Bridging Intellectual Property and Cultural Heritage Law in the Practice of International Governmental Organisations*

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Abstract

The relationship between cultural heritage (CH) and intellectual property (IP) is often seen as one of the most thorny – or sometimes even unsurmountable – issues in the international governance of culture and cultural expressions. The axiological foundations of international IP law instruments and those on the safeguarding of the intangible CH are the most evident manifestations of this difficult relationship. In fact, the problems refer not only to the scope of competing legal regimes, but they also concern their practical operationalisation, i.e. the (non)suitability of international norms and institutional processes in addressing the relationship between IP and CH – especially 'on the ground'. This chapter explores the latter aspect and analyses how the collective/communal focus of CH legislation has been confronted with the individualistic and market-oriented regimes of IP law in the practice of international governmental organizations (IGOs). The analysis is not confined only to global (universal) IGOs with an explicit cultural heritage or IP mandate: particularly UNESCO and WIPO. It also covers those organisations which deal with the two issues in relation to regional and/or economic integration. It argues that the role of IGOs needs to be seen as an element of a larger, gradual process of the evolution of traditional individualistic conceptualisations and regulatory choices in respect of IP rights towards the wider recognition of collective aspects of creativity and the collective enjoyment of cultural heritage. Hence the core objective of this chapter is to investigate and characterise the role of IGOs vis-à-vis the growing regime complexity in developing and operationalising an international law framework dealing with the IP – CH relationship. Accordingly, the chapter outlines legal and policy instruments available to IGOs

in this regard and examines how these are used in practice, comprising various instances of cooperation between distinct organisations and their joint efforts in the fields of creativity and cultural heritage.

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Introduction

The relationship between cultural heritage (CH) and intellectual property (IP) is one of the most thorny or even unsurmountable matters in the international governance of culture and cultural expressions. The underlying and seemingly competing axiological foundations of international IP law instruments and those on the safeguarding of the intangible cultural heritage (ICH) are the most evident manifestations of this difficult relationship (for instance, see Burri 2020: 460-66; Martinet 2020: 97-98). Undoubtedly, the fundamental challenge relates to the subject matters involved and the different methodological and pragmatic lenses through which CH law and IP law view human creativity, as well as the reasons for its legal protection. Therefore, the international law-making and institutionalised forms for the international protection, safeguarding, and management of IP and CH originally developed separately from one another, driven by different interests, rationales, and priorities.

Today, the relationship between IP and CH presents a complex but interlinked setting, marked by a number of often competing legal regimes, institutions, and actors, on the domestic, regional, and international levels. The nature of this setting has been the subject of much scholarly investigation, comprising critical analyses of the regulatory frameworks applicable to the interplay between IP and CH established by the key international intergovernmental organisations (IGOs) in this domain – UNESCO and WIPO (for instance, see Macmillan 2020; Antons and Logan 2018; Blake 2017; Shyllon 2016; Kono 2009; Heath and Kamperman Sanders 2005). This chapter seeks to the contribute to these studies by demonstrating the actual roles and functions of IGOs dealing with the IP – CH relationship. The analysis is not confined only to global (universal) IGOs with explicit CH or IP mandates; it also covers those organisations which deal with the two issues in the context of regional and/or economic integration. Hence the core objective of this chapter is to investigate and characterise the role of IGOs in framing the IP – CH relationship, as seen through the lenses of the concepts of 'individual' and 'collective /communal' which are applied (though in many cases implicitly). It also explores to what extent the actions of IGOs in these domains have been driven and fostered by the growing regime complexity, including factors such as the particular interests of their members, as well as other considerations and actors within the IGOs themselves (see Helfer 2009).

Being aware of the fact that the structure, scope and operation of IGOs have greatly changed over time, we endeavour to describe and explain the evolution of the practices of IGOs in the context of the IP – CH relationship. Hence we first briefly present the origins of international IP and CH organisations. Secondly, we seek to identify the moment when the operationalisation of IP rights at the international level began to concern the protection of human creativity of a collective nature, showing how this was strictly related at first to the concept of folklore, and we offer an outline of the major inter-organisational endeavours in this regard. Thirdly, we address the nature of IGOs' engagement with both individual creativity and collectively created and enjoyed CH, primarily in the domains of international human rights and global trade. Fourthly, the balance between the protection of IP and CH is examined in light of the practice of regional IGOs. Finally, we scrutinise the role and place of IGOs within the context of the growing regime complexity (Alter and Raustiala 2018; Alter and Meunier 2009) that frames the present day IP – CH relationship.

For the sake of analytical consistency, in this chapter we follow the general 'classic' notion of how IGOs function under public international law (see Peters 2016). According to the International Law Commission (ILC), the basic definition of an IGO regards 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organisations may include as members, in addition to States, other entities.'[1] While this definition was provided in the particular context of the ILC's works on the responsibility of international organisations, it seems applicable more broadly as well (Bouwhuis 2012: 464). Moreover, we take this definition as a starting point to observe how IGOs navigate in an ever more complex and dense international system – in search of proper formulas which satisfy not only their member states, but also fulfil IGOs' objectives and mandates, all of which is analysed in the context and through the concept of regime complexity.

History of IP and CH international intergovernmental organisations

As already alluded to, international regimes for the protection of IP and CH initially developed separately. Accordingly, the first IP treaties (the Paris Convention of 1883,[2] and the Berne

[1] See Article 2(a) of Articles on the Responsibility of International Organizations (9 December 2011) A/RES/66/100 Annex; also see Report of the International Law Commission (2011) Supp 10 A/66/10, 54.
[2] Paris Convention for the protection of industrial property (adopted 20 March 20 1883, entered into force 7 July 1884, last amended 28 September 1979) 828 UNTS 305.

Convention of 1886[3]) – fostered by the desire of authors and other creators to protect their rights vis-à-vis the challenges of the growing international market – led to the establishment of two small international bureaux which merged in 1893, giving rise to the United International Bureaux for the Protection of Intellectual Property (BIRPI), an international body. This entity, responsible for administering both IP treaties, was replaced by the newly created WIPO in 1970,[4] which four years later became an organisation within the UN system (for more, see Dutfield and Suthersanen 2020: 52-58).

