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ARTICLE

Applying Best Practice Principles to International Intellectual Property Lawmaking

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Abstract This article applies the Max Planck Principles on Intellectual Property Provisions in Bilateral and Regional Agreements to several recently established or still-being-negotiated international lawmaking instruments. It identifies recent, fundamental changes and overarching patterns in the evolution in the procedures, institutions, and substantive outcomes of international intellectual property lawmaking. Specific analysis is provided of the Principles' potential application to the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership Agreement (TPP), the Comprehensive Economic and Trade Agreement (CETA), the Pan-African Intellectual Property Organization (PAIPO), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (VIP Treaty). The article concludes that the Principles and other best practice guidelines for international intellectual property lawmaking can be usefully applied beyond orthodox bilateral and regional trade agreements. By adhering to the Principles, international lawmakers can help make the global knowledge governance system more transparent, participatory, legitimate, and effective.

Keywords Intellectual property · International trade · Max Planck Institute · ACTA · TPP · CETA · PAIPO · VIP Treaty

1 Introduction

International intellectual property (IP) lawmaking has become increasingly complex and controversial in recent years. Although agreements among states on cross-

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border IP issues are not new – key treaties including the Berne and Paris Conventions are over 125 years old – their form and substance have changed dramatically, especially since the turn of the 21st century. It is not merely that the nature of protected subject matter and the scope and duration of protection have expanded.[1] Nor is it just that the forums in which agreements are negotiated and enforced have shifted[2] as IP issues have become evermore intertwined with international trade, environmental sustainability, human rights, and a host of other issues. Rather, the fundamental nature of international IP legal instruments, and the way they are negotiated, is evolving.

Parties to international IP agreements are beginning to go much further behind the border with topics put on the negotiating table. Harmonized minimum standards of legal protection and reciprocal national treatment formed the core of past agreements, but are only the starting point for new negotiations. Because legal measures, especially statutory frameworks, are only one influence on on-the-ground practices, much more emphasis is now being placed on IP enforcement and administration mechanisms. While the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[3] addressed such matters, provisions in newer agreements are becoming (or were hoped to become) increasingly detailed and prescriptive. The Anti-Counterfeiting Trade Agreement (ACTA)[4] is one contemporary example.

Also, while TRIPS was the first instrument to provide reasonably comprehensive coverage of copyrights, patents, trademarks, and certain other IP rights, newer agreements deal with an even wider variety of rights. Matters like protections for clinical trial data or other confidential business information are no longer peripheral but now constitute key negotiating issues, for example in the just-completed Canada-European Union Comprehensive Economic and Trade Agreement (CETA).[5] Negotiations toward a Tran-Pacific Partnership (TPP)[6] Agreement trigger similar concerns.

Yet another change is happening in the process of creating entirely new IP institutions. WIPO had existed in some form since the 19th century before it became the specialized agency of the United Nations responsible for IP issues. The institutional emergence of the WTO broadened the coverage of IP issues compared to the General Agreement on Tariffs and Trade (GATT), but the WTO was not established as an IP-only institution. The procedures through which ACTA's

[1] *See* for example Drahos and Braithwaite (2002).

[2] Regarding "regime shifting" *see* generally Helfer (2004).

[3] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[4] ACTA: Anti-Counterfeiting Trade Agreement, online: http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

[5] *See* generally http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ and http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?lang=eng.

[6] *See* generally http://www.ustr.gov/tpp.

institutional framework was established, and the creation of a new Pan-African Intellectual Property Organization (PAIPO),[7] however, are quite different.

Recent procedural and substantive changes in international IP lawmaking have triggered a variety of criticisms, particularly from non-governmental organizations and also from academics whose work generally aligns with values of the "access to knowledge" movement.[8] Until recently, however, academic scholars and other experts had not discussed systemic problems in detail together or collectively proposed a set of principles to respond to the emerging problems. In October 2012 an expert working group met at the Max Planck Institute for Intellectual Property and Competition Law in Munich, Germany, to confront this challenge. The outcome of this meeting – part of a broader consultative research process – was a clear statement of principles that can be used to establish and guide best practices: the Max Planck Principles on Intellectual Property Provisions in Bilateral and Regional Agreements.

As the title indicates, the Principles were designed with particular kinds of agreements in mind, specifically bilateral and regional trade agreements. Yet it is both possible and productive to contemplate how the Principles apply beyond orthodox free trade or economic partnership agreements. Toward that end, this article moves beyond mere discussion of best practices to consider the Principles' specific application to a number of recent agreements or ongoing negotiations that do not fit most standard models of bilateral or regional agreements: ACTA, TPP, CETA, PAIPO, and the VIP Treaty. Some of these (ACTA and PAIPO, for example) are not trade or economic agreements at all. Others (such as TPP and CETA) are trade agreements, but involve deeper economic integration or regulatory cooperation than many previous measures. The VIP Treaty is an illustration of a more conventional multilateral agreement, but is distinct because it harmonizes limitations and exceptions rather than protections for IP.

