



Globalization of Law Enforcement

A Study of Transnational Public-Private Partnerships Against Intellectual Property Crimes

Thesis submitted for assessment with a view to obtaining
the degree of Doctor rerum politicarum (Dr. rer. pol.)
of the University of Bremen

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Date of submission: 15 October 2012
Date of defense: 24 January 2013

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Abstract

This study explores the issue area of globalization of law enforcement at the example of transnational public-private partnerships (PPPs) against intellectual property (IP) crimes. It provides a comprehensive survey of all such PPPs that involve a global public international organization (IOs). The study covers the PPP activities of Interpol, of the World Customs Organization (WCO), of the World Intellectual Property Organization (WIPO), of the World Trade Organization (WTO), and of the World Health Organization (WHO). As the term PPP is used in very different ways in the literature and as no existing definition appeared suitable to define all PPPs in this comprehensive survey, a new definition and typology of PPPs is developed and applied in this study.

Based on the analysis of each case and their comparison, this study inductively develops theory that explains the studied PPP activities. This theory consists of three hypotheses, which concern (A) the formation, (B) the type, and (C) the continuation or change of transnational PPPs against IP crimes. These three hypotheses are based on different configurations of five influencing factors. Those are (1) cooperation in the pursuit of resource gains, (2) common ground, (3) the PPP management, (4) the representation of stakeholders, and (5) the PPP policy.

Acknowledgements

The research for this study would not have been possible without the support of the many participants of the analyzed PPPs and other stakeholders who were willing to talk with me about their experience with these PPPs and share unpublished documents, such as meeting agendas, participant lists, minutes, reports, or correspondence. I would like to thank Aline Plançon, Bill Dobson, Bob Barchiesi, Brad Huther, Brian Monks, Christophe Zimmermann, Dave Simpson, David Blakemore, David Finn, Gina Vetterre, Heike Wollgast, Jeff Hardy, John Newton, Kaitlin Mara, Michael Buchan, Philippe Vorreux, Richard Heath, Rob Calia, Ronald Brohm, Sabine Kopp, Tom Kubic, William New, Wolfgang Starein and the many people who gave me an interview under the condition of anonymity. I would also like to thank my doctoral supervisors Prof. Dr. Peter Mayer and Prof. Dr. Graf-Peter Calliess and the entire Bremen International Graduate School of Social Sciences (BIGSSS) for their support of my research. Last but not least, I would like to thank the taxpayer for funding the research that was necessary to produce this study.

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List of Abbreviations

ACE	Advisory Committee on Enforcement (at the World Intellectual Property Organization)
ACTA	Anti-Counterfeiting Trade Agreement
AIFA	Agenzia Italiana del Farmaco (Italian Drug Regulatory Agency)
AIM	Association des Industries de Marques (European Brands Association)
ASEAN	Association of Southeast Asian Nations
BASCAP	Business Action to Stop Counterfeiting and Piracy (at the International Chamber of Commerce)
BAT	British American Tobacco
BIAC	Business and Industry Advisory Committee (at the Organisation for Economic Co-operation and Development)
BIEM	Bureau International de l'Édition Mécanique (International Bureau of Mechanical Rights Societies)
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (United International Bureau for the Protection of Intellectual Property)
BSA	Business Software Alliance
CACP	Coalition Against Counterfeiting and Piracy (at the United States Chamber of Commerce)
CAP	Counterfeiting and Piracy (Group at the World Customs Organization)
CCC	Customs Co-operation Council
CEN	Customs Enforcement Network (at the World Customs Organization)
CIAC	Certification Industry Against Counterfeiting (at Interpol)
CIPIH	Commission on Intellectual Property Rights, Innovation and Public Health (at the World Health Organization)
CIPR	Coalition for Intellectual Property Rights
CoE	Council of Europe
DAG	Development Agenda Group (at the World Intellectual Property Organization)
DIIP	Database on International Intellectual Property (at Interpol)
EC	European Community
ECJ	European Court of Justice
EP	European Parliament
EPO	European Patent Office
EU	European Union
EU COM	European Commission

FBI	Federal Bureau of Investigation (in the USA)
FH	Fédération de l'industrie Horlogère suisse (Swiss Watch Federation)
FIFA	Fédération Internationale de Football Association (International Federation of Association Football)
FoD	Friends of Development (at the World Intellectual Property Organization)
G8	Group of 8
GA	General Assembly
GACG	Global Anti-Counterfeiting Group
GAO	(United States) Government Accountability Office
GATT	General Agreement on Tariffs and Trade
GBLAAC	Global Business Leaders Alliance Against Counterfeiting
GCCC	Global Congress to Combat Counterfeiting
GCCCP	Global Congress on Combating Counterfeiting and Piracy
IACC	International Anti-Counterfeiting Coalition
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICCE	Imaging Consumables Coalition of Europe
ICDRA	International Conference of Drug Regulatory Authorities
ICE	Immigration and Customs Enforcement (in the USA)
ICPC	International Criminal Police Commission
ICPO	International Criminal Police Organization (Interpol)
IFPI	International Federation of the Phonographic Industry
IFPMA	International Federation of Pharmaceutical Manufacturers & Associations
IGO	Intergovernmental Organization
IGPA	International Generic Pharmaceutical Alliance
IIPCAG	Interpol IP Crime Action Group
IIPCIC	International IP Crime Investigator's College (at Interpol)
IMPACT	International Medical Products Anti-Counterfeiting Taskforce (at the World Health Organization)
INTA	International Trademark Association
IO	International Organization
IP	Intellectual Property
IPM	Interface Public-Members (at the World Customs Organization)
IPR	Intellectual Property Right
ISMA	International Security Management Association
ITO	International Trade Organization

MOU	Memorandum of Understanding
MPA	Motion Picture Association
MPAA	Motion Picture Association of America
NGO	Non-Governmental Organization
NSA	Non-State Actor
OASIS	Operational Assistance, Services and Infrastructure Support (at Interpol)
OC	Organized Crime
OECD	Organisation for Economic Co-operation and Development
PA	Principal-Agent (Theory)
PCT	Patent Cooperation Treaty (at the World Intellectual Property Organization)
PFIPC	Permanent Forum on International Pharmaceutical Crime
PhRMA	Pharmaceutical Research and Manufacturers of America
PPP	Public-Private Partnership
PSI	Pharmaceutical Security Institute
RCMP	Royal Canadian Mounted Police
REACT	Réseau Européen Anti-Contrefaçon (European Anti-Counterfeiting Network)
RHC	Rights Holders Consultative (Group at the World Customs Organization)
SECURE	Standards Employed by Customs for Uniform Rights Enforcement (at the World Customs Organization)
SNB	Stichting Namaakbestrijding (Anti-Counterfeiting Foundation)
TRIPS	(Agreement on) Trade-Related Aspects of Intellectual Property Rights
UIA	Union of International Associations
UL	Underwriters Laboratories
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund (United Nations International Children's Emergency Fund)
UNICRI	United Nations Interregional Crime and Justice Research Institute
USCC	United States Chamber of Commerce
USPTO	United States Patent and Trademark Office
USTA	United States Trademark Association

USTR	United States Trade Representative
WCO	World Customs Organization
WCO IPR SG	World Customs Organization Intellectual Property Rights Strategic Group
WEF	World Economic Forum
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Introduction: Law Enforcement Goes Transnational

“The sharing of information from the private sector will help law enforcement agencies in our 186 member countries to focus their resources more effectively in investigating individuals and groups linked to transnational counterfeiting and piracy. As a result of this cooperation, Interpol is making organized criminals aware that international borders no longer protect them from the long arm of the law.”

Ronald K. Noble, Secretary General of Interpol (2008c)

“Within Interpol 90% of our funding comes from the public sector and a maximum of 10% comes from the private sector. But within the IPR program - it varies from year to year - the direct or indirect benefit we get is roughly about 50/50 between the public and the private sector, which, I think, gives you an indication of how we work.”

John Newton (2011), Interpol Intellectual Property Crime Program Manager

A public-private partnership (PPP) is often seen as an excellent way of increasing public policy options by tapping into private sector resources. The two quotes above mention two kinds of resources that are often transferred in PPPs: information and money. But not every public-private partnership is a success story. In the first quote above, Interpol Secretary General Ronald K. Noble spoke about the launch of the Interpol Database on International Intellectual Property (DIIP), which is an example of a transnational PPP against intellectual property crime that was only partially successful. Based on the DIIP partnership agreement, the International Criminal Police Organization (ICPO Interpol) received 750,000 USD funding from the private sector US Chamber of Commerce and additional 250,000 USD funding from the public sector US Patent and Trademark Office (Huther 2010). This allowed Interpol to hire additional staff for its Intellectual Property Crime Program (Newton 2009a), but, once the database was set up, little data was provided by the private sector. Although many private companies run investigations into the counterfeiting and piracy of their products and brands, they are often reluctant to share the information acquired in those investigations. This is because they are afraid that their investigations could be jeopardized and that their reputation could be harmed if the

information gets into the wrong hands. Such a lack of trust is often a problem for cooperation.

Some private actors may lack trust in public actors, but there are also cases where public actors lack trust in private actors. Private sector support often enables public institutions to engage in activities they could not or would not engage in without private sector support. This often leads to concerns that the private actors have an undue influence on the public institutions. The SECURE partnership of the World Customs Organization (WCO) and the IMPACT partnership of the World Health Organization (WHO) are two examples of PPPs that were accused of undue private sector influence (see chapters 5 & 9). In both cases the criticism led to a halt of the respective PPP, but some of the criticised activities were continued in another organization. The WCO SECURE partnership was unsuccessful in developing an international intellectual property enforcement convention administered by the WCO. However, the controversial Anti-Counterfeiting Trade Agreement (ACTA) was eventually negotiated outside of the WCO, was opened for signature in October 2011, but then was rejected by the European Parliament in July 2012.

The WHO IMPACT partnership pursued a variety of activities against counterfeit medicines. It came to a halt after it was accused by the Brazilian ambassador at the World Health Assembly of “waging a war against generic medicines” (WHO 2010c: 9). However, the enforcement working group of this PPP continued its work under the management of Interpol. In 2011, its activities involved the participation of 81 countries and led to the seizure of at least 2.4 million pills, the shutting down of at least 13,500 illegal online pharmacy websites, and to investigations against at least 55 individuals (Interpol 2011c).

International law enforcement cooperation against transnational organized crime is often presented in media reports as a story of savvy criminals who exploit globalization and law enforcement officers who are limited by national borders, jurisdiction, and bureaucratic hurdles (e.g. Naím 2003). However, globalization not only affects the legal and illegal economy. Nation states and national law enforcement agencies have also adapted to it, as shown by research about international crime policies and international law enforcement cooperation (e.g. Andreas & Nadelmann 2006). This study contributes to this research area by showing that law enforcement agencies not only collaborate internationally, resulting in transgovernmental networks (Slaughter 2004: 56), but that their simultaneous collaboration with the private sector results in transnational¹ law enforcement.

Public international organizations² (IOs), such as Interpol, the World Customs Organization, the World Intellectual Property Organization, and the World Health Organization, act as facilitators of transnational public-private cooperation. These IOs are only composed of public sector members, but for the purpose of cooperation with the private sector they have established special transnational PPPs, where actors from both the public and the private sector are members.

Transnational PPPs are increasingly being observed in many policy areas (Schäferhoff et al. 2009, Andonova 2006, Börzel & Risse 2005). However, law enforcement PPPs are surprising, because states are usually very reluctant to loosen their grip on the monopoly of the legitimate use of force (Jachtenfuchs 2005: 50). As this monopoly is considered to be the constituting characteristic of the modern nation

¹ The term "transnational relations" denotes interactions across national borders that involve at least one non-state actor (Risse 2002: 255).

² The term "public IO" denotes international organizations with public sector members only (as used by Amerasinghe 2005, Slaughter 2004, or Reinicke 1998). It is meant to include intergovernmental organizations and transgovernmental organizations (as used by Archer 2001 and Keohane & Nye 1974).

state (Weber 1972: 29), transnational law enforcement PPPs can be considered a least-likely case for the creation and functioning of transnational PPPs in general. In the case of these law enforcement PPPs, the actual application of force is still done by national law enforcement agencies, but the entire decision making process about when, where, why, and how to apply force is heavily influenced by partners from international organizations, from other countries, and from the private sector.

So why is this new institutional format of public-private partnership applied to law enforcement, a policy area where one would least expect it? This is the question that inspired this study. In particular, this study develops a theory that explains why global PPPs against IP crimes are formed, which type of PPP is chosen, and why the PPP is then continued or changed after its initial formation.

The remainder of this introductory chapter briefly introduces the policy areas that form the background of this study. Those are international law enforcement cooperation, intellectual property rights, intellectual property crime, and transnational IPR enforcement. Finally, this chapter gives an overview of the structure of the study.

International Law Enforcement Cooperation

Based on the existing literature, it is useful to distinguish between three different aspects of international law enforcement cooperation: normative, procedural, and organizational. Normative aspects, also known as international prohibition regimes, refer to the criminalization of certain activities by international law and domestic law (Nadelmann 1990, Andreas & Nadelmann 2006: 17). Examples of such internationally criminalized activities are maritime piracy, slavery, and trade in heroin and cocaine.

Procedural aspects are concerned with the procedure of law enforcement cooperation. Examples of procedural agreements are extradition treaties, mutual legal assistance treaties, or agreements on the transfer of criminal proceedings (Joutsen 2005: 259). Such treaties regulate, for example, an obligation to respond to requests for law enforcement cooperation, the conditions under which such a request can be denied, and the procedures to ensure the rights of the suspect.

Organizational aspects of law enforcements cooperation refer to the facilitation of law enforcement cooperation. Important examples of organizations that facilitate international law enforcement cooperation are the International Criminal Police Organizations (ICPO Interpol), the World Customs Organization (WCO), Europol of the European Union, and a variety of bilateral police and customs operations centers (Haberfeld & McDonald 2005, Barnett & Coleman 2005, Anderson 1989). The activities of such organizations include the establishment of personal contacts between law enforcement officers through a system of liaison officers and seconded officers, the analysis of combined information gathered by several law enforcement agencies, and the maintenance of databases for the exchange of information about fugitives, stolen motor vehicles, stolen works of art, and lost and stolen travel documents. Organizational aspects are especially relevant if the available organizations and services influence the frequency and kind of cooperation, compared to a situation where cooperation has to be organized ad hoc.

The focus of this study is on an organizational aspect of law enforcement cooperation: the creation of transnational public-private partnerships. But normative and procedural aspects are also relevant for the decisions to create such PPPs.

Intellectual Property Rights

Intellectual property rights (IPRs) are “legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields” (WIPO 2004b: 3). The most well-known examples of IPRs are trademarks, patents, and copyrights. Trademarks protect certain names or symbols used in commerce. Patents protect certain inventions. And copyrights protect certain literary or artistic works. There are also several other less well known kinds of IPRs, such as utility models, industrial design rights, plant breeders' rights, and geographical indications (WIPO 2004b: 3). The rationale behind the protection of intellectual property rights is as diverse as the IPRs themselves. Trademark protection increases market transparency by allowing the easy identification of the producer or licensor of a certain product. Patent protection encourages investments in research and innovation by providing a way to protect those investments without keeping the inventions a secret. And copyright protection encourages creativity by allowing the commercialization of creative works even if they can be easily copied. Besides such functionalist arguments for IPRs, they are also frequently regarded as expressing a moral right of creators in their creations (WIPO 2004b: 3).

The international harmonization of intellectual property law started in the late 19th century with the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. The United International Bureau for the Protection of Intellectual Property (BIRPI)³ was created in 1893 to administer these two treaties. It evolved into the World Intellectual Property Organization (WIPO), which was founded in 1967 and became a specialized United Nations agency in 1974 (Bogsch 1992).

³ Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle

A very important development for the global protection of IPRs was the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which established a minimum standard for IPRs in the member states of the World Trade Organization (WTO). Within this minimum standard is the requirement to criminalize trademark and copyright infringements of a commercial scale (TRIPS Art. 61). This criminalization requirement makes the TRIPS agreement the first global IP treaty that goes beyond private law and emphasizes the public interest through the use of criminal law. Therefore, TRIPS is not only a trade agreement but also the foundation of a prohibition regime (Andreas & Nadelmann 2006: 54).

International negotiations about IP rights continued after the TRIPS Agreement. Examples include the 2001 Doha Declaration on the TRIPS Agreement and Public Health, several bilateral and regional agreements, and the Anti-Counterfeiting Trade Agreement (ACTA), which was opened for signature in October 2011 and was rejected by the European Parliament in July 2012. General issues in the international IP debate include higher penalties for Intellectual property crimes (UNICRI 2007: 129) and the balance between private IP rights and the public interest, especially when it comes to patents on pharmaceuticals and life forms (Sell 2003: 139). There are also concerns about the fair use of digital products (Mara 2008b), the liability of the internet industry for the exchange of digital products over the internet, and the trade of tangible goods through internet trading platforms (Amazon.com et al. 2008). Transshipment issues arise in cases where the IPR protection differs in the country of origin, destination, and transshipment (Schneider 2011, Vrins 2010).

While these debates continue, the largest obstacle to IPR protection today is not the law but the lack of law enforcement (OECD 2008: 187). Intellectual property

crime is not a high priority for most law enforcement agencies around the world. As resources for specialized training or even specialized units are limited, most law enforcement agencies prioritize crimes that are considered more severe, such as drug trafficking, human trafficking, and terrorism.

Intellectual Property Crimes

Intellectual property (IP) crimes are acts that infringe IP rights and violate criminal law. In many cases the infringement of IP rights constitutes a criminal act in itself, as the TRIPS Agreement requires WTO member states to criminalize trademark counterfeiting and copyright piracy on a commercial scale (TRIPS Art. 61). Therefore, the fight against this “counterfeiting and piracy” is the focus of most activities against IP crime. However, some states have chosen to go beyond the TRIPS requirements and also criminalize infringements of other IP rights, such as patents. IP infringing activities may also be considered criminal if they are committed in concurrence with other acts that are criminal, such as fraud or smuggling. If the use of dangerous counterfeit products results in deaths, it can also be addressed as negligent homicide. The director of the Nigerian Food and Drugs Administration even spoke of mass murder in the case of deadly counterfeit medicine (Akunyili 2007).

Due to the health and safety risks of many counterfeit products, IP crimes are increasingly seen not only as an economic issue but also as a threat to human security. There are a number of recent examples: a plane flying from Norway to Germany in 1989 crashed due to the failure of a counterfeit spare part and killed 55 people (UNICRI 2007:55). Thirteen babies died in China in 2004 from being given counterfeit baby food (ICC 2008: 141). 23 people died in Turkey in 2005 due to drinking a counterfeit beverage (UNICRI 2007: 51). And 50 000 people received

counterfeit meningitis vaccines in Niger in 1995 resulting in 2500 deaths (WHO 2006c: 2).

Besides the specific risks to consumers of counterfeit products, intellectual property crimes can also be seen as a security risk for the general public when the proceeds of intellectual property crimes go to organized crime groups. The common definitions of organized crime groups refer to their organizational duration and their aim to generate profits from criminal activity (von Lampe 2010). Given these definitions, the industrial scale of most intellectual property crimes, and the transnational delivery chain of the products, there is no doubt that transnational organized crime groups are involved in this business. A number of infamous organized crime groups are reported to be active in the business of counterfeiting and piracy, such as the Chinese Triads, the Japanese Yakuza, the Russian Mafia, and the Neapolitan Camorra (UNICRI 2007: 118). Intellectual property crimes are appealing to these organizations, because the profits are similar to those of drug trafficking (sometimes even higher), but the risk is very low, as penalties are less severe and law enforcement agencies focus less on these crimes (UNICRI 2007: 106). The same reasons that make intellectual property crimes appealing to organized crime groups also make it an attractive criminal activity for the funding of militant political groups. For example, proceeds of intellectual property crimes in the tri-border area of Argentina, Brazil, and Paraguay have been reported to go to the Lebanese Hizballah (Arena 2006: 459). The Irish Republican Army has also reportedly funded their activities with the trade in pirated movies and software (Treverton 2009: 82).

It is very difficult to quantify the overall effects of IP crime. The number of unreported cases can only be estimated, but it is expected to be much higher than

the number of reported cases. It is also difficult to assess the rate in which IP infringing products substitute legal products in the market. And it is especially difficult to assess all the effects beyond the lost revenue from the sale of legal products, such as health and safety risks, loss of brand value, or reduced incentives for research and innovation (GAO 2010). For a global assessment, the most frequently cited figure comes from the Organization for Economic Cooperation and Development (OECD). According to their study, “international trade in counterfeit and pirated goods could account for up to USD 200 billion in 2005” (OECD 2008 :96). As this is a maximum figure within the OECD calculation model, the actual figure could be lower. However, the overall effects of IP crime could be higher, as the OECD study did not include domestic trade, the trade of intangible goods over the internet, nor did it include other factors such as loss of brand value, reduced incentives for research and innovation, or health and safety risks. Besides these negative effects, a comprehensive study on the effects of IP crime would also need to address the positive effects. While it is unpopular to speak about the “positive effects of crime”, they can be an important factor in explaining the prevalence of IP crime and the challenges in fighting it. For example, factories that produce counterfeit products and businesses that trade with them can provide jobs and income for many people. And consumers may be able to save money with pirated music, movies, or computer software.

Transnational Intellectual Property Rights Enforcement

Many businesses and their associations are actively involved in the transnational enforcement of intellectual property rights. Their private investigators can bypass the procedures of more traditional international law enforcement cooperation, which are

established by mutual legal assistance treaties. This can make transnational law enforcement cooperation faster and easier than international law enforcement cooperation, as is explained in the following quote:

“There is a trial, just started in the UK, called Surf the Channel. And one of the main witnesses is in Los Angeles. So when I was over there four weeks ago, I had to literally go and get this witness, get a copy of the hard drive that he had. Then any statement in the UK, if it is to be fit for purpose for use in the UK court, it has to be signed on English soil. So I then had to drag this Californian to the British embassy to get him to sign the statement so it could be used as evidence in the court. But that is what we have to do everywhere. We prepare full evidence packages. [...] And then they will take the whole thing, to get the actual operation or whatever done, they will just hand the package across. So the cops have to use just their powers to get a warrant to arrest somebody. Then even - and this is where we are really working hand in hand - the [private] investigators would then go and do the interview with the cops. So that's what else we do - and other industries. It's not just the film industry. Other industries do exactly the same.”

Michael Buchan (2010), Director of Content Protection
& Customs Liaison at the Motion Picture Association

Private companies and associations invest significant resources in law enforcement, which would not be available by relying on public law enforcement agencies alone. For example, the software company Microsoft, the tobacco company Philip Morris International, the film industries' Motion Picture Association (MPA), and the music industries' International Federation of the Phonographic Industry (IFPI) have all spent several millions of US dollars on the enforcement of trademarks and copyrights. They employ private investigators who gather evidence and prepare case files to hand over to a public law enforcement agency including a recommendation when a police raid should take place (Buchan 2010, Finn 2010, Int.03 2010, Int.21 2010, Schild 2007).

Private investigation work makes it a lot easier for police officers to protect intellectual property rights, but sometimes the private actors go even further. There are reports of cases where bribes were paid by private investigators for a police raid on counterfeiters and pirates, for example, in Russia (Phillips 2005: 96) and in Thailand (Green & Smith 2002: 104). However, there are also legal ways to use

private financial resources in order to get public law enforcement agencies to do more against IP crime. For example, in the USA and in China there are public-private arrangements where IP rights holders cover the expenses of local law enforcement agencies, such as equipment needed for raids, food and drink, and sometimes even pay for overtime (Barchiesi 2011, Phillips 2005: 36, 50). Such arrangements also exist at the international level. For example, Philip Morris International, Japan Tobacco International, British American Tobacco, and Imperial Tobacco have all signed agreements with the European Commission to combat contraband and counterfeit cigarettes. Based on these agreements, the tobacco companies provide annual payments of over 150 million USD to reimburse the EU and participating member states for their efforts against counterfeit cigarettes (EU Com 2004, EU Com 2007, EU Com 2010a, EU Com 2010b, Alvaro 2008). The sum invested in law enforcement by just these four corporations is higher than the annual budgets of Europol or Interpol (UIA 2009) and thereby shows that non-state actors and their influence on law enforcement should not to be underestimated.

Plan of the Study

The previous sections of this chapter introduced the empirical policy areas that form the background of this study. Chapter 2 is dedicated to theory. It starts by presenting the theoretical foundations of this study: the transnationalization of law enforcement, international organizations and non-state actors, and a typology of public-private partnerships. Chapter 2 then goes on to present the theory that has been developed with this study and embeds these findings in existing theory.

Chapter 3 presents the methodological foundations of this study. It starts with the research design that is based on the comparative method and on process

tracing. It then presents the methods used for data acquisition and for data evaluation.

Chapters 4 through 9 each present one case study. The studies focus on particular public international organizations, whereas individual PPPs are then presented in sections within the chapters (table 1). This is done in chapter 4 on Interpol, in chapter 5 on the World Customs Organization (WCO), in chapter 6 on the World Intellectual Property Organization (WIPO), and in chapter 9 on the World Health Organization (WHO). Structuring the case studies in this way puts more attention on the IOs than on other PPP participants, but this is justified for three reasons: First, the public IOs have very important roles in the PPPs, whether by chairing them or by providing secretariat services for them. Therefore, most PPPs are closely associated with one IO even if another IO is also a member.⁴ Second, it facilitates the process tracing of PPP evolution where one PPP replaces another or where new PPPs complement previous ones and form a PPP network around one IO. Third, using IOs as cases instead of PPPs also allows a better case comparison. A selection bias is avoided by allowing variation of the dependent variable “PPP formation” and including a control case where no PPP was founded. This is done in chapter 8 on the World Trade Organization (WTO). The WTO never founded its own PPP against IP crime, although it administers the TRIPS Agreement, which is an important foundation for the global criminalization of IP infringements. The only exception to this IO-based case construction is the Global Congress on Combating Counterfeiting and Piracy. As this PPP is not more associated with one of its member IOs than with another, it is presented as a stand-alone case in chapter 7.

⁴ The only exception is the Global Congress on Combating Counterfeiting and Piracy. The chair of the board of this PPP rotates among Interpol, the WCO, and the WIPO.

Table 1: IOs and PPPs Covered by this Study		
Chapter	IOs	PPPs
4	Interpol	Interpol IP Crime Action Group, Operation Jupiter, Interpol IP Crime Training Program, International Law Enforcement IP Crime Conference, Certification Industry Against Counterfeiting, International IP Crime Investigator's College, Database on International Intellectual Property
5	WCO	WCO IPR Strategic Group, SECURE Working Group, Rights Holders Consultative Group, Interface Public-Members
6	WIPO	Advisory Committee on Enforcement
7	Interpol, WCO, WIPO	Global Congress on Combating Counterfeiting and Piracy
8	WTO	-
9	WHO	International Medical Products Anti-Counterfeiting Taskforce (IMPACT), IMPACT Enforcement Working Group, Operation Storm, Operation Mamba, Operation Pangea

Source: Own account

After the study of the six cases in chapters 4 through 9, chapter 10 presents a comparison of those cases. Based on the similarities and differences, in terms of circumstances and results in each case, inferences about the reasons for the creation and the continuation or change of transnational PPPs against IP crimes are presented. Finally, chapter 11 presents a summary of the contributions of this study and an outlook to open questions that can provide the basis for further research.

2. Theory: Transnationalization, IOs, and PPPs

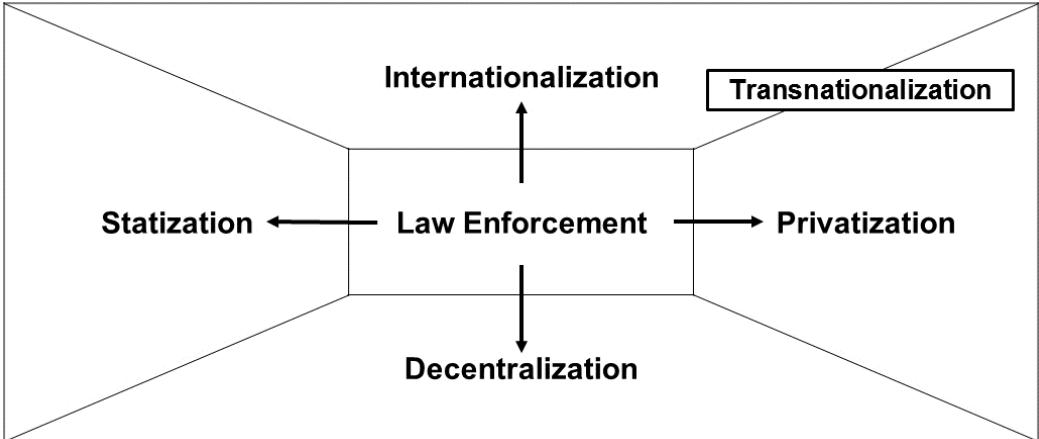
This study explores a new research area and develops theory about the formation and development of transnational public-private partnerships against IP crimes. In spite of the exploratory character of this study, it is still embedded in wider research contexts that provide theoretical foundations. The primary context of this study is International Relations (IR) research on international law enforcement cooperation. The first section of this chapter explains how this study is embedded in this context and contributes to it with a case of transnationalization of law enforcement. Also, IR research about International Organizations and especially their willingness to cooperate with non-state actors is important background for this study. This is explained in the second section of this chapter. Research about public-private partnerships is also relevant for this study. The third section of this chapter introduces this research and then develops a typology of PPPs to be used in this study. The final section of this chapter presents the theory that was developed with this study and embeds the finding in existing theory.

Transnationalization of Law Enforcement

In International Relations research the issue of international law enforcement cooperation is “remarkably understudied” (Andreas & Nadelmann 2006: VIII). The few available studies focus on the internationalization of law enforcement: some are about international prohibition regimes (e.g. Nadelmann 1990, Andreas & Nadelmann 2006), about specific international organizations such as Interpol (Barnett & Coleman 2005) or Europol (Deflem 2006), about specific international treaties such as the United Nations Convention Against Transnational Organized Crime (Albrecht & Fijnaut 2002), or about police assistance in post-conflict and post-authoritarian states

(Bayley 2006). Other works combine several of these aspects of internationalization of law enforcement (Möllers & van Ooyen 2006, Haberfeld & McDonald 2005, Anderson 1989, Deflem 2002, Koenig & Das 2001). When it comes to privatization of law enforcement, there are studies about the privatization of public security (Jones & Newburn 2006) and about the privatization of law enforcement against economic crimes (Williams 2005). What all these studies have in common is that they look at the changing role of the nation state in law enforcement from different perspectives. Such change can take place via internationalization, decentralization, privatization, or statization as illustrated in figure 1.

Figure 1: Changes to the Role of the Nation State for Law Enforcement



Source: Own illustration inspired by Leibfried & Zürn 2005: 15

Nation states can delegate or lose law enforcement competencies to the sub-national level as with community policing projects (Brogden & Nijhar 2005, Paun 2008), to the private sector (Jones & Newburn 2006), to the international level (Andreas & Nadelmann 2006), or to the European level (Jachtenfuchs 2005) – as a special form of internationalization. The statization of policing can be found in studies of the historical development of policing together with the rise of the modern nation state (Roberg et al. 2000: 32, Mawby 1999, Waddington 1999, Horton 1995: 7). When it comes to the combined effects of internationalization and privatization - the

transnationalization of law enforcement - there is a gap in the current state of research, with only very few exceptions (e.g. Abrahamsen & Williams 2009, Johnston 2000).

This study is meant to contribute its part to fill this gap in the current state of research with the example of transnational public-private partnerships against intellectual property crimes. It contributes a deviant case study (Bennett 2004: 22) to the field of international relations research on international law enforcement cooperation. The case is deviant insofar as studies of law enforcement cooperation against more prominent crimes, such as drug trafficking and terrorism, have concluded that there is very little transnationalization of the state monopoly of force (Jachtenfuchs 2006). In the case of the analyzed law enforcement PPPs, the actual application of force is still done by national law enforcement agencies, but the entire decision making process about when, where, why, and how to apply force is heavily influenced by partners from international organizations, from other countries, and from the private sector. Besides this empirical observation, there is also a theoretical reason to consider this case deviant: As the monopoly of the legitimate use of force is considered to be the constituting characteristic of the modern nation state (Jachtenfuchs 2005: 1, Weber 1972: 29), the transnationalization of law enforcement can be considered a surprising development. Even the most radical libertarians in political philosophy, like Robert Nozick (1974), do not propose the privatization of law enforcement. Nonetheless, the PPPs against IP crime in this study are a way to involve the private sector in law enforcement.

International Organizations and Non-State Actors

Public international organizations (IOs) are important actors in the public-private partnerships analysed in this study. They perform the function of a chair or a secretariat of the PPPs. Therefore, theories about IOs and, especially, their openness to non-state actors (NSAs) is relevant background for this research. In this context, the term public international organization denotes IOs with public sector members only (as used by Amerasinghe 2005, Slaughter 2004, or Reinicke 1998). It is meant to include intergovernmental organizations (IGOs) and transgovernmental organizations (TGOs). TGOs are often not mentioned as a category or subsumed under the category of IGOs (Diehl 2005, Karns & Mingst 2004), but the distinction is useful for this research. As early as 1974 Keohane and Nye explicitly mentioned Interpol as an example of transgovernmental relations: interactions between "sub-units of governments on those occasions when they act relatively autonomously from higher political authority in international politics" (Keohane & Nye 1974: 41). This autonomy from higher political authority is an important aspect for the direct cooperation between national criminal policy agencies at Interpol (see chapter 4). Transgovernmental cooperation with varying degrees of autonomy from higher political authority also exists, for example, between national customs agencies at the WCO (see chapter 5), and between national patent and trademark agencies at the WIPO (see chapter 6). Transgovernmental cooperation can happen in organizations (Archer 2001) and outside of organizations (Slaughter 2004). The empirical fact of government agencies acting relatively autonomously from higher political authority challenges the idea of the state as a unitary actor, which is assumed in realist and institutionalist International Relations theory (Simmons & Martin 2002).

In this study, public IOs are treated as actors, not as mere instruments or

forums for states. This means that IOs can act autonomously from states at least to some degree. In the state-centered discipline of International Relations, such autonomy is the result of delegation from states to IOs (Rittberger & Zangl 2006). Such delegation can be explained using principal-agent theory, according to which delegation from a principal to an agent is chosen if it is beneficial for the principal. This may be the case, for example, due to specialization and division of labor, due to the reduction of transaction costs, or because an independent body has a higher degree of credibility when monitoring treaty implementation or is needed for dispute resolution (Hawkins et al. 2006b). However, once IOs have autonomy, they can also seek to increase it (Hawkins & Jacoby 2006, Barnett & Finnemore 2004, Reinalda & Verbeek 2006).

Public IOs may also seek to increase their autonomy by cooperating with non-state actors, thereby getting access to resources that are not provided by the states. Such interaction of an IO with NSAs may also be beneficial for and sought by the states themselves. For example, IO access to private sector resources reduces the need for public sector resources, non-state actors may be helpful in monitoring the IO, and they may be helpful in increasing domestic support for an IO (Hawkins & Jacoby 2006, Raustiala 1997).

There are different ways for international organizations to cooperate with non-state actors. For example, they can be invited to special stakeholder hearings or to regular meetings, they can be accredited as observers, they can sell services to an IO, or they may engage in public-private partnerships.

A Typology of Public-Private Partnerships

For a study about public-private partnerships (PPPs), it is important to clarify what is meant by the term. Unfortunately, there is no single authoritative definition of PPPs. Various authors use the term with different meanings (Klijn 2010, Hodge et al. 2010, Schäferhoff et al. 2009, Weihe 2008, Andonova 2006, Börzel & Risse 2005, Linder 1999). Guðrið Weihe (2008) even came to the conclusion that the different PPP definitions are so distinct that an overall PPP definition is not possible. Her literature review identified four areas of literature about PPPs with four different PPP approaches: The urban regeneration approach focuses on municipal PPPs, where participants from the public and the private sector collaborate as equal partners in order to improve municipal conditions for living and doing business. The infrastructure approach focuses on infrastructure PPPs, where a contract defines a principal-agent relationship between the public principal and the private agent who supplies the infrastructure project. The policy approach focuses on policy input from PPPs no matter how the public-private partnership is organized or what its focus is. And the development approach focuses on PPPs in the area of development aid, which are often, but not always, organized as a network (Weihe 2008). These distinctions are helpful to identify streams of literature and their origin, but it does not automatically lead to a clear PPP definition.

For the purpose of this study, I developed a definition and typology of public-private partnerships that is based on previous literature, but specifies and adjusts the concepts found in the literature in a way that allows an overall PPP definition and the identification of distinct types of PPPs. The PPP definitions used in the urban regeneration approach and in the infrastructure approach are fully embedded in my typology as the collaborative PPP type and the contractual PPP type. The policy

approach and the development approach do not have clear PPP definitions, but the more frequently found definitions have been specified to fit into this typology as the advisory PPP type and the PPP network type.

This study is based on the following definition and typology of PPPs: Public-private partnerships are forms of cooperation between actors from the public and the private sector⁵ that are set-up with the intention to continuously exist over a long period of time⁶ and that are organized according to the characteristics of one of the following types of PPPs:

- *Unitary PPP*: There are four different types of unitary PPPs:
 - o *Collaborative PPP*: Collaborative provision of public services, or significant contribution thereto, where the private partners voluntarily invest significant resources beyond information and advice without being paid by the public partners.
 - o *Contractual PPP*: Private provision of public services, or significant contribution thereto beyond information and advice, based on a contract with public partners that ensures payments to the private partners in return for their investment.
 - o *Advisory PPP*: Public partners rely on nonpaid advice or information from private partners for public policy decisions.
 - o *Consulting PPP*: Public partners rely on paid advice or information from private partners for public policy decisions.
- *PPP Network*: A network of PPPs that differ from each other through non-identical membership or different forms of organization, but that belong to each other by having the same management or by being sub-groups of a larger PPP network.

⁵ Public sector refers to governments, government agencies, and public international organizations. Private sector refers to for-profit and not-for-profit non-governmental organizations.

⁶ The distinction between long-term and short term cooperation may depend on the issue area.

Table 2: A Resource-Based Typology of Public-Private Partnerships

		Contract ensures payment of private partners for their invested resources	
		No	Yes
Kind of resources contributed by private partners	Beyond advice and information	Collaborative PPP	Contractual PPP
	Limited to advice and information	Advisory PPP	Consulting PPP

Source: Own account

While various forms of public-private cooperation have existed for as long as there has been a distinction between public and private (Wettenhall 2010), the term public-private partnership was first established in the 1970s for business-community partnerships for urban regeneration and development (Weihe 2008: 431). A prominent example is the New York City Partnership that started in the 1970s and organized different projects to deal with issues such as youth unemployment, education, transportation, housing, crime, and public safety – all with the aim “to make New York City a better place to live, to work and to conduct business” (NYT 1985). The private participants are often the driving force behind these partnerships and their voluntary contributions are often the main sources of funding for them (Weihe 2008: 431). I propose to label these partnerships as collaborative PPPs, as their defining characteristic is the collaborative provision of public services. An example of a collaborative PPP in this study is the World Customs Organization Intellectual Property Rights Strategic Group, which organized private funding and private human resources to assist the World Customs Organization in the area of IPR enforcement (chapter 5).

In contrast, the contractual PPP reflects a buyer-seller relationship. This type of PPP is mostly used for infrastructure projects with a special type of participation by the private sector that involves private financing. This is a special type of procurement where the public partner does not pay the price of a project to the private partner at once, but instead enters a long-term contract, for example, by leasing a prison or by allowing the private partner to charge fees for a public service, as in the example of toll roads. Weihe (2008) uses the term “infrastructure approach” and Hodge et al. (2010) use the term “long-term infrastructure contract (LTIC)” to describe such partnerships. However, the term contractual PPP can be used for any outsourcing of public services to private partners, where the contract ensures payments to the private partners either by the public partner or by the users of the public services provided. PPPs that charge a member fee as a means to pool resources, but not for profit, should be considered as collaborative, not contractual. Collaborative PPPs can also have a contract, but it does not reflect a buyer-seller relationship. What keeps collaborative PPPs together is not the monetary incentive from the partnership contract itself, but an interest in the public services provided or supported by the partnership. Interestingly, no global PPP against IP crime is of the contractual type. Therefore, it was not possible to include this type of PPP in this study. There are apparently enough private actors with an interest in supporting PPPs against IP crimes that are not paid to do so.

