

THE ACTA/TPP COUNTRY CLUBS

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1. INTRODUCTION

After three years and 11 rounds of formal negotiations among developed and like-minded countries, the Anti-Counterfeiting Trade Agreement (ACTA) was finally adopted on 15 April 2011. Negotiated by Australia, Canada, the European Union, Japan, Morocco, Mexico, New Zealand, Singapore, South Korea, Switzerland and the United States, this highly controversial plurilateral agreement aims to set a new and higher benchmark for international intellectual property enforcement. Out of the 11 negotiating parties, all of them except the European Union and Switzerland have since signed the Agreement.¹ As of this writing, ACTA is still awaiting ratification and has not yet entered into force. Japan, which serves as the Agreement's depositary, remains the only country that has ever ratified ACTA.

Commentators have widely criticized the ACTA negotiation process for its lack of transparency and accountability. They are also concerned about the multiple threats that the Agreement has posed to access to information and knowledge and the protection of due process, free speech, privacy and other civil liberties. In addition, by ushering in a new 'country club' approach to setting international intellectual property norms, the negotiations have 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.² The agreement's heightened enforcement standards will upset the delicate balance struck in the Agreement on Trade-Related Aspects of

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¹ Some members of the European Union did sign the Agreement. As Duncan Matthews recounts: 'In the EU, the agreement was adopted unanimously by the Council of the EU in December 2011 and, on 26 January 2012, at the signing ceremony of the EU for ACTA, 22 Member States also became signatories to the agreement.' D. Matthews, *The rise and fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, 2012, available at: <http://ssrn.com/abstract=2161764>.

² Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of meeting, IP/C/M/63, paras 248–73.

Intellectual Property Rights (TRIPS Agreement). ACTA will also increase the incoherence and unpredictability of the international regulatory framework.

Similarly, Francis Gurry, the director general of the World Intellectual Property Organization (WIPO), expressed concern that, in negotiating ACTA, countries have ‘tak[en] matters into their own hands to seek solutions outside of the multilateral system to the detriment of inclusiveness of the present system’.³ 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’.⁴

This chapter 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. Such an agreement is not only unlikely to provide effective protection for intellectual property rights holders, but it also jeopardizes the individuals’ ability to enjoy free speech, free press and other civil liberties.

The chapter then compares ACTA with TPP and argues that the latter agreement is a much better country club agreement. Nevertheless, it warns that TPP is likely to be much more dangerous from a public interest standpoint. The chapter concludes by situating both ACTA and TPP 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.

2. 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.⁵ To highlight the problematic nature of ACTA, some commentators have described the agreement as a ‘country club agreement’.⁶ As Daniel Gervais wrote: ‘I refer to this approach as “Country Club” because, like a country club, the membership rules are negotiated by a number of like-minded founders. Others are then invited to join, but changes to the membership rules are difficult to achieve’.⁷

Within the ACTA 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

³ C. Saez, ACTA a sign of weakness in multilateral system, WIPO head says, Intellectual Property Watch, 30 June 2010.

⁴ M. Geist, Toward an ACTA super-structure: How ACTA may replace WIPO, 2010, available at: <http://www.michaelgeist.ca/content/view/4910/125/>.

⁵ P.K. Yu, Six secret (and now open) fears of ACTA, SMU L. Rev., 2011, Vol. 64, No. 3, pp. 975–1094.

⁶ For example, D. Gervais, Country clubs, empiricism, blogs and innovation: The future of international intellectual property norm making in the wake of ACTA, in: M. Burri and T. Cottier (eds), Trade Governance in the Digital Age, Cambridge, Cambridge University Press, 2012, pp. 323–43; IQsensato, The proposed Anti-Counterfeiting Trade Agreement (ACTA): Global policy implications, In Focus, 2 June 2008, p. 4; G.J. Michael, ACTA, Fool: Explaining the Irrational Resort to a New Institution, 2010, available at: <http://sites.google.com/site/iipenforcement/acta-papers-for-wcl-meeting-june-16-18-2010/>.

⁷ D. Gervais, *supra* note 6, p. 324.

