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Regime failure and bilateralization

The Millennium Goals and the Substantive Patent Law Treaty

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Introduction¹

In 1967, the World Intellectual Property Organization (WIPO) had been established “to promote the protection of intellectual property throughout the world” (WIPO 1967). Working under the umbrella of the United Nations, WIPO is committed to contributing to the UN Millennium Goals, i.e. “to ensure that the benefits of new technologies (...) are available to all” (UN 2000). Considerable divergences notwithstanding, most industrialized countries hold that these objectives are mutually reinforcing. They argue that temporary monopolies (e.g. patents) provide for an economic incentive that stimulates innovation. Thus, both developing and industrialized countries stood to profit from a harmonized patent regime. This view, however, is strongly contested by an alliance of emerging and developing countries. Hinting at the potentially negative effects of monopoly rights, they claim that a “one size fits all” approach in intellectual property regulation may hamper the UN development goals.

During the course of two negotiation rounds (1991-1994 and 2001-2006), WIPO has striven for a balance between these competing perspectives. Given the successful unification of filing procedures for a patent application and the establishment of an international preliminary examination in the Patent Cooperation Treaty (PCT), a further step had been envisaged by which the substantial requirements for the assignation of patents would have been assimilated throughout the world. However, the Substantive Patent Law Treaty (SPLT) talks ended in a crescendo of protests on all sides, and it is anything but clear if the intended resumption of negotiations will lead to a reconciliation of interests.

The paper attempts to explain the causal mechanisms which forestall the conclusion of an internationally binding agreement on patent examination provisions. At the same time, the analysis of the SPLT talks may shed some light on the functioning of an UN Organization which has been rather neglected by public policy researchers for a long period of its existence (May 2007). Additionally, by putting WIPO into the context of more or less loosely coupled international organizations, the article may be read as a contribution to the growing literature on “regime complexes” (Raustiala 2006).

To these ends, the paper is organized as follows. Section 1 presents the conflicting viewpoints as a North-South as well as a North-North schism. Emphasis is not only laid on the interaction between governmental representatives, but also on the influence of intermediary inter-, quasi-

¹ The paper evolved out of an of an ongoing research project funded by the Fritz Thyssen Foundation. Empirical evidence has been obtained by internet-based enquiries, document analysis, personal talks during the WIPO SPLT Open Forum from 1 to 3 March 2006, and 49 interviews in Geneva, Brussels, and Strasbourg. I am indebted to Marian Döhler and Susanne Lütz (both Fernuniversität Hagen) for helpful comments and suggestions. Christian Grün has contributed to the analysis of the WIPO committee minutes.

and non-governmental organizations. Section 2 provides some insight into the structures and processes of the WIPO decision-making procedures. The concrete SPLT negotiations are contextualized with the discussions and outcomes of neighbouring committees and higher-ranking levels of the WIPO hierarchy. Section 3 addresses the interrelation between WIPO and other UN bodies. Although not acting under the umbrella of the UN, the World Trade Organization (WTO) is endorsed, as the distinctive mixture of cooperation and competition between WIPO and WTO turns out as a major determinant of WIPO policy goals. The paper sums up with some concluding remarks about potential future outcomes of the reinvigorated SPLT talks and their implications for the analysis of regime complexes.

1 Appropriating knowledge: free trade, protectionism and development goals

For the time being, international patent law harmonization has not challenged the principle of territoriality by which national governments safeguard their authority to grant temporary monopolies on innovative processes and products (Drahos/Braithwaite 2002: 28). Even under the European Patent Convention (EPC), the most encompassing patent treaty, national courts have the last say in the validation of patents. The draft SPLT provisions may be considered as a first step to break with this tradition. Whether this paradigm shift lead to a “world patent” or simply reduced the administrative burden of national patent offices, contracting parties would waive the right to define patent requirements corresponding to their national economic interests. So it comes as no surprise that nearly all negotiation parties act as trustees and advocates of their domestic regulation (Interview 037). Nevertheless, during the course of the SPLT talks, national negotiators have rallied around three competing core perspectives, which are juxtaposed in the following subsection (1.1). At the same time, a network of inter-, quasi-, and non-governmental organizations has evolved around these core positions. Its characteristics will be described thereafter (1.2).

1.1 National priorities

The U.S. and Japan find themselves at the apex of those who claim that an in-depth harmonization of patent examination procedures would benefit all contracting parties. Japanese representatives tend to envisage a “world patent system” (Prinz zu Waldeck und Pyrmont 2006), but U.S. negotiators remain rather sceptic about a mutual recognition of patent examination

results (Interview 038), although they had shared the Japanese vision at the beginning of second round of SPLT talks in 2001 (SCP/4/6: 22ff). Nevertheless, in the U.S. and Japanese common perspective, a harmonization of patent requirements could decrease the administrative burden of national or regional patent offices. Resulting cost reductions would enable the private sector to redirect financial resources into research and development, and an increased quality of the examination process would minimize the potentially harmful effects of wrongly granted monopolies. As the U.S. receives a net income of 19 billion U.S.\$ a year from patent licence fees (May/Sell 2006: 187), the expectation of tremendous welfare gains realized by a facilitated free trade of intangible assets spurs its indefatigability in promoting a substantive agreement on patent examination requirements. Whenever the breakdown of negotiations seems inevitable, U.S. representatives successfully convince other OECD delegations to continue the search for a common ground. In 2006, after it had become clear that no compromise would be settled within the WIPO, the U.S. delegation invited the industrialized countries' delegations to continue discussions within the "Alexandria Group", named after the town of its first meeting (Interview 038). For the time being, the U.S. attempts to re-establish SPLT negotiations within the framework of a WIPO committee (IP Watch, 18 June 2007).

Although European negotiators have followed the U.S. invitation to Alexandria and the subsequent meetings, they do not necessarily share the enthusiasm for a harmonization of patent requirements. At least Eastern European delegations are aware of potentially detrimental effects of monopoly rights for technology-importing economies (Interview 048). All European negotiators take a tough stance against the U.S. attempts to extend the patentable subject matter in the course of the SPLT talks. (SCP/5/6: 23f; SCP/6/9: 30f; SCP/7/8: 29) Furthermore, they insist on major reforms of the U.S. patent law as a prerequisite for harmonisation. (Interview 002) Most prominently, they demand for a universal implementation of the legal concept of first to file², which is commonly applied outside the U.S. (Pugatch 2004: 114f). A European interview partner describes the persisting divergence as follows: "The principal idea of first-to-invent is to protect the inventor (against the public), while the idea underlying the European system is to protect the public from unjustly granted patents (against the inventor)."

² According to the first to file concept, the first application for a claimed invention is regarded as a self-sufficient condition for the assignation of patent. Under the U.S. first-to-invent procedure, however, only the inventor is entitled to a patent. (Nolff 2001: 159) If a patent has been granted to another applicant, the inventor may prove his priority of a claim in interference proceedings. This may lead to legal uncertainties and the risk of time-consuming, cost-intensive legal procedures. The U.S. first to invent concept factually discriminates against smaller entities outside the U.S., because they are likely to shy away from the litigation costs in a jurisdiction they are not experienced with. Moreover, if non U.S.-resident firms decide to go to court, the design of the first to invent concept is likely to favour U.S. entities, even if foreign litigants can prove the priority of their invention (for a recent case see IPKat 2007).

(Interview 036) Moreover, European negotiators demand for the abolition of protectionist clauses in the U.S. Patent Statute, such as the Hilmer doctrine³ (SCP/10/11: 20) or exceptions to the publication of patent applications 18 months after the filing date⁴.

In the run-up to the SPLT negotiations, EU member states have held formal and informal consultations in order to develop a common position. (Interview 035) During the talks, they “were careful not to show differences.” (Interview 034) Nevertheless, remaining differences between the European delegations are still visible for interested observers. (Interview 038) Depending on the national priority of a globally harmonized patent system, European negotiators disagree on the concessions they are willing to accept. (Interview 036; 040) Among the controversial issues, the length and design of a grace period⁵ plays a dominant role in respect of intra-European disputes. As an EU negotiator puts it, “there are differences in details (...), but overall we have the usual mixture of agreed positions, where we speak with one voice, and work-in-progress, where discussion is going on. We are a large family. Have you ever seen a large family without lots of discussion?” (Interview 036) All in all, the coordination among the EU member states enables the European delegates to speak with a single voice vis-à-vis their U.S. negotiation partners.

