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International Regime Complexity and Enhanced Enforcement of Intellectual Property Rights: The Use of Networks at the Multilateral Level

Valéria Guimarães de Lima e Silva
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INTERNATIONAL REGIME COMPLEXITY AND ENHANCED ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: THE USE OF NETWORKS AT THE MULTILATERAL LEVEL

Valéria Guimarães de Lima e Silva[1]

[1] Fellow, Oxford-Princeton Global Leaders Program. E-mails vglsilva@princeton.edu and valeria_glsilva@yahoo.com.br.

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"Adam Smith's theory argued that individuals in pursuit of their self-interest (firms in pursuit of maximizing profits) were led as if by an invisible hand to the general well-being of society. One of the important results of my work, developed in a number of my papers, was that the invisible hand often seemed invisible *because it was not there*.[2]"
Joseph Stiglitz

1. Introduction

In recent years, several initiatives have taken place in different international regimes to advance standards on the enforcement of Intellectual Property Rights (IPR) beyond the level of obligations accepted by states through multilateral consensus.

IPR enforcement provisions include the determination of the scope of civil and administrative procedures, remedies, border measures and criminal procedures, and vary significantly across countries. Nonetheless, they are subject to minimum standards multilaterally agreed by states and incorporated into the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), arising from the Uruguay Round of trade negotiations that led to the creation of the World Trade Organization (WTO) in 1994.

Until recently, the existing multilateral standards of IPR enforcement had not been contested in the international setting. After the signature of TRIPS, states have focused on the incorporation of its provisions into their domestic legislations, as many members of the World Trade Organization (WTO) either had lower standards of IPR protection or none. Enforcement of IPRs was not included in the agenda of negotiations of the 2001 WTO Doha Round.

However, around 2002 stakeholders began to show discontentment with the enforcement of IPR by several states, under the alleged increase of counterfeit and pirated goods[3]. The argument was that TRIPS provisions on the subject had a weak implementation in several states, as well as that they were not stringent enough[4].

In response, states representing the interests of stakeholders sought to increase the level of enforcement of IPR domestically and abroad, while also improving the implementation of these rules by national authorities. As a result, initiatives at the multilateral, plurilateral, bilateral and domestic levels have been adopted to advance more stringent provisions.

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[2] Joseph Stiglitz, 'Economic Foundations of Intellectual Property Rights' (2008) 57 Duke Law Journal, p. 1693
[3] Interview with EU official, 08.03.12.
[4] Ibid.

This paper addresses international regime complexity at the multilateral level, taking into account initiatives undertaken to increase the scope strengthen the enforcement of IPR through shifts in regimes and the expansion of networks of state and non-state actors to increase the chances of obtaining a desirable outcome. Examples of multilateral organizations that have recently become involved in the enforcement of IPR are the World Customs Organization (WCO), World Trade Organization (WTO), International Criminal Police Organization (INTERPOL) and the Universal Postal Union (UPU), taking the lead in a field that has been traditionally under the attribution of the WTO and the World Intellectual Property Organization (WIPO).

The goal of the present study, which is still ongoing, is to provide a picture of the major dynamics that have taken place in the field of enforcement of IPR at the multilateral level and identify strategies adopted. It has to be taken into account together with initiatives pursued at the domestic, bilateral and plurilateral levels, in order to draw a framework of the overall complexity, a project to be developed in a further stage. However, the current study already allows the establishment of a timeline of initiatives undertaken before international organizations and the identification of major characteristics of strategies in the multilateral level.

In view of the differences between provisions and treaties on Industrial Property Rights – most notably patents and trademarks – and on other Intellectual Property Rights – specifically copyright - as well as the intent to address, at a further stage, the implications of IPR enforcement strategies for health rights and for the adoption of corresponding public policies by states, attention will be given to enforcement of patents and trademarks.

For the purpose of this paper, it will be assumed that there is a strong influence of domestic private sectors in governmental policies advanced for increased IPR protection, not only nationally but also internationally[5].

The paper is grounded on three major arguments, either accompanied or followed by a pragmatic assessment. In the following section, it is argued that the policy space of states has significantly been reduced over time, against increasing international regulation of IPR culminated with TRIPS. The balance of rights and obligations claimed to exist under the TRIPS has been called to justify the significant reduction of domestic policy space, and such balance now risks being jeopardized by global initiatives undertaken to set forth provisions for more stringent IPR enforcement. Although this agenda reflects private interests, it has been reframed into a public policy issue, in order to foster its incorporation and increased implementation by states. Section 3 will address the increasing regime complexity

[5] Susan K. Sell, 'Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights' in Geoffrey Underhill and Andreas Bieler Richard Higgott (ed), *Non-State Actors and Authority in the Global System* (Routledge 2000)

that has been reducing policy space and promoting a departure from multilateral standards on IPR enforcement. Section 3.1 presents how regime complexity has been fostered: through the use of several networks of domestic regulators, which brings several benefits to advancing the intended strategies. Section 4 demonstrates how the theoretical framework introduced in the previous sections has been implemented to advance increasing IPR enforcement in various intergovernmental organizations, seeking to identify common characteristics through an analysis of the strategic processes conducted in each venue. Finally, the concluding section summarizes the strategies assessed in the paper.

Further research will be carried out to complement the current paper, through the addition of processes fostered before WIPO, INTERPOL and the WHO. Further documents and information will be sought before relevant international organizations on i) source of budget for the development of initiatives; ii) chair of each body developing the initiatives; iii) members of these bodies; iv) participation by non-members and openness; v) level of transparency and information flow on initiatives to other members of the international regime.

2. Policy space, TRIPS flexibilities and beyond

States face diverging constraints in terms of resource capacity, national industrial policy and investment priorities[6]. It is expected that they rationally implement domestic policies taking into account the allocation of scarce resources to achieve specific economic, political and social goals. Policy space therefore provides autonomy for a country to determine the substantial and procedural measures it will adopt for pursuing national goals.

Notwithstanding the relevance of domestic policies, a constant decrease in countries' ability to promote them - mostly trade and industrial policies - has taken place as from the 1980s, as a result of constraints from increasing regulation by international trade and investment agreements[7]. The outcome of the World Trade Organization (WTO) and its agreements in 1994, superseding the 1947 General Agreement of Tariffs and Trade (GATT), led to the establishment of a significantly higher standard of international trade rules to be incorporated in the domestic legislation of its members.

As trade liberalization is secured through domestic deregulation combined with

[6] Bernard Hoeckman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' 8 Journal of International Economic Law 405, p. 406.
[7] Kevin Gallagher, 'Globalization and the Nation-State: Reasserting Policy Autonomy for Development' in Kevin Gallagher (ed), *Putting Development First: the Importance of Policy Space in the WTO and International Financial Institutions* (Zed Books 2005), p. 10; Ha-Joon Chang, 'Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies' 41 Economic and Political Weekly 627, p. 630.

increasing international regulation, the result is a reduction in the ability of countries to find differentiated solutions for the promotion of domestic policies. Hoeckman adds that "[t]he 'adjustment burden' of new rules (…) mostly fall on developing countries, as the rules that are likely to emerge will reflect the status quo in industrialized countries ('best practice')"[8]. The adoption of a strong multilateral regulation to promote free trade has not led, however, to increasing economic gains outside of the industrialized world. Whereas per capita income in developing countries grew 3 per cent in the 1960s and 70s - when these countries were able to apply trade and industrial policies with significant autonomy - the growing rate decreased to 1.5 per cent in the 80s and has even shrunk in Sub-Saharan Africa[9].

Within the WTO framework there has also been a significant departure from prior international standards for IPR protection. Under the TRIPS Agreement, states not only reaffirmed obligations undertaken in prior international IPRs agreements, such as the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Work. They also agreed on higher international standards of protection, thereby reducing the degree of flexibility of the previous system. TRIPS has created and strengthened rules on the availability, scope and use of IPR. It has also determined parameters for IPR enforcement to be adopted by the signatory countries in their domestic laws, and subjected obligations under the Agreement to enforcement through the WTO dispute settlement system.

With regard to IPR enforcement provisions, TRIPS has created minimum standards for civil and administrative procedures and remedies (including the production of evidence, concession of injunctions and damages), border measures and criminal procedures, which shall be made available to right holders under the domestic laws of WTO members.

International regulation of IPR under the TRIPS has reduced the policy space of developing countries for the promotion of local technological innovation through reversed engineering or copying, the same methods that allowed Britain, the U.S., Japan and other economically well-developed states to promote their own industrialization[10]. Stiglitz refers to cases of successful development – Japan, the United States and East Asia, all driven by national industrial policies prior to the

[8] Hoeckman, p. 406. Least developed countries were allowed longer transition periods for the implementation of the TRIPS, until 2013 for IPR except for pharmaceutical product patent and undisclosed pharmaceutical test data protection, extended to Jan. 01, 2016.
[9] Chang, p. 630
[10] Robert Hunter Wade, 'What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of "Development Space"' in Kevin Gallagher (ed), *Putting Development First: the Importance of Policy Space in the WTO and International Financial Institutions* (Zed Books 2005), p. 85

outcome of the TRIPS[11]. Governments have had a key role in the promotion of innovation through the implementation of industrial policies, producing a more efficient outcome than markets by themselves[12].

From an economic perspective, the costs of TRIPS have been high for countries that are net consumers of IPR. The high standard of IPR protection granted by TRIPS has led to a raise in prices of patentable knowledge and increased rent flows from net producer countries (developed) to net consumer countries (developing)[13]. A report by the World Bank stated that the latter were negatively affected by stronger IPR by two means, namely, "by increasing the knowledge gap and by shifting bargaining power toward the producers of knowledge, most of whom reside in industrial countries"[14].

Joseph Stiglitz argues that imbalances created by TRIPS have reduced access to medicines by developing countries, through increasing financial costs they cannot not bear with[15]. Furthermore, revenues from IPRs have not been invested in the development of new drugs that primary affect low-income countries. A very recent study shows that the increase of patent protection by developing countries has not been accompanied by an increase in R&D for diseases that prevail in their territories[16]. Patent protection is related to diseases affecting high-income countries, and the study suggests this is due to projected higher revenues[17]. This is not a major issue in relation to drugs targeting global diseases, but low-income countries have to find by themselves alternatives for R&D as a result of the lack of financial incentives for pharmaceuticals to invest in drugs against diseases affecting their population.

From a political perspective, developing countries' rights and developed countries' obligations (such as transfer of technology) under the TRIPS are vague and difficult to enforce, whereas developed countries' rights and developing countries' obligations are subject to specific rules that facilitates its enforceability[18], leading to further imbalances.

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[11] Joseph Stiglitz, 'Development Policies in a World of Globalization' in Kevin Gallagher (ed), *Putting Development First: the Importance of Policy Space in the WTO and International Financial Institutions* (Zed Books 2005), p. 26

[12] Stiglitz enumerates two reasons for this: the attributes of public good that knowledge has ("high costs of exclusion and low or zero costs for to additional individuals enjoying the benefits of the good"), and the significant externalities engendered by innovation. Ibid

[13] Wade, p. 82.

[14] World Bank, *World Development Report 1998/ 1999: Knowledge for Development* (Oxford University Press, 1999), p. 36

[15] Stiglitz, 'Economic Foundations of Intellectual Property Rights', p. 1694

[16] Margaret K. Kyle and Anita M. McGahan, *Investments in Pharmaceuticals Before and After TRIPS. Accepted for Publication.* (MIT Press Journal 2012)

[17] Ibid

[18] Wade, p. 83

TRIPS has tied WTO members to a high level of obligations but still allows, to a certain extent, the adoption of domestic policies taking other priorities into account, as other fields of public policy have also been affected by the scope of the TRIPS: IPR rules intersect with public health, human rights, biodiversity and genetic resources for agriculture, regulated by other domestic and international regimes.

In recognition of these implications TRIPS has established general principles limiting the protection of exclusive rights set forth in the Agreement, by introducing parameters that allow states to take into account public policy objectives that may be affected by the Agreement. Article 7 of TRIPS, for example, determines that "[t]he protection and enforcement of intellectual property rights should contribute to (…) the balance of rights and obligations", whereas article 8 provides allows members, as long as there is no violation to the Agreement, to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".

