INSTITUTIONAL PROLIFERATION AND WORLD ORDER: IS THERE VISCOSITY IN GLOBAL GOVERNANCE?

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ABSTRACT

In recent years there has been a proliferation of international rules, laws and institutional forms in world politics. This has triggered attention to the role that forum-shopping, nested and overlapping institutions, and regime complexes play in shaping the patterns of global governance. A few policymakers, some international relations scholars, and many international law scholars posit that this trend will lead to a more rule-based world in world politics. This paper suggests a contrary position: institutional thickness has a paradoxical effect on global governance. After a certain point, proliferation shifts global governance structures from rule-based outcomes to power-based outcomes – because proliferation can enhance the ability of great powers to engage in forum-shopping.

It is possible, however, that not all regime complexes are created alike. This leads to another question – under what conditions will great power governments be constrained from forum-shopping? Most of these factors suggested in the international regimes literature do not pose either a consistent or persistent constraint to forum-shopping. The paper then examines a case that represents a "tough test" for the proposed argument: the 2001 Doha Declaration on intellectual property rights and public health, and its aftermath. This is a case where forum-shopping was temporarily constrained. I argue that issue linkage and organizational reputation can temporarily increase the viscosity of global governance. The barriers to forum-shopping are not constant over time, however; in the long run, there is little viscosity in global governance structures.

In recent years there has been a proliferation of international institutions, as well as renewed attention to the role that forum-shopping, nested and overlapping institutions, and regime complexes play in shaping the patterns of global governance.[1] A few policymakers, a fair number of international relations scholars, and many international lawyers posit that this trend will lead to a more rule-based world in world politics. This increased attention has not necessarily improved our theoretical understanding of the phenomenon, however. The increasing thickness of the global institutional environment clearly suggests a change in the fabric of world politics. Just as clearly, however, great powers have demonstrated a willingness to substitute different decision-making fora in order to advance their interests in world politics. This leads to an important question. Does the proliferation of rules, laws, norms and organizational forms lead to an increase in rule-based outcomes, or merely an increase in forum-shopping?

IR theorists have tried to move beyond demonstrating the mere existence of institutional choice and forum-shopping to explaining when it is likely to occur. What are the necessary and sufficient conditions that would lead a great power to substitute governance structure within a regime complex? To get at this question, this paper makes two arguments about the effect of institutional thickening on global governance outcomes. First, the proliferation of rules, laws and institutional forms can have a paradoxical effect on global governance. As global governance structures morph from international regimes to regime complexes, legal and organizational proliferation eventually shifts world politics from rule-based outcomes to power-based outcomes – because proliferation enhances the ability of powerful states to engage in forum-

shopping. Small states as well as the great powers can avail themselves of this strategy. There are a variety of reasons, however, why this tactic favors the strong over the weak to a greater degree than if forum-shopping did not occur at all.

The second part of the paper considers whether there are exceptions to this general prediction. One can conceive of conditions when great power governments might be constrained from forum-shopping. The concept of viscosity might be useful here. In fluid mechanics, viscosity is the resistance a material has to change in its form. High levels of viscosity imply a material that is slow to change. In global governance, high levels of viscosity would mean lots of internal frictions within a single regime complex, making it costly to shift fora. It is worth contemplating whether some regime complexes suffer from higher rates of viscosity than others – and also whether some regime complexes grow more or less viscous over time. When are the costs associated with switching fora too prohibitive?

Recent literature on international organizations, including the Rational Design school, propose a number of factors that could explain the relative viscosity of global governance structures.[2] These include membership, scope, centralization, legalization, legitimacy, and reputation. The paper suggests that most of these factors do not pose either a consistent or persistent constraint to forum-shopping. After examining one example of where forum-shopping was temporarily constrained – the 2001 Doha Declaration on intellectual property rights and public health – this paper suggests that issue linkage and organizational reputation can *temporarily* increase the viscosity of

[1] Goldstein et al 2001; Raustiala and Victor 2004; Aggarwal 2005; Alter and Meunier 2006.
[2] Koremnos, Lipson and Snidal 2003.

global governance. The barriers to forum-shopping are not constant over time, however; in the long run, there is little viscosity in global governance structures.

The rest of this paper is divided into six sections. The next section revisits the realist-institutionalist debate to understand why institutions might contribute to more rule-based outcomes in the first place. The third section discusses why the proliferation and legalization of global governance structures can undercut rather than reinforce institutionalist theories of world politics. The following section draws on recent literature to evaluate the collection of factors that could increase the viscosity of global governance. The fifth section examines the Doha Declaration to determine what factors prevented short-term forum-shopping on intellectual property rights. The final section summarizes and concludes.

Why institutions matter

To understand how increasing institutional proliferation can affect global governance outcomes, it is worth reflecting why international institutions are considered to be important in the first place. In the debate that took place between realists and institutionalists a generation ago, the latter group of theorists articulated in great detail how international regimes and institutions mattered in world politics. The institutionalist logic is persuasive in a world with coherent and cohesive international regimes. In an environment of institutional proliferation, however, many of the proffered reasons for *why* institutions matter begin to lose their explanatory power.

The primary goal of neoliberal institutionalism was to demonstrate that even in an anarchic world populated by states with unequal amounts of power, structured cooperation was still possible.[3] According to this approach, international institutions are a key mechanism through which cooperation becomes possible. A key causal process through which institutions facilitate cooperation is by developing arrangements that act as "focal points" for states in the international system.[4] Much as the new institutionalist literature in American politics focused on the role that institutions played in facilitating a "structure induced equilibrium" within domestic politics, neoliberal institutionalists made a similar argument about international regimes and world politics.[5] By creating a common set of rules or norms for all participants, institutions help to intrinsically define cooperation, while highlighting instances when states defect from the agreed-upon rules.

The importance of institutions as focal points for actors in world politics is a recurring theme within the institutionalist literature. Indeed, this concept is embedded with Stephen Krasner's commonly accepted definition for international regimes: "implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."[6] More than a decade later, Robert Keohane and Lisa Martin reaffirmed that, "in complex situations involving many states, international institutions can step in to provide 'constructed focal points' that make particular cooperative outcomes prominent."[7]

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[3] Keohane 1984; Oye 1986; Baldwin 1993; Keohane and Martin 1995; Hasenclever, Mayer and Rittberger 1996; Martin and Simmons 1998. Though often conflated, the institutionalist paradigm is distinct from liberal theories of international politics. On this distinction, see Moravcsik 1997.
[4] Schelling 1960.
[5] On structure-induced equilibrium, see Shepsle and Weingast 1981. See Milner 1997, and Martin and Simmons 1998, for conscious discussions of translating this concept to the anarchic realm of world politics.
[6] Krasner 1983, p. 2. See also North 1991, p. 97
[7] Keohane and Martin 1995, p. 45.

