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Hybrid International Intellectual Property Protection

Coherence, Governance and Balance

Peter-Tobias Stoll

ABSTRACT

At international level, the protection of intellectual property rights is subjected to a hybrid array of international regimes and agreements. Traditionally, this has been the realm of WIPO and its conventions. Since the establishment of the WTO and the entry into force of its TRIPS Agreement in 1995, the multilateral trade system has also assumed regulatory power in this field. In addition, recent "regional," "preferential," and "free" trade agreements increasingly engage in setting standards in regard to intellectual property rights as well. The resulting complexity raises questions as to coherence, effectivity and legitimacy. This paper will assess the coherence and effectivity of this hybrid system and discuss its implications for governance. In addition and more specifically, the balancing of the individual rights and interests of right holders with the public interest will be seen. This balancing is a key challenge of the protection of intellectual property rights. The paper concludes that the "hybrid" international regimes still see such public interest as a matter of concern for the national level and widely fail to properly take into consideration the manifold international principles and rules at hand, including, for instance human rights and multilateral environmental agreements.

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A. INTRODUCTION

The law of the international protection of intellectual property (IP) rights emerged as a very early element of what later became the International Economic Legal Order. Based on universal agreements dating back to the end of the nineteenth century and administered by the United Nations special agency, this branch of the law had its own culture. At the end of the twentieth century, IP rights became closely connected to the emerging multilateral trade order and to the World Trade Organization (WTO). Soon after, trade agreements on a regional and bilateral basis were concluded in large numbers, and IP rights were addressed in many cases.

We may call this new state of affairs a “hybrid” system. The increasing roles that international investment law and human rights play in this area add to the complexity. In addition, the system has met with a number of challenges: among others, the failed attempts to set up the Anti-Counterfeiting Trade Agreement, the Trade-Related Aspects of Intellectual Property Rights (TRIPS), and public health debate must be mentioned here. These developments have been accompanied by heated debates in public as well as in academia.

As early as the TRIPS negotiations, there were concerns about what was understood to be the exclusive competence of the World Intellectual Property Organization (WIPO). Later, IP chapters in trade agreements were feared to be “ratcheting up” IP protection at the expense of public policy objectives in access and use. In these debates, many different points were made. Along with the more general issue of the fragmentation of international law, issues of interpretation and treaty conflict were considered. In addition, concerns about bargaining power in multilateral and bilateral settings were voiced, and the appropriateness of the levels of protection in different countries was questioned.

A three-pronged approach is proposed here to assess the impact that the “trade turn” (and the subsequent “bilateral turn”) has on the system of the international protection of IP rights. Accordingly, firstly it will be seen whether these developments have affected the coherence of the system with its diverse agreements and its dispute settlement activities, using a rather “technical” perspective in order to assess whether the system represents a “healthy” state of affairs, in line with the questions and findings of the discussion of the fragmentation of international law. Secondly, it will be seen whether all these agreements along with their rules, procedures, and institutions represent an appropriate form of governance, in a manner that offers a regulatory system that achieves its goals. Thirdly, it will be seen whether this system – in a substantive dimension – does appropriately balance the diverse objective and interests involved.

B. MAPPING A HYBRID WORLD OF INTERNATIONAL AGREEMENTS ON IP

Internationally, IP protection is taken care of by multilateral and regional or bilateral agreements. The field has seen important developments in terms of content and structure over the last twenty years.

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I. *The International Core of IP Protection and Its Multilateral and Regional Levels*

The international protection of IP rights rests on numerous international agreements, called "conventions." The most basic ones originated in the nineteenth century. They set out the basic elements of international protection in terms of national treatment and minimum standards, and they address specific details for those rights that depend on grants by authorities and applications. These conventions have been subject to revisions and amendments over time. Institutionally, the conventions are hosted by the WIPO, a specialized agency of the United Nations that was founded in 1964.

This array of conventions and the WIPO as an administering institution are open to all members of the United Nations and indeed, WIPO and most of the basic instruments enjoy almost universal membership. A number of other instruments, while also being negotiated and adopted within WIPO and open for any member state, have a less comprehensive membership. Nevertheless, the system altogether always has been and still is seen as a "universal" system, as its instruments – the WIPO conventions – as well as the institutions are open to all states. It should be noted that beyond this formal dimension, the term "universality" in international law is also seen to carry a substantive dimension[1] In this way, it might be seen as referring to an existing or "pre-positive" system of common values.[2] More recently, universalism in this sense is contrasted with legal pluralism.[3]

Nowadays, the term "multilateral," which appears to have been borrowed from international trade terminology, is often used. The term in our sense, has different meanings. It first of all indicates that the organization and the agreements are open to all UN members and are not limited to a regional or even a bilateral set of members. In this way, multilateralism contrasts with bilateralism or unilateralism.[4] Second, "multilateral" signifies that the discussion, negotiation, conclusion, and the later administration of instruments are taken care of by a forum with UN-like membership, where all states have a voice. It is important at this point to recall that "multilateral" in this sense signifies the organizational frame and design of the

[1] See Graeme B. Dinwoodie, Universalism in International Copyright Law as Seen through the Lens of Marrakesh (in this volume).

[2] André Nollkämper, Universality, in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, 2011, at para. 5. For a discussion of universalism and legal pluralism, see Jørgen Blomqvist, Universality or Diversity? The WIPO Role and Strategy in International Copyright Lawmaking in T. E. Synodinou (ed.), *Pluralism or Universalism in International Copyright Law*. 1 ed, Wolters Kluwer, Alphen aa den Rijn, Nederlandene, 2019, pp. 317–337.

[3] Jørgen Blomqvist, Universality or Diversity? The WIPO Role and Strategy in International Copyright Lawmaking in T. E. Synodinou (ed.), *Pluralism or Universalism in International Copyright Law*, Alphen aa den Rijn, 2019, pp. 317–337.