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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.⁸ By using these organizational 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.⁹ Based on the variations between the costs of adjusting national regulatory standards confronting 'great powers'¹⁰ and those confronting the rest of the world, he identifies four different types of international regulatory standards: (1) harmonized standards; (2) sham standards; (3) rival standards; and (4) club standards.¹¹ Professor Drezner's four-field matrix is highly useful to our analysis of ACTA (see Table 1).

*Table 10.1. A Typology of Regulatory Coordination*¹²

| | | |
|---|---|--|
| | High Adjustment Costs (The Rest) | Low Adjustment Costs (The Rest) |
| High Adjustment Costs (Great Powers) | Sham Standards | Rival Standards |

⁸ P.K. Yu, Access to medicines, BRICS alliances, and collective action, *American J. of L. and Medicine*, 2008, Vol. 34, No. 2, pp. 345–94, 370 (Access to medicines); P.K. Yu, Building intellectual property coalitions for development, in: J. de Beer (ed.), *Implementing the World Intellectual Property Organization's Development Agenda*, Waterloo, Wilfred Laurier University Press, 2009, pp. 79–99 (IPC4D).

⁹ D.W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes*, Princeton, Princeton University Press, 2008, pp. 119–48.

¹⁰ Drezner defines 'great powers' as those having 'a combination of internal market size and reduced vulnerability to external disruptions'. D.W. Drezner, *supra* note 9, p. 35. Only the United States and the European Union fit his criteria at the moment. D.W. Drezner, *supra* note 9, p. 36.

¹¹ D.W. Drezner, *supra* note 9, pp. 71–85.

¹² This table draws on D.W. Drezner, *supra* note 9, p. 72.

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| | | |
|--|----------------|----------------------|
| Low Adjustment Costs (Great Powers) | Club Standards | Harmonised Standards |
|--|----------------|----------------------|

According to Professor Drezner, harmonized 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 harmonized 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 criticized by developed countries and their intellectual property industries for being primitive, constrained, inadequate and ineffective.¹³ To some extent, the ACTA negotiations represent the attempt by developed countries to make an upward adjustment to the weak harmonized standards in the TRIPS Agreement.

In contrast to harmonized 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, traditional cultural expressions and genetic resources. Although these standards have yet to become fully developed, they may find their way to another category as their quality improves.

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.¹⁴ 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.¹⁵ Such disagreement has also led to the inclusion in US free trade agreements (FTAs) of provisions governing the relationship between geographical indications and trademarks.¹⁶

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

¹³ P.K. Yu, TRIPS and its Achilles' heel, *J. of Intell. Prop. L.*, 2011, Vol. 18, No. 2, pp. 479–531, 483.

¹⁴ J. Hughes, Champagne, feta, and bourbon: The spirited debate about geographical indications, *Hastings L.J.*, 2006, Vol. 58, No. 2, pp. 299–386, 305–11.

¹⁵ World Trade Organization, European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs, Panel Report, WT/DS174/R, 2005; World Trade Organization, European Communities – Protection of trademarks and geographical indications for agricultural products and foodstuffs, Panel Report, WT/DS290/R, 2005.

¹⁶ For example, Central America–Dominican Republic Free Trade Agreement, 5 August 2004, art. 15.3.7.

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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.¹⁷

Although developing countries and their supportive commentators have widely criticized 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).¹⁸ 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 organizations, such as the Gulf Cooperation Council.¹⁹

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.²⁰ Once these standards had been accepted, the second stage kicked in when these trading powers sought to multilateralize 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.²¹ As Moisés Naím, the former editor in chief of *Foreign Policy*, has noted: ‘a smart multilateral approach to illicit trade has to be selective.’²² 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.²³ 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

¹⁷ D.W. Drezner, *supra* note 9, p. 75.

¹⁸ H.M. Shams, ‘Club multilateralism’ and global supranationalism: The case of FATF, in: J.B. Attanasio and J.J. Norton (eds), *Multilateralism v Unilateralism: Policy Choices in a Global Society*, London, British Institute of International and Comparative Law, 2004, pp. 459–82, 461.

