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The TRIPS Agreement
as a
Standard of Civilization?

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Abstract

The concept of a standard of civilization evolved in wake of the European colonial expansion, dividing societies by various shades of “civilization”, which essentially referred to the level of European resemblance. Whereas that classical standard of civilization is obsolete, the phenomenon might still be occurring under different labels but with similar traits. In this thesis, I derive a set of abstract criteria from previous research which typically designate a standard of civilization: 1) A normative benchmark formulated according to the domestic custom; 2) One-track universalism and the myth of progress; 3) A quest for rationalist legitimacy; 4) Codification (transformation into legislation) and/or institutionalization; 5) A position of hegemonic power. Applying these criteria on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, I conclude that it displays interesting similarities with a standard of civilization, the main difference being the dubiousness with which criteria 1) and 3) interact in this particular case; this is probably due to the both contending views on the justification of intellectual property rights.

Keywords: Civilization, WTO, TRIPS, Intellectual Property Rights, Globalization, Trade

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1 Introduction

We have all probably come across old books with yellow-stained pages in which adventurous Stanleyesque heroes in khaki cut their way through a threatening and dark jungle where no white man has ever set foot before. The plot is invariably set among savages, far away from civilization. Civilization was a major buzz-word of the last centuries of the foregoing millennium. “The civilized world”, “acting in a civilized way” – those were concepts attributed great importance and explanatory value as the European powers expanded beyond their heartland. It implied a standard of “civilization”, a single standard with universal applicability according to which the peoples of the world were categorized into various shades depending on how they were benchmarked against this standard: the civilized, the barbarous and lastly the savage. Full sovereignty and recognition in the international community was naturally only given the civilized countries.

Now that the white spots on the maps have been surveyed, the European colonies have been abandoned and it has become out of fashion – to say the least – to label people of foreign descent as savages, all of this might seem like a finished chapter. Surely, “civilization” was used rather cautiously in general during the cold war, when the dichotomy of capitalism and communism overshadowed nearly every other aspect of international relations. The end of the cold war, by many held to be the triumph of Western capitalism over communism, has somewhat changed this.

First of all, there has been a resurgence in the 1990s of using civilizations in the plural (not in the singular, as a universal ideal but as separate macro-cultural entities in a certain time and place) – to a large extent the intellectual offspring of Samuel P. Huntington’s article (1993) and book (1996) which has attracted a lot of attention.

However, this particularistic approach is challenged by other universalistic currents, many of them bunched together under the umbrella of the term “globalization”. While realizing that any relevant aspect of an elastic and elusive concept like globalization is virtually impossible to cover in a bachelor thesis, I will try to shed some light on certain aspects which I find intriguing. If “globalization”, as used generally, designates something new in the world of international relations, one possible novelty could be that it (whatever “it” then might be) might afford an opportunity for global regimes to gain ground.

The structures of ‘civilization’ (with its classical connotations) and economic globalization bear some similarities worthy of further examination. Could a new standard of civilization be re-entering from the backstairs of “globalization”? Is (economic) globalization the buzz-word of our time much like civilization was in the 19th century and does this resemblance possibly go further still? Like civilization did then, economic globalization tends to represent the ultimate stage

of progress towards which the late-comers should strive – or be brought on a fast-track.

One of the most interesting of the international agreements since the end of the cold war is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) within the WTO framework. This agreement requires a certain minimum level of protection for intellectual property rights in all the WTO member states and goes beyond the realms of most other international treaties, which usually do not regulate in detail how the domestic legislation is to be designed.

1.1 Purpose

The purpose of this thesis is to analyze a certain phenomenon – the TRIPS agreement – as a possible reflection of an international standard of civilization. I will attempt to examine the processes behind the adoption of the agreement.

1.2 Methodology and Theory

This thesis is a qualitative theory consuming case study, using existing theories in an area of research to try to explain a certain phenomenon in a specific case (Esaiasson et al 2006:40).

The theories I will use are developed by Gong, Fidler, Mozaffari, Bowden et al., relating to the creation, functioning and diffusion of international standards of civilization as a way of legitimizing actions and aspirations in international relations. Although these authors express some theoretical differences, I will try to derive criteria of what a standard of civilization typically is. These criteria will be applied to a specific case from which a certain phenomenon – the TRIPS agreement – will be analyzed, to see how that agreement can be understood in the light of those theories.

A study of this kind raises some critical concerns as to methodology. Many concepts must for reasons of brevity be by-gone without the definition which they could merit. However, leaning on Puchala, I argue that since the scholarly discipline of international relations is essentially about making our world understandable, one should not dodge important and interesting phenomena *only* because they are elusive and methodologically challenging (although not reckless): “the ultimate empirical validity of the theorists’ big pictures must remain elusive” and “positivistically *unverifiable* does not necessarily mean *untrue* (Puchala 2003:31) Hence, while keeping the limitations of my thesis in mind, I argue that there is still scientific value in a study of how standards of civilization play a part in shaping of social, legal and institutional aspects of international relations.

1.3 Material, Delimitation, and Outline

The theoretical literature on the notion of civilization and relating fields is collected from academic books and journals. The sources on the TRIPS agreement consist of secondary sources from academic books and papers.

This is an area characterized by an intense and rather heated debate. A lot of views are expressed and various facts and events are interpreted in different, even contradictory, ways. This calls for prudence when evaluating the sources. I have sought to exclude tendentious sources and where there is substantial disagreement, I will make that adequately clear.

It is worth to bear in mind that this thesis is not an attempt to assess neither general rights or wrongs nor costs or benefits of intellectual property regimes as such.

