one explanation as to why. Self interested groups persuade legislators to enact laws that create rents for these groups, but no overall welfare gains. Legislators agree to this because they, like the groups they serve, are self interested. They make calculations that involve their chances of staying in power, getting re-elected and ensuring that the rewards of office continue to be theirs. Legislation on this view turns out to be a product, a product that is generated by the self interested exchanges that take place in the marketplace of politics.²

Not all legislation can be explained in this way. But there is little doubt that some can be. Intellectual property is a case in point. Take, for example, legislation that increases the length of patent or copyright terms, or adds new intellectual property rights to existing ones. If such legislation applies to patents and copyrights in existence, then clearly there has been no welfare

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1 See, G W Keeton and G Schwarzenberger (eds), *Jeremy Bentham and the Law*, London, Stevens, 1948.

2 For an introduction to the economic literature: see I Mclean, *Public Choice*, Oxford, OUP, 1991; D A Farber and P P Frickey, *Law and Public Choice*, Chicago, University of Chicago Press, 1991.

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gain, but welfare loss.³ This loss is the cost to society of allowing the information, which is the subject of the patent or copyright, to be locked up by private hands for a longer period of time. There are, in exchange for this privilege, no goods being produced. The increase in intellectual property protection may contribute to dynamic efficiency (more innovation). But the question that has to be asked, is whether there is a *net* incentive gain, since all intellectual property rights impose costs.

The case of intellectual property is somewhat analogous to tariff protection. Local industries lobby their governments to increase tariff protection in order to increase their income. This activity is not economically productive in the sense of producing new goods or services. Industries which have grown up under conditions of market pressure (eg the data base industry), lobby governments for intellectual property protection. Putting the point a little bluntly, much of intellectual property law reform fits into the economic category of directly unproductive, profit seeking (DUP) activities.⁴

Law reform has, for the most part, been an activity that individual sovereign states have undertaken. States might borrow legal models from other countries in the way that Australia borrowed some of its Trade Practice Act from US antitrust law, but law reform has essentially been a state centred activity. This is changing. The evolution of a global economy has also seen the emergence of an international regulatory order. This regulatory order manifests itself in various ways; in regional trading blocs and organisations like NAFTA and APEC, as well as multilateral trade instruments and supranational organisations like the Final Act of the Uruguay Round (Final Act) which also established the World Trade Organisation.⁵ This regulatory order places constraints on the capacity of states to reform their laws. Australia, for example, by virtue of signing the Final Act can no longer reform its intellectual property law by repealing its Patent Act (something it once contemplated even if only for a nanosecond).⁶

The internationalisation of capital and production has seen the emergence of a new and powerful citizen in the world, the transnational corporation (TNC). Very often TNCs hold more power than the nation states in which they operate. This power, combined with the absence of suitable international regulatory regimes, has allowed TNCs to pursue self interest in an unrestrained fashion. So it is that pharmaceutical TNCs form international cartels for the sale of antibiotics and international publishers divide the world into private lots for the distribution of books.⁷

State centred law reform activity faces two challenges. First, the emerging

3 The Patents (World Trade Organisation Amendments) Act 1994, for instance, extends to 20 years the term of patents already in existence and whose term expires on or after 1 July 1995. The Industry Commission is, at the time of writing this, working on a study of the welfare losses to Australia of this reform.

4 See J N Bhagwati, "Directly Unproductive, Profit-seeking (DUP) Activities", 90 (1982) *Journal of Political Economy* 988-1002.

5 *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

6 See *Industrial Property Advisory Committee, Patents, Innovation and Competition in Australia*, Canberra, 1984, at 17.

7 On the use of patents to form international cartels: see M Costello, "The Tetracycline Conspiracy: Structure, Conduct and Performance in the Drug Industry" (1968) 1 *Antitrust*

international regulatory order means that most states find themselves in the position of being law takers rather than law makers. That is to say that national regulators administer regulatory standards which have been determined outside of a given nation state. Second, the supranational regulatory order itself becomes the target of interest group activity. Instead of delivering welfare gains this regulatory order delivers rents to a powerful transnational elite. It becomes a new form of domination, a domination based on the rule of law.

The remainder of this paper illustrates the nature of these two challenges using the recent agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) as a case study.⁸ It tells the story of how the TRIPS Agreement came to have a place in the Final Act.⁹ It is a story of remarkable achievement. One country, the US, was able to persuade more than 100 other countries that they, as net importers of technological and cultural information, should pay more for the importation of that information.¹⁰ Assuming rational self interest on the part of these other states, their willingness to sign off on TRIPS constitutes a real world puzzle worth studying. By doing so we may learn something about the mechanisms and forces that help to explain the emergence of individual global regulatory institutions as well as the politics of global law reform.

The paper comes in the following parts. Sections 1 and 2 discuss US motives and strategy. Sections 3 and 4 deal with the bilateral and multilateral aspects of this strategy. Section 5 deals with aspects of the negotiations themselves. Some conclusions are then drawn.

Law & Economics Review 13-44. On the publishers: see Copyright Law Review Committee, *The Importation Provisions of the Copyright Act of 1968*, Canberra, AGPS, at 58-60.

⁸ See the Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994.