In relation to IPR enforcement provisions set forth by the TRIPS, those flexibilities led to a limitation of the modalities of IPR subject to enforcement measures, the scope of measures to be adopted, the extent of competence of each authority as well as national jurisdiction. TRIPS limits, for example, the obligation of WTO members to apply border measures for the protection of IPR to "the importation of counterfeit trademark or pirated copyright goods" (art. 51). Footnote 14 of art. 51 clarifies the definitions of counterfeit trademark goods, as referring only to registered trademarks, and pirated goods, applicable only to copyright. The same exclusion applies to goods in transit or exported, as a result of the limitation of the application of art. 51 to imports.

TRIPS flexibilities, both in terms of scope of substantive rights and enforcement provisions, allow states to take certain national priorities into account, such as public health. The treatment of health as a human right by the United Nations (UN) led to the classification of drugs as essential goods, which requires them to be accessible – that is, available to the population at affordable prices[19]. Parallel imports and compulsory licensing are examples of measures that may be adopted under TRIPS to balance such public interests against private rights.

Although TRIPS provides for flexibilities as a result of a negotiated compromise, states are allowed to increase IPR protection domestically beyond the standards set forth in the Agreement, as long as the provisions of the latter are not violated. Adding to this, there is a strong economic incentive for countries that are net-exporters of IPR to seek to increase, both domestically and internationally, rights benefiting its Intellectual Property (IP) knowledge industries, thereby reducing the remaining flexibilities left by the TRIPS for the implementation of national policies

[19] World Health Organization, *Pharmaceuticals in the Trade Related Aspects of the Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization - A Briefing on Trips* (WHO/WPRO 2000)

by states that are net importers of IP knowledge. This industry has a key role for export economies. The share of intangible assets in the market value of major U.S. companies increased from 25% in 1984 to 64% in 2005, and the latter were responsible for more than 90 per cent of the total investments in R&D[20]. In that market, IP-intensive manufacturing industries produced 72% more value-added per employee than other industries, and a direct correlation was found among growth of R&D, employment and nominal GDP [21]. The most IP-intensive industry, pharmaceuticals, generated 3.3 more value-added per employee, in comparison to all manufacturing[22]. In view of the central role of innovation for the U.S. economy, the study recommends that the government provide higher priority for the protection of IPR, both domestically and abroad.

These figures help understanding why there is a constant and unlimited demand by exporters of IP knowledge to modify the balance of rights and obligations achieved under the TRIPS towards more stringent rules. However, it does not explain why, in recent years, they have established the promotion of laws, regulations and procedures towards stronger IP enforcement as a top priority, in parallel with increasing substantive IPR rules negotiated in free trade agreements.

A justification may be found in a recent investigation conducted by the U.S. International Trade Commission (USITC). It estimated that losses for U.S. IP-intensive firms as a result of IPR infringement in China amounted to US$ 48.2 billion in sales, licenses fees or royalties in 2009[23]. This estimate is based on replies by U.S. IP-intensive firms to a survey, and the report recognizes that this result falls within a much broader range, between US$ 14.2 to 90.5 billion[24]. The economic gains to the U.S. resulting from an improvement in overall IPR protection in China, to levels comparable to the United States, were simulated in US$ 107 billion and would further benefit the U.S. economy through the reallocation of its labor force[25]. The economic interests at stake are clear, as well who would benefit from increased enforcement. It does not consider, though, domestic priorities and who would bear the costs on the other side of the equation.

3. International regime complexity on IPR

So how has the policy space been shrinking against increased enforcement of IPR by states? This has been carried out through the use of regime complexity by

[20] Robert J. Shapiro and Nam D. Pham, *Economic Effects of Intellectual Property-Intensive Manufacturing in the United States* (World Growth, July 2007), p. 5, 8.
[21] Ibid, p. 5-6
[22] Ibid, p. 6
[23] U.S. International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy* (May 2011), p. xv
[24] Ibid
[25] Ibid, p. xviii

states exporting IP knowledge, in order to advance stringent international soft law and hard law provisions. Lack of hierarchy at the international level leads to the development of regimes[26] that often exercise overlapping, parallel and sometimes conflicting roles. States take advantage of the prevailing anarchy in the international order to advance strategies in different regimes, favoring their particular approach to a legal *status quo* they seek to contest[27].

International regime complexity therefore acknowledges the existence of several regimes dealing with governance on a specific field, in an anarchical international order where hierarchy among institutions makes it hard to withhold and clearly delineate parameters of competence[28].

The multiplication of international institutions as a result of increasing integration of the world economy means, on the one hand, that issues that were previously limited to domestic ruling have become increasingly subject to international regulation. On the other hand, it implies that international institutions originally created to deal with certain specialized topics have had their original scope expanded to incorporate issues that would be initially under the attribution of another regime(s).

Regime theorists diverge on whether weak states can successfully shift international regimes to advance their own agenda. Whereas some consider that these states have been able to successfully achieve their goals in certain international venues (such as the Convention on Biological Diversity – CDB - and the Food and Agriculture Organization - FAO)[29], others believe that they have been able to affect the process through which coordination is attempted, but not its final outcome[30], or, yet, that negative outcomes lead powerful states to force changes in the regime[31]. The two latter alternatives arise from the fact that powerful states have attractive options outside of international institutions and may choose to exit if

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[26] Regimes can be understood as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations". Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (Ithaca, NY) [Cambridge University Press] 36 International Organizations, p. 186

[27] See Laurence R. Helfer, 'Mediating Interactions in an Expanding International Intellectual Property Regime' 36 Case Western Reserve Journal of International Law 123, p. 128

[28] "International regime refers to the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered"; Karen J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity' 7 Perspectives on Politics 13

[29] See Laurence R. Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' 29 The Yale Journal of International Law 1

[30] Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press 2007), p. 5

[31] Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (Little Brown 1977), p. 50

costs for complying with their rules are too high[32].

International institutions make it possible for dominant states to enjoy increased access to information, to key agents and a greater degree of cooperation[33], as regimes propitiate that a higher number of states abide simultaneously to rules of interest to the former[34]. But the exit option determines the point in relation to which the dominant states consider that it will be more effective to pursue other forums or regimes in order to achieve rules protecting their interests instead of advancing or insisting in the same institution[35]. If they choose to exit, this will mostly occur after building coalitions to forward their interests in other multilateral or plurilateral forums or regimes, or else by pursuing bilateral agreements - which make it easier to exercise constraints on trade partners and advance rules with higher standards than if they had been negotiated in the multilateral level. Among the drawbacks of the exit option from a multilateral regime are the decreasing level of legitimacy and recognition of rules alternative venues; the number of participants bound to the new rules in venues with lower levels of representativeness; and the democratic deficit in the creation of new rules; sunk costs resulting from the shifting of venues.

Regime shifting[36] can be both vertical (across multilateral, plurilateral, bilateral and unilateral venues) and horizontal (across venues at the same level). While inter-regime shifting is a recurring strategy aiming at the creation of outcomes that reshape the existing rules in other venues, the goal of intra-regime shifting, or forum-shifting, is to obtain a favorable single decision within a given regime[37]. Once regime complexity is increased as a result of addressing the same issue in various institutions, it allows decision-makers to use cross-institutional political strategies - "chessboard politics", for the promotion of a given agenda in different international institutions seeking to influence its outcome[38].

Regime shifting in the field of IPR is far from a new strategy. The successful shift of regime promoted by the U.S. and the EU in the 1990s, from the World Intellectual Property Organization (WIPO) to the World Trade Organization (WTO) has been

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[32] Randall W. Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge University Press 2011), p. 14.
[33] Ibid, p. 13
[34] On the use of interdependence as an instrument of power see Robert O. Keohane and Nye, p. 15ff.
[35] See Albert O. Hirschman, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states* (Harvard University Press 1970), p. 104-105
[36] Defined as "an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another" Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', p. 14.
[37] Laurence R. Helfer, 'Regime Shifting in the International Intellectual Property System' 7 Perspectives on Politics 39, p. 39; Karen J. Alter and Meunier, p. 16
[38] Karen J. Alter and Meunier, p. 16

extensively addressed[39].

Pressure from its IP-intensive industries had led the U.S. government to seek to raise international standards of protection and to fight counterfeiting and piracy in order to increase access of its firms to foreign markets[40]. The deadlock in negotiations to revise the Paris Convention at WIPO in the 1980s, due to conflicting interests of member countries, led dominant states to modify their strategy. The shift of negotiations to the GATT and bargain of market access in exchange for IPR protection increased the leverage of those countries in negotiations, leading to the creation of the WTO and to the outcome of the most comprehensive agreement on IPR ever achieved. The U.S. and the EU adopted a power-based strategy to increase their leverage in negotiations, by withdrawing from the GATT 1947 and the obligations assumed therein after joining the WTO; this constrained other states to accept the terms of the Uruguay Round Final Act and sign the same agreements they had opposed, gaining very little in comparison to GATT 1947 and giving up a lot[41].

As a result, IPR began to be dealt within the international trade regime. TRIPS considerably expanded the intersection of IPR with other issue areas affected by its regulation (health, plant varieties, biodiversity) and contributed to increase uncertainty on how to reconcile conflicting regulations[42], domestic priorities and competences of competing organizations. Adding to this, efforts by IP net importer states to limit the scope of TRIPS while net exporter states have sought to expand it led both sides to shift to different regimes to maximize their respective interests[43].

In respect to rules on IPR enforcement, the strategy adopted in the mid-2000s has been to resort to several regimes and forums simultaneously, in order to obtain favorable outcomes that could be then transposed to other venues, ultimately leading to a general acceptance of new higher standards and their incorporation in the practice and by domestic regulations of other states. But how has this strategy been forwarded?

3.1. Fostering strategies through regulatory networks

It is not possible to explain the current increase of regime complexity towards more stringent IPR enforcement without understanding the instrument that has been used to its full extent for this purpose: international organizations and

[39] Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', p. 18-23; see also Sell
[40] Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', p. 20
[41] Richard H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT-WTO' 56 International Organization 339, p. 360-366
[42] Helfer, 'Regime Shifting in the International Intellectual Property System', p. 40
[43] Ibid

networks of government officials represented therein[44]. An increasing number of networks of domestic regulators from different fields have been called to play a major role on the fight against counterfeit and pirated goods promoted by IP-knowledge export countries, through the corresponding multilateral organizations they participate in. Health regulators, custom agents, criminal police and postal officials are examples of domestic actors involved in debates and initiatives on how to foster IPR enforcement in different intergovernmental organizations.

Anne-Marie Slaughter describes this new reality acknowledging that, after the signature of a treaty in the international order, the official representatives of states step out and technocrats take their place to promote the implementation of the new rules, cooperation with counterparts in other states, exchange of information and development of best practices, among other initiatives[45]. The perception of states as unitary actors in the international system does not correspond to this existing reality. Networks of government officials are the ones actually making global governance: the G-8 and G-20, OECD, EU, intergovernmental organizations such as the WHO, WIPO, WCO, UPU, each convenes domestic regulators in their respective fields, such as health, intellectual property, customs, post, and many others, to disseminate cooperation, exchange expertise, promote common standards on enforcement and even the harmonization of national policies and rules[46].

As both the driver and the instrument for the promotion of global governance, networks can perform either a positive or a negative role. Some considerations are relevant for the assessment of the potential negative implications of strategies advanced before multilateral institutions through networks of domestic regulators.

Networks hold significant soft power, which provide them with the ability to disseminate ideas and promote soft law convergence among their members. Soft power allows powerful states to disseminate their values among others and make them aspire to incorporate such values, after being convinced of their attractiveness[47]. Resort to soft power allows dominant states to set the international agenda in different fields, and networks of domestic regulators have a strategic role for its consecution, by disseminating and promoting standards based on "regulatory export" practices from dominant to weaker states[48].

Soft power canalized through networks of officials from the executive branch of different governments cannot be underestimated: their members can promote

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[44] See Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004)
[45] Ibid
[46] Ibid, p. 11
[47] See Joseph S. Nye, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (Oxford University Press 2002), p. 8-9
[48] Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' 43 Virginia Journal of International Law 1, p. 7

domestic regulation in the executive and submit bills to the legislative branch for approval, reproducing standards already existing in other jurisdictions and shaping hard law domestically in their areas of attribution. In the field of antitrust, for example, the OECD successfully conveys meetings among competition authorities twice a year to discuss policy, submit different competition law systems to peer review promoting recommendations for improvement, exchange experience and elaborate codes of best practices that are used by the members of the network to advance new rules and regulations in the domestic level, all based on standards adopted by developed countries. The effects of a network are positive in technical fields where there is a consensus among states on the core policies and goals to be promoted, but can lead to an undesirable convergence when triggered to produce outcomes in fields where diverging and highly politicized interests are at stake, such as IPR.

