Time to Reconsider Intellectual Property as a Trade Issue?

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Since the mid-90s when the TRIPS Agreement was struck at the World Trade Organization (WTO), the negotiation of international intellectual property standards has been framed as a trade issue; and ever since then, these negotiations have been shifting from fully multilateral venues such as the WTO and the World Intellectual Property Organization (WIPO), to narrower coalitions of the willing.

Part of the reason for this shift is that reaching a global accord on intellectual property issues has become increasingly difficult. Just as the Doha round of WTO talks has been stagnant for a decade, so too the multilateral negotiations at WIPO have been grinding to a halt, if any indication of this is given by the complete lack of progress made on substantive issues at its 41st General Assembly in 2014.

Thus the move to smaller groupings of states, a trend that has been termed “minilateralism”—as coined by Moisés Naím to describe “the smallest possible number of countries needed to have the largest possible impact on solving a particular problem”. (The G7 itself, as a small group of the world's leading developed economies, falls into this category.) Minilateral agreements are frequently intended to set *de facto* global standards to which other countries will later be pressured to subscribe.

In the context of intellectual property (IP) rules, an example of a minilateral agreement is found in the Anti-Counterfeiting Trade Agreement (ACTA), which was announced in 2007 by the United States and Japan, and by the time of its conclusion in 2011 had grown to include nine other partners including the European Union. Ultimately ACTA failed to reach the threshold of ratifications that it required to take effect, due to an effective international civil society campaign against the agreement that led to its rejection by the European Parliament in July 2012.

The architects of ACTA found themselves in between a rock and a hard place; its membership had been crafted narrowly enough to exclude the developing countries who would cause it to stall if the agreement were discussed at WIPO or the WTO (Mexico was the token developing country in the ACTA club), but by excluding those same countries and by further limiting public participation and access to the negotiations, ACTA was thereby drained itself of its public legitimacy.

Oddly, these failings of ACTA are being repeated in negotiations over a Trans-Pacific Partnership agreement (TPP). The TPP also contains a chapter on IP, and has been pursued on a similar basis to ACTA, having already expanded from an original group of four negotiating countries into a current partnership of twelve. If anything, the TPP negotiations are even more exclusionary than those of ACTA, for which draft text was officially released prior to its conclusion. Other than courtesy of

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Wikileaks, no such release has been made of the TPP text.

The argument raised is that the agreements are being negotiated in private because trade agreements have *always* been negotiated in that way. But trade agreements have most certainly not always looked the way that they do now, extending to include so many "behind the border" issues, including those that impact on the Internet. Aside from IP, recent agreements such as the TPP also include rules on e-commerce ("free flow of information"), telecommunications services, and "regulatory coherence", amongst other measures. The negotiations thus bring up a range of other areas of law and policy outside of trade law, including competition law, data protection and human rights law.

In most cases there are already more well established homes for multilateral discussion of these issues (such as WIPO, the WTO and UNCTAD), but including them in narrower trade agreements enables them to be played off against offers of trade concessions, as well as excluding the powerful blocs of developing and emerging economies who would otherwise more strongly oppose the rules that highly industrialized countries such as the United States seek to impose on their trading partners.

There is however a significant risk that this strategy of forum shifting will backfire. Whereas trade agreements may traditionally have been negotiated in relative secrecy, the same has not been true of intellectual property treaties, and is still less true of the discussion of other Internet-related global public policies such as rules on information flows. The NETmundial Multistakeholder Statement, concluded in April 2014 and since incorporated by reference into a number of multilateral resolutions and recommendations, provides:

> The development of international Internet-related public policies and Internet governance arrangements should enable the full and balanced participation of all stakeholders from around the globe, and made by consensus, to the extent possible. … Decisions made must be easy to understand, processes must be clearly documented and follow agreed procedures, and procedures must be developed and agreed upon through multistakeholder processes.

The mode of negotiation of trade agreements such as the TPP is facially incompatible with these criteria. The TPP has offered no means for the participation of non-governmental stakeholders in text discussions; even the ability for non-governmental delegates to make presentations to delegates, as allowed in early negotiation rounds, has been discontinued since 2013. The transparency of the process has also been consistently poor. There is not even an official TPP website where information can be found; rather, the responsibility of disseminating information about the negotiations to the public is delegated to individual countries, none of whom execute it very well.

Compounding these specific faults of the TPP are the broader democratic deficits that apply to many multilateral processes, whereby negotiators move in something of an accountability vacuum, disconnected from domestic political oversight. This renders the overall process vulnerable to business lobbying, and also allows the misuse of multilateral negotiations for the purposes of "policy laundering" of rules that would be too politically unpopular to be negotiated directly in local parliaments.

The upshot of this is that the scathing reception that ACTA received may be nothing to that awaiting

the TPP, if ever the agreement is finally concluded and the text released. However well-established the secrecy of trade negotiations may have been until now, significant changes are clearly going to be required going forward. In the parallel negotiations between the European Union and the United States for a Trans-Atlantic Trade and Investment Partnership (TTIP), the first signs of these are visible in the European Commission's 2014 undertaking to release all EU text proposals to the public as they are presented in the negotiations.

There is much scope for the refinement and formalization of such standards. One possible avenue for this may be through the Open Government Partnership (OGP), a multilateral body through which member governments make periodic public commitments to improve their transparency and openness. Civil society takes a role in shaping these commitments and in reviewing the independent assessment of states' compliance.

Although the commitments given to the OGP are voluntary, these best practices could ultimately feed into the development of a binding international instrument on trade transparency; perhaps at the WTO, or at UNCITRAL, which has already developed a set of Rules on Transparency in Treaty-based Investor-State Arbitration and concluded a 2014 Convention on the topic.

Complementing or perhaps feeding into such state-led initiatives, it would also be appropriate to commence a fully multi-stakeholder dialogue on trade transparency. Given the relatively well-established norms of multi-stakeholder engagement that exist in the regime of Internet governance, the development of norms to guide the development of Internet-related trade rules could be a most apt topic for the consideration of a multi-stakeholder body such as the Internet Governance Forum (IGF) or even the recently-formed NETmundial Initiative, which was established to operationalize the NETmundial principles.

Initiatives such as these could begin to construct a positive alternative to the current exclusionary, opaque and democratically illegitimate process by which IP and other Internet-related rules are being foisted on the citizens of negotiating countries, and ultimately, beyond. Aside from being more open, participatory and transparent than the status quo, it is difficult to say exactly what reforms such a process might point to—whether, for example, to more thoroughly reform trade negotiation processes, or rather to exclude certain issues from such negotiations altogether, in favour of more inclusive and accessible fora (whether new or existing).

Whatever form these new arrangements may take, the cost of failing to develop them will be the repetition of the fate of ACTA. Much may ride on the final outcome of the TPP, which is soon to be known—perhaps even as soon as this article sees print. If, as seems quite possible, the agreement falls to clear its last hurdle due to widespread public opposition over its process and substance, this will speak volumes for the future prospects of this antiquated mode of trade negotiation.