⁹ Briefly, the TRIPS agreement does several basic things. First, it requires many countries to protect information which in the past they had not (eg plant variety protection, a controversial issue for developing countries in particular. See V Shiva, *Monocultures Of The Mind*, Penang, Third World Network, 1994). Even for countries like Australia, which have a large legislative stock of intellectual property rights, there will have to be some new legal acquisitions (eg rental rights in relation to software). Second, it raises the price of information by increasing the duration of protection for some intellectual property rights and requiring signatory countries to enact new rights. (For example, art 33 of TRIPS raises the patent term to 20 years.) Third, it requires states to have a much greater role in the enforcement of intellectual property rights. Countries are required to provide legal and administrative structures for the civil and criminal enforcement of intellectual property. Fourth, it establishes a council for TRIPS to monitor the operation of TRIPS, in particular compliance. The new dispute resolution procedures under the GATT mean that countries which default on their obligations face the high probability of a successful GATT action against them. For a discussion of the new dispute resolution mechanism: see A F Lowenfeld, "Remedies Along With Rights: Institutional Reform In The New GATT", (1994) 88 *The American Journal of International Law* 477-88.

¹⁰ For a discussion of the economics facing importers and exporters of intellectual property: see A Subramanian, "The International Economics of Intellectual Property Right Protection: A Welfare-Theoretic Trade Policy Analysis", (1991) 19 *World Development* 945-56.

1 Motives

Why was a TRIPS agreement so central to US aspirations at the GATT? There was, after all, an international framework already in place for the regulation of intellectual property, a framework that was presided over by a specialist international organisation, the World Intellectual Property Organisation (WIPO).¹¹ Furthermore, the basic elements of this international framework had been around since the end of the 19th century. Why was the Uruguay Round the round in which the US chose to push intellectual property onto the world trade stage?

The answers to these two questions have several layers. One answer is that those US corporations like IBM, Pfizer and Microsoft which had large intellectual property portfolios were worried about the loss of profits due to the piracy of their products. This is not to say that US corporations were not being profitable in the 80s. Many of them were.¹² A second answer, and one that helps to explain the support of Congress, is the widespread fears over the loss of US competitiveness.¹³ A third answer is the belief that the US was losing power in the world. The loss of competitiveness when combined with other losses, like those in Vietnam, began, in the eyes of many, to add up to the one thing, the visible loss of US power to strong competitors. Analysts started to pronounce the last rites over US hegemony.¹⁴ The US began to suffer what Bhagwati has called the diminished giant syndrome.¹⁵

Developing countries like India and Brazil began to show leadership potential, albeit of a regional kind. At the same time new economic competitors emerged. The public images the US constructed of these rivals, were neither friendly nor comforting. "The gang of four", "the Asian tigers", "the dragon economies" could hardly do otherwise than make the US uneasy about its share of world markets. Then the Japanese economic miracle began increasingly to wear on US nerves. Japanese manufacturing triumphs began to be seen as a portent of US deindustrialisation. Public myths began to be constructed in the US about the "true" nature of this success. American ideas, American know-how were being stolen by the Japanese, it was widely believed.¹⁶ The trade surplus that Japan had with the US became a rallying

11 A Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization*, Geneva, WIPO Publication, 1992.

12 Eg Pfizer's net income went from \$103.4m in 1972 to \$800m in 1990. Its return on equity was almost double that of the median return for Fortune 500 companies. See, "Pfizer: Protecting Intellectual Property in a Global Marketplace", *Harvard Business School*, 1992, at 3.

13 The causes of falling competitiveness were not however, in the beginning, attributed to poor intellectual property protection. See H Ullrich, "GATT: Industrial Property Protection, Fair Trade and Development", in F K Beier and G Schricker, (ed), *GATT or WIPO? New Ways in the International Protection of Intellectual Property*, Munich, Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, 1989, at 131-2.

14 P Kennedy, *The Rise and Fall of the Great Powers*, London, Unwin Hyman, 1988.

15 J Bhagwati, "The Diminished Giant Syndrome - How Declinism Drives Trade Policy", (1993) 72 *Foreign Affairs*, 72, 1993, 22.

16 Like all public myths it had some basis in reality. Transistor technology had been patented by AT&T, but under US antitrust law it was required to issue patent licences to qualified manufacturers. The Japanese company Tokyo Tsushin Kogyo Kabushiki Kasha (eventually to be known to the world as SONY) was granted a licence by AT&T. The Japanese, in other

point for protectionist elements within the United States.¹⁷

By the time those who represented US intellectual property interests arrived on Capitol Hill to tell their story, they found an audience that was in the mood to do something concrete to remedy US economic problems. The story they would tell this audience was, in the style of Mark Twain, beautifully simple. Stronger property rights were needed to protect American ideas and industry. Better protection meant more jobs, and these intellectual property based industries were the very ones that would restore the US to a positive trade balance with the world. Under any conditions it was always going to be a persuasive story. In the climate of insecurity about the political and economic future of the US this story, with its deeply nationalistic underpinnings, made compelling listening.

