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Coalitions, Power and Institutional Change in Global Patent Politics

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ABSTRACT

With the 1995 Agreement on Trade - related Aspects of Intellectual Property Rights (TRIPS), a centralised rule - system for the international governance of patents was put in place under the general framework of the World Trade Organisation (WTO). Since then, the number of patent - related institutions has increased monotonically on the multilateral, plurilateral and bilateral levels. I will explain this case of institutional change by focusing on the norm - setting activities of both industrialised and developing countries, arguing that both groups constitute internally highly cohesive coalitions in global patent politics, while institutional change occurs when both coalitions engage in those negotiating settings in which they enjoy a comparative advantage over the other coalition. Specifically, I make the point that industrialised countries' norm - setting activities take place on the plurilateral and bilateral level, where economic factors can be effectively translated into political outcomes while simultaneously avoiding unacceptably high legitimacy costs; whereas developing countries, on the other hand, use various multilateral United Nations (UN) forums where their claims possess a high degree of legitimacy, but cannot translate into effective political outcomes. The paper concludes with some remarks on how this case yields new insights into ongoing debates in institutionalist International Relations (IR), as pertaining to present discussions on "regime complexity".

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Table of Contents

1	Introduction	8
2	Interests and Identities in Global Patent Politics	10
2.1	The economic geography of patents	11
2.2	Normative conflicts in Global Patent Politics	14
3	Power, Legitimacy and Institutional Change.....	17
4	Institutional Change in Global Patent Politics	20
4.1	Compulsory power and patent clubs	21
4.2	Institutional power and UN multilateralism.....	25
5	Conclusions	28
6	References	30

1 Introduction

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) formed part of the 1994 Marrakech Agreement constituting the World Trade Organisation (WTO), obliging WTO members to provide for a broad range of legal minimum standards in their respective national patent laws. TRIPS, in the following years, turned out to be a highly controversial issue. While developing countries increasingly claimed a wide range of negative socio-economic impacts as a consequence of TRIPS, industrialised countries largely insisted on further scalling TRIPS' minimum standards upwards. The years since 1995 have seen a remarkable, monotonic increase in the number of multi-, pluri- and bilateral forums that are to different degrees relevant to global patent governance. This entailed the emergence of new forums characterised by varying degrees of legalisation (Abbott et al., 2000), shifts in existing forums' mandates, and finally (usually politically contested) re-definitions of issue areas. The pattern that has been emerging is that (largely) members of the Group of 77 (G77) have been shifting their political attention towards a broad number of multilateral institutions within the United Nations (UN) system, while (largely) Organisation of Economic Cooperation and Development (OECD) member states have begun engaging in norm-setting on the pluri- and bilateral levels. Institutional changes between 1995 and 2013 have taken place within already existing institutions (where, i.e., mandates have been broadened to include certain patent-related issues), but also a range of new and specialised institutions have emerged.

This increase of patent-relevant institutions on various levels relates to larger discussions on the "fragmentation of international law" (ILC, 2006; Koskenniemi and Leino, 2002), or what is sometimes referred to as increasing "institutional density", "institutional proliferation"

(Raustiala, 2012) or “treaty congestion” (Hicks, 1998). My aim in this paper will be to explain why institutional change in global patent politics took the specific shape sketched out above and substantiated below. I am largely drawing on a scientific realist framework (Patomaeki and Wight, 2000), using an approach based on abduction. This mode of inference revolves around back-tracing an empirical phenomenon to its most likely necessary causes, “whereby a hypothesis is reasonably accepted if it is the best explanation of some phenomena or evidence that needs to be explained” (Psillos, 2007: 257).

The explanation I propose for explaining institutional change in global patent politics (GPP¹) between 1995 and 2013 is that a combination of economic and normative factors has constituted two coalitions along the political North–South divide that are internally highly cohesive in terms of interests and identities, and which each have a context-specific comparative advantage in terms of norm-setting. I will draw on the conceptual approach to power proposed by Barnett and Duvall (2004), arguing that industrialised and developing countries in GPP differ in their respective capabilities to draw on certain types of power. While industrialised countries draw on their comparative economic advantage (in terms of Foreign Direct Investment (FDI) patterns, Intellectual Property (IP) trade flows, market size, etc.) to exercise “compulsory power” for inducing institutional change in GPP, developing countries are more adept at exercising “institutional power” within the UN system, where their claims enjoy high legitimacy and where the institutional framework gives them a structural advantage over industrialised countries. Based on this framework, I argue that the strategies the “North” and “South” coalitions have respectively adopted since 1995, in line with their different patent

¹ Under “global patent politics” I will understand those multi-, pluri - and bilateral norm - setting activities that directly influence or might influence various aspects of the national patent law of participating countries.

agendas, have induced institutional proliferation and change in those areas where they are holding a comparative advantage in the exertion of their respective compulsory and institutional power (Barnett and Duvall, 2004).

