

## 28 Analysis of the Political Processes for the Formation of the TRIPs Agreement

### -- With the Focus on the Pharmaceutical Industry and the Computer Industry in Japan, Europe, and the United States --

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#### I Introduction

The purpose of this paper is to review from the perspective of international politics the developments that led to the establishment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPs Agreement") at the Uruguay Round of GATT. This paper puts special emphasis on clarifying how the government-corporate relationships in Japan, Europe, and the United States and the changes in those relationships affected the formation process of the TRIPs Agreement.

Many studies have been conducted on the TRIPs Agreement in the fields of law and economics. However, almost no studies have been conducted until very recently from the perspective of international politics. This is

because the bargaining power and economic might of the United States were considered to be the only factors taken into consideration when interpreting the formation process of the Agreement. In reality, however, economic studies did not reach any consensus as to how the international economy would be affected if all of the intellectual property rights to traded goods were protected. Moreover, the United States and any other participating country did not have a draft Agreement to propose. Despite this initial lack of common ground for further negotiation, the participants successfully devised the TRIPs Agreement, which not only defines the minimum standards applicable to intellectual property rights as a whole but also stipulates specific rules for new technological fields including computer programming and undisclosed information. It would be

meaningful to review the political process of establishing these rules.

Since the establishment of the WTO, as the issues covered by the TRIPs Agreement became more noticeable, the public interest in the relationship between the Agreement and international economics has grown. In order to examine such relationship, some studies were conducted on the political process to conclude the Agreement. Many of those earlier studies pointed out the significance of the influence from firms in the developed countries on the Uruguay Round. They also considered the political process to have been greatly influenced by the draft TRIPs Agreement submitted to the GATT Round from the private sector led by the Intellectual Property Committee (IPC), which was formed by some U.S. firms in anticipation of the coming GATT talks on intellectual property rights, in collaboration with the Nippon Keidanren and the Union of Industrial and Employers' Confederations of Europe (UNICE). Those earlier studies described the expanding globalization in international society, the increasing awareness of the importance of intellectual property rights, and the resulting action taken by firms. However, those studies failed to clarify how the newly developed political process differed from the conventional process. Those studies describe such cross-boarder activities of U.S. firms as a part of lobbying to influence the government. In other words, earlier studies illustrate the formation of the TRIPs Agreement as a typical case where U.S. firms' lobbying was very successful. This is why earlier studies put emphasis on the United States with little consideration for the corporate and governmental action taken by Japan and Europe.

However, earlier studies fail to explain why U.S. firms needed cross-border cooperation with non-U.S. firms even though U.S. firms could have easily achieved their goal by themselves through active lobbying thanks to the U.S. government's policy of promoting intellectual property protection since the beginning of the 1980s. It would be

necessary to examine how the firms (business organizations) in the United States, Europe, and Japan differed from one another in their opinions, how they managed to achieve a consensus, and how their consensus influenced the formation of each provision of the Agreement in order to clarify the political process of the creation of the TRIPs Agreement. Therefore, further analysis of this formation process would require a new study covering Europe and Japan as well as the United States, unlike earlier studies, which focused solely on the United States.

This paper illustrates the formation process of the TRIPs Agreement in order to analyze the recent establishment of international economic institutions by reviewing the changes in the actions of the parties concerned. Furthermore, this paper illustrates how the private sector influenced the political process of establishing an intellectual property system in the Uruguay Round with special emphasis on the computer industry and the pharmaceutical industry, which was described in earlier studies as the industries that had especially great effect on the process of concluding the TRIPs Agreement. This paper presents the findings of an analysis of materials about the moves of Europe and Japan and the summaries of interviews with the people concerned in order to analyze the formation process of the TRIPs Agreement with due consideration for the corporate and governmental action in Europe and Japan as well as in the United States.

This paper divides the TRIPs negotiations into four phases with a focus on the following points: the development of intellectual property systems in Japan, Europe, and the United States. (Phase 1 up to the 1970s), the pre-Uruguay Round relationships between the government and firms in intellectual property industries in the United States, which was the first to recognize intellectual property rights as a trade issue (Phase 2), the cooperation among firms in Japan, Europe, and the United States (Phase 3), and the TRIPs intergovernmental negotiations (Phase 4).