2 US Strategy: Nature And Origins

The problems in intellectual property protection that confronted the United States at the beginning of the 80s were global in nature. Most other sovereign states, particularly developing countries, were not particularly sympathetic to the needs of US business on intellectual property. The US faced a massive free rider problem. The way in which it chose to solve that problem was through forging a link between the international trade regime and the development and enforcement of intellectual property standards. Combining trade with intellectual property gave the US what it had lacked to deal with the problem of copying: leverage. As one former US trade official put it, trade helped the US "rebalance the equation".¹⁸ Banning the imports of Brazilian software would have done little to stir trade officials in Brazil. Slapping large tariffs on Brazilian coffee would make them jump.

Crucial in the evolution of the US trade based strategy for intellectual property was the work of the Advisory Committee for Trade Negotiations (ACTN). This committee was designed to provide direct input by the US business sector into US trade policy. ACTN was an open and direct line of communication between business and the bureaucratic centre of trade policy. It has no real equivalent in any other country.

From 1981 ACTN was chaired by Ed Pratt, the CEO of Pfizer. Pfizer was a pharmaceutical corporation which had made a strategic long term commitment to doing business in developing countries. More than most corporations, it became concerned by the copying of its products. Pratt himself became a leading exemplar of a trade based approach to intellectual property protection, and in his speeches did much to alert other US business leaders to the fruitful possibilities of such an approach.¹⁹

words, acquired this US technology legitimately. See R J Barnet and J Cavanagh, *Global Dreams*, New York, Simon and Schuster, 1994, at 46-7.

17 See W M Corden, "The revival of protectionism in developed countries" in D Salvatore (ed), *The New Protectionist Threat To World Welfare*, North-Holland, New York, Amsterdam, London, North Holland, 1987, 45 at 61-4.

18 Interview with Mr Emery Simon, former US Trade Negotiator, now with Alliance to Promote Software Innovation, Washington, 22 April 1994.

19 Information provided by M W Hodin, Vice President - Public Affairs, Pfizer, New York, at an interview on 23 September 1994, New York.

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ACTN established a Task Force on Intellectual Property. The recommendations of this Task Force were fundamental to the development of a US strategy for intellectual property. Most importantly the Task Force recommended that the US government develop "an overall IP strategy".²⁰ In essence the strategy required the US to have a long term goal of placing intellectual property into the GATT. Bilateral and unilateral efforts, using trade tools, would provide an "interim" strategy for improving intellectual property protection abroad.

The bilateral strategy had "nice guy, tough guy" parts to it. The "nice guy" part consisted of suggesting that proselytizing work be done by intellectual property experts in developing countries, preferably under the aegis of some economic assistance program like the US Agency for International Development. The "tough guy" approach consisted of using the dependency of problem countries on the US market, a dependency which the US had built up through programs like the Generalized System of Preferences (GSP).²¹ The effect of the GSP was to allow beneficiary countries duty free trading privileges in the US market. Favourable treatment under the GSP program, the Task Force suggested, should be made conditional upon those countries setting the right level of intellectual property protection. The idea of the Task Force was to link intellectual property to as many levers as the US could pull. The Task Force also suggested that the US Executive Directors to the IMF, the World Bank and regional development banks, in exercising their voting power, should examine a country's record on intellectual property protection. Debt restructuring programs could also have, as part of their conditionality, better intellectual property protection.

There were two other important elements of ACTN's thinking on intellectual property. There was an insistence that the private sector be continuously and intimately involved in the evolution of US policy on the intellectual property issue. ACTN also urged that a consensus building exercise of a massive scale take place on a number of fronts. At some point the US, Japan, Europe and other developed nations, as well as the developing world, all had in the end to agree to a set of reasonably detailed proposals in relation to what was, for any state, its most fundamental mechanism: property.²²

3 The Bilateral Story: Trade Duelling

In preparation for its bilateral trade duels the US began to systematically expand the areas in which the linkage between intellectual property and trade appeared.²³ The problem for the US was that in seeking to achieve its

20 Unpublished paper, *Recommendations of the Task Force on Intellectual Property to the Advisory Committee for Trade Negotiations*, March 1986, at 1.

21 Problem countries were Singapore, Taiwan, Indonesia, Korea, Philippines, Malaysia, Thailand, Brazil, Egypt and Nigeria. The GSP operates under the Trade Act of 1974 s 502, as amended.

22 On the link between property, externalities and societal evolution: see H Demsetz, "Toward a theory of property rights", (1967) 57 *American Economic Review*, 347-59.

23 The linkages between intellectual property and trade appeared in the Caribbean Basin Economic Recovery Act of 1983, the Generalized System of Preferences Renewal Act of 1984, the International Trade and Investment Act of 1984 and the Omnibus Trade and

intellectual property objectives it was dealing with sovereign states which were entitled, under the existing international conventions, to fix lower rather than higher levels of protection for intellectual property. Furthermore, many of these states were not culturally predisposed to accept intellectual property²⁴ or, alternatively, saw intellectual property as a form of recolonisation or economic imperialism.²⁵ The US could not realistically expect to reform the international framework of intellectual property protection through the agency of WIPO, because in that forum it had only one vote and could always be expected to be outvoted by developing countries. Some form of coercion was needed if a global protectionist paradigm for US intellectual property interests was to have any chance of becoming a reality.

To solve this problem the US reshaped its trade law to give it an array of enforcement strategies. In particular it amended its 301 process under its Trade Act of 1974. It is worth focussing on the nuanced nature of 301 which is often simply thought of as just a big stick.

