

Organizing for Influence: Developing Countries, Non-Traditional Intellectual Property Rights and the World Intellectual Property Organization

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- I. Introduction
- II. International Trade, Institutional Convergence and Poverty Reduction
- III. Working Typology of Successful Developing Country Negotiating Strategies
- IV. WIPO, Developing Countries and Intellectual Property
- V. WIPO and Non-Traditional Intellectual Property Rights
- VI. Conclusion

I. Introduction

On 13-18 June 2004, political leaders from over 100 developing countries met in São Paulo, Brazil, for the quadrennial United Nations Conference on Trade and Development (UNCTAD). The goal of the conference was to serve as an organizing forum for developing countries to

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search for ways to ensure that trade integration and economic development are complementary.²

In addition to the usual calls for preferential market access, special and differential treatment, and an end to agricultural subsidies in developed countries, two additional developments stand out. First, one of the animating premises of the conference was that “trade liberalization has been unsuccessful in many developing countries.”³ The conclusion drawn from this premise was that developing countries should push for trade policies and international trade rules that permit them to “integrate at their own pace, in accordance with their particular needs and circumstances.”⁴ While this is far from a categorical denunciation of international trade, it sends a clear signal that developing countries are increasingly skeptical of one-size-fits-all trade and development policies. Second, conferees identified the need for developing countries to do a better job of consolidating their negotiating strategies in the WTO as a means for achieving these goals.

As Part II. of this paper shall describe, the first of these developments coincides with a growing skepticism among economic development specialists about the relationship between what Harvard economist *Dani Rodrik* calls “first-order economic principles”—the fundamental principles that all successful economies more or less have in place, including property rights, fiscal responsibility, sound currency, and market-based incentives—and their specific institutional form. The role of free trade in economic development has come under particular fire, with domestic institutions looking more and more like the primary driver of economic development. One of the key lessons of this literature is that domestic institutions tend to be most successful at causing growth when they are homegrown and dynamic, but nonetheless fulfill basic first-order economic principles.

What seems to be emerging is a consensus among the political leadership of developing countries and among economic development specialists that successful economic development strategies tend to be *inter alia* context-dependent; countries at different stages of economic development and with different underlying political and economic cultures require different development strategies. An important corollary is that

² UNCTAD XI, available at: <http://www.unctadxi.org/templates/Startpage___103.aspx>.

³ UNCTAD XI, The Conference: Development Strategies. Available at: <http://www.unctadxi.org/templates/Page___108.aspx>.

⁴ Ibid.

developing countries generally require some measure of room to experiment with their domestic institutions. But with the trend in trade negotiations moving more and more in the direction of relocating regulatory policy-making at a transnational level, their ability to experiment with their institutions is increasingly limited.

There are few indications that developed countries share in the growing skepticism over the “single-undertaking” mindset. As a result, developing countries will likely have some difficult negotiating ahead of them. Unfortunately, however, developing countries individually and collectively have small markets, which severely limits their negotiating leverage and makes them vulnerable to developed country coercion.⁵ Is the way to manage this fundamental obstacle more and better organization among developing countries, as the June 2004 UNCTAD conference seems to suggest? Part III. argues for a qualified “yes” and summarizes some steps that could help developing countries adopt a more proactive (as opposed to reactive) role in international trade negotiations.

Parts (IV.) and (V.) document and assess a recent, ongoing effort among developing countries under the auspices of the World Intellectual Property Organization (WIPO) to cooperatively orient the global intellectual property rights regime in a direction that better favors their interests. This effort involves TRIPS implementation issues (Part IV.) and the subject matters of traditional knowledge and genetic resources (collectively, “non-traditional intellectual property”) (Part V.), and is interesting for several reasons. First, it concerns intellectual property, which is among the more controversial developed-developing country international trade issues. It is also one of the most comprehensive acts of substantive harmonization of regulatory rules in the WTO framework. In addition, WIPO’s work with developing countries on TRIPS implementation issues tends to confirm many of the characteristics catalogued in Part III. On the other hand, this typology suggests that

⁵ It’s sometimes quipped that there’s no such thing as a bad trade agreement, since all countries should in theory leave the negotiation better off than when they came. See, e.g., A.L. McDonald, “Organisation and Management of a Complex, International, Economic Negotiation,” *World Economy* 23 (2000), 199 et seq. But after the Uruguay Round, there is some reason to suspect that it isn’t this simple, as the inclusion of the TRIPS Agreement probably resulted in a net loss for certain developing countries. See K. Maskus, *Intellectual Property Rights in the Global Economy*, 2000. Developed countries threatened to punish developing countries if they didn’t sign the deal.

the prospects for a successful, collective push by developing countries for including protections for non-traditional intellectual property are dim, and would be an unwise use of their precious negotiating capital.

Before proceeding, some caveats are in order. WIPO's work on TRIPS implementation and non-traditional intellectual property are still mid-stride, so the story presented in Parts IV. and V. must be regarded as incomplete and preliminary in nature. In addition, this article makes no strong causal claims between WIPO's work and specific outcomes at Doha (such as the limited concessions on access to medicines achieved there). Putting together a stronger causal story of WIPO's role in the complicated, contentious politics of intellectual property protection since the close of the Uruguay Round is beyond the scope of this article.⁶ Instead, this article has the more modest aim of showing how institutions, in this case WIPO, can serve as the hub in a network of developing countries that helps them learn more about their options, build stronger coalitions, and produce specific policy recommendations that collectively strengthen their ability to resist new trade rules that are not in their development interests, in light of ongoing research by development economists that challenges the causal relationship of free trade and institutional harmonization to economic development.

