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WIPO-WTO RELATIONS AND THE FUTURE OF GLOBAL INTELLECTUAL PROPERTY NORMS*

Ruth L. Okediji**

1. Introduction
2. The rise of a monolithic global IP Governance Institution
 - 2.1 The strategic genesis of the IP and ‘development’ linkage
 - 2.2 The UN-WIPO Agreement
 - 2.3 The hidden costs of inter-institutional coordination: credibility and self-preservation
 - 2.4 Some limits of coordination
3. Reciprocal linkage bargains and the trade origins of parallel IP regimes
 - 3.1 The insularity of WIPO and the primacy of IP protection
 - 3.2 The WTO is not a clear institutional preference
 - 3.3 Initial considerations for a WTO preference: Serial linkage through multiple sites of regulation
 - 3.4 Normative pursuits and common ends in the IP/trade interface
4. Heterarchy and the new global IP institutional apparatus
 - 4.1 WIPO in the context of global governance by international organizations
 - 4.2 Institutional competitive advantage
 - 4.3 Form and function in the WIPO-WTO Agreement
 - 4.3.1 Establishing WTO primacy: Article 2 of the WIPO-WTO Agreement

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** William L. Prosser Professor of Law & Solly Robins Distinguished Research Fellow, University of Minnesota Law School. I am grateful to Mary Rumsey and Tomas Felcman for extraordinary research assistance; to the Board of Editors of the Yearbook, for their patience, support and comments on an initial draft. Participants at International Law Workshops at Michigan Law School and Vanderbilt School of Law, and a faculty workshop at Duke Law School, provided helpful observations and critique; I also had the benefit of comments from James Bacchus, Antony Taubman and Michael Tonry. Any remaining shortcomings are, of course, my own. This article is dedicated to my father, Prof. Aaron T. Gana, a student and scholar of international relations for almost fifty years, who, with great virtue, dedicated his life to public service and promoting the high ideals of the rule of law in service of human welfare – in loving memory.

- 4.3.2 Article 3 of the WIPO-WTO Agreement
- 4.3.3 Article 4 of the WIPO-WTO Agreement
- 4.4 Models of WIPO-WTO Cooperation
 - 4.4.1 The expert agency model
 - 4.4.2 The presumptive peer-to-peer model
 - 4.4.3 The explicitly hierarchical model
- 4.5 The persistence of linkage and the strategic use of the WTO
- 5. Hierarchy or heterarchy: Prioritizing the WTO as a source of global IP norms
 - 5.1 Shared governance as a hallmark of future IP norm-setting
 - 5.2 Norms and norm-setting capacity in the WTO
 - 5.2.1 The Unlimited Mandate of the TRIPS Council
 - 5.2.1.1 The TRIPS Council and the development linkage
 - 5.2.1.2 The TRIPS Council and legitimacy with DCs and LDCs
 - 5.2.2 The enforcement power of TRIPS dispute settlement
 - 5.3 The WTO and hierarchy
 - 5.3.1 Whither WIPO?
 - 5.3.2 Towards a future of TRIPS-related global IP norms?
 - 5.3.3 Some risks of WTO primacy over global IP norms
 - 5.3.4 A soft hierarchy versus institutional cooperation to address the supply of global public goods
- 6. CONCLUSION
 - Abstract*

1. INTRODUCTION

The role of the World Trade Organization (WTO) in the public international legal order continues to generate significant attention, particularly with regard to the effects of WTO action (or inaction) in areas over which the Organization has no formal authority,¹ but on which its activities have significant normative and political consequences.² Examination of the WTO's ascendancy as an international or-

1. The principal WTO Agreements regulate trade in goods, services and intellectual property. See Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 *UNTS* 154, 33 *ILM* 1144 (1994), *Trb.* 1994 No. 235.

2. See e.g., E. Rosenthal, 'Both Sides Cite Science to Address Altered Corn', *New York Times*, 26 December 2007 at C1 (discussing the WTO's ability to affect the environment by ruling on genetically-modified organisms). Human rights obligations and environmental regulation are the most com-

ganization usually has taken place within the context of trade linkage debates,³ either in efforts to delineate the appropriate scope of WTO jurisdiction or in explicit attempts to harness its politico-legal power to advance norms that otherwise lack a powerful institutional home or international structure to encourage compliance by states. Because the jurisdictional contour of the WTO is embedded in a broader global framework in which competing social goals must be reconciled, the enforcement power of the WTO in particular has attracted intense scrutiny for its potential to promote objectives and influence state behaviour in matters that are ostensibly far removed from the world of transactions in goods and services with which trade rules are to be (at least in theory) preoccupied.

Demands for WTO accountability to, or accommodation of, non-WTO obligations are also sometimes framed as concern over the prospect of norm conflicts due to the activities of multiple actors operating within the same policy space. The argument generally is that the WTO, with its capacity for strategic linkage bargains, has the constitutional capacity and, perhaps, mandate to internalize the negative trade-offs associated with the free trade regime by recognizing the legal obligations of states to, for example, protect the environment, promote fair labour standards, protect human rights or secure other human welfare goals.⁴ Thus, claims for norm accommodation in the WTO reflect, at least partially, a legal argument that the trade system must be constrained by the obligations arising from other international law regimes, and that the welfare objectives of free trade⁵ should cohere with the social goals that more directly animate other multilateral instruments.⁶

monly identified beneficiaries of putative claims on WTO jurisdiction, although they are by no means the only possible targets. See e.g., S. Charnovitz, 'The World Trade Organization and Social Issues', 28 *Journal of World Trade* (1994) p. 17 at p. 33 (arguing that the WTO is the most promising forum for addressing labour issues); F. Weiss, 'The WTO and the progressive development of International Trade Law', 29 *NYIL* (1998) p. 71 at p. 75 (noting pressure on the WTO to bear responsibility for the governance of globalization in areas including environmental standards, social justice, e-commerce, investment and competition policy).

3. The intellectual project of mapping linkages between trade and other subjects is a subset of a larger enterprise to which much academic attention has been directed, namely the legal obligations of the WTO in the broader public international law system. See e.g., P. Lamy, 'The Place of the WTO and Its Law in the International Legal Order', 17 *EJIL* (2006) p. 969 at p. 982; J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *AJIL* (2001) p. 535.

4. See *supra* n. 3. See also A.D. Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', 10 *Journal of International Economic Law* (2007) p. 795 at p. 799.

5. See Marrakesh Agreement Establishing the World Trade Organization, *supra* n. 1, Preamble at para. 1.

6. See *supra* n. 3. See also G. Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) p. 753 at pp. 755-756; C.R. Kelly, 'Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes', 24 *Berkeley JIL* (2006) p. 79 at pp. 86-87.

To minimize conflicts among disparate legal regimes, scholarly attention has been directed at the importance of managing the inter-dependency that develops when institutional allocations of responsibility overlap.⁷ Such overlaps could be the unavoidable result of the proliferation of specialized bureaucracies that autonomously expand their specific mandates in response to the complexity and transnational nature of global problems.⁸ At other times, however, shared institutional oversight of a subject matter has been the deliberate design of states, such as in the case of intellectual property (IP), which was incorporated into the trade regime through the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁹ With specific regard to TRIPS, a more nuanced form of inter-dependency has emerged from the strategic behaviour of states seeking to exploit the non-hierarchical structure of the international community by proposing norms in alternative fora specifically to undermine, if not upend, TRIPS obligations.¹⁰ Regardless of the underlying basis, however, scholars and commentators have encouraged stronger institutional coordination among international organizations as one way to overcome institutional isolation and to facilitate effective fulfilment of related mandates.¹¹ The emphasis on coordination characteristically presumes equality among the relevant international organizations.

7. See V. Mosoti, 'Institutional Cooperation and Norm Creation in International Organizations', in T. Cottier et al., eds., *Human Rights and International Trade* (New York, OUP 2005) p. 165 at p. 168; R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, in T. Cottier et al., *ibid.*, p. 180; J.L. Dunoff, 'Constitutional Concepts: The WTO's "Constitution" and the Discipline of International Law', 17 *EJIL* (2006) p. 647 at p. 667 (noting that there is broad consensus on the desirability of increased coherence between the WTO and other international organizations).

8. There is of course another general source of this overlap, namely the intensification of rule networks that create unintended, but nevertheless significant, reciprocal risks and obligations for states and individuals across a wide variety of international law regimes. See D. Held and A. McGrew, 'Political Globalization: Trends and Choices', in I. Kaul et al., eds., *Providing Global Public Goods: Managing Globalization* (New York, OUP 2003) p. 185 at pp. 186-187 (characterizing contemporary globalization by its 'extensive reach of cross-country relations and networks matched by their high-intensity, velocity, and impact propensity across many facets of life, from economic and social to environmental').

9. The TRIPS Agreement explicitly references cooperation between WIPO and the WTO and incorporates substantive provisions of WIPO treaties into its core text. See Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 *UNTS* 299, 33 *ILM* 81 (1994) (hereinafter TRIPS Agreement); *Trb.* 1999 No. 235 p. 337.

10. See generally L.R. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale JIL* (2004) p. 1.

11. See e.g., Mosoti, *supra* n. 7; F. Abbott, 'Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance', 3 *Journal of International Economic Law* (2000) p. 63; N. Khlestov, 'WTO-WIPO Co-operation: Does It Have a Future?', 10 *European Intellectual Property Review* (1997) p. 560 at p. 561; P. Passell, 'Loading the Trade Agenda with

In this article, I argue that the WTO, in a hierarchical division of labour with the World Intellectual Property Organization (WIPO),¹² should be promoted as the future locus of substantive international IP regulation, particularly with respect to the creation of IP norms affecting the regulation and supply of global public goods such as health, education, scientific data and the environment. I advance three principal arguments in support of this claim. First, linkage is an indelible fact of modern economic relations. WIPO is neither formally charged nor structurally designed to accomplish the kind of linkage bargains now associated with the WTO. Second, the WIPO-WTO Agreement,¹³ while not unambiguous, can reasonably be interpreted as creating a hierarchical relationship between the two Organizations. Third, while there are risks and problems associated with a move to the WTO, particularly the WTO's casuistic methods, there are good reasons, mainly flowing from the economic interests of developing and least-developed countries (DCs and LDCs), to prefer a hierarchical approach to the current institutional structure of global IP regulation.

My arguments for WTO primacy over the future development of global IP norms encompass public welfare considerations more universal in nature than the customary geopolitical construct of relations between disparately situated states. To a large extent, the 'North-South' divide has merely become a leitmotif for a new transnational IP discourse framed more broadly as access to knowledge, or 'A2K'.¹⁴ This discourse, among other things, offers a counter-narrative that has systematically challenged the established IP orthodoxy, which has represented ever stronger IP rights as a source of inescapable virtues for economic growth. Today, global public concerns about matters as varied as labour standards, environmental protection, gender equity, biodiversity and food security, set against a backdrop of vast

Diverse Issues Could Backfire', *New York Times*, 9 October 1997 at D2 (citing statement by a group of economists arguing that '[m]ore efficient outcomes are achieved by institutional specialization in policy assignment coupled by consultation and coordination among the relevant organizations'); World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (March 2004), at <<http://www.ilo.org/public/english/wcsdg/docs/report.pdf>> (emphasizing the need for greater policy coordination among international organizations on issues on which their policies interact or mandates intersect). See also UN General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, para. 9, UN Doc. A/CN.4/L.682 (13 April 2006), at <<http://untreaty.un.org/ilc/sessions/58/58docs.htm>> (noting that some have treated fragmentation as a problem that could be controlled by 'technical streamlining and coordination').

12. Convention Establishing the World Intellectual Property Organization, 14 July 1967, 21 *UST* 1749, 828 *UNTS* 3, *Trb.* 1969 No. 145 (hereinafter WIPO Convention).

13. Agreement between the World Intellectual Property Organization and the World Trade Organization, 22 December 1995, 35 *ILM* 754 (1996) (hereinafter WIPO-WTO Agreement). Of course, the relationship between WIPO and the WTO arguably is not fully captured by this Agreement.

14. See A. Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property', 117 *Yale LJ* (2008) p. 804.

social networks, all canvass around the A2K rubric, combining the claims of ordinary citizens worldwide with the longstanding demands of less industrialized countries for a global IP system that promotes technological, social and cultural progress. These are some of the critical issues at the frontier of future global IP norm-setting. Responding effectively to these challenges requires an institutional framework competent to address and facilitate the issue linkages that necessarily must be part of any multilateral solutions. It also requires consideration of which institutional forum will generate appropriate political incentives to foster mutually beneficial outcomes in an iterative fashion.

In section 2 of this article, I briefly summarize the evolution of the international framework for global IP regulation, highlighting institutional strategies, including institutional coordination, employed by the United International Bureaux for the Protection of Intellectual Property (BIRPI),¹⁵ WIPO's predecessor, in establishing its exclusive governance over global IP norm creation.¹⁶ As I point out, institutional coordination can be a way to resist normative change and to forestall challenges to entrenched institutional culture. In section 3, I focus on the imperative of IP linkages with other international trade and political issues and the constitutional incapacity of the BIRPI/WIPO institutional chain to deal with those issues. I begin here to outline considerations for WTO primacy over global IP regulation. In section 4, I make the case for the WTO as the preferred organization for generating global IP norms. The arguments are made in the context of globalization and shared power between states and international agencies, and a review of the WIPO-WTO Agreement.¹⁷

Finally in section 5, I identify key features of the WTO system that support my arguments and briefly discuss the important role WIPO will continue to have in the global IP system even under hierarchical conditions. I also note some risks that could be associated with WTO primacy. In the end, I favour a 'federated' IP system in which global IP regulation is organized around a soft organizational hierarchy in favour of the WTO, particularly as regards issues that affect the legal framework for the production and diffusion of knowledge goods generally, and global public goods specifically.

15. The acronym BIRPI is from the French name 'Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle'.

16. For a more extensive analysis of this process, see generally R.L. Okediji, 'Becoming WIPO', draft paper presented at the Fordham University Law School Symposium, When Worlds Collide: Intellectual Property at the Interface between Systems of Knowledge Creation, 31 October -1 November 2008.

17. WIPO-WTO Agreement, *supra* n. 13.

2. THE RISE OF A MONOLITHIC GLOBAL IP GOVERNANCE INSTITUTION

2.1 The strategic genesis of the IP and ‘development’ linkage

For a little over a century, the development of international IP law has occurred primarily within WIPO.¹⁸ WIPO is the outcome of an evolutionary process that started with a fairly simple administrative framework established in the late nineteenth century when the two principal treaties for the protection of IP – the 1883 Paris Convention for the Protection of Industrial Property¹⁹ and the 1886 Berne Convention for the Protection of Literary and Artistic Works²⁰ – were negotiated. Both Conventions established an International Office²¹ to deal with the administrative and financial obligations attendant to the respective Treaties. However, these Offices had no formal role, responsibility, authority or capacity to monitor and secure compliance by member states with the substantive treaty obligations.²² In 1893, seven years following the conclusion of the Berne Convention, the Paris and Berne Bureaus were combined to form a single structure – BIRPI. Between 1893 and 1967, BIRPI exercised significant autonomy in the exercise of its bureaucratic functions and, as a result, greatly influenced the normative context for the development of international IP rules.²³ With the post-World War II rise of international organizations dedicated to, among other things, the social and economic welfare of post-colonial states, BIRPI commenced a tactical initiative for an enhanced organizational status.

18. Prior to the conclusion of the major multilateral IP conventions, transborder protection of IP rights was provided through bilateral trade agreements. See R.L. Okediji, ‘Back to Bilateralism? Pendulum Swings in International Intellectual Property Agreements’, 1 *University of Ottawa Law and Technology Journal* (2003-2004) p. 125. The establishment of BIRPI, which was succeeded by WIPO, represents the first international organization dedicated to the development of international IP protection. However, following World War II, the UN and several of its specialized agencies also began to address IP issues, although it is fair to say that with the exception of UNESCO, norm-generation was not the primary focus of these activities. Finally, there is evidence that other international organizations expressed interest in various aspects of global IP regulation, but not on a sustained basis.

19. Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, 14 July 1967, 21 *UST* 1583; 828 *UNTS* 303, *Trb.* 1969 No. 144 (hereinafter Paris Convention).

20. Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Paris on 24 July 1971 and amended on 28 September 1979, 25 *UST* 1341, 1161 *UNTS* 30, *Trb.* 1972 No. 157 and *Trb.* 1980 No. 39 (hereinafter Berne Convention).

21. See Paris Convention, *supra* n. 19, Art. 13; Berne Convention, *supra* n. 20, Art. 16(1).

22. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, Kluwer 1987) p. 150; S.P. Ladas, *The International Protection of Industrial Property* (Cambridge, Harvard UP 1930) p. 117.

23. For a detailed history and examples of BIRPI’s normative influence, see Okediji, *supra* n. 16.

From the very beginning of BIRPI's bid for institutional re-design, safeguarding the economic development of DCs and LDCs was identified as part of a complex set of justifications for an elaborate organizational form with recognized legal personality and authority.²⁴ While formally embracing the post-colonial integration of these countries into the global IP system, important strategic and substantive reasons fuelled BIRPI's orchestrated pursuit of exclusive institutional power over global IP norm-setting. First, the activities of United Nations (UN) specialized agencies threatened WIPO's unilateral voice over the development of international IP law. In particular, the UN Educational, Social and Cultural Organization (UNESCO) had successfully produced a multilateral copyright treaty specifically targeted at the interests of less developed countries.²⁵ This posed a threat to the 'unity' of international copyright doctrine²⁶ and effectively destabilized BIRPI's political clout in the governance of international copyright norms. The importance of marginalizing UNESCO's role in international copyright law clearly was significant in BIRPI's considerations for a new organizational status.²⁷

Second, also within the UN structure, some countries had already raised challenges regarding the presumed benefits of the global patent system for development.²⁸ BIRPI's capacity to effectively respond to or mitigate the latent antipathy toward the international patent system was constrained by, among other things: 1) its membership which consisted primarily of developed European countries; 2) its limited jurisdictional authority *vis-à-vis* the broad constitutional mandate of the UN system; and 3) its lack of a comparable legal status in relation to other interna-

24. See A. Krieger, 'A New International Organization for Intellectual Property? Efforts to Modify the Structure of the Paris and Berne Unions', 5(2) *Industrial Property* (1966) p. 37 at p. 37 (noting that a reason for the new organizational form was to create a 'conditions for universal adherence to the two Unions, with particular reference to coverage of the developing countries'); see also at p. 39 (arguing that developing countries will demand 'due representation and will also want to play a full part in the [Paris and Berne] Unions').