Within the 301 process there are three important categories: Priority Foreign Country, Priority Watch List and the Watch List. A country that is put on the Watch List is being sent a message that it has unsatisfactory practices when it comes to intellectual property, and that the US Administration is paying special attention to those practices. The country knows that it has entered the 301 process and that it can expect to be in regular contact with the Office of the United States Trade Representative (USTR). In 1993 Spain remained on the Watch List because its remedies in the copyright area did not provide owners with the capacity to conduct *ex parte* searches.²⁶

If a country does not keep its pledges to shut down piracy to minimal levels, the target country faces a Priority Watch List grading. Typically, for a Priority Watch List country the USTR has formed some set of precise objectives which the relevant country has to begin to work towards. Saudi Arabia, for example, was in 1993 shifted from the Watch List into the Priority Watch List because it was not a member of the Berne Convention on copyright, had a poorly drafted copyright act and its enforcement of copyright law remained weak. No country is immune from the 301 process. Australia and the European Community, both supporters of the TRIPS agreement, were in 1993 retained on the Priority Watch List. Amongst other things, Australia had a broadcast quota that was purportedly affecting the US motion picture industry. Priority Foreign Countries are those on trade's death row. These are countries that have, in the words of the legislation, "the most onerous or egregious acts, policies, or practices" when it comes to intellectual property. The sentence is not irreversible. The USTR may revoke the Priority Foreign Country

Competitiveness Act of 1988. A full discussion of the legal detail of each of these Acts is beyond the scope of this paper. Basically the idea was that trading benefits would only flow to countries if they provided effective and enforceable intellectual property protection.

24 An argument used by the South Koreans was that copying the work of an artist was in their culture a form of flattery.

25 See C Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World*, Penang, Third World Network, 1990. See also C Raghavan, "Recolonization: GATT in its historical context", (1990) 20 *The Ecologist*, 205-7.

26 *Ex parte* searches are searches of the defendant's premises ordered by the court after having heard only the applicant for the search order.

identification of a country and retaliation is not instant. Brazil in 1993, along with Thailand and India, were named Priority Foreign Countries. In the case of Brazil it was because it limited the scope of its patent legislation, and its term of protection for computer software was only 25 years.

The 301 process is also accompanied by a sophisticated form of surveillance. Clearly, the USTR does not have the resources to globally police US intellectual property rights. This work is largely done by the US business community working through its global trading posts. Each major US company with an important intellectual property portfolio is a member of a trade association, and those trade associations are members of umbrella organisations like the International Intellectual Property Alliance (IIPA).²⁷ The IIPA represents 1500 companies which have significant copyright interests. These companies provide the IIPA with information about problem spots in the world.²⁸ This information is sifted by the IIPA which turns the raw data into a series of recommendations to the USTR concerning appropriate action under 301.²⁹ A decision to impose trade sanctions against another country is serious, and so that decision is itself the product of an inter agency process, although generally it is resolved along the line suggested by the USTR.

It is not only states which have felt the heat of the 301 process. Known pirates have become targets. Right from the beginning, the US intellectual property lobby correctly analysed that the effective enforcement of intellectual property rights in many countries where piracy took place was a function of high level political commitment to that enforcement. During the 301 process, information about problem centres in a country as well as problem individuals was passed on to officials of target countries so that those officials were fully informed of the problems they had. Naturally, when the ritual of public enforcement was undertaken by those states they took that information into account. Thus it was that businesses like Tower Publications in South Korea that had happily been copying US textbooks without attracting any attention from their own government suddenly found themselves the object of government raids and penal sanctions.³⁰ Ultimately the head of Tower publications spent a little time in jail, something which sent shock waves through the South Korean government.³¹

The 301 process played a crucial role in the US's success on intellectual property at the GATT. Once the US had persuaded a sufficient number of

27 The IIPA is probably the single most important copyright lobbyist in the world. It is an umbrella organisation consisting of eight trade associations: American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Computer and Business Equipment Manufacturers Association, the Information Technology Association of America, the Motion Picture Association of America, the National Music Publishers' Association and the Recording Industry Association of America.

28 Interview with Eric Smith, Executive Director and General Counsel, IIPA, 25 October 1993, Washington.

29 See, eg the 301 filing (unpublished) entitled, IIPA 1993, *Special 301 Recommendations and Estimated Trade Losses Due to Piracy*, submitted to the United States Trade Representative on 12 February 1993.

30 Interview with Eric Smith, Executive Director and General Counsel, IIPA, 25 October 1993, Washington.

31 Information provided by the President of the Korean Intellectual Property Research Society, 28 July 1994.

countries to act on the intellectual property issue at a bilateral level, it could expect little resistance in the multilateral forum to the TRIPS proposal. (In fact, resistance to US negotiating objectives at a multilateral forum could itself trigger the 301 process.) This strategy proved so effective that in the end the disputes over intellectual property issues at the GATT became ones between the intellectual property triumvirate, the US, Europe and Japan. By the final stages of the negotiations developing countries had long stopped resisting the TRIPS proposal.