II. International Trade, Institutional Convergence and Poverty Reduction

In the late 1980s, a sort of development orthodoxy popularly (if loosely) known as the "Washington Consensus" gained widespread acceptance among mainstream economists.⁷ It was the culmination of several decades' worth of critique on what was previously the prevailing view among development economists, namely that a carefully managed trade policy had been critical to the impressive economic development of countries like Japan, South Korea and Taiwan. The policy recom-

⁶ For an attempt to overlay a theoretical structure over this environment, see L. R. Helfer, "Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking", *Yale J. Int'l L.* 29 (2004), 1 et seq.

⁷ John Williamson is coined for crediting the phrase. See "What Washington Means by Policy Reform", in: J. Williamson (ed.), *Latin American Adjustment: How Much Has Happened?*, 1990.

mentation associated with the older view was that countries seeking to develop should likewise adopt trade policies.

Anne Krueger, one of the most influential economists associated with the “Washington Consensus”, sums its critique of the old view as: 1.) misapplying sound theory; 2.) inferring positive policy proposals from negative results; and 3.) basing good theory on a series of “stylized facts and premises.”⁸ That is, while there has always been basic agreement over the fundamental economic *principles* that all successful economies must display, the two camps diverged over which specific *policies* developing countries should adopt to promote growth.

A new set of policy recommendations became associated with the “Washington Consensus”. These recommendations were highly specific and typically advocated that developing countries adopt more or less facsimile versions of the policies and institutions of leading capitalist economies, especially those of the United States (e.g., liberal labor and capital markets, openness to trade, etc.).⁹ One set of arguments associated with the “Washington Consensus” is that trade liberalization has played a strong historical role in the economic development of developed countries such as the United States, that trade liberalization will cause developing countries to grow faster, and that the particular form that trade liberalization should take is basically that of the United States.

Just as the “Washington Consensus” acquired mainstream acceptance in the academy and among economic development professionals, so did trade liberalization become increasingly politically viable for developing countries in the 1980s, as the political leadership in the developing world interpreted “the export-oriented policy stance taken by the dynamic economies of South-East Asia, and the collapse of central planning” as evidence that liberalization, not dirigisme, held the greatest growth potential.¹⁰ In essence, mainstream economics thinking and political will converged to create a powerful force towards trade liberalization and the substantive harmonization of regulatory institutions.

⁸ A. Krueger, “Trade Policy and Development: How We Learn”, *American Economic Review* 87 (1997), 1 et seq.

⁹ For a list, see D. Rodrik, “Growth Strategies” (October 2003), Table 1. Available at <<http://ksghome.harvard.edu/~drodrik.academic.ksg/growthstrat10.pdf>>.

¹⁰ B.M. Hoekman/ M.M. Kostecki, *The Political Economy of the World Trading System*, 2001, 391.

The empirical evidence supporting the causal role of trade liberalization in economic development, however, is beginning to thin. The historical record on the relationship between openness to international trade and the economic development of countries like the United States strongly suggests that they developed despite a farrago of trade barriers that would make any strident neoliberal blush.¹¹ And recent econometric estimations of the effects of trade liberalization on economic development are showing an insignificant role for that variable, at best.¹² These same studies suggest that the quality of domestic institutions, not trade (or geography), is a key driver of economic development.¹³

There are two additional—and important—levels of analysis that must be carried out if this finding is to aid in the formulation of development strategies. First, the institutional characteristics that are most relevant to economic development have to be distilled from the incredibly diverse range of institutions out there. *Rodrik* presents the outline

¹¹ P. Bairoch, *Economics and World History: Myths and Paradoxes*, 1995, Part I.

¹² See, e.g., D. Acemoglu/ S. Johnson/ J. Robinson, “Institutions as the Fundamental Cause of Long-Run Growth,” National Bureau of Economic Research Working Paper No. W10481 (2004); D. Rodrik/ A. Subramanian/ F. Trebbi, “Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development,” *Journal of Economic Growth* 9 (2004), 131 et seq.; R.B. Freeman, “Trade Wars: The Exaggerated Impact of Trade in Economic Debate,” *World Economy* 27 (2004), 1 et seq. This point should not be mistaken as a claim that trade liberalization cannot fuel growth. See, e.g., A. Subramanian/ Shang-Jin Wei, “The WTO Promotes Trade, Strongly but Unevenly,” National Bureau of Economic Research Working Paper No. W10024 (2003). The problem for developing countries is that in order for trade to fuel growth, their domestic economies and institutions must first meet a host of ideal conditions. Since conditions in most developing countries are typically far from ideal, trade liberalization is not the panacea it is sometimes presented as. Cf. Rodrik, see note 9.

¹³ R. Hall/ C.I. Jones, “Why do some Countries produce so much more Output per Worker than others?,” *Quarterly Journal of Economics* (1999), 83 et seq. (114); Rodrik/ Subramanian/ Trebbi, see note 12; W. Easterly/ R. Levine, “Tropics, Germs, and Crops: How Endowments Influence Economic Development,” *Journal of Monetary Economics* 50 (2003), 3 et seq. Citing these sources, Rodrik is more categorical: “There is now widespread agreement among economists studying economic growth that institutional quality holds the key to prevailing patterns of prosperity around the world;” D. Rodrik, “Getting Institutions Right”, (2004), 1. Available at: <http://ksghome.harvard.edu/~drodrik.academic.ksgh/ifo-institutions_article_April2004_.pdf>.

of such a typology.¹⁴ Focusing primarily on the impressive economic development that has taken place in East Asia since World War II, he suggests that quality institutions operationalize a set of principles that any effective development strategy must have: fiscal responsibility, sound monetary policy, prudential regulation, and market-influenced incentives, including property rights. Second, these findings must then be transposed into a development strategy for a particular country.

