Preferential trade agreements and power asymmetries: implications for domestic public policy

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Introduction

States have long sought to cooperate on intellectual property matters, however the inclusion of intellectual property in trade agreements is relatively new. While treaties on intellectual property date back centuries it was not until the early 1980s that countries such as the United States (U.S.) began to consider less stringent intellectual property protections to be a trade issue. From 1986 multilateral trade negotiations under the Uruguay Round included intellectual property issues for the first time. These negotiations sought to establish minimum standards for intellectual property protection and enforcement, culminating in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement which came into effect in 1995.

The TRIPS agreement has also been the most controversial of the Uruguay Round, even among the most prominent proponents of free trade. Nevertheless, following the conclusion of the Uruguay Round developed countries such as the U.S. have pursued efforts to expand on the minimum requirements included in the TRIPS agreements. Meanwhile, developing states have generally sought to resist these efforts and even to wind back some of the standards included in TRIPS.

The schism over intellectual property issues and several other disagreements between developed and developing states has resulted in deadlock in multilateral trade negotiations. The Doha Round of the World Trade Organisation (WTO) which succeeded the Uruguay Round failed to result in any new multilateral trade agreements. As a result, many states have pursued their international preferences through as preferential trade agreements (PTAs), including on intellectual property issues (see graph one below). This behaviour is called *forum shopping* – shifting between and creating new international forums when existing ones are unfavourable.

Using PTAs is a preferred forum shopping strategy for powerful states such as the U.S. as it maximises power asymmetries (Sell 2010). Between 2000 and 2007 the U.S. negotiated and signed 11 bilateral trade agreements[2] and one regional trade agreement in Central America (WTO 2018). All of the U.S's post-Uruguay Round PTAs

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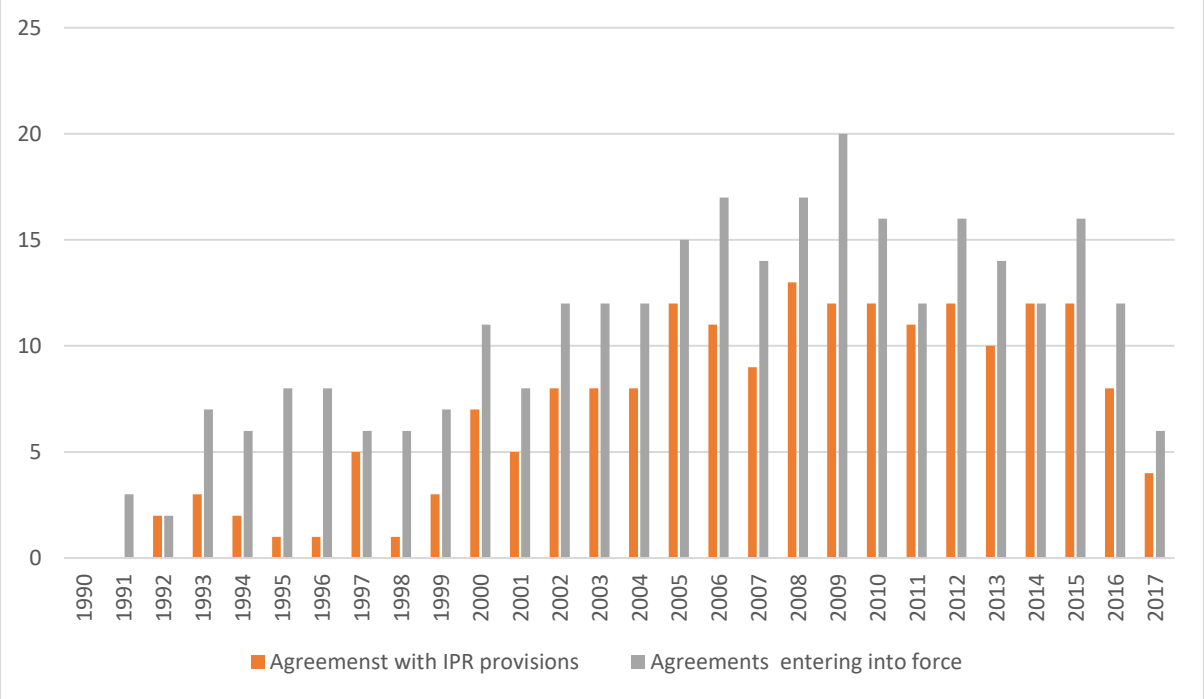
[2] Jordan (2000), Chile (2003), Singapore (2004), Australia (2004), Morrocco (2004), Bahrain (2004), Oman (2006), Peru (2006), Colombia (2006), Panama (2007) and Korea (2007).

have included intellectual property provisions that build on the minimum standards of TRIPS – establishing so-called 'TRIPS-plus' standards.