¹⁹ H.M. Shams, *supra* note 18, p. 464.

²⁰ D.J. Gervais, *The TRIPS Agreement and the Doha Round: History and impact on economic development*, in: P.K. Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, Westport, Praeger Publishers, 2007, Vol. 4, pp. 23–72, 43.

²¹ D.W. Drezner, *supra* note 9, p. 75; P.K. Yu, *Access to medicines*, *supra* note 8, p. 384.

²² M. Naím, *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy*, New York, Anchor Books, 2005, p. 255.

²³ P.K. Yu, *A tale of two Development Agendas*, *Ohio Northern University L. Rev.*, 2009, Vol. 35, No. 2, pp. 465–573, 508–11.

membership with a more homogenous set of preferences. The smaller number of actors also increases a club's ability to coordinate and enforce policy.²⁴

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 hardliner developing countries, such as Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.²⁵ 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.

3. 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 organizations, club standards are strategically chosen to enable powerful developed countries to establish high standards without the worry of dilution by marginalized 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.²⁶

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

²⁴ D.W. Drezner, *supra* note 9, pp. 67–8.

²⁵ J. Watal, *Intellectual Property Rights in the WTO and Developing Countries*, The Hague, Kluwer Law International, 2001, p. 19, fn. 17.

²⁶ D.W. Drezner, *supra* note 9, pp. 75–6.

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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.²⁷ 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’.²⁸ Most other developing countries received merely special and differential treatment. Today, however, the WTO includes 159 members, consisting of three different groups of countries: developed, developing and least developed. Although the TRIPS Agreement provides transition periods to both developing and least developed countries, these 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 have noticed a similar dilemma confronting members of the Berne Union, the well-known international copyright club. Following the decolonization movement after the Second World War and the arrival of a large number of newly emerging countries in the 1960s, developed countries in the Berne 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.²⁹ 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.³⁰

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 chapter, 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 a

²⁷ Drezner questions whether the G-20 is actually a club in light of the fact that it ‘meets only once a year, and has no secretariat or working groups’. D.W. Drezner, *supra* note 9, p. 146. Whether the G-20 is a club, however, is not important for our purposes. The most important insight is that the G-7 has been expanded in response to changing circumstances.

²⁸ J.H. Barton, J.L. Goldstein, T.E. Josling and R.H. Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO*, Princeton, Princeton University Press, 2006, p. 153.

²⁹ S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed., Oxford, Oxford University Press, 2006, p. 885.

³⁰ P.K. Yu, *supra* note 23, pp. 471–84.

discussion paper leaked before the negotiations, which was presumably advanced by the United States:

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 [intellectual property right] enforcement standard.³¹

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'.³² 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 emphasized early on that 'the intent of the agreement is to address the IPR problems of third-nations such as China, Russia and Brazil, not to negotiate the different interests of like-minded countries'.³³ 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.³⁴ 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.³⁵ As Samuel Kim observed at that time, China was willing 'to gain WTO entry at almost any price'.³⁶ The country's approach was understandable. To many Chinese leaders, 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.

³¹ The leaked discussion paper, Discussion paper on a possible Anti-Counterfeiting Trade Agreement, is available at: <http://ipjustice.org/wp/wp-content/uploads/ACTA-discussion-paper-1.pdf>.

³² M. Geist, Japan wanted Canada out of initial ACTA group, 2011, available at: <http://www.michaelgeist.ca/content/view/5656/125/>.

³³ M. Geist, *supra* note 32.

³⁴ World Trade Organization, China – Measures affecting the protection and enforcement of intellectual property rights, Panel Report, WT/DS362/R, 2009. On this dispute, see P.K. Yu, The TRIPS Enforcement Dispute, *Nebraska L. Rev.*, 2011, Vol. 89, No. 4, pp. 1046–131; P.K. Yu, TRIPS Enforcement and Developing Countries, *American University International L. Rev.*, 2011, Vol. 26, No. 3, pp. 727–82.

³⁵ P.K. Yu, The Middle Kingdom and the intellectual property world, *Oregon Rev. of International L.*, 2011, Vol. 13, No. 2, pp. 209–62, 224.

