Neither the architects that set out to build a new post World War II order nor the scholars that took upon themselves to observe it could have foreseen the nature, shape and complexity of the global governance edifice a mere 60 years later. Nor could they have done so, for human affairs in general and global affairs in particular are complex, fluid, indeterminate and always changing, in both intended and unintended directions. While disagreements on the magnitude of recent changes in global governance exist, there also exists a strong consensus that its nature has changed in some real and fundamental ways in the last decades or so. Indeed, the emergence of the term global governance itself exemplifies the need for a concept capable of better capturing the changed nature of the current word order (or disorder). The most prominent changes relate to the nature and sources of authority, it being understood to have been diffused from state governments to international organisation, regional and local bodies, private actors and, importantly, the market. In addition to this de-territorialisation and privatisation of global governance, the growing density of networks which connect these various centres of authority together is also a defining characteristic, as is the increasing number of issues faced by, actors involved in, and rules emerging from them.

Despite ongoing work, some of these aspects are not fully understood yet and issues related to the impact of these changes on the effectiveness, distributional effects and legitimacy of global governance are only recently being explored more comprehensively. One area that demands further attention relates to the increasing linkages being made between various issue-areas and the resulting overlap, and potential conflict, between the institutional structures and mandates that govern them. These various institutional structures are referred to here as regimes, while global governance is broadly understood to encompass all these operative institutional arrangements and networks. The growing density of transnational relations and interdependence among a variety of issues and state and non-state actors to which observers and scholars pointed since the early 1970s has resulted in the remit of regimes being extended to encompass more, sometimes overlapping, issues and an increasing number of actors and interests. Broadly speaking, this is the phenomenon that concerns us here.

One clear but certainly not the only example where such linkages, overlaps and conflicts between various regimes and issue-areas have emerged is that of intellectual property rights.
rights (IPRs). In what follows, an attempt is made to untangle what has become a complex global IPRs regime so as to understand how and why these linkages and overlaps have come about and what implications they might have for the shape and future of the IPRs regime in particular and global governance structures more generally. To start with, the first section engages briefly with the concept of regimes and regime linkages before moving on into the second section which focuses more specifically on the emergence of the current global IPRs regime, hurriedly launched in the early 1990s hanging on a dubious linkage established between IPRs and free trade. This section uncovers how this linkage came about, as well as what changes it brought to both the trade and the IPRs regimes. Building on this discussion, the third part considers the other issue-areas to which IPRs have been linked from the mid 1990s onwards, such as human rights, public health, development and others. As in the previous section, here, too, we seek to understand how and why this linkages have been made and with what implications. The latter are discussed further in the concluding section.

1. Regimes and Linkages

As any student of international relation (IR) would be able to ascertain, the concept of international regimes has lost some of the charm it possessed in the 1970s and 1980s, and much of the debate about regimes between mainstream IR approaches, namely neorealism and neoliberal institutionalism, has quite simply exhausted itself. This is particularly the case with definitional issues and those seeking to explain why states set out to create a regime in the first place. The latter set of issues do not concern us here directly; as for the former issues, thankfully a consensual definition of regimes exists, one which conceptualises them as a set of implicit or explicit principles (beliefs of facts, causation and rectitude), norms (standards of behaviour defined in terms of rights and obligations), rules (specific prescriptions for action) and decision-making procedures (prevailing practices for making and implementing collective choice) around which actors' expectations converge in a given area of international relations (Krasner 1982: 185). Scholars belonging to different schools of thought are likely to stress different aspects of international regimes; for instance, constructivists, who, incidentally, were amongst the first to develop the concept and later posit the most formidable criticism to mainstream regime theories, would likely stress regimes’ norms and principles, in line with their conceptualisation of international regimes as intersubjective and dialogical in character (Kratochwil and Ruggie 1986; Ruggie 1998).

Here, the consensual definition of regimes is retained, but our interpretation is different. Rather than viewing them as fixed arrangements held together by bonds of coercion or ties of temporarily converging interests, or as benign, orderly and cooperative arrangements among rational state actors, regimes are understood here as evolving, dynamic and contested processes (Keely 1990), or rather, the outcome of new and old processes and contests at a given point in time. In other words, regimes are understood to be sites of contests and tensions between regime actors and issues, although the length and intensity
of these contests varies over time and in some cases can be hidden from view altogether (this is when a regime seems stable). We opt for this conceptualisation because a narrow focus on regimes as benign and fixed arrangements says very little about what goes on inside a regime, what shapes the behaviour and interest of regime actors, what the contests are about and how these unfold and get resolved. These shortcomings are not negligible, if the focus of analysis, as in this case, is on how regimes develop, change, expand and overlap.

