

Intellectual Property in Global Governance

A Development Question

Chidi Oguamanam



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The Individual in the International Legal System

Kate Parlett's study of the individual in the international legal system examines the way in which individuals have come to have a certain status in international law, from the first treaties conferring rights and capacities on individuals through to the present day. The analysis cuts across fields including human rights law, international investment law, international claims processes, humanitarian law and international criminal law in order to draw conclusions about structural change in the international legal system. By engaging with much new literature on non-state actors in international law, the author seeks to dispel myths about state-centrism and the direction in which the international legal system continues to evolve.

KATE PARLETT is an Associate in the public international law and arbitration groups of the Paris office of Freshfields Bruckhaus Deringer LLP. She was previously a research fellow of the Lauterpacht Centre for International Law at the University of Cambridge.

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

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Acknowledgements

In writing this book, I have explored and exploited diverse disciplinary convergences and resources to illuminate the interminable intellectual property issue linkages in global governance. They include research and scholarship in a wide range of disciplines in law, economics, science, globalization, world system theory, international relations, history, development studies, anthropology, and a host of other disciplines in the social sciences. I am indebted to those whose work in these areas provided the platform on which I stood and those on whose shoulders I have leaned to contribute in this complex conversation.

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Foreword

Commentators have widely noted the transformation of intellectual property law and policy from an arcane, obscure and technical area to one that now has a direct and pervasive impact on our daily life. Most of these commentators, however, did not discuss the growing complexity, fragmentation and incoherence in intellectual property law and policy at the international level. Professor Oguamanam's book, therefore, is a highly welcome addition to the intellectual property literature. It provides a rich narrative on how the protection of intellectual property rights has spilled over into other policy areas that have their own histories, cultures, philosophies, languages, institutions, players, norms, values, approaches and dynamics.

Drawing on the author's broad knowledge of intellectual property, international trade, public international law, political science, international relations, anthropology, and development studies, the book covers what commentators have described as the "international intellectual property regime complex." This ever evolving conglomerate regime was established by linking in a decentralized, nonhierarchical manner the various partially overlapping international regimes that have been implicated by the protection of intellectual property rights. These regimes cover areas ranging from public health to human rights and from biological diversity to information and communications.

The present regime complex builds on a decade-and-a-half-old, but highly turbulent marriage of intellectual property and trade through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization. Entering into effect on January 1, 1995, the Agreement has adverse impacts on a wide range of areas in the developing world, including agriculture, health, the environment, education, culture and competition. To date, the international intellectual property regime complex remains one of the fastest growing but understudied conglomerate regimes in the international policy arena.

In this book, Professor Oguamanam introduces a wide and diverse array of actors, fora and issues that populate the emerging international intellectual property regime complex. The book also identifies many new battlegrounds, in particular those that provide developing countries with opportunities to restore the balance of the international intellectual property system. Although developments in this area are dynamic, entangled, multifaceted, rapidly changing and often messy, the

author has successfully kept the discussion manageable for his readers without oversimplifying detail.

For lay readers, the book carefully breaks down the intriguing discussion into different policy areas. It situates the larger international intellectual property debate in the familiar contexts of globalization, global governance and post-industrial society. It explores the discourse on intellectual property law and policy in relation to the formation of a post-industrial global society driven primarily by creativity, innovation and a knowledge-based economy and also pays special attention to two issues that the TRIPS Agreement has failed to fully address: the information revolution and the advance of biotechnology. Such discussion is important because information technology and biotechnology have become key economic drivers in the 21st century.

For those well versed in international law, regime theory or international relations, or those who are already familiar with international intellectual property issues, Professor Oguamanam's highly informative account is equally insightful. It provides a deep understanding of the complex interrelationship between the many different nation states, state and non-state actors, global institutions and international regimes that have been implicated by the protection of intellectual property rights. The narrative not only shows vividly the dynamic nature of global standard setting in the intellectual property area, but also documents the alarming impacts the resulting standards have on scientific research, knowledge dissemination, technology transfer, industrial development, global competition, food security, environmental sustainability, cultural patrimony and wealth distribution.

Unlike other books that devote the last chapter, or last few chapters, to outlining solutions to address problems in the international intellectual property system, this book embeds the solution in itself. It reminds readers that, if we are to solve myriad problems in our existing system, we need to acquire a deeper and more sophisticated understanding of the international intellectual property regime complex. In short, *we need to read this book!*

The last chapter does, however, provide some concrete suggestions on how countries, in particular the oft mentioned BRIC countries, can team up with others to push for a proper recalibration of the international intellectual property system. The author rightly reminds us that the world is now at a crossroads. From climate change to global economic recovery, we are confronted with new issues and debates that have serious ramifications for the future development of the international intellectual property regime complex.

More importantly, how this regime complex develops will have serious implications for the developing world – for example, for access to medicines, textbooks, seeds, fertilizers, technology, knowledge and other development resources. As more developing countries migrate from the traditional agrarian and industrial economies to ones that are based on post-industrial, knowledge-based innovation, intellectual property can only become more important.

Thus, we should all be thankful that Professor Oguamanam has written this timely and important book. It shows how increased complexity, fragmentation and incoherence in the international intellectual property regime complex may place

developing countries at a considerable disadvantage. Yet, the book offers hope by noting the possibility for these countries to better manage international regimes. In so doing, they can address global inequities, bridge the north–south divide and ultimately restore the much needed balance of the international intellectual property system.

