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ACTA and Its Complex Politics

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Counterfeiting; Enforcement; Intellectual property; International relations; International trade; Politics

Introduction

On October 1, 2011, eight countries—Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States—gathered together in a ceremony in Japan to sign the Anti-Counterfeiting Trade Agreement (ACTA).¹ Aiming to set a new and higher benchmark for international intellectual property enforcement, this highly controversial plurilateral agreement was the result of three years and eleven rounds of formal negotiations among developed and like-minded countries. This agreement was finally adopted on April 15, 2011. As of this writing, it is still awaiting ratification and has not yet entered into force.²

Commentators have widely criticised the ACTA negotiation process for its lack of transparency and accountability. By ushering in a new “country club” approach to setting international intellectual property norms, the negotiations have also raised important international concerns. This approach is likely to have serious ramifications for both the structural integrity and continued vitality of the existing international intellectual property regime.

As China and India noted at the June 2010 meeting of the WTO Council for Trade-Related Aspects of Intellectual Property Rights, ACTA has raised a wide variety of systemic problems within the international trading system.³ The agreement’s heightened enforcement standards will upset the delicate balance struck in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It will also increase the incoherence and unpredictability of the international regulatory framework.⁴ Similarly, Francis Gurry, the director general of the World Intellectual Property Organization (WIPO), expressed his concern that, in negotiating ACTA, countries have “taken matters into their own hands to seek solutions outside of the multilateral system to the detriment of inclusiveness of the present system”.⁵

² Pursuant to art.40.1, ACTA will “enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval as between those Signatories that have deposited their respective instruments of ratification, acceptance, or approval”.
Michael Geist, a law professor at the University of Ottawa, also noted that “some might wonder whether ACTA is ultimately designed to replace WIPO as the primary source of international IP [intellectual property] law and policy making”.6

ACTA has indeed provided an excellent case study for examining the complex politics and institutional dynamics behind the development of the international intellectual property regime. As with the past two volumes of this journal, Volume 3 will devote its first issue to a topic of great importance to intellectual property scholars. Focusing on the politics of intellectual property, this special issue reminds readers that intellectual property developments are not just about law and economics—the primary foci of the previous two special issues. Intellectual property can also be about politics. Although scholarship on the politics of intellectual property is only emerging in the scholarly literature, policymakers and activists have long recognised the importance of such issues.7

As an introduction to this special issue, this article examines the country club approach the ACTA negotiating parties embraced to establish new and higher international intellectual property enforcement standards. It points out that the agreement is flawed not only because it is a country club agreement but also because it is a bad country club agreement. The article then situates ACTA in the context of a recent trend of using bilateral, plurilateral and regional trade and investment agreements to circumvent the multilateral norm-setting process. It contends that this disturbing trend could upset the political dynamics in the current international intellectual property regime. The article concludes with a discussion of the multiple layers of complex politics behind the ACTA negotiations: international, domestic and global. It focuses on developments both within the new intellectual property enforcement club and without.

The ACTA Country Club

At the global level, the major criticisms of ACTA concern the limitation of its membership to developed and like-minded countries, the lack of representation by countries in the developing world and the agreement’s potential negative impact on the international intellectual property regime.8 To highlight the problematic nature of ACTA, some commentators, such as Daniel Gervais, have described the agreement as a “country club agreement”.9

Within this country club, members set rules to govern its membership. Article 36 provides details on the ACTA Committee, which is charged with the agreement’s administration and management and is granted broad powers to establish ad hoc committees. Article 42 delineates the procedure for amending the agreement. Article 43 further specifies the time the agreement will be open for signature and how countries can accede to it after the expiration of the specified period.

Although the country club approach used by the ACTA negotiating parties has garnered considerable attention from policymakers and commentators, the use of clubs to coordinate international regulatory standards is not unprecedented. Developing countries, for instance, have frequently used coalitions to shape their negotiating agenda, articulate more coherent positions and establish a united negotiating front. By using these organisational structures, countries seek to achieve leverage that otherwise would not have existed for each country on its own.

What is interesting and somewhat different this time, however, is the developed countries’ aggressive use of club arrangements to enhance their already very powerful bargaining position. In political science, a burgeoning literature has been devoted to examining the use of club standards to set international norms. In All Politics Is Global, for example, Daniel Drezner advances a typology of regulatory coordination. Based on the variations between the costs of adjusting national regulatory standards confronting “great powers” and those confronting the rest of the world, he identifies four different types of international regulatory standards: (1) harmonised standards; (2) sham standards; (3) rival standards; and (4) club standards. Professor Drezner’s four-field matrix is highly useful to our analysis of ACTA (see Table 1).

