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The TRIPS Implementation Game: A Fight for Ideas

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the centrepiece of the global system of rules, institutions, and practices governing the ownership and flow of knowledge, technology, and other intellectual assets. TRIPS emerged from the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations (1986–94), and was a victory for multinational companies determined to raise international intellectual property (IP) standards and boost IP protection in developing countries. During the TRIPS negotiations, industry lobbyists persuaded the world's economic powers to wage a protracted campaign against developing countries opposed to the deal. Developing countries protested that the Agreement would consolidate corporate monopolies over the ownership of ideas, exacerbate the north-south technology gap, and perversely speed the transfer of capital from developing to developed countries.[1] They argued that stronger IP standards would harm their development prospects[2] and that they were ill-equipped to harness any purported benefits.[3]

The conclusion of TRIPS represents a revolution in the history of IP protection. By establishing a universal, comprehensive, and legally binding set of substantive, minimum IP standards, TRIPS both strengthens and supplements the earlier patchwork, of international IP agreements.[4] To meet these standards, TRIPS calls on all of the WTO's 152 members[5] to take action within their borders.[6] This requirement is particularly onerous for developing countries as TRIPS demands far higher standards of IP protection than most would otherwise provide.

For developing countries, a second battle began after the TRIPS negotiations ended. As developing countries struggled to complete extensive reforms of IP laws, administration and enforcement, they faced mounting pressures from developed countries, multinational corporations, and some international organizations, to adopt even higher IP standards than TRIPS requires and to abstain from using the flexibilities available in TRIPS.

The Implementation Game

Amidst growing debates on globalization and inequality, TRIPS became a symbol of the vulnerability of developing countries to coercive pressures from the most powerful developed countries and galvanized critics regarding the influence of multinational corporations on global economic rules. While IP advocates insisted that stronger IP protection could serve as a 'power tool for development',[7] a host of prominent international economists, such as Jagdish Bhagwati and Joseph Stiglitz, questioned the place of TRIPS in the WTO system (and continue to do so).[8] TRIPS triggered an intense global debate on the relationship between IP regulation and development. In 2008, the chief economics commentator for the *Financial Times* described constraints upon developing countries in the area of IP as 'unconscionable'.[9] Cambridge economist Ha-Joon Chang, among others, emphasized the costs to developing countries of introducing 'irrelevant or unsuitable laws' that restrict access to technologies and knowledge.[10] Developing countries argued that TRIPS ignored the diversity of national needs and forced them to sacrifice the 'policy space'[11] that richer countries had harnessed in early stages of their growth.

Given the vocal concern expressed by developing countries during the TRIPS negotiations and after it came into force, one would reasonably expect them to have taken full advantage of the possibilities the Agreement provides to tailor implementation in response to national economic and social priorities. Careful examination of the empirical evidence from 1995 to 2007, however, reveals a more complex picture of how developing countries responded to this room for manoeuvre. There was striking diversity in the approach developing countries took to the implementation of TRIPS rights and obligations. Most notably, developing countries took varying advantage of the legal safeguards, options, and ambiguities in TRIPS, now commonly referred to as the TRIPS 'flexibilities'.[12] Further, a surprising number of developing country WTO members implemented even higher IP standards than those required by TRIPS. By contrast, some developing countries took advantage of a range of TRIPS flexibilities, but their approaches varied according to the type of IP (e.g. copyright or industrial property). Further, many developing countries missed their deadlines for bringing their laws into conformity with TRIPS, thus effectively claiming more flexibility than provided for in the Agreement. Across the developing world, governments struggled to upgrade institutional capacity and resources to effectively administer and enforce their IP laws.

Why did developing countries 'draw the line' differently when implementing TRIPS? Why did so many developing countries, but *curiously* not all, implement reforms that went beyond minimum TRIPS requirements? What explains the apparent contradiction between what most developing countries *said* about TRIPS and what many *did* in respect of its implementation?

This book advances the first scholarly effort to explain the variation in TRIPS implementation across the full spectrum of the WTO's developing country members, almost a third of which are least developed countries

(LDCs).[13] In so doing, I build on a fragmented but growing literature on the politics of global IP regulation and national IP reforms as well as the work of scholars of international political economy and compliance with international law. To date, the literature on TRIPS implementation has mostly provided legal description and analysis. Where political analyses exist, they usually focus on explaining TRIPS-'plus' reforms in selected developing countries. This book shares an interest in why IP laws in so many developing countries exceed TRIPS requirements, but its purpose is broader: that is, to explain why we see such *variation* across the WTO's developing country membership in how governments approached TRIPS implementation from 1995 until the end of 2007.

The reasons for variation in TRIPS implementation defy any one parsimonions explanation. In this book, I provide an account that is richer, more comprehensive, and more subtle than popular narratives about the reasons for TRIPS-plus outcomes. The first challenge is to unpack the range of actors and dynamics involved, and examine how their interplay contributed to variation in TRIPS implementation. The second is to balance a search for general conclusions with a recognition of the complexity of global IP politics, the broad scope of TRIPS, and the diversity of the group of countries under examination.

This book advances the metaphor of TRIPS implementation as a complex political game. Developed and developing country governments were the key players, flanked by teams comprising a range of stakeholders, including multinational corporations, non-governmental organizations (NGOs), international organizations (IOs), industry lobby groups, and academics. Within governments, a range of agencies were active. Trade officials and the staff of national IP offices played particularly critical roles. Each of the players devised strategic moves, appealed to both spectators and referees to influence ideas about 'fair play', advanced different interpretations of the rules, and tried to get away with whatever they could. This in turn demanded a mix of psychology, rhetoric, strategy, technical skill, power, and endurance.

The TRIPS implementation game was intensely played because the economic and social stakes were high and the playing field was deeply unequal. The final TRIPS deal left both proponents and detractors dissatisfied, provoking post-agreement efforts from both sides to revise the contested text, sway its interpretation, and influence how it was implemented. The impacts of strengthened IP protection were hotly debated. Further, across the period under study, IP interests evolved and diversified in both developed and developing countries. A dynamic interaction ensued between debates regarding possible revisions to TRIPS and the implementation of the Agreement at the national level.

At the centre of these debates were different interpretations of what constitutes legal, TRIPS-consistent behaviour. Like most of the negotiated outcomes embodied in international laws, TRIPS contains many ambiguities and a

variety of inbuilt options. Further, the negotiating history of many TRIPS provisions is disputed. Laws and actions which some developing countries deem consistent with TRIPS obligations, developed countries consider TRIPS-'minus'. Conversely, developing countries view some developed country interpretations of what constitutes TRIPS-'minimum' behaviour as TRIPS-plus. As developing countries took steps to implement TRIPS, their questions were many: What would constitute adequate implementation? How much 'wiggle room' could they legally exploit?

In this political context, explaining variation in TRIPS implementation demands attention to: (*a*) the interplay between evolving global debates on IP and national reforms to implement TRIPS; and (*b*) the interaction between international pressures on developing countries and the political dynamics within them. In the chapters that follow, I specify the key actors and trends in global IP debates, highlight where the interplay between negotiation and implementation was most intense, and identify which factors governed the interaction between international and national political dynamics to generate different kinds of variation in implementation. The evidence shows that explanations differ according to the particular aspects of TRIPS under study and whether the focus is on the use of particular flexibilities; the strength of standards overall; or the timing of implementation, administration, or enforcement. Several broad findings also emerge which I briefly foreshadow here.

First, accounting for variation demands a nuanced consideration of the international pressures on developing countries, one that delineates different forms and sources of power. Pressures for stronger IP protection were a ubiquitous part of the global political landscape for TRIPS implementation. Economic pressures exerted by developed countries and industries had a decisive impact on TRIPS implementation in some countries, but was not exercised equally across them. Further, across the developing world, countries faced more subtle forms of power. IP advocates made strategic use of ideas and knowledge to shape perceptions and understandings of what kind of IP reforms were appropriate, possible, and would garner economic and political rewards. Their opponents also harnessed the power of ideas, mounting a countervailing campaign to persuade countries to use TRIPS flexibilities. Capacity building was a key vehicle through which this ideational power struggle played out and had a decisive impact on the decisions many countries took.

Second, economic circumstances and political dynamics at the national level made a significant contribution to variation in TRIPS implementation. The developing countries that took most advantage of TRIPS flexibilities were those that drew on a broad range of ministries, stakeholders, and expertise, and that devised a policy framework through which they approached TRIPS implementation. The countries that had participated most in TRIPS negotiations had the greatest technical expertise on the Agreement and made

the most targeted efforts to use its flexibilities. In short, the politics within developing countries made a difference to TRIPS implementation: there was some room for agency and manoeuvre. Alongside the many instances where TRIPS-plus pressures prevailed largely unchallenged, there were important cases of resistance, some of which succeeded. Importantly, as economic and social circumstances changed and the configuration of domestic interest groups evolved, some countries perceived stronger IP protection to serve their interests in particular sectors.

This chapter presents an overview of the book. It begins with an introduction to historical debates on IP, the emergence of a developing country voice on international IP regulation, and the rocky, political road to TRIPS. It then introduces the Agreement and several core elements of variation in developing country approaches to its implementation, emphasizing variation in timing and in the use of TRIPS flexibilities. After a brief review of relevant literature, I set out my analytical framework for explaining variation in TRIPS implementation, and preview this book's contribution to the international relations literature and global IP policy debates. To conclude, I provide a note on methods, sources, and several boundaries that delimit the scope of this book.