By creating focal points and reducing the transaction costs of rule creation, institutions can shift arenas of international relations from *power-based outcomes* to *rule-based outcomes*. In the former, disputes are resolved without any articulated or agreed-upon set of decision-making criteria. The result is a Hobbesian order commonly associated with the realist paradigm.[8] While such a system does not automatically imply that force or coercion will be used by stronger states to secure their interests, the shadow of such coercion is ever-present in the calculations of weaker actors.[9]

Most institutionalists agree that power also plays a role in rule-based outcomes as well.[10] However, they would also posit that the creation of a well-defined international regime imposes constraints on the behavior of actors that are not present in a strictly Hobbesian system. Institutions act as binding mechanisms that permit displays of credible commitment. In pledging to abide by clearly-defined rules, great powers make it easier for others to detect noncooperative behavior. These states will incur reputation costs if they choose to defect. If the regime is codified, then they impose additional legal obligations to comply that augment the reputation costs of defection.[11]

Institutionalists – and even some realists – further argue that once international regimes are created, they will persist even after the original distributions of power and interest have shifted.[12] Because the initial creation of institutions can be costly, Hasenclever *et al* point out, "the expected utility of maintaining the present, suboptimal (albeit still beneficial) regime is greater than the utility of letting it die, returning to

[8] Waltz 1979; Mearsheimer 1994/95, 2001; Wendt 1999, chapter six.
[9] Carr 1939 [1964]; Drezner 2003.
[10] Indeed, Oran Young made this point in an early article about international regimes. See Young (1980), p. 338.
[11] Abbott and Snidal 2001; Goldstein and Martin 2000.
[12] Ikenberry 2000.

unfettered self-help behavior, and then trying to build a more satisfactory regime."[13] Some realist scholars have acknowledged that international regimes will persist despite changes in the underlying distribution of power.[14] For smaller and weaker actors, institutions provide an imperfect shield against the vicissitudes of a purely Hobbesian order.[15]

It does not take a great deal of effort to find examples in both security and IPE of hegemonic compliance with international regimes even when such a move goes against their short-term interests. Despite its reputation for unilateralism, the Bush administration complied with a WTO dispute settlement body's ruling that its imposition of steel tariffs in 2002 contravened world trade law. The administration removed the tariffs in late 2003 despite the political hit President Bush would incur in his re-election campaign.[16] As Judith Goldstein and Lisa Martin point out, "the use of legal rule interpretation [in the WTO] has made it increasingly difficult for governments to get around obligations by invoking escape clauses and safeguards."[17]

In the security realm, Richard Holbrooke recounted one key motivation for President Clinton to intervene in Bosnia in 1995 – a NATO obligation under OpPlan 40-104 to commit U.S. troops to evacuate British and French peacekeepers. As Holbrooke recounts:[18]

> [OpPlan 40-104] had already been formally approved by the NATO Council as a planning document, thus significantly reducing Washington's options….

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[13] Hasenclever, Mayer and Rittberger 1996, p. 187.
[14] Krasner 1983, pp. 357-361.
[15] Reus-Smit 2004.
[16] On the domestic politics of the steel tariffs, see Susskind 2004.
[17] Goldstein and Martin 2000, p. 619.
[18] Holbrooke 1998, p. 66-67.

> The President would still have to make the final decision to deploy U.S. troops, but his options had been drastically narrowed. If, in the event of a U.N. withdrawal, he did not deploy American troops, the United States would be flouting, in its first test, the very NATO process it had created. The resulting recriminations could mean the end of NATO as an effective military alliance, as the British and French had already said to us privately.

By the late nineties, most variety of realists allowed that the international institutions could contribute to rule-based outcomes.[19] Other realists have acknowledged the contributions made by neoliberal institutionalists. As Randall Schweller and Davis Priess observed, "institutions matter because even the most rudimentary actions among states requires agreement on, and some shared understanding of, the basic rules of the game.[20] In moving from an anarchical world structure to one with coherent international regimes, institutions could contribute to a shift away from Hobbesian outcomes in world politics.

The tangled web of global governance

For the first generation of institutionalist literature, the key problem was how to surmount the transaction costs necessary to agree upon the rules of the game in a world where there were no institutional focal points.[21] The proliferation of international law and international organizations reduces the importance of this question, however.[22] Table 1 demonstrates the proliferation of global governance structures in recent years.

[19] The obvious exception here are structural neorealists and offensive realists. See Waltz 1979 and Mearsheimer 1994/95.
[20] Schweller and Priess 1997, p. 10.
[21] For a review, see Lipson 2004, 1-4.
[22] For one empirical account of this growth see Shanks, Jacobson, and Kaplan 1996.

There has clearly been a steady increase in the number of conventional IGOs, autonomous conferences, and multilateral treaties.

The causes for this increase are clearly varied, ranging from rational to mimetic causes. Robert Keohane argues that increased "issue density" stimulates the demand for new rules, laws and institutions.[23] In other instances, the "capture" of international institutional institutions by a powerful state or interest group could spur the creation of countervailing organizational forms.[24] The creation of new regimes – and the manipulation of old ones – can help rational actors cope with situations of uncertainty and complexity.[25] Some scholars go further, suggesting that the bounded rationality of international actors explains the existence of such structures. Organizational overlap is created when institutions are created in an evolutionary manner, suggesting that such instances are not planned in advance.[26] The world society school posits that actors create new rules and institutions as a mimetic exercise to adopt the forms of powerful institutions – which can explain the expansion of world associations and the proliferation of regional groupings.[27] For the concerns of this paper, the relevant fact is that the sources of institutional proliferation are not strictly endogenous to the rational design of states.

In a world thick with institutions, surmounting the transaction costs of policy coordination is no longer the central problem for institutionalists. The problem now shifts to selecting among a welter of possible governance arrangements.[28] As Duncan Snidal and Joseph Jupille point out: "Institutional choice is now more than just a starting

[23] Keohane 1982.
[24] On this possibility, see Mansfield 1995.
[25] Koremenos 2005; Rosendorff and Milner 2001.
[26] Jupille and Snidal 2005; Snidal and Viola 2006.

point for analysts and becomes the dependent variable to be explained in the context of alternative options."[29]

The current generation of institutionalist work recognizes the existence of multiple and overlapping institutional orders.[30] For many issues and/or regions, more than one international organization can claim competency. Kal Raustiala and David Victor label this phenomenon as regime complexes: "an array of partially overlapping and nonhierarchical institutions governing a particular issue-area. Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors."[31] Even those who stress the non-rational aspects of global governance agree that some actors engage in explicit efforts to foster strategic inconsistencies within a single regime complex.[32]

Many scholars and practitioners have welcomed the proliferation of international institutions. The literature on regime complexes and the progressive legalization of world politics examines the extent to which these legal overlaps constitute a new source of specific politics and what strategies governments pursue to maneuver in such an institutional environment.[33] The editors of *Legalization and World Politics* observe approvingly that: "In general, greater institutionalization implies that institutional rules govern more of the behavior of important actors—more in the sense that behavior

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[27] Meyer et al 1997.
[28] Krasner 1991; Drezner 2007a.
[29] Jupille and Snidal 2005, p. 2.
[30] Aggarwal 1998, 2005; Helfer 1999, 2004; Raustala and Victor 2004; Jupille and Snidal 2005; Alter and Meunier 2006.
[31] Raustiala and Victor, 2004, p. 279.
[32] Raustiala and Victor 2004, p. 298.
[33] See the citations in fn. 1.

previously outside the scope of particular rules is now within that scope or that behavior that was previously regulated is now more deeply regulated."[34]

Policymakers issue calls for ever-increasing institutional thickness.[35] In the final report of the Princeton Project on National Security, John Ikenberry and Anne-Marie Slaughter concluded:

> [H]arnessing cooperation in the 21st century will require many new kinds of institutions, many of them network-based, to provide speed, flexibility, and context-based decision making tailored to specific problems. This combination of institutions, and the habits and practices of cooperation that they would generate – even amid ample day-to-day tensions and diplomatic conflict – would represent the infrastructure of an overall international order that provides the stability and governance capacity necessary to address global problems.[36]

The proliferation of international rules, laws, and institutional forms *might* lead to the outcomes predicted by Ikenberry, Slaughter *et al*. As regimes grow into regime complexes, however, there are at least four reasons to believe that the institutionalist logic for how regimes generate rule-based orders will fade in their effect. First, institutional proliferation can dilute the power of previously constructed focal points. Second, the existence of nested and overlapping governance arrangements makes it more difficult to detect opportunistic defections from existing regimes. Third, the creation of legal mandates that could potentially conflict over time can weaken all actors' sense of legal obligation. Finally, the increased complexity of global governance structures places a disproportionate resource strain on poorer countries. All of these reasons create dynamics that favor the great powers more than would be expected under the institutionalist paradigm.

