

**THE UTILISATION OF AGENDA-SETTING POWER IN THE
MULTILATERAL TRADING SYSTEM'S EVOLUTION FROM
'NEGATIVE' TO 'POSITIVE' INTEGRATION**

LA UTILIZACIÓN DEL PODER DE FIJAR LA AGENDA EN LA
EVOLUCIÓN DEL SISTEMA DE COMERCIO MULTILATERAL DE LA
INTEGRACIÓN 'NEGATIVA' A LA 'POSITIVA'

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ABSTRACT

This paper contends that the construction of a globalised intellectual property rights regime (TRIPs) within the World Trade Organization (WTO) was emblematic of the shift from 'negative' to 'positive' integration, which necessitates that WTO Member states harmonise domestic regulations to conform to the precepts of multilateral trading system, and accounts for the relative institutional failure of the organisation since its inception in 1995. The paper examines this shift towards 'positive' integration by focussing on the campaign to formulate and construct the globalised intellectual property rights regime within the WTO. By examining the role of agenda-setting power in the creation of TRIPs this article intends to highlight the extent of the symbiosis between private commercial diplomacy and international trade law in campaign construction, and thereby demonstrate how private corporations have been able to formalise their specific interests within the WTO, while further exacerbating those asymmetries which ultimately have led to stasis in multilateral trade regulation.

KEYWORDS

TRIPs Agreement, Multilateral Trading System, 'Positive' Integration, Agenda-Setting Power, Intellectual Property Rights (IPR)

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1. Introduction. 2. The use of Agenda-Setting power to construct TRIPs. 3. The globalised intellectual property rights regime. 4. Intellectual Property Rights (IPR). 5. Utilising "The myth of lost hegemony" in campaign construction. 6. Framing the TRIPs campaign. 7. Intellectual Property Committee's (IPC) campaign construction. 8. Conclusion. References.

RESUMEN

Este documento sostiene que la construcción de un régimen de propiedad intelectual globalizado (ADPIC) de la Organización Mundial del Comercio (OMC) fue emblemático del cambio de una integración "negativa" a una "positiva", que requiere que los Estados miembros de la OMC armonicen la reglamentación nacional para adecuarse a los preceptos del sistema multilateral de comercio, y representa el relativo fracaso institucional de la organización desde su creación en 1995. En el documento se examina el cambio hacia una integración "positiva" centrándose en la campaña para formular y construir el régimen

de propiedad intelectual globalizado en la OMC. Al examinar el papel del poder de fijación de la agenda en la creación del Acuerdo ADPIC, este artículo tiene la intención de resaltar el alcance de la simbiosis entre la diplomacia comercial privada y el derecho mercantil internacional en la construcción de la campaña y, por lo tanto, demostrar cómo las empresas privadas han sido capaces de formalizar sus intereses específicos dentro de la OMC, mientras que agrava aún más las asimetrías que en última instancia han dado lugar a la parálisis en la regulación del comercio multilateral.

PALABRAS CLAVE

Acuerdos ADPIC, Sistema de comercio multilateral, Integración "positiva", Poder de fijación de la agenda, Derechos de propiedad intelectual (DPI)

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1. Introducción. 2. El uso del poder de fijar la agenda para construir los ADPIC. 3. El régimen de propiedad intelectual globalizado. 4. Derechos de Propiedad Intelectual (DPI). 5. Utilizando "El mito de la hegemonía perdida" en la creación de la campaña. 6. Enmarcando la campaña sobre los ADPIC. 7. La creación de la campaña del Comité de Propiedad Intelectual (CPI). 8. Conclusión. Bibliografía

1. INTRODUCTION

The globalisation of an intellectual property rights (IPR) regime, as embodied in the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs), brought about some of the most significant normative and procedural changes in global property laws enacted throughout the 20th century by codifying a set of stringent intellectual property norms that are compatible with the interests of a small cluster of knowledge-intensive, high-technology industries. The campaign to globalise intellectual property protection standards culminated in an extraordinary victory for a cohort of private sector actors in the Uruguay Round of trade talks which took place from 1986 to 1993 and led to the establishment of the WTO in 1995. One of the foremost aims of the Uruguay Round was to institutionalise and intensify the prevailing economic tendency towards trade liberalisation and deregulation by necessitating that all member states of the WTO harmonise their domestic regulations to the precepts of the organisation.

The campaign to place TRIPs within the Uruguay Round negotiations was indicative of the agenda-setting power of the agreement's private sector architects who assiduously exploited the changing institutional context within the United States, which facilitated the construction of complementarity between private and state interests in the arena of intellectual property rights (IPR). The agenda-setting power exhibited by business networks in formulating and transposing TRIPs from an aspirational framework document into legal reality can be assessed as symptomatic of the great distortions of power that exist in the global political economy and redolent of how as each new layer of regulation is added to the WTO's agenda, the asymmetries in multilateral trade regulation have proliferated further (Wilkinson, 2006:18).

