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Thomas Cottier & Marina Foltea

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GLOBAL GOVERNANCE IN INTELLECTUAL PROPERTY PROTECTION: DOES THE DECISION-MAKING FORUM MATTER?

Authors: Thomas Cottier and Marina Foltea

Abstract

The question whether TRIPS would bring economic benefit not only to the developed but also developing countries has been debated ever since the nascence of this legal instrument. This has been widely assessed through the so-called balance of rights and obligations established in the TRIPS Agreement. With the advent of parallel bi- and plurilateral IP rule-making fora, this question has acquired even more nuances requiring examination of specific legal language at all these different levels. Against this background and by examining the balance language of the relevant treaties, this paper examines how the negotiation fora producing IP rules impact on the achievement of a balance between the rights and obligations of the stakeholders involved. Thus, global, plurilateral and bilateral IP norm-making avenues are assessed with the view to understanding whether there is any discrepancy in their capacity to reflect a balance of rights and obligations. Thus, we are mainly interested in comparing multilateral fora bilateral and plurilateral fora and how they differ in terms of outcomes. We find that this balance is better secured under the WTO TRIPS Agreement and other multilateral forums in particular WIPO. This is why we propose greater judicial openness towards the developments in this organisation at the WTO – a mechanism which should partially compensate for the Doha negotiations stalemate.

I. Introduction

The adoption of the TRIPS agreement and the expected hard line enforcement of the minimum IP standards have attracted a lot of attention and - ever since the advent of the agreement - raised multiple questions. One of the salient questions relates to the economic benefit of the Agreement, mostly whether the benefits accruing to developed and developing countries and LDCs are comparable and sufficiently balanced. In the aftermath of the Uruguay Round negotiations, a great amount of scholarly work has emerged on this topic. This attention has been further enhanced by the spread of bilateral free trade and plurilateral agreements which incorporated expansive and stronger IP obligations than those adhered to under the TRIPs. While TRIPS has received a good amount of criticism as favouring privatization of knowledge, entrenching economic privileges centered in the developed world and neglecting the 'social function of IP laws'[1], the question which arises is how should one characterize the bi- and plurilateral IP related agreements from this point of view. Against this background, we examine how the negotiation fora producing IP rules impact on the achievement of a balance between the rights and obligations of the stakeholders involved.

The balance of rights and obligations also relates to vertical allocations of powers between international and domestic fora. The minimal standards set out in the TRIPs Agreement have been criticised of being too rigid, not sufficiently taking into account different levels of social and economic development. Powers, in other words, have been unduly centralised in the WTO, and a more flexible mode emphasizing domestic legislation should be sought. Moreover, the TRIPs Agreement does not contain Members from imposing even higher standards. It does not contain ceilings, but has remained open-ended. Members are free to adopt higher levels of protection, and checks based upon competition law have remained purely national or regional.

[1] Sub-Commission on Human Rights resolution 2000/7, Intellectual property rights and human rights (17 August 2000).

Against this background, it is important to examine the role and experience of different fora and layers of governance in shaping and applying intellectual property rules. Global, regional, bilateral and sectoral avenues need to be assessed as to how they relate among each other and to domestic fora of legislation in nation states. We are interested in assessing substance-structure pairings, i.e. how substantive rules relate to the procedures and fora which bring them about and which apply them.[2] In this paper, we mainly focus comparing multilateral fora bilateral and plurilateral fora and how they differ in terms of outcomes. Insights from past experience may assist in projecting appropriate allocations of powers which may also be relevant to other regulatory fields still unchartered or less developed than intellectual property protection.

Section II sets out intellectual property protection as paradigm both of international legislation and of multilayered governance. It briefly offers the foundations based upon which horizontal and vertical relations in regulating IPRs are assessed. Section III examines the horizontal international IP governance. Here we look at the multilateral IP rule-making in comparison with the one taking place in the bilateral (and plurilateral) settings. This takes account of the decision-making processes at the WTO and WIPO – the most important multilateral IP norm-creation forums – followed by analysis of the IP obligations entrenched thereof with their capacity to achieve a balance of rights and obligations. Showing that the balance is better preserved in a multilateral setting, it is suggested to encourage rule-making in these fora while taking proper account of the current political constraints under which they operate. Section IV examines the interrelationship of different international fora. It suggests that the WTO collaboration with WIPO should, among other, work towards overcoming fragmentation and current deficiencies and act as guardians in the process of global IP governance. Section V offers a number of conclusions emphasizing the need to return to multilateral fora and how they should be reformed in order to respond to the needs of global governance.

II. IP as a paradigm of international legislation and Multilayered Governance

Intellectual property protection in international law perhaps amounts to the area of law which is most advanced in terms of international standards and norms prescribing conduct of governments, and often indirectly, of private actors. It is a paradigm of international legislation. There is hardly any other field in international economic law where rules on substantive and procedural standards offer a more comprehensive and common set.[3] Interest to secure foreign trade and investment and to protect domestic markets from counterfeiting and piracy induced strong industry pressures to address intellectual property in diplomacy and international and regional law. The multilateral Paris Convention on the Protection of Industrial Property and the Berne Convention on Artistic and Literary Works were adopted in 1983 and 1886 respectively, long before the multilateral rules of the GATT were formed in

[2] See Cottier, T., Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings, in 8 National Constitutions and International Economic Law 409, 411 (Meinhard Hilf and Ernst-Ulrich Petersmann eds., 1993); Thomas Cottier, Preparing for Structural Reform in the WTO, 10 JIEL 497 (2007), reprinted in Davey W.J., Jackson J.H. eds. The Future of International Economic Law, 59-70 Oxford: Oxford University Press 2008.

[3] See generally Abbott F.M., Cottier, T., Gurry F., International Intellectual Property in an Integrated World Economy, 2nd edition, Aspen Publishers: Austin, Boston, Chicago, 2011.

1947. While the latter focused on rules setting limits to Members in terms of tariff and non-tariff measures, intellectual property from its very inception was designed in terms of positive integration: Members to these conventions are obliged to positively provide protection at least to the levels entailed in these conventions. The 1995 TRIPs Agreement built on that tradition. None of the other WTO agreements is prescriptive to the same extent; many felt, too prescriptive and uniform in the light on diverging needs and stages of development of Members; none of the other agreements has been as controversial as the TRIPs Agreement and its positive minimal standards.

A number of international institutions are involved in setting and operating such minimal standards and procedural requirements, ranging from WTO, WIPO, UPOV, WHO, FAO, UNCTAD, UNESCO to regional bodies, in particular the EU, the European Patent Organization and other regional bodies, such as AOAPI. Moreover, IP rules are not limited to specific IP conventions, but can be equally found in sectoral agreements, such as the Convention on Biodiversity (CBD) and related instruments, or the Multilateral Agreement on Plant Genetic Resources in Food and Agriculture (ITPGRFA). They can be found in the UNESCO Convention on Cultural Diversity. A number of functional institutions are involved in regulating IPRs, and horizontal coordination amounts to an important task within this paradigm.

The field of intellectual property protection is strongly and mainly anchored and operational in domestic law from where it expanded to regional and international law. Vice versa, parts found harmonization or minimal standards, and multilateral region systems to obtain protection developed in international law feed back into the realm of domestic law. The interaction and complementarity of rules located at different layers of governance offer a complex web of vertical allocations of powers. This constellation promises to offer interested insights for the doctrine of multilayered or multilevel governance.[4]

Building upon the precepts of federalism, this doctrine expounds the relationship of different layers of governance and how they interact. [5] It designs a doctrine of vertical separation and allocation of powers, all with a view to install mutual and vertical checks and balances between different layers. It no longer makes a fundamental difference between domestic, regional and global law but perceives them all forming part of a single and coherent system of mutual interaction in producing global public goods and promoting welfare. The different layers all are informed by shared principles and the rule of law. They mutually complement, control limit and stabilize each other. The doctrine of multilayered governance essentially emanates from the idea of constitutionalising international law and look at overall governance in a comprehensive manner.[6] There is no agreed school or terms.[7] Efforts range

[4] It is interesting to note here that intellectual property has also been examined through lens of global legal pluralism which in case of intellectual property regulation is triggered by the competition and sometimes conflict between national and international norms, or among various international norms. See Chon, Margaret, A Rough Guide to Global Intellectual Property Pluralism (November 16, 2009). Oxford University Press, Forthcoming; Seattle University School of Law Research Paper No. 09-01. Available at SSRN: http://ssrn.com/abstract=1507343, at 2.

[5] See Cottier, T., 'Multilayered Governance, Pluralism, and Moral Conflict', 16 (2) Indiana Journal of Global Legal Studies, (2009), 647-679.

[6] See Cottier T. and Hertig M., 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck Yearbook of International Law 261-328; Cottier T 'The Constitutionalism of International Economic Law' in KM Meessen (ed) Economic Law as an Economic Good (sellier European law publishers Munich 2009) 317-333. Jackson J.H, Sovereignty, the WTO and Changing Fundamentals of International Law (Cambridge University Press Cambridge 2006); Peters A

from explaining the functions of international economic and trade law in terms of embedded liberalism to explanations based upon the precepts and functions of administrative law partly assumed by international levels.[8] The underlying theory used in the present context is depicted as a Five Storey House – a metaphor used to depict different layers of government from local, provincial, national regional to global levels.[9] While these levels are subject to an ordering hierarchy essentially based upon pacta sunt servanda, it does not exclude subsequent layers predominating in the pursuit of protecting fundamental values and human rights. All layers share common values and principles, entailing the preservation of peaceful relations, fundamental principles of law, the rule of law, democracy and human rights protection. Yet, these principles operate with divergent priorities. While democracy is key to local, provincial and national levels, maintaining peaceful relations and the rule of law dominate on international levels, without excluding other and shared principles. In this metaphor, it essentially is a matter of properly allocating powers and functions with a view to produce appropriate public goods, local, provincial, national, regional and global. The main focus is on vertical allocations. The task, however, equally entails horizontal allocations among different functions of governance. The topic is of particular relevance on the global level. There is a lack of centralizing governance structures and international organizations are functionally defined. Fragmentation is the norm. Allocation of powers and cooperation with a view to achieve greater coherence amounts to a major goal of the doctrine of multilayered governance not only vertically, but also horizontally. So far, the latter aspect has not been paid as much as attention as vertical relations. Yet, checks and balances within a particular layer of governance are of equal importance and, of course, at the heart of constitutional law. The same holds true for the level of international governance, albeit hardly discussed in constitutional terms. The interaction of different organizations and treaties is of equal importance and deserves fuller attention in finding coherence and appropriate structures of governance in a particular regulatory field. The emergence of the G-20 following the financial crisis renewed the debate on the legitimacy and architecture of global governance and the need for enhancing awareness. [10]

'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579-610; Peters, A., The Merits of Global Constitutionalism, 16 Indiana Journal of Global Legal Studies 397-412 (2009); Klabbers, J., Peters, A., Ulfstein, G., The Constitutionalization of International Law, Oxford Oxford University Press 2009.

[7] Milewicz, K., Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework, 16 Indiana Journal of Global Legal Studies 413-436 (2009).

[8] See Ch Joerges and EU Petersmann (eds.) Constitutionalism, Multilevel Trade Governance and Social Regulation (Hart Publishing Oxford 2nd ed. 2011 forthcoming). Many scholars remain critical of the process of constitutionalization of international law, e.g. Besson S 'Whose Constitution(s)? International Law, Constitutionalism and Democracy' in J Dunof and J Trachtman (eds) Ruling the World? Constitutionalism, International Law and Global Governance (Cambridge University Press, Cambridge 2009c), 381-407; Cass D., 'The Constitutionalization of the World Trade Organization' (Oxford University Press Oxford 2005); Howse R and Nicolaidis K 'Legitimacy through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far' in T Cottier and PC Mavroidis (eds) The Role of the Judge in International Trade Regulation (Michigan University Press Ann Arbor 2003) 307-348.

[9] Cottier, T., 'Towards a Five Storey House' in Ch Joerges and EU Petersmann (eds.) Constitutionalism, Multilevel Trade Governance and Social Regulation (Hart Publishing Oxford 2nd ed. 2011 forthcoming)

[10] See in particular Lamy, P., Pragmatic Solutions need to be found now to Enhance Global Governance, speech delivered February 2, 2011 at the European University Institute, Florence,

There is hardly any other field of law and policy than intellectual property protection which offers an equally complex and advanced example of interplay of different regulatory levels. There is hardly a field which allows discussing the pro and cons of vertical distribution and allocations in an equally comprehensive manner, adding, in a specific area to insights of the doctrine of multilevel governance. And there is hardly another field which is more suitable to further earn from the doctrine of multilayered governance in finding and completing existing lacunas and regulatory deficiencies. Importantly, it offers particular insights into horizontal allocations of powers as intellectual property is addressed and administrated by a number of international organizations and bodies, both global and regional, and strongly influenced by bilateral and preferential agreements.