The outline is as follows: In chapter 2, the thesis continues with an introduction of the theoretical concepts regarding standards of civilization. From this, I will try to derive abstract criteria which typically characterize a standard of civilization. Leaning on the premise that a new standard of civilization very well could be found with respect to a certain market structure, I have found the TRIPS agreement to be an interesting potential reflection of such a standard. Chapter 3 is treats the case itself, the TRIPS agreement, and its context, followed by the application of the set of abstract criteria of a standard of civilization to that case in chapter 4.

2 Standards of Civilization Then and Now

2.1 What is (a) Civilization?

Etymologically, the word ‘civilization’ is first known to have been used in the French language (Bowden, 2004a:26, 28-29), and developed in latter half of the eighteenth century as the opposite of “barbarism” (Huntington 1993: 40-41). This implied a singularity or a dichotomy of civilization and barbarism; a normative ideal with universal aspirations.

Instead of seeing civilization as a value or an ideal, it can be seen as ‘fact’ (to use the parlance of Huntington), existing in a certain time and place. This leaves room for several civilizations rather than a singular, normative dichotomy of civilization and barbarism. The various civilizations in this view are normally not measured by a common yardstick. On the contrary, the scholars treating civilization as fact often emphasize the particularity of the various civilizations, which gives the approach descriptive and neutral connotations, lacking the normative component (at least explicitly) of the universal-singular approach (Bowden 2004b, 30-31).

What makes the two concepts hard to completely separate is that even the pluralist, “factual” approach contains a normative element since it requires a qualitative assessment of the socio-political organisation of the collective that possibly could merit the ‘civilization’ status, since not any group of people can constitute a ‘civilization’.

Hence, the word ‘civilization’ contains two concepts which might be overlapping, but which also are potentially very different: The first one uses civilization as a normative concept to designate an ideal. This ideal is universal, in that all peoples, countries and societies can be measured against it. Different from this is the notion of civilizations as distinctive entities in a certain time and place, with no particular normative component or benchmark (except in the selection).

The term has been used by scholars in line with both of the definitions above. The concept was given renewed interest at the end of the Cold War, where two articles, by Fukuyama (1989; although not using the terminology) and Huntington (1993), to a large extent represented one of these notions each. At least Huntington’s article (which was later expanded into a book with essentially the same key points) has given a renewed interest to the concept of several separate civilizations as subjects in international relations. However, contrary to the

explicit reference to the concept of civilizations in the plural in the wake of Huntington, the singular approach might have lingered on under different names but with similar implications and patterns of use.

2.2 Standards of Civilization

2.2.1 The Development of Standards of Civilization

The adherence to a standard of civilization needs to be separated from the emergence of a single civilization as understood in plural. Whereas a civilization would encompass far more changes with cultural impact, a standard of civilization can reach over different civilizations.

It is hard to put a starting date of old core phenomena of international relations. Peoples have always interacted in peaceful (trade) or not so peaceful (war/conflict) ways as far as our historical sources go back. The expansion of the European powers and its offshoots into the non-European part of the world in the latter half of the last millennium accelerated and enhanced both trade and conflict. As the European expansion lasted over a longer period of time, contact and interaction with non-European peoples became a recurrent pattern which required a universally acceptable justification. It emanated from the problem of ensuring life, liberty, and property of the Europeans in the non-European world (Gong 1984:24). As the world was increasingly viewed as universal, a universal identity was created, an international system which had its roots in Europe (Gong 1984:4-5). “[T]he imposition of extra-territorial requirements until a certain ‘minimum of efficiency in running the State machinery, modicum of independence of the judiciary from the executive, and adequate protection of the safety, life, liberty, dignity, and property of foreigners’ could be guaranteed by the non-European countries themselves, seemed a practical solution to the everyday problems which unavoidably arose when different civilizations collided in their customs and traditions.” (Gong 1984:64)

The concept of civilization as an ideal had to be filled with a meaning, and with that followed the measuring of to what extent specific collectives could meet those ideals. Whereas the ideal of civilization (although not known under that name) up until that point mainly had been attached to Christianity, it now was an ostensibly non-religious standard of civilization, although emanating from the older, “Christian” standard of civilization (Gong 1984:4-5, 15). According to Gong, the “classical” standard of civilization could be described with the following five requirements:

“1. a ‘civilized’ state guarantees basic rights (i.e., life, dignity, and property; freedom of travel, commerce, and religion), especially those of foreign nationals.

2. a ‘civilized’ state exists as an organized political bureaucracy with some efficiency in running the state machinery, and with some capacity to organize for self-defense;

3. a ‘civilized’ state adheres to generally accepted international law, including the laws of war; it also maintains a domestic system of courts, codes, and published laws which guarantee legal justice for all within its jurisdiction, foreigners and native citizens alike;

4. a “civilized state” fulfills the obligations of the international systems by maintaining adequate and permanent avenues for diplomatic interchange and communication.

The standard of “civilization” also included a more subjective requirement:

5. a ‘civilized’ state by and large conforms to the accepted norms and practices of the “civilized” international society, e.g., suttee, polygamy, and slavery were considered “uncivilized” and therefore unacceptable.” (Gong 1984:14-15)

The standard of civilization according to the definition above had its heyday in the late 19th and early 20th century.