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[34] Goldstein et al 2001, p. 3.
[35] For a recent example, see Daalder and Lindsey 2007.

The proliferation of regime complexes and decision-making fora leads to an inevitable increase in the number of possible focal points around which rules and expectations can converge.[37] The problem, of course, is that by definition focal points should be rare, otherwise it becomes more difficult to develop common conjectures. Indeed, in his original articulation of the idea, Thomas Schelling stressed that uniqueness was essential for focal points to have any coordinating power.[38] If the number of constructed focal points increases, then actors in world politics face a larger menu of possible rule sets to negotiate. Logically, actors will seek out the fora where they would expect the most favorable outcome.[39]

All actors will pursue this strategy, but institutional thickness endows great powers with a decided bargaining advantage. Because powerful states possess greater capabilities for institutional creation, monitoring and sanctioning, regime complexes endow them with additional agenda-setting and enforcement powers relative to a single regime.[40] For example, Emilie Hafner-Burton looks at the relative performance of different components of the human rights regime complex.[41] She finds statistical evidence that human rights provisions contained within American and European preferential trade agreements have a more significant effect on human rights performance than the effect of United Nations human rights treaties. In this situation, the ability of the

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[36] Ikenberry and Slaughter 2006, p. 27. See also Slaughter 1997, 2004.
[37] This is true even if newer organizational forms are created to buttress norms emanating from existing regimes. Actors that create new rules, laws and organizations will consciously or unconsciously adapt these regimes to their political, legal, and cultural particularities. Even if the original intent is to reinforce existing regimes, institutional mutations will take place that can be exploited via forum-shopping as domestic regimes and interests change over time. For empirical examples, see Raustiala 1997; Hafner-Burton, n.d.
[38] "Equally essential is some kind of uniqueness; the man and wife cannot meet at the 'lost and found' if the store has several." Schelling 1960, p. 58.
[39] Raustiala and Victor 1994, p. 280; Drezner 2007, chapter three; Busch 2007.
[40] Krasner 1991; Voeten 2001.
[41] Hafner-Burton 2005.

United States and European Union to shift fora away from the United Nations and into trade deals allowed these governments to push for their preferred human rights standards. Even though their overall intent was similar, the specific rights pushed by the US and EU differed for domestic reasons.[42]

Second, the proliferation of international rules, laws, and regimes make it more difficult to determine when an actor has intentionally defected from a pre-existing regime. Within a single international regime, the focal point should be clear enough for participating actors to recognize when a state is deviating from the agreed-upon rules. If there are multiple, conflicting regimes that govern a particular issue area, then actors can argue that they are complying with the regime that favors their interests the most, even if they are consciously defecting from other regimes. Consider, for example, the ongoing trade dispute between the United States and European Union over genetically modified organisms in food.[43] The US insists that the issue falls under the WTO's purview – because the WTO has embraced rules that require the EU to demonstrate scientific proof that GMOs are unsafe. The EU insists that the issue falls under the 2001 Cartagena Protocol on Biosafety – because that protocol embraces the precautionary principle of regulation. The result is a legal deadlock, with the biosafety protocol's precautionary principle infringing upon the trade regime's norm of scientific proof of harm. It will be difficult to reconcile the legal norms contained within the WTO and Cartagena regimes.[44]

Third, the legalization of world politics can paradoxically reduce the sense of legal obligation that improves actor compliance with international regimes. International law scholars argue that the principle of *pacta sunt servanda*, buttressed by the general

[42] Hafner-Burton n.d.
[43] Drezner 2007a, chapter six.

norms and procedures of the international legal system, impose important obligations upon states.[45] The proliferation of international law, however, can lead to overlapping or even conflicting legal obligations. If one posits an evolutionary model of institutional growth, such an occurrence can take place even if actors are trying to adhere in good faith to prior legal mandates.

Once conflicting obligations emerge, so does the problem of reconciling such a conflict. As Raustiala and Victor point out, "the international legal system has no formal hierarchy of treaty rules. Nor does it possess well-established mechanisms or principles for resolving the most difficult conflicts across the various elemental regimes."[46] Because of legal equivalence, regimes can evade international laws and treaties that conflict with their current interests by seeking out regimes with different laws. Even if governments did not initially intend to act opportunistically when creating overlapping law, shifts in either the international environment or domestic politics can create political incentives for exploiting their existence.

This problem is hardly unique to international law. In American politics, for example, different federal agencies with different mandates will often conflict at the joints of a complex policy problem. This leads to obvious legal or bureaucratic battles. There is at least one important difference between the domestic and international realm, however. In American politics, administrative law and administrative courts function as a means for adjudicating overlapping mandates. No concomitant body of widely-recognized law exists at the international level.

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[44] Ibid.
[45] Goldstein et al 2001, p. 24-28.
[46] Raustiala and Victor 2004, p. 300. The Vienna Convention on the Law of Treaties provides a limited set of norms regarding the hierarchy of law, but observed adherence to these norms remains unclear.

Competing legal claims can create an institutional stalemate. States, international governmental organizations, and courts will face complexity in trying to implement policies that lie at the joints of regime complexes.[47] Politically, however, this situation privileges more powerful actors at the expense of weaker ones. When states can bring conflicting legal precedents to a negotiation, the actor with greater enforcement capabilities will have the bargaining advantage.[48]

Finally, and related to the last point, institutional proliferation increases the complexity of legal and technical rules. In such a complex institutional environment, more powerful actors again have the upper hand. Negotiating the myriad global governance structures and treaties requires considerable amounts of legal training and technical expertise related to the issue area at hand. Although these transaction costs might seem trivial to great powers with large bureaucracies, they can be imposing for smaller states.[49] This is particularly true when dealing with regime complexes that contain potentially inconsistent elements. Navigating competing global governance structures requires a great deal of specialized human capital. This is a relatively scarce resource in much of the developing world.[50] It is less problematic for states that command significant resources.

Figure 1 displays the relationship posited here between institutional thickness and the prevalence of rule-based outcomes. In moving from a purely Hobbesian order to one with a single, well-defined international regime, there is a marked shift away from

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[47] Aggarwal 2005; Alter and Meunier 2006.
[48] One counterargument would be that legal obligation fosters concerns about reputational costs if a state violates international law. Recent IR research, however, suggests that reputational effects are more tightly constrained than previously thought. See Downs and Jones 2002; Press 2005.
[49] Stiglitz 2002, p. 227; Jordan and Majnoni 2002; Reinhardt 2003; Drezner 2007a, chapter five.
[50] Some governments outsource their legal needs to western law firms well-versed in international law. This mitigates the human capital problem, but replaces it with a budgetary problem.

power-based outcomes to rule-based outcomes. However, as institutional thickness increases, the prevalence of power-based outcomes increases. Contrary to the expectations of global governance scholars and practitioners, after a certain point the proliferation of nested and overlapping regimes and the legalization of world politics actually contributes to more power-based outcomes.