Finally, intellectual property protection reflects the impact of modern technology more than other fields.[11] It allows discussing the impact of technology on governance structures. It is very dear to competing nation states and local exporting and importing industries. Key industries, ranging from chemical and pharmaceuticals to genetic engineering, from mechanics, avionics to computation, from print, film to digital products and programming all are subject to intellectual property protection. In the information society, the lead and thus power of economies is largely defined by knowledge and information in terms of goods and services subject to intellectual property protection. Rights and obligations define the realms of private and public spheres. They define the control of information and use of knowledge and determine how much such knowledge may be appropriated and how much it ought to be shared with the public at large. Marketing and commerce largely depends on trade marks and related forms, and amounts to a key prerequisite of commerce both domestic and international. It is a domain close to the heart of national sovereignty, and countries seek to preserve appropriate policy space. The pursuit of economic interests abroad encourages, at the same time, international disciplines and restrictions of national sovereignty in a sensitive area of regulation. The battle for key industries in goods and services makes it a pivotal point and domain of law on all layers alike. The paradigms of international law and of multilayered governance therefore are at the heart of the battle for international competitiveness which in return should inform suitable structures of governance.

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http://www.wto.org/english/news_e/sppl_e/sppl187_e.htm (visited June 8, 2011), concluding: "At this stage, the only avenue I can see is reaching out to civil society, unions, political parties, and parliamentarians to discuss and debate with them the global issues we are facing. We need global governance. But global governance necessitates global citizens. It necessitates citizens inhabited by a sense of "togetherness", by a feeling of belonging to a global community. How many people today, when asked which country they come from, would answer, like the ancient Greek philosopher Diogenes of Sinope, "I am a citizen of the world"? In the absence of global elections, the global governance debate needs to be brought closer to citizens to instill this feeling of togetherness that is now missing. Bringing the global governance debate closer to citizens could also contribute to greater coherence at a global level. This would render governments more accountable in terms of coherence."

[11] See Abbott, F.M., Gerber, D., (eds.) Public Policy and Global Technological Integration, Kluwer International Law, Dordrecht 1997.

III. The horizontal level of international IP law

The exploration of the horizontal level of global IP governance is the focus of this study and is concerned with the institutions and norms emerging on the international plain. We look into the relationship of different treaty systems and organizations and how they relate to bilateral and plurilateral avenues of protecting intellectual property. We submit that the choice of forum matters in terms of results and that multilateral instruments offer a more appropriate balance of rights and obligations than bilateral and plurilateral instruments.

The alleged superiority of multilateral regimes over the bilateral and plurilateral ones lies in their ability to reflect and achieve a finer balance between the obligations and rights concerned by the intellectual property regulation. Thus, despite its limitations, TRIPS has a claim in serving as such a benchmark, allowing judgment on whether other free trade agreements provide – at least on their face – any flexibilities comparable to those enunciated in TRIPS. Peter Yu has described this feature of the TRIPS as a 'seed' which should direct the development of new IP norms.[12] These principles 'also help remind the treaty drafters of the nature, scope, and objectives of intellectual property norms.'[13]

Against this background, sub-section A below examines the extend to which the balance between rights and obligations and the respect for wider public interests are entrenched into the TRIPS, and other IP norm setting arrangements, in particular whether they provide policy scope reflecting various interests. Section B focuses on the institutions with greater relevance to the global IP governance - that is the WTO and WIPO - and their current and future interaction addressing the question what should be their proper interface in maintaining and strengthening the multilateral IP norm generation.

The objective of IP systems to strike a balance between the various interests is well reflected in TRIPS Article 7 stating that 'the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and *to a balance of rights and obligations.*' This provision clearly reflects the *reason d'etre* of the IP protection systems which should promote innovation – a concern that has permeated policy domains and scholarly work across the world – with due consideration of the other interests at stake. The latter interests are defined, although not exhaustively, in Article 8 of the TRIPS which prescribes further flexibilities for the Members in pursuit of their public health policies, nutrition, promotion of the public interest in the sector of vital importance…(para 1); as well as, adopting measures to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology (para 2). Thus, taking TRIPS at its word, it seems to offer both: an utilitarian means of promoting public welfare and a means of fitting together diverse rights and interest to produce a positive sum accommodation. IP protection should thus yield a

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[12] Yu, P. K, Objectives and Principles of the TRIPS Agreement, at 1042, Houston Law Review 2009, electronic copy available at: http://ssrn.com/abstract=1398746

[13] Ibid.

'balance' of rights and obligations, the mutual advantage of different interest groups, and overall social and economic welfare.

The interests to be put on the balance may depend on the issues and forms of IP concerned in a specific case and may appear in diverse forms. These could be public as against private interests, the interests of developing as against developed countries, consumer against producers, rent-seeking or sectional interests as against the defence of the public domain or of free trade; access to technology as against innovation, exclusivity of property rights as against entitlements to equitable or adequate remuneration; individualistic innovation as against the collective innovation of indigenous community etc.[14] Although the list is long, it should not create the illusion that these interests can be neatly delineated. It is equally difficult to assess the extent to which the pursued balance would tolerate leaning "a little more" or "a little less" to one side or another. As Dinwoodie has correctly acknowledged, even in the domestic context the term balance in difficult to define, let alone the multilateral context,[15] where the interests at stake become more diverse given the various level of economic development of the interested parties. Moreover, specific terms can be employed only when discussing the balance in the context of a specific IP form of protection. For example, in any patent system, with a view to contributing to the promotion of technological innovation and to the transfer and dissemination of technology, finding the right balance between producers and users of technological knowledge is considered fundamental.[16]

The interests at stake within the protection of various forms of IP and across countries with a varying level of development can be generally subsumed into two categories: public or collective interests as against private interests; and exclusive rights as a means of promoting or rewarding the production of knowledge goods against limitations and exclusions to such rights as a means of diffusing and accessing such goods. Good IP policy thus is when these interests are balanced and vice-versa bad policy would tilt to favour one interest over another. The continued search for this balance is evidenced in various policies covering a vast array of IP forms. For example, the debate over biopiracy concerns both limiting the patenting of material in the public domain and affirming rights to exclude unauthorized third party use of traditional knowledge and genetic resources, even when users assume these material to be in the a 'public domain'.[17] In the context of copyright, laws for example generally only protect a concrete expression of an idea, whereas ideas as such are left for free use in the public domain.[18] Thus, these laws will protect, for example, scientific articles, but not the ideas or scientific concepts expressed therein. As in the case of other forms of IP, and flowing from the TRIPS, they

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[14] On the last example see Antony S. Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge', in Keith E. Maskus and Jerome H. Reichman, (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge 2005), pp. 521-564

[15] Dinwoodie, Graeme B., The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking? (January 21, 2010). Case Western Reserve Law Review, Vol. 57, No. 4, 2007. Available at SSRN: http://ssrn.com/abstract=1601235

[16] WIPO, SCP/14/4, 11 December 2009, para 119.

[17] Taubman, Antony, TRIPS Jurisprudence in the Balance: Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic. Ethics And Law Of Intellectual Property: Current Problems In Politics, Science And Technology, Lenk, Hoppe and Andorno, eds., Ashgate, 2007; ANU College of Law Research Paper No. 08-10. Available at SSRN: http://ssrn.com/abstract=1130683, at 9.

[18] See Article 9.2 TRIPS.

may further provide for exceptions which allow the (non-commercial) educational use of such articles to a certain extent.[19]

A. The TRIPS and its evolution

In response to the realization of the value of IPRs in the aftermath of 1980s, different strategies have been developed by the governments in order to reap the benefits conferred by these rights. This started to take robust shape with the emergence of the WTO TRIPS Agreement imposing minimum IP standards upon WTO Members.[20] Within the Uruguay Round negotiations, the TRIPs Agreement overall mainly pursued interests and concerns of developed countries competing in globalising economy.[21] These interests were overall balanced with those of developing countries in negotiations on textiles and agriculture. The criticism of the TRIPS as neglecting the social function of IP law, along with the other points of traditional fears related thereto stems from the genesis and negotiation dynamics of TRIPS, its initiation having been characterized as a form of regulatory capture by specific producers' interests.[22] Since the TRIPS deal concerns various stakeholders, including individuals, corporations, nations and society - all having different goals and expectations from intellectual property'[23]- the critics have viewed TRIPS as a symbol of imbalance.[24]

But not everyone shares these perceptions. The criticism itself had in fact the effect of contributing to a better understanding of the distinction between "the political and axiological penumbra of TRIPS from its core legal effect, and its positive role in setting bounds to and alleviating trade disputes on IP issues between WTO members"[25]. A striking feature of the TRIPS is that it begins to serve as a broadly accepted benchmark for an overall balance of interests (notwithstanding certain strongly contested elements); this being testified also by that it is taken as a *de facto* benchmark in the critical analysis of other IP norms setting processes, like those emerging in the context of free trade agreements with their so-called "TRIPS- plus" obligations.

The evolution in the perceptions of the TRIPS Agreement from being regarded as promoting specific industry interests to its broader acceptance as mediating diverse objectives and public interests enunciated in TRIPS Article 7 (entitled 'Objectives') and 8 (entitled 'Principles') is evidenced through a number of examples. First, this emerges from the explicit language of these provisions, which guide the general TRIPS interpretation and serves as basis for

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[19] See Art.5:3 of the EC Copyright in the Information Society Directive (2001).

[20] See generally Cottier, T., Trade and Intellectual Property Protection in the WTO: Collected Essays, Cameron May: London 2005; Gervais, Daniel J., *The TRIPS Agreement, Drafting History and Analysis*, 2nd ed., (London: Sweet and Maxwell, 2003).

[21] Abbott, F.M., Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT, 22 Vanderbilt Journal of Transnational Law 689 (1989).

[22] Drahos Peter, Braithwaite John, *Information Feudalism. Who Owns the Knowledge Economy* (New York, 2002).

[23] Ove Granstrand, The economics and management of intellectual property: towards intellectual capitalism, Edward Elgar Publishing, 2000, at 9.

[24] See e.g. Hamilton A., 'The TRIPs Agreement: Imperialistic, Outdated and Overprotective', Vanderbilt J. Transnational Law 613 (1996).

[25] Taubman, above n 17, at 26.

justification for policy choice not explicitly addressed with TRIPS. An interpretation based on the TRIPS balancing objectives and public interest principles confirms a horizontal flexibility which affects the understanding of all individual TRIPS obligations. This is particularly true for broad and open terms with more than one defensible meaning. An interpretation compatible with TRIPS objectives and principles would allow WTO Members to reconcile IP protection and public interests such as access to medicines in their domestic IP laws.

Further scope of manoeuvre is also accorded to domestic policies allowing to remedy anti-competitive practices, including licensing that constrain transfer of technology (Article 40); provisions are introduced which incentives the transfer of technology to least developed countries as a matter of obligation (Article 66.2); and finally, introducing the requirement of enforcement provisions to be *fair* and *balanced* (Article 41.2). Second, as alluded above, the evolution of these perceptions is confirmed by a renewed concentration of the attention of the international community on the systemic benefits of multilateral norm setting and judicial regimes, as reflected in the debate over the implications of new IP standards and dispute settlement procedures in bilateral and regional mechanism.[26] Third, the frequency with which TRIPS is referred to in international norm setting denotes its transformation into a sort of benchmark of international standard-setting in the field of intellectual property. [27]

Additionally, the Doha Declaration and the decisions taken thereafter kicked in as another evidence of the detachment of the TRIPS from its partisan perceptions. The Declaration initiated the 'paragraph 6' process to amend TRIPS to enable countries with insufficient or no manufacturing capacities in the pharmaceutical sector make effective use of compulsory licensing under Article 31. Many found this outcome a tautology or an assertion of existing law so as to validate the flexibilities arising out the TRIPS. The balance was already entrenched in the language of the TRIPS but it needed restatement, as the Declaration did, since the WTO Members were not entirely clear on how they could benefit of these provisions. In conclusion, as stated by Margaret Chon "[A]lmost everyone can agree that the original connection to trade was for purely economically instrumental purposes, and yet few would have predicted its other consequences, particularly the reshaped relationship of intellectual property and its classic innovation mandate to other development goals".[28] This effect is testified through the variety of TRIPS flexibilities illustrated above.

But the evolutions in the perceptions of the TRIPS did not manifest only at the political level. After fifteen years of operation both the hopes and fears traditionally linked to TRIPS and its enforcement under the WTO were and continue to be largely exaggerated. In this view, the TRIPS has been labelled as

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[26] Note also the recent speech of Pascal Lamy on Global Governance (19.02.2011) stating the challenges the global governance is facing today one of it being the lack of a coherent approach by the States towards certain regulatory issues available at http://www.wto.org/english/news_e/sppl_e/sppl_e.htm, visited May 2011.

