Part I
Revisiting the Policy Rationale of TRIPS

The Origins and Structure of the TRIPS Agreement

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Abstract The essays in this volume focus upon the Trade-Related Intellectual Property Agreement, which is an important element in the constitution and practice of the World Trade Organisation (WTO). Known to all as the TRIPS Agreement, it reached its twentieth anniversary in operative effect on January 1, 2015. It is unlikely that the text of the TRIPS Agreement will be substantially amended by the Member states of the WTO for at least another decade or two. Our contributors therefore take its current terms as a continuing authority in international law for its immediate future. They do so, however, questioning how far the Agreement was adequate for its own time and how far it remains so in a world that has been changing so extraordinarily during the intervening 20 years and doubtless will continue to do so for the twenty to follow.

1 Introduction

The remit of this chapter is to consider the histories of free trade agreements and intellectual property rights up to the introduction of the revised GATT in 1995, while leaving it to other contributors to comment upon events that have provoked front-line debates in the 20 years that have followed.[1] Some of these contributions discuss particular events, for example decisions by Dispute Settlement bodies and the amendments made in the Doha Round.[2] Others seek to explore possibilities for

[1] For legal commentaries on the interpretation of TRIPS, see A. Taubman, H. Wager & J. Watal (2012), A Handbook on the WTO TRIPS Agreement; J. Malbon, C. Lawson & M. Davison (2014), The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary; C. Correa (2010), Research Handbook on Intellectual Property Law and the WTO; C. Correa (2007), Trade Related Aspects of Intellectual Property Rights; D. Gervais (2012), The TRIPS Agreement: Drafting History and Analysis; T. Stoll, J. Busche & K. Arend (2009), Trade-Related Aspects of Intellectual Property Rights. For some imaginative conceptualisation, see esp. G.B. Dinwoodie & R.C. Dreyfuss (2012), A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime; which should be read with their essay supporting a central role for WIPO in international development of intellectual property policy.

[2] See Lewinski (this volume).

the future legal interpretation of TRIPS, continuing the extensive literature on "flexibilities" that arise from the drafting of TRIPS.[3] The recurrent question is the extent to which TRIPS and associated international law principles leave responsibilities and freedoms to be set by domestic or regional legislation, administration, judicial precedent and learned commentary. Some chapters consider the explicit and implicit flexibilities within the international framework in so far as TRIPS sits alongside the revised General Agreement on Tariffs and Trade (GATT) and other bilateral and multilateral agreements containing specific terms relating to intellectual property, such as the North American Free Trade Agreement of 1994 between the United States, Canada and Mexico, which have grown so significantly in number.[4] Other chapters consider external sources of law and practice, and the extent to which they deserve recognition in settling how far TRIPS provisions are cast in concrete and how far in more malleable terms, for example, fundamental human rights, the preservation of biodiversity, environmental control and competition law.[5]

These and other arguments surrounding TRIPS reflect the fact (now largely lost in history) that intellectual property protection is not a natural coordinate within a multilateral agreement on international trade. This is one of the central reasons why TRIPS has proven such a significant, controversial and awkward legal instrument in its 20-year life. It is one of the issues we seek to draw out in this chapter.

Intellectual property rights (IPRs) are constructed for specific, limited objectives to encourage those who trade in a nation state to exploit ideas and indications of source without a competitor making unauthorised use of the protected subject-matter, be it a technical invention or trade secret, a literary or artistic work, a trade mark for goods or services or some other category capable of similar legal protection. Holders of IPRs acquire the power to exclude others in a manner which has come to be characterised as private property, an assignation which implies a good many things.[6] It is the right holder who determines how his right will be utilised—in order to protect his own trade from infringers or through assigning or licensing the right by itself or on contractual terms that often enough set out a complex balance of interests between the parties involved. To achieve their objective, the rights must normally provide their holder with a stable commitment: they are not open during their term to cancellation or limitation by the state that grants them, save in exceptional circumstances. As with other rights of property (in land, commodities or assets) the holders may enforce IPRs against infringers who refuse to negotiate permission to act within the scope of the right. This is a realm of hard national law. Accordingly the owners' first recourse in most legal systems is to proceed by civil action brought privately by them. In consequence the legal attributes of intellectual property tend towards conformity over substantial periods of time. The main risks

[3] For a selection of this extensive literature, see below at fn. 37.