The standard of civilization not only required a certain kind of behavior from the people embarking on the process of becoming civilized. It also had a flip side that required a certain code of conduct of the “civilized” countries themselves – a sort of *noblesse oblige* (Gong 1984:5). Or, to quote Kipling, it could simply imply an obligation to “take up the white man’s burden” and civilize the uncivilized for their own good. Thus the civilizing mission offered a rational justification of colonialism: the civilized countries are entitled to expand their realm since it brings (at least perceived) economic and social benefits to the civilized countries *and* the uncivilized. (Pigman 2006:192-193).

However, it is worth pointing out that although imposition or enforcement was the normal way in which the standard of civilization was implemented, “internalizations” through voluntary adoption and also took place (Mozaffari 2001a:25).

The “classical” standard of civilization had two other important components, apart from the universal normative division of the world according to various degrees of civilization according to a standard of civilization.

The first other component is the ideal of progress, which implies that there is a path linear along which humanity ascends towards an ultimate destination. The means of this progress is the Enlightenment pillars of science of reason (Bowden 2004). The notion of a meaning and an end in history is a prerequisite when describing peoples as being on a track towards a higher goal.

The second is power. The ability to set or formulate of standards of civilization is naturally a corollary of a power position in the world. The setting or formulation of standards of civilization is “incumbent upon the predominant civilization” (Mozaffari 2000b:253).

The various countries, peoples, and cultures that were benchmarked were often highly self-aware as anything but barbarous – and had their own standards of civilization. The stigma of being labeled “uncivilized” was naturally a deep-felt humiliation (Gong 1984:12-13). “Whereas the standard of ‘civilization’ provided

the European powers with an explanation and justification for their global expansion, it represented an insult, a humiliation, and a fundamental threat to the proud and culturally independent non-European countries” (Gong 1984:7).

2.2.2 The Standard of Civilization and International Law – Unequal Treaties, Capitulations, and Extraterritoriality

The standard of civilization became a profane concept predominantly elaborated on in a legal context (Gong 1984:5). Schwarzenberger, one of the first theorists of this particular area of study, even called it “the standard of civilization in international law”, whereas Gong later replaced “law” for “society”. In the words of Schwarzenberger: “The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners.” (Schwarzenberger 1955:220, quoted in Gong 1984:24). This was not to be done in just any way; a rather fix notion of how this was best done was developed by the European nations from which the standard-setting emanated: “the standard of ‘civilization’ demanded that foreigners receive treatment consistent ‘with the rule of law as understood in Western countries’” (Gong 1984:14). The prevailing legal norms of the West became the standard of civilization against which the non-European countries were measured (Bowden 2005:19). By the mid-nineteenth century, the standard of civilization had “crystallized into a rule of international customary law”, if not by specific treaties (Fidler 2000:394, esp. note 31). To use the concluding remarks of Bowden: “the principle of a legal standard of civilization is implicated in a long-running universalizing Western imperial project” (Bowden 2005:23).

With the categorization of the world in civilized and uncivilized countries came a plethora of phenomena, perhaps most importantly treaties known as capitulations. These were exceptions to the main principle of full sovereignty in international law. Capitulations were systems of extraterritorial jurisdiction by European states in the territories of non-European countries, since these could not meet the criteria necessary for receiving full international recognition as civilized and thus becoming fully sovereign. The treaties normally exempted citizens of the European countries from criminal and civil jurisdiction. “Capitulations were a crude form of legal harmonization to facilitate the conduct of international trade and transactions in the early era of global commerce” (Fidler 2000:391).

The commercial relations were at the core of the matter, and the basics of a “civilized” legal system was capitalism and liberalism – at home as well as abroad (Fidler 2000:393). The capitalist system developed in western Europe and North America was exported, but only to cover the commercial relations between the Westerners and the Indigenous, not regulate commercial relations between the Indigenous themselves. International law became “a critical conduit for establishing the conditions of economic and social interaction between Western and non-Western peoples along the lines prescribed by the Western standard of

civilization” (Fidler 2000:394). When entering a new but uncivilized market, the standard of civilization made the contents of a capitulation to be a part of international customary law.

2.3 Standards of Civilization Today?

The text so far has focused on showing the existence and contents of a historical standard of civilization. By the end of World War Two, the habit of referring to ‘civilization’ where its core states had engaged in large scale atrocities was less appealing (Bowden 2005:21-22; Gong 1984:90). The wave of decolonization in the following decades further enforced this trend.

Most scholars agree that the “classical” (essentially Western) standard of civilization accounted for above is dead. Some argue that the whole concept is an anomaly, whereas others argue that new standards have arisen, that transcendent Western and non-Western countries. Definitely, accusations of barbarism or savagery are rare and the connotations of “civilization” in that sense are purely colonial. The use of labels like “member of the world community”, “rogue states”, “good governance” might sometimes serve similar purposes as the vocabulary that went out of fashion many decades ago. Hence, there seems to be *prima facie* similarities to examine further.

Gong himself in 1984 hinted at two possible successors of the “classical” standard of civilization: a) a standard of non-discrimination or a standard of human rights, based on international human rights conventions, court practices and customary law, and b) a standard of modernity, which he claimed could take two forms: one that “vindicates the nineteenth-century assumption that the laws of science, being universal, undergirded a rational cosmology which could bring the ‘blessings of civilization’ to all” (Gong 1984:92). The other form is reflected in “common shared values, moral norms” in the “contemporary cosmopolitan culture” (Gong 1984:90-93). After the end of the cold war, similar concepts have been elaborated upon. In the academic literature, there are three main strands – often merged in various combinations, sometimes on their own – as to how this new this new standard of civilization could be described: 1) human rights, 2) democracy, and 3) a certain capitalist market structure.

