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9

Postcards from International Negotiations

Peter Drahos and Geoff Tansey

This chapter includes reflection on experiences with international negotiations about issues that arise from biodiversity, food security and intellectual property (IP). It discusses the types of leverage available to countries in negotiations as well as turning negotiating gains into real gains and more evidence-based approaches. The experiences are crystallized as observational postcards, rather than lessons.

Introduction

The negotiations that have led to the current set of treaties, conventions and international institutions dealing with IP, biodiversity and food have a long, interacting history, as discussed in Part II of this book. To individuals involved, negotiations in different fora may appear to be unconnected and episodic activities. Yet as earlier chapter authors have discussed, positions taken by some states, such as developing countries promoting a new international economic order from the 1960s to the early 80s, led to reactions by others, as in the promotion of IP rules into the trade regime. Competition between industrialized countries underlay pressure for expansion of IP rights (IPRs) into agriculture, with Europe creating plant breeders' rights and UPOV in response to developments in the US. IPRs were becoming an important element in the industrial model of agricultural production developed in those countries and being exported globally.

Competition between the major OECD trading powers also promoted strengthening of IPRs globally as some industries based in those countries saw the need for global IP rules for their business models to survive in the face of technological innovation and intensified competition. States themselves saw IPRs as a tool to help them gain a greater share of the benefits that flowed from the domination and control of new technologies. Supporting monopolies through the passage of national IP laws became, somewhat paradoxically, a key element in promoting national competitiveness in a globalizing economy. The nature and type of global IP rules we have today emerge not only from concerns about our food and environment but also from the competing interests of states to maintain their economic power and regulate business activity in their interests.

As discussed in the preface, a key concern behind the Quaker programme of work is for

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fairer processes that reflect the needs of people and environment. Much could be said about what constitutes fairness, but at the most basic level it involves states, which are committed to representing the needs of their citizens, participating in an informed way in negotiations affecting IP, food and biodiversity. International negotiations should be, as a minimum, procedurally fair, and, in the case of negotiations concerning food and biodiversity, serve the basic needs of citizens everywhere. It was this ideal that lay behind the Quaker work that first focused on supporting Sub-Saharan African countries' participation in the negotiations on the International Treaty on Plant Genetic Resources on Food and Agriculture (ITPGRFA – the Treaty) and then subsequently moved to supporting informed participation in the review of Article 27.3(b) of the TRIPS Agreement, begun in 1999, and its impact on food and biodiversity (Tansey, n.d.).

One fact, illustrated by some of the chapters in this book, is that many more actors now participate in international negotiations. Many more states, for example, participate in WTO negotiations than did in the GATT rounds of earlier decades. Robert Wolfe (2007) lists more than 30 negotiating clubs that are active in WTO negotiations of one kind or another. More developing countries participate and there are more developing country coalitions than ever before, reflecting their diversity and different interests. Gone are the days when developing countries had few and probably unwieldy coalitions (for example the G-77). Developing countries have shown that they can organize coalitions quickly and effectively, the G20 and its role in the WTO's Cancun Ministerial Meeting being one example. In Chapter 5, Bragdon, Garforth and Haapla draw attention to a number of developing country coalitions in the context of the CBD, including the formation in 2002 of the Like-Minded Group of Mega-Diverse Countries, a coalition that aims to create more enforceable obligations for users of genetic resources. More striking than the increased participation of developing countries, however, is the involvement and influence of civil society actors in international negotiations (see Chapter 8 in particular). Naturally, civil society groups do not sign treaties as legal agents, but they do influence outcomes. One example of that influence is farmers' rights (see Chapter 6) and another is the de facto moratorium on genetic use restriction technologies (GURTs) mentioned in Chapter 5. As the authors of the latter chapter note, the struggle over the future of that moratorium is a struggle between civil society and pro-GURT countries such as Australia, Canada, New Zealand and the US.

Internationally influential social movements have existed in the past (for example the anti-slavery movement, the temperance movement and the women's movement), but information technology in particular has driven down the costs of organizing internationally and there is, in effect, a global pool of capital available from developed country governments, philanthropic organizations and society in general to meet the costs of organizing. The scale of civil society networks is thus unprecedented in historical terms. One very important consequence of this network scale is that civil society has acquired a global scanning and detection capability. Put simply, lots of people and networks gather and release information about what governments and business are doing when it comes to the regulation of food, biodiversity and IP. Multinational companies have long had this kind of capability; at a collective level civil society now also has it. Business organizations and companies have, of course, always participated in negotiations around food, biodiversity and IPRs (see Graham Dutfield's observations in Chapter 2 about the role of the seed industry in UPOV). They continue to do so and to form new organizations for that purpose, the formation of the American Bioindustry Alliance by Jacques Gorlin, a key player in TRIPS, being an example (see Chapter 5).