I identify factors that, in their particular interaction, result in the formation of stable and cohesive coalitions in GPP in terms of interests and identities. Section 3 links different types of power to institutional change in GPP. Section 4 empirically applies my framework to coalition-based norm-setting on different levels between 1995 and 2013. Section 5 will show what general insights might be drawn from this case in relation to the larger discussion on institutional proliferation and change.

2 Interests and Identities in Global Patent Politics

In this paper, I follow an abductive approach for explaining institutional change in GPP, thus back-tracing the empirical phenomenon to its deeper, underlying causes. This approach entails a “multifactorial and open-ended approach in which, while the causal status of multiple factors is accepted, the relative causal effects among the chosen factors are not predetermined” (Eun, 2012: 166). Accordingly, I adopt a pluralist methodology aimed at explaining the particular phenomenon at hand, while potential implications for theory-building will be addressed in the conclusion.

At the core of the phenomenon of institutional change in GPP is, I argue, the emergence of the two internally cohesive and stable, but towards each other often strongly politicised coalitions of (largely) developing and industrialised countries, both with a respective comparative advantage in terms of norm-setting capacities in GPP. This process of coalition formation was largely due to the interaction of particular patent-related issues with more general political,

normative and economic issues in North–South relations. In this text, I will use the term “coalition” in a broad sense to refer to structures of both informal coordination and formal organisation between state actors that share a particular political agenda and are, between themselves, coherent in regard to interests and identities. Nevertheless, the term coalition is not to imply any kind of bloc politics, and it does not necessarily exclude the possibility that individual states will, from time to time, pursue policies that might be vastly at odds with other members of their respective coalition. However, I will use the somewhat strong term “coalition” to refer to rather coherent norm–setting activities across forums and levels that is based on a set of goals and norms that are widely shared between members of the respective coalition.

This section will look into the factors driving interest and identity formation in GPP. The first part will deal with the economic geography of patents, that is, how economic patterns related to all kinds of patenting activity are, at a very elemental level, largely in line with the political dimension of the North–South split. The subsequent part will look into the normative debate on patenting as it has emerged during the 1990s. I argue that the combination of those (interlinked) economic and normative factors has significantly contributed to interest and identity formation along the North–South lines, a development obviously being re-enforced by much broader economic and normative aspects of North–South relations since the early 1990s. Nevertheless, I will primarily focus on the economic and normative dimensions specifically pertaining to patents, while making links to larger issues in North–South relations where necessary.

2.1 The economic geography of patents

The World Intellectual Property Organisation (WIPO) currently defines a patent as follows:

“A patent confers, by law, a set of exclusive rights to applicants for inventions that meet the standards of novelty, non-obviousness and industrial applicability. It is valid for a limited period of time (generally 20 years), during which patent holders can commercially exploit their inventions on an exclusive basis. In return, applicants are obliged to disclose their inventions to the public so that others, skilled in the art, may replicate them” (WIPO, 2012: 41).

The 1995 TRIPS agreement centrally prescribed a range of minimum standards in patents which are mandatory (and highly enforceable) towards WTO member states. That is, WTO members are obliged to harmonise their national patent systems in a number of ways. TRIPS does not constitute a global patent system, instead, patents are granted under national law, with some mechanisms (such as the European Patent Convention (EPC); or the WIPO’s Patent Cooperation Treaty (PCT)) providing for a bundle of national patents. Also, TRIPS does not harmonise national patent laws completely, though, rather leaving some safeguards and flexibilities to the discretion of national governments.