Regimes are thus sites of negotiations, tensions, agreements and contests. They are alive and evolving, although, clearly, the speed and nature of change differs over time and between regimes. Changes occur within a regime because new issues emerge continuously, old ones are often reframed, new actors enter the regime, regime actors’ interests change, new knowledge emerges or the distribution of power changes within it. Obviously, regime actors initiate and respond to these changes attempting to shape the regime and its content in ways which best address their concerns and interests. With respect to actors, all mainstream regime theories, and the vast majority of constructivist ones, have maintained an unhealthy concern with states as the key actors in international regimes. In practice, while central, state actors are not the only group of actors involved in regime contests, although they are the only actors with the political authority and legitimacy to agree on (public) regime rules. But, as suggested earlier, agreeing on specific, technical rules is only one part of what goes on in a regime. For this reason, regime actors here are not limited to those with the ultimate authority or power, but include all state and non-state actors (businesses, academics, experts, NGOs and so on) who actively participate in and shape, to a greater or lesser degree, the outcomes of the contests over the principles, norms and rules that govern an issue-area.

One important and problematic aspect of regimes relates to establishing the specific issue-area they are supposed to govern. Naturally, issue-areas, being generally understood to encompass issues that are substantively related, can be open-ended and expansive (Leebron 2002). While in conditions of heightened interdependence the scope of an issue-area is expected to expand, its borders are not randomly or naturally established; on the contrary, they are contested, negotiated and changing, reflecting the power-interest matrix of the actors involved and the degree to which they share a common understanding and knowledge on how to deal with a particular set of issues. Defining the scope is particularly problematic at the global level, where actors often engage in prolonged contests over the precise borders of the set of issues a regime or a particular arrangement within it must govern. The protracted negotiations that preceded the launch of the Uruguay and Doha Round of trade negotiations over what issues could reasonably and effectively be dealt with by the trade regime are a clear example of the nature and extent of this problem.

As Haas (1980) and Leebron (2002) have suggested, regimes and issue-areas can be linked in a number of ways. For our purposes, the two most important linkages are substantive
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linkages and strategic, or tactical, ones. Broadly speaking, two or more regimes and issue-areas can be substantively linked when it is widely accepted that an inherent link exists between them, although that link is not close enough to warrant their clustering within the same issue-area. Substantive linkages can be sought between regimes whose norms are either congruent, for instance, the General Agreement on Trade in Services and the General Agreement on Trade and Tariffs (GATT), or in conflict, as is the case with the linkage sought between the trade and environment whereby economic growth (the goal of one regime) is seen to be in conflict with conservation of the planet (the goal of the other). On the other hand, issues are not inherently linked when the linkage sought is strategic or tactical. Tactical linkages are pursued by strong and weak regime actors alike, either to use and enhance the bargaining power vis-à-vis other actors so as to achieve a deal not attainable otherwise, or to increase pay-offs and maximise separate gains, or both. An example of the former linkage would be the US seeking to link access to its vast market in trade negotiations to nontrade issues, such as workers’ rights. As for the latter, most international or bilateral negotiations are in fact concluded under these conditions, that is, actors often agree on a ‘package deal’ where concessions in one issue-area are made in return for gains in another issue-areas, all of which are bound together through such tactical linkages.

It should not be surprising that regimes, providing, as they do, a fora where actors come together to negotiate, resolve and regulate, should be the sites where various linkages are attempted and made. This is not to say, of course, that all attempts to link issue-areas succeed; efforts to establish linkages between (amongst others) trade liberalisation, industrial development, employment policy, foreign investment policy and commodity agreements through the establishment of the International Trade Organisation in the late 1940s were completely unsuccessful (Aaronson 1996; Diebold 2002). More recently, efforts within the Organisation for Economic Cooperation and Development to establish an agreement on investment (MAI) in the late 1990s were also unsuccessful, not least because the package of the issues linked was unacceptable to some actors, particularly with respect to the issue-areas of labour rights and environmental protection (Walter, 2001). These examples should also be taken to demonstrate that establishing linkages between issue-areas is not at all a recent phenomenon. One of the earliest comparative studies of international organisations observed that the latter had always struggled with respect to defining their scope of authority and how their decisions impacted upon the scope of cooperative ventures with other international or regional entities (Cox and Jacobson, 1973). Even when only a few international regimes existed, extensive use was made of issue-area linkages in bilateral agreements, as the many Treaties of Amity, Economic Relations and Consular Rights or Friendship, Commerce and Navigation Treaties signed between states throughout history clearly demonstrate.