The TRIPs Agreement ultimately represents an attempt to not merely to control resources but to control who gains access to those same resources. By demonstrating how the campaign to bring TRIPs within the ambit of the WTO was constructed this paper will attempt to highlight how the shift from the 'negative' integration of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT) to the 'positive' integration of the WTO

has resulted in the multilateral trading system being beholden to a great degree of trepidation and mistrust, particularly by those developing country members such as Brazil and India, that have stymied progress towards a conclusion of the WTO's ongoing Doha Development Round.

2. THE USE OF AGENDA-SETTING POWER TO CONSTRUCT TRIPs

One of the most important activities of any campaign is agenda-setting, which entails generating issues by disseminating information and providing a normative frame to interpret it (Sell and Prakash, 2004). Peter Bachrach and Morton Baratz (1970) define agenda-setting power as the ability of actors 'to consciously or unconsciously create or reinforce barriers to the public airing of policy conflicts' (Bachrach and Baratz, 1970:8). Similarly, Fred Berenskoetter outlines how agenda-setting power represents the ability of actors to mobilise the system-inherent biases built into institutions to their own advantage and thereby limit choices regarding what decisions can be taken (Berenskoetter, 2007:8-9). Agenda-setting power, therefore, relates to the ability to influence the preferences of other actors and is shaped by how various perspectives are presented in relation to dominant policy concerns. As agenda-setting power involves the provision of information and normative frames, the process of agenda-setting greatly influences policy debates and, by extension, policy outcomes. Given that policy debates concerning critical issues, such as IPR, invariably feature competing agendas, it is imperative to investigate whose agenda determines outcomes—a task which this paper will endeavour to perform.

In her ground-breaking work *States and Markets*, the iconoclastic Susan Strange (1988) delineated her typology of four separate structures of power (production, security, finance, and knowledge) in order to surmount the limitations inherent in conventional paradigms of international relations theory (IR), such as state-centrism and the artificial separation of politics and economics. Within one of those structures of power, the knowledge structure, Strange outlined two forms of power. The second of these forms of power, agenda-setting power, represents the kernel of structural power. While agenda-setting power is derivative of other, 'harder', more structural capabilities, it confers upon actors the power 'to decide how things shall be done, the power to shape frameworks within which states relate to each other, relate to people or relate to corporate enterprises' (Strange, 1988:25). Fundamental to our understanding of structural power as outlined by Strange is that the dominant actor will attain their objectives not simply by resorting to relational power (the power of A to get B to do something B would otherwise not choose to do), but also by its capacity to create the rules, norms and modes of operation of the international system, thereby attaining the consent of the other actors within the system (Strange, 1988:24). Strange's approach to the study of structural power allows us to conceive of IPR as a source of power in the international political economy, and also permits us, by examining the role of agenda-setting power in institutional formation, to ascertain the structural, power-based, factors which led to TRIPs being placed within the WTO. For the purposes of this paper, the following categorisation will be utilised to outline the role of agenda-setting power in the context of the multilateral framework that delivered the TRIPs Agreement:

- AGENDA: Which Contracting Parties - is the by which members of the GATT were know from 1947 to 1994; Countries that belong to the WTO are known as “Members”- and/or coalition grouping within the General Agreement on Tariffs and Trade (GATT) exerted influence on what items were to be placed on the Uruguay Round negotiating agenda?
- ORGANISATION: Which Contracting Party and/or coalition grouping within the GATT was better organised to influence the outcome of the multilateral trade talks and why?
- COALITIONS: Which coalitions were created throughout the negotiating process and how influential were they in determining outcomes?
- FORUMS: Why was the GATT/WTO and not the World Intellectual Property Organization (WIPO) chosen as the forum for negotiating a globalised IPR regime in the Uruguay Round? Which actors engaged in “forum-shifting” from WIPO to GATT, and from where does the ability to engage in the process of “forum-shifting” emanate?
- INKAGES: Were negotiations on IPR linked to negotiations in other issue areas throughout the course of the Uruguay Round?
- FRAMING: What framing skills were utilised to place TRIPs within the WTO and which parties were most effective in promoting the frame that IPR protection would also promote trade and investment, thereby leading to economic growth in less developed countries despite the lack of empirical evidence to support such a hypothesis?
- MOMENTUM: Which group was the most skilled at creating and maintaining support for its agenda in the Uruguay Round, and how was it possible for this group to obtain and maintain such support? (see also Deveraux et al., 2006:35)

3. THE GLOBALISED INTELLECTUAL PROPERTY RIGHTS REGIME

The transformation of the General Agreement on Tariffs and Trade (GATT), which was established in 1947, into the WTO signified a momentous conceptual alteration in the rules and procedures governing global trade. GATT’s focus had been traditionally on “negative integration” which consisted predominantly of the liberalisation of trade by reductions in tariffs and regulatory barriers to trade; TRIPs signifies a shift to “positive integration” and represents an approach that goes beyond de-regulation to affirmatively re-regulate (or harmonise), imposing global standards in place of national ones (Pager, 2006: 217). Whereas the provisions of GATT were not binding if they were considered inconsistent with Contracting Party’s national legislation, WTO rulings and agreements-which are much more extensive than the GATT-are binding on all Members. This shift from ‘negative’ to ‘positive’ integration, therefore entails the harmonisation of domestic regulations to the precepts of the WTO, and has exacerbated the perennial problem of concluding trade agreements that has bedevilled the multilateral trading system since the prolonged conclusion of the Kennedy Round in 1967. Despite the subsumption of the GATT into the WTO since 1995, the rules, norms and mechanics of operating which were first developed under the GATT have not only remained unaltered, they have actually been extended into new areas such as services, agriculture, investment and intellectual property, and have further amplified the asymmetries that exist in multilateral trade regulation (Wilkinson, 2006).