The following three issues are discussed in this paper: (1) Why did some of the firms belonging to these industries in Japan, Europe, and the United States take the initiative in cooperating with firms in other countries? (2) How did those firms manage to reach a consensus in their cooperative activities? (3) What effects did such cross-border cooperation among private firms have on the formation of the TRIPs Agreement?

## **II Change of the Issue of Intellectual Property Rights in Developed Countries**

### **--- Development of the Pharmaceutical Industry and the Computer Program Industry**

#### **1 Intellectual property systems in Japan, Europe, and the United States and relevant industries up to the 1970s**

This chapter analyzes the roles of the pharmaceutical and computer program industries in the establishment of the intellectual property systems in Japan, Europe, and the United States respectively, and the preferences that those firms newly developed in the course of creating an international system within the framework of GATT. In order to clarify the background of the formation of the TRIPs Agreement, Section 1 outlines the policies that had been adopted by Japan, Europe, and the United States concerning patent rights and copyrights up to the 1970s. Around that time, it was rare for the government of any country to link its intellectual property policy with its industrial policy. The copyright and patent cases were solved within the framework of the copyright system of each country.

#### **2 Change of the issue of intellectual property rights in developed countries**

Section 2 reviews the moves of computer firms and pharmaceutical firms, which actively promoted improvement of the intellectual property system of their respective countries.

The intensified debate about the issue of legal protection for computer programs prompted computer firms to raise their awareness of the issue of intellectual property rights. In the United States, this issue was dealt with by a revision of the copyright law. IBM, which had increased its influence thanks to the U.S. government's transformation from an antitrust advocate to a promoter of intellectual property protection, took the initiative in expanding the scope of protection. This initiative invited criticism from Japanese computer firms, which had enjoyed government incentives and significantly boosted their competitiveness. While Japan and most of the European countries also decided to protect computer programs by copyright due to the United States' pressure, Japanese computer firms were alarmed by the prospect that the scope of protection for computer programs would be determined under the leadership of the U.S. firms. In contrast to U.S. firms, which were trying to sustain their competitive advantage in the world by enlarging the scope of copyright protection for computer programs, Japanese computer firms were afraid that such an attempt by U.S. firms might prevent them from improving the existing technologies and using the improved technologies to catch up with their U.S. counterparts.

In the meantime, pharmaceutical firms rapidly developed after the war mostly in western countries. In the United States, a substance patent system had existed since the creation of the patent law. On the other hand, in Europe, a substance patent system was introduced as a result of a confrontation between European pharmaceutical firms and their U.S. counterparts. The rapid increase in the production of pharmaceutical products by western firms was slowed down by the problem of drug-induced diseases. In order to deal with this problem, the government of each country imposed stricter regulations on the production and sale of pharmaceutical products. Consequently, western firms tried to recover the investments in the research and development of a new pharmaceutical

product by entering the markets of other countries. Their endeavor to cultivate new markets prompted the Japanese government to establish a substance patent system to encourage Japanese pharmaceutical firms to develop new drugs on their own. The intensifying competition among pharmaceutical firms and the tightening governmental regulations caused friction between original drug makers and generic drug makers in Japan, Europe, and the United States. The government of each country took such measures as extending a patent period in order to protect the rights of original drug makers in an effort to promote research and development of new drugs. In the 1980s, pharmaceutical firms started to enter the markets of developing countries that had strong demand for pharmaceutical goods in an attempt to cultivate new markets in addition to the markets of developed countries. Their entrance to the markets of developing countries raised such new issues as protection for application data itself and introduction of a substance patent system in developing countries. As there was no confrontation among original drug makers in developed countries, they started taking active measures with the aim of establishing a preferable international institution.

### **III Strengthening of Intellectual Property Protection in the United States**

#### **--- Diversification of Corporate Opinions in Their Lobbying Activities**

#### **1 Recognition of intellectual property rights as a trade issue**

This chapter examines the process of strengthening intellectual property protection in the United States and analyzes why the IPC was established despite the fact that the U.S. government was making efforts to enhance intellectual property protection.

