



Working Paper

Forum Shopping in the Global Intellectual Property Rights Regime

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Editorial Note:

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Abstract

The regulation of intellectual property rights (IPR) takes place in a range of international forums, ranging from the World Intellectual Property Organisation (WIPO), the World Trade Organisation (WTO), the Food and Agricultural Organization (FAO), the World Health Organization (WHO), to the Union for the Protection of New Varieties of Plants (UPOV). This proliferation of international forums within which state representatives and constituents can pursue their interests has greatly enhanced the potential for forum shopping. In this paper, we explore three reasons for forum shopping: diverging actor preferences, government agency specialisation, and differing degrees of judicialization.

We devote particular attention to this last reason, as we hypothesise that judicialization – the presence of binding third party adjudication and the threat of sanctions –, is a form of institutionalisation that increases the likelihood for issue linkage within a particular forum. Actors who prefer weak IPR standards (mostly IP importing countries) strive for forums with low degrees of judicialization, whereas IP exporting countries prefer relatively highly judicialized forums. However, actors may simultaneously seek lower standards in one area of IPRs (e.g. the use of traditional medicine) and higher ones in another area (e.g. patent protection on pharmaceuticals). We explore our theoretical expectations in three substantive sub-fields of global intellectual property regulation: the regulation of plant genetic resources, IPR for medicines, and the form of protection for traditional knowledge.

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1. Introduction

The regulatory framework governing the global intellectual property rights regime is spread across a host of international forums. Not only the World Intellectual Property Organization (WIPO) – a UN specialized agency - holds sway over this area of global regulation, also the World Trade Organization (WTO), the United Nations Food and Agricultural Organization (FAO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention on Biodiversity (CBD), and the International Union for the Protection of New Varieties of Plants (UPOV) are occupied with this peculiar issue area. Moreover, regional and bilateral trade agreements frequently include elements related to the protection of intellectual property rights (IPR). The different regulatory frameworks have not been set up in isolation from each other but are interrelated – which includes the possibility that parts of these regulatory frameworks contradict each other. Why is the issue of IPR protection dispersed over so many specialized international forums and agencies? And why has this institutional proliferation even increased in recent years? Surely, one of the reasons why the issue has received more attention, also in forums that at first sight do not have the competence and expertise to deal with the issue, is the fact that technological changes in a wide range of economic areas have stimulated international trade in technology as a commodity (Matthews 2002: pp. 12). More interestingly though, the adoption of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) in 1994 and its incorporation into the institutional setting of the World Trade Organization (WTO) meant that industrialized countries were able to secure their “first mover advantages” (Keohane 2002: 253) in technological fields such as the pharmaceuticals, biotechnology or information technology. As we will explain in more detail, the TRIPs agreement has given pre-existing rules set forth for example by WIPO a higher degree of enforceability and has in addition sparked new IPR regulation in forums other than the WTO and/or its TRIPs Council. The enforceability of international regulations has, as we argue, a decisive impact on the extent to which states apply forum shopping strategies to achieve their regulatory goals.

One commonly heard explanation why states use forum shopping strategies is that the WTO is characterised by deadlock in the current negotiations of the Doha Development Agenda (DDA), which has been ailing for years on end now. Despite the fact that some member states did not want to extend the agenda in order to come to a package of mutually acceptable proposals¹, member states as well as their constituents have engaged in extensive negotiations on IPR both before the conclusion of the Uruguay Round in 1994 as well as during the first 15 years of the WTO. We, however, do not primarily locate the motive for forum shopping in a ‘joint-decision trap’ (Scharpf 1988) of the WTO itself, but rather in the fact that the relevant actors – i.e. mainly states and interest groups on whose behalf they negotiate – consider the enforceability of potential rules as an important element of international negotiations. In this paper we will discuss and validate this hypothesis using the example of the global IPR

¹ Foremost, several pivotal WTO members have refused to put other issues on the negotiating agenda, while sticking to US agricultural entitlement programmes or Indian special safeguard margins for food stuffs.

regime to examine whether forum shopping in this issue area is determined by the enforceability of regulations.

The concept of forum shopping as such has proven a useful tool for policy analysis both on the national and on the international level. Actors engage in forum shopping when the possibility for moving around different access points exists and when the new location is preferred over other ones for achieving specific policy objectives (Baumgartner and Jones 1993: 34-36). Forum or venue shopping can occur either between the same levels of government ('horizontal venue shopping'), across different levels of government ('vertical venue shopping'), or both (Princen and Kerremans 2008: 1137). Looking at the global IPR regime since the 1980s, one observes forum shopping strategies occurring horizontally between different international regimes. This is in line with the concept of state actors operating in an anarchical setting, where a clear hierarchy of norms is lacking. Conceptualized this way, forum shopping is intricately linked with a legalistic reading of sovereignty. The institutional location of a particular regulatory standard does matter however, in that it attributes more or less influence to particular actors to achieve their regulatory goals. In the global IPR regime, countries have shifted between forums with restricted as well as inclusive membership. A more restricted membership of an institution might for instance alleviate the effects arising out of heterogeneous memberships as well as preferences of the actors involved. Institutions differ furthermore in their issue scope and depth of integration. Regarding the latter, industrialized countries for instance negotiated bi-lateral and regional trade agreements with developing countries and included in these agreements provisions that prescribe higher standards on the protection of IPR than provided for in the TRIPs agreement (the so-called 'TRIPs Plus' clauses). Here, industrialized countries were able to raise the level of IP protection considerably as compared to what would otherwise be expected from developing countries under agreements adopted within the WTO or the WIPO. The scope of issues covered by agreements includes the degree to which existing institutions are according to their mandate receivable to new regulatory issues. Developing countries have for instance so far in vein intended to place the issue of traditional knowledge and 'bio-piracy' on the agenda of the WTO and therefore had to locate the discussions on the issue in intergovernmental committees at the FAO or WIPO. These brief examples reflect the extent the design of an institution influences the attractiveness for actors' preferences to forum shop.² So far, the 'rational design' literature has only insufficiently dealt with the effect of the existence of multiple institutions and the motivations of actors to apply forum shopping strategies (Duffield 2003: 418).

Prerequisite for forum shopping is a need for negotiations on a given policy issue. Actors involved in negotiations are in a situation of diverged interdependence: even though they share a common interest, they cannot agree on which course of action to take; "without common interest, there is nothing to negotiate for, without conflict, nothing to negotiate about" (Iklé 1964: 2). Negotiation in turn have been defined as "a process of mutual persuasion and adjustment which aims at combining non-identical actor preferences into a single joint-decision" (Rittberger 1983: 170). However, in the context of multi-

² See (Koremenos, Lipson et al. 2001) for more on the design of institutions in general.

ple institutions and overlapping regulatory competences, it becomes difficult to reach such joint-decisions given that forums might differ in their decision-making rules and thus could allow for coalition-building *across* different institutions. When actors are dissatisfied with the outcomes of negotiations in one forum, they can simply shift the venue and seek to achieve their policy preferences in a different one. Thus, negotiations within and across multiple institutional locations may inhibit the ability of actors to reach an overall consistent regulatory outcome. Where – at least in theory - several institutions have the competence to deal with a given policy issue, negotiating over where to locate the negotiations in the first place, may become part of the negotiation process itself.

Forum shopping takes place at different stages of the policy process, which in international politics are the equivalent to the subsequent phases of negotiations: first the agenda-setting phase, then the bargaining phase, followed by the decision-making phase, and finally the implementation phase. Some authors refer to forum shopping in international law exclusively in this last sense. During implementation, actors can strategically decide at which quasi-judicial institution to bring a particular case or complaint about insufficient or incorrect national implementation of international norms (Jönsson and Tallberg 1998; Busch 2007).³ For the purposes of this article we are interested in forum shopping in the three first stages of the policy process, i.e. those in which actors actually set new regulatory standards. However, even if an agreement is struck and the implementation of the accord is underway, in many cases this means that the negotiation game starts again. The main reasons for this lies in the existence of contractual gaps, meaning that specific issues have been left out of the agreement to be dealt with at a later stage or certain provisions of an agreement are subject to a review. Alternatively, certain (groups of) actors might be unsatisfied with the negotiated outcomes and seek to renegotiate the terms of the agreement. In more general terms, it is not unlikely that a certain regulatory outcome in one venue – perceived as unfavourable by some - triggers a new regulatory initiative in the agenda-setting phase of negotiations in another, meaning that the negotiation phases across regimes are intertwined and overlap. Negotiations typically take place under the shadow of future negotiations– in this sense post-negotiation is pre-negotiation.

In the following parts we explore reasons why in the global IPR regime actors shop around various international forums in search for their best IP protection levels. We differentiate between diverging actors' preferences, divergence of capabilities and power, government agency specialization, and different degrees of judicialization as possible explanations. Regarding the last explanation, we will in particular explore the different dimensions of judicialization and how they increase the enforcement of international rules and regulations. It follows a brief introduction to the global IPR regime and its institutional setting. We then look more deeply into three specific issue areas of the international IPR pro-

³ An example for this type of forum shopping for more favourable venues for international litigation is the dispute between the US and Canada over the alleged subsidization of Canadian softwood lumber dating back to 1982. In this specific case a series of judgements of different international adjudication bodies were issued to the effect that the defeated party moved on to another venue to reach a more favourable judgement; since 2006 the US and Canada have agreed that the only competent dispute settlement mechanism is the London Court of International Arbitration, after before both the WTO as well as NAFTA adjudication procedures had been used, see (Hoberg and Howe 2000; Anderson 2006; Gagne and Roch 2008).

tection: genetic resources and biological diversity, public health, and traditional knowledge. We close by reflecting on the broader implications of forum shopping for the legitimacy of the global IPR regime in particular and international trade regime more generally.

2. Reasons for forum shopping

Four different explanations for forum shopping come to mind: diverging actor preferences, divergence of capabilities and power, government agency specialization, and differing degrees of judicialization. Logically prior to any form of forum shopping occurring is the existence of multiple institutions with a similar issue scope. The institutions may be either overlapping and/ or nested but out of the set of institutions none is focal (Jupille and Snidal 2006). This international regime complexity increasingly permits actors to apply forum shopping strategies by altering their preferred forum or venue for achieving specific policy objectives (Alter and Meunier 2009). However, actors in addition have the possibility to not only use (or alter) existing regimes but to create new institutions as well (Aggarwal 1998). Even though it requires large transaction costs, actors might find it appropriate to set up a new institution if the existing institutions fail to adequately deliver the (public) good they were once created for. Due to the various costs and the uncertainty involved in establishing new institutions, such decisions are however extremely rare (Jupille and Snidal 2006). In the following section we will now turn to diverging actor preferences and distributional outcomes as one explanation for forum shopping.

2.1. Diverging actor preferences

First and quite obviously, forum shopping takes place because state and private actors hold diverging preferences over specific (regulatory) policies. Actors consequentially choose the forum where they expect to achieve their regulatory goals best. Diverging actors' preferences are linked to actual or perceived distributional outcomes of a particular regulatory initiative. In the global IPR regime one dividing conflict line runs between those that prefer strong property rights protection of particular items, and those that prefer weaker and less exclusive rights. Against popular opinion and in contrast to some decades ago, the fault line within the global IPR regime no longer runs straight between industrialized and developing countries but its borders have increasingly become blurred. Whereas formerly the US, the EU and other OECD countries advocated high IP standards for plant genetic resources, at least since the beginning of the 1990s, also developing countries have changed their preferences: whereas previously they held the view that all plant genetic resources should be regarded as 'common heritage of mankind', they now advocated that plant varieties could – under certain circumstances - get certain property rights attached to them. Many developing countries are so-called 'mega-biodiversity' states with a seemingly endless pool of genetic resources of plants and animals. Thus, the perception of the distributional outcomes has changed on part of these countries due to the prospects of exploiting the richness in genetic resources. Much of the debate over access and benefit sharing in genetic resources and traditional knowledge reflects the changed preferences of developing countries in this regard.

