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# The rise and rule of a trade-based strategy: Historical institutionalism and the international regulation of intellectual property

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## ABSTRACT

One of the most dramatic instances of international market regulation in the twentieth century was the adoption of a multilateral, enforceable, intellectual property protection regime at the end of the Uruguay Round of trade negotiations in 1994. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) ushered in a new era of high standards of intellectual property protection, requiring profound and costly domestic institutional changes in many, many countries. International market regulation has increasingly penetrated domestic regulatory environments in ways that have compromised domestic political bargains. Historical institutionalism can help to explain the emergence of a global regime for intellectual property protection as a product of institutional change in the US. Historical institutionalism provides a lens to examine the directly political (rather than technocratic or efficiency maximizing) processes establishing domestic and international power relations.

## KEYWORDS

Intellectual property; trade; historical institutionalism; developing countries.

One of the most dramatic instances of international market regulation in the twentieth century was the adoption of a multilateral, enforceable, intellectual property protection<sup>1</sup> regime at the end of the Uruguay Round of trade negotiations in 1994. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) ushered in a new era of high standards of

intellectual property protection, requiring profound and costly domestic institutional changes in many countries. By 2005 all but the least developed countries had to implement new national legislation protecting these rights in conformance with TRIPS. The distributional consequences of this shift have been profound, leading to substantial rent transfers from developing countries to OECD-based companies. International market regulation has increasingly penetrated domestic regulatory environments in ways that have compromised domestic political bargains.

If you had told the United States Trade Representative (USTR) that TRIPS was a 'lock' at the beginning of the Uruguay Round of trade negotiations in 1986 he would have been rightly skeptical. That year USTR Clayton Yeutter complained to private sector intellectual property (IP) advocates that Canada, Europe and Japan were not getting any industry pressure to bring intellectual property into the General Agreement on Trade and Tariffs (GATT), and without a consensus among the Quad (US, Europe, Japan and Canada) there would be no hope for an IP deal.<sup>2</sup> Makers of luxury trademarked goods had failed to get an international anti-counterfeiting agreement at the end of the Tokyo Round in 1979 due to the eleventh hour proposal and a lack of consensus. Efforts to amend the Paris Convention for the Protection of Industrial Property at the World Intellectual Property Organization (WIPO) had failed by 1985 (Sell, 1998: 107–40). The fraught negotiations led to an intractable stalemate between developing and developed countries. As part of the New International Economic Order (NIEO) developing countries sought to revise the Paris Convention to better match their national laws that restricted patenting and to allow compulsory licensing of drugs. For their part, developed countries reluctantly came to the table determined to prohibit any weakening of the patent system. Over the course of the negotiations, they changed their position to actively seek stronger intellectual property protection. The prospects for a new multilateral agreement did not look hopeful. Copyright interests were especially wary of a multilateral approach, fearing that their interests might get bargained away in a multi-issue negotiation (Ryan, 1998: 106–7). Instead, they preferred a bilateral approach to enforcement that domestic institutional changes had made available to them. In the end the TRIPS's architects were surprised that they achieved so much of what they had wanted.<sup>3</sup>

Indeed, inserting intellectual property into the multilateral trade regime made no sense on its face. Intellectual property and trade are different issues, posing very different problems. Overall, both domestic and multilateral post-war trade policy has moved in the direction of accelerated trade liberalization, lowering tariffs and reducing non-tariff barriers to trade. To the extent that trade liberalization works to free trade and increase consumer access to goods and services, intellectual property policy cuts against this by constructing scarcity in knowledge-based goods and services and *rationing* access. Intellectual property protection grants

temporary monopoly privileges that can effectively limit competition. Prominent free trade advocates such as Jagdish Bhagwati have insisted that intellectual property does not fit into the trade regime; Bhagwati (2004: 182) has bemoaned the fact that the World Trade Organization (WTO) has in effect become a 'royalty collection agency'. Historically the United States has been ambivalent about intellectual property protection. For much of the twentieth century US policy reflected skepticism about intellectual property protection and monopoly power; it was not until the last 20 years of the twentieth century that the US became a vigorous advocate of expanded global property rights (Sell, 2004: 269). Thus there is no natural, automatic or obvious fit between trade liberalization and intellectual property protection (Machlup and Penrose, 1950). This fit was constructed by non-state actors in conjunction with policymakers worried about international competitiveness and fortified within domestic institutions such as the legislature and the Office of the USTR.

This article argues that historical institutionalism can help to explain how a global regime for intellectual property protection emerged as a product of *internal* institutional change in the US. The process began with a post-Watergate trade policy reform and subsequently, the explicit incorporation of intellectual property into trade policy and trade institutions. Layering intellectual property protection onto trade institutions through lobbying and legislation gave the USTR more authority and resources, and also created new tasks for the USTR. Institutional layering also helped an initially disparate group of actors with various understandings of, and interests in, intellectual property to build a coalition united behind a multilevel (bilateral and multilateral) trade policy framework to further institutional change.

This article proceeds in four sections. The first discusses alternative explanations and situates the argument in the literature. The second section examines domestic institutional change in the US as an instance of functional conversion, achieved by a process of layering, lobbying, legislative change, and institutional expansion. It lays out the recursive dynamic through which institutions mobilized actors and actors altered institutions. The third investigates how these changes affected bargaining power and in particular provided the US (and associated intellectual property interests) with new domestic sources of bargaining strength in international negotiations. The fourth section examines cross-national sequencing and policy diffusion of high standards of intellectual property protection into the developing countries. It highlights some important limits of historical institutionalism's understandings of dynamics of policy diffusion and enforcement when applied to relations between industrialized countries and developing and middle-income emerging countries. Finally, the article offers concluding reflections and suggestions for further research.

## ALTERNATIVE EXPLANATIONS AND HISTORICAL INSTITUTIONALISM

Why did the US seek to include global intellectual property protection in the WTO? Conventional international relations accounts offer various possible explanations, none of which are entirely satisfactory.

A simple structural interest explanation might suggest that US advocacy for global intellectual property protection was inevitable, given the long-term decline of US manufacturing and the rise of globally oriented firms trading in knowledge-based goods. Stronger intellectual property protection would be in the national interest. However, this account reveals little of the substance and timing of change, or the agents who advocated for it. Structural factors are indeterminate. Globally competitive firms such as Sun Microsystems, which provided customized solutions for their clients, had very different preferences from other leading knowledge-based firms such as IBM and Microsoft, which provided standardized software. While the former favored reverse engineering to facilitate interoperability of different systems (Band and Katoh, 1995: 229), the latter were strongly in favor of an international copyright law that would prohibit reverse engineering, leading to what Anthony Clapes (1993) has called 'softwars'. Additionally, various user groups, such as the Association of American Publishers, mobilized to protest the semiconductor chip manufacturers' quest to get first patent protection, and later copyright protection for the 'mask works' or the chips' layout design. The latter ended up opting for *sui generis* (unique) protection that was neither patent nor copyright (Sell, 1998: 64). TRIPS was neither structurally ordained nor automatic. Just as in the services and financial services sectors (Woll, 2006), advocates of incorporating intellectual property into the GATT spent painstaking years building and selling their case to other business interests as well as to regulators. Agency and coalition-building were required to make this policy a reality.