These asymmetries are further aggravated by another significant deviation from the GATT: All member-states of the WTO must sign up to the principle of a *single undertaking*. This requires signatories to accept *all* WTO Agreements as a complete package, rather than on an

individual basis, and as such is unique among multilateral organisations. All of the provisions of the TRIPs Agreement, therefore (with certain exemptions for the timescale of implementation), are legally binding on all 153 member states of the WTO. There is effectively no scope for states to deviate from any of the WTO's agreements regardless of that Member state's stage of economic and social development.

TRIPs incorporates the principles of national treatment (whereby imported and locally-produced goods and services should be treated equally in the same market) and most-favoured nation (MFN) (whereby countries cannot discriminate between their trading partners) and deals with highly-contentious and emotive policy areas which had hitherto proven obdurate blocks to agreement at international level, such as compulsory licensing of the manufacturing of pharmaceutical products, and the protection of new varieties of plants (Downes, 2010:127). The TRIPs agreement forms an integral part of the ideological and normative transformation that emanated from the collapse of the Bretton Woods institutions which had promulgated fixed exchange rates and capital controls since 1945. Its emergence within the WTO is emblematic of the structural changes that took place in the global economy during the post-Bretton Woods era, such as the emergence of a panoply of new high-technology, knowledge-intensive industries and the escalating costs of innovation in goods embodying intellectual property. The changing dynamics of the international economy from the early 1980s onwards witnessed transformations which resulted in the widespread globalization of finance, internationalisation of production, extensive changes in technology, and increased adherence to the politics of deregulation (Palan and Abbott, 1996:6)

The rush throughout the 1980s to enforce the precepts of what Robert Cox termed 'hyper-liberalism' (Cox, 1993), endorsed a quasi-Darwinian conception of global economic competition. The post-Keynesian approach to policy encompassed neo-classical, monetarist norms, a waning in anti-trust enforcement, and adherence to supply-side economics, best exemplified by the "Volcker Shock" doctrine undertaken by the United States Federal Reserve from October 1979 to August 1982, and the policies of the Reagan administration (1981-'89). Reagan's consistent rhetorical leadership in support of free trade, and his predisposition to organisations with extensive IPR interests (which Reagan's administration regarded as congruent with those of a flourishing American economy) had marked a decisive shift in the position of Republican administrations within the United States supporting world-wide trade liberalisation (Deese, 2008:178). Concurrently, pre-eminence in the global economy was increasingly accorded to finance capital and mobile factors of production-changes that effectively constituted an endeavour to alter expectations and ideas about the role government should assume in a market economy, the importance of private enterprise, and the merits of market-based exchanges over a structurally planned economy (Gill and Law, 1989).

One of those aspects of globalization that altered market structures in the last quarter of the twentieth century was technological transformation, which not only rendered the possession of intellectual property in innovations more lucrative but also made such innovations more susceptible to imitation or 'piracy'. As a result, intellectual property supplemented *assemblage* in economic significance within the global economy. Concomitantly, the escalating costs of R&D became one of the central catalysts in provoking private business networks into linking intellectual property protection with trade. These transformations in international capitalism propelled the issue of IPR from an relatively unfathomable area of legal analysis to the forefront of global economic policymaking.

4. INTELLECTUAL PROPERTY RIGHTS (IPR)

Intellectual property can be categorised as information which has market value when put into use in the marketplace and on which there is a public willingness to confer the status of property (Maskus, 2000). IPR represent the legal form through which many key knowledge-based resources, such as ideas, information and knowledge, are commodified, and i.e. ‘transformed into property-like goods that can be exchanged in markets’ (May, 2006:33) IPR constitute an attempt to resolve market failure by granting exclusive rights to an innovator to exploit their product or process and stop others from using it without his/her sanction for a specified limited period (20 years, in the case of TRIPs). IPR therefore are time-bound monopoly rights and represent a divergence from the principle of free trade. Reconciling the concept of IPR, which had been historically synonymous with grants of monopoly, for example, in 1902 the United States Supreme Court ruled that ‘the general rule is absolute freedom in the use or sale of patent rights under the patent laws of the United States. The very object of these laws is monopoly (Jaffe and Lerner, 2004:96), to a multilateral regime (the WTO) with the objective of enhanced trade liberalisation, necessitated the creation of a new normative architecture that not only elided intellectual property’s monopolistic history but also depicted ownership of IPR as commensurate with liberalisation and democracy. This construction resonated powerfully among policy makers in the United States where property rights had long been considered constitutionally sacrosanct.

