

# Global Ruling

Intellectual Property and Development in the  
United Nations Knowledge Economy

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## **Abstract**

This paper firstly provides an ethnographic account of the dynamic of events in Geneva in 2004, when meetings of various multilateral agencies and global civil society organizations were held simultaneously to discuss the proposal to include the Development Agenda as a key element of intellectual property rights (IPR), seeking to insert some public policy aspects into the existing legal frameworks on IPR. Secondly we describe the historical context for the emergence of the intellectual property system as global legislation, explaining how it came into being and the ways in which it intertwines with international trade, examining the extent of its impact and its interfaces with various domains of social life, including culture and knowledge. Finally, based on interviews, documents and minutes from international agency meetings, we reconstruct the three-year process of negotiating the Development Agenda at the World Intellectual Property Organization (WIPO), describing the role of its main actors. Since Brazil, a member state of the organization, assumed a lead role in promoting the Agenda, we examine the disputes that occurred during this process as political actors veered back and forth in their support for the international system to protect and enforce intellectual property rights, and the tensions generated as IPRs become barriers to the trade and development of developing nations.

**Keywords:** trade regulation; global policy; WTO; Intellectual Property

## **Resumo**

Este artigo, em primeiro lugar, relata em uma perspectiva etnográfica a dinâmica de eventos ocorridos em Genebra em 2004, encontros de agências

multilaterais e da sociedade civil global que ocorreram simultaneamente, com o objetivo de discutir uma proposta de inclusão de uma pauta de desenvolvimento em relação ao regime de propriedade intelectual, em uma tentativa de contemplar alguns aspectos de políticas públicas na legislação vigente de propriedade intelectual. Em segundo lugar, em uma perspectiva histórica, apresentamos o contexto da criação do regime de propriedade intelectual como uma legislação global, indicando como este se constitui e se vincula ao comércio internacional, sua extensão e interfaces com tudo aquilo que passa a regular, inclusive o conhecimento e cultura. Por último, a partir de dados advindos de entrevistas, documentos e atas de reuniões de agências internacionais, retomamos o processo de negociação, que teve a duração de três anos, da Agenda de Desenvolvimento junto à Organização Mundial da Propriedade Intelectual (OMPI), descrevendo o papel dos autores principais neste processo. Como o Brasil, país-membro da organização, assumiu uma posição de liderança propondo a Agenda, nós abordamos as disputas neste processo e a oscilação de atores políticos entre apoiar o sistema internacional de proteção de propriedade intelectual e suas tensões, à medida que esta legislação se transforma em barreiras ao comércio e ao desenvolvimento de países em desenvolvimento.

**Palavras chaves:** OMC; WIPO; Desenvolvimento; Política Global; Propriedade Intelectual

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We need to anthropologize the West: show how exotic its constitution of reality has been; emphasize those domains most taken for granted as universal (this includes epistemology and economics); make them seem as historically peculiar as possible; show how their claims to truth are linked to social practices and have hence become effective forces in the social world. (Rabinow 1996: 36)

## Introduction

Over recent decades the notion of *Intellectual Property* has become indelibly linked to a legal regime responsible for implementing, regulating and scaling up intellectual property rights at global level: the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement administered by the World Trade Organization (WTO). It is in this context that the domain of what we call Intellectual Property has expanded and become redefined at global scale, subjecting new technologies and cultural productions to hegemonic property laws and market structures.

An Anthropology of the world economic system must inevitably address the legal frameworks that regulate the production of goods on the global market, as well as the production of ideas and knowledge, insofar as these too have been transformed into goods. The TRIPS Agreement has imposed a reorganization of the relations of production and trade at global level. Moreover it has induced a radical change *within* and *between* nations that produce science and technology and those that do not, but nevertheless require them. Since the agencies responsible for regulating global trade, which includes intellectual property law, form part of the United Nations system, one of the

most controversial topics when it comes to intellectual property issues have been the relations between Intellectual Property Rights (IPRs) and development. The main argument is that TRIPS-related patent laws and practices work against the interests of developing countries and need to be reformed.

The paper is divided into three sections. In the first we provide an ethnographic account of the events that took place in Geneva, Switzerland, during the months of September and October 2004, when a proposal for the establishment of a Development Agenda was first submitted to the World Intellectual Property Organization (WIPO) 2004 General Assembly sessions. Reflecting the typical dynamic of these global assemblies of nation states, the meeting took place in parallel with other events: meetings of national and regional member state delegations, meetings of experts from specialized international agencies, and a wide-range of global civil society conferences and summits, all held simultaneously in Geneva. The Development Agenda proposed by Brazil, as a WIPO member state, emerged in direct response to the intellectual property legislation and sought to establish various public policy aspects as an integral part of the IPR framework.

In the second section of the work, we present the context of the global intellectual property regime, examining how it formed and became intertwined with international trade, as well as the range of its impact, indicating its interfaces with diverse areas of social life, including knowledge production and culture.

In the final section of the article – which is based on data from interviews, documents and the minutes of multilateral agency meetings – we shift back to the main topic of our study, focusing our attention on the conclusion to the negotiation process for the WIPO Development Agenda in 2007, and describing the role of the main actors, namely the member states of the United Nations organizations. As Brazil assumed a lead role in proposing the Agenda in 2004, we examine the disputes that occurred during the construction of this process as the political actors oscillated back and forth in their support for the international system designed to protect and enforce intellectual property rights and the tensions generated as these rights themselves became seen as barriers to the trade and development of developing nations.

We followed the three-year negotiation process as direct observers from October 2004, when the proposal for the Development Agenda was first presented at the WIPO General Assembly, to October 2007, when the

same Assembly finally adopted the consolidated Agenda unanimously. Our research included observation of events, interviewing key people, and collecting and analyzing the rich documentation available through the virtual libraries hosted on international agency websites. Needless to say, we take this production of discourses about intellectual property and development by this law-making agency not as a political breakthrough, but rather as an important moment in the reorganization of country alignments and the production of new realities within the global order. As Escobar (1995: 46) wrote concerning another context: “The invention of development necessarily involved the creation of an institutional field from which discourses are produced, recorded, stabilized, modified and put into circulation.” Escobar’s argument is that the development discourse creates the Third World as the *other* to be developed by the West. In the case analyzed here, though, we address the clash between two global discourses and their different mandates and constituencies: one about intellectual property, where ideas, knowledge and imagination are re-envisaged as privately-owned commodities to be commercialized within the global market; the other about development, rephrased in terms of public wealth and the right to access knowledge and technology.