Advisory PPPs are forms of public-private cooperation where public partners rely on nonpaid advice or information from private partners for their public policy decisions. Consulting PPPs resemble advisory PPPs with the only distinction that a contract ensures payment for the consulting. In both cases, the advice and information may be based on research that required the investment of monetary

resources by the private partners, but the resource that is transferred to the public partner is advice or information only. While the term public-private partnership is well established for collaborative and contractual PPPs, advisory and consulting PPPs are not always described as a PPP and it may be disputed whether it makes sense to describe such continuous consultation as a partnership. However, such relationships are described as PPPs by several authors, such as Börzel and Risse (2005: 199) in their co-optation PPP or Linder and Rosenau (2000: 5) in their definition of PPPs. In this study the Advisory Committee on Enforcement of the World Intellectual Property Organization is an example of an advisory PPP (chapter 6). As there is no global PPP against IP crime of the consulting type, it was impossible to include this type in this study.

The previous four PPP types are all unitary PPPs, which means that all PPP members are part of one group with a relatively clear structure. In contrast, a PPP network has a more complex structure. It is a network of PPPs that differ from each other through non-identical membership or different forms of organization, but that belong to each other by having the same management or by being sub-groups of a larger PPP network. Examples of this type of partnership are the Global Alliance for Improved Nutrition (GAIN 2010) and the Public-Private Partnership for the Urban Environment of the United Nations Development Programme (UNDP 2009, Weihe 2008). This type of PPP often functions as a platform for further partnerships that can be set-up as sub-groups or projects. Often an international organization acts as a facilitator, while PPPs within the network provide a public service in a specific region or in a specific issue area. This is also consistent with the concept of IOs as orchestrators (Abbott et al. 2010). A PPP network may consist of collaborative, contractual, advisory, or consulting PPPs. An accurate description of a PPP network

therefore makes it necessary to describe the type of each PPP in the network. An example of a PPP network in this study is the International Medical Products Anti-Counterfeiting Taskforce of the World Health Organization (chapter 9).

This typology of PPPs provides a useful framework for the description of the partnership activities of Interpol, the WCO, the WIPO, and the WHO in the following chapters. It is helpful to show the differences and similarities of the PPPs and also how they change over time. Interpol started with an advisory PPP that evolved into a PPP network consisting of an advisory PPP and several collaborative PPPs. The WCO had a collaborative PPP for several years, which was then aborted and replaced with a network of one advisory and several collaborative PPPs. During a second PPP reform at the WCO, the advisory PPP within the network was replaced, while the collaborative PPPs continued their work.

Reasons for Transnational PPP Creation

As there is no single authoritative PPP definition, there is also no single established theory about why public-private partnerships are formed. This is also true for transnational PPPs. A literature review of empirical studies about transnational PPPs shows that they identify reasons for PPP formation that do not significantly differ from reasons for other kinds of cooperation, such as overlapping interests, benefits from a PPP, and a common understanding of a problem (Schäferhoff et al. 2009, Andonova 2006). The applicability of general cooperation theory is not surprising, as public-private partnerships are a special form of cooperation and therefore the requirements for cooperation are also necessary for PPPs. However, such studies fail to explain why a PPP is chosen instead of other forms of cooperation, why specific types of

PPPs are chosen, and why some PPPs are continued while others are terminated or reformed.

This exploratory study started from the basis of rationalist cooperation theory (Taylor 1987), but went on to develop a theory that explains transnational PPPs as a distinct form of cooperation. In the course of this study, five factors have been identified, of which the first refers to cooperation in general (cooperation in the pursuit of resource gains), and the additional four apply specifically to transnational PPPs:

1) Cooperation in the pursuit of resource gains

The basis for the creation of PPPs is cooperation in the pursuit of resource gains. Different kinds of resources may be pursued: human resources, financial resources, information, advice, credibility, reputation, legitimacy, and access to further actors. Besides the pursuit of absolute resource gains, the pursuit of relative resource gains may also be important. The entire idea behind the protection of intellectual property, from an entrepreneurial perspective, is to gain and protect a competitive advantage, which is effectively a relative resource gain. Therefore many private sector members of a PPP participate because they pursue such relative resource gains. However, public sector members may also compete with other public sector actors and therefore seek resource gains relative to those competitors. Whether relative or absolute resource gains are pursued and the kind of resources pursued not only influence the creation of a PPP, but also which kind of PPP is founded and how it develops. Advisory PPPs are chosen if only information or advice is pursued. Collaborative PPPs are chosen if financial or other material resources are also pursued. PPP networks are useful if concerns about relative resource gains lead to cooperation problems that make it difficult to collaborate in one large unitary PPP.

The finding that absolute and relative resource gains matter for PPPs, a special form of cooperation, is consistent with general cooperation theory. Michael Taylor (1987) has described several configurations of interests that could lead to cooperation. While the most common assumption in cooperation theory is an interest in absolute gains, a combination with an interest in relative gains is also possible. The relevance of relative gains increases with competition or rivalry between actors. In extreme cases, an actor will not participate in cooperation even if it is beneficial in terms of absolute gains when a rival actor would benefit relatively more (Taylor 1987: 116). This line of reasoning can also be found in the concept of power in the theory of the state by Thomas Hobbes (1968: 185) or in the realist theory of International Relations (Grieco 1988).

2) Common ground

In order to move from mere cooperation to partnership, the partners need to reach an agreement, which requires at least some common ground. This common ground may involve, but does not require, common interest. The partners' views on a given issue do not necessarily need to be identical, but they need to share some basic understanding about an issue to serve as common ground for the partnership. In almost all of the cases in this study, the TRIPS Agreement is the written manifestation of this common ground. The only exception is the case of the World Health Organization. The WHO developed a definition of counterfeit medicines together with private sector representatives, which serves as the written manifestation of the common ground.

3) PPP management

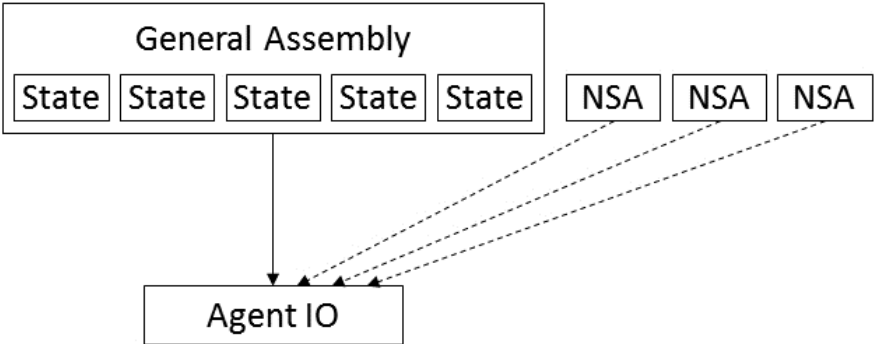
Based on the PPP definition established above, a defining characteristic of a PPP is that it is set up in order to continuously exist over a long period of time. This makes it necessary that at least one partner in a PPP provides the day-to-day management, so that the PPP can continuously exist between meetings. For transnational PPPs, the most common provider of such management services is a public international organization (IO). In order to provide such services, the public IO needs approval from the members of the PPP, as well as from its regular constituents - the member states represented in the general assembly. The approval from the member states is even more crucial than the approval of other stakeholders. If a few stakeholders do not approve the PPP management, the PPP can still exist with fewer members. But if a few member states in a general assembly with consensus decision making reject the PPP management by a public IO, they can thereby put an end to the existence of the PPP. Therefore, the approval of the member states is crucial for the PPP management, which is required for the existence of the PPP. The managing IO either needs an explicit mandate or sufficient discretion to interpret a general mandate as the basis for the PPP management.

The IO may be interested in providing the management service for the PPP in order to increase its discretion. The resources acquired in the PPP make it less dependent on the resources contributed by the member states. This is consistent with principal-agent theory (Hawkins & Jacoby 2006: 208). The relationship of states and IOs is frequently explained with a principal-agent model, where the states form a collective principal and the public IO is the agent (e.g. Hawkins et al. 2006a, Reinalda & Verbeek 2006). Non-state actors are usually described as non-principals in principal agent theory about IOs. However, PPPs can be seen as a special type of

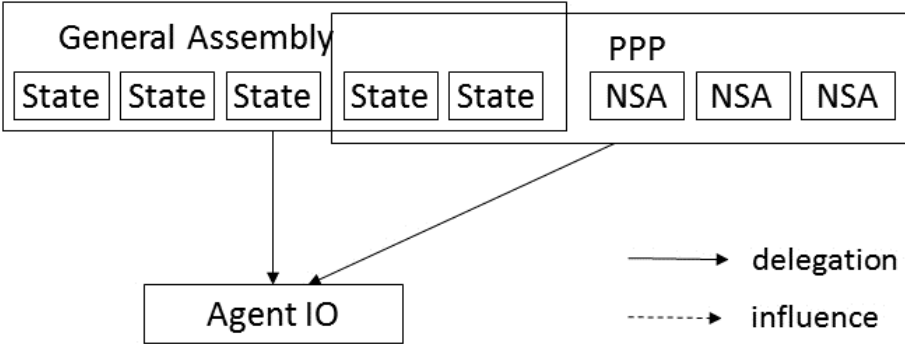
cooperation with non-state actors that makes principals out of former non-principals. Within the PPP, the public and private actors are both members of a collective principal, delegating additional public and private authority to an IO that could possibly lead to a restructuring of that IO (Hawkins & Jacoby 2006: 210). Figure 2 shows principal-agent models of delegation to an IO. Section 1 shows how non-state actors are usually treated in PA theory, while section 2 shows how to integrate PPPs into PA theory if they delegate to an IO.

Figure 2: PA-Models of Delegation to an IO

1) Collective Principal and Non-State Actors



2) Two Overlapping Collective Principals: GA and PPP



Source: 1) Own account based on Hawkins & Jacoby 2006: 208;
 2) Own account

4) Representation of stakeholders

If some stakeholders are not adequately represented in the PPP, they may choose to oppose it from the outside. Such opposition is especially relevant if the opposing stakeholder has access to official decision making bodies of the public international organization that manages the respective PPP. Things are further complicated by the fact that states are not always uniform actors as assumed in realist and institutionalist International Relations theory. Different agencies of a state can pursue different policies and therefore it matters not only if a state is represented, but also by which government agency it is represented. In several examples in this study, a PPP was supported by one government agency while it was opposed by another government agency from the same state. The degree to which the representation of stakeholders is accepted can be considered the input legitimacy of the PPP.

This finding supplements research by Anne-Marie Slaughter, who identified regulators and law enforcement officers in transgovernmental networks as “new diplomats” (Slaughter 2004: 36, 55). This study shows that the legitimacy of such “new diplomats” can be challenged, especially if other stakeholders or “old diplomats” are not adequately represented.

5) PPP policy

Another factor that can influence the development of a PPP is its policy. The degree to which the PPP policy is accepted can be considered as the output legitimacy of the PPP. Different policies can lead to more or less political conflict, which then can constrain or terminate a PPP. PPPs which avoid highly controversial policies also avoid opposition against that PPP. This study has shown that legislative proposals and standard setting can lead to controversies, which jeopardize a PPP. Less

controversial policies are improvements to the enforcement of existing laws, the exchange of information, and the allocation of resources to conferences and training seminars. In particular, the acquisition of voluntary funding from PPP members avoids discussions about the distribution of resources.

Based on the five factors above, three hypotheses have been developed from this study, which concern the formation, type, and development of transnational PPPs against IP crimes:

A) Formation

The factors (1) cooperation in the pursuit of resource gains, (2) common ground, and (3) PPP management are each necessary for the formation of a PPP. Together, they are sufficient for the formation of a PPP, if their continuous existence is anticipated.

B) Type

An advisory PPP is chosen if the public sector partners seek only information or advice and a collaborative PPP is chosen if they also seek financial or other material resources. A unitary PPP is chosen if the planned PPP activities do not involve cooperation problems. If, however, the planned activities involve cooperation problems, then the more flexible and conflict-resistant PPP network is the PPP type of choice.

C) Development

A PPP is continued if the factors that led to its formation remain stable, its representation of stakeholders is unchallenged, and its policy does not include controversial activities such as the drafting of legislative proposals. A PPP is changed (reformed or terminated) if there are relevant changes to the factors that led to its formation, its representation of stakeholders is challenged, or its policy includes controversial activities such as the drafting of legislative proposals.

3. Methods: Proceeding of the Inquiry

Starting from existing theory about cooperation, this study developed a new theory about a special type of cooperation: transnational public-private partnerships against IP crime. As the goal of this study is theory development and as this study explores a new research area with very recent developments, I have chosen a qualitative approach in order to have the ability to react to new insights and new developments during the study (Munck 2004). This chapter explains the methodological approach of this study. The first section explains the research design and the subsequent sections explain the methods used for data acquisition and for data evaluation.

Research Design

This study uses the comparative method (George & Bennett 2005: 151) based on six cases and the method of process tracing (Bennett 2004: 22) for each individual case study. The selection of the cases from all possible transnational PPPs has been done according to three criteria:

First, only cases from the specific area of intellectual property crime have been chosen. Although this criterion is already introduced through the topic of the study and the research question, I would like to stress its importance for the theory development in this study. Non-academic policy documents often point to the specificities of an issue area to justify the chosen policy as appropriate. If one compares PPPs from different issue areas, the importance of issue-specificity may indeed appear overwhelming compared to other factors. However, if one keeps the issue area (IP crimes) constant, there is still a large degree of variation in terms of PPP activities, including different types of PPPs, different developments after

formation, as well as a case where no PPP was founded at all. These differences beg for an explanation, which is delivered by this study.

Second, I avoided choosing only existing PPPs as cases, because this would be a selection without variation of the dependent variable “PPP formation”. To avoid such a selection bias, I have chosen to structure this study into six cases along the lines of the involved international organizations, resulting in a comparative case study with variation of the dependent variable. The WTO is the case without a PPP, which serves as a contrast to the other cases where a PPP was created. In those other five cases, different types of PPPs have been created, of which some remained stable, while others have been changed (either reformed, replaced, or terminated). In such cases, several PPPs have been studied in one case according to the primary public IO they are associated with. This facilitated the tracing of the process that led from one PPP to its successor, and thereby allowed to draw more conclusions from the single case studies than if each PPP would have been treated as an independent case. The structuring of the cases along the lines of the involved public IOs is beneficial for the process tracing and for the case comparison, but it shifts some attention from the PPPs to the IOs. However, this is justified as the IOs have been identified as crucial actors anyway. The case study of the Global Congress on Combating Counterfeiting & Piracy slightly departs from the IO structured case logic, because this case involves several IOs as equal partners. Therefore the Global Congress is presented as an individual case, but is also seen in relation to the involved IOs.

Third, only global IOs have been selected as cases. There is only small variation in terms of member states among the IOs. This small variation is also irrelevant, as all the active states in global IP policy are members in all IOs in this

study. This criterion, similar to the first, excludes certain explanatory factors that could have appeared overwhelming, but offer little value for theory development. The fact that different states pursue different IP policies is already well known (Sell 2003, May 2007). However, if one excludes regional and state membership variation by analyzing only global IOs, there is still a large degree of variation in terms of PPP activities. These differences beg for an explanation, which is delivered by this study.

These three criteria have led to the identification of six cases for this study: Interpol, the World Customs Organization, the World Intellectual Property Organization, the World Trade Organization, the World Health Organization, and the Global Congress on Combating Counterfeiting & Piracy. Given the rather small number of cases with considerable variation in terms of PPP creation and PPP type, I have chosen to study all these cases and not only a sample of them. Therefore, this study is a comprehensive survey of the research area narrowed down by the three criteria above, while it also is the study of a purposefully selected sample of the wider research area of all transnational law enforcement PPPs.

Data Acquisition

I gathered the required data for each case study with reconstructive empirical investigations (Gläser & Laudel 2009: 37). The investigation started in 2008 and lasted until 2011. Data has been gathered about ongoing processes as well as about processes that happened several years before the start of the investigation. Most analyzed processes did not happen before the year 2000, but some information has also been gathered about earlier events.

In the process of the investigation, the first sources of data were the secretariats of the analyzed public-private partnerships against IP crime. This

included the relevant units within the PPP-managing public international organizations (Interpol, WCO, WIPO, and WHO), the IP division within the WTO, which did not manage a PPP but participated in PPPs of other IOs, and the business association SNB-REACT, which performed secretariat services for the WCO from 2000 until 2007. The first data gathered from these sources were publicly available primary documents, such as websites, press releases and reports. Then I approached the managers of the PPPs, as well as other employees and former employees who were involved in PPP-management for more information. I conducted semi-structured expert interviews (Gläser & Laudel 2009: 111) with them and received unpublished primary documents, such as internal reports, correspondence, and agendas, minutes and participant lists of meetings.

Further sources were various participants of the PPPs and also opponents of the PPPs. I identified those further sources based on the information I received from the first sources, internet searches, and information from topical discussion groups and contact lists on internet career networks, such as LinkedIn and Xing. I also gathered such information with participant observations at two Global Congresses on Combatting Counterfeiting and Piracy (2009 and 2011), at the 2010 meeting of the WIPO Advisory Committee on Enforcement, at the 2010 Interpol International Law Enforcement IP Crime Conference, at the 2010 INTA Anti-Counterfeiting Congress, at the 2008 INTA Annual Meeting, and at the 2008 IACC Meeting. For the selection of those further sources, I used relevance and accessibility as criteria. I conducted interviews with people who were available in a cost-efficient way, for example, at conferences. I made extra efforts to speak with people I identified as either very important supporters or opponents of the PPPs or as very knowledgeable about them. For economic reasons, I had to use such a relevance- and accessibility-based

sampling strategy for further sources, but I did a comprehensive survey with the first sources. I conducted expert interviews with representatives of all the studied public IOs and SNB-REACT. An overview of the type of interview partners per case study is presented in table 3.

Table 3: Expert Interviews per Case Study

	Interpol	WCO	WIPO	Global Congress	WTO	WHO
current and former employees of that IO	2**	4	2	8***	1	2**
further PPP participants	15	13	13	23	2****	10
PPP opponents*	-	5	-	-	-	5
Total interviews	17	22	15	31	3	16

Source: Own account based on altogether 36 expert interviews.
 *) PPP opponents have only been counted for the WCO and the WHO, as there was major opposition. Criticism and suggestions for improvement have not been considered opposition here.
 **) Aline Plançon, an Interpol employee on loan to the WHO, has been counted for Interpol and for the WHO here.
 ***) Refers to employees of IOs in the Global Congress Steering Group: Interpol, WCO and WIPO.
 ****) There are no PPP participants for the WTO case as there is no PPP. However, the number represents participants of other PPPs who mentioned failed attempts to establish a closer relationship between the private sector and the WTO.

In total, I conducted 36 expert interviews. Conveniently, most interview partners were able to give information about more than one case as they were involved in several PPPs against IP crimes. Each expert interview was conducted in person and lasted between 30 minutes and 2 hours. Often additional information was given after the interview via e-mail or in phone calls. I offered anonymity to all interview partners, but many interview partners explicitly stated that they do not need protection through anonymity. I recorded almost all interviews. In only a few cases I had to rely on notes because the interview partner was not comfortable with a recording.

Although literature about interview-based research often recommends not to confront one interview partner with information from another interview (Gläser & Laudel 2009: 152), I decided to depart from that rule in the rare cases when information given in one interview appeared inconsistent with previously received information from a non-anonymous source. This strategy proved very helpful in increasing the accuracy of information. Once presented with the apparently contradictory information, the interview partners clarified misunderstandings, corrected errors, or supported their version of the events with evidence. In one case, this led to a lively e-mail exchange between interview partners with supporting evidence sent as attachments in copy to me.

Data Evaluation

I identified relevant statements about PPP developments in the interview transcripts, interview notes, and several primary documents and coded them using MaxQDA software. In further steps of the coding process I grouped the codes into code categories that are sufficiently abstract to be applicable across cases (Coffey & Atkinson 1996: 26). For example, in the first coding process I coded statements concerning cooperation in the pursuit of absolute gains in money, human resources, information for policy decisions, information for law enforcement operations, and in the knowledge and skills to conduct trainings. In the second step of coding, I grouped all these codes into the code category of cooperation in the pursuit of absolute resource gains. This code and the code for cooperation in the pursuit of relative resource gains / competitive behavior were then coded as the top-level code cooperation in the pursuit of resource gains. In a similar fashion, I coded all

references to a mandate for PPP management and all references to discretion for PPP management. I subsequently grouped these codes into PPP management.

After these two phases of coding, I proceeded to the comparison of the six cases using Mill's methods of agreement and difference (George & Bennett 2005: 153) in order to identify necessary and sufficient conditions for PPP formation, type, and development. With this method I identified five relevant factors and developed three hypotheses about how these factors influence PPP formation, type, and continuation or change.

4. Interpol

The International Criminal Police Organization (ICPO / Interpol) is a public international organization that facilitates international police cooperation against transnational crime. While Interpol has no police powers anywhere in the world, it offers a wide variety of support services to law enforcement agencies in its 188 member countries. Intellectual property crimes fall into Interpol's field of activity as long as they are transnational. Mere civil actions against intellectual property infringements do not fall into its field of activity, unless they are of interest because they overlap with criminal actions. Interpol increased its activities in this crime area after the signing of the TRIPS agreement in 1994 and especially since it created a dedicated IP crime unit in 2001.

This chapter starts with relevant background information about Interpol and then analyzes how Interpol became active against IP crime. The subsequent sections are dedicated to different Interpol-led PPPs against IP crime. They start with the Interpol IP Crime Action Group and analyze how this unitary advisory PPP increasingly developed into a PPP network, consisting of one advisory PPP and several collaborative PPPs. The final section of this chapter summarizes the key findings from the Interpol case study with a view to explaining the developments.

Background on Interpol

In 2009, Interpol had 188 member states, a staff of 645, and a budget of 59 million Euro (app. 82m USD), of which more than 90% came from member states (Interpol 2010f). From its secretariat in Lyon, Interpol provides a wide variety of services for its member countries in order to improve international police cooperation. Interpol facilitates personal contacts between law enforcement officers through a system of

liaison officers and seconded officers. It maintains a global police communication system and several police databases, for example, to exchange information about fugitives, stolen motor vehicles, stolen works of art, and lost and stolen travel documents. Interpol also analyses the gathered information and provides information about transnational crime developments. Last but not least, Interpol offers assistance to member countries with police training, police capacity building measures, and operational support through the 24 hour a day operational Command and Co-ordination Centre or through Interpol support teams who are sent on request to member states (Interpol 2010f).

Interpol has a history of understanding itself as a non-political organization. From its beginnings, it was intended to facilitate police cooperation even between states that have difficult political relations. Therefore, regular diplomatic channels were avoided as much as possible. Interpol's predecessor, the International Criminal Police Commission (ICPC), was founded in 1923 as a nongovernmental organization similar to an international professional association of chiefs of police, but its business was the facilitation of international cooperation between public law enforcement agencies (Anderson 1989: 39). This ambivalent character of the organization - acting on behalf of governments and yet remarkably independent from governments - continued when it was re-established after World War II. It filed a request to the United Nations Economic and Social Council for recognition as a nongovernmental organization in 1947 (Anderson 1989: 69). This request from an apparently intergovernmental organization created some confusion, but was eventually granted. However, in many respects Interpol was treated differently than other nongovernmental organizations and in 1971 the UN re-classified it as an intergovernmental organization (Anderson 1989: 70). Keohane and Nye explicitly

mentioned Interpol as an example of what they call transgovernmental: interactions between "sub-units of governments on those occasions when they act relatively autonomously from higher political authority in international politics" (Keohane & Nye 1974: 41).

Interpol still can be described today as a public international organization that is more transgovernmental than intergovernmental, and less political than many other public international organizations. However, the degree to which Interpol is transgovernmental and non-political has decreased over the years. Interpol was often described as a "policeman's club" during the first 25 years after World War II (Anderson 1989:42, Fooner 1989: 54). In 1971, the UN re-classified it from a non-governmental organization to an intergovernmental organization (Anderson 1989: 70) and it is widely regarded as such today. All public international organizations examined in this study recognize Interpol as a peer organization. More than 20 international conventions mention Interpol and thereby legitimize it as an international institution (Interpol 2010b). Interpol's constitution, regulations, and practices allow two interpretations concerning the membership of the organization. On the one hand, Interpol's current constitution from 1956 frequently refers to police bodies as members of the organization. For example, article 4 of the constitution regulates that "Any country may delegate as a Member to the Organization any official police body whose functions come within the framework of activities of the Organization." (Interpol 1956) On the other hand, the constitution regulates that each country, not each police body, has one vote in the General Assembly, Interpol's supreme governing body. And today's Interpol website provides a list of 188 "member countries" (Interpol 2010h), not member police bodies. However, the member countries are represented in the annual General Assemblies by chiefs of police and

high ranking law enforcement officers instead of the diplomats who would otherwise be expected in international affairs. This is regulated in the Interpol constitution:

“Because of the technical nature of the Organization, Members should attempt to include the following in their delegations:

- (a) High officials of departments dealing with police affairs,
- (b) Officials whose normal duties are connected with the activities of the Organization,
- (c) Specialists in the subjects on the agenda.”

Article 7, Constitution of Interpol (1956)

The “technical nature” described in article 7 is understood as in contrast to the “political nature” of many other international organizations. Article 3 of the convention prohibits any “activities of a political, military, religious or racial character”. The purpose of this self-restraint is to allow police cooperation even between countries with difficult political relations, who, for example, would not want to help the other country in its suppression of political dissidents. However, Interpol’s interpretation of the distinction between political and ordinary criminals has changed over the years. While Interpol refused to assist in activities against war criminals after World War II, it changed the policy in 1985, when it issued a red notice⁷ requesting the arrest of Nazi war criminal Joseph Mengele (Anderson 1989: 46). During the 1960s and 1970s, Interpol reacted very reluctantly to requests for assistance against terrorists on the grounds that it is political, but this changed in the 1980s and 1990s (Barnett & Coleman 2005: 611). Since the 1999 General Assembly declared the fight against international terrorism as one of the main aims of Interpol (Interpol 1999b), it became increasingly a core crime area of Interpol and many of the Interpol red notices for wanted persons now concern terrorist suspects (Interpol 2011f).

However, although the degree to which Interpol is non-political has decreased over the years, it is still less political than many other public international

⁷ A red notice is a standardized Interpol communication informing all Interpol members about a person whose arrest and extradition is requested. It is usually based on a national arrest warrant.

organizations and this is an important characteristic of the organization. When talking to Interpol employees, they mention quite frequently that they deal with technical, non-political matters (Reuland 2009, Newton 2009a, Plançon 2010).

Interpol and Intellectual Property Crimes

When Interpol first paid high level attention to the issue of intellectual property crimes, it was rather brief and did not have significant consequences. The Interpol General Assembly at its 1977 session in Stockholm passed a resolution encouraging member states to do more to combat piracy of movies and sound recordings. It did so after lobbyists from the film industry approached Interpol and asked for actions against such copyright infringements (Sandhu 1999: 99). However, besides encouraging its members to become active, Interpol did not take action itself.

The issue resurfaced in 1994, the year when the Uruguay Round of trade negotiations was concluded and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was signed. The affected industries, which had lobbied for IP regulation through TRIPS (Sell 2003: 2), then also lobbied Interpol to get involved in the enforcement of those rights. A public-private “Working Party on Product Counterfeiting and Piracy” was held on two consecutive days in February 1994 at the Interpol Headquarters in Lyon. The participants of this meeting represented associations, nine individual companies from Europe and the United States, and law enforcement agencies from Belgium, France, Germany, Italy, Switzerland, Thailand, the United Kingdom, and the United States (Sandhu 1999: 99). This meeting adopted recommendations to increase international cooperation against product counterfeiting and piracy and to raise awareness of the issue at the national level. In October 1994, the Interpol General Assembly in Rome passed a

resolution that was based on the recommendations of the public-private working party (Sandhu 1999: 99). Interpol asked its members to increase its efforts against IP crime, but its own efforts were rather limited. None of the Interpol staff was exclusively dedicated to the issue, and the Working Party on Product Counterfeiting and Piracy was invited only every two years from 1994 on.

However, Interpol made an attempt to gather more information on the issue. A 1995 Interpol study showed that the information available about the subject was sketchy. The study was further complicated due to the fact that only 45 of its then 177 member states replied to Interpol's IP crime survey. But Interpol's efforts to gather information and to raise awareness culminated in a 1999 special issue of the Interpol member magazine *International Criminal Police Review*. The entire special issue of more than 100 pages was dedicated to counterfeiting and piracy and included contributions from Microsoft, PSA Peugeot Citroen, Glaxo Wellcome, the Anti-Counterfeiting Group, and the International Chamber of Commerce (Interpol 1999a). This 1999 special issue had set the scene for the 2000 Interpol General Assembly in Rhodes, where the Interpol General Secretariat received the mandate "to combat international violations of intellectual property rights." (Interpol 2000) With this resolution, the General Assembly supported Interpol's plans to address this issue "in co-operation with the international business community by implementing a comprehensive programme not only aimed at raising awareness of the problem, but also focusing on a comprehensive strategy to actively combat this form of crime" (Interpol 2000).

This program was created in 2001 and its first manager was the Danish police officer Erik Madsen. Thereafter, Interpol had one staff member dedicated to intellectual property crimes. In order to establish a closer relationship between this

new program and the interested business community, Interpol hosted an International Conference on Intellectual Property Rights in November 2001. This conference proposed to establish a public-private partnership to address this issue, as a more formal and permanent working group (Interpol 2005b: 9). The resulting PPP became known as the Interpol IP Crime Action Group.

The Interpol IP Crime Action Group (IIPCAG)

At its first meetings in July and October 2002, the group was first called “Interpol Expert Group on Intellectual Property Rights” and then “Interpol Advisory Group on Intellectual Property Rights” (WIPO 2003b: 5). Only from its third meeting in January 2003 onward did it have its final name: the Interpol IP Crime Action Group. Since then it has met about two to three times a year. Especially during its early years, this group served as the primary IP related partnership with the private sector for Interpol. Later, it became only one of many partnerships in a PPP network with the Interpol IP crime program at its center. Table 4 shows a list of the members of IIPCAG based on a brochure that was produced by Interpol in June 2007. This list shows 18 public sector members and 13 private sector members. 10 of the private sector members are business associations and only 3 are individual companies.

Table 4: Interpol IP Crime Action Group (IIPCAG)

Founded 2002

Secretariat: Interpol

Co-chairs: Interpol

Int. Federation of the Phonographic Industry (founding co-chair)
Underwriters Laboratories (since 2006)

Public Sector Members

International: Interpol

World Customs Organization (WCO)
World Intellectual Property Organization (WIPO)

Europol

National:

Belgian National Police
Department of Public Security (PR China)
Federal Bureau of Investigation (USA)
Finland National Board of Customs
French National Police
Irish National Police (Garda Siochana)
Italian National Police
Mexican Institute of Industrial Property
Mexican National Police
Police Service of Northern Ireland (UK)
Public Prosecutor for Serious Economic Crime (Denmark)
Royal Canadian Mounted Police
Spanish National Police (Guardia Civil and Policía Nacional)
United Kingdom Intellectual Property Office

Private Sector Members:

Associations: Coalition for Intellectual Property Rights (CIPR)

Global Anti-Counterfeiting Group (GACG)

International Chamber of Commerce Business Action to Stop
Counterfeiting and Piracy (ICC BASCAP)*

International Federation of the Phonographic Industry (IFPI)

International Trademark Association (INTA)

Motion Picture Association (MPA)

Pharmaceutical Research and Manufacturers of America (PhRMA)

Pharmaceutical Security Institute (PSI)

Union des Fabricants (Unifab)

United States Chamber of Commerce Coalition Against Counterfeiting
and Piracy (USCC CACP)

Companies: Microsoft Corporation

Procter & Gamble

Underwriters Laboratories (UL)

Source: Own account based on IIPCAG 2007a, Monks 2010, Grant 2011

*) In January 2007 BASCAP merged with the Global Business Leaders Alliance Against Counterfeiting (GBLAAC). Until then GBLAAC was an independent member of IIPCAG (Dobson 2010).

While the published membership list emphasized the membership of business associations instead of individual companies, many participants of the meetings are actually employees of companies who sit at the table officially representing one of the business associations. For example, employees of Unilever, British American Tobacco, Lacoste, L'Oréal, and LVMH Moët Hennessy Louis Vuitton have participated in IIPCAG meetings, although the names of these companies do not appear in the brochure or on the Interpol website (Heath 2010, Hardy 2009, Interpol 2005b). John Newton, a British police officer who has managed the IP crime program since 2003, explained this emphasis on business associations instead of individual companies as a means to safeguard the reputation of Interpol:

“It would be deadly for us to be perceived as being in the pocket of one particular company. That would kill the program overnight. So we work with cross-industry representative bodies.”
John Newton (2011), Interpol Intellectual Property Crime Program Manager

This concern also influences how Interpol accepts financial support from the private sector for its activities. The IP crime program does not accept funding from individual companies, only from associations. For example, the US Chamber of Commerce, the International Federation of the Phonographic Industry (IFPI), and the Pharmaceutical Security Institute (PSI) supported the Interpol IP crime program financially (Newton 2009a, Huther 2010, Kubic 2010, IIPCAG 2007b, IFPI 2005: 11). Acquiring private sector funding for its activities has been increasingly important for Interpol and especially for its IP crime program. While Interpol as a whole gets up to 10% of its funding from private sector entities, the IP crime program receives about as many contributions from the private sector as it receives from the public sector (Newton 2011). When IIPCAG was set up in 2002, the financial aspect of the public-private cooperation was less prominent than it is today. It was first designed as an advisory

PPP, as is also indicated by the early names “Expert Group” and “Advisory Group”. The initial goals of the group were to raise awareness of IP crime, to exchange information about it and about the means to fight it, and to discuss how the fight against IP crime can be improved by international and public-private cooperation. However, the Interpol secretariat aimed to make the partnership more collaborative, by trying to persuade the private sector members of IIPCAG to put more resources into the joint fight against counterfeiting and piracy. It tried to model the Interpol PPP against IP crime based on another PPP at Interpol, which worked against payment card fraud. The payment card companies American Express, Discover, MasterCard, Europay, and Visa had an agreement with Interpol from 1999 to 2004 in which they agreed to finance Interpol activities against payment card fraud (Madsen 2002). This PPP was not continued, because Interpol asked the payment card companies to increase their funding for this PPP, but they could not reach an agreement (Int.06 2010).

However, Interpol’s attempt to transfer the model of the payment card PPP to the IP crime partnership was not successful. One important reason was that there are a lot more owners of intellectual property than there are payment card companies. While it was possible for Interpol to bring all major payment card companies to the table and reach an agreement that excludes the possibility of free riding for some stakeholders, this is practically impossible for all the IP owners and their many associations. Nevertheless, some private sector partners were willing to commit more resources to the partnership than just their advice and active participation in meetings, though they were not willing to provide general funding for the Interpol IP crime program. Such general funding by a few IP owners or associations would have been an incentive for free riding for others, possibly

competing companies, who could benefit from Interpol's work against IP crime without supporting it directly. Instead, some private sector partners were willing to support specific Interpol projects that they considered to be more immediately in their interest (Dobson 2010, Newton 2009a). This strategy made it easier for them to justify their investment and it also increased their ability to influence Interpol activities. However, this project-based funding does not mean that Interpol was completely controlled by private sector organizations. Interpol was not dependent on one partner. It could choose between various partners. And whether a project was launched always depended on the ability to align Interpol's interests with the interests of the particular partners. This is also expressed in the following two quotes. The first is from a private sector participant of IIPCAG, and the second is from the chair of IIPCAG and manager of the Interpol IP crime program:

"IIPCAG is a forum for John [Newton] and the secretariat at Interpol to convince the business community to support initiatives that Interpol wants to do. I think to a certain extent it also becomes a forum where the business community can present projects that Interpol should be working on. But my impression is, unless Interpol, unless John sees a way that those are really going to help him and help Interpol, they don't go very far."

Bill Dobson (2010), IIPCAG participant on behalf of the
Global Business Leaders Alliance Against Counterfeiting (GBLAAC) and later the
Business Action to Stop Counterfeiting and Piracy (BASCAP)

"In the decision making process [I ask:] Is there a cost-benefit for Interpol? And that does not necessarily mean cash. Does this activity meet our core priorities? There are certain core priorities we have, which is operation of police databases, operation of police support, and all that sort of things. So I make a judgment on: does it meet the needs of our member countries and is it in line with the objectives of my organization."

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

As an unintended side-effect, this project-based funding also led to the fragmentation of the Interpol PPP from one large unitary partnership (IIPCAG) to a PPP network with several smaller partnerships involving only those partners willing to commit significant resources to it. Until 2007, IIPCAG had a central role within this PPP network, but this diminished over time (Newton 2009a, Monks 2010). This can also

be seen from Interpol publications, where all Interpol activities against IP crime were presented as activities of IIPCAG until 2007 (IIPCAG 2006, IIPCAG 2007b). Later, the IP Crime Action Group became only one of several partnerships in a PPP network tied together by the Interpol IP Crime Program as the central node. This is also reflected in later Interpol publications, which were no longer presented on behalf of IIPCAG (Interpol 2009f, Interpol 2010j).

During the early years of IIPCAG, there were about 30 participants, but only four of them were willing to commit significant resources to the partnership beyond active participation and advice (Newton 2009a). These were the music industry, represented by the International Federation of the Phonographic Industry (IFPI), the movie industry, represented by the Motion Picture Association (MPA), the pharmaceutical industry, represented by the Pharmaceutical Security Institute (PSI), and the tobacco industry, most prominently represented by British American Tobacco (BAT). These four private sector partners were also the first to support Interpol's training and operational activities in the operation Jupiter (Newton 2009a, Hobbs 2009, Int.06 2010, IIPCAG 2006: 2). Among these four core supporters, IFPI was probably the most influential (Dobson 2010, Kubic 2010). They had lobbied Interpol for years to take an active role against IP crime, and when IIPCAG was founded, the IFPI representative Iain Grant took the lead as the private sector co-chair of this PPP (Grant 2011). IFPI also provided 35,000 Euro direct funding for the Interpol IP Crime Program (IFPI 2005: 11) and they provided training material, which served as the basis for an Interpol IP crime investigations manual (IIPCAG 2006: 3).

In 2006, the US Chamber of Commerce became an important partner of Interpol when they decided to finance the creation of the Database on International Intellectual Property (DIIP) (IIPCAG 2007b). The product safety certification

organization Underwriters Laboratories Inc. (UL) also became an increasingly important Interpol partner in 2006 when UL representative Brian Monks was elected as co-chair of IIPCAG. Since then, UL has been a major partner in several partnerships in the Interpol PPP network: the International Law Enforcement IP Crime Conference, the Certification Industry Against Counterfeiting (CIAC), and the International IP Crime Investigator's College (IIPCIC) (Monks 2010, Newton 2009a). The following sections of this chapter give an overview of the different partnerships in the Interpol PPP network.

Operation Jupiter

Operation Jupiter is the most prominent operational partnership in the PPP network of Interpol. It started in 2004 in South America and consists of several training seminars, investigations, and raids in different locations of the participating countries that are conducted annually. In the seminars, the law enforcement officers learned about the method of operation of IP criminals and how to distinguish counterfeits from original products. The trainers in these seminars were from the public and private sector (Newton 2009a). Also, the investigations and raids involved close collaboration between public law enforcement officers and private sector security professionals. The actual arrests and seizures have been carried out by the national law enforcement agencies of the participating countries because they have the necessary legitimacy to apply force, but the entire decision making process about when, where, why, and how to apply force has been influenced by the partners from the private sector. The resources invested by the companies and associations, in terms of information, intelligence, human resources, and money, were relevant for the outcome of Operation Jupiter. Interpol, which has neither the resources nor the

necessary police power for such operations, contributed in two ways: On the one hand, Interpol facilitated and coordinated the necessary transnational and public-private collaboration (Newton 2009a). On the other hand, Interpol's reputation also helped to legitimize the entire operation (Dobson 2010). Information was given from the private sector partners to Interpol, was checked there, and was then passed on to the national law enforcement agencies. Thereby, Interpol lent its credibility to the private sector information. This gain in credibility and reputation can make it more attractive for companies and associations to operate via Interpol rather than approaching the national law enforcement agencies directly. The flow of information from the private sector via Interpol to national law enforcement agencies in Operation Jupiter is also described in the following quote of a former British police officer who then became investigations manager at British American Tobacco:

"I am one of the founder members of Operation Jupiter on behalf of my company. As a former Metropolitan Police Service (MPS) detective chief inspector (Organised Crime Group in the days when I retired), I have worked for British American Tobacco at its headquarters in London since I retired in 2001. [...] All the evidence gained in each phase of the [Jupiter] operations, and there have been four thus far, has been obtained by industry itself and then handed to the appropriate enforcement authority via Interpol. [...] There are great opportunities to be had by mutual cooperation between private industry and the enforcement authorities. You would be astounded at the intelligence industry generates in its operations, as was I when I first joined, and it is there to be shared in appropriate circumstances."