Furthermore, the evidence suggests that the advocates of stronger intellectual property protection relied on domestic institutional structures that were the product of historical accident rather than conscious contemporaneous planning. For instance, the advisory committee structure that facilitated generous access for private sector actors (the Advisory Committee for Trade Negotiations (ACTN)) had its origins in the Nixon administration. Nixon had asked John Connolly to establish an institutional counterweight to labor union power. Years later this institutional change, which initially had *nothing* to do with intellectual property, became a key conduit for advancing a global intellectual property rights agenda.

More sophisticated structural accounts, such as Daniel Drezner's (2007) study of bargaining strength and global regulation similarly fail to capture the reasons for change. Drezner sees bargaining strength as a simple

product of domestic market size, paying no systematic attention to other possible sources of advantage. Surely the United States' market size had important consequences in WTO negotiations. Yet this structural focus on power is too simplistic to reveal consequential elements that are, as historical institutionalism reminds us, rooted in domestic politics and institutions. In the case of international intellectual property regulation the US, despite its considerable market, was long unable to obtain stronger intellectual property rules globally. It had tried in the Tokyo Round to get an anti-counterfeiting code, and had failed in its efforts to strengthen the Paris Convention. Significantly, these episodes predated the US institutional reforms that elevated intellectual property to the top of the trade agenda, especially the 1988 Omnibus Trade and Competitiveness Act, and before the institutionalization of the USTR's Super 301 watch list process.

While structural explanations come up short, so do traditional pluralist domestic-level explanations. Domestic actors did not simply seize on an existing set of government institutions as the easiest and most convenient way to press their sectoral interests (Frieden, 1988; Rogowski, 1989). As I discuss below, interest groups were not independent of the state, but instead helped shape it, even as the state in turn shaped them. Yes, actors approached institutions, but institutions also helped to shape the advocacy process and actors' ultimate preferences for a multilateral approach. When intellectual property advocates began to build linkages between intellectual property and trade, many of the most important institutions (such as the USTR for investment) did not even exist.

Nor was the shift towards intellectual property protection a simple tale of regulatory capture in which powerful domestic groups captured the state, which in turn did their bidding. As I show in detail below, one cannot understand the final outcome without understanding the political processes through which these firms came together. The government-business relationship in this case was more complex than simple regulatory capture would imply. As Cornelia Woll (2006: 59, emphasis added) argues in a different context:

Even when firm preferences were effectively reflected in the policy output, the impact of business depended on the interest government had in letting business play its role. In the international negotiation context, governments encouraged business activities when they saw a strategic advantage in advancing on the trade issue in question. The apparent lobbying success is therefore not an indication of 'power', i.e. the victory in a business-government conflict, but of the *convergence* of business and government objectives.

One cannot explain TRIPS's trade-policy focus using either traditional realist approaches that highlight the autonomy of the state and its conception of the national interest, (Krasner, 1978; Drezner, 2007), or pluralist

approaches that focus on the role of groups in setting the policy agenda for the state, while remaining separate from it (i.e. societal explanations, Frieden, 1988; Rogowski, 1989; Moravcsik, 1993). Instead, we see how institutional change and interest group formation actively co-constituted each other; Underhill refers to this dynamic as the 'state-market condominium' (2006: 17; Kratke and Underhill, 2006: 34–5). Interest groups pushed for institutional changes that furthered their own needs, but institutions not only provided interest groups with a focus, but helped *create* them by fostering alliances between disparate actors that otherwise would have had little in common with each other. Finally, both became intertwined and mutually dependent as institutions formalized advisory roles for interest groups, and interest groups provided crucial resources that allowed institutions to pursue their mandated and expanding tasks (Drahos with Braithwaite, 2002: 94–9).

Historical institutionalism provides a lens to examine the directly political (rather than technocratic or efficiency maximizing) processes establishing domestic and international power relations. In Pierson's (2004) terms, the shift to the intellectual property agenda involved the consolidation of new constituencies that were not present at the creation of the institution. This approach allows us to understand the three critical steps through which intellectual property assumed its central position in the international trade agenda. First, it allows us to understand the *domestic processes* within the US through which institutions and interest groups co-constituted each other so as to transform the US approach to intellectual property. Second, it explains how the United States' *international bargaining strength was increased*, allowing it to prevail in international negotiations where it had previously been blocked. And finally, it provides a partial (but only a partial explanation) of how this has led to a *subsequent wave of diffusion* of institutions that helps anchor specific kinds of intellectual property protection in the domestic institutions of developing countries.

### FUNCTIONAL CONVERSION AND LAYERING

The domestic transformations that led to intellectual property and trade becoming intertwined in US policy debates are best understood as an instance of what Kathleen Thelen (2000: 105) refers to as 'functional conversion' in which exogenous shocks empower new actors who then 'harness existing organizational forms in the service of new ends'. These actors did this by layering intellectual property on top of trade and investment. Economic globalization empowered exporters and global service providers who eclipsed declining traditional protectionists and promoted a platform of market access abroad. Trade policy became tethered to intellectual

property protection and the USTR became increasingly prominent. State preferences emerged from a conversion and layering process that resulted in institutional change.<sup>4</sup>

Before these domestic institutional changes, when an intellectual property holder suspected that a foreigner was infringing her property, she would notify the US embassy in that country. Embassies handled such disputes on a case-by-case basis. Amending international intellectual property rules historically had taken place in the WIPO. Advocates for stronger property rights saw these old channels as dead ends as they had not had much success through them. With low barriers to new political action through legislation (Hacker, 2004: 248; Streeck and Thelen, 2005: 36), especially with the post-Nixon opening up of trade policymaking, interest groups and the legislature began layering intellectual property policy on top of existing trade institutions. Subsequent amendments in domestic laws added intellectual property infractions as actionable under trade statutes.

The results are striking. According to Drahos and Braithwaite (2002: 89–90), ‘surveillance and monitoring of intellectual property ha[s] been turned into an obligatory routine as opposed to something that the USTR might occasionally do’. USTR’s current mission is the negotiation of an Anti-Counterfeiting Trade Agreement (ACTA) which is not about trade liberalization but rather about securing stronger protection for US-held intellectual property.<sup>5</sup> In a classic instance of conversion through differential growth (Streeck and Thelen, 2005: 36), this function increasingly has overshadowed the USTR’s purported commitment to trade liberalization.

The political linkage between intellectual property and trade emerged out of particular institutional changes that created a new locus for organization and action. There was nothing inevitable or natural about this process; both historical contingency and agency played important roles. Interest groups and institutions co-constituted each other to create particular institutional changes. These changes led various interests to mobilize for further policy change. State institutional changes created client groups that pushed not just for the maintenance of institutions, but also for their expansion. Interest groups empowered institutions by lobbying for the institutions’ expanded role. For instance, the Motion Picture Association of America (MPAA) actually lobbied for an expansion of the USTR’s staff (Drahos and Braithwaite, 2002: 99)! In turn the institutions (e.g. USTR) promoted policies favoring the interest groups’ preferences. Institutions helped shape interest groups, as different interests coalesced around the political possibilities offered by institutional changes. Finally, the ensuing symbiosis embedded interest group representation at the highest levels of government in trade policymaking. A trade policy approach led to the emergence of state preferences for an international intellectual property agreement within the multilateral trading regime.