25. See Universal Copyright Convention (Paris text), 24 July 1971, 25 *UST* 1341, *TIAS* 7868, 1 *Basic Documents of International Economic Law* 813, 943 *UNTS* 193, *Trb.* 1972 No. 114 (hereinafter UCC).

26. See J. Secretan, 'Structural Evolution of the International Unions for the Protection of Intellectual Property', 7 *Industrial Property* (1962) p. 170 at p. 173 ('new conventions providing for the protection of intellectual property ... initiated within the framework of other international organizations [may] protect different interests from those traditionally connected with such property').

27. For example, in its Synopsis of the proposed reforms, BIRPI referenced UNESCO's work with the UCC while also explicitly stating that the new organization had to be the primary centre for 'world-wide efforts for maintaining, improving, and adapting the rules of international protection in the field of industrial property and copyright.' BIRPI, 'Synopsis of the Proposed Administrative and Structural Reform of BIRPI', 5 *Industrial Property* (1966) p. 183 at p. 183.

28. See R.L. Okediji, 'History Lessons for the WIPO Development Agenda', in N.W. Netanel, ed., *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford, OUP forthcoming 2008).

tional organizations.²⁹ In the prevailing international context, global concern for the interests of the newly independent countries was an unavoidable element of a carefully orchestrated platform on which the credibility of BIRPI's demands would be assessed. Nonetheless, the link between IP and development interests had to be carefully made in light of the Euro-centric vision and interests that explicitly dominated the major treaties administered by BIRPI.

For their part, developing countries had a very different utility for the IP system already in place, viewing it not as a regime that offered them unquestionable benefits but as one that would have to be reformed to suit their immediate development goals. Yet, it was plainly evident that the priorities and demands of the developing countries were at odds with the IP culture that had been fostered between relatively homogenous European states. The complexity of the situation was reflected in the debates that took place leading up to the Stockholm Revision to the Berne Convention.³⁰ In the highly contested ensuing negotiations between BIRPI, its European member states and the broader international community, a conceptual link was forged between the protection of IP and the welfare aspirations of developing countries. In this framework, economic and social progress was magnified as the primary goal of IP protection and participation in the incipient transnational IP system established by the Paris and Berne Conventions was forcibly advanced as a key to economic growth. Based solely on the limited experience of its European member states, these seminal treaties of global IP regulation came to stand for the bold, if untested, proposition that strong proprietary interests in knowledge goods or, put in modern terms, an absolutely free market in IP, would inexorably lead to innovation, economic growth and abundant social surplus. These claims were made in parallel with the creation of WIPO to replace BIRPI, a feat which occurred in connection with the Stockholm Revision to the Berne Convention.³¹

2.2 The UN-WIPO Agreement

With the conclusion of the Convention Establishing the World Intellectual Property Organization (WIPO Convention)³² and the associated enhancements of an administrative structure for the global IP system, WIPO could lay legitimate claim to a broad delegation of power by its member states to strengthen its position *vis-à-vis* new international actors in the IP field.³³ In 1974, WIPO officially became a

29. See Okediji, *supra* n. 16.

30. Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised at Stockholm on 14 July 1967, 828 *UNTS* 222; Okediji, *supra* n. 16.

31. See BIRPI, 'Note by BIRPI', 7 *Industrial Property* (1967) p. 153 at p. 154.

32. WIPO Convention, *supra* n. 12.

33. Interestingly, BIRPI had included most of its major potential competitors in the IP field to be part of the discussions of its transformation into an international organization. See Krieger, *supra*

specialized agency of the UN,³⁴ formalizing a long history of informal agreements with a step which only further enhanced WIPO's exercise of authority over global IP norm-setting. In Article 1 of the UN–WIPO Agreement, the UN recognized WIPO as the specialized agency 'responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, *inter alia*, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development ...',³⁵ In effect, this agreement subordinated the UN to WIPO with respect to its jurisdiction over issues pertaining to IP.

As might be expected, the UN–WIPO Agreement was extremely instrumental for WIPO's strategic purposes in that it served to constrain the credible exercise of power over IP by other UN agencies, particularly the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Program (UNDP), the United Nations Industrial Development Organization (UNIDO) and UNESCO. These agencies were perceived as fora in which the interests of non-industrialized countries could be effectively represented and pursued. Accordingly, they were precisely the agencies most threatening to WIPO's deep-rooted IP philosophy which clearly favoured instantiated interpretations of the negotiated preferences embodied in the signature IP treaties. In sum, it was not the historic IP bargains themselves as such that were problematic, but rather WIPO's own institutional agenda in maintaining the extant norms. WIPO maintained a stubbornly persistent IP ideology by: 1) bureaucratizing the interests of new actors by translating normative challenges about the role of IP in development into technical assistance programs; 2) integrating former colonies into the global IP system in a manner that attended only to the interests of existing rights owners³⁶ without considering the effects on the innovative capacity of its new and differently situated members; and 3) making efforts to subordinate competing regime values, such as human rights,

n. 24, at p. 37 (noting that at the invitation of the BIRPI Director, international organizations had been asked to send observers to the meeting of the Committee of Experts to draft a convention establishing a new international IP organization; observers from UNESCO and the United Nations were in attendance).

34. See Agreement between the United Nations and the World Intellectual Property Organization, 17 December 1974, 956 *UNTS* 405, reprinted in 14 *Industrial Property* (1975) p. 3 (hereinafter UN–WIPO Agreement).

35. *Ibid.*, Art. 1.

36. For an overview of the legal mechanisms used to incorporate the former colonies into BIRPI, see R.L. Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System', 7 *Singapore Journal of International and Comparative Law* (2003) p. 315 at pp. 329–331.

into the IP system in a way that reflected only a partial view of the domestic IP systems upon which the international principles had been founded.³⁷

To make clear, WIPO's decision to join the UN system was about consolidating its authority, not enhancing its responsibility to the global community. As a UN agency with specialized expertise in IP, any work undertaken by these other so-called 'development-friendly' UN agencies would have to be subject to some oversight or active involvement by WIPO. Most pervasive, however, was WIPO's IP jurisprudence, which posited strong IP protection as the means to accommodate many of the goals set forth in the UN Charter regarding social and economic development. In sum, WIPO's institutional transformation and the strategies by which that transformation was effected, especially institutional coordination/collaboration, were central in entrenching the contemporary prevailing IP orthodoxy in which public policy concerns could limit the exclusive proprietary interests of rights owners only in exceptional circumstances. The contested orthodoxy with which WIPO administered its mandate is one that originated not with the states but with WIPO independently; WIPO structured that orthodoxy around its institutional identity. It is difficult to imagine today that the Organization might successfully divest itself of its own institutional culture, much less the only culture it has ever known.³⁸

2.3 The hidden costs of inter-institutional coordination: credibility and self-preservation

Until the recent adoption of a 'Development Agenda',³⁹ the Stockholm Revision conference had produced the singular expression of WIPO's acquiescence in favour of an instrument addressing access to knowledge goods.⁴⁰ This was established

37. An article by the BIRPI Director in 1962 published in the BIRPI official journal referenced the Universal Declaration of Human Rights (UDHR) only on the issue of protection of intellectual creations and saw the UDHR as vindicating IP rights and the work of BIRPI, not vice versa. See Secretan, *supra* n. 26, at p. 173.

38. See M.N. Barnett and M. Finnemore, 'The Politics, Power, and Pathologies of International Organizations', 53 *International Organization* (1999) p. 699 at p. 703 ('normative and cultural forces shape how organizations see the world and conceptualize their own missions').

39. See WIPO General Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, 27 August 2004, WIPO Doc. WO/GA/31/11, at <http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf> (hereinafter Development Agenda Proposal); WIPO General Assembly, Decision on a Development Agenda, 4 October 2004, at <<http://www.cptech.org/ip/wipo/wipo10042004.html>> (hereinafter Development Agenda Decision); WIPO, The 45 Adopted Recommendations under the WIPO Development Agenda, at <<http://www.wipo.int/ip-development/en/agenda/recommendations.html>> (hereinafter Development Agenda Recommendations).

40. Although no similar 'development' round ever took place in connection with the Paris Convention, DCs and LDCs were, over the years, able to stymie the development of harmonized patent rules. See e.g., F. Weitsman, 'TRIPS, Access to Medicines and the "North-South" Conflict After Doha:

through rules that permitted compulsory licensing of literary works via a series of complicated procedural manoeuvres set forth in the Berne Appendix.⁴¹ The subsequent unmitigated failure of the Appendix has been attributed to the burdensome requirements necessary to invoke its benefits.⁴² Fundamentally, however, the failure reflected a larger and more persistent impulse of the global IP system. The organizing instinct toward strong proprietary rights made it implausible that an institutional platform designed to extricate IP regulation from a broader set of international social concerns could effectively have addressed the copyright-related priorities of development hungry nations.

Three important points are worth summarizing in the rise of WIPO as the sole institution for global IP governance. First, in the process of becoming WIPO, the interests of DCs and LDCs in economic development played an important strategic role on two fronts. One was to lend credibility to the argument for a new organization equal to, or at least comparable in form and rank with, other international organizations of the time.⁴³ The second was to secure a diverse membership base without which the new organization would have been less politically relevant.

Second, it was critically important to link IP protection to the broader social and economic considerations that permeated the public international law system and which, in particular, occupied the mission of the UN and its specialized bodies. This was necessary to establish WIPO's legitimacy in the international order and also to limit the possibility that its IP mandate might be shared with other international organizations. Inter-institutional cooperation for BIRPI thus was a means to participate in the public law order, which was limited to 'organizations',⁴⁴ and by so doing, to preserve for itself the global platform for IP regulation.⁴⁵ The jurisdic-

The End or the Beginning?', 6 *Asper Review of International Business and Trade Law* (2006) p. 67 at pp. 72-73; Kristen Riemenschneider, 'Philosophy, Trade, and AIDS: Current Failures to Obtain a Substantive Patent Law Treaty', 11/5 *Virginia Journal of Law and Technology* (2006) p. 5.

41. Berne Convention, *supra* n. 20, Appendix.

42. See R.L. Okediji, 'Welfare and Digital Copyright in International Perspective', in J. H. Reichman and K. Maskus, eds., *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge, CUP 2005) p. 142.

43. See Secretan, *supra* n. 26, at p. 170; Krieger, *supra* n. 24, at pp. 39-40. See also BIRPI, *supra* n. 27, at p. 185: 'The charter and structure of the proposed new Organization would be similar to those of modern intergovernmental organizations. The creation and existence of such an Organization are indispensable for keeping the protection of industrial property and copyright in a specialized organization in which all attention can be devoted to the safeguarding of the international agreements in this field, and to their development and adaptation to changing circumstances.'

44. It should be noted, however, that BIRPI did sign numerous agreements with other organizations, including the UN, and with regional entities such as the Council of Europe. See BIRPI, 'The Evolution of the United International Bureaux', 76 *Le Droit d'Auteur* (1963) p. 91 at pp. 94-95; see also Working Agreement between BIRPI and the United Nations, reprinted in 3 *Industrial Property* (1964) p. 207.

45. See Secretan, *supra* n. 26, at p. 173 n. 9. See also Okediji, *supra* n. 28.

tional arguments advanced were framed in the language of norm fragmentation and norm conflict, identifying the dangers that could arise if multiple regimes with overlapping goals were to engage in IP norm-setting,⁴⁶ and importantly, advocating institutional coordination with the UN.

Further, the need for a new international status was also justified by reference to norm coherency, phrased as ‘the unity of intellectual property’,⁴⁷ that could be preserved only by a ‘truly International Organisation for Intellectual Property’ whose competence was recognized by the UN.⁴⁸ Within this agenda, institutional coordination served an important strategic purpose of maintaining the status quo in the normative underpinnings of the global IP system, seeking to embed these IP norms in the global governance structure by embracing states that would likely join potentially competing regimes⁴⁹ and deliberately identifying or establishing issue linkages with other organizations.⁵⁰ This was all accomplished within the auspices of a global development mandate that provided a premise for a plausible relationship between WIPO and the UN.

2.4 Some limits of coordination

It is striking that the claims made by BIRPI in its quest for international stature rested principally on the same justifications offered today in support of institutional coordination, namely a concern about fragmentation rooted in multiple actors regulating various IP accords; the inefficiencies and redundancies associated with overlapping mandates in the same issue area; norm conflicts that could be generated by the work of the various actors; and the importance of safe-guarding the objectives for which IP treaties were established. But BIRPI/WIPO’s goal was to preclude incursions into its domain, whether through the introduction of new norms or by marginalizing new organizations with power to create or influence IP norms. Institutional coordination was a mechanism deployed to preserve only those norms that BIRPI/WIPO thought were consistent with *its* (not necessarily member states’) perspective on the global IP system and to ensure that norms or perspectives contrary to this view were excluded, pre-empted or utterly subordinated to BIRPI/WIPO’s view. To be fair, it is likely the case that no IP norm from *outside*

46. See e.g., BIRPI, *supra* n. 27.

47. *Ibid.*, at pp. 178-179.

48. *Ibid.*, at p. 179.

49. D.W. Leebron, ‘Linkages’, 96 *AJIL* (2002) p. 5 at p. 12 (noting that in membership linkage, inter-regime influence is only implicit); Secretan, *supra* n. 26, at p. 172 (linking the membership of the UN with that of BIRPI in the context of the former’s power to address international economic and social issues with which BIRPI was also affected).

50. See e.g., Secretan, *supra* n. 26 (stating that IP goals had been incorporated into the UDHR, justifying a claim for an international IP organization, but insisting on the supremacy of IP norms).

WIPO, including those arguably supportive of WIPO's ideology, held much direct sway in norm creation *within* WIPO. It was a situation of both normative and institutional isolation in the international community, as the work of other international organizations rarely penetrated the edifice of the WIPO-driven international IP system.

As a result, key normative components necessary to ensure the effective operation of IP in the global setting to stimulate innovation, competition, economic growth and other welfare gains did not receive the same attention within WIPO as efforts to strengthen the capacity of states (and their private sub-actors) to exercise and enforce private rights globally.⁵¹ This longstanding imbalanced attention to global IP regulation occurred at the expense of DCs and LDCs whose decision to participate in the WIPO-mediated regime was influenced by the prevailing wisdom that such participation was a necessary component of national development progress.⁵² Today, that expense is also borne by a more diffuse set of consumers worldwide, as WIPO's newest IP regimes⁵³ provide legal cover to exact fresh social costs in the form of restrictive licenses, digitally controlled locks to information portals and unprecedented private controls over publicly funded research outputs.⁵⁴

While contemporary arguments for inter-institutional cooperation have merit to them, it also is the case that such collaboration/coordination can be deployed to undermine prospects for normative change. At no time in the historic transformation process did BIRPI, or eventually WIPO, reconsider any kind of normative premise for IP protection – not even as a way to open up dialogue and foster mutually beneficial cooperation between the industrialized country members and the newly independent countries in whose name much of the political and moral force

51. See J. Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property', 2004 *Duke Law and Technology Review* (2004) p. 9 (noting critics' points that in WIPO, 'progress on making humanitarian and regional exceptions, even ones clearly contained in international agreements, has been grudging'); K.E. Maskus and J.H. Reichman, 'The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods', 7 *Journal of International Economic Law* (2004) p. 279 at p. 294 (arguing that WIPO has interpreted its mandate to require progressive elevation of IP protection standards throughout the world).

52. See R.L. Gana, 'Prospects for Developing Countries Under the TRIPS Agreement', 29 *Vanderbilt Journal of Transnational Law* (1996) p. 735; J.H. Reichman, 'Richard Lillich Memorial Lecture: Nurturing a Transnational System of Innovation', 16 *Journal of Transnational Law and Policy* (2007) p. 143 at p. 165 (referring to the 'the one-sided emphasis on private rights in the WTO and WIPO law-making processes', which has made it more difficult for developing countries to bridge the technology gap and to maintain adequate supplies of public goods).

53. See WIPO Copyright Treaty, 20 December 1996, S. Treaty Doc. No. 105-17 (1997), 36 *ILM* 65 (1997) (hereinafter WCT); WIPO Performances and Phonograms Treaty, 20 December 1996, S. Treaty Doc. No. 105-17 (1997), 36 *ILM* 76 (1997) (hereinafter WPPT).

54. See e.g., J.H. Reichman and P.F. Uhler, 'A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment', 66 *Law and Contemporary Problems* (2003) p. 315.

behind BIRPI's transformation into WIPO had occurred. The fault lines created by this institutional commitment to a specific normative orientation, which consisted entirely of the bargain struck by European nations in the late nineteenth century, would ultimately be exposed in the mid-twentieth century with WIPO's failure to live up to the expectations of both industrialized and non-industrialized countries with respect to IP norm development,⁵⁵ and the subsequent introduction in 1994 of IP to the WTO.