[4] See Drexl (this volume).

[5] See Beiter et al. (this volume).

[6] As acknowledged in the Preamble to TRIPS, Recital 3.

that owners face arise from the conditions of the markets to which their IP is relevant. An IPR may confer an exclusive legal right; but its economic value will partly be set by the prospects of continuing demand for products or services that fall either inside or outside the scope of the particular right.

In contrast, free trade agreements (FTAs) are typically consensual commitments between states, on a bilateral, plurilateral or multilateral basis, over the limits that those states must place on restrictions to trade in products or services between their own and other territories. Their conception was thus of the soft law kind which typified international obligations between states before the twentieth century. The content of FTAs emerges through a participant state first considering the treatment that its exporting industries desire by securing the removal or the lowering of customs barriers and other inhibitions imposed by the country to which they are to be sent; and also the needs of its domestic industries for protection against the inflow of competitive products and services from other participant state or states. Out of this preliminary process of consultation are generated policies in the collaborating states relating to trade between them which will reflect the degree of importance that countries attach to their particular industries. Public servants, under the direction of their politicians, will set about striking deals that are acceptable for the time being, but on the basis that each country may in future seek to alter the terms of its earlier agreement. However, as we shall see, TRIPS has put somewhat more by way of legal backbone into the "hard" regulatory obligations that FTAs impose in respect of IPRs.

In order to put these developments into their historical context as well as outlining the legal framework that is their outcome, it is best to deal with the emergence and growth of free trade agreements and intellectual property separately. This we do in Sects. 3 and 4 respectively, even though it calls for some doubling back in historical description. This enables us to treat the first perceptions of some significant amalgamation between the two and then describe the melting pot of major re-negotiation of the original GATT, which started with the Uruguay Round in 1986 (Sect. 5). With the origins of TRIPS summarised, we then move on to the actual content of the TRIPS Agreement (Sects. 6–9).

2 Political Economy and Free Trade

From the late Middle Ages onwards monarchs and their advisers had begun to seek the advantages of international trade, building upon an instinct to hoard—to accumulate their reserves of precious metals, currency, cultivated farmland, technical secrets, staple materials, profits of trade from colonies and so on—which would eventually be labelled 'Mercantilism'. These policies would be challenged in the later eighteenth century by the French Physiocrats and by Adam Smith and his

great follower, David Ricardo, who did much to make the advantages of free or liberalised trade between states a basic tenet of "classical" political economy.[7]

Inter-state trade instruments were largely the outcome of diplomatic negotiation, the studied politeness of which sometimes erupted in ash clouds of political antagonism. Protection of agricultural prices, for instance, would appeal to domestic landowners, but industrialists at home would claim that in consequence they must pay their labour force more than if imports of food ingredients were free of duties. As industrialising economies came to depend increasingly on their colonial and foreign trade, their politics tended to divide over conservative preferences for national protection at home and liberal preferences for free trade abroad. Once a state established a trade ministry, appointed a trade representative or set up offices to oversee trans-national trade in particular fields, that state was likely to be involved in bilateral discussions or, less frequently, in moves to establish plurilateral trade agreements as a means of balancing these preferences.[8]

Trade negotiations were inevitably pragmatic. Each country's public servants, having consulted its industries, would set about securing advantages for its own exporters by ensuring that they would have only to meet comparatively low tariffs, or even none at all, in countries to which they sought to export. Reciprocally, the exporting country would itself undertake not to impose tariffs above an agreed level for products being put onto its own markets from the other state or states. A government, whatever its political colour, had also to consider the needs of its own domestic economy. How satisfactorily could these be met by its own producers? Where would those producers find their raw materials and their own labour force—skilled, semi-skilled, or unskilled—needed to turn out finished commodities? How much more than the costs of bare subsistence would these workers have to earn in order to keep up a sufficient supply of products to a particular market?