Donnelly (1998) has argued that a new standard of civilization has arisen, based on the notion of international human rights as expressed in “authoritative documents” like the Universal Declaration of Human Rights (Donnelly 1998:16). This is a fairly embraced version of a possible standard of civilization today, although few of their proponents, unlike Donnelly, use that label. Acknowledging the somewhat dubious connotations and historical usages of the concept of standard of civilization, Donnelly still reintroduces the concept of an explicit standard of civilization. To Donnelly, a standard of civilization is a means to “save us from the barbarism of a pristine sovereignty that would consign countless millions of individuals and entire peoples to international neglect” (Donnelly 1998:15-16) and goes on to state that “European human rights initiatives have

been missionary in the best sense of that term, seeking to spread the benefits of (universal) values enjoyed at home” (Ibid.). This would definitely legitimize civilizing missions into the realms of the uncivilized to save them from their own barbarism, such as humanitarian interventions and even preventative wars for the purpose of development (civilizing).

The second new standard would be the one articulated by (among others) Thomas Franck, that the right to a democratic government now represents a new standard of civilization. Franck argues that the right of each state to be represented in international organs, trade, development, and security programs should be dependent upon its government satisfying a standard for democratic validation (Franck 1992). This right would be “transposed from political philosophy, where it is ‘mere’ moral prescription, to law [...] a new legal entitlement [of a democratic government] is being created, based in part on custom and in part on the collective interpretation of treaties” (Franck 1992:47). Rationalist justifications are normally revolving around a correlation between democracy and peace (Franck 1992:88-89).

The third strand of a possible new standard civilization is, to me, the most intriguing one and concerns a capitalist market structure – a standard of market civilization – such as free trade and openness to foreign direct investment. Does a certain market structure today constitute the threshold over which a possible entrant has to climb in order to be embraced as civilized (or the yardstick against which the shades of its degree of civilization is measured)? This standard of civilization would have its residence somewhere in the intersection of concepts like liberalism, capitalism and economic globalization. While ‘human rights’ and ‘democratic government’ strands imply something new, the ‘market’ strand bares more similarities with the classical standard of civilization, as both of them to a large extent focus on the creation and maintenance of certain conditions and regulations of trade, commerce, finance etc. Trade is now as then seen as a means to bring civilization to the rest of the world (Pigman 2006:192).

There is a fairly established consensus among scholars that globalization above all is an economic phenomenon (Mozaffari 2001a:24). Narrowing it down further, Mozaffari has equated globalization with those two terms, capitalism and liberalism and argues that a global standard of civilization is on the rise. Mozaffari argues that the standard-setting emanates from the fact that “the two pillars of our current megacivilization remain unchallenged”, namely “adherence to liberalism and capitalism” (Mozaffari 2001b:250-251), since the “global standard of civilization is [...] defined – primarily – by the dominant Western civilization, which happens to be democratic, liberal, and economically globalized” (Mozaffari 2001:253-254).

Fidler (2000) has called this the “standard of liberal, globalized civilization”, which overlaps to a considerable extent with the democracy and human rights strands. The liberal character of the standard is apparent because liberalism focuses on the freedom of the individual, democracy, the “rule of law,” market economics, economic interdependence between nations, and the power of reason to improve human welfare through scientific advance” (Fidler 2000:409). Fidler

claims that the substance of this standard is to a large extent overlapping with the “classical” standard (Fidler 2000:400-401).

As for the classical standard of civilization, a standard of market civilization (the term used in an anthology covering various phenomena from that outset; Bowden & Seabrook 2006) also seem to harbour a master narrative of capitalist progress, development and growth, which is displayed by the usage of labels like “developing economies”, “emerging markets”, “non-market economies” etc (Bowden 2006:31). This implies the benchmark of liberal capitalism as developed in the West. However, not only do countries need to adhere to certain liberal market standards in order to obtain full international recognition; the market itself might need to be “civilized” (Pigham 2006:203; Cohen 2006).

In my view, it seems highly likely to assume that standards of market civilization are developing and that full recognition in the “world community” nowadays presupposes the embrace of the economic structures of liberal trading nations and the engagement in the international market economy. The market structures of economic liberalism are promoted through intergovernmental organizations, international credit rating agencies and trade organizations, where membership itself often requires adoption of economically liberal policy measures (Bowden 2006:30-31).

The two phenomena trade and property rights are crucial concepts in economic globalization. Trade practices and civilization are intimately intertwined, since how we regulate trade and economic life in general emanates from the way in which we understand economic policy and human society (Pigman 2006:203). It seems likely that reflections of a possible emerging standard of market civilization would most likely be found in the legal or institutional contexts of international liberal trade regimes. Hence, I have chosen the TRIPS agreement as a case study (see next chapter).

2.4 An Attempt to Synthesize Theory

What can be said generally about the phenomenon standards of civilization? From the research presented above, I will try to put together a list of criteria, which a standard of civilization typically would fulfil in order to be perceived and function as such. It leads me to suggest the following:

1. A Normative Benchmark Formulated According to the Domestic Custom. This is the base of the concept; usually a perception of a certain organizational aspect of society. The normative benchmark is set according to a domestic image; e.g. the European countries attribute normatived benchmark value to a perception on the “rule of law” as developed in Europe during the era of the ‘classical’ standard of civilization (essentially the same for human rights, democracy and markets). Typically, the effects of the proliferation of the normative are to the benefit of the formulators but the normative benchmark could be set also to cater for interests. However, there is an in-built contradicting force limiting the instrumentality line of promoting interests, since obligations also

come with being civilized (labelled the *noblesse oblige* by Gong). While promoting a standard of human rights could (in combination with the other criteria below) justify for example a war, the human rights violations that are a corollary of war would contradict the normative benchmark itself. This makes the implications of the normative benchmark Janus faced (which transplants to the concept of a standard of civilization as such).