### **The world in Geneva**

The first proposal for the establishment of a WIPO Development Agenda was submitted by Argentina and Brazil at the 2004 WIPO General Assembly with the support of twelve other developing countries. This group of member states, coordinated by Brazil and naming itself the Group of Friends of Development, comprised South Africa, Bolivia, Cuba, Egypt, Ecuador, Iran, Peru, Kenya, the Dominican Republic, Sierra Leone, Tanzania, Uruguay and Venezuela. In order to reconstruct what we identify as a turning point in the dynamic – or rather the discourse – between North and South (or to use the language of the multilateral agencies: between developed and developing countries), we explore some of the tensions between these actors and power groups and the overarching bureaucratic framework of multilateral organizations. It is our view that – independent of the actual outcomes of the Agenda as a set of reform proposals, such as safeguarding public interest flexibilities in the international system of intellectual property rights and working towards more equitable trading conditions – the three-year process involved in negotiating the Agenda provides

us with a unique opportunity to observe the multiple roles and asymmetrical relationships of different actors within a scenario of supranational law-making agencies involved in producing globalization.

Globalization means that decisions of interest to a particular collectivity are no longer taken either locally or nationally, but internationally by global supranational entities – the multilateral agencies – that overlay localized actors. On one hand, this has led to the emergence of a new sphere of social life located above all of us – including the nation state – and belonging to a broader systemic order capable of imposing its own interests through law. On the other, it demands that local actors actively or passively adhere to this new legal regime. In the new global governance of production, which includes (especially) the ownership of ideas, the global and the local are reconfigured by a political economy of knowledge production. The context itself produces a narrative on the meanings of development, West, North and South, global and local. As various anthropologists – Abélès (2008), Appadurai (2001), Fischer (2011), among others – have pointed out, contemporary concerns in anthropology about translating and understanding cultural practices have abandoned traditional objects. Indeed, anthropological inquiry has shifted its attention to the global arena of policy making and to the conditions through which such political discourses or rituals of truth, to borrow Foucault's terminology, are produced.

By multilateral agencies we mean entities linked to the United Nations (UN) system, including the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the World Health Organization (WHO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Joint Programme on HIV/AIDS (UNAIDS) and the Global Fund, to mention just a few among the similarly structured entities, specialized agencies and affiliated organizations headquartered in Geneva, Switzerland.

Our focus here is WIPO and its 2004 General Assembly, composed of 186 member states, which follows a UN representational governance system of *one country, one vote*. In any of these multilateral organizations, holding an Assembly, their main deliberative policy-making forum, generates an important dynamic involving other events and meetings occurring simultaneous to the main event. Although long speeches and voting decisions take place on the main floor of the Assembly, a building and room guarded with the

highest security, everything else happens away from this space. Although the international rituals unfolding on the main stage are indeed very important, much of the decision-making process, disputes and consensus building very clearly unfolds elsewhere. Multiple formal and informal meetings are held in parallel to the main event: besides the sessions between member states and clusters of countries, these include celebrations, protests, media statements, sittings and civil society gatherings, all held simultaneously in the central space and its surroundings.

During these periods when the main agencies hold their assemblies, Geneva becomes a plethora of political rituals and the whole town is taken over by the thrill and expectation of the event, expressed in diverse languages and accents. Briefly, given the scope of this paper, we shall explore three *scenes* of events held in Geneva during September and October 2004: an international conference of civil society organizations called ‘The Future of the WIPO’; a meeting held to discuss intellectual property and public health at one of the Geneva-based intergovernmental technical agencies; and the main sessions of the WIPO General Assembly.

Prior to the WIPO Assembly meeting, a two-day meeting called ‘The Future of the WIPO’ was organized by Consumers International (TACD)<sup>1</sup>, an international NGO. The meeting brought together stakeholders from academia, NGOs, government officials, IP experts and well-known scientists, including Nobel Prize laureates, and as a final document produced the ‘Geneva Declaration on the Future of WIPO,’ signed by hundreds of individuals and organizations.

This meeting took place in a venue across the street from the WIPO headquarters. A few members of the WIPO secretariat were also present at the civil society forum, invited to discuss “the future of the WIPO.” They gave short talks, stressing that the primary mission of WIPO, as a technical agency and law-making body functioning as the “leading global forum for the promotion of intellectual property as a force for innovation and creativity,” was to deliver capacity-building programs to help developing countries benefit from intellectual property legislation. The position of the WIPO officials was highly defensive given that the overall tone of the meeting – reiterated in all

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<sup>1</sup> TACD Transatlantic Consumers Dialogue is a forum of European and North American consumer organizations, run by Consumers International, with the aim of developing policy recommendations to foster consumer interest in policy making (see [www.tacd.org](http://www.tacd.org)).

its sessions – was critical of the legitimacy of WIPO’s mandate as a UN agency. The argument was that WIPO only became part of United Nations system in 1974, and has sided with intellectual property rights, its original function prior to becoming a multilateral agency, to the exclusion of human rights.

To a strong round of applause, the representative from one intergovernmental organization of developing countries asserted: “WIPO does not appear to act according to the UN mandate, but according to its original mission to foster IP,” a reference to the fact that before obtaining its current agency status, WIPO had been the Office for the Protection of Industrial Property, a body established to administer services for the Paris and Berne Conventions on industrial property and copyright. “The king is naked!” someone in the audience joked, loud enough to be heard, labelling the fact an “inconvenient truth.” The accusation was that WIPO cares more for the rights of intellectual property owners than those of users, especially those in developing countries. The collective demand was for WIPO to “change its culture and direction.” It should be working in the public interest, giving emphasis to free and open source software, public domain assets like the human genome, and patent exceptions to allow access to medicines for the poor.

Lectures were given by leading figures from various civil society movements like Richard Stallman, founder of the Free Software Movement, John Sulston and Tim Hubbard, leaders of the Human Genome Project, and Helen ‘t Hoen from the Médecins Sans Frontières (MSF) Campaign for Access to Essential Medicines. The conferences, discussions, documents and press releases all criticized WIPO’s course of action in protecting patents, stressing that WIPO practices at global level had led to unequal access to vital medicines and health, anti-competitive economic practices, concentration of ownership, technological measures such as digital rights management (DRM), and the hijacking of the public domain by private interests. Stallman asserted that IPRs restrict the public’s access to information and essential goods, and should not be termed ‘rights.’ Sir John Sulston, the Nobel laureate scientist, claimed that WIPO has pursued the agenda of those who “perverted the course of scientific discovery, instead its mission should be everyone’s interest.” He spoke against the present practices of gene patenting as an abuse, given that gene sequences are discoveries, not inventions.