What is new, however, is the immense pressure to establish linkages at the international level, now that there are many more state and non-state actors involved, more issues that are increasingly more interdependent and more fora which could serve as platforms to
foment these linkages. As a result of these pressures, some issue-areas are now being
governed not by regimes conventionally understood, but by regime conglomerates or
regime complexes. This is a relatively new development in global governance and one which
will potentially become much more common in the future. Broadly speaking, a regime
complex or conglomerate is a collective of partially overlapping and even inconsistent
regimes, marked by the existence of several arrangements that are created and maintained
in distinct fora; the rules emerging from the latter can functionally overlap and often there
is no agreement on how to resolve potential conflicts between such rules (Raustiala 2007).
The rules governing plant genetic resources, for instance, are negotiated in various regimes,
hence it is more realistic to talk of a regime complex for plant genetic resources (Raustiala
and Victor 2004). As will become clearer in the following pages, now we can also talk of a
regime complex for IPRs, insofar as IPRs rules are negotiated and discussed within the
traditional IPRs regime (managed by the World Intellectual Property Organisation, WIPO),
within the trade regime (largely managed by the World Trade Organisation, WTO) and the
public health regime (managed by the World Health Organisation, WHO), to mention but a
few. In other words, the current IPRs regime has moved away from a uni-nodal regime
towards a multi-nodal one as a result of IPRs being linked to several other issues-areas. The
most important one so far has been the linkage of IPRs to free trade, to which we now turn.

2. Linkages old and new: IPRs and free trade

Without doubt, the 1995 WTO TRIPs Agreement (Trade-related Aspects of Intellectual
Property Rights) is the most significant development of the global IPRs regime. IP protection
has existed and evolved since the 15th century but, until TRIPs came about, IP rules were
generally developed and embedded within national borders. An international IP regime did
emerge in the late 19th century with the establishment of the Paris and Berne Conventions
(on the protection of industrial property and literary and artistic work, respectively) and of
the United International Bureau for the Protection of Intellectual Property (BIPRI, the
forerunner of WIPO), underpinned by the broad principle of non-discrimination (national
treatment). In this regime, international IP law developed mainly on the basis of individual
national choice, as states were largely free to design their own IP legislation as long as they
did not discriminate against foreigners (Anawalt 2003; Okediji 1994). As a result, by the late
1970s, the IPRs regime was characterised by diverse national IPRs laws (although a shared
consensus existed with regard to most IPRs rules) and a growing number of separate
international IP treaties (on patents, plant varieties, copyright and so on), commanding
different memberships and presided over by the WIPO which, incidentally, had no effective
enforcement or dispute mechanisms (Emmert 1990). TRIPs entered the scene in 1995 and
thereon the IPRs regime changed substantially; it mandated minimum, and rather high
standards in both substantive and procedural IP matters, decreeing what rights should be
granted, in what areas, to whom, how domestic administrative bodies and courts should
enforce them, whilst also binding all the WTO members (currently 153) and their IPRs commitments to the WTO dispute settlement mechanism. In other words, it launched a global IPRs regime wherein, although some flexibility is allowed to governments, rather high IP protection rules are binding, enforceable and (becoming) fairly harmonised across most of the world.

The making of TRIPs is a fascinating case, not least because the likelihood that the trade regime, concerned primarily with liberalising trade and enhancing competition, would extend strong monopoly rights to private right-holders when, incidentally, most of its members are net-IPRs importers, was plausibly very small (Braithwaite and Drahos 2000). TRIPs was concluded at the WTO thanks to a reframing of IPRs as a trade-related issue-area, a linkage which was manufactured in the late 1970s and early 1980s by certain IP-reliant business actors in the most economically-advanced WTO members, namely, the globally-oriented entertainment and high-tech industries (such as music, film, publishing, pharmaceutical, electronic and chemical ones in the US, the EU, Switzerland and Japan). These actors were extremely successful in framing the protection of their IP interests in the world market as a commercial and competitiveness issue which, in turn, resonated well with the broader concomitant shift which saw certain key state governments increasingly rely on markets and market actors to improve their competitive position and address pretty much all the economic and social problems they found themselves facing. As has been demonstrated elsewhere (Sell 2003; Drahos and Braithwaite 2002; May and Sell 2006), the worldwide protection of these actors’ IP interests came to be seen as a vital part of the commercial interest of the US, EU and a few other trade regime members whose economic make-up had a significant knowledge and information base. Once these actors’ interests were redefined in this manner and the linkage was brought into the trade regime, other regime members, particularly resistant ones such as India and Brazil, were made to see reason in a variety of ways; unilateral pressure from the US and the EU worked fairly well, as did linking TRIPs in a ‘package deal’ to agriculture and other issue-areas negotiated during the Uruguay Round (Watal 2001; Sell 2003). These strategies were supplemented by a discourse which framed the lack of IP protection as a non-tariff barrier, a phenomenon the trade regime seeks to eliminate, and strong IP protection as the harbinger of the much needed foreign investment (FDI) and economic development (Blakeney 2006).