3. RECIPROCAL LINKAGE BARGAINS AND THE TRADE ORIGINS OF PARALLEL IP REGIMES

3.1 The insularity of WIPO and the primacy of IP protection

WIPO's modern role in the creation of harmonized global IP rules is well known, as is its administrative management of the entire global IP infrastructure. Other newer international organizations have participated in IP related norm-setting and norm-influencing activities and several continue to do so, including some UN agencies.⁵⁶ Until the emergence of the WTO, however, such discrete excursions by other institutions into the global IP architecture have always been with deference to WIPO's IP standard-setting activities,⁵⁷ and in some cases, to strengthen and buy into WIPO's institutional ideology with respect to the importance of IP protection for economic well-being.⁵⁸ Thus, despite the linkages between IP and other issue areas reflected in institutional mandates over culture, science, agriculture, biodiversity or health, WIPO's exclusive responsibility for global IP norms has only meant that non-conforming normative considerations could be treated as irrelevant, subservient or subversive. Such norms could not supplant the primacy of the model that privileged a singular utility of the IP system over all other possible welfare considerations.

WIPO's principal responsibility, as defined by its charter, is to 'promote the protection of intellectual property' throughout the world.⁵⁹ All of WIPO's func-

55. See e.g., M.L. Cordray, 'GATT v. WIPO', 76 *Journal of the Patent and Trademark Office Society* (1994) p. 121 at p. 122; M. Leaffer, *Understanding Copyright Law*, 2nd edn. (New York, Matthew Bender 1995) p. 372.

56. For a list of UN bodies involved with IP activities, including norm-setting, see <<http://www.un.org/issues/m-intprp.html>>.

57. See e.g., Convention on Biological Diversity, Decision VI/20 on Cooperation with Other Organizations, Initiatives and Conventions, at <<http://www.cbd.int/decisions/?m=COP-06&id=7194&lg=0>>.

58. See e.g., World Customs Organization (WCO), Strategic Plan: Customs Environment, at <http://www.wcoomd.org/home_about_us_strategic_plan.htm>.

59. WIPO Convention, *supra* n. 12, Art. 3.

tions are designed with this sole objective in mind⁶⁰ and its collaborative engagement with other international organizations is explicitly organized around the protection of IP on terms determined by WIPO.⁶¹ Indeed, no attention is given in WIPO's founding institutional documents for the purpose, context or aspirations of what a global IP system should look like, or what objectives should be pursued in an integrated global economic system. Not surprisingly then, the WTO TRIPS Agreement, which was based on the two premier WIPO treaties,⁶² has been the subject of intense debate *precisely* because of its failure to reflect broader principles associated with the welfare goals that animate most national IP systems. Further, in a manner consistent with the treatment of some social concerns in the previous GATT system, the WTO TRIPS Agreement is, at least facially, committed primarily to an absolutist vision of 'free-IP' (analogous to free trade for rights holders), with the most grudging derogations emerging primarily from the ashes of transnational battles involving the role of IP regulation in promoting global public welfare.⁶³

Given the WTO's governance role over international economic affairs, the impulse for shared governance with WIPO for norm-setting in all IP issues is strong.⁶⁴ Indeed, as earlier mentioned, WIPO has embarked on an auspicious new Development Agenda⁶⁵ perhaps signalling a new institutional orientation in response to demands spanning over half-century that global IP regulation must be sized to fit the priorities of less-industrialized countries, even if such regulation does not ultimately reflect their socio-cultural framework.⁶⁶ Recently, WIPO also advertised new high-level positions to address IP issues relating to global challenges and to provide an empirical basis for, *inter alia*, probabilistic measures of IP on economic growth.⁶⁷

But the question of institutional choice for global IP norm development is no longer merely (or even principally) about the role of IP in economic growth. Just as

60. *Ibid.*, Art. 4.

61. *Ibid.*

62. See Paris Convention, *supra* n. 19, Art. 13; Berne Convention, *supra* n. 20, Art. 16(1).

63. See Kapczynski, *supra* n. 14.

64. See Abbott, *supra* n. 11.

65. See Development Agenda Decision, *supra* n. 39; Development Agenda Recommendations, *supra* n. 39.

66. See generally Okediji, *supra* n. 28.

67. See WIPO/OMPI Advertisement for a Director, Global Challenges Division, *The Economist*, 15-21 November 2008) at p. 26 (noting that the Director position will be 'responsible for anticipating/addressing IP issues arising from global challenges and ensuring an effective contribution from WIPO in the collective search for solutions by the UN and the international community'). See also, WIPO/OMPI Advertisement for a Chief Economist, *The Economist*, 15-21 November 2008) at p. 26 (noting that the Chief Economist will be 'responsible for providing high-quality empirical analysis of the impact of the IP system on economic growth and development to improve understanding of the evolution/trends in the system and inform wider policy debates and efforts to improve its efficiency').

vital as the traditional North-South tensions over the global IP system is the emergence of a range of new issues that compel a new institutional recipe for meeting the demands of a global environment. It is an environment suffused with new forms of digitally inspired creative endeavours, cross-cultural innovation, scientific databases and the emergence of highly sophisticated research tools, all affected to some degree by the elaboration of global IP rules.⁶⁸ Added to this rich and promising global innovation frontier are the pressing issues of public health, the risks and promise of agricultural biotechnology and the challenge of climate change. Undoubtedly, institutional coordination and collaboration will play an important role in efforts to address these critical global issues and to more precisely manage increasingly scarce political and economic resources. Nowhere has this been more apparent than in the critical work of the World Health Organization (WHO) with respect to mobilizing efforts between WIPO, the WTO and other agencies, directed at normatively sensitive and practically oriented solutions to address global public health needs with full awareness of the IP constraints in place.⁶⁹

Nonetheless, institutional capacity for strategic bargains, not coordination, should take precedence in the development of future global IP norms intended to guide the formulation of state and international policies required to secure the welfare interests of global citizens. As already established, in the context of WIPO's history, institutional coordination was an explicit means to legitimize and consolidate WIPO's claim to an exclusive mandate for global IP norm setting.⁷⁰ WIPO used institutional coordination with particular effectiveness when confronted with the emergence of new international organizations, particularly the organs of the UN, whose mandates explicitly included social and economic welfare considerations.⁷¹ WIPO's global IP norms became increasingly entrenched in an economic theory devoid of such concerns at precisely the same period in which international institutions were being consciously designed to respond to the demands and interests of developing countries and even as a robust doctrine of state accountability for the welfare of its citizens was codified through the development of international human rights law. Throughout these fundamental shifts in the international legal system, IP norms and the treaties negotiated in WIPO remained largely insulated from the demands for a socially and culturally relevant normative IP framework.

68. See e.g., J.H. Reichman and P.F. Uhler, 'Global Trends to Restrict Access to Scientific Data from Government Funded Research', paper presented to the Yale University Conference on Global Information Flows, 2-4 April 2005; 'Identifying and Addressing Global Trends to Restrict Access to Scientific Data from Government Funded Research', in J.M. Balkin and E. Katz, eds., *The Global Flow of Information* (New Haven, Yale University Press) (forthcoming).

69. See e.g., WHO, Public Health, Innovation and Intellectual Property Rights, Report of the Commission on Intellectual Property Rights, Innovation and Public Health (2006), at <<http://www.who.int/intellectualproperty/documents/thereport/ENPublicHealthReport.pdf>>.

70. See *supra* section 2.

71. See Okediji, *supra* n. 16.

3.2 The WTO is not a clear institutional preference

A claim that the WTO is better suited to develop IP norms more meaningfully responsive to an array of new global challenges (for which IP rules constitute only a partial response) is legally grounded in the preambles to the TRIPS Agreement and the WTO Charter. Both documents recognize social and economic growth (or ‘development’) as an overarching instrumental purpose underlying the international economic system.⁷² Yet, despite the legal integration of IP in the WTO system, it is no forgone conclusion that the WTO should take pre-eminence in the development of IP norms. Neither the history of global IP norm creation, the way in which IP issues were handled within the previous GATT framework, institutional expertise, the negotiating history of the Uruguay Round or even the substantive text of the TRIPS Agreement provide strong support for the WTO’s role in IP norm creation beyond the dispute settlement arena. Rather, a number of facts and organizational design elements suggest a far less equivocal choice of institutional prerogative for future IP norms.

First, the IP work in GATT that presaged the TRIPS Agreement clearly noted the relative technical expertise of WIPO, as did other international organizations addressing IP-related issues within their discrete mandates. States could not agree that GATT was the appropriate forum to address a limited range of trade-related IP concerns, not even the most obvious problem, namely trade in counterfeit goods.⁷³ Second, the TRIPS Agreement incorporated the substantive IP norms developed by WIPO,⁷⁴ but also embraced new subjects,⁷⁵ it enhanced and expanded (in some cases significantly) existing norms,⁷⁶ while also specifically excluding some significant principles.⁷⁷ Third, the Agreement established a new institutional mechanism to monitor the implementation of agreed-upon obligations,⁷⁸ including those incorporated from earlier WIPO treaties, but it is WIPO (and only WIPO) that has

72. Weiss, *supra* n. 2, at pp. 78-81 (briefly describing the history of socio-economic concerns in international economic regulation and identifying development, human rights and social justice as fundamental pillars of world order).

73. See D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London, Sweet & Maxwell 2001) p. 9.

74. See TRIPS Agreement, *supra* n. 9, Arts. 1(3), 2 et seq.

75. See *ibid.*, Arts. 22-24 (protection for geographical indications), Art. 39 (protection of undisclosed information), section 4 (enforcement obligations).

76. See *ibid.*, Art. 1(3) (binding all members to minimum standards at least equivalent to those embodied in existing conventions), section 4 (enforcement obligations), Art. 27 (defining patentable subject matter).

77. See *ibid.*, Art. 9 (excluding moral rights).

78. See *ibid.*, Art. 63(2) (requiring members to notify IP-related legislation to the TRIPS Council ‘to assist [the] Council in its review of the operation of [the] Agreement’), Art. 68 (establishing the role and functions of the TRIPS Council in monitoring compliance with TRIPS).

been explicitly mandated to ‘promote the protection of intellectual property throughout the world through cooperation among States’.⁷⁹ Fourth, WIPO and the WTO entered into a collaborative agreement in which core WIPO functions and activities⁸⁰ were made indispensable to the work of the WTO TRIPS Council and WTO Secretariat,⁸¹ but collaboration in the progressive development of IP norms is not addressed in the agreement.⁸² Finally, TRIPS provides an enforcement mechanism complete with an array of remedies which member states must make available to IP rights holders,⁸³ but WIPO treaties are silent on the issue of remedies and WIPO itself has no enforcement power.⁸⁴ Although WIPO’s role remained an important consideration throughout the TRIPS negotiations,⁸⁵ there is no question that its normative and administrative dominance has been fundamentally altered by the emergence of the WTO.⁸⁶

3.3 Initial considerations for a WTO preference: Serial linkage through multiple sites of regulation

Unlike other classic ‘trade and’ problems, the IP mandate of the WTO should mean that the IP-trade linkage is not formally burdened with questions regarding the propriety of the WTO’s IP norm-setting or norm-influencing activities. Nevertheless, the scope of the WTO’s mandate invariably extends its IP prerogative in directions that clearly were not anticipated by states at the time of the Uruguay Round. In short, where IP goes, so must the WTO. Who knew, for example, as the TRIPS Agreement was being negotiated and placed under the jurisdiction of the WTO, that public health concerns of DCs and LDCs would generate such political controversy and public outcry to the point of producing an amendment to TRIPS just over seven years after the conclusion of the Uruguay Round?⁸⁷ Who envisaged

79. WIPO Convention, *supra* n. 12, Art. 3(1).

80. See *ibid.*, Art. 4.

81. See *infra* sections 4.3 and 5.

82. See *infra* section 4.3.

83. See TRIPS Agreement, *supra* n. 9, section 4.

84. See R.L. Okediji, ‘TRIPS Dispute Settlement and the Sources of (International) Copyright Law’, 49 *Journal of the Copyright Society* (2002) p. 585 at p. 587 n. 11. But see *ibid.* at p. 594 (noting that most commentators who criticize WIPO’s lack of enforcement power have ignored the possible role the International Court of Justice (ICJ) could have played with respect to compliance with WIPO treaties).

85. See Gervais, *supra* n. 73, at pp. 11, 14.

86. See Leebron, *supra* n. 49, at pp. 19–20 (noting that the TRIPS Agreement established a separate IP regime and characterizing the selective incorporation of IP norms into the trade regime as a linkage fuelled by ‘regime borrowing’).

87. See WTO, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2, 41 *ILM* 755 (2002) (hereinafter Doha Declaration).

that the import of the TRIPS Agreement on the development, supply and pricing of pharmaceuticals would be so significant as to affect the mandate of the WHO and raise interminable questions about the intersection of trade law and human rights law?

It seems inevitable that the WTO's enforcement of IP norms will implicate environmental concerns,⁸⁸ including efforts to regulate biodiversity.⁸⁹ And a state's enforcement of an author's exclusive right to reproduce her work may occasion quandaries about freedom of expression or privacy, which are core considerations of human rights⁹⁰ and civic democracy. In short, linkage breeds linkage. IP issues in particular are pervasively embedded in multiple regulatory frameworks already integrated in the global economic framework creating a network of serial linkages, intricately connected through the formal mandates of the trade system and justified by its objectives. Non-trade, IP-related questions thus create an 'orange zone' around the WTO's explicit IP mandate, representing areas in which the WTO can legitimately claim a right to proceed because an issue is 'TRIPS-related' even if it must do so with caution.

The more sites of global economic regulation are affected by a specific IP question, the greater the legitimacy with which the WTO can and should elect to proceed with norm-influencing activities. Institutional forays into such TRIPS-related areas will no doubt reinforce arguments that the significant role of IP in shaping the terms and conditions in which human, social and political aspirations are pursued compels greater WTO accountability to regimes outside of its formal aegis. But the same is true even for the WTO's relationship with institutions with which it has a substantive relationship, such as WIPO. Recently, for example, the government of Brazil urged the WTO to adopt the normative objectives and process for technical assistance under WIPO's Development Agenda as part of the TRIPS implementation process.⁹¹ This is undoubtedly an effort to leverage a perceived normative

88. Concerns of ecological justice have long featured in the international trade system. See Weiss, *supra* n. 2, at pp. 90-102.

89. See e.g., R.G. Tarasofsky, 'The Relationship between the TRIPS Agreement and the Convention on Biological Diversity: Towards a Pragmatic Approach', 6 *Review of European Community and International Environmental Law* (1997) p. 148 at p. 148 (noting that the relationship between biodiversity and intellectual property rights has been 'the subject of considerable rhetoric and political controversy'). See also WTO, Ministerial Declaration, para. 19, WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001).

90. For an excellent analysis of these competing interests, see L.R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?', 5 *Minnesota Intellectual Property Review* (2003) p. 47. See also N. Helberger and P.B. Hugenholtz, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law', 22 *Berkeley Technology Law Journal* (2007) p. 1061, at pp. 1068, 1083 (noting effect of European human rights concepts on IP law).

91. See Technical Cooperation and Capacity Building: Cluster A of the Development Agenda, Communication from Brazil, p. 2, WIPO Doc. IP/C/W/513, June 20, 2008 (hereinafter Communication from Brazil).

success in WIPO into the WTO.⁹² But beyond such inter-organizational ‘norm transfusion’, the fact remains that as a practical matter, the pervasiveness of technology and information products in the ordinary, routine activities of global citizens – both natural and corporate – already complicates the question of the WTO’s IP jurisdiction. This is because the very objects of IP protection are tools indispensable to the objectives of other disciplines,⁹³ such that line-drawing between where the ‘IP’ issue stops and the ‘health’, ‘environmental’ or ‘free speech’ issue starts can be an exercise in futility.

3.4 Normative pursuits and common ends in the IP/trade interface

As IP scholars in the common law tradition characteristically point out, the justifications for proprietary rights in knowledge goods reflect a careful balancing act between incentives to create and the importance of dissemination to advance other domestic policy objectives. Accordingly, IP regulations even in the most protective civil law systems reflect exceptions designed to accommodate policy goals that are necessary adjuncts to the cultural framework within which domestic IP norms are generated.⁹⁴ The WTO, despite its power (or perhaps because of it) must tread carefully onto this complex terrain.

In implementing IP norms, judicial and administrative bodies around the world regularly consider competing social interests and rationalize them within the domestic IP framework.⁹⁵ While it is true that this practice is more explicitly characteristic of common law jurisdictions, the concept of ‘fundamental freedoms’ in the European Union (EU) resonates strongly with this tradition, constraining IP’s pre-emptory claim over knowledge goods in light of countervailing social goals.⁹⁶

92. See A.A. Latif, *Inside Views: Linkages Between the WIPO Development Agenda and the TRIPS Council*, IP-Watch, March 13, 2008, at <<http://www.ip-watch.org/weblog/index.php?p=959>> (noting the WIPO Development Agenda was itself ‘aimed at integrating the development dimension into WIPO’s activities in view of ... the particular importance it had acquired in ... the WTO. ...’). It also sought to address the integration of the TRIPS flexibilities into WIPO’s operations. See *ibid.*

93. See R.L. Okediji, ‘Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations’, in M.E. Salomon et al., eds., *Castling the Net Wider: Human Rights, Development and New Duty-Bearers* (Antwerp, Intersentia 2007).

94. See e.g., L. Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’, 49 *Harvard ILJ* (2008) p. 1 (analyzing the relationship between human rights and IP through the lens of decisions issued by the European Court of Human Rights (ECHR)); Helberger and Hugenholtz, *supra* n. 90.

95. See generally P.B. Hugenholtz and R.L. Okediji, ‘Conceiving an International Instrument on Limitations and Exceptions to Copyright – Final Report’, a study sponsored by the Open Society Institute (6 March 2008), at <<http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>>.

96. See e.g., P. Drahos, ‘Intellectual Property and Human Rights’, 3 *Intellectual Property Quarterly* (1999) p. 349 at p. 367; P. Drahos, ‘An Alternative Framework for the Global Regulation of Intellectual Property Rights’, 21(4) *Journal für Entwicklungspolitik* (2005) p. 44.