This section describes how the issue of intellectual property rights became a trade issue. The Reagan Administration, which

was established in the 1980s, proposed a trade policy to restore the international competitiveness of the United States by improving the intellectual property systems of developing countries. This policy aimed at concluding an international treaty that would cover not only the procedural aspect but also the regulatory aspect of the intellectual property system for the purpose of strengthening protection for the intellectual property rights as a whole. This policy was a result of the aggressive lobbying of the computer program industry and the pharmaceutical industry in the United States. The U.S. government's intention to strengthen intellectual property protection was clearly expressed in the "Young Report" as well as the "President's Trade Policy Action Plan (TPAP)" publicized in 1985.

#### **2 Bilateral diplomacy and multilateral diplomacy**

This section examines what action the U.S. firms took to request developing countries to improve the local legal systems. The U.S. government, which had come to recognize intellectual property rights as an important trade issue, started actively engaging in bilateral diplomacy to encourage developing countries to improve their legal systems. This governmental move was strongly supported by the copyright industries, which formed the International Intellectual Property Alliance (IIPA). The IIPA did not find it particularly beneficial to improve the international level of intellectual property protection, which has been sought by the pharmaceutical industry and the computer industry. The IIPA was concerned about the nonperformance of the Berne Convention by developing countries. The IIPA regarded bilateral diplomacy as more promising than multilateral diplomacy because bilateral diplomacy was more likely to bring concrete results than multilateral diplomacy. In its view, multilateral diplomacy was less predictable in terms of outcome. The IIPA therefore insisted on taking a bilateral diplomacy approach in order to solve intellectual property issues in each country.

The IIPA explained the current situations and identified countries where infringements were rampant in an effort to lobby the USTR to take appropriate action under Section 301 of the Trade Act. U.S. Congress was also trying to improve intellectual property protection. Since the revision of Section 301 of the Trade Act, Congress had been pressuring the government to immediately improve the U.S. trade balance through bilateral negotiations. Pushed by Congress and the IIPA, the U.S. government started a series of bilateral talks with many countries from around 1985.

On the other hand, the pharmaceutical firms and some computer firms in the United States demanded under the leadership of Pfizer and IBM that the issues related to intellectual property rights be solved through multilateral diplomacy. Pfizer and IBM insisted that comprehensive international standards for intellectual property protection be created in order to protect new technologies developed in high-tech industries from piracy in developing countries. The two firms used the President's Advisory Committee for Trade Policy and Negotiation (ACTPN) to promote their proposal to create such standards within the framework of GATT and not of WIPO, where negotiations were slowed down by a North-South confrontation. The USTR itself was also making an effort to realize the new Round talks. It came to consider it practical to discuss problems related to intellectual property rights within the framework of GATT. This is why the U.S. government came to conduct both bilateral and multilateral negotiations in order to carry out its diplomatic policies for intellectual property rights.

### **3. The establishment and activities of the IPC**

As described above, pharmaceutical firms and computer firms were striving to ensure protection for their new technologies in developing countries. In order to achieve this goal, they considered it necessary to establish protection standards for

intellectual property rights as a whole within the framework of an international organization that had a system to ensure compliance, namely, GATT. These firms persuaded the U.S. government to establish such a system and started discussions to form a consensus on the concrete standards of GATT to provide protection for intellectual property rights. This task of consensus-building was commissioned to the newly established IPC, which later led the collaborative activities among the United States, Japan, and Europe. This section analyzes the purpose of the establishment of the IPC. USTR Clayton Yeutter was concerned that the awareness of other developed countries about problems related to intellectual property rights was not high enough to be able to expect cooperation from them for the realization of stronger intellectual property protection in GATT negotiations. To improve the situation, he asked for cooperation from IBM and Pfizer, both of which were very eager to strengthen intellectual property protection. It should be noted that the intention of the founders of the IPC differed from that of the USTR. First of all, the IPC did not place a high priority on building a consensus of the entire U.S. industries on the issue of intellectual property rights despite the USTR's request to do so. The IPC was structured in such a way that allowed smooth formation of its concrete draft standards for intellectual property protection. In addition to the restrictions on the number of persons that each firm was allowed to send as committee members, the firm was also required to authorize its representatives to make decisions in the committee meetings. The IPC also invited many economic and legal experts to participate in the meetings. In this way, the IPC was started as a new private organization that aimed at preparing draft international standards in cooperation with firms in other countries. The IPC continued its effort to form a consensus of the U.S. industry, while devising guidelines for the intellectual property system that was under discussion in the GATT Round.