[27] But the polarities over TRIPS are not all settled by these arguments. As noted by Taubman, the TRIPS polarity in most need of resolution is the one of TRIPS as a source of law for international dispute settlement, which States comply with either by virtue of the *pacta sunt servanda* principle or for fear of adverse effects under DSU; and TRIPS as an essential element of a model law with the purported goal of promoting the social and economic welfare benefits of IP protection. See Taubman, above n 17, at 29.

[28] Chon, above n 4, at 3.

the 'dog that barked but did not bite'.[29] On the 'fear' side, many developing countries and NGOs expected, in line with the above perceptions, merciless enforcement of the negotiated IP standards with no room for manoeuvre in the national policy space.[30]

Indeed, there was some convergence between proponents and critics of the TRIPS on the expectation that their would be a high rate of litigation under the TRIPS, especially between developed and developing countries, the latter being targeted by the former on non-compliance with the TRIPS minimum standards. This flood of IP disputes with the advent of the TRIPs did not however materialize.[31] The onslaught of IP enforcement by developed against developing countries did not materialize either Most of the case law relates to disputes among industrialised countries, reflecting the technological and commercial interests at stake. [32]

A glance should be taken at the relevant IP disputes reflecting how the WTO adjudicator perceives the two allegedly opposing poles; the one stating that IP should promote innovation and balance this with the rights of other stakeholders concerned. Although there have been only few substantive IP disputes settled by the WTO dispute settlement mechanism, those allow making some inferences concern the interpretation of the TRIPS general exceptions as concerning copyright (Article 13), trademarks (Article 17) and patents (Article 30). The interpretation of these provisions is among the most important contribution to the refinement of IP law to date. These cases refer to the *Canada-Pharmaceutical Patents* dealing with Article 30 exceptions, and *US-Copyright* tackling the copyright exception in Article 13. The outcome of this interpretation has been characterized as nuanced and not consistently biased in favour of IP protection.[33] In both cases, the panel accepted at least one of the two limitations as meeting the relevant TRIPS exception (respectively, the 'regulatory review provision' and the 'homestyle exemption'). Although the outcome of these disputes found broad support among the IP commentators there is also some critique around and there is certainly scope for improvement in the panels' endeavour to strike this balance.[34]

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[29] See e.g. Pauwelyn, J., The Dog That Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO, Journal of International Dispute Settlement, (2010), 1–41, at 1.

[30] Jayashree Watal, for example, notes 'a strong and widespread perception that the TRIPS agreement is against the interests of developing countries' and arguing that '[t]he focus for the demandeurs in the immediate future is likely to be on implementation of and dispute settlement under TRIPS rather than on further development'. See e.g. Jayashree Watal, Intellectual Property Rights in the WTO and Developing Countries (London/The Hague/Boston, Kluwer 2001) 363.

[31] Four TRIPS cases in the last 9 years (2001–10) would hardly strike anyone as a flood of IP cases or major IP activity in WTO dispute settlement.

[32] Only 9 of the 27 TRIPS disputes (and four of the nine TRIPS Panels) were North–South cases. Rather than developing countries, the EC was by far the first target of TRIPS complaints so far (10 out of 27 complaints). Another striking feature of this review of the TRIPS disputes is the low number of disputes that are centered on traditional IP questions and could not have been decided without TRIPS and the overwhelming systemic (as opposed to immediate commercial) nature of the cases filed. See Pauwelyn, above n 29, at 6.

[33] Pauwelyn, ibid, at 15. A nuanced outcome of a type seems to have been registered also in the *EC-Trademarks and GIs. See* Panel Report, paras 7.625-7.682.

[34] Pauwelyn, ibid, praised the outcome of the disputes and did not see a problem with the adjudicator's balancing test since in none of these cases did the litigants invoked specific third party or social interests. But there was quite some critique on the outcome of the US-Copyright panel for having been too lenient on the interpretation of Article 13 three step test. See, for example, David J Brennan, 'The Three-Step Test Frenzy – Why the TRIPS Panel Decision Might be Considered Per Incuriam' (2002) 2 Intellect Prop Quart 212–25. It has been argued that both

Although these disputes do not break ground on the issue of the reconciliation of different interests affected by the TRIPS obligations, which would have to await new disputes, the argumentation of the above three panels shows however that:

> TRIPS exceptions do refer to countervailing 'legitimate interests' of 'third parties' which Panels have found to include non-economic interests as well as consumer interests and interests of competing right holders. Moreover, even where 'third party' interests are not explicitly included in the terms of the TRIPS exception as such (as in TRIPS Article 13), the other qualifiers in these exceptions—ie 'legitimate' interests of right holders, 'normal' exploitation and 'unreasonably' conflict or prejudice—are broad enough to allow for a balancing of the interests of IP right holders and other interests including broader social or public interests.[35]

Thus, the three prongs of the TRIPS exceptions allow it to for interpretations to accommodate broader social interests. While one might think that the second and third prongs would be more indicated for this, the first prong too has been used to this effect. In the *US-Copyright* case for example, the panel under the first prong of Article 13 drew 'inferences about the reach of the business and homestyle exemptions from the stated policy purposes underlying these exemptions'.[36]

But the TRIPS exceptions (along with Article 7 and 8 discussed above) are not the only provisions in the TRIPS which consent the interpreter to reconcile countervailing interests. An array of other provisions can be cited for this purpose, including exceptions which allow precluding any IP rights granted in the first place. This includes TRIPS Article 27.2 referring to 'inventions, the prevention… of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment' and TRIPS Article 27.3 in respect of 'diagnostic, therapeutic and surgical methods for the treatment of humans or animals', certain 'plants and animals' and certain 'biological processes'[37]. The list can be completed with

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litigants on the *Canada-Pharmaceuticals* focused exclusively on the interests of the right holders and generic producers whereas in *US-Copyright* too no broader social concerns were invoked; '…it did not implicate for example any of free speech of scholarship interests that underlie many copyright exceptions' See Ginsburg, Jane C., 'Toward Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' (2001) 187 Revue Internationale de Droit d'Auteur 3, at 9. For other examples of criticism of the interpretation of the TRIPS exceptions see also below Section IV.B (i).

[35] Pauwelyn, above n 29, at 22. See also, for example, Ginsburg, ibid, at 15, arguing that if there would be 'a non economic motivation for the exception… it would be appropriate to develop the neglected normative dimension of "normal" exploitation' and, at 16, 'the third step may reduce to a balancing of the legitimacy of the interests of the rights holders and of the beneficiaries of the exception…the reasonableness (if not also the legitimacy) criterion of step three by its own terms requires some weighing of conflicting interests.'

[36] Panel Report, para 6.113 (emphasis added). The reading that an exception must be justified by some 'clear reason of public policy or some other exceptional circumstance' is confirmed also by the leading authority on the Berne Convention Ricketson. See Ricketson, The Berne Convention: 1886–1986 (1987) para 9.6.

[37] This is true for other forms of IP protection. With respect to copyright, for example, there are Articles 2bis and 10 and 10bis of the Berne Convention (incorporated into TRIPS through TRIPS Article 9) which permit limitations for certain speeches, lectures and addresses and certain free uses of work as well as the Appendix to the Berne Convention with special provisions for

the provisions allowing for compulsory licensing without the authorization of the right holder, like TRIPS Article 31 (and Article 5 of the Paris Convention), which has been solidified through an amendment ensuing from the Doha Declaration on the TRIPS and Public Health, resulting in the introduction of paragraph (f).[38] The existence of compulsory licensing or actually the mere threat of using it can be utilised by interested Member to bring down the price for the patented product and hence increase its availability. While this mechanism is seldom used in practice, the threat of and possibility to use the system remains an important tool for governments to address public interests and facilitating access to a particular patented technology.[39]

Another important flexibility arising from the Doha Declaration relates to the fact that: "Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency." This allows WTO Members to depart from some of the conditions of compulsory licensing enshrined in TRIPS Article 31 having more discretion in determining what instances will be covered by the term 'extreme urgency' and other circumstances. This again enlarges further the policy space of the WTO Members to address public health crisis and the access to medicine.

The question of exhaustion of rights is also an example where the WTO Members have been granted considerable discretion in that they are entitled to decide their own regimes. TRIPS Article 6 explicitly states that the agreement leaves the question of 'exhaustion' of IP rights untouched thereby allowing countries to engage in so-called 'parallel importation', that is import of e.g cheaper medicines licensed and sold by the patent holder in a foreign country at a lower price in order to increase accesses to these medicines. The Doha Declaration clarifies in this context that "the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4." These flexibilities allow developing countries considerable policy space in which to maximize the benefits and minimize the social costs of adopting the international minimum standards. Some of these flexibilities are missing in the bi-lateral trade agreements containing IP obligations; moreover they exert a pressure which adds to the burden of implementing the minimum TRIPS standard.[40]

Overall, the TRIPS Agreement thus shows a balanced set or rights and obligations, taking into account the need for enhanced protection of IPRs in a globalising economy. Today, the main challenges in the agreement relate to the absence of international disciplines in anti-trust and competition law and policy

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developing countries. For trademarks, there is, for example, Article 6ter of the Paris Convention incorporated into TRIPS through TRIPS Article 2(1) in respect of State emblems.

[38] The Doha Declaration recognizes that each WTO Member "has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted." The TRIPS amendment will enter into force when all WTO Members would have ratified it.

[39] Henning Grosse Ruse – Khan, Protecting intellectual property under BITs, FTAs, and TRIPS: Conflicting regimes or mutual coherence?, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-02, at 8, Electronic copy available at: http://ssrn.com/abstract=1757724.

[40] See Frederick M. Abbott, Intellectual Property Rights in a Global Trade Framework: IP Trends in Developing Countries, 98 AM. SOC'Y INT'L L. PROC. 95, 97–98 (2004).

within and without the WTO. The refusal by developing countries to take that relationship up under the Singapore issues has retarded the introduction of efficient ant-trust rules in many countries around the world, creating imbalances which need to be addressed in coming years. The question relates to the fundamental question to what extent the TRIPS Agreement not only should entail minimum, but also maximum standards of protection in order to preserve an overall balance of rights and obligations.[41]

The second problem to be addressed relates to graduation of rights and obligations. The minimal standards of the TRIPs Agreement do not sufficiently reflect levels of involvement of countries and industries in the world economy. Levels of protection, of rights and obligations should be commensurate with levels of competitiveness. Ideally, the application of intellectual property standards should be linked to a number of economic factors and indicators of competitiveness. They should only become mandatory as a matter of international law once certain levels of competitiveness and participation in the world economy have been achieved.[42]

B. The balance in other multilateral IP treaties

Many of the TRIPS references above are accompanied by references to IP provisions contained in the TRIPS-incorporated treaties, like the historical Paris and Berne conventions. These treaties in addressing the balance of rights and interests, however, are less evident. Rather, the balance was implicitly struck by leaving key issues to the realm of domestic law and thus granting members substantial policy space as to the contours and evolution of intellectual property protection within their own jurisdiction.

The historical copyright treaties, like the *Berne Convention*, had not made any explicit reference to substantive balance. This does not mean that these classical systems were pursuing an imbalance. The reason for this caveat can be rather explained by the fact that the international copyright system 'was trying to do more and to do less with respect to balance than the domestic copyright system'.[43] It was doing less in the sense that these rules did not provide positive copyright law; it had rather established parameters which allowed the domestic authorities creating the substantive balance themselves – something which could fit to particular circumstances. On the other hand, the international copyright framework was doing more than the national one by seeking to reflect additional balance, which was the one between national autonomy and universal standards.

Moreover, the negotiating context of the Berne Convention would have to be considered. This instrument emerged at a time of high concerns against rampant piracy were protection for foreigners was not available yet. Thus, the Convention sought to address these issues primarily prescribing some

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[41] See Henning Grosse Ruse-Khan, Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection, *Trade, Law and Development*, Vol 1, No 1 (2009); Annette Kur & Henning Grosse Ruse-Khan, Enough is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection, Max Planck Institute for Intellectual Property, Competition & Tax Law, Research Paper Series No. 09-01.

[42] See Thomas Cottier, From Progressive Liberalization to Progressive Regulation in WTO Law, 9 JIEL 779-821 (2006).

[43] Dinwoodie, above n 15, at 755.

minimum standards to this effect.[44] At the time, the international IP protection system was largely a codifying devise. Therefore the regard for the balance was not disregarded in the treaty in a negative sense but it was rather deferred to domestic authorities for regulation in their national laws.[45] In fact, the national legislation of a number of countries contained already regulations on technological protection measures (TPMs) – a concept which emerged in the WIPO Copyright Treaty (WCT).[46]

The Stockholm 1968 revision of the Berne Convention sought to reflect this balance recognizing more explicitly the concerns of developing and developed countries about access to copyrighted works.[47] The mission was not however accomplished till 1996, when two important treaties emerged under the auspices of the WIPO related to copyright protection in the digital environment.[48] This refers to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT),[49] the so-called 'Internet Treaties'.[50] These instruments introduced new concepts into the previously familiar architecture of the WIPO's normative orientation.[51] Both instruments formally acknowledged the intense impact of information and communication technologies on the creation and use of literary and artistic works, and on production and use of performances and phonograms.

