

# Learning to Love Patents: Capacity building, intellectual property and the (re)production of governance norms in the ‘developing world’

There is little settled or uncontested about the current settlement as regards the construction of regimes of property rights that establish the ownership of knowledge and information along the lines laid out in the TRIPs agreement. This suggests that the provision of training and technical assistance to build capacity is itself part of the reproduction of the dominant (TRIPs constituted) view of intellectual property and is therefore a political project rather than merely technical provision. On one side many developing countries’ elites and governments are keen to join the international trading community and see the need to adopt the increasingly universalised rules of the system as part of this process. On the other hand, in many developing countries there are vocal constituencies less supportive of an unqualified adoption of TRIPs related standards of legal protection for IPRs. Given the continuing importance of legal structures to underpin and constitute markets (and this is most especially the case in markets for knowledge and information), the processes by which the TRIPs solution to the question of knowledge ownership is being globalised through technical training needs to be understood and brought under analysis. In this paper I lay out the importance of the reproduction of legal structures in this issue area, the character and size of the programmes in developing countries, some of the political issues that surround this activity, and conclude by suggesting that this process can be seen as one aspect of Stephen Gill’s more generalised conception of the ‘new constitutionalism’.

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#### TRIPs: Article 67, Technical Co-operation

In order to facilitate the implementation of this agreement, developed country members shall provide, on request and on mutually agreed terms and conditions, technical and financial co-operation in favour of developing and least-developed country Members. Such co-operation shall include assistance in the preparation of domestic legislation on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel (GATT 1994, A1C: 29)

Since 1995 intellectual property rights (IPRs) have been subject to the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) which is overseen by the World Trade Organisation (WTO). While this agreement does not determine national legislation, for members of the WTO to be TRIPs-compliant their domestic intellectual property law must support the protections and rights that are laid out in TRIPs' 73 articles. The agreement covers not only general provisions and basic principles, but also represents an undertaking to uphold certain standards of protection for IPRs and to provide legal mechanisms for their enforcement. Perhaps most importantly, the robust dispute settlement mechanism (DSM) which is a central aspect of the WTO now encompasses international disputes about IPRs. Prior to 1995, while there were long standing multilateral treaties in place regarding the international recognition and protection of IPRs, overseen by the World Intellectual Property Organisation (WIPO), these were widely regarded as essentially toothless in the face of 'piracy' and the frequent disregard for the protection of non-nationals' intellectual property outside the most developed countries (and even sometimes between them).

In addition to the advantages to be gained by having a tougher multilateral enforcement mechanism, the US government (alongside allies in the European Union) wanted to move the international regulation of IPRs into the new WTO (at the expense of regulatory competence located with the WIPO) because negotiators felt they were more likely to gain agreements to their advantage by linking these issues to the international trade regime (Braithwaite and Drahos 2000: 61-64). Therefore it is perhaps unsurprising that the TRIPs agreement represents a particular view of the role of IPRs in economic relations, a view that has emerged primarily from the US private sector.<sup>1</sup> Furthermore, the inclusion of the TRIPs, the General Agreement on Trade in Services and a number of other agreements (ranging from investment to antidumping) into the Uruguay Round final settlement was the culmination of a general strategy on behalf of the United States and the European Union to force developing countries to adopt multilateral agreements in sectors which they had hitherto resisted (Steinberg 2002). By withdrawing from their previous commitments under GATT 1947 and therefore terminating their obligations under that agreement, the US and EU forced developing countries to accede to a much wider agreement under the WTO if they wished to regain the trade arrangements with which they had started the Uruguay Round.

Although there are still some members of the WTO who are in a transitional period, the TRIPs agreement establishes for the first time a potentially global settlement on the recognition and protection of IPRs. For the developed countries TRIPs compliance has involved some legislative reorientation and occasionally new laws (or judicial reinterpretations of existing laws). For the developing countries, often with little or no tradition of IPRs, compliance is considerably more difficult and expensive to achieve. Or as K. Kalan, puts it: ‘trying to insert a patent system deriving primarily from the tenets of Western thought into a country shaped primarily by non-Western thought may invoke the classic square-peg-in-a-round-hole situation’ (Kalan 2000: 1447). In recognition of these difficulties most developing country members of the WTO are currently covered by the transitional arrangement (recently extended to 2016 in regard of pharmaceutical patents); they have been allowed a interim period in which they are expected to develop the legal and governance structures that full accession to the TRIPs agreement requires.

During this transitional period developing countries have been in receipt of extensive technical support (under article 67 of the agreement) to enable them to build the legal capacity to establish TRIPs compliance. On one side there is a need to fully understand the agreement because it is not only complex, but in many ways is a subtle and quite flexible set of negotiated undertakings. Hence legal capacity building can have clear benefits for developing countries who may be able to use newly conversant legislators and specialists to take advantage of these opportunities to make the agreement do what they need it to. However, on the other hand, such capacity building and legal training may also lead to the effective ‘epistemic lock-in’<sup>2</sup> of specific views of how IPRs are should be treated. Thus the danger of these programmes is that they implicitly socialise developing country legal practitioners into a specific way of dealing with IPRs, a manner that is already of course widely manifest in the TRIPs agreement.

My central concern in this paper is to examine the tensions that stem from contrasting views of the social utility of ‘owning’ knowledge: on one side the US/European acceptance of the legitimacy and usefulness of IPRs; on the other a widespread suspicion by NGOs of the benefits of commodifying knowledge, as well as some doubt in developing countries about what IPRs seem intended to do. It is far from clear to many that IPRs represent a reflection of customary practice in developing countries, and without this link legal innovation becomes relatively more difficult to sustain. This is not a new problem: as Graeme Dinwoodie has noted:

It is not a new lesson that real approximation [harmonisation] of laws, one that will endure, does not come from the transplanting of disembodied concepts... It is economic and social contexts that *sustain* these laws [of intellectual property], and if similar social setting does not exist, merely harmonising text may be of little value (Dinwoodie 2000: 311/312, emphasis added).

Firstly I briefly lay out the basics of IPRs (which anyone familiar with patents, copyrights and other forms of IPRs can easily skip) and some important aspects of the TRIPs agreement, before moving to set out the scope of support that is currently made available to developing countries to support their accession to full TRIPs compliance. I then explore some of the political and social tensions that the imposition of a

putative global legal culture on diverse local developing countries legal formations engenders. I conclude by suggesting that the debates about IPRs need to be rescued from the realm of technical assistance and efficiency maximisation, and returned to the realm of political economy where they belong, linking this to Stephen Gill's arguments regarding the emergence of the 'new constitutionalism'.

### *What is intellectual property?*

When knowledge and/or information becomes subject to ownership, intellectual property rights express ownership's legal benefits: the ability to charge rent for use; to receive compensation for loss; and demand payment for transfer. Intellectual property rights are sub-divided into a number of groups, of which two generate most discussion: industrial intellectual property (patents) and literary or artistic intellectual property (copyrights). Conventionally the difference between patents and copyrights is presented as between a patent's protection of the idea itself, and copyright's protection of its expression. Laws of intellectual property attempt to support the rights of individuals over their creative endeavours, while at the same time recognising that the extensive social benefits from the diffusion of innovation, in terms of economic and social advance, should be relatively unlimited by cost. This important balance between private reward and public interest is at the heart of all intellectual property legislation and is expressed through time limits on IPRs. Unlike property rights in material things, IPRs are formally temporary: once their term has expired they return to the public realm where no price can be exacted.

For patents the knowledge which is to be registered and thus made property should be applicable in industry. To gain the rights attached to a grant of patent an idea must be:

- *new*, not already in the public domain or the subject of a previous patent;
- *non obvious*, it should not be common-sense to any accomplished practitioner in the field who having been asked to solve a particular practical problem would see this solution immediately, it should not be self-evident using available skills or technologies and;
- *useful, or applicable in industry*, it must have a stated function, and could immediately be produced to fulfil this function.

Following the harmonisation of national legislation across all members of the WTO through the TRIPs agreement, once these three conditions have been fulfilled then an idea can be patented within each member's territorial jurisdiction. The patent application (detailing the idea and all its relevant details or specification) is lodged at the national patent office (or with the European Patent Office). For an agreed fee national patent offices allow others access to the patent document, but perhaps more importantly the office supports legal action against unauthorised usage when infringement is reported. Essentially, patents are an institutionalised bargain between the state and the inventor: the state agrees to ensure the inventor is paid for their idea when others use it (for the term of the patent) while the inventor allows the state to lodge the idea in its public records, to ensure public dissemination of innovation.