The key institutional innovation that ultimately facilitated TRIPS had nothing to do with intellectual property. The American domestic institutional story began in 1974 with Richard M. Nixon's resignation in disgrace from the presidency. Nixon had centralized power in the executive branch. After his resignation, Congress took steps to rebalance the government and inject more transparency into the political process. Opening up legislative procedures made trade policymaking more transparent, and the House of Representatives made mark ups of new bills open to the public. This effectively offered new opportunities for special interests to press their proposals (Destler, 1992: 69).

It was by no means obvious at this point that intellectual property issues and trade would go together. However, the changed political climate offered opportunities that interest groups were willing to take advantage of. Traditional protectionist groups from the steel and agricultural sectors pushed for amendments to trade policy law in 1974. They sought more effective remedies against infringement of *domestic* intellectual property rights in the United States (Matthews, 2002: 14). Congress responded and adopted amendments to Section 337 of the US Trade Act of 1930. The new Section 337 transferred from the president to the International Trade Commission (ITC) the authority to exclude the importation of foreign goods that violated the Trade Act (Matthews, 2002: 14). This initial intellectual property-trade linkage was limited to cover only goods that were imported into the United States.

This provided intellectual property interests with an opening; other sections of the 1974 Trade Act (which were not intended to apply to intellectual property) provided tools that they could develop over the longer term. Section 301 of the Trade Act of 1974 gave the president the power to take all appropriate action to enforce US rights under trade agreements. The act also permitted US industries, trade associations, and individual companies to petition the USTR to investigate actions of foreign governments. If the USTR decides to investigate, he or she consults with foreign governments to try to resolve the problem. If these efforts fail, within a year the USTR can recommend to the president retaliation via trade sanctions.

Together these changes to trade policy had unexpected consequences. Most importantly, they both led to the mobilization of a new coalition around intellectual property enforcement, and channeled its activities in some quite specific directions. Some interest groups were already concerned with the relationship between intellectual property and trade issues. Luxury goods producers, concerned about counterfeiting, saw Section 301 offered an opportunity to expand the United States' domestic anti-counterfeiting efforts by blocking questionable imports. The USTR, which had recently obtained a legislative charter and an associated cabinet position, provided a potential institutional lever, but only if intellectual property could be implicitly incorporated under its remit. Near the end

of the GATT Tokyo Round negotiations that lasted from 1973–1979, the Levi Strauss Corporation initiated an effort to combat denim counterfeiting (Doremus, 1995: 149). Other trademark-sensitive luxury firms joined in and lobbied as the International Anti-Counterfeiting Coalition. This coalition lobbied the USTR and secured its support for an Anti-Counterfeiting Code that would use *at-the-border measures* to seize infringing imports. The effort did not succeed in the multilateral forum because it emerged quite late in the negotiations and there was no broad consensus behind it, but represented the first US-based multilateral push for a GATT-based approach to remedy perceived intellectual property infractions (Matthews, 2002: 8–9).

Over the longer term, however, what was more important was the creation of a *new* coalition of industry actors, which eventually brought a much more disparate set of interests, in pursuit of a far more ambitious set of objectives. Just as welfare state institutions created new political constituencies that helped entrench them (Pierson 1996), changes in trade policy gave rise to a different kind of trade lobby. Rather than focusing on traditional protection, this new crew focused not on protection from imports but rather on promoting exports, global markets, and outward investment – in a nutshell, market access *abroad* (Destler *et al.*, 1987).

The beginnings of this coalition were modest enough. With increasing economic integration, firms worried about their high value-added products being counterfeited, and about their aspirations to earn maximum returns through foreign commerce. In the late 1970s agricultural chemicals producers – Monsanto Agricultural Company, FMC, and Stauffer – acting through the US government, engaged in bilateral talks with the Hungarian government in a quest to end the ‘piracy’ of agricultural chemicals and strengthen Hungarian intellectual property laws (Enyart, 1990: 54). The private sector mobilization process began in the late 1970s within the agricultural chemicals industry in these negotiations with the Hungarians. Initial efforts began within Pfizer, FMC, International Business Machines (IBM), and Du Pont.

As time passed, these actors grew more ambitious and began to press for institutional changes that would better allow them to prosecute their interests. Replicating the mechanisms of policy feedback that Pierson (2000) identifies, private actors lobbied for amendments to Section 301 of the Trade Agreements Act of 1979 that would further embed their access to trade policymaking. This was an important step in the evolution of a trade-based multilateral intellectual property agreement because the private sector and the USTR began to co-constitute each other’s interests and preferences. The 1979 amendments allowed private parties directly to seek government redress for others’ violations of international trade agreements. Amendments in 1979 *required* the federal government to ‘take into account the views of affected industry, effectively establishing a

cooperative relationship between public and private sectors' (Fisher and Steinhardt, 1982: 605). The 1979 amendments enlarged the scope of private sector participation in trade policy and further institutionalized its role.

### USTR and a bilateral approach

This experience helped foster the creation of a wider and more disparate coalition of interests. The president's appointment of Edmund Pratt, chief executive officer (CEO) of Pfizer Pharmaceutical to chair the ACTN provided an official channel for business people to provide private sector consultation to the president. ACTN played a major role in devising a trade-based intellectual property strategy for US trade policy. The ACTN argued that investment issues, in particular weak intellectual property protection, belonged on the trade agenda. Pratt and John Opel, CEO of IBM, had been active in the International Anti-Counterfeiting Coalition at the end of the Tokyo Round. Together they lobbied the administration in favor of stronger foreign patent and copyright protection respectively. ACTN recommended that the USTR create a new post – assistant trade representative for investment – which the USTR established in 1981 (Ryan, 1998: 68). This institutional innovation guaranteed that there would be an assistant trade representative dedicated to intellectual property issues and elevated the role of the USTR for all those seeking protection of their intellectual property abroad. This further underscored the influence and power of the intellectual property lobbyists *and* also strengthened the USTR's competence and role in this area. After 1981 the USTR, not the US Embassy abroad, became the 'go to' agency for intellectual property. As the introductory article's authors framework would lead us to expect, more intellectual property interests emerged and coalesced around the institutional focus on trade policy. With deeply institutionalized private sector access and guaranteed participation, the USTR became a magnet for previously disparate intellectual property coalitions and for actors which had previously displayed little interest in the international intellectual property agenda.

In 1982 the USTR led a number of public/private sector bilateral consultations with Hungary, South Korea, Mexico, Singapore, and Taiwan on their patent, trademark, and copyright laws. These consultations introduced a new US approach to trade policy; under this bilateral pressure some of the targeted countries pledged to ensure stronger protection. Significantly, former assistant general counsel, office of the USTR Alice Zalik (1986: 200) emphasized the importance of having US trade officials (rather than intellectual property administrators) conduct these discussions with foreign counterparts because trade officials have more power to change policy. Through these early successes both the US government and the

activist firms appreciated the effectiveness of linking intellectual property protection and trade. This recursive feedback loop reinforced both the private sector's and the government's preferences for a trade-based intellectual property policy that reached beyond the US borders.