All of these unorthodox international lawmaking agreements can usefully be evaluated against the Principles. Indeed, the Principles' drafters and proponents surely had several of these agreements in mind when developing and endorsing the document. Applying the Principles provides a litmus test not only of the agreements' perceived legitimacy, but also of their prospects for public acceptance, and therefore, successful implementation in practice.

2 General Observations

Before applying the Principles to particular agreements and negotiations, it is appropriate to explain why academic scholars and other experts would collectively advocate such statements. There is a legitimate worry that curtailing a country's freedom to negotiate IP issues in any manner or forum it chooses is paternalistic. Perhaps espousing such standards is even harmful to those who were intended to

[7] *See* http://www.au.int/ar/sites/default/files/PAIPO%20Statute%20English.pdf for the African Union's most recent draft statute constituting PAIPO.

[8] De Beer and Bannerman (2013); Kapczynski (2008); Kapczynski and Krikorian (2010).

benefit, constraining their negotiating parameters by expressing concern about the use of this "bargaining chip."[9] Furthermore, it is difficult to explain the exceptionalism of IP that might justify treating these issues distinctly from other equally or more "intrusive" measures, such as environmental, labour, or safety standards in bilateral and regional agreements.

The drafters and signatories of the Max Plank Principles, however, share the belief that the profound changes underway in international IP lawmaking mandate that something be said. Aware of the trends, as well as the real or perceived injustices being created, the Principles reflect a collective commitment to improve both the process and substance of international IP law. However, because of tensions between best practice principles and paternalistic protections, the Principles are sometimes more tentative and less critical than might be justified. Compromises in the forcefulness of particular Principles are a result of this tension. The diplomacy apparent in certain Principles is also a result of the drafters' pragmatism. While there might be more to say about the many problems of international IP lawmaking, the Principles stated have been singled out for their realistic possibility of adoption by negotiators.

3 Applying the Principles

3.1 The Anti-Counterfeiting Trade Agreement

Despite being signed barely two years ago, and not yet in force, ACTA has already attracted more academic attention than any other agreement considered in this article.[10] The United States Trade Representative (USTR) describes ACTA as "a groundbreaking initiative by key trading partners to strengthen the international legal framework for effectively combating global proliferation of commercial-scale counterfeiting and piracy."[11]

USTR's plans for negotiations were first announced in October 2007.[12] Facing gridlock at WIPO on the development of more comprehensive anti-counterfeiting provisions, further to TRIPS, the United States rallied a coalition of supportive partners including Japan, South Korea, Mexico, New Zealand, Canada, and the European Union to negotiate a separate agreement. With discussions apparently having taken place for several years in advance of the 2007 announcement, it was expected that ACTA would be concluded quickly. Secrecy surrounding negotiations of the agreement, however, and leaked information regarding proposed provisions, led to mounting public pressure, prolonging its conclusion until 2010.

[9] Max Plank Institute for Intellectual Property and Competition Law (2012), Preamble.

[10] The most comprehensive analysis is contained in a book authored by Blakeney (2012); numerous other works are cited throughout this section.

[11] *See* http://www.ustr.gov/acta.

[12] Remarks by US Trade Representative Susan Schwab, 23 October 2007, available online: http://keionline.org/sites/default/files/asset_upload_file110_13428.pdf, accessed 9 September 2013.

ACTA was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. In 2012 the EU, its 22 members and Mexico also signed the agreement. Requiring six parties to ratify the agreement for it to come into force, as of yet, Japan is the only country to have ratified the agreement. In March 2013 Canada[13] enabled ratification of the "Combating Counterfeit Products Act" to formally ratify ACTA, but as of publication of this article that Act has not passed into law. Since signing, public backlash against ACTA has caused the legislatures of Mexico[14] and the European Parliament[15] to reject adoption, while an Australian parliamentary committee has recommended delaying ratification.

ACTA could be the poster child representing almost all of the substantive, institutional, and procedural problems that the Max Planck Principles on IP Provisions aim to address. But it does, however, not fit the form of ordinary "bilateral or regional agreements" contemplated within the Principles' own title. It is multilateral, not bilateral. And it is diversely multinational, not geographically regional. Although the word "trade" is not actually in the title, trade agreements are clearly at the heart of the Principles. Applying the Principles to ACTA helps to demonstrate their broad utility.