Thus, it is not until the 1996 Diplomatic Conference and in the aftermath of adopting the TRIPs Agreement that we begin to see the most widespread explicit discussion of the concept of "balance" being integrated into

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[44] See Dinwoodie, Graeme B, A New Copyright Order: Why National Courts Should Create Global Norms, 149 U. PA. L. REV. 469, 491 (2000).

[45] That the Berne Convention left great discretion to contracting parties is also confirmed in the US-Copyright case in the interpretation of minor exceptions doctrine. See Foltea M., International Organizations in WTO Dispute Settlement: How much institutional sensitivity? PhD thesis, 2010, University of Berne (book forthcoming 2011), at 206 et seq.

[46] World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1997) [hereinafter WCT].

[47] See e.g. Ruth L. Okediji, Sustainable Access to Copyrighted Digital Information Works in Developing Countries, in International Public Goods And Transfer Of Technology Under A Globalized Intellectual Property Regime 142, 148 in Maskus and Reichman eds. 2005.

[48] A question which naturally arises in this context regards how the WTO should position itself versus these new treaties. For an account see Abbott, Frederick, 'Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance', 3(1) Journal of International Economic Law (2000), at 72. See also Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441 (1997).

[49] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (1997).

[50] Note that in the post-TRIPS era the WIPO engaged in other norm-creation activities like the developed soft-law recommendations on the protection of well-known marks and marks on the Internet. WIPO, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, WIPO Doc. 833(E) (Sept. 1999); WIPO, Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, WIPO Doc. 845(E) (Oct. 2001). Another example is the negotiations on the WIPO Treaty Protection of Broadcasting Organisations, *See* Standing Comm. on Copyright & Related Rights, WIPO, *The WIPO Treaty on the Protection of Broadcasting Organisations*, SCCR/17/INF/1 (Nov. 3, 2008). Nevertheless, it has faced significant opposition in both areas. See William New, *WIPO Committee Advances Agenda on Copyright Exceptions, Broadcasting*, INTELL. PROP. WATCH, Nov. 9, 2008, http://www.ip-watch.org/weblog/2008/11/09/wipo-committee-advances-agenda-onexceptions-to-copyright-broadcasting.

[51] The WIPO Internet Treaties opened for signature in 1996 and entered into force in 2002.

international IP rule-making.[52] Levels of economic globalization achieved called for higher levels of harmonization of intellectual property rights on the level of international law. Balance no longer could be left to implied deference to the same extent this was the case prior to the advent of the TRIPs Agreement. The discussions at the 1996 Conference lead to the incorporation of such concerns into the Preamble of the *WCT* which refers to a "balance between the rights of authors and larger public interest, particularly education, research and access to information". The two treaties are notable however for another feature; whereas the Berne Convention countries were all developed nations with fairly similar economic conditions, the WCT contracting parties were mainly DCs and LDCs. Commentators argue that the implementation process of the WCT obligations reflects rather nuanced policy choices that calibrate a variety of domestic interests at stake.[53]

There has been however some controversy both domestically and globally over the impact of some obligations enshrined in the Internet Treaties, like the implementation of anti-circumvention and digital rights management (DRMs) by the developed countries.[54] It has been argued that the benefit which may accrue to the DCs and LDCs as a result of implementation of these treaties is impaired by lack of infrastructure; [55] and by that only a small share of populations of poor countries has access to Internet. The emergence of the two Internet Treaties has been however generally regarded as an outcome that recognized public-oriented considerations in the design of global copyright[56] and at least that much should be acknowledged among their merits. Moreover, what can be learned from this process is the openness of the rule-making process at WIPO, where space has been given to a wide number of stakeholders during the multilateral discussions. This type of decision-making is more likely to harness the support of national lawmakers on merits of the negotiated proposal and surely enhances the legitimacy of multilateral norm-setting process.[57]

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[52] Although note that the importance of copyright's attention to users has been evident since the first copyrights law of modern history, the British Statute of Anne from 1709. The act offered mechanism for curbing overly aggressive exercise of new property rights.

[53] See Urs Gasser, Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model, 17 Fordham Intell.Prop.Media & Ent. L.J. 39 (2006) at 66-93.

[54] See eg June M. Besek, Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts, 27 COLUM. J.L. & ARTS 385, 467-69 (2004).

[55] See Okediji R, The Regulation of Creativity Under the WIPO Internet Treaties, at 2406. This author generally contends at 2380, that "the WIPO Internet Treaties have fallen considerably short in what was to be their central mission, namely, to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context"; at 2394: "neither the WCT nor the WPPT reflect the complexity of creative endeavor in an online environment, nor, as increasingly dynamic uses of social networking sites show, do the agreements even portend the myriad of ways users interact with and within digital space."

[56] See Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134; *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 370–71 (1997); David Nimmer, *A Tale of Two Treaties: Dateline: Geneva-December 1996*, 22 COLUM.-VLA J.L. & ARTS 1, 1 (1997).

[57] Dinwoodie, above n 15, at 766.

C. *The imbalance in IP related preferential trade agreements*

By subscribing to multilateral IP obligations, countries did not intent to foreclose the possibility of entering agreements which would seek to implement higher standards. This is the case not only of the TRIPS Agreement but also other IP treaties, like the Berne Convention.[58][59] Thus, every since the foundation of international IP protection through international treaties, the IP norm-setting has seen a one-way route of development, that is towards a continuously increasing protection.[60] This is explained by the fact that the international IP treaties sent only minimum standards of protection; they create a 'floor'[61] representing the minimum of protection whereas further extension is fully conceivable.

In light of the latest shifts in the post-TRIPS environment, one should explore however the extent to which the exertion of this maximalist force over multilateral IP regulation contributes in practice to balanced consideration of users. This would inevitably lead to a more general discussion, that is, to what extent the stronger IP rights are beneficial and whether these IP strengthening is still compatible and considers the flexibilities flowing from deals stuck at the multilateral level. A lot of scholarly debate has been dedicated to the effects of FTAs stronger IP rules on the exercise of national sovereignty in areas such as public health, food security, technological advancement, promotion of domestic industries and access to knowledge.[62] However, the positive effects of these rights have yet to be empirically proven. It has been claimed for example that the strong IP rights would stimulate the transfer of technology to the south and stimulate investment, domestic creativity and innovation, and general development progress. None of these advantages however have been confirmed in the experience of most DCs and LDCs and the relationship between the IP and development is much more complex that the above allegations suggest. Claims that the IP strengthening would create jobs all over the world for many economic sectors that contribute to manufacturing, sales and services of these

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[58] Article 20 of this Convention states that: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention...." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221.

[59] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended on Sept. 29, 1979, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[60] There are only few remarkable exceptions to this, that is the Revision of the Berne Convention 1971 where an Annex addresses the option for developing countries to grant compulsory licenses mainly for translation purposes and the proposed amendment of the TRIPS Agreement in the course of the Doha process; see General Council, Amendment of the TRIPS Agreement, WT/L/641, (Dec. 8, 2005) Hardly ever was an effort undertaken to question or curtail incumbent rules; see Annette Kur & Henning Grosse Ruse – Khan, above n 41.

[61] See A Taubman, Rethinking TRIPS: Adequate Remuneration for Non-Voluntary Patent Licensing, JIEL Vol.11 No.4 (2008), 927-970 (944).

[62] See e.g. S Musungu & G Dutfield, Multilateral Agreements in a TRIPS-plus World, WIPO 2004; see also K. Maskus & J. Reichmann, The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, 7 JIEL, 279 (2004) and South Centre, Analytical Note: Intellectual Property in Investment Agreements: The TRIPS-plus Implications for Developing Countries; May 2005; SC/TADP/AN/IP/5; online available at http://www.southcentre.org/index.php?option=com_content&task=view&id=81.

products do not find support either in existing empirical evidence or the conclusions of leading economists.[63]

The continuous raise of the IP protection in the bilateral free trade agreements is an issue which received an important amount of scholarly attention. Rather engaging in a general assessment of the IPR provided in these agreements,[64] consistent with the above inquiry, we focus on the extent to which these IP provisions allow policy space and flexibilities comparable to those flowing from the IP commitments undertaken multilaterally. The public health concerns will thus re-emerge as an example used in the context of these analyses.

One striking feature of the sheer amount free trade agreements expanding IPRs[65] is that distinct to the effects of the FTAs concluding pursuant to GATT Article XXIV (and GATS Article V), any TRIPS-plus protection secured by one trading partner via an FTA is automatically and unconditionally available to right holders from all other WTO Members. These trends may thus result in effectively globalising the increasing standards to become the international relevant standards.[66] It has been found that not only the IP provisions in the FTAs - as driven by the developed countries, US in particular - go beyond the TRIPS standards,[67] but sometimes constrain the public health related flexibilities discussed above.

Even though the detailed provisions differ from agreement to agreement, there are certainly common elements which can be analysed. To exemplify, while TRIPS allows the use of compulsory licenses without specifying the grounds for issuing them, four of the US bilateral agreements (US-Vietnam, US-Jordan, US-Singapore, and US-Australia) limit the use of compulsory licensing to emergency situations, anti-trust remedies, and cases of public non-commercial use. Second, there are agreements which prevent marketing approval of generic drug during the patent term without the consent of the patent holder- an issue on which TRIPS does not impose any obligation (US-Vietnam and US-Jordan). Third, whereas TRIPS requires data protection against "unfair use" only, by contrast, many FTAs explicitly mandate test data exclusivity (e.g. US-Chile, US-Singapore). As a result, once a company has submitted original test data (e.g. for approval of a drug), competing

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[63] See generally K. Maskus, Intellectual Property Rights in the Global Economy (2000).

[64] Any comprehensive evaluation of TRIPS-plus standards in FTAs would by far exceed the space available here. For a comprehensive analysis of the IP provisions in FTAs see Roffe, Pedro, "Intellectual property, bilateral agreements and sustainable development: The Challenges of Implementation", CIEL, 2007.

[65] Increasing level of IP protection is also found in Bilateral Investment Treaties (BITs) where IP is enshrined as protected investment. The model BITs of most countries address IP rights. See L. Liberti, Intellectual Property Rights in International Investment Agreements: An Overview; TDM 2009, Vol. 6, Issue 2, at 5-9.

[66] Henning Grosse Ruse – Khan, above n 39, at 12.

[67] E.g. All FTAs include provisions regarding protection of patents and pharmaceutical test data. The patent protection term is frequently extended beyond the 20 years term provided in the TRIPS Agreement when delays occur in the regulatory approval process (e.g. EFTA-Chile, US-Singapore, US-Chile). Extensions to the patent term are also granted under FTAs when there are delays in the examination of the patent application itself. Moreover, the patent scope is extended to cover patenting for new uses of unknown products (e.g. US-Australia, US-Morocco, US-Bahrain). It has been claimed that this provides patent holders with the opportunity to 'ever green' existing patents, adding another full term of protection on the already patented pharmaceutical product. Essentially, all bilateral agreements go beyond TRIPS in enhancing patent protection for plants and animals. For an account see Roffe, Pedro and Christoph Spennemann, "The impact of FTAs on public health policies and TRIPS flexibilities, Int. J. Intellectual Property Management, Vol. 1, Nos. 1/2, 2006, 80.

manufacturer is not allowed to rely on these data for a period of five years to request marketing approval for its own drug.[68] This may pose a second obstacle for governments to effectively use compulsory licensing, as the new compilation of comparable test data by competing manufacturers may take several years and may be prohibitively expensive.[69]

Flexibilities have been reduced also with regards to the issue of parallel importation on which TRIPS mandates discretion to the WTO Members, which impact on the access to medicines. Thus, the US agreements with Australia, Morocco, and Singapore allow patent holders to prevent parallel importation through contractual means. Other non-US agreements (e.g. the Central American Free Trade Agreement with Dominican Republic (CAFTA-DR),[70] are less encroaching on the public health related flexibilities in TRIPS. This agreement does not prohibit parallel imports nor does it limit the ability to grant compulsory licenses. It however does constrain policy space under Art.27:3 b) TRIPS to exclude biological material from patentable subject matter and sets out additional conditions for the revocation of patents.[71] The EU has usually not demanded US-style detailed IP obligations in its FTAs. It has rather requested its partners to accede to various international IP agreements.[72] This tradition is well reflected in the replacement of a more general language on IP obligations found in the Partnership Agreement between Members of the African, Caribbean and Pacific Group of States (ACP countries) (Art 46) with much more comprehensive and detailed IP rules negotiated in the framework of so called Economic Partnership Agreements (EPAs) which are to supersede the Cotonou Agreement.[73] The first comprehensive EPA agreed with the group of CARIFORUM States[74] contains a full chapter with detailed rules on IP protection. This signals that EPAs also include significant TRIPS-plus obligations, notably in the area of IP enforcement, trademarks and geographical indications. On the other hand, this EPA also contains an explicit recognition of the importance of the Doha Declaration for the issue of patents and public health. According to Grosse Ruse, "since the final version of the EC – CARIFORUM EPA lacks any substantive TRIPS-plus obligations on patent protection,[…] it arguably does not constrain any of public health related flexibilities[…]".[75]

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[68] This has been found to create a new form of monopoly not required by TRIPS. See Abbott, F., "The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements", Occasional Paper 14, Quaker United Nations Office, Geneva, Contradictory Trend, 2004.