Terry Hobbs (2009), Senior Investigations Manager, Brand Enforcement Group of British American Tobacco

The first phase of Operation Jupiter was conducted from November 2004 until April 2005. Its focus was the triborder region between Argentina, Brazil, and Paraguay. The participating public sector partners were the police agencies of these three countries together with the Brazilian Customs and Interpol. The private sector partners came from the music, motion picture, pharmaceutical, and tobacco industry (Interpol 2008e). The music and the motion picture industry each show an exceptional high degree of law enforcement collaboration, also between competing

companies. They pool their law enforcement resources to a large extent and have their copyrights enforced by associations. The two major global associations for these industries are the International Federation of the Phonographic Industry (IFPI) and the Motion Picture Association (MPA), which were also partners in Operation Jupiter from the beginning. The impact of their involvement might be seen from the fact that many of the seized products were CDs and DVDs, especially during the first three years of Operation Jupiter (Interpol 2008e, Interpol 2011g). Interpol published the first detailed statistic of the seizures with a breakdown by product category for Operation Jupiter III. According to this statistic, 55.5% of the seized products were CDs and DVDs (Interpol 2008e).

The pharmaceutical industry was represented in Operation Jupiter by the Pharmaceutical Security Institute. PSI is an association of 25 research-based pharmaceutical companies that focuses on anti-counterfeiting. It became the primary private sector partner of Interpol in the fight against counterfeit medicines and has also supported Interpol financially (Kubic 2010). The level of law enforcement collaboration between competing companies in the pharmaceutical sector is lower than in the music and movie industry, but it is still higher than in many other industry sectors. The PSI member companies have their own security staff and only rely on PSI for the facilitation of collaboration with other companies and for the analysis of all the information submitted by members, especially checking for links between cases. Due to the prominent role of the individual companies, some were also involved in Operation Jupiter individually (Interpol 2011g).

The tobacco industry and all other industries that subsequently joined Operation Jupiter have been represented by individual company representatives during operations, as such work is not delegated to associations. For activities in the

area of awareness raising and lobbying, Interpol prefers the participation of representatives from business associations in order not to appear too influenced by a few particular companies (Newton 2009a). For example, when the results of the first phase of Operation Jupiter were presented at a conference in Rio de Janeiro in June 2005, the private sector was represented on the high level panel by the Global Business Leaders Alliance Against Counterfeiting (GBLAAC) executive director William Dobson (Dobson 2010, Interpol 2005c). And when the Jupiter results were presented on the occasion of the second Global Congress on Combating Counterfeiting & Piracy at the Interpol Headquarters in November 2005, the BAT employee Neil Withington also spoke on behalf of GBLAAC (Withington 2005).

Table 5: Operation Jupiter (South America)

No.	Time	Countries	Results
I	Nov 2004 - Apr 2005	Argentina, Brazil, Paraguay	93 arrests and seizures with an estimated value of 15 million USD*
II	Sep - Dec 2006	Previous 3 plus Chile and Uruguay	129 arrests and seizures with an estimated value of 35 million USD*
III	Oct - Dec 2007	Previous 5	185 arrests and seizures with an estimated value of 116 million USD*
IV	Jul - Sep 2008	Previous 5 plus Bolivia and Peru	311 arrests and seizures with an estimated value of 131 million USD*
V	Sep 2009 - Dec 2010	Previous 7 plus Colombia, Ecuador, French Guyana, Panama, Suriname, Venezuela	About 1000 arrests, seizures with an estimated value of 200 million USD* and more than 150 law enforcement officers trained

Source: Own account based on Interpol 2008e, Interpol 2009b, Interpol 2011g, Interpol 2011d
 *) Interpol does not provide details about the method used to estimate the value of the seized goods. These figures need to be treated with caution due to the difficulties involved with estimating the value of counterfeit goods as described in chapter one.

Operation Jupiter II was conducted from September until December 2006. In addition to the participants of the first phase, law enforcement agencies from Chile and Uruguay also joined. New representatives on the private sector side came from luxury brand companies producing textiles or other designer articles. Since then, the operation has been conducted annually and has included more and more industry

sectors and more countries. It has also led to an increasing number of arrests and seizures associated with the operation. Operation Jupiter V was thus far the longest and largest phase of Operation Jupiter. It lasted from September 2009 until December 2010 and involved 13 participating countries in South America and 20 participating industry sectors. In addition to Interpol, the World Customs Organization was also involved. As a result of all five phases of Operation Jupiter, several hundred law enforcement officers have been trained in the fight against IP crime, about 1700 people have been arrested, and several tons of counterfeit and pirated products have been seized, including CDs, DVDs, toys, cigarettes, watches, clothes, medicine, agrochemicals, and processed food (Table 5).

The Counterfeit Medical Products Spin-Off

Under the umbrella of Interpol operations, the majority of counterfeit product seizures outside of South America have been focused on medical products. An important reason for this is the health risk involved with pharmaceutical counterfeiting. This helps Interpol to legitimize the activity against IP crime (Newton 2009a). The specialization in counterfeit medical products has its origin in Operation Jupiter South-East Asia that ran from May 2005 until March 2006. It was organized by Interpol in collaboration with the World Health Organization and the Tropical Medicine Research Programme of the charitable Wellcome Trust (Newton 2009a, Newton et al. 2008). The focus of Operation Jupiter South-East Asia was an investigation into the trade of counterfeit versions of the anti-malaria medicine artesunate. A sample of tablets from Cambodia, Laos, Myanmar, Thailand and Vietnam was examined, showing that 49.9% of the sample was counterfeit. All counterfeit artesunate tablets contained less than a quarter of the required active

ingredient. Instead, the tablets contained a wide variety of other, potentially harmful, ingredients. The forensic examination of the tablets and the packages also suggested that at least some of them originated in China (Newton et al. 2008). In March 2006, the Interpol secretary general Ronald Noble presented the findings at the Chinese Ministry of Public Security in Beijing, emphasizing the health risk from the counterfeit medicine and the economic effect on the main producer of genuine artesunate, the Chinese pharmaceutical company Guilin. The subsequent investigation in China led to the arrest of two suspects and the seizure of 24,000 blister packs of counterfeit artesunate (Newton et al. 2008).

In February 2006, the World Health Organization founded its own public-private partnership against counterfeit medical products, the International Medical Products Anti-Counterfeiting Taskforce (IMPACT), and Interpol was one of the founding members of that PPP. The collaboration between Interpol and WHO intensified in January 2008, when the French police officer Aline Plançon was sent from Interpol to WHO to manage the enforcement activities of IMPACT from the WHO secretariat (Plançon 2010). Since then, almost all Interpol operations targeting counterfeit medicine have been conducted under the umbrella of WHO IMPACT. These include Operation Storm in South-East Asia, Operation Mamba in Africa, and the global Operation Pangea, targeting counterfeit medicine sold on the internet. These activities will be analyzed in more detail in chapter 9 about the World Health Organization. However, in January 2010 the Interpol Medical Products Counterfeiting and Pharmaceutical Crime Unit was founded as a newly independent spin-off (Interpol 2010g). The remaining Interpol IP Crime Unit has been dedicated to all non-medicine related IP crimes.

Other Operational and Training Activities

The main operational partnerships are those that are conducted annually: Operation Jupiter in South America, Operation Storm in South-East Asia, Operation Mamba in East Africa, and the global Operation Pangea. However, there are also smaller operations which have only been conducted once, such as Operation Atlantic in West Africa (Interpol 2011e) and Operation Zambezi in Southern Africa (Interpol 2009a). The course of events is similar in each operation: a training seminar followed by investigations and raids with arrests and seizures. However, the partners involved and the support for each operation can differ. For example, low purchasing power makes most African states a less attractive market for many companies. Therefore, they are not interested in getting involved with law enforcement PPPs there, as the benefits would probably not offset the costs (Buchan 2010). Nevertheless, Interpol managed to find supporters. A major financial contributor to Interpol activities in Africa is the German government. Since 2008 it has financed the Interpol OASIS (Operational Assistance, Services and Infrastructure Support) program with an annual budget of 4 million EUR (Interpol 2010k, AA 2010). While OASIS supports law enforcement capacity building throughout Africa in general and not just in the area of IP crime, it has effectively been the main funding source for Interpol activities against counterfeiting and piracy in Africa since 2008 (Plançon 2010).

The operations are probably the most impressive aspect of the Interpol PPPs against IP crime because the results can be immediately measured by the number of seizures and arrests. However, there are also many partnerships organized only around training seminars without subsequent raids. The trainings are relevant because they raise awareness of IP crime, provide law enforcement officers with the skills and knowledge to fight it, and establish contacts between public law

enforcement officers and private security professionals that provide the basis for future collaboration. One example of such a training partnership is the Interpol IP Crime Training Program. It started in November 2007 with a five day training course that was held in Rome at the police academy of the Italian financial police Guardia di Finanza. Four such courses have taken place in Rome, providing training for a total of more than 100 law enforcement officers from Italy and from many other countries. Private sector partners from the Interpol IP Crime Action Group provided substantial support to the courses including trainers, training material, and financial support. The private funding was also used to pay for the travel costs of several public sector participants (Interpol 2009f: 7, Dobson 2010).

Interpol organized similar courses on IP crime in Argentina, Kenya, Senegal, South Korea, Hong Kong, Turkey, Mexico, and Thailand, training more than 200 people per year (Interpol 2009f, Interpol 2010j). The partners involved and the sources of funding differed from course to course. The course in Kenya has been financed by the German government through the OASIS program (Interpol 2008h), the course in Turkey has been financed by the European Commission (Interpol 2010i), and the courses in Senegal and in Mexico both have been financed by the United States Patent and Trademark Office (Interpol 2010l, Interpol 2011a).

By receiving funding from different partners, Interpol is less dependent than if it would rely on only one source of income. It can get support from a wide variety of private and public partners. However, the Interpol IP crime program depends on external income, because it does not get enough funding from the regular Interpol budget to organize these operations and trainings (Newton 2009a). Though the limited regular funding increases the dependence of the program on external funding, it also increases its independence from the regular Interpol members and the Interpol

decision making bodies. It can be time consuming and could be difficult to organize a majority at the Interpol General Assembly to increase the budget of measures against IP crime, as IP crime is not considered to be a priority crime. Therefore, it is easier to avoid a potentially controversial discussion and seek support from individual member countries and from the private sector. This high level of discretion through less dependence on the Interpol membership is also expressed in this quote from the manager of the Interpol IP Crime Program:

“We are not constrained by member country criteria. [...] We don't have to go and ask for permission, like Europol for example. They have to get authority from all the member countries to do specific actions. Whereas I have a conversation with a representative of the private sector, identify common interest, and say <okay we will do this> and then we just do it.”

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

International Law Enforcement IP Crime Conferences

The product safety certification organization Underwriters Laboratories Inc. (UL) became an increasingly important Interpol partner. In 2005, the UL vice president for anti-counterfeiting operations, Brian Monks, joined the Interpol IP Crime action group upon invitation from Interpol. In 2006, he was elected co-chair of IIPCAG (Monks 2010). And the first separate Interpol-UL partnership within the Interpol PPP network started in 2007, the International Law Enforcement IP Crime Conference. This annual three-day conference was first hosted in June 2007 in Niagara Falls, Canada, with the Royal Canadian Mounted Police (RCMP) as the hosting partner. The RCMP was also the hosting partner for the 2008 conference in Halifax, Canada (Newton 2009b). The conference in 2009 was hosted in partnership with the Irish national police Garda Siochana in Dublin, Ireland (Interpol 2009e). And the 2010 conference was

hosted in Hong Kong, China, together with Hong Kong Customs⁸. While the hosting partner changed depending on the venue of the conference, Interpol and UL were continuously the leading partners in this PPP. UL managed the bulk of the organizational work for the conference, including financial aspects like finding conference sponsors, exhibitors, and charging the delegate fees. So in the end, UL was not the only paying partner for the conference. The sponsorship and the fees from private sector delegates also make it possible for many police and customs officers to participate for free, and additional public sector delegates only have to pay a reduced fee (Newton 2009a). The fact that UL managed these financial transactions and much of the organizational work reduced the human resources needed at Interpol for the conference. It also prevented potential conflicts with Interpol financial regulations, as the Interpol program manager explained:

“It’s all done in a way which complies with our financial regulations. And quite often it is very helpful to work with a company like UL, who insulate us. They deal with the money side and they approach the private sector. I’m not a fundraiser. [...] It is very useful for us as a way of getting financial support without Interpol having to ask for money.”

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

Interpol’s strength in this partnership is that it attracts a wide variety of conference participants, especially from law enforcement agencies around the world. Interpol can invite speakers and public sector delegates who would be less willing to come to a purely private sector conference. Around 400 participants came to each of the first three conferences and around 500 to the fourth (Newton 2009b, Interpol 2009e, Interpol 2010d). This format is much bigger than the Interpol IP crime training courses, where the specific knowledge and skills are being taught in smaller groups. The focus of these IP crime conferences is more to exchange information and the

⁸ Information about the 2010 Interpol International Law Enforcement IP Crime Conference has been obtained by a participant observation.

networking across national borders and between the public and the private sector. Smaller workshops during or after the conference may also serve a training function, such as the training day subsequent to the Hong Kong conference (Interpol 2010e).

On the other hand, the International Law Enforcement IP Crime Conference is smaller than the Global Congress on Combating Counterfeiting and Piracy analyzed in chapter 7. It also has a more technical and less political focus. While the Global Congress also lobbies a higher political level to change the legal environment, the IP Crime Conference is focused on practical approaches within the existing legal framework (Newton 2009a).

Certification Industry Against Counterfeiting (CIAC)

In March 2008, Interpol hosted a Certification Industry Anti-Counterfeiting Summit at its headquarters in Lyon. Eleven major international certification organizations participated in this summit and formed the Certification Industry Against Counterfeiting (CIAC) together with Interpol (Interpol 2008d). A list of CIAC members is shown in table 6. While each member has a particularly strong presence in one country or region, all these certification organizations operate internationally. Therefore their areas of operation overlap and they are to some extent competitors. Yet they decided to overcome the competition and collaborate on anti-counterfeiting work, as the CIAC industry chairperson expressed:

“CIAC is again to bring all these people / industries together. We can all be competitors, but when it comes to counterfeiting we are not competitors. We need to provide information, who the bad people are and what case you solve.”

Brian Monks (2010), Vice President Anti-Counterfeiting Operations at Underwriters Laboratories and Industry Chairperson of Certification Industry Against Counterfeiting (CIAC)

Table 6: Certification Industry Against Counterfeiting (CIAC)

Founded 2008

Secretariat: Interpol and Underwriters Laboratories

Co-chairs: Interpol and Underwriters Laboratories

Public Sector Members

Interpol

Private Sector Members (with location of headquarters):

Bureau Veritas LCIE (France)

CSA International (Canada)

IMQ (Italy)

Intertek Group (United Kingdom)

KEMA (Netherlands)

NSF International (USA)

SGS S.A. (Switzerland)

TÜV Rheinland Group (Germany)

TÜV Süd (Germany)

Underwriters Laboratories (USA)

VDE Testing and Certification Institute (Germany)

Source: Own account based on CIAC 1011 and Monks 2010

Interpol and Underwriters Laboratories are the leading partners in this PPP as they co-chair CIAC and both provide secretariat functions. However, as Interpol prefers to work with associations instead of individual companies, CIAC was created to broaden the partnership with the certification industry. Besides three summits held in 2008 and 2010, the main CIAC activity is Operation Overshock, which focuses on the fight against counterfeiters of certification marks. Law enforcement agencies participating in Operation Overshock include the Australian Federal Police, the Royal Canadian Mounted Police, the U.S. Federal Bureau of Investigation (FBI), the U.S. Immigration and Customs Enforcement (ICE), and Europol (Interpol 2009f: 8, Interpol 2010j)

Interpol is interested in intensifying the partnership with the certification industry within the IP crime program, because products with a counterfeit certification mark are especially likely to pose health and safety risks (Newton 2009a). For example, electrical appliances such as a flat iron, which can melt down and cause

fires, have been found with a counterfeit UL certification mark. Also, smoke-detectors with a counterfeit UL mark have been found (Monks 2009). The Interpol IP crime program has increasingly focused its activities on products which pose a health or safety risk, such as electrical appliances, toys, and medicine. For example, about 70% of the products covered in the IP Crime training workshops in East Africa involved a health or safety risk. This has been done because it is easier to find public support for the fight against such counterfeit products than for the fight against pirated DVDs or counterfeit handbags (Newton 2009a). At the same time, raising awareness of the health and safety risks that result from counterfeiting is beneficial for all the partners in the Interpol PPP network, as it is used to lobby for increased enforcement of intellectual property rights in general.

International IP Crime Investigator's College (IIPCIC)

Besides the many training courses provided at different times in a variety of locations, Interpol also provides IP crime training material as a permanent resource. This started during the early years of the Interpol IP Crime Action Group with IP crime investigations manuals in different languages, which were partly based on a training manual of the International Federation of the Phonographic Industries (IIPCAG 2006: 3, Interpol 2005b, Interpol 2004: 20).

In 2009, Interpol and Underwriters Laboratories started to develop an online learning site: the International IP Crime Investigator's College (IIPCIC). The first IIPCIC training modules were presented at the 2009 Global Congress on Combating Counterfeiting and Piracy in Cancun. The website (iipic.org) went online with a set of seven introductory learning modules shortly before the 2011 Global Congress in Paris (IIPCIC 2011). The idea behind IIPCIC is not only to provide training needed for

IP crime investigations: it is also to provide investigators in different countries, in different public agencies, and in the private sector, with shared knowledge, which makes collaboration easier. Having an online learning site, as opposed to a printed manual, also allows the updating of information and the coverage of recent developments. Interpol also intends to use IIPCIC as a communication platform to connect a global IP crime investigators community. A list of contact points and subject matter experts is available in order to provide specific information that is not covered in the modules. Also, Interpol training courses are announced on the platform (IIPCIC 2011, Newton 2009a).

The leading partners in this collaborative PPP are Interpol and Underwriters Laboratories. The arrangement between the partners bears some similarities with that of the IP Crime Conference. Interpol's strength in this partnership is its access to law enforcement agencies around the world. UL provided seed funding and most of the required human resources to develop the online learning site. Additional private sector partners can provide industry specific learning modules. In order to do so, they have to pay a fee to UL and thereby offset some of UL's costs (Newton 2009a). For example, a training module about optical disc piracy has been contributed by the Motion Picture Association (Buchan 2010).

Database on International Intellectual Property (DIIP)

Providing databases for the international exchange of information between law enforcement agencies is one of the core businesses of Interpol. Examples are the databases on fugitives, stolen motor vehicles, and lost and stolen travel documents. However, the Interpol databases did not contain much information related to IP crime before the IP crime program was started (Sandhu 1999: 100). Therefore, one of the

first ideas Interpol presented in the IP Crime Action Group was to create a specialized database for IP crime in collaboration with the private sector (Dobson 2010). The idea was that IP rights owners collect a lot of information in their investigations, especially for civil litigations, and that it would be beneficial to share that information in order to find links between cases and to get a bigger picture of the IP crime situation (Newton 2009a).

However, this idea met with mixed reactions from the private sector. While the International Federation of the Phonographic Industries was willing to submit information from their investigations to an Interpol database, many other participants were not so keen on the idea (Dobson 2010). Some companies simply did not have much information to share. Others had concerns they might violate national laws for data protection. Still others did not expect a benefit for them that would justify the resources needed to process and submit the information. And yet others were concerned about the security of their information at Interpol. If information would leak, it could potentially jeopardize ongoing investigations, have a negative impact on brand reputation, or it could be exploited by competitors (Huther 2010, Dobson 2010, Newton 2009a).

Nevertheless, Interpol pursued the aim to set up a database for the exchange of information related to IP crime. In 2006, Interpol managed to get financial support for the creation of such a database. The U.S. Chamber of Commerce (USCC) provided seed funding in amounts of 400,000 USD for one year and 350,000 USD for the second year. And the U.S. Patent and Trademark Office (USPTO) paid an additional 250,000 USD to Interpol (Huther 2010, IIPCAG 2007b). Besides financing the database, this grant of a million dollars was also used to hire additional staff for the Interpol IP crime unit (Newton 2009a). Therefore, this partnership with the USCC

and the USPTO was a significant boost for the development of the Interpol IP crime unit, although the initial expectations concerning this database have not been met as many companies continued to have reservations.

The Database on International Intellectual Property (DIIP) was operational and was officially launched in February 2008 at a conference in India hosted by the USCC, the US-India Business Council, and the Confederation of Indian Industry (Interpol 2008c). In reaction to the concerns of the private sector, DIIP has very strict data handling procedures to ensure a high level of security. The database may only be accessed by staff of the Interpol IP crime unit and nominated technicians for database maintenance (Interpol 2008b). Law enforcement agencies or participating private sector organizations have no direct access to the database. If companies submit data about a case, the Interpol IP crime unit checks the data, enters it into the database, and checks for links to other cases in DIIP or in other Interpol databases. DIIP itself only contains information submitted by the private sector, and other Interpol databases contain information only from police agencies. While the data is stored separately, there is an interface that allows to find links between a case submitted by a public law enforcement agency and a case submitted by a private sector investigator (Interpol 2008b). If a link is found, Interpol staff contacts the organizations who submitted the data and asks if their contact information and case reference number may be submitted to another organization. If the organizations agree, only the contact is established and the information exchange then takes place bilaterally. Interpol does not send the case information itself. Through this system, collaboration between different private sector organizations and between public and private organizations can be facilitated (Interpol 2008b).

Nevertheless, the database was not as successful as hoped. Many private sector members of the Interpol IP Crime Action Group continued to have reservations about the DIIP and did not supply data. Even the Pharmaceutical Security Institute, one of the core Interpol partners, decided not to supply data to the DIIP. Instead, they offered to provide specific information to Interpol on request or establish a contact with a member company which has the relevant information (Kubic 2010). The US Chamber, which invested significant resources into the database, was dissatisfied with the fact that other partners of Interpol were very reluctant to invest resources, be it money or data for the database. The USCC representative in the Interpol IP Crime Action Group at the time expressed this with the following words:

“I was a part of the Interpol so-called IIPCAG advisory group and I was not very pleased with the composition of the group, nor was I pleased with what they did. They met. They worked on some interesting reports. The companies contributed no money. Most of the companies were not contributing data to the very database that was designed to help Interpol get better data. To me it was not very functional.”

Brad Huther (2010), Senior Director at the Global IP Center of the United States Chamber of Commerce from 2005 until 2010

While the database was not as successful as hoped, it became a useful tool for Interpol coordinated operations. Most of the information in the database was gathered in operations like Jupiter, Mamba, and Storm. Thereby, it has helped to find links between organized crime groups involved in IP crimes in different world regions (Newton 2009a).

Key Findings about the Development of Interpol PPPs

Interpol's involvement with IP crime was very limited until 1994. A resolution at the 1977 Interpol General Assembly had hardly any consequences. No staff was dedicated to the issue and there was very little information about IP crime in the Interpol files. This began to change slowly as a result of a General Assembly resolution in 1994, and it increased significantly after a resolution in 2000. This coincided with the signing of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 and its subsequent implementation in several phases, which depended on the stage of economic development of each WTO member country and its date of accession. The year 2000 was the year in which TRIPS had to be implemented in countries in transition and in developing countries that were parties from the beginning.

The TRIPS agreement triggered the increased activity of Interpol in three ways: First, the TRIPS agreement was the first agreement to regulate an international minimum standard for IP rights and, thereby, provided a common ground for the global enforcement of those rights. Second, the TRIPS agreement requires member states to criminalize trademark counterfeiting and copyright piracy on a commercial scale. This requires law enforcement agencies around the globe to take an active role against IP crime, and Interpol, as their global transgovernmental organization, is also affected by the creation of this new prohibition regime. And third, the affected industries that lobbied for the regulation of IP rights through the TRIPS agreement subsequently lobbied Interpol to become involved in their enforcement.

The public-private Working Party on Product Counterfeiting and Piracy that was first held at the Interpol headquarters in 1994 was an early form of public-private cooperation but not a public-private partnership. As it was hosted only every two

years, it rather had the character of a re-occurring conference than of a continuous form of cooperation, which is a defining characteristic of a PPP. The re-occurrence of this working party in 2001 was called the International Conference on Intellectual Property Rights, and it proposed to establish a public-private partnership as a more formal and permanent working group. Therefore, the resulting Interpol IP Crime Action Group (IIPCAG) is the first Interpol PPP against IP crime. It met two to three times a year and had a continuous work plan as an advisory PPP focused on raising awareness of IP crime, exchanging information about such crimes and the means to fight them, and discussing ways to improve the fight against IP crime.

However, Interpol wanted more than an advisory PPP. It wanted a collaborative PPP where the private sector partners invest more resources into the partnership. Interpol had such a collaborative partnership with the payment card industry against payment card fraud, but it did not succeed in establishing a similar partnership with the IP owning industries. Cooperation problems between the private IIPCAG partners, especially the risk of free riding of some partners at the cost of others, prevented them from pooling their resources into one unified collaborative PPP. Instead, some private sector partners were willing to support specific Interpol projects that they considered to be more immediately in their interest. This project-based funding led to the fragmentation of the Interpol PPP from IIPCAG into a PPP network with several smaller partnerships that involved only those partners who were willing to commit significant resources to it. This transition phase went from about 2004, when the first Operation Jupiter was started, to about 2007, when the first International Law Enforcement IP Crime Conference showed the special partnership between Interpol and UL, and when the Interpol IP crime program received a

significant boost through funding from the US Chamber of Commerce for the Database on International Intellectual Property (DIIP).

The new Interpol PPP network consists of IIPCAG as one advisory PPP and several collaborative PPPs, such as Operation Jupiter, DIIP, IIPCIC, the International Law Enforcement IP Crime Conference, and the Interpol IP Crime Training Program. The growth of the PPP network was paralleled with growth of the Interpol IP crime program. The number of staff grew from 1 in 2005 to 6 in 2010. About half of its funding comes from the public members and the other half from the private members. It receives requests from the members of the PPPs and reports back to them. So while the Interpol General Secretariat as a whole acts as an agent for the Interpol member states, the IP crime program within it effectively also acts as an agent for the private and public members of the PPP network.

Resources and the pursuit of gains in them are important to explain the formation of the Interpol PPP and its transformation. For the purpose of the exchange of information, it was relatively easy to set up an advisory PPP. However, when Interpol wanted more resources than just information, especially money, some cooperation problems appeared. PPP members were reluctant to invest more resources if the return on investment was unsure. And they were not only concerned with absolute gains of resources, but also with relative gains - or at least the avoidance of relative losses compared to their competitors. Partners did not want to pay for something which may be more beneficial for a free-riding competitor than for themselves. These concerns led to a fragmentation of the Interpol PPP into a network of smaller PPPs, where free-riders can be more easily excluded and where the benefit is more apparent.

The most important resources invested by the private sector partners were information, human resources, and money. Interpol contributed the coordinating functions of the secretariat of the PPP, as well as its reputation, its credibility, and its access to law enforcement agencies, which brought their legitimacy to apply force as subjects of police powers to the partnership.

Besides the cooperation problems mentioned above, there was no major interference of the Interpol PPP. The Interpol member states gave the secretariat an explicit mandate to form an IP crime program and to work in partnership with the business community. Additional mandates or budget increases were not necessary, as Interpol acquired discretionary funding of the IP crime program from public and private members. Interpol also avoided getting into the contested field of IP policy. It did not make any legislative proposals. Interpol emphasized that it is a technical and non-political organization and focused on the facilitation of international and public-private law enforcement cooperation. This avoidance of contentious issues⁹ is an important factor in explaining the durability of the Interpol PPP compared to PPPs of other international organizations analyzed in this study. The Interpol IP crime program manager explains this difference in this quote:

“I think one of the reasons why we are successful is that we don't get caught up in the political argument about the definition of counterfeit and all that sort of thing. [...] If I get asked by the media about any of these political things, my response is: <Our focus is transnational organized criminals. These criminals are commodity brokers, they are organized criminals, they manipulate any product to generate profits.> And that takes us immediately straight out of the political dimension.”

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

⁹ In 2012 the Interpol IP Crime Program was renamed to “Trafficking in Illicit Goods Program”, while continuing with the same management and activities against IP crimes. Apparently this name change reflects Interpol's conflict avoidance strategy, as it happened amidst increased attention for international IP policy and public protests against ACTA. However, as this recent development happened after the investigation period of this study, it is not possible to present a more thorough analysis here.

5. World Customs Organization

The World Customs Organization (WCO) is a public international organization that facilitates international cooperation between customs agencies with the aim of enhancing their effectiveness and efficiency. The enforcement of intellectual property rights has been a task for customs agencies around the world since the TRIPS Agreement has been implemented. Therefore, IP has also been a topic for the WCO since 1994. In the year 2000, the WCO founded the IPR Strategic Group, a collaborative PPP with the higher involvement of the private sector than all other PPPs in this study. The WCO effectively outsourced much of its IP related work to a private sector business association. It regained control over the outsourced activities when it replaced the WCO IPR Strategic Group in 2007 with another PPP, the SECURE Working Group, which was an advisory PPP. Collaborative partnerships have also been re-formed. Thereby, the WCO PPP effectively changed from a collaborative PPP to a PPP network. Since 2007, IP policy at the WCO has been highly contentious, which also affected the public-private relationship.

This chapter starts with relevant background information about the WCO and then analyzes how the WCO became active in the area of enforcement of IPRs. The next two sections are dedicated to an analysis of the WCO IPR Strategic Group and its activities in the area of legislative proposals. Subsequent sections analyze the end of the IPR Strategic Group and its various successors: the SECURE Working Group, the CAP Group, the RHC Group, and the IPM. The final section of this chapter summarizes the key findings from the WCO case study with a view to explaining the developments.

Background on the World Customs Organization

In 2009, the WCO had 176 member customs administrations, which included 172 nation states and four semi-independent administrations: Bermuda, Hong Kong, Macau, and the Netherlands Antilles (WCO 2010a). The WCO secretariat in Brussels operated with a staff of 106 and an annual budget of 14 million Euro (app. 20m USD) (Vorreux 2010a). The activities of the WCO range from more intergovernmental to more transgovernmental forms of international cooperation: for example, it developed and administers several customs conventions, such as the Convention on the Harmonized Commodity Description and Coding System and the Convention on the Simplification and Harmonization of Customs Procedures; it maintains the Customs Enforcement Network (CEN) for the exchange of information about customs offences; it facilitates joint operations against smugglers; and the WCO provides training and technical assistance to help developing countries, in particular, keep up with international customs standards, such as the non-binding SAFE Framework of Standards to Secure and Facilitate Global Trade (Mikuriya 2010).

As far as the conventions are concerned, the WCO is an intergovernmental organization. However, the WCO also acts as a transgovernmental organization, especially with respect to its role as a facilitator of cooperation between customs agencies. These two modes of cooperation, intergovernmental and transgovernmental, are to some extent linked to the two roles customs agencies have: One role is to collect revenue in the form of customs duties. In this role, which is embedded in fiscal policy and trade policy, the WCO tends to work more intergovernmentally and cooperates with the intergovernmental World Trade Organization (WTO). The other role is to protect societies from crimes, such as drugs smuggling or weapons smuggling. In this role, which is embedded in the policy area

of crime and policing, the WCO tends to work more transgovernmentally and cooperates with Interpol, which is also very transgovernmental.

The ambiguity of the WCO between different customs roles and different forms of international cooperation can also be seen in its history. It was originally founded as the Customs Co-operation Council (CCC) in 1952, which is still its formal name, while the World Customs Organization is a working name adopted in 1994. The functions of the CCC described in article 3 of the Convention concern the revenue collection role, such as matters regarding the classification of goods in customs tariffs and their valuation, or they are rather broad and unspecific, such as “to study all questions relating to co-operation in Customs matters” (WCO 1967). Nothing in the convention explicitly refers to the protection role of customs agencies.

With respect to the revenue role of customs agencies, the WCO was successful in drafting and administering intergovernmental conventions. However, it focused on aspects that were perceived to be more technical, such as the valuation of goods and their classification, and less political than tariffs themselves. The negotiations about tariffs were left to the trade rounds of the General Agreement on Tariffs and Trade (GATT) and, subsequently, to the World Trade Organization (WTO). The Convention establishing a Customs Co-operation Council was signed in 1950 together with the Convention on Nomenclature for the Classification of Goods in Customs Tariffs and the Convention on the Valuation of Goods for Customs Purposes, which were also the first conventions to be administered by the WCO (Asakura 2003: 288). Both conventions have been further developed and are rather successful today. The Nomenclature Convention has been replaced with the Convention on the Harmonized Commodity Description and Coding System, which was signed in 1983 and entered into force in 1988. It had 138 contracting parties as

of 2010 and it serves as a global standard beyond its membership (WCO 2010a). It has also been used in GATT/WTO negotiations (WTO 2011b). The Valuation Convention was replaced with the WTO Valuation Agreement, which is administered partly by the WTO and partly by the Technical Committee on Customs Valuation under the auspices of the WCO. A similar division of labor between WCO and WTO has been established for the WTO Agreement on Rules of Origin (WCO 2011). In both cases the work of the WCO is perceived as more technical and less political than that of the WTO. This is also expressed by the following quote of the former head of communications at the WCO:

"They have a saying at the WCO: When you arrive at the WCO, you leave your politics at the door. We deal with practical problems. We are looking for solutions. We work together. So that gives a sense of the tone of the organizations."

David Blakemore (2010), Former WCO Head of Communications 1996-2004

In spite of this division of labor between WCO and WTO, they have also been in competition to some extent. When the WTO was founded in 1995, many people at the WCO secretariat were concerned that the WCO could be subsumed within the WTO, as much of its work was very closely related to the work of the WTO. This concern has led the WCO secretariat to promote the organization as indispensable and to emphasize work areas that are less related to the work of the WTO, such as the role of customs to protect societies from crimes (Blakemore 2010).

Although the protection role of customs is not explicitly mentioned in its founding convention, the WCO increasingly assumed a role in these matters from its founding. As early as December 1953, the Customs Co-operation Council passed a recommendation on bilateral mutual administrative assistance in customs enforcement matters. And in 1954 the Council mandated the WCO secretariat to

perform the role of a central office pooling information about persons convicted of customs offences (WCO 1977). Since 1967, the WCO also pools additional information concerning the method of operation of smugglers, and in 1975 the WCO decided to extend the information from convicted smugglers to also include persons suspected of smuggling. This is, however, limited by laws in many countries prohibiting the sharing of information about suspects who are presumed innocent until proven guilty (WCO 1977, Blakemore 2010). Since the year 2000, the WCO has operated the computerized Customs Enforcement Network (CEN) for the voluntary exchange of information about customs offences, such as drug smuggling, weapons smuggling, and the infringement of intellectual property rights. Customs officers from more than 155 countries received access to CEN up until 2009 (WCO 2009b), but the willingness to upload data was less than the WCO hoped (Vorreux 2010a). Especially when it comes to the exchange of sensitive information, bilateral cooperation is often preferred over multilateral cooperation (Blakemore 2010).

All these activities in the area of customs enforcement are rather transgovernmental ways of cooperation. Director Generals of customs agencies, Customs Attachés, and other high ranking customs officers meet in the Council, the governing body of the WCO, make recommendations, and mandate the WCO Secretariat to perform certain tasks. The secretariat then facilitates and coordinates direct cooperation between customs agencies. All this does not require ratifications as in the case of intergovernmental conventions. The WCO tried to make conventions concerning the protection role of customs agencies, but was less successful in doing so. It drafted the Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (Nairobi Convention), which was signed in 1977 and entered into force in 1980. But this

convention only has 51 contracting parties as of 2010, not including many major countries in world trade, such as the USA, China, Germany, Japan, South Korea, and the Netherlands (WCO 2010a). And the 2003 Johannesburg Convention on Mutual Administrative Assistance in Customs Matters has not entered into force as it has only been ratified by three countries so far (WCO 2010a). Therefore the WCO also uses more transgovernmental kinds of agreements that do not need ratification. For example, in 2005 the WCO has set the non-binding SAFE Framework of Standards to Secure and Facilitate Global Trade. And it subsequently provided capacity building measures, such as training and technical assistance, to implement these standards, especially in countries which have fewer resources to modernize their customs agencies accordingly (WCO 2008c).

Altogether, the WCO uses a combination of intergovernmental and transgovernmental forms of cooperation, with an emphasis on transgovernmental cooperation especially when it comes to the role of customs as an agency that protects societies from crime. This is also relevant for the approach of the WCO in the fight against intellectual property crime. Compared with the other public international organizations in this study, the WCO as a whole is less transgovernmental than Interpol but more transgovernmental than WTO, WIPO and WHO.

The WCO and Intellectual Property Rights Enforcement

An important development for the relationship between customs agencies and IP rights owners was the 1994 TRIPS Agreement and its subsequent implementation until 1996 (for industrialized countries), 2000 (for countries in transition and developing countries), and 2013 (for the least developed countries). The articles 51-60 of the TRIPS Agreement require the customs agencies of the WTO member states to cooperate with IP rights owners for the seizure of IP infringing goods. The basis for such border measures is an application for action from the rights owner. In addition, customs agencies may also seize suspected IP infringing goods on their own initiative (*ex-officio*), but, in practice, seizures without application are less common (e.g. EU Com 2009: 6). The application for action is a civil law measure that can also be used for non-criminal IP infringements. Depending on the country, criminal procedures involve specialized customs investigation units, specialized agencies, or the police (Zimmermann 2009).

In 1994, the WCO Council explicitly mentioned the newly signed TRIPS Agreement in a recommendation “on the need to develop more effective customs controls aimed at the prevention of international trade in goods which infringe intellectual property rights” (WCO 1994). While the recommendation is mainly directed at its member customs administrations, it also served as an indirect mandate for the WCO to increase its own activities in this issue area, but it did so only slowly at first. The first representatives of IPR owners to engage with the WCO were associations representing copyright owners. The International Federation of the Phonographic Industry (IFPI) signed a Memorandum of Understanding (MOU) with the WCO in 1988. MOUs with the organization representing mechanical copyrights societies (BIEM) and the Motion Picture Association (MPA) followed in 1997

(Robinson 1999). This approach of signing MOUs with private sector associations was to some extent adopted from the ACTION/DEFIS (Alliance of Customs and Trade for the Interdiction of Narcotics) program. The MOUs were mostly declarations of intent with which the WCO encouraged activities of its member customs administrations, but little activity of the WCO itself followed (Raven 2010).

However, this was different in the area of intellectual property rights. The WCO developed an IPR program since 1997. This program collaborated with IP owners who fully funded the activities of the WCO in the area of IPRs (Robinson 1999, Brohm 2010). It produced IP training material and organized training seminars for customs officers. However, the WCO did not have full-time staff for its IPR program at that time and, therefore, it became increasingly difficult for its secretariat to keep up with the increasing workload for IP-related activities. To solve this problem, the WCO secretariat made an agreement with the anti-counterfeiting business association SNB-REACT, which took over most secretariat tasks for the newly founded WCO IPR Strategic Group in 2000 (Brohm 2010, Blakemore 2010, Zimmermann 2009).