In hindsight, there exists no conclusive proof or consensus that stronger IPRs encourage FDI and technology transfer, while the gains offered in other issue-areas of the Uruguay Round in exchange for accepting TRIPs, particularly agriculture and textile trade, never fully materialised (Maskus 2004; Martin and Winters 1996). Nevertheless, it was through coercion and such arguments that the brittle linkage between IPRs and trade was consolidated and transformed into hard law, not to mention that it solidified into one of the three pillars on which the trade regime now rests. And a brittle linkage it was, for the trade and IPRs regimes are not inherently linked. They developed separately from each other, one concerned primarily with the liberalisation of and non-discrimination in trade, and the other
with temporary discrimination (in terms of access to) and protection of IP matter. The two issue-areas themselves are not closely related either, as the awkward ‘trade-related’ prefix to the Agreement clearly demonstrates. While clear in this respect, it is a misleading guide to the scope of TRIPs in that the Agreement included all IPRs in use in the key economically-advanced members at the time of its negotiation, to the extent that it is impossible to ascertain what non-trade related IPRs might be; in other words, all IPRs are trade-related (Subramanian 1990; May 2000). As indicated earlier, TRIPs’ scope is a fair reflection of the IP interests of the different business actors which were involved in bringing it about. Due to rapid changes in technology, some business actors saw TRIPs as either outdated or irrelevant within a few years of its coming into force, while all business actors, without exceptions, saw it merely as a base. This is why they, alongside their home government actors, have been active post 1995 on a ‘TRIPs plus’ platform, seeking to further expand IP rights, introduce new IPRs not covered by TRIPs and reduce exceptions to IP protection afforded by TRIPs itself.

While the IP-trade link continues to be so expanded, the increasing number of variations on the ‘trade and...’ theme emerging since the 1980s indicates that not all issue-areas which can potentially be linked to trade are in fact seen to be so closely related to trade as to be dealt with by the trade regime. In other words, the existence of a link, weak or strong, is not enough in itself to legitimise the linkage being made. As mentioned earlier, issue-areas are by their nature open-ended and expansive so various links can be made at any time. Indeed, IPRs lend themselves particularly well to linkages, for IPRs are complex and impact upon a great many issue-areas, such as education, creativity, health, agriculture, competition, biodiversity, technological innovation and transfer, human rights, development, investment and so on (Maskus and Reichman 2004). In fact, some such linkages have been sought or made in the past and others are being pursued currently. For instance, when the US was less concerned with IP protection and eagerly promoting the US-style transnational corporation model at home and abroad, it used its dominant position after the World War II to negatively link IPRs to competition and anti-trust measures were adopted widely as a result (Porter 1999). Similarly, developing countries’ efforts to establish a New International Economic Order (NIEO) during the 1970s included demands for a New Information and Communication Order which negatively linked IPRs to human and economic development, but without success (Braithwaite and Drahos 2000; Drahos 2002). Indeed, IPRs had been linked to free trade before, but the link was inverse to that established by TRIPs. During the mid 1800s, avowed free trade advocates in Europe argued that IP protection constrained free trade in goods with IP claims and achieved some success in rolling back or eliminating patent protection in certain European powers, albeit only for a short time (Machlup 1958; Penrose 1951).

So, IP linkages are not new, but the link to the trade regime through TRIPs is different and important for several reasons. Firstly, a shared consensus among regime actors that IPRs are closely linked to trade and ought to be dealt with together is still missing, even (or, rather,
especially) after over a decade of TRIPs. This does not make TRIPs illegitimate in legal terms, for trade regime members accepted it alongside other Uruguay Round agreements. However, because regimes operate on shared understandings, the linking of IPRs to trade lacks legitimacy, insofar as a considerable number of regime actors were cajoled and coerced into accepting the link. As the next section shows, their efforts to link IPRs to other issue-areas and regimes post-TRIPs, and the growth in the number and intensity of IP contests, clearly expose this lack of consensus. The TRIPs Agreement reflects a tactical, strategic linkage, not a substantive one (Ryan 1998, Leebron 2002; Bhagwati 2002); that is to say that it locks in the IP competitive advantage of certain regime actors who were able to strategically use their bargaining power within the trade regime to achieve their goals (strong, enforceable IPRs) there, rather than elsewhere. When consensus is missing, this situation is bound to create tensions between actors and regimes.