1.1. An Introduction to the Politics of IP and TRIPS

1.1.1. *A History of Contestation*

Debates between developed and developing countries over TRIPS reflect tensions that inhere in the provision of IP rights and which have accompanied IP regulation since its inception. Laws on IP are one of the central means through which governments manage the ownership, availability, and use of ideas and technologies and the distribution of the profits they generate. IP laws have a bearing on a range of critical and sometimes competing areas of public policy, from industrial and health policy to cultural, agricultural, and education policy. They can impact international competitiveness; the pace and focus of innovation; and affordable access to new technologies, knowledge, and creative works.

The origins of formal IP protection date back to fifteenth-century Venice when the first patents were issued and to the late seventeenth century when England laid the foundations for the first copyright laws.[14] Since then, the range of IP rights has expanded. Patents protect the underlying ideas used for industrial products or processes. Copyrights protect forms of expression, such as written materials and artistic works, whereas trademarks protect names and symbols associated with particular products and services. Through these and other IP rights (including geographical indications, plant breeders' rights, and utility models), governments grant inventors or creators private

rights to use, transfer, or profit from their work for a specified period of time. These rights enable IP holders to legally control (with certain conditions) the circumstances under which others can use their 'products of the mind'.[15] Once the term of protection ends, patented inventions and copyrighted works fall into the public domain where they may be freely used without permission or payment. (Trade secrets work differently: they enable owners to preclude any outside access to particular ideas indefinitely.)

In the case of patents, government intervention to grant private rights is conditional on the public disclosure of information about the invention through the publication of a patent document. Governments generally further balance private rights by including safeguards and exceptions in their IP laws that enable them, under selected circumstances, to promote public policy goals such as building local industry or boosting the availability and affordability of new inventions, ideas, technologies, and knowledge. To achieve these ends, many countries include provisions in their IP laws that, for example, limit the scope of patentability, enable compulsory licensing, require local use or 'working' of patents, or allow for 'fair use' of copyrighted materials. To guard against the abuse of the monopoly privileges that arise from private IP rights, governments may also complement IP laws with antitrust or competition laws.[16] In addition, in some countries, laws to promote the availability of medicines, protect genetic resources, or stimulate local industrial capacity operate in conjunction with IP laws.

In designing IP policies and laws, governments face several core recurring questions: what kinds of intangible assets warrant IP protection? To what degree should private rights be afforded to them? What is the right balance between private rights and public benefits? To what extent should a government extend private rights to foreigners? A core challenge for governments is how best to achieve the appropriate balance between, on the one hand, providing incentives for innovation and creativity and, on the other hand, ensuring the availability of the inputs necessary for further innovation and affordable public access to the products that emerge. To discern the right balance, governments must adjudicate a range of arguments for or against stronger IP protection from stakeholders working to advance particular private interests or public goals.

In a historical review of the recurring themes of patent debates, two leading legal scholars compile convincing evidence that 'there is little, if anything, that has been said for or against the patent system in the 20th century that was not said equally well in the 19th'.[17] Within developed countries, disputes between investors, the producers and inventors of IP, and consumers (and also among different groups within them) have prompted significant shifts in IP laws over time. The United States and Europe have, for example, experienced several cycles of IP reform, adjusting the terms of IP protection to their stage of economic development and to the changing preferences and

political influence of interest groups.[18] In the early nineteenth century, an anti-patent movement emerged in England, demanding not just reform but abolition of the patent system. There were also patent controversies in Europe from the 1850s to 1875. In the late nineteenth century, the UK House of Lords passed a bill calling for 'a reduction of patent protection to seven years, strictest examination of patent applications, forfeit of patents not worked after two years, and compulsory licensing of all patents'.[19] Further, in 1919 the UK reformed its patent law to exclude the patentability of chemical compounds in the face of a growing challenge from the German chemical industry.[20] In the United States, there have also been several rounds of debate in Congress about the appropriate level of IP protection, followed by changes in national IP laws.

Today, as at the time of the first efforts to make 'property out of knowledge', IP law-making is a political process 'in which particular conceptions of rights and duties are institutionalized; each settlement prompts new disputes, policy shifts, and new disputes again'.[21] To help build domestic industries, some businesses lobby for weak patent rights that enable them to copy and adapt foreign technologies. Knowledge-intensive industries, on the other hand, usually lobby for stronger patent protections to protect their investments in research and development. Consumers and public health advocates frequently appeal for weaker patent rights to make products like medicines cheaper. Creators, artists, and authors in cultural industries sometimes call for stronger copyright protections as do those companies that invest in them. Yet, to promote the availability of educational materials, librarians and educators frequently promote fair use exceptions to copyrights. In the absence of evidence-based assessments, the process of IP reform is often a war of ideas among competing interest groups pitting 'conviction against conviction, argument against argument, assumption against assumption'.[22]

1.1.2. *The Contested TRIPS Process and Outcome*

Since the late 1800s, developed countries worked to develop, strengthen, and harmonize international IP laws and to internationalize IP protection.[23] From bilateral arrangements, the first multilateral IP agreements emerged. To administer these treaties, governments created an international secretariat which ultimately became the World Intellectual Property Organization (WIPO). Over time, a global IP system emerged, comprising a dynamic set of national, regional, and multilateral legal instruments. By the mid-1980s, there were some eighteen international IP treaties (covering topics from patents, trademarks, and geographic indicators to industrial designs), most of which were administered by WIPO. (Appendix 2 provides a timeline of the core international IP agreements.) Both the significance of these treaties and the number of signatories varied. In practice, weak enforcement mechanisms

meant that governments could still exercise considerable discretion over the level and form of IP protection available within their borders.

Developing countries were largely uninvolved in the development of the core international IP treaties, several of which were negotiated in the colonial era. Only in the post-colonial era did distinct developing country concerns about international IP regulation emerge, culminating in their fight for a New International Economic Order (NIEO) and a North-South stand-off on reform of the international IP system in the 1970s and 1980s.[24] (See Chapter 2.)

In the 1980s, developed countries responded with an intensified push for stronger international IP protection. As U.S. pharmaceutical, agrochemical, electronic, software, and entertainment industries faced increasing threats from foreign competitors, the United States recruited Japan and the European Union to support their campaign extend the length and breadth of IP rights at the international level. In order to gain 'maximum returns' from increasing trade in IP-related goods and services,[25] they worked to add IP to the agenda of the Uruguay Round of GATT negotiations. Developing countries opposed this effort. They viewed the prospect of strengthened and binding international IP rules in the world trading system as an aggressive intrusion into the preserve of domestic regulation that would reinforce existing inequalities.[26]

At the time the TRIPS negotiations were launched, most developing and many developed country WTO members provided lower standards of protection than those required by the final agreement. The length and scope of patent protection for instance, varied widely across developing countries (see Appendix 3).[27] Some developing countries did not have any modern IP laws at all.[28] While many Latin American countries had worked to tailor IP laws to national development priorities, IP standards in several African countries had not changed since the colonial era. Further, some developing countries had TRIPS-consistent or TRIPS-plus standards in some areas even before the negotiations concluded. Further, the approach to IP institutions, administration, and enforcement differed considerably among countries. Most developing countries nonetheless shared at least one common characteristic: the degree of actual IP protection that foreign and domestic IP rights' holders received was weak, even by governments' own assessments.[29]

As the Uruguay Round advanced, a core group of developing countries worked to stall negotiations, narrow the scope of the IP agenda, and secure provisions that would help them defend their policy space. Hamstrung by limited negotiating capacity and inadequate knowledge of the technical issues under negotiation, no more than twenty developing countries had the resources and expertise to follow the IP negotiations and their implications closely.[30] The most vocal developing countries, such as Brazil and India, faced increasing unilateral political and trade pressures to accept rules for stronger IP protection.[31] The TRIPS deal was sealed when progress on improved market

access for textiles and agriculture was linked to acquiescence on IP as part of a 'single undertaking' of agreements.[32] The result was a deeply contested agreement.[33]

1.1.3. *A High-Stakes Battle*

The intensity of the TRIPS debate was fuelled by the major social and economic interests at stake. Industries with a direct stake in TRIPS were among the world's largest and most profitable: the US$650 billion per year global pharmaceutical industry (estimated to increase to $US900 billion in the next four years), the commercial seed industry (worth an estimated US$21 billion per year), and the global software and entertainment industries (worth an estimated US$800 billion per year).[34] In many of these industries, a handful of companies monopolized markets and their business model depended on securing IP protection.[35] The IP playing field was uneven. Throughout the TRIPS negotiations, developed country corporations, research centres, and individuals together held over eighty per cent of the world's IP rights.[36]

Throughout the TRIPS negotiations, development economists and legal experts debated evidence regarding the relationship between IP and development.[37] IP proponents argued that stronger IP protection would encourage foreign direct investment (FDI), innovation, and technology transfer, and spur the development of national cultural and creative industries. In the face of growing trade in counterfeit medicines and other products, proponents presented stronger IP protection as a way to help protect public health and safety.