Despite contrasting views and priorities, all industrialized countries “have closed ranks among themselves” (Interview 044) against the demands of emerging and developing countries. Since the late 1990s, developing countries protest against the patenting of products and processes based on the exploitation of genetic resources or traditional knowledge. (Correa 2001: 24ff) As it is estimated that 80-90% of the world’s biodiversity is located in developing countries (Götting 2004: 733), the Southern negotiators aim to prevent Northern life science industry from exploiting genetic resources for a commercial use without an equitable remuneration for the countries of origin. The same holds true for the appropriation of traditional knowledge of indigenous populations. As their experiences in respect of e.g. medical cures or agricultural techniques play a great role for the maintenance of a subsistence economy, Southern delegates attempt to impede an intellectual property regulation that would undermine traditional ways of living. (Correa 2000) They perceive an obligation to disclose the origin of genetic re-

³ According to sec. 104 U.S.C., inventions from outside the U.S. are only considered as prior art, if they have obtained a priority date assigned by the U.S. Patent and Trademark Office (USPTO). (CA/115/06: 6; Straus/Klunker 2007: 103) Taken together with the above mentioned first to invent principle, U.S. inventors are clearly privileged over those of other nationalities. (Pugatch 2004: 114f)

⁴ According to sec. 35 U.S.C., applications before the USPTO are exempted from a mandatory publication, if the applicant does not intend to apply for patent protection outside the U.S.

⁵ The grace period offers an exemption of former publications from the assessment of novelty in patent applications. Whereas the U.S. and Japan traditionally recognise a grace period of twelve (six) months, the European Patent Convention insists on an absolute novelty standard for the claimed invention. (IPR Helpdesk)

sources and traditional knowledge in patent applications as a means to prevent unauthorised appropriations by Northern pharmaceutical and agronomical industries. (Interview 045)

Apart from the demand for a disclosure requirement, developing countries' positions appeared rather defensive at the beginning of the SPLT negotiations. Their proposals focused on the vindication of the flexibilities laid down in TRIPS agreement (WTO Treaty on trade-related intellectual property rights, see section 3.2). Most notably, they insisted on a perception that intellectual property should be regarded as instrumental to public policy goals e.g. in the sectors of public health, industrial development etc. (SCP/8/5) In 2003, Brazil and Argentina elaborated comparably advanced proposals, by which the wording of patent applications should take the technological level of a patent's destination country into consideration. (SCP/9/8: 34f)

Before 2004, however, emerging and developing countries suffered from serious disaccords. Major players like Mexico had changed sides and supported the position of the industrialized countries (Interview 046; Moniz 2005: 40ff), and some emerging economies like India or China steered a middle course in the SPLT talks (Straus/Klunker 2007: 93). These factions undermined the developing countries bargaining position. (Interview 046) At the end of 2004, Brazil and Argentina initiated a transregional alliance, the Group of the Friends of Development (GDF).⁶ The formation of this alliance has enabled developing countries to change their strategy in the SPLT talks in 2005. Supported by their allies, Brazil and Argentina slammed dunk a proposal to reduce the SPLT negotiation mandate to the industrialized countries' priorities. (SCP/11/4) Moreover, the GDF alliance takes a proactive approach addressing developing countries' needs for technology transfer as an argument against the expansion of intellectual property rights. Given the U.S. and EU refusal of an issue-linkage of patent law harmonization and development goals, the position of the GDF inevitably incites a cleavage among the SPLT negotiation parties. (Interview 035)

⁶ Apart from Brazil and Argentina, the following countries take part in the alliance: Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela. (WO/GA/31/11 Add.)

1.2 Intermediary actors

During the course of the negotiations, developing countries, EU members and, albeit to a lesser degree, the U.S. are supported by a network of inter-, quasi- and non-governmental organizations. Especially developing countries stand to profit from the South Centre, an international organization of the G77 and China. South Centre attempts “to meet the need for analysis of development problems and experience, as well as to provide intellectual and policy support required by developing countries for collective and individual action, particularly in the international arena.” (South Centre 2007) In 2006, South Centre has initiated a task force on intellectual property. (IP Watch, 20 April 2006) Although it suffers from organizational quarrels and a lack of resources (Interview 043), negotiators from developing countries underline the importance of South Centre as a think tank and discussion forum. (Interview 044; 045) In respect of the SPLT negotiations, South Centre officers try to “bridge the gap” (Interview 046) between the varying developing countries’ positions.

In respect of its function, the European Commission (EC) may be regarded as the counterpart to the South Centre. A core task of the European Commission officers is to gather information about the potential effects of the proposals discussed in the SPLT talks. Therefore, the EC has institutionalized inter-service consultations in order to include the perspectives of all directorates (Research, Information Society etc.). They are supplemented by informal meetings both among EC officers and between the EC and European member states’ representatives. (Interview 037) The EC also organizes pre-negotiations among the European countries’ delegates in the Council patent law working group (Interview 039), which facilitate a common position in the SPLT talks. (Interview 033) However, the role of the EC is compromised by the fact that it has no formal competences in patent law regulation, because the European patent regime is based on the European Patent Convention (EPC) outside the EU. Contracting parties to the EPC, which are not members of the EU, prevent the EC from presenting itself as the “European voice”. (Interview 040) That might be the cause why the EC acts “in a moderate manner” (Interview 048). The European Patent Office (EPO) as the operational unit of the EPC, however, plays a minor role, because EPC members are not willing to invest the EPO with a negotiation mandate. (Interview 034)

Although the U.S. does not dispose of an international organization comparable to the South Centre or the European Commission, the trilateral cooperation of the world’s leading patent offices (EPO, USPTO and Japanese Patent Office) partially serves as an equivalent supporter. Although the European Patent Office’s position on substantive patent law deviates from those

of the USPTO and the JPO (CA/115/06), the trilateral cooperation has pushed for a harmonization of patent requirements during the SPLT talks. In 2004, the trilateral offices proposed to reduce the negotiation package to a few common priorities, thrusting aside the developing countries' demands. They were ambitious to reach an agreement on their issues at least before 2006. (SCP/10/9) Some negotiators even got the impression that the trilateral cooperation pursued a nontransparent strategy far beyond the national delegations' ambitions. (Interview 044; 046) However, it remains to be seen if the patent offices will sustain their course. Recent developments at the EPO may indicate a major in turn in the office's policy towards increased public welfare considerations. (EPO 2007) It might be the case that the advanced cooperation of the USPTO and the JPO (Interview 038) induces a decoupling of their European counterpart from a common policy perspective. In this scenario, the U.S. position of an in-depth harmonization could forfeit the already half-hearted commitment of European negotiators.

Yet the U.S. position is weakened by domestic disputes about a reform of the patent system, which leads to a substantial lack of support from non-governmental organizations in respect of international negotiations. Only the U.S. biotech sector, small entities' and universities' representatives support the U.S. negotiators' perspective. NGO representing the U.S. information technology are rather sympathetic to the European demands for the overall introduction of the first to file concept. (Interview 042; 048) Although the American Intellectual Property Law Association (AIPLA) and the American Bar Association (ABA) predominantly defend the U.S. approach (e.g. SCP/8/9: 22f) and express their preferences for an enlarged patentable subject matter (SCP/7/8: 27f), they have established a relationship with the UK based Chartered Institute of Patent Agents (CIPA) in order to find a common position on the further proceeding of the SPLT talks (WO/GA/31/9). Thus, they are aware of the need for a compromise between the U.S. and the EU. The same holds true for international NGO like the International Federation of Inventors' Associations (IFIA) or the International Federation of Intellectual Property Attorneys (FICPI). Both organizations urge the U.S. to adopt the first to file concept. (SCP/4/6: 8; SCP/10/11: 11)

Compared to the dissonant choir of U.S. pressure groups, the positions of European NGO appear less controversial. UNICE (now: Business Europe) as well as patent attorneys' organizations like CIPA or the Institute of Professional Representatives before the European Patent Office (EPI) oppose the extension of the patentable subject matter (SCP/6/9: 31). Both industry federations and lawyers' associations are quite reluctant to the introduction of a grace period in Europe (ibid; SCP/9/8: 33). Most European organizations are less willing to give some concessions to the U.S. than their national / regional delegates. (Interview 048)