Interestingly, the deliberate turn to view IP as an instrument of social policy has become more pronounced following the conclusion of the TRIPS Agreement, with several countries, for example, codifying a US-style fair use doctrine⁹⁷ despite the fact that this venerable doctrine is arguably inconsistent with the Berne Convention.⁹⁸ In essence, then, the WTO's IP mandate unavoidably requires assessment of policies that are external to the IP realm but that inform or affect implementation and compliance with the norms embodied in the TRIPS Agreement. The more TRIPS-related a particular policy, the more the WTO must take into account non-IP, extra-trade norms that animate the particular regime.

This is not particularly unique to the TRIPS Agreement. As mentioned earlier, the WTO must also weigh a variety of domestic policies under various trade rules that have built-in space for justified national discrepancies.⁹⁹ However, the incorporation of IP into the trade regime means that in this area the WTO would in effect be reconciling a variety of normative conflicts, depending on the particular issue at stake. For example, a dispute involving TRIPS Article 27.3 may require consideration of norms from environmental, patent and human-rights regimes. The exact nature of the problem and degrees of regime overlap will impact the construction of TRIPS-relatedness and help shape the range of norm conflicts that only the WTO could feasibly manage. If the GATT history is any indication, anything short of an explicit mandate to address IP-related social concerns may fall short at the WTO.¹⁰⁰ But what is clear is that the TRIPS mandate provides a legal platform on which linkage claims can be credibly addressed within the WTO.

At a more general level, however, one further consideration is necessary in the context of dispute settlement in particular – there must be a means to translate the domestic balance between protection and access/dissemination of knowledge goods into the global sphere. In the absence of globally articulated binding principles directed at securing a competitive balance and promoting common social objectives through appropriately structured IP norms, the TRIPS Agreement inexorably has placed responsibility for fostering IP goals on a *global* scale on WTO TRIPS

97. See J. Band, 'Israel Now Has the Right Copyright Law', *Jerusalem Post*, 26 March 2008, at <<http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1206446110027>> (noting that Singapore also recently enacted a fair use provision); Israel Copyright Act of 2007, 2007 Law Statutes of Israel, Issue 2199, p. 34, 25 November 2007), at <http://www.wipo.int/lea/en/text_pdf.jsp?lang=EN&id=5016> §19 (Fair Use). Japan is also contemplating a fair use provision. See Y. Akada, 'Fair Use Stipulation Planned for Intellectual Property', *Asahi Shimbun*, 28 May 2008, at <<http://www.asahi.com/english/Herald-asahi/TKY200805280068.html>>.

98. See R. Okediji, 'Toward an International Fair Use Doctrine', 39 *Columbia Journal of Transnational Law* (2000) p. 75 at pp. 114-115, 119-121.

99. See Weiss, *supra* n. 2 (discussing the treatment of national employment and environmental policies as exceptions to/linkages with trade rules from the Havana Charter to the WTO).

100. See *ibid.*, at pp. 81-90 (citing example of labour standards and their failure to achieve much deference as legitimate exceptions to the GATT discipline).

dispute panels. Currently, dispute settlement offers the only context in which the legitimacy of *domestic* policy considerations can be ascertained with binding force. Indeed, as an experienced observer has noted, the broken ideal that the WTO would be an ongoing forum and framework in which to forge consensus has created a situation in which issues are driven, instead, to dispute settlement in the absence of completed trade rounds.¹⁰¹ Viewing the WTO as a forum for such interstitial law-making when trade rounds fail to close may facilitate progress in contested areas, particularly in light of WIPO's resort to treaties as a predominant form of law-making.¹⁰² An important example of interstitial norm creation is the ongoing work of the WTO TRIPS Council with respect to a register for geographical indications (GI's) notwithstanding the standstill of the Doha Round.¹⁰³ Despite deep and continued contentions among countries, the Council provides a forum for progress to occur on this issue.

4. HETERARCHY AND THE NEW GLOBAL IP INSTITUTIONAL APPARATUS

4.1 WIPO in the context of global governance by international organizations

The once clear vision of an international legal order dominated by sovereign states whose interests, priorities and actions serve as the sole locus of power and legal authority over global affairs has dimmed significantly in light of a compound set of issues that demand coordinated and often repeated intervention and management across multiple geopolitical boundaries, organizational mandates and subject matter disciplines. The inevitability of shared governance among a diverse and large number of actors – heterarchy – to address the demand for international cooperation has thus become a critical feature of the global era.

The de-centring of states in the international legal order and the recognition of multiple new actors has not, however, eclipsed the prominence, proliferation and power of international organizations.¹⁰⁴ These organizations constitute critical en-

101. Comments by James Bacchus, Vanderbilt Law School International Law Workshop, 6 November 2008.

102. See E. Kwakwa, 'Some Comments on Rulemaking at the World Intellectual Property Organization', 12 *Duke Journal of Comparative and International Law* (2002) p. 179.

103. See K. Mara, 'WTO IP Negotiations Lengthen As New Questions Put On Table', IP-Watch, 5 December 2008, at <<http://www.ip-watch.org/weblog/index.php?p=1347>>; K. Mara, 'WTO: Progress On IP At Last; Consensus Still Uncertain', IP-Watch, 5 December 2008, at <<http://www.ip-watch.org/weblog/index.php?p=1351>>.

104. See M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, Cornell UP 2004) pp. 1-2 (describing the pervasiveness and centrality of

try points for non-traditional actors to pervade and participate in global governance more easily and with greater effect, whether by allowing non-governmental organizations (NGOs) to participate in official meetings as observers¹⁰⁵ or by formal and informal collaborations between civil society (including corporations) and state governments. Such collaborations have yielded notable results in the international arena,¹⁰⁶ with the TRIPS Agreement¹⁰⁷ and the Doha Declaration¹⁰⁸ being prominent examples. The influence and power wielded by international organizations has enhanced significantly both in absolute terms and by sheer virtue of their rapid proliferation. It is no surprise, then, that scholars routinely recognize international organizations as significant *and* independent sources of international law.¹⁰⁹

Dominant strands of liberal international relations theory justify the existence of international organizations by pointing to their role in encouraging political cooperation among states, facilitating the exchange of information and lowering transaction costs associated with generating needed cooperation in international affairs.¹¹⁰ Within the leading theoretical approaches to global politics, states create international organizations precisely to meet their self-interests and these organizations should, accordingly, exercise power primarily (if not solely) in response to state-authored mandates reflected in their institutional charters.¹¹¹ Yet, as is evident in

international organizations in addressing global problems); J.E. Alvarez, *International Organizations as Lawmakers* (Oxford, OUP 2005) p. 3 ('Because of their quasi-governmental status, [international organizations] are usually accorded "international legal personality" that approximates that of the prime actors of state-centric international law.')

105. See generally M. Edwards and S. Zadek, 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors', in I. Kaul et al., eds., *Providing Global Public Goods* (New York, OUP 2003) p. 200. For an outline of proposals to enhance the relationship between non-state actors and international organizations, see *ibid.*, at pp. 216-217.

106. See Edwards and Zadek, *supra* n. 105, at p. 206 (describing three categories, with examples, of how non-governmental organizations (NGOs) have influenced international legal activity with concrete results).

107. See R.L. Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement', 17 *Emory International Law Review* (2003) p. 819 at pp. 844-848 (tracing the origin of the TRIPS negotiations to collaborations between private industry groups meeting with their respective governments in the US, EC, and Japan). For a sustained examination of the role of private parties in international IP lawmaking, see S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, CUP 2003) pp. 100-109.

108. See Doha Declaration, *supra* n. 87. See also Kapczynski, *supra* n. 14, at pp. 829-837 (describing the influence of non-state actors under the A2K movement on IP law).

109. See Alvarez, *supra* n. 104; Barnett and Finnemore, *supra* n. 104.

110. See R.O. Keohane, 'The Demand for International Regimes', 36 *International Organization* (1982) p. 325 at pp. 332-334; W.E. Holder, 'International Organizations: Accountability and Responsibility', 97 *American Society of International Law: Proceedings of the Annual Meeting* (2003) p. 231 at p. 231; Barnett and Finnemore, *supra* n. 38, at pp. 702-703 (summarizing neoliberal and neorealist approaches to the creation of international institutions).

111. See D.L. Nielson and M.J. Tierney, 'Delegation to International Organizations: Agency Theory and World Bank Environmental Reform', 57 *International Organization* (2003) p. 241 at pp. 243-245 (summarizing the state-centric similarities and failures of Neorealism and Neoliberalism).

the case of BIRPI/WIPO, there is good evidence that international organizations exercise power autonomously,¹¹² in ways that extend well beyond the prescriptive duties stated in their charters and at times even in directions inconsistent with the interests or wishes of their member states.¹¹³ While such exercises of power may raise questions of legitimacy in the operation of an international organization, autonomous exertions of influence, particularly to shape norms, also reflect on the effectiveness of the organization to meet the expectations of member states.¹¹⁴

Again, WIPO's recent move to formally incorporate an office dealing with 'global challenges' into its organizational structure is, at a minimum, a clear attempt to insert itself into a global debate that has potentially serious implications for its influence over areas less directly connected to the administration of global IP. As the move illustrates, the capacity of an organization to identify new challenges that affect its operations, to redefine its mission as new, complex global challenges arise, and to identify and act upon appropriate subject matter linkages is critical to the organization's ability to remain relevant and pertinent to the interests of its member states.¹¹⁵ This is also exemplified by the often referenced WTO response to the public health crises in DCs and LDCs shortly after the conclusion of the Uruguay Round. Had this issue been left unaddressed by the WTO, it undoubtedly would have imperilled the legitimacy of the TRIPS Agreement and, by association, the perception of the WTO as a highly evolved organizational body capable of responding to the needs of less powerful countries despite the interests of powerful states.¹¹⁶ Today, the relationship between the TRIPS Agreement and public health is a significant work platform of the WTO¹¹⁷ and the Organization has worked

112. International relations scholars have identified design features embedded in some organizations that grant or anticipate the power to act autonomously. See e.g., B. Koremenos et al., 'The Rational Design of International Institutions', 55 *International Organization* (2001) p. 761.

113. See Barnett and Finnemore, *supra* n. 104, at p. 27 (arguing that the legal authority of international organizations gives them power independent of states and that this power is then channeled deliberately in specific directions).

114. See Barnett and Finnemore, *supra* n. 104.

115. See P.M. Haas and E.B. Haas, 'Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique', in Commission on Global Governance, in *Issues in Global Governance: Papers Written for the Commission on Global Governance* (The Hague, Kluwer Law International 1995) p. 295 at pp. 300-306 (describing characteristics of 'learning' versus 'adaptive' international organizations and noting that the former respond to issues in a way that advances their ability to remain vital to their constituency); Barnett and Finnemore, *supra* n. 104, at pp. 27-29 (outlining various kinds of autonomous power in relations between international organizations and states).

116. See J.H. Jackson et al., *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations*, 3rd edn. (St. Paul, West Publishing 1995) p. 289.

117. For an overview of the WTO's work on this issue, see WTO, TRIPS and Public Health, at <http://www.wto.org/english/tratop_e/TRIPS_e/pharmpatent_e.htm>.

with the WHO to address issues at the interface of public health and IP protection.¹¹⁸ Similarly, other international economic institutions, such as the International Monetary Fund (IMF) and the World Bank (WB), have embraced issues such as gender equality and environmental protection as important parts of their monetary and development mandates.¹¹⁹ Such ‘mission creep’ or autonomous behaviour represents a dual problem of legitimacy (are organizations doing what their members want them to do?) and effectiveness (are organizations producing results that justify the political and economic costs of maintaining them?).

In some cases, member states have empowered an international organization with a measure of independence, even if only implicitly stated, to undertake actions in new areas so long as those areas are consistent with the broader goal of the organization. Thus, for example, WIPO’s stated mission is to ‘to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organizations’. WIPO’s functions include: (i) promoting the development of measures designed to facilitate the efficient protection of IP throughout the world and to harmonize national legislation in this field; (ii) encouraging the conclusion of international agreements designed to promote the protection of IP; (iii) offering its cooperation to states requesting legal–technical assistance in the field of IP; and (iv) assembling and disseminating information concerning the protection of IP, carrying out and promoting studies in this field and publishing the results of such studies.¹²⁰ None of these functions reflect the notion that WIPO’s activities are to have any particular effect on the domestic interests or goals of member states in promulgating IP laws. Nor do these functions suggest any authority, capacity or competency to develop IP norms in connection with norms arising from other regimes. This is not to say that WIPO could not interpret its mission in light of possible issue-linkages. Clearly, it has started to do so with its recent activities through

118. See WHO and WTO, *WTO Agreements and Public Health: A Joint Study by the WHO and the WTO Secretariat* (2002), at <http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf>. The WHO has regular observer status in some WTO councils/committees, and ‘ad hoc’ observer status in others. See WTO, *International Intergovernmental Organizations Granted Observer Status to WTO Bodies*, at <http://trade.wto.org/english/thewto_e/igo_obs_e.htm>.

119. See D.D. Bradlow and C. Grossman, ‘Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF’, 17 *Human Rights Quarterly* (1995) p. 411 (describing how these institutions have changed in response to new global issues of widespread concern). See also Nielson and Tierney, *supra* n. 111 (describing how the World Bank came to reform its rules and practices to address environmental concerns, especially in light of actions by leading industrialized countries); T. Gutner, ‘Explaining the Gaps between Mandate and Performance: Agency Theory and World Bank Environmental Reform’, 5 *Global Environmental Politics* (2005) p. 10 (same case study and theory but arriving at different conclusions about the cause of the World Bank’s reform on environmental issues).

120. See WIPO Convention, *supra* n. 12.

the Development Agenda and its proposed new offices. But WIPO's willingness to embrace linkage cannot easily or quickly overcome its institutional culture which traditionally has eschewed any competition with its proprietary ethos of IP norm production.

It is easy to assume that WIPO's doctrinal positions with respect to the relative benefits and costs of IP protection are mere reflections of the views of its most powerful member states and nothing else. However, this view would not explain several important hallmarks (successful or not) of IP law-making that ostensibly responded to the demands of weaker countries. These include the Stockholm Revision, the stymied efforts to revise the Paris Convention, the lapse until recently of the Standing Committee on the Law of Patents (SCP)¹²¹ and the much touted WIPO Development Agenda.¹²² But its very ability to create new platforms reinforces the claims articulated earlier. Rather than merely serving as an indifferent agent in the creation of global IP norms, WIPO has been a key player in shaping the contours of the debates among its members, thus ultimately defining what stays in the global IP system, what stays out, and the conditions under which these decisions will occur.

4.2 Institutional competitive advantage

Proponents of inter-institutional cooperation between WIPO and the WTO note the particular advantages in IP expertise that WIPO may boast as compared to the WTO.¹²³ And in part to address the WTO's institutional deficiency, the TRIPS Agreement was quickly followed by a cooperation agreement between the WTO and WIPO.¹²⁴ In one sense, the WIPO-WTO Agreement can be viewed as a formal commitment by WTO members to limit the possibility for conflict between the two institutions. But as noted earlier, the text of the Agreement itself does not reflect how cooperation between the two Organizations should be structured, or which institution will or should govern IP norm-setting in the future. In a global environment marked by a multiplicity of international organizations whose mandates and/or work programs concern and affect diverse aspects of IP protection,¹²⁵ global IP

121. See WIPO, Standing Committee on the Law of Patents (SCP), at <<http://www.wipo.int/patent-law/en/scp.htm>>.

122. See *supra* n. 39.

123. See Abbott, *supra* n. 11, at pp. 67-68.

124. See WIPO-WTO Agreement, *supra* n. 13.

125. International organizations are actively engaged in IP issues in several key areas such as food security, biodiversity, public health and education. See e.g., UNESCO, Copyright, at <http://portal.unesco.org/culture/en/ev.php-URL_ID=12313&URL_DO=DO_TOPIC&URL_SECTION=201.html> (describing UNESCO's activities in the field of copyright and neighbouring rights); Food and Agriculture Organization (FAO), Res. 3/2001, Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture and Interim Arrangements for Its Implementation (adopted 3 November 2001), at <<ftp://ftp.fao.org/ag/cgrfa/res/c3-01e.pdf>> (establishing a multilateral system of

governance requires, at a minimum, a mechanism to ensure coherence in the normative ideals that sustain the rationale for global IP standards.

As an initial matter, an organizational hierarchy for global IP norm-making is important because of outstanding disagreement over the propriety of existing levels of global IP protection. This dissonance remains a controlling feature of the global IP system. The contest has only been sharpened by the TRIPS Agreement's references to the importance of IP in achieving national public policy objectives. TRIPS Article 7 articulates the objectives of the Agreement:

'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

No previous WIPO treaty had formally embodied a reference to the role of users in accomplishing the innovation goals that IP policy generally has been designed to advance. And within WIPO, there is no effective mechanism to inject this public-oriented view of global IP into WIPO's culture. But with the various access points in the WTO – from the TRIPS Council to the dispute panels – Article 7 serves as an important textual premise to re-invigorate the dominant owner-centric model of global IP policy with broader socio-economic concerns. The WTO is a wholly distinct source of IP jurisprudence for the global economy. As the only forum within which WIPO-negotiated treaties can be interpreted and enforced, the WTO is a singularly dominant authority for the creation of appropriately balanced global IP norms.