Graph one: PTAs and PTAs with intellectual property clauses 1990-2017



Source: WTO 2018

This policy brief argues that because modern PTA negotiations a) often involve power asymmetries between the parties and b) include economic standards such as intellectual property, they result in poor policy outcomes for smaller states. As such, countries should not include standard setting in PTA negotiations – especially in those negotiations include much larger parties such as the U.S. This is illustrated through a case study examining a copyright standard on so-called 'effective technological measures' under the Australia-U.S. free trade agreement and the Trans-Pacific Partnership (TPP). The brief also considers the implications of this analysis for Canada, especially in light of its recent negotiations with the U.S. and Mexico.

Case study: Australia-U.S. Free Trade Agreement

In 2004 Australia and the U.S. signed a free trade agreement known as AUSFTA. This free trade agreement, like all of the U.S.'s PTA since 2000, included detailed standards on intellectual property. It also involved stark power asymmetries: Australia's Gross Domestic Product was just 4 percent that of the U.S. at the time the negotiations began (World Bank, 2016).

As a result, AUSFTA has created poor public policy outcomes for Australia. This is illustrated through the agreement's provision on so-called 'effective technological measures'. Effective technological measures (often called 'technological protection measures' in domestic law) are copyright standards that govern how digital encryption used to restrict the use of digital music, films et cetera can be circumvented.

The current multilateral standard on effective technological measures is found in the World Intellectual Property Organisation (WIPO) Internet Treaties[3]. The U.S. however has a WIPO-plus standard on effective technological measures, which it has included in all its PTAs since 2000.

Under WIPO's standard effective technological measures are defined as technologies that are used by copyright owners "in connection with the exercise of their rights' and that restrict uses that are 'not authorised' by the owner 'or permitted by law" (WIPO Copyright Treaty 1996, Article 11).

Meanwhile, under U.S. law it unlawful to circumvent a technology which prevents *access* to copyrighted work, meaning that effective technological measures cover uses that do not infringe copyright at all The U.S. definition therefore gives legal protection to technology used for *commercial reasons*.

Prior to AUSFTA Australia's standard on effective technological measures provided protection from copyright infringement only, not access. This was reaffirmed in a high-profile case before the High Court, Australia's highest court. In the case Sony accused an individual of distributing circumvention devices in the form of 'mod chips' which enabled PlayStation gaming consoles to bypass the region-coding of the devices and games (digital locks that make games sold in foreign markets incompatible with gaming consoles sold in Australia). The High Court rule against Sony, stating that:

> The true construction of the definition of [effective technological measures] must be one which catches devices which prevent infringement. The Sony device does not prevent infringement. Nor do many of the devices falling within the definition advanced by Sony. The Sony device and devices like it prevent access only after any infringement has taken place (quoted in Rimmer, 2007).

Therefore, in Australia effective technological measures were determined not to include measures

[3] This refers to two separate treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. Both define effective technological measures in the same way.

that did not protect copyrighted work from infringement. This was as odd with the U.S.'s definition of effective technological measures, which affords legal protection to digital locks that prevent access.

Several policy reviews, all of which extensively consulted with relevant stakeholders, reaffirmed Australia approach. In 2002 the now-defunct Copyright Law Review Committee conducted a review of Australian copyright law. The report, *Copyright and Contracts,* recommended that Australia retain its provisions on effective technological measures (Copyright Law Review Committee, 2002).

Another extensive review commissioned by the Attorney General, which ran concurrently with the AUSFTA negotiations, actually recommended that Australia *tighten* its definition by making the law more explicit in stating that effective technological measures must be designed to 'prevent or inhibit the infringement of copyright' and not 'merely deter or discourage a person from infringing copyright' (Phillips Fox, 2004, p. 107).

A parliamentary committee overseeing how to implement AUSFTA was concerned that the agreement essentially usurped these domestic policy reviews:

> These processes rejected some of the very changes to Australian [intellectual property] law that the AUSFTA now requires Australia to adopt. This suggests to the Committee that at least some of the changes required to Australian law under the AUSFTA are not desirable from an Australian policy perspective. The Committee considers it neither desirable nor appropriate that domestic law reform processes have been made virtually redundant by the AUSFTA negotiations (Senate Select Committee, 2004, p. 82).

Opposition to the definition of effective technological measures under AUSFTA was apparent after the details of the agreement were publicly known. Consumer groups, libraries, the tech community and Australia's competition and consumer regulator all raised objections to the increased scope of the standard (Senate Select Committee, 2004, pp. 79-89). Of particular concern was that the protection of access controls would inhibit Australian consumers from bypassing region coding, empower companies to charge Australian consumers more for copyrighted products.

In 2006 another parliamentary inquiry was conducted, looking specifically at how to implement AUSFTA's provisions on effective technological measures. It

recommended that when implementing the effective technological measures provisions of AUSFTA "the definition of technological protection measure/ effective technological measure clearly require a direct link between access control and copyright protection" (House Standing Committee on Legal and Constitutional Affairs, 2006, p. 26). This recommendation is essentially an appeal for the status quo and a rejection of the definition included in AUSFTA, which requires no such link between access control and copyright protection.