³⁶ S.S. Kim, China in world politics, in: B. Buzan and R. Foot (eds), *Does China Matter? A Reassessment: Essays in Memory of Gerald Segal*, London, Routledge, 2004, pp. 37–53, 49.

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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 Special 301 Watch List released by the United States Trade Representative (USTR).³⁷ 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:

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.³⁸

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.³⁹

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'.⁴⁰ Likewise, Brazilian officials refused to 'recognize the legitimacy of the treaty'.⁴¹

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 the agreement states in its 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.

³⁷ Office of the United States Trade Representative, Fact sheet: Anti-Counterfeiting Trade Agreement (ACTA), 2008, available at: http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_15084.pdf.

³⁸ K. Weatherall, The Anti-Counterfeiting Trade Agreement: What's it all about?, 2008, available at: <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=kimweatherall>.

³⁹ P.K. Yu, Enforcement, enforcement, what enforcement?, IDEA, 2012, Vol. 52, No. 3, pp. 239–84, 240.

⁴⁰ Economic Times, India will not accept any intellectual property talks outside WTO: Anand Sharma, 9 April 2011, available at: http://articles.economictimes.indiatimes.com/2011-04-09/news/29400634_1_intellectual-property-trips-agreement-anand-sharm.

⁴¹ M. Geist, Brazil, India speak out against ACTA, 2010, available at: <http://www.michaelgeist.ca/content/view/5362/196/>.

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 with the TRIPS Agreement, many developing countries have begun to realize that the oft-presented ‘carrots’ may be illusory.

To date, economists have widely questioned the link between intellectual property protection and FDI.⁴² 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’.⁴³

More importantly, developed countries have a long-standing history of failing to respect technology transfer obligations in international intellectual property agreements – obligations explicitly stated in Article 66.2 of the TRIPS Agreement, for example. Although the Doha Ministerial Decision of 14 November 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.⁴⁴ Because ACTA is designed as a TRIPS-plus agreement and covers rights falling largely within the scope of the TRIPS Agreement, unilateral sanctions are unlikely to constitute a permissible ‘stick’.

To be certain, the United States could still rely on the monitoring mechanism in section 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 USTR can take section 301 actions against countries that have failed to provide ‘adequate and effective protection of

⁴² P.K. Yu, Intellectual property, economic development, and the China puzzle, in: D.J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, Oxford, Oxford University Press, 2007, pp. 173–220, 176–80.

⁴³ K.E. Maskus, The role of intellectual property rights in encouraging foreign direct investment and technology transfer, *Duke J. of Comparative and International L.*, 1998, Vol. 9, No. 1, pp. 109–61, 129.

⁴⁴ World Trade Organization, *United States – Sections 301–310 of the Trade Act of 1974*, Panel Report, WT/DS152/R, 1999.

intellectual property rights *notwithstanding the fact that [they] may be in compliance with the specific obligations of the [TRIPS] Agreement*. Nevertheless, without the teeth provided by unilateral sanctions, the section 301 process is at best a shaming device.⁴⁵ As annoying as this device may be to developing countries, the process' 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, one cannot help but wonder why countries negotiated this agreement in the first place.

4. TRANS-PACIFIC PARTNERSHIP

If ACTA fails dismally under its own theoretical model, one has to wonder whether TPP would be more successful. TPP began as a quadrilateral agreement known as the Trans-Pacific Strategic Economic Partnership Agreement, or more commonly as 'P4' or 'Pacific Four'. As Meredith Lewis recounts:

[The negotiations were initially] launched by Chile, New Zealand and Singapore at the APEC leaders' summit in 2002. These original negotiations contemplated an agreement amongst the three participating countries, to be known as the Pacific Three Closer Economic Partnership (P3 CEP). However, Brunei attended a number of rounds as an observer, and ultimately joined the Agreement as a 'founding member'. The Agreement was signed by New Zealand, Chile and Singapore on July 18, 2005 and by Brunei on August 2, 2005, following the conclusion of negotiations in June 2005.⁴⁶

In March 2010, shortly before the eighth round of the ACTA negotiations in Wellington, New Zealand, the TPP negotiations began among the United States, Australia, Peru and Vietnam for an expanded agreement. Since then, Malaysia, Canada, Mexico and Japan joined the negotiations.