The importance of a globalised IPR regime to high-technology, knowledge-intensive industries was emphasised by a study undertaken by the United States International Trade Commission (USITC) in 1987 which sought to investigate the extent of the cost of intellectual property piracy around the world to US-owned corporations. The USITC estimated that piracy of pharmaceutical products reduced annual R&D investment by US firms by between US\$720 million and US\$900 million a year (Mossinghoff and Bombelles, 1996). Similarly, the International Anti-Counterfeiting Coalition in 1993 calculated that the US economy loses about US \$200 billion each year and 750,000 jobs annually from piracy (ibid, 1996). By the middle of the 1980s, exacerbating trade deficits and the loss of up to two million jobs in the US manufacturing sector created the impression of a hegemon in relative decline. The stream of depressing economic data exacerbated by an over-valued dollar, provoked protectionist tendencies in trade policy-making on Capitol Hill. The perceived decline in US economic hegemony, combined with the lingering trauma of its calamitous military experience in Vietnam, added up in the eyes of many to a visible loss of US power to strong competitors (Drahos, 1995:420).

5. UTILISING ‘THE MYTH OF LOST HEGEMONY’ IN CAMPAIGN CONSTRUCTION

The American historian Paul Kennedy’s totemic work *Rise and Fall of the Great Powers* (1987) exemplified the standpoint of a “declinist school” which argued that the United States was losing its competitive position relative to countries such as Japan, and that its imperial over-reach and fixation with military power replicated the patterns of decline witnessed in previous hegemonic powers, such as Habsburg Spain and Napoleonic France. Jagdish Bhagwati referred to the United States towards the end of the twentieth century as suffering

from “the diminished giant syndrome” (Bhagwati, 1989:173), a malaise analogous to the erosion of Britain’s political and economic pre-eminence at the end of the previous century. The symbolism of an enfeebled American giant providing public goods to the global system, yet being superseded by robust and free-riding “Asian Tigers” resonated strongly with domestic opinion within the United States and led to calls for remedial action in the arena of IPR within policy-making circles (Drahos with Braithwaite, 2002). As Japan’s trade surplus with the USA acted as a rallying cry for proponents of protectionism, it became necessary among proponents of a globalised IPR regime to create a myth of origin to account for the provenance of Japan’s phenomenal growth (Matthews, 2002). By creating a powerful (and deeply historically resonant) allegory of Japanese imitators free-riding on the ingenuity of American innovation it would be possible to construct a specific correlation between Japanese economic pre-eminence, relative American decline and intellectual property piracy.

While prognoses of American economic diminution in relation to Japan seems high on preposterous at a remove of twenty years (and should perhaps make us wary of contemporary accounts of China’s ostensibly inexorable rise), the ascendancy of the ‘Asian Tigers’ and Japan’s economic surge stimulated a raft of scholarship throughout the 1980s (e.g. Keohane, 1984; Gilpin, 1987) which depicted American global power in relative decline. For this reason, among others, Susan Strange’s delineation of an ontology of structural power in *States and Markets* (1988) was important in rupturing the myth of diminishing American hegemony. Strange distinguished relational power (the ability of actor A to compel actor B to do something that actor B otherwise would not do) from structural power, a form of power which ‘shapes and determines the structures of the global political economy within which other states, their political institutions and economic enterprises have to operate’ (Strange, 1988: 24). Strange observed that while the global political economy and international society were undergoing major structural change, conventional frameworks of analysis, where a “dialogue of the deaf” existed between IR’s three classical paradigms (or meta-narrative), were failing to take such dynamics into account: It was important therefore to develop a theory which would bring together politics and economics in order to guide policy in a dynamic world system. She proposed four structures (production, finance, knowledge and security) as a taxonomy for examining change in the global political economy and labelled this taxonomy “structural power”.

Structural power was therefore fundamental not only in understanding the profound changes in globalization, such as the globalization of finance and the rise of information technology, which altered market structure, but in obliterating notions of declining American hegemony. As Strange highlights (1994:213), the “declinist school” was grievously mistaken in its assumption that American power was in a precipitous tailspin and that the United States had relinquished power to other states, such as Japan. The zero-sum idea, as she stresses, is far too simplistic: In reality, successive US governments ceded power not to other states, but to the market, and did so of its own volition through a series of political decisions which promoted structural change in the global economy.

Throughout the 1970 and 1980s various US governments broke down barriers to foreign investment, destroyed the Bretton Woods agreements, promoted capital mobility, circumvented GATT with unilateralist Trade Acts and deregulated the markets for air, transport and finance. While all of these acts contributed to a deterioration in the legitimate authority of the state over the economy’, they did not precipitate a decline in American power vis-à-vis competing states (*Ibid.*:213). Strange emphasised that indicators such as

current account deficits and monetary reserves were virtually irrelevant as gauges of hegemonic power-what mattered was structural power which the United States possessed via its ability to protect its allies, its ascendancy in the knowledge industry, the US dollar's status as global reserve currency, its share of global production, and its agenda-setting power in international fora (Norloff, 2010:18).