Table 1: A Typology of Regulatory Coordination

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<thead>
<tr>
<th>Low Adjustment Costs (Great Powers)</th>
<th>High Adjustment Costs (The Rest)</th>
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<tr>
<td>Low Adjustment Costs (The Rest)</td>
<td>Harmonised Standards</td>
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<tr>
<td>High Adjustment Costs (Great Powers)</td>
<td>Club Standards</td>
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<tr>
<td>Low Adjustment Costs (Great Powers)</td>
<td>Rival Standards</td>
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<tr>
<td>High Adjustment Costs (The Rest)</td>
<td>Sham Standards</td>
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According to Professor Drezner, harmonised standards come into existence when adjustment costs are low for both great powers and the rest of the international community. The minimum substantive and enforcement standards in the TRIPS Agreement provide instructive examples. Because harmonised standards are usually the product of political compromises, they tend to be low and are therefore open to future upward adjustment. The TRIPS enforcement provisions, for instance, have been widely criticised by developed countries and their intellectual property industries for being primitive, constrained, inadequate, and ineffective. To some extent, the ACTA negotiations represent the attempt by developed countries to make an upward adjustment to the weak harmonised standards in the TRIPS Agreement.

In contrast to harmonised standards, sham standards are developed when adjustment costs are high for both great powers and the rest of the world. Examples of these standards are those concerning the transfer of technology, abuse of rights and restraints on trade. One could arguably include the standards for the protection of traditional knowledge and cultural expressions, which have yet to become fully developed. As the quality of these standards improves, however, they may find their way to another category.

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15 This table draws on Drezner, All Politics Is Global (2008), p.72.
When adjustment costs are high for great powers but low for the rest of the international community, negotiations usually result in the creation of rival standards. The textbook example of this type of standard is the provision concerning the protection of geographical indications. While the European Union favours greater protection in this area, the United States insists that the use of certification and collective marks would provide adequate protection to rights holders. The disagreement between these two major trading powers eventually led to a World Trade Organization (WTO) dispute between the United States on the one hand and the European Union and Australia on the other. Such disagreement has also led to the inclusion in US free trade agreements (FTAs) of provisions governing the relationship between geographical indications and trademarks.

Finally, when adjustment costs are low for great powers but high for the rest of the world, negotiations tend to result in the development of club standards. As Professor Drezner explains:

“[A] great power concert will generate enough market power to lock in the concert’s preferred set of regulatory standards. The combined market size of a great power concert will induce most recalcitrant states into shifting their standards. However, states with severe adjustment costs will still resist, and the Prisoner’s Dilemma aspect of enforcement can tempt some governments into noncompliance; under this constellation of interests, the enforcement of standards becomes an issue. The crucial step for coordination to take place is a coalition of the willing among the greater powers.”

Although developing countries and their supportive commentators have widely criticised the arbitrariness and exclusiveness of club standards, those standards have been used in other fields of international law. In 1989, the Group of Seven (G-7) established the Financial Action Task Force in the Paris Summit to combat money laundering (and later terrorist financing). In the early 1990s, this task force was extended to countries in the Organisation for Economic Cooperation and Development (OECD) as well as to a select group of non-OECD members, such as Hong Kong and Singapore, and to regional organisations, such as the Gulf Cooperation Council.

While club standards have not been widely used in the intellectual property arena, one could arguably trace the development of the TRIPS Agreement back to a two-stage process involving these standards. The first stage took place when the United States, the European Communities and Japan banded together to develop “highest common denominator” standards for the protection and enforcement of intellectual property rights. Once these standards had been accepted, the second stage kicked in when these trading powers sought to multilateralise the standards by extending them to other members of the General Agreement on Tariffs and Trade (GATT), and later the WTO.

While many have considered the developed countries’ use of club standards undemocratic and inequitable, the standards’ more effective outcomes can justify such use. As Moisés Naím, the former editor in chief of Foreign Policy, has noted: “[A] smart multilateral approach to illicit trade has to be selective.”

19 e.g. Central America-Dominican Republic Free Trade Agreement, August 5, 2004, art.15.3.7.
Moreover, club standards can help to avoid gridlocked situations where developed and developing countries fail to achieve progress in multilateral negotiations—the notorious stalemate over the revision of the Paris Convention being a good example.26 As Professor Drezner observes:

“Club IGOs, such as the … G-7 … or the OECD, use membership criteria to exclude states with different preference orderings and bestow benefits for in-group members as a way to ensure collective action. Compared to universal IGOs, clubs have reduced legitimacy because of their limited membership, though this can be partially compensated through other sources of legitimacy such as a reputation for effectiveness. Clubs also have the advantage of a membership with a more homogenous set of preferences. The smaller number of actors also increases a club’s ability to coordinate and enforce policy.”27

Finally, it is important to keep in mind the geopolitical reality behind traditional international intellectual property negotiations. Regardless of what forum is ultimately used, countries—especially the weaker ones—rarely participate equally in the development of multilateral standards, due in part to their lack of resources, capacity and bargaining power. Even during the TRIPS negotiations, the discussions were dominated by developed countries and a small group of hardline developing countries, such as Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.28 Participation by smaller developing countries remained rather limited.

Thus, when examining ACTA, we need to compare its standards with those achievable under the present conditions of international intellectual property negotiations. We should not focus on an ideal arrangement that does not exist. Nevertheless, even if we take the present conditions into account, ACTA, as the next section will show, is still a rather disappointing plurilateral agreement.