Famously, in 1860, Richard Cobden, a leading voice of the Manchester School of political economy, persuaded the Emperor Napoleon III and his chief adviser, Chevalier, to reduce duties imposed on imports of British coal and coke to France in return for the removal of British duties on French wine. He argued that the two trades would then expand more rapidly than if high tariffs were maintained. Within a few years the trade in each direction grew as Cobden had predicted, though the Emperor remarked ruefully on its hardships for the French coal industry and its workers.[9] The trend of thought would be sustained by the successful negotiation of further free trade

[7] For guidance through the evolving theories of free trade advantages, absolute (Smith) or comparative (Ricardo), see M.J. Trebilcock, R. Howse & A. Eliason (2013), Regulation of International Trade, Ch. 1.

[8] For recent use of the evidence over time of adopting free trade underpinnings in support of industrialising economies, see H. Chang (2002), Kicking Away the Ladder: Development Strategy in Historical Perspective.

[9] A.L. Dunham (1930), The Anglo-French Treaty of Commerce of 1860 and the Progress of the Industrial Revolution in France after Napoleon.

agreements, most of them bilateral or to some degree plurilateral.[10] There would be decades to come in which economic depression would persist even in states advancing towards complex urban conditions. Notably this was so towards the end of the nineteenth century and then in the short-enough peace between the World Wars, when governments turned back to supporting their own industries by protecting them with duties against competing products being imported from abroad.

3 Technical Innovation and Economic Growth

3.1 Incentives to Innovate

Alongside the belief in the rewards of free trade between states ran parallel theories that came to be treated as taproots of capitalist enterprise. Economists as different as Maynard Keynes and Milton Friedman associated economic growth to a large degree with a government's control over its money supply. Others, however, such as Joseph Schumpeter, stressed the emergence of a spirit of entrepreneurial drive as crucial to achieving those major technical innovations that would count as creative destructions of the settled orders of economic behaviour. These were the sources of industrial and commercial "revolutions", which increased the prospects for globalising trade during the period before World War I when competitive colonisation by powerful European states was at its height.[11]

Here was a crossroads between opening international trade to competition and providing incentives for industrial change by bolstering innovation. National governments that were promoting the scramble for technology and its productive application began to look at policies that would justify an acceptable flow of traffic between them. Public programmes enhanced the place of education and research and encouraged private individuals and enterprises to do likewise through their own business instincts or public benefactions and the like. Equally governments sought to foster the development of infrastructures that would improve the chances of businesses in their hunt for profitable returns from their business ventures. And for a host of motives, governments would attempt to enhance the productive capacities of less developed countries abroad through, for instance, aid programmes. As industrialising countries spread their wings in the nineteenth century, capital providers, being in the main private risk-takers, began to look for protected positions in the markets that they sought to exploit.

From early on governments in these states were attracted by ideas for intellectual property rights, concentrating their attention for the most part on their domestic scene. Part of their interest was undoubtedly that their role would primarily be

[10] See H. Chang (2002), Kicking Away the Ladder: Development Strategy in Historical Perspective.

[11] See esp., J.A. Schumpeter (1955), History of Economic Analysis.

confined to maintaining a formal granting procedure; and to providing a court system that would handle enforcement of the rights against infringers. Government did not have to take the lead in the recurrent negotiations with other states that was the crucial element in free trade agreements.