Total annual patent applications have grown from about 1.1 million in 1995 to about 2.1 million in 2011 (WIPO, 2012: 43). The so-called trilateral patent offices, that is, the EPO, the US Patent and Trademark Office (USPTO) and the Japanese Patent Office (JPO) have traditionally been both the biggest source and the biggest recipient of patent application, due to their dominance in terms of innovation, and market size. Until around 2000, patent applications in other countries and regions were negligible. Since then, however, patent applications in the Republic of Korea and particularly in China leveled-off (WIPO, 2012: 47). In recent years, patenting activities in JPO, USPTO and in the EPC have stagnated or declined, while the Chinese Intellectual Property Office (SIPO) has become, in terms of applications granted,

the biggest patent office in the world, growing at an average annual rate of 22% between 2008 and 2011; in comparison, the JPO, the USPTO and the EPO grew, on average, -4.3%, 3.3% and -0.8% respectively (WIPO, 2012: 5). Of the emerging economies, though, China is the exception rather than the rule, with India, Brazil and Mexico currently each attracting merely 1.9%, 1.1% and 0.7% of worldwide patent applications (WIPO, 2012: 5).

Patenting activity is obviously strongly correlated to general economic developments. However, differentiating by resident vs. non-resident patent applications, a strong correlation holds between income levels and patenting activity. For high-income and upper middle-income countries, a majority of patent applications came from residents (61.8% and 73.2% respectively, as of 2011); at the same time, patent applications in lower middle - income and low - income countries primarily emerged from non-residents (78.8% and 89.5%) (WIPO, 2012: 52). The exorbitant increase in Chinese patent activity since about 2000 is linked to larger shifts in the global economy, in particular related to (other) emerging economies such as Brazil and India, but also South Africa, Indonesia or Turkey. This development is, at present, significantly blurring the traditional economic North-South divide. Emerging economies have for some years now been substantially increasing their share of global economic activity, which is also impacting patenting activity. Patent offices in upper middle-income countries have been drawing an overproportional share of applications compared to other countries. Between 2008 and 2011, applications in those countries increased on average by 14.2% annually; for comparison, the same increases for high-income countries shrank by -0.3%, and by -38.5% for low- income countries (WIPO, 2012: 5).

Although the global patent geography is shifting currently, particularly towards China, the political North-South divide is far from being

replaced. It is unclear whether recent (and currently diminishing) growth in most emerging economies will even translate into substantive patenting activity. Also, many developing countries simply do not see stringent patent protection based on mandatory international minimum standards as in their economic interest. India as the world's largest exporter of generic medicines has a natural interest in not weakening its exports through agreeing to higher levels of patent protection (Thach and Marsnik, 2009). And for countries like Brazil and South Africa, high levels of patent protection have been linked to significant problems in public health and access to essential medicines in the past (see below). On the other hand, industrialised countries as the prime exporter of patent-protected products have a very strong interest in protecting their industries from competition by local imitators in developing countries, particularly in regard to electronic, pharmaceutical and agricultural products. Accordingly, industrialised countries have been repeatedly voicing concerns over patent infringements in (mainly) India and China, where products originating from industrialised countries are often reverse-engineered to be sold both domestically and internationally in violation of patent holders' rights.

2.2 Normative conflicts in Global Patent Politics

The TRIPS agreement formed part of the package deal agreed upon within the Uruguay Round. Nevertheless, at the time, TRIPS was not considered a major component of the WTO agreement, with negotiations mainly focusing on tariffs and agricultural subsidies. The inclusion of patents in the Uruguay agenda, however, was by no means a necessary development, and resulted rather from politically created issue-linkages on behalf of the United States (US)-based IP industry (Muzaka, 2010). In the WTO context, patents and other IPRs are understood to be highly trade-relevant, in so far that only high levels of protection will induce sufficient technology transfer from North to South, absent the danger of IP theft by local imitators.

There are a range of normative conflicts related to TRIPS since the mid- 1990s, which generally revolve around the notion of rather asymmetric pay- offs and negative impacts on developing countries by the agreement. By far the most salient issue has been the debate on public health and access to medicines, where it was quickly recognised that TRIPS can impede access to life-saving medicines in developing countries, where consumers do not have adequate levels of purchasing power while oligopolist price politics by industrialised countries' pharmaceutical Multinational Corporations (MNCs) are largely protected by TRIPS.

Before being amended in Doha 2001, TRIPS put rather extensive constraints on WTO member states that wished to restrict patent protection on certain life- saving medicines held by (usually) foreign-owned companies. Particularly salient cases were a law-suit by a range of pharmaceuticals producers against the South African government, which had, in 1999, introduced legislation for improving access to medicines via parallel imports; a second case took place in 2001, when the US initiated a dispute settlement proceeding under the WTO against Brazil, which had since the 1990s been using compulsory licenses for improving access to antiretroviral treatments in light of the Brazilian HIV / AIDS pandemic (Hoen, 2002).