Substantively, ACTA sets uniform standards for the enforcement of IP rights through enhanced border measures, civil and criminal enforcement measures, specific practices for the digital environment, and increased international cooperation between enforcement agencies and right holders. At a glance, ACTA seems to embody a lack of respect for the established multilateral policy balance, including flexibilities and ceilings, emphasized by the Principles. ACTA's IP enforcement provisions in particular have garnered a great deal of criticism.[16] For example, ACTA could empower customs officials free of immediate judicial oversight to seize goods without understanding or applying the limitations and exceptions that make infringement such a complex legal determination.[17] Laws permitting the free trade of parallel imports could be rendered ineffective. Further, ACTA's provisions could make transshipments of goods merely routed through (instead of destined to) ACTA members subject to the standards of the seizing country rather than the country of importation.[18]

The extent to which ACTA achieved radical, substantive changes to existing legal systems has, however, been the topic of contrasting tales told by constituencies

[13] An analysis of the impact of ACTA on the enforcement of copyright in Canada can be found in Judge and Al-Sharieh (2012).

[14] For further details on Mexico's experience with ACTA, *see* Haggart (2013).

[15] The actions of the European Parliament are partially explained by the findings of commissioned report by Geist (2012a, b, c). For more on ACTA's European implications, *see* Geiger (2012a, b).

[16] *See* for example Geist (2011, 2012a, b, c).

[17] Geist (2012a).

[18] Grosse Ruse-Khan (2010).

on different sides of the debate.[19] Several commentators have concluded that the final substance of ACTA's provisions are not as alarming as first feared.[20] That said, one should not downplay the legal impacts of ACTA. In its own report on the Agreement, the European Parliament concluded that ACTA is "significantly more stringent and rightholder friendly than the TRIPS Agreement."[21] Substantive concerns are justified.

Institutionally, ACTA creates a new governing body outside existing forums, such as WIPO and other UN agencies, and the WTO. One worry is that the move away from the institutional use of WIPO and WTO to find agreement on global IP protections, far from solving existing gridlock, will perversely increase it. Among the institutional problems with ACTA's "country club" or "committee" model are that it is likely to exacerbate existing geopolitical power imbalances in international IP lawmaking, without actually consolidating club members' positions to facilitate future multilateral bargaining.[22] Another problem is that ACTA actually threatens existing institutions, such as WIPO.[23] These institutional concerns relate directly to the observations made in the Principles about the importance of preserving the existing framework for multilateral IP lawmaking.

While substantive and institutional issues have been highlighted as problematic, procedural aspects of ACTA's negotiation and conclusion have received perhaps the most academic and public criticism. A major point of procedural alarm is that the world's poorest people, in developing countries – which are frequently perceived as the primary source of IP rights violations, and where the implications of stronger enforcement mechanisms might be greatest – were largely excluded from negotiations.[24] The exclusion of consumer groups and other civil society organizations from the formal negotiating process has been a related criticism.[25] Both concerns relate to broader worries about the ineffectiveness and illegitimacy of international IP agreements that are negotiated mostly in secret.[26] Lack of transparency, inclusiveness, and equal participation constitute ACTA's most egregious violations of the Max Planck Principles on IP Provisions.

Where the Principles do not apply so neatly to ACTA is in respect of trade-offs. As well as not being a normal bilateral or regional agreement of the sort contemplated by the Principles, ACTA is an "IP-only" instrument. IP is not just one chapter of a much broader trade agreement or economic partnership; it is the sole focus of the agreement. The Principles' observation that increasingly common trade-offs are undermining the integrity of IP policy, and recommendation to consider the long-term consequences of such concessions, do apply in the context of ACTA. The trade-offs for ACTA, however, are extrinsic preferences rather than

[19] McManis and Pelletier (2010).

[20] *See*, for example, Mercurio (2012) and Weatherall (2011a, b, c).

[21] European Union Directorate-General for External Policies (2011), p. 6.

[22] Yu (2011, 2012).

[23] Bannerman (2012).

[24] Rens (2011).

[25] Malcolm (2010).

[26] Levine (2011).

intrinsic to the agreement itself. It is obvious that countries such as Jordan, Mexico, and Morocco are only included in ACTA on account of their economic and political relationships with the United States. The concessions offered by such countries are rooted in other instruments, notably bilateral agreements between the United States and Jordan and Morocco respectively, and the multilateral North American Free Trade Agreement (NAFTA) among the United States, Canada, and Mexico. Similar observations might be made about the involvement of South Korea, Singapore, and even Australia in ACTA.