## **IV Corporate Cooperation among Japan, Europe, and the United States for the Conclusion of the TRIPs Agreement**

### **--- Cross-Border Corporate Cooperation for the Formation of a Draft Agreement**

#### **1 Establishment of the Private Trilateral Meeting**

This section reviewed how the three business organizations in Japan, Europe, and the United States created a draft agreement that was submitted to the intergovernmental negotiations held in the GATT Round. This section started with the description of how the Private Trilateral Meeting was formed. The IPC started approaching foreign business organizations immediately after its establishment in order to point out that the government of each country knew little about issues related to intellectual property rights and to propose that the private sector prepare an agreeable draft agreement that would provide protection for the intellectual property rights to a wide range of goods, including pharmaceutical products and computer programs. The UNICE was a central institution of the European industry, engaging in coordination and consensus-building processes among various industrial organizations. In general, the European industry was reluctant to let GATT extend its agendas to comprehensively cover the issue of intellectual property rights because the industry considered the existing treaties related to this issue as sufficient. Despite this reluctance, the UNICE decided to join the Trilateral Meeting partly because the UNICE was swayed by the IPC and also partly because the UNICE agreed to the IPC's proposal of making procedural improvements in intellectual property protection.

On the other hand, the Nippon Keidanren in Japan was still dominated by traditional industries, such as steel, that had little interest in the issue of intellectual property rights. However, high-tech firms developed their interest in intellectual

property rights. In particular, Japanese computer firms strongly advocated the IPC's proposal. In the end, the UNICE and the Keidanren agreed to cooperate with the IPC to take necessary action in formation for the coming GATT Round. These three business organizations in Japan, Europe, and the United States created the "Cooperation among European, Japanese and United States Business Communities (Private Trilateral Meeting)."

#### **2 Differences and changes in the objectives of business organizations**

This section illustrates how the purposes of the IPC, the UNICE, and the Nippon Keidanren differed from one another for their participation in the Private Trilateral Meeting. The UNICE and the Keidanren put more emphasis on the procedural improvement than on the regulatory aspect of protection standards. The two organizations were alarmed by the excessive protectionism pursued by both the U.S. government and U.S. firms. The European industry was an especially firm believer in putting the issue of piracy first. On the other hand, the Keidanren was aiming at preventing the United States from taking excessively protectionist measures and at having the United States abandon its first-to-invent principle, which had long been controversial among the JPO, the USPTO, and the EPO. Having been concerned that the Japanese government lagged behind the U.S. government in terms of building a consensus about intellectual property rights, the Keidanren was hoping to counter the protectionism of the United States in cooperation with the European industry and closely monitor GATT negotiations so that the negotiations would not be dominated by the opinions of the United States.

Contrary to the expectations of business organizations in Japan and Europe, the IPC and the U.S. government were not striving to achieve the common goal. The USTR was trying to expand intellectual property protection to as broad a range of goods as possible. On the other hand, the IPC was

aiming at establishing concrete enforceable standards by limiting the GATT negotiations to the fields about which the Japanese, U.S., and European industries had already reached a consensus.

As the Trilateral Meeting progressed, firms in Japan, Europe, and the United States, which came to recognize the necessity of creating a draft agreement, increased their participation in substantive discussions in working groups. At an early stage of the Trilateral Meeting, they had almost completed the draft of the "Fundamental Principles" and "Explanation of Fundamental Principles" for such subjects as patents, trademarks, designs, and semiconductor chip layouts. All three organizations favored the introduction of a substance patent system. However, the Trilateral Meeting was slowed down because a gap between Japanese high-tech firms and their U.S. counterparts about the protection standards for intellectual property rights gradually widened as a result of the increasing rivalry between those firms. The major issues of the controversy were protection for computer programs and trade secrets.