Taken together, the dissonances among the U.S. pressure groups, the skeptical stance of European organizations and the ambiguous comments of international lawyers' associations are not inclined to increase the political weight of business interests in the international negotiation rounds. Although most negotiators refrain from negative comments and accentuate the organizations' experiences in the regulatory details (Interview 035), they are well aware of the limited perspective of each pressure group (Interview 032; 033). Due to the inter-organizational quarrels, it is clearly visible for national delegates that each federation tries to protect its constituency. (Interview 048) Furthermore, some delegates express that lawyer and business representatives show a tendency to get lost in details, because they are rather accustomed to direct lobbying activities than to the more deliberate style of discussions in a multi-lateral forum. (Interview 044) In consequence, economic interest groups are rather perceived as less important actors. "They express their voices, but who cares?" (Interview 034)

Civil society organizations, however, are rather appreciated, at least by developing countries' negotiators. (Interview 044) At the beginning of the second round of the SPLT talks, they virtually ignored the discussions on patent law harmonization – the first ecological NGO joined the committee session in November 2002. (SCP/8/9: 3) Civil society organizations' initial neglect may be explained by their lack of legal expertise (Matthews 2006: 16f). The technical character of the SPLT round is supposed to deter critical NGOs from participating. As one activist puts it, "I do not understand the technical details. I am not a patent lawyer." (Interview 041) Since the SPLT talks turned from a discussion of legal details to more fundamental questions, civil society groups have become more and more actively involved. In 2005, at the 11th and last official meeting of the Standing Committee on the Law of Patents (SCP), at least six civil society organizations were accredited as observers. (SCP/11/5 and previous minutes) They opposed the Northern perspective of the SPLT with regard to its negative impact on ecological and developmental policies in the South.

However, the impact of civil society's participation is difficult to evaluate. On the one hand, ethical considerations are not easily transformed into the wording of a legal framework. This may explain why some NGO consider their activities as less influential. (Interview 041) On the other hand, the presentation of "real world cases" (Interview 042) substantiates the developing countries' demands. If, for example, a western consumer protection NGO claims that the U.S. patent system is broken, negotiators from the South may refer to such an evaluation in order to oppose the U.S. proposals in the SCP. (Interview 044) Moreover, civil society groups circulate the information they receive in the meetings. This can be helpful for understaffed delegations from developing countries. (Interview 045) Furthermore, they can initiate

pre-negotiations by organizing meetings and conferences. Many interlocutors from the South express their appreciation for the discussion forum offered by the UN Quakers, which has helped them to make acquaintances and to get an overview about the inner circles of Geneva. (Interview 044; 045) All in all, critical NGO are supportive to Southern negotiators by creating networks, sharing relevant information and offering ethically rooted argumentation schemes.

1.3 Interim conclusions

At the end of this section, the three core positions on patent law harmonization shall be resumed for the sake of clarity. Spurred by a facilitated free trade of intangibles, U.S. negotiators try to expand the scope of patent protection by extending their national regulations on a global level. Southern delegates are fiercely opposed to their ambitions, arguing that intellectual property regulations tend to impede their economic and public health policy goals. Furthermore, they claim that the draft provisions of the SPLT should acknowledge genetic resources and traditional knowledge as a major source of income for developing countries. European delegations usually steer a middle course, although to varying degrees. Together with the U.S., they are not willing to address development goals within the SPLT, but on the other hand, they do not accept a harmonization of patent requirements at any price. From their point of view, the U.S. has to give up the protectionist character of its patent legislation in an exchange for a worldwide harmonization.

Both European and Southern delegations are supported from intergovernmental agencies, such as the South Centre or the European Commission. Although the U.S. lack such a support, the trilateral cooperation of patent offices proves helpful for preventing a breakdown in negotiations. Both the U.S. and the European countries can only partially rely on the support of business / lawyers' associations, because the pressure groups suffer from deep disagreements between their constituencies. Developing countries, however, may compensate their lack of staff and experience by the assistance of critical civil society organizations.

2 Bridging the conflict: WIPO as a negotiation forum

In respect of the SPLT negotiations, WIPO as a negotiation forum has to balance diametrically opposed positions. While concrete negotiations take place in a specialized committee, the Standing Committee on the Law of Patents (SCP), the course and outcome of its meetings are influenced by moderating activities of WIPO officials, higher levels such as the General Assembly (GA), and the (non-)decisions taken in parallel committees. The interconnectedness of multiple WIPO organs amplifies the described conflicts and makes it even harder to achieve a compromise. The first subsection of this chapter is devoted to the characteristics of the SCP itself and the WIPO Secretariat's impact on the negotiations (2.1). The following subsection focuses on the effects of the interrelation between the SCP negotiations and those of other committees. As it will be shown, the course of the SPLT negotiations is inseparably linked to discussions and decisions taken in higher levels of WIPO's internal hierarchy (2.2).

2.1 Inside the Committee

A first attempt to harmonize substantial patent application requirements had been undertaken under the auspices of WIPO as early as in 1985. Nevertheless, the first negotiation round (1991-1994) failed due to the French and Scandinavian unwillingness to accept a grace period and the U.S. disinterest after the conclusion of the TRIPS agreement. (Straus/Klunker 2007) As a result of this failure, WIPO constituted the Standing Group on the Law of Patents in 1998 in order to overcome the perceived superiority of the WTO by achieving a more concrete framework at least for international patent law. From 1998 to 2000, the SCP successfully negotiated a treaty on formalities and procedures of international patent applications. The Patent Law Treaty (PLT) was adopted by a diplomatic conference in 2000 and entered into force in 2005. After its conclusion, the SCP applied itself to the harmonization of substantial patent requirements. Negotiations took place from 2001 to 2006 and will most probably be resumed in 2008.

The SCP official conferences are regularly scheduled once or twice a year. NGO, i.e. patent lawyer associations, business federations, civil society organizations etc., are allowed to participate in the negotiations, provided they have an accreditation as an observer at WIPO. Nevertheless, the SCP may grant other NGO an ad hoc observer status. (SCP/1/2) As the decisions taken within the SCP are not subjected to a vote, NGO and national delegations negotiate on an almost equal footing. Most interview partners perceive the SCP official sessions as

rather deliberative, whereas the more power-based bargaining and alliance-building processes take place in informal meetings. (Interview 044) However, these informal meetings are inclined to cause distrust among non-invited parties if they become public. (IP Watch, 27 January 2005) Most notably, Southern delegates are not willing to discuss any proposals resulting from pre-negotiations among the industrialized countries' representatives, as long as they are not put on the formal SCP session's agenda. (SCP/10/11: 3ff)

In consequence, the SCP meetings may hardly become bypassed. During its official sessions, the mere number of more than 300 participants exacerbates effective negotiations. (Interview 033) All relevant discussions have to take place during these sessions, because the constitution of sub-committees holding interim meetings is contested by developing countries' delegations. According to the SCP rules of procedure, they are eligible for a compensation for travelling expenses in respect of the SCP official meetings, but travelling costs for interim sessions are not reimbursed. (SCP/1/2)

What is more important, however, is the variety of both the delegates' professional backgrounds and their negotiation mandates. At the beginning of the second round of the SPLT talks, most European governments commissioned their national patent offices' representatives to conduct the negotiations. During the last years, the SPLT rounds have gathered an increasing public interest, and although most European national patent officers have remained in charge, they become more and more scrutinized by governmental departments and ministries. Occasionally, national ministers of justice even decide to participate directly at the SCP sessions. (Interview 001) Depending on each European country's administrative culture, the negotiators are obliged to report to the parliament, to consider interdepartmental arrangements, and to integrate the recommendations of national hearings or town hall meetings. Consequently, they suffer from a severely restricted room for manoeuvre during the negotiations. (Interview 033; 035; 039)

The U.S. delegation, however, is lead by the U.S. Patent and Trademark Office (USPTO), and the U.S. permanent mission in Geneva is restricted to political assistance. Although USPTO representatives have to report to the U.S. Department of Commerce, they have a large leeway in defining their position. (Interview 038) Despite the fact that U.S. negotiators' activities in Geneva are scrutinized by the new Democrat majority in the Congress, their strategies are largely defined in terms of commercial policy goals. (IP Watch, 3 May 2007) On the opposite, delegations from middle-income developing countries receive their priorities from interdepartmental agreements of their domestic governments. (Interview 044, 045) Thus, their policy

goals result from a coordinated position of multiple departments, including the ministries of culture, public health, development and so forth. Most Southern delegates are career diplomats, which are quite experienced in the field of commercial negotiations. In respect of their policy-making skills, they are clearly superior to most of their European co-negotiators. As they are regularly based in Geneva, they are quite closely integrated into the inner circles of the town. In terms of their policy objectives, both their professional background and the domestic decision-making process almost necessitate an opposition to the U.S. counterpart.