My final remark about the Principles' application to ACTA relates to the fundamental purpose served by this statement of best practices. Even if ACTA is eventually implemented with technical legal effect, we know from experience that enforcement depends upon an agreement's perceived legitimacy and buy-in. ACTA cannot be effectively implemented in signatory countries or elsewhere through coercion. Weatherall's critiques of ACTA as a new kind of international lawmaking make this point clearly:

> 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.[27]

The Principles are not a statement of opposition seeking to undermine the objectives of those negotiating new kinds of IP provisions. Rather, by following the best-practice guidelines that Principles represent, negotiators are able to increase the likelihood of successful policy outcomes.

3.2 The Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) Agreement is an ongoing set of negotiations initially convened by Brunei, Chile, New Zealand and Singapore in 2005 as the Trans-Pacific Strategic Economic Partnership (TPSEP) Agreement.[28] The current negotiations toward the TPP have been taking place since 2010. As of August 2013, as well as the original four countries, the 19th round of negotiations included Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States, Vietnam and South Korea. In November 2011 leaders of the nine negotiating countries at the time, (consisting of all those above with the exception of Canada, Mexico, Japan and South Korea) announced their agreement on a broad outline toward an ambitious agreement that would "enhance trade and investment among the TPP partner countries, promote innovation, economic growth and development, and support the creation and retention of jobs."[29]

[27] Weatherall (2011a, b, c).

[28] Brunei, Chile, New Zealand and Singapore, 18 July 2005, UNTS No. 46151, online: http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf.

[29] United States, Office of the United States Trade Representative, Executive Office of the President, *Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of the Trans-Pacific Partnership Agreement,* online: http://infojustice.org/wp-content/uploads/2011/11/APEC-USTR-Fact-Sheet-on-TPP-112011.pdf.

If concluded (which is no guarantee), the TPP Agreement would cover many areas, including intellectual property rights, and aims to further liberalise trade among the economies of the Asia-Pacific region. The fact that IP provisions are dealt with only in one chapter of TPP raises an immediate point of contrast with ACTA, which was conceived of and signed as an IP-only instrument. Also, unlike ACTA, TPP is more formally structured as one of the "regional agreements" clearly contemplated within the scope of the Principles. Despite these differences between ACTA and TPP, there are number of problematic similarities.

As with ACTA, negotiations have been conducted without public access to the proposed text. Independent researchers and public interest advocates have had to base analyses on several leaked drafts of proposed sections of the agreement, including the February 2011 United States draft proposal for the chapter on intellectual property.[30] It is interesting, however, that there seems to be somewhat more transparency about the process (though not the substance) of negotiating TPP than ACTA. Perhaps negotiators are already learning lessons from the irreparable procedural flaws now tainting ACTA. For example, the USTR's website contains at least the basic details about the contours of the agreement's scope and structure, information that was not made public during the early days of ACTA negotiations. In several negotiating countries, stakeholder updates are also provided during periodic teleconference calls or other meetings. Nevertheless, full transparency and public participation remains a problem with TPP, in particular because certain industry groups are privileged to share in confidential information provided by negotiating governments.[31]

The USTR's "Fact Sheet" on the TPP negotiations states, in relation to intellectual property that the negotiating countries have agreed to reinforce and develop existing TRIPS rights and obligations. The wide-ranging scope of topics being discussed – "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" – certainly validates the observation in the Principles about the broadening of subjects being negotiated outside of established multilateral IP policy frameworks. One core concern, reflected in the Principles' recommendations, is that such regional agreements will shape and constrain future trends in more globalized multilateral forums.

There are also numerous substantive concerns about the proposals being discussed. In an apparent effort to pre-empt substantive criticism of TPP's IP provisions, the USTR's website points out: "TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health."[32] Researchers, however, have noticed that "[t]he provisions … are inconsistent with the current laws in every TPP member country for which public

[30] Trans-Pacific Partnership, Intellectual Property Rights Chapter (draft 10 February 2011), online: http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf.

[31] Geist (2012b).

[32] *See* http://www.ustr.gov/tpp.

analysis is available, including the U.S. itself."[33] The hypocrisy has led to criticism that potential TPP parties, including Canada specifically, may be engaged in "policy laundering,"[34] attempting to enact unpalatable domestic law reforms through the backdoor of treaty requirements.