[4] See André Nollkämper, Unilateralism/Multilateralism, in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, 2011.

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conventions and does not necessarily imply that all WIPO conventions actually enjoy "universal" or "multilateral" membership. Furthermore, it should be noted, the notion of multilateralism probably lacks any substantive dimension, which as mentioned above would be inherent in the term "universalism."

This "multilateral core" of international protection of IP is accompanied by a number of agreements – or regimes – which set up regional institutions, procedures, and rules, often relating to specific rights. The European and African patent organizations must be mentioned here as well as the regional trademark systems. Institutional links exist between the regional and the multilateral institutions. In addition, a relatively small number of bilateral agreements have been concluded over time, which specifically address the protection of IP.

II. *The "Trade Turn"*

The classic WIPO system of international protection of IP rights met with growing criticism in the 1980s. The standards of protection were believed to be too low and experts feared they would be further watered down by initiatives of developing countries in WIPO bodies. In addition, compliance and enforcement were at issue, as the WIPO conventions did not address the enforcement of IP rights in substance and barely contained any means to secure the compliance of state parties and to settle disputes among them.

To remedy these shortcomings and concerns, the protection of IP rights was tabled in negotiations on a new trade regime. The hope was that linking IP rights with trade would allow for improvements in the protection of IP by offering trade advantages. In this vein, IP rights became part of a larger package, which resulted in the establishment of the WTO with its various agreements. The TRIPS Agreement extensively refers to existing WIPO agreements, often envisages a higher standard of protection, and for the first time adds enforcement provisions. In addition, as part of the WTO legal system, the agreement is subject to the WTO's proper dispute settlement system.

Hence, a link has been established between matters of international trade and the international protection of IP rights. This link is well established and hardly questioned today. It is largely forgotten that at the time of the negotiation of the TRIPS Agreement, there was a clear controversy as to whether a trade body, the General Agreement on Tariffs and Trade (GATT) at the Uruguay Round, had any competence at all to negotiate on IP issues – which are after all part of the remit of WIPO.[5] The sheer existence of the TRIPS Agreement indicates these concerns did not prevail in the end. Indeed, the jurisdictional boundaries of international organizations and regimes are not very strict. Moreover, the proponents of an agreement on

[5] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis*, London, Sweet & Maxwell, 2021 at para. 1.12 et seq.

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IP in the context of the nascent WTO argued that the agreement would confine itself to the trade-related aspects of IP rights protection, which were not addressed at all in the WIPO conventions. Even today, the frequent use of the term "trade-related aspects" testifies to the effort to relativize a potential conflict between WIPO and the international trading system.[6]

In addition to the question of jurisdiction, the parallel regulation of the international protection of IP rights in WIPO and the WTO raises questions of international treaty law. At first glance, it is hard to overlook the fact that both systems deal with the international protection of IP rights. The differences between the two systems lie not so much in the substantive standards as in the enforcement, for which the TRIPS Agreement provides for private mechanisms and WTO dispute settlement, while the WIPO conventions merely refer to the International Court of Justice.

The question of whether this situation raises issues in view of the international law of treaties depends on how one interprets the lack of further enforcement mechanisms in the WIPO conventions. If one believes that relevant WIPO conventions expressly and conclusively exclude additional mechanisms for enforcement, the inclusion of private means of enforcement and trade dispute settlement in the TRIPS Agreement could be seen as a successive treaty among parties relating to the same subject matter, Art. 30 of the Vienna Convention on the Law of Treaties, or even as an amendment of a multilateral treaty. Moreover, the specific provisions on amendment as contained in various WIPO conventions would come into play. However, there is no indication that WIPO bodies or WTO committees or states have further considered the issue. Likewise, the issue has hardly ever been discussed in public or in academia.

III. *The Bilateral Turn: Preferential Trade Agreements*

However, much more relevant for this paper are the rules and regulations on IP rights that have been adopted and provided for in a different context. Regional integration is a particularly relevant issue in this regard and indeed, in addition to the regional IP systems already mentioned, some developments took place in the EU, for instance, and in the Andean Pact. In addition, the 1994 North American Free Trade Agreement explicitly addressed IP issues.[7]

[6] See Josef Drexl, The Concept of Trade-Relatedness of Intellectual Property Rights in Times of Post-Trips Bilateralism, in Hanns Ullrich, Reto M. Hilty, Matthias Lamping and Josef Drexl (eds), *Trips Plus 20 – From Trade Rules to Market Principles*, Heidelberg, Springer, 2016, pp. 53–83; Holger Hestermeyer, The Notion of "Trade-Related" Aspects of Intellectual Property Rights: From World Trade to EU Law – and Back Again, *IIC* 44 (2013), pp. 925–931

[7] See Peter Drahos, BITS and BIPS, Bilateralism in Intellectual Property, *J. World Intell. Prop.* 4 (2001), pp. 791–808 at 799 et seq.

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In addition to arrangements in a regional context and a focus on regional integration, a different type of agreement emerged in the 1990s – and in particular after the establishment of the WTO. They are often called "free trade agreements" (FTAs) and they reflect the desire of particular WTO members to establish better market access and closer cooperation in trade matters on a bilateral level. Today, such bilateral agreements make up the majority of preferential trade agreements. The WTO members initiate and conclude such agreements for various reasons. A number of agreements have been concluded by parties that are in a specific geographical situation, as is true for Chile or Singapore, which sometimes have been called "hubs." In addition, big players such as the USA have established a network of such agreements. The USA maintains such agreements with quite a few partners.