The intellectual property lobby worked hard to establish and maintain relations with the USTR's office. Associations like the IIPA and the Business Software Alliance (BSA) provided the USTR with a continuous stream of reports and estimates as to trade losses that US companies were experiencing in various parts of the globe and while, from time to time, the USTR expressed some mild scepticism about the size of the estimated losses, there were no other figures to go on. Whether the USTR became a captive of the intellectual property lobby is difficult to know, but clearly a close working relationship between the two existed. When, for instance, the USTR had to calculate the loss of GSP to countries like China, it used the figures provided by the BSA on the dollar losses that US industry had suffered in those countries.³²

Parallel to the 301 process was a consciousness raising campaign designed to convert the populace of various countries to the idea that theft was no less theft when it came to taking intellectual property. This work was carried out by organisations like the BSA which went from its formation in 1988 to being active by 1994 in over 50 countries. The consciousness raising took different forms. BSA and others undertook well publicised criminal prosecutions against firms or individuals guilty of copying. Messages about the perils of piracy appeared on videos; "phone in a pirate" hotlines were established; seminars on copyright enforcement issues were provided. Large accounting firms began to offer their clients software audit programs, and illegal copying became a contingent liability within the audit process. Whenever governments were facing relevant law reform issues the intellectual property lobby would make submissions, often sparing no expense. When the Australian Copyright Law Review Committee was considering the issue of software protection, IBM, rather than relying on the superhighway, flew experts into Australia to do live and, by all accounts, slick presentations.³³

While the US under the umbrella of 301 had a great deal of success in negotiating satisfactory outcomes, it was, in the words of one negotiator, "a slow and painful process".³⁴ Another problem was that aggressive bilateralism is a dangerous strategy in the long run, even for a powerful nation. The US was and is the leading proponent of a global liberal trade order, which has at its core the idea that trade disputes should be resolved under some rule of law approach. Illegal aggressive bilateral measures constitute an erosion of the credibility of a dispute resolution system within a multilateral liberal trade

32 Interview with Robert W Holleyman II, President, Business Software Alliance, Washington, 20 April 1994.

33 Information provided by Professor Dennis Pearce, member of the Copyright Law Review Committee.

34 Interview with Mr Michael Keplinger, US negotiator at TRIPS, 27 October 1993, Washington.

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order.³⁵ There was also the problem that the bilateral strategy would only work for so long as other countries depended on the US market and/or US trade concessions. It was important to the US to have in place a multilateral dispute resolution mechanism, which could be used by it to contest trade issues with economically stronger opponents.

4 The Multilateral Story

US business wanted intellectual property included in the GATT, because the GATT offered the possibility of a high set of standards of protection for intellectual property, a set of standards that could be tied to an enforcement mechanism.³⁶ There was in the beginning no real support for the idea amongst nations of the developed world. Most tellingly, there was not much enthusiasm for the idea amongst Japan, Europe and Canada, the other members of the QUAD. (The QUAD is a distinct group within the GATT used to progress issues.) When ACTN, in the early 1980s, began to suggest that intellectual property become part of the next trade round, the US Trade Representative reported that there was not much pressure in the QUAD for such an initiative. It was simply not a priority issue for European and Japanese industry.³⁷

Given that agreement amongst QUAD members was itself a precondition to any successful initiative at the GATT, US business realised that it faced a consensus building exercise of Herculean proportions. The Intellectual Property Committee (IPC) was formed to do the job. The analogy with Hercules is apt for the membership of the IPC consisted of Bristol-Myers, Du Pont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International and Warner Communications.

The background to the formation of the IPC in March 1986 lay with the CEOs who were members of the President's ACTN Committee. They had persistently raised the issue of trade and intellectual property protection with the US Trade Representative. Once it became clear that nothing would come of the suggestion to place intellectual property into the next trade round unless, at the very least, there was some pressure for that inclusion from QUAD members, they formed the IPC. Its first task was to create an international consensus amongst the business communities of the QUAD countries. Once this business consensus was in place, it could be used to persuade the governments of QUAD states to support the inclusion of intellectual property in the coming GATT round, which was to be launched at the Ministerial Meeting at Punta del Este in September of 1986.

The IPC came to its task with what was, by then, a well developed sense of the grand strategy that had to be pursued. Most of this is contained in an unpublished paper of 1 September 1985 written by Jacques Gorlin. Gorlin, an

35 Many US trade retaliations would have been GATT illegal. See R E Hudec, "Dispute Settlement" in J J Schott, (ed), *Completing the Uruguay Round*, Washington DC, Institute for International Economics, 1990, 180, at 198.

36 See *Basic Framework of GATT Provisions on Intellectual Property*, Statement of Views of the European, Japanese and United States Business Communities, June, 1988, The Intellectual Property Committee, Keidanren, UNICE, at 11-12.

37 See Intellectual Property Committee release, 14 June 1988.

economist with a trade background, wrote the paper for IBM in response to a request from the USTR's office for a review of the major questions involved in placing intellectual property into the next round of the GATT. He had also been a consultant to the ACTN committee and had helped to prepare many of the papers that that committee had released on the intellectual property issue. While there had been earlier papers on the intellectual property issue, Gorlin's paper contained a discussion of a possible model for an intellectual property code in the GATT, and a detailed analysis of the problems that the US might expect to encounter, and what it could do to overcome them. It was, in other words, a synthesis and development of ideas that a small elite community of business leaders, lobbyists, consultants and trade officials had been discussing for some time.