Convergence of national laws and regulations on IPR enforcement has been carried out through the declared use of government networks for the enforcement of existing domestic laws (enforcement networks), while the exchange of information and ideas has been performed with a view of promoting higher standards of best practices (information networks) and the creation of soft law in the multilateral level.

High standards of rules are not a synonym of "best practices" for all states, as they do not consider the economic, social and political implications of the measures outside of the narrow regulatory scope where debate is carried out, nor the difference of their impact in each state. The dilution of the debate within different networks leads these dimensions to be lost or disregarded, as regulators from the executive branch of the government do not go beyond the scope of their technical expertise and competence to consider implications where other technical fields intersect nor global governance from the perspective of the interests of its state.

The strategy of resorting to preselected networks leads to the compartmentalization of controversial issues into certain technical areas, removing other policy perspectives that may be relevant for the choice of rules to be adopted and constraining political opposition. It increases the probability of obtaining positive outcomes for the dissemination of dominant standards through domestic lawmaking and its implementation, as a result of the partial perspective under which an issue is considered within each technical network. Taking this into account, states select which networks they will resort to, according to an assessment of the expected level of success in promoting certain agendas. They also choose other international institutions with which they can cooperate and enhance, through a web of other networks, the reach of their agenda, thereby increasing its chance of success. Initiatives developed among networks for the enforcement of IPR have been hosted by organizations such as the WCO, WIPO and Interpol.

The one-size-fits-all approach benefits from the fact that regulators are favorable to expanding their own power, and networks propagate increasing attributions and

responsibilities among their participants. Regulators are naturally in favor of expanding their influence in policy-making in the respective fields of competence. This leads those that do not have as many powers as their counterparts in other countries to aim at achieving the same level of attributions.

Powerful states also benefit from the fact that, in weak states, dialogue across different branches of the government to reach common grounds to be transposed to the international level is either flawed or inexistent. As a result of a lack of debate to bring together different perspectives on the same topic – such as IP policy - different and disintegrated views may prevail. This hampers the prevalence of a unified position by a state in the multilateral level and not rarely leads to conflicts among different sectors of the executive within the same country. In the WCO, for example, customs authorities are representing each member state; diplomats, who aggregate the political view of states in different issues, but do not have a seat in the organization, have to negotiate their participation with customs authorities in order to be able to submit opposition to initiatives contrary to the interests of their own states. Situations of impasse have taken place, leading to the deterioration of the relationship between officials of the same government as a result of what is considered, by certain customs authorities, as an undue interference of foreign affairs officials in an international forum where the former should reign.

Against this dominant setting some developing countries promote a dialogue among various sectors of the government, in order to foster cohesive policies to be pursued or defended by different networks both domestically and abroad. The Brazilian government, for example, created in 1990 an inter-ministerial group composed by officials from different branches of the executive to promote converging views on various issues directly or indirectly related to the field of IPR, in order to set policy guidelines for the negotiation of international agreements, determine how the incorporation of such obligations into national laws will take place and provide technical expertise within the government. The so-called *Grupo Interministerial de Propriedade Intelectual* (GIPI), initially informal, was formally established in 2001[49]. The participation of experts from 11 different Ministries under the coordination of the Ministry of Foreign Affairs (Agriculture; Science and Technology; Culture; Development, Industry and Foreign Trade; Justice; Foreign Affairs; Health; Chief of Staff of the Presidency; Environment; Finance; Strategic Affairs), with the possibility of inviting other ministries and experts whenever pertinent, provides the government with a forum that brings together the perspectives of different networks to develop a unified policy agenda for the country.

A last benefit of the strategic use of government networks for those making use of it arises from their overall lack of accountability. Networks deter significant soft power and shape global governance in various fields, but the fact that they are in

[49] Brazil, Decree of Aug. 21, 2001.

essence processes rather than entities[50], expressed by the lack of hierarchy among their members, their characteristic fragmentation, the resort to the structure and decision-making process of international organizations, the existence of asymmetric information and the use of informal mechanisms for regulation, all these characteristics make it very difficult to identify the origin of initiatives, the processes for their implementation and the actors to be held accountable. Accountability refers to three different sets of problems, grouped by Anne-Marie Slaughter as i) lack of transparency and access to information by groups affected by policies originated from networks; ii) inferior decisions as a result of narrow focus and lack of responsiveness to democratic constituencies affected; and iii) lack of legitimacy deriving from the absence of formal institutions in which government networks are embedded[51].

The literature acknowledges the difficulty of assessing the costs of networks through traditional mechanisms of accountability, in view of information asymmetry between networks and their democratic constituencies[52]. Recent strategies carried out in organizations such as the WCO and the UPU, to be later addressed by this paper, demonstrate that information asymmetry and lack of transparency also takes place among members of the same government networks and is promoted to foster initiatives for which a lack of consensus is anticipated.

4. Mapping regime complexity on IPR enforcement in the multilateral level

After introducing the theoretical framework explaining the main international mechanism used to reduce domestic policy space for IPR regulation over time (regime and forum shifting) and the soft power mechanism through which it has been implemented (use of government networks), the next step is to map regime complexity for the promotion of the IPR enforcement agenda multilaterally.

Mapping regime complexity and determining the starting point of the strategy to advance an agenda for stringent IPR enforcement in the international level is not a simple task. The use of intergovernmental networks of different regulators makes it difficult to trace the initiatives, as well as to have access to the backstage of any debates. Lack of transparency seems to be an overall characteristic present in most

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[50] Anne-Marie Slaughter, 'Agencies on the Loose? Holding Government Networks Accountable' in George A. Bermann, Matthias Herdegen and Peter L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press 2000), p. 525

[51] Ibid, p. 524-525

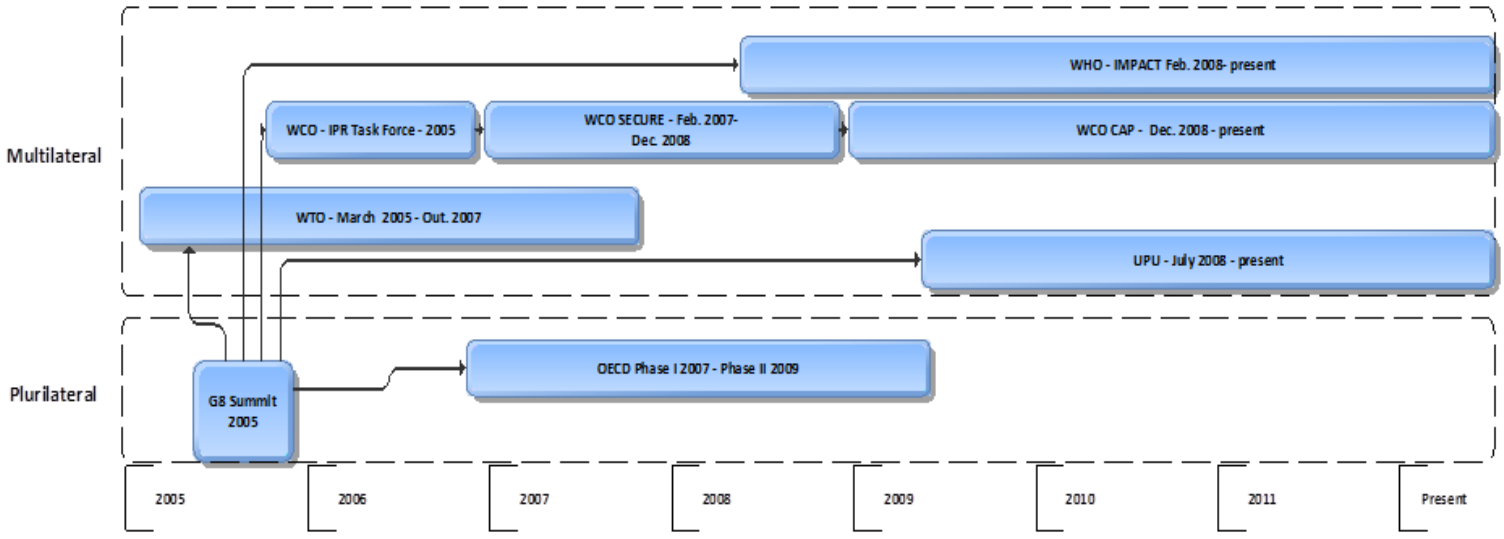
[52] Robert Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy' in George A. Bermann, Matthias Herdegen and Peter L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press 2000), p. 471

venues, even for network participants themselves.

The intention of the present mapping is to identify the starting period of different strategies and how they evolved over time in major multilateral organizations, in order to trace their origin and provide an idea of their dimension and dynamics.

The starting point for all strategies is a consensus among G8 states to take an active role in tightening IPR enforcement at the global level. Each G8 member took a leading role in promoting this agenda in different multilateral regimes, with the support of the others. Organizations with different expertise have been called to advance IPR enforcement beyond the existing multilateral standards, and some have identified this as an opportunity to increase their own relevance and political role before powerful states and, consequently, in the international system. Such international organizations have developed horizontal relationships, complementing each other's role and leading to a spin off of collaborative work among their respective networks, thereby increasing the chances of reaching the desired outcome.

The strategies advanced within major multilateral venues will be considered in the following section. At this moment, mapping the overall framework of multilateral strategies provides an overall view on when they have been triggered, by which interested governments and how they have developed along time. As a result, a multilateral mapping of strategies could be translated into the following configuration:



From the diagram it is possible to observe that the strategies have taken place almost simultaneously, as from 2005, triggered by G8 countries. The amount and diversification of regimes has also expanded in relation to the previous shift in the multilateral treatment of IPR from an IP to a trade regime (that is, from WIPO to the WTO) in the 90s: IPR enforcement has been currently discussed under the international regimes of health, customs, post and criminal law, which have a high level of specialization in fields that do not directly relate to IPR or where other perspectives prevail.

The fact that a certain strategy has been pursued for a specific period of time and has not achieved the desired outcome in a given regime does not mean that it was unsuccessful. It might have been defeated temporarily, to be later subject to another attempt, motivated by a shift to other regime(s) that would make the initial option of having the agenda discussed rather than blocked in the original regime not such a negative alternative for states opposing the enforcement agenda.

4.1. Strategies pursued at the multilateral level

Although enforcement has been a recent topic in non-traditional IPR regimes, none of them has produced hard law, differently from the existing rules at WTO and WIPO. The absence of negotiations of new treaties provides members of the former regimes with a leeway to depart from the enforcement standards set forth in the TRIPS and from assessments of whether new rules preserve TRIPS standards and the flexibilities for states to regulate and, more broadly, whether they preserve an adequate balance between private IPR and public interests foreseen by the Agreement.

Moving away from traditional multilateral regimes where rules have been established as a result of a highly political debate and framed in hard law is a strategy that avoids the broader contextualization of obligations on IPR protection against other applicable rights that should be taken into account when balancing and ultimately limiting its scope. It allows the compartmentalization of this issue on technical grounds that rather focus on how to enforce IPR in view of the estimated effects of its violations in other issue areas. At the same time, moving away from the existing multilateral hard law framework provided by the TRIPS allows states to promote best practices based on their own domestic rules rather on multilateral standards, modify concepts, amplify the scope of enforcement, change perceptions on the major national authorities that would be in charge and on the extent of powers that should be conferred to them.

Current multilateral strategies for enhancing IPR enforcement have been centered in the WCO. The organization has been coordinating activities in the field of IPR enforcement not only vertically, in the level of its implementation by national customs authorities, but also horizontally, converging several international organizations (both governmental and non-governmental) and individual private

actors around the issue, thereby enhancing its capability to reach different actors and networks for the promotion of this agenda.

International governmental organizations have been called to play a complementary role in this regard. While the WCO focuses on enhancing regulation on border measures, OECD provides the economic studies used to justify the need to tighten IPR enforcement, UPU prohibits the circulation of counterfeit and pirated goods by post and collaborates with WCO on a database to track mails, WHO is called to consider IPR violations as a public health issue, and INTERPOL considers these practices as criminal and as part of the activities of organized crime networks while seeking to dismantle them. Networks have been developed and used to their full extent, among international organizations and their respective participants. The intention is to present in sequence the main international organizations that have been called to play a role in the strategies, and how these have been developed so far.

