

COMMENTS ON TRIPS AT 20 AT THE WTO FORUM 1 OCTOBER – ADRIAN MACEY

I should note that unlike some others on the podium at this and the previous session, my experience of TRIPS over the past twenty years has been from a distance, aside from serving on dispute settlement panels. Unlike others who have continued to be involved, I don't have to live with the consequences of any shortcomings that we negotiators might have been responsible for! But TRIPS has impinged on some major public policy issues that I have had to deal with.

TRIPS legacy in dispute settlement

To follow on from the book launch, I would like to briefly recall the TRIPS legacy in the WTO's current dispute settlement arrangement. The area of "cross retaliation" was pioneered in the early stages of the TRIPS negotiations, and fed into the dispute settlement negotiations later in the Uruguay Round. At the time the big fear was that if this were allowed, developing countries would find themselves under pressure from trade sanctions to increase IP standards. Ironically, withdrawal of concessions in IPRs on cases involving goods concessions has become a tool for the weak against the strong – quite the reverse of those earlier fears. Developing countries have been authorised to use cross-retaliation in IPRs in three disputes unrelated to intellectual property, involving areas as diverse as online gambling, bananas and cotton.

Some of the concepts discussed in the TRIPS negotiations fed into the dispute settlement negotiations in the latter stages of the Uruguay Round when it was clear we were headed towards a unified system.

A feature of dispute settlement cases under TRIPS is that there has been much less than normal frequency of recourse to the Appellate Body. Is this an endorsement of the clarity of the TRIPS Agreement?

Non-violation on the other hand was a bridge too far for TRIPS at the time and may still be....

TRIPS and public policy

I thought it would be useful to link today's discussion to some of the themes from yesterday. TRIPS got several mentions in relation to public policy, and I felt some questions did not get a very satisfactory answers. Amongst civil society, there are perceptions that WTO (TRIPS a prime target) is too powerful and often inimical to public policy goals. Pharmaceuticals and health is one of course but so are environmental issues. These concerns were voiced several times during the Forum sessions yesterday and I sensed some on the part of the Director General when responding. I agree with his observation that the claim that WTO overrides public policy is misguided. So let's look at the two very prominent public policy issues where TRIPS has been cast as a villain.

Pharmaceuticals

We're all familiar with the history that led to the declaration on TRIPS and health. This showed that the TRIPS Agreement could respond to such concerns without major revision. But the same issues are again to the fore in FTA negotiations, where "TRIPS +" provisions are being discussed. As others have pointed out, these are now the main forum for increasing intellectual property rights protection. In this context, some of the contributors to the book have put forward their views on the "balance" of public and private benefit in the TRIPS Agreement.

The Trans Pacific Partnership (TPP) is a contemporary example. It is quite controversial in New Zealand, with pharmaceuticals right at the top of public concerns. The Government has indicated that the price of a deal on what most interests New Zealand (notably dairy access) may be more expensive medicines. But the Government has felt it necessary to reassure the public that they will not face higher prices – implying that the taxpayer would foot bill for any concessions made in the final agreement. The mode of negotiation adopted by the TPP – which has been alluded to more than once during the Forum - means that the public stage is occupied by those ideologically opposed to such FTAs and others who have concerns like medicines prices but have had no answer because they can't officially be shown any text. The latter tend to fear the worst.

Yesterday afternoon at the Forum two groups met in two different rooms to talk about the objective of improving access to medicines especially in developing countries. But they expressed opposite views – one was to increase the protections under TRIPS – TRIPS +. The other argued for largely leaving TRIPS alone but making some other changes to facilitate generics and biosimilar medicines getting on to the market. What a lost a lost opportunity! Why did we not have the two groups together in the same room? The dialogue would have been more informative for the public – and very possibly entertaining as well.

Climate change

Yesterday several questions were asked about TRIPS, the environment and climate change. Not all the questions got convincing answers. This is certainly topical with COP 21 in Paris at the end of the year. So let's look at the public policy issues.