The widespread claim against WIPO gradually became a social effervescence, in Durkheim’s sense, appearing on signs held by activists and taking

over discussions, rooms, blogs, buses and bus stops, post-conference gatherings, restaurants and café conversations. Manifesto statements quickly circulated, echoing MSF's statement: "We cannot accept a world in which the fruits of innovation can only be enjoyed by the wealthy." Meanwhile, a prominent group of people was drafting the Geneva Declaration, which criticized WIPO for embracing "a culture of creating and expanding monopoly privileges, often without regard to consequences," and called for the organization to shift its focus from intellectual property as an end in and of itself, to a means of benefiting humanity. The Declaration advocated a moratorium on the practice of harmonizing intellectual property legislation throughout the developing world with the laws currently existing in the United States and Europe.

The final document of the meeting held to debate the future of WIPO conveyed the urgent need for a change in WIPO's approach, expressed in strong language:

Humanity stands at a crossroads – a fork in our moral code and a test of our ability to adapt and grow. Will we evaluate, learn and profit from the best of these new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favor of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies? Much will depend upon the future direction of the World Intellectual Property Organization (WIPO), a global body setting standards that regulate the production, distribution and use of knowledge. (Geneva Declaration on the Future of WIPO 2004)

As at other events involving so-called *global civil society*, 'global' here clearly stands for Northern civil society, that is, a geopolitical configuration dominated by European and North American countries. The cognitive map of international politics divides the planet into North and South as an updated and politically correct version of the old division between First and Third Worlds. In terms of the institutional language used by multilateral agencies, however, the vocabulary still revolves around the Developed and Developing Worlds. The latter group, the Developing World, includes the LDCs, shorthand for Least Developed Countries, a designation apparently deemed unpronounceable in multilateral agency speeches and documents, cited only by the acronym.

At the same time as the WIPO Assembly, another event was taking place in another corner of Geneva to discuss the price of new drugs to combat HIV-AIDS, a cost that patent protection had made completely inaccessible for the majority of people in the world with the illness. On the agenda was the demand for access to healthcare and life-saving medications to be supported by public policies through a human rights approach. This was a meeting of experts working to define strategies capable of reversing a global epidemic. Conversations about what was happening at the WIPO Assembly took place at the sides, but never on the main floor of the Conference. Apparently there was no dialogue between the two agencies on the topic of HIV-AIDS drugs: each institution remained enclosed in its own set of norms, ruling bodies run by technical experts, office hierarchies and bureaucratic structures.

Summits and meetings in this world of multilateral agencies bring together an array of different nationalities and multidisciplinary academic consultancies. Ethnic, linguistic and gender diversity are highly cherished. Each meeting is a colorful and exotic display of diversity, or an illusion of it, that celebrates difference in a sea of swirl of turbans, saris, tunics and Western executive clothing. Each person bears a national identity in his or her own brand of expertise, garments, language, accent or emblematic embodied attitudes corporeality – reflecting, in this combination of *othernesses*, the intricate power games of the multilateral world where borders are symbolically and temporarily suspended for the time span of the sessions.

We return now to our main stage in this global policy-making negotiation process, the WIPO 2004 Assembly and the session held on the 30<sup>th</sup> of September. As we remarked above, Brazil co-sponsored a proposal to establish a Development Agenda for WIPO. In the dynamic of the UN system Assemblies, the decision-making process is based on the principle of one country, one vote. Each speaker takes the floor ‘on behalf of’ a country or groups of countries, such as “The Delegation of Egypt, speaking on behalf of the African group” or “The Delegation of Benin, speaking on behalf of the LDCs (Least Developed Countries).” Countries may be clustered by geographic location, or grouped under an umbrella political identity like “Least Developed Countries” or “Islamic Nations.” As we explore later in relation to the Agenda proposal, Brazil would speak on behalf of the newly created “Group of Friends of Development.” Hence the identities of the countries and the organization taxonomies are fluid and comprise important rhetorical

devices. Powerful political strategies in this arena include speakers shifting from one identity label to another during their discourse, which requires political skill and the ability to strategize efficiently as an interest group. In earlier Assembly sessions addressing other issues, Brazil's delegation had already made profuse reference to its participation in the "Group of Friends of the Chair." The rhetorical parallel drawn with the creation of a "Group of Friends of Development," critical of the course that WIPO was taking, cannot be overlooked in this discursive dispute.

As part of the dynamic of the Assembly, reference was seldom if ever made to someone's personal name. Only member states have seats at the conclave, meaning that individuals personify countries in a ritualized form to such a point that is extremely hard to discover the speaker's actual name. Neither is this information made readily available in the assembly reports. The country is the actor delivering the statements. Even backstage, people can be overheard referring directly to one another as a country or a country delegation. In a strongly bureaucratized transnational organization, the fact that the nation state mandate eclipses personhood is very much part of the symbolic repertoire of this unique form of institution, and also a symbolic indicator of its capacity to operate effectively in a wholly impersonal mode.

This dynamic of country decision-making power enables so-called global civil society to build links and strong alliances with country representatives, delegates or permanent mission representations in Geneva's forums or elsewhere. In this context, the interplay between a Northern NGO and a Southern country and the establishment of links are a recurrent and legitimized interest-oriented strategy. Alliances and networking among groups through formal or informal channels are part of the established practices, along with negotiating positions and votes when key issues are being debated on the main decision-making floor. The same dynamic occurs in relation to transnational companies and other non-governmental bodies representing diverse interests in the global market. The boundaries between lobbying and advocacy are blurred: political opportunity is perceived as an asset, or to put it in Bourdieu's terms, as political capital. The practices of power groups are recognized as a legitimate part of the game, a grammar of the multilateral organization culture.

Since its first session on September 27<sup>th</sup> when Argentina and Brazil included 'Item 12' as one of the items to be discussed on the Assembly agenda

(filed on September 22<sup>nd</sup>), a tension was palpable in the corridors: we could hear the words ‘Item 12’ spoken in small group conversations. It was clearly a surprise for the institution as a whole: it was as though a consensus had been shattered. At this early stage, Item 12 was merely proposing inclusion of a discussion of Development on the WIPO agenda for further debate. As a matter of protocol, not accepting inclusion of Item 12 could be seen as a mistake in the one country, one vote environment.

The Brazilian delegate’s speech at the Assembly began: “I take the floor on behalf of Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Iran, Kenya, Sierra Leone, South Africa, Tanzania and Venezuela...” This discursive strategy of presenting a proposal as the work of more than one country is used wherever possible, as is listing the partner countries in alphabetical order: as well as demonstrating good diplomacy, it is another example of depersonalization, used even when one country assumes the role of the main actor. It is hard to assess whether in the context of talking about 12 countries (from a total of 186 member states) it was indeed a symbolic asset. In this case, the retort overheard in the Assembly’s halls was: “Well, *those* countries!” and “Do you remember the movie *The Good, the Bad and the Ugly*?” in a teasing reference to the epic Italian spaghetti western. Spoiled country identities are always the subject of jokes, also used teasingly as a label manipulated by national delegations themselves – for example, to impersonate countries closer to ‘The Axis of Evil,’ a sarcastic reference to Bush’s famous speech, a joke only made away from the main halls, and certainly not in English.