4.3 **Form and function in the WIPO-WTO Agreement**

In general, effective accommodation of 'extra-trade' objectives depends on the application or consideration by the WTO of extant legal norms within the particular subject matter for which linkage claims are being made and an assumption, at

access and benefit-sharing (MLS) for a list of crops crucial for food security and in which countries are inter-dependent. The treaty restricts recipients of gene materials from using IP rights to restrict access to 'the plant genetic resources for food and agriculture (PGRFA), or their genetic parts and components, in the form received from the MLS (Art. 12.3 (d))'; WHO, Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, para. 15, WHO Doc. WHA61.21 (24 May 2008), at <http://www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf> (stating that in light of WHO's objective, the Organization 'shall play a strategic and central role in the relationship between public health and innovation and intellectual property within its mandates (including those contained in relevant WHO resolutions), capacities and constitutional objectives, bearing in mind those of other relevant intergovernmental organizations').

the minimum, that those norms: 1) are legitimate and/or uncontested (i.e., stable) within the particular discipline; and 2) have an internal logic that is reasonably compatible with the core tasks with which the trade regime has been entrusted. Further, there must be a reasonably stable iterative process by which developments in the linked subject-matter disciplines can be effectively incorporated in the application of WTO law and by which WTO action can permeate the political edifice of the global regulatory system. In the context of the TRIPS Agreement, the WIPO-WTO relationship offers an important means to ‘globalize’ post-TRIPS IP norms that could positively modify the presumptive ascendancy of property rights in knowledge goods over the affirmative role that governments must undertake in the provision of public goods.

The official institutional governance framework for IP is grounded in the TRIPS preamble, which identifies the desire of the contracting parties to ‘establish a mutually supportive relationship between the WTO and [WIPO]’.¹²⁶ Further, in TRIPS Article 68, the TRIPS Council was mandated to establish within a year of its first meeting ‘appropriate arrangements for cooperation with bodies’ in WIPO.¹²⁷ However, these are only the explicit directives for a cooperative framework to manage relations between WIPO and the WTO. As is well known, the substantive obligations of the TRIPS Agreement are derived from treaties administered by WIPO.¹²⁸ Accordingly, the required knowledge and technical expertise associated with those treaties are important to the WTO’s activities with respect to IP, particularly in the case of dispute settlement.¹²⁹ WIPO’s administration and management of the IP treaties, including those not incorporated in the TRIPS Agreement, may also be pertinent for the overall global regulatory system which the WTO now largely oversees.¹³⁰

The WIPO-WTO Agreement itself consists only of five articles of which the first and the last address purely mechanical matters involving definitions, entry into force and termination of the Agreement.¹³¹ Of the three remaining provisions

126. TRIPS Agreement, *supra* n. 9, Preamble.

127. *Ibid.*, Art. 68.

128. These include the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the Treaty on Intellectual Property in Respect of Integrated Circuits. See TRIPS Agreement, *supra* n. 9, Art. 1(3).

129. See *infra* section 5.2.2.

130. WIPO’s second objective is to ensure administrative cooperation among the Unions which formed around specific treaties. Accordingly, WIPO’s functions include performing ‘the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union.’ See WIPO Convention, *supra* n. 12, Art. 4. Today, WIPO’s administrative functions encompass 24 IP treaties. See WIPO, WIPO-Administered Treaties, at <www.wipo.org>.

131. Art. 1, for example, provides meanings for the various acronyms used in the Agreement, while Art. 5 addresses issues of entry into force, amendment and termination of the Agreement.

the most extensive is Article 2, which draws upon WIPO's administrative competency. Article 2(1) requires WIPO to service the needs of WTO members and its nationals with respect to making copies of laws and regulations in the WIPO collection, and also to make available copies of translations of such laws and regulations.¹³² WTO constituents (members and their nationals) are also guaranteed access to electronic databases containing such laws and regulations.¹³³ Another access provision links Article 63.2 of the TRIPS Agreement, which requires member states to notify the TRIPS Council of laws or regulations which affect TRIPS obligations, with WIPO's administrative functions. Finally, Article 2(5) requires WIPO to furnish assistance to both WTO and WIPO members who are DCs with respect to the translation of laws and regulations.¹³⁴

The WIPO-WTO Agreement requires that WIPO furnish, upon request of the WTO Secretariat and TRIPS Council, copies of laws or regulations submitted to WIPO and notified to the WTO pursuant to TRIPS Article 63(2).¹³⁵ Similarly, the WTO is required to transmit to WIPO, without restrictions on WIPO's use, copies of laws and regulations received by the Secretariat pursuant to TRIPS Article 63(2) for placement in WIPO's collection.¹³⁶

4.3.1 *Establishing WTO primacy: Article 2 of the WIPO-WTO Agreement*

At least three important features of Article 2 suggest that WTO primacy was implicit in its drafting. First, all the obligations in Article 2 require unconditional equal treatment by WIPO of WTO members and their nationals. No institutional privileges associated with WIPO membership may be denied to WTO members, at least with respect to WIPO's well-known status as a rich repository of copyright laws from countries around the world. Second, this principle of equal treatment, at a minimum, infuses a sense of institutional parity with respect to the respective roles of the WTO Secretariat and the International Bureau of WIPO in the oversight of the minimum substantive obligations of the WIPO treaties incorporated into the TRIPS Agreement. Third, in its collaborative stance even in matters as seemingly mundane as the exchange of the IP laws and regulations of member states, Article 2 of the WIPO-WTO Agreement serves as a mechanism for facilitating transparency and openness in the architecture of global IP regulation. Such transparency may have been intended only to serve the WTO's interest in compliance with the formal obligations of the TRIPS Agreement.¹³⁷ But it could also

132. See WIPO-WTO Agreement, *supra* n. 13, Art. 2(1).

133. See *ibid.*, Art. 2(2).

134. See *ibid.*, Art. 2(5).

135. See *ibid.*, Art. 2(3).

136. See *ibid.*, Art. 2(4).

137. Art. 63 is titled 'Transparency'.

enhance (or be used to leverage) greater transparency in WIPO, particularly with respect to its legislative and other technical assistance to developing countries.

In recent years, WIPO has faced intense criticism for fostering an organizational culture which belies the benefits of transparent governance over global IP.¹³⁸ As IP issues have become increasingly fractious and contested, insistent demands for transparency in numerous WIPO activities have only intensified. Critical assessments of WIPO's technical assistance to DCs and LDCs were reflected in demands by those countries for institutional reform in WIPO that brought about the Development Agenda.¹³⁹ Cluster A of the Agenda consists of fourteen proposals, all driven by a 'development-orientation' that includes assistance to facilitate diffusion and access to knowledge goods.¹⁴⁰ Brazil's recent proposal that the TRIPS Council adopt the normative premise of the technical assistance principles is an important example of the significance of WTO primacy. While the Agenda originated in WIPO, in the absence of an enforcement mechanism, implementation along consumer-friendly and balanced normative lines is highly improbable. Adoption by the TRIPS Council under the aegis of Article 67 of the TRIPS Agreement would legalize the obligation of developed countries to acknowledge interests, other than rights holders', in the application and delivery of capacity building programs. As a WTO matter, then, the normative impetus of the Development Agenda could claim legitimacy for bargaining or dispute settlement purposes. At least with respect to technical assistance, formal adoption by the WTO would in turn help constrain any slippage in WIPO's commitment to the Agenda, since the platform in effect would be shared with the WTO.

4.3.2 Article 3 of the WIPO-WTO Agreement

The second substantive article in the WIPO-WTO Agreement reflects an unavoidably deeper linkage between WIPO and the WTO than Article 2, although it also draws on WIPO's administrative competency. Article 3 of the WIPO-WTO Agreement establishes WIPO as the governing agency, for *TRIPS purposes*, of the communication of emblems and transmittal of objections consistent with Article 6ter

138. See P.S. Berman, 'The Globalization of Jurisdiction', 151 *Univ. PA LR* (2002) p. 311 at pp. 397-398 (noting that both WIPO and the WTO have been attacked for their lack of transparency); Development Agenda Proposal, *supra* n. 39, at p. 4 (stating that 'WIPO has an obligation to ensure that its technical cooperation activities are geared towards implementing all relevant UN development objectives, ...' and that '[p]rograms for technical cooperation in IP related matters should be considerably expanded and qualitatively improved').

139. See Development Agenda Proposal, *supra* n. 39.

140. See Development Agenda Recommendations, *supra* n. 39, Cluster A: Technical Assistance and Capacity Building.

of the Paris Convention.¹⁴¹ Here, the WIPO-WTO Agreement explicitly integrates WIPO into the TRIPS administrative framework and, in effect, consolidates an agency role for WIPO already somewhat evident from the language in Article 2.

4.3.3 *Article 4 of the WIPO-WTO Agreement*

The last substantive article of the WIPO-WTO Agreement also confirms this agency role. Article 4 of the Agreement requires that WIPO make available to WTO member states that are not WIPO members the same legal and technical assistance offered to WIPO members. The WTO Secretariat is also obligated to provide to developing country WIPO members who are not members of the WTO the same technical cooperation relating to the TRIPS Agreement offered to developing countries.

Finally, Article 4 requires both agencies to ‘enhance cooperation’ in the provision of legal-technical assistance and technical activities relating to TRIPS for DCs ‘so as to maximize the usefulness of those activities and ensure their mutually supportive nature.’¹⁴² The two agencies also agreed to stay in regular contact and to share non-confidential information with regard to the legal-technical assistance activities. Given this provision, it is possible to argue that the TRIPS Council could, in principle, refuse technical assistance along the lines envisaged by the Development Agenda. In other words, although WIPO is obligated to give to WTO members the same level of technical assistance available to WIPO member states, it appears that if the WTO formally eschews the objectives of the Development Agenda, WIPO could easily resort to its previous model of technical assistance. Since, under Article 4, the WTO usually makes a formal request for technical assistance from WIPO, it is entirely plausible that it could define the terms of such assistance. Brazil’s proposal to the WTO could be seen as an implicit acknowledgement that the WTO is not obligated to accept WIPO standards as a matter of course.

4.4 **Models of WIPO-WTO Cooperation**

Competing claims of final legal authority are not commonly or explicitly made in the international legal context. There is no hierarchical or structured order governing inter-institutional relations. Instead, legal pluralism remains the central governance framework characterized by unsettled or ambiguous relationships among various regimes and, accordingly, among international organizations. Indeed, while most international organizations have formal and informal modes of cooperation with others, many of the mechanisms employed, such as observer status, formal

141. See WIPO-WTO Agreement, *supra* n. 13, Art. 3(1).

142. *Ibid.*, Art. 4(2).

agreements or memoranda of understanding, tend to be task-oriented, focusing, like the WTO-WIPO Agreement, on technical assistance and capacity-building obligations. This is not to undermine the earlier point that such activities can be norm-influencing in themselves, as WIPO's history in particular illustrates. However, inter-institutional cooperation focused on areas in which norms are uncontested hardly precludes norm fragmentation or norm conflict, which is a core motivation for such collaboration. Further, to the extent contemporary methods of inter-institutional collaboration are a means for international organizations to protect their jurisdictional turf (or otherwise expand it), inter-institutional collaboration could itself be another source of fragmentation. In this regard, it is worth considering how WIPO-WTO relations might be structured with greater emphasis on the competing interests at stake in future IP norm-setting.

At least three models of WIPO-WTO relations merit consideration and the TRIPS dispute decisions reflect traits from each model. These are: 1) an expert agency model; 2) a presumptive peer-to-peer model; and 3) an explicitly hierarchical model. To different degrees, each of these models is evident in the existing WIPO-WTO relationship. In briefly outlining the models, the intention is not to identify a single model to govern WIPO-WTO relations. Rather, it is to point out that each model has a functional benefit or advantage that may appropriately serve welfare interests in different contexts. For example, the peer-to-peer model, in which each organization functions in a discrete policy space, could be seen as the default situation that governs the relationship between both organizations most of the time. The expert agency model, on the other hand, may be most dominant in the context of a dispute between states. This is an area in which, given WIPO's lack of enforcement power, only the WTO has the capacity to create norms through its interpretation of the relevant treaties. WIPO's expertise, if necessary, should ideally play a role in the process, but only at the discretion of a dispute panel. The hierarchical model should prevail in situations where a global public good is involved and the prospect of a multilateral solution will require linkages to facilitate a negotiated normative outcome. The hierarchical model could also prevail in an area of shared policy space, such as technical assistance or technology transfer, in which the structure of the WTO offers a wider range of opportunities to introduce norms regardless of the status of a trade round. Given the important and often immediate technology needs of DCs and LDCs, it is important that as many options for norm development exists outside the constraints of the treaty negotiating process that characterizes law-making in WIPO.

4.4.1 *The expert agency model*

A possible way to view WIPO in relation to the WTO is as an agency with relevant technical, factual and historical expertise and experience with respect to global IP

laws. Such a model would place WIPO in the position of supplying specialized information and/or opinions to the WTO based on its historical work and participation in the establishment of the global IP system. As a quasi-legal fact finder with respect to the evolution of IP obligations incorporated into the TRIPS Agreement, the WTO would treat facts supplied by WIPO with a pre-determined level of deference.¹⁴³ At the high end of this model, it is possible to consider that such facts should be binding on the WTO, or be presumptively treated as an acceptable standard for TRIPS purposes similar to the Codex Alimentarius.¹⁴⁴ Doing so would clearly suggest a more administrative (but still hierarchical) form of interaction between the two organizations and it would be important to develop a framework to determine how such deference could be structured.

Further, deference to an appropriately carved-out expert role for WIPO would reflect a more meaningful integration of the WTO in the international IP system.¹⁴⁵ At a minimum, WIPO documentation and materials should form part of the official sources in considering the nature of the obligations imposed by the norms codified in the WIPO treaties. Even as a fact-supplier, WIPO could opine on the way those facts have influenced norm creation within WIPO. Such interpretive opinions should not be binding on a TRIPS dispute panel or the Appellate Body (AB) as such, particularly given that interpretation of the Berne and Paris Conventions within the trade regime could emphasize different values¹⁴⁶ or incorporate norms from other regimes. Nonetheless, such opinions can add credibility and assurance to panel and AB deliberations when interpreting the TRIPS Agreement.¹⁴⁷ Since there can be no denying that WIPO has much to offer by way of technical and historical

143. Several scholars have pointed to deference as a way of structuring cooperative relations between international organizations. See e.g., J.E. Alvarez and S. Charnovitz, 'Triangulating the World Trade Organization', 96 *AJIL* (2002) p. 28.

144. See J.E. Alvarez, 'Institutional Linkage: Transcending "Trade and ..."', 96 *AJIL* (2002) p. 77 (noting deference by the WTO to the WHO, IMF, and FAO Codex Alimentarius). See also generally T.P. Stewart and D.S. Johanson, 'The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics', 26 *Syracuse Journal of International Law and Commerce* (1998) p. 27 at pp. 8-30 (reviewing the international organizations upon which the WTO Dispute Settlement Body (DSB) relies when determining what international standards it will apply in evaluating Members' SPS measures).

145. See Lamy, *supra* n. 3, at p. 980.

146. See N. Netanel, 'The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement', 37 *Virginia JIL* (1997) p. 441.

147. See e.g., Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1998, para. 146, WTO Doc. WT/DS176/AB/R (2 January 2002) (noting the consistency of its interpretation with a WIPO publication); Appellate Body Report, Canada – Term of Patent Protection, para. 54, WTO Doc. WT/DS170/AB/R (18 September 2000) (same); Panel Report, Canada – Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R (17 March 2000).

expertise, some level of presumptive validity should be accorded to this expertise in the WTO.

4.4.2 *The presumptive peer-to-peer model*

The peer-to-peer approach is the most intuitively and politically expedient approach as well as one that is consistent with the presumptions of equality among actors in international law. Upon close scrutiny, it may be different from the agency model only as a matter of degree. As Professor Abbott has proposed, in such a ‘distributed governance’ model, both organizations continue to exercise autonomy and discretion over their respective mandates, creating and influencing IP norms ostensibly around their stated functions.¹⁴⁸ But in this model, more than in the agency approach, the activity of state members can influence the rate and direction of norm-setting as well as which organization will produce future IP norms.¹⁴⁹

A fully functioning classic peer-to-peer approach will require more in WIPO-WTO relations than is contemplated by the language of the WIPO-WTO Agreement. Deeper linkages should be sought in norm-setting that can draw upon WIPO’s collective institutional resources and the WTO’s strategic linkages across regimes.¹⁵⁰ In the absence of such deliberate collaboration, the peer-to-peer model will inevitably produce a competitive tension between the two organizations in which strategic forum-shopping by states and the exercise of institutional autonomy could yield different norms or effect different legal obligations with regards to compliance with existing IP norms. For example, in the face of Antigua’s consideration of suspending TRIPS obligations for US’ failure to comply with a WTO ruling, a WIPO official opined that while suspension of IP rights may be permissible under the WTO IP regime, such suspension would still constitute a violation of the WIPO IP treaties.¹⁵¹ If this view were to prevail, the benefit of strategic trade-offs that characterized the Uruguay Round would be lost for relatively powerless DCs and LDCs. Importantly, it would disrupt the balance of concessions central to the stability of the trade regime.

148. See Abbott, *supra* n. 11.

149. See *ibid.*, at pp. 69-70 (discussing the comparative strengths of each institution and viewing the WIPO-WTO Agreement as helpful to building synergy and expanding the institutions’ respective capacities).

150. See Lamy, *supra* n. 3, at p. 980 (stating that ‘the WTO encourages Members to negotiate norms in other international forums, which they will then implement coherently in the context of the WTO’).

151. See International Center for Trade and Sustainable Development (ICTSD), ‘As Antigua Considers Cross-Retaliation against US, WIPO Official Creates Stir’, 23 January 2003, at <<http://ictsd.net/i/news/bridgesweekly/6612/>>.

4.4.3 *The explicitly hierarchical model*

The capacity to hold all member countries to the benefit of the bargain concluded under the Uruguay Round is precisely why a hierarchical model for IP is inevitably the reality on the ground. The ambiguity regarding parallel duties in a non-hierarchical world is evident in other regimes with enforcement prospects, such as in international criminal law.¹⁵² But within the IP regime, a case for WTO primacy could easily be made given that WIPO lacks any effective or mandatory enforcement power. Accordingly, the real issue in considering WIPO-WTO relations is how the WTO interprets its mandate and decides which IP issues it will leave to WIPO. In this regard, state action will play a role in what will likely be a dynamic process, as will organizational culture.¹⁵³ The extent to which either Organization utilizes its internal culture to effectively address issues important to its member states and produces outcomes that reflect a careful balance between the divergent interests represented by IP governance will surely affect how hierarchy is construed between the two organizations. It will also determine which of the three models will dominate WIPO-WTO relations at any given point in time.