While there is still a considerable amount of research that needs to be done on this level of analysis,¹⁵ there are nonetheless some important, general lessons about how to do this. Two of them are relevant for purposes of the present discussion. One is that the development strategy must be politically sustainable. This seems obvious, but it is sometimes easy to forget that economic development often entails significant redistributive consequences, which may threaten the interests of politically important groups. If a strategy is unsustainable or unrealistic, it is of little practical use. The other lesson is that successful growth strategies tend to operationalize these characteristics in a way that leverages local opportunities while managing or circumventing local constraints. As *Rodrik* puts it, these principles “do [...] not determine the form that institutional arrangements should or do take ... [they] all come institution-free.”¹⁶ Quality institutions typically reflect a politically sustainable (though not necessarily fair or just) compromise between the efficiency of an economic policy and its distributive consequences. As such, successful institutions tend to be homegrown and hence unique to a particular social context.¹⁷ There is no ideal, Platonic institution that corresponds to any of the basic principles of economic development.

This typology implies a significant critique of the more orthodox view associated with the “Washington Consensus”: just as the causal role of trade liberalization relative to other variables in fueling growth and reducing poverty has come under fire, so has the notion that neo-classical economic principles generate a finite list of template institutions that countries *must* implement in order to jumpstart growth and reduce poverty.¹⁸ Whereas the orthodox view tends to recommend that

¹⁴ Rodrik, see note 9.

¹⁵ Rodrik, “Getting Institutions Right,” see note 13.

¹⁶ Rodrik, see note 9.

¹⁷ This isn’t to say that these or any institutions necessarily evolved or were purposefully created in light of these goals. Rodrik, see note 9.

¹⁸ A broader, and highly accessible critique of the Washington Consensus is J. Stiglitz, “More Instruments and Broader Goals: Moving Toward the Post-

developing countries more or less adopt facsimiles of Western institutions, the critique says that countries tend to grow fastest when their institutions are competent, dynamic, and home-grown. If quality institutions tend to be homegrown, and Western-style institutions tend not to travel well to other contexts, then rules that constrain the freedom of developing countries to experiment with their institutions may obstruct developing countries from achieving their growth potential.

Thus, one of the overarching lessons of this critique is that developing countries need space to experiment with their institutions. But the focus of the multilateral trade negotiations is increasingly oriented towards forging transnational regulatory procedures and substantive rules that bind freedom to experiment, and not just the lowering of tariff and non-tariff barriers to trade. The goal of this is to induce a convergence of regulatory and other economic institutions among participating countries. The implicit assumption here, however, is that the institutions we are converging towards are in fact the kinds of institutions that are especially effective at promoting economic growth, or at least better than the diverse institutions they replace. This assumption, however, is looking increasingly dubious from an economic development standpoint, and the June 2004 UNCTAD conference strongly suggests that the political leadership of developing countries have also retaken this view.

Developing countries need flexibility to experiment with their institutions, but it is that flexibility that positive integration curtails. Meanwhile, the strong causal arguments made on behalf of the growth effects of international trade are looking more and more doubtful.

This should sound a note of caution for developing countries about accepting international trade rules that require them to import foreign institutions. Positive integration may not always be conducive to economic development. Indeed, if it unduly stifles the capacity of developing countries to experiment with their institutions, it might even be counterproductive. How can developing countries more effectively assert their development interests in international trade negotiations?

Washington Consensus," 1998 WIDER Annual Lecture, Helsinki, Finland.
Available at: <<http://www.globalpolicy.org/soecon/bwi-wto/stig.htm>>.

III. Working Typology of Successful Developing Country Negotiating Strategies

This Part of the article presents a critical summary of work on the political economy of trade negotiations between the developed and developing world, focusing in particular on how developing countries can collectively maximize their limited bargaining power.¹⁹

Putting aside all pretenses about the Doha Round being primarily about economic development,²⁰ an important question is whether developing countries can as a practical matter withstand efforts by the United States, the European Union, Canada and Japan (known as “the Quad”) to require them to adopt facsimiles of Western institutions. The TRIPS Agreement, which is arguably the most blatantly unfair feature of the international trading regime enshrined by the WTO,²¹ is perhaps

¹⁹ This Part draws heavily on P. Drahos, “When the Weak Bargain with the Strong: Negotiations in the World Trade Organization”, *International Negotiation* 8 (2003), 79 et seq.

²⁰ I do not mean to imply that trade ministers from wealthy countries are being duplicitous. I mean only to suggest that their primary job is to promote the interests of domestic producers in their constituencies, and that any concessions they make to economic development will have been made only to the extent necessary to secure the agreement of developing countries.

²¹ The arguments that were advanced in favor of it are generally weak or simplistic. For example, the argument that IP protection is in the long-term interests of developing countries, almost all of whom are net importers of IP, is simplistic because many countries are a long way from being able to attract or sustain the types of industries where IP rights are especially important (such as in high-technology fields). Moreover, any benefits a country might receive from establishing OECD-levels of IP protection must first be weighed against the tremendous costs associated with implementing and enforcing a new IP regime, and second against the fact that IP protection often entails higher prices for inputs, many consumer products, and pharmaceuticals. Hoekman/ Kostecki, see note 10, 290 et seq. The development benefits of IP vary widely by country, see K. Maskus, “Intellectual Property Rights and Economic Development”, *Case W. Res. J. Int’l L.* 32 (2000), 471 et seq., and the only allowance that TRIPS makes for this is a three-tiered implementation phase, where developed, developing, and least developed countries have different implementation time-tables. The argument that TRIPS must be appraised in light of the overall package of benefits that fell to the developing countries as a result of the Uruguay Round is also weak. For many developing countries, the rent transfer associated with TRIPS resulted in a substantial net transfer of rents out of the country,

the most poignant example of developing countries' difficulties in resisting determined efforts by "the Quad" to impose Western-style institutions on the developing world. "The Quad", led by the United States, strong-armed developing countries into accepting TRIPS by threatening to sanction recalcitrant countries and/or eliminate their Generalized System of Preferences (GSP) status.²² This was an effective bargaining strategy for the United States and its economic allies, since during the 1980s developing countries had become increasingly dependant on access to developed countries' markets.²³ In addition, developed countries made concessions of their own that were intended to sweeten the Uruguay Round deal for developing countries.²⁴ "The Quad" has generally been slow to implement this component of the bargain, and developing countries have a difficult time enforcing compliance. In addition, developing countries don't have the funds and the expertise to play a sustained role in debates over the substance of TRIPS.²⁵