Advocates of the "declinist school" were myopic, as Strange (1994) highlighted, in focusing on relational power and not on structural power, through which, as Jonathan Kirshner observes, 'simply by its enormous size, a dominant state creates the context in which political interactions take place-often without even the intention of doing so' (Kirshner, 2008:425). Nevertheless, the framers of the campaign to place TRIPs within the WTO persevered in promoting a myth of lost hegemony in order to adapt the WTO's agenda to their own financial and commercial exigencies. Therefore, in order to avert further (perceived) erosion of American dominion, a comprehensive agreement on IPR containing a strong dispute settlement mechanism with powers of enforcement and linkages to trade became a *sine qua non* of American trade diplomacy prior to the Uruguay Round (Devereux, 2006). In the absence of institutional arrangements for innovations, the proponents of TRIPs argued, firms would regard the allocation of resources to inventive activities as a risky investment (Pugatch, 2004:21).

GATT was chosen as the forum in which to negotiate a globalised IPR regime as that institution was deemed less amenable to the perspective of the majority of developing countries on IPR than the UN agency, WIPO, which heretofore administered all international treaties on IPR. WIPO was deemed too ineffective by American trade officials in terms of policing intellectual property piracy and its weak enforcement mechanisms (Drahos with Braithwaite, 2002:113). Such latitude permitted sovereign states engage in a *laissez-faire* attitude to IPR enforcement. GATT, by contrast, was a forum in which the United States was the single most influential player, as the multilateral trading system was deemed to be congruent with American interests 'ninety-five per cent of the time' (Friedman, 2001:19). Shifting the issue of IPR disputes from WIPO into the WTO, an institution with significant regulatory and enforcement powers, necessitated extensive framing skills and adroit trade diplomacy. The ability to engage in forum shifting was indicative of the agenda-setting power that knowledge-dependent industries based within the United States were able to exercise, through the offices of the USTR, within the arena of international trade law.

The architects of TRIPs also sought to frame a discourse which equated the protection of intellectual property in the minds of legislators with the safeguarding of tangible property and by extension, equate the piracy of intellectual property with the theft of tangible property. This necessitated the creation of a 'political project to firmly establish unauthorised use [of intellectual property] as theft' (May, 2006:49). The construction of equivalence between the 'theft' of tangible and intangible property resonated powerfully in the United States, where private property rights have long been considered inviolate and whose Bill of Rights incorporated John Locke's notion that 'the chief end of men uniting into commonwealths, and putting themselves under government, is the preservation of their property' (Locke, 2004 [1690]:73).

It is salutary to emphasise in this context that the expression 'intellectual property rights' is one that has been politically constituted and is not as value-free as much of the literature by IPR advocates conveys. The most important aspect of IPR, from a legal perspective, is their formal construction of scarcity where none necessarily exists (May, 2006:37). Unlike

material property, knowledge, ideas and information are not necessarily rivalrous and one person's use of them does not axiomatically inhibit someone else deriving utility from that good. Because it is legally difficult to demand royalties for the use of a non-rival public good it became necessary to construct a legal form of scarcity, IPR, so that a price could be obtained for its use. Information is not inherently scarce—it is only scarce in relation to how societies permit agents to create artificial scarcity through property rights. Because patents and other forms of IPR have been historically synonymous with monopolies, the term 'intellectual property rights' is the result of assiduous and strategically co-ordinated efforts utilised by IPR proponents since the so-called 'Great Patent Debate' raged between 1850 and 1875 (Malchup and Penrose, 1950).

The process of transforming hitherto global knowledge assets from the public domain into commodified knowledge and presenting the process of commodification as 'a depoliticised, natural occurrence' (May, 2006:42) was pivotal to the establishment of TRIPs and at the centre of the normative framework constructed to engender support for the accord. Whether intangible information and knowledge constitute "public goods", i.e. goods that are non-rivalrous and non-excludable, or whether they should be legally commodified as knowledge in order to ensure that a price can be obtained for its use remains one of the most contentious aspects that has emanated from the signing of TRIPs.

The use of a natural rights discourse by the proponents of TRIPs was ingenious: Instead of being synonymous with monopolistic practices, the characterisation of intellectual property as a concept on which rights should be bestowed imbued it with significant moral underpinnings. Transgressing a "right" can be depicted as morally repugnant, given that rights in moral terms are often portrayed as inviolate. A rights-based discourse enabled promoters of IPR to emphasise their pure moral content in terms of rights and their economic desirability in terms of property (Pugatch, 2004:4-5). It was a discourse that resonated powerfully within the United States and was particularly persuasive among policy makers on Capitol Hill. The use of such a discourse was hugely important in the construction of the TRIPs regime and highlights the importance of framing a discourse favourable to one's own exigencies when engaging in campaign construction. As Jeremy Waldron contends, 'It sounds a lot less pleasant if, instead of saying we are rewarding authors [and other innovators], we turn the matter around and say we are imposing duties, restricting freedom, and inflicting burdens on certain individuals for the sake of the greater social good' (Waldron, 1993:862).