A world of institutional proliferation turns the realist-institutionalist debate on its head. If it is possible for the major powers to shift policy from one fora to another, an institutionally thick world begins to resemble the neorealist depiction of anarchy. A military hegemon like the United States has the luxury of selecting the fora that maximizes decision-making legitimacy while ensuring the preferred outcome. For example, in the wake of the financial crises of the nineties, the G-7 countries shifted decision-making from the friendly confines of the IMF to the even friendlier confines of the Financial Stability Forum.[51] If there are only minimal costs to forum-shopping, and if different IGOs promulgate legally equivalent outputs, then institutional thickness, combined with low levels of viscosity, actually increases the likelihood of neorealist policy outcomes.

Policymakers and policy analysts in the United States have become increasingly aware of the ability to exploit institutional proliferation to advance American interests.[52] Richard Haass, Director of Policy Planning in the State Department from 2001 to 2003, articulated the Bush administration's approach to global governance as "a la carte multilateralism." According to this doctrine, the United States would choose to adhere to some but not all international agreements, to ensuring that favored multilateral

[51] Drezner 2007a, chapter five.
[52] See also Brooks and Wohlforth 2005, p. 515.

arrangements would expanded rather than constrain U.S. options.[53] Francis Fukuyama explicitly endorses a forum-shopping strategy in promoting the idea of "multi-multilateralism":[54]

> An appropriate agenda for American foreign policy will be to promote a world populated by a large number of overlapping and sometimes competitive international institutions, what can be labeled multi-multilateralism. In this world the United Nations will not disappear, but it would become one of several organizations that fostered legitimate and effective international action.
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> …. a multiplicity of geographically and functionally overlapping institutions will permit the United States and other powers to "forum shop" for an appropriate instrument to facilitate international cooperation."

This leads to the next question: what factors increase the costs of forum-shopping? What makes regime complexes viscous?

Candidate constraints to forum-shopping

Recent work on international organizations – including the Rational Design project and legalization efforts in the pages of *International Organization* – suggest a welter of possible independent variables to explain the variation in coordination solutions: membership, scope, centralization, legalization, and legitimacy, among others.[55]

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[53] Thom Shanker, "White House Says the U.S. Is Not a Loner, Just Choosy," *New York Times*, July 31, 2001, p. A1; Richard Haass, "Multilateralism for a Global Era," remarks to Carnegie Endowment for International Peace/Center on International Cooperation Conference, Washington, DC, November 14. Available at http://www.state.gov/s/p/rem/6134.htm (accessed October 19, 2006).
[54] Fukyuama 2006, p. 158, 168.
[55] Goldstein et al 2001; Koremenos, Lipson and Snidal 2001.

While these variables undeniably affect the origins of international regimes, the shift in focus from forum-creation to forum-shifting renders many of these factors less important. The variables of concern in the study of regime creation seem less salient in looking at institutional choice. Any examination of the cohesion of international choice must recognize that at some point in the past, the relevant actors were able to agree on a set of strategies such that cooperation was the equilibrium outcome.[56] This means that the costs of monitoring and enforcement could not have been too great. As James Fearon observes: "[T]here is a potentially important *selection effect* behind cases of international negotiations aimed at cooperation. We should observe serious attempts at international cooperation in cases where the monitoring and enforcement dilemmas are probably resolvable (author's italics)."[57]

This selection effect implies that some factors affecting the origins of international cooperation are not as relevant for explaining the persistence of international regimes. For example, cooperation theorists place a great deal of emphasis on the ability of international regimes to centralize the provision of information to ensure effective monitoring of norm adherence.[58] While it cannot be questioned that imperfect information about actions can lead to the breakdown of cooperation, it would be odd to claim that states invest in negotiations to reach an agreement without considering how to monitor it.[59] It would be hard to believe that information provision would provide a barrier to forum-shopping.

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[56] See Keohane 1984 for a verbal description of cooperation, and Bendor and Swistak 1997, pp. 297-298 for a more technical description.
[57] Fearon 1998, p. 279.
[58] Axelrod and Keohane 1985; Koremenos, Lipson and Snidal 2001; Mitchell 1998; Dai 2002.
[59] Downs, Rocke and Barsoom 1996.

Legal complexity and ambiguity could potentially explain why governments are blocked from forum-shopping, regardless of the issue area. Karen Alter and Sophie Meunier argue, for example, that the relationship between EU law and WTO law was ambiguous. Because of the hard legalization of both regimes, resolution of the banana dispute was more difficult than in a world of costless forum-shopping.[60]

The problem with this argument is that the constrain of legal complexity is often overestimated. For example, both Vinod Aggarwal and Alter & Meunier posit that because international law remains non-hierarchical, it is difficult for one legal agreement to "trump" another. This fact, however, gives great powers an incentive to create new institutions as a way to hedge against unfavorable outcomes in pre-existing institutions. Even when there are differences between hard law and soft law institutions, great powers can manipulate fora on either the rule creation or rule enforcement dimension.[61] Through forum-shopping, great powers can dilute or evade even the hardest legal strictures, with non-legal factors playing the pivotal role in determining governance outcomes.

For example, the anti-money laundering regime consists of multiple governance bodies with different degrees of legal standing.[62] The primary international standard – the Financial Action Task Force forty recommendations on money laundering – has achieved widespread compliance. FATF itself is not a treaty-based organization, however, nor is it an emanation of one.[63] Neither is the Financial Stability Forum, the body that recommended the promulgation of the FATF standard. The low level of legalization of both the FSF and FATF was not a hindrance to forum-shifting away from

[60] Alter and Meunier, 2006, p. 377.
[61] Manipulating fora during the adjudication phase (if there is one) is a more difficult, though not impossible, task. On this point, see Busch 2007. I am grateful to Joel Trachtman for this observation.
[62] This paragraph is drawn from Drezner 2007a.

the international financial institutions – indeed, if anything, their membership structure and relative informality were an attractor for the United States and the European Union. In the end, the great powers were able to have the FSF's recommendations implemented and monitored by the IMF. John Eatwell characterized the outcome accurately: "the IMF is using a treaty-sanctioned surveillance function to examine adherence to codes and principles that are not themselves developed by accountable treaty bodies."[64] Despite the high degree of legalization within the IMF, the G-7 countries were able to shift law creation to less formal international bodies.

The hard law/soft law distinction might be useful in discerning between which parts of a functional regime complex are used for rule creation and which parts are used for monitoring and enforcement. However, legalization in and of itself is not a barrier for shifting rule creation to another forum – indeed, hard legalization might promote the proliferation of rule creation in order to dilute the impact of some hard law regimes.[65]

Membership can also posited as a barrier to forum-shopping through its effects on collective legitimacy. An IGO has high legitimacy if it can enhance the normative desire to comply with the promulgated rules and regulations. Norms derive their power in part from the number of actors that formally accept them.[66] The greater the number of actors that accept a rule or regulation, the greater the social pressure on recalcitrant actors to change their position.[67] As an IGO's membership increases, its perceived "democratic" mandate concomitantly increases – thereby enhancing its legitimating power. On this dimension, the more powerful compliance-inducing IGOs are those with the widest

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[63] FATF originated from the 1989 G-7 summit.
[64] Eatwell 2000, p. 10.
[65] Goldstein and Martin 2000.

membership – such as the United Nations organizations.[68] Aspiring forum-shoppers must factor in the costs of lost legitimacy if they try to shift governance responsibilities away from legitimate institutions.