The WCO IPR Strategic Group

The WCO IPR Strategic Group, which existed from 2000 until 2007, was a collaborative PPP with higher involvement from the private sector compared to any other PPP in this study. Many of the activities of the WCO in the area of IPRs were effectively outsourced from the WCO headquarters in Brussels to the private sector association SNB-REACT in Amsterdam. SNB-REACT was founded in 1991 in the Netherlands as Stichting Namaakbestrijding (SNB, Dutch for Anti-Counterfeiting Foundation) by the Dutch lawyer and former Chamber of Commerce Amsterdam

employee Ronald Brohm. This organization pooled resources from several IP rights owners to conduct joint activities against IP crime. Since 1995, SNB has expanded across borders and supplemented its name with the acronym REACT (Réseau Européen Anti-Contrefaçon, French for European Anti-Counterfeiting Network). SNB-REACT has opened offices in several European countries and is also collaborating with independent anti-counterfeiting business associations across Europe as part of the REACT-Network. Its services include applications for customs seizures and follow up activities until the destruction of the seized goods, the organization of training seminars for customs and police officers, and the monitoring of internet auction sites and street markets (Brohm 2010).

SNB-REACT collaborated with the WCO since 1998 for the organization of training seminars for customs officers. When it became clear that human resources at the WCO were lacking to meet the increasing demands for the organization of customs training, SNB-REACT offered to perform the functions of a secretariat for the new public-private partnership. The arrangement was that the WCO secretariat managed communication with the customs agencies, while SNB-REACT managed communication with the private sector and all remaining administrative work, including the hosting of a website and the handling of all the financial transactions of the PPP (Brohm 2010). The role of SNB-REACT in this PPP is expressed in the following quote by the WCO head of communications at the time:

"The IPR Strategic Group was established and that was essentially an interface group of rights holders. The secretariat in fact was managed by SNB-REACT in the Netherlands. It was actually based there. And the rights holders provided the funding for the training, paid for the venue, they met other expenses, in terms of flying the WCO experts around the world to conduct the training. That was all made by the rights holders."

David Blakemore (2010), Former WCO Head of Communications 1996-2004

Table 7: WCO IPR Strategic Group

Founded 2000, Terminated 2007

Secretariat: SNB-REACT in cooperation with WCO

Co-chairs: WCO and Société BIC (founding co-chair),
WCO and Procter & Gamble (2003-2007)

Successors: WCO SECURE Working Group and IPR Business Partnership

Public Sector Members

World Customs Organization (WCO) theoretically representing all its member customs administrations (171 in 2007). In practice the customs agencies of the following states participated:

Angola, Australia, Austria,
Bangladesh, Belgium, Bhutan,
Cambodia, Canada, China, Croatia, Cyprus, Czech Republic,
Denmark, Estonia, Finland, France, FYR Macedonia,
Germany, Hong Kong, Hungary, India, Indonesia, Iran, Italy,
Japan, Korea (South), Latvia, Lithuania, Luxembourg,
Macau, Malaysia, Maldives, Malta, Mauritius,
Mongolia, Montenegro, Myanmar,
Netherlands, Nepal, New Zealand,
Pakistan, Papua New Guinea, Philippines, Poland, Portugal,
Romania, Russia, Serbia, Singapore, Slovenia,
South Africa, Spain, Sri Lanka, Sweden, Switzerland,
Turkey, UK, USA, Vietnam

Private Sector Members:

SNB-REACT theoretically representing all its members (about 150 in 2007). In practice the following associations and companies participated:

Associations: International Bureau of Mechanical Rights Societies (BIEM),
International Federation of the Phonographic Industry (IFPI),
Imaging Consumables Coalition of Europe (ICCE),
Motion Picture Association of America (MPAA),
Pharmaceutical Security Institute (PSI),
Swiss Watch Federation (FH),

Companies: Abercrombie & Fitch, adidas,
BBC, BIC, British American Tobacco,
CHANEL, Daimler Chrysler, Dolby Laboratories,
Eli Lilly & Company, Epson, General Motors,
Harley Davidson, Hermes,
Imperial Tobacco, Intel, Japan Tobacco,
La Chemise Lacoste, LVMH Fashion Group, L'Oréal,
Microsoft, MSD Merck Shape & Dohme,
New Era Cap Company, Nike, Nokia,
Pfizer, Philip Morris International, Philips, Procter & Gamble,
Reebok, Rouse & Co International,
Samsung, Sanofi Aventis, Sara Lee,
Sony, Sony Ericsson, Spirits International,
Timberland, Tommy Hilfiger,
Underwriters Laboratories, Unilever, V.F. Corporation

Source: Own account based on WCO IPR SG 2007d and Brohm 2010

Table 8: Recipient Countries of WCO IPR Strategic Group Training Seminars

Recipient Country	Year(s) with Training	Training for
Argentina	2006*	customs
Brazil	2003, 2006*	over 40 customs officers
Bulgaria	2000*, 2001, 2005	over 40 customs and police officers
Chile	2006*	customs
Cyprus	2003	customs
Czech Republic	2001	40 customs and police officers
Estonia	2001, 2002*	over 60 customs and police officers
Greece	2000	customs
Hong Kong	2001	customs
Hungary	2001, 2003	customs and police
India	2006	customs
Indonesia	2000	customs and police
Italy	2004	customs
Kazakhstan	2005	customs
Kenya	2006*	customs
Latvia	2000, 2002*	over 90 customs and police officers
Lithuania	2000, 2002	over 30 customs and police officers
Malaysia	2003, 2005	customs
Malta	2003	customs
Netherlands	2000	customs
Pakistan	2005	customs
Panama	2004	customs
Paraguay	2006*	customs
Philippines	2007	no report available
Poland	2001, 2002	customs and police
Portugal	2001, 2002	over 50 customs officers
Romania	2000, 2003	customs and police
Rwanda	2006*	customs
Slovakia	2001	over 50 customs and police officers
Slovenia	2000	customs and police
Sri Lanka	2006	customs
Tanzania	2006*	customs
Turkey	2002, 2006	over 90 customs officers
Uganda	2006	customs
United Arab Emirates	2001	customs
Uruguay	2006	customs
Vietnam	2005	customs

Source: Own account based on WCO IPR SG 2007c

*) These seminars were conducted in another country but included participants from the listed country

The management of the IPR Strategic Group has put SNB-REACT in a unique position of being able to offer privileged access to the WCO for its member-companies. SNB-REACT charged a membership fee of 2000 Euro per year, which included membership in the WCO IPR Strategic Group (WCO IPR SG 2001b). However, membership was not mandatory to participate in meetings as a guest or to participate in specific projects, such as the many training seminars that were organized (Brohm 2010). But the vast majority of active private sector participants of the IPR Strategic Group were also members of SNB-REACT. Until 2007, SNB-REACT had grown to about 150 members, which were thereby also members of the IPR Strategic Group. In practice, however, only 47 active private sector participants were listed in a 2007 directory of the IPR Strategic Group. On the public side, all WCO member customs administrations were represented in the PPP through the WCO, but only 59 customs administrations were listed as active participants in the 2007 directory (table 7).

The IPR Strategic Group had about four meetings per year. Approximately half of the meetings of this PPP were hosted by private sector members at various European company headquarters. The other half of the meetings were hosted by public sector members, most of which by the WCO at its headquarters in Brussels, and some by various national customs agencies (WCO IPR SG 2007b). The duration of each meeting was one, two, or three days. The longer meetings also involved separate sessions in subgroups. The public sector members met in a customs expert group and the private sector members met in a business group. The most important activity of this PPP was the organization of several customs training seminars in Europe and around the world.

Table 8 shows a list of countries whose customs officers received training by the IPR Strategic Group. Several seminars also included police officers. Detailed reports were not available for all seminars; therefore, the list may not include all the participants from countries other than the country hosting the seminar. Most seminars took two days and consisted of elements where 10-15 IP owner representatives explained how to find and identify counterfeit products, and of elements where national or international customs experts explained techniques of risk analysis, procedures for seizures, and the subsequent steps until the destruction of the goods. In addition to the teaching and learning aspect of the seminars, they also served as networking events for the public and private sector participants that provided a basis for further cooperation (WCO IPR SG 2007c). Such follow up cooperation took place bilaterally between the customs agencies and the rights owners or their representatives, such as IFPI, MPA, or SNB-REACT itself (Brohm 2010). The WCO did not act as a coordinator of joint transnational operations in the way Interpol did, but it joined Interpol-led operations like Jupiter (chapter 4) and Pangea (chapter 9).

On average, the WCO IPR Strategic Group organized seven training seminars per year. In addition the group also participated as a partner in several seminars organized by other organizations, such as the World Intellectual Property Organization (WIPO) and the United Nations Economic Commission for Europe (UNECE). All seminars in table 7 were organized by SNB-REACT acting as the secretariat of the WCO IPR Strategic Group. But SNB-REACT also organized several additional seminars on its own. For example, the seminars in Hungary in 2001 and 2003 were seminars of the IPR Strategic Group, but subsequent seminars

in 2004 and 2005 were organized by SNB-REACT in bilateral cooperation with the Hungarian Customs (WCO IPR SG 2007c).

Companies that participated in such training seminars often had to pay additional costs as the annual membership fee of 2000 Euro was not sufficient to fund all activities. However, the seminars were not only funded by private sector participants. SNB-REACT also managed to acquire funding from public sector sponsors, such as the United States Patent and Trademark Office (USPTO), the United States Agency for International Development (USAID), and the European Union (WCO IPR SG 2007c). In several cases, the public funding was so generous that the private IP owners did not have to bear additional costs (Brohm 2010).

However, the work of the Strategic Group was not limited to the organization of seminars. Subjects that were discussed at the PPP meetings included the practical aspects of public-private cooperation for customs seizures, desirable changes to the procedures for customs seizures and their legal framework, as well as the strategic development of the WCO IPR Strategic Group itself (WCO IPR SG 2007b). After the organization of the training seminars, the second most important aspect of its work was the drafting of legislative proposals and to lobby for their implementation.

WCO IPR Model Legislation and Guidelines on Free Zones

The WCO developed model legislation for the implementation of the border measures of the TRIPS Agreement already in 1995 (WCO 2004: 1). But in collaboration with its IPR Strategic Group in 2001, the WCO started drafting revised model legislation that went beyond the minimum standards required by the TRIPS Agreement. It did so based on the assumption that “the minimum level of protection provided by the TRIPs Agreement is no longer adequate to fight current cross-border

traffic in counterfeit and pirated goods” (WCO 2004: 8). The WCO Model Legislation is to a large extent based on provisions of the European Union customs regulation (3295/94 and 1383/2003). It uses the example of the EU customs regulation to specify several deadlines for customs agencies. It also obliges the customs agencies to supply rights holders with information about the parties involved in the shipping of the infringing goods (Art.8), while this is optional in the TRIPS Agreement (Art.57). The WCO Model Legislation also includes the authority of customs agencies to act on their own initiative (*ex officio*) without an application by an IP rights holder (Art.9), while this is only optional in the TRIPS Agreement (Art.58). And it introduces a simplified procedure for the destruction of seized goods if no one responsible for the goods opposes the destruction (Art.11).

While such IP rights holder friendly deadlines and procedures may be a burden for customs agencies, especially in developing countries, the more controversial aspect of the WCO Model Legislation was that it extends the scope of the border measures¹⁰ beyond the TRIPS requirements, in terms of the kinds of intellectual property rights that are enforced with border measures and in terms of the cases in which border measures are applied by customs agencies. The TRIPS Agreement only requires the enforcement of trademarks and copyrights with border measures, but the WCO Model Legislation extends this to all IP rights, including patents for example. It also covers devices whose primary purpose is to circumvent copyright protection technology, such as digital rights management (Art.1). Thus, the WCO Model Legislation introduces principles of the 1996 WIPO Copyright Treaty in a strengthened form.

¹⁰ The term “border measures” denotes customs seizures of goods that crossed a border.

The TRIPS Agreement requires customs agencies to have the authority to seize¹¹ IP infringing goods when they are imported. In contrast, the WCO model legislation, if applied, authorizes customs agencies to also seize IP infringing goods when they are exported or in transit (WCO 2004: Art.1). In order to make the seizure of IP infringing goods in transit or destined for export easier, the WCO model legislation requires that the laws that are applied are those of the country where the seizure takes place - as if the goods were produced or sold in that country. The laws of the country of origin or destination are considered to be irrelevant for trademarks, copyrights, and other IP rights, except in the case of IPR violations of geographical indications (WCO 2004: Art.1). This exception reflected the dispute at the WTO during that time about geographical indications between the European Union and the USA and Australia (WTO 2006a). The principle to seize goods in transit without considering the laws of the country of origin or destination was contested¹² at the time, also beyond the issue of geographical indications. But while both sides of the geographical indications dispute were involved in the drafting of the WCO model legislation, this was not the case for the dispute about the seizure of goods in transit. Therefore, this did not influence the WCO model legislation at the time of its drafting from 2001 to 2004. Only when the same principle was presented in the 2007 WCO Standards Employed by Customs for Uniform Rights Enforcement (SECURE) did it

¹¹ The term "seizure" is used as an umbrella term, which includes the legal concepts of "detention" and "suspension of release" used in the TRIPS Agreement and the WCO Model Legislation.

¹² The definition section of the WCO Model Legislation uses a modified version of the "production fiction", which is based on an interpretation of article 6 of the European Union customs regulation 3295/94. The production fiction requires that the IPR infringement is determined based on the assumption that the goods were produced in the country where they were intercepted. Using such a fiction instead of facts was already contested at the time the WCO Model Legislation was drafted. The European Court of Justice (ECJ) has repeatedly made decisions in favor of owners of goods in transit and in contrast to the principle of the production fiction, but without explicitly addressing the production fiction (ECJ 2000, ECJ 2003, ECJ 2006). In the 2003 revised EU customs regulation 1383/2003 the production fiction is only mentioned in the recitals, casting doubt on its character. This and the ECJ decisions have led to a heterogeneous application of the production fiction. The customs agency in the Netherlands continued to use it, while the UK customs refused to do so. Finally, in December 2011 the ECJ made an explicit decision against the production fiction (ECJ 2011). (see also Schneider 2011, Reeskamp & Ouden 2010, Vrins 2010, Schneider & Vrins 2006: 92)

meet opposition by Brazil and others (see below in this chapter). Subsequently, Brazil and India complained about seizures of generic drugs produced in India and seized while in transit through the Netherlands to Brazil and other countries. They filed complaints with the WTO Dispute Settlement Body against the European Union and the Netherlands in 2010 (WTO 2010c).

The WCO Model Legislation has been discussed several times in meetings of the WCO IPR Strategic Group. Several private sector members contributed to the legislation, such as the International Federation of the Phonographic Industry (IFPI), the International Trademark Association (INTA), the Business Software Alliance (BSA), the Swiss Watch Federation (FH), and Adidas (WCO IPR SG 2001a). In 2002, the first version of the model legislation from the WCO IPR Strategic Group was presented to the WCO Enforcement Committee, an official decision making body of the WCO for enforcement matters. The committee stated that the customs agencies of many developing countries were unable to inspect goods at export or in transit and that the proposed time limits of the model legislation are too demanding (WCO IPR SG 2002d). The draft was subsequently discussed by the entire Strategic Group and also by a subgroup that was primarily composed of customs representatives: the customs expert group (WCO IPR SG 2002d). The subgroup as well as the entire Strategic Group received legal advice from the World Intellectual Property Organization (WIPO) concerning the model legislation (WCO IPR SG 2002e). The drafting of the model legislation was also informed by a draft of the EU customs regulation 1383/2003 in 2002 before it was passed by the Council of the EU in 2003 (WCO IPR SG 2002c). After two years of consultation and editing, the model legislation changed more in terms of style and very little in substance (WCO IPR SG 2004b). Nevertheless, the WCO Enforcement Committee “noted” the updated version

(Int.14 2010). But it neither officially endorsed it nor forwarded it to the WCO Council for adoption (Moraes 2009: 187). As the WCO Model Legislation was a guideline for countries that wanted to voluntarily implement IP protection measures beyond the TRIPS minimum standard, it was considered a technical and non-political document that did not require official adoption (Int.14 2010). Another reason for not seeking a higher level approval of the model legislation may have been the anticipated difficulties involved with a political debate about TRIPS-plus measures. Such a cautious approach would be understandable given the heated debate since the 2007 WCO Council adopted the SECURE document, which is to a large extent based on the model legislation (see below in this chapter).

The WCO Model Legislation was widely disseminated despite lacking high-level endorsement. It was presented in several customs trainings organized by the WCO IPR Strategic Group. For example, it was presented at seminars in Bulgaria, Vietnam, Panama, Uruguay, and Uganda (WCO IPR SG 2007c). According to a media report, the 2006 Seminar in Uganda, which included participants from Kenya, had some influence on the drafting of an anti-counterfeiting act that was passed by Kenya's parliament in 2008 (Michael 2010). The Model Legislation was also used in events that were not hosted by the WCO IPR Strategic Group. For example, a partnership between the European Union and the Association of Southeast Asian Nations (ASEAN) resulted in the production and distribution of a Handbook on IPR Enforcement for Customs in the ASEAN countries that includes the WCO Model Legislation (ECAP 2007). However, the actual effects of the model legislation are difficult to determine as there was no monitoring of its implementation. The WCO secretariat attempted to change that when it started the SECURE Working Group in 2007 (see below in this chapter).

An issue that was not explicitly addressed in the WCO Model Legislation was that of IPR infringing goods in so-called free zones, which are also commonly referred to as free trade zones. An annex to the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention), which is administered by the WCO, defines free zones as locations where goods are generally regarded as being outside the customs territory as far as import duties and taxes are concerned (WCO 1999). This has led to some confusion about whether customs agencies should inspect goods going in and out of free zones. In 2004, the WCO Enforcement Committee in collaboration with the WCO IPR Strategic Group started to develop a Guideline on Controlling Free Zones in Relation to Intellectual Property Rights Infringements. This guideline was adopted by the Enforcement Committee in 2005 and states that customs agencies should control goods in free zones based on risk assessments (WCO 2005). This approach to free zones and the principles of the WCO Model Legislation were later parts of the 2007 WCO Standards Employed by Customs for Uniform Rights Enforcement (SECURE).

From the WCO IPR Strategic Group to the SECURE Working Group

The issue of intellectual property was a low priority for the WCO when it developed its IPR Program in the late 1990s and when the WCO IPR Strategic Group was founded in 2000. The secretariat did not devote any full time staff to the issue and outsourced much of the IPR related work to SNB-REACT. The mere enforcement of IPRs was also considered a technical issue separate from the political negotiations about the intellectual property rights themselves. This WCO approach to IPR enforcement gradually began to change when the issue gained in prominence on the global policy agenda. It was on the agenda of the 2003 Annual Meeting of the World

Economic Forum (WEF) in Davos, where the WCO was represented by its Deputy Secretary General, Kunio Mikuriya. Following discussions at the WEF, the PPP around the Global Congress on Combating Counterfeiting and Piracy was formed (see chapter 7). And when the first congress of that series was held in 2004 at the WCO Headquarters, the WCO Secretariat managed this event without seeking help from SNB-REACT (Brohm 2010). The issue also became a prominent agenda item for the Group of 8 at its 2005 summit in Gleneagles and at subsequent G8 Summits.

The WCO Secretary General Michel Danet saw this development as a chance to increase the relevance of the WCO by making IPR enforcement a top priority of the organization (Blakemore 2010, Int.14 2010). Proving the relevance of the WCO was not only important for the WCO secretariat when the WTO was founded in 1995, but also several years later. An official report of the WCO Policy Commission in 2002 states that “the WCO was not losing ground vis-à-vis the WTO and that the WCO’s competitive edge could be put to good use by other international organizations.” (WCO 2003) In such a competitive environment, the WCO emphasized its work in areas less related to the work of the WTO. This meant that the WCO embraced the role of customs to protect societies from crimes. In the aftermath of the terrorist attacks in the United States on 11 September 2001, the WCO discussed measures for customs agencies to prevent terrorist attacks by improving the customs capability to detect smuggled bombs, bomb making material, radioactive substances, and other hazardous goods (WCO 2003). These discussions culminated in the SAFE Framework of Standards to Secure and Facilitate Global Trade, which was adopted by the WCO Council in 2005. Similarly, the issue of IPR enforcement was increasingly seen as a crime fighting issue and not as a purely economic issue. This

made it attractive for the WCO secretariat to embrace this emerging issue as a means to increase the relevance of the WCO.

After the fight against counterfeiting and piracy was discussed at the 2005 G8 summit in Gleneagles, the WCO Secretary General hosted a Task Force on Combating Counterfeiting and Piracy at the WCO headquarters in October 2005. This was a public-private conference involving participants who also participated in the WCO IPR Strategic Group. The fact that the WCO hosted a new conference instead of using the existing PPP as a venue prompted some concern about the WCO's intentions. At a meeting of the IPR Strategic Group, the members expressed their confusion about the role of parallel groups with similar membership and similar goals (WCO IPR SG 2005).

In March 2006, Secretary General Michel Danet attended a meeting of the IPR Strategic Group and explained his "Task Force Vision" (WCO IPR SG 2006c). He assured the members of the WCO IPR Strategic Group that the group continued to be an important partner of the WCO and he explained that the subject of counterfeiting and piracy became a higher priority for the WCO. He mentioned plans to develop a new anti-counterfeiting convention, which was proposed by the Japanese Prime Minister Junichiro Koizumi at the 2005 G8 Summit in Gleneagles, and explained that the WCO could and should play an important role in these developments (WCO IPR SG 2006c). As a step in that direction, he wanted the WCO to develop a framework of standards for IPR enforcement by customs agencies. His plan was to present this framework of standards to the WCO Council in 2007 in the form of an IPR Annex to the SAFE Framework of Standards to Secure and Facilitate Global Trade, which was adopted by the WCO Council in 2005 (WCO IPR SG 2006c). The Task Force on Combating Counterfeiting and Piracy was a project

initiated by the WCO Secretariat with the aim of soliciting input for the development of a framework of standards. The task force has met three times for this purpose. In between, four groups worked on the topics of (1) transit, transshipment, and free zones, (2) the destruction and recycling of goods, (3) information exchange, and (4) the use of the internet for counterfeiting and piracy (WCO IPR SG 2006c, WCO IPR SG 2006a).

As a result of the increased attention the IPR issue received at the WCO, the secretariat also devoted more resources to it and employed full-time staff for the first time on this issue. The French customs officer Christophe Zimmermann has been the WCO Coordinator for the Fight Against Counterfeiting and Piracy since April 2006. He was also in charge of pursuing the new IPR policy of the WCO secretariat and developing the framework of standards for IPR enforcement. Input for this framework was taken from the third and final meeting of the Task Force on Combating Counterfeiting and Piracy in November 2006, a meeting of the WCO Policy Commission in December 2006, a meeting of the Enforcement Committee in February 2007, and a meeting of the WCO IPR Strategic Group in March 2007 (WCO IPR SG 2006a, WCO IPR SG 2007a, WCO 2007b). The result was not the planned IPR Annex to the SAFE Framework, but an independent document called provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE) that was presented to the WCO Policy Commission and the WCO Council in June 2007. Confusingly, the cover letter to the SECURE document states that the WCO IPR Strategic Group is tasked with the review, maintenance, and updating of SECURE, but the document itself states that the "Secretary General will establish a SECURE Working Group to supersede all other IPR and related groups at the WCO, and those affiliated with the WCO" (WCO 2007b). This decision was also the basis

for the end of the IPR Strategic Group. The WCO Secretary General effectively terminated this PPP with the following words in a letter to SNB-REACT in June 2007:

“At its 109th/110th Sessions, the Council adopted provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE). [...] The Council also decided to establish a single SECURE Working Group, consisting of Member's Customs experts and private sector representatives, to improve and develop these Standards. The secretariat services for this new body will be provided by the WCO Secretariat only, with my staff member Mr. C. Zimmerman responsible for co-ordination. As a result I am obliged, by means of this letter, to put an end to our co-operation. Therefore I must ask that you no longer use our WCO logo, host our IPR Web-site or conduct any training in our name.”¹³

Letter from WCO to SNB-REACT (2007)

The decision to end the WCO IPR Strategic Group came as a surprise for SNB-REACT and the private sector members of the group. Considerations to change or end the Strategic Group were not discussed at its last meeting in March 2007 and they were also not discussed bilaterally between the WCO secretariat and SNB-REACT (Brohm 2010, Blakemore 2011). The WCO secretariat was able to end the outsourcing of IPR activities because it hired new full time staff dedicated exclusively to combating counterfeiting and piracy in 2006, which made it less dependent on the secretariat services from SNB-REACT. Therefore, the end of the Strategic Group also reflected the increased priority the issue of IPR enforcement had for the WCO and its willingness to invest more resources in this issue area.

There may have been additional reasons for the WCO secretariat to end the WCO IPR Strategic Group, including the aim to exercise more control over the available private sector funding (Blakemore 2011), and to increase the role of customs in the PPP at the expense of the role of the private sector. The WCO Coordinator for the Fight Against Counterfeiting and Piracy expressed this with the following words:

¹³ The “109th/110th sessions” are on consecutive days. The WCO Convention requires at least two Council sessions per year, but since 1966 they have been held concurrently (WCO 2010b).

“The difficulty was that it was a little bit - according to our members - too oriented to the private sector and not enough to customs. So when we got more human resources on this issue in 2006, the Secretary General decided to bring back the dossier to WCO.”

Christophe Zimmermann (2009),
WCO Coordinator for the Fight against Counterfeiting and Piracy

While some people involved with the end of the Strategic Group said that the WCO secretariat reacted to demands of the WCO members (Zimmermann 2009, Hardy 2009, Dobson 2010, Heath 2010), others said that it was a secretariat initiative and that criticism by WCO members only came up after SECURE was created and not before (Brohm 2010, Int.14 2010). However, even the WCO IPR Strategic Group members admitted that the group was more driven by the private sector participants and that too few representatives of customs agencies were actively and continuously involved (Brohm 2011, WCO IPR SG 2004a). Nevertheless, the termination of this PPP by the WCO secretariat came as a surprise to the private sector participants. They decided to continue their work as a purely private sector business association with the name IPR Business Partnership. The secretariat of that business partnership continued to be managed by SNB-REACT and continued much of the bilateral cooperation with customs agencies in organizing training seminars (Brohm 2010, Blakemore 2010).

The WCO has also managed many customs IPR training seminars in public-private partnerships since the end of the Strategic Group, but it separated these collaborative PPPs from the more policy-oriented advisory PPP for the updating of the standards for IPR enforcement. Thus, the WCO effectively created a PPP network consisting of several collaborative PPPs around training seminars and an advisory PPP for the SECURE standards.

The SECURE Working Group

The provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE), which were adopted by the WCO Council in June 2007, did not actually contain many new things compared to what the WCO did previously on IPR enforcement. The document contains nine standards concerning “IPR Legislative and Enforcement Regime Development” (WCO 2007b) that can also be found in the WCO IPR Model Legislation and in the Guidelines on Free Zones. It contains eight standards concerning “Risk Analysis and Intelligence Sharing” that are an application of existing WCO risk analysis approaches to the issue of IPR and a summary of existing WCO intelligence sharing methods, such as the Customs Enforcement Network. And the document contains six standards concerning “Capacity Building for IPR Enforcement and International Co-operation” that are basically a summary of the already existing capacity building measures through training seminars and international and public-private cooperation. A noteworthy new idea in the SECURE document is the plan to improve the Customs Enforcement Network (CEN) by developing a specialized IPR information system for the exchange of information between the private sector and customs agencies. This information system was launched three years later under the name IPM (see below in this chapter).

However, while much of the content of the SECURE document was not new, the form of its presentation was. Previously, the WCO secretariat did not make much ado about its technical work, which was summarized in the SECURE document. The previous WCO IPR Model Legislation was only presented to the WCO Enforcement Committee, but never to the WCO Policy Commission or the WCO Council. The new thing about the SECURE initiative was that the issue of IPR enforcement was brought to the highest decision making bodies of the WCO and was declared a top

priority. While SECURE was still non-binding, the WCO secretariat asked the WCO members to indicate their political will to implement SECURE with a letter of intent. By February 2008, the WCO received such letters of intent from 34 members (WCO 2008a). This procedure is similar to that of the SAFE Framework of Standards and much more formal than that of the WCO IPR Model Legislation, which was simply disseminated as a recommendation.

The WCO secretariat also heavily advertised the new SECURE initiative vis-à-vis its members. It declared the fight against counterfeiting and piracy as the WCO theme of the year 2007 (WCO 2007a) and an entire issue of the WCO News, the member magazine of the WCO, was dedicated to this topic. It used very strong language to condemn counterfeiting and piracy, even referring to it as “economic terrorism” (WCO 2007a). 2007 was also the year when the Organisation for Economic Co-operation and Development released a first draft of their study on the economic impact of counterfeiting and piracy. The WCO contributed to this OECD study by sending a questionnaire to customs officials (OECD 2007).

The WCO promoted not only the issue but also itself as an important organization in the fight against counterfeiting and piracy, and it was successful in getting high level attention. Only three weeks before the 2007 WCO Council started, the G8 held their summit in Heiligendamm and issued a statement welcoming the development of an IPR enforcement information exchange system in cooperation with the WCO (G8 2007). The Japanese proposal for a new Anti-Counterfeiting Trade Agreement (ACTA), first proposed at the G8 summit in 2005, had meanwhile resulted in preliminary talks involving Japan, the USA, the EU, Switzerland, and Canada (USTR 2009). It was the plan of WCO Secretary General Michel Danet that the WCO SECURE standards could also serve as a basis for the negotiations about

the new anti-counterfeiting trade agreement (WCO IPR SG 2006b). Therefore, the SECURE document was quickly adopted as “provisional standards” (WCO 2007b) that could be presented, but that need further discussion and development in the SECURE Working Group. The WCO SECURE document explicitly refers to discussions about IPR enforcement at the G8 summits in its introductory section that explains the reasons for the SECURE initiative (WCO 2007b).

The WCO secretariat effectively pursued a strategy of raising the profile of the WCO by cooperating with the G8 and the OECD in a new IPR enforcement initiative. As it became clear that ACTA would be negotiated outside of the WTO, this was also a way for the WCO to compete with the WTO. However, this strategy was problematic for the WCO, as the majority of its members are neither in the G8 nor in the OECD. When the preliminary talks about ACTA shifted to official negotiations in June 2008, the initiative was already watched critically by several countries and organizations that were not involved in the negotiations. This critical attention was also extended to the WCO SECURE initiative. For example, the South Centre, an intergovernmental organization of developing countries, criticized both ACTA and WCO SECURE as initiatives of IP-rich countries at the expense of developing countries (South Centre & CIEL 2008a, South Centre & CIEL 2008b, Biadgleng & Munoz Tellez 2008, Li 2008, Li & Correa 2009).

The new critical attention on the WCO also affected the composition of the SECURE Working Group. Not only were several countries represented in the group that were not represented in its predecessor, but also the kind of representation changed. While the IPR Strategic Group was considered a technical group where customs officers meet with the private sector, the new SECURE Working Group also involved diplomats who came because they considered IPR enforcement a political

matter. Table 9 shows an overview of the members of the SECURE Working Group. All national delegations that included diplomats are marked with a star. Especially noteworthy is the Brazilian delegation, which even included the Brazilian Ambassador to the EU Maria Celina de Azevedo Rodrigues. The following is a report about a statement she made at the third meeting of the SECURE Working Group in April 2008:

“The Brazilian Ambassador requested the floor and made a statement concerning the position and concerns of the Brazilian Government about the scope of the SECURE Working Group. She stated that she is a head of delegation which is composed of Customs officers and diplomats. The Brazil delegation believes the work of SECURE Working Group is in a political realm. [...] According to the Brazilian position, the WCO is going beyond its mandate by creating a sort of "TRIPS plus". The fact that the standards are being offered as voluntary measures doesn't exclude the fact that the standards could become legally binding eventually.”

Draft Report of the 3rd meeting of the SECURE Working Group, WCO (2008b)

By identifying the SECURE discussions as a political matter, she justifies her own presence and that of the other diplomats in a group, where others only expected the presence of technical customs experts. She even considered the drafting of “TRIPS plus” standards as so highly political that such an activity would be beyond the mandate of the WCO, which is usually considered a more technical and less political organization. This criticism led the WCO secretariat to commission an external legal opinion from the French law professor Alain Pellet, who confirmed that the SECURE standards fall within the mandate of the WCO (WCO 2008b). The Brazilian Ambassador also expressed her concern that the non-binding standards could evolve into binding standards, for example, by reference to them in bilateral trade agreements. She thus rejected requests by other delegates for Brazil not to block the SECURE negotiations from proceeding if it had no intention to adopt the voluntary SECURE standards anyway (WCO 2008b).

Table 9: WCO SECURE Working Group

Founded 2007, Terminated 2009

Secretariat: WCO

Co-chairs: Customs Senegal and Philips

Vice-chair: Customs Israel

Successors: WCO CAP Group and WCO RHC Group

Public Sector Members

WCO Members: Angola, Argentina*, Australia, Austria, Bangladesh, Belgium, Brazil*, Bulgaria, Canada, Chile*, China, Congo (DR), Cote d'Ivoire, Cuba*, Denmark, Ecuador*, Estonia, Finland, France, Ghana, Greece, Hong Kong, Iceland, India*, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Lebanon, Malaysia, Mexico*, Netherlands, New Zealand, Norway, Paraguay, Poland, Russia, Saudi Arabia, Senegal, Serbia, Singapore, Slovenia, South Africa, Sudan, Switzerland, Thailand, UAE, UK, Ukraine, Uruguay*, USA, Vietnam, Zambia, Zimbabwe

International Org: World Customs Organization (WCO), European Union (EU), Council of Europe (CoE), South Centre

Other: La Poste, France (also speaking for the Universal Postal Union)

Private Sector Members:

Associations: Belgian Association Against Counterfeiting (ABAC-BAAN), Business Alliance for Secure Commerce (BASC), BusinessEurope, European Association for Forwarding, Transport, Logistic and Customs Services (CLECAT), European Brands Association (AIM), Global Express Association (GEA), International Bureau of Mechanical Rights Societies (BIEM), International Chamber of Commerce Business Action to Stop Counterfeiting and Piracy (ICC BASCAP), International Federation of Freight Forwarders Associations (FIATA), International Federation of the Phonographic Industry (IFPI), The International Air Cargo Association (TIACA), Union des Fabricants (Unifab)

Companies: Beiersdorf, Daimler, DHL, Eli Lilly & Company, Hutchison Whampoa, Philips, Rouse & Co. International, Sanofi Aventis, Sony Ericsson

Source: Own account based on WCO 2008b. The list may be non-exhaustive.

*) Marked delegations included diplomatic representatives, while the standard representation is through customs agency representatives. Also this list may be non-exhaustive.

Brazil was the most vocal opponent of SECURE, but it was not alone. It received support from Ecuador and the South Centre (WCO 2008b). And Brazil managed to build an even broader coalition against SECURE when it addressed procedural issues. The SECURE Working Group never adopted any terms of reference (Moraes 2009: 173) and hence different participants had different opinions on the rules of procedure and the status of the different participants of the meetings (Mara 2008a). Many of the members of the SECURE Working Group were previously members of the IPR Strategic Group. Notable new members on the public sector side were diplomatic representatives from foreign affairs departments. On the private sector side, new representatives came from transport associations who regularly attend the WCO Council sessions as accredited observers (table 7).

The WCO Secretariat treated the SECURE Working Group as a public-private partnership. As it was a successor of the WCO IPR Strategic Group, they continued to act according to the established rules of procedure of the predecessor PPP. For example, the group elected two chairpersons: the Senegalese Director General of Customs Jean-Jacques Armand Nanga as public sector chair and the Philips Vice President Jef Vandekerckhove as private sector chair. The equal relationship between public and private participants appeared normal to those delegates who were used to the WCO IPR Strategic Group, but it was irritating for some new participants. For example, the Brazilian delegate Henrique Choer Moraes, a career diplomat at the Brazilian Mission to the EU, complained that “member states and representatives of the private sector, predominantly from rights-holders, act on the same footing, presenting proposals and commenting on each other’s positions” (Moraes 2009: 173). Working in the SECURE Working Group without having agreed on terms of reference was especially irritating to him, but he also complained about

unclear rules of procedure and a lack of transparency at the WCO as a whole, as expressed in the following quote:

“WCO work in the area of IPRs in general – and the SECURE project in particular – is moving at the expense of informed debates. More often than not, discussions are conducted under murky or non-existing rules of procedure in an environment of poor transparency, where access to documents is restricted to a small number of actors, which includes rights-holders but excludes public interest organizations and interested intergovernmental organizations.”

Henrique Choer Moraes (2009: 162),
Brazilian diplomatic representative in the SECURE Working Group

The Brazilian delegate also accused the WCO secretariat of using unclear rules and a lack of transparency in order to steer the SECURE process instead of moderating it (Moraes 2009: 172). He assumed that the provisional SECURE document was only adopted at the 2007 WCO Council because “not everyone was fully aware of what was being proposed” (Moraes 2009: 179). By addressing these procedural aspects, Brazil was successful in forming a coalition against the SECURE process. When the WCO secretariat submitted a Report of the SECURE Working Group (WCO 2008b) to the WCO Policy Commission and the subsequent WCO Council in June 2008, a coalition of Argentina, Brazil, China, Cuba, Ecuador, and Uruguay criticized this document as not reflecting the position of the Working Group. According to them, the group had not reached an agreement, and they criticized the entire SECURE process as being too driven by the WCO Secretariat (Mara 2008a). The SECURE opponents were successful in preventing the WCO Policy Commission and the Council from adopting any SECURE document in 2008 (Li 2008).

The debate about SECURE coincided with the regular five-yearly election of a new WCO Secretary General. The WCO Council in June 2008 elected Kunio Mikuriya as the new Secretary General and his term started in January 2009. He promised a reform policy with the aim of “strengthening Members’ participation in the WCO decision-making process, by applying the principle that sharing

information, rather than withholding it, is the source of the Secretariat's power" (Mikuriya 2008). This policy directly addressed the criticism that was expressed by the opponents of the SECURE process and it also marked the beginning of the end of the SECURE Working Group. After the 2008 Council, the SECURE Working Group met only one more time in October 2008, but it could not agree on terms of reference for the group (Moraes 2009: 182). Subsequently, the Policy Commission and the Council decided to terminate the WCO SECURE Working Group because of the deadlock. They created the Counterfeiting and Piracy (CAP) Group as a successor, which is composed exclusively of public sector members and has a mandate that excludes any legislative proposals (WCO 2009a).

As it turned out, the policy of the previous WCO Secretary General Michel Danet was not successful. By pursuing a high profile enforcement agenda, the WCO did not become more relevant, but actually lost reputation and discretion (Int.14 2010, Dobson 2010). Before SECURE, the secretariat had a high degree of discretion with regard to IPR enforcement as was shown through the activities of the WCO IPR Strategic Group. The WCO Enforcement Committee criticized some aspects of a draft of the WCO IPR Model Legislation (WCO IPR SG 2002a), but later took note of an updated version without notifying the WCO Policy Commission or the WCO Council about the activity (Int.14 2010). The WCO Secretariat effectively promoted a TRIPS-plus approach without interference from WCO members. This changed when the WCO promoted its IPR enforcement activities through the SECURE project and attracted attention outside the customs community. Critics of the SECURE project not only criticized the SECURE document itself but also other WCO activities in the IPR area, including the IPR Model Legislation (Moraes 2009: 168, South Centre & CIEL 2008b). The WCO Secretariat used its discretion in a way

that has led several WCO members to examine the secretariat's activities more thoroughly and to reduce its discretion. The mandate for the new CAP group is much more limited than that of any predecessor group. The new Secretary General Kunio Mikuriya effectively reversed an important aspect of the IPR policy of his predecessor: While Michel Danet made the WCO more political, Mikuriya made it again more technical (Int.14 2010). This is shown in the activities of the Counterfeiting and Piracy (CAP) Group, the Rights Holders Consultative (RHC) Group, and the Interface Public-Members (IPM).