A bad country club agreement

In discussing club standards, commentators have widely noted the need to include in the negotiation process those countries that have a significant impact on the issue area. Consider, for example, the standards for international financial regulation established by the G-7 and the OECD. Because all the important players in the field belong to either one of the two organisations, club standards were strategically chosen to enable powerful developed countries to establish high standards without the worry of dilution by marginalised players.

Once these standards have been established, an important goal of the G-7 and the OECD is to expand the club to outside players. As Professor Drezner explains:

“In dealing with nonmembers, a club IGO can encourage the pooling of resources to induce outsiders into agreeing to the core’s regulatory regime. Material inducements, such as aid or technical assistance, can encourage peripheral states to accept the imposed standard. Small country leaders that are sympathetic to the core position can also use pressure from an international organization to bypass entrenched domestic interests and other institutional roadblocks. For the most recalcitrant states, a club IGO greatly enhances the utility of multilateral coercion. Once they join, they then have an incentive to pressure other governments into altering their regulatory standards. This dynamic produces a cascade effect in which a club IGO expands to near-universal size.”29

29 Drezner, All Politics Is Global (2008), pp.75–76.
Over the years, new conditions have arisen, while the geopolitical make-up has changed. At times, clubs have adjusted their membership to accommodate these changing circumstances. For example, in the wake of the recent global economic crisis and in response to the rise of the so-called BRICS countries (Brazil, Russia, China, India and South Africa), developed countries smartly redesigned their norm-setting approach. By initiating discussions in the so-called G-20, which include emerging countries such as Argentina, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia and South Africa, the G-7 countries successfully expanded the “club” in the area of international financial regulation to cover new players that have increasingly significant impacts on the field. Such an expansion is unsurprising. After all, it is hard to imagine how the club could effectively respond to the sovereign debt crisis without the cooperation of powerful emerging economies.

To some extent, the transformation of the GATT to the WTO reveals a similar need to adapt to changing circumstances. In the beginning, the GATT, like the G-7,

“was perceived of as a ‘rich nations’ club,’ focusing on the needs of the developed nations, though some of the more prominent developing nations such as Brazil and India played a role.”

Most other developing countries received merely special and differential treatment. Today, however, the WTO includes 153 members, including three different groups of countries: developed, developing and least developed. Although the TRIPS Agreement includes transitional periods for both developing and least developed countries, the latter two groups of countries still take on key obligations on the protection and enforcement of intellectual property rights, similar to those assumed by developed countries.

If one is willing to go back even further in time, one will notice a similar dilemma confronting members of the Berne Union, the well-known international copyright club. Following the decolonisation movement after the Second World War and the arrival of a large number of newly emerging countries in the 1960s, developed countries in the Union had to decide whether they wanted to maintain their high Euro-centric copyright standards or offer significant concessions to entice developing countries to join the Union. In the end, the Berne Union members drafted the Stockholm Protocol Regarding Developing Countries, which was eventually adopted as an optional appendix to the Paris Act of the Berne Convention.

Notwithstanding the insights and lessons provided by these helpful precedents, ACTA fails to follow the formula for success for developing club standards. While the agreement was ambitiously designed to include high standards, similar to those international financial regulatory standards established by the G-7 or the OECD, the agreement does not include all the important players in the field of intellectual property enforcement. Notably excluded from the ACTA negotiations were Brazil, China and Russia, key players whose cooperation is badly needed to reduce cross-border piracy and counterfeiting.

Even worse, unlike the other club standards discussed in this article, ACTA has a very limited ability to induce other countries to join the club after it has been formed. In all fairness, the agreement was originally conceived as one involving two consecutive stages. As stated in an early discussion paper:
In the initial phase, it is important to join a number of interested trading partners in setting out the parameters for an enforcement system that will function effectively in today’s environment. As a second phase, other countries will have the option to join the agreement as part of an emerging consensus in favor of a strong IPR enforcement standard. Nevertheless, it remains unclear which countries this second phase will target. A leaked US government cable, for example, has revealed that Japan and the United States initially disagreed over whether “Italy and Canada … should be approached in the second group”. The US position that these countries should be included eventually prevailed.

In contrast to Canada and Italy, major developing countries, such as Brazil, China and India, were excluded from the very beginning of the negotiations, even though Japan emphasised early on that “the intent of the agreement is to address the IPR [intellectual property right] problems of third-nations such as China, Russia and Brazil, not to negotiate the different interests of like-minded countries”. From the standpoint of intellectual property protection, there is no doubt that these emerging countries are important to the successful operation of the international enforcement regime.

Consider China for example. The country’s piracy and counterfeiting problems have provided a major impetus for the development of new international intellectual property enforcement norms. China was also involved in a recent WTO dispute with the United States over the protection and enforcement of intellectual property rights. Given the negotiating parties’ conscious and determined choice to exclude China from the negotiations, it is unclear how they can now entice China to join this new exclusive club.