All in all, SCP sessions suffer from a large number of participants, difficulties to form sub-committees, and the variety of the negotiators' mandates and professional backgrounds. Hence, the International Bureau (i.e. the WIPO secretariat) has to outweigh these inconveniences in order to facilitate the conclusion of an agreement. Its tasks are made up of preparatory works, moderating interventions during the sessions, and follow-up activities. Among the most important is the drawing up of a draft treaty, which serves as a basis for discussion during the SCP sessions. Although the International Bureau is bound to the results of previous meetings, it disposes of considerable discretionary powers to implement national delegations' proposals in the wording of the draft treaty, be it as a stand-alone proposition or by offering alternatives to debate. Occasionally, the International Bureau's decisions are quite contested, but negotiators hardly have a possibility to overcome the pre-selections made by WIPO officials (e.g. SCP/8/9: 6f).

Apart from drafting the discussed corpus, the International Bureau occasionally initiates legal studies in order to bridge controversies resulting from different connotations of legal wordings in the various jurisdictions. (SCP/9/5) Moreover, the WIPO secretariat may attempt to influence the session's agenda, e.g. by postponing the circulation of proposals submitted by national delegations. However, such strategies are likely to meet the resistance of experienced negotiators (e.g. SCP/10/11: 9ff), but even if the International Bureau's adjustments are rejected, the discussions during the sessions are inevitably influenced by these interventions, if they are supported by a critical mass of delegations (e.g. SCP/11/5).

Compared to its impact in the preparatory stage, the International Bureau's role during the course of the SCP sessions is rather limited. The WIPO secretariat insists that the process of decision-making shall be member-driven (Interview 042), and a proactive participation at the discussions would obviously contravene the declared self-restraint. Nevertheless, WIPO diplomats occasionally try to moderate in the case of outright disaccords, e.g. by proposals to postpone controversial issues (SCP/4/6: 10; 22f). As regards the follow-up activities, WIPO

only acts as a secretariat. When preparing the conference minutes, it does not dispose of a large leeway, because national delegates may revise the texts in the following session.

Between the official SCP sessions, WIPO diplomats try to sound out possibilities of potential tradeoffs in the course of informal consultations. (Interview 033; 037) Occasionally, they focus on less engaged delegations in order to overcome the polarized positions expressed during the official meetings. (Interview 042) Nonetheless, strategies deploying the means of secret diplomacy are not without risk. When informal meetings are convened by high-ranking WIPO officials without the participation of influential delegations, the latter are likely to oppose any outcome as soon as it is put on the official agenda. (SCP/11/4) Moreover, such strategies are likely to stipulate a “lack of credibility” and provoke distrust in WIPO’s role as a secretariat. (Interview 044) In respect of the SPLT talks, the International Bureau’s informal consultations have clearly proved counterproductive. (Interview 046)

This might have been the reason why the WIPO Secretariat has chosen to break out in a new direction. After the failed informal meetings, the International Bureau organized a SPLT Open Forum in March 2006. Apart from national negotiators, all interested parties were invited to present and to debate their perspectives on patent law harmonization. Critical public interest NGOs, business organizations and representatives from the academia used the opportunity for a vibrant discussion. Nevertheless, many key negotiators decided to stay away (Interview 032), and the Open Forum suffered from the lack of engagement on the part of the WIPO director general. (Interview 033) Although some observers emphasize the Open Forum’s role to “improve the understanding between different views” (Interview 036), the event did not help to reconcile the opposing perspectives. On the contrary, each party was able to use some argumentations derived from the Open Forum in order to substantiate its own position. (Interview 034) Some negotiators even hold the Open Forum responsible for the temporary breakdown of negotiations. (Interview 038)

All in all, the WIPO secretariat seems to have altered its position on the SPLT talks during the course of the negotiations. At the beginning of the second round, the International Bureau clearly supported the industrialized countries’ position. WIPO diplomats overtly opposed the consideration of traditional knowledge / genetic resources within the SPLT treaty. (SCP/5/6) More intricately, they expressed their sympathy for the EU position, at least in respect of the non-extension of the patentable subject matter (e.g. SCP/9/5). At least after the failure of the SPLT Open Forum, WIPO diplomats tend to take a rather neutral stance (Interview 038; 046). For the time being, the International Bureau insists on WIPO’s leadership as a negotiation

forum, but its diplomats avoid any determination of the outcome: “We are not pushing to a unique law for all countries. We should recognize the differences of the member states.” (Interview 042)

The International Bureau’s indifference might be stimulated by a lack of leadership, as some negotiators assume. (Interview 044) Another reason might be seen in the ongoing discussions on the WIPO human resources management and its allocation of financial resources. (IP Watch 2007: 11) In each case, recent developments outside the SCP are supposed to have a direct influence on the SPLT talks. The interplay between the SCP and its neighbouring committees as well as its dependency on decisions taken in higher-level organs of the WIPO shall be addressed in the following subsection.

2.2 Parallel discussions

In terms of substantial overlapping, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) may be understood as complementary to the SCP. Constituted in 2001, the IGC is mandated to negotiate appropriate means to defend developing countries against the unremunerated appropriation of genetic resources and traditional knowledge by Western bio-prospecting corporations. The IGC is peculiarly supportive of civil society organizations and representatives from indigenous peoples. Although negotiators from industrialized countries and business organizations participate in the IGC talks, the committee is clearly dominated by representatives of developing countries and civil society organizations. (e.g. GRTKF/IC/1; WIPO/GRTKF/IC/2) However, the IGC has a comparably low status within WIPO. (Interview 046) For the time being, IGC negotiators have not found a common position whether the outcome of their deliberations shall be fixed in a legally binding treaty or if its conclusions shall be regarded as “recommendations”, i.e. soft law instruments. (GRTKF/IC/1; WIPO/GRTKF/IC/8)

In 2004, it became clear for developing countries’ negotiators that the IGC was not the appropriate forum for the envisaged policy goals: “In WIPO, there were two fora where we started to push of this [the disclosure of genetic resources, T.R.E]. One was the IGC. We perceived that it was not possible to continue discussing disclosure there because there is no mandate for having concrete results. So we went to the SPLT with this proposal.” (Interview 045) The vagueness of the IGC mandate is perceived as disadvantageous from the developing countries’ point of view, but from the industrialized countries’ perspective, its ill-defined tasks are

regarded as very useful for their own policy goals. Every time developing countries try to link the disclosure requirement with the SPLT, Western negotiators refer to the discussions in the IGC. (SCP/10/11: 13f; SCP/11/5: 2) Even a compromise proposed by India to hold combined sessions of the IGC and the SCP is fiercely contested by industrialized countries. (IP Watch, 10 April 2006) Their general unwillingness to establish any relationship between patent application and disclosure requirements on the one hand and the attempt to relegate all inconvenient issues to the IGC on the other has severely damaged the prestige of the committee. Meanwhile, the IGC is considered as a “garbage can”, whose only use is to provide an opportunity to rehearse speeches. (Interview 044; 045; 046)

Since 2004, the negotiations both in the IGC and the SCP are overshadowed by the ongoing discussion on a “Development Agenda” proposed by the above mentioned Group of Friends of Development (GDF, see section 1.1). Introduced at the General Assembly in September 2004, the Development Agenda claimed a general revision of WIPO’s approach to intellectual property regulation. Patents, copyright etc. should not be perceived as an end in itself, but rather as a means to enhance technology transfer to developing countries. (WO/GA/31/11) The Development Agenda gained thunderous applause by the Southern hemisphere, but it received mixed feelings among the industrialized countries. (WO/GA/31/15) Although the rhetoric of the Development Agenda refers to the official justification of intellectual property, it indirectly implies a downgrading e.g. of patent protection in respect of the developing countries’ needs.