TPP is anticipated to include an intellectual property chapter, similar to those intellectual property chapters found in existing US free trade agreements. As the USTR stated in his update on the TPP negotiations in November 2011:

TPP countries have agreed to reinforce and develop existing [TRIPS] rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to

⁴⁵ P.K. Yu, *Sinic trade agreements*, U.C. Davis L. Rev., 2011, Vol. 44, No. 3, pp. 953–1028, 970.

⁴⁶ M.K. Lewis, *Expanding the P-4 Trade Agreement into a broader Trans-Pacific Partnership: Implications, risks and opportunities*, ASIAN J. of the WTO and International Health L. and Policy, 2009, Vol. 4, No. 2, pp. 401–22, 403–4.

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reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.⁴⁷

Like ACTA, TPP involves only a very small number of countries. That number is even smaller than the 39 countries involved in the ACTA negotiations, due in large part to the lack of participation of the 27-country-strong European Union.⁴⁸ Unlike ACTA, however, TPP is more inclusive. Before Canada and Mexico joined the negotiations most recently, more than half of the negotiating parties were outside the OECD. Based on the 2011 World Bank indicators, the GDP per capita of Malaysia, Peru and Vietnam were 9,656, 6,009 and 1,411, respectively. Even the figures for Chile and Mexico, two OECD members, were only 14,394 and 10,064, respectively. TPP would therefore strike a better balance between developed and developing countries, even though the negotiations continue to exclude major developing countries, such as Brazil, China and India.

Compared with ACTA, TPP is also more successful in providing the ‘carrots’ needed to facilitate constructive bargaining among the negotiating parties. While the former focuses narrowly on intellectual property protection and enforcement, the latter is trade-based and has a much broader scope. Because the negotiations involve more cross-cutting issues, the US negotiators will be able to offer ‘carrots’ that they otherwise could not provide during the ACTA negotiations. For instance, New Zealand may find it beneficial to make greater concessions in the intellectual property area if the United States is willing to allow for more exports in dairy, lamb, wool and other sheep products. As a result, TPP may ultimately be a better and fairer bargain than ACTA, even for those countries with limited negotiation resources and bargaining chips.

From the standpoint of protecting due process, free speech and other civil liberties, however, TPP is likely to be more dangerous. Because of the different value negotiating parties place on trade and trade-related items, some parties may be willing to concede more on intellectual property protection and enforcement in exchange for greater benefits in other trade or trade-related areas. The final text of the TPP Agreement therefore could end up with intellectual property standards going beyond those aspired to by the ACTA negotiators – standards some commentators have described as ‘ACTA-plus’.⁴⁹

In sum, although TPP is a better country club agreement than ACTA, it is also likely to become more dangerous from a public interest standpoint. In addition to having a more effective club arrangement to push for higher standards of intellectual property and enforcement, TPP has raised four additional concerns.

First, in the TPP negotiations, the United States has more political and economic leverage over its negotiating partners than in the ACTA negotiations.⁵⁰ Although ACTA brought together two major intellectual property powers – the European Union and the United States – the continuous disagreements between these two powers resulted in the adoption of a more moderate

⁴⁷ Office of the US Trade Representative, *Outlines of the Trans-Pacific Partnership Agreement*, 2011, available at: <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

⁴⁸ Jordan and the United Arab Emirates participated in only the first round of negotiations in Geneva in June 2008.

⁴⁹ For example, S.K. Sell, *TRIPS was never enough: Vertical forum shifting, FTAs, ACTA, and TPP*, *J. of Intell. Prop. L.*, 2011, Vol. 18, No. 2, pp. 447–78, 464; P.K. Yu, *supra* note 5, pp. 1039–44.