Again, the recent organizational developments in WIPO¹⁵⁴ could signal the arrival of a much-anticipated evolution in WIPO's view of the role of IP in a complex modern environment and its willingness to respond meaningfully to new challenges. WIPO's new offices will make it look much more like the WTO – an organization with proven ability to address linkage problems. Whether WIPO can develop the organizational facility to carry out a radically new orientation and function is a separate question. Alternatively, the recent initiatives could simply be another strategic effort by WIPO to preserve its authority and credibility in the international community by offering an institutional platform on which new issues can be absorbed into the organization. Only time will tell which of these two possibilities is likely to prevail in WIPO's future.

4.5 **The persistence of linkage and the strategic use of the WTO**

It is easy to assume that once a linkage bargain has been struck, the underlying rationales of states become insignificant. Yet, what the troubled IP-trade linkage

152. See M.M. El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute', 4 *Journal of International Criminal Justice* (2006) p. 448 at p. 460 (noting the lack of hierarchy between the ECHR and the International Criminal Court (ICC) such that 'the extent of the duty of compliance of one court with the decision of another court is not clear').

153. See generally J. March, *Decisions and Organizations* (London, Basil Blackwell 1988); J. March, 'Understanding How Decisions Happen in Organizations', in J. March, ed., *The Pursuit of Organizational Intelligence* (Oxford, Basil Blackwell 1999) ch. 2.

154. See *supra* section 4.1.

illustrates is that once linkage is embraced, it must inform the kind of institutional arrangements needed to manage normative, administrative and strategic considerations necessary to make the linkage sustainable. The fact is that linkages are less likely to cohere over time if the substantive regulation occurs within distinct regimes. The potential for incoherence increases significantly if members initially embraced the linkage for starkly disparate reasons, as is the case with trade and TRIPS.¹⁵⁵ Accordingly, the greater the degree of divergence in the motivations for the linkage, the greater the possibility for norm fragmentation, as states utilize different institutional competencies to advance their particular goals.

The trade-IP linkage was motivated primarily by the interests of developed countries for effective global enforcement of IP rights. That same linkage today shows signs of capture by DCs and LDCs, whose interest in linkage is focused almost entirely either on bargains made possible by the IP leverage, as in the prospects for cross-retaliation, or use of the WTO to enforce normative IP principles not likely to gain ground in WIPO. Both sides face tremendous challenges in such strategic uses of the WTO.¹⁵⁶

For example, efforts by the US, Japan, the EU, and Switzerland to advance enforcement activities in the TRIPS Council were rejected by developing countries.¹⁵⁷ The Antigua cross-retaliate controversy also is a relevant example of the parallelism that can evolve when regime linkages are disconnected from broader social and political contexts.¹⁵⁸ If WIPO is not subordinated to the enforcement outcomes of the WTO, what seemed like a justifiable issue linkage at the beginning of the Uruguay Round may instead turn out to be an unworkable and unstable regime linkage¹⁵⁹ that renders the current global IP system vulnerable to norm fragmentation and incoherence, as institutional emphases differ despite overlapping IP mandates.¹⁶⁰ In the absence of shared foundational principles or a common objective on the propriety of global protection for IP, regime linkage can merely be a means to accommodate forum shifting. This is evidenced recently by the proliferation of efforts to forge an IP enforcement agenda in multiple fora¹⁶¹ and through new bilateral, regional and plurilateral trade agreements.¹⁶² Hierarchical relations

155. See *supra* section 2.

156. See e.g., ICTSD, *supra* n. 151.

157. See ICTSD, TRIPS Council: Divided We Stand, November 2006, at <<http://ictsd.net/i/news/bridges/11691/>>.

158. See *supra* n. 151.

159. See Leebron, *supra* n. 49, at p. 11 (noting that placing substantive areas in different regimes will generally make issue linkages more difficult and controversial).

160. See *ibid.*, at p. 20 (noting that regime amalgamation is possible but 'in the international context the obstacles are especially formidable').

161. Examples abound; see most recently, the controversy on proposed IP rules at the WCO, SUNS #6535, 11 August 2008.

162. The most controversial of these efforts have recently been the 'behind the curtain' negotiations on the proposed Anti-Counterfeiting Trade Agreement (ACTA). See generally Monika Ermert,

offer one way to break the ties that bind global IP norms to the vagaries of strategic behaviour by states and the disruptive exercise of autonomous power by international organizations.

5. HIERARCHY OR HETERARCHY: PRIORITIZING THE WTO AS A SOURCE OF GLOBAL IP NORMS

5.1 Shared governance as a hallmark of future IP norm-setting

In pursuing the WTO as a primary source of future IP norms, an important consideration is the relative openness of the WTO to the multiple actors affected by IP rules. Just as WIPO has done historically, the WTO has the capacity to insulate its processes and decisions from the very community its mandate directs it to serve. While it is the case that a variety of non-state actors have increasingly, and often successfully, affected the course of international policymaking, with a prominent example at WIPO,¹⁶³ international organizations by far still stand at the epicentre of debates about the changing nature of global governance.

As non-state actors become more firmly and formally integrated into international organizations and global policy-making processes, shared governance is increasingly characteristic of the global political framework.¹⁶⁴ This system, which gives non-state actors the ability to affect and be part of constituencies in which norms are incubated and eventually expressed through policy and treaty obligations, is the inevitable by-product of multilayered decision-making that spans local national, regional and multilateral organizations. Heterarchy is not only a means of governance across these several locus points, but also a recognition that the effectiveness and sustainability of norms is intricately linked to the way various structures interact to reflect and reconcile the competing interests of multiple stakeholders and actors in any single regime. It is important to make clear, then, that hierarchy cannot replace heterarchy with regard to the process of IP norm creation. Even with respect to the important question of global public goods, the reality is that the WTO cannot act in isolation no matter how laudable its goals or how superior or effective its institutional structure. This point is particularly poignant in reflecting

ACTA: Negotiations Advance behind the Curtain; Many Concerns, IP-Watch, 2 August 2008, at <<http://www.ip-watch.org/weblog/index.php?p=1186>>; Monika Ermert, G8 Governments Want ACTA Finalized This Year, SPLT Talks Accelerated, IP-Watch, 9 July 2008, at <<http://www.ip-watch.org/weblog/index.php?p=1136>>; Monika Ermert, Speculation Persists on ACTA As First Official Meeting Concludes, IP-Watch, June 5, 2008, at <<http://www.ip-watch.org/weblog/index.php?p=1082>>.

163. See P. Samuelson, 'The U.S. Digital Agenda at WIPO', 37 *Virginia JIL* (1997) p. 369 (describing how a coalition of state and non-state actors re-directed the course of events in negotiating the WIPO Internet Treaties).

164. See Held and McGrew, *supra* n. 8.

upon the TRIPS Agreement and the subsequent developments in international IP – both internal and external to the trade regime – such as the Doha Declaration, the establishment and report of the UK Commission on Intellectual Property Rights (CIPR),¹⁶⁵ and most recently, the WIPO Development Agenda – all of which in varying degrees question, refute, push back on and acknowledge the need for different conceptual and policy considerations in the development, interpretation and application of TRIPS obligations.

The same heterarchy that became an explicit delimitation on the specialized regime model of WIPO also must play a role in holding the WTO accountable. As between WIPO and the WTO, some scholars note that shared IP governance enhances the comparative advantages of both organizations without replicating functionalism, since there would be an integrated decision-making and enforcement structure.¹⁶⁶ In the absence of such integration, obviously the WIPO-WTO relationship would be more like regime amalgamation, which requires a supra-structure to overcome significant moral hazard problems.¹⁶⁷ This is one problem with a peer-to-peer model in which no clear division of labour has been articulated, as is the case with the WIPO-WTO Agreement.

There is the further problem of expertise with respect to the emerging issues at the frontier of global IP regulation. Neither WIPO nor the WTO alone can effectively account for the range of subjects on which IP regulation has an effect. Both organizations will require the expertise and input of other organizations. While the activities of WIPO and the WTO will long continue to attract premium attention with respect to norm-setting import, there is no doubt that organizations such as UNESCO, WHO, the Food and Agriculture Organization (FAO), along with NGOs will be important sources of normative principles¹⁶⁸ that are destined to impact the terms of future IP cooperation among nations. Notwithstanding, as between WIPO and the WTO, important design features make the WTO uniquely situated for global IP norms that must assure an unbroken supply of critical global public goods.

5.2 Norms and norm-setting capacity in the WTO

In considering the future of IP norm creation, the primary question that arises is how and where best the common development aspirations of trade and IP can be more explicitly defined and fostered. A significant challenge to the WTO's author-

165. See <<http://www.iprcommission.org>>.

166. See Abbott, *supra* n. 11.

167. See Leebron, *supra* n. 49, at p. 20 (noting that regime amalgamation in the international context is 'especially formidable' unless a conglomerate structure already exists).

168. See e.g., Kapczynski, *supra* n. 14 (discussing the role of civil society in accomplishing important disruptions of IP maximalism as expressed in the TRIPS Agreement).

ity over global minimum IP standards is its historical institutional deficit with respect to IP norm-setting. It is important first to define what I mean by the term ‘norms’ and ‘norm-setting’ in this context. In international law, norms usually are synonymous with the legal obligations codified in treaties and which, as a result, constitute authoritative standards to which state actions must conform.¹⁶⁹ Norms also encompass principles or precepts discernible in patterns of state behaviour established over a period of time. Such behaviour, whether or not associated with prescribed treaty provisions, constitutes a basis from which principled expectations of state behaviour arise and are relied upon to guide and regulate acceptable interaction among states. Norms thus encompass explicit bargained-for rules, standards of behaviour associated with how states have complied with those rules, expectations arising from the established practice of states and other generally recognized precepts that exert a moral pull on actors, either because they have consented to be bound by the rule (e.g., through a participatory process) or because the rule reflects a constitutional value indispensable to the basic order of socio-political communities,¹⁷⁰ whether national or multilateral.

In the context of IP, I view norms to include the goals or objectives the relevant treaty rules and standards are intended to accomplish, as well as the processes by which those expectations are assimilated into international law. Thus, in terms of norm-setting activity, for example, the way in which WIPO or the WTO determine the constitutive elements of ‘technical assistance’ and assesses whether such assistance is, first, necessary and, second, effective, is part of the normative orientation likely to manifest in the expectations that states have with respect to compliance with treaty obligations.¹⁷¹ Similarly, the manner in which the WTO evaluates state IP laws for compliance with TRIPS also injects normative bias into the global IP framework by altering state behaviour along the lines of such WTO counsel. Accordingly, one of the benefits of WTO primacy over global IP rules is the range of avenues available to it to create and diffuse IP norms through its various offices and tasks.

169. See e.g., E. Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’, 7 *EJIL* (2006) p. 395 at p. 398 (‘norms have the fundamental functions of obligating, prohibiting and permitting ...’); G.B. Dinwoodie, ‘The Development and Incorporation of International Norms in the Formation of Copyright Law’, in P.S. Berman, ed., *The Globalization of International Law* (Ashgate, Aldershot & Burlington 2005) p. 421 (discussing Berne Convention treaty obligations and the decisions of WTO panels as ‘international copyright norms’). On variations in the character of international law norms, see P. Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* (1983) p. 413.

170. These are also known as ‘jus cogens’ or peremptory norms. See Vienna Convention on the Law of Treaties, Art. 53, 23 May 1969, 1155 *UNTS* 331, 8 *ILM* 679 (1969), *Trb.* 1972 No. 51 (hereinafter Vienna Convention).

171. See Latif, *supra* n. 92.

The impressive breadth of the TRIPS Agreement in terms of the obligations embodied therein is second only to the expansive administrative structure states designed to secure the objectives of the Agreement. While the negotiated obligations established strong legal standards for IP protection, it is the WTO's capacity to shape the development of IP norms incorporated in the Agreement that potentially holds transformative power over the multilateral IP regulatory landscape. Of particular importance is the work of the TRIPS Council, TRIPS dispute panels and the AB, whose mandates clearly envisage a role for them in the hierarchy of multilateral IP institutions, and whose accomplishments already reflect their respective power over the future of global IP norm-setting.

5.2.1 *The unlimited mandate of the TRIPS Council*

The TRIPS Council serves as chief administrator for the TRIPS Agreement, responsible primarily for monitoring compliance with its provisions.¹⁷² Compliance in this regard should be viewed not as a constraint on the scope of the Council's jurisdiction but rather as an explicit grant of authority to, in the first instance, interpret and give full force and meaning to the obligations contained in the TRIPS Agreement and to foster ongoing cooperation among member states with respect to global IP issues. In carrying out its monitoring functions, the Council exercises enormous power over the conceptual framework and practical orientation of the global IP system. This incorporates issues of particular concern to DCs and LDCs, but also attends to the importance of securing the Uruguay bargain against threats that might unravel states' commitment. Article 68 provides that the Council is the forum where WTO members can 'consult' on matters 'relating to trade-related aspects of IP rights' and receive assistance with respect to dispute settlement procedures. Thus, the consultative function of the Council offers a tremendous opportunity to leverage diplomacy to overcome resistance to IP issues in an environment in which broader concerns could also be aired.

Nothing in the language of the Council's mandate suggests a limited jurisdiction with respect to IP matters to which the TRIPS Council may direct its attention. The use of 'trade-related intellectual property rights' to qualify the issues which members can bring to the Council for consultation cannot reasonably be viewed as anything but a polite effort to avoid explicitly marginalizing WIPO's role in promoting global IP protection and the measures (i.e., primarily treaties) designed to enhance such protection.¹⁷³ Indeed, the TRIPS Council may 'consult with and seek information from any source it deems appropriate', notwithstanding the formal cooperation with WIPO. In effect, the Council's mandate authorizes activities

172. See TRIPS Agreement, *supra* n. 9, Art. 68.

173. See WIPO Convention, *supra* n. 12, Arts. 3-4.

that span and pervade the full spectrum of the global IP architecture, from overseeing members states' domestic laws and ensuring compliance with TRIPS obligations, to discussions and negotiations regarding established norms and obligations in IP generally, and participation as needed in the context of dispute settlement. The scope of the Council's activities clearly extends beyond the obligations currently embodied in the TRIPS Agreement and it would seem to legitimately encompass any issue which affects the interests of the global IP system structured around the Uruguay bargain. This is evidenced by the additional issues directed to the Council under the Doha Ministerial.¹⁷⁴

Nothing would suggest, for example, that the TRIPS Council is precluded from discussing any IP issue on the grounds that the topic is not 'trade-related'. Indeed, the seemingly unlimited scope of the Council is reflected in the fact that it is charged to 'carry out such other responsibilities as assigned to it by the Members'. Presumably, then, nothing precludes a WTO member from raising concerns not directly addressed in TRIPS before the Council. For example, considerations of political prudence aside, it is unlikely that interposing concerns raised by the WIPO Development Agenda¹⁷⁵ would raise outcries that such work is beyond the scope of the Council. As mentioned earlier, the government of Brazil has requested just this very thing, namely that the normative basis for technical assistance in the Development Agenda should inform the discussions and work on the same issue in the TRIPS Council.¹⁷⁶ Indeed, given the development concerns referenced in the TRIPS Agreement¹⁷⁷ but not in the WIPO Convention, the TRIPS Council clearly is more directly and extensively charged to address and foster cooperation over issues at the intersection of IP and development. This is evidenced by the formal recognition in TRIPS of the special interests of LDCs.¹⁷⁸ Further, the TRIPS Agreement recognizes the need for balance and the mutual interests of users and owners of IP rights to promote social and economic welfare.¹⁷⁹ Neither the Paris or Berne Conventions reflect an acknowledgement of IP as a means to accomplish social ends.

Further, the collaboration between WIPO and the WTO on technical assistance programs for DCs and LDCs¹⁸⁰ logically situates the concerns motivating the De-

174. See Ministerial Declaration, *supra* n. 89, paras. 18-19.

175. See Development Agenda Proposal, *supra* n. 39.

176. See Communication from Brazil, *supra* n. 91.

177. Development considerations are referenced several times in the TRIPS Agreement, whether as part of the context within which the Agreement should be interpreted, such as in the preamble, or indirectly through explicit mention of the interests of developing and least-developed countries. See e.g., TRIPS Agreement, *supra* n. 9, Preamble at para. 6, Art. 66.1.

178. See *ibid.*, Preamble at para. 6.

179. See *ibid.*, Art. 7.

180. This has mainly been in the form of workshops and colloquia. See e.g., the yearly WIPO-WTO colloquia for teachers of intellectual property from developing countries and countries in transition, at <http://www.wto.org/english/tratop_e/TRIPS_e/wipo_wto_colloquium_june08_e.htm>.

velopment Agenda in the TRIPS Council, particularly given the prominent role of technical assistance programs in the approved cluster of activities¹⁸¹ and also in TRIPS implementation.¹⁸² Of course, the WTO's TRIPS-related technical assistance work has been carried out principally by WIPO. But, the point is that WIPO, in the absence of any explicit mandate and contrary to its historical institutional orientation, has sought for decades to address the interests of non-industrialized countries with little success. Neither has it succeeded in narrowing the conceptual gap between the divergent perspectives on the proper delineation of a global IP policy suitably directed at advancing the interests of technology-importing nations. In short, WIPO has not effectively served the classic functions of international organizations, which include, among other things, ameliorating a natural unwillingness toward cooperation occasioned by incomplete information and high transaction costs. The TRIPS Council, however, has an explicit mandate to deal with *any* issues members might bring before it and to monitor compliance with the TRIPS Agreement, whose objective is to establish a balanced global IP system. Whether or not it makes a practical policy difference at the institutional level, the language of balance at least gives a legal basis on which international actors can be unrelenting in their demand that IP regulation be accountable to human welfare considerations. Two additional legitimacy and design-related points should be made about WTO primacy over IP norms.