It is worth comparing ACTA with the WTO, an international trade club China joined a decade ago. In the 1990s and early 2000s, China was very eager to join this club and accede to the TRIPS Agreement even though it had to revamp a large array of laws and regulations and agree to high WTO-plus standards. As Samuel Kim observed at that time, China was willing “to gain WTO entry at almost any price”. The country’s approach was understandable. To many Chinese, the WTO membership helped secure China’s rightful place in the international community. Even if the economic costs were high, the symbolic value of the WTO accession and an improved standing in the international community would more than compensate for the short-term costs.

ACTA, however, is not the WTO. It does not give China a rightful place in the international community. Nor does the club membership seem to have any bearing on China’s dignitary interests. While it could be unattractive for China to be branded as a pirating nation, ACTA is not limited to countries that have always respected intellectual property rights. The chequered pasts of Japan and the United States, the two major proponents of this agreement, speak for themselves. More importantly, at the time of the negotiations, Canada, South Korea and a few EU member states were on the United States Trade Representative’s Special 301 Watch List. Even under the standards set unilaterally by the United States, the ACTA country club is a den filled with known pirates.

Even worse, the illegitimate nature of ACTA heavily undercuts the argument’s moral basis. To begin with, the negotiating parties’ insistence on completing the agreement through a shady backdoor deal has greatly undermined the legitimacy of the adopted standards. As Kimberlee Weatherall reminds us:

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“The secrecy [in the ACTA negotiations] is . . . operating, once again, to bring intellectual property law into disrepute. To the extent that at some later point governments and IP owners will ask people to accept the outcomes as ‘fair’ and ones that should be adopted, it will be more difficult to convince them when the agreement has the appearance of a secret deal done with minimal public input.”

Indeed, the adopted standards tell us more about like-mindedness than moral wrongs. At the international level, there remains no philosophical or normative consensus on the enforcement of intellectual property rights.42

Like China, Brazil and India have shown no urgent desire to join ACTA. Nor have they found the club membership advantageous. As Anand Sharma, the Indian commerce and industry minister, emphatically declared: “If [the TRIPS Agreement] has to be revisited in any stage in future, it will be only in multilateral forum—the WTO, it cannot be done outside”.43 Likewise, Brazilian officials refused to “recognize the legitimacy of the treaty”.

The reactions of Brazil, China and India are indeed no surprise. In today’s age, these increasingly powerful developing countries are unlikely to buy into a system they did not help to shape. With their now considerable increase in economic power and geopolitical leverage, those days where a system could be created in developed countries and then shoved down their throats are long gone. If “enhanced international cooperation and more effective international enforcement” are some of ACTA’s key goals, as stated in the preamble, it is simply ill-advised to ignore these crucial partners in the negotiations. It is also short-sighted to consider countries unclubable by virtue of their lack of like-mindedness.

Compared with Brazil, China and India, small middle-income or low-income countries do not have the same bargaining leverage vis-à-vis the United States or the European Union. Nevertheless, it is still unclear how effective ACTA actually will be in inducing these countries to adopt higher intellectual property enforcement standards. After all, those countries that are overly eager to obtain trade benefits from the United States or the European Union are likely to agree to ACTA-like standards in non-multilateral agreements regardless of whether ACTA is adopted. By contrast, those countries that remain on the fence and that have enough power to resist pressure from the United States or the European Union are unlikely to find ACTA attractive. The reason is simple: ACTA offers neither carrots nor sticks.

The two “carrots” developed countries typically dangle in front of developing countries to entice them to offer stronger protection and enforcement of intellectual property rights are (1) increased foreign direct investment (FDI) and (2) accelerated transfer of technology. After more than 15 years of disillusionment in the TRIPS Agreement, many developing countries have begun to realise that the oft-presented carrots may be illusory.

To date, economists have widely questioned the link between intellectual property protection and FDI.44 As Keith Maskus noted, if stronger intellectual property protection always led to more FDI:

“recent FDI flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe … [rather than] China, Brazil, and other high-growth, large-market developing economies with weak IPRs”.45
More importantly, developed countries have a longstanding history of failing to respect technology transfer obligations in international intellectual property agreements—art.66.2 of the TRIPS Agreement, for example. Although the Doha Ministerial Decision of November 14, 2001 reaffirmed the mandatory nature of these obligations, developed countries, thus far, have yet to take these obligations seriously. Thus, whether in the form of FDI or technology transfer, ACTA does not offer any attractive carrot.

The “stick” developed countries typically use in response to low intellectual property standards involve unilateral sanctions. However, in United States—Sections 301–310 of the Trade Act of 1974, the WTO dispute settlement panel made it clear that members are not allowed to use sanctions to resolve TRIPS-related disputes until they have exhausted all the remedies permissible under WTO rules.47 Because ACTA is designed as a TRIPS-plus agreement and covers rights falling largely within the scope of the TRIPS Agreement,48 unilateral sanctions are unlikely to constitute a permissible stick.