6. FRAMING THE TRIPs CAMPAIGN

The strategy undertaken by knowledge-intensive industries in institutionalising the globalised IPR regime conforms to Keck and Sikkink's summation that campaigns are 'processes of issue construction constrained by the action context in which they are carried out....Activists identify a problem, specify a cause, and propose a solution, all with an eye toward producing procedural, substantive, and normative change in their area of concern' (Keck and Sikkink, 1998:8). This characterisation of campaign construction resonates with how James Enyart, then CEO of Monsanto, describes the process whereby private-sector actors lobbied the US government to negotiate the insertion of an IPR regime within the WTO. According to Enyart, 'Industry... identified a major problem for international trade; it

crafted a solution, reduced it to a concrete proposal, and sold it to our own and other governments... The industries and traders of world commerce played simultaneously the role of patients, the diagnosticians and the prescribing physicians' (Enyart, 1990:54).

The campaign to establish TRIPs resulted in an extraordinary re-configuration in trade diplomacy that manifested itself in three distinct ways from the mid-1980s onwards. Firstly, the Office of the United States Trade Representative (USTR), which was granted significant autonomy for conducting negotiations by President Reagan, exerted enormous diplomatic pressure on developing countries to adopt US-style patent protection by linking market access, in the form of Generalised System of Preferences (GSP) benefits, to protection of American intellectual property, thus bringing IPR within the realm of trade policy; Secondly, the United States government stipulated that in future all regional free trade agreements would include provisions regarding IPR protection: The USTR signalled its intentions in this area when intellectual property protection became one of the central tenets of the North American Free Trade Agreement (NAFTA) launched in January 1994; Thirdly, the United States trade negotiators forcibly insisted that high standards of IPR be included in the GATT negotiations of the Uruguay Round (Winham, 2005). IPR were to be utilised, therefore, as a tool to freeze the comparative advantages that had so far ensured US technological supremacy in the global economy.

The expertise and control over information by the private sector within the United States privileged its position in the determination of the normative context governing the IPR regime and ultimately, enabled the private sphere to shape the definition of the public interest of the United States. In the late 1980s knowledge of the intricacies of intellectual property law and the possible implications of a globalised IPR regime were confined to a specialist grouping of trade lawyers, principally based within the United States, who were predominantly socialised to promote the protection of international property and uphold the ideology of private property rights (Sell, 2003:44).

Intellectual property law is highly technical and complex, obscure even to most practising lawyers. The esoteric make-up of IPR law accorded intellectual property lobbies significant advantages when presenting their respective cases to the US Congress. The possession of technical, arcane and juristic knowledge was an important source of the IPR lobby's private authority. Due to the abstruse and obscure composition of IPR law, governments have consistently relied upon intellectual property experts within corporations to provide them with information. In the Uruguay Round, the US government consistently relied upon IPR experts to translate technical complexities into political discourse and make clear the connection between IPR and international trade (Sell, 2003:99).

Corporations with highly-developed intellectual property interests maintain a uniquely privileged position in IPR surveillance and information regarding the flouting of IP laws. This is primarily because it is technically unfeasible for the USTR to monitor the implementation of all IPR directives abroad. Given these technical constraints, surveillance on behalf of the United States government is carried out, in the main, by the American business community, a scenario that confers on that community an enormous degree of political and economic power as the grouping can determine what information is disseminated to the USTR. Every major US corporation with a large IPR portfolio belongs to a trade association. In turn, such trade associations are members of umbrella organisations such as the International Intellectual Property Alliance (IIPA), a grouping that represents more than 1,500 companies with significant IPR interests (Drahos, 1995). These companies

provide the IIPA with information about IPR transgressions around the world; in turn, this information is used by the IIPA to make recommendations to the USTR regarding actions to be taken against the violators of American-owned IPR (Deveraux et al., 2006). The symbiosis between business and government, as exemplified by the IIPA's role as IPR watchdog for the United States government, was a fundamental facet in bringing an IPR agreement with a binding enforcement mechanism into the realm of international law.

7. INTELLECTUAL PROPERTY COMMITTEE'S (IPC) CAMPAIGN CONSTRUCTION

Corporate sector actors which lobbied for the insertion of TRIPs into the GATT benefited enormously from the institutional changes which the United States House of Representatives enacted in the political fall out from the Watergate Scandal, which bedevilled the administration of Richard Nixon from 1972 to 1974. These institutional changes facilitated private sector actors in playing a much more significant role in determining the trade policy of the United States. As power became decentralised in the US Congress, legislative procedures were opened up thereby rendering policy making in trade-related areas much more transparent than had hitherto been the case. New procedural rules in the House of Representatives made mark-ups of bills, i.e. the debating, amending or re-writing proposed legislation, more open to the public and provided new opportunities for sectoral interests to influence the legislative agenda (Sell, 2003:78).

One of those sectoral interests coalesced in the establishment of an ad-hoc alliance, called the Intellectual Property Committee (IPC), in March 1986. The IPC had policy goals that were rooted in the normative discourse that favoured the liberal economic mantra of defending property rights and endorsing market-based exchanges-concepts that were very amenable to policy makers within the United States Congress. The grouping promoted the frame that IPR protection would increase free trade and investment, thereby encourage economic growth in industrialised and developing countries-a frame that 'ultimately became the normative building block of the TRIPs Agreement' (Sell and Prakash, 2004:145). Additionally, the IPC sought to convince Congress and the Reagan administration of the enormous importance to the United States of trade in goods and services dependent upon intellectual property protection worldwide.