[69] See Fink, Carsten and Reichenmiller, Patrick, Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements, World Bank Trade Note, February 7, 2005, 2.

[70] The CAFTA-DR (signed in 2004) is the first free trade agreement between the United States and a group of smaller developing economies – five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic.

[71] An similar approach can be found in one of the most recent US FTAs – the one negotiated with South Korea

[72] For a comprehensive analysis of EC FTAs see Santa Cruz, Intellectual Property Provisions in European Union Trade Agreements (ICTSD, Geneva, 2007) – online available at http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf.

[73] For a detailed analysis of the EC's trade relationship with ACP countries see L Bartels, The Trade and Development Policy of the European Union, 18 EJIL (4/2007), 715-756.

[74] The CARIFORUM countries consist of Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, and Trinidad and Tobago.

[75] Henning Grosse Ruse – Khan, above n 39, at 15.

Although there are no explicit conflict between the TRIPS language and these FTA provisions, the latter can still be seen as being at odds with the spirit of the TRIPS to the extent that they preclude the effective use of compulsory licensing system by developing countries. The analysis on TRIPS-plus IP provisions suggests that certain obligations directly undermine these flexibilities. This is particularly true with regards to the US agreements which do not contain any specific clauses which safeguard or uphold the operation of the public health related flexibilities.[76] In this context one could question whether these TRIPS-plus, although mandated under TRIPS Article 1.1[77], curtail (optional) TRIPS flexibilities runs afoul these latter provisions.

The issue of the TRIPs flexibilities consistent interpretation arises also in the context of the IP provisions in the BITs. Although these treaties tend to offer the above mentioned safeguard clauses,[78] which apparently offer investors predictability that TRIPS standards will govern the question of (indirect) expropriation under investment protection, the issue is that the TRIPS consistency of these clauses is tested in arbitration proceedings *outside* the (state-to-state) WTO dispute settlement system.[79] There is risk of isolated analysis of such consistency with certain TRIPs provision, e.g. Article 30 regarding exceptions to patent rights and interpretation of open terms therein such as unreasonableness, legitimacy. This might not fully follow the imperatives cannons of VCLT rules of interpretation, in particular those prescribing consideration be given to the object and purpose of the treaty (but also rules on legal standing and burden of proof may be disregarded).[80] If such consistency analysis do not take into account the TRIPS object and purpose, the risk is that any such interpretation would prevent the operation of one of the main flexibilities all WTO Members.[81] As a result the interpretative outcome in these bilateral settings may be quite different from those at the WTO where the conformity with the customary rules of interpretation is specifically prescribed by Article 3.2 DSU. Moreover, another problem is that wherever (FTA based) TRIPS plus provisions apply in relation between the parties to a BIT, the latter – rather than TRIPS and its flexibilities – will form the consistency benchmark.

The above suggests once more that the multilateral forums would be more adequate to secure the flexibilities and policy space provided in the multilaterally set agreements, such as TRIPS, in contrast to bilateral agreements which tend to erode them. As the WTO Doha Declaration has shown, these flexibilities are quite important for a major part of global population in addressing their public health concerns. The TRIPS flexibilities are thus relevant in achieving the balance between the provision of incentives to innovate and the access to the protected knowledge. The new bilateral and

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[76] Another example is Japanese FTAs.

[77] Art.1:1 2nd sentence TRIPS makes the right of WTO Members to introduce more extensive protection subject to the condition that it does not 'contravene' with TRIPS provisions.

[78] Although this is not the case for all the investment chapters under FTAs negotiated by US.

[79] For a comprehensive account see Henning Grosse Ruse – Khan, above n 39, at 27-29.

[80] See para 5 Doha Declaration stating that: "In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."

[81] According to an author: "Since the questions of TRIPS consistency are incorporated into the BIT or FTA containing the safeguard clause, an arbitration panel may struggle to neglect context and objective of the BIT or FTA as guiding its interpretation of the consistency test". See Henning Grosse Ruse – Khan, above n 39, at 27.

plurilateral layers of IP governance may well undermine the ability of the countries to autonomously achieve such a balance as tailored to domestic needs.

D. The imbalance in plurilateral agreements: The ACTA project

The *ACTA*[82] negotiations received significant attention not only due the tenacious attempt of its promoters to strengthen the existent IP enforcement TRIPS standards. This is also owing to the lack of transparency in the negotiation process, which was conducted behind closed doors until a series of leaked documents in 2010. Although the TRIPS Agreement offers the most comprehensive legal framework dealing with IP enforcement, the initial reason of the developed countries to push for this plurilateral agreement was the perceived lack of effective enforcement obligations, coupled with increasing trade in counterfeit goods.[83] The scope of ACTA includes counterfeit goods, generic medicines and copyright infringement on the Internet. It envisages establishing a new international legal framework that countries can join on a voluntary basis and the arrangement would also create its own governing body outside existing international institutions such as WTO, WIPO or UN.

The ACTA draft has been perceived to differ from TRIPS at least in two important respects. First, it generally reduces the space for manoeuvre in matters which used to fall under the discretion of the nation States. Second, it expands the strength and scope of enforcement rules established under TRIPS Part IV. For example, the TRIPS Agreement Article 61 requires criminal sanctions be implemented by Members only in "cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". These two conditions were found by commentators as according key flexibilities and leaving ample policy space for WTO members.[84]

The available ACTA consolidated draft of October 2010 allows analysis on criminal enforcement rules and a comparison to the corresponding standards contained in the TRIPS Article 61. As stated above, the general approach is to go beyond the TRIPS Article 61, adding mandatory criminal sanctions for goods infringing any of the intellectual property rights covered by TRIPS, except the exclusion of patents from border measures (which initially were part of the draft).[85] Amongst the various concerns expressed in relation to ACTA there is its potential impact on the free transit of goods, hence on international trade.[86]

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[82] See Anti-Counterfeiting Trade Agreement Dec 3, 2010 final draft.

[83] Correa, C. (2007) *Trade Related Aspects of Intellectual Property Rights – A Commentary on the TRIPS Agreement* Oxford: Oxford University Press, at 409. See also at 575 ICTSD/UNCTAD, (2005) *Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement* Cambridge: Cambridge University Press, online available at www.iprsonline.org/unctadictsd/ResourceBookIndex.htm [accessed in May 2011].

[84] Correa, C. (2008) "The Push for Stronger Enforcement Rules: Implications for Developing Countries" in ICTSD, The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries, Issue Paper No.22, Geneva, Switzerland, at 41; Xue H. (2009) 'An Anatomical Study of the United States versus China at the World Trade Organisation on Intellectual Property Enforcement', *European Intellectual Property Review* No.6, 292-299, at 295.

[85] ACTA Draft – Dec. 3, 2010, Article 5 and Article 13, fn 6.

[86] E.g., Urgent ACTA Communiqué: International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests, American University Washington College of Law, available at http://www.wcl.american.edu/pijip/go/acta-communique. This statement reflects

Removing patents from the border measures arsenal under the ACTA is a positive improvement to the earlier drafts but this does not ensure that, for example, the highly disputed seizure of generic medicines in transit will not occur.[87] The inclusion of all forms of trademark is particularly problematic in this sense given the difficulty to assess whether the signs or words used on the packages makes them "confusingly similar trademark goods" which are similar or close to the trademarks of the original manufacturer.[88] The customs authorities are not well placed to carry out such evaluation. This would require a comprehensive legal analysis which is less straightforward than determining counterfeit goods, to be performed by courts or trademark offices. The situation is further aggravated by the fact that, unlike TRIPS Article 53:2 which requires for certain forms of alleged IP infringements that the owner/importer of the goods must have the option for posting a security in order to have the goods released, the ACTA does not recognize such a right and the defendant will have to await a positive finding on the similarity of the trademark in order to obtain possession of such goods.[89] Finally, whereas TRIPS Article 52 points to the laws of the country of importation against which the infringement of IP rights should be assessed[90], the ACTA requires the Parties to apply 'the laws of the Party providing the procedures…' – meaning the domestic IP law of the authorities adopting the border measures. The broader public interests, like health implications arising out of this provision are complex given the fact that this rule mandates the ACTA Parties to apply their legislation not only with regards to imported goods but also those passing in transit through their territories. This means that even if the goods are not infringing any IPR in the country of exportation or importation they risk seizure in one of ACTA Parties. In fact this rule has been found to conflict with TRIPS.[91]

In this context, the emergence of ACTA has raised questions with regards to *public health* considerations and whether the above would eventually imperil the pursuit of such goals in accordance with the TRIPS flexibilities and the Doha Declaration on TRIPS and Public Health. While these concerns can be countered with the argument on the inclusion by reference into the ACTA of TRIPS Article 7 and 8, this language still creates uncertainty and legal insecurity for all international trade in goods.[92] It remains to be seen whether the imbalances of the above ACTA provisions would be interpreted away

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the conclusions reached at a meeting of over 90 academics, practitioners and public interest organizations from six continents gathered at American University Washington College of Law, June 16-18, 2010.

[87] For a comprehensive account on the effect of ACTA on the transit of generics see Henning Grosse Ruse-Khan, A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit. American University International Law Review, Spring 2011; Society of International Economic Law (SIEL), Second Biennial Global Conference University of Barcelona, July 8-10, 2010; Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper No. 10-10. Available at SSRN: http://ssrn.com/abstract=1706567

[88] ACTA, above n 85, Article 5.

[89] Ibid, Article 18, last sentence.

[90] The 1st sentence of Article 52 TRIPS obliges WTO Members to require from right holders applying for the seizure of goods "adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right".

[91] See Grosse Ruse Khan, above n 87, at 62.

[92] ACTA Article 2.3 provides: 'The objectives and principles set forth in Part I of the TRIPS Agreement, in particular in Articles 7 and 8, shall apply, *mutatis mutandis*, to this Agreement'.

through reference to these provisions, as this is to be done in the context of TRIPS.

Apart from the specific differences of the above ACT border measure standards from those enshrined in the TRIPS, the concerns with the latter go further in that the former generally tends to extend the remedies for right holders, without foreseeing the necessary checks and balances to secure the rights of defendants. These concerns have been raised by developing countries in the TRIPS Council, in particular India which argued that ACTA is to be blamed for 'lowering knowledge thresholds, limiting due process requirements (e.g. requirements to act within particular time frames), limiting evidentiary requirements, and by not specifying the type of authority empowered to make critical decisions'.[93] In spite the inclusion into the ACTA of a general proportionality rule[94] regarding the ultimate decisions on IP infringing goods, applicable to all ACTA enforcement procedures, concrete defenses and other relevant safeguards for the rights of the defendants are often absent in the ACTA. Thus, the asymmetry between concrete and concise remedies and general checks and balances is a systemic concern over ACTA. Moreover, when ACTA is committed to under FTA deals by developing countries and small economies, the implementation of some of its provisions, like the on the applicable law, risks to be challenged under the WTO dispute settlement system.

ACTA, in conclusion, is likely to serve as template for enhancing enforcement of IPRs vis-à-vis developing countries, short of having them involved in debating and negotiating these standards in the first place. It will be used to strengthen domestic procedures in concentration and to insert corresponding provisions in bilateral agreements. There is a serious risk that the approach, lobbied for by industries affected and not sufficiently filtered by governments, will undermine the overall legitimacy of the international intellectual property regime as fundamental precepts of participation and inclusiveness are not sufficiently complied with.

IV. Multilateral IP norm-setting institutions and their interface

The previous Section illustrated and expanded upon a number of multilateral IP agreements with emphasis being put on their ability to incorporate language which would strike a balance between the rights and obligations - the interest of right holders on the one side and the general public interests (or consumers) on the other. We noted that the WTO freeze in the IP law-making process is to some extent compensated by the evolutions taking place elsewhere, mostly under the WIPO. Rightly so, the IP regulation is evolving beyond what the TRIPS minimal standards provide and strive to respond to the new technological developments which occurred over the last 15 years. The TRIPS Agreement negotiation was an era that pre-dated a number of such developments like the internet commerce in trademarked goods, distribution of digitized copyrighted

[93] Third World Network (TNW) Info Service on Intellectual Property Issues, Concerns raised over ACTA at TRIPS Council (1 November 2010) – published in SUNS#7030.