The statement presented by the Brazilian delegation at the 2004 Assembly refers to the position of civil society, directly citing the document “The Geneva Declaration on the Future of WIPO” launched in the parallel civil society forum. The latter argued for the incorporation of the development dimension into WIPO’s program, specifying four issues: WIPO’s mandate and governance; norm-setting; technical cooperation; and technology transfer to developing countries. Development was the main word, but what was at stake was WIPO’s position as a UN agency, as the delegate put it in an almost patronizing, if not daring, tone:

Because Development is a shared commitment of the international community, incorporating the ‘development dimension’ in all WIPO activities should be a major concern for us all. [...] This debate is necessary for the sake of WIPO,

for its legitimacy and credibility as an institution. We want to help it cater to the interests and concerns of all Member States and all relevant stakeholders, including, in particular, civil society. (Statement of the Delegation of Brazil, WIPO Assembly, Geneva, September 30, 2004)

## **Ruling global trade: the intellectual property regime**

The term Intellectual Property designates a broad range of private, monopolistic rights. Two dimensions define Intellectual Property in its contemporary acceptance of rights and meanings: *rights to industrial property*, which refers to inventions (patents, trademarks, and industrial design) and geographical indications; and *copyright*, which includes artistic and literary production in all media. The contemporary intellectual property regime impinges directly and radically upon everything we call *culture*, the classic object of anthropological work.

The global intellectual property regime has implications for all areas of social life. The text of the TRIPS Agreement sets out its *raison d'être* and scope:

Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value – for example brandnamed clothing or new varieties of plants. [...] The WTO's TRIPS Agreement is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. (Agreement, 1994; World Trade Organization, 2012)

Today the term Intellectual Property refers to this new global regime, an umbrella system designed to protect the rights of patent holders (whether corporations or individuals). The processes through which these rights have been redefined have engendered new forms of social coercion and control, including private monopolies on genetic resources and biodiversity, the folk,

the local, and social spaces. In other words, the privatization of collective and cultural resources, as well as inventions of public interest, emerges as a powerful strategy for controlling global flows of knowledge and information, and, as a consequence, access to intangible cultural goods and new technologies.<sup>2</sup>

As many critics have pointed out, intellectual property is not just a regulatory structure defining the right to exploit knowledge and circumscribe creative work, but also a discourse legitimizing the power structures that found the emerging global knowledge economy. For Bourdieu (1998), the legal field is a site of competition over the monopoly of the right to tell what is right. He points to the fact that supposedly universal practices and discourses are self-referred, or legitimized, within the same legal field that produces them. The social space of producing international law also defines those actors who are allowed into the game, and those who are excluded:

Power is rapidly moving towards sharper hierarchies in the international division of knowledge ownership – ownership of the raw materials, the production cost of which increasingly determines the relative price of goods and services that are exchanged internationally. From now on, copyrights, trademarks and trade secrets will be the actual subject of international negotiations. (Cocco 1999: 275)

The global knowledge economy, centered on notions of immaterial labor, human capital and intellectual property, establishes a new international division of competences between centers and peripheries, North and South, rich and poor, holders of technology and suppliers of raw materials: “This means that the position of each country will increasingly depend on its capacity to capitalize knowledge, on the possibility of converting knowledge costs into relative prices” (Cocco 1999: 275). Moreover, although this discussion is beyond our present scope, it is important to recall that the background for such a legal regime involves a philosophical conception of intellectual property that links authorship to ownership. This is a matter of significant debate in anthropology. As Strathern (1996) has put it, property is the legal connection between a being and an entity, which is regarded as the extension of a subject who, in the case of intellectual property, is conceived according

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<sup>2</sup> Part of the analysis of the historical context of IPRs presented in this section has been addressed in Leal and Souza 2012. See also Leal, Deitos and Souza 2010 and Souza 2009 for further discussion of this topic.

to Western canons of the individual (rather than collective) subject.

We can identify three broad sets of knowledge on which intellectual property rights have impinged. These not only configure new markets, they also restructure the daily lives of social actors in relation to these objects: access to information and knowledge; traditional knowledge and intangible cultural heritage; and access to essential public health assets.

The shaping of the global intellectual property regime unfolds within this scenario of deep technical changes and the dominance of corporations that attempt to impose their agendas on everyone else, including those issues that directly affect public interest:

The international extension of patenting reflects both the geographical range of the operation of a company and the importance it attributes to the protection of its monopolistic positions, the rentier extraction of royalties, and the power to sterilize innovation if it so wishes. Large US corporate groups have always attributed paramount importance to this protection. They were the ones to impose the adoption of TRIPS on GATT at the end of the Uruguay Round. (Chesnais 1996: 164)

This form of domination, in which knowledge is privately appropriated by corporations, is based on an assumed scarcity of intangible goods and resources, including information, previously understood to be part of the commons. Drahos and Braithwaite (2004) refer to this as a logic of knowledge hegemony, which finds its fullest expression in the current global intellectual property regime. This regime may be understood as a set of institutional, juridical, philosophical and social strategies that enable the exclusive control of resources of virtually any kind. Anthropology, which takes the question of nature/culture as a central theoretical axis, becomes a spectator to how nature or *life* – to use the discursive terms deployed by intellectual property regulations – becomes culture and, as such, comes to entail authorship or becomes liable to commodification and thus patenting. Fischer (2009: 85-6) noted that “biology has been transformed from a republic of science in which the flow of information, at least in academic settings, was largely free to one in which the biologist always tries to patent before publishing and much data is closely held and no longer freely available.” This was exactly the same point made by the Nobel laureate geneticist at the Geneva Conference in 2004, narrated in the first part of this paper.

Intellectual property rights, whether copyright or industrial, are monopolistic strategies designed to secure control over certain objects by certain agents, especially corporations. They are a “dynamic instrument for accessing and controlling markets, to the benefit of industrial companies” that have “enough capital to direct the flow of research and invest in markets created by products and processes, the commercialization of which was made possible by such research” (Ost 1999:81).<sup>3</sup>

What is known today as the global intellectual property regime has its origins in the post-war period when multilateral governance strategies first emerged. From the second half of the nineteenth century until the end of the Second World War, international directives on IPRs were regulated in compliance with the Berne and Paris Conventions.<sup>4</sup> The 1883 Paris Convention responded to the interest of technology-supplying<sup>5</sup> countries in “facilitating technology flows across contracting nations, thus creating common requirements for granting patents and guaranteeing national coverage for foreigners” (Gandelman 2004: 101). The 1886 Berne Convention, in turn, covered the protection of literary and artistic works. According to Gandelman (2004), the latter emerged from the concern of European countries to guarantee protection for their authors in foreign countries. Neither convention imposed the standardization of national laws, or the mandatory and unconditional adherence to minimal standards. Unions were also open to the entry and exit of their members without any obligation to adhere to subsidiary agreements. In 1893, the two conventions were unified under the International Unified Bureau for Intellectual Property Protection (BIRPI), whose headquarters were located in Berne, Switzerland, until 1960.