In turn, the international forum for global dialogue between civilisations, which also included the concept of the protection of shared cultural heritage (Laqua 2011: 229-30), was consolidated within the system of the first worldwide IGO, the League of Nations. It included the: International Committee for Intellectual Co-operation (ICIC); the International Institute of Intellectual Co-operation (inaugurated in 1926 as an executive agency to ICIC); the International Museums Office; and finally the International Cooperation Organisation (ICO) (for more, see Vrdoljak and Meskell 2020: 13-24). Yet only with the adoption of the UNESCO Constitution (1945)[5] did CH become truly internationally institutionalised. Today UNESCO, with its 193 Member States and 11 Associate Members, has become the central, universal IGO in cultural matters within the UN system.

Notably, on the UN level the spheres of IP and CH gradually became aligned and covered by the expanding treaty law under the auspices of UNESCO, as initially there was no specialised IP IGO. In fact in the early 1950s UNESCO worked in parallel on cultural property and IP international conventions. Already in 1952 the Universal Copyright Convention (UCC)[6] was adopted, followed in 1954 by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[7] Both treaties sought to provide universal standards for the protection of IP on the one hand (UCC), and tangible CH on the other (1954 Hague

[3] Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887, last amended 28 September 1979) 828 UNTS 221.
[4] Convention Establishing the World Intellectual Property Organization (adopted 14 July 1967, entered into force 256 April 1970) 828 UNTS 3.
[5] Constitution of the United Nations Educational, Scientific and Cultural Organization (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275.
[6] Universal Copyright Convention (adopted 6 September 1952, entered into force 16 September 1955) 216 UNTS 132, as revised at Paris on 24 July 1971 943 UNTS 178.
[7] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

Convention), in a manner acceptable for all peoples of the world, although they did not engage on their mutual underpinnings.

The situation changed at the end of 1960s. The 1967 Convention Establishing WIPO provides that the prime objective of this organisation is 'to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization' (Article 3(i)). The Convention's Preamble indicates that the promotion of IP protection is desirable 'in order to encourage creative activity'. Both these objectives opened up the possibility for long-term cooperation between UNESCO and WIPO vis-à-vis their common endeavours towards the protection of the creative element in CH through the IP rights.

Common institutional endeavours in the IP and CH domains

Considering the organisational history of UNESCO and WIPO and the gap between 1946 (when UNESCO began to operate) and 1970 (when the Convention Establishing WIPO came into force), it is not surprising that UNESCO endeavoured at the beginning of its functioning to create an international instrument on IP protection. The UCC aimed at establishing 'copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force', which would 'ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts' (Second recital of the Preamble). Hence, while the UCC was designed to complete the regime of the Berne Convention in light of demands of the post-Second World War economies, it is also true that the notion of creativity regarded only those cultural expressions that were traditionally associated with the wider European or Western vision of heritage: literary, historic, and artistic expressions.

Yet soon after the UCC's adoption, in the 1950s and alongside the discussions on its revision in the 1960s, the first debates on the international protection of IP rights to collectively-created works took place. In fact UNESCO, in cooperation with the Berne Union (signatories of the Berne Convention), became focused on the copyright issues surrounding such works. Their efforts resulted in the 1967 revision of the Berne Convention, which introduced a new provision on anonymous works (Article 15(4)) (see Martinet 2020: 99). Although the efforts to safeguard folk arts and traditions had already been addressed within this IGO's agenda, a major breakthrough was possible due to the increasing change in Western multicultural societies on

the one hand, and the decolonisation of Africa on the other. While the former process, also associated with the 'heritage boom' (see Harrison 2013: 68-94), involved an expansion of the idea of cultural heritage beyond literary and artistic sources to include a variety of cultural manifestations encompassing traditions and traditional ways of life, the latter process brought the idea of living cultures and collective creativity to the political forefront. In fact, the attempts by newly independent countries to define their cultural, and thus political identity – not only on the basis of decisions on their borders taken by former European empires but also on the basis of distinct cultures and traditions (called at that time 'folklore', Lange 1999) – revealed serious flaws and tensions in the existing IP regulations. The latter process marked by the difficult economic and political situations of the former colonies also demonstrated the existence of severe inequalities between the global North and the global South.

In this context, and with the assistance of WIPO, the Lusaka Agreement establishing the African Regional Intellectual Property Organization (ARIPO) for English-speaking African countries was signed in 1976.[8] A year later, the Organisation Africaine de la Propriété Intellectuelle (OAPI) for mainly French-speaking African countries was founded pursuant to the so-called Bangui Agreement (OAPI Convention), joining the regional efforts to protect IP of both an individual and collective character in Africa, and providing anti-counterfeiting measures (see Schneider and Ferguson 2020: 7-30).[9] Importantly, these two organisations, ARIPO and OAPI, call themselves 'sister organisations' and have cooperated together since 1996, as they agreed to take common positions on major IP issues affecting their Member States at the regional and international levels.[10]

The Lusaka Agreement is composed of strictly structural, functional and administrative provisions – it does not define the scope, nature or problems related to IP. These have been covered by separate protocols concluded between ARIPO's members, such as the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.[11] In contrast,

[8] See <http://ipr.mofcom.gov.cn/hwwq_2/zn/Africa/ARIPO/file/Lusaka_Agreement.pdf> accessed 15 August 2021.
[9] Bangui Agreement on the Creation of an African Intellectual Property Organization (signed 2 March 1977, entered into force 8 February 1982); Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (Bangui (Central African Republic) (signed 24 February 1999, entered into force 28 February 2002) available at <https://www.wipo.int/edocs/lexdocs/treaties/en/oa002/trt_oa002_2> accessed 15 August 2021; revised again in December 2015, this revised treaty is not yet in force.
[10] See <https://www.aripo.org/oapi-and-aripo-sign-new-cooperation-agreement> accessed 15 August 2021..
[11] (adopted by the Diplomatic Conference of ARIPO on 9 August 2010, and amended on 6 December 2016, entered into force 1 January 2012) <https://wipolex.wipo.int/en/text/201022> accessed 20 August 2021.

the Bangui Agreement (as revised in 1999) sets out, in addition to the structure and objectives of the organisation, the principles for the application of IP law to 'works' under which falls also 'expressions of folklore and works derived from folklore' (Annex VII, Article 5). The OAPI Convention also introduced the term 'communities' as an element of the definition of folklore: 'Folklore means the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation' (Article 68, Bangui Agreement). At the same time, in the 1970s several States adopted national regulations protecting folklore based on the mechanism of copyright law (see the Commentary to Model Provisions 1982;[12] and for a detailed examination of national legislation, see Schneider and Ferguson 2020).