The draft IP chapter of TPP has specifically been criticized for its lack of balancing provisions; its potential harm to developing countries with respect to exclusionary pricing of medication; elevated protection standards for rights holders without adequate evidence or public support; and add a dispute resolution mechanism that would expand access for rights holders to potentially challenge domestic policies of the state.[35] Investors' rights to sue states over policies or actions that impact their investment and the pricing of pharmaceutical drugs for example has raised significant concern.[36] Concerns are not limited to the domain of patented medicines. Non-governmental organizations have also outlined several concerns in respect of copyright and communications policy issues, including that the draft TPP IP chapter could impose additional liabilities on internet intermediaries, treat more instances of temporary copying as infringement, extend the length of copyright term, escalate protection for technological protection measures, restrict fair use/dealing, ban parallel imports, and impose criminal law sanctions for non-commercial infringements.[37] Academic scholars have joined with representatives of certain other industries, such as journalism, to likewise criticize numerous substantive aspects of TPP.[38]

Increasing public-interest opposition over the implications of the proposed IP provisions have recently led a number of legislators and government officials in several countries, including Chile, Malaysia, and the United States,[39] to raise concerns.[40] The fact that government officials are expressing concerns much earlier than had happened with ACTA could be an interesting consequence of the approach advocated in the Max Planck Principles. Specifically, the more scrutiny to which proposed agreements are subjected, the more controversy might be generated. Greater procedural transparency has the paradoxical effect of making substantive agreement more difficult to reach, because as the range of constituencies involved becomes broader, perspectives increasingly diverge on the appropriate policies to satisfy "the public interest."

[33] Flynn et al. (2011).

[34] Geist (2013).

[35] Flynn et al. (2012).

[36] Letter from Knowledge Ecology International to Barbara Weisel, Office of the United States Trade Representative, Regarding Copyright Provisions in the Trans-Pacific Partnership Agreement (TPPA), online: KEI http://keionline.org/sites/default/files/TPP_Copyright_KEI2Weisel_26june2012.pdf.

[37] Electronic Frontier Foundation, *Trans-Pacific Partnership Agreement* online: https://www.eff.org/issues/TPP.

[38] Kingsmith (2013).

[39] Letter to Michael Froman, Office of the United States Trade Representatives (5 August 2013) online: http://infojustice.org/wp-content/uploads/2013/08/18MOCs08052013.pdf.

[40] Mike Palmedo, *Chilean, Malaysian, and U.S. Government Officials Weigh in on Intellectual Property and the TPP*, (20 August 2013) online: Infojustice.org: http://infojustice.org/archives/30559.

3.3 Canada-European Union Comprehensive Economic and Trade Agreement

CETA, like TPP, exemplifies the kind of bilateral free trade agreement or economic partnership to which the Principles were clearly designed to apply. Like TPP, there are procedural concerns, especially about transparency and preferential access to information about negotiations, but the secrecy is not on the scale of ACTA. CETA is one of numerous examples of relatively "standard" trade agreements that could be discussed in this article; others include the already-completed Australia-United States Free Trade Agreement (AUSFTA) or the Trans-Atlantic Trade and Investment Partnership (TTIP) that the United States and European Union have just begun to negotiate.

One interesting feature of CETA, like AUSFTA or TTIP, in the context of the Principles is that the negotiating parties are developed countries with advanced economies. As such, the issue of trade-offs acquires much different significance than it has in negotiations involving at least one developing country. The Principles observe that the use of IP provisions as a bargaining chip for concessions in other areas can undermine the internal coherence of both global and national IP policies. But underlying this observation is a concern that some countries negotiating these trade-offs may not fully comprehend the consequences of the sacrifices they are being asked to make. That was certainly true of the trade-offs that led countries representing most of the world's population to sign the TRIPS Agreement. Information asymmetries, abuses of geopolitical bargaining power, and instances of potential coercion make IP trade-offs not just unwise but also unjust.

Yet those underlying concerns do not apply when the negotiating parties are politically sophisticated and economically advanced. This increases the degree of discomfort about imposing potentially paternalistic restrictions on the use of IP as a bargaining chip. If Canada wants to trade the European Union concessions on pharmaceutical patents for better access to beef markets, what is wrong with that? The European Union, meanwhile, cares more about a dress rehearsal for an ambitious trans-Atlantic treaty with the United States than Canadian procurement contracts. The disadvantages of such motivations driving negotiations are not immediately self-evident, and may be outweighed by the generalized gains of trade liberalization. The Principles suggest an answer to this question lies in the preservation of multilateral frameworks for IP policymaking, but the preference for IP multilateralism over bilateralism, which I support, is not held universally. Furthermore, if intrinsic or extrinsic trade-offs are inevitable, it is arguably better to acknowledge than ignore them.

The substantive issues negotiated in CETA have been divisive,[41] but not necessarily because proposals are against the public interest that the Max Planck Principles for IP Provisions aim to protect. By far the most significant source of controversy is the extension of IP protection for patents and the clinical trial data that sustain the position of brand-name pharmaceutical firms vis-à-vis generic competitors.[42] Canada's generic pharmaceutical industry has been among the most

[41] Geist (2010, 2012c).