The GFD considered the Development Agenda as a cross-section issue relevant for all WIPO committees, but Brazil’s attempts to implement this perspective within the SPLT talks were objected by the U.S. and the EU. (SCP/11/4) Most notably, the U.S. tried to encapsulate the perceived potential threat in the Permanent Committee on Cooperation for Development related to Intellectual Property (PCIPD). They argued that WIPO’s contribution to development policy should remain constricted to capacity-building and technical assistance for the establishment of intellectual property institutions in the South. (WO/GA/31/15: 57) Nevertheless, in 2005 the General Assembly constituted an “Intersessional Intergovernment Meeting” (IIM) in order to discuss further proceedings. Within the IIM, the U.S. continued to object the establishment of a permanent committee devoted to the claims of the Development Agenda. (IP Watch, 13 April 2005) Its ongoing resistance was mainly spurred by tactical reasons, i.e. to coerce developing countries to refrain from their demands in respect of a disclosure requirement in the SPLT. However, the U.S. strategy failed because the EU surprisingly changed sides and supported at least a “Provisional Committee on Proposals Related to a WIPO De-

velopment Agenda” (PCDA). (Shashikant 2005: 9f) In 2006, after the intermittent breakdown of the SPLT talks, the U.S. tried to conclude an agreement on patent law harmonization outside WIPO. At the same time, they took an obstructive stance towards the work in the PCDA. (IP Watch, 16 February 2006; 29 June 2006) Now, after it has become clear for the U.S. that an agreement among the industrialized countries seems unreachable outside WIPO, they have started back-peddalling. It is expected that the U.S. will approve the constitution of a permanent committee on the Development Agenda at the next General Assembly. In an exchange, developing countries accept a re-uptake of the SPLT talks, although they insist on a preliminary survey in order to access all relevant aspects for the subsequent negotiations. (Interview 038; 044; 045)

The quarrels over the constitution of a Development Agenda committee demonstrate the importance of the WIPO General Assembly. Although delegates are quite autonomous in terms of substantive negotiations, they depend on the committee’s mandate that is defined at the General Assembly. (Interview 040; 042) In 2005, the U.S. delegation together with Japan and the EPO introduced a proposal at the General Assembly to exclude the disclosure requirement for genetic resources from the SCP negotiation mandate. (WO/GA/31/15) Their suggestion, however, was defeated by the Assembly, that decided to charge the WIPO director general with informal consultations. Again, the outcome of these consultations was rejected at the next General Assembly by developing countries’ delegations. (WO/GA/32/13: 40ff)

All in all, the General Assembly may be perceived as a hung parliament. On the one hand, most WIPO member states are developing countries. Thus, one might expect that a majority would defend the interests of the Southern hemisphere. On the other hand, the General Assembly’s decision-making is generally not subjected to votes, but to informal agreements and tradeoffs. As relevant pre-negotiations take place between the chair of the General Assembly, committee chairs and representatives from regional groups, the more united alliance of industrialized countries may deploy a “divide and conquer” strategy in order to water down the positions of regional groups comprising developing countries with heterogeneous interests. (Interview 046) In consequence, the General Assembly’s resolutions regularly end in a vague compromise wording that remains open to diverging interpretations.

During the sessions of the General Assembly, the WIPO secretariat takes a backseat, most probably for the same reasons as in the SCP. However, it has a more proactive role in the Program and Budget Committee (PBC), which is responsible for the allocation of financial resources to each WIPO committee. The International Bureau drafts a proposal for WIPO’s

budget. The proposal is discussed in the PBC in the first instance and finalized according to the amendments of the General Assembly. Thus, the International Bureau acts as an agenda-setter within the PBC and has considerable discretionary power when it comes to define the priorities of the organization.

Nevertheless, it has to anticipate conflicting perspectives and power arrangements. On the one hand, the General Assembly is unlikely to accept a resource allocation plan that is directly opposed to developing countries' interests. Furthermore, the PBC is actually chaired by the delegation of a middle-income developing country. (Interview 046) On the other hand, WIPO financially depends on the PCT system, i.e. its resources stem from industrialized countries' applicants for a preliminary patent examination. (May 2007a: 166) Most notably, the U.S. exerts some pressure on the International Bureau by demanding a 15% reduction of PCT fees. (WO/PBC/11/17 Prov.: 8) In consequence, the International Bureau is not entirely free in defining its priorities. Rather, it has to comply with the industrialized countries' preferences without snubbing the Southern hemisphere and vice versa. All in all, a one-sided approach is not to be expected neither from the International Bureau nor the PBC or the General Assembly.

2.3 Provisional results

Apart from the schisms described in the first chapter, the SPLT talks within the Standing Committee on Patent Law (SCP) are primarily impeded by the delegates' varying professional backgrounds and negotiation mandates. The WIPO Secretariat does its best to moderate between the negotiation parties. At the beginning of the second round of the SPLT talks, WIPO has shown sympathetic to the European position on patent law harmonization. The introduction of a Development Agenda, however, has led to a "change of culture" (Interview 041), and the International Bureau is eager to demonstrate strict neutrality. Nevertheless, its influence has remained limited. Although the International Bureau disposes of considerable discretionary power in the preparatory stage of SCP sessions, its suggestions are likely to be defeated if they are opposed to one of the dominant negotiators' positions. For the same reason, both informal consultations and the involvement of interested third parties have not improved the International Bureau's performance as a facilitator.

The negotiations on the SPLT take place in the context of neighbouring discussions held in other WIPO committees. Similarities in the discussed subject matters provide an incentive for

all negotiators to seek adequate forums for their policy goals. Moreover, the discussions in one negotiation forum are often played off against expected results in another committee. As a result, delegates' tactics of internal-forum shifting tend to impede the overall process. Higher-ranking levels such as the General Assembly or the Program and Budget Committee are unlikely to prevent these tactics. Although they formally have the power to define the committees' mandates and/or to cut their resources, they suffer from a stalemate between developing and industrialized countries' positions. Generally, their resolutions remain vague and open to interpretation. At least in the case of major disagreements between member states, the consensus-oriented method of operation within all WIPO organs and levels is not inclined to advance the decision-making process.

3 Bringing patents into context: WIPO in the framework of the UN and the WTO

Since 1967, WIPO administers all but one internationally binding, patent-related treaties. (May 2006) As WIPO is the principal institution "to shape and converge the expectations of participants" (Arts 2000: 516) in this policy field, it may be qualified as the focal point of the world patent regime. However, WIPO discussions and regulations do not evolve in void. As a UN Organization, WIPO has agreed "to co-operate within the field of its competence with the United Nations and its organs" (UN-WIPO agreement from 1974: Art. 10). Apart from statutory relations, the discussions on patent law harmonization are substantially linked to the policy goals which are pursued in other UN organizations, e.g. the Food and Agriculture Organization (FAO), the Convention on Biodiversity (CBD) or the UN Conference on Trade and Development (UNCTAD). It can be assumed that these inter-organizational relations will have an impact on the outcome of negotiations within WIPO itself. The following chapter attempts to analyse the implications of WIPO's organizational environment with regard to the presented threefold conflict on patent law harmonization. In the first subsection, the influence of other UN organizations will be scrutinized (3.1), whereas the second subsection concentrates on the World Trade Organization's impact on the SPLT talks (3.2).

3.1 WIPO and the UN organizations

During the 1990s, most developing nations adopted a *sui generis* regulation in respect of the protection of genetic resources in order to avoid their patentability.⁷ However, national regulations proved as a blunt weapon, because they are not enforceable abroad⁸. National regulations did not prevent Northern life science industry from obtaining patents on products or processes based on the Southern biodiversity within their domestic jurisdictions. Hence, developing countries pushed for international treaties protecting their biodiversity from what they perceived as “biopiracy” (Bödecker et al. 2005: 29ff). At first glance, their ambitions seemed complementary to some industrialized countries’ demands for preserving biodiversity (Jungcurt 2006: 21), and developing countries successfully reached an agreement on the Convention on Biodiversity (CBD) under the umbrella of the UN Environment Program (UNEP) in 1992. (Raustiala/Victor 2004) In 2004, a comparable agreement in respect of economic plants was concluded under the FAO. (Lightbourne 2005: 16)

Both the CBD and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) start from the assumption that genetic resources and traditional knowledge shall be regarded as government property. (Raustiala/Victor 2004: 290) The treaties enable (CBD) or commit (ITPGRFA) developing countries to exempt natural resources from patentability. (Lightbourne 2005) In respect of products and processes based on genetic resources or traditional knowledge, both treaties apply the ABS (“access and benefit sharing”) concept. (Musungu 2007) Foreign bio-prospecting corporations are not allowed to exploit these resources, unless they have sought and obtained an approval by national authorities. These clauses are intended to ensure that national governments may demand an appropriate participation in profits, be it terms of a financial remuneration or an agreement on technology transfer. (Götting 2004: 733f)

Although both treaties seem to establish a balance between the interests of developing countries and Northern life science corporations, they have two serious weaknesses. First, they do not provide for an effective enforcement mechanism (Rosendal 2006: 437), and second, the U.S. as the homeland of most life science corporations has neither ratified the CBD nor the ITPGRFA. As both treaties may be considered as “paper regimes” (Arts 2000: 518), develop-

⁷ According to TRIPS (Art. 27.3b), plant resources or animals may be excluded from patentability, if member states provide for alternative protection mechanisms. Most contracting parties have used this clause by applying the Union for the Protection of New Varieties of Plants (UPOV) Convention as a *sui generis* regime. (Bödecker et al. 2006: 58f).