The adoption of the 1972 World Heritage Convention[13] and the above-mentioned attempts to ensure the protection of human creativity in its individual and collective dimensions induced ever more countries to express their interest in the international protection of folklore. Bolivia was the first to raise the issue internationally in 1973, submitting a proposal to the Director General of UNESCO for the adoption of an additional protocol to the UCC, which would deal with the protection of folklore (for more, see Hafstein 2018: 21-24). This was indirectly achieved in 1976 as a result of cooperation between UNESCO and WIPO, which published together the Tunis Model Law on Copyright for Developing Countries (Tunis Model Law).[14] Notably, it defined 'folklore' as 'national cultural heritage'. In Section 6 it introduced the concept of 'works of national folklore', that 'are protected by all means …without limitation in time … by the national competent authority.' Moreover, Section 15 of the Tunis Model Law introduced sanctions for the infringements of rights and specified that 'any infringement of any one of these rights which is considered as a violation of the national cultural heritage may be curbed by all legitimate means' (paragraph 2).

The Tunis Model Law is the first document prepared under the auspices of two IGOs: UNESCO and WIPO, both of which aimed to soothe the already evident tension that had developed over time between individually-oriented IP instruments and collectively-created 'works'.

[12] UNESCO-WIPO, 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Expression and Other Prejudicial Actions' (1985) available at <https://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf> accessed 10 August 2021.

[13] Convention Concerning the Protection of World Natural and Cultural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

[14] The Tunis Model Law on Copyright was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO, see https://www.wipo.int/publications/en/details.jsp?id=3177&plang=FR (accessed 16 August 2021).

Interestingly, this legal incompatibility was alleviated by what we call here the 'heritagisation' of folklore. Thanks to this process folklore was elevated and received the status of 'national heritage'. The efforts of states to take measures to protect collective works of important 'cultural legacy' were for the first time internationally recognised.

Further cooperation between UNESCO and WIPO resulted in the publication in 1982 of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).[15] These were based on the concept of *sui generis* protection, based on three assumptions: 1) that the object of protection is heritage belonging as a whole to a particular community; 2) that there is reciprocity between national laws and international law; and 3) that the use of folklore for economic purposes can be protected by law, while its social use cannot. It was also then that the term 'expressions of folklore' (EoF) was defined – albeit still without defining what 'folklore' is. The use of the word 'expression' was to emphasise its different nature from the word 'work' used in IP law. 'Expressions' were divided into four categories: 1) verbal; 2) musical; 3) related to performance; and 4) embodied in a material object.

On the basis of these provisions, a draft convention was created in 1984 – the UNESCO/WIPO Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.[16] It however has never been officially adopted due to opposition from developed countries, which were reluctant to accept the obligation to provide protection to folklore or 'lower' culture, which was less valued at that time (Blake 2001: 19). Other issues that were also reluctantly addressed at the time included the concept of 'regional folklore' – that is folklore present on the territory of more than one country (giving rise to the problem of which political entity was obliged to protect it and the possible obligation to coordinate protective measures), as well as the practical problem of the lack in most countries at that time of sources of knowledge, meaning inventories indicating those works which can be considered a manifestation of folklore and those which cannot (Ficsor 2003: 93-95); (for more on the work of these two organisations in respect of folklore and cultural heritage, see Kuruk 2020: 64-97).

[15] (1982) XVI(4) UNESCO Copyright Bull 62 available at <https://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf> accessed 16 August 2021.
[16] UNESCO/WIPO/FOLK/CGE.1/2.

Separate endeavours but common objectives to protect IP and CH

The failure to adopt the joint 1984 UNESCO/WIPO Draft Treaty resulted in the adoption – this time only by UNESCO – of the Recommendation on the Safeguarding of Traditional Culture and Folklore.[17] The Recommendation clearly states that 'as folklore constitutes manifestations of intellectual creativity *whether it be individual or collective*, it deserves to be protected in a manner inspired by the protection provided for intellectual productions'. The Recommendation refers to 'the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for *separate action* in a range of areas to safeguard folklore is urgent' (part F of the Recommendation). Accordingly, from this point on (with a brief revival of common cooperation in 1997-1998, Blake 2017: 50), and especially after the Conference in 1999 during which the Recommendation was critically examined, UNESCO and WIPO have chosen separate paths in their folklore-safeguarding efforts. UNESCO, led by Kōichirō Matsūra since 1999, opened the fast track for drafting the Convention on the Safeguarding of the Intangible Cultural Heritage (the ICH Convention), and in three years' time its adoption was announced (Matsūra 2020). At the same time, in the year 2000 the WIPO General Assembly approved the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[18] The IGC remains today, since its first session in 2001, the most important forum where the debates on IP and CH take place. In its 40th session in 2020 it formed a platform and produced many important documents, in which the clash of 'individual' IP rights and 'collective' effects of human creativity could be traced.

The ICH Convention separated IP and CH, though this separation in practice is not clear at all by force of Article 3 (b), which states that 'nothing in the Convention can be interpreted as affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties' (see Blake and Lixinski 2020). The relationship between the ICH

[17] (adopted 15 November 1989) 25C/Resolution 7, 1.
[18] See documents 'Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (25 August 2000) WO/GA/26/6, para 13; 'Report by the Assembly' (3 October 2000) WO/GA/26/10, para 71.