This dynamic accelerated significantly in the early 1980s. Faced with huge trade and budget deficits, US policymakers sought to bolster US economic competitiveness and embarked upon what came to be known as 'aggressive unilateralism' in an effort to level the trade playing field – whether or not targeted policies were consistent with international trade law. In other words, US domestic preferences would trump international law.

With the USTR as the main focus of lobbying efforts, its relationship to private sector interests became increasingly symbiotic. The MPAA, led by Jack Valenti, became a sharp critic of copyright 'piracy' abroad, and urged the USTR to exert bilateral trade pressure on countries 'pirating' American movies. He achieved a noteworthy breakthrough when he succeeded in his quest to get an intellectual property provision incorporated into the 1983 Caribbean Basin Recovery Act (CBERA), stipulating that countries pirating US copyrighted products would lose non-reciprocal tariff waivers on their imports under the Generalized System of Preferences (GSP) (Drahos with Braithwaite, 2002). American book publishers emulated the MPAA and looked to the CBERA to help to eliminate book copying. Joint lobbying for copyright protection by the entertainment and publishing industries delivered the 1984 amendments to the Trade and Tariff Act (Ryan, 1998: 70).

In a clear instance of an institution shaping interest group formation, the USTR Section 301 process inspired the MPAA's Jack Valenti and Nicholas Veliotis, Vice-President of the Association of American Publishers, to create an umbrella organization specifically focused on 301. Created in 1984, the International Intellectual Property Alliance (IIPA) worked to promote copyright interests at the USTR, generate information for the USTR about the scale and costs of copyright 'piracy' and to educate legislators about the importance of the issues (Veliotis, 1986: 162, 164). It represented over 1500 firms and quickly became a powerful and effective lobbying arm.

That summer the USTR, the State Department, the Patent and Trademark Office, the Copyright Office, and 20 private sector participants representing 10 industry associations worked together consulting with the governments of Taiwan and Singapore over counterfeiting issues. The trip significantly brought together representatives of both patent *and* copyright interests, which had previously pursued quite separate (and partially incompatible) agendas. The USTR now had become both the *target* for private sector lobbyists and the *agent*, bringing together coalitions that heretofore had not collaborated. In this way the interaction between the USTR and private sector intellectual property lobbyists shaped state preferences for

a *comprehensive* approach that would cover *all* types of intellectual property – trademarks, patents, and copyrights. Furthermore, on this trip participating industry associations pledged to press the administration and Congress to make intellectual property protection a new precondition for the Generalized System of Preferences (GSP, a post-colonial non-reciprocal advantageous trade deal) eligibility (US Department of Commerce, 1984: 2). Since Taiwan and Singapore were both GSP beneficiaries at the time, an intellectual property condition looked like an attractive form of leverage. The private sector sought to more deeply entrench its preferences by promoting institutional innovations that would provide USTR with new levers of influence.

In 1984 Congress passed amendments to the Trade and Tariffs Act that finally explicitly included failure adequately to protect intellectual property as actionable under Section 301 and firmly incorporated intellectual property into trade policy. The Act identifies as ‘unreasonable’ acts, practices or policies that deny ‘fair and equitable provision of adequate and effective intellectual property protection of intellectual property rights’ even though the act, policy or practice does not violate ‘the international legal rights of the United States.’ “‘Unjustifiable” includes any act that . . . denies protection of intellectual property rights’ (Hughes, 1991: 184–5). The amended Section 301 permits industries, trade associations, and individual companies to petition the USTR to investigate actions of foreign governments. The 1984 amendments gave USTR authority to initiate cases on its own motion. USTR gained significant autonomy.

The 1984 Act also made intellectual property protection a new condition for GSP eligibility and renewal. This reflected the CBERA precedent and the entertainment and publishing industry associations’ lobbying demands. The CBERA approach became institutionalized in US trade policy and became applicable to *all* US trading partners. The feedback between the USTR and industry more firmly entrenched intellectual property as a centerpiece of trade policy, further empowering both the pro-intellectual property lobby *and* the USTR.

Intellectual property lobbyists accelerated their activities to keep intellectual property on the front burner of trade policymaking. The 1984 Act had more statutory bite, and the intellectual property lobbyists urged Congress to use the new tools at its disposal. In 1985 the USTR instituted the National Trade Estimate of Foreign Trade Barriers (NTE), an annual list that identifies countries with trade barriers (including intellectual property infractions) and an estimate of the nature and severity of those barriers. This institutional innovation greatly empowered the private sector pro-intellectual property lobby and intensified the symbiotic relationship between the lobby and the USTR. Establishing the NTE extended the intellectual property lobby’s role as a dominant player in monitoring countries’ behavior. It strengthened the lobby’s role by

creating significant data dependence on the part of the USTR and focused on the lobby's various grievances.

The USTR relies on extensive private sector input in producing this report, and at times the reports may exaggerate infractions because self-interested actors compose them and seek government action to address them. The USTR's calculations of economic damages caused by other countries' policies rely extensively on the estimates that affected US industries provide. The NTE process thus enshrines a particular and self-interested perspective on intellectual property that shapes state preferences. The NTE and its 'Watchlist' identify countries that are to be targeted for USTR consultations and that are expected to change their policies and behavior.

While intellectual property advocates united around the trade focus, they were sharply divided over whether or not to pursue a multilateral agreement through GATT. Pharmaceutical and agricultural chemicals firms favored a multilateral approach that they developed in part in the ACTN. Patent-based industries sought changes in other countries' national laws, for example to secure protection for pharmaceutical *products*, and thought that new multilateral rules could help in the quest. By contrast copyright interests, such as the IIPA, did not seek new laws<sup>6</sup> but rather sought effective enforcement of existing laws. The intellectual property bar was wary of a multilateral approach as well, worried that intellectual property interests could get bargained away or diluted in a complex multi-issue trade agenda.<sup>7</sup> At this point the USTR was persuaded of the merits of the patent interests' preferred multilateral approach, but now had to convince some of the reluctant copyright interests to get on board. The IIPA and music, film, and book publishing industries preferred 301 with its bilateral negotiations and sanctions, viewing it as more flexible and effective (Ryan, 1998: 107).

This time, *the USTR* had to convince a key segment of business that they should re-organize their efforts around a multilateral approach. The USTR hosted a series of meetings with representatives of copyright-dependent industries to make the case that a multilateral agreement would offer international coverage of intellectual property rights, and that any enforcement mechanisms would be available for intellectual property if it were within the GATT. Reportedly these meetings were 'testy' and 'acrimonious' (Ryan, 1998: 107). Finally and reluctantly the coalition of entertainment and book publishing industries agreed to back the multilateral strategy, but only on the condition that the USTR retain the 'proven route of bilateral Section 301 action' (Matthews, 2002: 22). This instance of co-constitution of state and private sector preferences helped to solidify private sector support for the multilateral approach.