2. One-Track Universalism and The Myth of Progress. The normative benchmark above is viewed as universally applicable, desirable and possibly also eventually inevitable. Standards of civilization seem to harbour a master narrative of progress, where the state represented in the normative benchmark represents a higher phase in the path of human progress.

3. A Quest for Rationalist Legitimacy. What the standards profess is not just right – it is also motivated and justified by their effect on other important societal aims as well (wealth, growth, morality, peace). This is something of a complement to the “it is right because it is how we perceive it to be right” approach of the first condition. The rationalist legitimacy is often formulated at the expense of democratic legitimacy. Whether populations outside the civilized community want democracy/human rights/capitalism is overshadowed by the rationalist merit of those phenomena.

4. Codification (Transformation Into Legislation) and/or Institutionalization. Standards of civilizations classically evolved as an essentially legal concept (capitulations arguably being the archetype). Even the suggested new standards of civilization, such as human rights, and capitalist market structures and free trade regimes are to a large extent founded through and codified in conventions, treaties and legal principles.

5. A Position of Hegemonic Power. Standards of civilization have to be understood from a context of power; someone sets the standards through his power to do so. The formulation and proliferation of standards of civilization emanate from countries powerful enough to put power (economic-political) behind them to at least be able to threaten to reprimand non-conformers.

3 Intellectual Property Rights and the TRIPS Agreement

The creation of a World Trade Organization (WTO) with supranational character and dispute resolution powers certainly expanded the reach of the trade liberalizing project and – interestingly – went beyond traditionally trade-related areas such as tariffs and quotas, and expanded free-trade regimes into areas up until then reserved for the sovereign nations to decide upon. One of the most peculiar documents of the WTO is the Agreement on Trade-Related Aspects of Intellectual Property Rights. This agreement sets prerequisite minima standards for the member states’ legal regulation of intellectual property rights.

In order to examine the TRIPS agreement as a possible exponent of a standard of civilization, I will begin with a brief inquiry on the origins of the concept of intellectual property and its main justifications, moving on to the specific creation of the TRIPS agreement.

3.1 A Brief Introduction to Intellectual Property Rights

Intellectual property rights essentially confer exclusive rights to the author of an artistic/cultural expression or a technology (an invention). Depending on the protected matter, the various kinds of IPRs have different scope and design. Copyright typically protects a specific expression (not the underlying idea), for example a text or a picture, and lasts a certain period of time beyond the lifetime of the author. Patents protect inventions (the underlying idea). Unlike copyright, patents need to be applied for and are granted if fulfilling certain criteria (the invention should be new, non-obvious and have industrial utility) and at the price of disclosure, the applicator is given a certain period of exclusivity for that idea. Patents are applied for nationally, just as copyright originate nationally, and protection is only afforded within that country’s jurisdiction (although international treaties can change that). A patent granted in the US thus affords protection in the US. Although there are a number of other forms of IPRs (industrial design, trademarks, geographical indicators, trade secrets etc), patents and copyright are the most important ones and conveys the patterns well enough.

The exclusive right given is the result of a balance between appropriation and diffusion. Too strong protection could impair diffusion of knowledge (and widespread use of it), whereas too weak protection could lead to free-riding problems and under-investment in research dependant branches of industry.

3.2 On the Genealogy of Intellectual Property Rights

According to the *Oxford English Dictionary*, the locution “intellectual property” first appeared in 1845 (Hesse 2002:39). The bearing idea – the connection of the notion of property with the notion of property – is in many ways a brain child of the Enlightenment (Hesse 2002:26). Up until then, ideas and intellectual achievements were generally held to be inspired by a supra-worldly power (i.e. God, muses etc.) and not possible to buy and sell like a physical object. In medieval canon (sacred) law, it was stated that “*Scientia Donum Dei Est, Unde Vendi Non Potest*” (Knowledge is a gift from God, consequently it cannot be sold) (Hesse 2002:28). Essentially the same view was prevailing also in major non-European (Islamic, Chinese, Jewish) cultural areas (Hesse 2002:27-30).

However, the commodification of knowledge and ideas took root in Europe. Legislation on copyrights and patents was drafted nationally in many parts of Europe and North America during the 18th and 19th centuries. As the concept of intellectual property became more established and elaborated on nationally, international conferences were held in Europe to overcome the problem of territoriality (that protection only is granted in one country). Two major conventions were signed in the later half of the 19th century; The Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. It was far from unanimously accepted with what justification the conventions were drafted (Sterckx 2005:178-179). The French argued the natural rights of the author-genious (*droit d’auteur*), whereas the US negotiators denounced that and favoured a more economical approach related to the copying of the books (copyright). (For more on the question of justifications, see the next subchapter.) However, the perception of knowledge as a public private good instead of a public was increasingly confirmed in Europe and North America in the 19th and (most importantly) 20th centuries.

Since then, various forms of intellectual property rights have been developed in Europe and the US. Not only the scope and variety of intellectual property rights have expanded, the importance and value attributed to them have also grown significantly. The commercial value of technological and scientific information has been on the increase in recent decades and it is common that a company’s highest valued asset is an intellectual property right. Furthermore, influences in economic theory during the same time have attributed crucial importance to the number and quality of innovations in the development of wealth in that country (e.g. Landes 1998). This makes questions of intellectual property regimes of great concern, especially with respect to trade since product categories heavily dependant on intellectual property protection tend to be among the fastest-growing items in international trade.