The CAP Group and the RHC Group

As a result of the SECURE controversy, the WCO Policy Commission decided to terminate the WCO SECURE Working Group and draft a very limited mandate for its successor (WCO 2009a). According to its terms of reference, which were adopted by the WCO Council in June 2009, the Counterfeiting and Piracy (CAP) Group only is a "dialogue mechanism on border measures on trademark counterfeiting and copyright piracy" (WCO 2010b). The group is required to respect national IP laws and may not engage in any norm setting activity, which explicitly includes "any kind of provisions (binding or non-binding), irrespective of the name, such as standards, best practices, recommendations, guidelines or any other denomination" (WCO 2010b). The group may also discuss WCO activities in the area of capacity building (WCO 2010b), such as the many customs training seminars, which the WCO organized since the end of the IPR Strategic Group (Zimmermann 2009). The WCO has collaborated closely with the private sector on the training seminars. Each seminar involved around 10-15 IPR holders (Zimmermann 2009). The cooperation with the private sector has continued although the WCO alienated its private sector partners twice: in 2007 with

the abrupt termination of the IPR Strategic Group and in 2008 and 2009 with the problems in the SECURE Working Group and its subsequent termination. The CAP Group, according to its terms of reference, was no longer a PPP. It consists only of public sector members. Representatives from the private sector can only be invited as guests (WCO 2010b). However, it remains to be seen how the CAP Group evolves in practice. If the WCO Secretariat invites some guests permanently, then it could evolve into an advisory PPP, although with a less prominent role for the private sector than in any of its predecessors. The WCO Secretariat is interested in continuing cooperation with the private sector in order to have access to private sector resources, but it is very careful because of the experience with the SECURE initiative. The difficult public-private relationship at the WCO after SECURE is expressed in the following two quotes by WCO Chief Legal Officer Philippe Vorreux and BASCAP Senior Policy Advisor Bill Dobson:

“The death of the SECURE initiative was for political reasons only. The majority of members believed that we should follow on cooperating with the private sector. And of course the private sector felt a bit offended by the way SECURE was terminated. So there was this common interest of starting again to talk together. Because even if there is a, I would say, structural mistrust of members towards private sector, for some good reasons some times, we have to work together because we have this common interest. And even if it is not to protect the margin of rights holders, at least for consumers it is very important.”

Philippe Vorreux (2010a), WCO Chief Legal Officer

“The WCO is still struggling to identify their right model for their ongoing relationship with the private sector. I think they recognize that they need the private sector’s involvement. They want the private sector's involvement. They recognize that the private sector can be a funding source for them, but they keep running up against the demands of their member states and they have not figured out a way, from a secretariat standpoint, to manage the member states in a way that allows them to develop the programs with the private sector that would benefit the WCO and the member states.”

Bill Dobson (2010), Senior Policy Advisor at the
Business Action to Stop Counterfeiting and Piracy (BASCAP)

In order to manage this difficult relationship, the WCO created two IPR groups: the CAP Group and the Rights Holders Consultative (RHC) Group. The CAP Group had its first meeting in October 2009 without any participants from the private sector (Zimmermann 2009). The first meeting of the RHC Group was in March 2010 and

involved 25 IP rights holders and the WCO Secretariat but no WCO members (Vorreux 2010a). Unlike the CAP Group, the RHC Group is not an official committee of the WCO but an advisory PPP that was created at the initiative of the WCO Secretariat. The WCO Secretariat manages its relationship with the IPR stakeholders from the public and the private sector through these two groups. It has also tried to bring these two groups closer together. The second meeting of the CAP Group was held in May 2010 and involved five RHC Group members as guests (Vorreux 2010a). The CAP Group and the RHC Group both meet twice a year and the WCO Secretariat plans to synchronize the meetings so that an exchange between the two groups becomes easier (Vorreux 2010a).

However, the relationship between the CAP Group and the RHC Group was still evolving when the research for this study was done, but the basic idea is clear. Within the PPP network at the WCO, the RHC Group serves as an advisory PPP for the WCO Secretariat. The WCO Secretariat can then decide if it wants to present the views of the RHC Group members to the CAP Group members itself or if it wants to invite some of them as guests to do that directly. Collaborative PPPs continuously exist around customs training seminars and a new collaborative PPP was launched in 2010 - the information exchange network IPM.

Information Exchange: from CEN to IPM

The enforcement of intellectual property rights by customs agencies requires at least some information exchange with the IPR holder. The standard procedure is that the IPR holder files an application for action with the customs agency and supplies some information about how to identify the IPR infringing goods, how to distinguish them from genuine goods, and how to contact the rights holder for further information. The

rights holder can also inform the customs agency about specific shipments containing counterfeit or pirated goods if he has such knowledge, for example, from his own investigations. Beyond that, it can also be useful to supply information about known legal trade routes and previous cases of illegal shipping, so that this information can be used for risk analysis and targeted inspections by customs agencies. All this information needs to be made available by rights holders to several customs agencies and it also needs to be updated frequently. Therefore, there have been several attempts to optimize this information management with the help of multilateral organizations such as the WCO.

The Customs Enforcement Network (CEN), which the WCO has operated since 2000, is a tool for the exchange of information about all kinds of customs offences (WCO 2009b). It also contains information about IPR infringements, but this information is primarily about previous seizures that can be helpful for future risk analysis. There is no specialized tool for the identification of IPR infringing goods in CEN and the input of information from the private sector is rather limited. The International Federation of the Phonographic Industry (IFPI) was the first private sector organization that supplied information to CEN in 2002 (WCO IPR SG 2002b). However, the overall success of CEN has been rather limited in general, including in the IPR area (Vorreux 2010a). When it comes to the exchange of sensitive information, bilateral cooperation is often preferred over multilateral cooperation (Blakemore 2010). Not every customs officer has access to the system to secure the information in the CEN. In 2009, only about 2000 officers in 155 countries had access (WCO 2009b). This means that the system cannot be used in order to disseminate IPR information to all relevant customs officers.

The 2007 SECURE document included a plan to improve CEN by developing a specialized IPR information system. When SECURE was aborted, this rather uncontroversial plan remained. In 2010, the WCO Secretariat launched this information system under the name Interface Public-Members (IPM) – where “members” stands for WCO members and “public” refers to non-member entities from the private sector. IPM is a database that allows private IP rights holders to submit and update information for the identification of genuine and counterfeit goods to one central point of reference for all participating customs agencies around the world. While this basic information is the primary function of IPM, rights holders can also upload more detailed information for risk analysis (Vorreux 2010a, Vorreux 2010b).

IPM is financed through subscription fees from the private rights holders that range between 2800 EUR and 8800 EUR depending on the rights holders’ sales revenue. Participation is free of charge for the customs agencies (Vorreux 2010b). Private rights holders have been able to subscribe to IPM since September 2010 and the access for customs agencies was established successively since early 2011. It still remains to be seen how successful IPM will be.¹⁴ However, it can serve as a communication platform for all kinds of IP related information, such as dates of RHC Group meetings or training seminars, which could make this collaborative PPP a central node in the PPP network at the WCO.

Key Findings about the Development of WCO PPPs

The World Customs Organization’s involvement with IP crime started when the TRIPS Agreement was signed in 1994 and subsequently has been implemented in several phases. In 1994, the WCO Council adopted its first recommendation

¹⁴ In August 2012 the WCO reported the participation of 43 countries and 400 brands in IPM (Molle 2012).

concerning IP rights enforcement and, thereby, indirectly mandated the WCO's activity in this area. The TRIPS Agreement triggered the increased WCO activity in two ways: First, the TRIPS agreement was the first agreement to define an international minimum standard of IP rights. It provided a common ground for international cooperation for their enforcement. Second, the agreement explicitly requires customs agencies to enforce IPRs at the border and to do so in cooperation with IP rights holders. This new responsibility for customs agencies also became a matter for the WCO, as it facilitates global transgovernmental cooperation between customs agencies.

The TRIPS Agreement was signed in concurrence with the Agreement Establishing the WTO. The emergence of this new international organization has led to concerns at the WCO that the WCO might lose ground vis-à-vis the WTO or might even be subsumed within the WTO. As a means to improve its competitive position, the WCO emphasized activities that are less related to the work of the WTO, such as the role of customs agencies to protect societies from crime. This made the fight against IP crime an attractive issue area for the WCO.

In the late 1990s, the most important activity for the WCO in the area of IP was the organization of customs training seminars to help countries implement the enforcement procedures required by the TRIPS Agreement. These seminars were organized in collaboration with IPR owners who financed the seminars and participated as trainer. Despite of this support from the private sector, the WCO had difficulty keeping up with the demand for such training due to a lack of human resources at the WCO Secretariat. This problem worsened when the demand for customs training increased as a result of the end of the transition period in 2000, when developing countries and countries in transition needed to implement TRIPS.

To address this resource problem, the WCO formed the IPR Strategic Group in 2000, which was a collaborative PPP with a very strong role for the private sector partners. The business association SNB-REACT managed the majority of the secretariat work for this PPP from organizing meetings of the PPP in different venues, hosting a website for the PPP, managing all communication with the private sector partners, to organizing customs training seminars including their financing. The WCO only needed to handle the communication with the customs agencies and to send a WCO employee to the training seminars, but even the travel expenses were covered by the private sector partners.

The WCO thus managed to establish itself as an important provider of services related to IPR enforcement. It had those services organized in its name, although it hardly invested any of its own resources. It mainly contributed its reputation, its credibility, and its access to customs agencies all around the world. Those customs agencies contributed their human resources, their information, and, most importantly, their legitimacy to inspect goods at borders. The resources contributed to the PPP by the private partners were human resources, money, and information that was necessary to find and identify IPR infringing goods.

The WCO secretariat formed the IPR Strategic Group without seeking an explicit mandate by its members to do so. It had a high degree of discretion for activities that were perceived as technical and non-political. However, being limited to technical, non-political work did not prevent the WCO IPR Strategic Group from drafting legislative proposals that went beyond the minimum IPR enforcement standards required by TRIPS. A draft of this WCO IPR Model Legislation was criticized for being too demanding by the WCO Enforcement Committee in 2002. However, another, yet similar, version in 2004 was noted by the same committee

without forwarding it to a more political decision making body, such as the WCO Policy Commission or the WCO Council.

In 2005, the Japanese Prime Minister Junichiro Koizumi brought up the idea of a new IPR enforcement convention at the G8 Summit and this initiative eventually resulted in negotiations about the Anti-Counterfeiting Trade Agreement (ACTA). The WCO Secretariat recognized that the Japanese proposal could lead to a major change in the international IPR enforcement system. Therefore it developed a strategy with the aim to increase the relevance of the organization by becoming a major actor in these new developments. In doing so, the WCO Secretariat used its discretion in a way that eventually resulted in resistance by WCO members.

In pursuit of its new strategy, which was meant to ensure long term gains by improving the competitiveness of the WCO, the WCO secretariat decided that it was worth investing more resource into IPR enforcement related activities. It hired its first full-time staff dedicated exclusively to the fight against counterfeiting and piracy. The newly available in-house human resources made the WCO less dependent on the services of SNB-REACT for the WCO IPR Strategic Group. As a result, the WCO put an end to the outsourcing of activities to SNB-REACT by terminating the IPR Strategic Group in 2007 and replacing it with the SECURE Working Group, whose secretariat was managed exclusively by the WCO. By reducing the role of its partners in the partnership, the WCO Secretariat increased its own control over its IPR enforcement activities. This strategy alienated several private sector partners, and the very assertive leadership of the WCO Secretariat subsequently alienated several WCO members. When it became increasingly obvious that the WCO Secretariat was using its discretion for political work instead of just technical work, a coalition emerged with the aim of reducing the discretion of the WCO Secretariat.

A side effect of the termination of the IPR Strategic Group was that the collaborative PPP was replaced with a PPP network. This network consisted of the SECURE Working Group, which was as an advisory PPP that continued to work on the various proposals in the SECURE document, and several smaller collaborative PPPs around customs training seminars, which the WCO organized together with private sector partners.

The change in the PPP structure and the change of the policy of the WCO secretariat also resulted in a new representation of stakeholders in the PPP, as well as at the WCO itself. The WCO IPR Strategic Group consisted of representatives of customs agencies and of IP rights holders. It drafted legislative proposals for IPR enforcement without the involvement of other stakeholders in IP policy and without seeking their attention. When essentially the same legislative proposals were presented in the SECURE document to the WCO Policy Commission and the WCO Council in 2007, the representatives of customs agencies in these decision making bodies adopted the document. However, as the WCO advertised itself as an important actor in IP policy, the WCO and the SECURE Working Group also attracted attention from other stakeholders. The SECURE Working Group included diplomatic representatives in addition to the customs officers; it also included transport associations in addition to the rights holders' representatives. The opposition against the SECURE initiative was mainly organized by the diplomatic representatives, who thereby effectively reversed the previous commitments of the customs representatives. As decision making in the SECURE Working Group was blocked, the WCO members decided to terminate it and create the CAP Group as its successor in 2009.

The very limited mandate of the CAP group was the WCO members' reaction to the way the WCO Secretariat previously used its discretion. The CAP group may neither engage in the drafting of legislative proposals nor in any standard setting. It may only discuss various national approaches to IPR enforcement and the capacity building measures of the WCO, such as customs training seminars. In order to prevent private sector representatives from having too much influence, they may not join the CAP group; only some may be invited as guests. However, as the WCO continued to depend on private sector resources for IPR enforcement work, it created new PPPs following the end of the SECURE Group: The RHC Group serves as an advisory PPP for the WCO Secretariat and the IPM is a collaborative PPP for the exchange of information between rights holders and customs agencies and it generates funding for the WCO. In addition, the WCO continues to organize customs training in collaborative PPPs.

This shows how different IPR enforcement policies can lead to more or less political controversy. The drafting of legislative proposals first led to mild criticism. When those proposals were presented as global standards, it resulted in a major political controversy, which was bad for the reputation of the WCO, reduced the discretion of its secretariat, and killed its advisory PPP. On the other hand, the collaborative PPPs that focused on training and information exchange were uncontested and even continued while SECURE was attacked. Measures to improve the enforcement of existing standards seem to be significantly less controversial than the setting of new standards.

6. World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) is a public international organization dedicated to the worldwide promotion of the protection of intellectual property¹⁵. It pursues this aim by negotiating and administering international treaties and by facilitating direct transgovernmental cooperation between intellectual property offices. The WIPO's primary concern relating to IP protection has been and continues to be the protection of IP by the law. The issue of law enforcement has only been addressed recently and is only a minor part of the overall work of the WIPO. In 2002, the WIPO created an Enforcement and Special Projects Division and it held the first meeting of the Advisory Committee on Enforcement (ACE) in 2003. This committee can be considered an advisory PPP based on the very broad definition for this PPP type used in this study. However, the role of the private sector in the ACE is rather small compared to all other PPPs examined in this study. Therefore, some people may refer to the ACE as another form of public private cooperation than a PPP.

This chapter starts with the relevant background about the WIPO and then analyzes how the WIPO became active in the area of IPR enforcement. The subsequent section is dedicated to the Advisory Committee on Enforcement and the work of the Enforcement and Special Projects Division. A further section analyzes how the WIPO Development Agenda affects the enforcement related work. The final section then analyzes the key findings from the WIPO case study with a view to explaining the developments.

¹⁵ IP protection is the primary objective of the WIPO as stated in the convention establishing the WIPO, but this purpose is being questioned as part of the WIPO Development Agenda, which is described further down in this chapter.

Background on the World Intellectual Property Organization

In 2009, the WIPO had 184 member states and a staff of more than 1200. Its secretariat in Geneva operated with an annual budget of 304 million CHF (app. 201m EUR or 280m USD) (WIPO 2010b). The WIPO has a source of income that distinguishes it from all other international organizations in this study. About 74% of its income is derived from fees for processing patent applications based on the Patent Cooperation Treaty (PCT), and about 15% of the income comes from fees for processing trademark applications based on the Madrid System¹⁶ (WIPO 2010b). Each of these agreements allows individuals or organizations to apply for an intellectual property right with a national patent and trademark office and indicate that protection is also sought in other participating countries. The WIPO then charges fees for processing these applications. With additional fees for processing industrial design applications (Hague Agreement) and geographical indication applications (Lisbon Agreement) the total income from fees is about 90% of the total WIPO budget. Contributions from member states only account for about 6% (WIPO 2010b). As the WIPO is generally rather well funded (Wollgast 2010), it could probably sustain itself without any contributions from member states.

In spite of its financial independence from member states contributions, the WIPO is an intergovernmental organization. The existence and the activities of WIPO are based on several international IP treaties that have been negotiated and further developed at the WIPO. However, the WIPO also employs transgovernmental means of cooperation as it facilitates direct cooperation between IP offices, for example, for the processing of applications for international IP protection.

¹⁶ The term Madrid System refers to the Madrid Agreement of 1891 and the Madrid Protocol of 1989

The WIPO has a rather complex governance structure, because it serves as the secretariat for several international unions, each established by an international treaty. When the WIPO Assemblies meet once a year, 20 assemblies convene at the same time: several union assemblies, such as the Patent Cooperation Treaty Union Assembly and the Madrid Union Assembly, as well as additional governing bodies. The WIPO Conference consists of all 184 WIPO member states. The WIPO General Assembly consists of 176 WIPO member states, which are also members of at least one union administered by the WIPO. It has the right to appoint the Director General based on a recommendation of the WIPO Coordination Committee, whose 83 members consist of and are appointed by the Executive Committees of the Paris Union and the Berne Union (WIPO 2010a, WIPO 1979a).

This complex governance structure evolved over more than 100 years. The predecessor of the WIPO was the BIRPI (Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle, French for United International Bureau for the Protection of Intellectual Property). The 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works first established individual bureaus. Both bureaus were united in 1893 and thereby formed the BIRPI (Bogsch 1992: 8). The BIRPI was located in the Swiss capital Berne and was under the supervision of the Swiss government, which was also responsible for its finances. Major developments for the BIRPI included the 1891 Madrid Agreement Concerning the International Registration of Marks and the 1925 Hague Agreement Concerning the International Registration of Industrial Designs. As each agreement created a new international union with its own membership, the BIRPI became the united bureau for an increasing number of such unions (Bogsch 1992: 9).

When the United Nations and its specialized agencies were founded after World War II, the BIRPI faced competing international organizations that also addressed the issue of IP. In 1952, the Universal Copyright Convention was signed at the United Nations Educational, Scientific and Cultural Organization (UNESCO). As this convention was less demanding, it attracted states that were not party to the Berne Convention at that time, such as the Soviet Union and the United States (Bogsch 1992: 21). In 1961, Brazil introduced a resolution to the Economic and Financial Committee of the UN General Assembly with the aim of adjusting the international patent system in order to make technology transfers to developing countries easier (Menescal 2005: 765). The resolution was adopted in a mitigated form and resulted in a 1964 report on “The Role of Patents in the Transfer of Technology to Developing Countries”, which was drafted in cooperation with the BIRPI (Menescal 2005: 773). This issue was subsequently debated at the United Nations Conference on Trade and Development (UNCTAD), which issued a report about the topic in 1974 (Menescal 2005: 773).

When the BIRPI faced such a competitive environment and attempts to decrease the level of international IP protection for the sake of technology transfers, it secured its position as the primary international organization for intellectual property protection with three steps: First, the BIRPI moved from Berne to Geneva in 1960, where it was physically closer to many other international organizations including the Geneva office of the United Nations (Bogsch 1992: 8). Second, the BIRPI was reformed to become the WIPO, an international organization that is no longer under the supervision of the Swiss government but has its own governance structure, which made it more accountable to the member states. The Convention Establishing the World Intellectual Property Organization was signed in 1967 and

entered into force in 1970 (Bogsch 1992: 11). And third, the WIPO signed an agreement with the UN to become a specialized agency in the UN system in 1974.

This last step was controversial. Some industrialized countries were concerned that they could be outnumbered by developing countries within WIPO (Bogsch 1992: 19). Decolonization had already led to an increasing number of developing countries joining WIPO, and it was assumed that the status of a UN agency could attract even more developing countries who could try to weaken the protection of IP for the sake of technology transfers to developing countries. However, the view prevailed that accommodating developing countries interests was a price worth paying for a more unified global IP system (Bogsch 1992: 19). As a concession to developing countries, the agreement between the UN and WIPO declares that WIPO cooperates with the UN “in promoting and facilitating the transfer of technology to developing countries” (WIPO & UN 1974: Art. 10). In practice, however, the WIPO interpreted this agreement not as a mandate to decrease patent protection, but as a mandate to stimulate the industrialization of developing countries by assisting them in establishing legislation and administration for the protection of intellectual property (May 2007: 27, 45).

After WIPO joined the UN system, it faced less competition and was increasingly successful. The Patent Cooperation Treaty, which was signed in 1970, entered into force in 1978. It became one of the most successful treaties of the WIPO and its fees serve as its main funding source. However, several industrialized countries aspired to increase the level of international IP protection in the 1980s and 90s. They pursued this aim not at the WIPO but at the Uruguay trade round of the General Agreement on Tariffs and Trade (GATT), which eventually led to the adoption of the TRIPS Agreement and the creation of the WTO. The forum for IP

negotiations was changed for three reasons: First, developing countries were less influential at the GATT trade round than at WIPO. Second, linking IP with other trade issues allowed industrialized countries to achieve a higher standard of IP protection by making concessions on other trade issues, most importantly market access for textile products. And third, the dispute resolution mechanism at the WTO is a much stronger way of ensuring adherence to the agreement because it includes sanctions (Helfer 2004: 20, Musungu & Dutfield 2003: 10).

The signing of the TRIPS Agreement in 1994, and the subsequent founding of the WTO to administer it, again challenged the position of the WIPO as the primary international organization responsible for IP protection. The TRIPS Agreement included all the principles of the WIPO-administered Paris and Berne conventions as well as several further provisions. The Paris and Berne conventions became, as a result, only relevant to the small and decreasing number of state parties that were not WTO members¹⁷. However, other WIPO treaties did not become obsolete: most importantly the PCT for international patent applications and the Madrid System for international trademark applications. Also, new treaties were concluded that went beyond the provisions of the TRIPS Agreement. Especially relevant are the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were signed in 1996. They both included provisions against the circumvention of copyright protection technology, such as digital rights management.

The WIPO also adjusted to the emergence of the TRIPS Agreement by concluding an agreement with the WTO in 1995. The WIPO thereby acquired a role in the implementation of the TRIPS Agreement, although it is actually administered by the WTO. According to the agreement, the secretariats of the WIPO and the WTO

¹⁷ From 2008 until 2012 those were 32 states, of which only 5 did not apply to become WTO members: Micronesia, Monaco, North Korea, San Marino, and the Vatican (WIPO 2011d, WTO 2011e).

“shall enhance cooperation in their legal-technical assistance and technical cooperation activities relating to the TRIPS Agreement for developing countries” (WIPO & WTO 1995: Art. 4.2). The agreement effectively mandates the WIPO to assist all developing countries with TRIPS implementation if they are a member of either of the two organizations¹⁸. By taking up the responsibility to assist with TRIPS implementation, the WIPO has managed to remain an important actor for IP-related assistance to developing countries (Musungu & Dutfield 2003: 16). The WTO also has a role in providing TRIPS implementation assistance to developing countries, but it does so mostly in collaboration with the WIPO. The relationship that evolved between the WIPO and the WTO with respect to TRIPS implementation in developing countries could be described as a division of labor: the WIPO assists developing countries with TRIPS implementation, and the WTO administers the procedure in which the TRIPS implementation is evaluated (Starein 2010, Huther 2010, WIPO 1999b). One could assume that such a division of labor increases the popularity of the WIPO among developing countries and decreases the popularity of the WTO, because support comes from the WIPO and potentially unpopular decisions come from the WTO. However, the WIPO continued to be a target of developing countries’ criticism about international IP policy, not least because it became a forum where TRIPS-plus measures are discussed (Musungu & Dutfield 2003: 10). Examples include the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The conflict between advocates for higher standards and for lower standards of IP protection continues to be a defining characteristic of the WIPO.

¹⁸ Art. 4.1 of the WIPO-WTO Agreement is literally only a reciprocal non-discrimination clause that requires the WIPO to provide the same TRIPS implementation assistance to WTO members as to WIPO members and vice versa. Effectively this mandated the WIPO to assist in the implementation of a WTO treaty, while it only mandates the WTO to assist non-members with the implementation of a WTO treaty (WIPO & WTO 1995, WIPO 1999b).

The WIPO and IPR Enforcement

The WIPO deals primarily with the protection of intellectual property by the law. Questions related to the enforcement of the law used to be of minor importance for WIPO's work, but they became increasingly relevant around the year 2000. There are two major reasons for this: First, that year marked the end of the transition period for developing countries and countries in transition to implement the TRIPS Agreement. As the WIPO acquired a mandate to assist developing countries with TRIPS implementation, and as the TRIPS Agreement includes enforcement provisions, the WIPO increasingly had to deal with the issue of law enforcement (WIPO 1998: 9, WIPO 1999a: 16). And second, the WIPO increased its activities in an area that is not specifically addressed by the TRIPS Agreement: the protection of IP with regard to the internet and digital media. Enforcement provisions have been an important aspect of this work. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty included enforcement provisions against the circumvention of copyright protection technology, such as digital rights management. Both treaties were signed in 1996 but did not enter into force until 2002. In 1999, the WIPO General Assembly adopted a Digital Agenda (WIPO 1999d), which included the promotion of the WIPO treaties of 1996 and addressed several other issues related to the internet and digital media. It also endorsed recommendations concerning the registration of internet domain names that are identical with registered trademarks. The WIPO recommendations concerning this practice, known as cybersquatting, eventually led to the adoption of the Uniform Domain Name Dispute Resolution Policy by the Internet Corporation for Assigned Names and Numbers, for which the WIPO provides arbitration services (ICANN 1999, WIPO 1999c).

As part of the overall WIPO strategy to address problems of IP protection with regard to the internet and digital media, the WIPO formed two new committees in 1998: the “Advisory Committee on Protection of Industrial Property Rights in Global Electronic Commerce”, which was part of the WIPO Program for “Development of Industrial Property Law”, and the “Advisory Committee on Management of Copyright and Related Rights in Global Information Networks”, which was part of the WIPO Program for “Development of Copyright and Related Rights” (WIPO 2002a). As both committees recognized that enforcement related questions were important for their work, it was included in their mandates in 2000 and this was also reflected by changing the names of the committees to include “enforcement”. In 2001, a joint meeting of the “Advisory Committee on Enforcement of Industrial Property Rights” and the “Advisory Committee on Management and Enforcement of Copyright and Related Rights” was held (WIPO 2002a). Such a joint meeting was held only once and can be considered the prelude to the creation of the Advisory Committee on Enforcement (ACE).

The WIPO Advisory Committee on Enforcement (ACE)

The Advisory Committee on Enforcement was the first WIPO committee dedicated to the enforcement of IPRs in general. The decision to form the ACE was made at the WIPO General Assembly in September 2002 after the decision was prepared at a consultation meeting ten days before the General Assembly (WIPO 2002b). A major point of contestation was the scope of the mandate of the ACE. The delegation from the United States suggested establishing it as a “permanent committee”, which would, similar to other permanent committees at the WIPO, also discuss the further development of existing laws. Such a norm setting mandate for the ACE was

opposed by the delegations of Algeria, Argentina, Barbados, Belarus, Brazil, Cameroon, Cuba, Kazakhstan, Peru, Uruguay, and Venezuela (WIPO 2002b). They argued that it was already very difficult for many countries to implement the enforcement provisions of the TRIPS Agreement. Therefore, the ACE should focus on helping developing countries with TRIPS implementation and should not discuss TRIPS-plus measures. The General Assembly also discussed the proposal that the ACE could develop a model law for the implementation of the enforcement provisions of the TRIPS Agreement, but this was also rejected.¹⁹ The opponents of a norm setting mandate were finally successful in acquiring a mandate for the ACE that explicitly excludes norm setting and limited the committee to technical assistance and coordination and (WIPO 2002b).

The ACE was established as a unified committee to replace the “Advisory Committee on Enforcement of Industrial Property Rights” and the “Advisory Committee on Management and Enforcement of Copyright and Related Rights”, which already had a joint meeting in 2001. The General Assembly therefore discussed whether this unification of committees should also be reflected by a new unified enforcement division within the WIPO Secretariat. However, the decision of how to reorganize the secretariat was left to the discretion of the Secretary General (WIPO 2002b). He decided to establish the Enforcement and Special Projects Division following the General Assembly session (WIPO 2003a: 2). The purpose of the new division was to serve as a secretariat for the ACE and to coordinate enforcement related activities at WIPO also beyond the immediate suggestions made by the ACE (WIPO 2003a). The German lawyer Wolfgang Starein was the first

¹⁹ The idea of the model law was introduced at the General Assembly as an issue that was discussed at the consultation meeting before the GA. Unfortunately, the records of the consultation meeting do not specify which delegation introduced the idea of a model law there. However, it is interesting that the model law idea was introduced at the WIPO at a time when a draft version of such a model law was discussed at the WCO (see previous chapter).

director of the Enforcement and Special Projects Division until his retirement in 2008 (Starein 2010).

The mandate of the ACE, as adopted by the General Assembly, includes cooperation with other international organizations, with law enforcement agencies of WIPO members, and with the private sector in order to include the experiences with IPR enforcement of all relevant actors (WIPO 2002b). For this purpose, the WIPO Secretariat was responsible for inviting delegates from the private sector and international organizations, and the WIPO members were encouraged to send delegations to the ACE that include representatives from government agencies responsible for IPR enforcement, such as police, customs, and prosecutors (WIPO 2002a). In practice, however, law enforcement officers and prosecutors were only rarely included in state delegations to the ACE. The usual delegation consisted of a diplomatic representative from the permanent mission of the WIPO member state in Geneva and often a so-called national expert from the patent and trademark office of that member state or from the national ministry responsible for IP matters (WIPO 2011b, Int.22 2010). As it was often difficult for developing countries to finance the participation of a national expert at the ACE, their delegations often consisted only of representatives from the permanent mission in Geneva. In order to address this problem, the WIPO secretariat has set up a scheme by which it pays the travel expenses of 15 developing countries, and the recipient countries rotate with each session of the ACE (Wollgast 2010).

Only WIPO members are members of the ACE. All other participants can be invited as a guest for a particular session of the ACE or they can be accredited as permanent observers and then come to every ACE session (Wollgast 2010). However, observers are not limited observing the meeting. They may also participate

in the debate; they can either react to an ongoing debate or they can actively introduce a topic at the ACE if they are invited as speakers. For example, at the 2006 meeting of the ACE, a representative of the International Trademark Association (INTA) gave a presentation on “Education & Awareness-Building Initiatives of INTA on Trademark Protection and Enforcement” (Aung 2006) and a representative of the International Federation of the Phonographic Industry (IFPI) gave a presentation on “IFPI's Work on Education, Training and Awareness Building in the Area of Enforcement of Rights” (Decker 2006). And at the 2009 ACE meeting a representative of the IPR Business Partnership gave a presentation on “Addressing costs and Balancing Rights” (Brohm 2009) and a representative of the development policy think tank IQsensato gave a presentation on “The Contribution of, and costs to, Right Holders in Enforcement, Taking Into Account Recommendation 45 of the WIPO Development Agenda” (Musungu 2009).

More than 200 NGOs and more than 50 public international organizations are accredited as observers at the WIPO (WIPO 2011c). However, not all of them come to the ACE, and not all observers at the ACE participate actively as speakers. Many literally remain observers. A list of the most active observers at the ACE is shown in table 10. The WIPO regulations only allow associations to qualify as observers, not individual companies. However, business associations may also include representatives of members companies in their delegations (WIPO 2011a, Wollgast 2010). They are invited to contribute their experience as IPR holders with IPR enforcement (Starein 2010).

Table 10: WIPO Advisory Committee on Enforcement (ACE)

Founded 2002, First meeting 2003

Secretariat: WIPO

Chair: Sweden (2003, 2004, 2006), Egypt (2007),
Romania (2009), Angola (2010, 2011)

(Election among WIPO members at each session until following session)

Public Sector Members

All 184 WIPO members

Public Sector Partners

WIPO has accredited more than 50 public IOs as observers, of which the following participated most actively in the ACE:

European Union*,

International Criminal Police Organization (Interpol),

World Customs Organization (WCO),

World Health Organization (WHO)

Private Sector Partners

WIPO has accredited more than 200 NGOs as observers, of which the following participated most actively in the ACE:

Global Anti-Counterfeiting Group (GACG),

International Chamber of Commerce (ICC),

International Federation of the Phonographic Industry (IFPI),

International Trademark Association (INTA),

IPR Business Partnership (since 2007),

IQsensato (since 2009)

Source: Own account based on WIPO 2011b and WIPO 2011c

*) Since 2006 the EU is not only an observer, but a non-voting member of the ACE

The first meeting of the ACE took place in June 2003. It has since met six times in eight years with a duration of two to three days per meeting (WIPO 2011b). The ACE meetings mainly served two purposes: First, they were a forum to discuss IPR enforcement between WIPO members and partners. And second, the ACE oversaw the activities of the WIPO Enforcement and Special Projects Division. The division reported its past activities at each ACE session and took requests from the ACE for future activities. However, the activities of the division were not only determined by ACE decisions. Due to divergent views on IP policy, the ACE often required a long debate to agree even on a program for the following session of the ACE as well as a detailed program for the Enforcement and Special Projects Division (WIPO 2011b).

Therefore, the division had some discretion to initiate activities without an explicit request from the ACE, but it always needed to be careful to stay within its limited mandate.

Since the founding of the division in 2002, it continued the enforcement related TRIPS implementation assistance for developing countries. This was done by different divisions within WIPO before a specialized enforcement division was created. The Enforcement and Special Projects Division conducted about eight capacity building seminars around the world per year and also participated in seminars and conferences organized by other national and international organizations. Its primary partners for the organization of seminars were the national IP offices and the judiciary of the states that requested assistance. A smaller number of WIPO seminars also involved police and customs officers (WIPO 2011b). Such seminars also involved participants from the private sector, mostly because of their expertise in identifying counterfeit goods (Wollgast 2010). However, the WIPO did not accept funding from private sector organizations for its seminars nor for other activities. As the WIPO is rather well funded, it does not require external funds for its activities (Wollgast 2010, Starein 2010). Besides not being dependent on additional funding, the WIPO also wants to avoid the impression that it could be influenced by such funding. This is expressed in the following quote by the former director of the Enforcement and Special Projects Division:

“The ACE is being managed as neutrally as possible. We do not want to create the impression that it could be influenced in any way by any donor.”*

Wolfgang Starein (2010), former Director of the
WIPO Enforcement and Special Projects Division (2002-2008)

*) This quote is translated. The original interview language was German.

Due to the limited role of the private sector in the ACE, some people refer to the ACE as another form of public private cooperation rather than a public-private partnership. Wolfgang Starein also considers the term PPP inadequate to describe the ACE (Starein 2010). However, after having described divergent views on the meaning of the term PPP in chapter 2, I decided to use a rather broad definition of a PPP and use a typology to distinguish between types of PPPs. Based on this definition and typology, the ACE qualifies as an advisory PPP because it is a form of continuous cooperation between actors from the public and the private sector in which public actors rely on nonpaid advice from private actors for public policy decisions. However, as the role of the private sector in the ACE is very small compared to all other PPPs examined in this study, the ACE can be considered a borderline case of a PPP. There are two important reasons for the limited role of the private sector in the ACE: First, the WIPO is rather well funded and does not depend on additional funds. Therefore, funding from the private sector is not a way for the private sector to increase its role in the relationship with the WIPO. And second, IP policy is highly contested at the WIPO. The conflict between advocates for higher standards and for lower standards of IP protection makes it difficult for the WIPO to take decisive actions. Such a limited ability to act makes the WIPO a difficult partner for the private sector. This difficulty arising from the conflict about IP policy is also expressed in the following quote by the BASCAP Senior Policy Advisor Bill Dobson:

“WIPO has been consistently the most difficult [public international organization] to work with, but that difficulty has been driven by their hyper-sensitivity to their member states interests, and not only to their member states interests but their member states vocal protests in WIPO forums. [...] WIPO has a relationship with the private sector and they recognize that they are there to protect the interest of the private sector, because they are registering patents and all that. So their business is all about protecting private intellectual property. But you would never know it from working with WIPO. When I work with WIPO it is all about bureaucracy and diplomacy and avoiding confrontation with their member states. So how they get anything done or whether they get anything done is a real question to me. I mean, I don't see how they get anything done.” Bill Dobson (2010), Senior Policy Advisor at the ICC Business Action to Stop Counterfeiting and Piracy (BASCAP)

The struggle between advocates for higher standards and for lower standards of IP protection peaked when the idea of a Development Agenda for WIPO was presented in 2004 and adopted in 2007. This agenda attempts to change the entire orientation of the WIPO and is also relevant for its IPR enforcement work.

The WIPO Development Agenda and IPR Enforcement

In 2004, the General Assembly of the WIPO discussed a proposal for the establishment of a development agenda (WIPO 2004a). The document was presented by the delegations of Argentina and Brazil one month before the start of the General Assembly. It proposed a re-orientation of the WIPO towards development policy goals. The furthest reaching proposal in this document was to change the convention establishing the WIPO so that the objective of the WIPO would not only be the promotion of the protection of intellectual property but also the consideration of the development needs of WIPO member states. However, even if the convention were not changed, the document argues that development is already an objective of the WIPO based on its agreement with the UN and the UN development goals. The document does not explicitly demand lower standards of IP protection for developing countries, but it paves the way for such demands by stating that a country-specific IP policy is to be preferred over a worldwide harmonized IP system. This is expressed, for example, in the following passage of the document:

“Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development. The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country’s level of development.”

Development Agenda Proposal by Argentina and Brazil (WIPO 2004a: 1)

The underlying idea of the development agenda proposal is not new. That high standards of IP protection could be disadvantageous for developing countries was already the underlying idea of Brazil's resolution introduced in 1961 to the Economic and Financial Committee of the UN General Assembly (Menescal 2005: 765). The debate about the relationship between intellectual property and development has remained relevant for the WIPO and the introduction of the development agenda proposal marked a new high for this debate.

The General Assembly decided that the proposal needed to be discussed further, and several intergovernmental meetings were held from 2004 until 2007 to discuss a possible development agenda for WIPO. The antagonists of this debate were organized as the "Friends of Development" on one side, consisting of the delegations of Argentina, Bolivia, Brazil, Cuba, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, Uruguay and Venezuela (WIPO 2006), and the "Group B" on the other, consisting of the delegations of Australia, Canada, Japan, Monaco, New Zealand, Norway, Switzerland, Turkey, the United States, the European Union and the EU member states²⁰. The latter wanted to avoid radical reforms to the WIPO and keep IP protection as its primary objective (Scherer 2004). The negotiations took almost three years until a compromise was reached.

The WIPO General Assembly in September 2007 adopted a Development Agenda consisting of 45 recommendations (WIPO 2007: 151). 19 of those recommendations were chosen for immediate implementation. These were either straightforward measures, such as to "increase human and financial allocation for technical assistance programs" (WIPO 2007: 258), or they reaffirmed existing principles, such as that "WIPO's technical assistance staff and consultants shall

²⁰ The exact composition of the group opposing a radical WIPO reform was in flux as the EU was enlarged in 2004 and 2007 and as not all Group B members were equally active. (cf. Scherer 2004, New 2007, New 2009, Saez 2011)

continue to be neutral and accountable” (WIPO 2007: 158). The remaining 26 recommendations either describe medium or long-term objectives or they are so vague that they leave room for different interpretations about their implementation. One of these vague recommendations is the only one that explicitly addresses IPR enforcement:

“To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that ‘the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’, in accordance with Article 7 of the TRIPS Agreement.”*

WIPO Development Agenda Recommendation 45 (WIPO 2007: 157)

*) The quotation marks within the recommendation mark the quotation of Article 7 of the TRIPS Agreement

The Recommendation 45 on IPR enforcement is not a new agreement, but it reaffirms Article 7 of the TRIPS Agreement. It also leaves ample room for different interpretations about how IP policy is influenced by a context of broader societal interests and development-oriented concerns. In order to discuss this and other aspects of the implementation of the Development Agenda, the General Assembly created a Committee on Development and Intellectual Property, which consists of all WIPO members (WIPO 2007: 152). Therefore, the adoption of the Development Agenda did not mark an end to the debate. The Friends of Development re-organized themselves in 2010 as the Development Agenda Group²¹ with the aim of mainstreaming development concerns throughout all of WIPO’s work (Mara & New 2010). And Group B continued their policy to keep the protection of IP as the primary

²¹ When the Development Agenda Group (DAG) was founded in 2010 it consisted of the delegations of Brazil, Cuba, Ecuador, Egypt, Iran, South Africa and Uruguay, which were also previously in the Friends of Development (FoD) Group, and of the delegations of Algeria, Djibouti, Guatemala, India, Indonesia, Malaysia, Pakistan, the Philippines, Sri Lanka, Sudan and Yemen, which were not previously in the FoD. It did not include the previous FoD members Argentina, Bolivia, Kenya, Peru, Sierra Leone, Tanzania and Venezuela (Mara & New 2010, WIPO 2006).

objective of the WIPO as a specialized agency, while development policy was to be confined to specialized committees and divisions within the WIPO (Saez 2010).