To be certain, the United States could still rely on the monitoring mechanism in s.301 of the Trade Act of 1974 to “punish” those countries that have failed to abide by ACTA standards. After all, the US Trade Act of 2002 stipulates that the United States Trade Representative can take s.301 actions against countries that have failed to provide “adequate and effective protection of intellectual property rights notwithstanding the fact that [they] may be in compliance with the specific obligations of the [TRIPS] Agreement.”49 Nevertheless, without the teeth provided by unilateral sanctions, the s.301 process is at best a shaming device.50 As annoying as this device may be to developing countries, the process’s ability to induce developing countries to join ACTA or adopt its standards is significantly constrained.

In sum, by leaving out the key parties needed for cooperation and by providing neither carrots nor sticks to induce non-members to subsequently join the agreement, ACTA has failed dismally even under its own theoretical model. ACTA is flawed not only because it is a country club agreement but also because it is a bad country club agreement. Given this weakness, and its many well-documented negative side-effects,51 one cannot help but wonder why countries negotiated this agreement in the first place.

The non-multilateral era

Although it is bad enough that ACTA fails under its own theoretical model, the use of the country club approach to international norm-setting has raised additional concerns. For example, commentators have expressed considerable fears that, by circumventing the multilateral process, ACTA will undermine the stability of the international trading system. The resulting instability is particularly disturbing considering the large amount of time, energy, resources and efforts developed countries have expended to create the TRIPS Agreement and present international intellectual property enforcement regime. The ACTA negotiating parties’ insensitive push for tougher enforcement standards regardless of a country’s local conditions has also alienated many trading partners.52 Such alienation is likely to make it more difficult for the international community to undertake future multilateral discussions.

Nevertheless, non-multilateralism has some benefits. For example, it can help achieve outcomes that otherwise cannot be achieved under a multilateral setting.53 It can also help key parties to develop a preliminary common position that can be easily extended to other less important parties in the future.54

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48 Article 5(h) of ACTA specifically provides: “[i]ntellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement.”
fact, the negotiations of many key international agreements began with mini-negotiations among a small group of key players before the negotiations were finally extended to other members of the international community—the TRIPS Agreement being a very good example.

Thus, the question concerning ACTA is not so much about whether the agreement is a significant departure from the usual multilateral path, but whether the agreement’s non-multilateral approach can eventually help consolidate the countries’ positions through the multilateral process. As the previous section has shown, the answer to this question is mostly negative. By ignoring major developing countries and key players in the intellectual property enforcement area, ACTA is unlikely to facilitate the development of practical compromises that can be multilateralised in future negotiations.

More importantly, when ACTA is juxtaposed with the many recent bilateral, plurilateral and regional trade and investment agreements, it makes salient a recent and highly disturbing trend of using non-multilateral arrangements to circumvent the multilateral norm-setting process. Indeed, if ACTA represents the future of international norm-setting, non-multilateralism will not be the passing phase many policymakers and commentators expect—a short, inevitable transitional period before the development of a new multilateral arrangement, such as TRIPS II. Instead, the world will likely go through a long period of non-multilateralism, thereby generating interesting political dynamics that commentators have not yet studied in depth.

Such a development is consistent with the commentators’ repeat reminders that the TRIPS Agreement should not be seen as the endpoint in the development of the international intellectual property regime. As Susan Sell observes: “The TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning.” Likewise, Carolyn Deere Birkbeck writes:

“After a decade of tense North-South debates, TRIPS emerged a contested agreement. It was quickly apparent that far from a final deal, TRIPS was rather the starting point for further negotiations…”

In an article examining the development of bilateral trade and investment agreements established by the United States since the turn of the millennium, Ruth Okediji traces the agreements back to those bilateral agreements the country has signed since its founding period. As she explains:

“The so-called new bilateralism is actually more consistent with historical uses of the foreign relations/treaty power of the United States, as well as the general framework of international law, in its dealings with developing countries since the independence era. Consequently, it is probably the TRIPS Agreement that is the aberration in international intellectual property law, and not the recent spates of bilateral and regional agreements.”

Based on Professor Okediji’s insightful observation, the TRIPS Agreement should therefore not be considered as the endpoint of the international intellectual property regime. Nor is ACTA a drastic deviation from the traditional path of regime development. Instead, both agreements merely represent the ups and downs of such development.

To complicate matters further, countries have used different approaches to establish their interstate relationships outside the multilateral process. While the United States and the European Union have actively introduced free trade and economic partnership agreements, emerging countries such as China

and India have been busy negotiating their own forms of non-multilateral agreements.\(^{61}\) As I have noted elsewhere, the agreements negotiated by China have very different goals and emphases from their US and EU counterparts. The approaches used to negotiate those agreements are also quite different.\(^{62}\)

If these differences continue—or, worse, escalate—the international intellectual property regime will become even more fragmented. Such fragmentation, most certainly, will result in what Jagdish Bhagwati and other commentators have described as the “spaghetti bowl”, the “noodle bowl” or the “curry bowl”.\(^{63}\) Although commentators have widely studied the growing fragmentation of the international regulatory regime, it remains unclear whether such growing complexity would benefit developed or developing countries.