Although the 2001 Doha Declaration made some noticeable changes in this matter, most notably significantly broadening WTO members' discretion in issuing compulsory licenses while extending the deadline for TRIPS implementation in LDCs by another 10 years up to 2016. However, the overall efficacy of those measures in alleviating the access to medicine problem is put in doubt by some observers (Kerry and Lee, 2007; Sun, 2004). Even as of 2013, a legal dispute between German pharmaceutical manufacturer Bayer and the Government of India is ongoing on whether the latter's issuance of a compulsory license for the anti-cancer drug Nexavar to the Indian pharmaceutical

Natco, resulting in a price drop from \$5,500 / month to \$175 / month, is in line with India's legal obligations under TRIPS (IPW, 2013). The debate on public health and patents does not end there, though. Furthermore, it is claimed that the current global patent system is also partially responsible for global financial flows in pharmaceutical Research and Development (R&D) overwhelmingly focusing on diseases affecting affluent customers in the Global North. As a recent World Health Organisation (WHO) report states:

"Type II diseases are incident in both rich and poor countries, but with a substantial proportion of the cases in the poor countries. R&D incentives exist in the rich country markets, therefore, but the level of R&D spending on a global basis is not commensurate with disease burden. [...] Type III diseases are those that are overwhelmingly or exclusively incident in the developing countries, such as African sleeping sickness (trypanosomiasis) and African river blindness (onchoceciasis). Such diseases receive extremely little R&D, and essentially no commercially based R&D in the rich countries" (WHO, 2001:78).

Besides negatively affecting public health in many developing countries, this debate has obviously a strong normative component. With the possibility of creating direct causal linkages between pharmaceutical pricing politics from multinational corporations based in the Global North and increased (and avoidable) mortality rates in developing countries, the problem fits well into the larger discourses on North-South equity and neo-colonialism as they emerged from the early 1990s.

This is also the case in another issue area which has been highly normatively charged in the post-TRIPS environment, that is, the misappropriation and misuse of genetic resources found (mainly) within developing countries by (mainly) Northern MNCs, which then

proceed to protect innovations resulting from these resources with patents, a practice that is commonly called “biopiracy” (Mgbeoji, 2006; Shiva, 1999). Besides the legal dimension of this practice, which is often somewhat in a grey area under international law, the normative dimension is similar, and fits well into the larger discourse on economic exploitation of developing countries by industrialised ones. Compared to the issue of access to medicines, the normative aspect of biopiracy is probably much higher than its economic ones. Whereas the impacts of TRIPS on access to medicines has obviously a measurable economic impact on public health, the precise economic impacts of biopiracy, i.e. in terms of opportunity costs, are completely unclear at the moment. That is, while a number of thoroughly documented and highly mediatised cases of biopiracy exist (Robinson, 2010), there are virtually no assessments of the total economic impact, or even approximate numbers of the prevalence of the phenomenon, a problem that is obviously confounded by biopiracy being (at best) a legally dubious practice. While the overall geo-economic impacts of biopiracy are thus totally unknown right now, the issue has consistently been framed within the context of North–South equity and neo-colonialism. In the absence of virtually any hard evidence on the impacts of biopiracy on North– South economic relations, the issue is rather a normative one, contributing further to identity formation in GPP.

3 Power, Legitimacy and Institutional Change

The above section has shown how normative and economic factors in GPP combine in constituting identities and interests of coalitions along the North – South line. This section will elaborate an analytical framework for explaining institutional change in GPP as resulting from different comparative advantages in terms of norm-setting by industrialised and developing countries respectively. I will adopt the rather broad taxonomy of Barnett and Duvall (2004). Here, power is

understood in two dimensions: first, whether power is exerted by individualised actors over other individualised actors (the billiard balls metaphor), or whether it results from larger, “constitutive”, social relations and is thus not attributable to a single source (Wendt, 1999). Secondly, power can act in a direct way or in a diffuse way operating more via discourses or generally systems of knowledge or meaning. I will conceptualise power over institutional outcomes along these lines. I argue, in particular, that power exerted within GPP by industrialised countries largely adheres to the “direct” and “causal” category of what Barnett and Duvall call “compulsory” power (2004: 13). That is, IP-relevant economic factors such as market size or innovation rate can be translated in rather immediate institutional outcomes on the ground. Often, IP relevant provisions are furthermore made part of larger package deals in the form of FTAs. Exertion of compulsory power can obviously entail legitimacy costs, which is why it is, in the present case, used in forums that are less accessible to arguing based on equity claims (c.f. Risse, 2000).