The struggle over the implementation of the Development Agenda also influenced the IPR enforcement work of the WIPO and the Advisory Committee on Enforcement. The Enforcement and Special Projects Division was renamed in 2009 to the “Building Respect for IP Division” in order to reflect the new approach to enforcement in the context of broader societal interests (Wollgast 2010). A representative of the development policy think tank IQsensato was invited to give presentations at the 2009 and the 2010 session of the ACE (Musungu 2009, Musungu 2010), balancing the more IP owner oriented presentations of the IPR Business Partnership (Brohm 2009), the International Trademark Association (Heath 2009), and the International Chamber of Commerce (Hardy 2010).

The 2010 session of the ACE was influenced by a debate around the question of how prominently the implementation of the Development Agenda should be discussed at the ACE²². The Development Agenda Group demanded a dedicated agenda item, while the Group B rejected this demand. Therefore the ACE started with a provisional agenda and then was interrupted several times for consultation meetings to discuss the final agenda. An agreement was finally reached in the afternoon of the second day of the two-day meeting, which renamed an existing agenda item to “work of the ACE” with the understanding that the Development Agenda implementation could be discussed under this agenda item. By debating so much about the formal agenda, the Development Agenda topped the effective agenda of the ACE meeting and left very little time to discuss the work of the ACE and the work of the Building Respect for IP Division. The ACE gathered several

²² Information about the 2010 ACE has been obtained by a participant observation.

recommendations about the future work of the ACE from the delegations, but it postponed the decision about a work program to the next session of the ACE and decided to continue working with the old program in the meantime.

In principle, the WIPO rules of procedure allow majority decisions in WIPO bodies (WIPO 1979b). In practice, however, a consensus approach is sought in order to be more inclusive (Int.22 2010). This consensus approach avoids a further fragmentation of international IP policy, but it can also delay or prevent decision making as in the case of the 2010 ACE and many other WIPO bodies. With the continuous conflict about the relationship between IP protection and development, many people perceive the WIPO as a deadlocked organization, which can administer existing treaties but is unable to achieve any change in terms of international IPR enforcement policy (Dobson 2010, Huther 2010).

Key Finding about the WIPO PPP

The World Intellectual Property Organization is primarily concerned with the protection of IP by the law and only to a small extent with the enforcement of the law. The relevance of IPR enforcement for the WIPO increased after the TRIPS Agreement entered into force in 1995 and after the transition period for its implementation in developing countries and countries in transition ended in 2000. The TRIPS Agreement triggered the increased WIPO activity in IPR enforcement in two ways: First, the TRIPS Agreement includes specific enforcement provisions. It requires procedures for customs seizures and it requires the criminalization of trademark and copyright infringements on a commercial scale. Thereby, it made IPR enforcement an important aspect of international IP policy. And second, the fact that the TRIPS Agreement is administered at the WTO instead of the WIPO challenged

the relevance of the WIPO. It reacted to this challenge by signing an agreement with the WTO, which gave the WIPO a mandate to assist developing countries with TRIPS. This became increasingly relevant when the transition period for TRIPS implementation in developing countries ended in 2000. The WIPO also reacted to the TRIPS challenge by taking on issues that were not addressed by the TRIPS Agreement, such as the enforcement of IPRs with regard to the internet and digital media. As part of this Digital Agenda, the WIPO formed two specialized committees to discuss the protection of different IPRs with regard to electronic commerce and information networks. Both committees received an enforcement mandate in 2000 and they held a joint meeting in 2001.

In 2002, the WIPO decided to unify its various IPR enforcement activities, which had evolved since the late 1990s. It created the Advisory Committee on Enforcement (ACE) and the Enforcement and Special Projects Division as its secretariat. The ACE was explicitly mandated to cooperate with a variety of stakeholders in IPR enforcement, such as other international organizations, law enforcement agencies, and the private sector. The private sector, especially IPR owners and their associations, was recognized as relevant for IPR enforcement. Access to private sector actors' knowledge about IPR enforcement was the main reason for the WIPO to cooperate with them and to invite them to the ACE.

Based on the typology of PPPs in chapter 2, the ACE qualifies as an advisory PPP. It is a form of continuous cooperation between actors from the public and the private sector in which public actors rely on nonpaid advice from private actors for public policy decisions. However, the role of the private sector in the ACE is very small compared to all other PPPs examined in this study. Therefore the ACE can be considered a case of a PPP that is very close to not being a PPP.

The ACE has existed continuously since it held its first meeting in 2003. It was neither terminated nor reformed. There are two reasons for this continuity: First, the WIPO is rather well funded. Therefore, access to additional funding from the private sector is not a motivation for increasing the role of the private sector in the PPP, as is the case in other PPPs. And second, the mandate for the ACE is rather detailed, which does not leave much room for discretion. Hence, the WIPO secretariat needs approval from the WIPO members for any major changes. And such an approval is rather unlikely, as IP policy is highly contested at the WIPO. Advocates of higher IP protection and of lower IP protection oppose each other and make it very difficult to achieve any change. There were only minor changes as part of the Development Agenda. The Enforcement and Special Projects Division was renamed to Building Respect for IP Division and the composition of the most active private sector participants in the ACE changed a little. Private sector actors that are critical about IPR enforcement took part as observers in the ACE since its founding, but since 2009 they were also invited as speakers.

7. Global Congress on Combating Counterfeiting & Piracy

The Global Congress on Combating Counterfeiting & Piracy has been hosted about every one and a half years since 2004. It is organized as a collaborative public-private partnership. Unlike the other PPPs in this study, it is not led by a single public international organization, but three public IOs contribute equally to this PPP: Interpol, the WCO, and the WIPO. As these three IOs have been introduced in the previous three chapters, this chapter starts by introducing the private sector members of the Global Congress: the International Trademark Association (INTA), the International Chamber of Commerce (ICC) and its Business Action to Stop Counterfeiting and Piracy (BASCAP), the International Security Management Association (ISMA), and the Global Business Leaders Alliance Against Counterfeiting (GBLAAC). Subsequently, the main section of this chapter analyzes the founding and the working of the Global Congress on Combating Counterfeiting and Piracy. The final section of this chapter summarizes the key findings of this case study with a view on explaining the developments.

The International Trademark Association (INTA)

The International Trademark Association is an international business association that also functions as a professional association. The regular INTA members are trademark owners. In its function to represent those trademark owners, the INTA is a lobbying association “dedicated to the support and advancement of trademarks and related intellectual property” (INTA 2011). However, the INTA also has associate members and academic members, such as IP law firms, IP service providers, and IP scholars. The INTA serves those non-trademark owning members primarily as a network of IP professionals. The Annual Meetings of the INTA are attended by

several thousand IP professionals and serve as trade fairs that bring together IP owners, IP lawyers, and other IP professionals.²³ In 2010, the INTA had 5789 members, of which about 40% were from North America, 27% from Europe, and 16% from the Asia Pacific Region (INTA 2010). The INTA has its headquarters in New York City and operates further offices in Brussels, Geneva, Mumbai, Shanghai, and Washington D.C. (INTA 2009).

The INTA was originally founded 1878 in New York City as the United States Trademark Association (USTA) and remained a U.S. association for a long time. Its international activities increased when it was registered as an observer at the WIPO in 1980 and when it participated in the conference where the Madrid Protocol was concluded in 1989 (INTA 2011). In 1993, the USTA changed its name to INTA to reflect the internationalization of the association. However, it took the association until 2003 to host its first annual meeting outside North America in Amsterdam and to open its first office outside the United States in Shanghai (INTA 2011). In the same year that the INTA opened its office in China, it also increased its activities on the issue of trademark counterfeiting, for example, by creating an INTA Anti-Counterfeiting Committee (GBLAAC 2004).

The International Chamber of Commerce (ICC) and its Business Action to Stop Counterfeiting and Piracy (BASCAP)

The International Chamber of Commerce is an international business association that consists of companies and of national business associations, which are referred to as ICC National Committees in the ICC terminology. Through those National Committees, the ICC has a presence in 91 countries around the world and its headquarters is located in Paris, France (ICC 2011a). On the one hand, the ICC is a

²³ Information about the INTA has also been obtained by a participant observation of the 2008 INTA Annual Meeting and an INTA Anti-Counterfeiting Conference in 2010.

lobbying organization with the aim “to promote open international trade and investment across frontiers” (ICC 2011a). On the other hand, the ICC provides several services for its members, such as arbitration services and standardized terms for international trade contracts.

The decision to establish the ICC was made in 1919 in Atlantic City, USA, and it was then founded in 1920 in Paris, France (ICC 2011b). The ICC Secretariat was subsequently established in Paris, where the ICC International Court of Arbitration was also founded in 1923 (ICC 2011b). During World War II, the ICC relocated to neutral Sweden and then returned to Paris afterwards. In 1946, the ICC obtained consultative status with the United Nations and has established relations with an increasing number of public international organizations since then (ICC 2011b). In the 1980s, the ICC established several specialized anti-crime service bureaus in London. They exist under the umbrella of the ICC Commercial Crime Services but have an independent membership structure. For example, the International Maritime Bureau provides services related to risks with international shipping, such as maritime piracy, and the Counterfeiting Intelligence Bureau provides services related to document and product counterfeiting (ICC 2011b).

The Business Action to Stop Counterfeiting and Piracy (BASCAP) was founded in 2004 at the ICC World Congress in Marrakesh, Morocco, and it became operational in 2005 (Hardy 2009, Heath 2010). While the ICC’s Counterfeiting Intelligence Bureau already provided operational services against counterfeiting for its members, the ICC BASCAP was primarily founded as a specialized lobbying organization with the aim of getting policy makers to do more against counterfeiting and piracy (Faustin 2008).

The International Security Management Association (ISMA)

The International Security Management Association is a professional association of security managers. It was founded in 1983 and has its office in Buffalo, Iowa. Of its 470 individual members, 81% are from the United States (ISMA 2010). The ISMA is rather selective in accepting members. Only one security manager per company may join the ISMA. It has to be the most senior security executive in that company and the company needs to operate internationally and have assets or sales exceeding 500 million USD annually (ISMA 2010). In addition, the security manager needs to have a college degree and needs to be recommended by three other ISMA members. The ISMA is so selective in order to provide its members a “trusted network for resource sharing” (ISMA 2010). It organizes several conferences, some also including security professionals from public sector agencies, such as the Overseas Security Advisory Council of the U.S. Department of State (ISMA 2010). The ISMA also has several working groups that specialize on specific business security issues, such as a working group on “Animal Rights and other Activists” and a working group on “Intellectual Property / Counterfeiting” (ISMA 2010).

The Global Business Leaders Alliance Against Counterfeiting (GBLAAC)

The Global Business Leaders Alliance Against Counterfeiting was a lobbying association for the issue of trademark counterfeiting from 2002 until 2007. While the issue of copyright piracy has already had a strong and globally active lobby with the Motion Picture Association (MPA) and the International Federation of the Phonographic Industry (IFPI), the founders of the GBLAAC desired an equally strong and global lobby for the issue of trademark counterfeiting (Heath 2010, Dobson 2010). They apparently did not consider the INTA as an adequate organization for

this task at the time, because the decision to found the GBLAAC was made on the fringes of the 2001 INTA Annual Meeting in San Francisco (Heath 2010). GBLAAC started operating in 2002. It was managed from an office in Cincinnati by the Executive Director, Bill Dobson, who previously was Vice President at Procter & Gamble (Dobson 2010). By the end of 2003, GBLAAC had 16 member companies: Allied Domecq, British American Tobacco, BP, Coca-Cola, DaimlerChrysler, General Motors, Gillette, Heineken, Henkel, Japan Tobacco International, Novartis, Pentland Group, Philip Morris International, Procter & Gamble, Sara Lee, and Unilever (GBLAAC 2004).

Major activities of the GBLAAC included lobbying for an OECD study on the effects of counterfeiting and piracy and to support that study (Dobson 2010), which was released in 2007 (OECD 2007), to draw the attention of the World Economic Forum to the anti-counterfeiting issue, and being a founding member of the Global Congress on Combating Counterfeiting in 2004 (Dobson 2010). After the ICC founded their BASCAP initiative in 2004/2005, the GBLAAC cooperated closely with BASCAP. And as the ICC is a much larger and more established organization that already had relations with many public international organizations, the GBLAAC decided to merge with BASCAP and thereby ceased to exist as an independent organization in 2007 (Dobson 2010)

The Global Congress on Combating Counterfeiting & Piracy

One of the first activities of the GBLAAC after its founding was to draw the attention of the World Economic Forum (WEF) to the issue of trademark counterfeiting. They managed to get a session about this topic on the agenda of the 2003 WEF Annual

Meeting in Davos (Dobson 2010, Heath 2010). Participants of that session included GBLAAC members and Kunio Mikuriya, who was then WCO Deputy Secretary General and eventually became WCO Secretary General in 2009. They decided that the issue needed more attention by policy makers in order to improve legislation and enforcement. They identified the customs, the police, the IP offices, and the IP owners as important stakeholders. As Richard Heath, who was Head of Corporate Trade Marks at Unilever at the time, explained:

“We sat down at the 2003 [WEF] meeting and said: Who are the key public sector stakeholders with this issue? This is principally the police, customs and the IP community - and we in the private sector. So what do we need to do to get the issue raised higher up on the public policy agenda? What do we need to do to get governments take notice of this serious problem? They have taken notice of the drugs problem, for example, but they are not taking much notice of counterfeiting and piracy - this was in 2003. So we said, if we get the governing bodies for the police, customs, and IP globally together with the private groups, we can hopefully have a strong policy making voice. That was really the genesis of the Global Congress.”

Richard Heath (2010), former Head of Corporate Trade Marks (1997-2006) and former Vice President (2006-2010) at Unilever

The 2003 WEF Annual Meeting in Davos was not only the starting point for further sessions about counterfeiting at the WEF but also the starting point for discussions about a congress exclusively dedicated to the issue (Mikuriya 2005). The WCO offered to host such a congress with the participation of other stakeholders. Interpol and the WIPO were involved as the public international organizations representing the police and the IP offices. The GBLAAC was initially the main private sector behind the organization of the congress, but the INTA was also involved, representing more IP owners than GBLAAC. The ISMA represented the corporate security managers dealing with this problem (table 11). The first Global Congress to Combat Counterfeiting took place in May 2004 at the WCO headquarters in Brussels and involved more than 300 delegates (GCCC 2004). Copyright piracy was not included on the agenda of this first congress. This was a result of the fact that

GBLAAC was the driving private sector organization behind this congress and GBLAAC's focus was trademark counterfeiting, not copyright piracy (Dobson 2010).

However, this congress was not a single event. A Global Congress Steering Group was set up as a collaborative PPP to organize a series of such congresses. Members of this steering group at the beginning were Interpol, the WCO, the WIPO, the GBLAAC, the INTA, and the ISMA (table 11). After the ICC's BASCAP was founded, it was also involved and became a member of this PPP in 2005 (Hardy 2009). The BASCAP was not only concerned about trademark counterfeiting but also about copyright piracy. Also Interpol's IP Crime Action Group was concerned about copyright piracy, not least because the International Federation of the Phonographic Industry was the co-chair of that PPP (table 4). And so the topic of the second congress was widened. It was hosted under the name "Global Congress on Combating Counterfeiting and Piracy" in November 2005 near the Interpol headquarters in Lyon and involved more than 500 delegates (Interpol 2005a).

The chair of the Global Congress Steering Group rotated among the three public sector members, thus rotating primary responsibility for the organization of the congress. The congress was held at the WCO headquarters in Brussels in May 2004, near the Interpol headquarters in Lyon in November 2005, and near the WIPO headquarters in Geneva in January 2007 (table 11). Then the cycle started again, though the congress was held in different places around the world, involving additional local hosting organizations: in Dubai it was hosted by the WCO and Dubai Customs in February 2008, in Cancun by Interpol and the Mexican Intellectual Property Office in December 2009, and in Paris by the WIPO and the French Intellectual Property Office in February 2011²⁴ (table 11).

²⁴ Information about the Global Congress on Combatting Counterfeiting & Piracy in 2009 and 2011 has been obtained by participant observations.

Table 11: Global Congress on Combating Counterfeiting & Piracy

Founded 2004

Chair of Steering Group: rotating among public sector members with each congress

May 2004 Brussels: WCO

November 2005 Lyon: Interpol

January 2007 Geneva: WIPO

February 2008 Dubai: WCO

December 2009 Cancun: Interpol

February 2011 Paris: WIPO

Public Sector Members

International Criminal Police Organization (Interpol)

World Customs Organization (WCO)

World Intellectual Property Organization (WIPO)

Private Sector Members:

International Trademark Association (INTA)

International Chamber of Commerce

Business Action to Stop Counterfeiting and Piracy (ICC BASCAP) (since 2005)

International Security Management Association (ISMA) (until 2009)

Global Business Leaders Alliance Against Counterfeiting (GBLAAC) (until 2007)*

Source: Own account based on GCCCP 2011

*) GBLAAC ceased to exist as an independent association when it merged with BASCAP in 2007.

The Global Congress Steering Group decided that the chair should rotate only among the public sector members and should not go to one of the private sector members. The decision to have public sector leadership was seen as beneficial by the private sector members as it was their aim to convince the public sector of the need to do more against counterfeiting and piracy (Hardy 2009). And it was also seen as beneficial by the public sector members of the steering group, because they did not want to appear as being driven by the private sector, as explained by John Newton, Interpol's IP Crime Program Manager:

"I was one of the founding members of the steering group of the congress. [...] The strength of this process is the three international organizations standing together on this subject. And also it's quite important for us not to be seen to be in the pocket of the private sector. So I think it's a very strong political statement that we made the decision that the chair would always rest with the international organizations. And the international organizations are essentially the main drivers for it. But that's not to minimize the role of the private sector organizations. We are equal partners within the steering group."

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

There is a division of labor within the Global Congress Steering Group. While the public sector side contributed manpower and their reputation to this PPP, the private sector side assured the financing of the congress. However, this does not mean that only the private sector members of the steering group paid for the congress. The fees from congress sponsors, from exhibitors at the congress, and the congress participation fees from private sector delegates make the congress self-sustaining (Newton 2009a). The funds of the congress are also sufficient to pay for the travel expenses of some public sector participants from developing countries, to waive the participation fee for many public sector participants, and to charge only a reduced participation fee from all remaining public sector participants (Newton 2009a).

From 2004 until 2006, the Global Congress Steering Group also hosted smaller regional conferences in Rome, Shanghai, Rio de Janeiro, and Bucharest (GCCCCP 2011). However, these regional events were discontinued when the Global Congress started to be hosted at other locations than those of the IO headquarters. The three public international organizations remained the only IOs in the steering group of the congress. Representatives of other public IOs, such as the WTO and the WHO, were invited to give presentations at the Global Congress, but were never involved in its steering group. There was some fluctuation on the private sector side of the steering group. The ICC BASCAP joined in 2005, increasing the number of private sector members to four. In 2007, the GBLAAC ceased to exist as an independent organization after it merged with BASCAP. And the ISMA left the steering group between the congress in 2009 and the congress in 2011, reducing the number of private sector members to two. As the ISMA is a rather small professional organization with limited capacities, it was the least active organization within the

steering group in terms of giving presentations and organizing panels for the congress. It therefore decided to discontinue its participation (Int.05 2010).

Key Findings about the Global Congress on Combating Counterfeiting & Piracy

The Global Congress on Combating Counterfeiting and Piracy was initiated in 2004 in order to complement the ongoing PPP activities of three public international organizations. The WCO had its IPR Strategic Group since 2000, Interpol had its IP Crime Action Group since 2002, and the WIPO had its Advisory Committee on Enforcement since 2003. While all three PPPs addressed the issue of counterfeiting and piracy, none was dedicated to bringing the issue to the attention of high level policy makers. Interpol's IP Crime Action Group focused on support for police agencies fighting transnational IP crime; it stayed away from any legislative proposals. The WCO IPR Strategic Group focused on supporting customs agencies to enforce IPRs. They also drafted a model law, but they did this without drawing much attention to the issue, at least not in 2004. And the WIPO ACE was a forum for the exchange of information about IPR enforcement, especially with a view to supporting developing countries with TRIPS implementation. The ACE's mandate explicitly excluded any norm setting.

Given this situation in 2003 and 2004, the public and private founding members of the Global Congress perceived a gap in the existing global PPPs against IP crime. No PPP was dedicated to bringing high level attention to the issue of counterfeiting and piracy with the aim of improving legislation and increasing resources devoted to fighting IP crime. The Global Congress was then organized as a collaborative PPP without one organization permanently leading it. The chair rotated only among the public sector members: Interpol, the WCO, and the WIPO.

Together with changing local hosting partners since 2008, they formed the public sector side of this partnership. They contributed their reputation and human resources as organizers to the PPP and they contributed information in the form of congress presentations. The private sector side also contributed information and human resources to the PPP as well as financial resources.

The Global Congress was successful insofar as it got high level policy makers involved, such as cabinet level politicians, and heads of customs, police, and IP offices. However, it is difficult to say if political attention on the issue, which led to the drafting of the Anti-Counterfeiting Trade Agreement (ACTA), resulted from these congresses.

8. World Trade Organization

The World Trade Organization (WTO) is a public international organization dedicated to the regulation of international trade policies. It is the most intergovernmental organization in this study. It facilitates the negotiation of agreements, the monitoring of the implementation of these agreements, and the settlement of disputes relating to those agreements between its member governments. Non-governmental actors have no standing before the WTO and are also not admitted as observers. One of the WTO agreements is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which includes enforcement provisions. Therefore, the WTO is also concerned with IPR enforcement, but it never created a PPP to address this issue.

This chapter starts with relevant background about the WTO. It then analyzes the WTO's involvement in IPR enforcement. And the final section summarizes the key findings of the WTO case study with a view to explaining why no PPP was founded.

Background on the World Trade Organization

In 2009, the WTO had 153 member governments, which included 150 fully recognized sovereign nation states, Taiwan²⁵, and two semi-independent customs territories: Hong Kong and Macau (WTO 2010a: 6). The WTO secretariat in Geneva operated with a staff of 638 and an annual budget of 189 million CHF (125m EUR or 174m USD) (WTO 2010a: 141). It is often stated that the WTO secretariat has very little discretion and that the WTO is a “member-driven organization” (Hoekman & Mavroidis 2007: 4, Int.04 2010). It only facilitates the intergovernmental negotiation of

²⁵ Taiwan is a WTO member under the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”, commonly abbreviated as “Chinese Taipei”.

agreements and the intergovernmental peer-review of the implementation of these agreements. Only the WTO appellate body for the settlement of intergovernmental disputes has a considerable amount of discretion as this is necessary for an independent judgment (Cortell & Peterson 2006: 272). The WTO is under very close scrutiny by its member governments and by the public, especially since large public protests drew attention to the 1999 WTO Ministerial Conference in Seattle (Hoekman & Mavroidis 2007: 2). In spite of the interest in the work of the WTO by the public and by interest groups such as labor unions or business associations, such non-governmental actors have very limited access to the WTO. They mainly try to influence the decisions by lobbying governmental delegations to the WTO (Hoekman & Mavroidis 2007: 25).

The supreme governing body of the WTO is its Ministerial Conference, which convenes about once every two years. These conferences are attended by large governmental delegations, which are usually led by a cabinet level politician (WTO 2009a). Also several hundred NGO delegates are allowed to attend the conferences on the fringes but do not have access to the governmental delegates' meeting rooms and are not invited as speakers (WTO 2009b). NGOs have no chance to be accredited as regular observers to attend WTO meetings, neither at the Ministerial Conference nor at other decision making bodies. This right is only available for governments that are not WTO members and for other intergovernmental organizations (WTO 1996).

The main decision making body of the WTO, apart from the sessions of the Ministerial Conference, is the General Council. It convenes about 5-6 times a year as the regular General Council and about 50 times a year in its other guises as the Trade Policy Review Body and as the Dispute Settlement Body (WTO 2011d). The

delegates are usually ambassadors or other representatives from the permanent missions of the WTO members in Geneva. In addition, there are several specialized councils and committees where governmental delegations regularly meet at the WTO, such as the Council for Trade in Goods, the Council for Trade in Services, and the TRIPS Council. Non-governmental organizations are not allowed to be accredited as observers to these councils.

However, the WTO has some technical assistance activities, which are not as intergovernmental as the core WTO work. It organizes seminars and workshops in order to help developing country members participate in global trade. As part of these technical assistance activities, the WTO also engages with representatives of government agencies that are not embedded in diplomatic delegations. Representatives from the private sector are sometimes invited as speakers to such events (Int.04 2010). Overall, however, transnational and also transgovernmental cooperation is minimal at the WTO compared to the other public international organizations in this study. The core activity of the WTO is the facilitation of intergovernmental cooperation.

The WTO is a rather young organization. It was founded in 1995, but it has a longer history through its predecessor: the General Agreement on Tariffs and Trade (GATT), which was negotiated in 1947. It was originally planned that the GATT would be administered by an International Trade Organization (ITO), but the ITO was never founded because the U.S. Congress refused to ratify the charter for its establishment (Hoekman & Mavroidis 2007: 8). Nevertheless, the GATT evolved into an international institution where governments agreed on limits on their tariffs and other trade policy measures in order to allow for more international trade. Agreements were reached in eight GATT negotiation rounds from 1947 until 1994, the

predecessors of today's WTO Ministerial Conferences (Hoekman & Mavroidis 2007: 9). The last of these negotiation rounds was the Uruguay round, which lasted from 1986 until 1994. It was concluded by 128 governments signing the Agreement Establishing the World Trade Organization, which includes several multilateral trade agreements in its annexes including as an update to the GATT, the General Agreement on Trade in Services (GATS), and the TRIPS Agreement. Becoming a member of the WTO requires accepting all of its multilateral trade agreements²⁶. Such a "package deal" allows to link agreements that are sought by some members with agreements that are sought by other members. For example, protection for intellectual property rights was sought by industrialized countries, while market access for textile products was sought by developing countries (Helfer 2004: 20).

Joining the WTO after its foundation requires an accession process that goes beyond accepting all multilateral WTO agreements. As part of the accession negotiations, the existing members may require the new member to make additional concessions in order to avoid situations where joining is more beneficial for the new member than for the existing members (Hoekman & Mavroidis 2007: 18). In this respect the WTO differs significantly from other international organizations like the WIPO or the WCO, where it is possible to become a member without signing any of the substantial agreements administered by the respective organization. Nevertheless, the WTO has expanded very successfully: 28 members have acceded to the WTO from 1995 until 2008, and a further 30 states have applied to become members (WTO 2011c).

²⁶ In addition to the multilateral trade agreements there are also some plurilateral WTO agreements, which do not have to be accepted by all WTO members.

The WTO and IPR enforcement

As the WTO administers the TRIPS Agreement, its provisions on intellectual property rights and, specifically, IPR enforcement are an aspect of the work of the WTO. However, the WTO is primarily dedicated to the regulation of international trade policies. Trade related intellectual property rights are a rather small work area compared to the WTO's overall work. Out of 425 cases in the WTO dispute settlement system, only 29 (7%) cite the TRIPS Agreement in the request for consultations and only 14 (3%) cite an article of its enforcement provisions (WTO 2011a). From the 638 staff members in the WTO secretariat only 13 (2%) are working in the Intellectual Property Division and there is no sub-division for IPR enforcement (WTO 2010a: 141). As part of its technical assistance activities for developing countries, the WTO secretariat organizes more than 400 seminars and workshops per year of which only about 1-2% are dedicated exclusively to intellectual property rights and none is dedicated exclusively to IPR enforcement (WTO 2010b, WTO 2004). Apparently there is no need for the WTO to increase its activities in this area, as other international organizations also provide assistance with TRIPS implementation. The WIPO provides assistance with TRIPS implementation based on the WIPO-WTO agreement and also offers seminars that are focused on IPR enforcement. Also the WCO and Interpol provide IPR enforcement training for customs and police agencies (see previous chapters). There is effectively a division of labor between the WTO and the other international organizations. The WIPO, the WCO, and Interpol provide assistance for the enforcement of IPRs with regard to the implementation of the TRIPS Agreement, and the WTO administers the procedure in which the TRIPS implementation is evaluated in the Trade Policy Review Body and the Dispute Settlement Body.

Private sector involvement with the WTO concerning intellectual property rights is minimal. The TRIPS Council, which has about three regular meetings a year, does not allow the participation of private sector representatives. Members of the TRIPS Council discussed the idea to invite guests from the private sector in order to speak on specific issues as experts, but this idea was rejected arguing that the WTO should remain a member-driven organization (Int.04 2010). Participants from the private sector would probably make the council sessions more difficult by challenging the status quo and demanding changes to the TRIPS agreement, either in the interest of IPR owners or in the interest of IPR-poor developing countries. With the two interests opposing each other and consensus-based decision making at the WTO, it is rather unlikely that any change to the TRIPS Agreement can be achieved, at least without major issue linkages. Especially with respect to IP, the WTO is similarly deadlocked as the WIPO. This is a reason why proponents of higher standards for IPR enforcement negotiated the Anti-Counterfeiting Agreement outside of the WIPO and the WTO. This may also be a reason why the intergovernmental delegates who maintain the TRIPS status quo at the WTO were not keen on inviting private sector representatives who would challenge this status quo.

Although the WTO secretariat has very little influence on the decision making, its staff is occasionally approached by interest group representatives advocating a certain position (Int.04 2010, Huther 2010). The secretariat is also occasionally involved with the private sector when it invites private sector representatives as speakers to its workshops for developing countries as part of the technical assistance activities. Apart from this episodic interaction with the private sector, there is no WTO forum for continuous public-private cooperation that would resemble a public-private partnership (Int.04 2010). However, the WTO does send participants to PPPs of

other international organizations: The WTO participates with speakers in the Global Congress on Combating Counterfeiting & Piracy. It is a participant of the International Medical Products Anti-Counterfeiting Taskforce (IMPACT) of the World Health Organization. It is also an observer at the WIPO ACE, and WTO representatives occasionally visit PPP meetings at the WCO as a guest. The WTO is not involved with any of the Interpol PPPs. Altogether, however, the WTO activities in those PPPs led by other organizations are minimal. It participated occasionally, but it did not assume any function in the working of a PPP (Int.04 2010).

Key Findings about the Absence of a PPP at the WTO

The World Trade Organization administers the TRIPS Agreement, which is currently the primary multilateral agreement concerning intellectual property rights and their enforcement. Therefore, the WTO has a basis for becoming active in this issue area. Nevertheless, its involvement with the private sector to address IPR enforcement is minimal and it has not founded any public-private partnership. There are two important reasons for this: First, the WTO secretariat never received an explicit mandate to form a PPP on IPR enforcement and it does not have sufficient discretion to engage in such activities. As different views on IP policy oppose each other in the intergovernmental WTO decision making bodies and as the decision making is consensus based, it would be rather difficult to achieve a mandate for a PPP that could influence IP policy. The WTO secretariat could not afford to take any initiative that could jeopardize its reputation as a neutral facilitator of intergovernmental negotiations as it is under very close scrutiny by its members and by the public. Only the cautious participation in PPPs led by other international organizations was

possible, as coordination with other international organizations is one of the tasks the WTO secretariat has a mandate for.

And second, the WTO has not been dependent on private sector resources as many of the activities that would require access to such resources have been taken up by other international organizations. The WTO occasionally invites representatives from the private sector as speakers to its TRIPS workshops for developing countries, but this seldom happens and has never sparked a continuous relationship with the private sector that would resemble a PPP. The WTO is under no pressure to increase such activities, as the WIPO, the WCO, and Interpol all provide assistance to developing countries with regard to IPR enforcement.

9. World Health Organization

The World Health Organization (WHO) is a public international organization dedicated to the “attainment by all peoples of the highest possible level of health” (WHO 2009a). It pursues this aim using intergovernmental, transgovernmental, and transnational cooperation. The working area of the WHO overlaps with intellectual property policy in two ways: First, the patent protection of medicine is one factor influencing access to medicine. It may encourage research that leads to new medicines, but it may also increase the price of patent protected medicines. And second, the counterfeiting of medicine may harm patients if the counterfeit medicine does not contain the correct ingredients. The WHO addressed the counterfeit medicine issue by forming a PPP in 2006, but this was criticized by several WHO member states because they were afraid that the anti-counterfeiting work could overlap with patent issues and thereby have a negative impact on access to affordable medicine.

This chapter starts with relevant background information about the WHO and then two sections give an overview of the WHO’s approach to patents and to counterfeit medicine. The next section of this chapter is dedicated to the WHO International Medical Products Anti-Counterfeiting Taskforce (IMPACT) and its work. A subsequent section analyses how IMPACT was supported by some actors but opposed by others and how this changed the character of this PPP. The final section summarizes the key findings of the WHO case study with a view to explaining the developments.

Background on the World Health Organization

In 2009, the WHO had 193 member states and an annual budget of 1971 million USD (app. 1418m EUR) (WHO 2010b). It had more than 8000 employees in its headquarters in Geneva, its six regional offices and its 147 country offices (WHO 2007). Compared with the other public international organizations in this study, the WHO is the largest with the most staff and the most money. However, this needs to be put in perspective with the resources required for the WHO's work. It performs a wide variety of tasks related to public health: It develops and administers international conventions such as the International Health Regulations and the Framework Convention on Tobacco Control. It administers international standards such as the International Statistical Classification of Diseases and Related Health Problems. It also supports health research and facilitates transgovernmental and transnational cooperation between health administrations and health professionals. And the WHO provides technical assistance for developing countries and aid in emergencies (WHO 2007).

Work in the areas of development aid and emergency relief requires a high amount of resources and acquiring those resources is an important aspect of the work of the WHO. The statutory contributions of member states only account for about 24% of the WHO budget. Additional funding sources are voluntary contributions from the member states (about 36%), from other public international organizations (about 12%), and from the private sector²⁷ (about 22%) (WHO 2010b). The WHO secretariat has limited discretion for the use of all these voluntary contributions, because they are usually earmarked for specific projects or even for

²⁷ The WHO financial report shows private sector, NGOs and foundations as separate categories of contributors. However, in line with the use of the term private sector in this study (for-profit and not-for-profit non-governmental organizations), these entities are all considered private sector.

specific purposes within projects (Lee 2009: 102). This also means that the World Health Assembly (WHA) has limited control over the WHO. In theory, the WHA is the supreme governing body of the WHO, which convenes once a year and consists of WHO members states delegations that are usually led by the health minister or another high ranking representative of the national health administration. In practice, however, much of the work of the WHO needs to be negotiated with the donors outside of the WHA. This can be a very difficult task as preferences about health policies can differ from state to state and from donor to donor (Lee 2009: 26).

Struggles about the appropriate health policy of the WHO have been a feature of the organization throughout its history. The WHO was founded in 1948 as a specialized agency of the United Nations and as the successor of the League of Nations Health Organization, which existed since 1920 (Lee 2009: 14). The constitution establishing the WHO was signed in 1946 and entered into force in 1948. It defines the objective of the WHO as “the attainment by all peoples of the highest possible level of health” (WHO 2009a), whereas health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (WHO 2009a). If health is understood so broadly, it is affected not only by medical care, but also by nutrition, sanitary conditions, working conditions, and overall economic and social conditions. This provides the WHO with a very broad mandate. In practice, however, the WHO’s ability to address such a broad mandate was limited by a lack of resources and by political controversies about how broad or how focused the WHO’s work should be (Lee 2009: 17). Interference with the wider area of social policy was especially controversial during the ideological confrontation of the Cold War. Less controversial was the fight against communicable diseases, as these diseases can cross national borders and thereby

make international cooperation especially relevant. Therefore most of the work of the WHO was focused on such diseases as smallpox, polio, malaria, tuberculosis, and HIV/AIDS (Lee 2009: 17).

The activities of the WHO overlap with those of other international organizations, especially in the area of health related development aid, where many organizations are active. Examples are the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the World Bank, and also many non-governmental charitable organizations. Therefore, the WHO has to compete with these organizations for donor funding, but it often cooperates with them as well (Lee 2009: 19, 111). About one third of the WHO's 2008/2009 budget was contributed by other public international organizations and by the private sector (WHO 2010b).

As a means to organize this cooperation, the WHO formed several partnerships. An example is the Stop TB Partnership, which was formed in 2000 as a PPP against tuberculosis and whose secretariat is housed by the WHO (Lee 2009: 30). However, cooperating with other organizations was not always a success story for the WHO as an organization. When donors lost confidence in the WHO Global Programme on AIDS, it was replaced with the Joint United Nations Programme on HIV/AIDS (UNAIDS), where the WHO is only one partner among several public international organizations including the UNICEF, the UNDP, and the World Bank (Lee 2009: 62). Similar expressions of non-confidence in the WHO were the founding of the Global Alliance for Vaccines and Immunization (GAVI) in 2000 and the founding of the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM) in 2002. Both are public-private partnerships where the WHO is one of several partners and not the leading organization (Lee 2009: 53, 117).

The WHO and Patent Policy

The signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994 marked a significant change in international intellectual property policy that was also relevant to the work of the WHO. The TRIPS Agreement is flexible with respect to pharmaceutical patents, for example, by allowing compulsory licensing, but it also reduces the discretion that WTO members have compared to the situation before the TRIPS implementation. Developing countries and countries in transition had to implement TRIPS until 2000. Least developed countries originally had to implement TRIPS until 2006, but this deadline was later extended until 2013 and for pharmaceutical patents until 2016.

The WHO Secretariat was concerned that the TRIPS Agreement could have a negative impact on access to essential medicines and issued a report on “Globalization and Access to Drugs – Implications of the WTO/TRIPS Agreement” (WHO 1999a). After the first version of this report in 1997 was criticized by the U.S. government and by the pharmaceutical industry, a revised version was published in 1999 (Lee 2009: 122). However, the new version of the report also expressed concern that the TRIPS Agreement may have a negative impact on access to essential medicines and recommends that developing countries should use the flexibilities allowed in the TRIPS Agreement:

“By 2005 at the latest, all developing countries will have to grant legal protection by patents to pharmaceutical products. Such a monopoly situation could lead to an increase in drug prices. That is why developing countries that are WTO Members should make the fullest use of the periods of transition they have been granted to transcribe the provisions of the TRIPS Agreement into their domestic law. [...]he law should cover the possibility of authorizing parallel importation of patented drugs sold at lower prices in another country, or establish - as has been done by the Group of Andean Countries - that a drug on the WHO Model List of Essential Drugs should be the object of a compulsory licence for public health reasons, under the conditions laid down in the TRIPS Agreement.”

WHO Report on Globalization and Access to Drugs –
Implications of the WTO/TRIPS Agreement (WHO 1999a: 41)

The 1999 version of the report also included contributions from three public international organizations (the WTO, the WIPO, and the South Centre) and from three private international organizations (the International Federation of Pharmaceutical Manufacturers & Associations (IFPMA), the International Generic Pharmaceutical Alliance (IGPA) and Health Action International) (WHO 1999a). The cooperation between the WTO and the WHO was intensified since 1999 and resulted in a joint WHO/WTO study on “WTO Agreements and Public Health” in 2002 (WHO & WTO 2002). As a result of the involvement of the WTO secretariat, the 2002 report was more politically neutral than previous and later reports that were issued by the WHO alone (Lee 2009).