### **3 Completion of a draft agreement**

This section explains how Japan, Europe, and the United States formed a consensus on the issue of protection for computer programs and pharmaceutical application data.

With regard to the issues of protection for computer programs, there had been a confrontation between the Nippon Keidanren, which desired to establish a new law to provide appropriate protection according to its characteristics, and the western organizations, which considered it enough to specify the scope of protection in the copyright law. Regarding the issue of trade secrets, the United States and the United Kingdom, which were familiar with the concept of trade secrets, were in conflict with firms in Japan and Europe, which were afraid that the scope of protection for trade secrets would broaden in the future. As far as computer programs are concerned, a consensus was finally reached thanks to

concrete draft agreements exchanged between business organizations in Japan and the United States and also to a draft amendment submitted by Europe, which gave some fine-tuning to the drafts. In the meantime, the IPC, the UNICE, and the Keidanren were greatly divided over the issue of trade secrets. Nevertheless, they were able to achieve a consensus at an early stage of the Trilateral Meeting on protection for pharmaceutical application data partly because the IPC compromised with the UNICE and the Keidanren as exemplified in the agreement to use the term "proprietary information" instead of "trade secrets" in the draft agreement. The timing of the publication of the draft agreement was decided in consideration of the eighth TRIPs meeting, which was scheduled for July.

## **V Conclusion of the TRIPs Agreement --- Effect of a Private Draft Agreement on International Negotiations**

On September 15, 1986, which was right before the official establishment of a Private Trilateral Meeting in Brussels, the commencement of a new Round was declared in Uruguay (Punta del Este Declaration). The "Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)" was included in the agenda of the new Round. This negotiation period may be divided into two phases by the interim review held in Geneva in April 1989. The first phase of the negotiation period was devoted to a confrontation between developed countries and developing countries, which were against the TRIPs negotiations to begin with. The developed countries held unofficial meetings to prepare a concrete draft agreement. This draft agreement decided the outline of the TRIPs Agreement. At the beginning of the TRIPs negotiations, Japan, Europe, and the United States were very different from one another in terms of their basic stances. While the United States was trying to place a high

priority on the regulatory improvement of protection and seeking to establish high protection standards, the EC and Japan put more emphasis on the procedural improvement of protection to create an environment where rights may be exercised properly. In this chapter, we are going to review how the governments of Japan, Europe, and the United States overcame their differences and prepared a draft in the first phase of the TRIPs negotiations. We will also examine, from the perspective of political processes, how such reconciliation process was affected by the draft agreement publicized in June 1988 by business organizations in Japan, Europe, and the United States.

### **1 The first phase of the Uruguay Round**

The TRIPs negotiations were started with a confrontation between developed countries and developing countries. In 1987, the governments of the United States, the EC, and Japan submitted their respective drafts. In order to improve the procedural aspect of intellectual property protection, the U.S. governmental draft proposed the reinforcement of the domestic procedures including the criminal procedure and the use of the GATT dispute settlement system. The draft also sought regulatory improvement by taking a very protectionist stance. While recognizing the necessity to create a new agreement, the EC draft presented no concrete proposals for regulatory improvement, whereas it gave detailed proposals on how to achieve procedural improvement in each of the following two areas: customs procedures and domestic procedures to crack down on piracy. Like the European Commission, the Japanese government also proposed to apply GATT's basic principles to intellectual property rights. Japan stressed the necessity for the reinforcement of implementation procedures, while insisting that excessive domestic measures should not be taken. Regarding protection for computer programs, Japan stated in the draft that program languages, protocols, and formula should be regarded as

unprotectable by copyright. With regard to the issue of protection for trade secrets defined by the United States as a type of intellectual property right, this issue was not addressed in either of the governmental drafts proposed by the EC and Japan.