The EU had originally been hesitant to conclude such agreements for fear that doing so might undermine the multilateral system. However, in 2006, a paper by the European Commission called "Global Europe" paper made a turnaround and advocated the conclusion of a whole set of FTAs. Indeed, from that point onwards, the EU started several negotiations to partner with a large number of countries around the world, including but not limited to the USA, Canada, Japan, Korea, Vietnam, Singapore, Mexico, and India. Obviously, the proliferation of such agreements also reflects the view that the WTO has not been able to achieve progress in the Doha round.[8]

In substance, all these agreements contain provisions or chapters on IP. They recall the TRIPS Agreement and related obligations. In addition, in many cases, they contain a list of additional WIPO conventions that the parties shall ratify or maintain. Furthermore, they contain a number of additional standards of protection in view of substance and enforcement, and sometimes they envisage a kind of institutionalized cooperation on these topics.

IV. *A Hybrid System*

As already explained, the international protection of IP rights has been traditionally understood to rest on WIPO and its conventions. On closer examination, however, it becomes clear however that even in earlier times, other international institutions became involved. A second pillar was added by the establishment of the TRIPS Agreement, and ever since then a sort of a bipolar system has existed. The merits and challenges of this bipolar system have been widely discussed. Indeed, one could say that the TRIPS Agreement added a dispute settlement and enforcement dimension,

[8] See Peter-Tobias Stoll, Saving The World Trade Order From the Bottom Up: A Role for Preferential Trade Agreements, in Colin Picker, Junji Nakagawa, Peter-Tobias Stoll, Rostam Neuwirth and Meredith Kolsky Lewis (eds), *The Post-WTO Legal order: Paradise Lost or Found?*, Springer 2020, pp. 259–276 at 261 et seq.

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whereas WIPO focused on substantive issues – and its work can even be seen to have been revitalized, whereas further negotiations in the WTO were stalled.

The bilateral and regional turn as seen above added an additional level of complexity. In addition to the bipolar universal – or multilateral – regimes, several regimes emerged that were focused at the bilateral, regional, or even "megaregional" levels, and the result could be described as a hybrid system.[9]

C. DEALING WITH COMPLEXITY

These developments have been widely discussed in academia and by the general public. A number of critical points have been made, and quite some statements and voices conclude that the developments resulted in a considerable increase in the standards of protection. To many, they have an inherent tendency to further "ratchet up" protection, while the public interest is marginalized.[10] In more detail, a potential erosion of the TRIPS Agreement, the effect of most-favored nation (MFN) clauses, and the bilateral setting of negotiations have been criticized. A number of issues have been raised, including treaty interpretation and conflict, the legitimacy of bilateral undertakings, and the proper balancing of individual and public interest. Aside from doctrinal perspectives, some analyses have drawn on critical theory, international relations, and the established reasoning in the law of IP. In some cases, more general discourses –for instance, the debate on the fragmentation of international law – have been taken into account.

The debate on regionalism and bilateralism in international economic relations is still ongoing and has not yielded much progress, given the specialist area of IP rights and its potential specifics. As this may indicate, there is need for a more encompassing theoretical background to understand the complexities in the field of the international protection of IP, in the context of international economic law and international law more generally, and to set the stage for a more sound and nuanced judgment. As one contribution to such endeavor to understand the international protection of IP more comprehensively, this paper addresses the coexistence of multilateral and regional or bilateral levels. In doing so, it considers three main dimensions:

(1) the coherence of the ensemble of rules in legal terms from a "technical" perspective (subsection I);

[9] See in this regard Peter-Tobias Stoll, A Washington wake-up call and hybrid governance for world trade. QIL [Questions of International Law], Zoom-out, 63, 59–81 at http://www.qil-qdi.org/wp-content/uploads/2020/01/04_WTO-Future_STOLL_FIN.pdf, last visited September 5, 2021.

[10] Peter Drahos, BITS and BIPS, Bilateralism in Intellectual Property, *J. World Intell. Prop.* 4 (2001), pp. 791–808 at 798; Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, London, Routledge, 2002.

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(2) the question of how governance is organized in such a context (subsection II); and
(3) how, in terms of substance, the different interests at hand – basically, individual property rights versus public interest – are balanced (subsection III).

I. *Coherence and Effectivity*

The escalation of a huge number of preferential trade agreements in recent times coincides with a general trend in international law. The "diversification and expansion of international law" has met with quite some concern, and in 2006 the trend prompted a well-received study by the International Law Commission.[11] In its assessment, the Commission rightly understood that this trend is accompanied by the proliferation of international courts and tribunals, and that the growing number of both international agreements and of those dispute settlement institutions and procedures have to be seen in context. The Commission has addressed the overlap and the potential for conflict resulting from these developments in view of the proper functioning of the international legal order.

The key concern in this regard has been the coherence of this order and the potential for conflicts arising from inconsistencies in both the agreements and dispute settlement. Hence, coherence is a valid starting point for exploring the array of multilateral and regional and bilateral agreements in the area of the international protection of IP rights. Indeed, the question is whether this number of agreements fit together well.

1. Coherence After an Unfriendly Takeover: The WIPO–WTO Relationship

The establishment of the WTO TRIPS Agreement alongside the established WIPO system was initially seen as an unfriendly takeover, provoking a number of critical questions. Now, after twenty-five years, this dual structure has become more routine. In view of the rules, hardly any inconsistency has surfaced. This may be due to the fact that the TRIPS Agreement makes several references to established WIPO conventions, which promote consistency. However, there seems to be a division of labor, where the WIPO system is more concerned with the substantive standards, whereas the TRIPS Agreement and the WTO institutions particularly address the enforcement side. This uncontroversial state of affairs continued even in times of quite some treaty-making activity within WIPO, which was probably sparked due to some kind of institutional rivalry or competition. Members, when drafting new

[11] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN ILC (2006) at para. 1.