[94] ACTA Article 6.3 reads: "In implementing the provisions of this Chapter, each Party shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties, and the applicable measures, remedies and penalties."

materials, and informatics revolution within the patent industries.[95] This explains why the focus has even shifted back, from the WTO to WIPO.

The analyses of the global IP governance cannot be thus detached and would remain incomplete if the negotiation environment of the new rules and the functioning of the relevant institutions are disregarded. This invites an inquiry into the IP norm-setting institutions. Moreover, given the existence of a number of such agencies,[96] one would naturally wonder what should be there proper interface. Peter Yu has called this the 'IP regime complex' characterizing the larger conglomerate regime that includes not only the traditional area of intellectual property laws and policies, but also the overlapping areas in related regimes or fora.[97] It would not be much of the problem with this conglomerate if one would consider the advantages of regulatory competition alone which, as recognized, could enrich international innovation policy. But the downside of this, in the words of Dinwoodie and Dreyfuss, leads "to a suboptimal global regime: thikets of rights (fn omitted), conflicting demands (fn omitted), disputes that perpetually cycle, (fn omitted), and uncertainties created by institutional cacophony".[98]

Against this background, as part of our investigation of IP governance on the horizontal axis, this section addresses these complicated interactions and suggests some solutions concerning the future co-existence and proper functioning (interface) of the relevant international organisations.

A. The incorporation of IP agreements into TRIPS

The first and most prominent example of IP law-making is entailed in the WTO TRIPS Agreement which assimilated several pre-existing intellectual property treaties – quite a novel feature in international treaty law.[99] The incorporation technique produces the most substantive linkage between the TRIPS with various treaties or conventions administered by the WIPO through what has been called 'common object'.[100] Thus, a traditionally separate regime was taken

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[95] *See, e.g.*, Katherine J. Strandburg, *Evolving Innovation Paradigms and the Global Intellectual Property Regime*, 41 CONN. L. REV. 861 (2009) (discussing how TRIPS institutionalized its approach before the explosion of open and collaborative innovation and thus is ill-equipped to deal with these new technologies and processes).

[96] To exemplify the regulation of intellectual property rights (IPRs), plant genetic resources (PGRs) and their impact on a wide spectrum of issues are taken over by a number of international organizations (WTO, WIPO, UPOV, UNEP, FAO, UNESCO, CBD), often working in isolation from each other and adopting divergent philosophies[96] We also distinguish interlinked but not necessarily mutually supportive objectives in the fora regulating biodiversity and biotechnology: the regulation of international trade (WTO, UNCTAD); conservation of genetic resources (FAO, CBD); health (WHO); investment protection (UPOV); (agricultural) development (FAO, UNCTAD); access and benefit sharing (CBD); cultural and ethical values (UNESCO) and IPRs and innovation (WTO, WIPO, UPOV).

[97] See Peter Yu, above n 12, at 1040.

[98] Dinwoodie, Graeme B. and Dreyfuss, Rochelle, Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO and Beyond. Houston Law Review, Forthcoming; Oxford Legal Studies Research Paper No. 50/2009; NYU Law and Economics Research Paper No. 09-48; NYU School of Law, Public Law Research Paper No. 09-63. Available at SSRN: http://ssrn.com/abstract=1502262, at 4.

[99] Cottier, Thomas, 'The Agreement on Trade-Related Aspects of Intellectual Property Rights', in Macrory P.F.J., Appleton A.E. and Plummer M.G (eds), *The World Trade Organisation: Legal and Political Analysis* (New York: Springer, 2005), vol. 1, 1043-1115, at 1063.

[100] Vivas-Eugui, David, 'What Agenda for the Review of TRIPS?: A Sustainable Development Perspective', Center for International Environmental Law TEP 2-3 (Summer 2002),

up into the body of WTO law through the TRIPS Agreement, which incorporates by reference most, though not all, obligations of several Intellectual Property Rights (IPR) treaties (*i.e.* the Paris Convention, the Berne Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits).[101] This combination of the IPR treaties with the TRIPS has been attributed high significance due to the merger of detailed technical rules with the effective dispute settlement resolution under the WTO.[102] Thus, with the advent of the TRIPS Agreement, the protection of various forms of intellectual property rights became a mandatory part of the multilateral system, binding on all Members alike and fully subject to WTO dispute settlement.[103]

The selective incorporation of these treaties into the TRIPS has been referred to as 'regime borrowing',[104] whereas the transfer of this corpus iuris is known under the term 'regime shifting',[105] denoting the transfer of the IP regime from the WIPO to WTO. The main proponents of the regime shifting were the US and the EC that perceived a weakness of the WIPO in enforcing IPRs.[106] Some commentators have also noted in this context the failure of the WIPO to live up to the expectations of both industrialized and non-industrialized countries in respect of IP norm development.[107] As a result of the above process, there is substantial overlap between the TRIPS with the categories of intellectual property covered by treaties administered by the WIPO. Moreover, despite the fact that a great deal of the intellectual property regime shifted to the WTO, today the WIPO administers almost two dozen other treaties, which are not

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www.ciel.org/Publications/AgendaTRIPS_Summer02.pdf (visited 20 March, 2009). This incorporation of the rules of one's own kind has been described as a 'cannibalization of the WIPO conventions'. See Mort, Susan A., 'The WTO, the WIPO & the Internet: Confounding the Borders of Copyright and Neighbouring Rights', 8 Fordham Intellectual Property, Media & Entertainment Law Journal 184 (1997).

[101] See TRIPS, Article 1.3. The Rome Convention is also referenced in the TRIPS but it has not been incorporated therein.

[102] Some even suggest employing this technique in order to bring into the WTO other trade-related rules, to the extent they are clear. This is perceived as something which would serve to tighten the relationship between the WTO and the relevant international organisation, while the latter would continue to further developing the detail of the respective area. See Hrbatá, Veronika, 'No International Organisation in an Island…the WTO's Relationship with the WIPO: A Model of Governance of Trade Linkage Areas?' 44 Journal of World Trade 1 (2010), at 35.

[103] Cottier, Thomas and Oesch, Matthias, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (London: Cameron May, 2005) 916. For an overview of the TRIPS Agreement see also Cottier, Thomas, 'The TRIPS Agreement', in Macrory, Patrick F. J.; Appleton, Arthur E. and Plummer, Michael G. (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer Verlag AG, 2005) 1041-120.

[104] Alvarez, Jose E. and Leebron, David W., 'Symposium: The Boundaries of the WTO: Linkages', 96 American Journal of International Law 5 (2002), at 19-20.

[105] See John Braithwaite & Peter Drahos, Global Business Regulation 576 (2000), at 564-71 (discussing the use of forum shifting); Christopher May, The World Intellectual Property Organization: Resurgence And The Development Agenda 30 (2007)., at 66 (discussing forum proliferation); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT.L L. 1 (2004) (discussing the use of regime shifting).

[106] But see Okediji, Ruth L., 'TRIPS Dispute Settlement and the Sources of (International) Copyright Law', 49 Journal of the Copyright Society 585 (2002), at 594, noting that most commentators who criticize the WIPO's lack of enforcement power have ignored the possible role the International Court of Justice (ICJ) could have played with respect to compliance with WIPO treaties.

[107] See, e.g. Cordray, Monique L., 'GATT v. WIPO', 76 Journal of the Patent and Trademark Office Society 122 (1994), at 122; Leaffer, Marshall, *Understanding Copyright Law*, 2nd ed. (New York: Matthew Bender, 1995) 372.

incorporated into the TRIPS. Thus, as the administrator of the Madrid Arrangement, and especially the Berne and Paris Conventions, the WIPO has a special claim to a role in articulating international intellectual property norms.[108] As a consequence, the question arises as to what should be the interaction or linkage mechanism between the WTO and WIPO as well as with other international institutions dealing with IP.

B. The WTO-WIPO cooperation

In this sub-section we assesses the interaction between WTO and WIPO suggesting that the latter can serve as a vehicle in the much needed IP norm-creation process, compensating the stalemate and the numbness in the IP law-making at the WTO. The two organizations can actually work hand-in-hand by combining their strengths - that is the responsiveness to change of the WIPO and the strong dispute settlement mechanism of the WTO. It is one of the exceptional cases where cooperation has been framed by an explicit agreement among international organizations.[109].We discuss such cooperation in light of the WTO being today rather static in terms of treaty making, and dynamic in terms of legal dispute settlement. Both is bound to affect the relationship and complementarity of the two institutions. We mainly focus on WIPO in discussing these issues.

The WIPO and its predecessor, the United International Bureaux for the Protection of Intellectual Property (BIRPI), were established to consolidate the international intellectual property regime. Although the WTO relationship with WIPO has been characterized as opaque,[110] Article 68 of the TRIPS Agreement states specifically that the Council for TRIPS may consult with and seek information from any source it deems appropriate in carrying out its functions and shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of [WIPO]. The Agreement Between the World Intellectual Property Organization and the World Trade Organization also calls for cooperation between the WTO and WIPO in the notification of, provision of access to, and translation of national legislation; the communication of national emblems and transmittal of objections pursuant to Article 6*ter* of the Paris Convention; and legal-technical assistance and technical cooperation. Notably, by virtue of the latter, the TRIPS Council, at the request of its Members might seek guidance from WIPO in the context of dispute settlement and might consult WIPO concerning the evolution of multilateral IPRs rules during periodic review of the TRIPS Agreement. These actions represent a significant step toward establishing a cooperative and

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[108] But see Okediji, Ruth, L., 'WIPO-WTO Relations and the Future of Global Intellectual Property Norms', 39 Netherlands Yearbook of International Law, (2008); Minnesota Legal Studies Research Paper No. 09-07, http://ssrn.com/abstract=1338902, at 43, suggesting that WTO is capable of setting more nuanced IP norms that account for differences in cultural, economic and political factors which are more likely to be consistently produced by the WTO than WIPO.

[109] Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, *available at* http://www.wipo.int/treaties/en/agreement/pdf/trtdocs_wo030.pdf

[110] *See* e.g. F-K. Beier and G Schricker eds., GATT or WIPO: New Ways in the International Protection of Intellectual Property, 1995, noting that on the eve of the conclusion of TRIPS, scholars and policymakers seriously debated whether the new international intellectual property system would develop in the WTO or WIPO.

mutually supportive relationship between the WTO and WIPO.[111] However, despite the enunciation in of the WIPO in the TRIPS Agreement and the cooperation agreement, at best WIPO enjoys observer status at the TRIPS Council meetings. The Cooperation Agreement is somewhat limited for it is confined to legal and technical assistance consisting in provision of copies and translations of domestic legislation and to assisting WTO members in meeting their obligations.[112] But as illustrated below, the enunciation of the consultation prerogative in WTO the dispute settlement is important but, as have been noted, this has not been properly explored either.[113] In order to enhance the legitimacy of the WTO dispute settlement, the panels would need to show greater sensitivity towards the input of regimes possessing 'epistemic superiority', in casu the WIPO.[114]

i) The WIPO in WTO dispute settlement

The WTO panels too have turned to this agency for advice on a few occasions. In the consideration of the TRIPS-related claims, WTO panels asked the WIPO for advice in the *US–Section 211 Appropriations Act*, *US–Section 110 (5) Copyright Act* and *China–Intellectual Property Rights*, *EC – Trademarks and Geographical Indications*. This input has been useful to the Panels but the case law analyses reveal that the submitted information has been treated as factual rather legal,[115] and was primarily used to elucidate negotiation history of the TRIPs incorporated treaties rather for elucidating context.[116]

These analyses also reveal that the WTO panels will make efforts to interpret TRIPS Agreement in a manner that preserves the flexibilities inherent in the pre-existing intellectual property conventions, deferring to the IP origins of the disputes.[117] This translated into leaving members with leeway to reconcile conflicting TRIPS obligations (e.g. the conflict between GIs and Trademarks in EC-GI case) and to prevent right-holders from benefiting from exclusive terms in excess of those mandated by TRIPS (e.g. to exploit the de facto exclusivity available to pharmaceutical companies by reason of the need for premarket clearance in Canada-Generics).

At the same time, the TRIPS panels have been criticized for not having had a genuine intrusion into a TRIPS obligation, ignoring the domestic rationales for the challenged legislation, refusing to provide a normative interpretation to terms like "normal", "legitimate", "prejudice", and

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[111] Abbott, Frederick, Cottier, Thomas, Gurry, Francis, *International Intellectual Property System*, Commentary and Materials (Kluwer Law International, 1999) at 360-361. See also generally, Abbott Federick, 'The Future of the Multilateral Trading System in the Context of TRIPS', 20 Hastings International and Comparative Law Review 661 (1997).