Critics warned that while stronger IP protection *might* foster such outcomes in some cases, this would require the right conditions, carefully tailored policies and laws, and a range of complementary measures.[38] Moreover, they emphasized that these same IP rules could also slow industrial development by constraining opportunities to copy and adapt technologies.[39] As net importers of IP, many developing countries sought to employ the same strategies of copying and reverse engineering that had served developed countries at similar stages of development, and thus wanted to limit the recognition of IP rights for foreigners.[40] Flexibility regarding the scope and terms of IP rights granted within their borders was considered central to national efforts to promote national industrial capacity, generate employment, and ensure affordable access to essential technologies and knowledge.

In addition, strengthened international IP rules were predicted to increase the price of seeds, medicines, and educational materials, which developing countries often import and impede domestic competition for such goods. Some critics also emphasized that IP rules that circumscribe the ability of farmers to save and share seeds could pose threats to global food security and the livelihoods of the world's billion-plus small-scale farmers.[41] For the

poorest and smallest countries, the evidence suggested that the potential economic returns of higher IP protection were a very distant prospect.[42]

To administer and enforce IP reforms undertaken to implement TRIPS, developing countries faced the cost of financing and enhancing relevant government agencies, and the opportunity cost of employing scarce human capital to administer IP rules in the face of more pressing social challenges.[43] To implement TRIPS, most developing countries needed to develop or import the relevant legal expertise and depended on external assistance to surmount the considerable financial, technical, and institutional challenges.[44] In 2002, the World Bank estimated that TRIPS implementation would generate annual net losses for Brazil of US$530 million, for China of US$5.1 billion, for India of US$903 million, and for the Republic of Korea of US$15.3 billion.[45] Questions arose about the fairness of requiring developing countries to devote scarce public resources to help private foreign multinational corporations collect licensing fees and royalties.[46] In countries where copying and imitation of foreign technologies and knowledge were widespread, there were complaints that stronger enforcement of IP rights would pose threats to the employment of millions of workers and raise the prices of products for poor consumers.

The overarching disparity between developed and developing countries in the generation and ownership of technology continued to fuel global IP debates even as TRIPS implementation advanced.[47] In 2005, despite the growth of R&D capacity in several developing countries, ten developed countries still accounted for over eighty per cent of global resources spent annually on R&D, controlled over ninety per cent of the technological output, and received over ninety per cent of global cross-border royalties and technology licence fees. The same year, developing countries paid net US$17 billion in royalty and licensing fees, mostly to IP rights holders in developed countries.[48] Also, in 2005, the United States alone earned US$33 billion from developed and developing countries through the global IP system, more than its total development assistance budget of US$27 billion for that year.[49]

1.1.4. *What Does TRIPS Require WTO Members To Do?*

While the pre-TRIPS global IP system provided 'a menu of treaties' from which countries could 'pick and choose and in some cases make reservations to',[50] TRIPS obliges all WTO members to implement minimum standards of protection within specified deadlines for virtually all categories of IP, namely copyright, trademarks, geographical indications, plant breeders' rights, industrial designs and patents, as well as layout designs of integrated circuits, undisclosed information, and trade secrets. TRIPS puts new and unparalleled emphasis on making privately held IP rights enforceable, demanding stronger provisions in national IP laws to promote enforcement of IP rights

at the border and within the domestic market. In addition, TRIPS incorporates provisions of many earlier WIPO and bilateral agreements, extending them to a broader group of countries and linking them for the first time to an effective enforcement mechanism (the WTO's Dispute Settlement Understanding).[51]

For the most part, developed countries already had TRIPS standards and IP institutions in place and needed to make only minor revisions to domestic IP laws and administration to implement TRIPS. For developing countries, on the other hand, implementation of TRIPS requires them to raise their IP standards (increasing the terms and scope of protection). For most countries, this involves a complex set of reforms to update or redraft existing laws, adopt new laws, judicially reinterpret existing laws, and/or promulgate new administrative regulations and guidelines. To give their IP laws effect, many countries need to strengthen and sometimes reorganize IP administration, and also to considerably increase the financial resources allocated to IP issues.

To conclude the TRIPS deal, the TRIPS proponents made some concessions to developing countries on some of the most controversial issues.[52] (and also to developed countries like Canada, which is also a net IP importer).[53] One such concession was that the opening paragraphs of TRIPS emphasize the right of WTO members to implement TRIPS in accordance with their own legal system and practice. The same section also affirms the rights of countries to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to socio-economic and technological development. TRIPS also includes a set of safeguards, options, and ambiguous provisions that together afford WTO members some room to interpret their obligations and tailor TRIPS implementation to address national priorities.[54] The existence of several of these flexibilities was later confirmed by the 2001 Doha Declaration on TRIPS and Public Health. (For more on TRIPS rights and obligations, see Chapter 3.) The Agreement allows WTO members to choose, for instance, their preferred system regarding exhaustion of rights and parallel importation, and to make certain exceptions to patent rights, including with respect to compulsory licences, pharmaceutical products, public and non-commercial use, and early working. TRIPS further permits countries to exempt plants, animals, and new uses of known products from patentability and leaves countries considerable room for discretion regarding their approach to the protection of undisclosed information. In the area of plant variety protection, countries can adopt either patent protection or a *sui generis* system, or a combination of both. And in the area of copyright, TRIPS includes opportunities for countries to use a range of limitations and exceptions. Intense debate on some provisions prompted negotiators to incorporate the prospect of future changes to TRIPS by mandating the membership to conduct several reviews and further negotiations through the TRIPS Council. TRIPS also permits

countries to determine within their own legal traditions how best to provide for effective enforcement of IP standards.

While many WTO agreements grant developing countries specific and substantive 'special and differential treatment' in recognition of the costs and challenges implementation poses, TRIPS includes only three concessions targeted to their exclusive benefit: transition periods for implementation; a legal obligation on developed countries to enhance technology transfer to LDCs; and a commitment on the part of developed countries to provide technical assistance and capacity-building.[55] The transition periods were significant because they postponed the date at which developing countries could become the subjects of WTO disputes for failure to implement the Agreement. Importantly, the transition periods were not a specific negotiating demand on the part of developing countries, many of which viewed the extended deadlines as arbitrary and insufficient concessions in the face of the Agreement's deeply unbalanced rules.

In contrast to the international IP agreements that preceded it, TRIPS prevents countries from 'going backward' by reducing their level of IP protection. Further, the links between TRIPS and the suite of other WTO agreements concluded as part of the Uruguay Round make it more difficult than ever before for developing countries to shy from their international IP commitments.

1.2. Variation in TRIPS Implementation

Despite their dissatisfaction with TRIPS, the Agreement spurred IP reforms across most developing country WTO members. By the end of 2007, the IP standards in developing country laws were higher than ever before, both in terms of the length and scope of IP protection. Most countries, for example, increased the term of patent protection to twenty years and extended the scope of patent protection to all fields of technology, as required by the Agreement. Given the binding nature of TRIPS and its focus on raising international IP standards to a common minimum, these shifts are not surprising. The degree to which there was variation in the IP reforms undertaken by developing countries does, however, warrant explanation.

In practice, there was a spectrum of approaches to TRIPS implementation. In the effort to implement laws 'consistent' with TRIPS, some countries adopted a TRIPS-'minimum' approach, whereby they took advantage of TRIPS flexibilities to tailor implementation to national priorities. In other cases, countries went beyond the minimum necessary to be consistent with TRIPS: that is, they took a TRIPS-'plus' approach.[56] Further, where countries did not conform to the minimum TRIPS requirements by, for example, failing to undertake legislative reforms to implement TRIPS within their deadlines, this can be characterized as a TRIPS-'minus' approach. (Note that LDCs that have not

yet reached their TRIPS deadlines would not be classified as TRIPS-minus as their commitments are not binding until the end of their transition period.) Some countries also coupled a TRIPS-minimum approach to some aspects of IP reform with a TRIPS-minus or TRIPS-plus approach in others. Diversity in how developing countries approached TRIPS implementation emerged in respect of the timing of reforms, the use of TRIPS flexibilities, and in the area of IP administration and enforcement. (Chapter 3 reviews this variation in detail).

The first element of variation concerns the timing of legislative reforms to implement TRIPS. The transition periods in TRIPS themselves anticipated variation in the timing of IP reforms by stipulating distinct deadlines for developing countries and LDCs. Many developing countries passed TRIPS-related legislation only weeks before their January 2000 deadline for TRIPS implementation. Almost half of the seventy-three developing countries with this deadline still had laws for TRIPS implementation pending approval in their legislatures at the time their transition period expired, or had yet to introduce relevant laws for consideration. In late 2007, several of these countries still lacked legislation to implement significant aspects of their TRIPS obligations. By contrast, almost half of the WTO's thirty founding LDC members adopted legislation to comply with TRIPS well in advance of their original 2006 deadline for implementation.[57] Further, a cluster of developing countries had implemented IP laws that met most TRIPS obligations even before the Agreement was concluded. In addition, many developing countries undertook several rounds of reforms to strengthen their IP laws. In some cases, subsequent reforms were designed to take greater advantage of TRIPS flexibilities.

