

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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no one regime is supreme over others as a legal matter. Moreover, the international legal system is disaggregated. Regimes and rules are developed in one forum that frequently implicate or even challenge regimes and rules developed in other forums.

As the PGR case illustrates, one result of rising density in this context is the development of overlapping but discrete regimes, often with conflicting rules during periods of transition to new interests and rules. ***

In the remainder of this article we use the PGR case to illustrate and probe the conjectures about regime complexes described in the introduction. Our argument is not that existing regime theory is fatally flawed, but rather that it is oriented around a model of regime development that fails to reflect the growing concentration and interconnection of institutions in the international system.

No Clean Slate

Existing scholarship on international regimes has generally, if implicitly, assumed that the process of regime formation begins with an institutional clean slate. In most empirical studies of regime formation negotiators arrive at the task of creating a regime without any explicit international rules in place; previous arrangements – if they exist at all – are readily discarded or adjusted. In these accounts, states with different interests vie to shape the outcomes, and institutions are crafted to serve the political agreement. ***

In a regime complex, by contrast, negotiations over most substantive rules commence with an elaborate and dispersed institutional framework already in place. The institutional slate is not clean. Ideas, interests, and expectations frequently are already aligned around some set of existing rules and concepts ***. Consequently, power, interests, and ideas do not directly map onto the norms that become enshrined in the agreements at the core of the regime; the content and evolution of rules does not trace neatly back to changes in the underlying driving forces. We expected that the lack of a clean slate would affect the development of the rules in the elemental regimes in a path-dependent manner – and, consequently, the evolution of regime complex as a whole. Despite the history of PGR being one of dramatic change – a normative shift, over many years, from common heritage to propertization – in many respects this expectation was borne out. We found path dependence at the meso scale, in that particular rules affected and constrained the architecture of subsequent rules. Yet at the macro scale the regime complex exhibited marked change.

One example of how previous expectations and institutional accretion affect outcomes in a regime complex is the creation of strong property rights for worked PGR. When negotiators in TRIPs began crafting rules for PGR in the late 1980s, there were several sets of rules already firmly in place. For decades, the community of plant breeders had built up the concept of plant breeders' rights and enshrined it in both international and domestic law. Some who opposed even this weak form of IP, predominantly concentrated in the developing world, had already established a marker in the 1983 FAO Undertaking. ***

With conflicting interests as well as divergent rules already on the books, it was impossible to gain consensus on a single approach to property rights. Yet the TRIPs negotiation, part of the omnibus Uruguay Round, could not be halted, so the negotiators adopted a broad umbrella approach. *** This approach contrasts sharply with more familiar cases of regime formation such as that of the Montreal Protocol on ozone depletion, where negotiators had diverging interests but the negotiation process was unconstrained by existing rules on ozone depleting chemicals.⁴¹ Faced with a clean institutional slate, the Montreal Protocol negotiators could strike a political compromise that directly reflected the power, interests, and knowledge within that issue-area, codified in precise rules with unambiguous timetables. The negotiators in the ozone regime were worried about how their decisions might affect other issue-areas – notably, they feared that provisions to apply trade sanctions against countries that refused to implement the Protocol's rules would run afoul of the GATT. The negotiators solved the problem by crafting trade restrictions narrowly and trying to navigate around any possible interactions with other regimes. * The negotiators of PGR provisions in TRIPs – which overlapped with rules being adopted in the FAO as well as in the CBD and the international gene bank system – faced a quite different situation. A multiplicity of overlapping rules and norms made it impossible to create a legal system that was isolated from the other elemental regimes.

The lack of a clean slate has at least two implications for the evolution of rules in a regime complex. First, when wary of conflicts between rules, the architects of new rules will attempt to avoid conflicts by demarcating clear boundaries. They will negotiate devices such as “savings clauses” and other mechanisms for disentangling one regime from another ***. Disentangling and demarcation appear to be viewed as a first best solution ***. (In a few cases, however, we observe explicit efforts to create

⁴¹ See Benedick 1991; and Parson 2003.

conflicts to force change in another regime – what we term “strategic inconsistency” – which we also discuss further below.)

Second, the sheer complexity of the interactions at high institutional density suggests that it will often prove difficult to demarcate boundaries clearly. In this context, the PGR case suggests that rules may evolve by a special pattern. When PGR-related matters have been linked to a much larger array of issues, the negotiating processes usually arrived at some agreement even when views were diverse and conflicting. *** Analysts often assume that broader negotiations allow for “negotiation arithmetic” that explores tradeoffs and seeks Pareto-superior deals.⁴² However, in the PGR regime complex the benefits or detriments of issue linkage were not critical ***. The “agreements” that resulted were usually broad to paper over differences, deferring resolution until later. The TRIPs rules on PGR exemplify this.