Unlike patent, copyright is concerned with the form of knowledge and information that would normally be termed, 'literary and artistic works', and needs no formal initial registration. Among those forms of expression that are usually regarded as subject to copyright are: literary works (fiction and non-fiction); musical works (of all

sorts); artistic works (of two *and* three dimensional form, and importantly, irrespective of content - from 'pure art' and advertising to amateur drawings and doodles); maps; technical drawings; photography; audio-visual works (including cinematic works, video and forms of multi-media); and audio recordings. However, the underlying ideas, the plot, the conjunction of colours, the musical key or chords, do not receive protection, only each specific creative expression attracts copyright.

Copyright is intended to ensure that creative expression should not be reproduced without the express permission of its author or producer. These rights can be legally transferred to another person or company who then exercises them in their own interest. In Anglo-Saxon countries (reflecting the common law tradition) these rights are limited to an economic right, where the creator (or copyright owner) is legally entitled to demand a share of earnings from the utilisation or reproduction of the copyrighted work. In continental Europe (and in jurisdictions drawing from the Roman law tradition), there is an additional moral right not to have work tampered with or misrepresented. In all cases, failure to agree terms prior to the act of reproduction or duplication may result in any income being awarded to the original copyright holder by the court if an infringement is deemed to have taken place. Unlike patents however, copyright resides in the work from the moment of creation; all that is required is that the creator prove that any supposed infringement is a reproduction of the original work.

Trademarks are an important third form of IPRs. These distinguish the products of one company from another and can be made up of one or more distinctive words, letters, numbers, drawings or pictures, emblems or other graphic representations. Generally trademarks need to be registered to ensure the mark is not already in use. A particular trademark is unlikely to succeed in being registered if it is too similar to, or liable to cause confusion with, a trademark already registered by another company or if it is already in common use. Of all IPRs trademarks have perhaps the longest history, tracing their origins back to makers' marks on early pottery and before that to tribal animal branding. There are other sorts of intellectual property from process patents (which cover processes as opposed to actual machines) to geographical indicators (such as 'champagne' and 'Parma ham') but these share the key characteristics noted above; they construct a form of information or knowledge as ownable property.

The most important aspect of IPRs is their formal construction of scarcity where none necessarily exists. Knowledge and information, unlike material things, are not necessarily rivalrous, co-incident usage does not detract from utility. In this sense, most of the time knowledge (before it is made property) does not exhibit the characteristics of material things before they are made (legal) property.<sup>3</sup> Property in a legal sense can only be what the law says it is, it does not exist waiting to be recognised as such, but rather is the codification of particular social relations, those between owner and non-owner, reproduced as rights. However, in its very materiality, that which is potentially tangible property (as it sometimes called) exists in a way prior to its recognition in a way the IPRs do not. Material property is 'naturally' scarce and therefore is rival in potential use, whereas knowledge in most cases is non-rival prior to becoming intellectual property. In cases where knowledge may produce advantage for the holder (information asymmetries), by enabling a better price to be

extracted, or by allowing a market advantage to be gained, information and knowledge *is* rivalrous. If there was perfect information (universal access) then the knowledge holder's benefits would evaporate.<sup>4</sup> However, in general, knowledge and information are non-rival, and it is difficult to extract a price for the use of non-rival goods. Therefore a legal form of scarcity is introduced to ensure a price can be obtained for use.

As this scarcity is far from natural or of self-evident benefit to all, significant time and effort is spent telling stories about intellectual property that are meant to justify its existence as a set of legal rights (May 2000: 22-29). These narratives revolve around three claims for the usefulness of making knowledge and information property which are frequently deployed in arguments about IPRs. The first argument is that effort deserves reward. This draws on a long line of political theory which asserts that where man has improved nature he deserves to have property in the fruits of the effort that has been put in. This started as John Locke's argument about property rights in previously common land being awarded to the diligent cultivator, and has now become a more general argument that effort requires reward. In intellectual property this justification is expressed both as a reward and an incentive. Only by allowing innovators and creators ownership rights over their creations can we reward their efforts (and by doing so also encourage further effort). Thus the construction of scarcity serves the social need to encourage and reward effort and innovation. Secondly, IPRs also reflect the rights of individuals to own the products of their own efforts, in that these efforts reflect the expression of an individual's self-identity. Thus, individuals should be allowed to own intellectual property in the products of their mental activity, because it is *their* mental work that has produced that which might subsequently be made property. This argument is not as often utilised (although it is frequently alluded to in arguments about piracy), as it raises questions about the legitimacy of transferring ownership of IPRs to others.

The third narrative of intellectual property reflects the capitalist character of modern society. Here the argument is concerned with the benefits of introducing markets into any particular area of social existence. Markets, we are told promote efficiency of use, and therefore if we want to ensure that ideas and knowledge are used efficiently, for the maximum benefit of society, we need to introduce markets into the distribution of knowledge and ideas. This will ensure that those who value knowledge and information most highly will pay most for it (rewarding the innovators) and will be also forced by a competitive market to enhance their efficiency in using these knowledge resources. Here the imposition of scarcity promotes efficient use, because knowledge can be costly to produce, and the drive to enhance efficiency itself produces further surplus to spend on more knowledge. These three stories appear in various combinations and in various ways, but wherever IPRs are contested, disputed or merely discussed, these stories are (re)told and have become part of the 'common-sense' of treating knowledge as property.

### ***The global governance of IPRs: from WIPO to TRIPs***

From the emergence of IPRs in a prototypical form in Venice in the fifteenth century (May 2002b), for the best part of four centuries the governance of intellectual property was essentially a *national* issue. However, in the last years of the Nineteenth

century, two sets of conferences focused on the international co-ordination of protection for IPRs, reflecting the success of political campaigning in support of the internationalisation of intellectual property protection (Machlup and Penrose 1950). These conferences resulted in the Paris Convention (covering patents), which was completed by an Interpretative Protocol in Madrid in 1891, and the Berne Convention for the Protection of Literary and Artistic Works (1886). While these conventions grew and developed over the subsequent century, as early as 1893 the common issues across both had led to the establishment of a combined secretariat, functioning under various names until the establishment of WIPO at the end of 1960s. An agency of the United Nations since 1974, WIPO also administers other international treaties covering intellectual property (including trademarks, geographic indicators and industrial designs) and is responsible for promoting technology transfer by supporting the recognition of IPRs in developing countries.

These conventions aimed to ensure that the rights of owners could be easily exercised in foreign jurisdictions, utilising common processes and levels of protection. However, not only did the conventions themselves (and thus WIPO's secretariat) have no explicit rules on enforcement, there was no settled and robust mechanism for the settlement of disputes between members regarding the protection offered non-nationals (Matthews 2002: 11). Members enjoyed enormous discretion over how they legislated to protect IPRs and many potential signatories of the various conventions who were IPR-importers did not perceive accession as in their immediate national interest.

These differing perceptions of national interests undermined attempts in the 1970s and 1980s to establish a more workable dispute settlement procedure. While the conventions allowed some voluntary harmonisation of protection across the various forms of IPRs, growing concerns among important industrial sectors in the richer, developed countries (especially the content industries) regarding piracy, were largely frustrated, at a time when IPRs were moving steadily to the centre of the commercial concerns of a number of important globalising industrial sectors. Nevertheless, 'co-operation with developing countries' remained at the heart of WIPO's self-nominated role. Extensive legal support through training, model legislation and advice was intended to aid the creation, or modernisation, of IPR-related laws, to establish a knowledgeable judiciary as well as knowledgeable legal professionals, and to generally support developing countries establishing a robust legal structure for the protection of IPRs (WIPO 1993: 55-57), (all of which continues under TRIPs).

The main political pressure from the developed countries to include intellectual property in the Uruguay Round originated in the response by the content industries to a series of technological innovations, centred on information and communications technologies (ICTs) which enhanced both the possibilities of an international (commodity) trade in information- and knowledge-related goods, but also enlarged the possibilities of 'theft' and 'piracy' (May 2000: 81-85). Trade negotiators from the developed countries were heavily (and successfully) lobbied on this issue while they themselves also argued that the complex of 24 multilateral treaties administered by WIPO produced too much rule diversity. But this did little to stimulate developing countries' interest in including IPRs in multilateral trade negotiations. To 'encourage' a change of heart the US trade representative threatened bilateral trade sanctions

(under the Special 301 section of the Omnibus Trade and Tariff Act, 1988), utilised against the Indian pharmaceutical industry among others (Matthews 2002: 31). The statutory authority on which this is based (and which is helpfully reproduced in each annual 'Special 301 Report') also notes that the section was 'amended in the Uruguay Round Agreements Act to clarify that a country can be found to deny adequate and effective intellectual property protection *even if it is in compliance* with its obligations under the TRIPs agreement' (USTR 2003: 9, emphasis added). As Duncan Matthews notes, if a country does not respond to this surveillance and reporting process, then 'trade sanctions may then be imposed under Special 301 in the form of increased tariff duties or import restrictions' (Matthews 2002: 26). In other words even now the USTR sees the TRIPs agreement as insufficient as regards the 'needs' of its industry clients, and has the ability to restrict access to the world's largest market as a device for 'encouraging' policy changes to induce compliance with the required standards of protection.