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Box 9.1 Postcards from an insider: Things are different now – A personal view of WIPO negotiations from a developed county insider

Ron Marchant, CB

A few years ago discussions at WIPO were conducted in the context of the impact of treaty provisions on rights holders, albeit with an eye to balance and impact on third parties. Business-interest NGOs, representing rights holders in the main, made contributions at those meetings, though rights holders most effect contributions came from work at a national level prior to meetings and with their inclusion as part of national delegations in some instances. That contribution undoubtedly was beneficial to discussions.

Three things have changed the context of discussions. First, the increased importance of business built on knowledge and hence a greater role for IP. Second, and in part a consequence of the first, the growth of globalization as the context for today's businesses. And third, the nature of innovation itself, with increasing activity within information technology and biotechnology (including crops, foods and pharmaceuticals).

The impact of this has been greater activity within developing countries and a wider range of NGOs with something to contribute. The UK Commission on IPR and Development set the scene and a number of developing countries came together as the Friends of Development, with a series of demands in WIPO. Whilst the initial discussion seemed negative, this has changed over the last couple of years and there is now common agreement on a set of proposals which will give greater force to development-related work at WIPO. This is to be welcomed and hopefully will be translated into action.

What lessons do I take from this?

- Member states will have to engage with a wider range of NGOs than in the past and this will alter the consultation process;
- Discussion cannot be restricted to WIPO. There is a need for discussion at the national level in a wider political environment; and
- The IP system is not itself able to improve the position of developing countries. IP gives power in the market place and the prime need is to enable innovation, which can then be fostered by improved IP systems.

* Former CEO of the UK Intellectual Property Office (2003–2007) and Director of Patents (1992–2003).

Summing up, we can say that in the last decade or so we have moved into a period of history where there are more international fora than ever before to negotiate food, biodiversity and IPRs (TRIPS and the CBD, for example, only came into operation in the early 1990s) and there are more actors, coalitions and networks participating and exercising some kind of influence in those negotiations than ever before. What have we learnt from this short period of history? Box 9.1 is one personal synthesis of key lessons. We are tempted to say that it has become overwhelmingly complex and leave it at that; however, avoiding the temptation to duck

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the question, we consider in the next section some of the lessons that have been learnt from the increased participation of non-state actors in the negotiations over IP, biodiversity and food. Lessons is probably too strong a term since it implies some kind of systematic instruction in negotiation that we cannot offer. Instead, we make observations that suggest themselves from a reading of the earlier chapters of this book. We believe that these observations have some degree of generalizability, but we cannot be sure, for negotiation is closer to art than it is to science. If negotiation were like a game of draughts, governed by fixed and determinate rules leading to a large but finite number of possibilities, we might be able to program, as has been done for draughts, a computer to cover all the possibilities. However, negotiation, as all the chapters of the book show, keeps on introducing new rules, enabling actors to make new moves. To a large extent, our guide to future negotiations becomes observational experience of varying degrees of generalizability.

Leverage Points: Some Observations

Structural leverage

We can define structural leverage as large scale institutionalized economic or military power. One clear example of structural leverage that matters in a trade negotiation is how much a country imports (on this point and for figures see Odell, 2007). In 2004 the US's share of world merchandise imports was 21.95 per cent and the EU's was 18.4 per cent. The only developing country to come close to these two was China, with an 8.07 per cent share. India and Brazil had 1.37 per cent and 0.95 per cent respectively. Smaller countries may be willing to give up a lot in order to gain access to these markets, especially if US or EU trade preferences give them an advantage over a competitor nation in an export market. Structural leverage may also have military sources that lead small states to calculate the costs and benefits of free trade agreements (FTAs) in geo-political terms rather than simply trade terms. Even if, as is usually the case, the economics of an FTA do not favour the weaker state (Freund, 2003), the leaders from that weaker state may see political benefit in having a bilateral relationship with the world's strongest state. Political leaders from a weak state may well be ready to give up hard-won negotiating gains in other fora as part of the price of securing a 'special' relationship with the US. The gain to a weak state may have little to do with trade and much more to do with its perceptions of security and how to manage the military power of the US, a point that has special salience for the Arab world (El-Said and El-Said, 2005). Robert Keohane's insight about the 'Al Capone alliance' between small and great powers is also relevant here. In this type of alliance:

> *remaining a faithful ally protects one not against the mythical outside threat but rather against the great power ally itself, just as, by paying 'protection money' to Capone's gang in Chicago, businessmen protected themselves not against other gangs but against Capone's own thugs.* (Keohane, 1969, p302)

Much more work needs to be done to understand the bigger web of relations and obligations that surround FTA negotiations, a web that often has strong strands of security and aid (including military) running through it, strands that produce dependencies. Perhaps then we will have a better understanding of why FTAs have proven to be a successful forum-shifting strategy for the US and EU (see

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Chapter 7). In any case, it is worth noting some of the examples of negotiating positions mentioned in the preceding chapters that perhaps are the product of this larger more complex web of relations:

- Australia is a mega-diverse country, but is not a member of the Mega-Diverse Coalition.
- From the discussion in Chapter 5 of the negotiations concerning the Cartagena Protocol on Biosafety, Australia and New Zealand appear to have sided with the US in pressing for a weaker protocol even though both have domestic systems for the regulation of GMOs that would point to them favouring a stronger one.
- More generally, we have seen that a number of countries that are members of the Mega-Diverse Coalition (see Chapter 5) also have FTAs or are part of regional agreements with the US and EU (for example Peru, Colombia, Ecuador and Mexico; see Table 7.1 for other examples). One can ask to what extent these agreements assist the goals of the Mega-Diverse Coalition (see Box 9.2). Some civil society activists may be tempted to borrow the words of that great tennis philosopher, John McEnroe: 'You can't be serious'.