Convention and IP is further addressed in the Operational Directives to the ICH Convention (Paragraph 104), as follows:[19]

> 'States Parties shall endeavour to ensure, *in particular through the application of intellectual property rights*, privacy rights and any other appropriate form of legal protection, *that the rights of the communities*, groups and individuals that create, bear and transmit their intangible cultural heritage *are duly protected* when raising awareness about their heritage or engaging in commercial activities.'

The beginning of the 20th century opened up the trend of 'untightening' the common endeavours towards the adoption of binding universal legal acts regulating relationship between IP and CH. This however does not mean that endeavours between WIPO and UNESCO in this direction ceased. WIPO is especially active in its efforts to protect the results of collective creativity (using the terms TK, TCEs or EoF). Although it has resigned from more profound inter-organisational cooperation, it has been extensively providing its expertise for local communities and researching the connection between IP and CH. The series of research reports ordered within the framework of the WIPO Creative Heritage Project[20] reveals the ongoing interest channelled through the Traditional Knowledge Division in WIPO (for instance, see Talakai 2007; Rincon 2009). This Project seeks to encourage the discussion on how cultural institutions take IP rights into consideration, with the aim to pool documentary resources that can serve as an empirical base for the long-term preparation of a set of coherent, relevant guidelines.

At almost the same time UNESCO accelerated its efforts to draft and adopt the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the Cultural Diversity Convention).[21] This instrument presents again the not-obvious and unclear linkages between CH and IP by stating in its Preamble that 'cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all' (2nd recital), and that 'intellectual property rights in sustaining those involved in cultural creativity' shall be recognized as very important (17th recital). It may however be argued that the two IGOs have followed different paths to protect collective, creative and communal practices: WIPO by enforcing a bottom-up approach and by focusing on local projects; and UNESCO by choosing

[19] Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage (adopted 19 June 2008; lastly amended 10 September 2020) CLT-2021/WS/5; CLD-758.21, 21.
[20] Available at <https://www.wipo.int/export/sites/www/tk/en/documents/pdf/capacity_building.pdf> accessed 10 August 2021.
[21] (adopted 10 October 2005, entered into force 18 March 2007).

a top-down approach and by focusing on more general and possibly universally-applied solutions.

The IP – CH relationship in the practice of IGOs: selected regimes

It should not come as a surprise that much of the present-day international debate on the nature of the IP – CH relationship is deeply rooted in human rights law and theory, which affects the practice of a variety of international organisations and institutions. The human rights dimension of the IP – CH interplay has also implications for the practice of IGOs in relation to global trade (particularly in respect of the WTO's framework), and the promotion of creativity as an element of sustainable development.

International human rights

In general terms, it has been correctly noted that there are two basic approaches to the human rights and IP interface. The first claims that strong IP protection is 'incompatible' with a vast array of 'human rights obligations, especially in the area of economic, social, and cultural rights'; while the second approach perceives 'human rights law and intellectual property law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other' (Helfer 2003: 47-48). In fact, the dynamics between the monopoly of the creator on the one hand, and the right to accede, enjoy cultural products and to participate in cultural life on the other perhaps best characterise the complexity of the relationship between IP and CH. This complexity is reflected also in the establishment of separate, but at the same time interlinked, regimes.

The tension and compatibility of the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary or artistic production, and the right to culture and to benefit from the results of creativity, are sharply expressed in two universal human rights instruments, i.e. under Article 27 of the Universal Declaration of Human Rights (UDHR)[22] and under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[23] Indeed, the Committee on Economic, Social and Cultural Rights (CESCR) already in 1999 noted the problems that result from the liberalisation of global trade and the uniformisation of IP standards under the Agreement on Trade-Related Aspects of Intellectual

[22] (10 December 1948) 217 A (III).
[23] (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

Property Rights (TRIPS Agreement) [24] of the World Trade Organisation (WTO), with respect to the protection of traditional knowledge and access to science. In this regard, it called for cooperation among the WTO members to ensure the balanced implementation of economic, social and cultural rights. Moreover, it underlined that international organisations with specific responsibilities in the areas of trade, finance and investment 'should play a positive and constructive role in relation to human rights'.[25] It recalled the duty of the WTO and WIPO, in their administration of international treaties and setting minimum standards for the protection of IP rights, to contribute to the realisation of human rights guaranteed under Article 27 UDHR and Article 15 ICESCR.[26]

Importantly CESCR, in its General Comment No 17 (2005),[27] explained that the relationship between distinct rights guaranteed under Article 15 ICESCR 'is at the same time mutually reinforcing and reciprocally limitative' (Paragraph 4). It also expanded the traditional understanding of the right to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production' (Article 15(1)(c) ICESCR). Originally, it was considered to regard only individual rights holders in line with the IP standards, and thus was hardly applicable to protect collectively-created and produced resources and knowledge (see Stoll and von Hahn 2008: 22-23). However over time, and in particular following the development of minority and Indigenous peoples' rights in international law and within the UN global policy agenda,[28] the CESCR underlined the communal, moral and heritage aspects of the provisions of Article 15(1)(c) ICESCR, and explained that right holders may be collective; that the notion of scientific productions may also cover 'knowledge, innovations and practices of indigenous and local communities' (Paragraphs 8-9); and that States are under an obligation to ensure the effective protection of interests 'relating to their productions, which are often expressions of their cultural heritage and traditional knowledge' (Paragraph 32).