On the one hand, greater complexity will allow weaker countries to better protect their interests by mobilising in favourable fora, developing the needed political and diplomatic groundwork and establishing new “counter-regime norms” that help restore the balance of the international intellectual property system.\(^{64}\) The existence of multiple fora will also help promote “norm competition across different fora as well as … inter-agency competition and collaboration”.\(^{65}\)

On the other hand, a proliferation of fora will benefit more powerful countries by raising the transaction costs for policy negotiation and co-ordination, thereby helping these countries to retain the status quo.\(^{66}\) The higher costs, coupled with the increased incoherence and complexities in the international intellectual property regime, are particularly damaging to developing countries, which often lack resources, expertise, leadership, negotiation sophistication and bargaining power.

More disturbingly, if significant differences exist between the terms found in the non-multilateral agreements established by developed countries and those established by emerging countries, the agreements may eventually precipitate what I have described as the “battle of the FTAs”.\(^{67}\) As countries continue to dispute over what norms they should obey, the conflicting norms in non-multilateral agreements will create complications that will eventually undermine the existing international intellectual property regime.

In fact, as Kimberlee Weatherall points out insightfully, ACTA tells us as much about the disagreement between the negotiating parties as it does about what higher standards these countries wanted to adopt.\(^{68}\) Among the conflicts revealed by the ACTA negotiations are the protection of geographical indications and the criminal enforcement of patent rights. These two disagreements have troubled the negotiations so much that the negotiators eventually had to strike a compromise by adopting a much lighter version (the so-called “ACTA Lite”) than what was originally advanced by the treaty’s proponents. In the wake of such drastically reduced protection, some commentators have wondered whether the final text would be so unattractive that some key negotiating parties would simply walk away from the treaty. To date, the European Union and Switzerland, two of the treaty’s major proponents, have not yet signed on to the agreement.


Equally salient from the ACTA negotiations is the disagreement between developed countries and major developing countries. Among the issues they continue to disagree about are access to essential medicines, software and information technology; the protection of traditional knowledge and cultural expressions; enforcement in the digital environment; special and differential treatment; obligations concerning transfer of technology, abuse of rights and restraints on trade; and the need to allow for alternative forms of innovation and modalities for protection. If one is willing to include such new issues as global climate change, the list can be extended even further.

Finally, the establishment of ACTA and the ongoing negotiation of the Trans-Pacific Partnership Agreement and other non-multilateral agreements have raised important questions about the future development of South-South agreements—or what I have described earlier as IPC4D (intellectual property coalitions for development). Discussions have already taken place among the fast-growing developing countries, in the form of IBSA trilateral cooperation (including India, Brazil and South Africa) and the BRICS summit (featuring Brazil, Russia, India, China and South Africa).

In a recent WIPO Development Agenda meeting, some developing countries specifically demanded the development of a project focusing on South-South collaboration. Although such demands were reasonable in light of the developing countries’ common plight, the proposal met with vehement opposition from developed countries. While the latter had a valid argument that events organised by a multilateral organisation like WIPO should not be limited to selected members, the position they took bordered on hypocrisy. After all, developed countries opposed the development of South-South collaboration at the same time when they were moving full steam ahead toward the completion of ACTA, a clearly North-North collaborative effort.

Indeed, without the complex questions raised by the mission of a multilateral organisation, one could logically argue that, by establishing ACTA, developed countries are estopped from complaining about similar efforts undertaken by developing countries. As Professor Gervais has recently warned us, the change initiated by ACTA is likely to be “irreversible”. Nevertheless, it remains to be seen whether developing countries can take full advantage of the precedent set by developed countries to establish a better and more sustainable “club” for countries with like-minded pro-development approaches.

In sum, ACTA is problematic not only as a standalone agreement. It is also problematic because it is emblematic of the disturbing trend by both developed and less developed countries to push for non-multilateral arrangements that reflect their preferred norms, values and development models. If this non-multilateral movement continues, ACTA will not be the only club deviating from the traditional multilateral path. Other clubs will most certainly emerge from both the North and the South, further fragmenting the existing international intellectual property regime.

Multiple layers of complex politics

Commentators have widely blamed the establishment of ACTA on the lack of progress in enforcement discussions at both the WTO and WIPO. While this observation is somewhat correct, it oversimplifies the complex politics behind the formation of the new ACTA country club. In fact, the internal club politics are quite complex. So are the politics concerning the protesters outside the club. This section discusses in turn three different types of politics implicated by ACTA: international, domestic and global.

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71 Remarks of Daniel J. Gervais, Professor of Law, Vanderbilt University Law School, at the “Economic Partnership Agreements of the EU: A Step Ahead in International IP Law?” Workshop in Frauenchiemsee, Germany, June 27, 2011.
The first type of politics implicated by the agreement is obviously international. To date, the divide in the international intellectual property debate is not as simple as one between the North and the South. Indeed, it is increasingly common to find developed countries standing side by side with emerging or fast-growing developing countries. An excellent illustration concerns the reluctance to publish the negotiating text of ACTA. The first draft text was not released until after the eighth round of negotiations in Wellington. Although commentators generally criticised the United States for preventing this important text from being publicly released, one has to appreciate the greater political complexity behind the decision not to release the negotiating draft.