[42] Lynas (2013).

vocal opponents of this aspect of CETA, understandably so given the economic ramifications.[43] Viewed abstractly, this is less a matter of public interest than of prioritizing one industry's business model over another's. The public policy concerns, however, lie beneath the surface of this particular issue.

In Canada, the cost of drugs is borne heavily by public-sector health insurance, managed and delivered at the sub-federal level by Canada's provinces and territories. The fascinating negotiation dynamic, therefore, is that Canadian provinces have a vested financial interest in the outcome of international IP negotiations. The same was true two decades ago when NAFTA and TRIPS were negotiated, but only recently have the healthcare costs and other impacts of pharmaceutical patent and data protection become a public-interest focal point of international agreements. In Canada's case, the issue is not merely about money; it is also about the constitutional division of legislative powers.[44]

While the federal government has the legal authority to negotiate treaties, the power to implement such an agreement lies with whatever level of government was given jurisdiction by Canada's Constitution Act, 1867. Confidential information and unfair competition (i.e. data protection) and patented pharmaceutical pricing controls are both, arguably, matters of provincial not federal jurisdiction. The same can be said for geographic indications that regulate supply chains for wines and spirits or meats and cheeses, as well as certain property and civil rights issues involving digital rights management systems and other "paracopyright" provisions that go beyond the scope of conventional copyright regulation.[45]

For such constitutional reasons, the European Commission insisted on having every Canadian province and territory participate directly in CETA negotiations. While the process of obtaining and enforcing sub-federal agreement is different in Canada and Europe, particularly post-Lisbon, the underlying concerns are similar. As IP provisions in trade agreements go further beyond the border, their intersection and potential conflict with matters within the sovereign jurisdiction of sub-state governments – Canadian provinces or European Union Member States – becomes an increasingly complex problem to manage.

The Max Planck Principles on IP Provisions, however, do not squarely confront such challenges, or offer recommendations to resolve them. Further work is required in this regard. For the moment, this observation in respect of CETA resembles the difficulties of increased transparency and participation generally. The process/progress paradox is that the more people become involved in negotiation procedures, the more difficult it becomes to obtain consensus about substantive changes to the IP system. This explains why ACTA proponents sought to create a separate country club following frustration with anti-counterfeiting negotiations at WIPO and WTO, why TPP negotiations are becoming increasingly bogged down as new parties and issues are added, and why CETA has been such a complex negotiating process.

[43] Canadian Generic Pharmaceutical Association (2010).

[44] De Beer (2011).

[45] De Beer (2005).

3.4 Pan-African Intellectual Property Organization

PAIPO is in a category distinct from the other instruments to which the Max Planck Principles might apply. It is not a trade agreement at all. It is an institutional body being proposed under the auspices of the African Union (AU), which would in theory coordinate but in practice supersede the functions of the linguistically bifurcated IP offices currently operating on the continent: the African Regional Intellectual Property Office (ARIPO) and l'organisation Africaine de la propriété intellectuelle (OAPI). PAIPO would also bring into its fold countries not currently members of either ARIPO or OAPI, such as South Africa, Nigeria, and Egypt for example.

Compared to instruments like ACTA and TPP, very little commentary has been published about PAIPO.[46] Nevertheless, the first parallel to be drawn between PAIPO and other international IP lawmaking instruments is institutional. Like ACTA, PAIPO would create an entirely new body to deal with IP issues across Africa. It is not clear, however, that the same institutional worries regarding ACTA would apply to PAIPO. The AU does not purport to not replace the autonomous ARIPO and OAPI bodies, but rather commits PAIPO to maintaining close and continuous working relationships with them. Advocates of PAIPO claim that a continental IP organization will facilitate discussion between the two predominant regional ones who can consolidate their views in advance for the purpose of efficacy. If successful, this would enhance rather than undermine multilateralism, and facilitate rather than frustrate the engagement of African countries in other IP lawmaking forums. Yet, it is difficult to imagine an efficient administrative system emerging through three separate bureaucracies, no matter how well coordinated they are. One of PAIPO opponents' concerns is whether limited resources would be better allocated to strengthening the capacity and broadening the reach of existing regional IP organizations.

Another institutional issue relates to the fact that PAIPO was initially motivated by a multi-forum movement to further integrate and unify Africa's IP system in accordance with the Southern African Development Community's ("SADC") 2008 Protocol on Science, Technology and Innovation, and the Common Markets for Eastern and Central Africa's ("COMESA") Southern and Eastern Africa Copyright Network ("SEACONET"). While bridging Africa's linguistic and colonial divides and increasing regional integration are laudable goals, the policy impacts of IP go far beyond the realm of science and technology. Questions can be raised about whether the AU Ministerial Council on Science and Technology is the appropriate body to develop an organization such as PAIPO, or whether this might be more appropriately housed within another branch of the organization, perhaps with a more direct focus on development.