Secondly, and related, what was achieved with TRIPs was a comprehensive IP treaty with quasi global reach and enforceability; as indicated earlier, this marks a significant shift within the IP regime. State actors now have considerably less space to design IP laws that match their level of development or address domestic exigencies, their high IP obligations are routinely monitored (by the WTO TRIPs Council, other WTO members and IP-reliant business actors) and often enough they find themselves either under bilateral pressure or facing a WTO dispute resolution panel for lapses in their IPRs commitments. The issue of global enforceability of IP protection rules is problematic, insofar as consensus is lacking about the desirability of a global IPRs regime in the first place, let alone one which, like the current arrangement, is too narrowly linked to trade. Indeed, there is growing consensus that we simply have no sufficient knowledge about how to fashion an effective global IPRs regime (Dutfield and Suthersanen 2004; Markus and Reichman 2004). Furthermore, consensus is also forming that the global regime launched by TRIPs entails considerable costs (financial and otherwise) for developing countries as a group in the short-term and it may also result in net long-term costs for many, if not the majority, of them (Deardorff 1990; Abbott 1998; World Bank 2002). Its implications on the direction of the future world economy have not even started being seriously explored yet.

Thirdly, its link to the trade regime has important implications for both regimes. As for the trade regime, as is now clear, the link has made the regime susceptible to increased pressure to establish new linkages between trade and other issue-areas. At one level, this has increased tensions within the trade regime, to the extent that, as the Doha Round has shown so far, it has come to be seen by some actors as an increasingly ineffective forum. At another level, it has led to shifting and establishing the desired linkages to the more accessible bilateral or regional level (through Free Trade Agreement, FTAs), a strategy stronger regime members are much more capable of deploying and benefiting from. As for the IPRs as an issue-area itself, its link to the trade regime and its logic is particularly disconcerting. Throughout its existence, it has been hard enough to establish an effective IP regime which strikes the right balance between private IP protection, increased innovation
and enhanced public access to IP goods (Maskus and Reichman 2004; May and Sell 2006). Today we are further away than before from striking this balance. This is so because now IPRs are explicitly linked to trade; as encapsulated by TRIPs, the promotion of international trade, not increased innovation and public access, is the primary purpose of enforcing IPRs (Katzenberger and Kur 1996; May 2000; Anawalt 2003). TRIPs itself is but a floor, albeit a high one, and global IPRs have ratcheted up since 1995 (Drahos 2003; Okediji 2004), amidst growing concerns that, while stronger IPRs may or may not improve trade in IP goods, they may well be stifling competition, innovation, creativity and public access altogether.

Lastly, the linking of IPRs to trade though TRIPs set in motion important changes within the IPRs regime. The key change was the shift from an international regime managed by WIPO to a bi-nodal regime, governed by WTO and WIPO. To start with, this caused considerable confusion, especially as to the role of WIPO now that the WTO presided over a comprehensive, binding, enforceable and new IP treaty, while WIPO remained the traditional international IP forum with considerable technical expertise. WIPO soon found its feet again by making use of its formidable expertise to assist the WTO TRIPs implementation process (through the 1995 WIPO-WTO Cooperation Agreement). It also re-established itself in the changed and expanding IP front through providing a forum where new and stronger IP treaties could and were negotiated in the post-TRIPs period, such as the 1996 Copyright Treaty and the 1996 Performances and Phonograms Treaty (Drahos and Braithwaite 2000; Yu 2004; May and Sell 2006). In addition to these changes at the multilateral level, the linking of IPRs to trade has also found expression at the regional and bilateral level, especially since the mid 1990s, where the expanding and overlapping grid of the FTAs with specific IP chapters provides yet another front in which IP rules are negotiated, expanded, strengthened and enforced (Abbott 2004; Drahos 2007). These development and others dealt with in the next section reflect a further move from a short-lived bi-nodal regime towards an IP regime complex.

3. A regime complex: more linkages, overlaps and tensions

As suggested in the preceding section, consensus is emerging that the current global IP regime treats IP protection too narrowly as a trade issue and that we currently have insufficient knowledge about how a balanced global IP regime should look like. This is not an enviable position, but neither is it final. The IP linkage to trade is a relatively new one and, as such, more prone to contests and changes compared to older linkages which may have been established and accepted within the regime earlier. That said, and unlike other IP linkages mentioned in the previous section, linkages which consolidate into internationally enforceable hard law such as TRIPs are harder to change or be undone. One possible way to unbundle the IP-trade link is that of superseding TRIPs with a new IP treaty of the same or wider scope, reach and enforceability. The problem, of course, is that, with consensual knowledge missing and actors’ interests varying widely, there is no agreement about what
this new treaty ought to be, or, indeed, whether it is desirable at all. Nevertheless, whilst a grand plan to overhaul the current global IPRs regime in its totality will probably never come to be, different state and non-state actors are coalescing, engaging in contests, negotiating and creating new IP linkages with the aim of shaping the regime in ways which align with their varied interests and understandings of what a global IP regime must do. As a result, the relatively new global IP regime is already complex, contested and often contradictory in its rule content. The relatively short post-TRIPs period has been characterised by numerous contests over IP rules unfolding in various regimes and fora, making it difficult to afford them here the space and attention they deserve. For our purposes, the most important linkages made so far are those between IPRs and access to medicines, human rights, development, biodiversity and the protection of traditional knowledge, which will be considered briefly below.