During the Uruguay Round of multilateral trade negotiations this stick was combined with the carrot of a promise to open up agricultural markets and an offer to abolish the Multi-Fibre Arrangement which constrained developing countries' textile exports (May 2000: 88). The developing countries generally lacked the expertise and resources to fully resist this firm bilateral pressure. As John Braithwaite and Peter Drahos point out: 'Negotiating fatigue among weaker states is one explanation... why 100 states signed the TRIPs agreement' (Drahos and Braithwaite 2000: 197). The combination of political pressure, and weakened resistance due to the complexity of the negotiations relative to the limited resources developing countries could dedicate to them, ensured that when the developing countries joined the new WTO they had to accede (with some transitional arrangements to be sure) to the TRIPs agreement as well.<sup>5</sup>

Since the conclusion of the Uruguay Round of multilateral trade negotiations, and the formation of the WTO, the legal regime for intellectual property has been effectively globalised. Although the TRIPs agreement does not dictate national laws it does require members of the WTO to ensure their laws in this area produce certain mandated patterns of governance. The preamble to the TRIPs agreement which itself was subject to some considerable negotiation was finally agreed on the basis that the signatories desired

to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade,

would adopt the provisions of the TRIPs agreement (GATT 1994, A1C: 2). The recognition that 'intellectual property rights are private rights' was partly balanced by an explicit allowance of the need for the 'public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives'. The previous problems of international enforcement of IPRs are reflected in the desire to promote 'adequate' protection through the application of a global set of standards.

The keystone of the TRIPs agreement is the adoption in the realm of intellectual property of the principles that are central to the WTO (like the GATT before it): national treatment; most-favoured nation treatment (MFN); and reciprocity. While reciprocity as a principle does little in itself to change the intellectual property regime, the introduction of MFN does change the international governance of IPRs somewhat. Under the auspices of WIPO there were many smaller scale treaties and conventions on various aspects of intellectual property; under TRIPs, and because of MFN, all such specialised agreements immediately apply to all the members of the WTO. Where there had been resistance to incorporate particular sectoral conventions in the past, by inclusion into the WTO their scope becomes as wide as the main IPR conventions. Furthermore national treatment ensures favouritism accorded domestic inventors or prospective owners of IPRs relative to non-nationals is rendered illegal. This is an important shift as many national IPR systems have favoured domestic 'owners' either through legislative or procedural means. Indeed, in the past, many industries in then developing countries (such as the US publishers in the Nineteenth century) 'pirated' non-national intellectual property because protection was awarded to nationals who were known not to be the original innovators.

At the dawn of the new millennium however, the central intention of the TRIPs agreement is to provide a legal framework for a single intellectual property regime throughout the international system. The TRIPs agreement presents WTO members with a single framework for dealing with the diverse aspects of intellectual property, replacing WIPO's more fragmented set of treaties and sectoral agreements. That said, it is not a model piece of legislation that can be incorporated directly into national law. Rather, it sets the minimum standards that should be reflected in the national legislation of all WTO members. It does not preclude members setting more rigid or stronger protection for IPRs except where such extensions above and beyond the minimum standards represent an infringement of the agreement's articles in some way. National legislatures are required therefore to ensure IPRs are protected but the method for this protection is only important as regards its consequences, not its form; the agreement is concerned with ends not means. But, national legislative enactment of the TRIPs agreement's principles are subject to the WTO's dispute-settlement mechanism under the agreement. Therefore, unlike the WIPO's stewardship of previous conventions, the WTO offers a considerably more robust mechanism for states to appeal to where the national laws of a particular country are seen to impede the rights of other nationals.

While the character of intellectual property, what is actually to be protected, is modified to some extent by the agreement (especially for computer programmes), the main area of discontinuity with prior practice is in the national protection of IPRs. By bringing intellectual property under the purview of the WTO, the TRIPs agreement stipulates that 'procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade' (GATT 1994, A1C: 19). The protection of intellectual property rights (or more often their non-protection) should not be used to disrupt trade flows. For instance, if only nationals are protected this would act as a barrier to non-nationals who would receive no protection for the IPR element of goods or services they wished to export to that jurisdiction. Non-discrimination must be explicitly part of a clear and fair registration procedure for IPRs, where they require registration, to be recognised (the exceptions being copyright and trade secrets - 'undisclosed

information’). The agreement provides a set of conditions which national legislation for registration must fulfil, broadly based on the requirements of openness and prompt enacting of procedures.

The members of the WTO are required to enact suitable procedures to ensure the ‘effective action against any act of infringement of intellectual property... including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement’ (GATT 1994, A1C: 19). These procedures must be fair and equitable and available under civil law. In the section of the agreement covering Civil and Administrative Procedures and Remedies there are a number of requirements which national legislation should include ranging from the need for courts to have powers to obtain evidence of infringements to the need to produce fair settlements in regard to damages. The agreement also mandates clear limits to the parallel importation of licensed goods from other jurisdictions. However, this is expanded in TRIPs to cover not only trademarked goods but also ‘pirated copyright goods... [and] goods which involve other infringements of intellectual property rights’ (GATT 1994, A1C: 23). Currently the most obvious effect of this aspect of TRIPs is to render the importation of pirated generic pharmaceuticals illegal for any WTO member, even if they have enacted the health emergency provisions of the agreement, as reasserted within the Doha ministerial declaration.<sup>6</sup>

Overall this extension of the protection of intellectual property in the international realm as well as the harmonisation of law across WTO members represented a major triumph for the ‘US pharmaceutical, entertainments and informatics industries that were largely responsible for getting TRIPs on the agenda’ of the Uruguay Round (Hoeckman and Kostecki 1996: 156). The TRIPs agreement is significant in the extension it represents for the rights of the owners of intellectual property. Indeed, Kurt Burch contends that this expansion of ownership rights also ‘extends an essentially liberal conception of social life as relations organised and understood by reference to exclusive property rights... [promoting] the vocabulary of rights and property and the liberal conceptual framework they help define’ (Burch 1995: 215). Furthermore, Samuel Oddi argues that the use of a natural *rights* discourse (utilising the narratives of justification I briefly laid out above) tries to establish that these rights are so important that individual [WTO] member welfare should not stand in the way of their being protected as an entitlement of the creators. This invokes a counter-instrumentalist policy that members, regardless of their state of industrialisation, should sacrifice their national interests in favour of the posited higher order of international trade (Oddi 1996: 440).

While the TRIPs agreement includes instrumentalist justifications alongside the more rights-oriented language, Oddi (and others including myself) argue that it is the rights side of any balance between individual rights and public developmental benefits that are systematically privileged throughout the agreement’s text.

Therefore, while the agreement itself is a complex and wide ranging set of requirements on signatories,<sup>7</sup> at the core is a particular set of norms regarding the treatment of knowledge as property. These norms underpin the entire agreement and are based on the notion that the private ownership of knowledge as property is a major spur to continued economic development and social welfare. They further

emphasise the development of knowledge as an individualised endeavour, and the legitimate reward of such individualised effort. Most obviously this includes a robust norm of commodification of knowledge and information. While the agreement is potentially quite flexible, as evidenced by the negotiations over the Doha ministerial declaration, the forces which support a particular reading of the agreement are difficult to overcome. The Doha declaration itself, despite extensive negotiations *only* reasserted the broad thrust of the original text's invocation of health emergencies as legitimate reasons for the suspension of IPR laws for pharmaceuticals. However, these norms of property ownership (especially as regards knowledge and information) are hardly universal and therefore represent a major problem for the legitimisation of the *global* governance of IPRs.

This is to note that a one-size-fits-all strategy may not self evidently serve many developing countries immediate best interests, even though this is the model which well-funded capacity building and 'awareness raising' programmes aim to reproduce. The World Bank, WTO, WIPO and a number of other multilateral, national, and private, agencies are expending significant effort in this area to 'help' developing countries establish TRIPs compliance. Furthermore, and paradoxically, as Peter Drahos has pointed out, in an attempt to ensure their clients are not caught up in costly IPR-related trade disputes with developed country members of the WTO, the staff of WIPO have often encouraged developing countries to adopt legislation that goes beyond the formal requirements of the TRIPs agreement (Drahos 2002: 777). Indeed, in the wake of bilateral trade agreements with the USA (reflecting the commitment under 'Special 301' to go beyond *mere* TRIPs compliance), a number of developing countries have found themselves needing 'TRIPs-plus' legislation which again reinforces this dynamic within the assistance programme at WIPO. Thus, in trying to help developing countries avoid trade disputes, the assistance programme has undermined the possibilities of diplomatic (and democratic) critical engagement with the agreement itself.