As a leaked document has shown, the major holdouts before the Wellington Round were the United States, some members of the European Union (Belgium, Denmark, Germany and Portugal), Singapore and South Korea. Although the United States has been widely faulted for the non-transparent approach used in negotiating ACTA, due in part to its geopolitical and economic strengths, this country was unlikely to suffer the most politically if the negotiating draft were released. In fact, negotiators from Singapore and South Korea could have been more concerned about the release than their counterparts in the United States. After all, those governments were already under heavy criticism domestically for negotiating the arguably one-sided FTAs with the United States. If the draft ACTA text were released early on, the timing of such release could not have been worse for those governments.

To be certain, the United States was also very concerned about the release. However, its concern was mainly due to the fear that such disclosure would result in parties walking away from the negotiation table (in addition to further complications in the ongoing negotiations of other trade and investment agreements). As far as the agreement’s impact on domestic politics is concerned, however, the US negotiators are likely to have much less to worry about than their counterparts in emerging countries.

After all, the American public is unlikely to be heavily disturbed by the treaty terms, most of which are similar or identical to those found in existing FTAs signed by the United States. The administration’s clear reluctance to introduce laws to implement the new agreement has also alleviated some of the reported concerns. If such reluctance is not sufficient, it remains unclear how much attention the public has actually paid to the ACTA negotiations. Other than internet websites, blogs and specialised newspapers, such as Inside US Trade, the media have provided very limited coverage of the negotiations. It is also unclear how many Americans are actually sympathetic to the positions held by developing countries and their supporters in the developed world.

The second type of politics implicated by ACTA is domestic. As Robert Putnam has convincingly shown, the negotiation of international treaties involves a two-level game: one domestic and one international. The TRIPS Agreement provides an excellent illustration of how negotiators need to take into consideration not only the preferences at the international level but also those at the domestic level. The same can be said for ACTA, where negotiators have to be sensitive to domestic demands and concerns.

As far as domestic politics are concerned, there is a tendency to simplify the overall picture within each country. For example, developed countries are often identified with the maximalist approach that ensures greater protection and enforcement of intellectual property rights. Meanwhile, less developed countries are noted for their need for limitations, exceptions, transitional periods and special and differential treatment.
While these caricatures are generally correct, they overlook the internal politics within each group of countries. Even in developed countries, where intellectual property rights holders prefer strong protection and enforcement of intellectual property rights, these countries continue to disagree over how high those standards should actually be and whether those standards should vary from sector to sector. A good example is the disagreement over appropriate patent reform in the United States between the major companies in the software and information technology industries and those in the biotechnology and pharmaceutical industries.\(^7\)

Cross-sector disagreements can also be found when analysing what measures the United States would find acceptable in ACTA. While the US movie, music and software industries have actively pushed for the inclusion of criminal enforcement provisions in ACTA, the Intellectual Property Owners Association insisted that those provisions should not be extended to patents.\(^8\) Such opposition continued the years-long fight against the incorporation of criminal sanctions into the EU directive on criminal enforcement of intellectual property rights, the so-called IPRED2.\(^9\) As Tim Frain, the director of intellectual property at Nokia, explained to the \textit{International Herald Tribune} at that time:

\begin{quote}
\text{“[P]atent holders wanted protection but not penalties of imprisonment as they tested the boundaries of other patents. ‘It’s never black and white,’ he said. ‘Sometimes third-party patents are so weak that I advise managers to go ahead and innovate because, after making a risk analysis, we feel we can safely challenge the existing patent.’

He added, ‘But with this law, even if I’m certain the existing patent is no good, the manager involved would be criminally liable.’”} \(^{10}\)
\end{quote}

In the end, fn.2 of ACTA struck a compromise by enabling parties to “exclude patents and protection of undisclosed information” from the agreement’s civil enforcement provisions.

Similar cross-sector divides are present in many fast-growing developing countries, in which intellectual property stakeholders are slowly emerging. In China and India, for example, filmmakers and computer programmers repeatedly complain about the lack of intellectual property protection and its adverse impact on their livelihood. To a large extent, their concerns parallel those of their counterparts in developed countries.

In many developing countries, the interests of fast-growing stakeholders differ significantly from those of the rest of the country. It is therefore increasingly difficult for these countries to establish cohesive nation-based positions on intellectual property law and policy. As I have noted in the past, China may want to have stronger protection for computer programmes, movies, semiconductors and selected areas of biotechnology but much weaker protection for pharmaceuticals, chemicals, fertilisers, seeds and foodstuffs.\(^{11}\) Similar “schizophrenic” preferences can be found in other large middle-income countries, such as Brazil and India.