Between the time of its formation in March of 1986 and the meeting at Punta del Este in September of 1986, the IPC managed, incredibly, to put in place amongst the giants of the international business community (Europe, Japan and the US) a consensus on the GATT and intellectual property. At the Punta del Este conference the group of sovereign nations which made up the Contracting Parties of the GATT agreed to a Ministerial Declaration which included on its agenda GATT rules for intellectual property protection.

During and after 1986 the US became, more than ever, as a result of its intellectual property mission a highly organised and coordinated industrial legal bureaucratic complex. Ed Pratt of Pfizer had said that the joint action of US, European and Japanese business represented "a significant breakthrough in the involvement of the international business community in trade negotiations".³⁸ This is true. But the initiative was very much that of the US. The more profound achievement, in many ways, was the elaboration of a system of cooperation and coordination between US business and the US state which was aimed at preserving the central position of the US in the world economy. US trade delegations at GATT meetings had access to the highest level business advice. (Ed Pratt was adviser to the US Official Delegation at Punta del Este.) The IPC established close working relations with the US Administration and Congress. As an IPC release of 1988 observes, "This close relationship with USTR and Commerce has permitted the IPC to shape the US proposals and negotiating positions during the course of the negotiations."³⁹

Having won the battle at Punta del Este the US turned its attention to the forthcoming negotiations. On the face of it the numbers did not look promising for the US. Almost every other country at the negotiations would be in the position of being a net intellectual property importer. Europe, with its excessively cultural perception of intellectual property (at least in the eyes of the US), was already showing some hesitancy about the issue. There was a lot of work to do.

5 At the GATT

The US was better prepared than any other nation to negotiate the TRIPS agreement. To begin with it had the advantage of terrain. The GATT is a place where deals are traded freely rather than a place where deals about free trade

³⁸ IPC release 14 June 1988.

³⁹ IPC release 14 June 1988.

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are made. This terrain of deal making was familiar to the US. The US was one of the few countries that sent negotiators with strong intellectual property expertise to the negotiations. US negotiators had already had experience in negotiating on intellectual property issues through the bilateral process and acquired more during the course of the negotiations over the North American Free Trade Agreement (NAFTA). Over time, as Gorlin's paper had recommended, trade people had become familiar with the subject matter of intellectual property, something which must have given them advantages over those negotiators from other countries who were coming to intellectual property for the first time. There was also, in a limited way, the advantage of surprise for the US on the intellectual property issue. Its inclusion in the round was very much a last minute affair. Other countries simply had not gone through the same processes of working out goals that the US had.

The trilateral forces of business that the IPC had put together continued to exert pressure on governments. In 1988 the IPC released an intellectual property manifesto which it hoped would become the blueprint for an intellectual property code in the GATT. The IPC worked hard to make sure that its business coalition stayed in place. It also worked on the GATT Secretariat. The GATT Secretariat was dealing with intellectual property for the first time. While some of the members of the Secretariat saw a conceptual tension between free trade and the monopoly privileges that intellectual property represented, it remained true that the Secretariat did not evolve its thinking on the TRIPS issue in some systematic fashion, but rather responded "to the imperatives of the negotiations".⁴⁰

With so many countries at the GATT and with so much at stake the potential for an irresolvable conflict was high. This was especially true of the TRIPS negotiations given the strong North-South divisions which had in the past characterised multilateral treaty making in the area. One way in which conflicts were managed at the GATT were through the use of enclave committees like the QUAD (the most powerful of these) which helped to develop the impetus for particular decisions.⁴¹ The same consensus building approach that US business had undertaken outside of the GATT was replicated within the GATT. A "Friends of Intellectual Property" group was formed, and this group along with the QUAD helped to shape the contents of the TRIPS text.

Why was there not more resistance at the GATT to the TRIPS proposal? After all there was a lot at stake. Within a world economy, the existence of a system of global monopoly privileges could constitute a serious threat to a given country's capacity to shift to its comparative advantage. Comparative advantage is determined by relative marginal costs. A global system of monopoly privileges could allow the holder of those privileges the possibility of changing the marginal costs of production for some countries.

The answer as to why there was not more resistance has several aspects. Developing countries that attempted to organise resistance found themselves

40 Interview with David Hartridge, Director, Group of Negotiations on Services Division, GATT, 7 October 1993, Geneva.

41 On enclave committees see M J Powell, *From Patrician to Professional Elite*, New York, Russell Sage Foundation, 1988, ch 4.

subject to the 301 process. Many countries believed that once they had shown some willingness to cooperate on TRIPS this might have caused some restraint on the part of the US in its use of 301 legislation.

There was also an advantage to TRIPS which stemmed from the nature of the GATT itself. At the GATT, countries were negotiating on a large number of items including intellectual property rights, services, investment, trade in goods, agriculture, food standards and so on. The GATT agenda was a broad agenda that allowed for the possibility of many kinds of conditionalities and linkages. This meant that there were more opportunities for countries to play for a win. Furthermore, a loss on a particular issue had some utility because, in the context of the linkage that GATT made possible, the loss turned into a concession that could be used to leverage a win on another issue. The GATT agenda was ingenious in another way. The large number of items on the table meant that it was unlikely that any one country, no matter how powerful, could walk away with a series of wins and no losses. As the number of wins piled up for a country on issues important to it, the pressure on that country to ensure that the whole round succeeded intensified, and this in turn meant that the pressure on that country to make concessions on some issues increased. The broad agenda made it probable that everyone could, at some point, expect a payoff.