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WIPO agreements, were obviously careful not to create any conflicting provisions. On the other hand, the potential for conflict in rulemaking has been limited, as the WTO has not developed much activity in this direction with the exception of the changes made due to the "TRIPS and Public Health" debate. Some other changes have been proposed to the TRIPS Agreement, which, however, only address very specific points and overall have stalled along with the general impasse in WTO Doha Round negotiations.

However, there has been a particular issue with dispute settlement. In general, WTO dispute settlement has worked well in promoting compliance with international standards of the protection of IP and has contributed to the clarification of the rules. While primarily applying WTO law and thus the TRIPS Agreement, panels and the appellate body have also looked into WIPO rules. Because the WIPO system contains hardly any efficient state-to-state dispute settlement mechanisms, the activities of the WTO dispute settlement process have been helpful and have not resulted in duplication and possibly divergent decisions.

However, there is a particular inconsistency in regard to retaliation in cases where a TRIPS obligation is paralleled by a similar obligation under one of the WIPO conventions. Such inconsistency arises – and indeed has already arisen – where the Dispute Settlement Body has authorized the suspension of obligations under the TRIPS Agreement, while a respective WIPO commitment would still stand.[12]

2. The Multilateral TRIPS Agreement and Patent Term Adjustment: Conflict or Harmony?

More recent are concerns about the consistency between the many IP-related provisions of patent term adjustments (PTAs) and the TRIPS Agreement.[13] Obviously, the former aim at a higher standard of protection and differ considerably from the TRIPS Agreement. In regard to their underlying policies and the intentions and strategies of the parties, one might in some cases even speak of a conflict between the multilateral TRIPS Agreement and PTAs. Doing so, however, would

[12] See Henning Grosse Ruse-Khan, A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations (2008) 11(2) *Journal of International Economic Law* 313.

[13] See Henning Grosse Ruse-Khan, Protecting intellectual property under BITs, FTAs, and TRIPS: conflicting regimes or mutual coherence? in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press / Springer, 2011, pp. 485–515. On the interrelationship between the TRIPS Agreement or PTAs and WIPO treaties see Jane C. Ginsburg, Floors and Ceilings in International Copyright Treaties (Berne, TRIPS, WCT Minima and Maxima) in this volume; Annette Kur, From Minimum Standards to Maximum Rules, in Hanns Ullrich, Reto M. Hilty, Matthias Lamping and Josef Drexl (eds), *Trips Plus 20 – From Trade Rules to Market Principles*, Heidelberg, Springer-Verlag, 2016, pp. 133–162 and Annette Kur, Measuring The Scope Of Obligations Under International Treaties: (To what extent) are IP Conventions binding on Paris- or TRIPS-Plus Legislation? in this volume.

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imply a sense of harmony of intentions and policies, which does not match the current reality of the international legal order and its purposes and needs.[14]

This was why the International Law Commission (ILC), while being fully aware of potentially conflicting policies and intentions of international agreements, introduced a distinction by pointing to a narrower notion of conflict, which entails incompatibility in the rules of two agreements in a given case. However, in most cases, PTAs contain TRIPS- "plus" standards, and Art. 1:1 2nd sentence of the TRIPS Agreement largely permits such a higher protection by stating that "[m]embers may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.'

It goes without saying that by allowing the "implementation" of "more extensive protection," the provision also allows for committing to such protection in an international agreement. It is equally clear from a reading of the last part of the provision that it does not allow for raising the standard of protection indefinitely.".[15] Thus, a conflict in the narrower sense could arise where a PTA would contain a "TRIPS plus" standard that would contravene a provision of the TRIPS Agreement.

However, it is difficult to identify the limits of the provision alluded to by referring to a contravention "to the provisions of this agreement." Art. 7 on the objectives of the TRIPS Agreement and Art. 8 on public health are relevant in this regard. Both are drafted in rather general terms, however, and it would be difficult to establish a clear-cut "contravention." Seen from a dispute settlement perspective, which is quite common in trade law discourse, the question would arise how the contravention issue could come to bear. This is certainly the case where, after concluding a PTA with TRIPS-plus standards, one party would refuse to abide by such standard later on. In such a case, the other party (or parties) to the agreement could initiate a complaint in the respective PTA dispute settlement system. As practically all PTAs fully endorse the TRIPS Agreement, the defending party could rely on Art. 1:1 TRIPS and base its defense on a "contravention." A PTA dispute settlement panel would then be tasked to adjudicate on the contravention issue. In doing so, it would have to engage in an interpretation and application of Art. 1:1 TRIPS, which has been made part of the PTA by reference.

When the panel engages in a detailed examination of the meaning on Art. 1:1, 2nd sentence TRIPS and the words "such protection does not contravene the provisions of this Agreement" it would have to keep in mind that "this Agreement" clearly relates to the TRIPS Agreement, even though the provision now has been "transplanted" to a PTA by way of reference. Nevertheless, such panel would very likely

[14] See ILC, para. 16.

[15] See Klaus Elfring and Katrin Arend, Art. 1 TRIPS, in Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights*, Leiden, Max Planck Institute, 2009, pp. 75–94 at para. 11 et seq.

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also have to consider the wider context, which is the PTA, and this might add a special flavor to its interpretation, which might differ slightly from what a panel in a WTO dispute settlement would conclude when looking only at the context of the TRIPS Agreement.

In addition, because the TRIPS Agreement does not include an exemption from the MFN standard in the case of PTAs, a third party *C* might reflect on bringing a claim in WTO dispute settlement to enjoy the protection that Party *A* committed to in relation to Party *B*. The proper basis of such claim would be the MFN standard under Art. 4 TRIPS. Again here, Party *A* would very likely defend itself by raising Art. 1:1, 2nd sentence. In this case, it would be for the WTO panel to apply and interpret that provision. It is obvious that the views of a PTA panel and a WTO panel might differ slightly and that fragmentation might occur here, which is true more generally as well as in a situation of parallel dispute settlement in PTAs and the WTO.