The problem with this logic is that it ignores the existence of alternative sources of collective legitimacy. Membership affects process legitimacy, under the assumption that an IGO with more participants confers greater authority. Beyond membership, however, IGOs can derive process legitimacy from other factors, such as technical expertise, a track record of prior success, or simply the aggregate power of member governments.[69] In some cases, the democratic character of the member states in question affects legitimacy.[70] For example, the U.S. opted to launch its 1999 bombing campaign against Serbia with the backing of NATO rather than the United Nations Security Council. This action generated minimal costs in terms of legitimacy. One could argue that was for two reasons. First, in terms of military power, expertise, and past success, NATO had greater legitimacy than the United Nations, despite the latter IGO's advantage in membership. Second, Serbia's specific reputation as a transgressive actor during the Balkan Wars gave NATO a greater moral legitimacy.[71]

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[66] Finnemore and Sikkink 1998. As will be seen, this is not to imply that membership size is the *only* source of legitimacy in world politics.
[67] Johnston 2003.
[68] Steffek 2003. It is certainly debatable whether the one-country, one vote principle used in most IGOs is truly democratic – however, the question here is whether the *perception* of democracy is present.
[69] Voeten 2005.
[70] Pevehouse 2002.
[71] NATO's success in halting Serbian actions in Kosovo highlights another point – regardless of process legitimacy, there is also the legitimacy of outcomes. If great powers deviate from established international regimes, but succeed in achieving their stated goals, that success can *ex post* legitimate their actions. For example, despite the UN Security Council's refusal to authorize Operation Iraqi Freedom, Security Council Resolution 1483, passed in May 2003, conferred legitimacy by recognizing Great Britain and the United States as the "Authority" in Iraq. See http://www.casi.org.uk/info/undocs/scres/2003/res1483.pdf (accessed November 2006).

Theoretical factors that affect the design and effectiveness of regime complexes do not significantly affect their viscosity. Indeed, in looking at a range of empirical cases from the global political economy, there appear to be few barriers to forum-shifting when the great powers want to change the content or enforcement of the rules.[72] There are exceptions, however. The next section looks in greater detail at one example of high viscosity to see what lessons, if any, can be generalized from it.

The case of the Doha Declaration

The intellectual property rights (IPR) regime complex for pharmaceuticals represents a tough test for the arguments made in this paper. The World Trade Organization is the center of gravity for the IPR regime complex, and has the reputation of being a high-functioning organization. Its Dispute Settlement Understanding (DSU) represents the gold standard of international judicial power. Furthermore, as will be seen, the humanitarian norms invoked on the issue of pharmaceutical patents are singularly powerful. Once enshrined, global civil society scholars posited that it would be extremely difficult for even powerful states to evade their normative power.[73] If any regime should have displayed persistently high levels of viscosity, it should have been this one.

In November 2001, at the Doha Ministerial meeting of the World Trade Organization (WTO), member governments responded to concerns that the trade-related

[72] Drezner 2007a.
[73] Keck and Sikkink 1998; Sell 2003; Prakash and Sell 2004.

intellectual property rights regime (TRIPS) was too stringent in the protection of patented pharmaceuticals. Members signed off on the "Declaration on the TRIPS Agreement and Public Health" or Doha declaration. This declaration stated that:

> [T]he TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.[74]

In August 2003, an additional WTO agreement was reached to clarify remaining ambiguities from the Doha declaration.[75] In December 2005 these agreements were codified through a permanent amendment to the TRIPS accord.[76] These events were the culmination of a sustained campaign by global civil society designed to scale back intellectual property restrictions on the production and distribution of generic drugs to the developing world.[77]

Neither the United States nor the European Union wanted the Doha Declaration The American negotiating position was that the original TRIPS accord *already* contained

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[74] "Declaration on the TRIPS Agreement and Public Health," http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.
[75] **"**Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health". 30 August 2003. Accessed at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm, 11 August 2005.
[76] "Amendment of the TRIPS Agreement," 6 December 2005. Accessed at http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc, December 2005.
[77] Epstein and Chen 2002; Sell 2003; Prakash and Sell 2004;

public health exceptions for epidemics and the like.[78] Furthermore, the U.S. wanted any exception to be limited to poor countries with weak state institutions that suffer from epidemics – but that the carve-out should not go any further. Whereas the final declaration actually said that the TRIPS accord, "does not and should not prevent members from taking measures to protect public health," the U.S. preferred narrower language, asserting a right "to take measures necessary to address these public health crises, in particular to secure affordable access to medicines."[79] The European Commission's position on the TRIPS accord was similar.[80] Global civil society advocates and developing countries, in contrast, wanted as broad a "public health" exception to TRIPS as possible, covering any and all forms of illness – and got what they wanted in the Doha Declaration.

The distribution of preferences on this issue is a classic example of club standards – a coterie of powerful states possessed radically different preferences from the rest of the world.[81] If the transaction costs of forum-shopping were minimal, one would predict the great powers to create new institutions guaranteeing that their regulatory preferences were locked in. In the past and present both the United States and the European Union have run into roadblocks at universal-membership IGOs. At these junctures in the past, great powers have evinced the willingness and the ability to either act unilaterally or shift fora to friendlier IGOs.[82] This would have been especially true of the Bush administration in late 2001, given their revealed preference towards multilateral

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[78] Office of the USTR, "TRIPs and Health Emergencies," 10 November 2001. Accessed at http://www.ustr.gov/Document_Library/Press_Releases/2001/November/TRIPs_Health_Emergencies.html, 10 August 2005. See, in particular, articles 7, 8, 30, and 31 of the original TRIPS agreement.
[79] Elizabeth Olson, "Drug Issue Casts a Shadow on Trade Talks," *New York Times*, 2 November 2001.
[80] European Commission, "Agreement on Intellectual Property Rights Relating to Trade and Pharmaceutical Patents," accessed at http://europa.eu.int/scadplus/leg/en/lvb/l21168.htm, 11 August 2005.
[81] Drezner 2007a, chapter three.

diplomacy. The important counterfactual question worth asking is why the great powers agreed to the Doha Declaration when there were alternative strategies outside the WTO process.