In ratifying the copyright provisions of AUSFTA in 2006, Australian attempted to create a carve-out for circumventing region coding on digital products. However, Australia's current post-AUSFTA standards on effective technological measures has nevertheless been criticised by subsequent reviews for making copyright law unbalanced and potentially "restrict[ing] uses that have been expressly permitted by parliament" (Productivity Commission 2016, p. 140), and well as for its ambiguity *vis-à-vis* effective technological measures used on the internet

Therefore Australia, through AUSFTA accepted an effective technological measures standard which has little support domestically. This is evident by the fact that numerous government and Parliamentary reviews, which have much greater opportunity for community engagement and higher levels of accountability to the Australian public, have either criticised the standard in AUSFTA or argued in favour of Australia's previous standard. This is true for reviews before, during and after AUSFTA was negotiated and ratified. As these reviews have also found, the new standard under Australian law adversely affect consumers and copyright users by enabling price discrimination and tipping the balance of copyright law in favour of copyright owners.

The Trans-Pacific Partnership

Since AUSFTA Australia has been a reliable proponent of the U.S.'s preferred copyright standards – including on effective technological measures. Prior to the agreement Australia sought only to reaffirm existing multilateral standards when negotiating trade agreements. However, post-AUSFTA Australia has shifted its preferences, actively pursuing intellectual property provisions consistent with Australian law and thus above existing multilateral standards (Weatherall 2015). This is because copyright provisions in PTAs are not actually preferential. After a member state reforms their local laws to comply with an agreement, all copyright owners can reap the benefits. If a state has already committed to a standard, it has little to lose by getting new parties to agree to the standard as well.

Australia's support was most evident in the TPP negotiations. Leaked negotiating drafts from 2013 show that Australia, Singapore, Mexico and Peru all joined the U.S. in proposing an effective technological measures standard which closely the U.S.'s domestic standard (WikiLeaks, 2013, QQ.G.10). All these states, with the exception of Mexico, had committed to the U.S. standard already through bilateral agreements.

Malaysia, Vietnam, Brunei and Japan all opposed this standard, while Canada proposed a clause creating a loophole allowing states to still restrict effective technological measures protection to actual infringing uses. (WikiLeaks, 2013, QQ.G.10(d)(xi)). The proposal by Canada reflected those included in other Canadian PTAs, such as its bilateral agreement with Korea (Canada-Korea Free Trade Agreement, 2015, 16.11.7).

Meanwhile, Chile, New Zealand, Peru, Vietnam, Malaysia, Brunei and Japan also proposed an alternative effective technological measures standard which more closely resembled the existing multilateral standards under WIPO (WikiLeaks, 2013, QQ.G.12). Australia joined the U.S. in opposing this proposal.

The agreement included the U.S.'s proposal of effective technological measures, which includes access control. However, it also included a clause similar to what Canada had proposed. This means that parties to the agreement had greater opportunities to allow circumvention of effective technological measures for non-infringing purposes. Canada secured similar concession in the newly renegotiated North American Free Trade Agreement, now called the U.S. – Mexico – Canada agreement or USMCA.

Even though Australia was a strident supporter of the U.S's position during negotiations it was nevertheless eager to reap the benefits of less stringent standard in the TPP by specifying with the U.S that its standards on effective technological measures would apply to Australia instead of AUSFTA's (Robb & Froman, 2016). This would have effectively weakened Australia's obligations to the U.S. over the regulation of effective technological measures, had the U.S. remained a party. Since the U.S. withdrew from the TPP, the provision on effective technological measures has been removed entirely.

Conclusion

This brief argued that larger states have used PTAs to maximise power asymmetries and enforce their preferred standards on smaller negotiating parties. This was illustrated by the effective technological measure standard included in AUSTFA.

Constituencies in Australia fiercely opposed its inclusion in the agreement. Since the agreement has been ratified, policy makers and the Parliament continue to criticise the standard, however are reluctant to change it due to Australia's obligation under its agreement with the U.S. This has resulted in poor policy outcomes for Australia.

Even though USMCA included similar language to what Canada secured in TPP– a cause for concern among the copyright owning industry in the U.S. – the effective technological measures provision is nevertheless TPP-plus in other respects as well as being WIPO-plus. The original North American Free Trade Agreement meanwhile included no clause on the effective technological measures.

Indeed, USMCA includes far more detailed standards on copyright and other intellectual property standards overall when compared to the existing North American Free Trade Agreement, making it more like the U.S.'s PTAs since 2000. Policy makers in Canada, not to mention the general public and civil society, should be cautious of the negative public policy outcomes this may result in if the agreement be ratified. This is illustrated by the case of effective technological measures in Australia. PTAs which include such detailed standards and which involve stark power asymmetries between negotiating parties can create new domestic standards that become path dependent and cannot be changed despite evidence of their harm to the public and their unpopularity among key constituents.

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