A quite different pattern appeared in elemental regimes that were specialized for PGR purposes – such as the FAO Undertaking. Unsurprisingly, serious negotiations yielded rapid agreement when key stakeholders shared core interests. For example, in the late 1980s the FAO was the first elemental regime to shift from the principle of common heritage to rules that allowed states to assert sovereign ownership of raw PGR. Indeed, the FAO employed exactly the language that was under negotiation in the CBD before it had been adopted in the CBD. The substantive narrowness of the FAO process made this rapid shift possible. ***

This pattern of evolution may help to explain why some interactions between elemental regimes are supportive and others yield rules that clash. The narrow, specialized elemental regimes that were under less political pressure to reach agreement tended to codify rules that reflected an emerging consensus. But agreements reached under pressure of a credible political deadline – such as the CBD and WTO – tended to yield more conflict. The CBD, for example, contained language on the scope of IP rights and requirements that governments adopt schemes to share the benefits of worked PGR – language that the U.S. government and many firms saw as aimed at undermining TRIPs.⁴³ The PGR case suggests a propensity for negotiators in highly complex areas to adopt broad and general agreements, if only because some of the complexity and conflict may resolve itself autonomously – in the sense that exogenous events or new political shifts may in time render the underlying conflict moot.

⁴² See Sebenius 1983; and Tollison and Willett 1979.

⁴³ Raustiala 1997.

Thus the 1989 Annex to the FAO Undertaking was a general effort to paper over different interpretations of the concept of “common heritage,” which just two years later was made obsolete by new interests that favored sovereign property rights.

Forum Shopping

The defining characteristic of a regime complex is the existence of multiple, overlapping elemental regimes. Given the availability of multiple fora for developing or elaborating international rules, we expected actors would attempt to select the forum that best suited their interests. The PGR case is consistent with this expectation.

The FAO, for example, served as the forum for the 1983 Undertaking that declared both raw and worked PGR to be the common heritage of all mankind. As part of the UN system and open to all states, the FAO was dominated by developing countries and thus became a favorable forum for asserting demands for wealth redistribution. By contrast, the United States and (to a lesser extent) the EU sought a different forum – the trade negotiations leading to the WTO – to push for new IP rules. The omnibus nature of WTO commitments and the exclusive membership criteria created high barriers to entry and made it easier for the United States to link IP issues *** to broader market access. ***

Created under the auspices of the UN Environment Programme, the negotiations that lead to the CBD originally centered on conservation ***. The UN Environment Programme (like FAO) was an open forum with low barriers to entry. Thus developing countries found it relatively easy to graft their IP agenda onto the CBD negotiations. What they were unable to achieve in other fora – notably TRIPs – developing countries tried to gain through linkages to biodiversity. The result was two diverging and distinct sets of rules, with the CBD rules on IP – mostly related to benefit-sharing – partly undercutting those in TRIPs. This divergence in substantive rules occurred despite the fact that the CBD and the WTO have broadly the same membership. The two institutions offered two distinct fora, with different bureaucratic representation, leading to different expressions of state interests and issue linkages. ***

Legal Consistency

Noting the general trend toward legalization in world politics, we expected that regime complexes would evolve in ways that reflect the increased

role of legal arguments and legal concepts in international cooperation.⁴⁴ One of the signal attributes of this shift to law is pressure for legal consistency. We expected that it might be extremely difficult to maintain legal consistency within a regime complex because of the complexity of issues and interests in the far-flung elemental regimes [and because the international legal system has no formal hierarchy of treaty rules.] ***

We found that the drive for consistency – a hallmark of legalization – has had a strong impact on the evolution of the PGR regime complex. The extremely large number of issues and complex interactions made it difficult for negotiators to ensure legal consistency; areas of persistent inconsistency became focal points for efforts at reconciliation and further bargaining. States responded to legal inconsistency in two linked ways. They first attempted to implement or interpret international norms such that inconsistencies evaporated. If those efforts failed then the inconsistencies set the agenda for subsequent negotiations. We find that these inconsistencies rarely persist within each elemental regime; rather, they arise at the “joints” between the elemental regimes.

This mode of development – driven by concern about achieving legal consistency – is illustrated in several conflicts surrounding PGR. ***

For example, when states in the late 1990s took up the task of negotiating the first protocol to the CBD – the Biosafety Protocol, intended to regulate trade in bio-engineered goods – they did so against the backdrop of provisions in the WTO that prohibited discriminatory barriers to trade.⁴⁵ The result was a massive bargaining effort focused on a “savings clause:” a legal provision inserted into the Biosafety Protocol that purported to immunize the WTO provisions from any inconsistency with the Biosafety Protocol. Similarly, the negotiation of the new Treaty on Plant Genetic Resources in the FAO was conducted against the backdrop of TRIPs and its strict IP rules. The result was a debate over whether to include a savings clause with the same aim: to protect the TRIPs provisions in the event of any inconsistency between the treaties. (Whether these savings clauses actually help to demarcate boundaries and establish priorities in the application of conflicting laws remains a proposition that lawyers debate).⁴⁶

⁴⁴ Goldstein et al. 2001.