⁵⁰ The United States’ leverage will considerably reduce if other major economies, such as Japan, join the negotiations.

agreement. For example, the United States wanted to have stronger mandates concerning digital enforcement; yet, the European Union was not ready to agree to provisions that the Union had not yet harmonized, such as those concerning the introduction of a graduated response system or safe harbours for online service providers.⁵¹ Similarly, although the European Union pushed hard for the inclusion of criminal liability for infringement on all forms of intellectual property rights (including most notably geographical indications), the United States was reluctant to provide such broad coverage.⁵² In fact, many US companies expressed concern over the potential criminal liability for trademark and patent infringement, as opposed to mere piracy and counterfeiting.⁵³

Compared with the ACTA negotiations, the dynamics of the TPP negotiations have been rather different. Without the European Union at the negotiation table, the United States is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interest of its intellectual property industries. From increased enforcement in the digital environment to greater protection of pharmaceutical products, TPP is likely to track more closely to the high US standards than the compromised standards developed in ACTA. In fact, if the United States needs to make compromises in the TPP negotiations, those compromises are likely to be found in other trade-related areas, not in the intellectual property area.

Second, although the ACTA negotiations already concluded, the TPP negotiations are still in progress. Being later in time, the latter negotiations may incorporate matters that did not have much traction during the ACTA negotiations. Should new issues arise, the TPP negotiators will also be able to include those new items in the negotiations. In fact, the TPP negotiators could even revive proposals that had already been rejected by the ACTA negotiators, especially those from the European Union.

Third, although both ACTA and TPP have raised similar concerns about transparency and accountability,⁵⁴ these concerns are somewhat different. While it is hard to justify the categorical nondisclosure of draft treaty texts, especially with respect to proposals advanced solely by US negotiators,⁵⁵ it is more acceptable to refrain from disclosing sensitive information, such as tariffs, quotas or financial data.⁵⁶ Thus, as problematic and disturbing as the USTR's secretive approach in handling draft ACTA texts was, this agency may have a much stronger justification for refusing to disclose draft TPP texts this time.

Finally, the highly technical and trade-oriented nature of the TPP negotiations may greatly reduce the interest of the public at large in the negotiations. In fact, without the

⁵¹ P.K. Yu, *supra* note 5, pp. 1055–7.

⁵² M. Ermert, European Commission on ACTA: TRIPS is floor not ceiling, Intellectual Property Watch, 22 April 2009.

⁵³ The Intellectual Property Owners Association, for example, sent a strongly worded letter to the USTR, asking for a limitation on the scope of the treaty's coverage of counterfeiting. M. Ermert, U.S. rightsholders seek narrower scope of ACTA, clarity on trademark infringement vs. counterfeiting, Intellectual Property Watch, 10 July 2010.

⁵⁴ D.S. Levine, Bring in the nerds: Secrecy, national security and the creation of international intellectual property law, *Cardozo Arts and Entertainment L.J.*, 2012, Vol. 30, No. 2, pp. 105–51; D.S. Levine, Transparency soup: The ACTA negotiating process and 'black box' lawmaking, *American University International L. Rev.*, 2011, Vol. 26, No. 3, pp. 811–37; P.K. Yu, *supra* note 5, pp. 998–1019.

⁵⁵ For example, Senator Ron Wyden recently introduced an amendment to the Jumpstart Our Business Startups Act that would require the United States to disclose documents 'describing a position of, or proposal made by, the United States with respect to intellectual property, the Internet, or entities that use the Internet, including electronic commerce, not later than 24 hours after the document is shared with other parties to negotiations for a Trans-Pacific Partnership Agreement'. 158 Congressional Record S1798, 19 March 2012.

⁵⁶ P.K. Yu, *supra* note 5, p. 1007.

controversial issues surrounding the internet and new communications technologies, one has to wonder whether the TPP negotiations could find their way to mainstream media. The public at large is simply not interested in trade tariffs or trade remedies. Even when the ACTA negotiations were mostly about intellectual property protection and enforcement, they did not receive much coverage in the mainstream media.⁵⁷ With even less public scrutiny than ACTA, and arguably a significantly reduced watchdog effect, the TPP intellectual property chapter could favour the intellectual property industries more than it otherwise would have.