In line with my general argument, power exerted by developing countries rather pertains to “diffuse” and “causal”, that is, “institutional” power, thus influencing institutional outcomes by manipulating procedural and formal context-norms and producing “unequal leverage in determining collective outcomes” (Barnett and Duvall, 2004: 17). Power is thus not exerted directly over another actor, but rather shapes the larger (legal, institutional or normative) context in which his behaviour plays out. The UN system, in particular, has always been recognised for being particularly inclusive while, at the same time, strongly emphasising procedural justice over any forms of resource-based bargaining. In such a context, comparative advantages in institutional power involve utilising the legal, institutional and normative set-up of the UN system (as pertaining to everything from “hard” international law over administrative procedures up to unwritten codes of conduct) to advance one’s own

goal (c.f. Najam, 2005).

Actors naturally seek those forums in which they have a comparative advantage over their negotiating partners, a phenomenon often described as forum-shopping (Alter and Meunier, 2009; Helfer, 2009). Institutional change in GPP thus results, on the one hand, from industrialised countries shifting their patent policies to the bi- and plurilateral level, which necessarily entails creating a broad number of additional institutions to obtain maximum legal coverage. Simultaneously, such negotiation settings are more conducive towards bargaining between participants based on their respective material resources, while being less prone to normative arguments as commonly seen on the highly politicised and mediatised multilateral level. Furthermore, negotiating partners can more easily accept deals in such former settings that might appeal to their immediate (economic) interests, but that might damage their reputation within a larger group setting. Furthermore, the use of small negotiation “clubs” makes it easier to reach agreements based on side-payments and package-deals. And, finally, the relatively higher lack of transparency of club settings makes it easier to exclude potentially disruptive parties from the negotiations (c.f. Keohane and Nye, 2001).

Norm-setting by developing countries in the (mainly) UN system, on the other hand, is centrally driven by the goal to adjust the global patent system for better accommodating developing countries’ needs in issues such as access to medicines, global pharmaceutical R&D flows, biopiracy, food safety, indigenous rights and others (Muzaka, 2010). The preference for multilateral negotiations, here, is driven by a range of factors. First, multilateral (UN) negotiations offer far better opportunities for “naming and shaming” of those actors perceived as pursuing narrow self-interests instead of opting for solutions that are acceptable across the developmental divide. Secondly, the specific normative character of the UN system make it relatively more open to

equity-based arguments than international institutions whose scope and mandate are focused on rather narrow and technical issues. Finally, the UN institutions give an advantage to developing countries in terms of (unweighted) voting-rules, informal decision-making procedures and a generally high degree of inclusiveness. Accordingly, the UN system particularly lends itself towards normative claims, even more so when those are embedded into larger discourses such as North-South equity or the legacy of colonialism and imperialism. The difference to the compulsory mode of power, however, is that influence exerted in such a way operates in a rather indirect and subtle manner by slowly transforming the context conditions under which collective decisions are made.

4 Institutional Change in Global Patent Politics

Having established those context-specific differentials in compulsory and institutional power, I will now move on to how the coalitions of industrialised and developing countries have used their comparative advantages for furthering their respective agendas in GPP in the post - TRIPS environment. TRIPS formed part of the larger WTO package deal that was finalised under the GATTs Uruguay Round in 1994. At that time, it was often perceived as a somewhat minor detail in a negotiation that was dominated by more salient issues such as market access and agricultural subsidies. In 1995, TRIPS, together with WIPO, were the only international institutions relevant to patent politics. However, the number of bilateral, plurilateral and multilateral institutions in the field has significantly increased since then. Table 1 sums up the major institutional changes between 1995 and 2013.

	1995	2013
Multilateral	TRIPS WIPO	TRIPS WIPO WHO FAO CBD UNESCO UNCTAD
Plurilateral	None	WCO (failed) ACTA (failed) NAFTA TPP EU EPAs with former ACP members
Bilateral	None	FTAs such as US-Chile, US-South Korea, EU-India (under negotiation), EU-Chile, EU-Tunisia, etc.

Table 1: Institutional change in global patent politics from 1995 to 2013

In the following two subsections, I will analyse how industrialised countries have been shifting their norm-setting activities to smaller club settings on the pluri- and bilateral level, in which their compulsory power can be exercised in a comparatively advantageous way. Afterwards I turn to developing countries' norm-setting activities in the UN system based on their comparative advantage in institutional power in this setting.