The IPC was critical in galvanising US Congressional support for an internationally-binding agreement on IPR at the Uruguay Round. The IPC represented the pharmaceutical, information technology, creative arts, biotechnology and chemical industries and deliberately limited its membership to twelve corporations in order to maximise its impact in garnering international support for strengthening IPR protection on a global basis. In so doing, the IPC subscribed to the logic of collective action (Olson, 1974, [1965]) which would predict that those firms with most to gain from a globalised IPR regime would coalesce into a coherent ad-hoc grouping of concentrated interests because concentrated interests face lower costs of organisation and greater individual rewards (Drahos, 2010: 11). From its inception, the IPC set about establishing a global private sector/government network that laid the ground for what became TRIPs.

The IPC utilised sophisticated framing skills by initially setting objectives for the Advisory Committee for Trade Negotiations (ACTN) - the ACTN was renamed the Advisory

Committee on Trade Policy Negotiations (ACTPN) in 1988- and the USTR, establishing priorities, determining the strategy to be undertaken in order to induce multilateral compliance, providing negotiating assistance, building international consensus, maintaining momentum for its objectives by linking the perception of declining hegemony directly to intellectual property piracy, and providing technical expertise to political actors. The IPC promoted the frame among policy makers in the US Congress that IPR is a “trade-related” issue whose protection is compatible with the greater liberalisation of trade objectives of the WTO. By placing the issue of IPR within the multilateral framework of the WTO, the IPC emphasised that ‘free-rider’ problems would be ameliorated, the so-called ‘tragedy of the commons’ would be averted, Pareto inefficiency would be diminished, and US trade negotiators would be handed the leverage necessary to deal with the problem of intellectual piracy abroad.

The symbiosis of government and business in the area of trade policy prior to and during the Uruguay Round was also evident in the creation of the Advisory Committee for Trade Negotiations (ACTN), which was established by the executive branch of the US government in 1974 to solicit private sector observations on trade policy. This group was one of the lynchpins of the USA’s trade-based strategy whose primary objective was to provide a direct line of communication between business and the bureaucratic centre of trade policy (Drahos, 1995). One of the first acts of the ACTN was the creation of an eight-member Task Force on Intellectual Property, which included among its ranks corporate executives such as John Opel of IBM (Matthews, 2002). The Task Force recommended that the US government pursue a strategy with the long-term goal of putting IPR into the GATT. In the short-term, the Task Force recommended the use of bilateral and unilateral means to improve the protection of American intellectual property overseas. The ACTN was chaired by Ed Pratt, the CEO of the pharmaceutical giant Pfizer, from 1981.

The pharmaceutical industry in particular was highly vociferous in clamouring for a globalised IPR regime and began to assert direct, instrumental power over US trade policy at the start of the second term of the Reagan administration in 1985. The objective of the industry’s primary lobbying group, the Pharmaceutical Manufacturers Association (PMA), was to create a trade-IPR paradigm which could be used as leverage within the Uruguay Round to compel other Contracting Parties to the GATT to accept US-style IPR laws. Success for the pharmaceutical industry specifically, and business groups generally, on the issue of IPR relied upon the construction of complementarity between state and private interests (Matthews, 2002). In order to put its case for the inclusion of IPR in the GATT round of talks more forcibly, the PMA hired Gerald Mossinghoff as its president. In his capacity as Assistant Commerce Secretary and Commissioner of Patents and Trademarks in the 1981-85 Reagan administration and parallel role as Chairman of the General Assembly of WIPO, Mossinghoff had first articulated the U.S. government’s linkage between IPR and trade when he stressed the central correlation between innovation, intellectual property protection and the United States’ ability to compete globally. In a declaration which signalled an end to the ad-hoc and erratic treatment of intellectual property held by American corporations overseas Mossinghoff stated:

There is widespread bipartisan agreement that the protection of intellectual property worldwide is a critically important factor in expanding trade in high technology products. This administration is committed to strengthening that

protection as an integral component of our service to US trade and industry (Mossinghoff, 1984:2)

Throughout the Uruguay Round, the IPC embarked upon a trans-continental proselytising enterprise which was intended, to repeat the missionary work on IPR that the IPC had undertaken in the US prior to start of the Uruguay Round, this time with the industrial associations of Europe (UNICE-the Union of Industrial and Employers' Confederations of Europe) and Japan (KEIDANREN-Japanese Federation of Economic Organisations), in order to convince these sceptical associations that a code [on IPR] was possible (Enyart, 1990:54).

Once convinced that a GATT-based solution, incorporating a stringent enforcement mechanism, was compatible with its members' interests, UNICE and KEIDANREN formed a trilateral grouping of IPR interests with the IPC. This transnational triumvirate mobilised itself to craft a consensual document in June 1988 based upon the IPR laws and norms of industrialised countries and presented the group's recommendations to the GATT Secretariat and Geneva-based representatives of numerous Contracting Parties to the GATT. The document became known as *The Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities*.