It would be a mistake to think that there were no insurgencies by developing countries on the intellectual property issue. India and Brazil did formulate counter proposals, but these were evaluated by counsel from US industry who had years of experience in international intellectual property protection and licensing. Once they had passed an opinion, the enclave committee structure within the GATT (groups like the IPC and IIPA, the business triumvirate and the developed countries) coordinated to criticise and reject the proposals. We might observe in passing here, that the rejection of developing country proposals was not a simple act of power and domination. Intellectual property practitioners from developed countries were part of a centuries old tradition of intellectual property consciousness, doctrinal knowledge and the juristic and judicial refashioning of that knowledge. By contrast many developing countries simply had no such traditions. For example, at the time the US began to negotiate with South Korea on intellectual property protection, there were no law schools in South Korea teaching intellectual property law and there were no Korean lawyers expert in intellectual property law.⁴² The Koreans were novices when it came to intellectual property, and as novices they were subject to the disciplining effect of expert knowledge. Negotiators from the developed world were almost always in a position to “pull rank” in terms of technical expertise.

Individual countries faced complete encirclement on the intellectual property issue. At the bilateral level it became a condition of any trade agreement with the US, and in the multilateral trade talks, individual countries were faced by a US built consensus amongst the major trading powers on the issue. At a regional level those countries like Chile, Argentina and Venezuela, which at some stage would seek to become part of NAFTA, came to see

42 Information provided by Professor Song Sang Hyun, Seoul National University, Korea, 28 July 1994.

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intellectual property as part of the price of admission.⁴³ And, while talks at various levels were occurring, countries faced the menace of the US 301 process. The US and US business succeeded in their intellectual property objectives because they pushed the issues relentlessly at all possible levels, in all possible fora, using all possible agents.

Conclusion

States coerce other states. By far the most popular means of coercion has been war or its threat.⁴⁴ Machiavelli's advice in *The Prince* was not just advice but a grimly accurate prediction of what states would do: "A Prince, therefore, should have no other object or thought, nor acquire skill in anything, except war, its organisation, and its discipline".⁴⁵

The intellectual property story is one of coercion, but it is economic rather than military in kind. The US used a sophisticated process of trade threats and retaliation to coerce some states into complying with its intellectual property objectives. The motivation for the development and use of this coercion is clear. Multinational corporations that take on a US identity successfully argue that trade coercion is the only way in which the theft of US technology and profit can be halted.

For the US state there is also a payoff. By helping its multinational clientele to achieve dominium over the abstract objects of intellectual property, the US goes a long way towards maintaining its imperium. TRIPS at one level is very much a story about the continuation of US hegemony. Keohane has argued that a hegemonic power must have control over raw materials, the sources of capital, markets and competitive advantages in production of highly valued goods.⁴⁶ One way to the control of material objects is through the control of abstract objects. A patent right over DNA, or a copyright over software, is a property right over an abstract object that gives the owner the power to determine the physical reproduction of that object. A global property regime offers the possibility that abstract objects come to be owned and controlled by a hegemonic state. Algorithms implemented in software, the genetic information of plants and humans, chemical compounds and structures are all examples of abstract objects that form an important kind of capital.

But it would be mistake to see TRIPS exclusively in terms of the powerful coercing the weak. US business was never certain that TRIPS was "doable".⁴⁷ Its goal in the beginning was a more modest agreement than the one the ink eventually dried on.⁴⁸ Crucial to the success of the US was the work of

43 Chapter 1, art 102(d) of NAFTA states, that one of the objectives of the agreement is to "provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory".

44 See C Tilly, *Coercion, Capital, and European States, AD 990-1990*, Cambridge, Mass, Basil Blackwell, 1990.

45 N Machiavelli, *The Prince*, (G Bull trs), Penguin, 1961, ch 14.

46 See R O Keohane, *After Hegemony*, Princeton, New Jersey, Princeton University Press 1984, at 32-3.

47 Interview with Richard Lehmann, Director of Public Affairs Governmental Programs, IBM, Washington, 27 September 1994.

48 Interview (by John Braithwaite) with Lars Arnell, Chairman of the TRIPS negotiations at the GATT, 30 July 1994.

individuals who, in entrepreneurial ways, managed to exploit the possibilities of existing structures to create new ones. Linking trade and intellectual property simply would not have been possible without the creative authorial input of lawyers and economists.⁴⁹ It was they who alerted US companies to the possibilities that such a linkage might bring, and provided, the necessary technical expertise. If, for example, US business had not tabled a concrete proposal on the type of arrangement that it wanted from the GATT, the TRIPS negotiations almost certainly would have failed to produce a detailed and comprehensive agreement. US power, in other words, did not just have a trade centre, but was also based on the possession of a body of juristic and economic knowledge that was mobilised at crucial stages by individuals who saw opportunities where others only saw constraints.