4.1.1. G8

Many commentators question the relevance of the G8 since the outcome of the last financial crisis, when other relevant economies where called to play a more active role in restructuring global governance in the international financial system. The G-20 is nowadays the major forum for cooperation and determination of economic and financial policies that will be then further pursued and implemented before international organizations. However, the G-8 coalition remains relevant in shaping policies and initiatives for cooperation in other issue areas in relation to which there is a strong opposition of interests between its members and those of the G2, IPR being one of such sensitive issue areas. After reaching grounds for building a common agenda within the G8, this will be advanced in different international venues and will usually prevail.

The international agenda for tightening IPR enforcement is fairy recent and can be traced to G8 member countries. On the final day of the 2005 G8 Summit in Gleneagles (UK), the G8 issued a declaration stating that it would increase efforts to fight counterfeit and pirated goods by different means, such as the promotion of laws, regulations and procedures to strengthen IPR enforcement domestically and abroad[53]. The declaration stated that "the G8 countries are working actively with other countries and through the World Intellectual Property Organization (WIPO), World Trade Organization (WTO), World Customs Organization (WCO), Interpol and other competent organizations to combat piracy and counterfeiting"[54]. Such declaration, although not establishing the starting date of such initiatives, identified it as a priority of the G8 countries as from 2005.

[53] G8 Summit Declaration, *Reducing IPR Piracy and Counterfeiting Through More Effective Enforcement* (Gleneagles, UK, July 2005)
[54] Ibid

This policy prioritization has not been preceded by an indication of its relevance or the negotiation of new rules in the multilateral setting. The WTO Doha Round did not include IPR enforcement in its agenda of negotiations, and the 2001 Doha Declaration on the TRIPS Agreement and Public Health suggested a path towards a broader scope for the implementation of TRIPS flexibilities rather than the establishment of more stringent rules on IPR. As recent as in Aug. 2003, the U.S. declared in the TRIPS Council meeting that "the TRIPS Agreement was carefully negotiated to be sufficiently flexible to recognize different legal regimes and to accommodate Members' needs to achieve policy objectives", and stated that the Agreement provided "effective and adequate enforcement provisions"[55].

The G8 Declaration at the July 2005 Gleneagles Summit was released when the enforcement agenda had already started to be pursued by its members earlier on in that same year, in multilateral forums pertaining to other regimes (such as customs, health and post). G8 members have split the responsibility of triggering the agenda in different forums. The UK successfully pursued the creation of an IP Task Force at the WCO in June 2005; the EU initiated in March 2005, although has not accomplished, the goal of having a debate on TRIPS enforcement and its inclusion as a permanent item of the agenda of the TRIPS Council; the organization of an international conference on combating counterfeit medicines by the WHO in Feb. 2006 led to the establishment of an informal initiative to foster this goal, the so-called IMPACT; at the UPU, the request to fight counterfeit and pirated goods posted by mail is reported to have originated from the WCO and led to the modification of Art. 15 of the Convention of the Organization in order to include counterfeiting and pirated goods as prohibited items to be sent by mail, and to the approval of several resolutions introduced or supported by G8 members.

The G8 released a second declaration, at the end of the St. Petersburg Summit in 2006, enumerating some concrete measures to be adopted for combating piracy and counterfeiting, including the preparation of a study by the OECD with an estimation of the economic consequences of those practices; cooperation among WIPO, WTO, OECD, Interpol and WCO to provide technical assistance in targeted developing countries; study of alternatives to tighten international rules on IPR enforcement and improve border measures through exchange of information, cooperation and best practices among customs authorities[56].

In the 2007 Summit in Heiligendamm, Germany, the G8 Declaration[57] contained provisions supporting cooperation and reinforced actions among different international organizations, states and the private sector to fight counterfeiting and

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[55] Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 4-5 June 2003* (Aug. 22, 2003), p. 34, par. 171

[56] G8 Summit Declaration, *Combating IPR Piracy and Counterfeiting* (St Petersburg, RU, July 2006)

[57] G8 Summit Declaration, *Growth and Responsibility in the World Economy* (Heiligendamm, DE, June 2007), par. 34-39.

piracy; invited major emerging economies to join the G8 initiatives in this area; established some concrete measures to be adopted to promote this agenda and welcomed a joint declaration issued by the private sector of G8 countries on strategies for enhancing IPR protection[58]. Among the statements, it provided support to ongoing initiatives in the WHO and WCO, called the OECD to play a central role in bringing the BRICS countries to a dialogue seeking their support and cooperation through a high-level dialogue among both groups (the so-called Heiligendamm Process); encouraged studies seeking to strengthen the international legal framework on IPR enforcement and the establishment of a Task Force to produce recommendations for action, including peer review; and supported the development of an information exchange system among customs officials, in association with the WCO.

In the 2008 G8 Summit at Hokkaido, Japan, one of the final declarations by G8 leaders supported the development of standards in the WCO for the enforcement of IPR (the controversial SECURE initiative) and the ongoing negotiations for the creation of the plurilateral ACTA[59]. A report issued by the G8 IPR Experts' Group, established in the 2005 Summit [60], targeted specific ongoing and designed actions, leaving behind premises built in the TRIPS. It provided WCO with a key role in strengthening IPR enforcement on the borders, assuming that customs rather than the judiciary or specialized administrative bodies have the authority to determine IPR infringement[61]. It also considered that states must take the leadership in fighting counterfeiting and piracy, against the understanding that the burden relies primarily on right-holders in view of the private nature of IPR and the interests at stake. The Group further mentioned the development of a second study by the OECD, focused on the assessment of the economic impacts of digital copyright infringement; noted the key role of the private sector in combating counterfeiting and piracy, and the launch of the INTERPOL Database on Intellectual Property (DIP) Crime.

In the Summit of 2009, although support to ACTA and to the initiatives conducted by the WCO continued to be part of the declaration issued by G8 leaders, they recognized of the central role of WIPO "in fostering an integral vision and coherent development of the international IP system"[62]. The change in the language

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[58] G8 Summit Joint Declaration, *Strategies of G8 Industry and Business to Promote Intellectual Property Protection and to Prevent Counterfeiting and Piracy* (Heiligendamm, GE, June 2007)
[59] G8 Summit Declaration, *World Growth* (Hokkaido, JP, July 2008), par. 17.
[60] G8 Summit, *Report of Discussions: G8 Intellectual Property Experts' Group Meeting* (Hokkaido, JP, July 2008)
[61] On the problems arising from this premise, see Xuan Li, 'Ten General Misconceptions About the Enforcement of Intellectual Property Rights' in Xuan Li and Carlos M. Correa (eds), *Intellectual Property Enforcement: International Perspectives* (Edward Elgar Publishing Limited 2009), p. 37-40.
[62] G8 Summit Declaration, *Responsible Leadership for a Sustainable Future* (L'Aquila, IT, July 2009), par. 57

seems to be partially motivated by the Heiligendamm Dialogue, as the G8 declaration recognized that this has contributed "to build common understanding on priorities of Partner countries, on the socio-economic aspects of intellectual property, and on ways to increase the efficiency of international system to the benefit off all"[63]. This declaration was released in the period of transition from the G8 to the G20, following the global financial crisis and the increasing role of emerging countries in contributing to overcome the crisis and finding solutions to the existing system. Although the new language adopted in the statement called for a balanced IPR taking into account its social-economic effects, it did not correspond to a modification of the enforcement agenda in the international level: ACTA continued to advance under several rounds of negotiations, the Trans-Pacific Partnership Agreement (TPPA) containing an IPR chapter with the highest stringent provisions existing started to be negotiated under the leadership of the U.S., and the SECURE standards were about to be submitted for approval in the WCO.

This calls into question the leverage of BRICS countries to halt G8 initiatives towards international regime shifting for increased IPR protection in the highest political level. It also seems unlikely that opposition that has taken place in each regime will refrain the G8 from pursuing this agenda. New plurilateral regimes have been created as alternative options to multilateral regimes; resort to bilateral trade agreements beyond the current multilateral IPR standards is a common instrument used by the U.S. and the EU; furthermore, developing countries have not come up with an alternative proposal to counter the current strategy. In the lack of alternatives, there are no other actions aside from isolated defensive reactions against a coordinated global strategy.

As the strategies are part of a very dynamic framework that is still being set in place and is in constant change, the current paper cannot and do not intend to assess whether the strategies have been successful or not. The chessboard politics is still being played and is far from the end. The current agenda will hardly be left aside by the G8 countries in view of opposition, as they just need to move from one international regime to another in order to enhance the probability of obtaining a positive outcome.

4.1.2. World Trade Organization (WTO)

In the WTO, initiatives led by the EU, Japan, the US and Switzerland to start a debate on TRIPS enforcement provisions started in March 2005. A request by the EU in the TRIPS Council meeting (IP/C/M47) intended to include the topic as a permanent item on the agenda, for the purpose of having the TRIPS Council to: i) "carefully examine compliance of Members with the TRIPS enforcement provisions" and identify the difficulties faced to implement them; ii) determine mechanisms to address the problems (such as cooperation from right holders); iii) seek a

[63] Ibid, par. 56

coordinated response through different tools, such as the promotion of best practices. The first topic suggested for discussions was border measures.

From the start, the proposal has received the opposition of developing countries, through oral statements during TRIPS Council meetings. The strategy adopted to keep the inclusion of the topic as a specific item in the agenda of the following meetings of the TRIPS Council was the continuous submission of proposals for discussion by G8 countries. The EU submitted three communications (IP/C/W/448, 468 and 471), followed by a joint communication from the EU, Japan, Switzerland and the US (IP/C/W/485) and separate communications by the US (IP/C/W/488), Switzerland (IP/C/W/492) and Japan (IP/C/W/501).

The first communications introduced the problem faced by those states with counterfeit and pirated goods and made suggestions on how to frame the debate and initiatives to be conducted by the TRIPS Council. In view of persisting opposition faced in the meetings, later communications focused on the presentation of practices on border measures adopted by those states for the declared purpose of exchanging information with other WTO members. The initiatives persisted for more than two years. Opposition seemed to have been effective to withdraw the topic from the agenda of the TRIPS Council when a WTO member, after the submission of the communication by Japan, posed detailed questions in the meeting of Oct. 2007 on whether the practices introduced were TRIPS-compliant (IP/C/M/55). Whether a coincidence or not, in the following meeting (IP/C/M56) of March 2008 the topic was no longer in the agenda and no debates on IPR enforcement took place.

It is uncertain, however, whether the removal of the issue from the TRIPS Council is an effective strategy when considering the chessboard of international regimes being used to advance the enforcement agenda. An alternative counterstrategy channeling the issue to the WTO could instead attempt to focus the debate on the balance between obligations and rights of new enforcement initiatives adopted in other regimes when contrasted to TRIPS and subject them to the scrutiny and parameters of WTO rules. Nevertheless this would be still a risky strategy, as powerful states have more resources to exert control over the informal mechanisms involved in the agenda-setting process and influence its outcome.

There has been a recent attempt to reintroduce the debate on IPR enforcement standards in the TRIPS Council. In the meeting of Oct.- Nov. 2011 (IP/C/M67), Australia, Canada, the European Union, South Korea, Japan, New Zealand, Singapore, Switzerland and the United States submitted the text of the Anti-Counterfeiting Trade Agreement (ACTA), a plurilateral agreement negotiated in secrecy among these countries establishing, among others, stringent IPR enforcement provisions. This triggered expressions of concern and opposition to the Agreement by developing countries, which might probably lead the signatories of ACTA to request the reintroduction of the topic in the next meeting(s) of the Council, as already suggested by Japan.

Aside from the activities of the TRIPS Council, the WTO has been participating, as an invited speaker, in the editions of the Global Congress on Combating Counterfeiting and Piracy, organized by WCO, WIPO, Interpol and private interest organizations. Furthermore, WTO has informally delegated the provision of technical assistance on IPR enforcement to the WCO. If this is the case, WCO should be limited to providing such assistance on a TRIPS-standard basis, but it is more likely that it is going beyond. Whereas the WTO, which should be supervising the implementation of such technical assistance to assure its conformity with WTO rules, has instead stepped back and kept the Organization silent in current debates and initiatives organized by other regimes.

4.1.3. World Customs Organization (WCO)

The WCO has been at the center of current initiatives to foster IPR enforcement. The Organization has 177 members, covering almost the entire globe, processing 98% of the world trade and working directly in the field of implementation, which provides a very favorable set of characteristics for strategically having IPR enforced in national borders.