4.1 Compulsory power and patent clubs

Industrialised countries' overall approach to GPP is often referred to with the term "TRIPS-plus", which amounts to a further up-scaling of

TRIPS' minimum standards while reducing existing flexibility mechanisms and safeguards (Sell, 2011). That is, the US and, to a lesser extent, the European Union (EU), have been systematically integrating IP – and patent – relevant provisions into smaller club settings on the bilateral and plurilateral level, i.e. requiring from their negotiating partners longer patent durations for certain sectors of technology, data protection for clinical test trials, narrowing down of existing TRIPS safeguard mechanisms and flexibilities and so forth. This approach to GPP emerged when, in the late 1990s and early 2000s, WTO multilateralism became increasingly obstructed. Patents formed only a small (but significant) part of the overall trade negotiations under the 2001 Doha Development Round, yet developing countries strongly resisted any further up-scaling of TRIPS' minimum standards. As the deadlock of the Doha Round became increasingly obvious, the US and, to a lesser extent, the EU, began incorporating provisions relating to patents (and other IPRs) into bilateral Free Trade Agreements (FTAs). A recent study covering all 28 EU and US FTAs with WTO members existing as of 2009 finds that all of those include obligations in TRIPS-plus areas aimed at raising TRIPS' minimum standards or reducing current flexibilities, with 27 of those being enforceable through various dispute settlement proceedings (Horn et al., 2010). Such obligations can be quite different in nature; i.e. the US-Peru FTA contains provisions on data exclusivity for agricultural (10 years) and pharmaceutical test data (5 years), non-pharmaceutical patent term extension, changing legal grounds for patent revocation, and so on (Biadgleng and Maur, 2011: 3), the US-Jordan FTA restricts flexibilities on compulsory licensing, while increases to maximum patent term length form part of the EU-South Korea FTA (article 10 – 35.2). The current US proposal for the Trans-Pacific Partnership (TPP) presently under negotiation between the US and a number of pacific states (such as Australia, Chile, Singapore and Mexico) contains TRIPS-plus provisions that go “far beyond definition of patentability contained in TRIPS Art. 27.1” and could “require

countries to open flood gates to patent applications on minor modifications or variations of existing chemical entities; on new uses or methods of using existing medicines, or on new formulations, dosages, and combinations” (Flynn et al., 2011: 20). As has been noted, the US strategy is rather explicitly based on the idea of a domino-effect, in which bilateral and regional TRIPS-plus standards were expected to be “multilateralised” as non-parties also adopt the new regulations, a strategy that has been, however, rather unsuccessful (Morin, 2009). The EU approach to GPP is centrally built around the notion that existing substantial rules under TRIPS are largely adequate as of present, but that the chief issue currently is an unsatisfactory enforcement of those rules. In this manner, the EU strategy mainly focuses on enforcement over attempting to add new substantial rules to the existing TRIPS minimum standards. In 2005, the EU adopted its global IP enforcement strategy (EU, 2005), which argued that although TRIPS minimum standards were increasingly implemented in third countries, enforcement of those standards was undesirably low. In 2007, the European Commission proposed that such IP enforcement become a central issue in FTA negotiations, aiming to use FTAs for “setting international IP norms and standards that cannot be realised under the WTO framework, also with a particular view towards preparing the ground for standard-setting on the WTO level when talks there pick up again” (Jaeger, 2010: 9-10). In further contrast to the US, which has often been relying on overt coercion and trade sanctions for promoting its IP and patent agenda, the EU “has been more willing to use more persuasive governmental tactics such as education campaigns, incentives and technical assistance” (Robinson and Gibson, 2011:1905). The EU has been integrating TRIPS-plus provisions into a broad range of Association Agreements (AAs). For example, such bilateral treaties with a number of Arab states contain provisions for early exhaustion of transition periods under TRIPS; require the EUs negotiating partners to join certain international treaties which contain provisions going beyond

the TRIPS agreement; or generally require them to adopt the “highest” international standards for patents and IPRs (such as in the EU–Tunisia AA), which is obviously a relative term that might change as TRIPS-plus standards proliferate in the international system (El Said, 2007). The EU has also been negotiating Economic Partnership Agreements (EPA) with the different regional groups that together form the ACP-cluster. So far, only one EPA has been concluded with the CARIFORUM group, containing several provisions on TRIPS-plus measures. In the (as of early 2013) ongoing negotiations on an EU–India FTA, TRIPS-plus issues related to patent term extension (up to 25 years in total), enforcement measures and data exclusivity for clinical studies have been on the agenda for some years now (TWN, 2012), although it is currently unclear what precise role they will play in any final agreement.