In the early 2000s, the UN human rights bodies repeatedly referred to the human rights attached to CH. In particular the CESCR, in General Comments No 21 (2009),[29] explicitly linked the right to participate in cultural life with taking part in, contributing to, and benefiting from the

[24] (signed 15 April 1994, in force 1 January 1995) 1869 UNTS 299.
[25] Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization (26 November 1999) E/C.12/1999/9 128-129.
[26] (14 December 2001) E/C.12/2001/15.
[27] (12 January 2005) E/C.12/GC/17.
[28] See Draft Declaration on the Rights of Indigenous Peoples (23 August 1993) E/CN.4/Sub.2/1993/29.
[29] (21 December 2009) E/C.12/GC/21.

cultural heritage and the creation of other individuals and communities (Paragraph 15). Particular focus is placed on the rights of Indigenous peoples in line with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[30] The protection of the moral and material interests of Indigenous peoples and local communities resulting from their knowledge, of which they are authors (either individually or collectively), has recently been reiterated by the CESCR in General Comment No 25 (2020) (Paragraph 40).[31] The issues of access to heritage and enjoyment of the benefits of scientific progress were also the subject of two reports by the Special Rapporteur in the field of cultural rights, brought within the UN Human Right Council's special procedure.[32]

While the work of the UN human rights bodies tend to conceptualise the human rights attached to creativity, regional IGOs and their organs often supply the necessary vehicles for realising these rights, taking into account regional specificities and demands. Probably the most advanced example of such a practice is provided by the Council of Europe (CoE). The core purpose of this organisation is 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage', including cultural actions in the full realisation of human rights and fundamental freedoms, and in cooperation with other international organisations.[33] In this regard, the CoE's engagement in the cultural field expanded greatly over the decades, encompassing the cultural rights of persons belonging to minorities, which resulted in the Framework Convention on the Value of Cultural Heritage for Society (the Faro Convention)[34] – perhaps the most advanced international treaty bridging human rights and CH. This instrument also addresses the balance between IP rights and access to CH, and obliges its States Parties to seek 'to resolve obstacles to access to information relating to cultural heritage, particularly for educational purposes, whilst protecting intellectual property rights' (Article 14(c)). The scope of this provision mainly regards the challenges posed by the information society and proposes a just accommodation between the desire for the widest possible free access to cultural resources and the need to ensure fair reward to those who create or own digital contents. However, it can also arguably be seen as a general

[30] (13 September 2007) A/RES/61/295.
[31] (30 April 2020) E/C.12/GC/25.
[32] (21 March 2011) A/HRC/17/38, and A/HRC/20/26 (14 May 2014).
[33] Article 1 of the Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS No 001.
[34] (adopted 27 October 2005, entered into force 1 June 2011) ETS No 199.

standard in realising both IP and CH rights in the European legal and cultural context, as is underlined in the current CoE's heritage policy agenda.[35]

In the last decades, the IP – CH relationship has also been approached by other regional IGOs from the human rights perspective, especially in relation to the cultural rights of Indigenous peoples and traditional communities. In this regard the key international human rights treaty adopted within the framework of the Organisation of African Unity (OAU and its successor the African Union (AU)) – the African Charter on Human and Peoples' Rights (African Charter) – already in 1982[36] placed much emphasis on the protection and enjoyment of cultural rights, both individually and collectively. Significantly, it sets positive obligations for States to promote and protect morals and traditional values, communally recognised, while underlying the right to take part in the cultural life of one's community and the right to cultural development 'with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' (Article 22(1)). Unsurprisingly, the IP – CH relationship is even better articulated in both OAU/AU cultural charters: the Cultural Charter for Africa (1976),[37] and the Charter for African Cultural Renaissance (2006 AU Charter).[38] Both of them recognise the value of creativity for the protection of all human rights, the enhancement of the right to cultural development, the promotion of cultural diversity and the enjoyment of CH. Similarly, the 2000 Declaration on Cultural Heritage,[39] adopted by the members of the ASEAN, underlines the linkage between human creativity, heritage, and communal IP rights as a human rights issue. It should be noted, however, that while such a link exists in all these instruments, it does not immediately translate into any obvious and clear implementation guidelines or strategies.

The human rights dimension of creativity and its value for CH have often been addressed by the Organisation of American States (OAS). In particular, the American Declaration on the Rights of Indigenous Peoples[40] explicitly links the protection of the CH and IP of Indigenous peoples. In this regard, it states that '[t]he collective intellectual property of indigenous peoples

[35] See Council of Europe, *European Cultural Heritage Strategy for the 21st Century* (May 2018) 16, available at <https:// rm.coe.int/european-heritage-strategy-for-the-21st-century-strategy-21-full-text/16808ae270> accessed 17.08.2021.
[36] (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[37] (adopted 5 July 1976, entered into force 19 September 1990) available at https://au.int/en/treaties/cultural-charter-africa> accessed 15 August 2021.
[38] (adopted 24 January 2006) available at <https://au.int/en/treaties/charter-african-cultural-renaissance> accessed 15 August 2021.
[39] (adopted 25 July 2000) available at <http://arc-agreement.asean.org/file/doc/2015/02/asean-declaration-on-cultural-heritage.pdf> accessed 14 August 2021.
[40] (adopted 15 June 2016) OEA/Ser.D.

includes, *inter alia*, traditional knowledge and traditional cultural expressions, including traditional knowledge associated with genetic resources, ancestral designs and procedures, cultural, artistic, spiritual, technological, and scientific expressions, tangible and intangible cultural heritage, as well as knowledge and developments of their own related to biodiversity and the utility and qualities of seeds, medicinal plants, flora, and fauna' (Article XXVIII(2)).

It also should be recalled that the human rights aspect of IP and CH has been the subject of an extensive judicial elaboration by regional human rights monitoring bodies. The practice of the European Court of Human Rights (see European Court of Human Rights 2017) and of the Inter-American Court of Human Rights are of particular relevance (see Hausler 2016). These have derived the protection of IP- and CH-related rights from other human rights enshrined in the regional human rights treaty law. However, the interplay between the protection of rights related to the protection of IP, creativity, and the protection of CH and the right to use and access it has not so far been the subject of an in-depth judicial analysis in the case-law of these two tribunals.

International trade

Viewed in the context of the aforementioned legislative and institutional developments, the present-day international organisational setting for the IP and CH seems to balance and enhance the importance of creativity and intellectual life with economic and social development, especially in light of the changing technological environment. As already mentioned, two of the key international organisations in this area – UNESCO and WIPO – have made a number of efforts in this regard. As far as digital circulation is concerned, it is necessary to recall the UNESCO Charter on the Preservation of Digital Heritage and WIPO's actions for IP rights' protection in digital commerce. In the latter instance, these are especially concerned with the practice of the WIPO Copyright Treaty (WCT),[41] a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. Yet it must be borne in mind that the establishment of the WTO in 1995 and its legal and operational framework affect the very nature of the international organisational panorama and the actual practice in this regard (see Voon 2007). Hence one of the most important areas of the organisation's work is the attempt to reconcile the freedom of trade with the protection of IP rights and issues of conservation and access to CH.