There was also variation in the degree to which developing countries took advantage of TRIPS flexibilities. The majority of developing country WTO members combined a mix of TRIPS-plus, -minimum, and -minus standards, and the use of TRIPS flexibilities varied according to the type of IP. Brazil, for instance, incorporated a broad set of grounds for compulsory licensing in its patent law but provided a longer term of copyright protection than required by TRIPS. South Africa, on the other hand, offered TRIPS-plus patent protections for biotechnological inventions but took advantage of TRIPS safeguards in order to promote access to essential medicines. There were also patterns of variation in the overall extent to which countries used TRIPS flexibilities. Over a third of the WTO's 106 developing country members included a broad range of TRIPS-plus provisions in their laws. Over half of the countries in this TRIPS-plus group were LDCs – the same countries that the economic literature anticipates would adopt the lowest levels of IP protection.[58]

A third element of variation in TRIPS implementation among developing countries relates to how laws were subsequently put into practice through

regulatory and administrative measures. In general, IP laws require regulatory or administrative acts by the executive branch of government to give them practical effect. Decisions made in the course of the administration of laws can modify the effect of laws and produce variation in the effect of similar IP standards. In many African countries, for instance, IP authorities granted patents for subject matter that their laws excluded from patentability.[59] Countries also had different regulations and guidelines on what constitutes an 'inventive step' in their examination of patent applications.[60] The case of compulsory licensing provides a further example of how IP administration influenced whether developing countries actually made use of the flexibilities inscribed in their laws. Even though most developing countries incorporated TRIPS safeguards regarding compulsory licensing in their national laws, by the end of 2007 less than fifteen governments had actually issued such a licence.[61]

A further aspect of variation concerns the implementation of TRIPS enforcement provisions. TRIPS deadlines prompted most developing countries to tighten their laws on enforcement, but the legal approaches to enforcement and the scale of resources devoted to the task varied widely.[62] The task of mapping variation between countries is complicated by the fact that few countries regularly gather their own statistics.[63] Moreover, TRIPS allows countries to implement enforcement provisions within their own legal traditions and does not provide legal or quantitative benchmarks against which enforcement of laws might be measured or compared.[64] While attention to IP enforcement increased after TRIPS came into force, the simultaneous growth in production and consumption of counterfeit and pirated goods meant that the actual protection of IP rights, particularly in the area of copyright and trademarks did not necessarily increase. Although critics rightly emphasized that industry methodologies greatly inflated the scale of losses industry suffered due to IP enforcement problems, it is notable that many developing country governments themselves complained of inadequate resources and acknowledged shortcomings in their judicial and customs procedures related to enforcement.

1.3. Existing Literature and Popular Narratives

A governing literature by economists and lawyers deftly describes IP reforms related to TRIPS implementation in some developing countries (usually focusing on one sector or one aspect of TRIPS).[65] The question of *why* there is such *diversity* in developing country approaches to TRIPS implementation and IP reforms has not yet, however, attracted the systematic attention it deserves.[66] Where efforts to explore the *politics* of TRIPS implementation by developing countries exist, the accent is on explaining TRIPS-plus reforms in a subset of developing countries or the decisions taken in a single country.[67]

These studies and the growing scholarly literature on global IP debates do nonetheless offer many reflections relevant to explaining the variation in developing country behaviour with respect to TRIPS. In addition, commentaries by policymakers, NGOs, and industry groups in policy debates, opinion pieces, and in the international media provide useful insights. Further, the international relations (IR) literature on compliance with international law and the diffusion of policy ideas suggests several avenues for explaining the decisions developing countries took in respect of TRIPS implementation. Together, the scholarly literature and narratives from policy practitioners yield three broad approaches to explaining variation in TRIPS implementation.

A first approach emphasizes the national characteristics of developing countries as a core source of variation in TRIPS implementation. It reminds us that countries already had a diversity of IP standards before TRIPS came into force. Further, it emphasizes that we should expect countries to tailor IP reforms according to factors such as their overall economic wealth, the relative weight of IP-related imports and exports, technological factors (such as the degree of domestic technological innovation, industrialization, and R&D), the structure of domestic industry, the presence or potential for cultural or 'creative' industries, and the scale of national socio-economic challenges in areas of health and education that might be impacted by IP laws.[68] Economists, for instance, propose that the appropriate level of IP protection differs according to national economic circumstances and goals, and that one should not be surprised to see variation in how countries responded to TRIPS.[69] Wealthier countries are, for example, expected to offer higher IP standards, particularly where they export IP-related goods. Countries with a strong reliance on imports of knowledge-intensive goods are expected to adopt weaker domestic IP standards.

Several scholars also observe the impact of national *political* factors on IP reforms.[70] Here, the argument is that variation in political and institutional arrangements within countries influenced how governments undertook the process of reform and how permeable they were to lobbying by domestic interest groups and international actors.[71] A number of studies explore, for instance, how government coordination impacted the enforcement of IP laws in China and the evolving role of interest groups in TRIPS-related debates in India.[72] In addition, legal scholars draw attention to how administrative decisions in IP offices impact the degree to which countries take advantage of flexibilities in TRIPS and in their own national laws.[73]

A second approach to explaining variation in TRIPS implementation emphasizes the role of international power dynamics. The general argument proceeds as follows. The growth of knowledge-based industries generated an inexorable drive by multinational companies to protect and expand their profits by securing private property rights to their intellectual assets as widely as possible across the globe. The capacity of developing countries to resist

was constrained by their economic, political, and intellectual dependence on developed countries, IOs, and foreign corporations for investment, market access, development assistance, and political security.[74] In this context, variation in developing country responses to TRIPS is attributed to the degree of pressure applied by external powers and their strategic choices regarding target countries.[75] Economic pressures frequently referred to include trade threats and corporate lobbying, to secure stringent IP reforms and stronger international IP rules.[76] In addition, several scholars observe that monitoring by developed countries, the WTO TRIPS Council, and industry created a 'web of surveillance' that put additional pressure on developing countries.[77] Recent scholarship on how policy ideas diffuse and on the politics of IP-related capacity building alerts us to ways that learning, socialization, and emulation could serve as channels through which international pressures penetrated developing country decision-making on TRIPS.[78]

A third explanation for variation in TRIPS implementation calls on us to consider that governments can make empty promises. At the international level, developing countries sometimes sign onto international agreements in the hope of reputational rewards or economic favours with little intention or capacity to enforce them. Many countries understand well the importance of lip service to those issues of particular interest to their donors in the areas of sustainable development, human right and democratization.[79] In some case, there are shared understandings that compliance is not really expected. At the national level, a similar logic may apply to laws passed to implement international agreements: laws can be cheap where countries do not intend to enforce them or have little capacity to do so. For some commentators, the gap between the strength of IP standards and the effective level of protection that right-holders receive in many developing countries puts the significance of some of the observed variation in IP standards into question.[80] In certain cases, it is possible that neither membership of TRIPS or subsequent national IP reforms, whether TRIPS-plus or TRIPS-minus, reflect a meaningful commitment on the part of governments, particularly where countries new they faced little prospect of retaliation for non-compliance. For the weakest countries especially, the argument is that some of the TRIPS implementation that occurred on paper was simply a mechanical response to international obligations rather than an indication of a real intention to make changes on the ground. The implication of the 'empty promises' approach is that not all of the variation we see ought to be taken seriously as a subject of comparative analysis as the genuineness of the observed reforms may differ.

While each of these three approaches provides important insights into the reasons for aspects of the diversity in TRIPS implementation, none alone can account for the degree and distribution of variation. The challenge at hand is to draw together and build on these explanations to devise an analytical framework and set of arguments about what factors mattered most.

1.4. Explaining Variation in TRIPS Implementation

In this book, I explain variation as an outcome of the *interplay* of global IP debates, international power pressures, and political dynamics within developing countries. To set the scene, Chapter 2 reviews the evolution of developing country perspectives on international IP regulation, tracing the history of developing country concerns about international IP regulation from colonial times up until the signing of TRIPS.

Chapter 3 surveys the variation in TRIPS implementation among developing countries from 1995 to 2007. It begins with a summary of the core requirements TRIPS places on developing countries and then highlights the variation in how developing countries implemented these requirements, focusing particular attention on the timing of legislative reforms and the use of TRIPS flexibilities. The chapter then contrasts this variation with what the economic literature and the history of international IP negotiations lead us to expect. On the one hand, it shows that national economic circumstances and changing sectoral interests can indeed explain some aspects of the variation. On the other hand, the evidence also reveals significant divergences between the behaviour of many developing countries and the predictions advanced in the economic literature, particularly for many of the world's poorest countries which adopted TRIPS-plus approaches to implementation.[81]

Chapter 4 argues that disagreements over the final TRIPS text set the scene for a global fight over how developing countries implemented the Agreement. TRIPS implementation occurred amidst efforts by both developed and developing countries to 'remake' the original TRIPS deal, both by influencing what governments did on the ground and by working to renegotiate the terms of TRIPS. Developed countries and their multinational companies pushed for ever stronger IP protection. Developing countries defended TRIPS flexibilities and mounted a progressively more assertive call for global IP reform. Post-agreement bargaining on the terms of TRIPS and global IP regulation[82] gave rise to an increasingly complex global IP system. With the engagement of a growing range of non-state actors (including NGOs, industry, IOs, and academic experts), global IP debates intensified. Tensions rose over the use of TRIPS flexibilities, particularly in the area of public health, and there was growing interest in ensuring the development orientation of international IP rules. As the decade advanced, WIPO re-asserted itself as a key player. As the WIPO Secretariat became more engaged in global IP debates, it also became a target of them.