Looking beyond FTAs, a number of (both successful and failed) initiatives on patent enforcement have been undertaken by EU and US in non-trade related forums in recent years. Within the WHO, talks have been ongoing for a few years now on how to protect consumers from so-called “counterfeit medicines”. While most definitions of such medicines, including the one officially adopted by the WHO, generally refer to medicines that are “deliberately and fraudulently mislabeled with respect to identity and/or source”, several industrialised countries designate medicines merely violating patents as already being “counterfeit” (WHO, 2013). That is, while the official WHO definition refers to medicines that do not work in the appropriate therapeutic way and might even have negative impacts on health, industrialised countries such as the US would be able to include generic medicines, differing from patent-protected medicines only in the legal sense, under the “counterfeit” label. Under such a definition, obviously, any action against counterfeit medicines on the basis of concerns about public health would simultaneously be a way of enforcing pharmaceutical patents vis-à-vis producers of generic drugs, such as in

India.

Finally, patent-related provisions have formed minor parts of several initiatives mainly concerned with enforcement of copyrights and trademarks, such as the Anti-Counterfeiting Trade Agreement (ACTA), the World Customs Union (WCO) SECURE initiative (both failed), or the WHO's IMPACT taskforce (Sell, 2010). What virtually all of the cases mentioned above have in common is the return to negotiation settings based on a lack of transparency and insulated clubs that do not enjoy the same degree of international legitimacy as is the case in classic multilateral settings (Keohane and Nye, 2001). As negotiations on ACTA and the TPP have exemplarily shown, it is quite often unclear in the eyes of the world public what is being discussed in such forums. Negotiations on ACTA were, for the longest time, shielded even from members of the European Parliament; and US proposals on the IP chapter of the TPP did not become public until being leaked by individual US negotiators. Clearly, though, what those club settings lack in international legitimacy, they make up for in efficiency regarding the ease of negotiations and the less normatively charged environment. While this might contribute to more outcome-oriented bargaining over symbolically charged negotiations along entrenched positions, the ability by industrialised countries to pick and choose those developing countries that are admitted into the respective club crucially allows forms of bargaining that are based on political and economic asymmetries, and accordingly are regarded skeptically by developing country actors.

4.2 Institutional power and UN multilateralism

Developing countries' preferred negotiating environment is in one central way the opposite of the patent clubs discussed in the preceding section. Focusing their norm-setting activities mainly on the UN system, a rather high degree of international legitimacy is here combined with a rather low effectiveness on the outcome level.

Developing countries have succeeded, in recent years, to integrate patent-related issues and policies into a wide range of multilateral UN institutions, with the ultimate goal of using the global patent system in a way that would accommodate a range of concerns specifically voiced by developing countries in areas as diverse as cultural rights, food safety, sovereignty over national resources or public health.

Sell and Odell argue that developing countries' success in achieving progress on the issue cannot readily be explained in terms of economic or market power, but rather that endogenous discursive factors can crucially favour "weak-state coalitions" through processes of global mediatization (Odell and Sell, 2006). While Morin and Gold acknowledge that discursive and processual factors have significantly influenced political outcomes, they rather attribute this to actors' "rhetorical entrapment" (Morin and Gold, 2010). And yet other work acknowledges the causal role that "frames" played in making what I refer to here as compulsory power relatively less efficient vis-à-vis institutional power (Muzaka, 2011, Sell and Prakash, 2004, c.f. Tversky and Kahneman, 1981). However, while we would expect such issues to have a comparatively higher degree of international legitimacy than, say, rent-seeking by pharmaceutical MNCs, substantial outcomes are rather limited. That is, while the UN system is particularly open to the voicing of developing countries' interests within a normative frame, decision-making procedures usually make it rather easy for industrialised countries to blunt the edges of any far-reaching proposals developing countries might voice. Since about 2001 and coinciding with the WTO Doha Declaration, developing countries have attempted to infuse a broad range of UN institutions with patent-related issues in line with a generally "developmentalist" patent agenda. The political centre-piece of this approach is WIPO's Development Agenda, first proposed in 2004 and adopted (in the form of 45 non-binding recommendations) in 2007 by the WIPO General Assembly. The Development Agenda spells out the larger contours of

a developmentalist approach to GPP, in which global norm-setting would take into account the needs of developing countries more strongly (De Beer, 2009), while specific proposals range from rather pragmatic modifications of existing rules under WIPO to rather broad and fundamental challenges to the current global IP system.