In 1988, following the year in which the governmental drafts of Japan, Europe, and the United States were submitted, the Private Trilateral Meeting led by the IPC publicized a draft in relation to the TRIPs Agreement. The IPC criticized the United States for taking an excessively aggressive and quick-fix policy and warned that such attitude could limit the outcome of the TRIPs negotiations to the area related to piracy. The IPC argued that the agreement of Japan and Europe would be indispensable for creation of a meaningful treaty in multilateral negotiations and therefore that the United States should propose draft protection standards acceptable to Japan and Europe. Furthermore, the Japanese and European governments' lack of enthusiasm for TRIPs negotiations surprised the U.S. government, which had been prepared to find them less enthusiastic than the United States. In this situation, it was obvious that the coordination of policies would be impossible without a compromise by the United States. In an effort to move the negotiations forward, the U.S. government abandoned its quick-fix policy and showed support for the IPC's proposal. The IPC, which was also concerned about the fact that Europe was particularly indifferent to the issue of intellectual property rights, took measures to raise its awareness. The UNICE had also explained the importance of this issue to the European Commission. The UNICE pointed out that the TRIPs policy adopted by the European Commission reflected only a small part of the European industry and that the defective intellectual property systems in developing countries had caused enormous damage to the European industry as a whole, while recognizing the importance of the issue of piracy. In the meantime, having seen the growing public interest in protection for geographical indications of wine in Europe,



the European Commission decided to put emphasis on the issue of geographical indications in exchange for agreeing to the draft protection standards for intellectual property rights submitted by Japan and the United States. This is why the European Committee submitted a concrete proposal for protection standards for various intellectual property rights. The EC proposal gave some fine-tuning to the governmental drafts submitted by Japan and the United States.

In Japan, the Nippon Keidanren conducted research on the legal systems of other countries and started preparing Japanese draft standards from the standpoint of private firms. Despite its negative view on the idea of letting the private sector lead the policy-making process, the Ministry of International Trade and Industry actively gathered opinions from firms on the subject of intellectual property rights granted in the high-tech industries. Following the EC draft, the Japanese government also proposed its concrete draft concerning regulations. Subsequently, the U.S. government presented a revised draft that proposed more relaxed protection standards than those it presented previously. In this way, the governments of Japan, Europe, and the United States formed a consensus in the TRIPs negotiations.

## **2 The second phase of the Uruguay Round**

After publicizing the draft agreement, the business organizations led by the IPC put a high priority on persuading developing countries. The IPC's strategy prompted newly industrializing countries, including South Korea and Hong Kong, that had raised their interest in intellectual property protection to actively participate in the TRIPs negotiations. Their participation caused a split in the opinion of the developing countries, which used to be united in their fierce opposition to intellectual property protection. Some isolated developing countries such as India and Brazil were pressured by the United States, which invoked Section 301 of the U.S. Trade Act,

and were forced to accept the TRIPs draft agreement under the principle of single undertaking.

## **VI Conclusion**

The above sections confirmed that the political process of concluding the TRIPs Agreement was unprecedented in that business organizations cooperated with each other across borders for creation of the international institution. This is a case where firms that had accumulated knowledge and experience through their involvement in improving their respective national institutions played a pivotal role in formulating an international institution. This political process was remarkable in that firms not only took the conventional strategy of increasing pressure on their respective governments through intensified lobbying activities but also drafted an international agreement of their own through cross-border collaboration. Recognizing that the corporate and governmental policies of other countries were different from the United States', U.S. firms promoted cross-border cooperation with firms in other countries in order to form a transnational consensus in the private sector. In order to create an international institution that reflected their preferences, U.S. firms chose not to rely on the U.S. government, which was eager to strengthen intellectual property protection. The draft was widely accepted because the draft was prepared by private firms, which had no obligation to pursue national economic benefits. The draft proposed a feasible legal institution based on a cross-border consensus among developed countries.

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the Agreement in detail. Most of those studies that examined the political process at all covered only the moves of the United States. This paper illustrated the corporate-government relationships in Japan, Europe, etc., since the 1970s and analyzes how the political process and the progress thereof influenced the formation of the Agreement. By shedding light on the collaboration among Japanese, European, and U.S. firms to prepare and submit a draft to the Uruguay Round, this paper revealed that this political process for the creation of the Agreement was very different from the conventional corporate strategy of increasing pressure on their respective governments. This paper focuses on the pharmaceutical industry and the computer industry in order to describe how such issues as pharmaceutical patents, protection for application data submitted to governments, and the scope of protection for computer programs were addressed in the firm-to-government, firm-to-firm, and government-to-government negotiations.