[112] Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, *available at* http://www.wipo.int/treaties/en/agreement/pdf/trtdocs_wo030.pdf, Arts 2, 4.

[113] See Foltea with reference to *Argentina–Textiles panel*, above n 45, at 194.

[114] Ibid.

[115] For a detailed account explaining the possible reasons behind this choice of the Panels see Foltea M. 'International Organizations in the WTO Dispute Settlement: how much institutional sensitivity', PhD thesis, Berne 2010 (on file with the author).

[116] See Dinwoodie and Dreyfuss, above n 98.

[117] See US-Section 110 (5) Copyright Act, Panel para 6.41.

"unreasonable". This apparently resulted in the third parties interests not being reached.[118] In this context, the panels have been contested for having looked to antecedent intellectual property sources without understanding the richer complexity of those intellectual property norms. They seem to have regarded the intellectual property rights as commodities to be traded.[119] Moreover, there has been over reliance by the panels on the negotiating history of the incorporated treaties without appreciating how radically the context in which these treaties emerged has evolved from when they were incorporated into the TRIPS.

This is not to say however that WIPO could have not have been consulted on a wider range of issues than on historical documents. Should the panels adopted a more open approach in these consultations, the WIPO's input itself could have signaled the ramification of the transposition of certain rights (e.g. reproduction right under the Berne Convention) into the TRIPS, stressing that such new context of the rights made them applicable to all user activities, all markets, and to all of the principal IP regimes. Moreover, with the WIPO's technical input the old rules could have been read through the prism of a diverse technological reality.

[118] See Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exemptions*, 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR 17 (2001). See also Dinwoodie and Dreyfuss, above n 98, at 15.

[119] Dinwoodie and Dreyfuss, above n 98, at 17.

ii) The WIPO's strengths and weaknesses

The WIPO has been criticized in the past for failing to achieve a balance between rights and obligations under its administered treaties.[120] Thus, recent developments have been more successful in meeting this challenge as WIPO agreed that as part of its mission, it would consider the impact of intellectual property protection on the developing world.[121] It recently renewed its commitment to a "Development Agenda", and has even discussed questions arising out of the overprotection in the developed countries.[122] Commentators have argued that the WIPO's institutional structure which requires members to enter into IP agreements without the possibility of side-payments in the form of concessions on unrelated matters – like in the WTO – has always forced it to strike a balance between access and proprietary interests.[123]

This is exemplified by the pro-balance language which found reflection in the WCT Preamble.[124] This trend has been reflected also in a set of authoritative Agreed Statements on the WIPO Internet Treaties, explicitly acknowledging limitations on the proprietary rights of copyright owners. These Statements recognize that States could exercise the necessary discretion to create additional limitations and exceptions at the domestic level, in order to maintain an appropriate balance between the interests of owners and users. It has been claimed that the interpretation of the TRIPS in the light of this policy shift at the WIPO 'may establish an evolving international norm of access that should surely, even if slowly, permeate the approach of TRIPS dispute panels with respect to how IP norms should be governed in a multilateral setting'.[125]

As the above analyses on the WCT negotiation illustrate, WIPO has also a decision-making structure which allows more sensitivity approach towards diverse negotiation input (including from non-governmental actors) than the WTO, coupled by greater flexibility in voting. Hybrid state-non-state partnerships have put forth substantive proposals and procedures within WIPO. This is quite unique for WIPO if we compare this model to other international regimes, like environment or human rights, where NGOs may be viewed as critics or adversaries.[126] At

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120 To exemplify, in one of its 1988 preparatory documents of the WCT, WIPO was stressing that: "The objective [of the proposals for the setting of norms in the field of intellectual property law] is to make the protection of intellectual property rights more effective throughout the world. "More effective" means that the norms and standards of protection are raised, where necessary, to the required level, and that enforcement of intellectual property rights will be easier and the sanctions for infringement stricter. This objective may be achieved by creating new treaty obligations or by persuasion." *See* MIHALY FICSOR, The Law of Copyright and the Internet 11 (2002).

121 D J Halbert, *The World Intellectual Property Organization: Past, Present and Future*, 54 J. COPYRIGHT SOC'Y U.S.A. 253, 263 (2007).

122 See generally Neil Weinstock Netanel (ed), The Development Agenda: Global Intellectual Property and Developing Countries, Oxford Univ. Press 2009). *See also* World Intell. Prop. Org. [WIPO], *Provisional Committee on Proposals Related to a WIPO Development Agenda, Fourth Session* (June 11, 2007), *available at* http://www.wipo.int/ip-development/en/agenda/pcda/pcda07_session4.html.

123 *See, e.g.,* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

124 See above section III.B.

125 Okediji, above n 103, at 46.

126 See Hari M. Osofsky, Climate Change Litigation as Pluralist Legal Dialogue?, 26 STAN. ENVTL. L.J. 181, 184 & 43 STAN. J. INT'L L. 181, 184 (2007).

WIPO, NGOs have worked effectively with developing countries and industry associations to advance specific norms and proposals.[127] This is well-epitomized not only by the evolvement of treaty law but also by the soft law developments, which flow from a re-structured norm development process purporting at enabling WIPO to respond expeditiously to the new regulatory issues.[128] The WIPO furthermore has engaged in examining how flexible its instruments are by cataloguing national approaches to limitations and exceptions in various fields of IP.[129] Thus, as noted by Dinwoodie and Dreyfuss, "the organization, along with the agreements it administers, bring to table an intellectual property sensibility that is currently lacking in the WTO".[130]

Finally, it has been claimed that the WIPO's practice of appointing informal groups of experts to consider disputes under the treaties it administers provides, at least in theory, a mechanism for finding best rules.[131] Thus, this institution emerges as a good example of an organization possessing superior legitimacy to that of the WTO on a specific subject matter, considering in particular the claimed insufficiency of expertise at the WTO in this field. The WIPO may also keep its norm-setting relevance due to the exemption of the new treaties from the 'most favoured nation' obligation set out in the TRIPS. This will supposedly encourage participation in the WIPO of the parties to the WTO Agreements.[132]Against this background, the importance of the cooperation between the WIPO and the WTO is indisputable.[133]

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[127] Peter Yu, Access to Medicines, BRICS Alliances, and Collective Action, 34 AM. J.L. &MED. 345, 346 (2008); European Patent Office, SCENARIOS FOR THE FUTURE (2007), available at http://www.epo.org/topics/patent-system/scenarios-for-the-future/detailed.html.

[128] See Graeme B. Dinwoodie, The International Intellectual Property System: Treaties, Norms, National Courts and Private Ordering, in Intellectual Property, Trade And Development: Normative And Institutional Aspects 61 (Gervais ed., Oxford Univ. Press 2007) at 80-84. This regulatory phenomenon, which comprises informal or non-public law making including private ordering, standard-setting, soft law and/or normative practices not sanctioned by law, have been characterized as multi-stakeholder governance, supplementing top-down models of global regulation. See Errol Meidinger, Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems, LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 121 (Christian Brütsch and Dirk Lehmkuhl, eds (2007), Buffalo Legal Stud. Res.Paper No. 2006-019 (July 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917952.

[129] See WIPO Standing Comm. on Copyright and Related Rights, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, at 14, SCCR/9/7 (Apr. 5, 2003) (prepared by Sam Ricketson); WIPO Standing Committee on the Law of Patents, 13th Session, March 23 to 27, 2009), SCP/13/3 (February 4, 2009), available at http://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_3.pdf

[130] Dinwoodie and Dreyfuss, above 98, at 6.

[131] Dreyfuss and Lowenfeld, above n 133, at 293. But see Petersmann, Ernst-Ulrich, 'Constitutionalism and International Organizations', 17 Northwestern Journal of International Law & Business 398 (1997), at 467, noting that 'the substantive standards, dispute settlement and enforcement mechanisms of the World Intellectual Property Organization have been criticized as inadequate by many countries. The proposals, made by the WIPO Secretariat after the conclusion of the Uruguay Round Agreements, to supplement the WTO dispute settlement system by a WIPO "Treaty on the Settlement of Disputes between States in the Field of Intellectual Property" have so far been opposed, notably by the United States'.

[132] Alvarez and Leebron, above n 104, in fn 47.

[133] See Dreyfuss, Rochelle C. and Lowenfeld, Andreas F., 'Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together', 37 Virginia Journal of International Law 275 (1997), at 293, drawing on that the WIPO resonates well with the negotiating history of the TRIPS Agreement: the Uruguay Round would not have produced the TRIPS had the administrators of the WIPO not participated in the identification of generally-accepted international norms.

However, the nature of the lawmaking relationship between the two organizations has yet to be fully elucidated. It is not clear for example whether or how the WTO should be taking account of WIPO's views on the incorporated treaties, nor whether new developments at WIPO should affect WTO obligations. We argue in favour of substantive reliance of the WTO adjudicator on WIPO's normative developments and expertise in the interpretation of the TRIPS obligations. This would not only satisfy the proposition of more institutional sensitivity at the WTO needed for its own legitimacy,[134] but we would go as far as to argue that the WTO can not sustain a claim of legitimate interpretation of IP global norms without such deference. This would require pondering the WTO adjudicator's interpretative approach in order for it to reflect the fluidity of the current IP regime. How to implement this is a far trickier question since, for example, the VCLT rules of interpretation do not provide guidance on how the incorporated treaty law has to be dealt with.

The above proposition may however be challenged given the rule-setting process at the WIPO is not coupled by a judicial mechanism, which would try to fill in the gaps through an effective judicial interpretation process. Efforts to this effect aborted in the 1980s. As illustrated above, some have challenged the claimed victory of the Internet Treaty with the inclusion of explicit treaty language on balancing of interests between holders and users. Language may be vague and subscribing States may not indeed know to what extend these flexibilities are about and in what precise legal form they may be reflected in national legislation. This situation reminds us the post-TRIPS conditions which lead to the approval of the Doha Declaration of TRIPS and Public Health.[135]

Thus the major WIPO's weakness is it not being equipped with a judicial mechanism which would fill in gaps. In fact, it has been acknowledged this organization does not have a well-functioning authoritative interpretation mechanism.[136] The treaty language is frequently purposely left vague so as to make agreement possible. If this WIPO treaty-making strategy may not pose particular problems in forums supported by a well-functioning judicial system, like the one the WTO, the triumphant treaty provisions which enunciate balance between holders and users may turn the victory into a lost battle for those who counted on such outcome. This is where the strengths of the WTO with its robust dispute settlement system come in to compensate this deficiency. As suggested above, the solution would lie in a proper interface and sensibility of the WTO judicial bodies towards both the old treaties and the new legal developments at the WIPO.

iii) The consideration of WIPO's IP law developments

Note should be taken that footnote 2 to the TRIPS Agreement states that references to the intellectual property conventions are to specific versions of those conventions; this does not mean however that these norms stopped their

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[134] See Foltea M, above n 45, at 43 et seq.

[135] Although some authors note that the Doha Agreement took several years to negotiate and that its efficacy is yet to be demonstrated. See Frederick M. Abbott and Jerome H. Reichman, European Parliament committee on international trade, access to essential medicines: lessons learned since the Doha Declaration on the TRIPS Agreement and Public Health, and policy options for the European Union 13 (2007)

[136] See Foltea M. above n 45, at 157, providing a comprehensive account on the issue. See also William R. Cornish, *Genevan Bootstraps*, 19 EUR. INTELL. PROP. REV. 336 (1997), at 336.

evolution in the WIPO. One of the WIPO's objectives is to ensure administrative cooperation among the Unions which formed around specific treaties. Accordingly, its functions include performing 'the administrative tasks of the Paris Union, the Special Unions established in relation to that Union, and the Berne Union.'[137] We suggest that with respect to these treaties the WIPO remains an important source of *State practice* as provided by VCLT Article 31.3.b which would have to be taken into consideration by the WTO adjudicator.

But the development of new law bears the greatest weight in the interpretation of the TRIPS Agreement.[138] Some WTO case law has already touched upon the issue. In US-Section 110 (5) the Panel noted that "the wording of the WCT, and in particular of the Agreed Statements thereto, nonetheless supports, as far as Berne Convention is concerned, the Berne Union members are permitted to provide minor exception to the rights provided under Articles 11 and 11bis..."[139]. Following this line of argumentation, the Panel considered WCT as relevant to seek contextual guidance in the WCT, as a treaty which was unanimously concluded at a diplomatic conference attended by 127 countries.[140] This is the right approach in trying to cope with the challenges posed by the new technological developments and the required normative adaptation.[141] Thus, the consideration of non-incorporated treaties would be possible under the VCLT Article 31.3.b *subsequent practice*, given the emergence of this law in the post-TRIPs era (or as context, as illustrated by the US-Section 110 (5)). This would also entail soft-law actions evolving from regimes in which IP issues bear relevance to organizational mandates.[142]

One important point is that the WTOs panels' approach which places TRIPS in its historical perspective, taking into account post-TRIPS developments either as subsequent practice or context, will not be enough in and of itself. The future WTO interpretative endeavors would have to address a number of other important issues.[143] First, the objective of preservation of the balance between the rights and obligations cannot be achieved solely by a mechanical transposition of the pre-existing IP treaties into the WTO context. This exercise would have to take into account the TRIPs own guidance, apart from its exception tests, which are the principles and objectives of the TRIPS

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[137] See WIPO Convention, Article 4.