The ACTN Task Force on Intellectual Property Rights included John Opel of IBM, plus representatives of Merck & Company and the MPAA. Its October 1985 report endorsed the incorporation of intellectual property

into GATT. This is a significant instance of projecting the US *domestic* approach internationally, and an example of how Farrell and Newman's framework facilitates analytic bridging between comparative politics and international political economy. US domestic institutions became the model for what the US wanted to impose abroad. TRIPS resembles Section 301 writ large insofar as intellectual property infractions can lead to trade sanctions.

The intellectual property lobbyists aggressively continued to press their claims, and with the help of the USTR embarked on additional bilateral negotiations with developing countries throughout the 1980s. In early 1986 while preparing for the launch of the Uruguay Round of GATT negotiations, USTR's Clayton Yeutter met with John Opel of IBM and Edmund Pratt of ACTN and Pfizer and expressed concern that European and Japanese governments were not getting any pressure for a multilateral intellectual property agreement. The USTR favored the approach and he sought the private sector's help in selling the idea abroad. He warned them that without the support of the Quad (US, Japan, the European Community, and Canada) there was no hope for an intellectual property deal. Yeutter said, 'I'm convinced on intellectual property but when I go to Quad meetings, they are under no pressure from their industry. Can you get it?' (quoted in Drahos with Braithwaite, 2002: 117). According to James Enyart of Monsanto, Pratt and Opel contacted fellow CEOs directly and convinced them to devote funding and human resources to the effort (Ostry, 1990: 54). They formed an ad hoc Intellectual Property Committee (IPC) that represented chemical, computer, entertainment, electronics, heavy and consumer manufacturing, and pharmaceutical firms (Bristol-Myers, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications). Pratt referred to this group as 'strange bedfellows' and the diverse mix created coordination challenges (Pratt, quoted in Ostry, 1990: 23). The IPC's consulting economist, Jacques Gorlin, indicated that members had to reach compromises between copyright and patent interests in order to achieve the necessary consensus on a possible multilateral agreement.<sup>8</sup>

While the US government advanced the intellectual property agenda in GATT as the Uruguay Round of trade negotiations got underway in 1986, it also threatened and/or imposed trade sanctions against various individual countries under Section 301. Not all states were equally vulnerable to such threats. For instance both India and Brazil had well-developed domestic intellectual property institutions, regulatory capacity, and a deliberate public policy approach to intellectual property that emphasized technology transfer, keeping medicines off-patent, and compulsory licensing. These countries expressed deep philosophical opposition to the US approach.

### Further strengthening USTR

During the Uruguay Round negotiations, industry lobbying pressure led to the Omnibus Trade and Competitiveness Act of 1988 which transferred additional substantial authority from the president to the USTR. The 1988 Act introduced *Special 301* to *explicitly* cover intellectual property. The Act stipulates that the USTR must annually identify intellectual property priority (i.e. infringing) countries. This mandate institutionalized for intellectual property blacklisting as a mechanism to spread domestic regulatory approaches abroad (Sharman, 2008). Within 30 days of identifying a country as a priority country, the USTR must initiate an investigation. Within six months it must determine whether the foreign activity is actionable, and if so, what action to take. The USTR must implement Section 301 action within 30 days of an affirmative determination. These new provisions guaranteed heightened scrutiny and swift retaliation, and gave the US new levers in its quest for a multilateral intellectual property agreement (Blakeney, 1995: 79).

The process strengthened the private sector's role in trade policymaking and created policy feedback that led these actors to press for even deeper institutionalization of their preferred approach to intellectual property protection abroad. This was a classic example of Pierson's (2000) 'increasing returns'. Representation on key trade advisory committees gave them additional resources to shape US intellectual property policy.

Thus, in short, the empirical evidence is clear. Changes in the US negotiating position on intellectual property rights are strikingly difficult to explain using either traditional pluralist or state-centric models of interest formation. Instead, the US's perceived interests in the realm of intellectual property emerged gradually over time. Interest groups sought initially to take advantage of the unintended opportunities offered by changes in US state structure. Their efforts gave rise to further institutional changes, which in turn built up an ever broader coalition of industry groups pressing for the continuation – and strengthening – of institutions strengthening intellectual property. Changes in the state over time were not the result of efforts by a predefined interest group, nor did the relevant interest group merely content itself with molding its activities to an exogenously fixed set of institutional tools. Instead, interest groups pressed for institutional change, and institutional changes in turn redefined and broadened the relevant interest group in just the kind of feedback loop that historical institutionalists such as Theda Skocpol and Paul Pierson have stressed in their explanations of outcomes in comparative politics.

### BARGAINING POWER

While Drezner (2007) highlights market size as the key to bargaining power, Farrell and Newman (2010) propose two mechanisms emanating

from domestic institutions that are likely to shape bargaining strength. One mechanism is regulatory expertise. The expectation is that parties with such expertise have an advantage over those who lack it. Expertise can be a product of training and/or experience. The second mechanism is a negotiating party's reversion point (also known as best alternative to no agreement (BATNA), Odell, 2000, 2006). A reversion point refers to the status quo in the absence of successful coordination; it is an institutionally determined fallback point (Farrell and Newman, 2010). Parties with more favorable reversion points can drive harder bargains. Both of these mechanisms help to explain the *timing* of the US bargaining victory in TRIPS. In short, the US long preferred stronger global intellectual property rules but was only able to exert its power in the wake of a specific set of domestic institutional reforms.

Mainstream international political economy approaches have typically discounted the extent to which actors have clashing interests over how certain issue areas are regulated, leading them to asymmetric bargaining between stronger and weaker actors, and have instead focused on the overall gains that actors may get from reaching agreement (Krasner, 1991). This systematically tends to discount politics and over-emphasize problem solving and mutual adjustment in international regulation.

Domestic institutions can affect bargaining strength in several ways. Increased bargaining strength can come from highly coordinated domestic policymaking processes and well-developed institutions when negotiating with counterparts who lack these resources. The previous section demonstrated the intensifying coordination between the private sector and the USTR in intellectual property policy. The US Department of Commerce, the Copyright Office, and the US Patent and Trademark Office also supported the negotiating agenda. During the Uruguay Round negotiations there was no well-organized or institutionally-based US opposition to the multilateral intellectual property agenda; therefore the US and pro-intellectual property private sector groups did not need to compromise or offer watered-down proposals before engaging in the multilateral trade negotiations.

Asymmetries in expertise and/or experience can also shape the bargaining process. Expertise in a complex and technical policy domain can increase bargaining strength. Developing countries were at a pronounced disadvantage when negotiating over intellectual property (Drahos, 1995). Many countries lacked the necessary expertise to fully grasp proposals and also lacked well-developed intellectual property institutions. As Farrell and Newman suggest, 'lacking expertise and control over their domestic market, states are unable to evaluate the relevant international policy alternatives' (2010). Expertise and control over a technical body of knowledge are themselves important forms of power, especially in the context of intellectual property policy negotiations (Sharman, 2008: 647). As noted earlier,

there were some important exceptions to this, including India and Brazil. India and Brazil had been quite active and engaged in the unsuccessful efforts to revise the Paris Convention for the Protection of Industrial Property in the WIPO in the late 1970s and early 1980s (Matthews, 2002: 10–12). For the most part developing country negotiators were outmatched by their OECD counterparts in deliberations over intellectual property.