The Organization also benefits from considerably more autonomy than the WTO and WIPO, delegated by member states in the creation of the WCO as a result of the nature of its activities, until recently considered as purely technical and operational. The Organization is in charge of the development of standards and harmonization of customs and trade procedures, such as the establishment of the international Harmonized System for the classification of goods (HS), used by most of the countries for the establishment of customs tariffs. It is also responsible for the administration of the technical aspects of the WTO Agreements on Rules of Origin and Customs Valuation.

The global reach of the WCO, the strategic role held by its members in international trade and the many "tentacles" held by the latter domestically –liaison with many other networks responsible for diverse issues such as environment, transportation, consumer protection, tax collection, trade, agriculture, and cultural heritage, makes it a perfect regime to be the core of coordination of multilateral initiatives to foster the IPR enforcement agenda.

The expected technical role of the WCO in terms to IPR enforcement would be to assist WTO members in the implementation of TRIPS provisions domestically, in respect to the technical aspects of this Agreement. The WCO has instead promoted stricter IPR enforcement among its members, focusing on the exchange of best practices based on high standards adopted by a few states and on the provision of technical assistance beyond TRIPS standards. The higher domestic standards that have been promoted have proved highly controversial, as there has been situations

in which they have been implemented in disregard to the territorial scope of IPR[64], created barriers to trade and infringed provisions contained in the TRIPS and more generally in the GATT[65].

The domestic standards alternative to the TRIPS promoted within the WCO has led customs officials to misconceptions in regards to definitions and the scope of protection that shall be provided under the TRIPS and the limits of the international obligations they are required to implement domestically. Due to the technical nature of the Organization and the regulators constituting its membership, it leaves aside the debate on the desirability of the implementation of stricter rules on border measures from the perspective of states in view of national laws, principles and public policies, which would preclude the one-size-fits-all approach currently pursued.

a) choice of regime based on the characteristics of the Organization

The literature points out that, in organizations dealing with controversial topics, weaker states do not want to delegate a high level of authority for rulemaking, as they foresee that norm setting might be captured by the interests of powerful states[66]. The technical nature of WCO activities and the relatively high degree of autonomy enjoyed by the Organization to conduct its attributions suggests that it has not been originally seen as a political or strategic forum by its member states.

However, in practice the high delegation of power conferred to the Organization and the nature of the activities carried out by WCO members favors the enhancement of its role as a major venue for the fight of piracy and counterfeiting. The fact that the authorities represented in the Organization are directly involved in the implementation of border measures in the domestic level makes it possible to

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[64] See Joined Cases C-446/09 and C-495/09 *Koninklijke Philips Electronics NV et. alt., Nokia Corporation vs. Her Majesty's Commissioners of Revenue and Customs,* Dec 1, 2011 Court of Justice of the European Union, where the Court decided that goods in transit in the EU could not be characterized as counterfeit or pirated if not proven that they were intended to be put on sale in the European Union.

[65] As argued in the requests for consultations by Brazil and India with the EU and the Netherlands before the WTO, in view of the seizure of generic drugs in transit from India to developing countries by Dutch custom authorities: *European Union and a Member State* - Seizure of Generic Drugs in Transit - WT/DS408/1 (Complainant: India), May 11, 2010 World Trade Organization and *European Union and a Member State* - Seizure of Generic Drugs in Transit - WT/DS409/1 (Complainant: Brazil), May 12, 2010 World Trade Organization. The consultations are currently suspended due to an agreement between India and the EU, whereby the latter assented to modify its customs Regulation 1383/2003 so as to avoid its extensive interpretation by member states and prevent the occurrence of similar incidents in the future.

[66] See Randall W. Stone, 'The Scope of IMF Conditionality' (Fall 2008) 62 International Organization, p. 593, and Stone, *Controlling Institutions: International Organizations and the Global Economy*.

avoid a debate on international standards for IPR enforcement and target any stringent procedures as a matter of implementation. The WCO and its members have an incentive to promote this agenda, as it allows them to acquire a central role in the IPR agenda priority of G8 countries.

Lack of democratic representation is a characteristic resulting from the structure of the WCO, which concentrates significant power in the hands of a few members participating in a key body of the organization. Policy recommendations to the main body, the Council, are delineated by the Policy Commission, a steering group of 24 members (plus a few observers) representing the totality of 178 members[67]. Although the Council is represented by the total membership, its decisions are based on the recommendations of the Policy Commission. Together with the Council, the Policy Commission further directs the activities of the technical working groups within the Organization, even though this attribution is not formalized in its terms of reference.

The balance of power is a result of the representativeness of each region in the Policy Commission. The latter is composed by the Chairperson of the Council; six Vice-Chairpersons of the Council, one for each region; one representative for East and Southern Africa; seven for Europe; one for North of Africa, Near and Middle East; four for Far East, South and South East Asia, Australasia and the Pacific Islands, one for West and Central Africa, and three for North America, Central America and the Caribbean. In sum, representativeness is not proportional to the number of countries or the population of each region. Adding to this, representatives of a simple majority of the Policy Commission shall constitute a quorum and approval of decisions is based on two-thirds of the votes of members of the Policy Committee present in a session[68].

Lack of transparency is another factor supporting the exercise of influence by a small group inside the WCO. Lack of transparency of the debates extends to WCO members that are not members of the Policy Commission, as the former are not entitled to participate in the sessions, unless under exceptional circumstances. Access of public interest organizations is reported to be hampered, in contrast with the participation granted to the private sector[69]. Information available online is extremely limited and copyrights are claimed by the WCO over the documents and meetings conducted by the Organization, which further restricts the dissemination of its activities.

Gaps in formal procedural rules in decision-making aspects also increase

[67] 173 countries, 1 customs union (EU) and 4 customs territories.
[68] Appendix, Policy Commission Rules of Procedure.
[69] Henrique Choer Moraes, 'Dealing with Forum Shopping: Some Lessons from the SECURE Negotiations in the World Customs Organization' in Xuan Li and Carlos M. Correa (eds), *Intellectual Property Enforcement: International Perspectives* (p. 159-188, Edward Elgar Publishing Limited 2009), p. 173.

exercise of informal governance by powerful countries[70], either directly or through the WCO Secretariat[71]. To give an example, it is not clear what are the criteria adopted to determine whether and when a member state that is not a member of the Policy Commission is allowed to attend its sessions and who is responsible for this assessment; the same questions can be posed in relation to the concession of access to interest organizations and private parties to participate in meetings of the working groups.

Another characteristic of the Organization that contributes for its strategic choice is the representation of states by domestic customs authorities in various committees. Diplomats do not have a formal seat in the WCO; instead, they have to liaise and negotiate with customs officials from their own countries if they want to have the political views of their respective states expressed. The terms of reference of the Committee on Enforcement, for example, establishes that it should be represented by "officials responsible for and specialized in enforcement matters".

The IPR enforcement agenda benefits from the fact that it increases the attributions of customs officials, and consequently their power. Customs authorities in developing countries hold mostly the role of collecting taxes, whereas in developed countries they exert a more stringent role in safeguarding the borders. This last role calls for the empowerment of customs officials, who are favorable to acquiring a more relevant participation in the structure of the government.

The lack of expertise of customs officials on IPR issues, from both a technical and a political perspective, is an additional challenge to opposition in the WCO. This i) favors the use of definitions and arguments that lead to misconceptions[72] in terms of the scope of the current multilateral level of IPR enforcement countries have to comply with; and ii) propitiates the promotion of broader definitions for counterfeit and pirated goods in comparison to the TRIPS.

The location of the headquarters of the WCO in Brussels, and the fact that meetings, including those of the Policy Commission, are organized in various countries, makes it more difficult for public interest groups and weaker member states to participate, follow the debates and the agenda carried out by the Organization.

b) strategies adopted

At the WCO, the main strategies were publicly set in place in May 2004, when the Organization co-hosted with Interpol, with the support of WIPO and the cooperation

[70] Stone, 'The Scope of IMF Conditionality', p. 590.
[71] An example is the submission, by the WCO Secretariat to the Policy Commission, of a document that has not achieved consensus among members of the WCO SECURE Working Group; see Moraes, p. 176.
[72] For a list of the misconceptions promoted on this topic, see Li

of the private sector[73], the First Global Congress on Counterfeiting in its headquarters in Brussels. The event sought to develop common principles and initiatives to strengthen IPR enforcement, to raise the perception of its relevance and effects before developing countries and consumers, as well as to increase mechanisms for inter-governmental cooperation.

In the following year, as a result of a successful request by the UK in the WCO sessions of June 2005, a Task Force on IPR was created in the WCO, for the purpose of coming up with solutions on how to fight counterfeiting, including the possibility of developing an IPR framework of standards. The Task Force held its first meeting in the headquarters of the WCO in the end of Oct. 2005. The private sector was represented and also chaired the meeting, through the International Trademark Association (INTA)[74].

The WCO Secretariat has had an active role in moving the IPR agenda forward at the WCO, as it enjoys a considerable level of autonomy for proposing initiatives. It proposed, in the meeting of the Policy Commission held in June 2006, an action plan for the development of the initiative in the Organization, based on the following objectives: publication of annual statistics on counterfeiting and piracy practices; creation of compendiums of best practices on legislation and training; increase of cooperation with the WTO, WIPO, Interpol, OECD and the EU, as well as with the private sector; and attainment of funding from both the private sector and states to enable the implementation of the plan[75].

The leading role of the WCO in the promotion of the G8 IPR enforcement agenda fostered its participation as a consultant in the preparations for the G8 Summit of June 2007 in Heiligendamm. As a result, the declaration issued at the end of the Summit supported WCO initiatives for advancing cooperation, coordination and exchange of information among customs authorities, including the establishment of IPR enforcement guidelines[76].

The WCO IPR Taskforce proposed the creation of a framework of standards to fight IPR infringements (SECURE - Provisional Standards Employed by Customs for Uniform Rights Enforcement), which was prepared as a draft in February 2007 by the Enforcement Commission and presented by the Secretariat in the meetings of

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[73] Namely, the Global Business Leaders Alliance Against Counterfeiting (GBLAAC), the International Trademark Association (INTA), the International Security Management Association (ISMA) and some member companies of the World Customs Organisation's IPR Strategic Group (WCOIPR).

[74] International Trademark Association, 'INTA Bulletin' Dec 1, 2005, v 60, n 22 <http://www.inta.org/INTABulletin/Pages/INTASecretaryRichardHeathChairsWorldCustomsOrganizationTaskForceMeeting.aspx> accessed April 10, 2012

[75] Report of the Policy Commission, *55th Session, SP0217E1b* (World Customs Organization, June 2006)

[76] G8 Summit Declaration, *Growth and Responsibility in the World Economy*

the Policy Commission and the Council in June 2007. The G8 influence in the establishment of an IPR enforcement agenda at the WCO is further evidenced by express reference to the corresponding G8 summits establishing this agenda as a priority, as stated in the introduction of the June 2007 version of SECURE.

The SECURE Working Group was created by the Council in the June 2007 meeting and conveyed four meetings between October 2007 and October 2008 for the development of IPR enforcement standards, which went beyond TRIPS provisions and of WCO's mandate[77].

Due to a reported lack of transparency in the process[78], combined with the lack of IPR policy expertise and awareness by regulators represented in the WCO, developing countries did not raise opposition to the draft IPR enforcement standards presented at the WCO summit meetings of 2007.

After this first meeting, both the procedures undertaken and contents of the draft – translated into global standards for the enforcement of IPR by customs officials above TRIPS provisions – were noticed by a developing country's diplomatic mission in Brussels.

Opposition by Brazil in the second meeting of the SECURE Working Group, in February 2008, was not accompanied with widespread support by other developing countries. The surprise factor of the strategy, conducted in a technical organization with a mandate for implementation rather than norm setting in the international level, had led to a low level of monitoring of its activities by developing countries up to that moment. Furthermore, states' experts aware of the sensitive political aspects of IPR and involved in international rulemaking negotiations on the topic are usually concentrated in Geneva, in view of the location of the WTO and WIPO headquarters. By the time the strategy was identified, there was not enough time to propagate it, organize a coordinated opposition in due time for the second meeting of the SECURE Working Group.

However, the immediate publicity of the initiative outside of the WCO – the Organization is highly nontransparent, most of its documents are not made available to the public and the WCO goes as far as to claim copyrights over them – contributed to disseminate and raise awareness about it before public interest organizations and developing countries' experts on IPR policy located outside of Brussels.