The intellectual property story is an example of a strategic alliance between three business groupings and the US state. But this alliance is fragile. If, for example, the US were to use trade sanctions to try and equalise labour costs in the world, it would find itself without the support of those particular business organisations. It might very well find support from protectionist and human rights factions for such an agenda.

One lesson that can be drawn from the present study is that the processes of global regulatory change are best analytically captured by a legal pluralist model of some kind.⁵⁰ Such a model would have to consist of a description of the international regulatory order, and identify the key actors within that order. The key organisational players in the intellectual property story were core states (the US, Europe and to a lesser extent Japan), international industry associations (eg the International Intellectual Property Alliance) and TNCs like IBM and Pfizer. The model would have to explain how the different types of players shape the international regulatory order by influencing other players, and provide an account of the mechanisms by which this influence is mediated.⁵¹ Coercion is an example of a mechanism that operated in the context of intellectual property.

States still retain a monopoly over the creation of formal positive law. But the processes and agendas that lie at the heart of global regulatory activity will be, it is suggested, constituted by alliance networks between different actors within the supranational regulatory order. The composition of these alliance networks will depend on the issue in question. In the case of intellectual property, actors from social movement politics, such as the consumer movement, were all but absent. They were largely ignorant of the issues at stake, as were many countries. Obviously this is not going to be true in other areas of global regulation, such as the environment or health. Alliance networks in international relations shall not, as in the past, be dominated by

49 On legal entrepreneurship: see M J Powell, "Professional Innovation: Corporate Lawyers and Private Lawmaking", (1993) 18 *Law and Social Inquiry*, 423.

50 Such a model is being developed by Braithwaite and Drahos in their study entitled "The Emerging International Regulatory Order", funded by the National Science Foundation, American Bar Foundation and the Australian Research Council.

51 For a discussion of different mechanisms: see J Braithwaite, "A Sociology of Modelling and the Politics of Empowerment" (1994) 45 *British Journal of Sociology*, 445-79; P Drahos and R Joseph, "Telecommunications and investment in the great supranational regulatory game", (1995) 19 *Telecommunications Policy*, 619-35.

states. States dominated alliance networks because, they organised for and against the military power of other states. Future regulatory orders will feature more structurally complex alliances, and will depend more on non-military forms of coercion for their existence.

The intellectual property story also reminds us not to throw out old learning on the nature of law. The philosopher Montesquieu observed that the legal institutions and principles of one country rarely serve another well.⁵² At a time when countries around the world are being “encouraged” to adopt US or European style intellectual property laws, it is just as well to remember Montesquieu’s warning that:

As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.⁵³

Whatever the explanation for economic development, we can be confident that it is not like baking a cake; ie simply a matter of purchasing some ingredients and following somebody else’s recipe. The idea being peddled by many lawyers, that extensive intellectual property protection is a necessary ingredient for economic development, would be laughable if it were not for the fact that some travel as consultants to resource starved countries like Rwanda in order to persuade them to purchase these magical ingredients from the WIPO shop front.⁵⁴ Imperial China is an example of a society that achieved spectacular outcomes in science and innovation.⁵⁵ Yet it did not rely on intellectual property rights or a customary equivalent.⁵⁶ Intellectual property rights within Western Europe were for most of their history narrow in scope and badly enforced. History may teach us that the connection between intellectual property, science and economic development is contingent and local rather than necessary and universal. The economic growth literature and its models suggest that perhaps the single most important factor in economic growth is human capital or “knowledge embodied in people”.⁵⁷ Ironically intellectual property laws may adversely affect the rate of

52 Montesquieu, *The Spirit of Laws*, (1748), Book 1, ch 3.

53 Id Book XXIX, ch 13.

54 Rwanda has a patent system. In 1992 there were two patents registered there. See *Industrial Property Statistics Geneva*, WIPO, 1992.

55 See, J Needham, *The Grand Titration* London, Allen and Unwin, 1969. See also the volumes in the series J Needham, *Science and Civilization in China* Cambridge at the University Press, 1954, v 1 onwards.

56 This raises the question of how Imperial China was able to achieve such an impressive track record in innovation in the absence of intellectual property rights. This is a matter for historians of science and technology. But there is little doubt that intellectual property did not play a role. There was no legal or customary equivalent to intellectual property in Imperial China. See W P Alford, “Don’t Stop Thinking About . . . Yesterday. Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China”, (1993) 7 *Journal of Chinese Law*, 3-34.

57 See G S Becker, K M Murphy and R Tamura, “Human Capital, Fertility, and Economic Growth”, (1990) 98 *Journal of Political Economy*, S12, at S15. For a useful discussion of human capital and its relation to development theory see the articles in the special issue of the (1990) 98 *Journal of Political Economy*. See also G S Becker, *Human Capital*, New York (for National Bureau of Economic Research), 1964.

human capital formation because through the pricing mechanism such rights restrict the diffusion of information.

The problem though is that, unlike in Montesquieu's time, countries in the emerging global regulatory order cannot simply decide to stop modelling certain laws. They will incur the wrath of certain alliance networks if they do so. The answer probably lies in forming counter hegemonic networks, and in democratising supranational regulatory institutions. Much could probably be achieved by states in the intellectual property area through regional agreements, rather than adopting one global standard of property protection to handle all their externality problems. But then this is another story.