

## Nesting and Complexity in the International Intellectual Property Regime

Laurence R. Helfer  
Vanderbilt University Law School

The international intellectual property (IP) regime has undergone a profound transformation in just over a decade. As recently as 1993, the regime was a discrete issue area dominated by a single intergovernmental organization—the World Intellectual Property Organization (WIPO)—whose core mission was to “promote the protection of intellectual property throughout the world.”<sup>1</sup> WIPO achieved this mandate by providing a hospitable forum for interstate bargaining for the adoption of multilateral agreements protecting industrial property (patents and trademarks) and literary and artistic property conventions (copyrights and the so-called “neighboring rights” of producers and performers). These agreements were widely viewed as technical subjects relevant mostly to industrialized countries and to legal specialists whose expertise had little if any portability to other issue areas in domestic and international politics.

Adherence to the IP regime during this period adhered to the traditional characteristics of public international law: (1) the decision by a state of whether to ratify any WIPO treaty was entirely voluntary; (2) the substantive and procedural provisions of the treaties were (with the exception of the national treatment rule) mostly opened-ended and flexible, with numerous exceptions and escape clauses; (3) international enforcement was weak to non-existent (no state ever invoked the clauses authorizing the International Court of Justice to hear a dispute involving an IP treaty); and (4) implementation of ratified treaties into national laws was left largely to the discretion of each member state.

All of this changed with the inclusion of a core set of international IP rules into the WTO in the form of the 1994 Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). This nesting of IP within international trade was a key goal of the United States and the European Union, whose IP industries stood to generate large profits from exports of IP-related goods and services to other countries. TRIPs transformed each of the four characteristics that prevailed when international IP was a uni-modal regime: (1) intellectual property was made a mandatory component of the global package deal that was the price of admission to the WTO;<sup>2</sup> (2) escape clauses and loopholes were closed or severely restricted; (3) enforcement increased exponentially through the WTO’s new dispute settlement system and a comprehensive domestic enforcement rules; and (4) treaty implementation became a matter of international scrutiny when national IP laws were submitted to the TRIPs Council for review and potential challenge.

With the subsequently negotiation of a 1995 agreement between the WTO and WIPO, it appeared that international IP would become a stable bimodal regime with the two intergovernmental organizations cooperating to divide a shared policy space. But the pressures of globalization and the rise of new information technologies quickly made that prediction obsolete.

---

<sup>1</sup> Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended on Sept. 28, 1979), art. 3(i).

<sup>2</sup> Phase-in and transitional rules did, however, apply to developing and least developed countries.

Flush with the success of negotiating TRIPs, IP content owners pressured industrialized governments for more expansive international rules to protect their investments in these new technologies and new markets. The result, during the mid- to late-1990s, was (1) a second generation of multilateral treaties negotiated within WIPO (most notably, the WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty, and the Patent Law Treaty), and (2) a growing number of “TRIPs plus” treaties—a new form of bilateral treaty favored by the US and EU to induce developing countries to ratify of these new WIPO agreements (or standards equivalent to them) in exchange for favorable trade and investment treatment.

During the same period, however, many developing countries and civil society groups became increasingly critical of the legal and policy constraints that the nesting of trade and IP rules had imposed. NGOs in particular were frustrated at being shut out of negotiations by the limited participation rights provided to non-state actors in WTO, WIPO, and bilateral trade talks. The dramatic expansion of intellectual property that nesting and bilateralism had engendered provided these groups with an alternative strategy. By the late 1990s, new coalitions of state and non-state actors were shifting their energies to multilateral venues within *other* international regimes whose principles, norms, and rules were being undermined by TRIPs and TRIPs plus treaties.<sup>3</sup>

These coalitions were highly strategic in their selection of issue areas, venues, and arguments. They emphasized subjects—such as public health, human rights, and biodiversity—with high visibility and the potential to generate strong public support. They selected forums that were open to participation by non-state actors or venues in which the United States was not a participant (having refused to ratify the relevant treaties). And they attempted to influence international bureaucrats and legal and technical experts whose support would give their claims the imprimatur of neutrality and legitimacy.

Having selected these venues, these coalitions adopted a twofold strategy. First, they challenged TRIPs and TRIPs-plus bilateral treaties on moral, legal, political, and economic grounds. And second, they established new and often conflicting legal rules in an effort to rollback or block further expansion of intellectual property rights.