3. Potential Conflicts among Different PTAs

It is far more complex to assess the potential conflicts that may arise in case of multiple regional or bilateral agreements. It is highly likely that a TRIPS-plus commitment in one agreement can coexist with an even stricter commitment in another agreement, on the understanding that these standards generally set a minimum standard but seldom a maximum standard. For example, if Party *A* were to agree with Party *B* on an extended duration of patent protection, and Party *A* then commits to an even longer prolongation in an agreement with *C*, both these commitments can stand side-by-side, in a simplistic linear understanding of the "more extensive protection" envisaged by Art. 1.1 TRIPS. However, the linear logic may turn out to be overly simplistic where different and conflicting concepts of protection are at stake. Geographical indicators are a case at hand, because conceptually, diverse – and divergent – approaches exist, and they are increasingly being written into PTAs. In addition, an extension of protection in terms of coverage, duration, or enforceability might be related to stricter limitations. In all these cases, a conflict of obligations might arise between different PTAs.

4. Conclusion

In summary, this preliminary assessment has yielded an ambivalent finding. Through the increasing number of regional and bilateral agreements on IP rights, states knowingly foster fragmentation and complexity. This certainly impacts the clarity and consistency of this body of law and ultimately its effectiveness.

However, so far, the probability for norm conflicts has been modest. Thus, the system may be deemed healthy and coherent from a technical point of view. This is

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particularly due to the fact that the agreements are based on the logic of minimum standards of protection and largely allow for other agreements to increase standards.

II. *The Governance Dimension*

Beyond the existing rules and their coherence, the array of multilateral, bilateral, and regional agreements may also be seen as part of a system of regulation of the international protection of IP. Rather than looking only at existing rules and agreements, this perspective would suggest seeing the protection of IP as a continuing process of reflection, discourse, and regulation, where agreements and laws are newly concluded and enacted and amended to respond to relevant – and changing – circumstances, and they reflect the potentially changing views of relevant actors and stakeholders. Such a system can be assessed by looking at its ability to achieve certain objectives and to do so in a way that is legitimate.

Altogether what is at stake here may be said to be the governance dimension of the international protection of IP rights. While a comprehensive understanding of such governance has yet to be developed, some particularly relevant aspects can be discussed here.

1. The Trade Turn as a Governance Problem

One noteworthy issue, as explained above, is the trade turn in international protection of IP rights that was introduced with the WTO TRIPS Agreement.

A. THE TRADE LINKAGE: A STRANGE ADDITIONAL "RATCHET" EFFECT In this case, as well as in the many subsequent trade agreements of a regional or bilateral nature, the linkage between the protection of IP rights and trade topics turned out to be effective in improving the standards of protection and enforcement. The "trade turn" made it possible to arrange for trade-offs in a way that trade advantages were offered in return for commitments in view of the protection of IP rights. This kind of mechanism worked out well with the WTO TRIPS Agreement as well as in case of the PTAs. The introduction of this linkage created an expectation whereby commitments regarding IP rights are tied to similar commitments in the area of trade. Agreements concluded in this way are seen to reflect a quid pro quo in this way.

A particular relevant issue in this regard is the potential later amendment of the rules once established by means of this linkage. As explained, the agreements once concluded will very likely be seen as embodying some sort of a quid pro quo and there will be a general expectation that IP issues will be negotiated jointly with trade issues. As a consequence, there is a strong tendency to subject any amendment to the same linkage and to expect trade concessions in return for agreeing to amend respective rules.

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The current WTO Doha negotiations are an example in this regard, as, according to the rules, potential amendments to the TRIPS Agreement will be adopted together with amendments of any other trade chapters of the WTO in some sort of a package deal, or more specifically through the single undertaking approach. As the whole negotiation undertaking is currently stalled, the few proposed amendments to the TRIPS Agreement have also been stalled. Although most of the bilateral or regional trade agreements lack such strict rules for amendments, it can be expected that future initiatives for the amendment of IP chapters will also raise the question as to a linkage to the amendment of other chapters of the agreements. If one party would like to raise the standards of protection, it will probably be asked to offer additional trade advantages, and the same is also true for cases where a party would like to ease its commitments.

B. TALKING TO TRADE PEOPLE Another implication of the trade turn concerns the actors and stakeholders involved in negotiations and later on in implementation, application, and dispute settlement at the international and national levels. Certainly, economic considerations also play an important role in WIPO. However, in a trade format, the stakeholders from the trade side are officially involved and take the lead in negotiations. In addition, IP issues are subjected to the logic of trade negotiations, with their strong sense of reciprocity and the need to arrive at a package deal – or a single undertaking. This is true for the setting of international negotiations as well as for the actors involved in delegations and capitals. In all these structures, IP issues have to be framed in a way that corresponds to the logic of other issues, such as trade in services, agriculture, or trade in goods. Given the fact that the structure of IP rights and their protection at international level is probably more complex and specific, this is a challenging task for negotiators, other officials, and stakeholders in charge of IP issues.

C. THE WIPO SYSTEM: REGULATORY COMPETITION? The situation is even more complex as one of the major multilateral players, namely WIPO, does not pursue this kind of a trade linkage in its work. To date, trade issues can hardly be tabled in discussions or negotiations within WIPO or be made the subject of any agreement proposal. Nevertheless, WIPO has been quite successful in its work in recent times. This success may indicate that the traditional rationale of dealing with IP separately still works. One could even see this scenario as welcome competition between two governance models: the traditional one and the trade-related one. However, the WIPO system and the multilateral and bilateral trade regimes are not entirely separate. Frequently, PTAs contain commitments as to the ratification of and compliance with WIPO conventions, and the TRIPS Agreement does the same. While probably being able to create momentum for widespread ratification on WIPO conventions, this might at the same time invite parties to wait for the

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ratification of WIPO conventions before they identify opportunities for a corresponding trade advantage.