In addition to the practical problems that these capacity building programmes encounter (not least, the fit with developing countries' previous political and legislative traditions), TRIPs has also engendered a political response especially in those developing countries where significant groups remain to be convinced of the appropriateness of the TRIPs model (of which the farmers' rights movement in India is perhaps the best known example). Recent debates have ranged across a number of sectors, sometimes focusing on perceptions of bio-piracy (Shiva 2001: 49-68), elsewhere concerned with pharmaceutical products (May 2002a), or the piracy of software, and the 'theft' of traditional knowledge (Gervais 2002). These debates, and their effects on the legitimacy of IPRs in developing countries, impact directly on the legitimacy of the norms which are being 'imported' through the legal assistance supporting TRIPs compliance. Indeed, the advice and support from many NGOs active on IPR-related issues (such as Oxfam and the Quaker Office at the UN) emphasises the problems these debates have thrown up, in direct contrast to the positive emphasis of much multilateral aid which seeks to reproduce the normative settlement set out in TRIPs. However, as Drahos and Braithwaite point out, whatever critiques may be mobilised against these norms of propertisation, the global regime governing IPRs sets 'strong limits on a state's capacity to define territorial property rights in ways that enhance national welfare' (Braithwaite and Drahos 2000: 75). It is

these welfare effects in developing countries that are the central problem in the global governance of IPRs.

Essentially this is the key issue underlying this paper; how is this liberal conception of right (re)produced across the WTO's membership, and most especially the developing countries? This particular legal culture with its set of norms regarding the treatment of knowledge as property, underlies the entire TRIPs agreement. However, this legal culture is by no mean uncontested and therefore the continuing concern to aid capacity building in developing countries was reasserted in the Doha declaration.

### ***The extent of assistance programmes for capacity building***

A number of agencies have been particularly active in helping developing countries construct the capacity to fulfil their TRIPs-related obligations. The World Intellectual Property Organisation (WIPO) in Geneva runs the 'Co-operation for Development Programme' providing support and training for countries developing the legal structures that TRIPs' undertakings require. The European Patent Office (EPO) has also undertaken various programmes although here the focus is more on the states which are seeking to join the European Union. Other organisations ranging from multilateral agencies like the WTO and the United Nations Conference on Trade and Development (UNCTAD) to some non-governmental organisations provide various forms of support to developing countries struggling to develop legal systems that will enable them to establish TRIPs compliance. Most developing countries are likely to be dependent on such assistance if they are to hope to establish the mechanisms and legal infrastructure required to fulfil their TRIPs obligations as such political-legal transformations can require considerable resources and investment.

The WIPO 'Co-operation for Development Programme' has two distinct elements, an assistance programme and maintenance of a documentation collection. The Collection of Laws section of the WIPO has centralised the archiving of the legislative texts which are received by the International Bureau of WIPO. These are available electronically to all members, to aid the drafting of their own legislation, and the section also publishes periodicals, distributed to members, drawing attention to aspects of the collection. The assistance programme is conducted by express agreement with the WTO and explicitly aimed at transitional developing countries to enable them to draft TRIPs compliant legislation. As WIPO note, this assistance may take a number of forms:

Depending on the content of the request [from a member developing country] and on the situation of the country concerned, it may take the form of the submission of a WIPO draft law on any aspect of industrial property or on copyright and related rights, or of WIPO comments or studies on draft laws prepared by the government or on existing laws as regards their compatibility with relevant international treaties... or any legal advice on any specific aspect of intellectual property law. *To the extent possible* the advice given takes into account the specific needs of the country concerned, in harmony with its legal, economic and political system (WIPO Assistance [no date], emphasis added).

While members concerns may be heeded, this can only take place within the constraints of the requirements of the agreement itself. This support is available to all

members of WIPO, and draft laws and other legal instruments frequently circulate between a government legislative team and WIPO a number of times before a final draft is settled on. These negotiations may also include visits to the country concerned by WIPO officials or invitations for key legislators and/or civil servants to Geneva for consultations. After the law has been enacted, WIPO offers national workshops on the adopted legislation, judicial symposia and training for enforcement officers.

Following a decision by the WIPO general assembly in September 2001, a unit for developing countries was established to co-ordinate WIPO's technical assistance activities, to ensure the non-duplication of work both within WIPO itself and also between WIPO and other agencies. To give an appreciation of the scale of WIPO's own capacity building and technical support operations, between January 1998 to June 2001 WIPO provided the following technical assistance for developing countries.:

- 2,087 intellectual property officials from the developing countries received training in awareness building and human resources development (1,451 from Africa, 383 from Asia-Pacific, 225 from Arabic-speaking developing countries and 28 from Haiti);
- 34 developing countries have received assistance in building-up or upgrading their intellectual property offices with adequate institutional infrastructure and resources, qualified staff, modern management techniques and access to information technology support systems;
- WIPO has sponsored study visits through the WIPO Worldwide Academy for officials from the developing countries, and organised study tours for officials from many developing countries to offices in industrialised countries to study various aspects of modernisation;
- 32 developing countries have been beneficiaries of WIPO assistance on legislation in the areas of intellectual property, copyright and neighbouring rights and geographical indications;
- in close co-operation with other international organisations, WIPO has organised national, regional and interregional meetings for the developing countries on the implementation of the TRIPs Agreement (WIPO Assistance [no date]).

The extent of this work reflects the agencies view that a 'clear and balanced view of the Agreement enables the developing countries to assess the conformity of their existing national legislation vis-à-vis the provisions of the TRIPs Agreement'. While this dwarfs most other provision, this is not to say no other agencies are providing important sources of support in this area.

Although much of their IPR-related training is delivered through WIPO, the WTO also continues to provide IPR-related support to its members. For instance, they have an ongoing project in Indonesia (running until 2003) with a budget of \$14.7 million, while an earlier project to establish an agency to implement industrial property (patent) laws in Mexico cost \$32.1 million between 1992-96. The WTO and WIPO jointly organised in 2002 two regional workshops, one for sub-Saharan Africa and Haiti, and the other for the Asia Pacific region, to introduce key officials on TRIPs compliance. Into 2003, this joint initiative is planned to developed specific action plans for developing country members of the WTO., focusing on preparing legislation, institution building, modernising intellectual property systems and enforcement issues (WTO 2001)

The European Patent Office (EPO) also has a number of programmes, from the EC-ASEAN Patents and Trademark Programme, to their Projects for Africa and the Middle East. Its programmes centre on training, advice and assistance, as well as the provision of patent (and other IPR-related) documentation. Although the EPO limits most of its work to 'awareness raising' and its programmes are more focused on direct trading partners, it has also done considerable work in the former Communist states of Eastern Europe. In 1997 it established its own academy, and in 1999 for instance 422 trainees from 80 states attended 23 courses it ran. Alongside these activities the EPO has a strong outreach programme arranging seminars for patent attorneys, judges and administrators in Eastern European countries and across Asia. Most significantly, given China's accession to the WTO and therefore TRIPs (alongside their long noted problem of 'piracy'), the EPO has also been working with the State Intellectual Property Office to improve its in-house training and the two offices are now linked by a direct data transfer connection to aid Chinese officials access to European legal documentation (EPO 2000: chapter 5). One of the key elements of the EPO's activities has been the provision of European national legislation and collections of patent applications as learning materials. These collections are intended to help legislators draw up laws that reflect the procedures and protections that are found in European law. As with the WIPO activities outlined above, training involves the composition of model laws and the importation of specific elements of extant European law.

Unlike WIPO and the EPO, the World Bank is perhaps a little more cautious in its support for the universalisation of the TRIPs standards of IPR protection. In the 2002 *Global Economic Prospects* report, the chapter on IPRs concludes:

While promising some eventual benefits, the new [TRIPs] regime is asymmetric in its likely effects across countries. Low-income economies may expect to incur net costs for some time, suggesting that patience and assistance are needed, along with programmes to limit potentially negative effects in areas such as new medicines (World Bank 2002: 148).

Nevertheless, the World Bank has included IPRs in its own wider legal training programme, and continues to aid countries develop the legal capacity to establish their TRIPs compliant legislation and practices. In the 1990s World Bank sponsored programmes include:

- Brazil - primarily supporting the implementation of the 1996 industrial property law, covering the training of IPR administration staff, some reform of administrative structures and the development of new local agencies to specialise in domestic IPR assistance (4 million USD);
- Indonesia - programme to aid the development of the necessary legal infrastructure to support the 1997 IPR laws (potentially bringing Indonesia into TRIPs compliance) covering administrative improvements, staff training, and further legal reforms (centred on regulations regarding the topography of integrated circuits, trademarks and trade secrets) (14.7 million USD);
- Mexico - from 1992-1996 a programme to speed up patent awards and increase domestic enforcement activities, including administrative improvements and a new IPR agency, staff training, the computerisation of the patent application process, and training in enforcement procedures for courts' staff (32 million USD) (Finger and Schuler 1999: 51-52).