According to Halbert (2006), during the 1950s the power struggle over the regulation of intellectual property rights was manifested in the coexistence of various organizations arbitrating on similar issues. In this context, BIRPI

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3 Referring to the production of science and knowledge in Brazil, Carlotto and Ortelado (2010) argue for a specifically peripheral agenda focused on the relationship between science and the market, and looking more closely at editorial activity in order to understand both the economic effects of the products of scientific activity, and the effects of the economy over scientific work.

4 Between the late nineteenth and early twentieth century a series of technical conventions or conferences were constituted to allow governments to exploit common interests without the obligation to adhere to a specific regime. This was the case of the 1865 International Telegraphic Union, the 1874 General Postal Union, and the 1875 International Weights and Measures Office (Almeida 2004).

5 Although it was not primarily a supplier of technology, Brazil was one of the ten original subscribers to the Convention.

progressively engaged in working relations with various multilateral agencies – specifically, those belonging to the United Nations (UN) system. This eventually resulted in the incorporation of the World Intellectual Property Organization (WIPO) into the UN system during the 1970s, an entity that had earlier replaced the Patent Office, BIRPI, in 1967. However, WIPO's functions were merely administrative and regulatory: it lacked the powers to impose adherence to multilateral norms on UN member countries.

This was not the only arena where disputes on the definition of IPRs unfolded. Ever since the creation of the General Agreement on Tariffs and Trade (GATT)<sup>6</sup> in 1947, the United States had pushed for the inclusion of IPRs in the Agreement's remit. On this point it faced opposition from several countries, including Brazil.

During the 1980s, the United States established an explicit policy for linking intellectual property rights to trade, both multilaterally through GATT and bilaterally by means of sanctions imposed through Section 301.<sup>7</sup> The question of intellectual property was progressively included in the Multilateral Trade System (MTS)<sup>8</sup> as the WIPO gradually lost ground to GATT. Compared to the WIPO, GATT offered three advantages (for the United States): it established higher protection standards; it applied commercial sanctions to states that failed to adapt to the established protection standards; and it limited the leverage of developing countries in defining the GATT agenda, given their relatively weak position in international trade (Correa and Musungu 2002).

After a round of failed negotiations on GATT, the Uruguay Round was launched in 1986. It ended in 1994 with the creation of the World Trade Organization (WTO). Despite strong opposition from developing countries, IPRs were incorporated to the organization by means of the Trade-Related

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6 GATT was the outcome of negotiations led by the United States at the United Nations over the reduction of barriers to international trade.

7 Section 301 of the U.S. 1974 Trade and Tariffs Law authorizes the government to unilaterally adopt coercive (tariff and non-tariff) measures against countries whose practices are considered unfair to U.S. commercial interests. In the following decade, this Law was amended to include, among other changes, the application of Section 301 to intellectual property. During the same period, the United States framed Brazil since the legislation then in force did not cover patenting of pharmaceuticals – thus unleashing what became known as the pharmaceutical patents dispute.

8 “The MTS includes the ensemble of international agreements signed by states from 1947 onwards to regulate international trade” (Nasser 2003: 33). These agreements were consolidated with the creation of the World Trade Organization (WTO), together with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.

Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>9</sup>

As the TRIPS Agreement has become incorporated into the multilateral trading system, considerable concern has been raised over its globally pervasive role. The Agreement represented a radical imbrication of intellectual property rights and trade, and thus the subjection of IPRs to market demands and the conversion of all tangible and intangible objects into commodities. The advent of TRIPS in 1994, together with the World Trade Organization (WTO), a multilateral agency with the power to impose global sanctions, marked the birth of an unprecedented era of commoditization, mercantilization and globalization.

This new, late twentieth/early twenty-first century expansionism in the intellectual property agenda has mostly been affected through bilateral and regional agreements that became known as TRIPS-plus. The intellectual property regime established by both the TRIPS Agreement and the series of agreements on IPRs of a TRIPS-plus kind globally regulates intangible goods, including: traditional knowledge; agriculture (whether through technological packages, including intellectual property protection clauses, or through the patenting of seeds and cultivars); health-related products, affecting the price of pharmaceuticals and essential inputs, for instance, as well as the direction taken by research into new drugs; education, through copyrights and their impact on the price of books and even their availability; and information and communication, through the executive regulation of their flows.

The current legal framework enforcing Intellectual Property Rights has shaped economic development, trade and market access. IPRs have become vectors in a profound shift in contemporary capitalism, inasmuch as the question of access to goods, products and services has become fundamental to understanding the dynamics of power relations at diverse levels (Rifkin 2000). These rights have also determined ownership and access to essential goods such as the pharmaceuticals necessary to contain endemics and epidemics, and have controlled the flux and content of information and creativity, not only by dictating what forms of human creativity and inventiveness are legally permitted (or not), but also by altering the ways in which they circulate and become expressed in societies.

The TRIPS-plus mechanisms reflect a new phase in the history of

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9 For the TRIPS Agreement text, see Agreement 1994, World Trade Organization 2012.

corporative monopolies, characterized by an imperative to extend control over markets. As Silva (2009) argues, just as the patent system's demands, which culminated in the TRIPS Agreement, only became materialized in the aftermath of the consolidation of industrial parks in the pharmaceutical, electronic and entertainment sectors – and when these were ready for massive advances into the global market, so the new pressures for broadening IPRs and TRIPS are related to the dynamics of contemporary capitalism.

## **A Development Agenda for WIPO**

One of the most controversial topics when it comes to intellectual property are the relations between IPRs and development. As far back as Queen Anne's England, privileges of invention and authorship were advocated as a way of bolstering local commerce. When WIPO entered the UN system in the 1970s, the good management of IPR agreements came to be linked, at least formally, to the promotion of creative intellectual activity and technology transfer to developing countries in order to speed up their economic, social, and cultural development. The TRIPS Agreement also incorporated a number of development-related issues, especially in its provisions concerning flexibilities<sup>10</sup> and the timeline for implementation in different countries.<sup>11</sup>

During the 1990s, it became increasingly evident that lengthier deadlines were not in themselves enough for developing countries to incorporate technology effectively and improve local productive capacities. Moreover, the obligations imposed by the TRIPS, even where minimal, proved to be at the limit or beyond the possibilities in some countries, turning them into obstacles to development. One of the solutions encountered by state and non-governmental actors alike was to advocate for deployment of the flexibilities already incorporated in the TRIPS Agreement as a means to secure the relative autonomy of the countries concerned, promote public interest, and press for an IPR regime less harmful to developing and less developed countries.