In sum, the trade turn has the potential for creating strong momentum for promoting international protection of IP rights, but in the long run renders it more difficult to achieve subsequent changes, as an expectation is created to link IP change with changes in the trade area too.

2. The Bilateral Turn: Pros and Cons

Another issue is the bilateral turn, which results from the increasing number of trade agreements concluded bilaterally or within relatively small groups of parties.

A. BARGAINING POWER AND FAIRNESS IN NEGOTIATIONS Frequently, concerns have been raised about inequalities in negotiation power and the state of economic development.[16] This point is particularly valid in view of the trade linkage, where IP issues are tabled along with market access questions. While such inequality in bargaining power exists in many areas of international relations, in IP matters, the MFN or national treatment effects give it an additional twist. While reciprocal market-access concessions, which form the core of PTAs, are exempt from MFN under Art. XXIV GATT and Art. V GATS, no such exemption exists in the TRIPS Agreement. Consequently, a TRIPS-plus standard that is agreed on in a particular PTA will benefit all members of the WTO and their inventors and creators respectively. However, as this happens "automatically," the party committing to the "plus" standard is not able to ask the other members benefiting from the commitment for a concession in return.

B. RESTRICTED NUMBER OF PARTIES: EXCLUSIVITY A particular issue with bilateral agreements is their exclusivity in terms of the parties at hand. Choices for potential partners to negotiate and conclude a PTA are typically influenced from a trade perspective and the choices made are not necessarily in line with an appropriate setting for IP issues. At least, in many cases an opening up of the membership to such agreements could be helpful, as lately envisaged by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Such quasi-plurilateral agreements have been widely discussed recently and may also hold merit for IP issues.

C. THE LACK OF TRANSPARENCY AND PARTICIPATION Furthermore, treaty-making in regional – and even more so in bilateral – contexts lacks transparency and the forum function provided for by the multilateral institutions at hand, namely WIPO with its various bodies, and the WTO, particularly the TRIPS Council.

[16] Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting, *J. World Intell. Prop.* 5 (2002), pp. 765–789.

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Regional and bilateral cooperation is certainly much more of a "closed shop," particularly at the negotiation stage. This is particularly worth noting, as actors such as the EU have made impressive steps to involve stakeholders and constituent bodies internally and to share their analytical work, such as sustainability impact assessments, and to publish early negotiation drafts. Moreover, recent PTAs envisage the involvement of stakeholders, for instance by setting up domestic advisory groups. They intend for joint meetings of such groups as a way of participation in the implementation process and in the operation of the agreements.

However, transparency and participation at the international level and among different states and international organizations are rather limited. PTAs envisage an involvement of parties with international forums, or with third states, only in particular circumstances. As far as international organizations are concerned, the WTO is relevant, as PTAs are primarily related to trade and WTO rules. However, even though the Committee on Regional Trade Agreements is notified about any PTAs concluded, it has never engaged in a more substantive discussion on the merits. The issues at hand might also be tabled in other WTO bodies or procedures. However, these options have hardly ever been explored further.[17]

Further, the prominent "forum function" of the WTO is explicitly related to the "multilateral trade relations" among members under Art. III:2 WTO Agreement. The WIPO is a bit more open in this regard, as the WIPO Convention envisages in Art. 7 (2)(i) that the WIPO conference may "(i) discuss matters of general interest in the field of IP and may adopt recommendations relating to such matters, having regard for the competence and autonomy of the Unions . . . ."."[18]

It is evident that much has been done to improve the transparency, participation, and ultimately legitimacy with regard to PTAs internally and within the respective bilateral relations. However, neither the parties to such agreements nor the competent international organizations have done much to discuss the manifold direct and indirect implications that PTAs in particular, and the bilateral turn more generally, entail for particular third states or the world trade order. The implications for the international system of IP governance more broadly have also not been addressed.[19]

[17] For suggestions to table the issues in the WTO TRIPS Council or in TPRM: Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting, *J. World Intell. Prop.* 5 (2002), pp. 765–789 at 783 and Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, London, Routledge, 2002, at 207.

[18] For a proposal to table development issues in WIPO see Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting, *J. World Intell. Prop.* 5 (2002), pp. 765–789 at 785.

[19] See Peter-Tobias Stoll, Saving The World Trade Order From the Bottom Up: A Role for Preferential Trade Agreements, in Colin Picker, Junji Nakagawa, Peter-Tobias Stoll, Rostam Neuwirth and Meredith Kolsky Lewis (eds), *The Post-WTO Legal order: Paradise Lost or Found?*, Springer 2020, pp. 259–276 at 274 et seq.

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D. A PIONEERING FUNCTION However, from a more general perspective on the international system of governance of IP protection, some positive effects of regionalism and bilateralism must also be mentioned. Parties to such agreements might pioneer more ambitious and progressive rules for IP, which can later on be taken up by multilateral forums. In a bilateral setting, agreement can be achieved relatively speedily, as only a small number of parties take part in the negotiation process.

E. CONCLUSION In sum, it becomes clear that the "bilateral turn" in international trade relations has important implications for the global governance of international economic relations and the international protection of IP rights. It allows "coalitions of the willing" to move forward and sometimes even to act as pioneers. At the same time, it fuels fragmentation both in terms of the rules and regarding global consensus and legitimacy.