The answer appears to be that the costs of forum-shopping were uniquely prohibitive for the great powers at the time of the Doha ministerial. In the aftermath of the September 11th attacks, the United States was determined to launch a trade round at Doha for two reasons. First, the United States wanted to counter impressions that the terrorist attacks would weaken the process of economic globalization and/or undercut U.S. leadership.[83] Second, the great powers wanted a successful trade round in order to reinvigorate a global economy slumping from the aftereffects of the terrorist attacks and the concomitant slowdown in global trade.[84]

U.S. and European leaders were quite conscious of the link between a successful round and the terrorist attacks. Nine days after the attacks, Federal Reserve Chairman Alan Greenspan testified before the Senate that, "A successful [trade] round would not only significantly enhance world economic growth but also answer terrorism with a firm reaffirmation of our commitment to open and free societies."[85] U.S. Trade Representative Robert Zoellick echoed these remarks in a *Washington Post* op-ed the very same day, stating, "We need to infuse our global leadership with a new sense of purpose and lasting resolve…. the Bush administration has an opportunity to shape history by raising the flag of American economic leadership. The terrorists deliberately

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[82] Krasner 1985, 1991.
[83] Panagariya 2002, p. 1226.
[84] Sandra Cordon, "Slowdown Adds Pressure at WTO," *Ottawa Citizen*, 1 November 2001; Frances Williams, "Growth in Trade Unlikely to Top 2%," *Financial Times*, 26 October 2001.
[85] Alan Greenspan, "The condition of the financial markets," testimony before the Senate Committee on Banking, Housing, and Urban Affairs, 20 September 2001. Accessed at http://www.federalreserve.gov/boarddocs/testimony/2001/20010920/default.htm, January 2006.

chose the World Trade towers as their target. While their blow toppled the towers, it cannot and will not shake the foundation of world trade and freedom."[86] As the ministerial started in Doha, the British Trade and Industry Secretary warned that the "war on terrorism could be lost here."[87] Hyperbole aside, media coverage of the run-up to Doha also stressed the importance of a successful ministerial meeting to buttress perceptions of U.S. leadership.[88]

The failure to launch a trade round at Seattle three years earlier also increased the stakes at Doha for the ability of the WTO regime to advance trade liberalization. As Zoellick pointed out in October 2001, "the WTO stumbled badly in its first effort, in Seattle in 1999, to launch a round of global trade liberalization. It has not been keeping up with the challenges of a changing world economy. The meeting in Doha needs to get the WTO back on track."[89] Even prior to the September 11th attacks, WTO Director-General Mike Moore stressed the importance of a successful ministerial meeting at Doha given what transpired at Seattle: "failure to reach consensus on a forward work programme that would advance the objectives of the multilateral trading system, particularly in the light of the earlier failure at Seattle, would lead many to question the

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[86] Robert Zoellick, "Countering Terror with Trade," *Washington Post*, 20 September 2001. In November 2001, Zoellick reiterated this point: "Just as the Cold War reflected a contest of values, so will this campaign against terrorism. Just as America's Cold War strategy recognized the interconnection of security and economics, so must its strategy against terrorism." Quoted in Denis Staunton, "Terrorist Threat Overshadows Key Trade Meeting," *Irish Times*, 9 November 2001. See also "American Trade Leadership: What is at Stake," speech at the Institute for International Economics, Washington, DC, 24 September 2001. Accessed at http://www.ustr.gov/assets/Document_Library/USTR_Speeches/2001/asset_upload_file522_4267.pdf, January 2006.

[87] Quoted in Oliver Morgan and Gaby Hinsliff, "'War on Terrorism Could be Lost Here,'" *The Observer*, 4 November 2001. See also Guy de Jonquières, "Dealing in Doha," *Financial Times*, 6 November 2001.

[88] Joseph Kahn, "A Trade Agenda Tempts Murphy's Law," *New York Times*, 9 November 2001; Siti Hajiar Sulaiman, "Call for Full Turnout at WTO Meeting," *Business Times Malaysia*, 25 September 2001. Staunton, "Terrorist Threat Overshadows Key Trade Meeting."

[89] Zoellick, ""The WTO and New Global Trade Negotiations: What's at Stake," speech at the Council on Foreign Relations, Washington, DC, 30 October 2001. Accessed at

value of the WTO as a forum for negotiation. It would certainly condemn us to a long period of irrelevance."[90] Following the Doha meeting, Zoellick declared, "We have removed the stain of Seattle."[91] Contemporaneous media accounts confirm the shadow that Seattle cast over American and European trade negotiators in the run-up to Doha.[92]

Finally, the ability of the great powers to shift fora on intellectual property from WIPO to the WTO in the Uruguay round made it that much more difficult to try and shift governance structures again less than a decade later. Ironically, the efforts to create enforceable "hard law" on IPR in the first place also raised the costs on future forum-shifting.[93] Because the Americans and Europeans had invested so much in the WTO, any legal weakening of the TRIPS regime would be costly to them for other aspects of WTO enforcement, such as the dispute settlement mechanism. One European Commission trade negotiator observed after Doha that, "in the absence of any Declaration on public health, *de facto* non-compliance by several developing countries was a real risk."[94]

The uniquely binding venue and timing of Doha prevented the United States from substituting across governance structures. The multiplicity of linked trade issues also benefited the developing country position. Because so many issues were being negotiated for inclusion in the Doha development agenda at the same time – textiles, agricultural subsidies, investment, procurement, the environment, etc. – the developing countries were able to link issues to ensure concessions on TRIPS. Because the U.S. was

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http://www.ustr.gov/assets/Document_Library/USTR_Speeches/2001/asset_upload_file821_4260.pdf, January 2006.

[90] Statement by the Director-General to the Informal General Council, 30 July 2001. Accessed at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_dg_statement_gcmeeting30july01_e.htm, January 2006.

[91] Quote to Agence-France Presse found at http://www.wto.org/trade_resources/quotes/new_round/new_round.htm, accessed January 2006.

[92] See references in fn. 74.

[93] On this point, see Abbott and Snidal 2000.

committed to securing an agreement at Doha to launch a new trade round, USTR officials decided early on that making concessions on IPR early on would increase the odds of success.[95] As Haochen Sun observes, "[WTO] members came to understand that no broad negotiating mandates such as investment and competition would emerge from the conference in the absence of a meaningful result on medicines."[96]

Institutional proliferation after the Doha Declaration

If the story ended at Doha in November 2001, then it could be argued that viscosity in global governance represents an effective brake against the dynamics discussed here about the problems of institutional proliferation and fragmentation. However, the story does not end. As the constraints faced by the great powers at Doha lessened, the regulation of IPR has shifted back towards the great powers' preferred set of outcomes. This has happened largely because of the proliferation of new institutional forms – namely, bilateral free trade agreements.[97]

Prior to the Doha Declaration, developed countries had pushed for the inclusion of stronger IPR protections than TRIPS – referred colloquially as "TRIPS-plus" – in trade agreements outside of the WTO framework.[98] After Doha, the developed countries – led by the United States – began pursuing this tactic with greater fervor. The European Commission and the European Free Trade Area both inserted TRIPS-plus IPR provisions

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[94] Van Eeckhaute 2002,p. 22.
[95] According to one interview with a former USTR official, Zoellick explicitly made this calculation in signing off on the Doha declaration. This has also been the post-Doha pattern on TRIPs and public health. Breakthroughs in negotiations over TRIPS preceded both the Cancun and Hong Kong ministerials in 2003 and 2005 respectively.
[96] Sun 2004, p. 136. See also Guy De Jonquieres, "All night haggling in Doha leads to agreement," *Financial Times*, 15 November 2001.
[97] It should be noted that these FTAs were used to push other standards as well. See Hafner-Burton n.d.

into their free trade agreements with developing countries.[99] EU agreements with Tunisia and Morocco, for example, included provisions requiring IPR protection and enforcement "in line with the highest international standards."

The United States was equally persistent in this practice. Table 2 demonstrates the TRIPS-plus IPR provisions in U.S. trade agreements that have been negotiated since 2000. In all of these cases, TRIPS-plus provisions were inserted into the text of the agreement. Beyond the use of FTAs, the U.S. has also used the carrot of bilateral investment treaties in order to secure bilateral intellectual property agreements that can include TRIPS-plus agreements.[100] Over time, the viscosity of global governance on intellectual property rights has lessened.