The link between IPRs and access to medicines was not the first one to be made post-TRIPs, but it certainly gained the most prominent profile and it was relatively successful, at least insofar as it resulted in the TRIPs Agreement being amended in the 2005. Like the IP-trade link, the IP-access to medicines one was framed by non-state actors; in the mid to late 1990s, a small but growing coalition of international (health) NGOs, known as the Access Campaign, became increasingly concerned and vocal about the impact of strong pharmaceutical IPRs on the affordability and accessibility of patented HIV/AIDS medicines (and of medicines generally, later), particularly in developing and least-developed countries (Sell 2003). This link, cast on strong moral terms such as ‘patients before patents’ and ‘generics = cheap medicines = life’, resonated well with three broader developments; firstly, in the post-TRIPs period, developing countries were finding their policy options to address public health concerns were limited, partly as a result of certain TRIPs obligations and partly due to the intense efforts of IP-rich business and state actors to narrow down whatever flexibilities TRIPs afforded them. Secondly, public health crises were also highly prominent; indeed, by the late 1990s the HIV/AIDS epidemic had reached disturbing and astonishing proportions, particularly in certain parts of the developing world. Thirdly, by then a consensus had formed which saw the concept of (inter/national) security considerably expanded, to include threats emanating from global epidemics and diseases (Fidler 2004). As a result of this link, prices of (particularly first line) antiretroviral drugs fell considerably in the early 2000s and some developing countries have made use of TRIPs flexibilities, such as parallel importing of medicines and compulsory licensing, to enhance access to affordable medicines, although such measures have not gone unchallenged by IP-rich state and non-
state actors (‘t Hoen 2009). Beyond public health concerns, the IP-access to medicines link further deepened two existing trends of the IPRs regime: intra-regime and inter-regime shifting. As noted above, bilateral or regional FTAs negotiated largely between a developed and developing party or group thereof have continued to link trade to IPRs. In order to ‘recoup’ losses suffered on the IP-access to medicines front at the multilateral level, IP-reliant business and state actors (particularly the US) have shifted the battle where their bargaining position is stronger and have increasingly made use of bilateral FTAs to further increase pharmaceutical (and other) IP protection and narrow down TRIPs flexibilities. In addition to this intra-regime shift, the IP-access to medicines link also deepened the trend towards inter-regime shifting, by opening up the IP regime to other regimes, on the first instance, to the public health and the human rights ones.

At the height of the IP-access to medicines contests in the late 1990s, the WHO passed a series of resolutions which encouraged member states to review options under international agreements (read, TRIPs) to ensure and safeguard access to essential medicines (WHA 1999; 2001). More recently, its role has gone beyond passing resolutions in support of public health commitments to housing new initiatives that seek to fundamentally overhaul the way the pharmaceutical R&D process is funded and the IP system to which it lends itself. These developments are directly related to a 2003 proposal by a group of developing countries, led by Brazil and supported by many health NGOs, to establish an independent commission to examine the relationship between IPRs, innovation and public health. As a result, the WHO Commission on IPRs, Innovation and Public Health (CIPIH) was set up in 2004 aiming, amongst other things, to produce concrete proposals for a sustainable R&D and a new pharmaceutical IP model. The idea underpinning this new model is that of somehow delinking the cost of pharmaceutical R&D from the price of medicines and expanding the definition of IPRs to include access, as well as discovery and innovation. The 2008 Global Strategy of the current WHO Intergovernmental Working Group on Public Health, Innovation and IP (IGWG) has already included proposals of new ways to fund pharmaceutical R&D such as prizes, government funds and patent pools (WHA 2008). While it remains to be seen whether these proposals will change fundamentally the conventional pharmaceutical IP model, it is clear that IPRs are now an important part of this regime’s remit.