Sell aptly describes the situation facing developing countries:

"With the exception of initial developing country resistance, opposition to TRIPS emerged rather late—after its adoption. This implies that while TRIPS cannot be "undone" in any direct sense, the fight over loopholes, alternative interpretations of vague language, and perhaps, most importantly, effective resistance to further expansion of global intellectual property rights lie ahead. This suggests some

wiping out a considerable degree of the benefits reaped elsewhere in the Round. *Ibid.*, at 292-293. In addition, developed countries have not fully implemented their end of the *quid pro quo* for TRIPS, namely liberalization of their textile and clothing markets.

²² S. Sell, "Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice", *International Organization* 49 (1995), 315 et seq.

²³ Sell, see note 22, 324-325.

²⁴ For an overview, see P. Drahos, "Global Property Rights in Information: the Story of TRIPS at the GATT", *Prometheus* 13 (1995), 6-19. See also Hoekman/ Kostecki, see note 10, 297-299.

²⁵ But with the help of NGOs and other civil society actors, they were able to successfully achieve greater freedom to grant compulsory licenses on pharmaceutical patents and parallel import generic drugs from other countries. See S. Sell, "TRIPS and the Access to Medicines Campaign", *Wisconsin International Law Journal* 20 (2002), 481 et seq. (522); R. Mayne, "The Global NGO Campaign on Patents and Access to Medicines: An Oxfam Perspective", in: P. Drahos/ R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development*, 2002, 244.

limits to the type of governance that TRIPS' architects had in mind, but it also opens up possibilities for more balanced democratic governance of intellectual property. The deck is still stacked in favor of a commercial, as opposed to social, agenda ..."²⁶

If it is hard for developing countries to push back against proposals and interpretations by "the Quad" that are not entirely growth-friendly or effectively enforce WTO rules in their favor,²⁷ then it is doubly hard for them to adopt a proactive role in actively shaping the international trade agenda in a more development friendly way.

Drahos identifies four sources of bargaining power in trade negotiations: market power, commercial intelligence networks, coalition-building skills, and the capacity of a negotiator to make binding commitments.²⁸ He suggests that the first two—market power and commercial intelligence networks—are the most important.²⁹ The last one is irrelevant for present purposes. The importance of market power is obvious: the more dependent an exporting country is on another country's market, the greater its interest in guaranteeing access to it, and hence the greater the negotiating leverage of the importing country. Commercial intelligence networks are also important because they enable a country to formulate an accurate assessment of the costs and benefits of a bundle of concessions. Developing countries are weak on both counts: they have very little market power, and the density of their commercial intelligence networks compared to the United States and other members of "the Quad" is paltry, since they have nothing like the corporate and governmental resource base of developed countries. Indeed, many countries have few or no diplomats at the WTO in Geneva.³⁰

Coalition building skills are an intuitive source of potential bargaining power for developing countries: as the old saying goes, "there is strength in numbers." Developing countries make up over two-thirds of the WTO's membership, so they certainly have raw numerical strength on their side. It is also well-documented that developing coun-

²⁶ Sell, see above, 498.

²⁷ On the other hand, the developing countries have so far managed to fend off attempts by "the Quad" to introduce labor and environment standards into the WTO framework.

²⁸ Drahos, see note 19, 82 et seq.

²⁹ Drahos, see note 19, 83 et seq.

³⁰ For an analysis of the problems facing African countries in particular, see R. Blackhurst/ B. Lyakurwa/ A. Oyejide, "Options for Improving Africa's Participation in the WTO," *World Economy* 23 (2000), 491 et seq.

tries tend to fare much better in multilateral WTO negotiations than they do when they negotiate with developed countries on a bilateral basis. Unfortunately, however, the ability of sheer numbers to compel fairer trade agreements is limited. “The Quad” economies are so big and developing countries’ economies are generally so small in comparison that even a reasonably strong coalition of developing countries would still have little bargaining leverage.³¹ In addition, the negotiating norms and conventions that typically inform multilateral trade negotiations do not work in developing countries’ favor: the practice of building consensus in GATT and WTO negotiations typically begins by securing the consensus of the most powerful countries, and then proceeds to bring ever more countries on board. By the time this effort reaches developing countries, the costs of withholding consent are strong, so developing countries typically just “let the consensus juggernaut roll on.”³² Finally, developing countries sometimes have different interests and goals on particular issue areas, which can make it difficult for them to collectively develop the sort of detailed, specific negotiating strategy that modern trade negotiations demand or to sustain a common front when the consensus juggernaut appeals directly to individual countries’ self-interest.

Nevertheless, coalitions among developing countries (and other actors, such as NGOs, international institutions, or more powerful states), do hold some promise to improve the ability of developing countries to assert and defend their economic interests. While there is no substitute for market power, the right kind of coalition can maximally leverage what market share its members do have, enhance its members’ ability to acquire more and better information about the costs and benefits of alternative negotiating strategies, and boost the legitimacy of the group’s negotiating positions by demonstrating a broad consensus over any inherent validity they might enjoy (for instance, a proposal that accords with conventional economic or moral thinking will enjoy some inherent validity). At the same time, the coalition should produce practical, specific proposals and find ways to sustain cohesion in light of the fact that developing countries are not monolithic—a coalition that tries to be all things for all its members will often have to sacrifice specificity for consensus.

³¹ For example, the 48 least-developed countries make up only 5 per cent of world trade. Hoekman/ Kostecki, see note 10, 9.