The actual legislation on intellectual that has emerged outside Europe has typically drawn heavily on European models, although having a mix and max approach in accordance with their perceived national interests and needs (See chapter 4.3).

3.3 Justifications of the Intellectual Property System

There are two main categories of justifications of the intellectual property system: 1) natural rights, and 2) consequentialist/economic arguments (Hettinger 1989).

The natural rights approach emanates from the rather common sense view that everyone is entitled to reap the fruits of their work, be it physical or intellectual. John Locke formulated views on property as a natural right which have been very influential on subsequent reasoning in the area. His “labour theory of property” states that Man acquires the right to a thing by mixing it with his efforts, adding something new to it. Natural rights approaches have certain in-built problems to cope with, as any labour-based intellectual property theory would likely have far-reaching logical consequences, narrowing the intellectual commons to a minimum. Robert Nozick famously asked whether dissipating a can of tomato juice into the ocean makes the ocean his (Nozick 1974:174-175). Separating the added value of a certain inventor or creator from those before him in an often cumulative intellectual environment makes the approach complicated.

The utilitarian, or consequentialist/economic, justification is based on the argument that in order to induce innovation and the creation of artistic works requires that the authors of those works are given property rights in them. This school of justification provides incentives to first of all innovate and create, and secondly (for patents) to disclose the invention or creation. The line of argument is by many held to be supported by the European and North American experience (e.g. Landes 1998; Sterckx 2005:194. However, see chapter 4.3 for circumstances possibly blurring that picture).

There is of course a natural tension between the approaches above, both theoretical and empirical. The value commonly attributed freedom of thought and expression can collide with IPRs, as they tend to enhance one persons rights at the expense of the rights of the others. It might also impede the proliferation of human knowledge generally (which especially goes for trade secrets, which are not disclosed in the way patents and copyrighted material normally are).

The tension has materialized historically. Net importers of intellectual property rights tend to emphasize the utilitarian, effects-oriented line of argumentation, holding that the national public interest should come before recognition of the author’s rights. Conversely, net exporters typically lean on a more natural rights based line of argumentation (Hesse 2002:43).

3.4 The Path to the TRIPS Agreement

The pedigree of the WTO goes back to the end of World War II and the General Agreement on Tariffs and Trade (GATT) from 1947, an evolving project which – somewhat simplified – evolved from a treaty into the present organization in 1995. In the 1970s and 1980s, many countries in the developing world as well as

the developed world pushed for a revision of the Berne and Paris conventions and wanted revisions as to the legal standards and the enforcements – albeit in conflicting directions (Sterckx 2005:202-203).

The initiative to include intellectual property rights during the Uruguay Round (1986-1993) came from the US and Japan (Gervais 2003:10) and those countries, sided by the EC, remained active throughout the drafting and negotiation of TRIPS (Gervais 2003:13-14, 16). Their various suggested treaty texts, which were the base of the present agreement, bear similarities strongly suggesting preceding consultations (Gervais 2003:16, 19). A division of different agendas of the industrialized and the developing countries was present all along (Gervais 2003:18).

Formally, decisions in the WTO are taken one the “one country, one vote” principle. However, in practice the decisions are negotiated through informal consensus-building. Official protocols on the negotiations of the TRIPS give a fairly firm picture of the way in which the agenda was driven by the US-EC-Japan block, a picture emphasized more by interviews with negotiators and other participators.¹ According to a senior U.S. trade negotiator, “less than 50 people were responsible for TRIPS” (Drahos & Braitwhite 2003:10). In essence, the harmonization initiatives have not been based as much on negotiation and mutual compromise as on an imposition of the economic policy of the net exporters of intellectual property rights.

As far as the substantial requirements go, the agreement has been called “Bern-Paris-Plus”. It is based on the old provisions from the two conventions, brought up to the high standard of IPR regimes in developed countries like the US-EC-Japan. They include minima standards for the protection of most of the IPRs currently existing in those countries (that is, patents, copyright, geographical indicators, industrial designs, trade secrets). It also requires effective enforcement procedures against the infringement of those IPRs.

Some time allowance (depending on the preceding level of protection) was given to developing countries to fulfil the requirements of the agreement (Cohen 2006:179). Apart from that, all WTO members are required to honour the agreement. The costs of administration and expertise incurred as a consequence of these agreements naturally vary depending on the previous legislation and enforcement agencies, but for many countries the costs are substantial (Sterckx 2005:207; Drahos 2002:11).

An important strand of critics mainly representing developing countries of the TRIPS provisions express concerns over the effects of strong IPR protection on economic efficiency (a part of the ongoing disagreement on the effectiveness of an IPR system) and secondly of concerns of health. The critics also argue that the

¹ Drahos & Braithwaite have conducted the most ambitious set of interviews with participants involved in the development and signing of the TRIPS agreement which I have come across. As trade negotiations of this kind are poorly understood only by official protocols, it serves as a good complement to Gervais 2003, which bases its accounts more on the official notes. There is an anti-IPR bias in Drahos & Braithwaite, which should be considered. However, the empirical findings from the interviews are separable from that argumentation.

IPR regime of TRIPS neglects the local, collective ways of maintaining knowledge still prevalent in large parts of the developing world, i.e. so-called traditional knowledge, for which the IPRs in TRIPS afford no or little protection.

