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GLOBALISING INTELLECTUAL PROPERTY RIGHTS

THE TRIPs AGREEMENT

DUNCAN MATTHEWS



Globalising Intellectual Property Rights

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Duncan Matthews



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Globalising Intellectual Property Rights

The World Trade Organisation has responsibility for intellectual property rights – including patents, copyrights and trademarks – on a global scale under the auspices of the TRIPs Agreement (Trade-Related Aspects of Intellectual Property Rights). This Agreement has profound implications for the commercial interests of global corporate actors and for access to technology in developing countries.

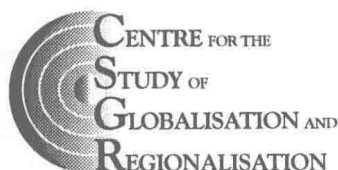
In *Globalising Intellectual Property Rights*, Matthews looks at various aspects of the TRIPs Agreement – agenda-setting, legal interpretation, implementation, enforcement and revision – from the viewpoint of both global business interests and developing countries. It is argued that the Agreement was largely the result of an initiative by multinational companies who sought to protect their own intellectual property rights through international law and, furthermore, that it is these multinational companies who are now its main guardians. The book concludes that the history of the TRIPs Agreement and the role of business is a clear example of governance by non-state actors on a global scale.

This book will be of interest to students and researchers in the fields of international relations, intellectual property law, international economic law and development studies.

Duncan Matthews is a lecturer in the School of Law at the University of Warwick. He has written widely on intellectual property rights, environmental policy and the single European market.

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4 Globalising Intellectual Property Rights

The TRIPs Agreement

Duncan Matthews

Series editor's preface

The Centre for the Study of Globalisation and Regionalisation (CSGR) (www.csgr.org), founded in October 1997, is funded by the Economic and Social Research Council (ESRC) of the United Kingdom. It has rapidly become an international site for the study of key issues in the theory and practice of globalisation and regionalisation. The Centre's agenda is avowedly interdisciplinary: research staff are drawn from international relations, political science, economics, law and sociology. Committed to scholarly excellence, the Centre also strives to be problem-solving in methodological orientation.

Three broad categories of activity inform and underwrite the research programme of the Centre: (a) What is globalisation? (b) Can we measure its impacts, and if so, how? and (c) What are its policy implications? Understandings of globalisation are seen to be multidimensional – political, economic, cultural and ideological – so CSGR sees globalisation in at least two broad ways. First, as the emergence of a set of sequences and processes that are increasingly unhindered by territorial or jurisdictional barriers, and which enhance the spread of transborder practices in economic, political, cultural and social domains. Second, as a discourse of political and economic knowledge offering one view of how to make the postmodern world manageable. For many, globalisation as 'knowledge' (both accepted and contested) constitutes a new reality. Centre research asks what kinds of constraints globalisation poses for independent policy initiative on the part of national policy-makers, and under what conditions these constraints are enhanced or mitigated.

Within these broad contexts, empirical work at CSGR focuses on:

- 1 particular regional projects in Europe, North America and the Asia-Pacific;
- 2 the enhancement of international institutions, rules and policy competence on questions of trade competition and international finance and investment; and
- 3 normative questions about governance, sovereignty, democratisation and policy-making under the constraints of globalisation.

Indeed, Centre research is sensitive to the wider normative nature of these questions, especially when considering the counter-tendencies towards, or sites of resistance to, globalisation at international, regional and local levels that give rise to different understandings of the importance of space and territoriality. *Routledge/Warwick Studies in Globalisation* provides an avenue for the publication of scholarly research monographs, policy-oriented studies and collections of original themed essays in the area of the research agenda of CSGR.

Duncan Matthews' book, the tenth in the series, looks at one of the major international institutions central to contemporary globalisation studies – the World Trade Organisation. Specifically, it explores the reasons behind intellectual property rights becoming a key issue for international trade, and examines how a consensus in favour of global action was achieved. It explains that, although the signatories to the TRIPs Agreement were WTO Member countries, non-state actors in the form of multinational companies played a crucial role in securing the inclusion of intellectual property rights within the WTO framework. However, Matthews goes on to demonstrate the potential for the TRIPs Agreement to have an adverse impact on developing countries, and the manner in which this is now becoming more widely understood, particularly in relation to access to affordable medicines.

This book examines a range of reasons that explain why the TRIPs Agreement consensus is under increasing pressure, including developing country opposition; strains in the relationship between the United States and Europe; a fragmentation of the corporate alliances that encouraged adoption of the TRIPs Agreement in the first place; and the role of new actors whose views were peripheral to the original negotiations, such as non-governmental organisations and institutions including the World Health Organization. The book concludes that pressure on the TRIPs Agreement consensus is likely to have profound implications for renegotiation of the WTO's intellectual property provisions during the Doha Development Round of multilateral trade negotiations. This book is timely in the extreme.