⁸ Only four countries have ratified the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. (Correa 2001: 17)

ing countries try to establish a linkage between CBD / ITPGRFA and a disclosure requirement in the SPLT. If Northern patent offices were compelled to make a check on patent applications' conformity with the CBD provisions, western corporations exploiting genetic resources would be obliged to seek the consent of the countries of origin. Even if Northern patent offices granted a patent without the prerequisite allowance and compensation, developing countries could challenge the corporations' patents before U.S. or European courts. From the Southern countries' point of view, a disclosure requirement for genetic resources or traditional knowledge could supplant the lacking enforcement mechanisms in the CBD and the ITPGRFA. For the same reasons, both the U.S. and the EU oppose such a commitment. They are not willing to accept substantial losses for their domestic biotech or agro-business corporations.

From a legal standpoint, WIPO diplomats confirm that the linkage between the SPLT and the CBD provisions would be conceivable. (Interview 042) However, such an undertaking would raise serious practical problems with regard to the cataloguing esp. of traditional knowledge. (Correa 2001: 16f; Rosendal 2006: 438). Nevertheless, FAO has developed an index of genetic resources exempted from patentability (Rosendal 2006: 429), and WIPO and FAO have made first experiences in the patent research for rice plants (FAO 2006). Acting on its own behalf, WIPO has initiated an "Online-Portal of Databases and Registries Related to TK and Genetic Resources". Under the EU law (but not under the U.S. Patent Statute), data registered in such an index negatively affect the novelty requirement of an application and forestall a patent on the claimed inventions. (Götting 2004: 735)

Although not all practical problems seem to be resolved for the time being, political obstructions are rather decisive for the weak linkage between the CBD and the WIPO regimes. Apart from the industrialized countries' protests, the lack of interest on the part of the relevant secretariats provides for an explanation for the incomplete cooperation structure. To the disappointment of developing countries' negotiators, neither FAO nor CBD had been participating in the SPLT talks. (Interview 044) Potential reasons might be a shortage of staff or the fact that CBD is eager to act independently from other organizations. (Interview 043) In the case of FAO, WIPO has tried to safeguard its prerogatives on all patent-relevant issues. (IP Watch, 1 October 2006) Nevertheless, Southern negotiators oppose the marginalization of FAO. (Interview 044) All in all, the engagement of CBD and FAO is rather inclined to increase in the future. (Interview 045; 046) Apart from Southern delegates, critical NGO, who are quite active at least in the CBD context (Matthews 2006: 30), are likely to insist on their commitment.

In each case, the mere existence of the CBD and FAO regimes challenge the western-centric perspective on patent law harmonization. (Götting 2004: 732)

The same holds true for the relationship between WIPO and the UN Internet Governance Forum (IGF) or the World Health Organization (WHO). Both UN bodies seek to enhance developing countries' supply of modern technologies, i.e. information and communication infrastructure and medicines. The IGF, for example, is committed to "advise all stakeholders in proposing ways and means to accelerate the availability and affordability of the Internet in the developing world." (IGF 2007) As the Southern hemisphere would profit from the deployment of open source and free software (Rajani 2002), the IGF is supposed to take a critical stance on all-encompassing property rights. In respect of medical care, the adoption of western patent standards seems even more detrimental for the Southern countries' development. (Barton et al. 2002: 29ff)⁹ In a recent report, WHO emphasizes that "monopoly costs associated with patents can limit the affordability of patented health-care products required by poor people in the absence of other measures to reduce prices or increase funding." (WHO 2006: 32)

The 2001 draft provisions of the SPLT, however, stated that "patentable subject matter shall include products and processes which can be made and used in any field of activity" (SCP/6/2: 28). Such a provision would have had overridden the exemptions for medicines laid down in the public health provisos of the TRIPS agreement and the Doha declaration. At the same time, the draft provisions of the SPLT would have extended the patentable subject matter far beyond the "industrial applicability" precondition, as it is prescribed in the European Patent Convention (Art. 57). "Software as such", which has been precluded from patentability in Europe (EPC Art. 52), would have been subordinated to patent regulations. So it comes at no surprise that both developing countries and EU member states protested against the wording of the SPLT draft provisions. (SCP/6/9: 30f)

One could have expected that, given the manifest conflict between the SPLT and the mission of WHO and IGF, both organizations would have taken a hand in the WIPO discussions. Actually, IGF representatives have never appeared in the SCP sessions, and the rare visits of a WHO official had been triggered by an intern's research for his doctoral thesis. (Interview 049) Both organizations' neglect for the SPLT talks may be explained by two reasons. The first problem relates to human resources. IGF is understaffed due to its financial situation, and WHO's constituency is usually trained in medical sciences, not in law. (Interview 044)

⁹ In recent discussions, the controversies about free software and health treatment show a tendency to converge. The Tropical Diseases Initiative, for example, proposes an open source model for pharmaceutical research projects. (Stolpe 2006: 130)

Second, both organizations are strongly influenced by proponents of a rigorous intellectual property regulation. The Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG), which addresses the treatment of neglected diseases under the umbrella of the WHO, is strongly contested by pharmaceutical industry representatives. (IP Watch, 30 January 2007). A current resolution of the World Health Assembly focussing on alternative Research and Development incentives has been vehemently opposed by the U.S.. (IP Watch, 23 May 2007) Thus, as long as the WHO is not able to define a coherent policy position on intellectual property, it cannot be expected to exert a direct influence on the WIPO patent agenda. The IGF faces similar problems. It receives its mandate from the World Summit on Information Society (WSIS). At the 2005 summit in Tunis, Microsoft prevented any statement propagating the use of open source software. (heise 2005) Generally, industrialized countries' representatives and corporate delegates attempt to eclipse intellectual property issues in the WSIS process. (Shashikant 2005: 10f)

Although neither the WHO nor the IGF have the capacity to intervene directly in the SPLT talks, both regimes may exert an indirect influence on the restarting negotiations. The WHO discussions on the maintenance of TRIPS flexibilities (Sell/Prakash 2004: 163; Shadlen 2004: 90) may corroborate the developing countries' claims for "ordre public" provisos. By quoting, for example, the recent WHO report on the consequences of patents, they dispose of a reliable source supporting their arguments. (Interview 037) In respect of the ongoing WSIS process, WIPO simply cannot afford to neglect the interrelation of intellectual property and internet governance for the sake of its own credibility. During the last IGF meeting in Athens (2006), the WIPO secretariat has tried to present intellectual property as a prerequisite for a sustainable technological development of the Internet. (IP Watch, 7 November 2006) Nevertheless, WSIS participants had already shown in 2005 that they were quite suspicious about WIPO's conception. (WIPO/CRRS/INF/1)

Moreover, WHO, IGF and the WSIS process have attracted numerous actors from civil society. Increasingly, their attention shifts from these forums to WIPO as the rule-making body. Civil society organizations like CP Tech (now: Knowledge Ecology International) use the background information obtained in WHO for their lobbying activities in WIPO. (Interview 041) The A2K@IGF coalition, as another example, plans to push for an Access to Knowledge treaty at WIPO. (IP Watch, 15 February 2007) As members of the European Parliament are at the forefront of the A2K@IGF¹⁰, civil society organizations around the WSIS process may get an even closer contact to the WIPO committees due to the assistance of European legisla-

¹⁰ See <http://www.a2k-igf.org/> (accessed 16 August 07).

tors. All in all, WHO as well as IGF and WSIS may not be influential enough to have a direct impact on the SPLT talks, but they can serve as a nodal point for a network of civil society organizations, that may support negotiators from the developing or the European countries.

The UN Conference on Trade and Development (UNCTAD), however, is supposed to exert a more direct influence than the above mentioned organizations, although to a moderate extent. After it had become marginalized in the aftermath of the TRIPS agreement, UNCTAD has begun to define its new role as an advisory body for developing countries' needs. (May 2004: 827) Thereby, the organization focuses on the interrelation of intellectual property and technology transfer issues. Under its auspices, multiple surveys have been carried out, illustrating the detrimental consequences of western intellectual property standards in the Southern hemisphere (e.g. Story 2004; Garrison 2006). Most notably, its research results sustain the developing countries' perspective that a high standard of intellectual property protection does not correlate with an influx of foreign direct investments. (Moniz 2005: 14f) These results frustrate the main argument that U.S. negotiators use to defend patent protection in the Southern hemisphere.