[138] Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441 (1997), at 471-72

[139] *US-110(5)*, Panel para 6.69.

[140] Ibid, para 6.70.

[141] Elsewhere is has been suggested that one option of reflecting these new norms was by amending the TRIPS Agreement through either the ordinary or *expedited* amendment procedure. The most difficult question with respect to this latter option, which requires a consensus vote of the TRIPS Council, is whether all Members of the WTO will accept a multilateral agreement negotiated under WIPO auspices. It would be unusual that all WTO Members will be parties to a WIPO agreement and they may not maintain the same perspective on desirable rules in each forum. Thus, additional treaties or protocols may be adopted in WIPO that are not contemporaneously approved or adopted in the WTO. These developments may lead to situations in which states may be in compliance with the TRIPS and in derogation of rule of WIPO-administered treaties, and vice-versa. See Abbott, Frederick, Cottier, Thomas, Gurry, Francis, *International Intellectual Property System*, Commentary and Materials (Kluwer Law International, 1999), at 362.

[142] An example can be found in the field of traditional knowledge and traditional cultural expressions where the WIPO developed the so-called 'draft provisions'.

[143] For an account see Dinwoodie and Dreyfuss, above n 98, at 25-26.

Agreement as stated in Articles 7 and 8.[144] The claim of superiority of the multilateral IP regulation over the bilateral and plurilateral ones would be feeble without a consistent attribution of a purposive gloss to such an interpretative exercise.[145]

Second, the WTO panels should endeavor to open to a larger variety of sources which would complete the development of the IP norms.[146] The VCLT rules of interpretation provides a number of methods which can by tried out in this context.[147] This allows space for the consideration of the *State practice* under VCLT 31.3 (b). This flexibility of the panels would ensure that the context of how international norms operate locally was fully taken into account. For example, the widespread adoption of rules like Germany's on the scope of gene patents might be interpreted as a response to upstream patenting rather than as an infringement of non-discrimination TRIPS clauses.

The consideration of *subsequent WIPO material* under Article 31.3.a offers ample space to the WTO adjudicator to reconcile the TRIPS with the current changes in the innovation landscape. Here a difference should be made however between the subsequent treaty law and other legal developments in the form of e.g. WIPO's Reports of Standing Committees, Model Laws or the advice provided by the WIPO's staff. The exploration of the consent required by this subsequent practice would have to be duly taken into account in order to assess the level of WTO judicial deference towards these instruments. Moreover, one would have to distinguish between post-TRIPs rules which deal with TRIPS subject matter and the new rights in new kind of subject matter, like databases, folklore, genetic endowment, traditional knowledge – or agreements which mandate a level of protection below the one of TRIPS (such as potential findings of the WIPO Development Agenda).[148] Finally, ideas have been expressed to continue to ask WIPO's advice in the WTO dispute settlement, but expanding its role beyond the provision of mere "factual information" on the pre-TRIPS practices. This would include the WIPO's Secretariat expert opinions on implementation options and how to handle new issues. Thus, while a square transposition of antecedent IP treaties into the TRIPS may mean higher deference to this organization (but not necessarily a valid interpretative outcome), the consideration of post-TRIPS material is a feature which should consistently characterize the interpretation of any future WTO intellectual property dispute.[149]

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[144] See above Section III.A.

[145] See e.g. the *Canada-Pharmaceuticals* Panel which has been criticized for having essentially written of such considerations, rejecting the claim that they should be used to determine whether Canada's policies on behalf of generic competition fall within the patents exception provision. While the Panel agreed that the sentiments expressed in the Objectives and Principles had to be "borne in mind," it also warned against using these provisions to alter the deal struck in the Uruguay Round. See *Canada-Pharmaceuticals*, *supra* note 38, para 7.26; *see also* Appellate Body Report, *India – Patent Protection for Pharmaceutical And Agricultural Chemical Products*, WT/DS50/AB/R (Dec 19, 1997).

[146] Dinwoodie and Dreyfuss, above n 98, at 27.

[147] For a comprehensive account on how various VCLT interpretation rules can be used to enhance its sensitivity vis-à-vis other IOs see Foltea M., above n 45, at 101 et seq.

[148] Dinwoodie and Dreyfuss, above n 98, at 29.

[149] See Foltea M., above n 45, at 221.

C. *Implication for inter-agency collaboration and beyond*

Aside from TRIPS, the WTO framework comprises many other agreements that rely explicitly on the expertise of non-WTO organizations by referencing standards enunciated by international bodies with relevant expertise,[150] mandating consultations with various actors and IOs (DSU Article 13), or establishing joint oversight in areas where there are potential conflicts.[151] Although this sub-section focuses on the WTO-WIPO interface, this analysis have broader application for developing a paradigm which allows productive input from all the international institutions that have interests in intellectual property norm development.[152]

One essential point here is that whatever the form of the IP rules/expertise residing outside the WTO, the sensitivity of the WTO adjudicator thereto would largely depend on the decision-making behind the specific material, coupled with the reputation and credibility of the relevant IOs.[153] This would take account of the extent to which state delegations participate to the decision-making, the voting procedures, the transparency and civil society participation in this process. A recent study which examined the UPOV's functioning has recommended addressing "some issues such as insufficient participation of observers, lack of accessible information about the system and activities, and the lack of transparency."[154] These types of concerns are not new and they have permeated the agenda of various WTO committees, in particular those managing agreements which refer to the standards of other IOs, like the Codex Alimentarius, IOE, IPPC.[155] These concerns are valid also for the IP global governance and the institutions involved in this process. The strength and legitimacy of the multilateral rule-setting is entangled in these elements and therefore the institutions which do not operate on transparent basis with the possibility of inclusion of a wide range of stakeholders would have to streamline their activities accordingly.

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[150] E.g the SPS three-sisters organisations. For a comprehensive account of all of these linkages see Tarullo, Daniel K., 'The Relationship of WTO Obligations to Other International Arrangements', in Bronckers, Marco and Quick, Reinhard (eds), *New Directions in International Law: Essays in Honour of John H. Jackson* (The Hague; London; Boston: Kluwer Law International, 2000) 155-73.

[151] See the Ministerial Decision on Trade and Environment, Apr. 15, 1994, 33 I.L.M. 1125 (1994), which is part of the 1994 Final Act.

[152] See above section Section II which references the plethora of relevant IOs.

[153] See Foltea M, above n 45, at 131-132.

[154] "Another concern is the lack of assessment of potential consequences on national policy objectives in key areas when countries become UPOV members. These consequences include economic development, food security and biological diversity". See Catherine Saez, Study: Change Needed At Plant Varieties Agency; WTO Talks Food Standards (8 April, 2010) at http://www.ip-watch.org/weblog/2011/04/08/study-change-needed-at-plant-varieties-agency-wto-talks-food-standards/?utm_source=weekly&utm_medium=email&utm_campaign=alerts

[155] See e.g. Stewart, Terence P. and Johanson, David S., 'The SPS Agreement of the World Trade Organization and International Organization: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and International Office of Epizootics', 26 Syracuse Journal of International Law and Commerce 27 (1998).

V. Conclusions

The declination of IPR structure pairings in multilateral, bilateral and plurilateral fora allow drawing the conclusion that fora of negotiations truly matter in terms of achieving an appropriate balance of rights and obligations. The relationship of multilateral and preferential trade rules emerges as a key issue of horizontal multilevel governance. It entails both the relationship among different international organizations, and of bilateral and preferential agreements, seeking greater coherence among these instruments.

The WTO TRIPs Agreement emerged from a lack of responsiveness of developing countries to further develop IPRs within the Paris and Berne Conventions within the WIPO. It formed part of a package deal and brought about substantially enhanced levels of minimal protection on a global scale. A careful analysis of the agreement and of WTO jurisprudence shows that the multilateral negotiating process brought about a reasonably balanced result of rights and obligations. The involvement of all pertinent interests in the negotiating process, both industrialised and developing countries, operating under consensus and within a package deal in hindsight produced a farsighted result. The incorporation of the Paris and the Bern conventions produced a comprehensive multilateral regime. The price to pay for a package deal, at the same time, has been that reform and further developments have been difficult. Improving access to essential drugs and the reform of Article 31 TRIPs has been the only albeit major development within the TRIPs Agreement since 1995. In WIPO, it is interesting to observe an inverse trend: while the organisation was largely blocked prior to the TRIPs negotiations, it benefited from the advent of the new IP disciplines in the WTO. The process of negotiations became more inclusive and was opened to civil society beyond a process mainly controlled by governments and strongly influenced by professional organizations. WIPO shows a host of interesting initiatives in treaty making during the last 15 years which further develop intellectual property protection in a globalised economy in a properly balanced manner. These efforts, however, are overshadowed by a persistent perception of developing countries that the overall regime has remained and that additional instruments developed in WIPO run to risk of eventually being incorporated into WTO law. We conclude that these concerns are ill founded. Instead, incremental progress in treaty law developed in WIPO should be eventually adopted in WTO law and should be taken into account in interpreting rights and obligations of the TRIPS Agreement in WTO jurisprudence. The process of negotations in WIPO today may also serve as model of reform for the WTO: intellectual property protection as a regulatory matter is more suitable for an ongoing legislative process once foundations had been created in the broad package deal of the Uruguay Round. Impending challenges, in particular the problem of graduation and ceilings of obligations can be dealt with more successfully in such an ongoing process.

The perception of imbalance of rights and obligations and stalemates in multilateral fora in return triggered a relocation of treaty making to preferential trade agreements. The advent of enhanced standards, mainly applied to developing countries, in such agreements forms part of the broader exodus to preferential trade given the difficulties in the Doha Development Agenda during the last decade. Partly, amendments to the TRIPS obligations are completing the multilateral rules, rendering them more operational, such as defining the periods of exclusivity of test data in the context of Article 39 TRIPs. To a large extent, however, preferential norms tend to upset a careful balanced achieved in the multilateral system. Intellectual property norms in preferential trade agreements are generally subject to broader interests of removing trade barriers

with a major partner and enhancing market access. Such norms, pressed for by interested industries, simply need to be taken into account. Developing countries therefore end up with a less balanced set of rights and obligations which, moreover, they practically need to apply on an MFN basis. Refusal to negotiate in multilateral fora making progress also explains the advent of ACTA which will serve as a basis of imposing unilateral disciplines by industrialised countries on imports from developing countries. The process itself is imbalanced as countries concerned and affected are not at the negotiating table. Again, the balance of rights and obligations risk further deterioration.

In conclusion, the balance of rights and obligations in the field of intellectual property can best be achieved and developed by work in multilateral fora. Both the WTO and WIPO offer appropriate foundations and should be clearly preferred to bilateral and plurilateral avenues. Efforts to seek agreement should primarily be sought within these fora. Refusal to engage and to show constructive flexibility merely result in pressures elsewhere. Today's world and its economic structure depend upon a workable and reliable system of intellectual property protection. It is simply a matter of how it can best be achieved in global and multilayered governance.

The interaction of WTO and WIPO as a matter of horizontal multilateral governance calls for further work. Much depends on the future of negotiating processes in the WTO, whether or not reforms will lead to a more ongoing norm-making, legislative process beyond administration of agreements and dispute settlement. Under the past and current philosophy of trade rounds, it will be bound to address basic issues in an almost generational sequence, such as the introduction of patents for pharmaceuticals in the Uruguay Round, or the disciplines on enforcing IPRs. Major political decisions may be taken a decade or so, with inertia reigning in the mean-time. It is bound to remain static and not sufficiently responsive. The main contribution and focus is on judicial dispute settlement which also includes the Berne and Paris Convention administrated by WIPO. Work, in the mean-time, essentially needs taking place in the more open processes of WIPO. Structural reform of the WTO may lead to a more dynamic and responsive approach in rule-making. Global governance and its regulatory challenges, of which IP is an key one, call for ongoing processes of legislation and what was a called a two-tier approach to decision-making.[156] To the extent that the WTO develops a more ongoing legislative process in the field, new forms of interaction and cooperation may emerged, perhaps even resulting in merging the two institutions, or coordinating them, under the umbrella of a future World Economic Organization.

[156] Thomas Cottier, A Two-Tier Approach to WTO Decision-Making, in: Debra P. Steger (ed.), Redesigning the World Trade Organization for the Twenty-First Century, Wilfried Laurier University Press Ottawa 43-66 (2010), Manfred Elsig, Can We Get a Little Help from the Secretariat and the Critical Mass? id. at 67-90.