While the IP-access to medicine link continues to be contested at the bilateral level (FTAs) and multilaterally at the WTO and WHO, yet another front was opened with the link established between IP protection and human rights in the late 1990s. Again, it was a consortium of different international NGOs which prompted the IP-human rights link in mid 2000 through challenging the compatibility of TRIPs with human rights obligations (Sell 2006). In response, the UN Human Rights Sub-Commission adopted a resolution on IPRs and human rights which explicitly pointed at real and potential conflicts between TRIPs obligations and the realisation of economic, social and cultural rights (ECOSOC 2000). This was only the first of many resolutions and reports the many bodies of the human rights
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regime have been only too keen to pass and adopt, all of which have been highly critical of the current IPRs arrangement (see, for instance, ECOSOC 2001; CHR 2003). Importantly, the conflicts they highlighted cut through many other issue-areas and regimes including, amongst others, health, farmers’ rights, education, biodiversity, and the protection of indigenous culture and knowledge. In many ways, the IP-human rights link has served as a broad umbrella under which actors engaged in contests over narrower IP links (such as health or biodiversity) can coalesce and tap into the strengths of a wider network (Schultz and Walker 2005). Clearly, one could argue that the human rights regime’s resolutions and reports have no real teeth; nevertheless, it and other regimes are important in generating ‘soft’ laws, norms and principles which, in turn, are an indispensable part of the international law-making process and of global governance more generally.

As these latter linkages demonstrate, issues now travel more freely within and between regimes and fora. As mentioned before, the issue of public health has been contested in the trade regime, the human rights regime and the public health one. Another good example relates to the issue (or, rather, issue-area) of biodiversity, also contested in various regimes: the trade regime, the human rights one and the complex regime governing genetic resources, which includes the 1992 Convention on Biodiversity (CBD), the 1961 International Union for the Protection of New Varieties of Plants (UPOV), and the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) (Helfer 2004). To unbundle only one dimension, the conflict between certain IP rules mandated by TRIPs and those set out by the CBD and, more broadly, concerns about the adverse impact of stronger ‘life-patenting’ IP rules on biodiversity and biopiracy, were the earliest one raised at the WTO TRIPs Council by some developing countries and sympathetic NGOs only a few years after TRIPs came into force (Watal 2000; Pugatch 2004). While the link between IPRs and biodiversity continues to be contested, a closely related link is also worth our attention. This refers to yet another complex link, that between IPRs and the protection of traditional/indigenous knowledge. This link has different dimensions relating to human rights, culture and biodiversity which is why it is contested in different fora, including various human rights committees, the WTO TRIPs Council, UNESCO and the CDB Conference of the Parties. Amongst others, one of the key arguments raised by countries with substantial indigenous communities, and civil society groups representing their interests, has been that new IPRs should be devised to protect indigenous knowledge (so far considered as part of the public domain) and that IPRs granted in the meantime should contain disclosure of the origins of genetic resources or traditional knowledge involved, as well as facilitate benefit-sharing with such communities of their commercial value (Pugatch 2004; Sell 2006).

Some of these issues mentioned above, have been brought back to WIPO, further deepening the density of links within the IP regime. For instance, concerns about IPRs, biodiversity and traditional knowledge were bundled together at WIPO by some developing countries seeking to incorporate this link into the negotiations over the WIPO Patent Law
Treaty (PLT) in the late 1990s, requesting that the latter include clauses for the disclosure of origin and benefit-sharing clauses within it (Sell 2006). This was not achieved in the 2000 PLT, but WIPO set up a separate body to address the IP aspects of resources and traditional knowledge, the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) (South Centre and CIEL 2005). While IGC’s work on these issues continues, actors with interest in biodiversity and indigenous people’s issues have more recently sought to incorporate this link again into the current negotiations for a new Substantive Law Treaty (SPLT) at WIPO. The latter is yet another effort by IP-rich actors to harmonise upwards the scope of patent protection globally through, unsurprisingly (given the current state of negotiations at the WTO), shifting the negotiations back to WIPO and away from the former.

Testifying to the growing density and the complexity of the current IP regime, the SPLT negotiations have become the platform to launch yet another linkage, that between IP and development. It is worth recalling that this is not a new linkage; rather, it was made, unsuccessfully, by developing countries as part of their efforts towards NIEO in the 1970s. A group of developing countries, known as the Group of Friends for Development, led by Brazil and Argentina and supported by civil society groups, proposed a Development Agenda for WIPO in 2004 which, much to the consternation of IP-rich actors, aims to overhaul WIPO’s mandate to view IP as a tool for development, rather than as an end in itself. In 2005, progress on the WIPO SPLT negotiations was made explicitly dependent on (hence linked to) progress on the Development Agenda (ICTSD 2005). An important item of this complex Agenda is a proposal for a treaty on Access to Knowledge (also known as A2K treaty) whose origins hark back, once again, to a widely divergent group of international NGOs (Drahos 2005; Helfer 2007). Reflecting its origins, the key idea bringing together the many themes of the A2K is that access to knowledge is a basic right, that restrictions on access to IP matter should be the exception, not the norm, and that international mechanisms ought to be created in order to protect and sustain open-source models of innovation (Kapczynski 2008). Negotiations and contests over the SPLT, the Development Agenda and A2K are still ongoing at WIPO and beyond.