5. THE NON-MULTILATERAL ERA

Although both ACTA and TPP do not fare well under their own theoretical models, the use of the country club approach to establish plurilateral agreements has raised additional concerns at the international level. For example, commentators have expressed considerable fears that, by circumventing the multilateral process, ACTA and TPP 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 the present international intellectual property enforcement regime. The insensitive push for tougher enforcement standards by the ACTA and TPP negotiating parties regardless of a country's local conditions has also alienated many trading partners.⁵⁸ 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 in a multilateral setting.⁵⁹ 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.⁶⁰ In 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 and TPP is not so much about whether the agreements are significant departures from the usual multilateral path, but whether the agreements' non-multilateral approach can eventually help consolidate the countries' positions through the multilateral process.⁶¹ The answer to this question, unfortunately, is mostly negative. By ignoring major developing countries and key players in the intellectual property enforcement area, ACTA and TPP are unlikely to facilitate the development of practical compromises that can be multilateralized in future negotiations.

⁵⁷ P.K. Yu, ACTA and its complex politics, WIPO J., 2011, Vol. 3, No. 1, pp. 1–16, 13.

⁵⁸ P.K. Yu, *supra* note 5, p. 1078.

⁵⁹ P.K. Yu, *supra* note 45, pp. 967–8.

⁶⁰ P.K. Yu, *supra* note 45, pp. 963–4; J.J. Schott, Free trade agreements: Boon or bane of the world trading system, in: J.J. Schott (ed.), Free Trade Agreements: US Strategies and Priorities, Washington, Institute for International Economics, 2004, pp. 3–19, 13.

⁶¹ S. Cho, A bridge too far: The fall of the fifth WTO Ministerial Conference in Cancún and the future of trade constitution, J. of International Economic L., 2004, Vol. 7, No. 2, pp. 219–44, 238; G. de Jonquières, Comment, in: J.J. Schott, *supra* note 60, pp. 30–3, 32; R.L. Okediji, Back to bilateralism? Pendulum swings in international intellectual property protection, University of Ottawa L. and Technology J., 2004, Vol. 1, No. 1–2, pp. 125–47, 143; P.K. Yu, *supra* note 45, p. 972.

More importantly, when ACTA and TPP are juxtaposed with the many recent bilateral, plurilateral and regional trade and investment agreements, they make salient a recent and highly disturbing trend of using non-multilateral arrangements to circumvent the multilateral norm-setting process. Indeed, if ACTA and TPP represent 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.⁶²

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.'⁶³ 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'⁶⁴

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.⁶⁵

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 should ACTA and TPP be viewed as drastic deviations from the traditional path of regime development. Instead, all of these 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.⁶⁶ As I have noted elsewhere, the agreements negotiated by China have

⁶² P.K. Yu, *supra* note 57, pp. 9–12.

⁶³ S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge, Cambridge University Press, 2003, p. 121.

⁶⁴ C. Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford, Oxford University Press, 2009, p. 304.

⁶⁵ R.L. Okediji, *supra* note 61, p. 130.

⁶⁶ J. Wang, *The role of China and India in Asian regionalism*, in: M. Sornarajah and J. Wang (eds), *China, India and the International Economic Order*, Cambridge, Cambridge University Press, 2010, pp. 333–86, 356–8; P.K. Yu, *supra* note 45, p. 953.

very different goals and emphases from their EU and US counterparts. The approaches used to negotiate those agreements are also quite different.⁶⁷

If these differences continue – or, worse, escalate – the international intellectual property regime will become even more fragmented. Such fragmentation most certainly will create what commentators have described as the ‘spaghetti bowl’ or the ‘noodle bowl’.⁶⁸ 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.⁶⁹ The existence of multiple fora will also help promote ‘norm competition across different fora as well as ... inter-agency competition and collaboration’.⁷⁰

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.⁷¹ 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’.⁷² 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.⁷³ Among the conflicts revealed by the ACTA negotiations are the protection of geographical indications and the criminal enforcement of patent rights. These two

⁶⁷ P.K. Yu, *supra* note 45, pp. 986–1018.