Coordination among developing countries' representatives in Brussels, Geneva, their capitals and other domestic authorities, as well as across states, making use of

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[77] Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries* (Enforcement of Intellectual Property Rights and Developing Countries, ICTSD Issue Paper n 22, 2010), p. 49-53

[78] For example, the draft standards were made public to member states only 19 days prior to the Council June 2007 meetings; see Moraes, p. 179.

networks that were previously nonexistent or weak, allowed the organization of a counterstrategy with the assistance of an international public interest organization. The result was a strong opposition conveyed in the third meeting of the SECURE Working Group, in April 2008. Brazil, Ecuador, Argentina, Mexico and China argued against the substance of the draft and the procedures for the negotiation of SECURE[79].

As a result of the coordinated opposition, instead of having SECURE forwarded to the Council for approval in the June 2008 meeting as initially envisaged by the WCO Secretariat, the Policy Commission recommended that the draft was sent back to the SECURE Working Group for further work.

In the fourth meeting of the SECURE Working Group, coordinated opposition led to a shift of the debate from the substance of the draft to procedural irregularities, focusing on the lack of transparency, legitimacy and member-driven process. The discussion turned to the Terms of Reference of the Working Group, which had not been subjected to debate and was considered to exceed the competence of the WCO[80]. A deadlock among members resulted in the recommendation by the Policy Commission in January 2009, approved by the Council in the sessions of June 2009, that the SECURE Working Group and its standard-setting task were set aside; on the other hand, it also decided that technical assistance on this field proceeded and that a new body were created to replace SECURE and deal with customs-related IPR matters[81].

The restraint of the IPR enforcement agenda at the WCO, which avoided the establishment of a code of best practices under SECURE, was possible in view of the timely awareness of the strategy: should it had taken longer for states to realize it, it would have been too late to halt the initiative in the Organization. Adding to this, coordination for the organization of a common counterstrategy in a very short period of time (between the second and the third meetings of the SECURE Working Group) was essential, as well as resorting to networks to organize the opposition and enhance its reach.

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[79] Arguments included the lack of debate and of approval of the draft terms of reference for the Working Group, leading SECURE to operate on informal basis; lack of mandate by the WCO to create international rules beyond the TRIPS; opposition to the express reference to the G8 in the introduction of the SECURE draft; proposals to modify the text of the SECURE standards and add a provision stressing that the document should not impair the flexibilities allowed under TRIPS and other international agreements. WCO SECURE Working Group, *Third Meeting, LS0008E1b* (Brussels, April 2008). See also Li, 'WCO SECURE: Legal and Economic Assessments of the TRIPS-Plus-Plus IP Enforcement', p. 65-68 and Moraes, p. 181-182

[80] The standard-setting characteristic of the initiative was claimed to exceed WCO's role in assisting with the implementation of TRIPS provisions through the use of technical tools.

[81] Report of the Policy Commission, *60th Session, SP0292E1a* (World Customs Organization, Jan 2009, Jan. 2009)

The new body established in June 2009 to replace SECURE - the WCO Counterfeiting and Piracy (CAP) Group - has significantly more limited attributions determined by its terms of reference. It limits the scope of the Group to the establishment of a dialog and exchange of views, experiences, practices and initiatives on border measures against trademark counterfeiting and copyright piracy; excludes all forms of norm setting (any kind of binding or non-binding provisions independently of its denomination, including best practices, guidelines, standards and recommendations); and determines that the respective levels of international commitments undertaken by states be respected.

Although the mandate has considerably restricted the role of the CAP Group, in practice initiatives for an enhanced IPR enforcement agenda continue to advance, even if at a much slower pace. Technical assistance is provided by the WCO based on standards above the TRIPS if requested by national customs authorities; the ongoing elaboration of an "IPR Legislation Compendium on Border Measures" by the CAP Group is a softer version of best practices, containing practices beyond the TRIPS and intended to be used for capacity building; customs authorities are being contemplated as a focal point to have access to networks of public prosecutors and judges, in order to foster the IPR enforcement culture among them, build capacity, obtain adherence and expand the effectiveness of initiatives; and joint meetings have been held between the CAP Group and the Right Holders Consultative Group (RHCG), where right holders present their demands and customs authorities their supply of recent activities to deter counterfeiting and piracy. Discussions in the Group focus on how to further enhance implementation of IPR enforcement provisions independent of multilateral standards, rather taking into account higher standards adopted domestically by a few members. The current strategy, as a result of opposition, has also been to direct efforts and voluntary financial contributions of interested states towards capacity building initiatives. Finally, it departs from the assumption of a high magnitude of the problem, which has not been corroborated by strong evidence but is rather anecdotal[82], focusing on the step of implementation that is at the end of norm setting. It further assumes that it is the primary responsibility of customs authorities, and therefore states, to provide increased relief to IPR violations.

Progress on the results of this strategy seems to be a matter of time, as soft power is a potent tool for the dissemination of high standards of practices through networks. Furthermore, the atomization of actors moving the agenda forward at the international level or implementing at in the domestic level makes it difficult to identify its origins, refrain soft power and establish accountability for the strategies and their potential consequences.

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[82] For an economic assessment of existing limitations of studies elaborated so far, see Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective* (Enforcement of Intellectual Property Rights and Developing Countries, ICTSD Issue Paper n 22, 2010), p. 1; 12

4.1.4. Organization for Economic Co-Operation and Development (OECD)

The current role of the OECD conferred by the G8 in the IPR enforcement agenda is the collection of data and elaboration of studies to identify problematic areas and propose recommendations for action, as well as to disseminate practices and measures among its member countries and emerging economies intended to be invited to a dialog[83].

The OECD elaborated a report earlier in 1998 on the economic impact of counterfeiting and piracy. It was heavily based on data provided by right holders[84], thus tending to an upward bias. A more recent project, consisting of three new studies, took place as from 2007. The first report was published in June 2008 and updated in November 2009, and took into account customs interception data - which is still very unevenly collected, if collected at all, by domestic authorities - leading to indirect estimates of the magnitude of counterfeit and pirated goods[85].

The second study focused on piracy of digital content - which can be directly identified with interests of private holders and states that are net exporters of IP knowledge. The report was published in July 2009. A third report, on infringements of other IPR, has been suspended in view of the controversy in the international setting about the limits of the scope of IPR that should be subject to infringement measures.

Besides the ongoing controversies, the accuracy of statistics produced by the mentioned studies has been questioned by the doctrine in view of the considerable expansion of the definitions adopted for 'pirated' and 'counterfeiting' in order to include all IPR modalities, in contrast to the definitions set forth in the TRIPS Agreement, leading to an expansion of the reported effects of those practices and a misunderstanding on the obligations of states under the TRIPS Agreement[86]. Further, the study does not distinguish between private non-commercial use and commercial use of the products infringed, as only the latter is contemplated by the TRIPS; an upward bias of estimates is also expected, as a result from data provided by the industry[87] and the economic interests involved. Estimates also assume a high

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[83] G8 Summit Declaration, *Growth and Responsibility in the World Economy*; see also G8 Summit.

[84] OECD, *The Economic Impact of Counterfeiting* (OECD, Paris, 1998), p. 8. It cautions for the fact that the data on the losses of the industries might be overestimated.

[85] OECD, *The Economic Impact of Counterfeiting and Piracy: Executive Summary* (OECD, Paris, 2007), p. 16

[86] See Fink p. 32-33, and Li, 'Ten General Misconceptions About the Enforcement of Intellectual Property Rights', p. 17-18.

[87] Duncan Matthews, *The Fight Against Counterfeiting and Piracy in the Bilateral Trade Agreements of the EU* (European Parliament Briefing Paper, Brussels, June 2008), p. 6-7, 30.

degree of substitutability between the original and the infringed products[88]. This assumption underestimates the high elasticity of demand in developing countries, as a result of high prices of original products and financial constraints of consumers[89]. The criteria used for determining the magnitude of the problem is further aggravated by the use of prices of IP protected products to assess the value of counterfeiting and pirated goods. Adding to this, it has been reported that the units of measurement of seized goods have not been applied consistently - the EU, for example, measured each cigarette as a unit seized rather than a package on a report published in 2005 and later admitted the error[90].

The use of definitions that do not find grounds on existing multilateral agreements leads domestic enforcers to misunderstandings in regards to the limits of definitions and obligations assumed under the TRIPS. Lack of information and bias against the adoption of precise definitions and measurements of the effects of counterfeiting and pirated goods also remain, but existing reports benefit from the absence of alternative studies.

The G8 strategy towards enhancing IPR enforcement cannot be explained by a significant increase in the global level of counterfeit and pirated goods in recent years. The G8 agenda preceded the 2007 OECD Report, and before the release of the latter it was recognized that the extent of IPR counterfeiting and piracy was uncertain[91]. The global dimensions given to the issue are not based on objective data. A considerable number of developing countries have not produced statistics on the issue, also given the fact that the major role of their customs authorities is still to collect revenue rather than protect their borders.

The claimed causal effect between the increase, in recent years, of the number of counterfeit and pirated goods seized by customs authorities of industrialized countries as a result of the increase of these practices is yet to be evidenced scientifically. In the EU, the number of seizures almost doubled in 2010 in comparison to 2009 (from around 41.000 to 79.000)[92]. However, it is not clear whether this increase results from an exponential escalation of counterfeiting and piracy, from the enforcement of stricter border measures in the past years or else from an increase of resources for its repression.

For further arguments see also Li, 'Ten General Misconceptions About the Enforcement of Intellectual Property Rights', p. 21-25.

[88] Matthews, p. 7

[89] Fink, p. 32.

[90] Li, 'Ten General Misconceptions About the Enforcement of Intellectual Property Rights', p. 24

[91] Report of the Policy Commission, *56th session, SP0232E1a* (World Customs Organization, Jan. 2007)

[92] European Commission - Taxation and Customs Union, *Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border* (2010), p.

Finally, the danger of products for the safety and health of a society varies considerably and the generalization of this argument leads to the consideration of clothing and copyright goods as providing more risk than weapons - which are actually subject to less international regulation and broadly traded. This risks leading to the distribution of equivalent amounts of resources to screening and identification at the border, to the benefit of private holders and their home states rather than public interest priorities of the state called to implement the measures.

4.1.5. Universal Postal Union (UPU)

The Universal Postal Union, one of the agencies of the United Nations system, has also been called to take part in the IPR enforcement agenda, mostly under the initiative and coordination of the WCO. The global postal network is a value asset due to its coverage to the most remote regions, which can provide a significant contribution for an extended reach of IPR enforcement initiatives.

The role of the UPU and its network of postal agents has modified over time to become more strategic in recent years, in view of a significant decrease in mail volumes since the financial crisis, mostly in developed countries. Other reasons include a considerable rise in parcel traffic as a result of e-commerce, the reduction of trade barriers and increased economic globalization. The UPU Nairobi Strategy for the years 2009-2012, to be followed by the Doha Strategy for the years 2013-2016, acknowledges those changes in the business environment and sets, among other strategies, increased coordination with customs officials, airlines and standards authorities.

a) structure

The UPU is a technical organization with headquarters in Berne, Switzerland, responsible for global cooperation among postal services. It has 192 member countries and holds a Congress every four years hosted by different member countries, with the participation of national Ministers. Below the Congress is the Council of Administration (CA), composed by 41 member countries, with annual meetings to ensure the continuity of activities between Congresses and with powers to approve regulations and new procedures. These are proposed to the CA by the Postal Operations Council (POC), a body with technical and operational attributions represented by 40 member countries. The secretariat functions of the Organization are conducted by the International Bureau (IB) located in Berne.

The above structure limits representativeness of membership at UPU. The Congress, which represents the entire membership, only takes place every 4 years. UPU is ruled by the CA during this interval, which in turn rely on recommendations made by the POC; both bodies suffer from democratic deficit, being represented by a minority of the total membership.

Decision-making for the modification of UPU Constitution and approval of regulations in the Congress are not based on consensus, but rather on a majority of two-third of the votes of members present in the Congress. Further, the fact that meetings take place in different countries makes it more difficult for weak states to assure participation. Finally, the Organization lacks transparency - even if not as striking in comparison to the WCO. It is not possible for non-members to obtain direct access to all relevant documents related to the activities of the Organization and information available online is incomplete.

The UPU has three major sectors liaising with the WCO for cooperation. The WCO/UPU Contact Committee, created in 1965, is composed by representatives of 6 member states of each Organization, with the attribution to advance studies and issue reports with operational recommendations for the simplification of customs formalities in postal services. With the increasing cooperation and coordination among networks of customs and postal officials approved by Resolution C 29/ 2008 (addressed in the next session), its role has been expanded.