[41] (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121.

As regards tangible CH, the general exception from the prohibition of arbitrary or unjustifiable restrictions on international trade was already confirmed by General Agreement on Tariffs and Trade (GATT) in 1947[42] for the purpose of protecting national treasures of artistic, historic or archaeological value (Article XX(f)). Hence the wider and standardised regime for IP protection (the TRIPS Agreement) became a key regulatory element of the international trade regime only with the establishment of the WTO. All Members of this IGO (since its inception, the WTO has grown from 123 to 164 members) must adhere to the TRIPS Agreement, monitored by the TRIPS Council, an intergovernmental body serviced by the WTO Secretariat. Thus it has had a major impact on the scope of IP protection around the world. The TRIPS Agreement establishes minimum standards of IP protection which must be incorporated through national legislation by the WTO Members unless specifically exempted by the WTO (as in the case of the Least Developed Countries (LDCs). More precisely, such standards are established for a variety of IP instruments, including patents, copyrights, trademarks, geographical indications, industrial designs, plant variety protection, integrated circuit designs and undisclosed information. With regard to these general standards, much of international discussion initially oscillated around the concept of the cultural exception as a limitation on free trade of culture and the protection of diversity of cultural expressions. This concept was particularly promoted by the EU, one of the key driving forces of the 2005 UNESCO Convention (Ferri 2005: 21-25).

With regard to the EU, it should be underlined that the relationship of this powerful, supranational organisation with IP rights and CH is of a unique nature. As actual regulatory measures arise from specific legislative powers of the EU, its axiological and policy considerations in respect of the IP – CH relationship are essentially driven by the value of creativity for the economic, social, and cultural development of the EU Member States and their societies and citizens (Lucas-Schloetter 2021: 13). In this regard, the EU legislative and institutional framework provides for the protection of a wide range of IP rights, including in the digital environment, which takes into account the larger community interests in accessing cultural heritage.

The recognition of larger community interests is also of major significance when taking other regional frameworks into consideration. It is interesting to note that IGOs with specific IP mandates – ARIPO and OAPI – have been established only in Africa and have no equivalents

[42] (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194; GATT 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

in other regions of the world, thus highlighting and demonstrating the specificities of the African approach to culture and creativity and their role in regional and communal development, while reconciling this regional IP uniqueness with the WTO's requirements. In fact, a revision of the Bangui Agreement took place in 1999 to ensure its conformity with the TRIPS Agreement. In Asia, matters related to IP were delegated to the ASEAN IP Organisation, established in 1995 as a non-governmental organisation accredited to ASEAN.[43] In addition, the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) holds four consultation meetings a year, with the participation of the IP offices and representatives of ASEAN countries, and announces corresponding work plans. This forum is very active and it has already met 64 times.[44] It is thus clear that the economic aspect of IP rights lies in the core of the wider agenda for regional development.

In the Americas, the TRIPS Agreement gave rise to a variety of regional responses and platforms for sharing know-how in terms of IP resources. These efforts have been undertaken by various regional organisations, including the Caribbean Community and Common Market (CARICOM) and OAS. Importantly, in 2010 a joint proposal was launched in order to create a regional solution for trademarks, patents, utility models, and industrial designs, known as the Cooperation System on Management Information and Industrial Property (PROSUR).[45] As already mentioned, the IP – CH relationship and problems related to IP rights also appear more and more often in the agenda of the oldest and biggest regional organisation – the OAS, whose mandate, under its founding Charter, is to 'preserve and enrich the cultural heritage of the American peoples' (Article 48).[46] The OAS also serves as depository of regional treaties concerning IP, culture, and cultural heritage. This regional IGO has taken a stance to protect the creators of CH in the face of rapid technological advancements, and today the organisation provides an important forum to promote more stringent IP protection and agreements throughout the region.

As regards the Arab world, the IP – CH relationship vis-à-vis the challenges of global trade and technology has developed in the practice of the three IGOs: the League of Arab States (LAS); the Islamic World Educational, Scientific and Cultural Organisation (ICESCO); and the Arab

[43] See <https://www.aseanip.org> accessed 17 August 2021.
[44] See <https://www.aseanip.org/News-Events/Latest-News-Events/ctl/Details/mid/1956/aid/88> accessed 17 August 2021.
[45] <https://prosur.org/en/about-us> accessed 18 August 2021.
[46] Charter of the Organisation of the American States (adopted 30 April 1948, entered 13 December 1951) 119 UNTS 3.

League Educational, Cultural and Scientific Organization (ALECSO). Importantly, Article 4(c) of the Charter of ICESCO[47] refers, in describing its mission, to the preservation and safeguarding of tangible and intangible heritage. ALECSO, with 22 Member States, operates not only in the CH area but is also an umbrella organisation in the IP field. Accordingly, under Article 21 of the 1964 of the Charter of the Arab Cultural Unity: 'Member States shall enact legislation to protect literary, scientific and artistic intellectual property.'[48] ALECSO and ICESCO regularly take part as observers in the UNESCO Cultural Conventions organ meetings and provide a platform for creating a common stance of the Arab Region towards CH developments.

Understanding IP and CH regime complexity

In this Chapter, we have aimed to analyse the practice of selected relevant IGOs in reference to the uneasy IP – CH interplay. The increasingly complex setting we have arrived at can arguably be well explained by the concept of regime complexity (see Alter and Meunier 2009). This concept highlights the proliferation of overlaps across diverse hard law and soft law instruments (which function in parallel); conflicts among international obligations; and growing confusion regarding which international, regional, bilateral or national obligations to follow, and what consequences result therefrom.