Developing countries' advocates tend to circulate UNCTAD papers in the run-up to SPLT negotiations (Interview 046), and discussions sometimes directly refer their conclusions. (Interview 037) Occasionally, UNCTAD holds seminars at the same time and in the same buildings like the SPLT negotiations. By these means, participants of the SPLT talks are inevitably confronted with concurring perspectives on intellectual property. (Interview 038) Recently, UNCTAD officers participate in the WIPO colloquia on patent law. (Interview 042) Moreover, UNCTAD serves as a discussion forum for developing countries' negotiators, in which they can coordinate their positions vis-à-vis U.S. or European delegates. During the meetings, UNCTAD officers do not simply act as moderators. They often go far beyond and advice Southern delegates how to proceed during the talks. (Interview 034) Whereas middle-income countries do not depend on the assistance of UNCTAD, particularly negotiators from weaker developing countries express their appraisal for the organization's collaboration. (Interview 044; 045)

The comparable high engagement and expertise of UNCTAD officers certainly is associated with the role UNCTAD plays in the enforcement of intellectual property rights. After the conclusion of the TRIPS agreement, developing countries were eligible for technical assistance in respect of its implementation. (Abbot 2006) Numerous actors – WIPO, the EU and the U.S. government as well as a multitude of public-private partnerships – participate in developing

countries' capacity building and enforcement of intellectual property rights. (May/Sell 2006: 177) Whereas most actors' recommendations focus on a rigorous implementation following a "one size fits all" approach (May 2004b: 822), UNCTAD attempts to assist developing countries in preserving the flexibilities TRIPS offers in respect of public health or "ordre public" provisos. (Matthews/Munoz-Tellez 2006: 647ff) Thus, UNCTAD may be perceived as an antagonist to the WIPO, or at least to the WTO, that shall be dealt with in the following subsection.

3.2 WIPO and WTO

Although WTO is not a UN body, it is considered the most influential international organization in terms of its impact on national economies. (Gilpin 2001: 382) Within the diplomatic community of Geneva, it is referred to as "the king of the town". (Interview 043) In 1994, U.S. negotiators assisted by European delegates successfully reached the conclusion of the Treaty on trade-related intellectual property rights (TRIPS) under the umbrella of WTO, after a similar undertaking had failed in WIPO. (Drahos/Braithwaite 2002: 111ff) The very special genesis of the TRIPS agreement contains the reasons for the ongoing controversies between developing and industrialized countries on the one hand and the complicated relationship between WIPO and WTO on the other.

As it is widely acknowledged, major U.S. corporations had pushed the U.S. Trade Representative to forum-shift from WIPO to WTO in respect of intellectual property rights. Therefore, they had been in need of the support of European business organizations in order to convince EU delegates to cooperate with the U.S. (Sell 2000: 92ff; Stegemann 2000: 1241f) Together, the U.S. and the EU delegations managed to overcome the initially fierce resistance of developing countries against an all-encompassing treaty and its enforcement by the WTO Dispute Settlement Body. (Drahos 2001: 793; Charnovitz 1998: 130; May 2000: 68) Southern countries finally gave in, after the western representatives had made substantial concessions in respect of market access possibilities for agricultural products and textiles. (Moniz 2005: 25f; Graz 2004: 610)

The conclusion of the TRIPS agreement may be perceived as a watershed. (May 2000) WIPO lost its leading role in the international arena of intellectual property regulation to WTO. Although the TRIPS agreement directly referred to the treaties administered by WIPO, the subsequent cooperation agreement between WTO and WIPO based on the latter's subordination.

Apart from sharing all relevant infrastructure (library of legal documents, databases etc.), WIPO is requested to assist the TRIPS implementation in developing countries. (WTO-WIPO 1995: Art. 4) Till this day, WIPO has not overcome the frustration caused by its loss in competence. WIPO and WTO closely cooperate on implementation issues and participate in each others' meetings (Interview 042), but observers and diplomats regularly mention "a frozen atmosphere" between both organizations' staff. (Interview 043; 044)

Although TRIPS may be considered the most encompassing treaty on intellectual property, its provisions clearly reflect the compromise that has been negotiated between U.S. and EU business organizations. TRIPS provisions impose the application of intellectual property protection to nearly all intangibles, but they are much less precise in terms of the specific design of these rights. Reverse engineering, for example, is not precluded, and the wording is quite ambiguous in respect of compulsory licences, research exemptions etc. (Gold/Lam 2003; Reichmann 2002). Most notably, the explicit non-interference with the exhaustion principle (TRIPS Art. 6) clearly reflects the concessions made to EU negotiators. Public interest provisos (TRIPS Art. 7) enable contracting parties to defend regulations which are favourable to their economic development. All in all, the European reluctance to subscribe to a more substantial agreement has given some leeway for development-friendly interpretations of TRIPS. These tendencies have been slightly reinforced by subsequent amendments such as the „Doha Declaration on the TRIPS Agreement and Public Health“. (Sell 2006; Shadlen 2004)

The persisting ambivalences in TRIPS explain why the U.S. and some business pressure groups push for a more substantial definition of patent requirements. However, the WTO is not any longer perceived as an appropriate forum for different reasons. First, the discussion of the technical details of patent applications would not fit in the trade-related context of WTO negotiations. (Interview 044) Second, developing countries would hardly subscribe to a TRIPS amendment concerning an extended patent protection. For the time being, industrialized countries have failed to keep their promises in respect of market access possibilities for developing countries. (Graz 2004; Ethier 2004) Thus, many developing countries are not prepared to accept what they perceive as even more restricting intellectual property standards (Interview 047), unless the industrialized countries decrease their subsidies and tariffs for agricultural products. (Interview 034)

Third, and perhaps most important, some middle-income countries have become aware of their market power if they defend a common position. (Koenig-Archibugi 2003) They try to achieve their policy goals, e.g. in respect of the disclosure of genetic resources, not only in

WIPO but also in the TRIPS Council. (Sell 2006) For the time being, they have not reached concrete results, given the resistance of the U.S. and the EU as described for the SPLT talks. (WTO 2007; WTO 2007a) Nevertheless, Southern negotiators express the aspiration that industrialized countries could finally accept their proposals in order to achieve the conclusion of the WTO Doha round. (Interview 044)

Given the latent competition between WIPO and WTO, the fact that an enhanced patent protection is unlikely to be negotiated in the WTO is supposed to have a direct impact on the strategic choices of the WIPO secretariat. If WIPO facilitated a closer harmonization of patent law, it would be able to reprise its leading position in the sphere of intellectual property regulation. In such a scenario, WIPO could turn the balance of power upside down. Whereas the most relevant treaty would be administered under its auspices, the WTO Dispute Settlement Body would only be considered as a provider of a useful enforcement mechanism.

3.3 Preliminary summary

WIPO and some other UN organizations like CBD (UNEP), FAO, WHO, IGF and UNCTAD may be perceived as “overlapping regimes”. (Alter/Meunier 2006) Although the organizations’ policy goals partially address the same regulatory subject matter (e.g. genetic resources, technology transfer and pharmaceutical care), they differ remarkably in their leading “policy paradigm” (Wilson 2000: 257). Whereas WIPO is committed to transform innovative knowledge into tradable goods, UNCTAD, WHO and the IGF focus on the accessibility of these goods in developing countries. More fundamentally, CBD and FAO challenge the western-centric perspective on intellectual property by hinting at the origins of these goods, which justifies a pre-ownership assumption for the Southern hemisphere.

For the time being, WIPO is only “loosely coupled” (Benz 2003; Eberlein/Kerwer 2002) with the other UN organizations, i.e. decisions and regulations of these bodies do not directly interfere with the SPLT negotiations. Nevertheless, developing countries’ negotiators try to achieve a more tightly coupling of WIPO and its neighboring organizations. From their perspective, the discussed SPLT should serve as an enforcement mechanism for the CBD and the FAO treaty. Technology transfer, as it is propagated in UNCTAD, WHO and the IGF should also be linked to the design of an international treaty on patent law. Although the opposition of both the EU and the U.S. has forestalled such a linkage, the surrounding UN organizations exert an indirect influence on the SPLT negotiations for two reasons. First, they offer alterna-

tive frames to discuss intellectual property issues, e.g. by research papers and occasional contacts. Developing countries and, to a lesser degree, European delegates may use these alternative viewpoints by implementing them in their argumentations. Second, WIPO's neighboring UN organizations attract numerous civil society actors. As soon as they become aware that WIPO is the decisive law-making body, their attention may shift to the SPLT talks. As presented in section 1.2, their support for developing (or occasionally European) countries' claims may serve to counterbalance the U.S. position.