Critics of the Intellectual Property regime denounced the narrow and

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<sup>10</sup> Flexibilities refer, for instance, to the right's term (national frameworks may choose to lengthen the protection term beyond minimal standards), the right's scope (to extend or reduce the scope of patentable objects), and the adoption of specific, clear rules in the education and public health sectors.

<sup>11</sup> In articles 65 and 66, the Agreement established deadlines for adapting national legal frameworks according to development levels: one year for developed countries; five years for developing countries; and eleven years for less developed countries.

mechanistic conception of development informing official discussions of the relationships between development and intellectual property. The latter assumed that the provision of legal security to the rights of inventors and creators, along with strict punishment of violations, would be enough to foster an enabling environment for technological development and industrial activity. The economic development that was expected to ensue would, it was argued, logically and automatically produce developmental offshoots in sectors such as social welfare and environmental protection.<sup>12</sup>

Taking a stance against WIPO's practices of expanding the scope and level of intellectual property protection, the Development Agenda – sponsored by Brazil and Argentina, and described in the first part of this article – was first presented at the WIPO General Assembly in 2004. In a joint declaration issued one year later, in 2005, the Agenda's co-sponsors named themselves the Group of Friends of Development. In 2007, when the Agenda was finally approved at the WIPO Assembly, this group was composed of 14 member countries, including its original sponsors. It emerged in the wake of other initiatives aimed at redefining the meaning of development as it became coupled with IPRs, such as the Millennium Development Goals, the Monterrey Consensus, the Johannesburg Declaration on Sustainable Development, and the Doha Declaration on TRIPS and Public Health. The Doha Declaration is particularly forceful in its demonstration of how IPRs may hinder the advancement of the human development goals proposed by the United Nations. It became increasingly accepted that, despite its universality, the application of TRIPS might produce different effects, depending on each country's development level, including negative impacts on social, economic and technological development (CIPR 2002).

Besides these challenges to the assumption that the regime could, in and of itself, promote development, two other major lines of criticism have emerged, as we saw forcibly presented in civil society fora in Geneva in the Fall of 2004. The first argues that, regardless of the existence of internal

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<sup>12</sup> An example of this kind of argument can be found in Sherwood (1992). The author claims that, especially for developing countries like Brazil, IPRs are an indispensable part of the infrastructure necessary for development. "The effective protection of intellectual property will help developing countries to move in two directions. One is towards participation in global technology networks. The other is towards encouraging human creativity within the national economy. The first step towards enjoying these benefits is to think of intellectual property protection as a vital part of the country's infrastructure. [...] Intellectual property protection, an inexpensive but powerful instrument, is available to any developing country wishing to benefit from it" (Sherwood 1992: 194-195).

efforts in this direction, WIPO must incorporate the specific needs of developing or least developed countries in its programs. The organization must acknowledge “more explicitly the fact that intellectual property protection brings both benefits and costs, and further emphasize the need for IP regimes properly adapted to the specific circumstances in developing countries” (CIPR 2002: 158). The second line of criticism suggests that the TRIPS-plus Agenda, whether in its traditional (bilateral and regional) versions or in WIPO’s recent efforts to adopt stricter criteria than TRIPS,<sup>13</sup> poses obstacles to further development and, as such, should not automatically be taken as a necessary part of the system’s evolution.

A developmentalist perspective, whose discursive field includes the Development Agenda, therefore emerged to a large extent in opposition to the pro-IPR bias. This set of arguments stems from “a developmentalist view on Intellectual Property, which should function as a tool for capacity-building [...]” rather than being an end in itself (Jaguaribe and Brandelli 2007: 286).

The developmentalist argument was pursued along two paths simultaneously: on one hand, as a positive and proactive response to the TRIPS-plus negotiations, both at WIPO and through bilateral pressures in free-trade agreements; on the other, as a reaction to the way WIPO had directed negotiations by disregarding policies catering to the demands and needs of developing and least-developed countries. This double characteristic was fundamental during the Agenda negotiation process as a way of deflecting criticisms that the Brazilian Delegation was opposed to IPRs per se or WIPO itself.

In general terms, the developmentalist argument within IPR negotiations highlights the need to balance the benefits and costs of the intellectual property system to ensure the viability of the system itself (Jaguaribe and Brandelli 2007). From this perspective, intellectual property should be a means to development, attuned to each country’s policies for industry and technology.

This recognition of the need to adapt IPRs stemmed largely from an assessment of the experiences of developing and least-developed countries in the aftermath of the Uruguay Round, when the TRIPS Agreement was

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<sup>13</sup> Here we refer to the Digital and Patent agendas (Jaguaribe and Brandelli 2007). The Patent Agenda includes the Patent Law Treaty (PLT), reform of the Patent Cooperation Treaty (PCT), and the Substantive Patent Law Treaty (SPLT). The Digital Agenda includes the World Copyright Treaty (WCT), the World Performances and Phonograms Treaty (WPPT) and the Protection of Broadcasting Organizations Treaty.

brought into being. Emphasis was also given to the historical experience of developed countries and how they had deployed IPRs differentially and flexibly during various key periods of their own techno-scientific and industrial development. Also relevant here was the perception that the current configuration of the intellectual property system has failed to benefit developing and less-developed countries in implementing policies for economic, social, cultural and human development.

Care should be taken, however, not to take the processes involved in constructing the Agenda as peaceful and unilinear decision-making by the Brazilian actors involved in constructing the country's stance. An initial fault line can be traced to the scope of the IPRs to be included in the Agenda. While the INPI (Instituto Nacional de Propriedade Industrial) and other institutions working in the area of technological development emphasized industrial property rights, those involved in civil society movements, such as Creative Commons Brazil and the Ministry of Culture's copyrights department, advocated the importance of allowing significant space for the interests pertaining to their fields.

On the other hand, these two discursive fields share a common semantic field, which allowed them to collaborate in the construction of a Development Agenda. This includes, first of all, the idea that the social function of intellectual property is not exhausted by the availability of a technique or the creation of products offered to the public. In order for intellectual property to effectively perform its social function, it must be widely available to all social sectors in the form of appropriable knowledge and consumable goods (including culture, knowledge and information). This entails shifting the basic role of IPRs from guaranteeing inalienable individual rights to ensuring the social function of (intangible) property.