The uncertainty as to how the IP – CH relationship may function in practice is probably the main constant and unchanging feature – but not necessarily a problem. It allows diverse stakeholders to find more appropriate forums, platforms, and solutions to serve their needs in the event those strictly devoted to IP or CH fail to satisfy the goals of one group or another. This strategy is sometimes referred to as 'regime shifting', whereby states and non-state actors relocate rulemaking processes to international venues whose mandates and priorities favour their concerns and interests' (Helfer 2009: 39). In the case of the IP – CH relationship, this can be observed in the above-described endeavours to protect collectively-created folklore by means of international IP legal instruments developed together by WIPO and UNESCO. This could not have been achieved by states due to the conflicting interests between developed and developing countries, so an international instrument that would 'heritagise folklore' was promoted instead by the IGO itself. Regime shifting resulted in the 'untightening' of WIPO and

[47] (adopted 3 May 1982, lastly amended in 2020) available at <https://www.icesco.org/en/wp-content/uploads/sites/2/2020/01/charter-statutes.pdf> accessed 16 August 2021.
[48] English translation available in ESCWA's Report 'Arab Integration: A 21st Century Development Imperative' (2014) Annex 3, 236.

UNESCO cooperation – leaving both IGOs with space to act in a more independent way and pursue their goals in the IP and CH nexus (e.g. the WIPO Creative Heritage Project). It thus seems evident that the regime shifting strategy can be used not only by States, but can also be supported by IGOs themselves. It is widely known that the UNESCO Director General Kōichirō Matsūra (1999-2009) was personally interested and involved, on the basis of the experiences of Japan in safeguarding 'living human treasures', in the process of drafting and the adoption of the ICH Convention (Duvelle 2017: 21; Matsūra 2020). The failure to establish a joint common regime by both IGOs resulted in the creation of new regimes (the 2003 and 2005 UNESCO Conventions), and led to a final separation of more profound efforts (though not necessarily interests) on the part of both WIPO and UNESCO in matters legally linking IP and CH. WIPO decided to go its own way and focused its efforts on embracing IP and CH on the local and national levels through non-legal means, such as research projects and training. UNESCO went forward with universal heritage instruments, acknowledging the existence of outside-UNESCO IP regimes and not making efforts to join with WIPO in this area again.

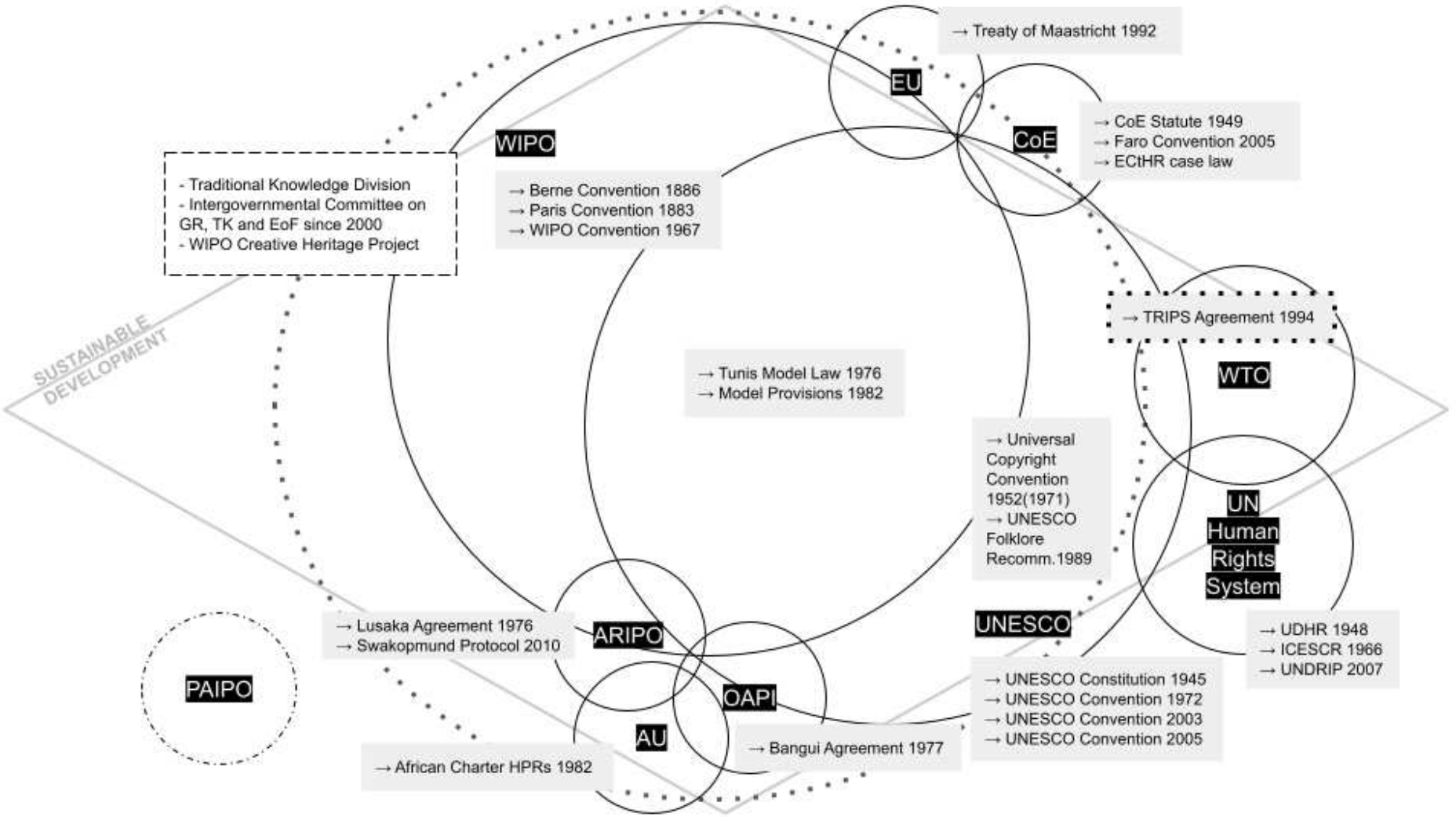

Figure 1. Bridging IP and CH in the practice of selected universal and regional IGOs: illustrating regime complexity. Note: this chapter also analyses the practice of other regional IGOs in the field of IP and CH. For the sake of clarity, in this graph we have chosen to present only African and European IGOs and their connections to universal WIPO and UNESCO. We have also added 'sustainable development' as regime hybrid .