Over time, a cacophony of voices and interests animated global IP debates. Broadly speaking, most of the players joined or supported one of two archetypal 'teams'. Neither of the teams was monolithic. As global IP debates progressed, players within each team sometimes expressed divergent views, adopted more or less aggressive political strategies and definitive

positions, and expressed varying degrees of interest in dialogue with the other team.

One team, led by developed countries and multinational corporations, favoured a narrow and swift compliance-oriented approach to the implementation of TRIPS and advanced a 'compliance-plus' agenda for IP reforms more generally. This included pushing developing countries to go beyond minimum TRIPS implementation, to sacrifice the use of TRIPS flexibilities, and to add new stronger IP standards to their domestic laws. In addition, this team argued for even stronger global IP regulation and more stringent enforcement in developing countries, and worked to influence the positions developing countries took in ongoing international IP negotiations and global IP debates.[83]

An opposing 'pro-development' team called for developing countries to take time to tailor implementation of TRIPS to their national needs, including by taking advantage of the flexibilities available in the Agreement. They also advocated reform of international IP rules, citing the need for greater balance in the global IP system to ensure proper attention to development and public-interest considerations.[84] The players on this side included NGOs, academics, some IOs (such as UNCTAD and the WHO), most developing country governments, as well as some foundations and development-oriented government agencies in developed countries.

Importantly, the scale of resources at the disposal of each of these two teams, and their legitimacy in the eyes of developing country officials, varied. The pro-IP team had greater financial reserves, access to governments, and global reach across and within developing countries, particularly through the IP community in each country notably, those with a pro-IP stance often stated and believed that their agenda would also help development in poorer countries. Further, many of those in the 'pro-development' were not anti-IP, but rather supported a balanced IP system. Nonetheless, the characterization of teams as pro-IP or pro-development serves to mark a distinction in perspective that members of each side acknowledged and used.

Chapter 5 explores how international pressures contributed to variation in TRIPS implementation. Some countries faced pressure in advance of their first efforts to draft, debate, and implement TRIPS-related IP reforms. Once TRIPS-related reforms were in place, many countries subsequently faced additional pressures to repeal, modify, or strengthen provisions in their laws. Most countries also faced international pressures in the area of administration and enforcement of laws, including regarding the practical use of flexibilities included in their national laws.

The intensity and focus of international pressures varied by country. In my analysis, I disentangle two kinds of power that were exerted (sometimes separately but often in tandem), identify the multiple pressure tools deployed,

and specify which players were involved. *Economic* power was used where players deliberately deployed their material resources and capacities to manipulate the strategic and economic constraints of other countries, to push them to do something that they would not otherwise do, or to compel them to desist from a particular action.[85] Developed countries worked, for instance, to link economic rewards with the positions that developing countries took in international IP negotiations and their progress on TRIPS reforms. Examples of tools used to exert economic power included bilateral trade and investment deals, WTO disputes and accession agreements, trade sanctions, and the threat of sanctions. The United States, for example, sometimes threatened, 'either change your IP policies or I will withdraw your trade preferences'. Coercive, economic pressures had a clear and decisive interest on some countries, but the success rate of such efforts differed and there was variation in the specific target countries, the issue-focus, and the intensity of pressure applied.

Ideational power was also at play. Each team used the power of ideas to advance distinctive perspectives on the pros and cons of different approaches to TRIPS implementation, to dominate the political environment for IP reforms, to influence the terms of debate in international negotiations,[86] and to shape how developing countries behaved at the national level.[87] Ideational power operated through efforts to influence expertise, know-how, and institutional capabilities on IP matters in developing countries, as well as understandings, beliefs, and discourses about IP. Tools used included monitoring of IP reforms, framing of IP debates, and building sympathetic knowledge communities of analysts, critics, and experts. The core framing mechanisms employed were research, international media campaigns, and public outreach. In addition, ideational power and economic power were combined in the provision of capacity-building.[88] Each team worked to provide technical advice and training, shape expertise, and build institutional capacity in ways that reflected their distinctive preferences.[89]

The pro-IP team used ideational power to advance three overarching messages: economic, legal, and political. On the economic front, they emphasized the benefits of swift TRIPS implementation, stronger IP protection, and higher international IP standards for innovation, foreign direct investment, and technology transfer. That is, they worked to advance the idea that stronger IP protection was economically desirable for developing countries in its own right. On the legal front, irrespective of the relative merits of TRIPS implementation for developing countries, the pro-IP advocates emphasized that TRIPS implementation was a legal commitment: the integrity of the multilateral trading system and the rule of law demanded that countries conform. On the political front, as global IP debates intensified, the pro-IP team embedded pressures for stronger IP protection in a broader political bargain. Support for stronger domestic and international IP protection was presented as a condition for accessing and maintaining economic and political

rewards from developed countries and their companies in areas as diverse as political security, investment, market access, and foreign aid. Even where the bargain was not explicitly articulated, its presence was keenly perceived by the leaders and officials of many developing countries. Evidence of political will in the area of IP protection became an integral part of the package of reforms developed countries needed to undertake to demonstrate their commitment to good governance and economic globalization. Developing countries were left with little doubt that positive talk and performance on TRIPS implementation shaped their global reputation, and with it their ability to secure foreign aid and trade deals, and to maintain broader political alliances. The pro-development team used ideational power to counter TRIPS-plus pressures and to battle the 'hegemony' of pro-IP discourse in global IP debates.[90]

In Chapter 6, I investigate how links between international and domestic factors contributed to variation in TRIPS implementation. National economic circumstances and political factors *within* developing countries shaped the capacity of governments to filter and manage international pressures regarding TRIPS implementation and the influence of global IP debates. Within developing countries, three factors influenced their susceptibility to external pressures, sometimes filtering and sometimes amplifying their impact, and thus contributed to variation in TRIPS implementation: (*a*) government capacity; (*b*) public engagement; and (*c*) government coordination. In terms of government capacity, the expertise and institutional competence of governments made a difference, as did the accountability and control of national IP offices. Public debate also had an impact, most notably through the relationships between governments and parliaments, the engagement of interest groups, and the degree of regulatory capture. Coordination within government contributed to divergences in implementation as well. Key factors included the degree to which IP decision-making was embedded in broader public policymaking processes, the communication between the internal and external faces of developing country governments, and the relationships between national governments, foreign donors, and regional and multilateral IOs.[91] To illustrate how the interplay between global IP debates, international pressures, and national politics generated variation, the chapter concludes with several mini case studies.

Chapter 7 explores the politics of TRIPS implementation in francophone Africa. Comprised of the world's poorest countries, the francophone African region was where one would most expect governments to have taken full advantage of TRIPS flexibilities, especially as these countries escaped the direct economic pressures that other developing countries experienced. Yet in reality, LDCs in francophone Africa adopted very strong IP standards well in advance of their TRIPS deadlines. This extreme 'outlier' case,[92] sheds light on how the combination of weak national capacity, capacity-building,

and a regional approach to IP regulation impacted TRIPS implementation. It shows that national institutional arrangements amplified the influence of international pressure and also how, even in the absence of explicit economic pressures, the compliance-plus global political environment influenced government perceptions and impacted their decisions.

To conclude, Chapter 8 draws together my core findings regarding the reasons for variation in TRIPS implementation and proposes a set of implications and strategies for those working for IP regulated tailored to the development priorities of developing countries.

1.5. Why This Book Matters

This book presents new empirically-grounded scholarly analysis of the *implementation* of TRIPS. It provides a comparative review of selected aspects of developing country implementation of TRIPS from 1995 to 2007. This time frame matters because it includes each of the deadlines by which all WTO members – developed, developing, and LDCs – were originally required to have implemented TRIPS.

This book also addresses an important gap in the scholarly literature by taking up the *politics* of the *implementation* of WTO agreements, including TRIPS. In the wake of the Uruguay Round, developing countries pushed for discussion of the challenges they faced in respect of 'implementation issues'.[93] Existing studies of the implementation of WTO agreements show that responses to commitments vary widely, and that developing countries do indeed face many difficulties.[94] The issue of WTO-related implementation has nontheless largely failed to attract either the political attention developing countries desire, or the interest of scholars of international relations and compliance with international law. To date, WTO scholars have generally examined implementation from a legal or descriptive perspective, often overlooking the ways in which it is a dynamic political process and the scope for different interpretations of legal commitments.

Whereas a growing literature explores the potential for developing countries to act collectively to advance their interests in international trade negotiations, countries usually stand alone when it comes to translating WTO laws into national policy.[95] As WTO rules reach further inside the borders of states and pressure for their implementation intensifies, the research terrain for scholars of international political economy has expanded. Even though TRIPS has inspired a burgeoning literature from critics and supporters, economists and lawyers, there has been surprisingly little effort by political scientists to complement studies of the process of WTO and IP negotiations with the analysis of the implementation process.[96]

This book makes the case for greater consideration of how the political dynamics of compliance with international law[97] are affected by the contested nature of international agreements and post-agreement bargaining to revise or clarify their provisions.[98] It also shows that WTO negotiations extend far beyond the conclusion of formal negotiating rounds and the entry into force of agreements: the TRIPS implementation process was influenced by ongoing IP negotiations among WTO members within and beyond the WTO context. Further, my analysis emphasizes that WTO rules exist within a web of bilateral, regional, and international agreements; analyses of implementation must thus locate rules within this broader context.