The United States' regulatory approach to intellectual property informed its negotiating stance. The US came to the table with a fully elaborated proposal for a multilateral agreement that others were forced to react to. The US sent seasoned trade negotiators who already had been pushing this agenda bilaterally at the behest of private sector interests through various iterations of Section 301. Indeed, TRIPS resembled US domestic intellectual property policy in large measure and further, sought to make multilateral a US *bilateral* approach to trade negotiation. All other things being equal, in negotiating the new multilateral agreement, the stronger bargaining partner tends to need to make the fewest adjustments in its domestic institutions, whereas the weaker partner is required to make the lion's share of adjustments.

If one can get away with it, one would generally prefer for others to adopt one's own policies. One very important reason that the US got its way was because its domestic institutional innovations meant that the reversion point or BATNA (Odell, 2000) favored the US. If countries did not go along with bilateral negotiations they would face sanctions under Special 301. If countries did not accept a *multilateral* intellectual property deal they would continue to experience the US's aggressive unilateralism and bullying tactics. Pursuing the trade route, the US was able to use its domestic institutions and regulatory framework to target those who opposed including intellectual property protection under the trading regime.

Not only did the reversion point favor the US throughout the course of the negotiations but the US *altered* the reversion point for developing countries. When the negotiations began in 1986 Brazil and India insisted that intellectual property protection regulation should remain in the WIPO and had no place in the GATT. These two countries stood firm in their opposition from 1986 until 1989 (Matthews, 2002: 30–1). They had assumed that they faced a choice between WIPO and GATT. Their reversion point then would be the pre-negotiation status quo in which WIPO dealt with intellectual property issues. The US had repeatedly seen its push for stronger intellectual property rules fail in the UN-chartered WIPO. However, over the course of the negotiations, US bilateral pressure on developing countries proceeded apace. The US specifically targeted India, Brazil, and Thailand for Special 301 investigations and sanctions during the Uruguay Round negotiations (Matthews, 2002: 31–2). The US had easily intimidated a number of other developing countries into adopting higher standards of intellectual property protection by using 301. By the

late 1980s it became abundantly clear that the choice had become not WIPO versus GATT, but rather GATT versus Special 301. Key developing countries finally assented to a multilateral deal in the hope that a rules-based multilateral bargaining system would end the bilateral bullying.

At the end of the Uruguay Round negotiations in 1994 many countries had already adopted TRIPS-Plus<sup>9</sup> standards in bilateral deals with the US. And *all* signatory countries were now required to provide patent protection for pharmaceutical products. This was perhaps the most deeply controversial aspect of the new regime, challenging many countries' domestic bargains to provide affordable medicines and to develop robust generic industries (Eren-Vural, 2007; Shadlen, 2007). India and Brazil had offered patents on processes for making drugs, but not on the drugs themselves. This allowed them to 'reverse engineer' brand name drugs and to develop generic production capabilities. With few exceptions, the US obtained its preferences for a high standard intellectual property agreement that would be enforceable via trade sanctions if the WTO ruled that a country had violated its obligations under TRIPS. That meant that the policy autonomy that India and Brazil developed would be jeopardized. TRIPS resembled the 301 approach that the US had developed and fine-tuned over several decades of lobbyists' advocacy and USTR's experience. The US effectively used its domestic institutions to externalize its national rules globally (Farrell and Newman, 2010).

In this instance, the final regulatory outcome was the product of an intensely political process. As Drezner (2007) and others have argued, this process involved difficult bargaining between states with different preferences, as well as obvious asymmetries between those states that had large internal markets and those states that had small ones. However, market size was far from being the only determinant of bargaining power, or the only reason why the US largely succeeded in imposing its preferences on the rest of the world. Also essential was the unparalleled system of domestic institutions that the US had built up over previous decades. These institutions provided the US with a two-fold bargaining advantage. First, because of its extensive technical expertise on intellectual property (as well as its ability to draw upon private industry for help where needed), the US could simply outmatch other trade negotiators, especially negotiators from developing countries. Simply put, these countries' negotiating representatives sometimes did not understand what they were signing up to, lacking domestic technical expertise and ability to propose alternatives. Second, US domestic institutions, particularly Special 301, allowed the US to leverage market access and manipulate the reversion point in ways that would have been impossible without such institutions. Market size on its own is insufficient to explain these outcomes – it is precisely when market size can be leveraged by appropriate institutions that it is most likely to explain the relative bargaining positions of states (Newman, 2008).

CROSS-NATIONAL SEQUENCING AND POLICY  
DIFFUSION

To analyze the projection of one's domestic institutional preferences into the international arena, [special issue authors] introduce the notion of 'cross-national interactive sequencing events' (2009: 32). As Farrell and Newman (2010) state, 'a country's choice at time  $t$  will not only be determined by previous institutional choices made within that country at  $t-1$ , but also by institutional choices made in *other countries* at time  $t-1$ '. For example, this temporal dimension helps to explain why developing country patent offices look the way that they do; technical assistance programs from European, Japanese, and US patent offices reflect institutional choices that these three countries made earlier (Drahos, 2007; Matthews and Munoz-Tellez, 2006). Other states, especially in developing countries, emulate these choices in part because they appear to be 'successful' and 'efficient'.<sup>10</sup> This, in turn, gives OECD patent officials and their clients significant advantages in shaping subsequent policy choices abroad. Thus the co-constitutive aspect of state preferences and institutions is not confined *within* states but also crosses borders into distant domestic regulatory environments. When observing how this process emanates from OECD countries to developing countries one witnesses something far less technocratic, functional, and more self-interested than that suggested by Slaughter's (2005) pioneering work on transnational regulatory cooperation. To its credit, Farrell and Newman's framework permits us to think in less soothing and more skeptical terms.

While many scholars have analyzed how actors reach international agreements, we know far less about agreements' implementation (Alter and Meunier, 2009: 15–17; Deere, 2009). Recent work on policy diffusion has started to map the ways in which certain kinds of policies diffuse globally, emphasizing how policies become diffused from governments that are perceived to be global economic leaders to others (Simmons and Elkins, 2004; Dobbin *et al.*, 2007; Sharman, 2008). Such accounts persuasively demonstrate the existence of broad trends, but fail to specify the exact causal mechanisms through which policies are communicated from perceived leaders to perceived laggards.<sup>11</sup> Slaughter (2005) develops one possible explanation stressing the role of trans-governmental networks, in which networks of specialized governmental officials diffuse expertise among themselves. Slaughter emphasizes how these networks enhance problem solving and the spread of 'best practices'. While there is little statistical evidence that density of communications predicts diffusion of policy (Simmons and Elkins, 2004; Dobbin *et al.*, 2007), such networks are inherently difficult to measure and may have consequences that are not captured in the aggregate data.