To take just one example, biodiversity-rich developing countries and supportive NGOs lobbied the Conference of the Parties to the Convention on Biodiversity to require “benefit sharing” by IP owners who patent inventions that derive from biological discoveries made in those countries. Although TRIPs does not authorize benefit sharing—and may even preclude making it a condition of patent protection—developing countries claimed that the failure to require such benefit sharing was “biopiracy”—a label that denigrated the practice as a form modern-day biological theft and highlighted the inequities of existing IP protection rules.

---

<sup>3</sup> For a more detailed analysis of these developments, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 23-47 (2004).

Other coalitions with similar goals launched challenges in other multilateral venues, including the World Health Organization (patented medicines and global health pandemics), the Food and Agriculture Organization (food security and plant genetic diversity), the International Telecommunications Union (trademark and copyright protections in digital media), UNESCO (which recently adopted a new treaty on cultural diversity that promotes access to cultural products protected by IP rights), and the UN Committee on Economic Social and Cultural Rights (which has released an authoritative comment on the authors' rights provisions of human rights treaties).

The result of these initiatives is that IP is now nested within many distinct international regimes, which together form a multi-modal, multi-venue "conglomerate regime"<sup>4</sup> or a "regime complex,"<sup>5</sup> made up of multilateral, regional, and bilateral treaties, soft law resolutions and declarations, and competing networks of state and non-state actors.

Initially, the normative activities within the different venues in this conglomerate regime were more or less compartmentalized. But they have recently spilled back into WIPO and WTO, whose work has been brought to a virtual standstill by pitched battles between IP proponents and opponents.

In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders' rights; and the protection of geographical indications have remained unresolved for nearly five years. Negotiations in WIPO are faring little better. Industrialized nations are pressing for new treaties on substantive patent rules, audiovisual works, and broadcasters rights. Developing countries and consumer groups have countered with a "development agenda" that calls for a moratorium on new treaty-making and instead demands that WIPO give greater attention to public access to knowledge and to non-proprietary systems of creativity and innovation. These conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents' proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism.

The ultimate outcome of this exponential increase in nesting and complexity in the international IP regime is still uncertain. However, the evolution toward deeper nesting has revealed a number of trends that may be more generally representative of nesting processes in international politics. I list these trends below and invite comments on whether other conference participants have observed similar trends in other issue areas.

1. Nesting and power. Realist and rational choice theories predict that powerful states will be more adroit at using the politics of nesting than weaker nations, a claim borne out by the success of the United States and EU in shifting IP lawmaking from WIPO to the WTO. But the post-TRIPs wave of regime shifting suggests that nesting is a maneuver available to both strong and weak actors. Does a nesting strategy, when adopted by weak states, produce only temporary gains (as is suggested by the failed effort to create a New International Economic Order in the 1970s)? Or can nesting strategies effect a more lasting change in the geostrategic balance?

---

<sup>4</sup> David W. Leebron, *Linkages*, 96 AMER. J. INT'L L. 5, 10, 19 (2002).

<sup>5</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG.277 (2004)

2. Multilateral vs. bilateral nesting strategies. Do powerful and weak actors adopt different strategies when they seek to nest one issue area within another? The evidence reviewed above suggests that weaker nations prefer multilateral venues, in which they can present more forceful and uniform arguments in favor of nesting. Powerful nations, by contrast, will counter with a strategy of bilateralism. They will attempt to pick off weak states one by one, neutralizing their opposition to the strong nations' preferred policy outcome by embedding those in bilateral treaties. This suggests that weak states face a collaboration game problem in which defection (in the form of adopting a bilateral treaty) is individually rationally but collectively sub-optimal. A similar collaboration game characterized the international investment regime, in which bilateral investment treaties promulgated by the US and EU ultimately overwhelmed the attempt by developing countries to adopt less investor-friendly legal norms in multilateral venues.
3. Soft law, hard law or new law? Realists scholars have sometimes argued that powerful states will acquiesce the creation of unfavorable soft law since they are, by definition, not bound it. Does an increase in nesting change the propensity of such states to acquiesce in the creation of soft law? In particular, to what extent do soft law norms serve as the foundation for later revisions to hard law in the form of treaty amendments, new protocols, or similar developments?
4. Nesting, stability, and complexity. To what extent can actors who seek to nest one issue area within another maintain a separation among different lawmaking and monitoring venues within a regime complex? Is it possible to develop two distinct sets of principles, norms and rules, or is it inevitable that nesting strategies will eventually focus on venues with the strongest lawmaking and enforcement powers? The recent effort by developing countries to amend TRIPs and police those amendments through the WTO's dispute settlement system suggests that treaty systems with strong enforcement rules will be ground zero sites for nesting strategies. Yet those strategies, if successful, could destabilize those strong treaty systems by overwhelming them with a surfeit of contentious regulatory issues.