What these developments demonstrate is that it has become increasingly difficult to understand one area of the global IP regime independent of others; with linkages being made and remade between and within regimes, and new and conflicting norms and rules emerging, the global governance of IPRs has become more complex, denser and harder to navigate. If this is the outcome, why, then, do actors engage in intra- and inter-regime shifting at all? As was suggested above, broadly speaking, actors with interest in the global IP regime act strategically in order to shape the regime’s norms and rules in ways which, from their perspective, address their concerns and interests. The latter vary widely, hence the current shape of the IP regime. More specifically, Helfer (2004) and Raustiala and Victor (2004) have suggested that actors engage in regime-shifting for at least three reasons. Firstly, actors make linkages and shift issues to other regimes so as to maximise the changes
of achieving their desired outcomes in a regime whose institutional characteristics enhance their bargaining power and chances of success. The TRIPs Agreement itself illustrates this strategy; shifting the issue of traditional knowledge to the human rights and the biodiversity regimes by some developing countries is also a case in point. Secondly, actors can use regime shifting as a safety valve, by moving an issue to a regime where meaningful outcomes are not likely to be forthcoming. In other words, actors in this case are keen to maintain the status quo, or simply attempting to diffuse pressure brought to bear on them by different constituencies by shifting the issue into a less effective fora, while, simultaneously, appearing to be dealing with the matter at hand. For instance, developed countries with stakes in strong IPRs may nevertheless acquiesce to review and debate such standards in a weaker regime, such as that of human rights. Lastly, actors shift issues to other regimes to deliberately create counter-norms, legal inconsistencies and tensions which, in turn, are used to subvert the prevailing legal landscape. This is a strategy that is usually adopted by weaker actors and it captures most of the activity that has taken place within the human rights and biodiversity regimes, for instance. Importantly, this may also be seen as an intermediate strategy whereby soft law norms thus produced in other regimes can later be incorporated into new rounds of IP law making at the more powerful WTO and WIPO.

Because negotiations over a new agreement build on an existing body of norms, rules and knowledge, and because a new agreement usually trumps the old, engaging in counter-norm and soft law making holds promise for significant changes to the current IP regime. There is no guarantee, of course, that the IP-trade link will be undermined, nor that, should it be so, it will be replaced by a more balanced or effective one. This is because, as suggested earlier, the outcomes of regime contests are indeterminate, particularly when the number of actors involved is large, their interests varied and consensual knowledge absent. Many of the developments mentioned here are still new and unfolding; while they may or may not change the current IP arrangement towards a more balanced one in the future, so far they have contributed in creating a regime complex which is in flux, overlapping, contradictory and confusing. Governments designing IP rules on plant genetic resources, for instance, may find it difficult to reconcile their TRIPs obligations with those of the CDB and of a regional or bilateral FTA to which they may be a party. And this is before taking into consideration a vast array of resolutions and declarations emanating from other fora and pressure from domestic and other groups. Clearly, the decentralised and non-hierarchical nature of global governance has always made the task of reconciling such obligations difficult. The more recent trend towards regime complexes is making it even more so.

**Conclusions**

It is ironic that the case of IPRs regime, never really having caught the attention of regime or global governance scholars, should exemplify the kind of fundamental changes that are
currently undergoing in global governance. As we have seen, in the recent years the IPRs regime has become a multi-nodal regime or a regime complex, wherein IP rules and norms emerge from various fora and regimes and, functionally overlap, strengthen or conflict each other. This is not natural progression; rather, it is the result of various linkages being strategically made, with varying success, between and within regimes and fora by state and non-state actors with interests and stakes in the shape and direction of the global IP regime. That said, the IPRs regime is not unique; the trade regime, for instance, also displays a high degree of complexity, as does the regime governing the law of the sea, amongst others. It may well be that the trend towards regime complexes in global governance is going to become much more common in the future. Should this be the case, we can expect the governance of specific issue-areas to become less clearly defined and more intricate, and global governance itself consisting of overlapping structures some of which are in conflict and operate out of synch with each other. The decentralised nature of global governance is both a cause and a result of this trend. Furthermore, due to differences of interests and the existence of conflicting norms and inconsistencies, we can expect new global arrangements governing a complex issue-area in the future to be more vague and general. This is turn, may perpetuate the trend towards density and complexity, as contests over clarifying vague rules and reconciling diverse norms and interests over one issue-area may be pushed to another level (bilateral or regional), to yet another regime, or to be ‘resolved’ through relevant conflict resolution mechanisms and adjudicating bodies. The overall result of these potential developments is ultimately unpredictable and, in any case, unfixed.

Bibliography:


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