3.2 Exclusive Rights of Exploitation Within Competitive Markets

Just when international trade agreements were spreading in the wake of industrialisation, so were systems of IPRs burgeoning in much the same countries. Initial types included patents for inventions, copyright in literary and artistic works, and protection for trade-marks, trade-names and 'get-up' used to indicate the trade source of products and services.[12] Each type was concerned with the ability to put knowledge to exploitative use, so IPRs were accordingly about factual information that had been developed into intelligent knowledge. Defining the rights was inherently difficult, since knowledge is shareable rather than separable; and these rights aimed to constrict what people other than IPR holders could do with it for commercial purposes. IPRs set boundaries to the general preference for freedom of competitive trading in a market, whether the market was purely local or one that extended beyond the reaches of a national state. They have therefore to be sustained by sufficient arguments in favour of their introduction. This is why one finds detailed laws relating to each IPR in developed countries. However much this throws up repeated disputes about the justifications for IPRs from an economic, legal, political, scientific or philosophical perspective, it is a necessary and important exercise that seeks to balance competing interests and resolve policy tensions in the face of considerable theoretical and empirical uncertainty. Understanding the source and importance of this complexity is one key to appreciating what TRIPS has added to inchoate notions of IPRs, their pitfalls and their dangers.

State legislation at the national level would provide the core of this movement but it would also be given shape and purpose through the decisions of courts, the management of patent and trade mark offices by public servants, the growth of professions primarily concerned with presenting applications for protection to these offices, and the establishment of private collecting societies (for example to collect royalties on performances of music in concerts, theatres, and then film showings and broadcasts). In some jurisdictions, enforcement powers were conferred on police, customs authorities and other public or private investigators. From one perspective

[12] For other, more specific forms of IPRs, see below. For further detail, W. Cornish, D. Llewelyn & T. Aplin (2013), Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights.

these investigators were engaged in consumer protection; but unfair trading could equally injure a competitor that held or ought to hold IPRs.[13] The crucial conception of each form of IPR was that right holders would gain what reward they could, not from any direct funding by the state but by their ability to trade on the basis that they had obtained exclusive use of certain types or embodiments of knowledge.

Many of the "intellectual" novelties that received IPR protection had little chance of generating truly striking levels of profit-making, since relatively few of the rights removed all competition between products or services available in a market. But there would be particular intellectual contributions that would displace all real alternatives by being so much fitter for their purpose. It was then that IP right holders gained real economic power to set prices and other advantages at levels most likely to maximise gains for themselves. The very possibility stimulated the gambling instincts of venture capitalists as well as manufacturing and distributive businesses.

3.3 The Degree of Exclusive Protection

This then was the basic legal model for the various types of protection that IPRs gave against direct competition and it would lead eventually to them being classed together under the banner headline, Intellectual Property.[14]

In a broad sense the rules which define the scope of each type of IPR are more elaborate when the right is capable of preventing unlicensed enterprises from producing and marketing a competing product or service at all (regardless of whether copying is involved). For example patents for inventions typically confer a right to any version of the invention to which the patentees have properly laid claim; and they will be entitled to do so when, at the priority date for their patents, they are the first to apply for protection. In modern patent systems, given the strength of such a patent right against independent inventors (not merely copyists), there has to be an application describing the invention so that there can be examinations by qualified personnel at a national or regional patent office before and in some systems immediately after the patent is granted. The procedures and requirements thus established seek to fulfil the basic purposes of the system; first that they provide incentives for research and development that may lead to commercial exploitation and which otherwise might be deterred by the costs involved; and secondly, if successful, they may advance a flow of information from which an industry as a whole can benefit.

[13] See A. Ohly (2015), TRIPS and Consumer Protection, in H. Ullrich, R.M. Hilty, M. Lamping & J. Drexl (Eds.), TRIPS plus 20: From Trade Rules to Market Principles, p. 681 (this volume).

[14] The wide use of the term became standard once the UN brought together the supervision of the major international IP Conventions under its World Intellectual Property Organisation (to English speakers, WIPO, to the French, OMPI; sited in Geneva). Thus it became accepted as a type of private property right, bringing together forms of IP previously labelled 'industrial property' and 'copyright'. See further below, Sects. 4.2 and 4.3.

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