Whether PAIPO would enhance not just science and technology policy, but human development in Africa, depends to a large extent on what precisely the organization would do. Many scholarly researchers, civil society advocates, and public citizens have expressed concern about the language used in the draft statute

[46] Ncube and Laltaika (2013).

constituting PAIPO.[47] It refers to socioeconomic development and effective IP systems, but does not contextualize these goals for Africa, such that it fails to affirm Africa's common causes and perspectives on IP and development, encompassed in the WIPO's African Group and Development Agenda Group (DAG) positions. The statute also fails to assert the importance of public interest flexibilities and the preservation of policy space for AU Member States. The drafters employed terms like "public health," "IP system," and "harmonization" without explanation, which limits the utility and accountability of the document in ensuring that the continental harmonization of IP is conducted in a manner that benefits African people. Of course a draft statute such as this should not spell out all details of the substantive issues the organization would work on, let alone how, but there is a missed opportunity to identify the specific challenges facing Africa in the realm of IP (for example, improving access to medicine and reaching the MDGs). The establishment of PAIPO could also be an opportune time to consolidate African and other developing countries' international achievements at the WIPO and WTO, such as the Declaration on the TRIPS Agreement and Public Health.

The primary concern about PAIPO seems, however, to be neither institutional nor substantive, but rather procedural. In 2006, the AU published a concept paper on PAIPO by the African Ministerial Council on Science and Technology.[48] AU's general assembly voted in favour of PAIPO's establishment in January 2007, and commissioned its Scientific, Technical and Research Commission to draft the PAIPO statute. According to the Commission, the drafting was done "in consultation with stakeholders in AU Member States, ARIPO, OAPI and Collective Management Organizations with the support of the WIPO." For example, in March 2010, the Ministerial Council created an IP Expert Panel to evaluate the PAIPO documents prior to their submission at the next Bureau Meeting in order to expedite the process.

Commission consultations and the work of the IP Expert Panel have not, however, been disclosed to the public. Moreover, ARIPO and OAPI were initially opposed to PAIPO, because – shockingly – the AU did not consult them during its creation. This is especially problematic, because PAIPO's mandate includes maintaining close and continuous working relationships with these organizations, which are experts on Africa's IP circumstance and needs. While the draft PAIPO statute was published on the AU-STRC website, the details of the organization's constitution are still being negotiated, due to concerns raised at a Ministerial conference held in late 2012. In a press release from the AU Summit on January 28, 2013, the AU indicated that the Commission will "convene a meeting of all stakeholders dealing with intellectual property in the implementation of the Decision by May 2013 Summit."[49]

It is possible to argue that the Max Planck Principles on IP Provisions do not apply to the creation of new IP organizations such as PAIPO. Although it is a regional agreement, it is not a *trade* agreement, like TPP or CETA. And although it

[47] Karjiker (2012); Kawooya (2012).

[48] African Union (2006).

[49] New (2013).

is a new IP institution, it would not be involved in international IP norm-making, like ACTA. On the other hand, there is a compelling counter-argument that adherence to the Principles is important because the capacity-building, coordination and administrative functions that PAIPO would perform are even more important "on the ground" than the abstract international laws being imposed through other instruments.

Applying the Principles to PAIPO, one observes a failure to comply with some of the recommendations. Concerns about circumventing multilateralism are not warranted, because PAIPO could actually consolidate members' positions on numerous issues. However, the new institution was negotiated by a select group of delegates of the African Union Ministerial Council on Science and Technology, without widespread public consultation or democratic participation, in pursuit of science and technology-specific objectives rather than industry/context-neutral norms and procedures to facilitate human development.

3.5 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled

The so-called VIP Treaty, signed in the summer of 2013 by 50 countries in Marrakesh, Morocco, is the newest international IP instrument discussed in this article. It is neither a free trade agreement nor a bilateral or regional initiative, and thus falls most clearly outside of the scope of the Principles' ostensibly intended application. However, the VIP Treaty provides a point of useful contrast, to consider whether more conventional forms of international IP lawmaking can be successful if negotiators adhere to the best practice principles and recommendations laid out in the Principles. The case of the VIP Treaty suggests it is possible to resolve the process/progress paradox, achieving successful substantive outcomes through procedures that are both transparent and participatory.

The historical origins of the VIP Treaty are much older than, for example, ACTA.[50] In 1982, WIPO and UNESCO's Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright produced a report detailing "model exceptions for national copyright laws," which, in combination with a report by Canadian copyright practitioner Wanda Noel (Annex II of the Berne Convention and the Intergovernmental Committee of the Copyright Convention's 1985 "Copyright Problems Raised by the Access by Handicapped Persons to Protected Works"), provided the foundation for a series of future negotiations on the issue from 2000 onwards.