This specific constellation of interests and preferences leads to two basic motivations for actors to shop around different forums: first, actors strive for policy change by shifting an issue to a more favourable institutional environment and secondly actors use forum shopping as a delaying tactic by burying an issue in a forum where decision-making is extremely hard or unlikely. With regard to the first motivation, actors try and achieve policy change by shifting a particular regulatory measure to a venue where they expect to achieve an outcome that resembles their preferences best. Developing countries for instance have adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in the UN Food and Agriculture Organisation (FAO) in 2001, rather than sign up to the International Union for the Protection of New Varieties of Plants (UPOV). Whereas the latter focuses on the protection of plant breeders' rights, the former emphasizes questions of national sovereignty over plant genetic resources and introduced the concept of 'farmers' rights'. The two agreements reflect the preferences of the actors whose backing the agreements received. They differ with regard to the scope and depth of regulation, but more importantly reveal different membership structures of the respective regimes, giving actors more or less influence in the determination of policies. UPOV for instance has since the 1960s mainly been an organization in which industrialized countries sought to protect the interests of their plant breeding industry. Despite an increase in membership to now 67 members⁴ (mainly due to bilateral agreements that make membership to one of the UPOV Conventions compulsory), UPOV is largely dominated by industrialized countries and their preferences for a so-called *sui generis* system of plant variety protection mainly benefiting the plant breeding industry in developed countries. Over time, this protection system has systematically been strengthened through the adoption of two amendments to the UPOV Convention in 1978 and 1991. Majority voting rules in UPOV facilitated this revision of earlier agreements. FAO in contrast is a specialized agency of the UN with a broad membership base, dominated by developing countries' concerns and preferences. Its decision-making procedures are based on majority voting, even though member states usually adopt new treaties by consensus. The membership and decision-making rules of the FAO are more open and receptive to developing countries' concerns and preferences, as opposed to UPOV. The afore mentioned farmers' rights principle reflects the preferences of many developing countries to strengthen the role of farmers in the protection and development of plant genetic resources in contrast to the breeders' rights focus of the UPOV instruments. Actors have brought their preferences to the forum in which these were served best – industrialized countries preferred UPOV whereas developing countries favoured the FAO both due to the design of the respective institution in terms of their decision-making rules and membership structure.

The second basic motivation that might drive negotiators – as well as the private constituents on behalf of which they negotiate – to apply forum shopping strategies is their intention to postpone or ultimately bury a particular regulatory initiative. The objective here is to prevent that a specific policy issue becomes regulated at all on the international level. Forum shopping can however also be interpreted as a way of experimenting with alternative regulatory arrangements for actors being in a

⁴ <http://www.upov.int/export/sites/upov/en/about/members/pdf/pub423.pdf> [last accessed 6 November 2009]

weaker negotiating position or that themselves are still unclear about their preferences (Helfer 2004a). Understood this way, actors strive to gradually develop 'counter regime norms' in alternative forums, and which eventually spill-over to other forums one day. However, on a more general level, actors may also intent to actively *create* a 'joint-decision trap' by shifting an issue to a forum with high a consensual decision-making procedure in order to ensure that particular undesired policy outcomes ever become binding standards. Where actors cannot prevent regulatory action on a specific policy issue, such new substantive rules might grudgingly be accepted. However, in many instances the enforcement and implementation of substantive rules is only negotiated afterwards in a next policy cycle. Thus, actors that oppose binding standards have the possibility to prevent any meaningful and effective enforcement mechanisms for the rules from being set up so that implementation is decentralized and left to the discretion of the parties.⁵

Originally, developing countries wanted the issue of traditional knowledge (TK) to be discussed in a mandatory review process of TRIPs, scheduled to take place in 2000. TK is a concept meant to denote long-standing traditions and practices of certain regional, indigenous or local communities. Even though developing countries' preferences for the exact nature of any regulation of TK were (and still are) far from clear, their preference for the WTO and its TRIPs council as the appropriate venue for decision-making was. Equally strong, however, was the preference of most industrialized countries to *not* discuss TK in the context of the WTO but to shift the issue to other venues. Because of industrialized countries' resistance to link notions of the protection of TK to IP rules on plants, animals and biological processes, the matter was conferred to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IPGRTKF). As indicated by the name of the committee, the range of issues being discussed in this forum is long, which has led it to convene in December 2009 for its fifteenth session.⁶ Much of the deliberations in the committee evolve not so much over substantive questions of the regulation of the issues covered, but rather on procedural matters of agenda-setting. Divergence among members is particularly high over the question of whether to regulate some or all of the issues addressed. The US and Japan for instance (and to a lesser extent the EU who rather takes a mid-way position in this matter) have so far delayed the negotiations (and decision-making) by pointing to the need for further analysis and by arguing that the regulation of TK should first and foremost take place on the domestic rather than the international level. Considering that new WIPO instruments are usually adopted by consensus (even though voting is possible)⁷, divergence over the nature and form of the regulatory outcome of the negotiations in the committee is likely to ensure blockage and thus prevent the adoption of any regulatory instrument.

⁵ Thus, the adoption of primary and secondary rules takes place in two different steps. First, substantive rules are adopted, whereas procedural or secondary rules on enforcement are reintroduced into the negotiation cycle of the members of the agreement later on (Hart 1961 (1994)). Hence, the degree to which procedural fairness and due process is guaranteed, has an influence on the expectations of the negotiating parties.

⁶ http://www.wipo.int/meetings/en/details.jsp?meeting_id=17585 [last accessed 6 November 2009]

⁷ See http://www.wipo.int/edocs/mdocs/mdocs/en/tlt_r_dc/tlt_r_dc_2.pdf [last accessed 6 November 2009]

2.2. Power and capabilities

Theoretically, we expect that international institutions facilitate cooperation and lead to rule-based outcomes, despite unequal distribution of power (Drezner 2009). On the other hand, even institutionalists would concede that power is not completely irrelevant for the study of institutions and regimes (Young 1980). Considering the increasingly dense web of institutions and rules to choose from, the power and capability to actually exercise this choice becomes more important. Selecting between multiple institutions, altering existing ones or even establishing new ones has to be considered to be rather the privilege of more powerful states with the necessary capacities given the various costs involved in institutional choices. Similarly, it is typically powerful states that are in a position to abandon existing forums, with the possible (but not necessary) objective to create a new institution which favours their interests better (Jupille and Snidal 2006). Abandoning institutions (or the threat thereof) in turn may affect the decisions of other less powerful actors in the sense that such a threat of a hegemonic state might 'convince' weaker states to give into demands within the existing institutional framework. Weaker states often lack the capabilities to create new institutions, a fact which leaves them more dependent on existing ones relying on powerful actors to bear the costs of an institutional arrangement – therefore weaker states might be far worse off without powerful actors involved. The threat of abandoning existing institutions in search for new institutional arrangements thus is a privilege of powerful states which might be exacerbated by rules that already work to the advantage of more powerful states. .

In addition, power and capabilities matter since they determine the ability to measure and weigh one's preferences accurately, particularly where (re-)distributional consequences are involved. Forum shopping is principally motivated by actors' aspiration to advance their interests, which requires that actors are aware of their own preferences and those of others so they can select the forum in which these preferences are accommodated best. This in turn requires that actors are acquainted with standard-setting initiatives and developments in different forums, which actors can then take into account in negotiations with others. The depth and scope of the desired regulatory policy determines which forum is the most adequate and promising for handling an issue. Preference formation regarding preferred regulatory outcomes may however include various costs, particularly if the issue at hand is a rather technical one and requires expertise, or the distributional consequences of a regulation are unclear. For example, developing countries only begun to realize the distributional consequences and costs after the TRIPs agreement had been adopted and its provisions had to be implemented. During negotiations of IPR in the Uruguay Round, for many developing countries IP protection was a less important issue rather being used as a bargaining chip in exchange for trade-offs in policy areas such as liberalization and market access in agricultural and textile trade.

Selecting a forum out of multiple existing institutions requires resources necessary to send representatives and/or delegates with adequate qualifications and expertise to follow the negotiations in different forums. However, often developing countries simply are not equipped with such resources and it happens that simply the respective Geneva representative is sent to the meetings of different venues. In contrast, industrialized countries hold considerable resources and capabilities to send qualified

delegates supported by sufficient staff from relevant ministries to such negotiations. Particularly when issues require a high level of expertise and technical knowledge, the importance of resources comes into play. In this sense, industrialized countries have a better possibility to formulate and specify policy proposals in different forums. Developing countries on the other hand increasingly rely on the support of NGOs or training seminars offered by international institutions. To conclude this section, the ability to actually select between existing institutions, to threaten to abandon forums, and to create new institutions, is closely related to the availability of power and capacities.

2.3. Government agency specialisation

International regimes and institutions are issue or 'policy field' specific, as they are often the emanation of government agency specialization. National ministries or regional agencies have a well specified scope of functional competences. Their representatives therefore also hold differing fields of expertise and qualifications, one for example being an intellectual property lawyer, the other coming from the health department, yet another from the agriculture ministry. Representatives participate in negotiations in international forums not only in their capacity as a state representative, but also as a representative of the substantive interests of the organisation's field of specialization which often converge with domestic constituents' demands. Within different institutions and regimes, they reproduce the rules, norms and procedures that guide their daily activities at home. Government agency specialisation thus has important consequences for the structure of international institutions since these are functionally differentiated and it may well be that they even have contrasting and/or contradictory priorities. Political decision-makers, on the other hand, remain in charge of adjudicating between conflicting policy objectives. Thus, the actors under investigation here are not so much *states* co-ordinating their activities, but different communities of experts, or so-called policy networks (Börzel 1998), dispersed over several policy fields that make an evaluation, which type of forum suits their preferences and interests most.⁸ This relative isolation of different government agencies on the international level implies that different forums at times find themselves in a situation of institutional competition over regulatory issues and policy fields. For instance, the adoption of the TRIPs agreement and in particular its enforcement mechanism created the necessity for WIPO to regain ground in the area of IP standard setting. The WIPO Draft Treaty on Dispute Settlement in Intellectual Property was laid to rest in 1997, after it had become apparent that competition from the WTO Dispute Settlement Body (DSB) for the enforcement WIPO and WTO rules was too large. In 2001, negotiations of WIPO's so-called Patent Agenda included discussions of a Substantive Patent Law Treaty, after negotiations of a similar agreement had failed in 1991 (Correa and Musungu 2002; Correa 2004; Reichman and Dreyfuss 2007).

More generally speaking, states (and their representatives) might urge an institution to add a specific issue or policy field to its agenda in competition to other forums. The success of such competitive ini-

tiatives again also depends on the membership structure and decision-making rules of the relevant forums, as these characteristics determine the ability of actors to capture a particular institution for their objectives (Drezner 2009). On the other hand, institutions with a certain degree of autonomy from its members, might themselves in competition to other forums intend to occupy a new emerging issue. The above mentioned efforts of WIPO to regain ground in the regulation of IP vis-à-vis the WTO are a case in point. Government agency specialization and the ability of institutions to capture a specific issue depend on the relative weight and influence the respective government departments have: typically those occupied with 'low' politics such as agriculture or environment have less influence than those dealing with 'high' politics such as security, trade and economy. This even more holds true for developing countries, where power among ministries is even more unequally distributed. Accordingly, the ability of institutions itself to autonomously capture a certain issue is shaped by the influence of its portfolio among the web of institutions and forums.