The TRIPS-plus provisions contained in FTAs would appear to conflict with the norms embedded within the Doha Declaration. Indeed, most of these FTAs contained side-letters specifically mentioning that nothing in the FTA should infringe on the Doha Declaration. For example, the side letter to CAFTA states that the treaty's intellectual property provisions "do not affect a Party's ability to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS."[101] The Doha Declaration is also explicitly mentioned in the understanding. Frederick Abbott argues, however, that these side agreements "are

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[98] Drahos 2001.
[99] Ibid., p. 13; see also European Commission, "EU Strategy to Enforce Intellectual Property Rights in Third Countries," MEMO/04/255, 10 November 2004. For information on EFTA trade pacts, see Julien Bernhard, "Deprive Doha of All Substance," August 2004, at http://www.evb.ch/cm_data/Deprive_Doha.pdf (accessed 12 August 2005).
[100] Drahos 2001, p. 6.
[101] Office of the USTR, "Understanding Regarding Certain Public Health Measures," 5 August 2004. Accessed at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file697_3975.pdf, 9 August 2005.

drafted in a substantially more restrictive way" than the Doha Declaration itself.[102] At a minimum, the combination of legal texts introduces legal uncertainty, constraining the flexibility of the TRIPS accord desired by developing countries and global civil society.

As Table 2 demonstrates, the most prominent of the TRIPS-plus provisions is the protection of test data.[103] To satisfy government regulations, drug manufacturers are required to undergo significant amounts of testing to demonstrate safety and effectiveness, imposing additional costs on first-mover manufacturers. Data protection prevents other drug manufacturers from relying on that data to obtain approval for drugs that are chemically identical to the original patent-holder. The United States ensures data protection for five years; EU member states offer between six to ten years. In 2005, the USTR stated in its Special 301 Report to Congress that data protection would be "one of the key implementation priorities" for the executive branch. The report went on to identify deficiencies in data protection for pharmaceuticals testing in more than twenty countries, including China, India, Russia, Mexico, and Thailand.[104] In the past, even this implicit threat of economic coercion has been sufficient to force dependent allies into altering their regulations on these issues.[105] By ensuring the protection of test data in these FTAs, developed countries have successfully extended the scope of patent protections.

Both proponents and opponents of patent protection on pharmaceuticals agree that the ground has shifted since Doha. Many of the same global civil society scholars and activists who claimed a victory at Doha acknowledge that the proliferation of "TRIPS-

[102] Abbott 2005, p. 352.
[103] Correa 2006.
[104] Office of the USTR, "Special 301 Report," April 2005. Quotation from p. 6.
[105] Drezner 2001, 2003.

plus" provisions in free trade agreements undercuts the public health norm established at Doha.[106] Frederick Abbott, who under the auspices of the Quaker United Nations Office provided legal assistance to developing countries in TRIPS negotiations, concludes that the developing world and NGOs have, "substantially increased their negotiating effectiveness in Geneva but have yet to come to grips with the U.S. forum-shifting strategy."[107] In a May 2004 letter to U.S. Trade Representative Robert Zoellick, approximately 90 NGOs protested the inclusion of these TRIPS-plus provisions in FTAs, stating, "Intellectual property provisions in US free trade agreements already completed or currently being negotiated will severely delay and restrict generic competition…. through complex provisions related to market authorization and registration of medicines."[108] In a November 2006 report, Oxfam International declared that, "every FTA signed or currently under negotiation has disregarded the fundamental obligations of the Declaration by maintaining or imposing higher levels of intellectual property protection."[109]

It should be stressed that these developments represent only a second-best outcome for the developed countries. Given their preference orderings, their ideal outcome would have been for the Doha Declaration to never have been signed in the first place. Since Doha, however, the United States and European countries have successfully pursued a forum-shopping strategy to achieve their desired ends. The proliferation of laws and institutions since the Doha Declaration has shifted the status quo closer to the U.S.-preferred outcome; one in which flexibility is only invoked in times of crisis

[106] Sell 2003, chapter six; Abbott 2005.
[107] Abbott, "The WTO Medicines Decision," p. 317.
[108] "Letter from 90 NGOs to U.S. Trade Representative Robert Zoellick ," 27 May 2004. Accessed at http://www.cptech.org/ip/health/trade/ngos05272004.html, 11 August 2005.

epidemics. At the same time, this proliferation has increased the degree of legal uncertainty developing countries must face when they contemplate this issue. The final outcome does not precisely fit with great power preferences; however, a strategy of institutional proliferation has allowed these states to get far more than would have been thought in 2001.

The determinants of institutional viscosity

The TRIPS case offers three tentative lessons about the sources of viscosity in global governance structures. The first is that the scope of an international governmental organization can provide a constraint against forum-shifting, provided that there is a tight linkage between the issue at hand and other issues under the organization's purview. The American and European positions on a public health exception to the TRIPS accord remained relatively stable and consistent while deliberations took place within the TRIPS Council. It was only when developing countries made it clear that there would be no Doha round without concessions on this issue that there was a shift in the U.S. negotiating position.

An interesting empirical question is the frequency of tightly linked bargaining issues within a single international governmental organization. Even within the WTO, this sort of linkage only existed within the context of a bargaining round. Between the end of the Uruguay round and the beginning of Doha, however, the WTO membership repeatedly thwarted efforts by some governments to add new issues to the WTO agendas. Beyond the drug patent issue, questions about labor standards and environmental

[109] Oxfam International 2006, p. 14.

protection were shunted to other IGOs at the Singapore and Seattle Ministerial Conferences.[110] Despite these rejections, however, there was no effort to link these issues to compliance with the WTO dispute settlement system. Linkage took place only within the context of a bargaining round.

The second lesson from the Doha Declaration is the way in which concerns about reputation led to increased viscosity. For the United States in particular, there were concerns about the future of the WTO after the failed Ministerial in Seattle, as well as the need to display hegemonic leadership in the wake of the September 11th attacks. By refraining from shifting fora away from the WTO, the United States reinforced the reputation of the WTO as the focal point for the trade regime complex. This restraint also acted as a correction against the impression that the United States government would withdraw from international regimes that did not conform to its preferences.

Given the Bush administration's penchant for forum-shifting, "a la carte multilateralism," and outright unilateralism, it is worth asking why the United States chose to bolster the WTO's reputation at that particular moment. One answer is that for the hegemonic power, any particular international organization within a regime complex only serves as a means to an end.[111] As the 2002 National Security Strategy put it: "In all cases, international obligations are to be taken seriously. They are not to be undertaken symbolically to rally support for an ideal without furthering its attainment."[112] The United States has treated multilateral institutions that fail to enforce their own norms – like the UN human rights organizations – as less useful parts of a

[110] O'Brien, Goetz, Scholte and Williams 2000; Drezner 2007a, chapter three.
[111] Drezner 2007b.
[112] Executive Office of the President, *The National Security Strategy of the United States of America*, September 2002, p.vi. Accessed at http://www.whitehouse.gov/nsc/nss.pdf, 11 January 2007.

regime complex. Those institutions that are seen as effective – like the WTO – are given greater deference.