Similar strategies employed in the context of regime complexity can be observed in regional responses concerning the implementation of the TRIPS Agreement. Regional integration organisations, which have usually a very broad mandate according to their statutes (such as OAS in both Americas; LAS in the Arab region, and ASEAN in the Asia and the Pacific) began discussions and projects about IP rights on their own. In some regions these have resulted in the creation of specialized IP regional organisations, i.e. PROSUR in Latin America and ASEAN IP in Asia. In Africa, despite the existence of ARIPO and OAPI (which specialise in IP), the biggest regional organization, i.e. the African Union, decided recently to establish a new Pan African Intellectual Property Organization (PAIPO)[49]. This endeavour, however, does not seem to be successful, at least as of yet (with only 6 signatures out of 55 AU Member states[50]). At the same time it shows that regime complexity is of a processual nature, marked by a temporality of adopted instruments, created projects, or established bodies. Though the graph presented above seems to be a static one, in fact it reflects the more fluid and dynamic changes in the regimes that happen over time.

The regime complexity theory allows us to understand this dynamic context, in which not only do new norms, organs, bodies and projects appear and disappear, but also new concepts and ideas. They foster regime shifts and/or the formation of new alliances. In the case of the CH – IP relationship the concept of 'sustainable development' (SD) has appeared as a game-changer since the adoption of the Rio Declaration in 1992.[51] It has influenced all UNESCO Cultural Heritage Conventions; e.g. the 2003 and 2005 Conventions explicitly refer to it in their preambles and core texts (Article 2 and 13 of the 2005 Convention, Chapter 6 of the Operational Directives to the ICH Convention). Even if not yet present in hard law instruments – SD appears in the guidelines, recommendations and other soft law instruments. It has also heavily influenced the discussion on IP. The concept of SD – also labelled as 'regime hybrid' (Koskenniemi 2012, 319) – has operationalised into the Sustainable Development Goals (SDGs) Agenda post-2015.[52] They may serve as either another bridge for the IP – CH

[49] https://au.int/sites/default/files/treaties/32549-treaty-0053_-_paipo_e.pdf (accessed 20 August 2021).
[50] https://au.int/en/node/32549 (accessed 20 August 2021).
[51] Rio Declaration on Environment and Development (June 1992) A/CONF.151/26/rev/1 (Vol. I) Annex I.
[52] https://www.unodc.org/unodc/en/about-unodc/post-2015-development-agenda.html (accessed 20 August 2021).

relationship or an additional element of regime complexity, as they are both overarching and cross-cutting, especially with regard to human rights as one of the most influential concepts in contemporary international law and international relations.

Taking SD as an example of regime hybrid, one should not overlook the fact that the IGOs function in a highly politicised environment. Though the tendency in legal scholarship is to focus on the analysis of legal texts that have been adopted and are in force, the context in which they were adopted and in which they are implemented is not – or at least not only – legal in nature. Politics play a significant role, and despite the fact that the proliferated term 'politicisation' suggests the negative side of this process, in practice without specific policies, political interests, diplomatic negotiations, bargaining, and power games international law would not exist. As Zürn rightfully observes, politicisation means that decisions have to be made about what constitutes appropriate collectively-binding actions (Zürn 2014, 50). In the case of the thorny and complex IP – CH relationship, choices about the appropriate collective action have changed over time since the 1950s and new actors impacting these choices have emerged. The proliferation of regional IGOs as platforms to pursue efforts in this area seem to be most visible proof of regional struggles with international standards, sometimes perceived as imposed by more powerful (hegemonic) states or regimes (Koskenniemi 2012).

Conclusions

The dynamic, complex, and constantly-evolving international law setting for the IP – CH relationship renders the achievement of consensus on universally accepted protective standards for individual and collective creativity nearly a 'mission impossible'. This naturally affects the practice of the key IGOs in this field, as has been proven by the almost 15 years of common WIPO – UNESCO endeavours. It is also true that these global IGOs, whose membership is almost entirely composed of sovereign States with often very different interests, may not offer ideal forums to address all the questions and challenges concerning the IP – CH relationship. What is achievable, however, and what has already been accomplished due to the present-day regime complexity (and its inconsistency) at the global level, is the adoption of various solutions at local, national and regional levels – thanks to regional IGOs' activity. Arguably, the international regime complexity inclined diverse groups of States as well as regional IGOs to find their own ways of protecting IP and CH. Marked by legal fragmentation and rule ambiguity, it has allowed diverse groups of states as well as regional IGOs to find their own ways of protecting IP and CH through cross-institutional strategies and regime shifts (Alter and

Meunier 2009, 16-17). This means that what matters most is not – or at least not only – necessarily a legal construction of international treaties on IP and CH, but regional, national and local implementation of these often general legal standards. The scholarly investigations of the IP – CH relationship limited to the practice of UNESCO and WIPO might give a definitively more clear, but at the same time false picture. Only by going down from the universal to regional and national levels does one obtain an understanding of the impact of IGOs on legal and policy strategies towards the IP – CH relationship.

By taking a bottom-up approach, one may also note how States attempt to use IGOs as suitable platforms to promote their interests. This relationship is definitely not one-sided, and the agency of IGOs (their Secretariats, treaty bodies and organs, working groups etc.), the agency of states (their governments, diplomats, experts etc.), as well as agency of non-state actors (NGOs, communities, transnational companies etc.) adds to the complexity of the picture. It is also important to note that all these actors operate in the situation of regime complexity and constantly develop and (re)create the realm of IP and CH. They also constantly interpret and reinterpret their needs, aims, objectives, and the values that they want to see embedded in the regime. Thus, bridging IP and CH in the practice of IGOs is – both politically and legally – a complex process submerged in time, in which diverse actors and agents are likely to change their positions, create new strategies, and establish new organs and institutions (including IGOs) in response to the regime interactions (regimes' cooperation as well as regimes' confrontations) they observe and experience (see Young 2012).

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