In general, scholars of compliance focus on what helps bring 'rogue' states into compliance with international rules. They assume these rules reflect a 'balance of advantage' and that governments 'ought' to comply with them either for their own 'good', for the credibility and durability of the system, or for the sake of some broader global public objective or principles (such as environmental protection, development, or human rights). These assumptions weaken the usefulness of the compliance literature for explaining TRIPS implementation. In this book, I take up Peter Gerhart's argument that TRIPS lacks substantive validity.[99] Only by acknowledging disagreements about the origins, legitimacy and interpretation of TRIPS, and the uneven distribution of its benefits, can we understand the politics of implementation. I also show that the narrow focus of many compliance scholars on the effectiveness of unilateral pressures, such as trade threats, is ill-suited to the far more complex set of interactions revealed in this study. In addition, I emphasize that TRIPS imposes positive obligations on States; it requires States to *do* a set of things. This study provides empirical evidence to support Gerhart's argument that the dynamics and politics of compliance with the 'positive commands' of international law may differ from those associated with 'negative commands', particularly where the regulatory commitments encroach deep into areas of law hitherto considered the national preserve.[100]

This book breaks new ground by proposing an analytical framework for studying the politics of TRIPS implementation in developing countries and the variation that emerges. The focus of much of the commentary on TRIPS has been the international dimension of the politics surrounding the Agreement.[101] Taking the lead from scholars of international political economy, this book shows that consideration of the way international pressures and domestic politics *interact* is required to understand the variation in how countries implement international IP laws.[102] In so doing, attention must shift beyond governments as unitary actors to explore the institutional arrangements within them, and also to consider the interactions among states, IOs, companies, NGOs, and experts.[103]

At the national level, this book draws attention to the role of IP offices in guiding the implementation of international IP agreements and as the

primary government interlocutors with international donors and the core recipients of their technical advice and capacity-building. I thus introduce national IP offices and the networks among them as a subject for further comparative study by scholars interested in processes of global regulatory harmonization and cooperation.

The TRIPS implementation process provides strong evidence to support the argument that capacity-building can play a decisive role in inducing, promoting, and sustaining compliance with international law.[104] Where patterns of non-compliance stem from administrative breakdowns, the ambiguity and technicality of international agreements, or weak technical capacity of some governments, 'managerialist' scholars of compliance propose that capacity-building may be a more effective tool for compliance than the threat of punishment.[105] In the case of TRIPS implementation, however, capacity-building was not the consensual tool that managerialist scholars of compliance describe. Rather in the context of debates on the scope of TRIPS rights and obligations, capacity-building was a highly politicized instrument used by an array of stakeholders to advance their respective agendas. Its influence was particularly significant in light of the limited technical expertise of most developing countries and the relatively low level of resources they had hitherto been devoted to IP protection.

This book also helps correct the relative neglect of the distinctive experiences of developing countries in their international relations and in the governance of the global economy.[106] My analysis of TRIPS implementation sheds new light on the nature, dynamics, and exercise of power in the global economy, providing specific examples of how different kinds of power are expressed and by whom, and how this impacts the way developing country governments respond to international legal commitments. By explaining the process and subtleties of how TRIPS was implemented, this book gives substance to the view that developing countries' policies are often set by others. By detailing the mechanisms through which developing countries were both coerced and persuaded to identify with, and mimic, the IP policies of richer countries, this book also contributes to the growing literature on how policy ideas are diffused in the global economy.[107]

My case study on TRIPS implementation in francophone Africa draws attention to the need for deeper analysis of the objectives, practice, and implications of delegation to regional organizations. At the time TRIPS came into force, over a third of the WTO's developing country members already belonged to regional IP arrangements among Arab, Andean, or African countries. In this book, I explore how the secretariats of these regional IP arrangements affected the way their members responded to TRIPS.

Finally, this book also adds new empirical evidence to the scholarly literature regarding the role of IOs in international relations.[108] IOs had a significant influence on global IP debates and also on TRIPS implementation

in many developing countries. The most influential IOs were the WTO and WIPO, both of which were instructed by their member governments to help developing countries implement TRIPS.[109] On a lesser financial scale, IOs such as the United Nations Conference on Trade and Development (UNCTAD) and the World Health Organization (WHO) also played a role in advising and assisting developing countries on TRIPS implementation. The Secretariats of IOs competed for influence on global IP debates and on developing country decision-making. They sometimes expressed the power and interests of particular countries or interest groups, and also emerged as authoritative players in their own right. I emphasize the role of WIPO as a central player in the TRIPS implementation game, highlighting its governance and activities as topics ripe for further critical study by scholars of international relations.

1.6. Methods and Sources

The analysis advanced in this book draws on a decade of professional experience in international debates on trade and IP decision-making. This study also draws on over 100 interviews with individuals engaged in the TRIPS implementation process, including staff of IOs, capital-based government officials, Geneva-based negotiators, academic experts, journalists, and a range of representatives from international NGOs and industry. With the exception of those who asked not to be listed, those consulted are listed in Appendix 1. For the case study on francophone Africa, I conducted a further set of interviews with relevant officials, scholars, and NGOs active in that region. Most interviewees specifically requested not to be cited by name in the text.

My analysis of variation in TRIPS implementation draws from an original, cross-national comparative review of TRIPS implementation of 106 developing country members of the WTO. The goal of the survey was to gather sufficient detail to illustrate the scope of variation among developing countries rather than to present an exhaustive survey or a definitive legal assessment of IP laws in developing countries or their compliance with TRIPS. The latter tasks would often involve a team of legal experts. Further, it will take several years of implementation and court action to determine the precise scope, boundaries, and effects of many IP laws. Moreover, the process of IP reform is dynamic and ongoing. At the time of writing, IP legislative reforms were still underway, particularly in developing countries that supplemented TRIPs obligations with further multilateral and bilateral commitments.

The evidence discussed in this book was drawn from a wide range of primary and secondary sources. The key primary sources were WTO and WIPO compilations of national IP laws. These laws were not, however, available in a database format that enabled electronic searches or comparisons across countries regarding the implementation of particular TRIPS requirements

or use of flexibilities.[110] Additional official sources of data on TRIPS implementation included the summaries of TRIPS Council meetings, notifications by countries of their IP laws and regulations, and TRIPS Council Reviews of the IP legislation of WTO members,[111] government responses to a TRIPS Council IP enforcement checklist,[112] and the IP chapters of the WTO Secretariat's Trade Policy Review reports on members.[113] Notably, in presenting information for the TRIPS Council and for Trade Policy reviews, many developing countries conveyed minimal information about their implementation efforts (sometimes to avoid or divert critical attention and to avoid use of information against them in potential disputes) and presented a positive picture of their efforts and intentions with respect to this process. The annual USTR Special 301 Reports and the yearly U.S. National Trade Estimate reports also provided information about TRIPS implementation, though the political purposes of these analyses similarly called for caution in accepting how developing country laws were characterized.[114] I also cross-checked information with secondary sources, namely government, industry, and NGO reports, which, while also often subjective, helped to provide a fuller picture of implementation. These included annual country and sector reports from industry associations,[115] the World Economic Forum (WEF),[116] and periodic reports published by NGOs such as Médecins Sans Frontières (MSF), Third World Network (TWN), and Oxfam.

The survey also benefited from country studies on TRIPS implementation in francophone Africa, Brazil, China, India, Mexico, Nepal, and Venezuela, as well as studies on the use of TRIPS flexibilities in Kenya and Uganda.[117] I also drew on examples presented in national legal textbooks[118] and reviews of particular IP laws in (e.g. patent laws in Egypt, Brazil, and India as well as plant variety protection laws in China).[119] Studies of enforcement and piracy in developing countries were also useful sources of data.[120] Examples cited in several studies of TRIPS implementation options and several cross-national legal studies of IP standards in developing countries were also drawn upon.[121] The latter were, however, limited either by scope (e.g. covering only patent or copyright protection)[122] or duration (covering only the period up until 2000).[123] Finally, my analysis draws on reports regarding IP reforms in developing countries from international and national news publishers as well as independent news services such as *BRIDGES Weekly*, *Inside U.S. Trade*, *Intellectual Property Watch*, and the *South-North Development Monitor*.

1.7. Scope

A note on the scope of this book is in order. My intention is to offer a global perspective on variation in TRIPS implementation and a framework for understanding the variation among developing countries in their responses

to TRIPS that captures the complexity of the political process. I use striking examples from a range of different countries to illustrate my arguments but do not propose to explain all aspects of variation across developing countries or to undertake a detailed examination of TRIPS implementation in any one country. While much attention in the global media focuses on IP protection and enforcement in the largest developing countries, such as Brazil, China, and India, my research is intentionally concerned with the broader range of developing countries. In particular, I set aside any detailed examination of TRIPS implementation in China, which has already attracted considerable scholarly attention and whose economic and political circumstances render it a case apart from other developing countries.

Finally, this book does not explore the impacts of TRIPS implementation on developing countries, their development goals, or other public policy objectives. It also does not attempt to assess or affirm the various claims by stakeholders regarding potential or actual impacts. Given the broad scope of TRIPS and the vast array of debates on global IP regulation, I devote most attention to issues of copyright, patents, and plant variety protection, which were the areas where IP debates were most consistent and intense both during and post the TRIPS negotiations. By contrast, IP laws related to integrated circuits, geographical indications, and trademarks are not taken up in detail. My analysis concentrates on legislative reforms and their interpretation by developing countries. It explores issues of IP administration only where they are relevant to these matters. The larger task of analysing the political dynamics of how countries enforced the laws they passed to implement TRIPS are deferred for future study. I do, however, consider how concerns about enforcement, piracy, and counterfeiting emerged in global IP debates and influenced the political environment for decision-making on TRIPS implementation.