This implies that regime complexes will become more fluid and less viscous when components of the complex develop reputations for "organized hypocrisy."[113] A hypocritical IGO generates policies that are at odds with great power interests, decoupled from stated norms, or so inchoate that they cannot be implemented or enforced. In numerous issue areas the United States has switched fora from what it perceived to be a hypocritical regime to a club regime inhabited by like-minded states.[114] While this has been a part of U.S. strategy for some time, it has been particularly pronounced during the Bush administration. The March 2006 National Security Strategy explicitly states, "Where existing institutions can be reformed to meet new challenges, we, along with our partners, must reform them. Where appropriate institutions do not exist, we, along with our partners, must create them."[115]

On nonproliferation, for example, the Bush administration showed little interest in the recent review of the Non-Proliferation Treaty – because in the administration's eyes, the NPT is a failed regime. Instead, officials have shifted nonproliferation responsibilities towards informal groupings like the G-8, the Nuclear Suppliers Group, and the Proliferation Security Initiative (PSI).[116] The PSI in particular played a crucial supporting role in convincing Libya to renounce its nuclear aspirations.[117] Through its statement of principles, bilateral treaties with flag-of-convenience states, and United

[113] On this concept, see Krasner 1999; Lipson 2007.
[114] For more on this phenomenon, see Drezner 2007a.
[115] Executive Office of the President, *The National Security Strategy of the United States of America*, March 2006, p. 36. Accessed at http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf, 11 January 2007. See, more generally, Drezner 2007c.
[116] David Sanger, "Months of Talks Fails to Bolster Nuclear Treaty," *New York Times*, 28 May 2005, p. A1.
[117] Robin Wright, "Ship incident may have swayed Libya," *Washington Post*, 1 January 2004, p. A18.

Nations declarations, the U.S. is clearly trying to shift customary international law in favor of allowing open seas interdiction of ships suspected of carrying WMD materials.[118] On trade matters, however, the administration has complied with WTO rulings against the United States – including, most prominently, the attempt to use the escape clause to raise steel tariffs in 2002.

There is one final lesson to draw from the TRIPS case – even in the medium run, there is lots of fluidity and very little viscosity in global governance. Despite the ability to link issues within the context of a WTO bargaining round, and despite the desire to bolster the WTO's reputation, major trading states were perfectly willing to shift fora away from the TRIPS Council and towards bilateral preferential trade agreements as a way to strengthen IPR standards. These moves did not obviate either the TRIPS accord or the Doha Declaration. They did, however, demonstrate that the major powers were willing to work outside WTO strictures to alter the content of the IPR regime complex, despite risks to the WTO's. In the long run, it appears that an institutionally thick world bears more than a passing resemblance to the neorealist conception of anarchy.

[118] Byers 2004; Cotton 2005.

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TABLE 1

GROWTH IN GLOBAL GOVERNANCE STRUCTURES

Type of international regime	**1981**	**1993**	**2003**
International bodies	863	945	993
Subsidiaries or emanations of international bodies	590	1100	1467
Autonomous international conferences	34	91	133
Multilateral treaties	1419	1812	2323
TOTAL	**2906**	**3948**	**4916**

Source: Union of International Organizations, data accessed at http://www.uia.org/statistics/organizations/ytb299.php.

TABLE 2

IPR PROVISIONS IN AMERICAN FTAs, 2000-2006

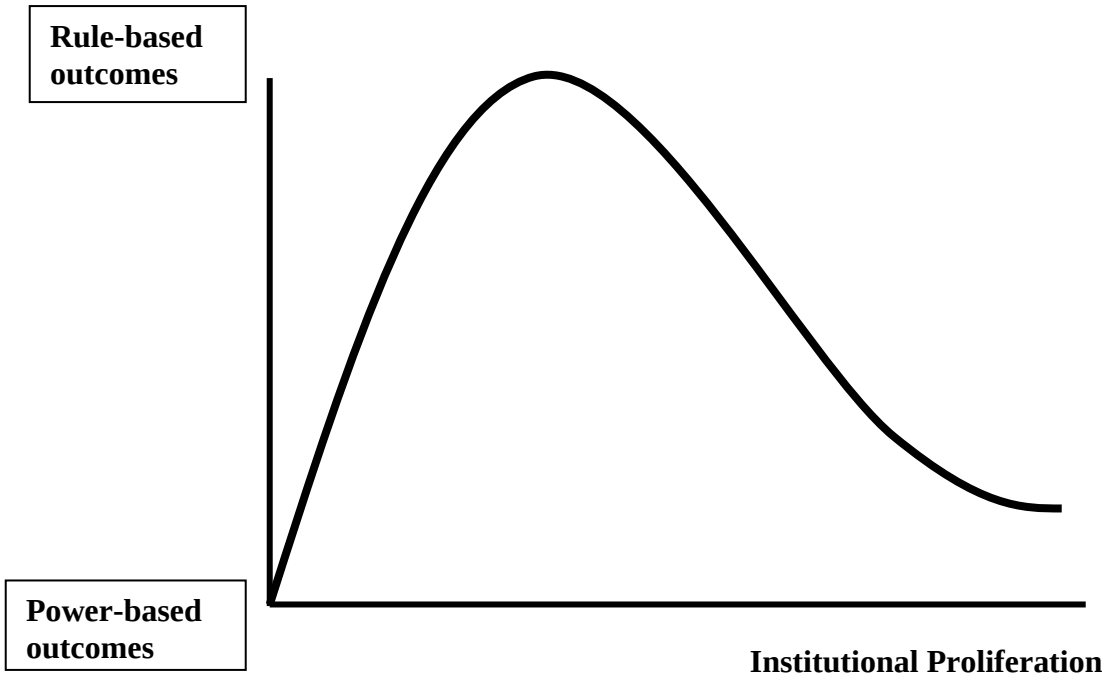
FTA	Mandatory patent extensions	Protection of test data	Marketing restrictions	Limits on parallel imports or compulsory licensing
Jordan		X		X
Singapore	X	X	X	X
Chile	X	X	X	
Australia		X	X	X
Morocco	X	X	X	X
CAFTA	X	X	X	
Bahrain	X	X	X	
Oman*		X		
Colombia*	X	X	X	
Peru*	X	X	X	
Thailand*		X		X

*****FTA negotiated but not ratified

Sources: Committee on Government Reform minority staff, U.S. House of Representatives, *Trade Agreements and Access to Medications Under the Bush Administration*, Washington, DC, June 2005; Oxfam, *Patents versus Patients: Five Years after the Doha Declaration*, Oxfam Briefing Paper #95, November 2006; Consumer Project on Technology, "Health Care, Regional Trade Agreements, and Intellectual Property," accessed at http://www.cptech.org/ip/health/trade/, 11 January 2007.

FIGURE 1

INSTITUTIONAL PROLIFERATION AND WORLD ORDER



GAME STRUCTURE

There is an issue X wherein all states must set their policies x_i where for all countries i, $0 < x < 1$. Each state's utility is function of maximizing its own value for x while ensuring that the global production of x approaches its ideal point. There is a pre-existing regime in which all states agree to set $x_i = x^*$.

States can choose to set their value of $x > x^*$, but there is a probability ρ of being caught, at which point there is a sanctions penalty of ϕ.

The hegemon begins the game by first choosing whether to follow regime R, create a new regime R' that sets $x_i = x^{**}$, or create regime R" that sets the penalty for noncompliance at ϕ'. Let's further assume that the mere act of going along with regime R in the first place bolsters its credibility.