Again, such approaches de-emphasize politics and conflict in favor of a functional focus on mutual help and information sharing. Intellectual

property is a useful policy arena to compare the benefits of more technocratic versus more political accounts of regulatory change. Farrell and Newman's version of historical institutionalism provides a recursive account of how countries may adopt domestic institutions modeled on their more successful competitors' institutions. However, to understand the dynamics of the relevant power relationships, one must move beyond a cross-national sequencing approach (Farrell and Newman, 2010) to incorporate a more precise account of the relevant diffusion mechanisms. In this case, two important mechanisms are technical assistance and blacklisting (or naming and shaming). I will discuss each in turn.

TRIPS Article 67 mandates one *particular* diffusion mechanism. This provision stipulates that:

... developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. Such cooperation shall include assistance in preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.<sup>12</sup>

Developed countries have free rein in providing technical assistance, and have little incentive to instruct developing countries in the use of TRIPS's flexibilities to retain their policy space (Matthews and Munoz-Tellez, 2006: 632; Deere, 2009). TRIPS triggered implementation requirements; countries that previously had no patent offices had to set them up. The US, Japanese, and European patent offices and numerous private actors have provided technical assistance to developing countries to assist them in implementing TRIPS. In 1998 the US established the US IPR Training Coordination Group to implement its Article 67 obligations. As Matthews and Munoz-Tellez (2006: 637) point out, this group prominently features private sector rights-holders groups such as the IIPA, PhRMA, and the International Anti-Counterfeiting Coalition that represent US-based intellectual property industries along with multiple government agencies that work to protect US intellectual property.

OECD patent offices have established a trilateral network of the US Patent and Trademark Office, the European Patent Office, and the Japanese Patent Office through memoranda of understanding (MOUs) (Drahos, 2007: 5). This cross-national coordination has had similar effects to concerted national coordination in developing strong domestic institutions. It has shaped OECD countries' preferences and bargaining strength vis-à-vis developing countries' nascent patent offices. This trilateral coordination has gone beyond information exchange and includes trilateral working

groups that negotiate at WIPO (Drahos, 2007: 7). This institutional innovation of MOUs spurred the creation of a cross-national *industry* trilateral group in 2003. Composed of representatives from the Union of Industrial and Employers' Confederations of Europe (UNICE), Japan Intellectual Property Association, Intellectual Property Owners Association and American Intellectual Property Law Association, this group formed to persuade the trilateral patent offices to focus on unifying administrative procedures, leading to much deeper administrative convergence (Drahos, 2007: 8–9). Industry seeks to streamline and speed up the patent granting process.

This process has demonstrated a recursive mechanism on a larger stage. Not surprisingly, through technical assistance programs developing countries' patent offices have been set up to resemble those of their OECD counterparts. Emphasizing property protection and enforcement tilts the balance toward foreign rights holders (Matthews and Munoz-Tellez, 2006: 633). This has serious repercussions insofar as it institutionalizes one particular approach to patenting and copyright that is under attack in the originating countries (Reichman and Dreyfuss, 2007). The process has entrenched a symbiotic relationship between OECD patent offices and those in many developing countries, again underscoring the increasingly blurry lines between comparative and international or global political economy.

Under conditions of such grossly unequal competence and power, this coordination process does not resemble the benign and functional coordination that Slaughter (2005) documents. Theoretically, it also raises more fundamental questions about how well insights derived from OECD experience travel to the developing world (Levitsky and Murillo, 2009). The vast majority of patent applications in the global South come from foreign countries. Technocratic trust engenders a recursive process in which 'the EPO trains developing country examiners to make decisions in their own countries that predominantly benefit foreign companies' (Drahos, 2007: 17). In practice, this means that patent officers in developing countries spend most of their time granting patents to foreign firms from the trilateral network; this leads to rent transfers from developing countries to the network. Technical assistance can be a very powerful mechanism for control and domination.

A second diffusion mechanism is blacklisting, or naming and shaming. The domestic institutional innovation of the annual National Trade Estimate requires the USTR to name and shame persistent violators of US-held intellectual property rights. Sharman (2008) identified an important dynamic in policy diffusion across glaring power asymmetries. Here policy diffusion is neither a benign constructivist socialization story nor a simple technocratic emulation, but rather a two-step sequence of blacklisting followed by mimicry (Sharman, 2008: 646–7). Sharman (2008: 647)

conceptualizes policy diffusion by mimicry as a coercive process, especially when preceded by blacklisting, or in my case, naming and shaming. Here mimicry is a way to avoid the stigma of violators and backwardness; according to Sharman (2008: 647), 'mimicry is driven by fear of losing social acceptance'. This is quite the reverse of the benign learning relationships that Slaughter and others invoke. Yet it, too, clearly rests on trans-governmental networks.

It is doubtful that these new patent offices are predisposed to put their broader national needs first because of the peculiar status of these offices in developing countries. Developing countries' patent office peer groups become transnational regulators and technical assistance providers linked to international organizations rather than to their own people (Drahos, 2007). According to Sharman, 'mimicry as power can be expected to exert strongest influence in technical areas within a defined policy community pursuing high-profile, valorized ends like fighting crime', or in this case, protecting property rights (Sharman, 2008: 648; Haunss and Kohlmorgen, 2008). Regulators wish to be seen as doing a good job (Sharman, 2008: 648). Deere (2009: 278–85) has documented this phenomenon in Africa in which, through interaction with the Organisation Africaine de la propriete intellectuelle (OAPI), some of the most impoverished countries in the world have adopted the most stringent intellectual property rights protections. These examples suggest that 'power, in its various forms, may make "cooperative action" hard to distinguish from exploitation or domination.' (Avant *et al.*, 2010:8).

Extending historical institutionalism to the analysis of developing countries raises four concerns: two normative, and two positive. The two normative concerns with the diffusion process are first, that foreign models may be wildly inappropriate for developing countries, and second, that the US is exporting a model for intellectual property protection that is under sustained attack at home. These developments challenge the basic claims of functionalist accounts that stress the policy benefits of trans-governmental networks. The relevant networks in intellectual property appear to be quite efficacious in diffusing policies from leader countries in the developed world to developing countries. However, this process of diffusion is problematic in two ways. First, much of the literature argues that the kinds of strong intellectual property policies that developed countries have adopted are inappropriate for developing countries, which should have laxer intellectual property policies so that they can more easily adopt innovations from the developed world (Commission on Intellectual Property Rights, 2002; Drahos and Braithwaite, 2002; Dutfield and Suthersanen, 2004; Matthews, 2002; May, 2000; May and Sell, 2006; Reichman, 2000; Schiff, 1971). Second, even within the developed world, rigid intellectual property policies in areas such as patents have come under increasing challenge, and are now typically perceived as a harmful

by-product of distributional coalitions that have captured the policy making process, rather than as competitive advantages (Jaffe and Lerner, 2006; Bessen and Meurer, 2008). The fact that the USPTO has granted a patent on a crustless peanut butter sandwich raises profound questions about its competence and role in society (Jaffe and Lerner, 2006). As Drahos (2007: 4) points out, 'developing country patent offices have been integrated into a system of international patent administration in which the grant of low-quality patents by major patent offices is a daily occurrence'. This raises important questions about whether what the US is exporting constitutes 'best practices' (Lessig, 2008). In cases in which 'best practices' simply do not exist, historical institutionalism may be less relevant. Here historical institutionalism needs to be supplemented with a stronger focus on power – beyond 'best practices' or comparative regulatory advantage (Mattli and Buthe, 2003).