However, WIPO is by far not the only forum in which developing countries have engaged. For example, at the same time as industrialised countries are pushing for anti-counterfeiting measures in WHO, developing countries are using the very same institution to discuss measures on how to adapt the global patent system so that more resources are, globally, channeled into R&D on diseases predominantly affecting the Global South (i.e. so-called Type II and Type III diseases like Malaria, HIV/AIDS, Dengue or Tuberculosis). Developing countries' concerns regarding biopiracy, discussed above, have resulted in substantial efforts to push for a legally binding international agreement on genetic resources within the framework of the Convention on Biological Diversity (CBD), culminating in the adoption of the CBDs Nagoya Protocol in October 2010. Within WIPO, long and arduous negotiations have been ongoing for over 10 years on how to specifically protect the Traditional Knowledge of indigenous and local communities from practices of biopiracy.

While issues such as access to medicines or biopiracy generally enjoy a high degree of legitimacy in the eyes of the world public, substantial outcomes are extremely limited, though. While the 2001 Doha Public Health Declaration arguably improved the global regulatory framework in favour of developing countries, the deadlock of the WTO Doha Round has made any further progress on this issue contingent on an (as of presently, rather unlikely) revitalisation of WTO multilateralism. And while developing countries can utilise their comparative advantage in institutional power within the UN framework to shape the larger context conditions of multilateral negotiations, consensual UN

decision-making procedures make it rather easy for industrialised countries to block developing countries' advances that go beyond the symbolic level into the realm of substantial norm-setting.

5 Conclusions

This article has approached institutional change in GPP under a coalition-centred perspective, arguing that the phenomenon is ultimately due to context-specific norm-setting activities of industrialised and developing countries. In particular, I argued that industrialised countries seek out those forums in which they can translate their economic advantages into political outcomes without incurring undesirably high legitimacy costs; and that developing countries have been focusing on multilateral forums within the UN system, where they enjoy advantages both in terms of legitimacy and of institutional structure. In this conclusion, I will make some propositions on how the above relates to larger debates in institutionalist International Relations (IR) scholarship, where a lot of research has in recent years focused on increases in the institutional population of the international system (Alter and Meunier, 2009; Raustiala and Victor, 2004; Raustiala, 2012). Beyond the case discussed in the present paper, this phenomenon has recently gained in prevalence in the international system, and a broad range of cases have been identified in the literature, in issue areas ranging from climate change (Keohane and Victor, 2009) over energy politics (Colgan et al., 2011) to food security (Margulis, 2013) and maritime piracy (Struett et al., 2013). With a few noteworthy exceptions (i.e. Morin and Orsini, 2013), those have predominantly focused on the effects of such new institutional arrangements, often dubbed "regime complexes" (Raustiala and Victor, 2004), while often neglecting to inquire into the origins of the phenomenon.

So what general lessons might be drawn from the case analysed in this

paper about the origins of such new institutional arrangements? On the basis of the above, I first suggest that it is a particular combination of persistent political conflict between actors, each having high norm-setting capacities, that can drive institutional developments as sketched out above. The presence of persistent conflict compels actors to seek out institutional solutions in line with their general interests, while high norm-setting capacities allow them to implement those solutions under otherwise adversarial conditions. Second, such strategic use of international institutions can take on the form of repeated interaction between actors, as institutional strategies are adopted to those of other actors. If conflict remains intractable, this may cause a self-reinforcing dynamic of institutional proliferation and change. Indeed, the literature on regime complexity widely acknowledges the stability, monotonous growth and path dependency of such institutional arrangements (Oberthuer and Stokke, 2011). As international institutions rarely disappear once they have been created, continuing strategic interaction between states would thus create a heap of institutions as a by-product. However, the case discussed in this paper is rather peculiar in one crucial dimension, which is the extraordinarily high homogeneity of actors' interests and identities, which led me to adopt a coalition-centred perspective in the first place. Generalising to other cases on this basis might pose difficulties, if heterogeneity of interests and identities makes the demarcation lines of political conflict less clear-cut, and also reduces actors' respective norm-setting capacities. Nevertheless, systematically taking into account an actor-centred perspective (either state- or coalition-level) appears to be a fruitful way of balancing the scholarly debate on regime complexity and fragmentation by going beyond mere effects and implications of such new institutional arrangements and, instead, focusing more on their empirical origins.

6 References

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