Preface

No one should start a book with an apology but I feel it is necessary to make one point about this book. As you read the discussions I have set out in the following chapters, you will discover that the rule of law is a very complex issue but if you are looking for an ‘answer’ I am unable to provide it. Certainly, this is a book about the rule of law, but what I am most interested in is the rule of law as a figure of political speech or commentary. I will discuss the legal issues but this is explicitly not a book of jurisprudence or legal commentary.

My aim is to set out a range of issues linked to the rule of law that have either been underplayed in work on the international (or global) political economy and associated fields, such as global governance, or have been missed entirely through the uncritical use of the term the ‘rule of law’. I seek to reveal this shortcoming and hopefully spur others to explore many of the loose ends that appear herein. This book, therefore, maps a field of investigation that I, and perhaps others, will explore in more detail in the next few years. I fully expect that some readers will find things to object to in the following chapters, and I welcome the argument(s) this will spur with and among colleagues, encouraging them to engage with these ideas; I seek to provoke a conversation about the rule of law beyond the realm of legal analysis.

This is to say, this book is an examination of the rule of law, as the common sense of global politics, for those with an interest in the law but little if any formal legal training; it is a book for those who find themselves confronted with the oft-repeated political mantra(s) of the rule of law, and like me have wondered what it might mean and how this discourse seems to have been elevated to a set of commonplaces. Let me also say that although I would regard myself as a political economist of some description, this is a work of interdisciplinary investigation, a work of pluralist (perhaps even post-disciplinary) social analysis. I range widely across various disciplines in the chapters that follow and while I start from a place one might call (critical) political economy, I do not see the scope of this study as limited to the boundaries that might be posited when using this description of an analytical intent; I return to this issue in the methodological interlude.
Given that you may be familiar with my previous work on intellectual property rights (IPRs), let me say (briefly) how that research led me to the issue(s) that I investigate in this book. Much of my work on IPRs focused on how intellectual property was legitimated or justified in contemporary (global) discourse with an attendant interest in the divergence between such political or analytical claims and the social impact of making knowledge into property in the ‘real’ political economy.¹ Much of this work was concerned with the allocation of benefits and costs and how these were presented by, and to, those involved in the production and use of various forms of information and knowledge, as well of those devising governance structures in which and by which these activities take place. However, it became clear to me that there was an underlying substrata to these claims, narratives and legitimating discourses that I was interested in: key aspects of the political economic realm that I focused on – the World Trade Organization; The World Intellectual Property Organization, for instance – were legally defined institutions working with legal instruments and practices to prosecute an agenda normalizing and expanding the making of property from knowledge.

However, the question of whether the law was the correct mechanism for achieving the results posited as beneficial was seldom if ever discussed in policy debates (although some critics did raise the issue of appropriate mechanisms). It was more often the case that in issue areas such as traditional knowledge both sides of the debate sought to further their priorities through legal instruments. Indeed, it was the support of legal mechanisms to ‘protect’ traditional knowledge from commoditization into intellectual property, to (re)make traditional knowledge as a specific form of intellectual property that finally led me to wonder more seriously about this underlying (normative) foundation. After some preliminary investigation I came to the conclusion that across the various parties discussing the political economy of IPRs there was little departure from the acceptance, recognition and indeed promotion of the (rule of) law as a mode of resolving difficult political economic conflicts, tensions and divergences of interest. This acceptance was often not articulated but when advocates, policy makers or others did say anything they usually invoked the ‘rule of law’ as a background narrative of justification or normative anchor. Given that I had spent much of my time looking at IPRs being concerned with such narratives as they were deployed in the political economy of intellectual property, my curiosity was aroused and I have now set out my concerns in this book that you hold in your hands.

¹ That work is presented and summarized in May (2010), which represents a review and synthesis of over a decade of reflection and research on the subject of intellectual property.
This book has been in gestation for some years, and I have presented some elements of the work here in various forums over the last five years; many people, who I shamefacedly admit I cannot remember, have offered all sorts of useful advice about sources I might look at, issues I should include and glaring lapses of analytical coherence that I should avoid. I thank all of these people, even if I am unable to name them here. However, I am particularly grateful for the help and advice that the following people have offered during these years: Andrew Baker, Israel Butler, Ed Cohen, Claire Cutler, Morley Frishman, Stephen Gill, Katharina Glaab, Colin Hay, Jan Klabbers, Anna Leander, Suzanne Ost, Morten Ougaard, Sol Picciotto, Peter Rowe, Len Seabrooke, David Seymour, Jason Sharman, Adriana Sinclair, David Sugarman, Teivo Teivainen, Kate Weaver and Antje Wiener. Most helpfully Steven Wheatley of Lancaster Law School very kindly read the entire manuscript after I had completed the first draft and offered some very helpful advice and comments as regards the structure and development of the argument, which helped me immeasurably in my work on the subsequent drafting. Likewise, I am grateful to Stephen Royle who did most of the leg work on The Economist editorials and thus saved me a lot of time and effort in the second half of my sabbatical when it looked like I would not get the manuscript finished in time.

While finishing off the first draft of this book I was also lucky enough to read Michael Billig’s How to Write Badly: How to Succeed in the Social Sciences (Billig 2013) and while working on the subsequent drafts I have tried to follow Billig’s advice to be clearer, avoid the overuse of passive ‘-izations’ and ensure that overly technical language does not hide a lack of actual interesting things to say. I hope that the draft has benefitted from Billig’s analysis of what is wrong with writing in the social sciences, and if you have not had a look at his book, I thoroughly recommend it as a prompt to self-reflection about one’s own writing practices.

Finally, as always I acknowledge the intellectual debt I owe to my father, whose influence remains with me 15 years after his passing. I also would not be able to do what I do without the support and love of my dear wife Hilary Jagger. In the main she is not that interested in the subjects I write about and this allows her to be an oasis of good taste, cultural sensibility and common sense that makes my life balanced, less self-obsessed and focused on matters other than the life of the university and its academic community.

Christopher May, November 2013