⁴⁵ Notably the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures – both part of the Uruguay Round negotiations.

⁴⁶ Safrin 2002.

While efforts at achieving consistency drive much of the action within a regime complex, [states] may also attempt to create what we term *strategic inconsistency*. Cognizant that the growing legalization of world politics means that legal conflicts focus efforts at solutions, states at times attempt to force change by explicitly crafting rules in one elemental regime that are incompatible with those in another. For example, developing countries led the establishment of the original FAO Undertaking in a radical attempt to refocus the agenda toward a broad and controversial common heritage principle for all PGR. The CBD's rules on IP rights are another example – the CBD purposefully included language that [appeared to contravene the content of TRIPs.] For diplomats operating in a legalized setting, the existence of a glaring inconsistency across regimes sets the agenda for future efforts, which in the legal paradigm typically focus on ways to restore rule alignment.

Regime Development Through Implementation

In the traditional model of regime development, parties that seek a change in regime rules press their cause through formal negotiations leading to new rules; the implementation process follows thereafter in a “top down” fashion. Rules beget changes in behavior and compliance. The actual practice of regime implementation, however, is not linear or neat. Earlier studies have shown that when international rules are demanding and intrusive, they are more likely to conflict with other national commitments – making it difficult to plan and anticipate the process of implementation.⁴⁷ * * *

We hypothesize that the existence of a regime complex resolves this tension in favor of a “bottom up” style of evolution. Negotiators adopt broad rules because it is extremely difficult to work out the fine detail for all contingencies *ex ante*. Where that is not possible, they adopt specific rules that often yield conflicts in other elemental regimes. This approach, amply evident in the PGR case, in effect relies on the implementation process for experimentation with different solutions to the ambiguities and inconsistencies that arise from divergent rules and interests. The parties used their implementation experiences as guides for subsequent changes in the formal rules. This process certainly occurs in the domestic context.⁴⁸ In that setting, however, courts often exist to elaborate and fill

⁴⁷ See Victor, Raustiala, and Skolnikoff 1998; and Evans, Jacobson, and Putnam 1993.

⁴⁸ See Ingram 1977; Bardach and Kagan 1982; and Stewart 1975.

gaps in statutes; internationally, aside from a handful of distinctive regimes, courts do not exist to play that role. This implies that the feedback loop from implementation to formal rules is even more significant in the international than in the domestic context. Three episodes in the history of the PGR regime complex reveal this bottom-up process of rule development through implementation and interpretation.

First, the evolution of access rules for the international gene banks shows how incompatible interests led states to adopt broad rules with the hope that conflicts could be resolved *ex post* as implementation progressed. The CGIAR system was built on the principle of common heritage. The system's gene banks were open to all, a core principle challenged when developing countries shifted preferences in the late 1980s toward sovereign rights over raw PGR. ***

[The solution was codified in the 2002 Treaty on Plant Genetic Resources.] The treaty's principal purpose was to resolve some of the inconsistencies that had arisen in the regime complex. It created a special "multilateral system" for core crop resources, including the collections of raw PGR in the gene banks. In a sea of sovereign and private property, it carves out a special collective property right for a limited number of staple food and feed crops:

In essence, the multilateral system is a communal seed treasury composed of 35 food and 29 feed crops . . . in exchange for access to this common seed pool, those who commercialize products that incorporate plant genetic resources received from the multilateral system must pay a percentage of their profits into a fund to be administered by the Treaty's Governing Body. That fund will be used to promote conservation and sustainable use of plant genetic resources, particularly by farmers and indigenous communities, whose rights and contributions to genetic diversity the [2002 Treaty] expressly recognizes.⁴⁹

For these key crops, the economic gains from property rights were outweighed by the costs of creating and policing those rights, and thus actors sought a reversal of propertization. This solution was the culmination of a process that, we suggest, is a generic feature of regime complexes. The parties started with broad and conflicting rules. They tried to work out the problems, attempting first those solutions that were easiest to implement – actions "on the ground" that sought to interpret and adjust legal commitments in favorable ways. As those failed they sought remedies that required progressively greater legal coordination – creating a new legal agreement as the last resort.

⁴⁹ Helfer 2002.