5.2.1.1 The TRIPS Council and the development linkage

As between WIPO and the WTO, the WTO appears deliberately designed and more fully equipped to address global IP norms with a view to fostering cooperation and specifically mediating the divide between industrialized and non-industrialized countries. Already, the work of the TRIPS Council has encompassed issues of material importance such as technology transfer¹⁸³ and the protection for geographical indications (GIs). Important regime linkages, such as between IP and public health, between TRIPS and the Convention on Biological Diversity (CBD)¹⁸⁴ and

181. See Development Agenda Recommendations, *supra* n. 39, Cluster A: Technical Assistance and Capacity Building.

182. See TRIPS Agreement, *supra* n. 9, Art. 67. See also WIPO, WIPO Intellectual Property Handbook: Policy, Law and Use (WIPO Publication No. 489, 2nd edn., 2004) pp. 359-360, at <<http://www.wipo.int/about-ip/en/iprm>>.

183. See WTO, Decision by the Council for TRIPS – Implementation of Article 66(2) of the TRIPS Agreement, WTO Doc. IP/C/28 (19 February 2003) (establishing a system to implement art. 66.2 and extending it beyond the role of IP rights to 'any mode of technology transfer').

184. See Ministerial Declaration, *supra* n. 89, para. 19 (instructing the TRIPS Council to, *inter alia*, examine, 'the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1').

between IP and traditional knowledge (a matter on which WIPO has expended significant institutional and political resources) have also been credibly established.¹⁸⁵ Indeed, the Council's work has squarely confronted some of the most controversial issues currently facing the global IP system, with the prospect that additional items could be added to the Council's charge under future ministerials, as occurred under the Doha mandate.¹⁸⁶ In all of these areas, the Council's views and deliberations evidence efforts that could yield side-bargains similar to the extensions granted LDCs for implementation of the TRIPS Agreement with respect to pharmaceutical patents.¹⁸⁷ Importantly, for norm-setting purposes, the Council was specifically charged by the Doha Declaration to be guided in its work by the objectives and principles of the TRIPS Agreement and is obligated to 'take fully into account the development dimension.'¹⁸⁸

5.2.1.2 The TRIPS Council and legitimacy with DCs and LDCs

It is important to emphasize that identifying the Council's comparative strengths with respect to IP norm-setting/influence is not intended to suggest that the WTO has a lesser interest and commitment to strong IP protection. And as I note later, there are risks associated with the WTO's primacy over IP. But two factors suggest that nuanced IP norms that account for differences in cultural, economic and political factors are more likely to be consistently produced by the WTO rather than WIPO. First, the WTO TRIPS Council is the product of a negotiated process; it was not designed by one group of nations and inherited by another, thus eliminating any challenge to its authority to issue rules imbued with a level of legitimacy to which states might feel compelled to adhere.¹⁸⁹ At least facially, then, the WTO benefits from liberal and neo-liberal assumptions associated with regime development, namely that states create international organizations to solve, *inter alia*, problems that they cannot solve alone. Second, the WTO offers a range of mechanisms to address and resolve issues. These include diplomacy in its monitoring activities, sanctions through the dispute resolution process, and the exercise of discretion to broker compromises that could ease long-term resistance to the global IP regime

185. See generally WIPO, Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore, at <<http://www.wipo.int/tk/en/>>.

186. The Doha Declaration added two issues to be deliberated within the TRIPS Council: 1) creating a multilateral register for wines and spirits and; 2) extending the level of protection under Article 23 beyond wines and spirits. See Doha Declaration, *supra* n. 87. For background information and a series of proposals presented to the Council, see <http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm#wines_spirits>. See also Ministerial Declaration, *supra* n. 89, para. 18.

187. See Doha Declaration, *supra* n. 87, para. 7.

188. See Ministerial Declaration, *supra* n. 89, para. 19.

189. See T.M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford UP 1990).

itself. The possibility of inter-regime conflicts thus suggests that countries could continue to engage in linkage bargains within discrete units of the WTO infrastructure.

5.2.2 *The enforcement power of TRIPS dispute settlement*

The power to shape and enforce norms is quintessentially bound up with the dispute settlement authority of legal institutions, particularly the judiciary. Not only are courts invested with the authority to interpret legal rules, but embedded in their core adjudicative function are opportunities to reconcile policy objectives within a cooperative framework in which various regulatory goals can be secured. In a multilateral system without institutions vested with coercive enforcement authority, the challenge of compliance with international obligations has long been vexatious. Yet, increasingly, states have taken the time and resources to develop international tribunals which exercise supranational jurisdiction over a diverse range of regulatory problems that require multilateral solutions. Although scholars continue to debate the efficacy of international tribunals,¹⁹⁰ few doubt the power of the WTO dispute settlement process in bringing about conformity to the prescribed rules of the various WTO Agreements. The WTO's mandatory dispute resolution system is widely acknowledged as one of the most significant international tribunals existing today.

In the context of TRIPS dispute settlement, WTO dispute panels have clarified fairly important obligations in the TRIPS Agreement, providing guidance to important questions such as the role of domestic policy interests in compliance with TRIPS standards,¹⁹¹ the appropriate domestic instrument for implementing TRIPS obligations¹⁹² and the propriety of 'soft' unilateral action in response to perceived violations of the TRIPS Agreement.¹⁹³ In its binding and enforceable exercise of

190. See A.T. Guzman, 'International Tribunals: A Rational Choice Analysis', 157 *Univ. PA LR* (2008) pp. 171-236, at <http://works.bepress.com/andrew_guzman/1/>; L.R. Helfer and A.M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale LJ* (1997) p. 273 at p. 276; E.A. Posner and J.C. Yoo, 'Judicial Independence in International Tribunals', 93 *Calif. LR* (2005) p. 1 at pp. 8, 27; L.R. Helfer and A.M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *Calif. LR* (2005) p. 899.

191. See Panel Report, Canada – Patent Protection of Pharmaceutical Products, *supra* n. 147 (Canada argued, *inter alia*, that '[a]s stated in the first recital of its Preamble and in the objectives endorsed by its Article 7, the TRIPS Agreement was not intended to promote patent rights at the expense of legitimate trade, social and economic welfare, and the rights of others'); Panel Report, United States – Section 110(5) of the US Copyright Act, Attachment 2.3, WTO Doc. WT/DS160/R (15 June 2000).

192. See Panel Report, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS50/R (5 September 1997).

193. See e.g., Panel Report, United States – Sections 301-310 of the Trade Act of 1974, WTO Doc. WT/DS152/R (22 December 1999).

authority over the TRIPS Agreement, the WTO dispute settlement process provides a formidable harbinger for global IP norms. But norm development in IP is not limited only to disputes over explicit obligations contained in the TRIPS Agreement. Regime linkages offer an indeterminate array of possibilities for TRIPS dispute settlement. For example, when a WTO panel is called upon to determine whether compliance by a state is satisfactory under existing international IP rules, the panel's task requires evaluation and interpretation not only of the extant obligations of the TRIPS Agreement but, pursuant to the Vienna Convention on the Law of Treaties, any subsequent treaty developments.¹⁹⁴ Such developments clearly will encompass new treaties developed by WIPO, but also treaties or other soft-law actions evolving from regimes in which IP issues bear relevance to organizational mandates.

The WHO and the CBD most immediately come to mind, given the explicit linkage that has taken place within the formal mandate of the TRIPS Council pursuant to the Doha Declaration.¹⁹⁵ The explicit relationship between these three regimes – public health, biological diversity and IP – should lead invariably to a consideration by the TRIPS panel of norms specific to those regimes in determining whether a particular implementation of TRIPS obligations is satisfactory. It is important to stress that such interpretive linkage goes beyond the mere invocation of the Vienna Convention's requirement that subsequent treaties between the parties should count in interpreting the scope of international obligations. Rather, the formal recognition by WTO member states of a relationship between IP regulation and public health or biological diversity, and the mandate to the TRIPS Council to consider these issues with a development focus¹⁹⁶ is a compelling argument to integrate the normative goals of these regimes in TRIPS implementation. Paragraph 19 of the Doha Ministerial states:

'We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.'

194. See Vienna Convention, *supra* n. 170, Arts. 31(3)(a), (c).

195. See Ministerial Declaration, *supra* n. 89, para. 17 ('We stress the importance we attach to implementation and interpretation of the [TRIPS Agreement] in a manner supportive of public health ...').

196. See *ibid.*, para. 19.

TRIPS panels have already referenced the interpretive force of the preamble and Article 7 of the TRIPS Agreement.¹⁹⁷ With the clear issue linkage formally established, reconciling the various competing regulatory goals of these regimes will be the responsibility of the dispute panel. Even with the suspension of the Doha Round, the TRIPS Council's mandate arguably is sufficiently broad for it to carry out this charge.¹⁹⁸

In addition to accommodating norms from other regimes in construing IP obligations, TRIPS panels must also account for the interpretive force of normative changes that may come from WIPO's norm-setting activities. In 1996, shortly after the conclusion of the Uruguay Round, WIPO concluded two treaties related to copyright protection in the digital environment.¹⁹⁹ These WIPO 'Internet Treaties' introduced new concepts into the erstwhile familiar architecture of WIPO's normative orientation. For example, the preamble to the WIPO Copyright Treaty (WCT) acknowledges a 'need to maintain a balance between the rights of authors and the larger public interest'.²⁰⁰ Although the statement is qualified by suggesting that existing Berne Convention obligations already incorporate these values, the fact remains that no general balance terminology or principle has ever characteristically been associated with the Berne Convention. Further, in a set of authoritative Agreed Statements, the WIPO Internet Treaties explicitly acknowledged limitations on the proprietary rights of copyright owners²⁰¹ and recognized that states can exercise the necessary discretion to create additional limitations and exceptions at the domestic level necessary to maintain an appropriate balance between the interests of owners and users.²⁰² As standards of progressive norm-setting principles, the Agreed Statements represent a high water mark in WIPO's otherwise unblemished history of admitting only the most minimal constraints on the rights of IP owners. Interpreting TRIPS obligations in light of this perceptible shift in IP policy, at least as regards copyright, and combined with the unequivocal statements embodied in the TRIPS Agreement about balance and the needs of access, may establish an evolving international norm of access that should surely, even if slowly, permeate the approach of TRIPS dispute panels with respect to how IP norms should be governed in a multilateral setting.

197. See e.g., Panel Report, United States – Section 211 Omnibus Appropriations Act of 1998, para. 8.49, WTO Doc. WT/DS176/R (6 August 2001); Appellate Body Report, Canada – Term of Patent Protection, *supra* n. 147.

198. See *supra* section 5.2.1 and, in particular, points about interstitial law-making by the WTO. I am grateful to Professor Larry Helfer for bringing this point to my attention.

199. See WCT, *supra* n. 53; WPPT, *supra* n. 53.

200. WCT, *supra* n. 53, Preamble at para. 5.

201. See WCT, *supra* n. 53, Agreed Statement to Art. 10.

202. *Ibid.*

5.3 The WTO and hierarchy

The norm-setting import of the activities of the TRIPS dispute panels and the AB clearly ranks most highly in the relative normativity of IP norms.²⁰³ This is not because of an inherent superiority of the norms per se, but rather because the norms are sourced in what is widely acknowledged to be the ultimate multilateral IP instrument. Institutional hierarchy thus may flow from the status of a treaty within a defined regime framework. Take for example the Universal Copyright Convention (UCC).²⁰⁴ Although it remains legally valid in the sense that it has not been denounced, and notwithstanding that it is still the only IP treaty designed to balance protection and access to knowledge goods, it nonetheless lacks legal influence in the contemporary global IP regime.²⁰⁵ Put differently, a conflict between provisions of the UCC and the Berne Convention would easily be determined by referencing the ultimate authority of the TRIPS Agreement pursuant to the Vienna Convention.²⁰⁶

Thus far, no formal conflict between WIPO and the WTO has emerged in the context of norm-setting, although this may change given that the TRIPS Council's range of activities remains open-ended. There is also no question that the TRIPS Council and WIPO cautiously evaluate and coordinate activities with a view to avoid such a patent conflict. Of course, if institutional prerogatives and orientation were ever to develop along parallel lines, conflict-avoidance will be relatively easy to accomplish, since both institutions can exercise discretion to abstain from norm-setting in a particular arena. Indeed, one way to avoid prospects for conflict over IP norm creation is simply for the institutions to strategically coordinate and allocate responsibility for future IP issues as they emerge. In some ways, the broader WIPO-WTO relationship already exhibits features of such allocation, particularly with respect to TRIPS disputes. As mentioned earlier, it is in this context that the hierarchical model will likely manifest most strongly. Take, for example, the fact that in the majority of the twelve reports issued, TRIPS dispute panels or the AB either have not referenced WIPO at all in their legal analyses or have only referenced factual information about WIPO, such as noting WIPO's administrative oversight of the Berne and Paris Conventions.²⁰⁷ In several disputes, the panel/AB has re-

203. See Vienna Convention, *supra* n. 170, Art. 31.

204. See *supra* n. 25 and accompanying text.

205. See e.g., A.A. Caviedes, 'International Copyright Law: Should the European Union Dictate Its Development', 16 *Boston Univ. ILJ* (1998) p. 165 at p. 172. See also generally R. Dreyfuss and A. Lowenfeld, 'The Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together', 37 *Virginia JIL* (1997) p. 295.

206. See Vienna Convention, *supra* n. 170, Art. 31(3).

207. See e.g., Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1998, *supra* n. 147.

quested factual information from WIPO,²⁰⁸ and a few decisions reflect reliance on WIPO publications and documentation in interpreting the TRIPS obligations at issue.²⁰⁹ It is interesting that it is predominantly in this latter sense that WIPO's activities have penetrated the WTO regime, illustrating yet again the normative power of WIPO's historical technical obligation to issue publications in the field of IP.²¹⁰

5.3.1 *Whither WIPO?*

There is no question that WIPO is and should remain a source of important historical and factual information pertinent to efforts to construe the IP treaties incorporated into the TRIPS Agreement. But nothing in the Dispute Settlement Understanding (DSU)²¹¹ or TRIPS Agreement obligates the WTO dispute panels or the AB to refer to WIPO for interpretive guidance, nor are they necessarily bound by the information WIPO provides. Further, the decision whether to request information from WIPO in the first place appears to be wholly at the discretion of the panels and the AB. In short, WIPO's role in the authoritative IP norm-setting activities of the WTO is subject entirely to the discretion of the WTO. And while considerations of prudence might demand that a panel or the AB look to WIPO for some support, the credibility with which the TRIPS dispute decisions are generally viewed suggests that resort to WIPO by the WTO is not required, and certainly not inevitable, in implementing global IP norms.

Finally, to the extent that the value of WIPO's contributions tends to be associated primarily with the historical context in which the two principal IP treaties emerged, this cannot usefully provide a basis for WIPO's future collaboration with the WTO. Virtually every joint activity in which the two Organizations have collaborated has revolved around TRIPS implementation in regard to the WIPO Treaties.²¹² In new areas in which norm-setting is likely to occupy significant focus, such as geographical indications, traditional knowledge, electronic commerce, or even in the area of norm-setting around the integration of development consider-

208. See e.g., *ibid.*, at para. 189. See also Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 13, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 *ILM* 1125 (1994) (hereinafter DSU).

209. See e.g., Appellate Body Report, *Canada – Term of Patent Protection*, *supra* n. 147, para. 54 n. 40; Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, *supra* n. 147, para. 5.28.

210. See *supra* section 3.

211. See *supra* n. 208.

212. Cooperation between WIPO and the WTO appears limited to technical assistance offered with respect to the TRIPS Agreement. WIPO lists a total of 17 such workshops/colloquia and symposia. See WIPO, Meetings by Topic – Intellectual Property, at <http://www.wipo.int/meetings/en/topic.jsp?group_id=24>.

ations in the application of TRIPS obligations, there is no evidence that the WTO and WIPO desire or plan active collaboration that would call for norm-setting in the IP context.²¹³ This does not mean, however, that WIPO simply fades into a horizon with no meaningful role in international IP. To the contrary, as stated before, WIPO's role *vis-à-vis* the WTO is quite important. Beyond WIPO's historical command of the global IP system, as the WIPO-WTO Agreement shows, the administrative oversight of global IP norms are squarely within WIPO's competence and authority. In addition, WIPO has been quite successful in a number of significant areas, for example as a domain name dispute resolution service provider under the Uniform Domain Name Dispute Resolution Policy (UDRP).²¹⁴ And like other international organizations, WIPO can choose to re-inform its mandate and infuse its institutional culture with the new challenges that face the transnational innovation apparatus. Importantly, it is still WIPO that defines what IP *is*; the constitutive elements of trademark, copyright and patent laws still reside primarily in WIPO. This is a tremendous source of influence firmly lodged in WIPO's domain. The WTO, despite its enormous political power, is still most effective in the (admittedly broad) space in which the major question is what IP *does*.

5.3.2 *Towards a future of TRIPS-related global IP norms?*

In the current framework, inter-institutional coordination between WIPO and the WTO, whether as a means to pre-empt norm fragmentation in global IP regulation or to strengthen the capacity of both organizations to fulfil their respective mandates, is more likely to impede prospects for regime balance in the global regulatory system. As I have argued, the WTO, more than WIPO, is likely better suited for working out inter-regime balance. Any incoherence or fragmentation that might be provoked by the norm-influencing/norm-generating activities of the WTO TRIPS Council,²¹⁵ or the decisions of dispute panels or AB, could be offset by positive welfare gains that hitherto have been difficult to foster within the classic paradigm of global IP law-making associated with the specialized regime of WIPO. Such positive welfare improvements are intrinsic justifications for the global IP system

213. See e.g., WTO, TRIPS Council Progress Report on 'Work Programme on Electronic Commerce', WTO Doc. IP/C/18 (30 July 1999), at <http://www.wto.org/english/tratop_e/ecom_e/e_ipc18.doc> (noting the extensive work done by WIPO on electronic commerce but stating that the WTO should continue to evaluate developments in this area, including by WIPO, because of the WTO's responsibilities for IP).