Compared with the UN-WIPO interactions, the latter's relationship with the WTO may be described as a "tight coupling" (Benz 2003), i.e. their policy objectives are closely interrelated. Most notably, the conclusion of TRIPS has had a deep impact on WIPO's room for manoeuvre. On no account, WIPO may fall short of the intellectual property standards prescribed in TRIPS. Otherwise, the organization would entirely lose its attractiveness as a negotiation forum for industrialized countries. The only way to reprise its leading role in international patent law would be a more comprehensive treaty framework than TRIPS. Therefore, WIPO would have to convince developing countries to accede to such a covenant. That, in turn, would suggest that such a patent treaty should by necessity contain some provisions in favour of the Southern hemisphere. As yet, WIPO has not found a way to solve its dilemma.

Outlook and conclusions

At the risk of being falsified by the reinvigorated talks, the results presented in this paper suggest that the conclusion of an international treaty on patent requirements does not appear probable in the near future. The divergences between developing and industrialized countries on the one hand and between the U.S. and the EU on the other seem fundamental in nature. Although the U.S. is able to invest considerable resources in the negotiations, developing and European countries dispose of an array of intermediary actors, which may support them in terms of providing useful information and coordination forums. In consequence, a balance of power between the three competing blocks can be assumed. Moreover, the institutional setting of WIPO is not likely to advance a resolution of the conflict. Parallel discussions in different committees tend to encourage actors to forum-shift or simply to play for time. Supervisory WIPO organs are not able to impede these tactics, because they suffer from the same stalemate as the working groups. As WIPO decision-making procedures are based on a broad consensus, the persisting ambiguousness is not likely to be resolved.

Finally, the existing WIPO patent regime is subjected to antagonistic push- and pull-factors. Neighbouring UN organizations exert a slight influence in favour of third parties' and public interest considerations. Moreover, developing countries try to utilize the SPLT as an enforcement mechanism for the CBD. However, the specific melange of cooperation and competition between WTO and WIPO deters the latter from such an attempt and provides WIPO with an incentive to push for enhanced patent standards on a global level. These results taken together suggest that WIPO will neither comply with the industrialized countries' demands for a harmonized standard on patent requirements nor will it be able to contribute to the Millennium Goals as they are interpreted by developing countries.

In respect of the industrialized countries, the lack of harmonization will stipulate a further development subjected to domestic or regional trajectories. Recent trends in Europe tend to indicate a latent suspicion on all-encompassing patent protection. Due to persisting divergences between European countries, an exact projection even of the near future seems too audacious. However, even if the contracting parties of the European Patent Convention decide to limit the scope of patentability for domestic reasons, they are unlikely to relax their efforts to enforce existing entitlements in third countries. The same holds true for the U.S. Recent decisions of the Supreme Court and an ongoing discussion on patent law reforms in the U.S. Congress notwithstanding, it is anything but clear if these reforms will lead to a rapprochement towards the European regulatory practices. Moreover, even if the most controversial aspects of the U.S. patent system were reformed domestically, U.S negotiators would not necessarily be inclined to accept national "checks and balances" overseas. (Abbott 2006)

As regards developing countries, they partially depend on trade preferences granted by the U.S. or the EU. Thus, most of them will continue to sign bilateral trade agreements, by which they commit themselves to the same or even higher standards of patent protection than they oppose in the SPLT talks. (Straus/Klunker 2007; Abbott 2006) Additionally, the most-favoured-nation clause prescribed in the TRIPS agreement will have a leverage effect in terms of an increased patent protection worldwide. (UNCTAD 2007; Drahos 2001: 802) However, the relative rigidity of patent protection will vary to a large extent. Depending on individual developing countries' negotiation strength and political considerations beyond commercial diplomacy, free trade agreements with the U.S. or the EU contain substantial discrepancies. (UNCTAD 2007) In consequence, middle-income developing countries are supposed to withstand regulations they perceive counterproductive to their development. Nevertheless, they will most probably loose some important allies in respect of the Development Goals they push

for at WIPO. Thus, the envisaged usage of the SPLT as an enforcement mechanism for the CBD will remain beyond reach.

If one subscribes to the developing countries' interpretation, the unlikelihood of a substantive patent law harmonization at WIPO furthers a trend of bilateralization that is detrimental to development policies. But even if accepting the industrialized countries' point of view, looming inconsistencies in national patent regulations must be considered a serious threat for the advancement both of the Northern and the Southern hemisphere. Thus, irrespective of the perspective taken, the failure of a global patent regime and the subsequent ongoing bilateralization will not be helpful for the achievement of the UN Millennium Goals.

Nevertheless, the case of the WIPO SPLT negotiations allows for some general observations with regard to the analysis of regimes and regime complexes. First of all, it challenges the assumption that a regime can be equated with an organization. The WIPO Standing Committee on the Law of Patents (SCP) is in charge with the international harmonization of patent law. At the same time, other WIPO committees such as the IGC or the (provisional) committee on the Development Agenda can be characterized as countervailing agents. Thus, WIPO as a single organization hosts two competing regimes at the same time, which illustrates that regimes and organizations are not necessarily congruent.

Furthermore, the example of the SPLT sheds some light on the characteristics of "regime complexes", i.e. „an array of partially overlapping and non-hierarchical institutions governing a particular issue-area" (Raustiala/Victor 2004: 279). The relationship between the SCP and other WIPO and WTO entities meets the criteria of the quoted definition. Treaties that are negotiated in the SCP or its precursory committees are referred to in the TRIPS agreement, and compliance to the treaty framework is ensured by the WTO Dispute Settlement Body (DSB). Moreover, some other WIPO committees play an important role in respect of technical assistance for developing countries.

On the one hand, the various entities of the patent regime complex are complementary to each other. The envisaged SPLT would remain toothless without the DSB, but its enforcement would not be perceived to be legitimate if developing countries were not eligible for WIPO's technical assistance. On the other hand, negotiations within the TRIPS Council may lead to amendments that can potentially override the conclusions reached in the SCP and vice versa. Apparently, the relationship at least between the norm-setting elements of the patent regime complex cannot be described in terms of subordination, cooperation or cooperation. Although a categorization of "nested" or "overlapping" regimes (Koenig-Archibugi 2003) may some-

times prove helpful for analytical purposes, these differentiations may fail to describe the empirical reality. (Alter/Meunier 2006: 363f)

Finally, the mere existence of the patent regime complex may be contrasted with the failure of establishing a parallel regime for the protection of genetic resources and traditional knowledge. The comparison may provide some insights into the principles leading to the formation of a regime complex. As regards the linkage between WTO and WIPO entities, U.S. and EU negotiators backed by domestic business organizations achieved to establish a corporation of two separate organizations in a single regime. However, the regulatory subject matter of the regime complex seems constricted to the area of consensus between these actors, even if both sides stand to profit from a deeper harmonization.

On the contrary, developing countries, even if they are supported by an armada of civil society organizations, do not appear able to push for a parallel cooperation between WIPO committees and the CBD, even if all organizations involved are bound to the normative framework of the UN Millennium Goals. The alliance of U.S. and EU negotiators successfully combat the emergence of such a regime complex. The fact that developing countries aim to achieve a more tightly coupling between WIPO committees and the CBD challenges the assumption that regime complexes necessarily favour strong actors. (Drezner 2007) Rather, weak actors do not seem to dispose of the capacity to initiate regime complexes that are supportive of their political priorities. Comparing the existing, albeit imperfect patent regime with the bad success of the proposed regime for genetic resources, one can derive the conclusion that a regime complex will only emerge, if powerful actors are willing to establish a close tight coupling between to existing regimes.

Taken together, the analysis of the SPLT negotiations allow for the following generalizations. First, regimes tend to transcend organizational borders. Therefore, an analysis of regime complexes should conceive organizations as an independent, not a dependent variable. Second, the various constituents of a regime complex may behave competitively and cooperatively at the same time. More research both on a conceptual and an empirical level is needed in order to assess suitable categories to describe the relationship between various elements of a regime complex. Third, both the initiation and the prevention of regime complexes depend on the existence of powerful actors comprising governmental and intergovernmental agents as well as economic pressure groups. If alternative constellations may also lead to the emergence of sustainable regime complexes, remains open to further research.

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