³² Drahos, see note 19, 86.

In their examinations of the Cairns Group of Fair Trading Nations, an influential coalition of free-trade oriented, highly-competitive agricultural exporters comprised largely of developing countries, *Drahos*, *Higgott* and *Cooper*, identify several features of relevance to the ability of developing countries to leverage their numbers and forge a more effective coalition.³³ First, there must be a coincidence of self-interest among the coalition members that is sufficiently robust to generate specific goals and negotiating postures. This requires effective leadership to keep the coalition fixed on reaching agreement over specific goals while avoiding a breakdown of the coalition in the process. In the Cairns Group, Australia and Canada—wealth countries with strong repute in the international community—were able to bring their considerable analytic resources to bear on group tasks and use their good offices to sustain the cohesion of the coalition, help promote strong communications among group members, and facilitate the exchange of information. The substantive research the coalition produced on the costs and benefits of agricultural protectionism in developed countries also jibed with current fashions about the benefits of trade liberalization while simultaneously shaming developed countries' protectionism by documenting the harm this does to developing countries. Their proposals made good economic sense, and could be used to generate a strong moral critique of protectionism by showing how much it hurt people in developing countries. On the other hand, since the Cairns Group focused exclusively on agriculture, rifts among participating countries over other potentially divisive topics didn't directly threaten the viability of the group.³⁴ The access to medicines campaign started in 1996 by NGOs and developing countries had similar features: effective leadership by the highly-respected Quaker United Nations Office, an NGO, solid research that rebutted key claims made by opponents of the campaign and made the costs of inaction difficult to contest, specific policy proposals, and a strong public relations campaign that shamed opponents.³⁵ Finally, the Cairns Group comprises a significant share of the global ag-

³³ Drahos, see note 19, 79; R.A. Higgott/ A.F. Cooper, "Middle Power Leadership and Coalition Building: Australia, the Cairns Group, and the Uruguay Round of Trade Negotiations," *International Organization* 44 (1990), 589 et seq.

³⁴ Drahos, see note 19, 79.

³⁵ Drahos, see note 19, 94-95.

ricultural market, leading *Higgot* and *Cooper* to call it “a third force in the context of the GATT negotiations.”³⁶

There is no reason to think that operationalizing these features would necessarily guarantee developing countries a stronger, more proactive voice in international trade negotiations. They did, however, facilitate the ability of the Cairns Group and the access to medicines campaign to more effectively assert their interests. As we look ahead to the Doha Round and beyond, and behind to see how ineffective developing countries have been in asserting their interests, it should be clear that developing countries face an uphill battle. The more we learn about what sort of arrangements, including institutional ones, best facilitate their capacity to effectively negotiate, the better the chances that the Doha Round produces development-friendly agreements.

The next two sections document and assess WIPO’s role in helping developing countries more effectively assert their interests along two dimensions. The first dimension pertains to the considerable implementation challenges that TRIPS posed to many developing countries.³⁷ WIPO was tasked with helping developing countries implement their TRIPS obligations, and has served as a forum for them to develop a stronger, more cohesive voice over implementation challenges. The characteristics of this effort confirm the many features of the typology described above. The second dimension, considered in Part V., is serving as a forum, organizing partner and source of technical assistance for developing countries striving to develop domestic legal frameworks for establishing and protecting non-traditional intellectual property rights.

IV. WIPO, Developing Countries and Intellectual Property

WIPO’s role in the international trade regime is unique. It is a specialized United Nations agency with a mission to afford the development of intellectual property rights. It is not part of the formal WTO institutional framework, though it is the host institution for most pre-TRIPS

³⁶ As Drahos points out, however, in the Uruguay Round “domestic market power was not the fundamental source of the Cairns Group’s success”; Drahos, see note 19, 92.

³⁷ For an overview of these challenges, see Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*, 2002, 137.

intellectual property treaties. In 1995 WIPO and the WTO signed the "WTO-WIPO Agreement," whereby WIPO accepted the bulk of the responsibility for providing technical expertise and assistance to developing countries seeking to make their laws TRIPS-compliant.³⁸ Though WIPO does not directly and formally advocate on behalf of developing countries, this arrangement effectively made WIPO the institutional hub and sounding board for developing countries' concerns about the TRIPS Agreement. It also situated WIPO as an interlocutor between developing countries and developed countries.

In this capacity, WIPO has organized a lengthy series of regional symposiums for developing countries on the implementation of the TRIPS Agreement beginning in 1996, shortly after the WTO-WIPO Agreement entered into force.³⁹ WIPO held them in locations that are easier for developing countries' representatives to attend than Geneva. WIPO also paid many participants' travel costs. These events were an important vehicle by which developing countries compared and shared their experiences over the implementation of TRIPS. Signs of disappointment among developing countries over the perceived fairness of TRIPS and the daunting implementation challenges that lie before them emerged early on in these symposia. WIPO also commissioned several studies on the implications of the TRIPS Agreement for developing countries. These and other studies poignantly identified the costs developing countries faced in building the institutional capacity needed to ensure that their intellectual property rights regimes satisfied the OECD-level standards set forth in the TRIPS Agreement.⁴⁰

³⁸ See WTO-WIPO Agreement, article 4, entered into force 1 January 1996, available at: <www.wipo.org>. In October of 1995, the WIPO General Assembly made it clear that WIPO would be responsible for "respond[ing] to requests from developing countries to WIPO for legal and technical assistance relating to the TRIPS Agreement." The two organizations strengthened WIPO's role as an intermediary between developing countries and the TRIPS Agreement in 1998 with additional technical cooperation. See PRESS/108 of 21 July 1998, "WTO and WIPO join forces to help developing countries meet year-2000 commitments on intellectual property," available at: <http://www.wto.org/english/news_e/pres98_e/pr108_e.htm>.