Floating points of leverage

Chapter 5 identified Ethiopia as a key player in the negotiations over the Cartagena Protocol on Biosafety. Ethiopia imports a minute percentage (less than 0.04 percent in 2005 according to WTO figures) of the world's goods. For practical purposes it has zero structural power. This suggests that the art of negotiation is itself a rather important residual that helps to explain why an Ethiopia can be a significant player in a major international negotiation and why we end up with rules that do not match what we might predict on the basis of structural leverage alone. While the CBD is not a trade negotiating forum, the Biosafety Protocol certainly had implications for agricultural exporters, leading to the formation of the Miami Group of countries (members included Australia, Canada and the US), a group that pushed for a weak protocol (see Chapter 5). The fact that Ethiopia became a player in these negotiations suggests that it, along with others, was able to find floating points of leverage by perhaps drawing on its level of technical capacity or its capacity to forge relations and build networks. Floating points of leverage are very context-dependent and essentially fleeting. Ethiopia is, for example, also applying for WTO membership and it will be telling how far it can ensure it is not pressured during the accession process to sign up to TRIPS or TRIPS-plus measures since, as a least-developed country, it is not required to do so until 2013 (2016 for pharmaceuticals) and even then would have the right to seek a further extension. As is pointed out in Chapter 7, the WTO accession process to date has not given acceding countries, even least-developed countries, the freedom to use the option and flexibilities within the TRIPS regime. For the time being the WTO's accession process appears to be a site where structural leverage dominates. Whether the greater attention now being given to the accession terms and the recommendations from UNCTAD for least-developed acceding countries 'not to be required to provide accelerated or TRIPS-plus protection' can lead to new floating leverage remains to be seen (Abbott and Correa, 2007; UNCTAD, 2007, px).

Finding floating points of leverage, or perhaps creating them, is what good negotiators do. Explaining how floating points of leverage are obtained is difficult, much more difficult than explaining the outcomes that arise from structural leverage, but in the next few sections we offer some suggestions.

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Box 9.2 IP, genetic resource negotiations and free trade agreements

Despite the progress made by developing countries in articulating their demands for an internationally binding disclosure obligation, bilateral negotiations conducted with the US for FTAs may defeat the very objectives they pursue. Such FTAs include provisions limiting the grounds on which a patent can be revoked, thereby possibly excluding revocation based on breach of such obligation. In addition, for example, the FTA between the US and Peru includes an 'understanding regarding biodiversity and traditional knowledge' according to which:

> *The Parties recognize the importance of traditional knowledge and biodiversity, as well as the potential contribution of traditional knowledge and biodiversity to cultural, economic and social development.*
>
> *The Parties recognize the importance of the following: (1) obtaining informed consent from the appropriate authority prior to accessing genetic resources under the control of such an authority; (2) equitably sharing the benefits arising from the use of traditional knowledge and genetic resources; and (3) promoting quality patent examination to ensure the conditions of patentability are satisfied.*
>
> *The Parties recognize that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers.*
>
> *Each Party shall endeavor to seek ways to share information that may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources by providing:*
>
> *a) publicly accessible databases that contain relevant information; and*
>
> *b) an opportunity to cite, in writing, to the appropriate examining authority prior art that may have a bearing on patentability'.*[a]

Although the legal value of this 'understanding' is unclear, it seems to undermine the Peruvian strong stand in favour of a binding international instrument or provision to deal with misappropriation and benefit sharing, as it suggests that these problems can be 'adequately addressed' by contractual agreements. This, however, is not in reality the case, particularly when resources or traditional knowledge have been fraudulently acquired.

a The full text of the FTA is at www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; see also GRAIN (2006c).

Choose multilateral arenas rather than bilateral ones

The fact that multilateral fora are better for weaker actors has been said often enough. Here we can only add that one reason for this is that multilateral fora seem to provide more opportunities for floating points of leverage. A skilled negotiator backed by a prepared group (as the Cairns Group was in the Uruguay Round) can take advantage of, say, a temporary split between the US and EU. Chapters 5 and 6 of this book corroborate this basic point about multilateralism. It is hard to see how the

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concept of farmers' rights, a concept that recognizes the rights of some of the poorest people in the world, could have emerged in anything other than the multilateral arena of the International Undertaking and the Treaty. We do not wish to idealize multilateral fora such as the FAO or the WTO, however, as they are far from perfect. Country members of the WTO are not equal in terms of their capacity to block consensus: blocking a consensus is comparatively easy for power centre countries like the US and EU (and increasingly China and India); it is not easy for Fiji or Papua New Guinea. Nevertheless, it remains true that the multilateral processes described in this book generate more floating points of leverage than bilateral processes and are more transparent to civil society, so it follows that they come closer to the ideal of procedural fairness that we mentioned at the beginning of this chapter.