More recently, World Bank programmes have included IPRs in more general good governance, general legal capacity building projects. Other recent more general projects have included a new *Legal Yearbook* to be distributed to governments (including legal materials, case studies and articles), legal education for the general public (in Russia and elsewhere), and a wide range of ‘best practice’ programmes. The Bank’s legal programmes have flourished under the rubric of good governance, and given the key issue of legal compliance with multilateral commitments it is no surprise that considerable emphasis continues to be given to TRIPs related activities.

In the realm of bilateral aid, USAID now spends around a quarter of its annual budget on legal and regulatory training including a major programme focusing on trade policy/regulatory activities.<sup>8</sup> This general work helps developing countries with little experience of ‘western’ legal practices to develop some of the skills that can be subsequently deployed for IPR legislation, and underpins much of the focused work undertaken by the specialist agencies. Furthermore USAID has launched a number of initiatives in developing countries to build capacity related to the accession to the WTO. Between 1999 and 2001 the US, through USAID, provided 7.1 million USD to aid developing countries related to TRIPs compliance. This has mostly taken the form of technical assistance from the US Patent and Trademark Office (USPTO) to help countries bring their domestic legislation into compliance with TRIPs ranging from assessments of draft laws to recommendations regarding existing laws and the manner in which they can be brought into compliance.

The USPTO also runs a visiting scholars programme which includes ‘hands-on’ training in the administration of intellectual property law, and has assisted a number of countries with seminars and training programmes for officials and legislators (including Kenya, Ghana, Mozambique, India, Brazil, Poland, Mexico, Russia, Georgia, Lithuania, Macedonia, Malaysia, Sri Lanka, Thailand, Uzbekistan, Oman, the Dominican Republic, Lebanon and Cyprus) (USAID 2002: chapter two). Thus, USAID is supporting the development of a specific legal cultures in developing countries at the general level of legal infrastructural building and at the particular level of specific legislative policies linked to IPRs. However, as Jacques deLisle warns, this should not necessarily be taken to mean that all assistance uncritically promotes US models of law, even if as he also notes the role of legal education at US and US-affiliated law schools *does* promote a specific view of the manner in which law should function (deLisle 1999). Therefore, due to the use of legal educators from outside government to facilitate much of this bi-lateral aid, the ‘hard’ message of TRIPs compliance may be somewhat diluted ‘twixt cup and lip’.

The United Nations Conference on Trade and Development (UNCTAD) was severely marginalised by the shift of global IPR regulation from WIPO to the WTO, reflecting the critical line it had taken previously to the IPR-related demands of the developed countries (which were finally codified in TRIPs). The agency continues to carry out feasibility studies for developing countries’ capacity enhancement, ranging in projected costs from nearly \$2 million to train staff to administer IPR laws effectively in Egypt, to nearly \$6 million to modernise India’s patent office (Finger and Schuler 1999: 53-55). However, John Braithwaite and Peter Drahos note UNCTAD, ‘the one UN organ with high levels of analytical expertise on trade and intellectual property has largely become irrelevant in affecting intellectual property standard-making’

(Braithwaite and Drahos 2000: 68). Nevertheless, the agency continues to provide analysis and advice to developing countries, and is currently running a programme in conjunction with the International Centre for Trade and Sustainable Development on capacity building which aims to provide documents and advice aimed at policy makers and trade negotiators from developing countries.<sup>9</sup> Additionally, where intellectual property law touches environmental law there is also the possibility that a new joint programme with the UN Environment Programme, a Capacity Building Task Force on Trade Environment and Development may look at some IPR related law, although the first projects have not done so.

It is not just multilateral and state-aid agencies that are active in the provision of assistance and legal training. In the private/NGO sector the Rockefeller Foundation recently has started to develop a programme to help developing countries develop TRIPs compliant legislation and infrastructure to protect IPRs. In a recent list of 'foreign supported' training events focusing on WTO compliance issues in China organisations delivering training/educational support ranged from the US Department of Commerce and offices of the US Embassy in Beijing, as well as EU, British, Australian and Japanese aid, to programmes delivered by the US-China Business Council, The Ford Foundation and the Asian Foundation. While not all these focused centrally on IPRs, the US-China Legal Co-operation Fund has been supporting the training of Chinese judicial officers in IPR-related issues and the EU-China IPR Co-operation Programme has been working for the last three years explicitly on 'realigning' China's IPR regime with 'international norms' (Goldstein and Anderson 2002). Of course, the bilateral assistance from the US government was tied to a Chinese agreement to upgrade its IPR-protection in the face of 'Special 301' bilateral sanction under US trade law (deLisle 1999: 223). China may be a special case, where many private and multilateral organisations have identified a 'need' for their support, but throughout the developing countries similar, if perhaps less extensive, training and support is being mobilised.

Finally, many NGOs, like Oxfam and Action Aid are offering policy advice to developing countries, which unlike the 'official' aid on offer, is intended to help policy makers and legislators resist some of the political pressure stemming from the developed states and the multilateral agencies for full and comprehensive TRIPs compliance. Although these voices have at times been drowned out by the vast and continuing resources dedicated to (re)producing the particular reading of the TRIPs agreement favoured by the developed countries, they were also instrumental in supporting the renewed negotiated resistance which culminated in the Doha declaration's passages on IPRs.

### *Some problems with 'encouraging' TRIPs-compliance*

Capacity building programmes aim to help countries which have no tradition and expertise in the field of IPRs, or whose legislative experience regarding IPRs is at variance from the TRIPs model, develop the mechanisms and human resources that will be required for the establishment or reorientation of national IPR-related legal regimes in line with TRIPs. Additionally, as I have already noted, in an attempt to ensure their clients are not caught up in costly IPR-related trade disputes with developed country members of the WTO (most obviously the US), the staff of WIPO

have often encouraged developing countries to adopt legislation that goes beyond the formal requirements of the TRIPs agreement.

Given that the USTR has access to what Drahos and Braithwaite (2002: 101) have described as ‘a global surveillance network, consisting of American companies, the American Chamber of Commerce, trade associations and American embassies, a network that gathers and reports on the minutiae of [countries’] social and legal practices when it comes to US intellectual property’, it is perhaps understandable that policy makers in developing countries feel under pressure as regards IPRs. It has been noted by the USTR that in the couple of months prior to their annual report on IPRs, many countries endeavour to pass legislation or conduct high-profile investigations into ‘piracy’ to positively effect their listing in the report: the designation *Priority Foreign Country* (currently only the Ukraine is so designated) can result in withdrawal from the US General System of Preferences (GSP); *Priority Watch List* countries can be subjected to considerable bilateral pressure (threats of withdrawal of GSP ‘privileges’ and enactment of WTO-DSM cases against them); *Watch List* countries are essentially ‘on notice’ and are regarded as trying to achieve in good faith, if having not actually achieved, the policy and enforcement outcomes desired by the USTR.

Overall there are three broad areas where developing countries need to act (and are receiving support to act) if they are to bring their legal systems into TRIPs compliance: legislative reform (either new laws or the redrafting/reorganisation of existing laws); administrative development (from computerisation and streamlining to cope with the expansion of applications and work, to the development of previously absent mechanisms); and effective enforcement (including the development of effective judicial systems as well as training for law enforcement agencies). While the development of administrative practices and enforcement mechanisms are important for the protection of IPRs (and indeed are focus of considerable attention from the USTR through the ‘special 301’ process), the foundation of any capacity building must be the legislation itself. Unless this is brought into compliance, the best administrative and enforcement practices will do little to ensure developing countries are able to fulfil the undertakings on IPRs which form an important element of their WTO membership.

Although the TRIPs agreement does not actually mandate the forms of law that any member may adopt, as J. Michael Finger and Philip Schuler have concluded, at the WTO the tendency has and continues to be

to give the benefit of the doubt to established standards. Finding grounds for moving away from established standards may be particularly difficult in the area of intellectual property rights. They are, after all, an existential matter of legal definition, not a scientific matter of empirical estimation... [Thus] the benefit of the doubt will rest with systems presently in place in the industrialised countries (Finger and Schuler 1999: 20).

This supports the suggestion that the type and scope of capacity building encouraged by the programmes outlined in the previous section would reflect similar considerations, not supporting novel and different solutions to the problems of IPR protection. Rather, as the statement from WIPO noted above, advice may ‘to the extent possible... take into account the specific needs of the country concerned’ but only where this

does not conflict with the TRIPs agreement's invocation of required legal effect, and the 'best practice' acknowledged by the various agencies involved in capacity building programmes.