A second example of evolution through implementation is the ongoing attempt at reconciliation of the various weak forms of IP for improved plant varieties, *** with the strong patents that many countries now grant. TRIPs accepts all of these systems because it was impossible to gain agreement on a precise rule *ex ante* ***. The TRIPs architects hoped that the implementation process would reveal which systems were most compatible with the diverse interests involved, and they built in a planned review of those experiences as a result. This review is proceeding slowly *** which underscores an earlier point about the dynamics of a regime complex: the codification of international norms is driven by credible deadlines, but the implementation process often drags on because politically the easiest solution in the face of conflict is to keep the rules broad and then defer the details until later.

The third example, still ongoing, involves two recent concepts in IP: “farmers’ rights” and “traditional knowledge.” [Modern IP law is] largely organized to protect discrete innovations that occur at a moment in time by identifiable persons; they are generally unable to protect innovations that reflect the slow accumulation of novel concepts by many (unknown) members of a community.⁵⁰ Farmers’ rights are “rights arising from the past, present and future contribution of farmers in conserving, improving, and making available plant genetic resources.”⁵¹ *** From the 1970s, the farmers’ rights movement called into question the dividing line between raw and worked resources, asserting that much of what is taken to be raw is in fact worked. *** The farmer’s rights movement has gained momentum as a broader group of indigenous communities – not just farmers – have realized that they could be victims of the same dividing line between “raw” and “worked” knowledge. As this broader coalition organized, it adopted a more general term: “traditional knowledge.”

*** Thus far efforts to protect traditional knowledge and to mandate the sharing of benefits that arise from its commercial use have not yielded much practical change ***. Now the World Intellectual Property Organization, which has been a peripheral actor in the PGR story, has convened a new working group to generate rules that recognize and reward traditional knowledge. This development may herald the arrival of a new element in the PGR regime complex. We expect that advocates for traditional knowledge will seek, through new WIPO rules, strategic inconsistency in the rules governing the allocation of benefits from PGR,

⁵⁰ Boyle 1997.

⁵¹ FAO 1995.

which in turn will force efforts to resolve the conflict through the various mechanisms and processes we have illustrated.

CONCLUSION

Genetic resources, while seemingly esoteric, are increasingly an arena of global conflict in world politics. The struggle over the control of plant genetic resources is at the core of this battle. During the past century, the international rules for PGR protection shifted quite dramatically from a common heritage, open access system to a system of sovereign resource rights and private intellectual property rights. We have argued that this transition was driven by the perception – and the reality – of the rising value of PGR, in particular as new techniques of genetic manipulation permitted innovators to add substantial value to plants. Propertization, initially resisted by the plant-rich developing world, decisively triumphed over common heritage.

This transition to an international property rights system did not occur smoothly. Rule evolution in the PGR case involved several distinct but overlapping international regimes interacting with each other as well as the domestic practices of key states. Whereas existing studies of international regimes have generally focused on regimes as single, self-contained entities, often built around a single treaty, the hallmark of the PGR story is the lack of any central, hierarchical international institution. The principles, norms, rules, and decision-making procedures that govern PGR have arisen and evolved in ways that are distinct from the existing body of theory about international regimes [– a regime complex rather than a regime.] The horizontal, overlapping structure and the presence of divergent rules and norms are the defining characteristics of a regime complex.

The regime complex for plant genetic resources is unlikely to be the first or the last such institution in world politics. Indeed, there are good reasons to believe that regime complexes will become much more common in coming decades as international institutions proliferate and inevitably bump against one another. *** Indeed, regime complexes may already be abundant – looking through this new conceptual lens, regime complexes may appear where previously analysts saw only individual decomposable regimes. ***

*** In a regime complex rules evolve against a thick backdrop of existing rules: there is no clean institutional slate on which actors pursue interests or wield power. This backdrop defines the regime complex but also generates its distinctive dynamics. In an international system

characterized by increasing legalization, the lack of legal consistency that flows from differing and overlapping rules pushes states to seek resolutions and to negotiate broad rules. At times, states also create strategic inconsistency as they seek to jolt rules in one or another direction.

Our work on regime complexes suggests not only some extensions for the theories of regimes but also advances the study of legalization in world politics. A hallmark of the regime complex is a shift in the locus of action – away from elemental regimes and toward legal inconsistencies that tend to arise at the joints between regimes, and away from formal negotiations and toward the more complicated processes of implementation and interpretation. As the scope of the regime complex grows and rules become more demanding and intrusive, the style of rule change shifts ever more to this more messy and complicated “bottom-up” system and away from the top-down mechanisms that are implicitly assumed in [mainstream regime scholarship.] *** More research that uses regime complexes as the unit of analysis will reflect a growing empirical reality. This type of research will also extend one of the most productive research programs in international relations – the study of international regimes – by integrating insights from studies on law and legalization, policy implementation and the role of institutions.

References

While citations within articles have been maintained, complete references have been omitted from the book. However, a complete set of references for each of the chapters in the book may be found at <http://www.cambridge.org/9780521861861>.

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