As for the positive concerns, first, while historical institutionalism was largely developed through observing OECD interaction, incrementalism may not apply as well to developing country institutions (Weyland, 2008). First, as one might expect, in the US institutional change was gradual and incremental over a period of years. By contrast, for developing countries TRIPS presented an exogenous shock ushering in major institutional change. Second, foreign imposition of institutions can lead to drastic institutional change at least on paper ('parchment reform') with or without any enforcement or administrative capacity (Levitsky and Murillo, 2009). Coercive mechanisms may well lead to incomplete implementation or to none whatsoever.

Historical institutionalism helps to remind us that the choice of institution *per se* is fundamentally political. Layering intellectual property policy upon a trade institution allowed the US to leverage access to its large domestic market in exchange for improvements in intellectual property protection. This carrot and stick approach would have been hard to achieve outside of a trade context. It played into developing countries' export dependence and economic vulnerability. Furthermore, it meant that neither health ministers nor consumer groups would be at the bargaining table. Braithwaite and Drahos (2000: 576) have argued that if intellectual property had been framed as a public health issue during the Uruguay Round there would be no TRIPS. Given the protests and controversy that have erupted after the fact this is quite plausible.

Historical institutionalism provides a useful analytic point of entry into this heretofore opaque world. Cross-national sequencing has proved to be an important factor in both the character and the effects of the trilateral public/private network's technical assistance programs. But it does not fully capture the relationship between leading and following countries.

The disadvantages of the latter not only stem from bargaining asymmetries that realists emphasize and the expertise and institutional capacity issues that historical institutionalists highlight. They also stem from the construction of a set of notions of expertise in patent matters, and a set of networks and institutions built on these notions of expertise, which reinforce the advantages of dominant countries by ensuring that follower countries partly internalize the dominant country's way of doing things, even when it is clearly inappropriate and, indeed, detrimental (Drahos, 2007; Sharman, 2008; Deere, 2009). Sharman's (2008) work on the diffusion of anti-money laundering policies to developing countries shows that expertise is not only a simple power resource (those that have more of it are likely to do better in negotiations), but may be *constructed* in ways that systematically advantage some actors, and systematically disadvantage others. For example, is it any surprise that Monsanto's genetically modified seeds are recognized as intellectual property but so-called 'traditional knowledge' is not? The apparently technocratic forms of policy diffusion and implementation that Simmons and Elkins (2004) describe may, when they are examined in detail, be intensely political and have more distributional than benign consequences. Sharman's (2008), Levitsky and Murillo's (2009), and Weyland's (2008) analyses of developing countries allow us to examine the effects of domestic institutions and power asymmetries in policy diffusion and provide a valuable supplement and corrective to both realist and historical institutionalist analysis.

## CONCLUSION

Historical institutionalism gives us important insights into the global intellectual property rights regime. It highlights the importance of feedback loops in understanding how institutional change and interest group formation co-constitute states' preferences. Co-constitution exists on the 'front end' insofar as institutional innovation creates institutional 'pull' for interest group mobilization. It also leads us to expect that states with well-developed domestic regulatory institutions will tend to prevail in regulatory contests. Historical institutionalism convinces us that domestic institutions not only 'matter' but also shape both the interests and the policies that states project abroad. Historical institutionalism helps to answer the question: why is one version of regulatory competence chosen as superior (Drahos, 2007)?

However, it also has clear limitations. In order to assess the effects of these choices, one must introduce structural power. International politics is hardly a meritocracy. It is a self-interested and competitive domain. Farrell and Newman's variant of historical institutionalism travels better than many because it emphasizes the power of expertise; this permits the

consideration of unequal power – albeit in a far more limited way than one may find in historical structuralism or even conventional realism. For example, historical structuralism (Brand and Gorg, 2008) and realism (Drezner, 2007) both emphasize power disparities that are far deeper and broader than a matter of ‘expertise’ or ‘experience’. Tyfield’s critical realist analysis locates the politics of intellectual property as embedded in the deep structure of ‘financialization’, ushered in by the monetarist revolution of Reagan and Thatcher (Tyfield, 2008: 554–5; but see Abdelal, 2007). Indeed, intellectual property became an important resource for start-up companies to raise venture capital. Yet, historical institutionalism does not foreground these deep structures. It is hard to imagine an instance of a developing country’s domestic institutions being so consolidated or well-developed that by virtue of their intrinsic superiority or historical precedence that they could trump OECD institutions in regulatory contests. Asymmetrical power seems to be the central story of these relationships. This raises the question of how far historical institutionalist insights alone may travel beyond inter-OECD relations.

Historical institutionalism is a mid-level theoretical approach – neither grand nor systemic theory – but it does identify mechanisms that can explain institutional change and bargaining strength. Historical institutionalism identifies micro-foundations for preference formation and influence in competitive regulatory contests. It provides a powerful way to examine the effects of domestic institutions that can complement a broader, more systemic, power-based critical realist or constructivist analysis. All of these perspectives highlight the interplay between structure (or institutions) and agency, and stress the structured nature of agency. In this sense they offer a middle way between the determinism of structural accounts and the voluntarism of rational choice approaches. Historical institutionalism identifies endogenous sources of change and highlights institutions’ generative properties. Farrell and Newman’s specific mechanisms: policy feedbacks; domestic institutional reversion points; and cross-national temporal sequencing provide valuable tools for analyzing international regulation. However, in order to truly understand bargaining asymmetries in the global economy, they must be supplemented with other accounts of power.

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## NOTES

- 1 Intellectual property includes patents, copyrights, trademarks, and trade secrets.
- 2 Based on author's interview with Jacques Gorlin, 22 January 1996, Washington, DC.
- 3 Interview with Jacques Gorlin, who had consulted key private sector actors in the run-up to TRIPS and stated that they were astonished that they got '95 per cent' of what they had wanted.
- 4 Hacker (2004) makes a distinction here, but it strikes me that layering is a particular *mode* of conversion rather than a completely discrete phenomenon. For instance, the International Monetary Fund has been 'converted' dramatically over time from a lender of short term liquidity to industrialized countries after World War II, to the global South's debt manager in the 1980s, to a lender of last resort in global financial crises in the 1990s and beyond. Layering new policies atop the original mandate had the effect of radical functional conversion of the institution as a whole.
- 5 <http://www.ustr.gov>
- 6 This was before Napster and the peer-to-peer file sharing revolution.
- 7 Author's interview with Jacques Gorlin, 22 January 1996, Washington, DC.
- 8 Author's interview with Jacques Gorlin, 22 January 1996, Washington, DC.
- 9 TRIPS-Plus refers to provisions that exceed TRIPS in terms of scope or time or subject matter.
- 10 Sharman (2008) underscores that in the case of developing countries, such emulation often follows more coercive mechanisms (in his case, blacklisting, in intellectual property policy naming and shaming – 'pirate', 'thief').
- 11 Although Dobbin *et al.* (2007) and Sharman (2008) make some progress in this direction.
- 12 Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 67, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_e.htm) accessed 14 July 2010.

## NOTES ON CONTRIBUTOR

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