III. *Balancing*

Yet another way to look at the system of international protection of IP rights and the related array of multilateral, bilateral, and regional agreements is to examine how this system achieves a balance between a number of potentially conflicting objectives and purposes. Such a view adds to the governance dimension as discussed before, in a more substantive perspective.[20] This assessment would have to identify the different objectives and interests and study how they are taken into account and balanced in a rational way.

1. Balancing in IP: How It Works at National Level

Very basically, IP law and policy is about the balancing of interest of inventors and creators in exclusionary protection and the interest of the public in access. While the former interest is secured by IP rights, public interests in access are less clearly defined. They are reflected by the limits of protection regarding protectable subject matter, the duration of protection, and limits to exclusionary uses, as taken care of by legislators, patent examiners, and courts, as the case may be. In rare cases only is this public interest reflected in individual rights or claims, as might be true for a competitor's right to claim a compulsory license, for instance. All this takes place at national levels, with a long tradition and in a consistent and homogeneous legal environment, which offers a rich orientation including constitutional provisions, fundamental rights, rule of law principles, and jurisprudence.

[20] Whereas most issues addressed here under the heading of "governance" could be considered roughly under "input legitimacy," the view offered here largely refers to what often has been called "output legitimacy."

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2. Balancing as an Objective of the TRIPS Agreement

The TRIPS Agreement reflects this understanding of balancing in its Art. 7 on objectives, which reads, "[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

In its explicit wording, the provision has a clear bias in favor of technology, while ignoring the creativity reflected by copyright and other IP rights.[21] However, it correctly recalls the general conceptual basis of IP law as also reflected by IP doctrine. In more general words, it shall promote innovation, but also its transfer and dissemination. It shall do so to the "mutual advantage" of "producers" but also "users," having in mind economic but also "social" welfare, and shall "balance" the rights and obligations. This scenario corresponds to an understanding in which the system of IP rights takes care of the interests of "users" more generally and society by the proper limitation of the rights limitations in terms of subject matter, eligibility, duration, and the scope of protected uses.

Article 7 may come to bear in the context of Art. 1:1 TRIPS. As mentioned earlier, the provision allows for a "more extensive protection . . . provided that such protection does not contravene the provisions of this Agreement." Art. 7 is one of the "provisions of the Agreement" and therefore limits the extent to which members may raise the standards of protection unilaterally or in context with an international agreement. However, the language of Art. 7 is rather vague, and it would be difficult to see how it can effectively curb the ratcheting up of standards.

3. The Protection of IP Rights as an International Concern

In more detail, the question of how balancing can be achieved relates to how the diverse interests at stake are defined and assigned to actors. The international protection of IP through WIPO conventions and the TRIPS Agreement roughly aim at the coordination of national systems by way of non-discrimination and minimum standards. Participating states thus opened up their IP systems to foreigners on a non-discriminatory basis, and the right holders enjoy a quasi-international protection. Altogether, one could consider this to be an internationalization of the rights and interests of the right holders.

In this system, any stepping up in the standards of protection, be it undertaken unilaterally or resulting from bilateral or other agreements, will benefit any inventor

[21] Florian Keßler, Art. 7 TRIPS, in Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights*, Leiden, Max Planck Institute, 2009, pp. 179–187 at para. 2.

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or creator across the world. This can be seen as a ratcheting-up mechanism, but it should be noted that arguably this is nothing new but happened even under traditional WIPO conventions. The internationalization of rights rests on the obligations of parties under international treaties, which can be enforced in dispute settlement in the WTO or PTAs.

4. The Public Interest: Primarily a National Concern

The situation is quite different in view of public interest in access. In part, the public interest is taken care of by the limits set by international minimum standards of protection in view of eligible subject matter, exclusionary uses, and duration. In addition, Art. 8 TRIPS must be mentioned, as it explicitly refers to the public interest and lists various issues and policy areas in this regard.[22]

In detail, such public interest considerations may be implemented by way of fair use and compulsory or non-voluntary licenses or even by implementation periods. The options to raise or not to raise standards beyond the international minimum standard of protection, to fully use implementation periods, to make use of fair use restrictions, and to grant compulsory licenses are all called "flexibilities," which secures policy space for parties of agreements. Overall, however, the public interest in access is primarily seen as an issue to be taken care of by the parties individually and internally. They are seen as the ones to define and secure such public interest. What is more is that also in substantive terms, this public interest is understood to arise in the confines of the territory of a party and to lie in its own responsibility.[23]

In sum, while the international rules on IP altogether acknowledge the protection of IP as a common interest and responsibility of the parties, they see the public interest in access as something to be taken care of by parties in their own responsibility.

5. Policy Spaces and Treaty-making

It is understood generally that parties may use such flexibilities, or policy spaces, unilaterally as well as through committing themselves in an international agreement. This is in line with international law reasoning more generally, according to which any matter not subjected to international commitments falls within the sovereignty of a state. As sovereignty essentially includes the power to conclude agreements, states would appear to be fit to freely make binding concessions.[24]

[22] See Oliver Brand, Art. 8 TRIPS, in Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights*, Leiden, Max Planck Institute, 2009, pp. 188–204 at para. 3 et seq.

[23] An example is the topic of TRIPS and public health.

[24] See, on the sovereignty issue in this context, Henning Grose Ruse-Khan, "Gambling" with sovereignty: Complying with international obligations or upholding national autonomy, in

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However, the realities of negotiations have sometimes been characterized as an "illusion of sovereignty."[25] In this context, the concept of "democratic property rights"[26] has been developed, which can be understood to imply that the policy spaces at hand in view of IP rights have not only a substantive but also a procedural dimension. In this vein, one might see the use of the policy spaces by way of national regulations as a matter of self-determination and democracy, which should not be subjected to any international obligation.