214. See <<http://www.icann.org/udrp/udrp-policy-24oct99.htm>>. For a recent analysis of WIPO's administrative role in trademarks, see K. Kaiser, 'WIPO's International Registration of Trademarks: An International Administrative Act Subject to Examination by the Designated Contracting Parties', 9 *German LJ* (2008) p. 1597.

215. See TRIPS Agreement, *supra* n. 9, Art. 68.

and the international framework should direct explicit efforts to realize these gains within the community of states.²¹⁶

Even in the (highly unlikely) event that a non-hierarchical shared mandate between WIPO and the WTO might generate an unmanageable level of incoherence for global IP norms or effect redundancy and inefficiencies in the respective institutional operations,²¹⁷ there also could be stronger benefits from *intra*-institutional norm competition given the array of international law subjects to which the WTO explicitly must attend as compared to WIPO. The WTO, for example, readily encounters far greater demands to address cross-cutting issues and to do so in a manner that fosters cooperation among member states. In other words, member states clearly anticipate, and are willing to accommodate, a minimum level of norm conflict within the trade regime as reflected in the different rationales governing exceptions to trade rules. I call these ‘constrained norm conflicts’ and they are most evident precisely in those areas where linkage claims are commonly made, such as conflicts among WTO members due to national policies on environmental or health concerns. Although the WTO has no formal mandate over environmental regulation or global public health, in addressing trade complaints it must evaluate, however perfunctorily, the validity or otherwise of these policies as related to WTO obligations.²¹⁸

The TRIPS Agreement is another example of how constrained norm conflicts are managed within the WTO. The dynamic tension that exists between the protection of proprietary rights, which grant IP owners presumptive market power but raise entry costs for new market entrants, must be managed alongside the elemental free trade principle of open competition, which normally requires low entry barriers.²¹⁹ Accordingly, some balance must be struck between the requisites of

216. WIPO states, for example, that ‘IP is an important tool for the economic, social and cultural development of all countries.’ See WIPO, What Is WIPO, at <<http://www.wipo.int/about-wipo/en/what/>>. Accordingly, it is ‘dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.’ *Ibid.* See also TRIPS Agreement, *supra* n. 9, Preamble at para. 5 (recognizing underlying public policy objectives for IP, ‘including developmental and technological objectives’), Preamble at para. 6 (recognizing the ‘special’ needs of least-developed countries with respect to the importance of a sound technological base for development). See also generally Okediji, *supra* n. 93 (arguing that doctrinal tools internal to IP are consistent with human rights objectives).

217. See e.g., Kwakwa, *supra* n. 102.

218. See H.D. Heavin, ‘The Biosafety Protocol and the SPS Agreement: Conflicts and Dispute Resolution’, 12 *Journal of Environmental Law and Practice* (2003) p. 373 at p. 374; Z. Tyler, ‘Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements’, 20 *Tulane Environmental Law Journal* (2006) p. 43.

219. Scholars have pointed out the inconsistency between IP doctrine and the assumptions that undergird the free trade system. See e.g., R.L. Okediji, ‘Copyright and Public Welfare in Global Perspective’, *Indiana Journal of Global Legal Studies* (1999) p. 117 at pp. 133-134 (describing the

the free trade system and the proprietary incentives on which IP protection is rationalized. Ultimately the global competitive framework is implicated, and although Article 40 of TRIPS shows some attempt to delineate the IP/competition interface, there are undoubtedly broader competition law principles with which a WTO panel must be concerned.²²⁰ In essence, the rationalization of global welfare goals within a single institution with enforcement power could yield, in the long term, important opportunities to foster IP norm creation that is more consistent with the stated objectives of a variety of international regimes and thus strengthen the prospects for global cooperation more generally.

5.3.3 *Some risks of WTO primacy over global IP norms*

International economic relations have been the deliberate context in which explicit social engineering has occurred in relations between the West and less-developed economies as far back as the colonial era, and beyond.²²¹ Between similarly situated countries of Europe, and later between Europe and the US, trade relations were consciously designed to host opportunities for coordinated expressions of sovereign prerogatives in light of shared political and economic interests.²²² In other words, trade relations, whether or not formalized through institutional mechanisms such as the WTO, were often ciphers (and still are) for a *mélange* of issues on which countries sought the strategic benefits of explicit arrangements.²²³ Accordingly, the conception of ‘non-trade values’ is intrinsically problematic,²²⁴ not

theoretical links between IP and international trade as ‘very weak’; J. Kokott and P. Egli, ‘International Decision’, 94 *AJIL* (2000) p. 386 at p. 388 (noting how trademarks can interfere with free trade); S. Sell, ‘Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement’, 38 *Loyola of Los Angeles Law Review* (2004) p. 267 at pp. 288-89 (describing debates in the nineteenth century in which free trade advocates viewed IP as a protectionist device).

220. See generally J.H. Reichman, ‘From Free-Riders to Fair Followers: Global Competition under the TRIPS Agreement’, 29 *NY Univ. JIL & Pol.* (1997) p. 11.

221. This is particularly true of European interaction with sub-Saharan African countries. With specific regard to this trade context and the integration of these countries into the global IP system, see Okediji, *supra* n. 36.

222. See Okediji *supra* n. 18.

223. See H. Rosen, ‘Free Trade Agreements as Foreign Policy Tools: The US-Israel and US-Jordan FTAs’, in J.J. Schott, ed., *Free Trade Agreements: US Strategies and Priorities* (Washington DC, Institute for International Economics 2004) p. 51 at p. 75 (analyzing two FTAs as foreign policy tools); S.G. Esserman, ‘Session 1: Canada and U.S. Approaches to Free Trade Agreements’, 31 *Canada-United States Law Journal* (2005) p. 11 at p. 16 (‘There is no question that foreign policy objectives have long been rationales for US trade policy initiatives generally and, more specifically, for decisions to enter into FTAs.’); H. Walker, Jr., ‘Modern Treaties of Friendship, Commerce & Navigation’, 42 *Minnesota LR* (1958) p. 805 at p. 805 (describing FCN treaties as instruments of foreign policy). See also generally Okediji, *supra* n. 18.

224. See Alvarez and Charnovitz, *supra* n. 143.

only is trade emblematic of specific values per se (e.g., efficiency, competition), but trade relations historically have been the fulcrum of foreign relations, often being the first substantive target of reprisal when adverse political situations arise between nations.

In light of the inherent value linkages embedded in every exercise of global trade negotiations,²²⁵ considerations of so-called non-trade issues in the WTO could be viewed as more than solely (or even primarily) about the scope of WTO agreements, although this is a relevant point of emphasis. Instead, they are fundamental design questions about the structure of the WTO as an international organization with authority to select which (not whether) norms or values will become explicit constraints in the construction and application of the formal texts that underlie the global trade system.²²⁶ As Steve Charnovitz and José Alvarez pointedly observe: '[t]he debate about the proper mission of the WTO is political and prescriptive ... [I]t is not primarily a legal debate about clarifying the WTO's existing mandate'.²²⁷ The inextricability of extra-trade values in the operation of the WTO system has implications both for how norms are generated in the global environment and for the 'stickiness' of those norms, i.e., the manner in which norms permeate the operations of other international organizations and become part of the international regulatory order.

The risks of prioritizing the WTO as a forum for IP norm creation are certainly evident. For example, IP could become even more politically charged than it already is and responsive primarily to the interests of private power,²²⁸ WTO panels could upset the balance between state power and international cooperation by limiting the role of domestic interest considerations in interpreting global IP policy,²²⁹ WTO panels could disrupt the internal coherence of IP norms by interpreting the

225. For example, who gets admitted to the trade rounds, how the trade rounds are designed, all reflect value judgments made prior to the specialized tariff negotiations. Even within this technical sphere, however, values and norms are explicitly at play. Consider, for example, GSP negotiations in which LDCs and DCs obtain preferential treatment in tariff schedules or the SPS Agreement which govern the scientific standards of certain products.

226. See *supra* section 2.

227. Alvarez and Charnovitz, *supra* n. 143, at p. 30.

228. Sell, *supra* n. 107, at pp. 100-109; J.H. Reichman, 'GATT/WTO Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement', 29 *International Lawyer* (1995) p. 345, at p. 388 (noting the influence of interest group capture of the trade regime and expressing skepticism that WTO panels 'will overly concern themselves with the public interest of the international community as a whole ...').

229. See e.g., Panel Report, Canada – Patent Protection of Pharmaceutical Products, *supra* n. 147 (rejecting Canada's argument that Article 30 of the TRIPS Agreement should be interpreted 'so that governments would have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies' and holding that a provision in Canada's patent law which allowed stockpiling of patented pharmaceuticals prior to patent expiry was inconsistent with TRIPS obligations).

TRIPS Agreement qua trade rules rather than as IP rules,²³⁰ and the TRIPS Council could focus primarily on monitoring only one side of the global IP bargain (i.e., protection and enforcement of rights)²³¹ without holding states accountable to the public interest aspect that includes built-in flexibilities to facilitate access and dissemination of knowledge goods. In other words, the WTO could experience or perpetuate similar institutional and policy failures that critics have levelled against WIPO in the past.²³² But as already mentioned, just as inter-institutional competition (or heterarchy) constrained WIPO's autonomy, the same could be true for the WTO. Such competition extends beyond WIPO and the WTO²³³ to bodies such as the WHO,²³⁴ FAO and other institutions. The point is that even when the regulation of IP is not central to the work of an international institution, deliberately

230. See Netanel, *supra* n. 146.

231. See C. Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford, OUP 2008) pp. 177-179, 264-265 (noting that with respect to LDCs in the French West African Region of OAPI, the WTO Secretariat 'reinforced a pro-compliance perspective on TRIPS throughout the post-ratification phase).

232. Many of the criticisms levelled against WIPO reflected enduring conflicts about the role and purposes of IP regulation in addressing national interests. Developed countries, as net exporters of knowledge goods, typically desired greater levels of global IP protection and pressed for new iterations of the WIPO treaties with stronger rights. Developing countries, on the other hand, consistently pointed to the failure of the WIPO treaties to address priorities that were of particular interest to national development goals. These conflicts inevitably played out in WIPO's formal activities, resulting in some cases in failed efforts to revise some treaties to improve the level of protection and in others, an inability to conclude treaties in new areas, and unsuccessful implementation of agreements directed at addressing the needs of developing countries. See e.g., H. Bardehle, 'A New Approach to Worldwide Harmonization of Patent Law', 29 *International Review of Industrial Property and Copyright Law* (1998) p. 876 at pp. 877-878 (discussing WIPO's failure to conclude a patent harmonization treaty in 1995); T.W. Blakely, Comment, 'Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection', 149 *Univ. PA LR* (2000) p. 309 at p. 350, fn. 239 (discussing WIPO's failure to accomplish trademark law reform).

233. There are currently numerous international organizations addressing IP issues, some of which have no formal relationship with the WTO or explicit mandate to address IP matters. The WCO, for example, has undertaken significant efforts to promote the enforcement of IPRs. See WCO, Responsibilities: The WCO Strategy, at <http://www.wcoomd.org/home_wco_topics_epoverviewboxes_epwcostrategyipsecure.htm> (describing the WCO's strategy to promote enforcement of IPRs). Similarly, although it disclaims the intention to work in the area of intellectual property, the United Nations Commission on International Trade Law (UNCITRAL) has recently sponsored a colloquium on security interests in IP. See UNCITRAL, Colloquium on Security Interests in Intellectual Property (Vienna, 18-19 January 2007), at <<http://www.uncitral.org/pdf/english/colloquia/2secint/Descamps.pdf>>. For a list of UN bodies that deal with IP, see <<http://www.un.org/issues/m-intprp.html>>.

234. See e.g., WHO, Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, para. 15, WHO Doc. WHA61.21 (24 May 2008), at <http://www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf> (stating that 'the WHO shall play a strategic and central role in the relationship between public health and innovation and intellectual property within its mandates'). The WHO works with the WTO on issues affecting the TRIPS/public health interface. See *supra* n. 118.

staged norm conflicts²³⁵ can be beneficial by re-distributing power from one forum to another, as a way of diluting norms already entrenched in the international system²³⁶ or as a way to temper perceived abuses of a presumptive regulatory fiat. Thus, international institutional competition, much like domestic inter-agency competition,²³⁷ can generate welfare gains for the international community.²³⁸ These gains include greater transparency in the processes of norm creation, improvements in the democratic deficit inherent in international organizations generally, as well as systemic gains from enhanced accountability in the global management of IP. Above all, the demand for future global IP norms will likely be directed at the norm-generating institution that best reduces the costs of regime conflict while also facilitating embedded compliance – compliance across disparate regimes – within settled principles of international law.

5.3.4 *A soft hierarchy versus institutional cooperation to address the supply of global public goods*

As the institutionalized face of economic relations, the WTO offers unprecedented opportunities to develop, spread and enforce an array of norms throughout the global community. Deliberate efforts to charge the WTO with IP norm creation over WIPO is not without tremendous uncertainty. For one thing, to the extent the seat of WTO power resides primarily in its dispute settlement authority, norm creation may be far less dynamic and thus less responsive to the significant social challenges for which IP regulation should play a critical role. But as I have argued, the WTO has a range of avenues through which norm generation can take place, ranging from the Ministerial Declarations that commence new trade rounds all the way through the dispute settlement process. In between trade rounds (or despite them) interstitial law-making can take place through the work of the TRIPS Council. Norms can develop along a spectrum through discussions, studies or written communications between member states. The argument for WTO primacy over

235. See Helfer, *supra* n. 10, at pp. 8-9.

236. See *ibid.*, at pp. 74-75.

237. See R.B. Keiter, 'Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective', 4 *Utah LR* (2005) p. 1127 at p. 1211 (noting 'beneficial dimensions of interagency competition'); M.C. Dorf and C.F. Sabel, 'A Constitution of Democratic Experimentalism', 98 *Columbia LR* (1998) p. 267 at p. 354 (noting benefits of 'mild' interagency competition); W. Kovacic, 'Antitrust after Microsoft: Upgrading Public Competition Policy Institutions for the New Economy', 32 *University of West Los Angeles Law Review* (2001) p. 51 at p. 58.

238. See e.g., D.C. Esty, 'Toward Optimal Environmental Governance', 74 *NY Univ. LR* (1999) p. 1495 at pp. 1557-1561; D.C. Esty and D. Geradin, 'Regulatory Co-Opetition', 3 *Journal of International Economic Law* (2000) p. 235; J.P. Trachtman, 'The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis', 17 *Northwestern Journal of International Law and Business* (1996-97) p. 470 at p. 512.

future IP norms is strongest with respect to issues that affect the regulation or supply of global public goods such as health, education or the environment. But with regard to the diffusion of knowledge goods, the WTO's institutional structure also offers comparative advantages as against WIPO.

Whatever the case, what I have argued is that institutional cooperation is not a superior or even desirable option. WIPO's history in this regard stands as a strong cautionary tale. If safe-guarding a *collective* global interest is viewed as a vital component of the international legal system, more critical evaluations of the relative power of international organizations *vis-à-vis* their subject matter is indispensable for determining the structure and conditions of institutional collaboration. The challenges presented by fragmentation are real and there are undoubtedly important ethical, normative and institutional benefits from encouraging institutional cooperation. Nevertheless, in the fraught environment of IP regulation, institutional coordination is not yet a palatable, viable or desired remedy. The WIPO-WTO Agreement does not reflect an explicit commitment to collaborate in norm-setting exercises; the available evidence on the nature of interactions between the two institutions does not suggest that joint norm-setting activities have yet been envisaged, and most importantly, the mandate of the two institutions could be construed differently, suggesting distinct approaches to the question of global IP policy.

6. CONCLUSION

Inter-institutional cooperation has been an important management tool in a global environment overly populated with international organizations. As a doctrinal matter, such cooperation rests on the classic assumption of equality among international organizations. The WIPO-WTO Agreement does not suggest such equality and the disparate powers, capacity, design and legitimacy that distinguish the two organizations mitigate against this otherwise classic presumption in international law.

The critical role of IP regulation to the provision of global public goods requires important attention to the political and normative costs of intense collaboration between WIPO and the WTO. Further, the human welfare dimensions of IP regulation that provide critical policy support for other regimes, such as human rights, the environment, workers' rights and global competition, suggest that the institution with the broader mandate is best situated to develop IP norms in a manner that balances the competing goals of distinct international law regimes to advance the common welfare of states and individuals around the world.

ABSTRACT

The World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has been the focus of intense scholarly debate regarding the effects of IP protection on the development interests of the global South. Far less attention has been directed at the organizational framework in which future IP norms should be developed. The governing assumption has been that the norm-setting role of the World Intellectual Property Organization (WIPO) will remain unchanged notwithstanding the primacy of the WTO as an Organization with explicit mandate for global IP regulation.

In this article, it is argued that the WTO, in a hierarchical division of labour with WIPO, should be promoted as the locus of IP norm-setting, particularly with respect to those norms that affect the regulation and supply of global public goods. IP norm-setting in the WTO is not without risks. Nonetheless, an organizational culture in which IP protection is one of many tools to accomplish defined welfare goals, rather than the raison d'être of the organization's existence, may force open important institutional space in which future IP norms consistent both with the interests of less developed countries and the ideals of mature IP systems, can be meaningfully negotiated. At a minimum, a hierarchical relationship could facilitate inter-institutional competition between the WTO and WIPO, generating additional welfare gains for the international community in the form of greater transparency in the processes of IP norm-setting, improvements in the democratic deficit inherent in international organizations generally, as well as systemic gains from enhanced accountability in the global management of IP.