2.4. Differing degree of judicialization

The fourth reason we identify as important for forum shopping is the degree to which the enforcement mechanism of an agreement or a regime is judicialized. We consider an enforcement mechanism to be judicialized when binding third party adjudication through the imposition of sanctions exists. Our argument draws on Fearon (1998) who contends that irrespective of the substantive domain at hand, international cooperation not only involves a bargaining problem but also an enforcement problem. It follows that states bargain particularly hard if actors know that an agreement will subsequently be enforced. This might even create a situation in which states actually prefer no agreement at all, if its substance is so salient that actors fear that the terms of an unfavourable agreement would actually be enforced in future and thus reduce future gains of cooperation (Fearon 1998: 270). Actors with strong preferences for a particular regulatory agreement will want to locate the agenda-setting, the negotiations itself, the decision-making, as well as the subsequent implementation in a forum, where they a high degree of enforceability of those rules is likely. In contrast, actors opposing a particular regulatory arrangement will seek to shift the negotiation process to a forum with less judicial strength and enforceability. Negotiators thus act accordingly in the pursuit of their preferences and use strategies to shop around different forums "under the shadow of enforcement" (Zangl 2008). Whether or not the enforcement procedure of a particular regime already is in place or institutionalized is not the decisive point, but rather whether such an enforcement procedure eventually could materialize in a certain forum.

⁸ We conceptualize different forums within a particular issue area as an institutional characteristic in the meaning of (Keohane and Nye 2001) who speak about the club model of multilateral cooperation.

The literature lists a number of dimensions to the concept of judicialization or 'legalization'.⁹ These include the degree to which state and non-state actors have access to the enforcement procedure, furthermore the scope of jurisdiction of the adjudicating body, then the independence of the adjudicators from the litigating parties, next the embeddedness of the adjudicators' rulings in domestic legal systems, and finally the remedies or sanctions that are available. Based on these dimensions, we define judicialization as the degree to which norms are subject to third party adjudication and enforcement or adjudication. Highly judicialized enforcement procedures are expected to ensure that disputes over the meaning and/or application of specific obligations arising out of an agreement are not carried out through political-diplomatic ways of dispute settlement, in which asymmetries of power play a decisive role. This prevents states from exerting direct influence over the outcome of the dispute settlement process and ensures that the outcome of the dispute is rule- and not power-based. In addition, judicialized enforcement procedures exert a high degree of predictability in their outcomes by extending the "shadow of the future" through creating precedents that guide the future behaviour of actors (Keohane 1984; Axelrod and Keohane 1985). Equally, judicial procedures – instead of political-diplomatic ones - enhance the legitimacy of decisions adopted by the regime and ultimately foster the acceptability of the rules.¹⁰

Actors either choose to pursue policy change by shifting an issue into the ambit of a judicialized forum with strong enforcement powers, or else transport it to a forum without any third party adjudication, or where the enforcement procedure is still in the process of being negotiated. For instance, both the Convention on Biological Diversity (and its Cartagena Protocol) as well as the ITPGRFA of FAO do not yet possess a compliance enforcement procedure, which are still subject to ongoing discussions. Even though a wide range of proposals drawn from the experience of other multilateral agreements are on the table, it remains to be seen which form and degree of judicialization the mechanisms will actually have. Actors opposed to the enforcement of the rules intent to prevent such a mechanism to be installed, or at least try to dilute its strengths.

⁹ We use the term 'judicialization' rather than 'legalization'. Semantically, 'legalization' is the process of making legal, as in the phrase 'the legalization of soft drugs', and would therefore seem to be appropriate for the legislative process of law-making. The term 'judicial' and its derivations allow a distinction between the legislative and the judicial arm of international organizations (De Bièvre 2006). The disadvantage of the concept is that it denotes a process, rather than a state of affairs. For this reason we speak of 'degrees of judicialization', meaning some forums have no judicial enforcement mechanisms, whereas others have binding third party adjudication (De Bièvre 2004).

¹⁰ The literature further identifies three other dimensions of legalization or judicialization, which are differing degrees of obligation, precision, and delegation (Abbott, Keohane et al. 2000). Obligation refers to the legal quality of the regulation in question; it can reach from unconditional obligation to the explicit negation of the intent to be legally binding (Abbott 2000; Shelton 2000). The higher the degree of obligation, the more likely that states will comply with it, even though some international regimes exert a considerable degree of compliance pull through non-binding soft law (Romano 1999). The degree of precision refers to whether a rule is determinate or vague. The idea of the authors of the IO special issue on legalisation is that the more precise an international agreement and its provisions, the less likely it is that ambiguous norms give rise to diverging interpretations and lead to compliance problems. Conceived of in this way, different degrees of precision result from incomplete contracting. However, both an agreement that is detailed and precise can later on lead to political conflict over interpretive detail and exact implications, just like any agreement stated in general and vague terms. Finally, Abbott et al. distinguish degrees of delegation, which refer to the powers conferred to an international (quasi-)judicial body.

2.4.1. Access to enforcement procedures

The degree to which state and private actors have access to the enforcement procedure is foremost concerned with the identity of the litigating actors. Complaints typically originate from states, private actors (directly or indirectly through domestic channels) or from the adjudication body itself in the form of so-called ex-officio procedures. Within the international realm, this last possibility is rare, except in the European Union (Goote & Lefeber 2004). Allowing private parties to bring forward complaints will significantly increase the case load of which eventually can enhance the influence of the adjudication body due to its heightened visibility. Most of all however, providing private litigants with access will considerably raise the likelihood that rule violations are detected (Keohane, Moravcsik et al. 2000a: pp. 462; Zangl and Zürn 2004: 25). Through this information on actors' behaviours the functioning of the regime is advanced.

In the global IPR regime only states have access to the WTO enforcement procedure. Some WTO members, however, also allow private parties to have indirect formalized access to enforcement. In the US, private companies or interest groups can lodge USTR Section 301 complaints, and in the EU, they may do so under the EU Trade Barriers Regulation. In the WIPO, no formalized dispute settlement procedure for states exists, but private parties have access to the WIPO Arbitration and Mediation Centre (Gurry 1999). Rulings of these alternative dispute resolution procedures belong to realm of private international law and only apply for the two private parties to the dispute without creating any precedence effect for other disputes. WTO rulings in contrast are broader in that they are concerned with national IPR legislation, and possibly acquire at least some *de facto* form of precedence formation effect.¹¹ Under WIPO like in other specialized UN agencies, disputes among state parties *can* be referred to the International Court of Justice (ICJ) in Den Haag. In practice, however, no such dispute has ever been brought to the jurisdiction of the ICJ. As a result the shadow of enforcement is longer under WTO than in WIPO as its rulings apply to national legislation to which *all* private parties have to conform, whereas the current solutions offered by WIPO arbitration procedures only apply to the two private disputing parties.

2.4.2. Jurisdiction of the adjudicator

The dimension of jurisdiction concerns the question whether the adjudicating body has compulsory jurisdiction over a particular issue or if the parties to an agreement voluntarily subject to its jurisdiction (McCall Smith 2000: p. 139; Zangl and Zürn 2004: 27). Voluntary jurisdiction is given in cases where parties have the option to put in a veto in the litigation process at any stage, as was for instance the case under the GATT 1948. In contrast, parties before the WTO dispute settlement procedure do not have the possibility of obstructing a further investigation. Jurisdiction is furthermore concerned with scope, meaning the extent of the power of the adjudicating body. Where various international judicial

¹¹ From a legal perspective it is highly disputed whether the ruling of the WTO dispute settlement body actually exert a legal precedent effect (Arup 2003; Gazzini 2006). Whether such legal effect exists or not, actors will nevertheless on a practical level take judgements on a specific case into account since the dispute settlement body will most likely issue similar judgements in similar cases.

bodies claim jurisdiction over a specific issue, the effectiveness of the enforcement procedure might be harmed given the non-hierarchical setting. If such overlapping jurisdictions exist for specific issues, actors can challenge the authoritativeness of the adjudicatory body. Therefore, some international agreements include provisions that specifically address such regime collisions and which are designed to resolve conflicts between diverging obligations arising from different regimes (Fischer-Lescano and Teubner 2006).¹² Taking into account the de-fragmented and non-hierarchical character of international law, the question remains whether such 'regime collision rules' actually will be able to resolve conflicts between different regimes. After all, an overarching entity to decide authoritatively which adjudication body has the jurisdiction over a particular case does not exist – at least legally speaking.¹³

2.4.3. Independence of the adjudicator

An important aspect of judicialization concerns the relative independence of the adjudication body (Helfer and Slaughter 1997). The more independent an adjudication body is, the more a dispute over the correct implementation of a particular regulation will resemble quasi-judicial proceedings and more importantly fewer possibilities for parties to try to influence the decision of the judiciary. Adjudication bodies include as members either an independent third party or the parties to the dispute themselves, in which case independence is absent. A long tenure of the members of the adjudication body, pre-defined required qualifications and independent experts receiving no instructions or financial support from governments are elements that significantly enhance the independence of the judicial body (McCall Smith 2000: 140). A clear example of a relatively independent adjudicator is the WTO Appellate Body with its legal expert members appointed for a fixed tenure of 4 years (renewable to 8 years). Independence is a decisive characteristic of judicialization as it ensures a rule- rather than power-based judicial proceedings.

2.4.4. The ruling's embeddedness in domestic law

Judicialization is furthermore influenced by the degree to which the decision of an adjudication body is embedded in national law and thus subsequently implemented (Keohane, Moravcsik et al. 2000b: pp. 466). Decisions either take the form of a recommendation with no legal effect at all, it might be legally binding under the condition that the concerned parties agree, or it may even take direct effect in domestic law. Embeddedness is closely related to the scope of jurisdiction: adjudicators usually give authoritative rulings over a specific issue area. If, however, the scope of jurisdiction is not clearly defined, and consequently more than one judicial body produces 'authoritative' rulings, the question of

¹² In Article 22 of the CBD it is for instance stated that " the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. [...] Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea."

¹³ The notion that international law is mainly non-hierarchical and horizontal is now mainstream judicial view, whereas specifically after WWII the debate focussed on the question as to which degree one could speak of international law as law at all given its lacking hierarchy. Whether however the improved enforcement of WTO agreements has created a *de facto* hierarchy – as some see it as a first step towards constitutionalization of the international trading regime - is debated.

compatibility and hierarchy of norms and rulings arises. Regarding implementation, a ruling is weakly embedded when states have the option to implement at all, it is indirectly applicable when the implementation itself is left either in the discretion of the complainants or a third party; a third dimension depicts a situation in which the ruling has direct effect and is directly applicable. The more decisions of an adjudication body are embedded in domestic legal systems, the surer it is that rulings will actually be implemented. In international relations, the latter possibility again only exists in the EU where (some) rules acquire direct effect. All other agreements – including those of the global IPR regime – exert a medium degree of embeddedness as they leave the implementation to the discretion of member states or the disputants.

2.4.5. Remedies and sanctions

Remedies (or sanctions) provided for in a range of international agreements to ensure that the outcome or ruling of a judicial body is implemented correctly and thus complied with. The underlying consideration is that the cost-benefit structure of norm violating behaviour is altered so that norm violators cannot reap any benefits from free riding: sanctions – defined as restrictions imposed on specific areas of state behaviour – are installed both to punish offenders and to serve as a deterrent designed to encourage compliance (Downs, Rocke et al. 1996; McCall Smith 2000). Remedies take several forms: first, retaliation or punitive damages are one possible remedy to deal with instances of non-compliance; remedies, however, can also be used as compensation; finally, a last remedy is so-called membership sanctions. Remedies do not have to be merely positively punitive (in the sense of a fine) but can also consist in the (threatened) loss of privileges and benefits such as technical assistance. In the case of the global IPR regime it is comparatively the WTO DSB which exerts the highest degree of sanctioning power in order to induce compliance with the WTO agreements including TRIPs. Even though the power to sanction is carried out bi- and not multilaterally, the winning party in a dispute has the possibility to cross-retaliate.¹⁴ Concerning other international agreements in the area of IP protection so far sanctions are not foreseen.