³⁹ Governing Bodies of WIPO and the Unions Administered by WIPO, Thirty-First Series of Meetings Geneva, 22 September to 1 October 1997; Overview of Activities and Developments in the Year 1996 and the First Half of the Year 1997, Doc. AB/XXXI/6 of 31 July 1997.

⁴⁰ Cf., e.g., Maskus, see note 5.

While significant implementation challenges lie ahead—especially for least-developed countries—WIPO’s work should be regarded as a preliminary success, as it helped these countries learn more about the implementation obstacles they faced, how to overcome them, and the costs associated with implementing a TRIPS-compliant regime.⁴¹ WIPO helped developing countries better understand just how costly the TRIPS Agreement is, at least in the short-run, and appears to be the first sustained effort to study and address the relationship between international trade and economic development in an organized, collective forum comprised of a broad cross-section of developing countries. These efforts owe their success to several factors. These factors confirm the importance of many of the criteria identified in Part III. as relevant to active developing country participation in the international trade regime.

First and probably foremost, the fact that developing countries generally faced high implementation costs furnished a common ground for them to begin to think more systematically about the relationship between intellectual property as it relates to international trade and economic development. WIPO, for its part, had experience with IP issues of concern to developing countries, so it made sense to make it a key interface between developing countries and the WTO on matters pertaining to intellectual property. Since its inception in the mid-1970s, WIPO has helped developing countries to develop indigenous intellectual property regimes. Intellectual Property did not become an international trade issue in the context of GATT/WTO until the TRIPS Agreement, and so WIPO’s developing country initiatives prior to then were focused entirely on economic development and not on the institutional convergence required by TRIPS.⁴²

⁴¹ It would be inappropriate to attribute any failure on the part of certain developing countries to implement their TRIPS obligations to a failure on WIPO’s part; WIPO can’t *make* countries implement their obligations, nor is it in a position to provide substantial funding for countries’ implementation efforts.

⁴² During this time, for example, WIPO and UNESCO jointly produced “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions,” which emphasize the cultural rights and human rights elements of folklore, and not the Anglo-American utilitarian justification for intellectual property protection that dominates mainstream international intellectual property discourse. See in this respect UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit

This initiative was aimed at helping developing countries to develop a capacity for safeguarding their folklore against exploitation by Intellectual Property producers in developed countries, which had defended their appropriation of folklore by claiming that this material did not qualify for copyright or other protection on the basis of it not being either new or creative, i.e. failing the utility test that underpins most Intellectual Property regimes.⁴³ To cite another example, when the Convention on Biological Diversity called for the creation of a benefit-sharing and sustainable development scheme to manage international trade in genetic resources, WIPO took the lead and developed model material transfer agreements, and situated itself as the leading forum for hosting consultations on this topic.⁴⁴ WIPO also accepted a commission from UNEP to undertake a study, entitled “Biological Diversity and Biotechnology,” which examined the “links between intellectual property aspects of biotechnology and the conservation, use, and benefit-sharing of biological resources” in light of the Convention on Biological Diversity.⁴⁵

Moreover, WIPO effectively organized an intelligence network for developing countries on the distributive consequences of the TRIPS Agreement and the relationship between TRIPS and economic development more broadly, with itself as a hub in that network. The empirical record that WIPO helped to create on the probable distributive consequences and the implementation costs of TRIPS furnished developing countries with an ethical platform from which to critique developed countries’ foot-dragging on implementing their commitments on such things as agriculture and textiles. WIPO did not engage in advocacy on behalf of its constituents in the same way that the Cairns Group or participants in the access to medicines campaign did. Instead, it facilitated the beginnings of an effective coalition among developing countries on intellectual property—an important step towards the more proactive role that they must take in the future if they are to ensure that trade rules are in their development interests. Such an effort was certainly ab-

Exploitation and Other Prejudicial Actions (1982), available at: <<http://users.ox.ac.uk/~wgtrr/modprovs.htm>>.

⁴³ Under the dominant United States paradigm of intellectual property, IP rights are granted to ensure a socially optimal level of IP production.

⁴⁴ Other specialized UN agencies, such as the UNDP also took a leading role, in consultation with WIPO.

⁴⁵ Main Program 11, “Global Intellectual Property Issues,” Doc. A/32/2WO/BC/18/2, <http://www.wipo.int/eng/document/govbody/wo_gb_ab/pdf/prg11.pdf>

sent during the Uruguay Round, where developing countries failed to organize a robust coalition against including intellectual property in the WTO framework. Some have suggested that if developing countries had better understood the distributive consequences of TRIPS and the costs of implementing it, they would have collectively resisted the Agreement far more strenuously, and possibly extracted more concessions from proponents of TRIPS. While we can only speculate whether developing countries would have been able to successfully prevent intellectual property from being made subject to WTO discipline even if they had fully grasped what they were getting into, WIPO's work has undoubtedly helped them better understand the distributive consequences and implementation costs of TRIPS *ex ante*, while enabling them to develop a clearer, more cohesive sense of common purpose and interest. As the next Part describes, WIPO also helped enable developing countries to more effectively raise the issue of non-traditional intellectual property rights as a trade issue, an area developed countries have no interest in subjecting to WTO discipline.

V. WIPO and Non-Traditional Intellectual Property Rights

There is no generally accepted definition for which forms of knowledge or resources would or should enjoy protection under a non-traditional intellectual property rights regime. Here, traditional knowledge shall refer to genetic resources, folklore and folk wisdom. Rights granted and duties imposed might include *inter alia* disclosure requirements on the geographic origin of genetic resources, or the right to collect fees for using the knowledge and block the exploitation or misappropriation of the knowledge. The Doha Ministerial Declaration in 2001 directed the TRIPS Council to "examine" the relationship between TRIPS and non-traditional intellectual property rights.⁴⁶ While this is far from a guarantee that non-traditional intellectual property rights will be added to a future WTO bargain, it nonetheless merits attention because attempts by developing countries acquired no traction in the Uruguay Round negotiations. Now, however, non-traditional intellectual property rights are being formally explored and discussed in the WTO with some eye—at least among many developing countries—towards a possible role in the WTO system.