Stick with winning contests of principles; reframe losing ones

The Sophists understood that what matters in political life is how people perceive the world. Investing in improving one's rhetorical skills mattered because through persuasive speaking one could change perceptions and therefore political outcomes. This insight is important for global negotiations because such negotiations often come down to a contest of principles. TRIPS, for example, was framed as contest between the right to have property protected and piracy. The simple but effective logic behind this contest of principles was that those against protecting the IPRs of innovators were for piracy; it takes some eye-glazing information economics to explain the problems with this argument, and most journalists have lost interest after the first 30 seconds of explanation. The negotiations that eventually led to the Doha Declaration on the TRIPS Agreement and Public Health in 2001 (the Doha Declaration) saw civil society public health networks reframe the contest of principles in the case of patents and medicines (Box 9.3). One could be for increasing the profits of already wealthy pharmaceutical monopolists or for helping to treat millions of dying and desperately poor people, but not both. The coalition that supported the Doha Declaration lacked structural leverage, at least of the kind that the US and the EU possess; reframing the contest of principles helped to create a floating point of leverage. We are not suggesting that reframing a contest of principles is sufficient to win a negotiation, but it matters. In most fora, from the WIPO Inter-Governmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC) (Chapter 4) to the CBD on access and benefit-sharing (ABS) (Chapter 5), developed countries and business interest argue that one size does not fit all. When it comes to IP they tend to argue that a minimum size fits all, with preferably an ever bigger minimum. This is another example of sophistry.

Contests of principles and reframing have been important in the negotiations surrounding food, biodiversity and IP. We saw, for example, in Chapter 5 that developing countries supported the principle of the common heritage of mankind for plant genetic resources in the context of the International Undertaking. Concerns about the effect of IPRs led to changes in the choice of principles – the adoption of the principle of sovereignty in the context of the CBD and the use of the principle of biopiracy to gain more leverage in the negotiations concerning IPRs in the CBD, the FAO and TRIPS. There is a danger that one can be blinded by one's own rhetoric, a point we will come back to in the next section, but there is little doubt that the principle of biopiracy has been an effective framing tool. It has helped to unite developing country coalitions such as the Mega-Diverse Coalition and been important in opening the door to serious dialogue about the need for a disclosure obligation in patent law. It

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Box 9.3 Access to medicines and WTO rules: A brief chronology

2001

In 2001, 39 pharmaceutical companies sued the South African Government, alleging that a South African law was illegal and contrary to the patent rules in TRIPS. The law allowed for the import of cheaper drugs from other countries, primarily to address the HIV/AIDS crisis. Even though South Africa was abiding by the TRIPS rules, the companies only dropped the suit and withdrew following widespread condemnation nationally and internationally in the media and by public health advocates.

Also in 2001, worldwide public concern and activism led to political pressure and much activity among negotiators in Geneva, prior to the WTO Ministerial Conference in Doha that year, to ensure TRIPS did not impede access to medicines. Developing countries worked on a declaration for the Ministerial Conference to make clear that patent rules should not undermine their health needs.

In November 2001, members of the WTO adopted the Doha Declaration on TRIPS and Public Health, which recognizes that TRIPS 'does not and should not prevent [WTO] Members from taking measures to protect public health'. The Declaration clarifies that governments have the right to override patents using a 'compulsory licence' to produce lower cost drugs and to determine the grounds upon which this can be done. The poorest, least-developed countries were also allowed to ignore TRIPS rules on pharmaceutical products until 2016.

2002–2003

The Declaration left one item outstanding (the paragraph 6 issue) – the problem of what countries with insufficient or no manufacturing capacity for medicines can do. Even if they issue a compulsory licence to produce generic drugs, they have no industry to produce them. They thus need to find a country where drugs could be made without interference from the patent holder and then exported to them. But under TRIPS rules this could be challenged. WTO Members were given until the end of 2002 to find a solution.

Instead of helping rapidly craft a workable solution, negotiations were long and difficult and developed countries loaded the draft agreement with administrative conditions. Even then, the US only joined the consensus waiver decision at the end of August 2003, eight months past the deadline and just before the next WTO ministerial meeting in Cancun in September 2003, following the formulation of some rather modest statements to appease the pharmaceutical lobby. The extent to which the WTO decision, and the subsequent amendment adopted in December 2005, will prove helpful in addressing public health needs remains to be tested in practice. In July 2007, Rwanda made the first notification to the WTO of intent to import antiretroviral products under a compulsory licence to be issued in Canada for export by Apotex, a major Canadian generic pharmaceutical producer.