4 The TRIPS Agreement as a Standard of Civilization

Connecting to the criteria derived from chapter 2, I will in this chapter analyze to what extent the TRIPS agreement fits the criteria as a possible reflection of a standard of civilization.

4.1 A Normative Benchmark Formulated According to the Domestic Custom

The first criterion concerns the normative base, which is typically a normative perception of a certain organizational aspect of society, which is made according to a domestic image. However, in-built obligations can also come with being civilized. In an intellectual property rights context, this dual character revolves around pirates and patients.

The pirate probably exercises one of the world's oldest professions (in noble competition with spies and prostitutes for that award). Some of the old-school pirates were not only successful professionals, they also operated with the support of – and to the benefit of – various countries issued so-called letters of marque and reprisal for “privateers”.

Like any concept, piracy is hard to define historically as well as contemporarily, but in the parlance of our times it typically designates either alleged copyright infringements (e.g. copying of DVDs) or counterfeiting of trademarks (e.g. a t-shirt displaying the a well-known logo, but not produced by the company that the logo suggests). The transfer of the concept of piracy to the realm of intangible assets contains both similarities and differences to “classical” piracy. One difference between a treasure chest and a piece of information is that the latter is non-rivalous. If I take your treasure, it is not at your disposal anymore, whereas if I obtain a piece of information which you possess, it does not change your possession of it, although it can change the comparative commercial value of that piece of information. A similarity is that “privateers”, pirates with support of states also have engaged in it and still do (for more on how piracy has been promoted by states, see chapter 4.3).

The crux of the matter is this: since intellectual property rights are confined to a certain jurisdiction, the legal principle of territoriality has it that US copyright law is as little applicable in Iran as Iranian penal law is in the US and vice versa. Overcoming that problem is the *raison d'être* of international agreements like the Berne Convention, where the signatories acknowledge each others' copyright

provisions. But – still – if no such treaty exists, there is nothing illegal in copying a book protected by foreign copyright.

But “piracy” is certainly a word with connotations of immorality. Hence, albeit not illegal, at least something immoral is strongly suggested by the use of it (possibly even uncivilized). This implies a view on IPRs strongly leaning towards the natural rights defence and rejects the notion that IPRs are a value-neutral result of a more or less utilitarian cost-benefit balancing act to boost inventive and creative activity. This would imply that having a regime of strong IPRs is morally superior to no or weak IPR protection.

However, just like the classical civilization, a “flip side” of the normative concepts – the *noblesse oblige* – is also present in a TRIPS context. The dual qualities of the standard could certainly clash. One such conflict concerns the health area, where pharmaceutical patents can both lead to new cures and potentially also restrict drug access. So far, the provisions mandating compulsory licensing have not been used in practice, although there is no certainly no shortage of health emergencies that would most likely qualify them under these provisions. This has been attributed to administrative, political and knowledge barriers (Cohen 2006:180). The potential effects of patent overprotection on public health measures have been acknowledged all along from the negotiations, where developing countries successfully pushed for the inclusion of provisions on compulsory licensing (Gervais 2003:15-16, 46). Also within the subsequent WTO framework itself, the potential impacts on health has been acknowledged and since the adoption of TRIPS, steps have been taken on those grounds. In the Doha Accord of 2003, statements were made recognizing the need to ensure objectives of health through compulsory licensing and clarified the interpretation of the provisions in a more permissive direction (Cohen 2006:182). This has been seen this as a way of “civilizing’ [...] trade agreements in terms of their real or potential impact on health” (Cohen 2006:175) where “patients are taking precedent over patents” (Cohen 2006:183).

4.2 One-Track Universalism and the Myth of Progress

As seen in chapter 2, the ideal of progress is central to a standard of civilization where a linear, upward leaning path of development is presupposed. If humanity is truly one, and cultural/racial/religious differences do not matter, then it is also less of a problem to impose one system on another one if it is perceived to have done use in one part of the world. This can bring about an enforced fast-tracking of a path of development that is perceived to have worked in one part of the world. It assumes identical preferences globally and excludes the possibility in discrepancies in priorities or different path-bound ascendants. The way ahead is both desirable and inevitable. The terminology of “backwardness”, “developing countries” and “modernization” presupposes a linear progress.

In a TRIPS context, high IPR standards are held to be a more trade-promoting, advanced, more developed and perfected way of the less advanced, or non-existing, IPR systems. This truth is often proven by pointing at the relationship between countries with developed IPR systems and their wealth, even though the causal relationship is not always critically evaluated along a longer time-line. As will be shown in the next section, the adoption of strong IPRs for less technology intensive countries represents something of a deviation from the historical path which the technologically advanced and economically powerful countries today took in the past, thus fast-forwarding them to the TRIPS stage.

The TRIPS regime does not leave room for special preferences when it comes to domestic economic priorities connected to IPRs. Since almost all countries of the world are either member in the WTO or applicants for membership, TRIPS extends “one size fits all” IPR standard of the developed world to a global reach.

4.3 A Quest for Rationalist Legitimacy

The third criterion for a standard of civilization is the quest for rationalist legitimacy, implying that the standard of civilization not only serves the purpose of achieving the first criterion; it also does the uncivilized good to be civilized. This is a controversial area, as the rationalist legitimacy typically is given supremacy over the usual source of legitimacy, i.e. democratic legitimacy.