⁶⁸ For example, R. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, London, Centre for Economic Policy Research, 2006; J. Bhagwati, *US trade policy: The infatuation with free trade areas*, in: J. Bhagwati and A.O. Krueger (eds), *The Dangerous Drift to Preferential Trade Agreements*, Washington, AEI Press, 1995, pp. 1–18, 2–3; P.K. Yu, *supra* note 45, p. 978.

⁶⁹ L.R. Helfer, *Regime shifting: The TRIPS Agreement and new dynamics of international intellectual property lawmaking*, *Yale J. of International L.*, 2003, Vol. 29, No. 1, pp. 1–83, 14; D.J. Puchala and R.F. Hopkins, *International regimes: Lessons from inductive analysis*, in: S.D. Krasner (ed.), *International Regimes*, Ithaca, Cornell University Press, 1983, pp. 61–91, 66.

⁷⁰ P.B. Hugenholtz and R.L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report*, New York, Open Society Institute, 2008, p. 41.

⁷¹ E. Benvenisti and G.W. Downs, *The empire’s new clothes: Political economy and the fragmentation of international law*, *Stanford L. Rev.*, 2007, Vol. 60, No. 2, pp. 595–631; P.K. Yu, *supra* note 23, p. 556.

⁷² P.K. Yu, *supra* note 45, pp. 1018–27.

⁷³ K. Weatherall, *ACTA as a new kind of international IP lawmaking*, *American University International L. Rev.*, 2011, Vol. 26, No. 3, pp. 839–901, 841–2.

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. With the European Commission’s recent withdrawal of its referral of ACTA to the Court of Justice of the European Union, it is very unlikely that the Union will adopt ACTA in its current form.

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, traditional cultural expressions and genetic resources; 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, TPP and other non-multilateral agreements have raised important questions about the future development of South-South agreements – or what I have described elsewhere as ‘IPC4D’ (intellectual property coalitions for development).⁷⁴ 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 the WIPO Development Agenda meeting in May 2011, some developing countries specifically demanded the establishment of a project focusing on South-South collaboration.⁷⁵ Those demands eventually led to the launch of the First WIPO Interregional Meeting on South-South Cooperation on Intellectual Property Governance; Genetic Resources, Traditional Knowledge and Folklore; and Copyright and Related Rights in Brasilia in August 2012. That event was followed a month later by the First Annual Conference on South-South Cooperation on Intellectual Property and Development in Geneva in September 2012, just a few days before the 2012 WIPO General Assembly.

Although the developing countries’ demands for South-South collaboration at WIPO were reasonable in light of their common plight and the establishment of the WIPO Development Agenda, their proposal was met initially with vehement opposition from developed countries. While the latter had a valid argument that events organized by a multilateral organization 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 and TPP, both clearly North-North collaborative efforts.

⁷⁴ P.K. Yu, *IPC4D*, *supra* note 8.

⁷⁵ C. Saez, *WIPO committee on Development Agenda suspended, discussions bogged down*, *Intellectual Property Watch*, 7 May 2011.

Indeed, without the complex questions raised by the mission of a multilateral organization, one could logically argue that, by establishing ACTA and TPP, 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'.⁷⁶ 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 and TPP are problematic not only as standalone agreements. They are also problematic because they are 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 and TPP will not be the only clubs 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.

6. 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'.⁷⁷ Likewise, Sisule Musungu and Graham Dutfield observed:

There are perceptions that the [International Bureau of WIPO] 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.⁷⁸

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 PublicACTA 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,⁷⁹ it was indeed astonishing to see this quick change of public perception

⁷⁶ P.K. Yu, *supra* note 57, p. 12.

⁷⁷ C. May, *The World Intellectual Property Organization: Resurgence and the Development Agenda*, London, Routledge, 2007, p. 4.

⁷⁸ S.F. Musungu and G. Dutfield, *Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)*, Geneva, Quaker United Nations Office, 2003, p. 4.

⁷⁹ For example, P.K. Yu, *supra* note 23.

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of WIPO – from an organization widely criticized 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.