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has also forced various actors to re-evaluate their own conduct and examine their normative commitments (see, for example, Box 6.5 describing the conduct of the CGIAR Centres on the issue of IPRs and Box 5.7 describing the introduction of a disclosure obligation in Norway's patent law and Australia's system of virtual certificates of origin). Australia, we might note in passing, has been an opponent of the disclosure obligation and has tended to side with the US on issues related to the regulation of genetic resources in the context of the FAO and the CBD. Overall the principle of biopiracy has been important in pushing public and private actors towards a greater public accountability when it comes to their use of genetic resources.

Network networks to increase points of leverage

Once a point of leverage is created it can be increased and built upon. Perhaps the best example of this comes not from the chapters of this book but from the negotiations surrounding the Doha Declaration. We suggested above that because different principles are linked to different conceptions of the world, reframing a contest of principles in a negotiation can be a good idea. One reason why reframing may work is that it brings other kinds of actors into play in a negotiation. By choosing simple principles (for example patent monopolies versus access to medicines), a wider range of networks can potentially be enrolled in support of a negotiating position because the simplified contest is more readily understood by the wider range of networks. The Africa Group could never have achieved the Doha Declaration alone because they were and remain a weak group. But an Africa Group that joined with a large coalition of developing countries that included Brazil and India, that drew on the power of Northern NGOs to work the Northern mass media, that gained the quiet support of some European states, that drew on independent technical expertise to evaluate draft text, and that gained resources from Geneva-based NGOs was a group strengthened by many networks (Odell and Sell, 2006). In his comments upon this chapter, Fred Abbott, Edward Ball Eminent Scholar Professor of International Law at Florida State University's College of Law, suggested that in the case of the negotiations over the paragraph 6 issue (Box 9.3) it was difficult for NGOs to rally public support around narrow technical issues (such as NGO preference for the Article 30 over the Article 31 solution to the paragraph 6 issue). (The insider nature of this example illustrates the problem we are talking about, since it requires a great deal of detailed knowledge to understand what it is about.) It was, Professor Abbott suggested, important for non-technical matters to be identified as the basis for debate. The right choice of principles can therefore bring in other networks to increase a point of leverage and perhaps create others. For weaker states the key is to network and then network some more, nationally, regionally and finally globally. We saw this maxim of networking networks in operation in Chapter 6, where, in the negotiations over the Treaty, regional networking served the US and EU well. Once Africa was able to arrange a regional meeting it became much more effective in the negotiations over the Standard Material Transfer Agreement (SMTA).

At the same time, however, there has to be more than just the rhetoric of principles. Those on the inside of the negotiation have to have access to experts who can craft the technical solutions that embody one's chosen principles. Shakespeare's suggestion in Henry VI, 'let's kill all the lawyers', is probably a widely shared sentiment, but in a negotiation one should not do away with them till they have crafted the text that embodies the victory that one seeks and have torn apart the other side's text.

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Box 9.4 Postcards from the periphery: TRIPS in Geneva

Geoff Tansey

After almost 10 years working through a number of projects with IP negotiators in Geneva, mostly in the WTO, four observations in particular seem relevant here:

1 The processes by which rule-making operates are flawed and unfair. Major trading partners often demand concessions from developing country markets while offering strikingly unequal access to their markets and technologies. The sense of injustice this leaves, along with subsequent experience in trying to address developing country concerns, for example over health, biodiversity and food, undermines trust in the ability of multilateral institutions to take the interests of developing countries and their peoples sufficiently into account.
2 There is often little connection between those negotiating rules in different institutions and often little knowledge of those in other places, despite their connections and potential conflicts in implementation. Initiatives to permit dialogue between these groups are necessary if more balanced outcomes are to arise. Informal dialogues are an important way of increasing mutual understanding and helping overcome unfounded or mistaken assumptions.
3 For developing country negotiators having to deal with the unfamiliar territory of IP, small, focused interventions to provide information, access to technical and legal expertise, and access to those with differing positions can help them in both better understanding the issues and developing more appropriate negotiating positions. Even very small NGOs, working in the right place with the right people, can have a disproportionate impact. When they cooperate together, as those in Geneva have done, they can maximize their effectiveness and use of scarce resources.
4 Despite talk of states and their interests, individuals matter. Those who do the negotiating and their personal relationships can have a profound effect on outcomes, especially where few people in a capital or country are familiar with the issues. The development of confidence between those dealing with Article 27.3(b) of the TRIPS review laid the groundwork of trust for a very rapid response to the need to address the access to medicines issue. The short period negotiators spend in places like Geneva, usually 3–4 years, also means there is a need for constantly informing, educating and exchanging between them and those people developing materials to assist these negotiators.