As noted in the previous section, both the WTO and the World Bank have funded programmes in Indonesia to support the development of TRIPs compliant IPR laws. A brief examination of this case reveals the problems which capacity building for IPRs may suggest more generally. One of the first problems encountered by any legislative reform in Indonesia is the traditional customary law known as *Adat*, which K. Kalan suggests is 'not so much a clear legal code as it is a malleable, yet deep seated way of making sense of the world' (Kalan 2000: 1467).<sup>10</sup> Furthermore, *adat* is not a unified system of law, but rather has quite significant regional variations. Despite considerable internal differences, there are also

four major differences between *adat* and Western law: (1) no distinction between real rights and personal rights; (2) no distinction between moveable and immovable property; (3) no distinction between public and private law; and (4) no distinction between civil and criminal delicts (Kalan 2000: 1467, fn.151).

At the heart of *adat* is the stability of the community, and hence the awarding of property (in material things or goods) has to be judged by virtue of its impact on community. Kalan argues that patents would be construed under *adat* 'as an advantage to the owner at the expense of the community, and thus as disruptive to the vital societal equilibrium' (Kalan 2000: 1468). Neither does *adat* have a clear philosophy of enforcement, not least of all as the community rather than individuals are the focus of law. All of this makes the co-ordination of traditional law and TRIPs compliant legislation difficult to say the least.

Above the 'bedrock' of *adat* are layers of Islamic legal conceptions, the formal Dutch Civil Code of 1847, and the 1945 Constitution. For instance, the patent system itself rests on a three Presidential decrees from 1989 and 1991, which themselves rest on this complex and multi-layered legal underpinning. In 1997 the government acceded to the agreements that compromise the legislative content of the TRIPs agreement (the Paris and Berne Conventions, and others).<sup>11</sup> Previously, between 1912 and the declaration of independence in 1945 Indonesia had an externally imposed and administered (colonial) patent law, but after independence this was rejected as a colonial imposition. Additionally, in order to thwart the control of the domestic publishing industry by Dutch publishers (from the ex-colonial power) in 1960 Indonesia withdrew from the Berne convention (Heath 1997: 307; Drahos and Braithwaite 2002: 78). The failure to pass even a promised patent law, led to a hiatus until 1989 by when over 13,000 patent applications were submitted in response to the continually promised but never enacted law. The move in the 1990s to a more robust set of laws regarding IPRs was prompted by external pressures, both from investors and from multilateral agencies which the Indonesian government was keen to join, of which the WTO was most important. This reflected the shift in Indonesia from import-substitution to export-led development, at least partly triggered by the decline in income from oil and gas upon which development until then had been based (Antons 1997: 321). And as Kalan suggests that '*Adat* and Islam would not, by themselves, generate intellectual property laws; the patent laws are Indonesia's response to the pressures of the global economy' (Kalan 2000: 1472). That said, the

successful implementation of TRIPs compliant laws has been very difficult, and remains incomplete (especially as regards the USTR's continuing demands).

Indonesians may still have difficulty conceptualising property other than material objects, while the country's overall agrarian character means that the role of IPRs is outside the majority population's experience or interest. There has been limited success in producing effective IPR protection not least of all due to the relative infertility of Indonesia's cultural soil to nurture the seeds or to support the trellis for maintaining such a harvest of invention. The mentality of Indonesia, shaped by years of *adat*, Islam, agrarian existence, and colonial rule, place a premium on the idea of community ownership and shared assets - a contrary view to the individualistic, monopolistic tenets of patent law... as evidenced by the country's retiring and leisurely approach to legislation and its weak record of enforcement (Kalan 2000: 1476).

And therefore despite the legislative capacity, there is still some need to expand the administrative and enforcement capabilities if Indonesia is to comply fully with its TRIPs commitments. In the case of patent law, there is also a perception that unlike copyright (where there is a relatively vocal and growing supportive industrial constituency of content producers), the legislative changes resulting from the accession to TRIPs are too strongly influenced by foreign interests. Christoph Antons identifies 'a substantial lobby of local industry that feels threatened by stronger patent protection that would make its products much more expensive' (Antons 1997: 346). Furthermore, as intellectual property is traditionally viewed as a criminal matter in Indonesia, partly because of the lack of civil enforcement mechanisms, investigation and enforcement have fallen to the police. However, Simon Butt suggests that the police do not treat IPR-related crime seriously, leaving enforcement often to confiscation but not prosecution, if alleged infringements are investigated at all (Butt 2002: 435). Thus, even if Indonesia does pass TRIPs compliant laws, it is not clear that this will deal with the problems which the USTR and other agencies have identified, primarily regarding 'piracy'.

Given the historical context briefly alluded to above, it is perhaps little surprise that in Butt's view:

With probable exception of senior intellectual property officials, the Indonesian Government and bureaucracy reject intellectual property law outright, or more commonly, are indifferent to it or more preoccupied with more pressing issues [fn.del]. This has meant that generally speaking, the government has done the minimum required to give the appearance of compliance... while simultaneously avoiding the more fundamental reforms that must be made to the bureaucracy and legal system if an effective intellectual property regime is to be established (Butt 2002: 436).

Thus, given the social and cultural divide between the putative law and societal practice, it is less than surprising that Indonesia remains on the US watch list as regards IPR infringement. Indeed, for the last three years Indonesia has been listed as *Priority Watch List* country in the USTR's annual report, having also spent most of the 1990s in this position, risking the flow of duty free exports to the US under the GSP. In the most recent report, the USTR notes that 'overall protection of intellectual

property remains weak... [while] long delays remain in prosecuting intellectual property cases and the Indonesian Government has not promulgated sentencing guidelines with deterrent penalties' (USTR 2003: 14). This contrasts with Malaysia, which while sharing a similar (but not identical) cultural background, has made more strenuous efforts to move towards the US mandated model of IPR protection, as a result has been downgraded from the *Priority Watch List* to merely a *Watch List* country.<sup>12</sup>

In contrast to Indonesia, and despite its pre-colonial legacy of customary and Islamic law, because British control lasted from 1874 to 1957, the post-independence legal system is based on British law with some elements of Islamic law held over. Unlike Indonesia the colonial 'rule of law' was not dismantled at independence. Indeed, Meredith Woo-Cummings notes that the judiciary and the judicial process still operate 'under the profound influence of the English common law and equity, judicial precedents, principles, ideas and concepts' (Woo-Cummings 2003: 217). This makes the adoption of TRIPs-compliant legislation less problematic than it is in Indonesia. Furthermore, despite this heritage of common law and several decades of working within the 'rule of law' Dr Mahathir's control of the state apparatus has also allowed any resistance to legislative change be brushed aside (Woo-Cummings 2003: 219). Thus, the normative foundations are closer to those which support IPRs, while resistance to TRIPs-compliant laws can be largely ignored by legislators. Furthermore, with state-led developmental projects like the Malaysian Multimedia Super Corridor, the government has identified strong IPR laws as a key element in the developmental of national competitiveness (Wong 1999), extending to a number of measures that directly reflect the USTR's demands in the area of copyright 'piracy', most importantly 'optical media production' (USTR 2003: 3). This contrasts with the mid-1980s when only US pressure in the form of 'special 301' measures prompted Malaysia to rework its copyright laws (including coverage for software) and become signatories to the Berne convention in 1990. However, the USTR's 2003 report keeps Malaysia on the *Watch List* because 'prosecution is a weak link in the enforcement chain and the judicial process remains slow' (USTR 2003: 26). That said, over the last four years the comments in the annual 'Special 301' report have become less antagonistic at the same time that those regarding Indonesia have become more caustic.

Quite apart from any historical or legal differences between Indonesian and Malaysia, there is also a question of their relative economic development. In July 2001, while Indonesia was designated a *low income* country, Malaysia was identified as an *upper middle-income* country by the World Bank (2002: 250, table 1). While such a distinction is crude, it does suggest in broad terms that Malaysia might be regarded as more economically developed than Indonesia. When this is compared to the experience of the Newly Industrialised Countries of East Asia, then a further reason for the difference in IPR legislation comes into focus. Surveying a number of studies, Nagesh Kumar concludes that

the east Asian countries, viz., Japan, Korea and Taiwan have absorbed substantial amount[s] of technological learning under weak IPR protection regime[s] during the early phases [of economic development]. These patent regimes facilitated the absorption of innovation and knowledge generated abroad by their indigenous firms. They have also encouraged

minor adaptations and incremental innovations on the foreign inventions by domestic enterprises (Kumar 2003: 216).

As these local industries started to innovate themselves, then a stronger regime of protection was established, *but only then*. Malaysia seems likely to be nearer this sort of threshold than Indonesia, which has led Darko Djaic to argue:

enforcement problems continue because protection intellectual property is simply not in Indonesia's interest. As Indonesia imports more intellectual property than it exports, [the] authorities realise that the new TRIPs-based intellectual property regime, based on Western standards protects foreign intellectual property (Djaic 2000: 466).