A United Nations Convention on the Rights of Persons with Disabilities was adopted in 2006, and contained three articles of specific importance to intellectual property, including provisions on access to information, participation in cultural life, and international cooperation. The topic of copyright exceptions for accessible format copies was re-introduced by the Delegation of Chile in 2007, the same year that 45 recommendations to implement a "Development Agenda" were

[50] For detailed discussion of this history, *see* Knowledge Ecology International (2011).

adopted.[51] Following that, non-governmental organizations were especially important in pushing this issue further. The World Blind Union (WBU) and Knowledge Ecology International (KEI) consulted widely on the issue with the intention of drafting a proposed treaty to increase accessibility for persons with disabilities.

A draft instrument was presented in 2008, and by the following year, over two dozen publisher organizations released a joint statement in opposition to the treaty. During meetings and negotiations from 2009 to 2011, developing countries expressed a high degree of support for a binding treaty. Alternately, the United States submitted an opposing proposal, which called for "non-binding soft recommendations," specifically excluded works created for profit, and sought less flexibility than provided for in existing treaties and trade agreements. The European Commission, meanwhile, proposed that publishers should retain the right to withhold their permission for the transnational sharing of accessible works.

The final text of the VIP Treaty represents a "landmark"[52] in international IP lawmaking, because it is the first multilateral instrument that establishes harmonized standards for exceptions and limitations to, rather than the protection of, IP rights. It requires parties to create exceptions to domestic copyright laws to make works available in formats, such as Braille display and DAISY navigation, for the purpose of expanding access to information for persons who are blind or have other disabilities. It also allows for cross-border exchange of accessible format works by organizations that serve the treaty's target beneficiaries, but limits the system's flexibilities to works that facilitate information-sharing for these specific beneficiaries to avoid the misdistribution of published works. While the agreement is not ideal from the perspective of constituencies for or against the Treaty, and its impact in practice remains to be seen, it has been generally praised as both a procedural and substantive success.

Before the 2009 Development Agenda recommendations were unanimously adopted by WIPO's Member States, multilateral IP lawmaking procedures and institutions had come under intense criticism.[53] It was hardly believable that in less than five years, WIPO would become the "gold standard" to which other processes would be held, but it now is. Applying the Principles to the process and substance of the VIP Treaty leaves very little room for complaint. While it is unclear the extent to which all signatories studied the long-term of impacts of the Treaty's contents, as the Principles recommend, the agreement aligns perfectly with the principle that international IP norms ought to consider not only minimum protections and standards but also maximum ceilings and flexibilities. Also, the VIP Treaty seemingly contains negotiations within the domain of IP rights, such that systemic balances are not skewed by trade-offs for concessions on unrelated issues. However, it is uncertain whether, as with ACTA, diplomatic trade-offs exist but are merely extrinsic to the treaty itself. Overall, the multilateral procedures of WIPO may not be perfect, but are at least transparent, inclusive and simultaneously pragmatic and effective.

[51] De Beer (2009).

[52] United Nations (2013).

[53] Boyle (2004).

4 Conclusion

Analysis of instruments such as ACTA, TPP, CETA, PAIPO, and the VIP Treaty demonstrate how international IP lawmaking is fundamentally changing. The Max Planck Principles on IP Provisions are intended to observe and respond to the changes happening through bilateral and regional agreements, particularly trade agreements. But the Principles designed to guide this form of international IP lawmaking can be also be applied usefully beyond orthodox bilateral and regional trade agreements.

The analysis in this article is not intended to limit the application of the Principles to just these particular unorthodox agreements. My purpose is to consider their application *beyond* bilateral and regional agreements, for example among the European Union and India, or in the Mercosur common market, which other authors in this volume address. Because I suggest that the Principles can usefully be applied multilateral initiatives like the VIP Treaty, the natural next question is whether they might also shed light upon instruments such as the Beijing Treaty on Audiovisual Performances, or the TRIPS Council's recent re-extension of the transition period for least developed countries to comply with certain TRIPS obligations.

While I embrace the notion that best practice principles should apply to *all* international IP lawmaking and policymaking instruments, I hesitate to recommend that these Max Planck Principles on IP Provisions be called upon for that particular task, lest they lose their niche and, consequently, specificity and effectiveness. Nevertheless, my analysis in this article of unorthodox agreements directly or indirectly involving new IP norms or practices, demonstrates the potentially wide applicability of these Principles. My analysis also suggests how, by following best practice principles, international lawmakers could help make the global knowledge governance system more transparent, participatory, legitimate, and effective.

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