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List of abbreviations

A2K	access to knowledge
ABS	Access and Benefits Sharing (Convention on Biodiversity's Working Group on)
AFC	American Folklife Center
AKST	agricultural knowledge, science and technology
ARD	World Bank's Agricultural and Rural Development Department
ASEAN	Association of Southeast Asian Nations
AU	African Union
BIRPI	<i>Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle</i> (United International Bureau for the Protection of Intellectual Property)
BRIC	Brazil–Russia–India–China (alliance)
BWS	Bretton Woods System
CBD	Convention on Biological Diversity
CDC	Cultural Diversity Convention
CDIP	Committee on Development and Intellectual Property
CDP	Cooperation for Development Program
CDS	Center for Documentary Studies (Duke University)
CESCR	Committee on Economic, Social and Cultural Rights
CGG	Commission on Global Governance
CGIAR	Consultative Group on International Agricultural Research
CHM	Common Heritage of Mankind
CHP	Creative Heritage Project (for Strategic Management of Intellectual Property Rights and Interests) (WIPO)
CIGI	Centre for International Governance Innovation
CIPIH	Commission on Intellectual Property Rights, Innovation and Public Health (WHO)
CMH	Commission on Macroeconomics and Health (WHO)
COP	Conference of Parties (Convention on Biodiversity's executive body)
CPGR	Commission on Plant Genetic Resources
CPGRFA	Commission on Plant Genetic Resources for Food and Agriculture

CTE	Committee on Trade and Environment (WTO)
DNDI	Drugs for Neglected Diseases Initiative
DRIPS	Declaration on the Rights of Indigenous Peoples (UN)
ECOSOC	Economic and Social Council (UN)
EoF	Expressions of Folklore
FAO	Food and Agriculture Organization
FFM	Fact-Finding Mission, 2001 (WIPO)
FOD	Friends of Development
GATT	General Agreement on Tariffs and Trade
GIPID	Global Intellectual Property Issues Division (defunct) (WIPO)
GKE	Global Knowledge Economy
GNNTDC	Global Network for Neglected Tropical Disease Control
GPPPs	Global Private–Public Partnerships
GR	Green Revolution
HGDP	Human Genome Diversity Project
HGP	Human Genome Project
HYV	High-yield Varieties
IAASTD	International Assessment of Agricultural Science and Technology for Development
IARCs	International Agricultural Research Centers
IBSA	India–Brazil–South Africa (trilateral union)
ICANN	Internet Corporation for Assigned Domain Name and Numbers
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	Intangible Cultural Heritage
ICJ	International Court of Justice
ICT	Information and Communication Technologies
ICTSD	International Centre for Trade and Development
IFAD	International Fund for Agricultural Development
IGC	Intergovernmental Committee on Intellectual Property, and Genetic Resources, Traditional Knowledge and Folklore (WIPO)
IGWG	Intergovernmental Working Group (on Public Health, Innovation and Intellectual Property) (WHO)
IK	Indigenous Knowledge
ILO	International Labour Organization
IMF	International Monetary Fund
IPC4D	Intellectual Property Coalition for Development
IPRs	Intellectual Property Rights
ITPGRFA	International Treaty on Plant Genetic Resources for Agriculture
IUPGR	International Undertaking on Plant Genetic Resources
IWG	Inter-sessional Working Group (WIPO)
MAT	Mutually Agreed Terms
MDG	Millennium Development Goals
MLS	Multilateral Systems
MSF	<i>Médecins Sans Frontières</i>

MTN	Multilateral Trade Negotiations on GATT (held in Uruguay from 1986 – 1993)
NAM	Non-aligned Movement
NCC	Nigerian Copyright Commission
OECD	Organization for Economic Cooperation and Development
PBRs	Plant Breeders' Rights
PCDA	Provisional Committee on proposals related to a WIPO Development Agenda
PCT	Patent Cooperation Treaty
PGD	Pre-implantation Genetic Diagnostics
PGRs	Plant Genetic Resources
PGRFA	Plant Genetic Resources for Food and Agriculture
PhRMA	Pharmaceutical Research and Manufacturers of America
PIC	Prior Informed Consent
PLT	Patent Law Treaty
PPP	Public–Private Partnership
PVPA	Plant Variety Protection Act (USA)
R&D	Research and Development
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SAP	Structural Adjustment Program, an initiative of the BWS
SCP	Standing Committee on the Law of Patent (WIPO)
SPLT	Substantive Patent Law Treaty
SPS	WTO Agreement on the Application of Sanitary and Agreement Phytosanitary Measures
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TKDL	Traditional Knowledge Digital Library (India)
TKUP	Traditional Knowledge of Uses of Plants
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UAEM	Universities Allied for Essential Medicine
UDCD	Universal Declaration on Cultural Diversity (UNESCO)
UDHR	Universal Declaration on Human Rights
UDRP	Uniform Domain-Name Dispute Resolution Policy
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCHR	United Nations Commission for Human Rights
UNCTAD	United Nations Commission on Trade and Development
UNDP	United Nations Development Program
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UPOV	Union for the Protection of New Varieties of Plants (International)

xx *List of abbreviations*

USAID	United States Agency for International Development
USTR	United States trade representative
WB	World Bank
WCT	WIPO Copyright Treaty
WFP	World Food Program (UN)
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonogram Treaty
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

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