While under pressure from the USTR, Indonesia has slowly up-dated and expanded its IPR-related legislation, this can hardly be said to be voluntarily undertaken. Therefore it seems likely that the political economy of Indonesia itself will need to change (or develop) before the demands of the USTR and the US Government are likely to be met.

The Indonesian and Malaysian cases alert us to a major issue in building capacity for IPRs in developing countries. Where prior legal culture and the TRIPs compliant laws come into conflict it is by no means certain that the new laws will be regarded as legitimate. Furthermore, despite the enactment of a legal framework that is broadly TRIPs compliant, supported by capacity building projects, enforcement practices may remain underdeveloped. Indeed, without clear cultural support legislation will be seen merely as the imposition of foreign laws. However, where economic development stimulates the emergence of an industrial constituency which is likely to support stronger protection, then capacity building may find more fertile ground. Hence, considerable political effort is being expended to start to (re)produce the globalised norms and justifications which are at the heart of the TRIPs agreement.

Law cannot work if it is only followed when there is continual explicit enforcement. This is even more the case where the very law itself disturbs the common character of that which it regulates (in this case through the construction of scarcity in knowledge and/or information). Thus, while the possession of material good, and the provision of personal services may be protected (or access and use withheld by force), this is not the case for knowledge and information made property. In the absence of socially accepted IPRs (and therefore the difficulty of establishing scarcity as it relates to use), it is difficult to govern access to knowledge and information unless it is kept altogether secret. Few if any knowledge-related business can expect to thrive without revealing the knowledge/informational base of their products or services. Thus, the construction of knowledge scarcity, if not seen as legitimate makes its almost impossible to operate knowledge or information related commerce through a set of market relations.

Certainly the TRIPs agreement is far from uncontested in many other developing countries which are experiencing similar mismatches between custom or tradition and the TRIPs-related laws their membership of the WTO requires. The provision of training and technical assistance to build capacity is itself part of the reproduction of the dominant (TRIPs constituted) view of IPRs and therefore is a site of considerable political struggle. By trying to shift elite perceptions away from these previous models of (non)ownership of knowledge resources, capacity building is explicitly

trying to engender a normative shift in members' societies. While there is no fixed developing country position on IPRs across sectors or countries, the current (TRIPs engendered) social bargain between private rewards and public benefits at the heart of the legal construction of IPRs, may not be as appropriate to developing countries as it is to developed and wealthy countries. On one side many developing countries elites and governments are keen to join the international trading community and see the need to adopt the increasingly universalised rules of the system as part of this process (not least of all in the realm of electronically delivered services, where India and some Caribbean countries are developing significant sectoral capacity). But, conversely there are vocal constituencies in many countries which have prompted a political response less supportive of an unqualified adoption of TRIPs related standards. Policy makers and legislators are also starting to question the claims made on behalf of the TRIPs-related settlement by developed countries' trade negotiators.

The manner in which the majority of patents are used in Africa does little to support the rhetoric of their supporters as regards the developmental advantage of IPRs. Rather than facilitating the importation of new technologies for production (or service fulfilment), patents have historically been used to maintain import monopolies (Kongolo 2000: 275). They have not been 'worked' and therefore do the precise opposite of what is intended: the patent holder is protected from any copying or competition regarding their technology, while also gaining new markets through imports, local production either by the patent holder or by imitators is foreclosed ensuring no real economic developmental benefits can be gained (apart from the direct consumption of the product). Of course this should be no real surprise: the driving force behind TRIPs-related diplomacy was an agenda of *trade* not development; and considerable efforts were mobilised in the negotiations behind TRIPs to ensure that the notion of 'working' patents was diminished as a justification for compulsory licence.

In the slightly different context of economic policy reform, Deborah Bräutigam has suggested that 'economic reformers need to be able to communicate with and (often) compensate losers' (Bräutigam 2000: 262). She stresses that some form of 'safety-net' or compensation package needs to be put in place to ensure that the 'losers' from any particular set of reforms do not become a critical block of resistance. She also argues that 'political sustainability may dictate less orthodox reform sequences' (Bräutigam 2000: 262). This is to say that the immediate adoption of all structures 'required' by liberalisation may itself be counter-productive in the medium term. Indeed, both these issues are at the forefront of problems with the establishment of TRIPs compliance through legislative reform and capacity building. Although capacity building at the national level may be one element of constituting a global legal structure for the protection of IPRs, there is also a need to (re)recognise the central balance between private rewards and public benefits that have been central to the legal history of IPRs in national legislation.

The history of the international recognition of IPRs is considerably shorter than any of its (various) national histories. In the late nineteenth century the Paris and Bern conventions attempted to construct an international regime for the protection of IPRs, but it was only with the TRIPs agreement over one hundred years later, linking IPRs to the dispute settlement mechanism at the WTO, that the international regime gained

any teeth. Thus, only for the last seven years has there been a truly global legal regime for IPRs, although many developing countries are still navigating transitional periods. The final achievement of this potential ‘one-size-fits-all’ settlement has revealed the central problem for the globalisation of IPRs. Its effects already suggest that without a well developed global society able to mediate between private rewards and social goods/public benefits, the notion of a global regime for IPRs is difficult (if not impossible) to justify. Before the end of the Nineteenth century (and for many countries, into the Twentieth), non-national intellectual property was seldom recognised. Indeed, from Venice onwards the legal recognition of IPRs was dependent on national registration or national production. Famously the US publishing industry thrived in the Nineteenth century publishing ‘unauthorised’ work of European authors, but perhaps less often noted, US industrialisation proceeded apace with technologies that were patented abroad, but freely available (essentially through ‘piracy’) to entrepreneurs in America, especially in the petro-chemical sector.

The character of national laws (only recognising national invention or creation) supported a similar appropriation of foreign knowledge and information when the US, and before that Britain, were ‘developing countries’ as it did more recently in East Asia. Since the Fifteenth century the restrictions on who was recognised as an owner of IPRs represented a strategic development policy to encourage the importation of innovation by domestic companies (and before them artisans). Thus, it is ironic that having reached the heights of economic development, the governments of the most developed countries now argue in multilateral negotiations that the very protection they ignored in their years of speedy expansion will actually aid and support the economic development of other countries. Their claims regarding the benefits of IPR protection fail to recall that the social bargain they wish to reproduce was constructed through national political mediation of interest, and not the imposition of a ‘one size fits all’ model across the global system.

### *Conclusion*

We are currently in a transitory period, where the global governance regime for IPRs has been established, but the political community on which the justification of intellectual property depends (alongside the socio-legal recognition of the private/public balance at the heart of the construction of IPRs) is far from globalised. This closely reflects the depiction of the contemporary (global) polity suggested by Richard Higgott and Morten Ougaard: while there is a ‘thick interconnectedness’ between ‘political structures, agents and process, with transnational properties’, these are as yet only linked by a ‘thin community that transcends the territorial state’ (Higgott and Ougaard 2002: 12). The TRIPs agreement and the political economy of its negotiation, alongside the international (industry-based) lobbying groups involved in establishing and expanding the (specific) agenda of IPR-governance discussed above, all fit with the notion of ‘thick interconnectedness’. Not only via the Internet (which itself very unevenly globalised) but also through the use of new (patented) technologies and the increasingly globalised reach of brands, as well as the capacity building programmes detailed herein, the *globalised* interconnectivity of the political economy of knowledge commodification becomes more pronounced by the day. However, there remains only a ‘thin community’ as regards the socio-political justification of IPRs on which the TRIPs agreement’s normative aspects are founded,

and the establishment of mechanisms (previously encoded in domestic law) to recognise the social values (and social costs) of this community.

While mechanisms exist at the national level to ameliorate problems that the balance of private rewards and public benefits might produce, few mechanisms exist at the global level. There is little way for developing countries to meaningfully factor in the national social costs of strong IPR laws. Whereas in national political debates those groups shouldering the immediate social costs may have a number of political avenues through which counter measures may be mobilised, with the exception of breaking international agreements there is much less scope for such mediation at the global level. Indeed, where there is little tradition or history of legal structures of some similarity to those promoted through TRIPs, there are few if any avenues for developing an alternative vision of how knowledge and informational resources might, or should, be governed. Troublingly, if we examine the situation regarding patents and transfer payments around the global economy some rather illuminating figures emerge.