Richard Higgott
Warwick
February 2002

Acknowledgements

The appearance of this book within the Routledge series *Warwick Studies in Globalisation* is no coincidence. The book was conceived and researched under the auspices of the University of Warwick's ESRC Centre for the Study of Globalisation and Regionalisation and adopts many of the themes that have been prevalent in the early work of the Centre: the role of non-state actors in the process of globalisation; the regional impact of globalisation; the impact of globalisation on economically disadvantaged sections of civil society; and, above all, a multidisciplinary approach to the study of globalisation (in this case encompassing both law and politics).

I would like to thank the Economic and Social Research Council for generously funding the research for this project within the ESRC Centre for the Study of Globalisation and Regionalisation at the University of Warwick in 1998. I would also like to thank the School of Law at the University of Warwick for granting leave from my teaching responsibilities to allow the writing of this book in 2001. Many colleagues and scholars have provided encouragement and helpful advice in the preparation of this work. I would particularly like to thank Richard Higgott, Susan Strange, Mike McConville, Andy Clark, Julio Faundez, Abdul Paliwala, Susan Sell, Peter Drahos and Chris May. Special thanks must also go to Nicola Harwood, Law Librarian at the University of Warwick, for skill and enthusiasm in applying her knowledge of electronic databases to locate documents so efficiently. Carol Hughes and Jill Southam provided invaluable secretarial support. Above all thanks go to Louise O'Reilly, who read and commented on the entire manuscript while simultaneously running Artpoint Trust.

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Rasser of Procter and Gamble Inc.; John Reid of the Intellectual Property Institute (IPI); Peter Richardson of Pfizer Inc.; David Roberts, Brian Russell and David Waters of GlaxoSmithKlein; Eric Smith of the International Intellectual Property Alliance (IIPA); Stephen Smith, Ivor Brown and Roger Pugsley of AstraZeneca; and Phil Thorpe of the Patent Office. I am extremely grateful to each of these individuals and organisations but none should be held responsible for any errors in this book, which remain entirely my responsibility.

Considerable thanks must also go to my postgraduate students studying for the LL.M. in International Economic Law at the University of Warwick, who patiently endured my earlier attempts to present the arguments that underpin this book during weekly seminars on the Legal Aspects of International Technology Transfer course and who contributed invaluable views of the TRIPs Agreement by explaining their own experiences in their home countries. Without the enthusiasm and international perspective of these students, developing the main arguments of this book would not have been possible.

Finally, I would like to mention two academics whose views I hold in high esteem and whose words provide some justification for the liberties that I have taken in writing this book. First, Peter Drahos, who, on hearing of my intention to write this book, gave his enthusiastic encouragement with the comment that far from unnecessarily duplicating earlier work (not least his own), it is only by telling and retelling the story of the TRIPs Agreement that an accurate picture of its origins and impact will emerge, thus giving me the confidence to write this book in the first place. Second, Paul Heald, who, by observing that the trademark provisions of the TRIPs Agreement lack 'sex appeal' (by which he means a relative lack of controversy) when compared with those on patents and copyright (Heald: 1996: 637), gave me the justification to follow through the decision that I had intuitively taken to concentrate on patents and copyright for much of this book at the expense of trademarks. I would like to thank Peter Drahos and Paul Heald for their guidance, unintended or otherwise, and remain indebted to them both.

Duncan Matthews

Oxford

November 2001

Abbreviations

ABPI	Association of British Pharmaceutical Industries
ANDA	Abbreviated New Drug Approval
ASEAN	Association of South East Asian Nations
BDI	Federation of German Industries
BSA	Business Software Alliance
CBI	Confederation of British Industries
CI ROAP	Consumers International Regional Office for Asia and the Pacific
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EFPIA	European Federation of Pharmaceutical Industry Associations
EMEA	European Medicines Evaluation Agency
FBI	Federal Bureau of Investigation
FDA	Food and Drug Agency
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IFAC	Industry Functional Advisory Committee
IFPI	International Federation of Phonographic Industries
IIPA	International Intellectual Property Alliance
INTA	International Trademark Association
IPC	Intellectual Property Committee
IPO	Intellectual Property Owners
ISACs	Industry Specific Advisory Committees
ITC	International Trade Commission
MITI	Japanese Ministry of International Trade and Industry
MPAA	Motion Picture Association of America
NGO	Non-governmental organisation
NMPA	National Music Publishers' Association
PHARE	Poland and Hungary: Aid for Economic Restructuring
PhRMA	Pharmaceutical Research and Manufacturers of America
RIAA	Recording Industry Association of America