The Customs Support Project Group was created by the POC in 2003, with attributions to address treaty and policy issues related to customs. It has been charged with the conduction of a study on customs and security-related issues concerning IPR, having concluded that postal operators do not have legal competence to determine whether a product is counterfeit or a customs declaration has been falsely completed[93]. It was also one of the committees in charge of drafting Resolution 40/ 2008 (addressed in the following section).

By its turn, during the January 2005 session of the UPU POC, the Customs Data Interchange Group (CDIG) was created, coordinated by the WCP/UPU Contact Committee and the Customs Support Project Group and reporting to the UPU Standards Board. Its work is to develop an electronic system using common standards to allow exchange of data among customs and postal networks (the so-called EDI – electronic data interchange), which will facilitate monitoring and repression of prohibited items sent by post.

Finally, Resolution C 29/ 2008 created a UPU Customs Group, under the supervision of the POC and the International Bureau, to strengthen cooperation between UPU and WCO[94].

b) strategies

The inclusion of the UPU and its member states' networks in the fight against counterfeiting and pirated items took place through a series of decisions undertaken during the 24th session of the UPU Congress, from July 23 to August 12, 2008.

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[93] See Universal Postal Union, 24th Congress, Resolution C 29/ 2008, "Work Relating to Customs Matters", Aug. 2008

[94] Ibid

One of the major proposals, submitted by France and Italy with the support of the UK and the Netherlands, was the amendment of Article 15 of the UPU Constitution[95]. The document asked for the inclusion, in the list of prohibited items sent by post, counterfeiting and pirated articles (paragraph 2.1.2.bis); the word "other" before the existing "articles the importation or circulation of which is prohibited in the country of destination" (paragraph 2.1.3.) and an additional paragraph determining the treatment of identified prohibited items according to each national legislation, which was later withdrew in view of opposition by the United States, justified by the fact that it did not want to leave space for countries to decide whether to return, forward to destination or deliver the items, but instead confer a stricter treatment to pirated and counterfeiting goods, equating it to the treatment provided to narcotics and immoral articles[96]. The expressed intention was to establish the responsibility of the sender of an item by post, when filling the corresponding form; to demonstrate support to the WCO initiatives in the field of IPR enforcement; and to reduce the circulation of pirated and counterfeited products by mail. The proposal was voted and passed without significant debate or opposition.

It is interesting to note that, while counterfeit and pirated articles are now items prohibited to be sent by post, no mention, restriction or prohibition is made in relation to weapons – quite an alarming contrast.

Another proposal submitted during the Congress by the POC[97], elaborated by the WCO/UPU Contact Committee and the Customs Support Project Group and introduced by France, proved to be more controversial. Resolution C 37/ 2008 states, in its preamble, that a study conducted by the UPU Customs Support Project Group concluded that postal authorities do not have legal authority to determine whether a product sent by mail is counterfeited or pirated. On the other hand, it assumes and supports customs authorities, together with IPR experts, as primarily responsible for such identification – a role that does not correspond to the laws in force in various countries or with multilateral standards. It also urges UPU member states to encourage their postal authorities to "take all reasonable and practical measures to support Customs in their role of identifying counterfeit and pirated items in the postal network" and to "cooperate with the relevant national and international authorities to the maximum possible extent in awareness-raising initiatives aimed at preventing the illegal circulation of counterfeit goods, particularly through postal services".

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[95] Universal Postal Union, 24th Congress, Convention Proposal 20.15.6, France and Italy, May 2008

[96] Universal Postal Union, 24th Congress, Convention Proposal 20.15.9, Amendment to Proposal 20.15.6, United States, July 2008

[97] Universal Postal Union, 24th Congress, Resolution 40, "Proposal of a General Nature", Postal Operations Council, July-Aug. 2008.

Member states, mostly developing countries, manifested intention to proceed with the debate to obtain further clarification on the implications of the resolution and consider, among others, further studies with WCO, WIPO and WTO before voting the new regulation in the UPU. The chair of the meeting, however, decided to proceed directly to a vote, leading some countries to file a procedural motion to continue with the debate, which did not succeed when voted[98]. The Resolution was then put to a vote and approved by majority.

As a reaction, some developing countries filed an appeal to the plenary session of the Congress to have the preamble of the Resolution modified, in order to recognize the ongoing work in the field of IPR before other international organizations. They also requested the substitution of the proposed declaration of customs authorities as the major enforcers of IPR through the recognition that "it is the responsibility of competent national authorities to define counterfeit item in accordance with their national legislation". The appeal was accepted, and the Resolution was approved under n. C 37/ 2008[99]. The WCO was present in the Congress sessions and supported both proposals.

A third proposal did not go through. France, supported by Italy and Great Britain, intended to amend Article 23 of the UPU Convention to establish sender's liability also in the country of destination of the mail, which would lead to the exercise of extraterritorial jurisdiction; the majority of members voted against it, including the U.S.[100].

Two additional proposals were approved during the same Congress. Resolution C 29/2008 reestablished the UPU-WCO Contact Committee and created the UPU Customs Group, coordinated by POC in cooperation with the International Bureau. The purpose is to coordinate more closely with customs authorities and support the work of the latter, through the establishment of common standards for exchange of information and (EDI) among networks of postal operators and among these and customs authorities; to complete the "Postal Export Guide", which will enable postal authorities to verify, in an electronic system, whether items are prohibited, restricted or admitted in the country of destination, thereby controlling the remittance of exports by post; to improve compliance with customs declarations; to develop joint guidelines with the WCO for further coordination between the networks of both Organizations on operational issues, including security; to provide technical assistance for member countries; and "to address safety and security concerns, including the monitoring of the situation regarding infringements of

[98] Universal Postal Union, 24th Congress, Report of the Committee 4 (Convention: Regulatory Issues), Third Meeting, Aug. 1, 2008
[99] Universal Postal Union, 24th Congress, Doc. 40.1, Resolution C 37/ 2008, "Counterfeit and Pirated Items Sent Through the Post", Aug. 2008
[100] Universal Postal Union, 24th Congress, Report of the Committee 4 (Convention: Regulatory Issues), Third Meeting, Aug. 1, 2008

intellectual property rights in relation to postal traffic"[101]. These goals were declared under this Resolution as a high priority of the Nairobi Postal Strategy of 2009-2012.

The last Resolution related to customs passed during the 2008 Congress (Resolution C 56/2008) promotes the enhancement of the electronic data exchange (EDI) system among networks of postal operators and customs authorities on postal shipments, for the promotion of safety in different levels of the supply chain on uniformly, while at the same time accelerating the clearance of postal items[102]. Since counterfeiting and piracy have increasingly been promoted as a security issue, it will not be surprising to see this tool being applied also to pirated or counterfeited items sent by post. The further development of the system will provide a relevant tool for tracing and identifying the source of products sold through e-commerce. It should further be taken into account whether scarce resources should be used for the purpose of tracking correspondences that represent a low value of the total estimates of counterfeited and pirated goods, also to the extent they are posted for non-commercial use.

The above resolutions have additional implications in the field of IPR enforcement to the extent that they promote understandings that are subject to diverging domestic policies and have not been consensually agreed at the multilateral level. It is not clear whether the UPU, as a multilateral organization, will fight pirated copyrights and counterfeited trademarks according to the definition multilaterally agreed by states under the TRIPS; further, in the resolutions the UPU promotes and supports customs authorities attributing them with a main role in IPR enforcement (whereas art. 51 of TRIPS determines enforcement by competent judicial and administrative authorities, to be determined as such as by each state); it integrates IPR within safety concerns by generalizing the effects of counterfeiting and piracy items and promotes campaigns to warn consumers about the risks, even thought it is difficult to attribute any risks deriving from pirated DVDs or counterfeit trademark clothing; it assumes that postal operators will be dedicating human and financial resources to fight counterfeiting and pirated items sent by post to the same extent no matter the differences in risk posed to consumers, also when the major interest lies with the right holders and other instruments are available for them to enforce their private rights; there is no mention to art. 60 of TRIPS, which enables members to exclude, from their IPR enforcement obligations under the Agreement, items of non-commercial nature sent in small quantities (*de minimis* imports); no mention to the discretion of states to decide on whether to establish IPR enforcement on their exports is made; it is not clear what are the IPR enforcement standards being used to provide capacity building to domestic postal operators, if those agreed in the multilateral level (which seems unlikely) or else higher

[101] Universal Postal Union, 24th Congress, Resolution C 29/ 2008, "Work Relating to Customs Matters", Aug. 2008

[102] Universal Postal Union, 24th Congress, Resolution C 56/ 2008, "Expanded Use of Electronic Data Interchange (EDI)", Aug. 2008

standards promoted by countries exporting IP technology.

4.2. Framework of strategies

Mapping the processes through which strategies have been adopted in recent years to foster the IPR agenda at the multilateral level makes it possible to delineate their framework taking into account different steps considered by the states promoting the strategies.

At a first moment, considering the political chessboard of international regimes, states opt for regimes that could be more beneficial to advance the strategies based on a) the goals to be achieved b) the characteristics of the organizations contributing for achieving the most favorable outcome; c) the speech around which the issue is framed in order to target different audiences and enhance the chances of success.

At a second moment, the chances of obtaining a favorable outcome for the strategies in each organization are assessed taking into account the extent to which the following elements are available, both to forward initiatives and to limit opposition in the regime: a) use of networks; b) informal mechanisms; c) democratic deficit; d) lack of transparency; e) establishment of best practices.

The strategies at the multilateral level have been adopted almost simultaneously, as from the mid- 2000s. This increases the chances of obtaining a successful outcome, as well as makes it difficult for countries with diverging interests to follow up and organize opposing coalitions in all fronts in view of their scarce financial and human resources. Further, the ability of developed countries to extensively coordinate coalitions and use networks as an instrument to foster common strategies gives them considerable advantage against the more limited scope of coordination among developing countries and their general inability to realize the power and make a consistent use of networks on a constant basis, with some exceptions.

4.2.1. Choice of multilateral regimes

The natural choice of regime for states interested in fostering multilateral provisions on IPR enforcement would be to negotiate a new set of rules at the WTO. The Organization already hosts the TRIPS Agreement, has the benefit of linking trade to IPR and enjoys an enforcement mechanism system. However, as previously stated, there is no space for the negotiation of more stringent rules on IPR. Developing countries consider that they already bear high costs with the existing standards, which are harmful to their interests, limits their policy space and are costly to be implemented, to the expense of other national policies they would rather prioritize. IPR enforcement has not been included in the WTO Doha Round of

trade negotiations, and attempts to increase those rights through a soft law approach in the TRIPS Council have been systematically opposed.

WIPO would be an alternative forum to the WTO, in view of its expertise on IPR. However, attempts to advance increasing hard law on IPR led to the development of plurilateral rather than multilateral treaties in the Organization - such as the WIPO Copyright Treaty. The Development Agenda brought by developing states to both WTO and WIPO expressed their dissatisfaction with the unilateral private rights perspective adopted on IPR issues and framed the debates outside the single scope of protection of private holders' rights, making it more difficult to negotiate new rights without balancing other interests against them. The WIPO Advisory Committee on Enforcement, created in 2002, had norm-setting negotiations excluded from its mandate and is limited to providing technical assistance and representing a forum for the exchange of experiences.

Due to the sensitive political issues addressed by both WTO and WIPO, their original structure and rulemaking was established so that a strong formal mechanism prevails and states can hold considerable control over the processes[103]. As a result decisions are, by rule, adopted by consensus, thereby providing a strong mechanism for states to halt strategies opposing their interests. This has led states interested in advancing an IPR enforcement agenda to seek alternative and more favorable venues.

a) Soft law vs. hard law

The ultimate goal of current multilateral strategies is to foster stringent IPR enforcement throughout countries, mostly through border measures as it captures the absolute majority of total trade. Since hard law on IPR is at present not a viable option, the solution has been to shift towards a soft law approach at the multilateral level.

G8 countries (evidence shows that, in practice, it is actually the G7 countries who are promoting the IPR enforcement agenda in different multilateral settings) have been moving away from a hard law approach towards the elaboration of soft law and the exercise of soft power in the multilateral setting through the use of networks. Hard law elaboration has shifted to the plurilateral and bilateral levels, where it is easier to reach a consensus among countries sharing similar interests, or else through the use of bargaining power to exercise constraint on weaker trade partners.