3. The global intellectual property rights regime

That a globalized system of IP regulation developed within the institutional structure of the WTO was made possible through the use of issue linkages in the Uruguay Round: demands for higher standards of IP protection brought forward by industrialized countries were agreed upon in return for concessions in issue areas salient for developing countries (Maskus and Reichman 2004). The TRIPs agreement set forth enhanced standards on patents, copyrights, and trademarks which not only extended the scope of subject matters but also increased the terms of protection significantly above the levels pro-

¹⁴ In a case before the WTO DSB regarding agricultural subsidies Brazil asked for cross-retaliation against the US in economic sectors covered by TRIPs. Ultimately, the case was solved bi-laterally. See <http://ictsd.net/i/news/bridgesweekly/7349/>; the Brazilian retaliation list can be found at http://www.mdic.gov.br/arquivos/dwnl_1257771150.pdf [last accessed 6 November 2009]

vided for in treaties administered by the WIPO.¹⁵ It is widely acknowledged that the adoption of the TRIPs agreement as part of the global trading system emerged on the initiative of private interest groups representing multinational corporations based in industrialized countries who actively lobbied for a shift of IP protection away from WIPO towards the WTO with its comparatively strong enforcement mechanism (Matthews 2002; Sell 2003: pp. 46). From the very beginning, the TRIPs agreement has been the object of criticism and debate, reflecting the diverging interests of the actors involved. Most industrialized countries – foremost the US, Japan, but also the EU – sought to further strengthen the global IP protection regime in order to protect their leading industries in high technology sectors. Developing countries on the other hand strictly opposed such “TRIPs Plus” endeavours by pointing to already tough regulations put in place in the course of the implementation of the TRIPs agreement. Developing countries specifically argued that a further increased level of IP protection would have a negative impact on technology transfer. What further aggravated the divergence over the agreement was that certain contractual gaps had deliberately been left in the TRIPs agreement for future negotiations. The TRIPs agreement therefore included two provisions dealing with the review of specific aspects (i.e. the non-patentability of plant and animal inventions, Art 27.3 b) and the agreement as a whole (Art. 71.1). In the context of these review processes (conducted by the TRIPs council) negotiations over the future direction of the TRIPs agreements began: whereas developing countries moaned the heavy regulatory burden placed upon them by the agreement, industrialized countries considered TRIPs as the baseline of further and deeper regulation – which they eventually sought in the adoption of bilateral agreements. However, since WTO members typically negotiate institutional reforms as package deals, negotiations in the TRIPs council were blocked similar to those of the Doha Development Agenda. Considering the non-hierarchical international structure, the divergence over the level of IP protection gave states the possibility to forum shop. The expansion of the subject matters affected by the TRIPs agreement had the effect that some of these issue areas were not only located in the realm of economic and trade law but in other policy areas as well. Policy areas which previously were considered to deal with the provision of (global) public goods were now occupied with private goods as well, meaning that consumers of these goods could now be excluded from their use (Maskus and Reichman 2004). The functional overlap of issues affected by global minimum IP protection levels meant that a range of international institutions and regimes began to take up the issue. We take the position that actors negotiated in the shadow of the strong enforcement mechanism and the constraining norms of the TRIPs agreement and attempted to fill in the regulatory gaps left by the TRIPs agreement.

Until the adoption of the TRIPs agreement in 1994 the WIPO was the primary location of decision-making and standard-setting in the field of IP protection. WIPO is a relatively young organization and was established only in 1970 after its 1967 Convention came into effect. WIPO became a specialized

¹⁵ These treaties are the Berne Convention for copyright norms and the 1883 Paris Convention on patent protection. Both instruments were incorporated into the TRIPs agreement, however added with additional provisions thereby increasing the level of IP protection (UNCTAD-ICTSD 2005: 390).

agency of the UN in 1974 and today has near universal membership with 184 countries.¹⁶ WIPO's mandate includes the promotion of IP protection in the fields of industrial property on the one hand (e.g. inventions, patents, trademarks, industrial designs, and geographic indications of source) and copyrights on the other (e.g. literary and artistic works). The organization is in charge of administering the WIPO Convention as well as 24 international agreements – some of which were adopted as far back as the 1880s. The treaties fall into three groups: (1) agreements that establish basic standards for the protection of IPR on the domestic level; (2) the so-called global protection system, which ensures that international registration facilitates application procedures in countries where protection for IPR is sought, and (3) the so-called classification treaties, which create an index to organize information on inventions, trademarks, and industrial designs. Two treaties of special importance are the so-called "Unions", which include the Paris Union on industrial property protection and the Bern Union on copyright.

Members of WIPO only have to ratify its Convention and do not necessarily have to accede to any of the administered treaties. Thus, the number of signatories to each of the different treaties varies considerably, meaning that in certain meetings only a small part of all WIPO members is present and has the right to vote. Due to its status as an international 'umbrella' organization administering a range of treaties with diverging membership, decision-making thus takes place in various arenas within WIPO. Decisions are generally made by the General Assembly comprising all WIPO members and those of at least one Union. The 'Conference' on the other hand comprises all WIPO members regardless of their membership to the Unions which in addition have their own Assemblies. The Coordination Committee is the executive council of WIPO and has restricted membership. The WIPO Secretariat is also called 'International Bureau' and is located in Geneva where most of its meetings are held. WIPO is actually one of the few international organizations that have not undergone a financial crisis during the 1990s due to its unique budgetary arrangement: for the biennium 2008/2009 90 % of its budget stems from application and registration fees under WIPO's registration services, paid by private companies, most of which are chemical, agro-chemical and pharmaceutical producers as well as banks and financial services (Sell 2003: 20).¹⁷

The WIPO Convention does not contain any reference as to how disputes between state parties are settled, but the treaties administered by WIPO provide for the possibility to bring disputes before the International Court of Justice (ICJ).¹⁸ Amidst the imminent institutional competition with strengthened WTO enforcement provisions, a Draft Treaty on the Settlement of Disputes in the Field of Intellectual Property Rights was negotiated throughout the 1990s in WIPO. Its adoption, however, failed *inter alia* because of the potential competing jurisdiction with the dispute settlement procedure of the WTO where states could enforce the TRIPs agreement. As WIPO does not have a formalized dispute set-

¹⁶ <http://www.wipo.int/members/en/> [last accessed 6 November 2009]

¹⁷ http://www.wipo.int/export/sites/www/about-wipo/en/pdf/evolution_of_income_source_of_income.pdf [last accessed 6 November 2009]

¹⁸ See for instance the Berne Convention, Article 33 I

tlement procedure but only Alternative Dispute Resolution (ADR) procedures for private parties, it displays a significant lower degree of judicialization compared to the WTO.

4. Piecing things together

The institutional characteristics of a forum affect the choice of state and constituent representatives where to locate a particular type of regulatory initiative. We have seen that government agency specialization may well increase the autonomy of a specialized forum, leading to standard-setting initiatives of these forums themselves. Yet, more often than not, it is the members that their desired regulatory standards towards a forum of their choice or obstruct the realization of rules they disapprove of. Among the characteristics of a forum, we consider judicialization to be a particularly important form of institutionalization. The higher the degree of institutionalization in a given issue area, the more likely it is that actors use issue linkages an available strategy to reach agreement (Zartman 1994; Leebron 2002). Negotiators and constituents with a particular interest in a regulation coming about (or not) know that this degree of stability of the institutional environment is an important determinant for the success or failure of negotiations.

The more inclusive - that is with a high number of members - a forum and thus the more heterogeneous the represented interests are, the more difficult it is to reach an agreement, at least when the negotiation environment is characterized by a low degree of institutionalization. If heterogeneity and inclusiveness, however, go hand in hand with a high degree of institutionalization, a stable negotiation environment is created, which in turn allows negotiators to use a package deal approach as a negotiation strategy (Martin 1994). Actors link issues in order to push their preferred regulation through or to halt the ones they dislike. Issue linkages crucially derive their stability from the enforcement mechanism attached to them. In particular, strong and judicialized enforcement of future deals enables negotiators to credibly link issues. This credibility is even more enhanced when the enforcement mechanism provides for the possibility of issue linkage just as well.

In the issue area of IP protection, specialized committees or UN agencies such as WIPO, FAO, or UNESCO are characterized by rather low degrees of institutionalization. None of the institutions disposes of an enforcement mechanism which could make agreed deals more salient. All offer fewer opportunities for using strategic linkages, whereby the scope of the agreement could be expanded (Helfer 2004: 21-22). In the GATT/WTO by contrast, decisions within the TRIPs Council take place under the shadow of WTO enforcement which ultimately includes the option for cross-retaliation. This means that TRIPs obligations can be enforced by the threat of linkages with simple market access commitments. Moreover, WTO members can shift an issue to the more comprehensive environment of a multilateral trade round, where issue linkage and single-package deal making is the rule. Illustratively, the package deal of the Uruguay Round started to take hold *after* GATT members decided in April 1989 to strengthen the GATT dispute settlement procedure, a decision that took immediate ef-

fect, irrespective of further progress during the Round (Croome 2003). These theoretical expectations underpin the typology of Figure 1.

Figure 1 - Institutional environment

		Scope of agreement	
		Specialized	Comprehensive
Membership	Inclusive	<ul style="list-style-type: none"> - WIPO Standing Committee on Patent Law Substantive Patent Law Treaty (SPLT) (<i>effectively vetoed by Brazil 2005</i>) - WIPO Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC GRTKF) - WIPO Draft Treaty on Dispute Settlement in Intellectual Property (<i>failed 1997</i>) - WIPO International Convention for the Protection of New Varieties of Plants (UPOV) - FAO Commission on Genetic Resources for Food and Agriculture (GRFA) - Convention on Biological Diversity (CBD) - UNESCO Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (2005) - World Bank/Global Fund/UNAIDS 	<ul style="list-style-type: none"> - WTO TRIPS Council - WTO Doha Round
	Exclusive	<ul style="list-style-type: none"> - Anti-Counterfeiting Code (by US, EU, Japan; early Uruguay Round, led to TRIPS) - Anti-Counterfeiting Trade Agreement (ACTA; US, EU, Japan, and some other) 	<ul style="list-style-type: none"> - Regional Trade Agreements - Bilateral FTAs with TRIPS+

An illustrative example for the significance of enforcement procedures for the location of negotiations on future regulation is the case of the Anti-Counterfeiting Trade Agreement (ACTA), whose negotiation began in late 2007. A group of industrialized countries – the US, the EU, Switzerland, Japan, later joined by other countries¹⁹ – started negotiations to strengthen efforts against counterfeit and piracy

¹⁹ These are Australia, South Korea, New Zealand, Mexico, Jordan, Morocco, Singapore, UAE and Canada. Jordan, Mexico, Morocco and UAE have all signed bi-lateral trade agreements either with the US and/or the EU stipulating higher standards on IPR protection than provided for in TRIPs.

goods. According to the EU, the primary objective of the agreement would be to improve the overall enforcement of IP regulations without establishing new substantive IPR standards as such.²⁰ Regardless of the potential substance of an agreement, we should ask why the states preferred this particular forum for negotiations on a topic that evidently falls into the realm of existing international institutions such as the WIPO or the WTO. The EU itself stated in this regard that *“the approach of a free-standing agreement gives us the most flexibility to pursue this project among interested countries. We fully support the important work of the G8, WTO, and WIPO, all of which touch on IPR enforcement. The membership and priorities of those organizations simply are not the most conducive to this kind of path breaking project.”*²¹ This statement points to different but interrelated aspects of the IPR regime and its international negotiation: first, given the anarchic structure of the international system and the lack of a competent authority to ultimately decide over the hierarchy of competing norms, the mere existence of competing jurisdictions and regulations creates a situation in which possibilities for forum shopping arise. Actors are in position to pursue their interests in a range of different negotiation venues, and if they manage to build a coalition of a sufficient number of likeminded actors, they might even succeed in establishing new forums – like in the case of ACTA.