SACIP	Standing Committee on Industrial Property
TABD	Transatlantic Business Dialogue
TACIS	Technical Assistance to the Commonwealth of Independent States and Mongolia
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TPRG	Trade Policy Review Group
TPSC	Trade Policy Staff Committee
UCC	Universal Copyright Convention
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN/ECE	United Nations Economic Commission for Europe
UNICE	Union of Industrial and Employers' Confederation of Europe
US	United States
USPTO	United States Patent and Trademark Office
USTR	Office of the United States Trade Representative
WHO	World Health Organization
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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Introduction

This book concerns the globalisation of intellectual property rights through the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (commonly referred to as the TRIPs Agreement). It is an account of the role played by global corporate actors (also known as multinational companies) in securing trade regulation capable of protecting global commercial interests to an extent not previously witnessed in relation to international protection of intellectual property rights. The book explains how a consensus in favour of global action was achieved across a range of industry sectors, how a coherent strategy of industry alliances linked to government action then emerged, most visibly in the United States but also in Europe and Japan, and how a willingness to engage in forum shifting from bilateral to multilateral action, coupled with a negotiating advantage over developing countries in terms of intellectual property expertise, led to a successful outcome to the Uruguay Round of GATT (General Agreement on Tariffs and Trade) negotiations as far as global business interests were concerned.

In the light of the Uruguay Round negotiations that secured a TRIPs Agreement, the book argues that global corporate actors have also played an important role in ensuring the effective implementation of the Agreement in each WTO Member country through surveillance carried out by their local branches and agents. But as the adverse effects of the TRIPs Agreement begin to be felt in developing countries, opposition to the Agreement has become more vocal. Again, it is global corporate actors that have sought to counter opposition to intellectual property protection by using a mix of strategies, ranging from assistance and educational programmes to economic coercion and recourse to legal proceedings under both the civil and the criminal provisions of developing countries' national law.

The book argues, however, that at a time when the impact of the TRIPs Agreement is becoming more widely understood in the developing world, the concentration of global business interests that achieved so much in securing the Agreement during the Uruguay Round negotiations is now under pressure that may result in its fragmentation. The reasons for fragmentation of the global consensus among corporate actors are examined in detail. First,

2 *Introduction*

the book identifies institutions in the United States and Europe as playing a significant role as gatekeepers that must balance the intellectual property concerns of business against wider priorities in international diplomacy. On several occasions, the result is that corporate complaints identifying inadequate intellectual property protection in developing countries have not been taken up by their home governments because of more pressing concerns relating to national security, political stability and economic development. Second, the book suggests that the consensus between the United States and Europe has started to erode as a result of disputes relating to the continued use of bilateral trade sanctions by the United States and as a result of an ongoing disagreement about the most appropriate mechanism to be used for ascertaining the priority date for patent applications (first-to-invent or the first-to-file). Third, there has been a fragmentation of the cross-sector industry consensus that enabled business support for the TRIPs Agreement to appear so unequivocal in the first place. Fourth, new actors whose views were peripheral to the Uruguay Round negotiations have now entered the debate on global intellectual property protection more wholeheartedly in the wake of a wider understanding of the impact of the TRIPs Agreement. These new actors include industry groups, such as generic drug manufacturers, that did not participate in the original negotiations; civil society groups, including non-governmental organisations (NGOs), farmers' groups and representatives of indigenous peoples that are raising awareness of the potential for adverse effects arising from the Agreement in terms of poverty and biodiversity; global institutions, such as the United Nations Conference on Trade and Development (UNCTAD) and the World Health Organization (WHO), that have to some extent shared the concerns of civil society groups; and developing countries themselves who, through information deficiencies and lack of resources during the Uruguay Round negotiations, did not fully envisage the far-reaching effect of the TRIPs Agreement and are now seeking renegotiation. Finally there are indications that, in interpreting the scope and meaning of the Agreement, WTO Dispute Settlement Panels themselves might be prepared to support a narrower interpretation of the TRIPs Agreement enforcement than global corporate actors envisaged, this narrower interpretation being restricted to flagrant violations as opposed, for example, to more general complaints that the 'legitimate expectations' of global corporate actors are not being met by the particular form of national implementing measure introduced to meet the requirements of the TRIPs Agreement.

It is against this background that the book sets the scene for any renegotiation of the TRIPs Agreement, particularly during the forthcoming Doha Development Round of trade negotiations between WTO Members, identifying the likely negotiating platforms of key players and the range of issues likely to be at the forefront of future deliberations on international intellectual property protection. The book examines the prospects for issues unresolved at the end of the Uruguay Round by virtue of being included but

left open for review or omitted from the TRIPs Agreement altogether, assesses the likelihood of new issues being added (particularly in relation to biodiversity, indigenous knowledge and electronic commerce) and suggests that maintenance of the current text, with no substantive revision of the TRIPs Agreement, is the most likely outcome, but with amendments favourable to developing countries also a possibility.