The TRIPS agreement is usually justified with a couple of key arguments, many essentially following the utilitarian line of argument. One is that the level of local research and development would thrive from highly set and closely enforced IPRs. A second main argument is that technology transfer from the industrialized to the developing countries would increase with high IPR standards (or – indeed – that it is a prerequisite for it). A third concerns foreign direct investment, where intellectual property rights can certainly be an important factor in investment decisions. However, connecting to what was written in connection to the foregoing criterion, the credibility of the rationalist justification of the introduction of high IPR standards is not evident from Euro-American history.

As shown in chapter 3.2, intellectual property rights of the kind introduced in the TRIPS agreement are of European-American origin and represent a collection of the IPR regimes in the developed, industrialized world. Weak intellectual property protection motivated by the national interest is by many scholars held to be an important factor behind the economic growth of Europe’s knowledge intensive industries (e.g. Dutfield 2005:22). Lax or even non-existing IPRs made knowledge an easy “pirate” prey and IP regimes for a particular country were generally adopted and enforced first after the country’s own production started going from imitation to invention (Dutfield 2005:247-249). The adherence to the first international copyright convention, the mentioned Berne convention, can serve as an example.

Net exporters of copyrighted material (copyright at that time mainly concerning literature) such as France, England and Germany tended to emphasize

natural law approaches, whereas net importers, such as the United States and Russia, refused to sign the treaties, forwarding utilitarian-objectivist arguments on the public good in their respective countries for the free appropriation of the scientific ideas and literary creations of the major economic powers (Hesse 2002:40-41). In the words of Hesse: “By the opening of the twentieth century, as America came to be a full-fledged competitor in international commerce in intellectual property and a net exporter of intellectual property, American legal doctrine began to move toward an increasing recognition of unique authorial rights rooted in the sanctity of the personality of the creator, rather than simply in commercial privileges extended for utilitarian ends” (Hesse 2002:42).

This fairly well represents the pattern which can be applied to other IPRs and other industrialized countries as well: industrialisation proceeded with the benefit of “pirated” patented technology from abroad (see e.g. May & Sell 2006: ch 5), Dutfield 2005; Drahos & Braithwhite 2002: ch. 2). The evolution of IP regimes in the developed world always has been subject to the perceived national interests of those countries. As for the focal area of pharmaceutical patents, the late introduction of IP protection in that particular area can be worth pointing out (France, 1960; Germany, 1968; Japan, 1976, Switzerland, 1977; Italy and Sweden, 1978).

In the newly-industrialized countries, the story is much the same. Before the introduction of TRIPS, many populous developing countries deliberately ignored IPRs in order to be self-sufficient in (low cost) pharmaceuticals and achieve an adequate domestic industry (Cohen 2006:180). In a study of the economic development of the East Asian countries (Japan, South Korea, and Taiwan), Kumar emphasizes the importance of technological learning under weak IPR protection (Kumar 2003: esp. p 216).

Thus, history would suggest that net exporters and net importers of intellectual property rights have a different agenda as to the level of IPR protection. The US is currently the largest exporter of intellectual property and between one quarter to a half of its exports are estimated to be directly related to intellectual property – a number that is expected to grow further (Sterckx 2005:178 with further references). It is outside the scope of this thesis to assess whether new trade regimes have changed the market dynamics that characterized the industrialization of the countries that are net exporters today. However, the half-choked mix of the IPR net-exporter’s tendency to resort to natural rights justifications and the well-doer’s rationalist legitimacy line of arguing are often contradicting and do not make a very clear case.

4.4 Codification and/or Institutionalization

The fourth criterion concerns the elaboration of the term in legal contexts and/or forming institutions. This is a pretty straight-forwardly the case with the TRIPS agreement as it is codified into an international legally binding agreement.

4.5 A Position of Hegemonic Power

The final criterion concerns power. Standards of civilization have to be understood from a context of power; someone sets the standards through his power to do so. The main powers of in international trade could probably be described as a historical block (to borrow a term from gramscian theory) of the major economic powers today, essentially the block of capitalist democracies of North America, Europe, Japan. As accounted for above, the interests of these parties as net exporters of IP and initiators of the TRIPS strongly suggest the exercise of power. There is not much “global” about TRIPS except from its reach.

5 Conclusion

The TRIPS agreement as a conceivable reflection of a standard of civilization exhibit many interesting properties that fit the criteria derived from previous research. However, there are some oddities. The normative benchmark of high intellectual property rights standards is there, but it is not there as shining and obvious as “civilization” in the classical standard was, or how “democracy” or “human rights” probably are perceived in the same function. To me, this is probably explained by two, possibly three, circumstances.

First of all, there is an in-built uncertainty in the countries with extensive IPR systems (which TRIPS was modelled on) as to the justification of IPRs. The either-or character of the natural rights vs utilitarian approach cause tensions and confusions.

The second is that this reflection of a standard of civilization does not operate in isolation, but (as hinted already in the end of chapter 2.3) forms a part of, and interacts with, a “grand” standard of market civilization. This vagueness is arguably due to the fact that the conceptual framework of the area encompasses a multitude of disciplines (history, sociology, economics etc) which makes definitive and water-proof assertions utopian.

A third possible criteria, concerns the individual level, where the immediate emotional appeal and pedagogical simplicity of concepts like civilization (in the 19th century set), human rights and democracy outshines notions of the nature of property and disposition, and thus is not awarded the pedagogical/emotional head-start of the others.

Nevertheless, the concept of a standard of civilization is in my view still useful as a tool to understand the patterns of diffusion of political-philosophical perceptions and their effects on international relations. For good or bad, the main effect of a standard of civilization – no matter if it sails under that badmouthed flag or under a flag of convenience – is that it affords legitimacy to one particular way of organizing society while undermining the legitimacy of other policy options.

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