The ACTA case, secondly, shows that the *structure* of international regimes matters in terms of their membership. Actors involved in the current ACTA negotiations obviously prefer a club negotiation model in which certain actors are excluded from participating in the first place. The membership structure of a regime is important as it may influence the ability of actors to pursue their interests. We can reasonably assume that the more exclusive the membership of a regime and the more homogenous the interests of actors are, the more likely it is that an agreement will be reached in the first place. Vice versa, the more inclusive a regime is and the more heterogeneous the interests of the actors are, the more difficult it will become to come to an agreement. Where actors manage to arrive at an agreement, it most likely merely reflects the lowest common denominator, or the deal has been struck through the use of issue linkages.

A further aspect of the ACTA negotiations is that enforcement seemingly plays a prominent role in the global IPR regime. Apparently, the most powerful actors and advocates of a strong international IP protection system were unsatisfied with the current state of affairs concerning the enforcement of rules set up in various regimes. Despite a recent success of the US against China before a WTO panel regarding the enforcement of certain aspects of the TRIPs agreement²², cases before the DSB on the domestic implementation of TRIPs provisions are relatively rare – against expectations of many observers when TRIPs entered into force (Horn and Mavroidis 2006). One explanation for this hesitation of actors to make full use of the WTO enforcement procedure might lie in the repercussions of a domestic case initiated by a group of multinational pharmaceutical companies in 2001 against the South African government for allowing the production and importation of cheaper generic HIV/AIDS medication (Shadlen 2004). The case was eventually dropped after national and international civil society

²⁰ http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf [last accessed 6 November 2009]

²¹ http://trade.ec.europa.eu/doclib/docs/2007/october/tradoc_136516.pdf [last accessed 6 November 2009]

organizations had organized mass protests and public opinion had negatively turned against the multinationals. Against the background of this particular case actors became more careful to not bring politically sensitive IP cases – such as those dealing with public health issues which mainly affect developing countries – before the WTO DSB. Even though it is not clear yet what an enforcement procedure of the proposed ACTA would look like, it appears as if the participating actors see the need for a new enforcement venue. By negotiating ACTA in a club model setting the actors seeking strong IP protection will have more leverage to introduce an enforcement system that suits their interests better.

4.1. Genetic resources and biological diversity: between TRIPs, UPOV, FAO and CBD

IP protection such as granting patents plays a vital role in securing investments of private entrepreneurs in capitalist economies. Even though at first hand this seems to present an obstacle to the free flow of goods and technologies in (perfectly functioning) markets, Schumpeter explained the existence of IP protection by stating that *“practically any investment entails, as a necessary complement of entrepreneurial action, certain safeguarding activities such as insuring or hedging. Long-range investing under rapidly changing conditions, especially under conditions that change or may change at any moment under the impact of new commodities and technologies, is like shooting at a target that is not only indistinct but moving – and moving jerkily at that. Hence it becomes necessary to resort to such protecting devices as patents or temporary secrecy of processes or, in some cases, long- period contracts secured in advance”* (Schumpeter 1950 [1975]: 88). The TRIPs agreement considerably expanded the range of economic sectors and technologies subject to IPR protection. Bestowing and expanding property rights has shifted the then existing balance between “the public domain and the realm of property” (Boyle 2004). However, one regulatory area where “safeguard devices” such as patents have not (yet) been fully adopted on the international level is the field of bio-technology. Advancements in bio-technology²³ have given rise to the more thical question whether living organisms (plants or animals) and their genetic resources²⁴ can be subject to IPR protection at all. The basic argument against the patentability of plants and animals is that private ownership over plants and animals and their genetic resources *per se* does not exist. Genetic resources of plants and animals have according to this view to be considered as belonging to the *“common heritage of mankind”* meaning that open access to these resources is guaranteed (Raustiala and Victor 2004: 281). Advocates of the patentability, in contrast argue that bio-technology is a means to secure the sustainable development of agriculture, yielding higher results with less use of pesticides and other environmentally harmful products. In order to achieve this, investments in technologies that make use of genetic resources and other biological material have to be protected and secured through the allocation of private property rights. The soaring international commodity and food prices have given boost to the

²² <http://www.ip-watch.org/weblog/index.php?p=1400> [last accessed 6 November 2009]

²³ Bio-technology is according to the Convention on Biological Diversity (CBD) *“any technological application that uses biological systems, living organisms or derivatives thereof, to make or modify products or processes for specific uses”*.

efficiency argument. So far however, it remains to be seen whether the use of biotechnology in agriculture has actually led to more efficiency or is likely to do so in the years to come.²⁵

The row over the regulation of plant genetic resources (PGR) illustrates quite well how the normative justifications change over time, but most of all it shows how actors have exploited different forums to achieve their policy objectives either by seeking policy changes or by trying to maintain the status quo. The case of PGR is a rather technical issue but touches upon a range of different policy areas subject to different functionally overlapping regulatory regimes – offering opportunities for forum shopping. PGR as a subject matter is politically salient as it “*lies at the nexus of critical areas of world politics – intellectual property (IP), environmental protection, agriculture, and trade*” (Raustiala and Victor 2004: 278). The regulation of PGR on the international level however did not begin with the adoption of the TRIPs agreement in 1994 but dates back way into the 20th century.

For most of the 20th century access to and use of PGR was considered to belong to the “*common heritage system*” meaning that even though plants as such could be owned and property rights attached to them, their genetic resources could not. Actually much of the agricultural innovations of the 1970s were brought about through improvements of wild PGR or that stored in seed banks (Raustiala and Victor 2004: 281). The PGR system consists of conservation measures (*in-situ* and *ex-situ*), research and development, as well as their use. A wide range of actors play a role in this arrangement, which includes traditional farmers and indigenous communities, collectors, research institutions, breeders, seed companies and farmers (Correa 2001). By the 1920s *commercial* seed breeding and production was limited to a small group of industrial enterprises, since most of the research and agricultural innovations at that time originated from either research institutions or universities. Consequently there was in most countries no reason for installing a specific IP protection system for PGR to further agricultural innovations. Nevertheless, innovative steps particularly in the US, for instance the invention of hybrid plants, let the government develop specifically designed regulatory framework for such innovations in plants – including patents. Most other countries, however, approached the issue of PGR through a regulatory mechanism called “plant breeders’ rights”. This means that it is not allowed to simply copy innovations in plant varieties, rather breeders have the right to use the innovations brought forward by somebody else for their own new variety. In 1961, the concept of plant breeders’ rights with limited IP protection was brought onto the international level through the International Convention for the Protection of New Varieties of Plants (UPOV Convention²⁶). Since plant breeders were almost exclusively located in industrialized countries, it is fair to say that this so-called *sui generis* system of IP protection set up in UPOV mainly mirrored the interests of commercial plant breeders of the developed world (Helfer 2004b: fn. 155). The UPOV Convention in its 1961 versions as well as in its

²⁴ Genetic resources basically include genetic codes, seed varieties or plant extracts.

²⁵ The sharp decline in raw commodity prices in the course of the current global economic downturn has certainly taken away some of the pressure from specifically developing countries’ governments to react to rising food prices by implementing export restrictions. The underlying problem – the production of sufficient quantities of affordable basic food commodities – remains.

²⁶ UPOV is the French abbreviation for Union for the Protection of New Varieties of Plants. Even though formally independent, UPOV is closely associated with WIPO (Raustiala and Victor 2004: 294).

1978 amendment, however, conferred property rights only over modified PGR, which left natural and unmodified PGR in the domain of the common heritage system. Basically, this implied that commercial and non-commercial plant breeders had access to this resource alike. Thus, bio-diversity rich developing countries mostly provided raw PGR, which plant breeders in industrialized countries subsequently commercialized. Due to the collective nature of conservation and preservation efforts, which typically span over a long period of time, farmers themselves did not qualify for any kind of IP protection.

Against this background, a group of developing countries decided in 1983 to bring the topic onto the agenda of the UN Food and Agriculture Organisation by adopting the legally albeit non-binding FAO International Undertaking on Plant Genetic Resources (Raustiala and Victor 2004: pp. 286). The FAO Undertaking stated that *all* PGR – whether modified, found in nature, or stored in seed banks – belonged to the “*common heritage of mankind*”, which allows access for all. With this provision, the FAO Undertaking stood in clear contradiction to the UPOV Conventions of 1961 and 1978, which provided for a *sui generis* protection system for new cultivated plant varieties. Already in 1985 several industrialized countries therefore sought to exempt commercial plant varieties from the FAO Undertaking, mainly with the argument that property rights in new plant varieties was an incentive for innovation and a contribution to the overall diversity of PGR (Helfer 2004b: 36; Zerbe 2007: 101). In 1989, FAO members eventually agreed on an *Agreed Interpretation of the International Undertaking*²⁷, which specified that plant breeders’ rights as protected by the UPOV were in principal “not incompatible” with the common heritage principle set forth in the FAO Undertaking. In order to balance the interpretative Annex, developing countries on their part introduced the concept of farmers’ rights into that same agreement of 1989. With the concept of farmers’ rights developing countries acknowledged the contributions of traditional farmers to the preservation and improvement of PGR. Thus, the notion of farmers’ rights was established in international law via the FAO as a counterpart to plant breeders’ rights laid down in UPOV. Even though developing countries did not seek the allocation of additional legal property rights for farmers to compensate their contribution to the preservation and innovation of PGR, they nevertheless sought the creation of an international fund for the purpose of protecting these rights (Helfer 2004b; Zerbe 2007: pp. 36). In 1991 a further Annex was introduced to the 1983 FAO Undertaking, in which the principle of national sovereignty over PGR was introduced. Developing countries sought to introduce the national sovereignty concept into the global PGR regime because they considered ownership over their natural resources as a means to counterbalance the increasing influence of plant breeders’ rights but also as a mechanism for future compensation and technology transfers (Helfer 2004b: p. 37). Particularly, bio-diversity rich countries saw national sovereignty over PGR as a possibility of benefitting from their natural resources by allocating property rights over them (Raustiala and Victor 2004: 289).

At the time IP protection of PGR was subject of discussions in the FAO and UPOV two other (negotiation) forums became involved in the issue - the Uruguay Round of the GATT and the CBD. In both cases, the issue of PGR became part of the agenda and ultimately formed part of the adopted agree-

ments. The CBD was largely negotiated by representatives of environmental ministries, which is why the issue of PGR was included. Parties to the CBD agreed to develop a redistributive system of benefit sharing for commercial research and development of PGR. It was mainly a concern of developing countries in the CBD negotiations to set up such a non-market benefit-sharing schemes. Another crucial topic in the negotiations was the question of bio-safety relating to possible dangers arising out of the use of biotechnology generally and genetically modified organisms in particular (Raustiala 1997). Ultimately, the issue of bio-safety was transferred to the Cartagena Protocol that was adopted in 2000 under the framework of the CBD. Negotiations in the FAO – largely dominated by representatives of agricultural ministries – soon spilled over to the negotiations of CBD. Whereas the CBD upheld the principle of national sovereignty over genetic resources, developing countries set up the “benefit sharing” principle with the objective to offset the effects of increased IP protection.²⁸ Relevant actors considered this to be necessary given that the Uruguay Round negotiations were in their final stage and at the time it was already evident that IP protection would be central to the negotiations.