The impossibility to produce new hard law on IPR in the traditional multilateral regimes has led interested states to resort to other intergovernmental organizations without expertise on IPR, to avoid debates around the desirability and pertinence of

[103] For a theoretical framework see Stone, *Controlling Institutions: International Organizations and the Global Economy*

new global rules fostering more stringent IPR enforcement. Instead, initiatives have been adopted for the creation of codes of best practices in these organizations. Although soft law might be helpful for states to achieve a compromise in certain situations[104], in the current context it has been used as an instrument to advance higher standards for IPR enforcement rules among states, without the promotion of the corresponding debate that should precede its creation.

At the WCO, where coordination of outstanding strategies has taken place, the initiative fostered for the creation of a code of best practices on IPR enforcement based on experiences of national authorities (SECURE) received strong opposition by developing countries when they realized the political implications behind the technical arguments. For the moment such initiatives have been restrained to a certain extent, but they are still been moved forward through softer mechanisms, including the ongoing elaboration of a guide containing states' practices and capacity building initiatives, and under different denominations.

b. Regimes outside the scope of IPR

The option for alternative multilateral regimes outside WTO and WIPO brings numerous benefits. Among others, targeting IPR in the stage of implementation through soft law mechanisms enables states to skip all the steps of norm setting. It avoids multilateral debates on issues involved in the rulemaking process, such as the precise quantification of the extent of violations[105], to be followed (or not) by a multilateral process for the negotiation of new rules on IPR enforcement as a result of consensus on the extent to which multilateral rights and obligations should be modified, taking into account a balance between different priorities and interests of states.

Alternative venues also favor the promotion of misconceptions about standards existing in traditional regimes, through different means: by expanding definitions multilaterally agreed, as well as the extent of enforcement obligations and the authorities bearing the main responsibility for the enforcement of IPR; by generalizing the harmful effects of counterfeit and pirated products to all economic sectors, as well as by liaising these activities to organized crime. Such strategy

[104] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' 54 International Organization 421, p. 448-449

[105] This process would include i) neutral estimates of the actual damage resulting from counterfeiting and piracy, based on unified economic data and realistic parameters, such as the degree of substitutability in different countries for different sectors, as well as concepts deriving from existing multilateral standards, to increase the legitimacy of the results; ii) the determination of the priority economic sectors to be targeted by states for the enforcement of IPR, based on the negative effects for society rather than to private holders, so as to justify a shift of costs from the latter to the former; iii) an assessment of costs and benefits for different groups of states to increase resources on IPR enforcement, avoiding the one-size-fits-all-approach. Data would provide the objective grounds for negotiating additional multilateral rules on enforcement while at the same time justifying their need.

enables to reframe the issue in the alternative multilateral regime, as well as to change the emphasis from private rights to public interests, thereby conferring the main duty to increase repression and bear the corresponding costs to states rather than right holders. It also makes the cause appealing to different audiences so that they embrace it, from domestic regulators who are empowered by the strategies to consumers targeted by awareness campaigns. In the long term, soft law and soft power disseminated through networks might lead member states to modify their behavior and domestic regulations[106].

Lack of expertise by the members of alternative regimes about IPR policy and the implications of initiatives conducted in the alternative regime for other interests of the state has the double advantage of reducing opposition and facilitating the approval of initiatives. Postal operators, criminal police and customs authorities, albeit the lack of expertise on IPR, have been called to exercise a major global role on repression of IPR violation on informal basis and notwithstanding the lack of clarity on which standards should be applied.

Intergovernmental organizations with a focus on technical matters that traditionally have not been considered as politically sensitive enjoy a larger degree of independence to conduct global governance and can be more easily manipulated to comply with the interests of powerful states[107]. Limited representativeness of membership in the decision-making process, as well as a higher influence of the secretariat in the conduction of the attributions of the organization, are a consequence of the original delegation granted by states and result in democratic deficit for rulemaking, favoring a small group of countries to exercise control over the regime.

Centralization of the coordination of current initiatives on IPR enforcement by the WCO brings additional benefits. Targeting border measures enables to reach the absolute majority of counterfeiting and pirated items traded. Further, the choice of a venue where members are directly responsible for the implementation of rules at the domestic level promotes the dissemination of best practices among networks of national regulators and reaches precisely the government representatives in charge of issuing new regulations and proposing new domestic laws in their field of competence.

At the same time, characteristics of the organizations and of the strategies pursued have created barriers to the organization and implementation of opposition by developing countries. The technical nature of activities traditionally conducted by WCO, UPU and INTERPOL has contributed to keep the recent strategies away from the attention of foreign affairs representatives of states and also out of their

[106] A regime might affect states' strategies both by converging states practices through guidelines collectively disseminated and by reducing domestic policy space as a result of increasing international regulation; see Robert O. Keohane and Nye, p. 273

[107] See Stone, *Controlling Institutions: International Organizations and the Global Economy*

reach, due to the structure and characteristics of these organizations. The choice of venues that traditionally deal with technical and operational issues has brought a surprise element to the initial strategy, allowing it to advance faster towards the establishment of a new *status quo* that would be more difficult to reverse at a later stage. Although the strategy has been timely identified and opposed before the WCO, the same cannot be said in relation to the UPU, where the absolute majority of the proposals has been approved without further considerations.

Additionally, in organizations outside of the UN system, such as the WCO, diplomats are not the official representatives of their states and have to negotiate a unified position with domestic regulators, a situation that creates additional barriers to oppose strategies. As different branches of government officials from developing countries do not coordinate their activities as a rule - in other words, they do not coordinate across networks - a unified and coherent opposition is harder to be organized in different international regimes.

Access to information is key to disseminate initiatives on IPR enforcement, understand how they have been conducted and raise awareness of members. Information, however, is not equally propagated across membership. Initiatives to foster the IPR agenda have been established with lack of transparency or through informal mechanisms, so that a small group of participating members determines the scope of initiatives and conduct them.

The fact that the headquarters of the main alternative regimes interacting for the implementation of initiatives are located outside of Geneva (INTERPOL - Lyon, France; WCO – Brussels, Belgium; UPU – Berne, Switzerland) makes it more difficult for governmental representatives and public interest organizations with expertise on IPR to participate and become aware

An increased difficulty for the participation of developing countries in the initiatives and follow-up, against their limited human and financial resources, also relates to the fact that meetings where major debates or rulemaking take place are organized in different countries each time (such as meetings by UPU, WCO, Global Congress to Combat Counterfeiting and Piracy, which is co-organized by WCO, INTERPOL, WIPO, BASCAP[108] and INTA[109]). The fact that strategies have been simultaneously pursued in different regimes also makes it difficult to follow their totality, build coalitions and organize timely oppositions.

The use of networks not only potentiates the scope and reach of the IPR enforcement agenda; it also makes it difficult to identify the source of initiatives, to trace their development as it is atomized among various actors and to effectively stop them from advancing. As information sharing is an essential element to identify

[108] Business Action to Stop Counterfeiting and Piracy, an initiative of the International Chamber of Commerce (ICC)
[109] International Trademark Association

violations, inference of their actual proportion, track of sources and exchange of information among various networks allows for the coordination of efforts and a broader reach of initiatives implemented as a result of strategies successfully advanced.

Finally, the lack of hierarchy within networks, the inexistence of a core authority or focal point and the fragmentation of the implementation of initiatives across different actors make it extremely difficult to identify those to be held responsible and promote a serious problem on how to determine and enforce accountability.

Conclusion

Increasing economic and political leverage of emerging countries in the WTO and WIPO, organizations where the decision-making process is based on consensus, has allowed those countries to block the advance of agendas that would make them worse off. As a result, regime shifting has targeted organizations where members are regulators of the executive branch of national governments, directly responsible for norm setting and for implementation of rules. Strategies have also shifted away from a hard law towards a soft law approach in the multilateral setting, in order to avoid the preceding stages of debate and negotiations for the establishment of new treaties.

Strategic processes developed so far in alternative multilateral regimes suggest that, among the main goals are

a. to establish the fight of counterfeiting and pirated goods as a high priority in each regime;
b. to initiate strategies simultaneously in a broad range of regimes, in order to make it difficult for developing countries to follow and oppose all of them successfully, in view of their scarce resources;
c. to use international regimes for the purpose of enhancing the impact of measures across a higher number of states;
d. to use international regimes to provide legitimacy to the strategies;
e. to use networks with the double purpose of enhancing the scope and impact of strategies, as well as creating a problem of accountability;
f. to expand the concepts of counterfeiting and piracy as established under the TRIPS;
g. to criminalize those practices, by associating them to the organized crime;
h. to link initiatives to fight counterfeit and pirated goods to existing initiatives and guidelines for ensuring safety and security;
i. to increase levels of punishment for IPR infringement across countries;
j. to reduce the regulatory space of states and increasingly address the issue at the multilateral level;
k. to establish a complementary role among international regimes, having the

WCO as the main focal point;

l. to coordinate the work of various regimes and integrate their respective networks to enhance the scope and efficiency of initiatives.

Attributions to foster the current strategies have been split through different plurilateral and multilateral organizations. The G8 is responsible for the determination and elaboration of global strategies; the OECD provides the studies and data under which strategies are justified; the WCO fosters the implementation of higher IPR standards by customs authorities and coordinates strategies across different organizations and their respective networks, in order to combine efforts, promote information sharing, enhance the impact of initiatives and increase the probability of obtaining positive outcomes; INTERPOL identifies, intercepts and dismantles IPR violations through its network and reinforces the concept of criminalization of IPR; UPU reinforces the role of customs as the major enforcement authorities at the national level and complements the work of the WCO through the identification and tracing of items sent by post; WTO contributes through its absolute omission: by informally transferring to the WCO its attribution to provide technical assistance for the enforcement of IPR without supervising whether it has been limited to the multilateral standards accorded under the TRIPS.

By its turn, within each alternative regime strategies have benefited from

a. compartmentalization of one single aspect of IPR, aimed at increasing the obligation of states to enhance existing enforcement mechanisms, while disregarding a balance with other interests, principles and rights set forth by the TRIPS;
b. lack of expertise of members of alternative regimes on IPR policy and on the implications of the initiatives;
c. empowerment of regulators, raising their support to initiatives;
d. low level of participation of diplomats or impossibility that they directly represent the interests of their states in the organization;
e. establishment of meetings and debates outside of Geneva;
f. democratic deficit resulting from the lack of representativeness of member states involved in the decision-making process;
g. implementation of initiatives by networks of domestic regulators, increasing its diffusion and making it difficult to trace them or identify sources for the purpose of determining accountability;
h. high level of delegation of governance from states to international organizations, increasing the scope for informal governance driven by powerful members;
i. lack of transparency of initiatives and low level of information sharing about their development, to both members and non-members;
j. lack of clear rules on the procedure and/or substance of initiatives;
k. financial contributions directly channeled to the initiatives;
l. increasing participation of right holders in the debates and initiatives developed by intergovernmental organizations;

m. lack of financial and human resources by developing countries to: i) follow strategies initiated in different venues simultaneously; ii) oppose all strategies;
n. lack of coordination within each developing country to build a cohesive dialog and a unified IPR policy across its various networks of governmental officials;
o. lack of coordination among developing countries to i) establish a global strategy for opposition and an alternative proposal to the IPR enforcement agenda – such inability limits the scope of their coordination to punctual reactions in each venue; ii) elaborate alternative studies to assess the impact of counterfeiting and piracy and the extent to which it harms their economic and social interests; iii) establish a body within UNCTAD or another organization to represent their interests, monitor strategies and coordinate counterstrategies.

The current unbalance towards a highly stringent IPR enforcement through soft law mechanisms, without the promotion of a multilateral dialog in regimes specialized on IPR, which would naturally precede such initiatives, is even more striking when IPR is put into perspective; in this regard, we will conclude this paper as we started, with a citation by Joseph Stiglitz:

> "Intellectual Property Rights are important, but the importance of IPR has been exaggerated, as they form only one part of our innovation system. IPR should be seen as part of a portfolio of instruments. We need to strengthen the other elements of this portfolio and redesign our intellectual property regime to increase its benefits and reduce its costs. Doing so will increase the efficiency of our economy—and most likely even increase the pace of innovation"[110].

[110] Stiglitz, 'Economic Foundations of Intellectual Property Rights', p. 1724

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The Global Economic Governance Programme
University College, Oxford OX1 4BH

Tel. +44 (0) 1865 276 639 or 279 630
Fax. +44 (0) 1865 276 659
Email: geg@univ.ox.ac.uk
www.globaleconomicgovernance.org