In a way, these ideas come close to the concept of absolute sovereignty. With concepts such as *jus cogens*, lack of capacity, or proper consent, a fundamental change of circumstances or a state of emergency in international law accommodates some of the concerns at hand. However, it is difficult to see how the TRIPS Agreement and its Art. 1:1, 7, and 8 could go beyond such established concepts in requiring a special standard of internal decision-making as a precondition for the validity of an international obligation in the area of IP rights.[27] Having said this, a number of options exist and have been recommended[28] to strengthen the legitimacy of obligations and to allow for the adaptation of commitments to new developments. Such options relate to the transparency and participation in respective negotiations and include treaty provisions such as a sunset-clause and emergency exceptions.

6. Public Interest: Support by Other International Law Rules

The array of agreements on the international protection of IP is not to be seen in isolation. The medicines controversy has made it clear that such agreements have to be seen in the context of other areas of international law.[29] The human right to health has been a starting point for reflecting on the impact that other rules of international law may have. The right to health also was at stake in a later case regarding clean packaging. Other human rights, such as the freedom to speech, the

Meredith Kolsky Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy*, Cambridge 2010, pp. 141–168.

25 Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, London, Routledge 2002 at 74.

26 Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, London, Routledge 2002 at 187 et seq.

27 In the context of criticism about the power imbalances in negotiating international IP standards, a concept of "democratic bargaining" (Peter Drahos, Developing Countries and International Intellectual Property Standard-Setting, *J. World Intell. Prop.* 5 (2002), at 766 and 769) and even the idea of "democratic property rights" have been proposed (Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, London, Routledge 2002, at 187.)

28 See Henning Grosse Ruse-Khan, Josef Drexl, Reto M. Hilty, et al., Principles for Intellectual Property Provisions in Bilateral and Regional Agreements, *IIC* 44, no. 8 (2013), pp. 878–83.

29 Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines*, Oxford University Press, 2008.

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right to privacy, and the rights of persons with disabilities, also became relevant in the application and further development of international IP rights rules.

Outside the area of human rights, a number of norms on sustainable development, particularly the climate change and biodiversity regimes, but also some provisions contained in sustainable development chapters of PTAs themselves, may also become relevant. Some of these norms can even be said to relate to what has recently been described as fundamental values in international law.[30] They may all be understood to protect what has been framed here as the public interest.

It is obvious that states are obliged to observe all their international commitments, and this implies to employ, what the ILC calls a "systematic" interpretation.[31] This is true for existing commitments as well as for negotiating and concluding new international agreements. Furthermore, particular human rights play a role in the emerging concept of a "duty to protect." According to this concept, states enjoy sovereignty not only as an end in itself, but – at least partially – also in a functional way to protect the human rights of their citizens. Seen in this light, the duty to protect could require states to balance their IP regimes and related international commitments with the public interest as determined by human rights.

D. CONCLUSION

The law on the international protection of IP rights has seen vivid development over the last thirty years. It has seen a "trade turn" with the entry into force of the TRIPS Agreement and a subsequent "bilateral turn" when a vast number of regional and bilateral trade agreements with IP chapters were concluded. The resulting complex array of international agreements and rules can be characterized as hybrid, where layers of multilateral and regional and bilateral agreements are interrelated.

These developments have met with quite some criticism concerning their coherence, effectiveness, and balance. There is an urgent need to elaborate an analytical framework to properly assess the various implications and impacts of this hybrid system. This paper has focused on the interrelationship between multilateral and regional or bilateral agreements. In so doing, three dimensions, namely coherence and effectivity, governance, and balance, were analyzed. As it turned out, the considerable fragmentation – while possibly affecting overall effectivity – did not call into question its coherence in technical terms. This is mainly due to the fact

[30] See Massimo Iovane and Pierfrancesco Rossi, International Fundamental Values and Obligations *Erga Omnes*, in Massimo Iovane, Fulvio M. Palombino, Daniele Amoroso and Giovanni Zarra (eds), *The Protection of General Interests in Contemporary International Law*, Oxford University Press, 2021, pp. 46–67

[31] See Peter-Tobias Stoll, A "New" Law of Cooperation: Collective Action across Regimes for the Promotion of Public Goods and Values versus Fragmentation in Massimo Iovane, Fulvio M. Palombino, Daniele Amoroso and Giovanni Zarra, *The Protection of General Interests in Contemporary International Law*, Oxford University Press, 2021, pp. 319–341 at 322 et seq.

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that most of the agreements are construed in a way that sets minimum standards and welcomes a further increase in protection agreed upon elsewhere, which has been described as a "ratcheting up" effect.

The strong and lasting trend to promote and increase protection has also driven the "trade turn." Seen from a governance perspective, linking trade to IP has been a strong momentum, which brought about the TRIPS Agreement. However, in the long run, such linkage may hamper the further development of IP, as it would make progress in the IP area dependent on progress in various other trade issues. The new bilateralism, while bearing some potential in view of pioneering new developments, raises a number of questions. These concern bargaining power, exclusivity, and the lack of transparency and a forum function. Moreover, in contrast to trade issues, MFN cannot be excluded for IP issues in preferential trade agreements. As a result, TRIPS-plus standards "automatically" benefit all WTO members, without giving parties a right to ask other members for a concession in return for such benefits.

Balancing rights and public interest is an essential function of national IP systems and is acknowledged explicitly by the TRIPS Agreement. However, while agreements envisage an international responsibility for protection, the definition and implementation of the public interest is left to the parties. Parties may, at times, have difficulty withstanding the demands from others to commit to stronger protection. While Art. 1.1, 7, and 8 of the TRIPS Agreement are of limited relevance in this regard, other international norms and particularly human rights might help, as has been seen in the medicines case.

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