As Rochelle Cooper Dreyfuss and Andrea Lowenfeld point out, developing countries have handicapped themselves by acceding to the TRIPs agreement: 'Instead of following the strategy (which many developed countries once pursued) of absorbing the world's knowledge base and coming up to technological speed before protecting foreign intellectual property, a country that enters into the TRIPs Agreement at this stage... may well raise the costs of acquiring the knowledge it needs' (Dreyfuss and Cooper 1997: 303). These costs are quite high: the World Bank has estimated annual 'net patent rents' on full implementation of the TRIPs agreement (in 2000 dollars). These figures suggested that the US will receive payments of around 19,000 million USD, while the republic of Korea (being at the forefront of TRIPs compliance, and a model of economic development for many) will experience a net outflow of over 15,000 million USD. While some developed countries gain rents (the United Kingdom, nearly 3,000 million USD; Germany, 6,768 million USD) and some will experience outwards flows (New Zealand, just over 2,000 million USD and Canada, 574 million USD net outflows), what is more interesting is the annual outflows from those developing countries listed (Brazil 530 million USD; China 5,121 million USD; India 903 million USD) (World Bank 2002: 133, table 5.1). These net transfers do not include those countries with less developed local industrial sectors, who may see IPR-related market advantage of foreign companies added to the transfer of funds.

The world is not sufficiently globalised (whatever commentators celebrating the 'borderless world' claim) for any political and legal settlement to closely follow previous national political bargains; the justifications that have previously been used to underpin IPRs do not have sufficient purchase on the current global situation without a mechanism for recognising the social costs side of any 'bargain' which promotes private rewards. As Graeme Dinwoodie stresses:

the incorporation of intellectual property agreements within trade mechanisms might (if trade concerns become paramount) deprive intellectual property policymaking of the rich palette of *human values* that historically has influenced its formulation. Considering only the ability to exploit comparative advantage in the ownership of intellectual property

rights would appear to make international intellectual property policy less multi-dimensional (Dinwoodie 2002: 1004, emphasis added).

In a nutshell, it is this lack of multidimensionality that is the key problem: given the vast inequalities evident in the world, the impact of these inequalities is not recognised when the social costs that are required for the continued support for private rewards remain largely hidden in policy discussions.

The current settlement for IPRs may work well for the developed countries, but for developing countries the central bargain at the centre of IPRs makes little sense. The private rights of IPR 'owners' in the richer states are being purchased at too great a social cost in the developing world. Before TRIPs this was essentially recognised in the defacto acceptance of widespread 'piracy' outside the developed countries. This was by no means a perfect solution, and a return to the essentially ungoverned character of the pre-TRIPs world of intellectual property is improbable. However, the current settlement does not command significant support outside the developed world, hence the potential tensions that surround attempts at capacity building are hardly likely to be transitory. The best efforts at norm (re)production will come up against the very real problems that TRIPs-compliance produces in many developing countries. Indeed, Jerome Reichman suggests that behind the ratcheting up of IPR enforcement standards is a protectionist rationale, to protect hi-tech companies from the sorts of competition that commodity manufacturing and agriculture have had to deal with in the past (Reichman 1997). The challenge is to square the problems of 'protection' with the real need to offer some protection of the rights of innovators and creators.

This, then, returns us to the global political realm. Intellectual property is of course not the only policy area where the US has mobilised considerable political economic pressure (not least through bi-lateral trade instruments). As Daniel Drezner has noted; 'Scratch the surface, and it is surprising how much transnational law is created through military, economic and diplomatic coercion' (Drezner 2001: 334), although perhaps less surprising to those viewing US practices from outside America's borders. Furthermore, again as Drezner suggests, 'the more the United States succeeds in creating top-down legal standards, the more such attempts will be made in the future' (Drezner 2001: 333). Thus, the capacity building efforts and political pressure towards accelerated and globalised TRIPs compliance utilised by various agencies of the US government are likely emblematic of the manner in which the 'rule of law' will be extended multilaterally. There is much more at stake politically for the US government than merely the governance of IPRs.

Stephen Gill has termed this wider political dynamic the 'new constitutionalism', an attempt 'to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development' (Gill 2003: 132). While the global governance of IPRs is only one, albeit important, part of this 'project', its general contours are clearly discernible. The TRIPs-mandated settlement on governance of intellectual property stresses and privileges the rights (and needs) of knowledge 'owners' while denuding the 'democratic' public realm of substantial knowledge and information resources. As Gill suggests, under this new constitutionalism 'public policy is increasingly premised on the goal of increasing security of property (owners) and minimising the uncertainty of investors' (Gill 2003: 196). In the governance of

IPRs these goals have been enacted in developing countries by the extensive capacity building programmes (in the legislative realm and in enforcement practices) that I have discussed above.

Additionally, Gill identifies the bilateral pressure (through market access and investment agreements) that the US government is able to bring to bear to further drive this political trajectory (Gill 2003: 134), which as I have noted above also has played a major role in the move to TRIPs-compliance in developing countries. In policy terms, the ‘new constitutionalism’ stresses the ‘need to strengthen surveillance mechanisms, and institutional capabilities to reinforce... market discipline at the multilateral level, and to help to sustain the legal and political conditions for transnational capital’ (Gill 2003: 177). This ‘new constitutionalism’ has prompted the utilisation of extensive political and economic resources to ‘support’ TRIPs-compliance through aid for institution building, ‘support’ in legislative development and the provision of training to those policy makers and public servants who will need to ‘govern’ IPRs in each national jurisdiction.

Finally, although I would not argue for setting aside law, it does not follow that there is necessarily one legal model which suits all countries at all levels of development. If the global political economy of IPRs tells us one thing it is that the world is far too insufficiently globalised for the imposition of a global legal settlement that does not allow for the divergent national social developmental interests to be recognised (and acted upon). In the governance of IPRs this requires not only greatly historical sensitivity to the manner in which IPRs have been governed in the past, it also requires an explicit recognition of the social bargain that lies at the centre of the justification of intellectual property. Again this requires some historical sensitivity, perhaps starting from the recognition that patents and copyrights originated in the award of limited monopolies not the recognition of unlimited ‘rights’ (Sell and May 2001). Critiques are now starting to emerge and despite the efforts at norm construction outlined above they may yet have a major impact on the future of the global governance of IPRs. Whether this impact will redirect the trajectory of the ‘new constitutionalism in the globalising realm of IPR protection and enforcement remains to be seen.

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### ***Endnotes***

An earlier version of this paper was presented at the International Studies Association conference, Portland, 2003. I thank all those who commented on it there, but especially the discussant, Richard Stubbs, who suggested a number of improvements to the argument from which the current version has benefited greatly.

<sup>1</sup> The private sector played a major role in the negotiations which led to the TRIPs agreement, drafting the majority of the document which became the broadly successful position advocated by the office of the US Trade Representative during the Uruguay Round (see May 2000: 82-84; Drahos and Braithwaite 2002; Matthews 2002; and Sell 1998).

<sup>2</sup> I owe this apt phrase to Dwijan Rangnekar of University College, London.

<sup>3</sup> Take the example of a hammer (as material property); if I own a hammer and we would both like to use it, our utility is compromised by sharing use. I cannot use the hammer while you are, you cannot while I am, our intended use is rival. Thus, for you to also use my hammer, either you have to accept a compromised utility (relying on my goodwill to allow you to use it when I am not) or you must also buy a hammer. The hammer is scarce. However, the idea of building something with hammer and nails

is not scarce. If I instruct you in the art of simple construction, once that knowledge has been imparted, your use of that information has no effect on my own ability to use the knowledge at the same time, there is no compromise to my utility. We may be fighting over whose turn it is to use the hammer, but we do not have to argue over whose turn it is to use the idea of hammering a nail into a joint, our use of the idea of cabinet construction is non-rival. Ideas, knowledge and information are generally non-rivalous.

<sup>4</sup> For instance, many problems for buyers in the second-hand car market could be ameliorated if all car dealers were required to reveal *all* they knew about the cars they were selling. This would likely reduce the price they could obtain for much of their stock, but would enhance the general satisfaction (and even safety) of second-hand car buyers.

<sup>5</sup> extended discussions of the negotiations that led to TRIPs can be found in Matthews (2002: chapter 2) and Stewart (1993: 2245-2333).

<sup>6</sup> For a discussion of IPRs, AIDS and the pharmaceutical industry see May (2002a).

<sup>7</sup> Space precludes a detailed account of TRIPs numerous sections; Keith Maskus (2000: chapter two) offers a good concise summary of the agreement, as does Matthews (2002: chapter three) but also see my discussion in May (2000: chapter three).

<sup>8</sup> Space precludes a detailed account of the activities, but for a comprehensive account see deLisle (1999).

<sup>9</sup> the project webpage is <<http://www.ictsd.org/iprsonline/unctadictsd/description>>

<sup>10</sup> see also Butt (2002: 434-435) and Djaic (2000: 463-464).

<sup>11</sup> for a brief history of Indonesia's patent law see Antons (1997: 322-324).

<sup>12</sup> Designation of Indonesia and Malaysia in last four year's USTR's *Special 301 Report*.  
PWL: priority watch list (high risk of sanctions); WL: watch list (lower risk of sanction).

	2000	2001	2002	2003
Indonesia	WL	PWL	PWL	PWL
Malaysia	PWL	PWL	WL	WL

compiled from USTR (2000;2001;2002;2003)

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