First, the "Paris Agreement" will be "applicable to all". This is political language to say that all countries will need to make contributions. This means the binary distinction under Kyoto (Annex I with emissions reduction commitments and -non-Annex I with none) will have to change. That is not to say there won't be differentiation. We won't be moving to a fully uniform regime for a while. But it should have a sounder basis than two outdated lists.

Second, the science has become clearer or rather the way scientists have communicated it to policy people has – it is about decarbonising the world economy - getting to around net zero CO₂. Cumulative CO₂ is what matters; there is only so much more of it we can emit. So there is a global carbon budget. Once that is used up we'll have to capture anything that we do emit. Getting out of CO₂ means fundamentally a massive global energy transition – away from fossil fuels to renewables and clean energy. This simplification is gradually getting through to policy makers.

The inescapable implication is that there will need to be a transition in all countries, which goes to the core off development policies. That leads to the **third** point – on which all the studies converge. About 85% of that investment will have to come from the private sector. That of course takes us to technologies, which in turn takes us to intellectual property.

Developing countries need access at scale. Their contributions are likely, perfectly understandably, to be conditional on having affordable access to the technologies they need. We've seen this in some of the contributions (INDCs) announced ahead of Paris. And since for many countries giving their citizens access to energy per se is the first objective, leapfrogging fossil energy will be accepted only if it's affordable and/or if financial assistance is available. Yesterday Minister Mahomed from Kenya talked about the high cost of the efforts her country has already made to develop renewable energy.

Energy markets around the world are evolving though, even with very low or no carbon prices. In New Zealand, where we don't subsidise renewables and where the carbon price is too low to influence commercial decisions it's now more economical to build wind or geothermal power generation plants. Coal-fired plants are closing. And globally, there is now more investment in new renewable electricity than new fossil-fuelled electricity.

To what extent is IP protection a barrier to accessing technology, and do we need to look at some form of replication of the TRIPS and Health declaration?

I should point out that you won't find the term "intellectual property" in the climate negotiating texts – it's a sensitive issue - but is to be read between the lines in such phrases as "development and transfer of technology" and "the different stages of the technology cycle".

Actually the discussion has been rather unspecific. I recall only one example cited of denial of access to technology. It concerned power generation – but it turned out to be unrelated to IP, as it was an export prohibition on security grounds. Another case cited was some difficulty in getting a licence to manufacture wind generators. There are apparently one or two sub-sectors of this industry where there is a concentration of patents in the hands of a small number of firms. But for the most part energy markets are competitive. There is a network of technologies going into renewable energy and a diversity of types of renewables too. There is no analogy with pharmaceuticals here – the single molecule and long delays needed for testing and then to gain regulatory approval. So in my view there's been more rhetoric than reality. (Which is not to deny that there can be delays in getting new energy technologies to market. The point was picked up by WIPO in a 2011 study, which interestingly did not find that IP was contributing to the problem.)

In the climate negotiations we are shaping up to have large scale commitments to assist developing countries – mobilising funding through the Green Climate Fund, capacity building in green technologies, and special technology mechanisms. Some of this is underway. And in the negotiating texts, the trilogy of "finance, technology and capacity building support" appears repeatedly.

One of the first things governments can do to assist the shift to clean energy is to price carbon and stop subsidising it. There is a symmetry between the scale of subsidisation and the need for financial assistance to develop renewables. Then, governments can consider complementary regulatory and other measures to promote the use of renewables. IP comes nowhere near the top of the list of the most effective policy interventions.

So there appears no immediate need to reach for the TRIPS agreement. If we did find a planet-saving technology that was practically inaccessible for reasons to do with intellectual property then we would find a way of making it available. It is highly unlikely this would need to entail a major revision of TRIPS.

So is TRIPS fit for purpose? It's been remarkably durable and flexible for a 20 plus year-old instrument. As one of the areas of WTO the most exposed to rapid technological change it has kept pace without revealing major shortcomings. So we can conclude that while there may be some "could have done better" areas, as pointed out by contributors to the book, those balances struck in the original agreement are not too far out.