The debate about the relationship between the TRIPS Agreement and public health also led to some important agreements in WTO decision making bodies. In 2001, the WTO Ministerial Conference adopted the Doha Declaration on the TRIPS Agreement and Public Health, which reaffirms and clarifies TRIPS flexibilities with regard to public health crises such as severe problems with HIV/AIDS, tuberculosis, and malaria (WTO 2001). Besides the clarifications, the Doha Declaration also is the basis for two changes to the TRIPS Agreement: First, least developed countries did not have to implement TRIPS provisions concerning pharmaceutical patents until 2016. And second, it led to a change to the compulsory licensing provisions in the TRIPS Agreement. The Ministerial Conference recognized that some states cannot use the compulsory licensing exception if they do not have domestic pharmaceutical companies that could produce the required medicine, as the TRIPS Agreement required that compulsory licenses “shall be authorized predominantly for the supply of the domestic market” (TRIPS §31.f). Paragraph 6 of the Doha Declaration instructed the WTO TRIPS Council to address this problem and present the agreed

solution to the WTO General Council. As a result of this mandate, the WTO General Council in 2003 adopted a waiver of the export restrictions, so that generic medicine that was produced under a compulsory license can be exported to countries in need (WTO 2006b).

The WHO also continued to address the question of the relation between IP protection and access to medicines. In 2003, the World Health Assembly created a Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH). This commission published a report in 2006. Among other things, this report came to the conclusion that IP protection mainly encouraged innovation to address health issues that are prevalent in high-income countries, while health problems of poor countries, such as malaria, are insufficiently addressed. It states that this problem cannot be solved by relying on market mechanisms alone, but that a “worldwide mobilization of resources, both public and private, and political commitments at all levels, is necessary” (WHO 2006e: 174). The report also encourages countries to use the flexibilities of the TRIPS Agreement, especially with regard to compulsory licensing. The 2006 WHA established an intergovernmental working group to discuss the implementation of the recommendations of the CIPRH report (WHO 2006d). Based on the report of this working group, the 2008 WHA adopted a “Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property” (WHO 2008). This discussion coincided with ongoing deliberations about the endorsement of the WHO International Medical Products Anti-Counterfeiting Taskforce (IMPACT). Both discussions were linked to intellectual property. This issue linkage, from access to essential medicine via intellectual property to anti-counterfeiting, contributed to the non-endorsement of the WHO PPP against counterfeit medical products.

The WHO and Counterfeit Medicines

The World Health Organization's concern with counterfeit medicines began a few years before the World Health Assembly passed its first resolution addressing the issue in 1988 (Kopp 2010a). This resolution on the rational use of drugs included a paragraph that mandated the WHO to "initiate programmes for the prevention and detection of export, import and smuggling of falsely labeled, spurious, counterfeited or substandard pharmaceutical preparations" (WHO 1992: 20). As can be seen from this grouping of issues, the WHO's approach to counterfeit medicines was not through trademark counterfeiting or the protection of other intellectual property rights, but rather as a violation of drug regulations and as a possible danger to patients. This is evident when looking at the definition of counterfeit medicines that the WHO used since 1992:

"A counterfeit medicine is one which is deliberately and fraudulently mislabelled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients, wrong ingredients, without active ingredients, with insufficient quantity of active ingredients or with fake packaging."

WHO definition of counterfeit medicine (WHO 1992: 1)

The above definition was adopted at an international conference that was organized by the WHO and the International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) in 1992. Participants discussed whether a draft version of the TRIPS Agreement could be helpful against counterfeit medicines (WHO 1992: 9). In 1994, the year when the TRIPS Agreement was signed, the WHA reaffirmed its mandate and asked the WHO again to assist member states in ensuring the quality of medicines, including activities against counterfeit drugs (WHO 1999b: 8). Based on this mandate, the WHO started a project on counterfeit drugs in 1995 that was financed by the government of Japan. This project resulted in a study of the issue

and guidelines on how to address it, which were published in 1999 (WHO 1999b). This project, as well as several WHO conferences on counterfeit drugs, involved cooperation with pharmaceutical manufacturers, but no permanent PPP was set up at the time.

Besides the World Health Assembly, another body also asked the WHO to become active against counterfeit drugs: the International Conference of Drug Regulatory Authorities (ICDRA). Unlike the intergovernmental WHA, where diplomats and representatives of the ministries of health meet, the ICDRA is a transgovernmental conference where representatives of drug regulatory agencies meet. Diplomats are not among the delegates as the ICDRA intends to do more technical and less political work (Int.17 2010, WHO 2011). The ICDRA meets about every two years. It is not an official decision making body of the WHO, but it is associated with it as the WHO secretariat also serves as the secretariat of the ICDRA (WHO 2011).

Since 1994, the ICDRA requested that the WHO assist its member states with measures against counterfeit drugs (Kopp 2010a). In 2004, the ICDRA recommended that the “WHO, in collaboration with other stakeholders, should develop a draft concept paper for an international convention on counterfeit drugs” (WHO 2004). However, it became clear during informal negotiations that no consensus could be reached on such a convention²⁸ (Kopp 2010b). As an alternative to the convention, the International Medical Products Anti-Counterfeiting Taskforce (IMPACT) was founded in 2006 to pursue other ways to combat counterfeit medical products.

²⁸ While the WHO was not successful in drafting a convention against counterfeit drugs, the Council of Europe (CoE) was. The CoE addressed the issue since 2004, and since October 2011 the “Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health” is open for signature (CoE 2010).

The International Medical Products Anti-Counterfeiting Taskforce (IMPACT)

When it became obvious that a consensus on a convention against counterfeit medicines was not within reach, the WHO brought together several stakeholders in order to find alternative approaches to the issue. At a conference in Rome in February 2006 these stakeholders formed the International Medical Products Anti-Counterfeiting Taskforce as a PPP network consisting of several collaborative PPPs with one steering PPP at the top. The IMPACT terms of reference clearly state that decisions should be made through a consensus-based approach, hence giving equal rights to members from the public and the private sector (WHO IMPACT 2009).

The membership of the IMPACT is comprised of public international organizations, government agencies from WHO member states, and of private international associations. Table 12 shows a list of all IMPACT members according to IMPACT documents, but not all of them have been equally active and some active participants are not listed as members. For example, individual companies are not members of the IMPACT, but the member associations like IFPMA send individual experts from member-companies to meetings of IMPACT working groups. Therefore, employees of many major research based pharmaceutical companies have been present at many IMPACT meetings (Int.17 2010, Int.08 2010). The most active IMPACT members are in the IMPACT planning group, which consists of the IMPACT chair, the vice-chairs, and the chairs of the five IMPACT working groups (table 12). Another indicator of active support for IMPACT is funding. IMPACT had a regular budget of 2.6 million USD during the period from 2006 to 2009, of which 28% came from the WHO and 68% from the European Union, Australia, Germany, Italy and the Netherlands (WHO 2010a). The IFPMA contributed an additional 4% (Int.17 2010).

Table 12: WHO International Medical Products Anti-Counterfeiting Taskforce (IMPACT)

Founded: 2006
Chair: World Health Organization (WHO)
Vice-Chairs: National Agency for Food and Drug Administration and Control (NAFDAC) of Nigeria and Health Sciences Authority of Singapore
Secretariat: WHO (2006-2010),
Interim secretariat hosted by the Italian drug regulatory agency Agenzia Italiana del Farmaco (AIFA) since August 2010

Public Sector Members

WHO and government agencies of its member states,
Permanent Forum on International Pharmaceutical Crime (PFIPC)*,
Interpol, WCO,
WIPO, WTO,
World Bank, OECD,
European Union, Council of Europe,
Commonwealth of Nations, ASEAN

Private Sector Members:

International Federation of Pharmaceutical Manufacturers & Associations,
International Pharmaceutical Federation,
International Alliance of Patients Organizations,
International Council of Nurses,
International Federation of Pharmaceutical Wholesalers,
International Generic Pharmaceuticals Alliance,
Partnership for Safe Medicines,
Pharmaceutical Security Institute*,
Pharmaciens sans frontières,
World Medical Association,
World Self-medication Industry,
Asociacion Latinoamericana de Industrias Farmaceuticas,
European Association of Pharmaceutical Full-line Wholesalers

Working Groups:

Legislative and Regulatory Infrastructure
Chair: Federal Ministry of Health, Germany

Regulatory Implementation
Chair: Food and Drug Administration, USA

Enforcement
Chairs: Interpol and Therapeutic Goods Administration, Australia

Technology
Chair: International Federation of Pharmaceutical Manufacturers & Associations

Communication
Chair: International Pharmaceutical Federation

Source: Own account based on AIFA 2011, WHO IMPACT 2008a, WHO IMPACT 2008c

*) A member list of PFIPC and PSI is available in table 13.

At the IMPACT founding conference, 57 national drug regulatory agencies were represented (WHO 2010a) together with representatives from private associations and public international organizations. However, some of the international organizations mentioned on the list do not consider themselves founding members. Representatives of the WIPO and the WTO said that their role in IMPACT is more that of an observer (Wollgast 2010, Int.04 2010). After the IMPACT founding conference 2006 in Rome, there were three additional IMPACT general meetings: 2006 in Bonn, Germany, 2007 in Lisbon, Portugal, and 2008 in Hammamet, Tunisia (AIFA 2011: 21). In addition, there were several regional and topic centered IMPACT conferences. The IMPACT working groups also discussed issues by e-mail and by telephone during the time between these conferences (Int.08 2010). Five working groups have been formed in 2006, which can be regarded as sub-PPPs in the larger IMPACT PPP network.

The Working Group on Legislative and Regulatory Infrastructure addressed the national legislative frameworks concerning counterfeit medical products. Its most important output was a document called “Draft Principles and Elements for National Legislation against Counterfeit Medical Products” (AIFA 2011: 48). This document includes several recommendations that could be considered controversial. For example, it recommends “liability for Internet service providers and other operators who facilitate advertisement of or trade in counterfeit medical products” (AIFA 2011: 54). The question if the service providers have reasonable grounds to believe that their services are used for such activities should, according to the document, only be relevant for criminal sanctions, not for civil liability (AIFA 2011: 59). The document also recommends that an “adequate legal basis (comprising criminal, administrative and civil frameworks)” (AIFA 2011: 54) can also be applied to

counterfeit medical products “in transit/transshipment, bonded warehouses, free zones and all situations of the international trade” (AIFA 2011: 54). However, this needs to be seen in perspective with the definition of counterfeit medical products used in the document. In line with the WHO definition quoted previously in this chapter, the document explicitly states that patent disputes and parallel imports should not be confused with counterfeiting, which is only about falsely representing the identity or source of a medical product (AIFA 2011: 51). Therefore, the recommendation from IMPACT would not have been relevant for the 2009 WTO dispute in which Brazil and India complained about seizures of non-counterfeit, though patent-disputed generic drugs in transit from India through the Netherlands to Brazil (WTO 2010c). Nevertheless, the work of the IMPACT Working Group on Legislative and Regulatory Infrastructure provided the basis for controversy, as will be shown later. It was criticized from actors outside of IMPACT, but also some IMPACT participants considered the approach of this working group as sometimes harsh and undifferentiated (Int.08 2010).

The Working Group on Regulatory Implementation addressed the question of how to secure the supply chain of pharmaceutical products. Its most important activity was to make recommendations for a revision of the WHO Good Distribution Practices for Pharmaceutical Products with regard to counterfeit medical products (WHO 2009b).

The Working Group on Technology discussed how technology can be used to distinguish genuine from counterfeit medical products, especially with regard to packaging. Its most important output was a document called “Anti-Counterfeit Technologies for the Protection of Medicines” (AIFA 2011: 144), which provides an overview of existing technologies.

The Working Group on Communication addressed the question of how to raise awareness of the risks involved with counterfeit medical products. Its main activities were to develop a communication strategy and communication materials, such as brochures, videos and a website (AIFA 2011: 65)

The Working Group on Enforcement is the most relevant for this study as it engaged in the most operational enforcement activities. It is the only IMPACT working group that has two chairs: Interpol and the Australian drug regulatory agency TGA. The WHO and Interpol were already collaborating before IMPACT, most notably in a 2005-2006 investigation of counterfeit malaria medicine in South East Asia (chapter 4). This collaboration has intensified since January 2008, when the French police officer Aline Plançon was sent from the Interpol headquarters in Lyon to the WHO headquarters in Geneva to manage the enforcement activities of IMPACT from there (Plançon 2010). Since then, Interpol has become an increasingly strong actor in the enforcement working group, making this group increasingly independent from the overall IMPACT PPP network.

The Interpol office at the WHO headquarters effectively served as the secretariat of the enforcement working group. It also operated with resources that were independent of the overall IMPACT budget. For example, the budget of the different enforcement operations carried out under the IMPACT umbrella was managed directly by Interpol (Plançon 2010). The Interpol unit that collaborated with the WHO IMPACT was the IP crime unit and Aline Plançon was an employee of that unit. This changed in January 2010 when she became head of the newly created Interpol Medical Products Counterfeiting and Pharmaceutical Crime Unit (Plançon 2010). This change was also a way to visibly separate the issues of IP enforcement and medical products counterfeiting as the link between the two issues became the

source of criticism directed at the IMPACT, which will be analyzed in the next section of this chapter.

The members of the IMPACT Enforcement Working Group are shown in table 13. The most active members are Interpol, the Permanent Forum on International Pharmaceutical Crime (PFIPC) and its members, and the Pharmaceutical Security Institute (PSI) and its members. The PFIPC is a group of drug regulatory agencies and law enforcement agencies from 15 countries. It was founded in 1998 and has held annual meetings since then to exchange information about pharmaceutical crime. The PSI is an association of research-based pharmaceutical companies that focuses on anti-counterfeiting. It was first created in 1992 as an informal network and then became more formal in 1997 when 12 member companies formed a consortium and set up a permanent office in Italy. In 2002, the PSI office moved to the Washington D.C. area, where PSI was incorporated and from where it has operated since. In 2010, PSI had 25 member companies and an annual budget of nearly 1 million USD. It became the primary private sector partner of Interpol in the fight against counterfeit medicine and has also supported Interpol financially (Kubic 2010).

The most important activities of the IMPACT Enforcement Working Group are the many enforcement operations, which are each organized as an additional collaborative PPP in the overall IMPACT PPP network. Operation Storm is a regional enforcement operation in South East Asia, Operation Mamba is a regional enforcement operation in East Africa, and Operation Pangea is a global enforcement operation focusing on the sale of counterfeit medicines via the internet (table 14). These enforcement operations are similar to the other Interpol enforcement operations analyzed in chapter 4. They involve training seminars, where public sector law enforcement officers learn how to find and identify counterfeit medical products,

and subsequent raids with seizures and arrests. However, as IMPACT has a public health focus rather than an IP focus and is funded primarily from public sector source, these PPPs are more driven by the public sector than the PPPs at Interpol or the WCO (Plançon 2010). Nevertheless, the private sector plays an important role by contributing information and human resources, as the Interpol-IMPACT Project Manager explained:

“When we do these enforcement activities, we are bringing along the private sector with the PSI. We cooperate quite a fair bit with them. And as Interpol we are really putting together the public sectors - police, customs, regulatory authorities - together, to enhance actions. [...] So we are on the thin line between working fully with the public sector, but still needing the expertise from the private sector and acknowledge that they are doing a great job, as far as disrupting the criminals, getting info, intelligence, and all this kind of enforcement work that requires a lot of time and money and expertise. They can be very relevant to a fight.”

Aline Plançon (2010), Interpol-IMPACT Project Manager

Table 13: IMPACT Enforcement Working Group	
Founded:	2006
Chairs:	Interpol and Therapeutic Goods Administration (TGA), Australia
Secretariat:	WHO (2006-2008) Interpol office at the WHO headquarters (since 2008)
Public Sector Members	
Interpol, WCO, WHO, Permanent Forum on International Pharmaceutical Crime (PFIPC) representing government agencies of 15 states: Australia, Belgium, Canada, Germany, Ireland, Israel, Italy, Netherlands, New Zealand, Singapore, South Africa, Spain, Switzerland, UK, USA	
Private Sector Members:	
Pharmaceutical Security Institute (PSI) representing its 25 member companies: Abbott Laboratories, Amgen, Astellas Pharma, AstraZeneca, Bayer-Schering, Baxter International, Boehringer-Ingelheim, Bristol-Myers Squibb, Eisai, Eli Lilly and Company, Forest Laboratories, Genzyme, Glaxo-Smith-Kline, Hoffmann-La Roche, Johnson & Johnson, Lundbeck, Merck Sharp & Dohme, Merck KGaA, Novartis International, Novo Nordisk, Pfizer, Purdue Pharma, Sanofi-Aventis, Servier Laboratories, Takeda Pharmaceutical	

Source: Own account based on McIntosh 2010, Plançon 2010, Kubic 2010

Table 14: Enforcement Operations in IMPACT

No.	Time	Countries	Results
Operation Storm			
I	Apr - Sep 2008	Cambodia, China, Laos, Myanmar, Singapore, Thailand, Vietnam	27 arrests, more than 16 million pills seized
II	Jul - Nov 2009	Previous 7 plus Indonesia	33 arrests, about 20 million pills seized, more than 100 shops closed
Operation Mamba			
I	Sep - Oct 2008	Tanzania, Uganda	22 shops closed
II	Aug 2009	Previous 2 plus Kenya	83 cases opened, at least 4 convictions
III	Jul - Aug 2010	Previous 3 plus Burundi and Rwanda	80 arrests, at least 10 tons of medical products seized
Operation Pangea			
I	12 Nov 08	Australia, Canada, Germany, Ireland, Israel, New Zealand, Singapore, Switzerland, UK, USA	Websites shut down and pills seized
II	16 - 20 Nov 2009	Previous 10 plus Austria, Belgium, Czech Republic, Denmark, France, Italy, Liechtenstein, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Thailand	72 websites shut down, about 167,000 pills seized
III	5 - 12 Oct 2010	Previous 24 plus Angola, Azerbaijan, Brazil, Bolivia, China, Colombia, Croatia, Cuba, Estonia, Finland, Iceland, Japan, Jordan, Malta, Mexico, Poland, Peru, Romania, Russia, Slovak Republic, Uruguay	290 websites shut down, over 1 million pills seized
IV	20 - 27 Sep 2011	81 countries	about 13,500 websites shut down, about 2,4 million pills seized, 55 individuals under investigation

Source: Own account based on AIFA 2011, Interpol 2009g, Interpol 2010g, Interpol 2008f, Interpol 2009c, Interpol 2010a, Interpol 2008a, Interpol 2009d, Interpol 2010c, Interpol 2011c

Mixed Reactions to the IMPACT

The International Medical Products Anti-Counterfeiting Taskforce was immediately welcomed by the transgovernmental ICDRA in 2006 (WHO 2006b). IMPACT was also endorsed by the Interpol General Assembly in 2008 along with the decision to second an Interpol officer to the WHO headquarters (Interpol 2008g). However, the World Health Assembly (WHA) has not given such an explicit endorsement of IMPACT. The WCO secretariat used rather general resolutions requesting actions against counterfeit medicine as the justification for its activities in the IMPACT (WHO 2010a). An attempt to get a more explicit endorsement was made at the WHA in 2008. A resolution from Nigeria received support from several African, European, East Asian and North American countries, but was blocked due to opposition from several Latin American, South Asian and South East Asian countries. The discussion about the proposed IMPACT endorsement coincided with the discussion about the “Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property” (WHO 2008) at the same WHA. The discussion of these two IP-related issues may have contributed to a critical attitude of some actors towards the IMPACT. It was feared that this PPP on counterfeit medicines could interfere with patent policy (Int.17 2010). When no consensus could be reached, the WHO Executive Board was asked to solve the issue (Reggi 2008).

However, the issue was not solved and erupted in a heated debate at the WHA in May 2010. The supporters and opponents in 2010 were the same as in 2008: While many African countries and OECD member countries supported the IMPACT, opposition came from Latin American, South Asian and South East Asian countries (WHO 2010c). Several of these opposing countries criticized the WHO secretariat for hosting this public-private partnership without an explicit mandate from

the WHA. The WHO secretary general Margaret Chan defended the secretariat saying that it is common practice at the WHO for the secretariat to take specific actions on the basis of general requests from the WHA. As an example, she pointed to the UNITAID partnership for the purchase of drugs against HIV/AIDS, Malaria and Tuberculosis, which the WHO hosts without being asked by the WHA to do so (WHO 2010c: 14). More specific and vocal criticism directed at the IMPACT came from Brazil and India, which accused the WHO secretariat of being unduly influenced by big pharmaceutical companies and of protecting private intellectual property instead of public health. This accusation and the reaction of the WHO secretariat are illustrated by the following quote from the records of the 2010 WHA:

“Ms FARANI AZEVÊDO (Brazil) observed that there were two dimensions to the term “counterfeit medicines”, one concerning trade and commerce and the other public health. [...] Some Member States had disguised their commercial and economic interests under a false public-health perspective. She claimed that certain private companies, with the Secretariat’s support, were waging a war against generic medicines. [...]

The DIRECTOR-GENERAL [MARGARET CHAN] said that she understood clearly what Member States were asking of her: WHO should focus on its mandate and address the public health aspects of counterfeit medicines. [...] Referring to the specific assertion made by the delegate of Brazil that private companies, with the support of WHO, were waging a war against generic medicines, she urged Brazil to provide her with the evidence.”

Records of the 63rd World Health Assembly (WHO 2010c: 9)

Several countries do not have a coherent policy towards the IMPACT. This is most obvious with Brazil. While Ms. Farani Azevêdo, a career diplomat, criticized the IMPACT heavily, the Brazilian drug regulatory agency ANVISA (Agência Nacional de Vigilância Sanitária) supported the IMPACT with their active participation in IMPACT meetings (WHO IMPACT 2008b, Int.17 2010) and with their participation in Operation Pangea (table 14). ANVISA representatives also participated in the 2006 International Conference of Drug Regulatory Authorities, which endorsed the IMPACT (WHO 2006a).

The participants of the 2010 WHA were not able to reach an agreement on the role of the WHO within the IMPACT. Therefore they decided to set up an

intergovernmental working group without private sector participants to find a solution to the issue. This working group was not able to solve the issue until the 2011 WHA and a decision is not yet in sight. One option on the table is that Interpol could take over the leadership of the IMPACT from the WHO, because Interpol is more supportive of the IMPACT than the WHO and the issue is less controversial there (Kopp 2010b, Plançon 2010, Int.17 2010).

Interpol's role within the WHO IMPACT has significantly increased over the years, while the role of the WHO itself has declined. IMPACT started as a WHO led partnership in 2006 and the full-time executive secretary was the WHO employee Valerio Reggi. Since 2009, the WHO did not dedicate any full-time staff to IMPACT. The new executive secretary was Sabine Kopp, who managed IMPACT ad interim besides other responsibilities (Kopp 2010b). In August 2010, the ad interim secretariat was transferred to the Italian drug regulatory agency Agenzia Italiana del Farmaco (AIFA 2011). Since that time, Interpol has invested more resources into the IMPACT than the WHO and this makes Interpol a more active player within this PPP than the WHO. As a result, the enforcement working group has endured the controversy around IMPACT better than any other partnership within the IMPACT PPP network. It continues to be active, while the other working groups are more or less halted. This is also expressed in the following quote from Interpol's IP Crime Program Manager:

"I don't think it's any secret that the law enforcement side of IMPACT is the strongest and the most vibrant and productive. And it's no coincidence that Interpol is in there. [...] Our focus is transnational organized criminals. That's where we are comfortable. And that's where the focus of our activities is. Discussions about the definition of counterfeit and the wider political issues is not really our business. It's a matter for the health community and WHO and their member countries."

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

Key Findings about the Development of the WHO PPP

The WHO's involvement with intellectual property crime is limited to counterfeit medical products and its primary concern is not intellectual property but drug regulation and public health. However, in the fight against this specific area of IP crime, the WHO has emerged as an important player on the global level. The World Health Assembly mandated the WHO to become active in the area of counterfeit medicines in 1988 and then reaffirmed this mandate in 1994, the year when the TRIPS agreement was signed. After 1994, WHO activity in this issue area peaked and this activity also involved cooperation with the pharmaceutical industry. However, these activities were project based and no permanent PPP was set up at the time.

Since 1994, the International Conference of Drug Regulatory Authorities has repeatedly requested the WHO to assist member states with measures against counterfeit drugs. In 2004, the ICDRA recommended that the WHO should draft a convention against counterfeit drugs. When it became clear that a consensus on such a convention could not be reached, the WHO brought together several stakeholders from the public and the private sector to pursue other means than a convention in the fight against counterfeit medicine. These stakeholders formed the first WHO PPP against counterfeit medicine: the International Medical Products Anti-Counterfeiting Taskforce. This PPP was built on common ground, specifically, on an agreed definition of counterfeit medicine and on a shared understanding that there is a need to address this problem. Yet this PPP was also built due to the fact that there was no consensus about the correct means to address this problem. This partial agreement and partial disagreement led the WHO secretariat to set up a PPP with several stakeholders that were willing to address the issue.

The IMPACT was set up as a PPP network from the beginning. Several working groups were set up as collaborative PPPs within the PPP network in order to address the issue of counterfeit medicines from different angles. In addition, the enforcement working group started different enforcement operations, each organized as a collaborative PPP within the overall PPP network of the IMPACT. The role of the private partners within IMPACT is rather low, compared to the Interpol IP Crime Action Group or the WCO IPR Strategic Group. This can be seen, for example, from the private contribution to the IMPACT funding of only 4%. In addition to this unevenly shared funding, the public and private partners also contributed human resources and specific information to the PPP. Several public partners also brought their legitimacy as a public drug regulatory agency or law enforcement agency to the partnership. The WHO itself contributed its reputation and its coordinating function by providing secretariat services from 2006 until 2010.

The IMPACT PPP significantly changed since 2008. One important factor for that change is the management of this PPP. When the WHO brought together the IMPACT partners and managed this PPP, it did so based on a rather general mandate from the WHA to address the problem of counterfeit medicines. An attempt to achieve a more explicit mandate from the WHA failed in 2008. In the same year, Interpol seconded an officer to the WHO headquarters and thereby assumed more responsibilities in IMPACT. In 2009, the WHO reduced the resources invested into hosting the IMPACT secretariat and, in 2010, it fully transferred the secretariat services to the Italian drug regulatory agency AIFA as a provisional measure until a decision about the future of IMPACT. With this distancing of the WHO from IMPACT and the IMPACT support from Interpol, the enforcement part of this PPP became the

most active, while the activities of the rest of the network have been more or less halted by the political controversy around the IMPACT.

The different policies in the different working groups resulted in different degrees of controversy. The mere enforcement of existing laws in the law enforcement working group was uncontroversial. The drafting of principles for national legislation in the working group on legislative and regulatory infrastructure, on the other hand, was the most controversial part of the IMPACT PPP network.

Last but not least, the representation of stakeholders in the IMPACT was an important factor that led to controversy influencing the development of this PPP. All WHO members are listed as partners in this PPP network, but exactly who would represent a country was disputed. For example, Brazil was represented by its drug regulatory agency ANVISA in several IMPACT meetings and in Operation Pangea. However, diplomatic representatives did not consider this adequate representation and decided to attack IMPACT as outsiders who were not represented in IMPACT. Together with several other diplomatic representatives, they have shifted the discussion about the future of the IMPACT from the IMPACT itself to an intergovernmental working group which consisted only of diplomatic delegations and did neither include drug regulatory agencies nor representatives from the private sector.

10. Comparison of Cases

The six case studies in chapters four through nine show some similarities as well as some differences. There are specific factors in each case study that explain the development of the PPPs in each case. The purpose of this chapter is to identify more general patterns that can be observed across many cases. A comparison of similarities and differences, in terms of circumstances and results in each case study, allows making inferences about the reasons for the creation, and the continuation or change of transnational PPPs against IP crimes.

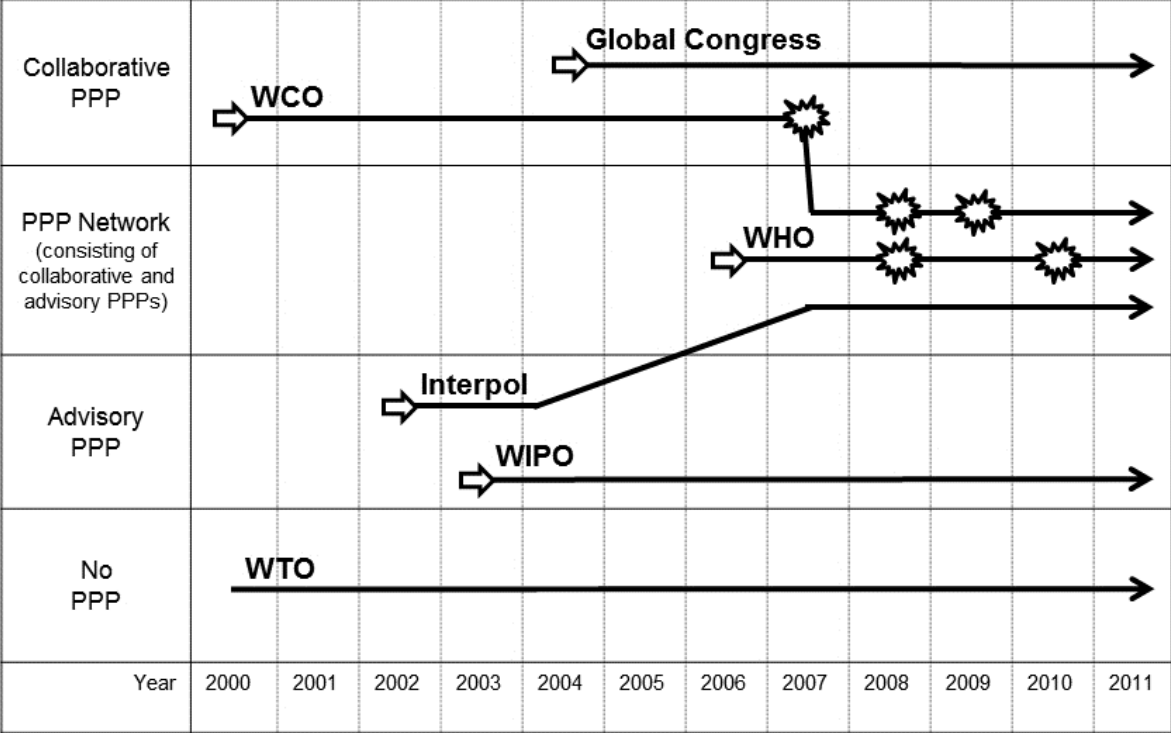
This chapter starts with a comparison of the results of each case, whereas result refers to the question of whether a PPP has been founded, which type of PPP it was, and how it developed over time: whether it was continued or changed. The second part of this chapter identifies five factors that have been relevant for the development of PPPs in several cases. Those are (1) cooperation in the pursuit of resource gains, (2) common ground, (3) the PPP management, (4) the representation of stakeholders, and (5) the PPP policy. The final section of this chapter is dedicated to the development of generalizable hypotheses about which combination of these factors leads to which result in terms of the creation, the choice of type, and the continuation or change of transnational PPPs against IP crimes.

Comparison of PPPs

If one compares the different PPPs in chapters four to nine with the PPP typology developed in chapter two, the most obvious result is that none of these PPPs is of a contractual or consulting type. Apparently, all the private sector partners were sufficiently interested in the PPP to participate in it without being paid by the public partners for their participation. Among the cases examined, the PPP network evolved

as the most prevalent type of PPP. Interpol, the WCO, and the WHO use this PPP type since 2007. However, while the WHO started directly with a PPP network in 2006, Interpol and the WCO chose different PPP types at the beginning and then changed to a PPP network later (figure 3).

Figure 3: Paths of Different PPPs Against IP Crimes



⇒ Creation of PPP ✨ Conflict about PPP

Source: own illustration

Interpol started with the Interpol IP Crime Action Group as an advisory PPP in 2002. It then gradually evolved into a PPP network consisting of an advisory PPP and several collaborative PPPs. The transition phase went from about 2004, when the first Operation Jupiter was started, to about 2007, when the collaborative PPPs with Underwriters Laboratories and the U.S. Chamber of Commerce showed effects on the Interpol IP crime program. Although the Interpol PPP changed over time, it was

very durable. From all the cases examined, Interpol has the longest lasting PPP that has not been terminated and replaced, which happened twice at the WCO. Interpol avoided the political controversies that affected the WCO and the WHO by focusing on law enforcement as opposed to law making.

The World Customs Organization set up its IP Rights Strategic Group as a collaborative PPP in 2000. The role of the private sector in this PPP was astonishingly high, as major secretariat functions were outsourced to the private sector. However, the strong role of the private sector and legislative proposals coming from the group has led to controversy. The WCO decided to devote more resources in-house to the issue of IP rights and stop the outsourcing, which terminated this PPP in 2007. The SECURE working group was set up as a new advisory PPP while continuing customs training with several collaborative PPPs. Thus, the WCO created a PPP network consisting of one advisory PPP and several collaborative PPPs. However, the continuous drafting of legislative proposals in the advisory PPP led to controversy. This controversy in combination with discussions about the appropriate representation of stakeholders in the PPP resulted in a major conflict and, finally, to the termination of this PPP within the PPP network only two years later. The secretariat continued the collaborative sub-PPPs and has set up a new advisory and a new collaborative PPP within the PPP network since then. However, while there were several changes to the PPP at the WCO after 2007, the overall PPP type was not changed. It remained a PPP network since 2007.

The World Health Organization was also troubled with conflicts about its PPP concerning its policy and the representation of stakeholders. The WHO International Medical Products Anti-Counterfeiting Taskforce (IMPACT) was set up as a PPP network with several collaborative sub-PPPs from the beginning. These sub-PPPs

were not only focused on enforcement, but they were also concerned with legislative guidelines. However, as a result of the conflicts about this PPP network, many parts of it have been halted since 2010. Only the enforcement sub-PPP continues to be very active, which is mostly managed by Interpol. In 2008, an Interpol officer was transferred to the WHO headquarters to support the IMPACT secretariat. However, while the IMPACT secretariat was initially hosted by the WHO, it was transferred to the Italian drug regulatory agency AIFA in 2010 as a temporary measure until the conflict is resolved. Interpol has become an increasingly strong player within this PPP since the beginning of the conflict in 2008, and it has invested more resources in the IMPACT than the WHO since the transfer of the IMPACT secretariat to AIFA. These changes are a challenge for the leadership role of the WHO in the very PPP it founded. However, in spite of these changes, the PPP type remained that of a PPP network.

As seen in the examples of the WCO, Interpol, and the WHO, the PPP network type is very flexible and can accommodate many changes. It is more flexible than a unitary PPP of an advisory or collaborative type. This can be seen by the earlier experiences of Interpol and the WCO. Interpol had to develop its advisory PPP into a PPP network in order to be more flexible and accommodate the different ways individual partners want to work with Interpol. The WCO did not even try to reform its collaborative PPP as they considered it inappropriate for future challenges. They terminated it and replaced it with a more flexible PPP network.

However, this study also contains cases of PPPs that were neither founded as a PPP network nor developed into one. The World Intellectual Property Organization had the first meeting of its Advisory Committee on Enforcement in 2003. It was founded as an advisory PPP and remained this type. There were some changes in

terms of the membership of the ACE but this could be accommodated without changing the type of the PPP.

The Global Congress on Combatting Counterfeiting and Piracy was founded as a collaborative PPP in 2004 and it also remained this type of PPP. The activities of this PPP were limited to the organization of congresses. While the venues of the congresses and the participants changed, there was no change to the type of the PPP that organized them.

This study also includes a case where no PPP has been founded at all: the World Trade Organization. Although the WTO is concerned with Intellectual Property crime, it never had a mandate nor sufficient discretion to found a PPP against IP crime.

Relevant Factors for PPP Formation, Type, and Development

When analyzing the development of each case in this study over time and comparing them with each other, five major factors can be identified that influence the formation of PPPs and their development. (1) cooperation in the pursuit of resource gains, (2) common ground, (3) the PPP management, (4) the representation of stakeholders, and (5) the PPP policy.

1) Cooperation in the pursuit of resource gains

In all cases of this study where a PPP was founded (all cases but the WTO), cooperation in the pursuit of resource gains was an important factor. Different kinds of resources have been pursued, such as human resources, financial resources, information, advice, credibility, reputation, legitimacy, and access to further actors. The funding of public sector partners by private sector partners is a frequently seen

reason for the creation of PPPs, as is explained in the following quote by a participant of several PPPs against IP crimes:

"The PPPs are great because in a way the public sector thinks that the private sector has got lots of money and therefore anything they want to do can be funded by the private sector. (...) But of course the private sector only funds them if they think it is worthwhile."

Richard Heath (2010), former Head of Corporate Trade Marks (1997-2006)
and former Vice President (2006-2010) at Unilever

While many members of PPPs pursued absolute resource gains, others also pursued relative resource gains, what could also be referred to as competitive advantage. The entire idea behind the protection of intellectual property, from an entrepreneurial perspective, is to gain and protect a competitive advantage. Hence many private sector members of a PPP participate because they pursue such relative resource gains. However, this is not only true for private sector participants. Public sector members also compete at times with other public sector actors and, therefore, seek resource gains relative to that competitor. Whether relative or absolute resource gains are pursued, and what kind of resources are pursued, does not only influence the creation of a PPP but also which kind of PPP is founded and how it develops. This can be seen in each case:

Interpol noticed that they had very little information about IP crime when the TRIPS agreement was signed in 1994. When they tried to get more information, they realized that private sector actors had significant information about the subject. Therefore, Interpol started cooperating with the private sector, but no PPP was established at first. When the cooperation intensified, Interpol sought a mandate from its member states, which it received at the General Assembly in 2000. Based on this mandate and the pursuit of information gains, Interpol created an advisory PPP in 2002. In addition to the information and advice, Interpol also wanted to receive material resources from the private sector for their activities against IP crime.

However, Interpol did not succeed in transforming the advisory PPP into a collaborative PPP where all those resources are pooled. Private sector members hesitated to invest financial resources into a PPP as they saw the risk that the funds could be used in a way that did not sufficiently benefit them and was possibly even more beneficial to their competitors. As a result of this competitive behavior – a concern with relative resource gains and losses – they chose to invest in specific Interpol projects. Each of these projects was set up as a collaborative PPP. What evolved thereby was a PPP network consisting of one advisory and several collaborative PPPs.

Competition between IOs also prevented a joint Interpol-WCO PPP. It was proposed more than once to merge the PPPs of Interpol and the WCO, but this was rejected by Interpol and the WCO, most likely because they did not want to lose control over the PPP as a tool to get private sector funding (Huther 2010, Int.14 2010). This preference for several overlapping PPPs instead of one joint PPP is also a reason for the development of the PPP network.

The WCO started organizing customs training seminars for TRIPS compliant IPR enforcement in the late 1990s. The demand for such training seminars increased when the transition period for TRIPS implementation expired in several countries. As the WCO did not have sufficient capacity to keep up with the demand, they decided to intensify the ongoing cooperation with a private sector association by creating a collaborative PPP. The private sector partners contributed information, financial resources, and human resources. As a result of this PPP, the collaboration in terms of human resources was so close that some parts of the WCO against IP crime was effectively outsourced to the private sector association.

After the necessary resources became available in-house at the WCO, the outsourcing was stopped by terminating the PPP and replacing it with a PPP network. This new PPP network was more closely controlled by the WCO than its partly outsourced predecessor. This remained true also after the architecture of this PPP network was changed by the termination of the SECURE Working Group and the creation of the CAP Group, the RHC Group and the IPM. The effect of these changes was that public sector members increased their control of the WCO activities at the expense of private sector influence.

Such concerns about relative gains influenced the WCO PPP development from the beginning. After the WTO was created, there were concerns at the WCO that the WCO might be subsumed within the WTO. As a means to improve its competitive position, the WCO emphasized activities that are less related to the WTO area of activities. This also meant increased activities in the area of border security, including border measures against IP crime. It was especially convenient for the WCO that it was possible to gain this competitive advantage at almost no cost, because the customs training seminars were organized by a PPP which was fully funded by the private sector. In 2006, the WCO decided that this low-cost strategy was no longer optimal in order to improve the competitive position of the WCO. It invested more resources into IPR enforcement activities, hired its first full time staff for this area, and terminated the outsourcing of activities one year later. It did so with the aim of improving the competitive position of the WCO by becoming a more active player in the development of the new Anti-Counterfeiting Trade Agreement (ACTA). This strategy eventually failed when the WCO member states did not approve it. Nevertheless, the re-organization of the PPPs against IP crime at the WCO in 2007

was driven by the pursuit of relative resource gains, even if this aim was not achieved.