The document it was hoped would act as a manifesto that would form the basis of a GATT-based IPR code (Matthews, 2002). The demands contained within the Basic Framework were reflected almost verbatim in what became the final draft of TRIPs (Drahos with Braithwaite, 2002). While certain concessions were made to developing states in the Uruguay Round such as a commitment to reform the EU's Common Agricultural Policy (CAP) and an agreement to phase out the Multi-Fibre Agreement (MFA) by January 2005, these compromises were negated by the onerous terms of TRIPs and a new WTO agreement, the General Agreement on Trade in Services (GATS), which necessitated the opening up of financial services and information technology, areas in which industrialised states hold a significant comparative advantage. Such trade-offs are reflective of how the WTO 'has protected those areas of key political importance to the institution's principal architects and dominant players' (Wilkinson, 2006:18).

The extent of the private sector triumph in TRIPs was articulated by Jacques Gorlin, the IBM economist who acted as consultant to the ad-hoc Intellectual Property Committee (IPC) throughout the Uruguay Round. Gorlin declared at the conclusion of the Round that the IPC had achieved, '95 per cent of what we wanted on intellectual property' (cited in Stein, 2005:171). The 'missing' five percent consisted of staggered timelines for implementing the agreement, such as allowing the least-developed group of countries until 2016 before implementing the provisions relating to patenting of pharmaceutical processes and products. The IPC's staggering achievement in the Uruguay Round exemplified how the process of bringing IPR from its erstwhile legal backwater to the forefront of international policy making was constructed by a coterie of companies 'creating ever-widening circles of influence that brought more and more actors and networks into the cause of IPR' (Drahos, 2003:3).

TRIPs was signed in Marrakesh, Morocco on April 15th 1994 and subsumed into the WTO on January 1st 1995. It has proven to be an exceedingly controversial agreement, particularly in regard to the patenting of pharmaceutical products and processes, the necessity

of imposing IPR on new varieties of plants, and the imposition of a property rights system on many communities where title to property has tended to be informal, subject to oral tradition or customary arrangements and informal community agreements. TRIPs has become synonymous with the WTO's acutely asymmetrical institutional evolution which has privileged the liberalisation of those sectors of greatest advantage to the economic and financial interests of the organisation's founding members while simultaneously protecting those interests of economic and political sensitivity to that leading number of industrialised states (Wilkinson, 2006:4).

8. CONCLUSION

The formation of the TRIPs Agreement was the product of collective action by a small group of multinational owners of IPR and is reflective of how private corporations have been able to formalise their specific interests within the institutions of global governance, and particularly within the WTO. The role of private sector actors in bringing TRIPs into the multilateral trading system is suggestive of how agenda-setting power, namely 'the power to shape frameworks within which states relate to each other' (Strange, 1988:25), was conferred upon particular agents to advance their IPR agenda in multilateral negotiations, thereby underlining the relationship between state interests and knowledge-intensive industries with extensive IPR portfolios. The astute construction of a campaign which equated the unauthorised appropriation of intellectual property with the theft of tangible property, and then connected that phenomenon to the (perceived) declining hegemony of the United States, necessitated judicious framing skills and a federal executive branch and legislature amenable to the importance of IPR for international competitiveness. The agenda-setting power displayed by this tiny corps of private sector interests manifested itself in how the group was able to influence the preferences of other actors by employing its financial assets, specialist knowledge, links to transnational networks, technical and legal competences, framing skills, and ability to work within those institutions where the bargaining and negotiations that culminated in TRIPs being placed within the WTO took place.

Ultimately, the story of how TRIPs was constructed and transformed into a central precept of the WTO demonstrates how, without countervailing opposition from civil society, it is possible for the institutions of global governance to become privy to regulatory capture by epistemic communities of private sector actors intent on structuring power within such institutions and creating path dependence within strategically important facets of the global political economy. The perennial failure to conclude the Doha Round of trade talks which began in November 2001 is symptomatic of the distrust engendered among many developing countries within the WTO as a result of the TRIPs negotiations and its highly asymmetric outcomes. The erstwhile clamour to extend the remit of the WTO by formalising an international anti-trust agreement and bringing the "Singapore Issues" on foreign investment, government procurement, competition policy, and trade facilitation, within the ambit of the WTO has been muted, as WTO Members increasingly engage in bilateral or regional trade agreements to the detriment of the multilateral trading system. Latterly, the WTO has become the victim of a type of "Prisoner's Dilemma" in which states are wary of cooperation because the *laissez-faire* conditions under which trade talks take place offer WTO Members too much latitude to manoeuvre and to act opportunistically (Pager, 2006:269). It is

imperative therefore, that the WTO's procedural rules are tightened in order to restrict the ability of Members to attain similarly injurious results to what knowledge-based industries with extensive IPR portfolios achieved in TRIPs. Unless such a reconfiguration of the WTO's remit is enacted, the organisation will be doomed to an even greater degree of intractability and non-cooperation than currently obtains among its extensive membership.

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