Be patient and persistent

This is obvious, but its obviousness does not change its truth and we should probably remind ourselves of it from time to time. Halewood and Nnadozie in Chapter 6 remind us of it when they note the precipitous decline of civil society participants in the six and half years of negotiations that it took to produce the Treaty, despite the fact that many delegations supported greater involvement by civil society. Perhaps the explanation is the one suggested by Braithwaite and Drahos (2000, p619): 'Most NGO activists are colourful and charming

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people with limited tolerance for spending long hours, days and years in Geneva sitting around large tables surrounded by punctilious bureaucrats in grey suits'. Real power, as those who have spent decades in universities know, comes from having sat on the same committee for years and years. Over the years of a negotiation, individual negotiators who become 'fixtures', particularly those who follow an issue across fora (for example the CBD and FAO), acquire an intimate historical knowledge of the issues, countries' positions and, like good swimmers, a knowledge of the currents and what is possible in them. This time and experience often gives them a status of trust that allows them to forge coalitions and coordinate with other coalitions and ultimately to help broker the deals that shape the final treaty. Large country powers do not have a monopoly on these kinds of individuals. For smaller powers and non-state players the key perhaps is, when they have identified such an individual, to let that person stay the course of the negotiation.

The variables we probably need to know more about are career structures for civil society activists and funding mechanisms. For many larger NGOs active in different sectors and working on policy, campaigning and field programmes, it is difficult to maintain an activity over a long period on a specific issue, especially if their supporters keep pressing for new areas of activity or if fundraising requirements or maintaining supporter motivation mean moving on regularly. For smaller NGOs dependent on donors, the short-term nature of much of that funding can make it difficult to maintain an activity over the long term. Moreover, as with negotiators, skills are short and knowledgeable staff move on, often leaving no-one with the expertise necessary to fill their shoes. A similar problem also arises in donor agencies themselves.

In any case, staying the course in a negotiation is a prerequisite to seizing points of leverage, which do not come along all that often for weaker players. Probably staying the course also involves coalitions of weaker players institutionalizing networks of expertise that can be called upon over the years of a negotiation, as has happened in Geneva (Box 9.4). None of the negotiations that gave rise to the multilateral treaties discussed in this book were short affairs. For example, work on the Biosafety Protocol started in 1995, with a text only being produced in 2000 (see Chapter 5), and the text of the Treaty involved 'six and a half arduous years' of negotiation (see Chapter 6).

Negotiating Gains, Real Gains and Evidence-Based Approaches

Negotiating wins or gains may or may not turn into real gains. In trade negotiation, an example of a negotiating gain that is turned into a real gain is where a state wins a tariff concession and the state granting the concession does nothing to frustrate the granting thereof with the result that the first state gains a share of an export market that it did not have before. (In economic terms the state granting the concession also wins, but this is not how it is seen in the world of trade negotiators (Finger, 2005).) Where mutual gains providing for self-enforcement do not exist, or where there is no strong enforcement mechanism, there is a real danger that a negotiating win, especially one by a weaker actor, will not be realized. Under these conditions it is essential that the negotiating win is accompanied by some strategy of post-negotiation implementation (Drahos, 2007a). Below we offer some examples drawn from earlier chapters of where negotiating gains that can be said to exist in a weakened form need support through implementation.

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Compromises, ambiguity – Who really wins?

International negotiations are full of examples of where coalitions end up settling on ambiguous language that allows both sides to claim some measure of negotiating gain. As Michael Halewood in Box 6.4 points out, Article 6.2 of the SMTA was deliberately left 'cloudy'. Recipients of materials from the MLS will not be able to claim IPRs on those materials in the form they received them. To begin with not everybody will see this as ambiguous. Patent attorneys specialize in drafting patent specifications that overcome restrictions and prohibitions on patentability, and drafting claims that do not claim the material in the same form will not, one suspects, be seen by them as some sort of mission impossible. Yet if the matter goes to arbitration, a lot will depend on the chosen interpretive approach. The Percy Schmeiser saga recounted in Chapter 5 is a reminder that the technicality of patent jurisprudence does not necessarily serve broader environmental goals. Before developing countries seek the refuge of compromise or ambiguity they should ask whether in reality they are simply opening the door to defeat. The question they should be asking is which party in the end game will be in the best position to resolve the ambiguity in its favour.

Doing away with the lawyers – Develop scientific, evidence-based approaches

If climate change has taught us anything, it is that no amount of political manipulation and investment in technologies of spin will change how physical systems behave. At some point the weight of evidence drives all the parties towards taking a more evidence-based approach. Shakespeare's 'killing all the lawyers' in this context means, for example, not adopting legal distinctions that are scientifically meaningless. We saw in Chapter 5 that a distinction between living modified organisms intended for release in the environment and those that are not is a 'legal fiction'. The example of genetically modified corn being found in a remote region of Mexico despite not being intended for release that we encountered in that chapter shows how meaningless legal distinctions can compromise scientific risk assessment. Similarly, lawyers who tend to resort to property-based forms of regulation may not understand the limitations of such models for agricultural biodiversity and innovation because they do not understand how systems of innovation in agriculture – where, in essence, breeding works best when many people exchange many materials – actually work. (See Chapter 8 for a discussion of the problems in allowing IPRs to dominate this many-to-many model of agricultural innovation.) There is too much at stake in agricultural biodiversity and biodiversity generally to allow global regulatory standards to rest on legal fictions. Generally, one suspects that all actors will have to move to higher levels of evidence-based negotiation when it comes to food, biodiversity and IPRs. There is no point, for example, in mega-diverse countries creating access regimes of such stringency that they defeat the capacity of their own scientists to understand what is happening to biodiversity (see Chapter 7 on this point). There is a danger, as noted earlier, of being blinded by one's own negotiating rhetoric.