At the outset it must be acknowledged that a great deal has already been written about the TRIPs Agreement and much of that excellent work is referenced in the text of this book. Chapters 1 and 2 trace the origins and negotiating history of the TRIPs Agreement. Earlier accounts of these events have tended to focus, on the one hand, on an analysis of official documents released at the end of the GATT Uruguay Round negotiations establishing the WTO and, on the other, on accounts of how and why business interests in the United States came to be mobilised so as to lobby for intellectual property protection on a global scale once the economic implications of widespread international piracy and counterfeiting became apparent from the early 1980s onwards. But in researching this book my initial concern was that these accounts, many of which provide entirely accurate versions of events in so far as they go, did not offer a complete picture of the events leading up to the TRIPs Agreement. By focusing on the undoubtedly significant role played by different US actors (individuals, corporations and business groups) in initiating and negotiating a new international agreement on the protection of intellectual property rights, American scholars have done a great deal to relate their side of the story. What has been underplayed in these accounts is a global perspective to counterbalance the US viewpoint – a recognition that there were also individuals, corporations and business groups outside the United States that played a significant role in laying the foundations for a new, global, regime for intellectual property protection in the twenty-first century. Far from being a victory for the United States (and US business interests in particular) as some authors have tended to argue, Chapters 1 and 2 suggest that once the whole picture of international corporate networking is revealed through an account of the relationships built between key European, US and Japanese actors in initiating and negotiating the TRIPs Agreement, we are presented with a classic example not of US corporate hegemony, but of *global* business identifying *global* obstacles to obtaining a secure international trading environment for their goods and services. With entire business sectors collaborating on a global scale and responding to the imperative of intellectual property protection in a coordinated way through lobbying and business group activity, corporate actors paved the way for the inclusion of intellectual property rights in the Uruguay Round trade negotiations and, ultimately, the adoption of new global regulation in the form of the TRIPs Agreement as part of the package of measures now administered by the WTO.

What this book implies is that only once the *raison d'être* of the TRIPs Agreement has been fully acknowledged by recognising the significance of

the consensus achieved among global corporate actors and business groups, and only once the origins and negotiating history of the Agreement have been understood in this way, can an interpretation of the main provisions of the TRIPs Agreement then be undertaken. This interpretation is undertaken in Chapter 3 with a provision-by-provision analysis of the text of the TRIPs Agreement elucidating its key components and indicating those measures which proved controversial during the Uruguay Round negotiations, often precisely because they ran counter to business practice and commercial expectation among global corporate actors or, conversely, because they amounted to representations of business priorities that were often opposed by developing country delegations to the GATT negotiations.

Once the final version of the TRIPs Agreement had been adopted at the end of the Uruguay Round, the significance of global actors and interests in securing the TRIPs Agreement did not stop. Chapter 4 describes how, following adoption of the TRIPs Agreement, scholarly attention has tended to shift to an assessment of whether the Agreement is now being effectively enforced, as a prerequisite for the intended outcomes of international legal obligations being achieved in practice. In this respect, there has been an expectation that the Members of the WTO, namely those countries (not businesses) that are signatories to the Uruguay Round agreements, will bring complaints about implementation of the TRIPs Agreement in the territories of other WTO Members before the WTO body responsible for scrutiny and transparency, the TRIPs Council, or through the formal Dispute Settlement Procedure of the WTO. But, although this shift in scholarly focus is laudable at the level of black letter law, in practice the corporate actors and business groups that provided the original stimulus for the TRIPs Agreement have themselves no right to be heard before the WTO. Because businesses do not have *locus standi* before the WTO, the continued significance of corporate interests in ensuring appropriate application of international intellectual property protection has tended to be overshadowed by the predominant focus on WTO Member countries and the formal aspects of WTO procedures. Chapter 4 seeks to redress this balance.

Following through the theme of highlighting the significant role played by global corporate actors, the book explains that this relates not only to the negotiation of the TRIPs Agreement, but also to the continuing efforts to monitor its application in foreign markets. Chapter 4 suggests that, in many instances, it is the very same companies and business groups that lobbied so hard to initially encourage adoption of the TRIPs Agreement that are now acting as the eyes and ears of developed country WTO Members in terms of global monitoring of national implementing legislation and administrative procedures on the ground. While government administrations in developed countries (particularly the United States and the European Communities)¹ rarely possess the resources to seek out instances of inadequate implementation of the TRIPs Agreement in foreign jurisdictions in any concerted way, it is frequently global corporate actors that bring the concerns