The TRIPs agreement was nevertheless relatively vague on the point of patentability of animals and plants and basically left this question unregulated. The TRIPs agreement, however, did require from its members states in its Article 27.3 (b) to grant patents for microorganisms and to establish a “*sui generis*” system for worked PGR. This provision means that all microorganisms, non-biological and microbiological processes are subject to patentability, even though a clear definition of the terms used is missing and therefore subject to interpretation (Wissen 2003: 5). Although the TRIPs agreement did not specifically require states to grant patents on plants or animals, it nevertheless obliged them to establish a specific protection system for PGR modified through bio-technological innovation. Industrialized countries consider the UPOV Conventions as an adequate *sui generis* system for worked PGR. These UPOV Conventions – negotiated in a forum where plant breeders’ interests dominate - successively increased the level of protection of plant breeders’ rights. In its 1991 revised version, plant breeders’ rights were strengthened whereas so-called farmers’ privileges – the saving of seeds for re-use – restricted (UNCTAD-ICTSD 2005: p. 401). Since not all countries signed up to the UPOV Convention, Article 27.3 (b) of the TRIPs agreement was left vague on that point and the provision subject to a later review process (Raustiala and Victor 2004). Even though not specifically stipulated in the TRIPs agreement itself, industrialized countries nevertheless managed to bring a range of developing countries to sign up to the UPOV Convention in its 1991 version, mainly achieved through bilateral trade agreements. The Article 27.3 (b) TRIPs review process is still ongoing and mainly evolves around the question which topics should be part of the review process at all. Industrialized countries mainly want to discuss the state of implementation of Article 27.3 (b) and want any substantive changes to the article only to consist of higher IP standards. Developing countries on the other hand call for a substantive revision of the regime as a whole. Regarding PGR developing countries want a clarification of the term “microorganism” as well as a determination of what should be considered an

²⁷ See Resolutions 4/89 and 5/89.

²⁸ Parties to the CBD were given specific guidance on setting up such benefit-sharing systems through the adoption of the non-binding Bonn Guidelines in 2002.

effective *sui generis* system of plant variety protection. Another demand of developing countries is that the relationship between the CBD and the TRIPs agreement should be clarified, not only regarding benefit-sharing mechanisms but also potential disclosure requirements for the use of genetic resources (in order to prevent bio-piracy), as well as the protection of traditional knowledge (Wissen 2003).

The CBD regulated PRG only in general terms, so that soon after the adoption of the TRIPs agreement negotiations in the FAO Commission on Plant Genetic Resources for Food and Agriculture began. These negotiations culminated in the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture (IT/PGRFA) in 2001, which entered into force in 2004 and revises the earlier Undertaking and converts its provisions into a legally binding agreement. Apart from stipulating farmers' rights, the treaty establishes a fund to which private parties contribute a part of profits realized through commercial products made from a communal seed treasury (Helfer 2004b: p. 39).²⁹ Despite having managed to introduce the farmers' rights principle in international law, the treaty itself is relatively weak concerning its implementation and enforcement, which is left to the discretion of member states (Zerbe 2007: 104). In 2001, amidst slow developments in the TRIPs review process, the topic of genetic resources was yet shifted to another forum: the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF). After 14 meetings so far no agreement has been reached on any issues on the agenda. From the discussions in the IGC it becomes obvious that not all actors are satisfied with the location of the negotiations: developing countries seek the issues to be discussed in the context of the TRIPs review process, whereas industrialized countries – most notably the US and Japan - want to keep the issues in WIPO and out of the TRIPs council. Hence, developing countries prefer negotiations of issues salient to them (mainly traditional knowledge, genetic resources, biodiversity) in the TRIPs council where issue linkages are possible. In contrast, developed countries without any significant interest in the matter prefer to keep the discussions in the more technical forum of WIPO where possibilities for issue linkages do not exist. Whether recent attempts of developing countries to pursue an issue linkage approach in WIPO will be successful remains to be seen.³⁰

The case of IP protection for PGR illustrates quite well the diverging interest the involved actors hold. Developed countries – to various degrees - mainly seek to protect their IP related industries through ever increasing IP standards. In the case of PGR, developed countries used the revised UPOV Convention of 1991 (through the adoption of bi-lateral trade agreements) to strengthen plant breeders' rights and thus their agro-technological industries. According to industrialized countries, a substantive discussion of the relevant provisions of the TRIPs agreement is not indicated. Interests and preferences of developing countries on the other hand are much more diverse and thus complex. The gradual acceptance of the national sovereignty principle over genetic resources marked a shift away from

²⁹ The fund became operational in January 2009, see: <http://www.ip-watch.org/weblog/index.php?p=1393> [last accessed 6 November 2009]

³⁰ <http://ictsd.net/i/news/bridgesweekly/38194/> [last accessed 6 November 2009]
<http://www.ip-watch.org/weblog/index.php?p=1412> [last accessed 6 November 2009]

the common heritage approach which had prevailed until then. Indirectly, this implied that the allocation of property rights to genetic resources was now acknowledged, at least by the majority of developing countries, with the exception of many African countries which oppose the patentability of animals, plants and their genetic resources in general. Added to this, on the initiative of developing countries genuinely *new* (legal) concepts such as benefit sharing, traditional knowledge, farmers' rights or prior informed consent were established with the result of an increased complexity. Unlike in the case of classical IP protection systems with its individualistic notion and its longstanding national experience, the implementation of before mentioned concepts is much more difficult to achieve given the lack of experience on the national level. Industrialized countries could therefore move these issues to more technical and specialized forums by (strategically) arguing that the complexity of the matter demanded expertise knowledge. The agency specialization on the other hand implied that mainly representatives of weaker environmental or agricultural ministries negotiated the outcome. In the field of genetic resources we observe that developing countries actually have managed to have agreements favourable to their interests adopted. However, none of these agreements disposes of an effective enforcement system, which ensures that the provisions of the treaty would actually be implemented. Industrialized countries have until now successfully prevented that those issues salient to developing countries enter the realm of the WTO/ TRIPs negotiations, taking place under the shadow of a strong enforcement mechanism. Finally, the unequal distribution of power and capabilities among actors played a significant role in the context of PGR: despite developing countries' success in attaining their interests in other forums than the WTO, industrialized countries nevertheless achieved that a range of new members signed up to the UPOV Convention in its 1991 version, and thus to bind themselves to a regulatory framework favourable to the interests of developed countries. Since the signing of the UPOV 1991 Conventions took place in the context of broader bilateral trade agreements, it can reasonably be assumed that the outcome of such negotiations was rather power- than rule-based.

4.2. Public health

The conclusion of the TRIPS agreement in 1994 triggered a ripple effect for other international forums, among which quite obviously the WIPO, but also for the World Health Organization (WHO), the World Bank and specialized UN agencies like UNAIDS. Advocates of easy and cheap access to medication to protect public health in poorer countries initially set themselves the goal of reducing global IP protection strictures by modifying the new WTO enforceable level of IP protection. The TRIPS regime, however, showed remarkable resilience. In a first phase, counter mobilization took place within the WTO TRIPS Council and the broader framework of the Doha Round negotiations, where some poorer countries and producers of generic medicines hoped for an issue linkage as a lever to force a more flexible implementation of TRIPS obligations in countries with strained public health services. In a second step, the issue of access to medication was shifted away from the intellectual property regime onto other international forums, especially operational international agencies like the World Bank, UNAIDS and the Global Fund to Fight Aids, Tuberculosis and Malaria.

Since the 1980s, pharmaceutical manufacturers and in particular research and patent-based manufacturers of medicines have engaged in forum-shopping in international IP protection. Companies with bases in the US, the EU and Japan were among the most active in the international coalition that advocated a shift from the granting of national *privileges* to the provision of global property *rights* (Correa 2000; Maskus 2002; Sell 2003), arguing in favour of institutional change to achieve this substantive shift in international regulation. The coalition of interest groups was especially disappointed with the existing international IPR regime under the auspices of the WIPO. The WIPO agreements do not impose substantive and obligatory IP rules, but rather resemble guiding standards whose implementation is left to the discretion of signatory states. And even if an up-grading of substantive IP rules would be achieved within that organisation, WIPO does not possess a high degree of judicialization which would allow enforcing those rules. In 1984, IP owning companies founded the International Intellectual Property Alliance (IIPA) (Sell 2003: 84). In 1986, American companies created the US Intellectual Property Committee, composed of twelve CEOs of IP dependent corporations (Sell 2003: 96). These private sector representatives and their allies in national public administrations advocated for a shift to a forum with a greater promise of judicial enforcement, the GATT/WTO. Here the threat of trade sanctions would allow states to link the issue of market access to the implementation of stricter IP protection legislation. Particularly the US had been pushing for tougher economic sanctions against countries in which US patents were either unprotected or only weakly protected. Japanese and European industries concurred and organized collectively in the so-called Trilateral Group composed of the US Intellectual Property Coalition (IPC), the Japanese employers' organization Keidanren, and its European counterpart UNICE. Together, they managed in the 1980s to get the struggle for an Anti-Counterfeiting Code on the agenda of the GATT Uruguay Round. Somewhat surprisingly, they even managed to expand the issue to a more fundamental shift to a global IP regime in the beginning of the 1990s (Sell 2003). IP thus became part of an overall package deal, linking the issue of IP protection to enhanced market access in goods and services. The WTO TRIPS Agreement effectively introduced the positive obligation to adopt national patent legislation, grant 20 years of exclusive rights, and empower domestic courts to enforce those rights.

Soon after the adoption of the TRIPS agreement, non-governmental public health organizations and developing countries raised the issue of access to essential medicines in the WTO TRIPS Council as well as in the World Health Organization (Helfer 2004b; De Bièvre and Dür 2007). They expressed concern that the TRIPS agreement did not provide for a sufficient degree of flexibility necessary to ensure easy and affordable access to medicines in countries with public health problems. For countries with manufacturers of generic pharmaceuticals³¹, this did not pose a direct problem. Developing countries with insufficient or no manufacturing capacities in the pharmaceutical sector on the other hand protested that the flexibility foreseen in the TRIPS agreement was of no use to them. They argued that in cases of a health emergency – outbreaks of diseases such as HIV/AIDS, malaria, and tuberculosis – they were not able to meet the crisis by overruling the payment of patent royalties by

³¹ Generic pharmaceuticals are drugs produced and distributed without patent protection.

granting so-called compulsory licenses. If, however, a country is not equipped with pharmaceutical producers, it is not possible to grant such licenses. Countries with an important generic manufacturing base, such as India and Brazil, therefore raised the issue in the WTO TRIPS Council and the ongoing Doha Round, demanding that the exportation of their products to countries with a health emergency should be explicitly allowed. The result of this political process was in 2001 the adoption of the Doha Declaration on the TRIPS Agreement and Public Health. The US, the EU and other industrialized states failed in their attempt to include an exhaustive list of diseases for which developing countries could declare a health emergency. The agreement specified the conditions under which compulsory licences would be possible as well as the procedure to be followed, yet reaffirmed the existing global protection of IPR as foreseen in the TRIPS agreement.

In parallel, US and EU-based patent-based manufacturers and representatives from IP government agencies successfully shifted the issue of access to medicines to other international forums, foremost the WHO, the World Bank, and UNAIDS, arguing that the main problem of access to medicines was a question of public infrastructure and resources, rather than of IP. WHO documents adopted a compromising tone with regard to public health and IP, while cooperation between government agencies, pharmaceutical companies and public health NGOs was formalized in the Global Fund – first established under an administrative services agreement with the WHO, since 2009 an autonomous international financing institution.

The global intellectual property regime thus displayed remarkable resilience as an attempt to loosen IP standards under TRIPS and make these lower standards enforceable through WTO dispute settlement failed. Developing countries and western NGOs settled for their second best option of going along with negotiations on exceptions and shifting the issue to agencies specialized in funding health care projects and price reduction through public funding. Patent-based pharmaceutical manufacturers on the other hand were amazed to have had to invest so much time and effort in defending the status quo.