Capturing real gains

We suggested at the beginning of this part of the chapter that negotiating gains have to be turned into real gains. Winning a negotiating gain, however, may bring its own complex implementation costs, especially if it requires a country to do something positive in the form of the creation of a system to capture those gains (doing something negative such as reducing

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tariffs is usually easier to implement). One clear example of the difficulty of meeting the implementation costs of gains that comes from the chapters of this book is the right, which Members of the WTO have under Article 27.3(b), of creating an effective *sui generis* system of protection of plant varieties. Few countries have been able to design their own system owing to the difficulties involved (as discussed in Chapters 2 and 3). The one example mentioned in this book is the Indian Plant Variety Protection and Farmers' Rights Act passed in 2001 (Chapter 2, Box 2.1). India is one of the world's largest economies, and its capacities of implementation are not representative of developing countries in general. It is true that various bilateral and regional agreements with both the US and EU have seen developing countries accept UPOV as the required standard (as discussed in Chapter 7). One reason is because, without considerable capacity or assistance, as Graham Dutfield noted in Chapter 2, '[i]t is actually very difficult for developing countries to design and implement their own systems of PVP if, as is likely, these would diverge at all from the latest version of the UPOV'.

That said, if a country enters into an FTA negotiation with the US or EU with a *sui generis* system in place, it probably has a better bargaining position than a country which has no system in place. The onus then falls on the US or EU to say that the relevant national system for the protection of plant varieties is not effective. The more general lesson here is that if an international negotiation permits the creation of alternative standards, countries had better act sooner rather than later to generate those alternatives. Otherwise, they will have little choice but to accept the international standard. Obviously this sets a massive challenge for many developing countries as they have to find the resources to implement a regulatory system that will satisfy the critical scrutiny of the US and EU.

Countries should also be sensitive to the strategies that other countries use to capture real gains. Once a negotiation over IP between a developed and developing country is finished, offers of technical assistance often follow. For those countries wanting to make the most of the IP rules in their interests, technical assistance can be dangerous or useful (Chapter 4, Box 4.3). Technical assistance by IP exporters may help create a Trojan horse IP approach and a community in developing countries that sees things through the dominant US–EU–Japanese approach. Assistance based on development values can help those affected in agriculture and environment understand the implications and impact of minimum standard IP rules, use whatever flexibilities there are to safeguard their interests, and better analyse and develop proposals for alternative approaches (Tansey, 2005). The central issue here is from whose perspective and with what objective the assistance is given and whose capacity to do what it supports. Imagine, for example, you are in a messy divorce in which you need a lawyer. You would not really want to have your spouse's lawyers also representing you – there would be a clear conflict of interest and you would not expect them to see things from your point of view. Too much IP technical assistance is like that – given by those whose entire mind-set is based on the dominant US or EU approach to IP, whether in implementation or enforcement, not on what might be most helpful for developing and least-developed countries.

Steering global systems

There is another point about the UPOV story that is worth drawing out a little more. UPOV is not just a set of treaty standards. It is also a system of decision making by technical committees (Figure 9.1), which over time make many decisions on things like the interpretation of standards or the kinds of scientific tests and guidelines to apply when examining for