Secondly, it becomes imperative to reinstate what was, arguably, the original balance between the monopoly rights afforded by private IPRs and the public interest – the latter understood not only as a formal counterpart to these rights, but also as effective form of participation in the innovation and creativity encapsulated in the objects they protected. In this sense, the introduction of the developmental dimension as further leverage in IPR mechanisms is key to redressing the distortions of a system that has been “hijacked by private interest groups” (in the words of ambassador Roberto Jaguaribe, interviewed in 2008) and that “needs to be calibrated” (according

to Maria Beatriz Amorim Páscoa, also in an interview given in 2008).

These concerns lead to one of the Agenda's most controversial items: the scope of the public domain. As a common intermediary space, in Benkler's sense (2007), the public domain becomes fundamental: it implies a particular frame of governance, involving the use of resources that differ from the current system of private property and based on the impossibility of any kind of private appropriation.

Within the Development Agenda, public domain rules include the limitations on and exceptions to IPRs. These rules are defined by states at two levels: via multilateral agencies, such as WIPO, through the establishment of supranational regulations; and domestically through national public policies and regulatory bodies. In the Agenda's various versions, the issue of the public domain – always a sensitive topic at WIPO and in negotiations in other multilateral and intergovernmental fora – has been the subject of oscillations and controversies fomented by countries such as the United States.

According to the official records available and other kinds of field data, Brazilian diplomats putting forth the country's stances during negotiations have been extremely careful to defuse any idea that they are advocating the abolishment or delegitimization of the intellectual property system per se. Among the regime's supporters and opponents alike, there is a tacit agreement regarding its existence, legitimacy and importance: what varies is the content and objectives attributed to it.

As we looked to show in the first part of the article, the process of building the legitimacy of the Agenda proposal involved an intense dialogue with and support from non-governmental organizations campaigning in the public interest, many of which were present at its launch in 2004. However it also involved appealing to the UN itself and its founding mission, building support among other multilateral bodies, and receiving the endorsement of regional groups and individual countries.

The 2004 WIPO General Assembly decided to transfer the assessment of proposals to Inter-sessional Intergovernmental meetings, which would be responsible for preparing a report for presentation at the 2005 General Assembly. Thereafter the tone was set for a dispute between the WIPO Secretariat, which sought to maintain the Agenda within the existing forum, and the Friends of Development group of countries, which began to be referred to simply as 'The Friends,' who were working continually to reinvent

its systemic and horizontal profile of governance. At that time, the Group of Friends was developing the Agenda's structure through four thematic teams, whose composition would change during the negotiations until a final version was reached. These displacements, which will not be examined here, eventually led to four groups of propositions: the WIPO mandate and governance; norm-setting; technical cooperation; and technology transfer (Souza 2009).

Even though the proposal eventually presented to the 2005 General Assembly was not approved, it did allow the balance of forces around the dispute to be mapped, as well as an assessment of the Agenda's most sensitive items, including those relating to the public domain and alternative modalities of copyright licensing. Over 130 public-interest NGOs "from all corners of the globe" signed a statement in support of the Friends of Development proposal. The 2005 Assembly, following a dynamic similar to the 2004 Assembly, was closely observed by non-governmental and public interest organizations and, outside the WIPO headquarters, Geneva once again became a political forum for diverse power groups. In the WIPO session held on September 29<sup>th</sup> 2005, Brazil and an impressive number of developing and least developed countries took turns on the floor to stress "the need to adopt appropriate measures to overcome the technological gap between developed and developing countries and arrangements that would facilitate technology transfer," along with other points of the Agenda. After a long procession of country member speakers delivered their messages, the United States Delegation merely issued a laconic statement in the opposite direction, expressing full support for "WIPO's work in promoting IP worldwide, as strong IP stimulates creativity and local investments." An important public interest organization issued a critical commentary that circulated widely in the international media and social media networks:

The United States government and the European Commission should abandon efforts to use WIPO as an instrument of uncritically expanding intellectual property protection and the protection of their export industries. They should support a new dialogue within WIPO; a dialogue consistent with modern intellectual discourse about the reform of intellectual property regimes in order to promote the public interest, North and South. (CP Tech document, October 3, 2005)

The Provisional Committee on the Development Agenda set up by the 2005 Assembly met in 2006, and its support base was enlarged to include countries from the African Group, expanding on questions of technical assistance, which were already part of WIPO's scope. It succeeded, moreover, in avoiding a restrictive interpretation of these issues on the Agenda.

Also at that moment, keeping in mind that the meaning of the notion of a development agenda is fluid, other development-oriented proposals emerged as alternatives to be discussed by the Committee alongside those presented by the Group of Friends: the African Group proposal, which was a revised version of one discussed earlier, as well as proposals from Chile, Colombia and the United States of America. In order to study all the different proposals, the Committee's president prepared a list, organized to encompass all the recommendations on an equal basis.

Three years after the initial proposal, the Agenda was finally approved at the September 28<sup>th</sup> session of WIPO's 2007 General Assembly. At this meeting, a set of forty-five proposals relating to a Development Agenda was agreed upon by member states and unanimously approved. The final formulation of the proposal was presented by the Brazilian Delegation, led by Ambassador Roberto Jaguaribe, and maintained a conciliatory and moderate tone. It presented some introductory points that had already been included in the document and stressed WIPO's status as a specialized UN agency, as well as the horizontal organizational structure of the Agenda. The text highlighted the fact that the Agenda's set of proposals would allow developing countries to safeguard public interest flexibilities existing in the intellectual property international system; these countries would receive assistance to implement such flexibilities; and the proposals would ensure greater civil society participation in WIPO's activities.

As Bennerman (2008: 25) pointed out, "the Friends of the Development have already won what is perhaps the biggest contest of principles to have faced WIPO in the past forty years – the question of whether the WIPO mandate includes development." Furthermore:

One of most important battles of the Development Agenda – the battle over the inclusion of development in WIPO's mandate – has already been won. [...] [Although] Pessimists (or realists) might generally predict that more powerful states will ultimately prevail over weaker ones, with the international IP regime

maintaining its rights-centered focus. [...] one more extension of, and infused with, international power relations – a struggle through which developing countries are unlikely to achieve substantial gains. (Bannerman 2008:26)

Nevertheless, it cannot go unremarked that while the Agenda was able to unite discontent voices and make a strong claim for change within WIPO's structure, a major leadership crisis became public precisely during the same 2007 General Assembly. Some might say that the crisis even overshadowed the Agenda. Calls for the Director General of WIPO to step down, after a decade in office, following accusations of corruption captured the attention of the member states. This discussion divided the countries between 'Brothers' of the Director General, the African Group, a silenced country member group, and the United States and other developed countries who demanded his immediate resignation. However, as Musungu (2009:74) put it, the crisis may also have been a blessing in disguise for the Development Agenda since the reforms that it envisaged could not have happened with an embattled Director General and a divided Secretariat, nor proceeded with a sharply polarized membership.