The WIPO was also concerned with its competitive position. When the TRIPS Agreement was reached outside of the WIPO, it lost its position as the only global organization for intellectual property regulation. In reaction, WIPO negotiated an agreement with the WTO, which gave the WIPO a role in the implementation of the TRIPS Agreement. In addition, the WIPO started initiatives in areas that were not addressed by TRIPS, such as the enforcement of IPRs with regard to the internet and digital media. As part of this initiative, the WIPO intensified its contact with the private sector in matters of IPR enforcement. The WIPO sought information and advice from the private sector and thus founded an advisory PPP. As the WIPO has sufficient funding for its activities, it never sought private sector funding and hence never attempted to create a collaborative PPP.

The Global Congress on Combating Counterfeiting and Piracy was first held in 2004 and established as a permanent collaborative PPP to host further congresses. The costs of organizing the congresses were shared by pooling financial resources and by rotating the chair of this PPP. The collaborative PPP type is well suited for such an endeavor between public and private partners.

The World Trade Organization did not make any attempt to pursue resource gains by approaching intellectual property rights holders concerning IPR enforcement and there was no such public-private partnership at the WTO.

The World Health Organization wanted to bring together several stakeholders from the public and the private sector in order to explore how the issue of counterfeit medicines could be addressed in a variety of ways other than an intergovernmental convention. For that purpose, information and material resources have been pooled.

However, as not all stakeholders were able or ready to support every aspect of the fight against counterfeit medicines, a PPP network has been set up consisting of several smaller collaborative PPPs. This allowed the stakeholders to contribute to specific work areas they consider important and have a certain influence on the way their resources are used in such a smaller collaborative PPP, but still be part of a larger PPP network that brings together many more stakeholders.

As can be seen from the different cases, the pursuit of resource gains is very important to explain the founding of PPPs, the type of PPP chosen, and their development over time. Advisory PPPs are chosen if only information or advice is pursued. Collaborative PPPs are chosen if financial or other material resources are also pursued. PPP networks are useful if concerns with relative gains result in cooperation problems that make it difficult to collaborate in one large unitary PPP. However, cooperation in the pursuit of resource gains is necessary but not sufficient for PPP creation. Other factors also come into play.

2) Common ground

The PPPs analyzed in this study emerged over a relatively short period of time. The WCO started their PPP in 2000, Interpol in 2002, and the WIPO in 2003. These three organizations then started the Global Congress as a joint PPP in 2004. The TRIPS Agreement and its implementation was a relevant factor in the PPP development in these four cases. It was less relevant for the WHO, which founded their PPP only in 2006. In the case of the WHO, the definition of counterfeit medicines served as the basis for activities against them. This definition was agreed upon at a WHO conference in 1992. What the WHO and all the other cases have in common is that there was a common ground the different partners could refer to. The TRIPS

Agreement served as the written manifestation of this common ground in all cases but the WHO. The World Health Organization, together with private sector representatives, developed its own definition of counterfeit medicine, which serves as the basis for further activities.

Interpol began activities against IP crime when the TRIPS Agreement was signed in 1994. It then increased those activities in 2000 when the TRIPS Agreement became increasingly relevant as the transition period for its implementation ended in many countries. The continuing increase in Interpol's activity against IP crime then led to the founding of an advisory PPP, which subsequently evolved into a growing PPP network. The TRIPS Agreement provided two reference points that were relevant for the development of PPPs against IP crime at Interpol: First, it was the first agreement to regulate an international minimum standard for IP rights, which served as the basis for their transnational enforcement. And second, the TRIPS Agreement requires member states to criminalize trademark counterfeiting and copyright piracy on a commercial scale, which served as the basis for public law enforcement agencies to get involved in transnational IPR enforcement.

The WCO also started its IPR enforcement activities when the TRIPS Agreement was signed in 1994. It also significantly increased those activities when the TRIPS Agreement became increasingly relevant in 2000. The same year, it created its first collaborative PPP for IPR enforcement with the primary purpose to assist member states with TRIPS implementation. The fact that the TRIPS Agreement was the first agreement to regulate an international minimum standard for IP rights was an important aspect in explaining these developments at the WCO. In addition, the TRIPS Agreement explicitly requires customs agencies to enforce IPRs

at the border and to do so in cooperation with IP rights holders. This also was an important basis for the PPP development at the WCO.

The WIPO was also affected by the signing of the TRIPS Agreement in 1994, as this landmark intellectual property agreement was reached outside the WIPO, which previously was the primary global organization for IP matters. In reaction, the WIPO reached an agreement with the WTO in 1995, which gave the WIPO a mandate to assist developing countries with TRIPS implementation. The minimum IPR standard of the TRIPS Agreement and its new enforcement provisions concerning criminalization and border measures then served as the basis for new IPR enforcement activities by the WIPO after 1995. When the TRIPS agreement became increasingly important as a result of the expiring transition periods in several countries, the WIPO activities concerning IPR enforcement also increased. A new enforcement division within WIPO was created in 2002 and an advisory PPP for this division had its first meeting in 2003.

After Interpol, the WCO, and the WIPO created their PPPs, they jointly launched the Global Congress on Combating Counterfeiting and Piracy as a collaborative PPP. The TRIPS Agreement served as a basis also for this PPP by defining trademark counterfeiting and copyright piracy and by listing some agreed elements of combating counterfeiting and piracy, such as criminalization and border measures.

Interestingly, the WTO itself did not found a PPP against IP crime. Although it directly administers the TRIPS Agreement, which served as a basis for several PPPs and could also do so for a WTO PPP, it did not lead to the same result in this case. This shows that common ground is necessary but not sufficient for PPP creation. Other factors are also relevant.

The WHO started their activities against counterfeit medicines in 1988 and increased these activities in 1994, when the TRIPS Agreement was signed. However, the basis for these activities was not the TRIPS Agreement but a definition of counterfeit medicines reached at a WHO conference in 1992. A permanent PPP network against counterfeit medicines at the WHO was set up only in 2006. Although this is 14 years later, the 1992 definition served as the basis for the PPP in 2006.

Transnational PPPs in this study involve diverse participating organizations from diverse countries. In order to work together as partners, their views on a given issue do not necessarily need to be identical, but they need to share some basic understanding about a problem to serve as a common ground for the partnership.

3) PPP management

Based on the PPP definition in chapter 2, one of the defining characteristics of PPPs is that they are set up in order to continuously exist over a long period of time. This makes it necessary that at least one partner in a PPP provides the day-to-day management in the form of a secretariat for the PPP, so it can operate between meetings. The regular providers of such management and secretariat services for global PPPs, at least in this study, are public international organizations. Exceptions were the WCO IPR Strategic Group, where the secretariat was jointly managed by the World Customs Organization and the private association SNB-REACT, and the WHO IMPACT, where the secretariat was transferred from the World Health Organization to the Italian drug regulatory agency as an interim measure during an ongoing conflict about the future of this PPP.

In any case, there needs to be at least one provider of such management services. On the one hand, the members of the PPP need to agree that one

organization is the legitimate manager. They can either make this decision explicitly in a meeting of the PPP or they can approve the self-proclaimed management of an inviting organization by accepting the invitation and join the PPP. On the other hand, the PPP managing organization also needs the explicit or implicit approval from its regular constituents to perform the management for the PPP. For public international organizations, these regular constituents are the member states represented in the general assembly of that organization. Their approval is even more crucial than the approval of other stakeholders. If only a few stakeholders do not approve the PPP management, the PPP can still exist with fewer members. But even a few member countries in a general assembly with consensus decision making can end a PPP if they do not approve its management by the public international organization. This has been shown in the case of the WCO and the WHO. Therefore, the approval of the member states – expressed by a mandate or by giving discretion – is crucial for the availability of PPP management, which is a necessary factor for the existence of the PPP.

Interpol is the most successful organization in terms of PPP management in this study. Its member states continuously granted Interpol a high degree of discretion, which never changed after PPPs were founded or reformed. Interpol also received explicit mandates for its activities. The general assembly mandate in 2000 approved previous discretionary cooperation with the private sector against IP crime and it was the basis for the founding of a PPP. Subsequent changes to the PPP were made without explicit mandates due to the high degree of discretion. An exception is the Interpol participation in WHO IMPACT, which involved sending an Interpol officer to the World Health Organization headquarters. This measure was approved by the Interpol General Assembly in 2008 with an explicit mandate.

The PPP management of the World Customs Organization was very successful at the beginning, but then it came into serious difficulties later. The first PPP against IP crime was founded in 2000. It was based on a high degree of discretion and a general mandate from 1994, which demands activities for IPR enforcement. Even several years after the PPP was founded, the WCO did not seek ex-post approval with an explicit mandate from its member states. The member states granted the WCO such a high degree of discretion that it was able to manage the PPP without an explicit mandate. Only when the WCO wanted to become an important player in the development of the Anti-Counterfeiting Trade Agreement, did they seek the approval of their member states for their SECURE plans, which also involved a change to their relationship with the private sector. When this plan was approved in 2007, the WCO terminated the existing PPP and replaced it with a new PPP network. However, this mandate for SECURE was later challenged by diplomatic delegates of the member states, which resulted in a reduction of the discretion granted to the WCO. With this reduced discretion, the WCO was no longer able to proceed as planned. In 2009, the WCO member states agreed on another explicit mandate, which terminated the SECURE Group, replaced it with the new CAP Group, and granted the WCO secretariat only a low amount of discretion.

The World Intellectual Property Organization continuously had a very low degree of discretion for its PPP management. In 2002, its member states approved an explicit mandate establishing an advisory PPP, which first came together in 2003. The WIPO did not have enough discretion to create a PPP earlier or to change the existing PPP after it was founded.

The Global Congress on Combating Counterfeiting and Piracy was first hosted by the WCO in 2004, which had a very high degree of discretion at the time. The

same year, the decision was made to host several such conferences organized by a collaborative PPP whose management rotates among the WCO, Interpol, and the WIPO. Every time the management was transferred to a new partner, the parameters of the PPP management changed. However, the simple organization of a congress was so uncontroversial that every managing organization received the approval of its member states. The WCO and Interpol had a high degree of discretion for their activities. The WIPO reported their activities to the Advisory Committee on Enforcement in 2004 and received approval there.

The World Trade Organization has no mandate to manage a PPP against IP crime. It also has a very low degree of discretion to re-interpret existing mandates and initiate new activities. As a result, the WTO did not manage any PPP for IPR enforcement.

The World Health Organization ran into troubles with their PPP management only two years after they founded their first PPP against counterfeit medicines. The WHO did not have an explicit mandate to found this PPP network, but they based it on a general mandate demanding activities against counterfeit medicines and the common practice at the WHO to engage with the private sector and form PPPs. The PPP was endorsed by the International Conference of Drug Regulatory Authorities (ICDRA), which, however, has no authority to mandate the WHO. The WHO generally has a medium degree of discretion from its member states. However, the issue of intellectual property rights enforcement was controversial at the WHO because it also involves pharmaceutical patent policy. Due to this controversy, resolutions with explicit mandates for the WHO PPP were neither passed by the general assembly in 2008 nor in 2010. The controversy also significantly reduced the discretion of the WHO secretariat for everything related to this PPP. Based on the

ongoing conflict, the lacking explicit mandate, and the reduced discretion, the WHO transferred the management of this PPP to the Italian drug regulatory agency in 2010.

It has been shown that the availability of management for a transnational PPP is a necessary factor. The managing organization either needs an explicit mandate or sufficient discretion to interpret a general mandate as the basis for the PPP management. If neither exists, no PPP is founded. If the existing mandate and the discretion for the PPP management are challenged, this also jeopardizes the PPP.

4) Representation of stakeholders

As has been shown in this study, a variety of stakeholders have an interest in IP policy. If they are not adequately represented, they may choose to oppose the PPP from the outside. However, not every opposition to a PPP is equally important for its existence. Opposition is especially effective if it results in a lack of approval for a PPP by the member states of an international organization that manages that PPP. This has already been mentioned in the previous considerations concerning PPP management. Things are further complicated by the fact that states are not always uniform actors, but that different agencies of a state can pursue different policies. Therefore, it does not only matter if a state is represented, but also which state agencies are represented. This is true for the PPP itself, but also for the decision making bodies in the public international organizations that manage those PPPs. This is explained by the following quote by the Interpol IP Crime Program Manager:

"In Brazil, for example, the diplomatic level is very anti-patents and that sort of thing. But Brazil has always been the strongest country in Operation Jupiter with fantastic support from the police and customs there. And I think it's because we are not operating at the political level. We are operating at the tactical level. And I think that's why we are able to deliver success. Whereas, I think, the constraints for WHO, WIPO, and WCO is that they are very much constrained by the political dimensions of their organizations."

John Newton (2009a), Interpol Intellectual Property Crime Program Manager

Brazil is not the only example of a country with an inconsistent policy towards transnational PPPs against IP crimes, but this example is especially striking as different representatives of Brazil have pursued very contradictory policies in different cases of this study. Interpol received very good support from the Brazilian police and the Brazilian customs. Brazil, together with Argentina and Paraguay, was a founding member of Operation Jupiter, which started the operational work of Interpol against IP crime. The Brazilian customs also participated in training seminars of the WCO IPR Strategic Group in 2003 and 2006. And the Brazilian customs delegation supported the mandate for the SECURE PPP in the Customs Cooperation Council in 2007. However, the Brazilian policy at the World Customs Organization changed when diplomatic representatives joined the ranks of the delegation. They criticized the SECURE group and formed a coalition to oppose it. Under their influence, the work of the SECURE group was halted and the group was eventually terminated.

At the World Intellectual Property Organization, the Brazilian delegation was a leader of the Friends of Development Group and the Development Agenda Group, which both have a very critical position concerning IPR enforcement. However, as this critical approach towards IP was not new for the WIPO, there was also no new influence on its PPP. The Advisory Committee on Enforcement was already rather constrained from the beginning.

The World Health Organization also experienced the contradictory Brazilian policy. The Brazilian drug regulatory agency ANVISA supported the WHO IMPACT PPP by participating in different working groups of that PPP network. ANVISA also supported the decision to endorse IMPACT at the International Conference of Drug Regulatory Authorities. However, the diplomatic representatives at the Brazilian mission in Geneva pursued a different policy. They heavily criticized the IMPACT

PPP at the WHO and they are a key player in blocking IMPACT endorsing resolutions at the World Health Assembly. The opposition resulted in a partial halt of the IMPACT activities, the transfer of the PPP management to the Italian drug regulatory agency, and it may result in a major change of this PPP.

All these examples show that the representation of stakeholders is an important factor that influences the development of a PPP once it exists. It matters not only if a stakeholder is represented but also how. For example, it matters by which agency a state is represented. If certain stakeholders are not adequately represented on certain decisions, they may choose to oppose the decision afterwards. Such opposition is especially relevant if those opposing stakeholders have access to official decision making bodies of the public international organization that manages the respective PPP. The degree to which the representation of stakeholders is accepted can be considered as the input legitimacy of the PPP.

5) PPP policy

Another factor that can influence the development of PPPs is the policy of that PPP. The degree to which the PPP policy is accepted can be considered as the output legitimacy of the PPP. Different policies can lead to more or less political conflict, which then can constrain or terminate a PPP. While all PPPs examined in this study want to do something against IP crime, they have chosen different policies in pursuit of this aim.

Interpol has presented itself as an expert in avoiding political conflict. It focused on activities that support the enforcement of existing rights and stayed away from drafting any new legislative proposals or setting new standards. Interpol claims to be purely technical and non-political, but its activities have an effect on IP

protection through the allocation of resources to IP crime fighting. Conflicts about the allocation of resources are avoided as those resources are contributed on a voluntary basis from public and private actors. Thus, the PPP makes policies feasible that would otherwise be too costly.

The WCO also began with a focus on the enforcement of existing rights. It organized customs training seminars with support by the private sector. The purpose of these seminars was to assist with TRIPS implementation. However, the WCO later began drafting legislative proposals that went beyond TRIPS and it sought to introduce these proposals into the discussion about the new Anti-Counterfeiting Trade Agreement. This has brought the political conflict about IP policy to the WCO. As a result of this conflict, the PPP network at the WCO was constrained and the discretion of the WCO Secretariat was reduced.

The WIPO Advisory Committee on Enforcement was very constrained from the beginning. The policy of this PPP has just been to exchange information about IPR enforcement. This did not result in further conflicts. The Global Congress on Combatting Counterfeiting and Piracy is also rather constrained. Its policy is limited to organizing the conference itself with the aim of getting the attention of high level policy makers on the issue of counterfeiting and piracy. This has not resulted in any major conflict.

The World Health Organization's IMPACT PPP pursued a variety of means to address the issue of counterfeit medicines. Those means included legislative proposals, which led to controversy. The only working group within the IMPACT PPP network that continues to be active in spite of the political conflict around IMPACT is the enforcement working group. This group, managed by Interpol, focuses on the

enforcement of existing rights and stays away from the drafting of new legislative proposals or the setting of new standards.

It can be seen from these developments that the policy of a PPP matters for the development of that PPP. Legislative proposals and standard setting have led to conflict at the WCO and the WHO. The results of these conflicts were changes to these PPPs to stop them from pursuing those policies. Less controversial policies are the enforcement of existing laws, the exchange of information, and the organization of conferences with the purpose of getting attention for an issue. PPPs that pursued such policies avoided political conflicts strong enough to severely harm the PPP.

Hypotheses about PPP Formation, Type, and Development

The studies of the six cases in chapters 4 through 9 and the comparison of those cases in this chapter has led to the identification of five factors that have been relevant for the development of transnational PPPs against IP crime: (1) cooperation in the pursuit of resource gains, (2) common ground, (3) the PPP management, (4) the representation of stakeholders, and (5) the PPP policy. The final step of this study is to identify which combination of these factors leads to which results and the formulation of hypotheses that can be generalized and applied to cases that are not included in this study.

Table 15 shows the combination of these factors and the result in terms of PPP formation in all six cases. Common ground was present in all cases. In the cases 1 through 5, this common ground was expressed with the TRIPS Agreement. In the case of the WHO, it was expressed with the definition of counterfeit medicines. As this factor was present in all cases, the comparison alone does not allow conclusions.

Table 15: Factors Influencing PPP Formation and Type

Factors	Cases	Interpol	WCO	WIPO	Global Congress	WTO	WHO
Cooperation in pursuit of resource gains		Yes, limited to advice	Yes, including funding	Yes, limited to advice	Yes, including funding	No	Yes, including funding and cooperation problems
Common ground		Yes	Yes	Yes	Yes	Yes	Yes
PPP management		Yes, explicit mandate with high discretion	Yes, general mandate with high discretion	Yes, explicit mandate with low discretion	Yes, rotating among Interpol, WCO and WIPO	No, no mandate, very low discretion	Yes, general mandate with medium discretion
Result		Advisory PPP formed	Collaborative PPP formed	Advisory PPP formed	Collaborative PPP formed	No PPP formed	PPP network formed

Source: Own account based on chapters 4-9

Table 16: Factors Influencing PPP Continuation or Change

Factors	Cases	Interpol	WCO	WIPO	Global Congress	WTO	WHO
Cooperation in pursuit of resource gains	Cooperation in pursuit of resource gains	Yes, changed to include funding and cooperation problems	Yes, changed to include cooperation problems	Yes, stable, limited to advice	Yes, stable, including funding	-	Yes, stable including funding and cooperation problems
Common ground	Common ground	Yes	Yes	Yes	Yes	-	Yes
PPP management	PPP management	Yes, explicit mandate with high discretion	Yes, varying mandates with varying discretion	Yes, explicit mandate with low discretion	Yes, rotating among Interpol, WCO and WIPO	-	Suspended, general mandate with discretion reduced to low
Representation of stakeholders	Representation of stakeholders	Unchallenged	Challenged	Unchallenged	Unchallenged	-	Challenged
PPP policy (main aspect)	PPP policy (main aspect)	Law enforcement	Law enforcement and legislative proposals	Exchange of information	Getting attention for the issue	-	Law enforcement and legislative proposals
Result	Result	Advisory PPP reformed to become a PPP network	Collaborative PPP terminated and replaced with a PPP network	Advisory PPP continued	Collaborative PPP continued	-	PPP network partly halted and reform discussed

Source: Own account based on chapters 4-9

However, the study of each individual case has shown that such a common ground was needed as a basis for the PPP formation. The fact that a common ground did not lead to a PPP formation in the case of the WTO shows that it is a necessary but not a sufficient condition.

Cooperation in the pursuit of resource gains and the availability of a PPP management, based on either an explicit mandate or sufficient discretion to interpret a general mandate, was given in all cases but the WTO. The study of each case has shown how both factors are necessary for the PPP formation. These case studies and their comparison allow the generation of the following hypothesis:

The factors (1) cooperation in the pursuit of resource gains, (2) common ground, and (3) PPP management are each necessary for the formation of a PPP. Together, they are sufficient for the formation of a PPP, if their continuous existence is anticipated.

If a PPP is founded, the type of the PPP is influenced by the pursuit of resource gains. Interpol and the WIPO pursued information and advice and founded advisory PPPs. The WCO and the Global Congress pursued financial resources and human resources and they founded collaborative PPPs. The WHO also pursued material resources, but they founded a PPP network as there were cooperation problems among the diverse members. Cooperation problems also led to the transformation of the advisory PPP at Interpol into a PPP network. Its members were not willing to share resources (information and funding) with all other PPP members. Cooperation problems also led to the termination of the collaborative PPP at the WCO and its replacement with a PPP network (table 16). These case studies and their comparison allow the generation of the following hypothesis:

An advisory PPP is chosen if the public sector partners seek only information or advice and a collaborative PPP is chosen if they also seek financial or other material resources. A unitary (advisory or collaborative) PPP is chosen if the planned PPP activities do not involve cooperation problems. If, however, the planned activities involve cooperation problems, then the more flexible and conflict-resistant PPP network is the PPP type of choice.

Once a PPP is founded, changes to the first three factors as well as to additional factors determine how the PPP develops over time. Table 16 shows the combination of these factors and the result in terms of PPP continuation or change (whereas change means either termination or reform) in five cases. The WTO is excluded here, as there was no PPP in this case that could have developed over time. In the cases of the WIPO and the Global Congress, the PPPs were continued without major changes. The WIPO Advisory Committee on Enforcement remained an advisory PPP and the Global Congress on Combating Counterfeiting and Piracy remained a collaborative PPP. In both cases, there were no major changes to the first three factors, the representation of stakeholders was unchallenged, and the PPP policy was limited to uncontroversial activities like information exchange and getting the attention of policy makers on the issue.

Interpol's PPP was reformed from an advisory PPP to a PPP network, as the resources pursued changed from mere advice to include also funding and as cooperation problems emerged. After this change, the PPP network at Interpol grew and remained stable. There were no more major changes to the first three factors, the representation of stakeholders was unchallenged, and the PPP policy was limited to law enforcement.

The WCO replaced its collaborative PPP with a PPP network in 2007 because cooperation problems emerged. An advisory PPP within this PPP network was again terminated in 2009 for several reasons: the representation of the stakeholders in the PPP was challenged; its policy of drafting legislative proposals led to conflict; and the discretion of the PPP management was reduced.

The PPP network at the WHO ran into similar problems when the representation of the stakeholders in the PPP was challenged, its policy of drafting legislative proposals led to conflict, and the discretion of the PPP management was reduced. Although the WHO did not make an official decision about reform or termination of this PPP, its activities are partly halted, the PPP management was transferred, and a change to this PPP appears to be very likely.

These case studies and their comparison allow the generation of the following hypotheses:

A PPP is continued if the factors that led to its formation remain stable, its representation of stakeholders is unchallenged, and its policy does not include controversial activities such as the drafting of legislative proposals. A PPP is changed (reformed or terminated) if there are relevant changes to the factors that led to its formation, its representation of stakeholders is challenged, or its policy includes controversial activities such as the drafting of legislative proposals.

11. Conclusion and Outlook

This study provides an analysis and a comparison of the public-private partnership activities against intellectual property crimes of Interpol, the World Customs Organization, the World Intellectual Property Organization, the Global Congress on Combating Counterfeiting and Piracy, the World Trade Organization, and the World Health Organization. The study delivers several contributions to the state of research, which are summarized in the subsequent section of this concluding chapter. The final section is dedicated to the weaknesses of this study and some open questions that could be the basis for further research.

Contribution to the State of Research

The public-private partnerships against intellectual property crimes covered by this study were directly involved in the arrests of more than 1800 suspects and the seizure of several tons of counterfeit goods. Beyond those PPP-coordinated operations, they facilitated transnational public-private law enforcement cooperation in many more cases. Although these PPPs have a considerable effect on people's liberty, on their property, and on the nature of international law enforcement cooperation, there was no study about them available. This study not only fills this research gap, but it provides a comprehensive and systematic survey of all PPPs against IP crime that involve global public international organizations.

Much of the information presented in this study was either not publicly available or the information was only available in an unsystematic way scattered across several primary documents. Therefore, the empirical description and analysis of these PPPs in six case studies is itself a contribution to the state of research on this issue.

In the course of systematizing the information about the PPPs, a working definition of the term PPP was needed. Unfortunately, research about PPPs in general has failed to come up with a commonly agreed definition or typology of PPPs. Therefore, the PPP definition and typology provided by this study are also a contribution to the state of research.

Based on the process tracing in each individual case study and on the comparison of these cases, this study developed theory explaining the formation, type, and development of transnational PPPs against IP crimes. Five relevant influencing factors have been identified:

1) Cooperation in the pursuit of resource gains.

PPPs are used to pursue different kinds of resources, such as human resources, financial resources, information, advice, credibility, reputation, legitimacy, and access to further actors. Besides the pursuit of absolute resource gains, the pursuit of relative resource gains (relative to competitors) is also often important. Such competitive behavior can create cooperation problems, which are also relevant for PPPs.

2) Common ground.

In order to come from cooperation to a partnership, the partners need to reach an agreement, which requires at least some common ground. This common ground may involve but does not require common interest. The partners' views on a given issue do not necessarily need to be identical, but they need to share some basic understanding about the issue to be addressed by the PPP.

3) The PPP management.

A defining characteristic of a PPP is that it is set up in order to continuously exist over a longer period of time. This makes it necessary that at least one partner in a PPP provides the day-to-day management so that the PPP can continuously exist between meetings.

4) The representation of stakeholders

If some stakeholders are not adequately represented in the PPP, they may choose to oppose it from the outside. Such opposition is especially relevant if the opposing stakeholder has access to decision making bodies of the organization that manages the respective PPP. The degree to which the representation of stakeholders is accepted can be considered as the input legitimacy of the PPP.

5) The PPP policy

The development of a PPP can be influenced by its policy. The degree to which the PPP policy is accepted can be considered as the output legitimacy of the PPP. Controversial PPP policies are, especially, the drafting of legislative proposals and the setting of standards. Less controversial policies are improvements to the enforcement of existing laws, the exchange of information, and the organization of conferences and seminars.

Based on these five factors, three hypotheses have been developed from this study, which explain the formation, type, and development of transnational PPPs against IP crimes:

A) Formation

The factors (1) cooperation in the pursuit of resource gains, (2) common ground, and (3) PPP management are each necessary for the formation of a PPP. Together they are sufficient for the formation of a PPP, if their continuous existence is anticipated.

B) Type

An advisory PPP is chosen if the public sector partners seek only information or advice and a collaborative PPP is chosen if they also seek financial or other material resources. A unitary PPP is chosen if the planned PPP activities do not involve cooperation problems. If, however, the planned activities involve cooperation problems, then the more flexible and conflict-resistant PPP network is the PPP type of choice.

C) Development

A PPP is continued if the factors that led to its formation remain stable, its representation of stakeholders is unchallenged, and its policy does not include controversial activities such as the drafting of legislative proposals. A PPP is changed (reformed or terminated) if there are relevant changes to the factors that led to its formation, its representation of stakeholders is challenged, or its policy includes controversial activities such as the drafting of legislative proposals.

Weaknesses, Open Questions, and Outlook to Further Research

While this study makes several contributions to the state of research, it also has some weaknesses and leaves some open questions that could direct further research.

The most important weakness of this study is the problem of indeterminacy associated with the relatively large number of influencing factors and a small number of cases (King et al. 1994: 118). Although this study is a comprehensive survey in its field, it was not possible to study all possible configurations of the influencing factors, as certain configurations do not exist in reality. This weakness was addressed as much as possible with process tracing and contrafactual reasoning, but some uncertainties remain. For example, in both cases where the representation of stakeholders of a PPP was challenged, the policy of this PPP included legislative proposals. Therefore, it is not possible to say with absolute certainty if a combination of both factors is necessary to trigger a change of the PPP or if one factor is sufficient.

Another important question is of course whether the theoretical findings of this study can be generalized and applied to a wider context: to other transnational law enforcement PPPs, to other transnational PPPs, and possibly even to PPPs in general. The research for this study has also revealed information about several cases that were not the focus of this study. Some of those cases show striking similarities to those that are included in this study. The most similar cases are probably those where transnational PPPs against IP crimes do not involve a global IO. For example, the United Nations Economic Commission for Europe (UNECE) founded the Intellectual Property Rights Advisory Group (IPR AG) in 1999. This collaborative PPP organized trainings mostly in Eastern Europe. The management of

this PPP was outsourced by UNECE to a private sector consultancy, which collected funding from IPR holders. This outsourcing was stopped in 2006, when UNECE decided to terminate the IPR AG and manage its successor, the Team of Specialists on Intellectual Property (TOS-IP), in-house (UNECE 2003, UNECE 2006, Baker 2012, Int.03 2010). These developments appear to be very similar to those at the WCO, where the management of the WCO IPR Strategic Group was outsourced to SNB-REACT and then brought back in-house.

Other examples of transnational, though non-global PPPs against IP crimes are the project on counterfeiting and piracy of the Organisation for Economic Co-operation and Development (OECD), which was started in 2005, and the European Observatory on Counterfeiting and Piracy of the European Union (EU), which was started in 2009. Both these PPPs' purpose is getting more accurate information about counterfeiting and piracy. At least in the case of the OECD, the pursued resources were not limited to information but also included funding. There was a debate about this topic at the OECD, where public sector representatives hesitated to accept financial support offered by the OECD Business and Industry Advisory Committee (BIAC), because they were afraid of undue influence from the private sector (Dobson 2010).

It would also be worth examining whether the findings of this study hold for transnational law enforcement PPPs in other crime areas. Some cases have already shown this. For example, Interpol and credit card companies started a collaborative PPP against payment card fraud in 1999. Interpol received funding from the credit card companies based on a five year PPP agreement. However, this agreement was not extended due to cooperation problems (Madsen 2002, Int.06 2010). Nevertheless, this PPP also served as an example for Interpol to seek a

transformation of the Interpol IP Crime Action Group from an advisory PPP to a collaborative PPP.

Another example of a transnational law enforcement PPP is the partnership between Interpol and the international football federation FIFA (Fédération Internationale de Football Association). The purpose of this collaborative PPP is the fight against corruption in football, match-fixing, and illegal football gambling. Based on the partnership agreement signed in 2010, FIFA is supporting Interpol with 20 million Euro over the period of 10 years. This is the largest grant that Interpol has ever received from a private sector organization (Interpol 2011b). This is another example of how relevant the pursuit of resource gains is for the formation of PPPs. However, it also shows how concerns about undue influence from a private sector organization can harm the reputation of a public sector organization, especially as the FIFA was involved in several corruption scandals before it decided to influence Interpol's activities against corruption.

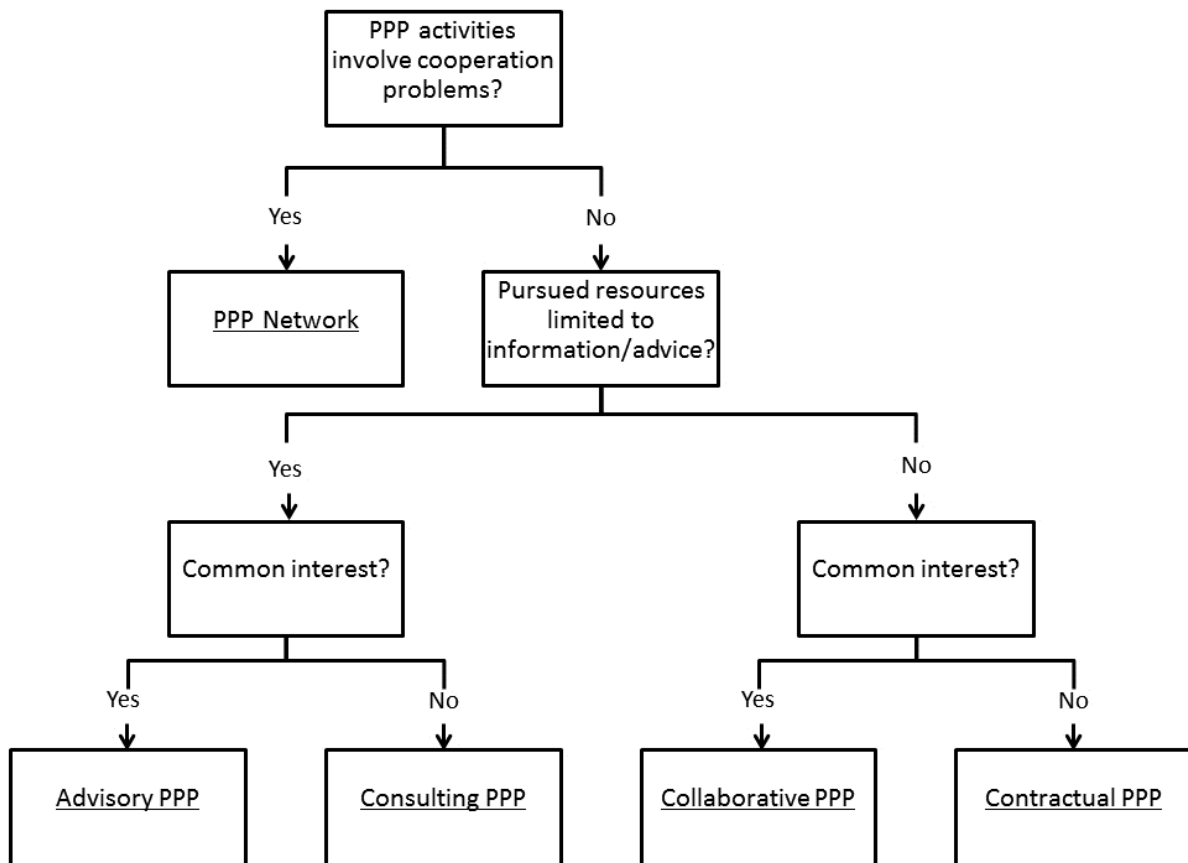
There are many more transnational law enforcement PPPs worth studying, such as PPPs with insurance companies against the theft of insured objects, partnerships with shipping companies against smuggling, or PPPs with internet service providers against cyber-crime. It would be useful to see if the findings of this study are also applicable to those PPPs. The hypotheses about PPP formation and PPP development could be tested in other cases of PPPs. However, as none of the partnerships analysed for this study fall into the categories of contractual or consulting PPPs, the hypothesis about the choice of the PPP type does not include these two types. Therefore, it would need adjustments in the light of findings of further research. One idea concerning the direction of these adjustments can be suggested here: This study identified common ground, understood as a shared

understanding about an issue, as a requirement for all PPPs, but advisory or collaborative PPPs also require at least some common interest as an incentive to invest resources into the PPP without a guaranteed return on investment. In order to include contractual and consulting PPPs, the hypothesis about the PPP type may have to be adjusted in the following way:

An advisory PPP is chosen if there is common interest and if only information or advice is pursued by the public sector partners. A consulting PPP is chosen if there is no common interest and if only information or advice is pursued. A collaborative PPP is chosen if there is common interest and financial or other material resources are also pursued by the public actors. A contractual PPP is chosen if there is no common interest and if financial or other material resources are pursued. A unitary (advisory, consulting, collaborative, or contractual) PPP is chosen if the planned PPP activities do not involve cooperation problems. If, however, the planned activities involve cooperation problems, then the more flexible and conflict-resistant PPP network is the PPP type of choice (figure 4).

The original hypothesis about the choice of the PPP type is based on the empirical findings of this study, while the adjusted hypothesis above goes beyond these empirical findings. However, this adjusted hypothesis is not purely speculative. It is informed by the theoretical considerations presented in chapter 2 and by the empirical findings of this study. Therefore, it may be a useful hypothesis for future research on PPPs.

Figure 4: Choice of PPP Type



Source: own illustration

The focus of this study was explaining the creation of transnational PPPs against IP crimes, which came at the expense of explaining their effects. However, this study did shed some light on several questions related to their effects, but without fully answering them. For example, this study has shown the effects of many PPPs in terms of trained law enforcement officers, arrested suspects, seized goods, and in terms of shops and websites that have been shut down. However, it is very difficult to assess the effect of all these activities on the level of IP crime. The level of IP crime itself is unknown. Estimates are based on statistics of seizures and assumptions about how much of this clandestine activity remains unknown (Bergevin 2011, GAO 2010, OECD 2008). Assessing the effects of PPPs on an unknown figure, which is

influenced by many other factors, is a task that seems impossible. However, it can be said that many PPPs against IP crimes address an aspect of IP protection that promises to be more effective than others. The largest obstacle to effective IP protection is not the law but a lack of law enforcement (OECD 2008: 187). Therefore, those PPPs that focus on the enforcement of existing laws rather than negotiating new ones are probably a lot more relevant than the much-debated initiative to establish an Anti-Counterfeiting Trade Agreement (ACTA). Thus far, the ACTA initiative has not led to increased IP protection but to increased opposition against IP protection. Meanwhile, the less well known PPPs against IP crimes have produced tangible results in terms of arrests and seizures. This study contributes to making those relevant activities more visible.

Another important question concerns the transnationalization of law enforcement through PPPs. The study provided several examples where the PPPs have facilitated transnational law enforcement cooperation, but it was not possible to provide a comprehensive assessment of the transnationalization of law enforcement before and after PPPs. This would have required a detailed analysis of law enforcement on the national level. However, the findings of this study suggest that PPPs are not a one-way street that leads only to the privatization of public services. The requirement of the TRIPS Agreement to criminalize IP infringements is an expression of statization of law enforcement in this issue area. The international criminalization, which was an important factor leading to the foundation of global PPPs against IP crimes, requires public prosecutors and public law enforcement agencies to enforce IP rights. Before the TRIPS Agreement, this was often a matter of private law only. Therefore, PPPs are not only an expression of public actors

moving towards private actors, but also of private actors moving towards public actors.

How the partners in a PPP influence each other is another important question that could be the subject of further research. The question of whether private actors have undue influence on public policy as a result of PPPs came up several times during this study, but there is probably no definite answer that applies to all PPPs. In many cases, a PPP may simply be a way of supporting an agreed public policy with resources from stakeholders that benefit most from the execution of that policy. It does not appear undue that the direct beneficiaries of intellectual property rights voluntarily support their enforcement disproportionately more than the average taxpayer. However, the availability of private sector resources may make certain public policies feasible that would have been unobtainable if the funding of the policy would have been an indispensable aspect of the public policy decision. Therefore, some PPPs may be a way of creative lobbying, where private money can be used in an official and legal way to support certain public policies.

Even if the money does not significantly influence the public policy decision, it can still harm the reputation of a public institution. For example, if Interpol should ever be involved in corruption investigations against FIFA officials, one might wonder if the actions taken by Interpol are influenced by the fact that FIFA is its largest private sector financier.

Last but not least, this study has shed some light on the important question: What are PPPs good for and what are they not good for? A comparison of the successful and failed PPPs in this study suggests that PPPs are especially good at mobilizing private sector resources for the support of existing public policies. This is especially useful if public actors made a decision for a policy without having allocated

adequate resources for its execution. Financial resources as well as information may support the execution of the public policies. Giving advice within a PPP that suggests a public policy change was also not a problem. However, it was problematic if such advice was not only given, but if the PPP acted as a decision making body and adopted this advice through legislative proposals. This has resulted in significant opposition against PPP activities at the World Customs Organization and at the World Health Organization. Apparently, PPPs are not good for making decisions about public policies before the appropriate public decision making bodies, even if those decisions are non-binding.

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Declaration by the Candidate

I hereby declare that this doctoral thesis is my own work without recourse to any unauthorized aids, that I used only such sources and aids as are included in the references, and that I made due reference to all the works either quoted or used as the basis for ideas.

Christopher Paun, 15 October 2012