⁴⁶ Para. 19 of the Doha Ministerial Declaration.

As we shall see below, WIPO has helped developing countries insert TRIPS into the more mainstream (at least from OECD country's viewpoint) debates over trade and Intellectual Property for two reasons. First, as in its work on TRIPS implementation issues, WIPO facilitated the emergence of a more effective coalition of developing countries seeking to introduce non-traditional intellectual property rights into debates over trade and intellectual property. Second, it helped developing countries collapse the distinction between trade/non-trade, developed/developing country intellectual property issues. Successfully raising an interest, however, is a long way from seeing that interest implemented. The remainder of the section shall then explore the prospects for success in this endeavor.

As WIPO fulfilled its mandate to assist developing countries in the implementation of the TRIPS Agreement, it also continued to pursue various programs and initiatives designed to advance the development of intellectual property rights outside the immediate context of TRIPS and international trade. These programs focused on a variety of issues, which tend to separate out into issue areas dominated by developed countries on the one hand (e.g., internet domain names, biotechnology and patents, database protection), and topics of concern for developing countries on the other hand (e.g., the work of the Permanent Committee on Cooperation for Development Related to Intellectual Property). Until the Uruguay Round, this was a familiar pattern in WIPO programming because developing countries typically had little interest in mimicking the Intellectual Property regimes of the developed world. As a result, WIPO programs were generally segregated along developed/developing country lines.

WIPO's programming on institutional and legal frameworks for protecting traditional knowledge, which as we saw earlier dates back to the early days of the agency, fit this description. This work greatly expanded in the late 1990s, however, as domestic and international efforts to develop legal regimes for protecting traditional knowledge intensified. The genesis of this expansion is interesting because elements of it seem to have emerged out of a series of consultative committees that pertained primarily to topics of concern for developed countries. In 1998, WIPO members created several Standing Committees comprised of governmental representatives from mostly OECD countries to discuss emerging Intellectual Property issues.⁴⁷ The overwhelming bulk of

⁴⁷ For a description of the activities of the Standing Committee for the Law of Patent, the Standing Committee for the Law of Trademark, Industrial

these Committees' agendas involve emerging Intellectual Property issues that are of special interest to developed countries. Nevertheless, it was during the meetings of these Committees that the movement towards a specialized discourse on non-traditional intellectual property rights under the auspices of WIPO acquired real momentum. The relationship of biotechnology, patent and non-traditional intellectual property rights first arose at the Third Session (6-14 September 1999) of the Standing Committee on the Law of Patents (SCP). In response to organized pressure from developing countries, the SCP recommended that the Working Group on Biotechnology pursue a more ambitious multilateral discussion program that would include the relationship of non-traditional intellectual property rights to biotechnology patent protection.⁴⁸

The Working Group accepted the SCP's suggestion, and included in its general survey of Member States' practices regarding the protection of biotechnology inventions a series of queries about biotechnology and traditional knowledge relating to the use of genetic resources.⁴⁹ The SCP further recommended that WIPO organizes a specialized "Meeting on Intellectual Property and Genetic Resources,"⁵⁰ which ultimately took place on 17-18 April 2000.⁵¹ The Chairman's Report from that meeting concluded that WIPO should create a specialized forum for discussing these issues.⁵² The subject of genetic resources also emerged at the 11 May to 2 June 2000 Diplomatic Conference for the Adoption of the Patent Law Treaty, with the consensus policy statement produced at the end of the Conference calling for continued discussions of

Designs and Geographical Indications, and the Advisory Committee on the Enforcement of Industrial Property Rights, see <http://www.wipo.org/activities/en/index.html?wipo_content_frame=/activities/en/development_iplaw.html>. See <<http://www.wipo.org/copyright/en/index.html>> for information relating to the Standing Committee on Copyright and Related Rights.

⁴⁸ See Doc. SCP/3/11, para. 208.

⁴⁹ WIPO General Assembly, "Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore," Doc. WO/GA/26/6, page 2. See also "WIPO Member States Discuss Intellectual Property and Genetic Resource Issues" (19 April 2000). Available at: <<http://www.wipo.int/pressroom/en/updates/2000/upd96.htm>>.

⁵⁰ See note 47.

⁵¹ Doc. WO/GA/26/6, para. 7.

⁵² Doc. WO/GA/26/6, para. 7.

genetic resources at WIPO.⁵³ Developing countries used a forum principally of, by and for developed countries as a launch-pad for creating a forum more closely attuned to their interests. WIPO provided developing countries with a structure that lowered the costs of organizing.

At the same time as discussions on genetic resources were taking place, WIPO initiated consultations on other non-traditional intellectual property rights. In 1998, WIPO sponsored, in collaboration with the United Nations High Commissioner for Human Rights, a “Panel discussion on Intellectual Property and Human Rights.”⁵⁴ WIPO also hosted in 1998 a “Roundtable on Intellectual Property and Indigenous Peoples.”⁵⁵ In 1999 WIPO sponsored a series of Regional Consultations for developing countries on the protection of folklore in collaboration with UNESCO. Like the Regional Symposia, these consultations also involved WIPO going to the developing countries, as opposed to the developing countries traveling to WIPO, to share national experiences about protecting traditional knowledge, develop a common body of expertise on the topic,⁵⁶ and otherwise help developing countries build a legal and institutional capacity for protecting traditional knowledge.