4.3. Traditional knowledge

The concept of traditional knowledge has already been mentioned several times in the context of forum shopping. Traditional knowledge (TK) plays an increased role in the global IP regime and its diverse forums as it overlaps and partially collides with exiting rules on IP protection. So far, no agreed upon and precise definition of traditional knowledge exists, mainly due to the complexity of the issue at hand and the many different forms of expressions of the information associated with TK (Correa 2001). TK includes established traditions and practices or specific regional, indigenous or local communities. WIPO uses the term TK to refer to tradition-based literary, artistic or scientific works. In the context of PGR traditional and indigenous communities have already been mentioned; here the TK refers to the knowledge of certain communities to use biological (thus PGR) and other material for medical treatment and agriculture. Categories of TK include: agricultural, scientific, technical, ecological, medicinal, and biodiversity-related knowledge; “expressions of folklore” in the form of music,

dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties (WIPO 2001: 25).

Considering the rather broad scope of issues covered by the concept of TK, it is not surprising that a range of different forums has addressed the issue so far. Early regulatory initiatives on the issue of folklore for instance date back to the 1960s and 1970s: in 1967 the WIPO Berne Convention was revised in order to introduce copyright protection for folklore at the international level. In 1971 the Berne Convention was again revised to better accommodate the specific needs of developing countries. In the 1970s UNESCO started to study the possibilities for developing an instrument to protect the cultural expressions of indigenous peoples (Blakeney 1998). The project was taken up in cooperation with WIPO, and eventually a WIPO/ UNESCO Model Law on the Protection of Folklore³² was adopted in 1982. States soon after began to consider developing an international treaty on the protection of expressions of folklore, again in a joint expert group of WIPO and UNESCO. The expert group, however, concluded that the adoption of a binding treaty was premature, and that a regulatory framework should rather be adopted in the form of a legally non-binding recommendation. In 1996, the WIPO Performances and Phonograms Treaty was adopted, which included a specific reference to expressions of folklore, considered necessary since the WIPO Rome Convention³³ of 1961 did not extend to performers of expressions of folklore. At the WIPO-UNESCO World Forum on the protection of Folklore calls for establishing a new international legal instrument for the protection of folklore were heard. From 2000 onwards, the discussion of the legal protection of traditional cultural expressions take place in the framework of the WIPO IGC on IPGRTKF (WIPO 2003: pp. 21). Draft provisions for the protection of traditional cultural expressions and expressions of folklore have been developed in the IGC, but similar to the case of traditional knowledge, it is so far uncertain which form and substantive content regulations would have.³⁴ Overall, until today the protection of folklore has been dealt with exclusively in technical forums of WIPO and UNESCO. Those agreements adopted so far only belong to the realm of soft law with low degrees of enforceability. The issue of the protection of traditional cultural expressions is largely a topic salient to developing countries with significant indigenous and traditional populations. This might explain the lack of interest on part of industrialized countries to set up binding hard law regulations on the matter.

In the context of the protection of PGR we have already hinted at the relevance of TK over the use and application of genetic resources and biological processes. The link between IP and TK is obvious: where multinational biotechnological or pharmaceutical corporations take profit of the knowledge of traditional and/or indigenous communities without their prior consent, this represents a case of misappropriation exists since public knowledge is exploited for private profits. Throughout the 1970s and 1980s the protection of TK has only been dealt with in the context of technical UN special agencies.

³² Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions of 1982

³³ International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations of 1961

³⁴ http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html [last accessed 6 November 2009]

The adoption of the TRIPs agreement then provided developing countries with the opportunity to shift the topic of TK onto the agenda of an institution with more enforceability with its sanction-equipped dispute settlement body. The difficulty arising out of the regulation of TK irrespective of the regulatory venue is the fact that the concept refers to the opposite of what is being sought in 'traditional' western-based IP protection system: TK is by and large held by groups and not individuals, and in contrast to the classical IPR protection scheme does not involve any innovative step (Wissen 2003). Even though developing countries were successful in including TK as a concept in the CBD and the FAO International Treaty (in the form of farmers' rights), the enforcement of these provisions is far from clear given the lack of an adopted compliance procedure. Actors opposing the (international) regulation of TK on the other hand were in the favourable position to postpone the negotiations due to the technicality and complexity of the issue, combined with rather ambiguous preferences of those in favour of regulatory action. When looking into the issue of TK more generally, the importance actors attach to the location of enforcement is striking: it is mainly industrialized countries that oppose the issue to be taken up by the WTO given the possibility of subsequent enforcement of the rules. Developing countries on the other hand exactly because of the prospects for enforceability want the issue to be negotiated in the WTO and not in the more technical forums, which they view as playing only a supportive role. Industrialized countries on the other hand try everything to keep the issue in the IGC of WIPO and to halt any progress in terms of reaching a binding agreement on the many issues debated.

5. Conclusion

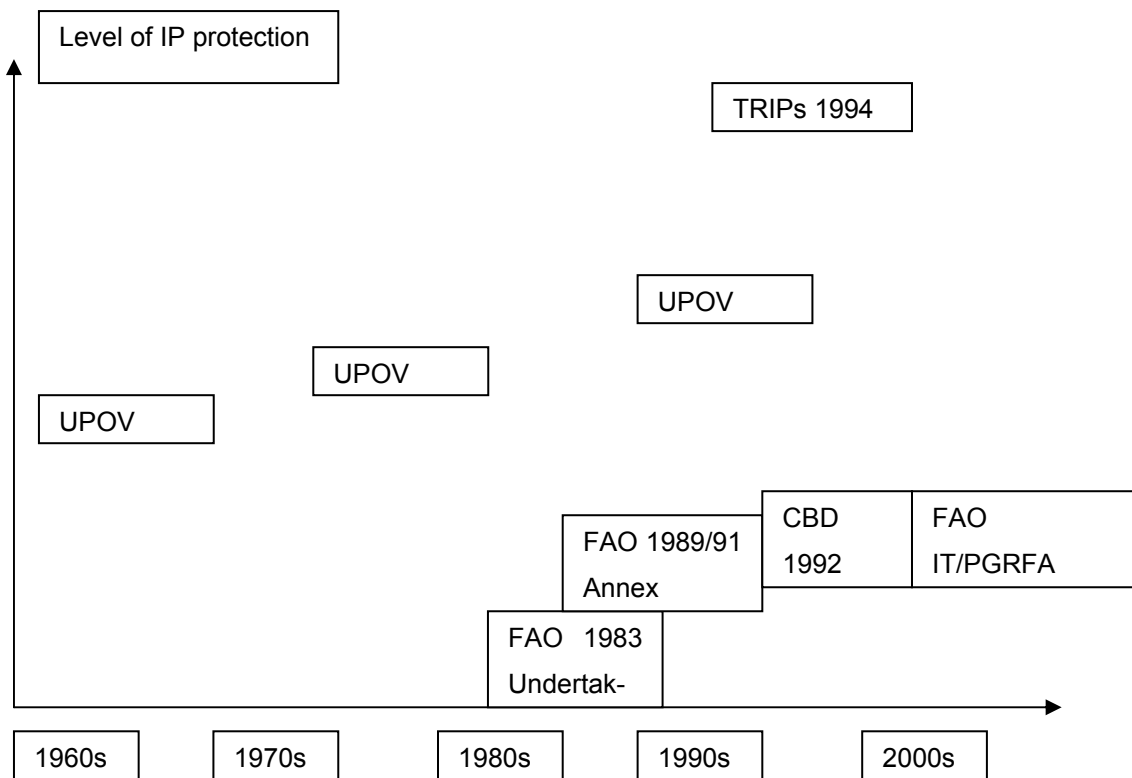
The global regime governing IPR protection has witnessed a considerable increase in the number of forums dealing with the international regulation of the issue. First of all, this is due to the technical and legal complexity of many of the areas involved. More importantly, however, the adoption of the TRIPs agreement implied that global minimum IP standards were not only established but implemented, as well as the expansion of the scope of protected areas and technologies. The TRIPs agreement was adopted through the use issue linkages in the Uruguay Round when developing countries gave in to demands for stronger IP protection rules in return for concessions in other issue areas. However, already before the adoption of the TRIPs agreement a range of other forums was occupied with the international regulation of IPR protection. Yet, the TRIPs agreement turned out to be the preferred forum for both developing and industrialized countries to locate salient issues there given its sanctions equipped enforcement procedure. The diverging preferences and interests of the actors became evident in the course of the TRIPs review process: industrialized countries with a high technology industry demanded strengthened IP standards whereas developing countries, many of whom are IP importing countries, sought a substantive revision of the IP regime as a whole. The negotiating position of developing countries was complicated further by the fact that the issues salient to them were not only complex but partially novel in the sense that they had so far been regulated neither on the internationally nor domestically. Thus, parties to the negotiations have to cope with complex and rather technical questions before coming to an agreement. Concepts like farmers' rights or access and benefit sharing were innovative with little to no domestic experience existing. This implied that the imple-

mentation of these concepts was conferred to the member states, even more since no international enforcement procedure exists. Considering the stall in negotiations in the TRIPs council in the course of its review process, negotiations on IP related issues continued to be negotiated in other regimes. While these forums are characterized by a relative high degree of government agency specialization, they nevertheless offered the advantage for developing countries to put IP related topics on the agenda of international agencies at all, giving the resistance of industrialized countries to discuss these issues in the context of the WTO. The outcome created in these forums, however, was not necessarily consistent with rules and regulation adopted in other forums. The explanation for this lies in the degree of governmental agency specialization: representatives from environmental or agricultural ministries necessarily pursue different interests and agendas as trade representatives or IP lawyers given the different knowledge and expertise these representatives have.

We identify the degree of judicialization of a possible agreement as the most important reason for actors to apply forum shopping strategies. Negotiating actors take into account the degree to which a negotiated agreement will subsequently be enforced. It is because of this that developed countries have so far managed to prevent any discussion of a substantive review of the TRIPs agreement in whole or in part to take place in the TRIPs council. By including the issues salient to developing countries in the TRIPs council negotiation forum would ultimately mean to place these issues under the strong WTO enforcement procedure. In contrast, by letting these issues being negotiated in the framework of UN specialized agencies, the likelihood for these agreements not being enforced increases. On the other hand, developing countries preferred to place their issues on the agenda of the TRIPs council exactly because they sought the proper enforcement through the WTO DSB procedure. Due to the obstruction of industrialized countries, developing countries however had to go for the second best option and pursue their interests in a different forum – just as intended by industrialized countries.