Notes

1. For reviews of these arguments, see Finger and Schuler (2000), Maskus (2000*a*), Rodrik (2001), and Stiglitz (2002).
2. While aware of the vast diversity of countries that make up those commonly referred to as 'developing countries', the terminology remains useful for the purposes of this research. The WTO does not have formal criteria for developing country status. Instead, developing countries in the WTO self-ascribe to this status. The UN designation of least-developed country (LDC) is however accepted and used in the WTO context. Where helpful to allow for a more fine-grained analysis, I differentiate developing countries according to region and economic status, e.g. LDCs, emerging developing countries, and African countries.
3. The leading historical accounts of the origins and process of the TRIPS negotiations include Beier and Schicker (1996), Drahos (1995), Gervais (1998), Matthews

(2002), Ryan (1998), Sell (1995, 1998, 2003*b*), Stewart (1993), and Wolfhard (1991).

4. Okediji (2003*a*: 1, note 1). The legal significance of TRIPS in the context of international IP regulation is also discussed comprehensively by Reichman (1997, 1998*b*).
5. This figure represents the WTO membership as of 5 February 2008.
6. In contrast to most previous GATT agreements, which focused on removing trade barriers at the border, TRIPS set out positive obligations on WTO members to take action within the realm of domestic regulation. Alongside TRIPS, the Uruguay Round also produced two other agreements specifically focused on 'behind the border' measures to address non-tariff barriers to trade: the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Standards.
7. Idris (2002).
8. Bhagwati (2001) and Stiglitz (2002: 245–6).
9. Wolf (2007).
10. Chang (2007).
11. 'Policy space' is a term widely used by developing country negotiators in the context of international trade negotiations to refer to the scope for governments to implement explicit pro-development policies (e.g. to support domestic industries, international competitiveness, local innovative capacities, and affordable access to technologies, knowledge, and information). See Group of 77 (2004). The 2004 UNCTAD Sao Paolo Declaration emphasized, for example, the importance of preserving policy space in international trade rules.
12. The widespread use of the term 'flexibilities' to refer to these safeguards and options emerged in the late 1990s in the context of the negotiations leading to the Doha Declaration on TRIPS and Public Health.
13. This survey excludes WTO members from Eastern Europe (many of which are now EU members or in the process of acceding to the EU) and the former CIS States (or Newly Independent States, such as Armenia, Georgia, Kyrgyz Republic, and Moldova). These countries do not generally claim developing country status at the WTO, instead designating themselves as 'economies in transition'.
14. In 1962, rising public literacy and the growing use of the printing press in England prompted the King to pass a Licensing Act, which established a register of licensed books and required a copy of each book to be deposited with the Stationer's Company. The 1710 Statute of Anne was the first copyright law and granted rights to authors for a fixed period. The English 1624 Law on Monopolies was the first formal industrial property law.
15. The most widely cited rationale for IP protection is to correct market failures whereby innovation, knowledge, and creativity may be underproduced due to fears of misappropriation and difficulties securing economic returns on the investment. For reviews of debates on this rationale, see Machlup and Penrose (1950) and May and Sell (2005).
16. Correa (2007*b*).
17. Machlup and Penrose (1950: 10, 28).
18. See May and Sell (2005), and Sell and May (2001).
19. Machlup and Penrose (1950: 4).

20. Ibid.
21. May and Sell (2005: 1).
22. Machlup and Penrose (1950: 10, 28).
23. May (2000, 2002).
24. Patel et al. (2001). Also see Chapter 2, note 92.
25. Drahos (2002*b*: 3).
26. Mowrey and Rosenberg (1989: 278).
27. Dutfield (2000) and WIPO (1988).
28. May (2000: 1).
29. This conclusion draws from reports submitted by developing countries for their respective national Trade Policy Reviews and their responses to questions posed during the TRIPS Council's review of TRIPS implementing legislation in 2000–1.
30. Drahos (2002*b*), Matthews (2002), and Stewart (1993).
31. *Economic and Political Weekly* (1989), Drahos (1995), Kumar (1993), Raghavan (1990), and Sell (2003*b*).
32. Ibid.
33. For a critical assessment of the implications of the Uruguay Round for developing countries, see Hoekman and Kostecki (2001), Raghavan (1990), and UNDP (2003*b*). For a positive assessment, see Schott (1994).
34. These figures draw from news reports in the *Economist* in 2007 and 2008, and Smith et al. (2008).
35. For example, ten companies including Monsanto (USA), DuPont/Pioneer (USA), Syngenta (Switzerland), and Groupe Limagrain (France) control half of the world's commercial seed sales. See ETC (2005: 1).
36. Kumar (1993).
37. For summaries of debates that took place during the TRIPS negotiations, see CIPR (2002), Correa (2000*a*), Raghavan (1990), UNCTAD (1996), UNDP (2003*b*: 203–34), Watal (2001), and Yusef (1995). For the views of various economists during the negotiations, see, for example, Binley (1992), Deardorff (1990), Grossman and Helpmann (1991), Kumar (1993), Primo Braga (1989, 1990), and Rapp and Rozek (1990).
38. Others have argued that stronger IP protections need not be a prerequisite for technology transfer. Binley (1992) observes, for example, that 'Korea benefited from technology transfer in numerous industries via licensing arrangements, subcontracting agreements and the location of foreign subsidiaries during a period in which its intellectual property laws were as weak as any of the other LDCs'. Regarding the link between the strength of IP rights and FDI in developing countries, Evenson (1993: 366) observed at the time of the TRIPS negotiations that 'the literature does not show strong correlations'. For a summary of the economic literature on IP, see Maskus (2000*a*).
39. Fink and Maskus (2005) and Maskus (2000*a*, 2004).
40. Drahos (2002*b*: 3), Maskus (1990), and Sell (1998).
41. Tansey and Rajotte (2008).
42. Maskus (1990).
43. See, for example, Finger and Shuler (1999).
44. Finger and Schuler (2000) and UNCTAD (2007).

45. World Bank (2002).
46. See Maskus (2000*a*), and Finger and Schuler (2000).
47. Kumar (2002).
48. Chang (2007).
49. Ibid.
50. Okediji (2003*a*).
51. Ibid.
52. For a comprehensive analysis of specific TRIPS provisions and their negotiating history, see UNCTAD-ICTSD (2005).
53. For a discussion of Canada's role in international IP negotiations, see Morin (2008).
54. For an overview of TRIPS flexibilities, see South Centre (1997) and Correa (2000*a*).
55. Reichman (1995: 783–4: note 115) affirms that unlike prior multilateral trade agreements, TRIPS 'provides no special regime that weakens international minimum standards as such for developing countries'.
56. The term TRIPS-plus is often specifically used in policy circles to characterize international agreements that require signatories to increase their level of IP protection beyond that required by TRIPS or which include provisions that reduce the scope or effectiveness of the flexibilities included in TRIPS or the ability of countries to use them.
57. Cambodia and Nepal subsequently acceded to the WTO, bringing the total number of LDC members to thirty-two. The transition periods available to LDCs are not automatically available to newly acceding members of the WTO. See Abbott and Correa (2007). Also see discussion on accessions in Chapter 5.
58. Maskus (2000*a*).
59. Musungu and Oh (2006).
60. Correa (2007*a*).
61. This figure was calculated by the author on the basis of studies by Love (2007), Oh (2006), Khor (2007), and Yoke Ling (2006), and a review of news reports until December 2007. For further discussion, see Chapter 6.
62. The tensions about the appropriate methodology for assessing and measuring the degree of IP protection and enforcement are discussed in Ginarte and Park (1997), Lee and Mansfield (1996), Mansfield (1994), Ostergard (2000), Primo Braga and Fink (2000: 39), Shadlen et al. (2005), Sherwood (1997), and Watal (2001).
63. A further option would be to find a measure of a country's political commitment to giving practical effect to their IP laws, such as the level of resources devoted. However, even the best-intentioned government may find its efforts to increase effective protection thwarted by unresponsive government agencies and factors such as a generally slow and inefficient judicial system.
64. Watal (2001).
65. Bentolila (2002/03), Shadlen (2004*a*), Shadlen et al. (2005), and Watal (2001).
66. Kenneth Shadlen (2006, 2008), a comparative political scientist, is the only scholar thus far to have specifically taken up the task of explaining variance in IP reforms in developing countries (with a particular focus on Latin America).