WIPO's Director General resigned. Brazil submitted Graça Aranha's candidacy for the position. At the 2008 General Assembly, among several other candidates, the Australian candidate was eventually elected WIPO's Director General by a difference of just one vote from Brazil's candidate.

From our anthropological standpoint, the account of a four-year dynamic of how the Agenda was built, embedded in a discursive dispute between two sets of principles polarized around the notion of *property* – one aligned with the private sector, the other with public interest – within global regulatory institutions, entices us into a narrative of a process in which powers and meanings are reordered, crafting a tale about the imaginary global geography of North and South.

### **Trespassing lines and the anthropological endeavor**

In exploring the proposal for the Development Agenda in this work, we also have tried to shed some light on two processes leading to the constitution of global law-making agencies regulating world trade. First, the World Intellectual Property Organization, which was transformed from a corporate patent office to a United Nations regulatory agency; and second, the advent

of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which came into being together with the World Trade Organization (WTO), with all its sanctioning power over global trade. Both events marked the beginning of an era of unprecedented commoditization and heightened regulatory barriers across the world. In this complex context, the Agenda could be seen as a mischievous attempt to challenge sanctified rules, routinized powers and homogeneous institutions. Our anthropological endeavor here has been to give an account of these tensions and the institutional context in which competing world visions are produced.

Intellectual property rights are a kind of legal fiction. The parameters defining this kind of relation, including relations between objects and active and passive subjects, are borrowed almost mechanically from a model that has been traditionally applied and historically constituted to protect objects of an altogether different nature. A straight, continuous line is traced linking the private property of immobile goods – land, for instance – to these completely different, intangible and mutable goods. It is in this sense that some critics, such as Richard Stallman, founder of the Free Software Movement, referred to the term ‘intellectual property’ as an oxymoron.

Intellectual Property Rights (IPRs) may sound like a kind of legal fiction of hybrid realities. Their objects are largely immaterial, yet these rights are based on analogies with material and immobile goods. Subject to individual monopolies, they are justified by appeal to collective interests and a particular social function. Personalized and grounded in individual creativity, they may be inherited by those who contributed nothing to their production. Despite being legal fictions, IPRs are legal entities. It is on this strange character that we must dwell if we are to make sense of the possibility of bringing together two objects like property and intellectual activity that are, in principle, antagonistic.

In our final remarks, we seek to show how, in its very constitution, the Agenda straddles both sides of what Boaventura de Sousa Santos (2010) calls the abyssal line. It has been argued that modern law is the most complete form of abyssal thinking: that is, the way through which Western modernity divides sensible and non-sensible objects into those belonging to “this side of the line” and those belonging to “the other side.” The Western side of this line is ruled by a dichotomy of regulation and emancipation, the other side by appropriation and violence (Santos 2010). IPRs, which belong to this side,

have been encroaching on an increasing number of objects, prompting a impassioned reanimation of the line. On one hand, it excludes and interdicts, precluding access to a wide range of goods and products located on the other side of the line (in the way, for instance, that public health programs are jeopardized by pharmaceutical patents). On the other hand, it nabs elements from the other side – traditional knowledge, material culture – which, when brought to this side, are subjected to the same rules, thus feeding into the interdiction cycle.

Abyssal thinking, a foundational matrix for thought and classification in Western modernity, is also characterized by the impossibility of existing simultaneously on both sides. To exist on ‘this side’ implies, necessarily and by definition, to negate, exclude and eliminate – if anything, to domesticate – whatever belongs to the other side.

In this sense, a multiplicity of legal systems and ways of defining which elements belong to the sphere of law not only escape the official framework, they are converted into non-legal or illicit acts, condemned to invisibility or illegality. The traditional cruelty of colonial regimes is revamped under the empire of Law, whether through the plundering of traditional knowledge and its transformation into a commodity, or by submitting groups to the official legal framework as the only viable means to safeguard their autonomy and protect their cultural particularities.

The proposal of a Development Agenda for WIPO is an endeavor to make this line more porous, albeit in a controlled manner. It is, in a sense, an attempt to render visible some elements from the other side, fostering the emergence of authorial, collaborative experiences that differ from the monopolistic-commercial logic of IPRs. The qualification ‘some’ is important here: not all elements from the other side are desirable, only those that can be domesticated and framed according to preexisting ways of distributing power and knowledge. This is manifested, for example, in the limitations imposed on the participation of non-governmental organizations in this process. Even if their presence is desired, their contributions regarded as fundamental, and their support deemed necessary, there is a clear separation between these actors, who are authorized to denounce and propose, and others, more authoritative and legitimate, who manage the contending interests and ultimately define the Agenda’s master guidelines.

From this stems the second process of approximation: the similarly

controlled attempt to recruit the dissident voices of historically silenced political minorities to this side of the line during the Agenda-building process. In a complex process that lies beyond our present scope, indigenous peoples, patient groups, academics, consumers groups, counter-cultural movements and anti-globalization movements are invited to participate in the construction of the new Agenda. They are recruited however on the basis not of their specificity, but their exoticism. As such, they must to some extent conform to the formal ritual acts that grant access to these instances – in particular, the idea of representation.

As stated above, the abyssal line is not a one-way process of incorporating elements from the other side. There are also increasingly qualified counter-movements: experiences of subaltern cosmopolitanism which press for a non-abyssal form of thinking, based “on the notion that the world’s diversity is inexhaustible” (Santos 2010: 51). In the case of IPRs, this means, for instance, seriously considering legal systems in which notions of property find no equivalent in our philosophy, or legal systems based on other logics of production, appropriation and distribution of (re)creative activity. These ‘others’ can be found not only on the ‘difference’ pole formed by indigenous peoples, peasants or traditional communities: they are also encountered at the center and margins of this side of the line, pushing for visibility and challenging the hegemony of abyssal thinking.

It is in this sense that the process for negotiating and approving a Development Agenda for WIPO – or, more precisely, *at* WIPO – is paradoxical. On one hand, it shows the political muscle of a heterogeneous group of social actors capable of tipping the balance of power in the international intellectual property regime. On the other, it points to the consolidation of the legal intellectual property regime as something to a greater or lesser extent ‘necessary’ for the countries’ development. In the first case, there is a counter-movement, an attempt to push and smooth the abyssal lines that constitute our world. On the other, there is a re-entrenchment of this line, since ultimately the existence of the regime itself is not at stake. Its content and pillars are questioned, but a consensus remains regarding its existence and reality – and what is more, its inevitability. Hence, even with the openings achieved by the Development Agenda, no substantial changes have been made to the configuration of forces. In fact, after the earlier moments of turmoil, the situation has settled in such a way that it has again become clear

who is on this side and who is on the other. And intellectual property continues to be, borrowing from Meneses (2010), one of the shadows that loom over our modernity.

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