Even more complicated, the positions taken by national leaders can be heavily skewed by political payoffs—or, worse, nepotism and corruption.\(^{12}\) Due to a lack of coordination and other reasons, the positions taken by policymakers in the capitals can be quite different from those residing in diplomatic outposts.\(^{13}\) As I was recently reminded, even the positions held by diplomatic corps in Geneva could be quite different from those held by their colleagues in Brussels. It is therefore no surprise that “…[d]eveloping
country diplomats working on IP issues in Geneva frequently expressed frustration with IP reforms underway at home that sacrificed TRIPS flexibilities. As we analyse the positions and interests of developing countries, it is important we take these variations into account.

The final type of politics implicated by ACTA concerns what commentators have identified as global politics—the type of politics that transcends the Westphalian order of nation states. While a significant part of the critique of ACTA addresses interests of countries in the South, many of the agreement’s most trenchant critics reside in the North. Examples of these critics are Michael Geist from Canada; the Electronic Frontier Foundation, Essential Action, Knowledge Ecology International, Public Citizen and Public Knowledge from the United States; the Foundation for a Free Information Infrastructure (FFII) and La Quadrature du Net from Europe; and global nongovernmental organisations such as Médecins Sans Frontières and Oxfam.

The active participation of critics from the North makes a lot of sense, considering their significant resources and capacity. Nevertheless, the collaboration between these players in the North and developing countries in the South has clearly shown that the developments in the international intellectual property arena have now gone beyond negotiations among nation states. Such developments also highlight the growing opportunity for the South to collaborate with the North—through academics, mass media or nongovernmental organisations.

Indeed, nongovernmental organisations have been increasingly successful in pushing for a greater recognition of the changing nature of global governance models. The World Summit on the Information Society and later the Internet Governance Forum provide good examples of how these models have shifted. So do the ongoing discourse on access to medicines and the emerging debate on access to knowledge. While non-state actors still have a long road to travel before they can become highly influential in the international intellectual property debate, there is no denying that the governance model has slowly evolved to cover these new and increasingly powerful actors.

In sum, ACTA offers not only insights into the development of club standards and the emerging non-multilateral era but also an important case study on the various layers of politics behind the development of the international intellectual property regime. While the agreement is both disappointing and disturbing, it does inspire us to think more deeply about the role politics can play in the future development of this regime.

**Conclusion**

Only a few years ago, commentators were widely criticising WIPO for its lack of legitimacy. As Christopher May noted shortly after the establishment of the WIPO Development Agenda, “[a]t the centre of [this] Agenda is a critique of the WIPO that suggests it represents a narrowly focused set of political economic interests that seek to expand the realm of commodified knowledge and information for their own commercial advantage”. Likewise, Sisule Musungu and Graham Dutfield observed:

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“There are perceptions that the Bureau is acting not as the servant of the whole international community but as an institution with its own agenda. That agenda seems more closely attuned to the interests and demands of some Member States than to others, and more to pro-strong intellectual property protection interest groups and practitioner associations, which are ostensibly observers but sometimes behave and are treated like Member States, than to the interest of developing countries.”

In the midst of the ACTA negotiations, however, commentators have begun calling on the ACTA negotiations to be moved back to WIPO. As the Wellington Declaration, which was drafted by the participants of the Public/ACTA Conference in New Zealand, proclaims:

“We note that the World Intellectual Property Organisation has public, inclusive and transparent processes for negotiating multilateral agreements on (and a committee dedicated to the enforcement of) copyright, trademark and patent rights, and thus we affirm that WIPO is a preferable forum for the negotiation of substantive provisions affecting these matters.”

For those of us who have paid close attention to the establishment of the WIPO Development Agenda, it was indeed astonishing to see this quick change of public perception of WIPO—from an organisation widely criticised for being heavily captured by developed countries and their industries to a totally different one that is noted for having “public, inclusive and transparent processes”. Such a swift about-turn is indeed indicative of the highly dynamic nature of international intellectual property developments. It also underscores our need for greater appreciation of the complex political dynamics behind such developments. Although intellectual property is a largely legal construct, it is not just about law and economics. It is also about politics. As Sebastian Haunss and Ken Shadlen write in the introduction to their timely collection of essays on the politics of intellectual property:

“[M]ost studies [of intellectual property policy-making] focus on national and international IP laws. But while laws are solidified results of social struggles and political conflicts, understanding the law itself tells us little about the social processes that lay behind laws and even less about the social dynamics that will eventually challenge and often change them. Laws establish opportunities for action, and strictly legal perspectives in most cases say little about different actors’ motivations and capacities to exploit these opportunities and how the motivations and capacities change over time. It is time, therefore, to reorient analysis of the politics of IP to the processes by which conflicts over the ownership, use, and control of information are manifest and resolved in regional, national and sub-national settings.”

While the political aspects of intellectual property have been largely understudied, the academic landscape has been slowly changing. As more scholars become interested in the subject, we will have a deeper and fuller understanding of the international intellectual property regime. We will also be in a better position to anticipate potential struggles and conflicts while designing appropriate reforms to resolve them. By bringing together leading scholars studying the politics of intellectual property and players at the frontline of international intellectual property policymaking, it is my hope that this special issue will help generate more attention in this under-explored area.