67. Das (2003) and Ramanna (2005).
68. Fink and Maskus (2005), Maskus (2000*a*), and UNCTAD (2007).
69. Ibid.
70. See Correa (2007*c*), Drahos (2007*a*), Shadlen et al. (2005), Shadlen (2006, 2007), and UNCTAD (2008).
71. Das (2003), Ramanna (2005), and Shadlen (2006, 2008).
72. Mertha (2005), Mertha and Pahre (2005), Das (2003), and Ramanna (2005).
73. Correa (2007*a*), Drahos (2007*a*), and Garrison (2006).
74. Sell (2003*b*) and Musungu and Oh (2006: 43). On the relationship between trade agreements and political security considerations, see Gruber (2000).
75. Several leading IP scholars discuss the use of coercion to influence international IP negotiations and IP standards in developing countries. See Abbott (2004), Correa (2004*a*, 2004*b*), Drahos (2002*b*, 2003, 2004*b*), MSF (2003), Oxfam (2002, 2004*a*), and Shadlen et al. (2005). For similar analyses of 'bullying' by developed countries, see the analysis by NGOs such as GRAIN (2003), MSF (2003), and Oxfam (2002, 2004*a*, 2004*b*). GRAIN (2003) has argued, for example, that 'the European Union is aggressively forcing developing countries to adopt the strictest intellectual property rules on seeds that are possible'.
76. See, for example, Drahos (1995, 1997, 2003), Matthews (2005), May (2004, 2006*a*), and Sell (2003*b*). Andersen (2006*a*, 2006*b*) reviews how capacity-building and industry lobbying influenced the adoption of the Philippines' plant variety protection law.
77. Sell (2003*b*: 121). Also see Matthews (2002) for discussion of the role and activities of the TRIPS Council.
78. Maskus (2006) explores how IP policies in the agricultural arena took hold in the Asia-Pacific region. For further analysis of policy diffusion in international relations, see Fordham and Asal (2007), Gleditsch and Ward (2006), Sabatier (2007), Simmons and Elkins (2004), Simmons et al. (2006), Strang and Soule (1998), True and Mintrom (2001), and Wolfe (2005).
79. Hathaway (2003), and Hafner-Burton and Tsutsui (2005) discuss the cost of commitments to international laws and the rationale for empty promises to comply with them.
80. Author's interviews with selected government and 10 officials.
81. Ibid.
82. For analysis of the dynamics of international negotiations and global IP debates since TRIPS, see for example, Drahos (2002*a*), Halbert (2005), May (2006*c*), Okediji (2003*a*), and Sell (2006).
83. See notes 39 and 45.
84. Sell (2003*a*), and Sell and Prakash (2004).
85. This definition draws from the definition of compulsory power in Barnett and Duvall (2005).
86. This analysis draws on the work of Bierstecker (1992, 1995), Goldstein and Keohane (1993), Sell (1998), and Woods (1995) exploring the role of ideas in international policy debates.
87. This analysis draws on literature that explores how 'epistemic communities' and 'technocratic elites' influence international policy debates. See Haas (1992*a*),

Howse (2002), and Cogburn (2007). In the realm of IP regulation, Braithwaite and Drahos (2000), Dutfield (2000), and Sell (2003*a*) have explored the influence of the community of IP professionals on international IP regulation.

88. The scale and nature of IP-related capacity-building to IP reforms in developing countries have attracted critical attention from several scholars. The following scholars each note the bias of technical assistance from IOs and developed countries in favour of a compliance-driven approach to TRIPS and of strengthened IP protection in general: Matthews (2005), Matthews and Munoz-Tellez (2006), and May (2004). Several NGOs also published critical reviews, for example, Bellmann and Vivas-Eugui (2004), Kostecki (2005), Musungu (2003), and Pengelly (2005).
89. The importance of ideas in debates on international IP regulation has been emphasized by Drahos (1996), Mayne (2002), Odell and Sell (2006), Okediji (2003*a*), Sell (1998, 2003*b*), and Sell and Prakash (2002).
90. The notion of a hegemonic pro-IP discourse in international IP negotiations has been advanced persuasively by Abdel Latif (2005), reflecting on his own experience as an Egyptian diplomat responsible for IP negotiations in Geneva.
91. Abdel Latif (2005).
92. Van Evera (1997: 86, 91–2) argues that a single 'outlier' case may be particularly useful where outcomes are poorly explained by existing theories and where close examination of the case may help elucidate otherwise under-appreciated causes.
93. See, for example, South Centre (2004).
94. Examples of assessments include FAO (2003), Oxfam (2005), U.S. Chamber of Commerce (2005), USTR (2004), VanGrasstek and Sauve (2006), and Wolfe (2003). For the domestic politics of implementing WTO rules in the United States and Europe, see Princen (2004) and Destler (2005). For analysis of the political factors influencing the implementation of the recommendations and rulings of the Dispute Settlement Body, see Barton et al. (2006: 61–70) and Petersmann (1997).
95. For analysis of developing country efforts to harness coalitions in international trade negotiations, see Kahler and Odell (1989), Narlikar (2002, 2003), Odell (2006), Shukla (1994), South Centre (2003), Tussie and Glover (1993), and Winham (1998).
96. The study of international trade negotiations by IR scholars was pioneered by John Odell (2000). Also see Odell (2006).
97. The compliance literature seeks to shed light on the incentives and conditions which foster compliance with international regimes and on the relative effectiveness of various tools that might be employed to further promote compliance, including conditionality, sanctions, and side-payments. For a synthesis of this literature, see Raustiala (2000). For a discussion on sources of compliance and motivations, see Young (1994). Also see Chayes and Chayes (1993, 1995), Cortell and James (2000), Downs and Jones (2002), Raustiala and Slaughter (2002), Simmons (1998), and Spector et al. (2003).
98. For discussion of post-agreement bargaining on other international issues, see Jonsson and Tallberg (1998).
99. The importance of this point for the examination of compliance with TRIPS was made by Gerhart (2000) in response to the managerialist literature on compliance

exemplified by the work of Chayes and Chayes (1993), Downs (1998), and Downs et al. (1996).

100. Gerhart (2000).
101. For contributions exploring the interaction of national and international factors, see Evans et al. (1993), Gourevitch (1978), Moravscik (1993), and Putnam (1988). For analysis of how interactions between national and international factors explained the way developing country governments behaved in the context of structural adjustment policies, see Haggard and Kaufman (1992).
102. Drahos (2007*a*), Correa (2007*a*, 2007*c*), Mertha (2005), Shadlen (2006), and Shadlen et al. (2005).
103. Wolfe (2005).
104. See note 99.
105. Managerialist scholars argue that formal enforcement actions (such as sanctions) are not (and are not likely to prove) a particularly effective instrument in promoting the overall level of regime compliance. See Chayes and Chayes (1993).
106. For literature examining the applicability of mainstream IR theory to the developing world, see Aydinli and Matthews (2000), Dunn and Shaw (2001), Lavelle (2005), Neuman (1998), Puchala (1998: 149), Thomas and Wilkin (2004), and Woods (2000).
107. See note 78.
108. Theoretical sources for analysis of how IOs may acquire and exert institutional power and independent 'agency' include Barnett and Finnemore (1999, 2004, 2005), Barnett and Duvall (2005), and Checkel (2005). The nature of international bureaucracies and the role of their staff in global politics have long attracted the attention of IR scholars. See Cox (1996), Cox and Jacobson (1973), Langrod (1963), and Weiss (1975).
109. WIPO-WTO (1996).
110. TRIPS requires members to notify the Council for TRIPS regarding several aspects of their implementation of the Agreement, including their laws and regulations. WIPO makes the laws and regulations contained in its collection available through its monthly review 'Industrial Property and Copyright' and through its Online Collection of Laws for Electronic Access (CLEA). See http://www.wto.org/english/docs_e/docs_e.htm and http://www.wipo.int/clea/en/index.jsp.
111. In 1996–7, the TRIPS Council conducted reviews of TRIPS implementing legislation of developed country members, followed in 2000–1 with reviews of developing countries with a 2000 deadline for TRIPS implementation. For documentation related to the reviews, see http://www.wto.org/english/tratop_e/trips_e/intel8_e.htm.
112. For TRIPS Council enforcement checklist and responses, see http://www.wto.org/english/tratop_e/trips_e/intel8_e.htm.
113. For the documentation related to WTO Trade Policy Reviews, see http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.
114. The USTR Special 301 reports and press releases are available at http://www.ustr.gov. The annual U.S. National Trade Estimates reports review factors affecting U.S. trade interests in a broad range of countries and include

commentaries on the state of IP protection in those countries. For these reports, see the U.S. Trade Compliance Center at http://tcc.export.gov.

115. Industry associations that produce such regular reports include the International Intellectual Property Alliance, the International Federation of Pharmaceutical Manufacturers Associations (IFPMA), the International Chamber of Commerce (ICC), the Pharmaceutical Research and Manufacturers of America (PhRMA), and the Biotech Industries Organization (BIO).
116. See Lopez-Claros et al. (2006).
117. On TRIPS implementation, see Karky (2004), Kongolo (2000*c*), Maskus (2000*b*), Perez (1998), and Sheppard (1999). On the use of TRIPS flexibilities, see Lewis-Lettington and Munyi (2004).
118. See, for example, Astudillo (1999) and Dean (1989).
119. Balat and Loutfi (2004), Marc (2001), and Varella (2004).
120. Shadlen (2006).
121. Correa (2007*c*) includes selected examples of the use of TRIPS flexibilities in a range of developing countries.
122. Consumers International (2006) presents a review of the use of copyright flexibilities in Asia. Musungu and Oh (2006) surveys the use of TRIPS flexibilities in the area of public health in forty-nine developing countries.
123. Thorpe (2002) surveys the use of a broad range of TRIPS flexibilities up until 2000. Sell (1998) and Sheppard (1999) each present a review of TRIPS implementation up until 1998.