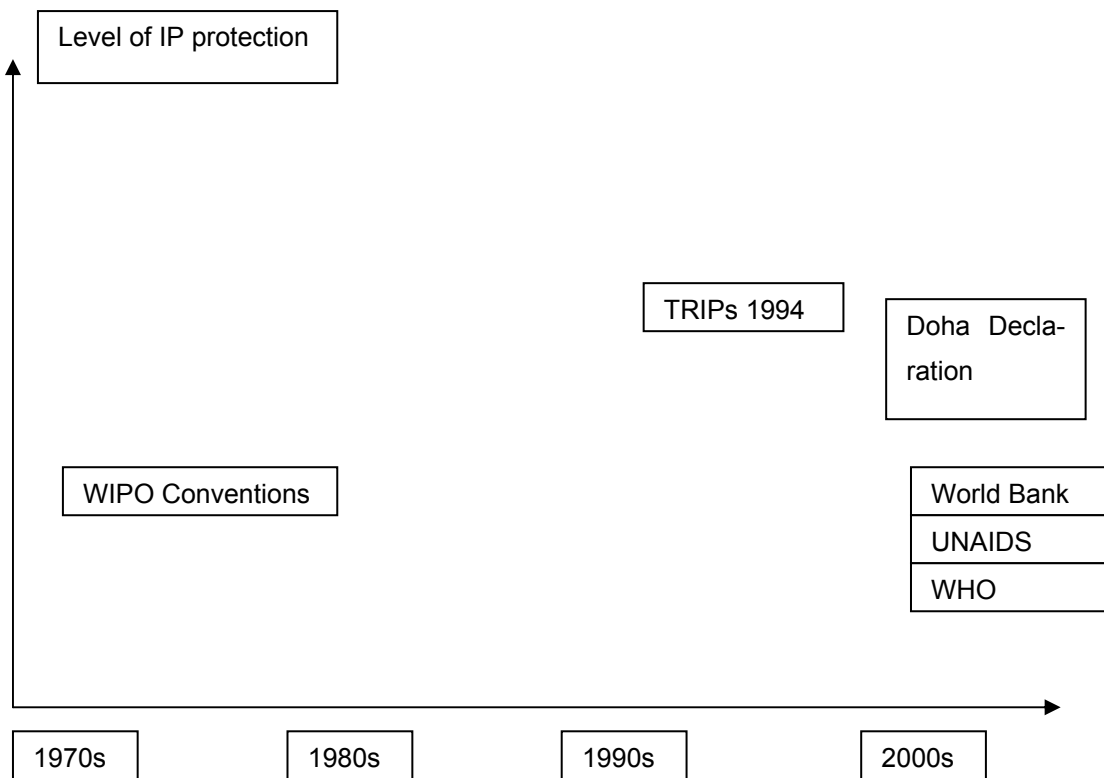
Forum shopping however is not a feature unique to the global IP regime. Overlaps between different international regimes are likely to increase due to functional reasons arising out of the complexity of the regulatory issues at hand. This will ultimately lead to a further defragmentation of international law in the sense that the functional boundaries which formerly had separated different regimes will become more blurry. The question that follows from this is whether different degrees of enforceability of international agreements will ultimately lead to certain de facto hierarchy of norms.

Annex 1: Timeline on Plant Genetic Resources³⁵



³⁵ Adopted from (Raustiala and Victor 2004: 294)

Annex 2: Timeline on Public Health



Bibliography

- Abbott, F. M. (2000). "TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda." *Berkeley Journal of International Law* 18: 165-179.
- Abbott, K. W., R. O. Keohane, et al. (2000). "The Concept of Legalization." *International Organization* 54(3): 401-419.
- Aggarwal, V. K. (1998). *Reconciling Multiple Institutions: Bargaining, Linkages, and Nesting Institutional Designs for a Complex World*. Bargaining, Linkages, and Nesting_V. K. Aggarwal. Ithaca and London, Cornell University Press: 1-31.
- Alter, K. J. and S. Meunier (2009). "The Politics of International Regime Complexity " *Perspectives on Politics* 7(1): 13-24.
- Anderson, G. (2006). "Can someone please settle this dispute? Canadian softwood lumber and the dispute settlement mechanisms of the NAFTA and the WTO." *World Economy* 29(5): 585-610.
- Arup, C. (2003). "The State of Play of Dispute Settlement "Law" in the World Trade Organization." *Journal of World Trade* 37(5): 897-920.
- Axelrod, R. and R. O. Keohane (1985). "Achieving Cooperation under Anarchy: Strategies and Institutions." *World Politics* 38(1): 226-254.
- Baumgartner, F. R. and B. D. Jones (1993). *Agendas and instability in American politics*. Chicago and London, University of Chicago Press.
- Blakeney, M. (1998). "Communal intellectual property rights of indigenous peoples in cultural expressions." *Journal of World Intellectual Property* 1(6): 985-1002.
- Börzel, T. A. (1998). "Organizing Babylon - On the Different Conceptions of Policy Networks." *Public Administration Review* 76(2): 253-273.
- Boyle, J. (2004). "A manifesto on WIPO and the future of intellectual property." *Duke Law & Technology Review* 9.
- Busch, M. L. (2007). "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade " *International Organization* 61: 735-761.
- Correa, C. M. (2000). *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* London, Zed Books.
- Correa, C. M. (2001). *Traditional Knowledge and Intellectual Property. Issues and options surrounding the protection of traditional knowledge*. A Discussion Paper. Geneva, Quaker United Nations Office.
- Correa, C. M. (2004). *The WIPO Draft Substantive Patent Law Treaty: A Review of Selected Provisions*. Trade- Related Agenda, Development and Equity Working Papers No. 17. Geneva, South Centre.
- Correa, C. M. and S. F. Musungu (2002). *WIPO's Patent Agenda: The Risks for Developing Countries*. South Centre Working Paper 12.
- Croome, W. (2003). *Dictionary of Trade Policy Terms*. Fourth Edition. Cambridge, Cambridge University Press.
- De Bièvre, D. and A. Dür (2007). "Inclusion without Influence? NGOs in European Trade Policy." *Journal of Public Policy*.

- Downs, G. W., D. M. Rocke, et al. (1996). "Is the Good News about Compliance Good News about Cooperation?" *International Organization* 50(3): 379-406.
- Drezner, D. W. (2009). "The Power and Peril of International Regime Complexity." *Perspectives on Politics* 7(1): 65-70.
- Duffield, J. S. (2003). "The limits of "Rational design"." *International Organization* 57(02): 411-430.
- Fearon, J. D. (1998). "Bargaining, Enforcement, and International Cooperation." *International Organization* 52(2): 269-305.
- Fischer-Lescano, A. and G. Teubner (2006). *Regimekollisionen. Zur Fragmentierung globalen Rechts.* Frankfurt am Main, Suhrkamp.
- Gagne, G. and F. Roch (2008). "The US-Canada softwood lumber dispute and the WTO definition of subsidy." *World Trade Review* 7(3): 547-572.
- Gazzini, T. (2006). "The Legal Nature of WTO Obligations and the Consequences of their Violation." *European Journal of International Law* 17(4): 723-742.
- Gurry, F. (1999). "The Dispute Resolution Services of the World Intellectual Property Organization " *Journal of International Economic Law* 2(2): 385-398.
- Hart, H. L. A. (1961 (1994)). *The Concept of Law* Oxford, Oxford University Press.
- Helfer, L. (2004a). *Intellectual property rights in plant varieties International legal regimes and policy options for national governments.* FAO Legislative Study 85. Rome, FAO.
- Helfer, L. R. (2004b). "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking." *Yale Journal of International Law* 29: 1-81.
- Helfer, L. R. and A.-M. Slaughter (1997). "Toward a Theory of Effective Supranational Adjudication." *Yale Law Journal* 107: 273-391.
- Hoberg, G. and P. Howe (2000). "Law , Knowledge, and National Interests in Trade Disputes. The Case of Softwood Lumber." *Journal of World Trade* 34(2): 109-130.
- Horn, H. and P. C. Mavroidis (2006). *The WTO Dispute Settlement System 1995-2004: Some descriptive statistics.* Washington D.C., Worldbank.
- Iklé, F. C. (1964). *How Nations Negotiate.* New York, Praeger.
- Jönsson, C. and J. Tallberg (1998). "Compliance and Post-Agreement Bargaining." *European Journal of International Relations* 4(4): 371-408.
- Jupille, J. and D. Snidal (2006). "The choice of international institutions: Cooperation, alternatives and strategies."
- Keohane, R. O. (1984). "After hegemony: Cooperation and discord in the world political economy."
- Keohane, R. O. (2002). *Power and Governance in a Partially Globalized World.* London, Routledge.
- Keohane, R. O., A. Moravcsik, et al. (2000a). "Legalized Dispute Resolution: Interstate and Transnational " *International Organization* 54(3): 457-488.
- Keohane, R. O., A. Moravcsik, et al. (2000b). "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* 54(3): 457-488.

- Keohane, R. O. and J. S. Nye (2001). *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*. Kennedy School of Government Research Paper 01-004, Kennedy School of Government, Harvard University.
- Koremenos, B., C. Lipson, et al. (2001). "The Rational Design of International Institutions." *International Organization* 55(4): 761-799.
- Leebron, D. W. (2002). "Linkages." *American Journal of International Law* 96(1): 5-27.
- Martin, L. L. (1994). "Heterogeneity, linkage and common problems " *Journal of Theoretical Politics* 6(4): 473-493.
- Maskus, K. E. (2002). "Regulatory standards in the WTO: Comparing intellectual property rights with competition policy, environmental protection, and core labour standards." *World Trade Review* 1(2): 135-152.
- Maskus, K. E. and J. H. Reichman (2004). "The globalization of private knowledge and the privatization of global public goods " *Journal of International Economic Law* 7(2): 279-320.
- Matthews, D. (2002). *Globalising Intellectual Property Rights. The TRIPs Agreement*. London and New York, Routledge.
- McCall Smith, J. (2000). "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts." *International Organization* 54(1): 137-180.
- Princen, S. and B. Kerremans (2008). "Opportunity Structures in the EU Multi-Level System." *West European Politics* 31(6): 1129-1141.
- Raustiala, K. (1997). "Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity." *World Politics* 49(4): 482-509.
- Raustiala, K. and D. G. Victor (2004). "The Regime Complex for Plant Genetic Resources." *International Organization* 58(2): 277-309.
- Reichman, J. H. and R. C. Dreyfuss (2007). "Harmonization without consensus: Critical reflections on drafting a substantive patent law treaty." *Duke Law Journal* 57(1): 85-130.
- Rittberger, V. (1983). "Global Conference Diplomacy and International Policy-Making: The Case of UN-Sponsored World Conferences." *European Journal of Political Research* 11: 167-182.
- Romano, C. P. R. (1999). "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle." *New York University Journal of International Law and Politics* 31: 709-751.
- Scharpf, F. W. (1988). "THE JOINT-DECISION TRAP: LESSONS FROM GERMAN FEDERALISM AND EUROPEAN INTEGRATION." *Public Administration* 66(3): 239-278.
- Schumpeter, J. A. (1950 [1975]). *Capitalism, Socialism and Democracy*. London, Harper Perennial.
- Sell, S. K. (2003). *Private Power, Public Law. The Globalization of Intellectual Property Rights*. Cambridge, Cambridge University Press.
- Shadlen, K. C. (2004). "Patents and pills, power and procedure: The North-South politics of public health in the WTO." *Studies in Comparative International Development* 39(3): 76-108.
- Shelton, D. (2000). *Law, Non-Law and the Problem of 'Soft Law'. Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*. D. Shelton. Oxford, Oxford University Press: 1-18.
- UNCTAD-ICTSD (2005). *Resource Book on TRIPs and Development*. Cambridge, Cambridge University Press.

- WIPO (2001). Intellectual Property Needs and Expectations of Traditional Knowledge Holders. WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999). Geneva, WIPO.
- WIPO (2003). Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore. Geneva, WIPO.
- Wissen, M. (2003). TRIPs, TRIPs-plus und WIPO. Konflikte um die Eigentumsrechte an genetischen Ressourcen. Postfordistische Naturverhältnisse. Konflikte um genetische Ressourcen und die Internationalisierung des Staates. U. Brand and C. Görg. Münster, Verlag Westfälisches Dampfboot: 128-155.
- Young, O. R. (1980). "International Regimes: Problems of Concept Formation." *World Politics* 32(3): 331-356.
- Zangl, B. and M. Zürn (2004). Make Law, Not War: Internationale und transnationale Verrechtlichung als Baustein für Global Governance. Verrechtlichung - Baustein für Global Governance? M. Zürn and B. Zangl. Bonn, Dietz: 12-45.
- Zartman, I. W. (1994). Two's Company and More's a Crowd: The Complexities of Multilateral Negotiation. *Multilateral Negotiations: Approaches to the Management of Complexity*. I. W. Zartman. San Francisco, Jossey-Bass Publishers: 1-12.
- Zerbe, N. (2007). "Contesting Privatization: NGOs and Farmers' Rights in the African Model Law " *Global Environmental Politics* 7(1): 97-119.