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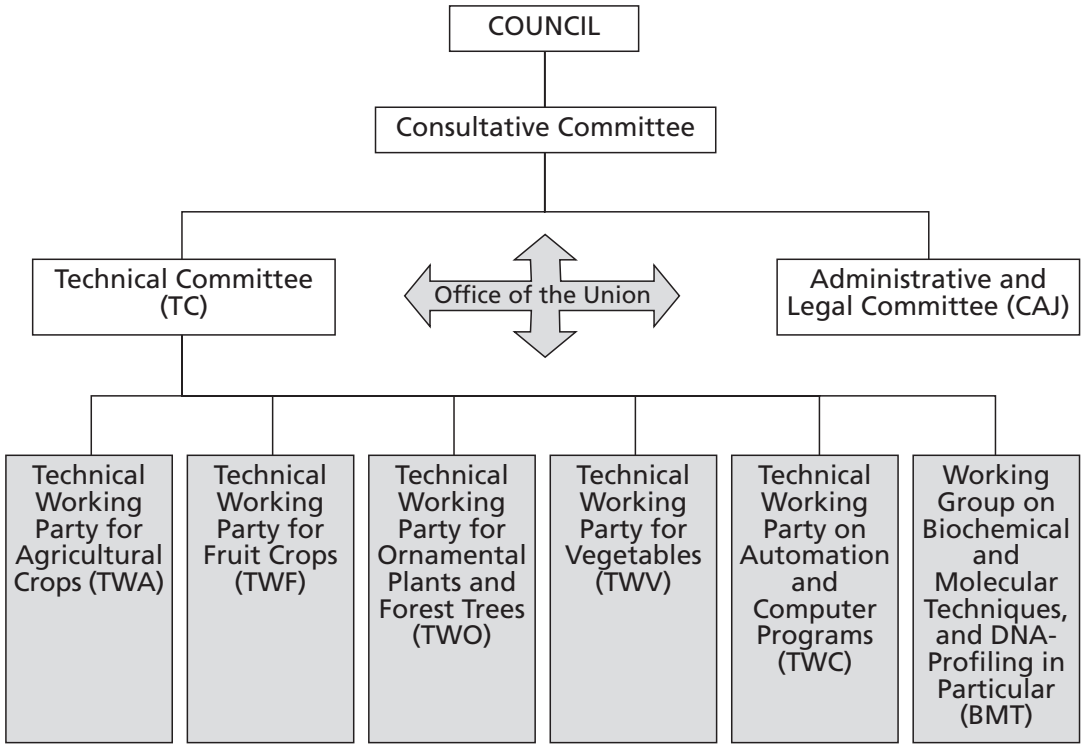

Source: 'UPOV bodies' link on www.upov.int/en/about/mission.html.

Figure 9.1 *UPOV's committee structure*

distinctness, uniformity and stability (see, for example, UPOV, 2002). It is the many individual decisions of these committees that become collectively important to a shaping of the UPOV regime. These technical committees represent yet another level of negotiation that is relevant to the global rules affecting food and agriculture. They will, no doubt, be important to the issue of harmonization identified in Chapter 2 as the big emerging issue for UPOV. If, as seems likely, more and more developing countries end up joining UPOV, they will have to find ways to participate in and influence the incremental processes of decision making that take place on these committees, because these processes shape the evolution of the regime. Encouragingly, Chapter 4's discussion of the Group of Friends of Development's success in pushing the WIPO Development Agenda shows that developing countries can take a holistic view of an international organization and develop an agenda for reform that recognizes the different vertical levels at which negotiations take place in the global system. Chapter 4 also suggested that increasingly, developing countries will focus on systemic issues when it comes to IP and biodiversity rather than being steered into the negotiating ghetto of a single committee in a single organization (for example WIPO's IGC). Perhaps UPOV will find in the long run that the FTA processes that bring it more members will cause more negotiating diversity to flourish within its walls.

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Conclusion

One optimistic conclusion that we can draw is that states in the last decade and a half have been successful in creating two important multilateral fora for the negotiation of food and biodiversity issues – the CBD (along with Biosafety Protocol) and the Commission on Genetic Resources for Food and Agriculture, where the Treaty was negotiated and which is now looking at other areas, beginning with animal genetic resources (Chapter 6). Developing countries have shown that they can organize coalitions that are responsive to their needs in ways that move beyond the coalitions they used to have in the bipolar world of the Cold War – the Like-Minded Group of Mega-Diverse Countries on the use of genetic resources, the Like-Minded Group of developing countries that emerged in the context of the Biosafety Protocol, and the African Group and the Friends of Development Group in the context of WIPO are all examples of this more differentiated approach by developing countries to negotiation. Chapter 7 in particular showed that WIPO, UPOV, the FAO, the WTO and the CBD are slowly but surely being edged into work programmes that treat food, biodiversity and IPRs as integrated issues of regulatory design. The IP system, in particular at the multilateral level, is more open than at any other time in its history. Surely much of the credit for this change can be claimed by developing country coalitions supported by a range of civil society actors.

Less optimistically, the structural leverage of the EU and US remains a problem for developing country coalitions. Hold-out groups in a multilateral negotiation that contains the US or EU can achieve much (for example the Miami Group with the Biosafety Protocol (Chapter 5) or the negotiations in the FAO over the International Undertaking (Chapter 6)). FTAs continue to undermine the goals of developing country coalitions in multilateral negotiations. There is no simple solution to this. Self-interest will do what self-interest will do. But at the same time, civil society groups, farmers and scientists are starting to build their own local systems. The emphasis here is on systems, for that is what is needed to counteract the global administrative systems of an organization like UPOV. Models of administration cannot be replaced by speeches and declarations, but only by counter-models. The example of BiOS, the open source system for biotechnology developed by CAMBIA in Australia, the work of Dr Melaku in Ethiopia with local farmer associations and the work of SEARICE in Southeast Asia are all examples of local systems building (see Chapter 8). It is not necessary for every local system to go global, but it is important that it is part of a linked system. Perhaps the maxim we should practise for food and biodiversity systems is to build locally and link globally.