Here, as in its work on TRIPS implementation issues, WIPO served as a forum and facilitator for developing countries to consolidate a more cohesive position. This enabled developing countries to collectively assert their interests more effectively. By facilitating the exchange of information among participating countries and hosting consultative and education workshops, WIPO also helped them acquire technical expertise about traditional knowledge and ways to protect it that would otherwise have been very expensive to obtain. In essence, WIPO lowered the costs of organizing and information gathering. Moreover, the fact that WIPO’s programs on non-traditional intellectual property rights—and implementation of TRIPS, for that matter—are limited to

⁵³ Doc. WO/GA/26/6, para 9.

⁵⁴ Available at: <<http://www.wipo.int/globalissues/activities/1998/humanrights/index.html>> for an index to the documents produced for and by this event.

⁵⁵ For an index to the documents produced by this event, see <<http://www.wipo.int/eng/meetings/1998/indip/index.htm>>.

⁵⁶ See, for example, WIPO, “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions 1998-1999,” see under <<http://www.wipo.int/tk/en/tk/ffm/report/index.html>>.

intellectual property matters means that other issues do not distract or undermine developing countries' cooperation and consultations.

Developing countries have succeeded in raising the issue of non-traditional intellectual property rights in the WTO, but what are the prospects for putting the protection of traditional knowledge on the negotiating table as the Doha Round moves forward? To the extent developing countries want non-traditional intellectual property rights enshrined as a WTO discipline, they are highly unlikely to succeed. Consider again the general typology elaborated in Part II. above for leveraging developing countries' strength in numbers into greater influence: significant market share, a commercial intelligence network, strong leadership, mechanisms for building coalitions, and coherence with generally accepted principles of economics or morality. Significant market share, as was suggested, is most important because it is most directly relevant to the concrete stakes of the negotiations—namely market access—but also the one where developing countries are typically weakest. Non-traditional intellectual property rights imply a fairly straightforward rent transfer from developed countries, which currently pay nothing for traditional knowledge, to developing countries, which are typically the source of this knowledge and would presumably now have enforceable ownership rights in it. In addition, it would require developed countries to institute *sui generis* protection for traditional knowledge. Implementation costs for “the Quad”—who presently have no serious efforts underway to create rights in traditional knowledge—could be high. The rent transfer associated with non-traditional intellectual property rights would be intensely transparent, and some of the most powerful conceptual arguments behind granting rights in traditional knowledge involve environmental and cultural preservation and dignity issues that do not fit neatly into the more utilitarian, Anglo-American framework that dominates conventional thinking about IP. Thus, the granting of strong, *sui generis*, rights in traditional knowledge would entail a fairly radical departure from conventional thinking in OECD countries—especially the United States—about the role and purpose of intellectual property. In sum, the price for getting “the Quad” to agree to international rules on traditional knowledge would be very high and require developing countries to make costly concessions on other topics.⁵⁷

⁵⁷ In light of how costly the protection of traditional knowledge would be to developed countries, the price may be so high that developing countries simply couldn't afford them even if they were willing to pay whatever it

In closing, it is important to note that the pursuit of an international regime for non-traditional intellectual property rights may not be in all developing countries interests. As we saw in Part II., we cannot assume that uniform, international rules are necessarily in any particular developing country's best development interests. For example, not all developing countries have significant traditional knowledge resource bases, and enforceable rights in some forms of traditional knowledge—such as genetic resources—could raise the costs of many important goods, such as pharmaceuticals. In addition, international rules would impose implementation costs on those countries that do not have non-traditional intellectual property rights regimes that are up to whatever international standards are set. Traditional knowledge-rich countries can always build domestic non-traditional intellectual property rights regimes, and use that regimes to uphold the dignity of cultural traditions and protect against their exploitation, or to exact rents from would-be users of the countries traditional knowledge resources. With the help of WIPO, they might well succeed.

Finally, there are also reasons to think that WIPO's ability to serve as an honest broker between developed and developing countries on IP issues is limited. WIPO's *raison d'être* is to promote intellectual property rights, and most of the interesting and lucrative issues relating to intellectual property pertain to topics of principal interest to developed countries. In addition, WIPO receives 85 per cent of its revenues from the Patent Cooperation Treaty, a treaty heavily relied upon by pharmaceutical companies, biotech firms, and other important constituencies for developed countries, and is firmly behind the Substantive Patent Law Treaty deliberations.⁵⁸ These moral hazards could hamper WIPO's ability to be an effective source of assistance to developing countries and an honest broker between developing and developed countries.

VI. Conclusion

Looking ahead at the issues that are currently on the table at Doha, many of the most intensely felt interests of developed countries involve

takes. For more on the question of which subjects should be included in the WTO framework, see H. Hestermeyer, "The Language of Trade Linkage: Lessons for the Singapore Issues Learned From Trips", unpublished manuscript on file with author.

⁵⁸ Sell, see note 25, 519.

positive integration and greater institutional convergence: labor and environment standards, competition policy, investment, procurement and trade facilitation. Without passing judgment on any of these in particular, what is clear is that recent economics research on the relationship between trade and economic development on the one hand, and the role and successful characteristics of domestic institutions on the other hand, counsels that a greater burden of proof be put on those who advocate institutional convergence under the guise of promoting economic development. The question explored here has been how developing countries can resist this pressure, or at least ensure that it not run counter to their economic growth strategies, given their inherently weak bargaining position as a result of having small markets.

Scholars have identified several important characteristics of the type of cooperation that seems most likely to result in greater negotiating leverage for developing countries. WIPO's work with developing countries on TRIPS implementation tends to confirm many of these characteristics. Compared to ten years ago, developing countries appear to be far better organized and better versed on intellectual property issues. WIPO facilitated the ability of developing countries to organize into a more formidable coalition of TRIPS-skeptics by facilitating the exchange of national experiences with Intellectual Property and helping developing countries develop a clearer picture about the scope of their obligations. On the other hand, the future of non-traditional intellectual property rights as an international trade issue is dim.