ACTA is secret. How transparent are other other global norm setting exercises?

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Pedro Velasco-Martins is a European Union negotiator for the Anti-Counterfeiting Trade Agreement (ACTA). He was recently quoted defending the secrecy of the ACTA negotiations, saying "I have never seen a treaty being negotiated in public. It is not feasible."[1]

Some USTR officials have offered similar excuses for the extreme secrecy surrounding the ACTA negotiations. But in fact, transparency is considered desirable in a wide range of global norm setting cases, including those involving intellectual property. Only in bilateral trade negotiations has such extreme secrecy been common.

The processes followed in the development of global norms for intellectual property and other topics have considerably diversity. However, in recent years, it has become common for such process to be fairly transparent, particularly with regards to meetings relevant to multilateral and plurilateral negotiations. This normally extends to the publishing of meeting agendas, meeting reports or minutes, names of participants, and copies of proposed texts and supporting documents, including policy paper and surveys.

The following are some examples of how norm setting is addressed in other fora.

WTO

The WTO maintains a web page for access to basic information about the TRIPS Council.[2] The TRIPS Council makes an Annual Report to the WTO General Council on its activities, and documents that countries submit to the TRIPS council can be found on the WTO web page.

The public can apply for accreditation to attend WTO Ministerial meetings.[3] There are opportunities for Geneva-based NGOs and the press to receive WTO accreditation, and be in the WTO building when the WTO TRIPS Council meets in order to talk directly to delegates

The WTO receives and distributes NGO position papers related to the activities of the WTO.[4]

Relevant examples of transparency in WTO negotiations include the the 2001 Doha Declaration on TRIPS and Public Health, and the subsequent negotiations on the implementation of paragraph 6 of the Doha Declaration. These were both relatively transparent, when compared to ACTA. Negotiators frequently shared drafts of documents, and there was an informed

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1 Elizabeth Sukkar, "Face-to-face: EU defends the need for anti-counterfeiting treaty," *Script World Pharmaceutical News*, July 1, 2009, http://www.scripnews.com/scripnews/therapysector/Face-to-face-EU-defends-the-need-for-anti-counterfeiting-treaty-149480?autnID=/contentstore/scripnews/codex/0e24106e-64bb-11de-b170-6d20077dd12d.xml.

2 "Work of the WTO TRIPS Council," http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm.

3 "NGOs eligile to attend the Sixth WTO Ministerial Conference to be held in Hong Kong, China, from 13 to 18 December 2005." (WTO, December 5, 2005).

4 "Non Governmental Organizations (NGOs) position papers received by the WTO Secretariat," http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm.

substantive debate[5] on highly technical provisions of the 2001[6] and 2003[7] agreements.

WIPO

WIPO provides special web pages for all meetings of its standing committees, which include draft agendas. There are very detailed minutes and reports of meetings, which provides information on the views of governments and accredited NGOs. WIPO distributes a list of meeting participants. Country submissions are public, and distributed on the WIPO web page. Examples are the web pages for the SCP[8] and SCCR.[9]

Accreditation of NGOs at WIPO is fairly simple and widely used. NGOs can attend the WIPO Genereal Assembly and meetings of WIPO committees, such as the SCP, PCT, SCCR, CDIP and IGC, and frequently post reports in blogs, listserves and Twitter.

Diplomatic conferences at WIPO are very transparent. The two WIPO Internet Treaties (WCT and WPPT) were negotiated in a completely open meeting at the Geneva Convention Center. The public was allowed to attend without accreditation. The draft texts for the WCT and the WPPT were public, and the U.S. government requested comments on the draft texts,[10] which were available, among other places, from the U.S. Copyright Office.[11]

WHO

The agendas and participant lists for meeting of the WHO Executive Board and the World Health

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5 http://www.cptech.org/ip/wto/doha/, http://www.cptech.org/ip/wto/p6/,

6 "Declaration on the TRIPS Agreement and public health. Adopted on 14 November 2001, at the Doha WTO Ministerial. WT/MIN(01)/DEC/2, 20 November 2001" (WTO, October 14, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

7 "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health. Decision of the General Council of 30 August 2003. GENERAL COUNCIL, WT/L/540 and Corr.1. 1 September 2003" (WTO, August 30, 2003), http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

8 "SCP: Meetings of WIPO Standing Committee on the Law of Patents," http://www.wipo.int/meetings/en/topic.jsp?group_id=61.

9 "SCCR: Meetings of WIPO Standing Committee on Copyright and Related Rights," http://www.wipo.int/meetings/en/topic.jsp?group_id=62.

10 USPTO, "Request for Comments on the Chairman's Text of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, To Be Held in Geneva From December 2 to 20, 1996. AGENCY: Patent and Trademark Office, Commerce. ACTION: Notice and request for public comments.," *Federal Register* (October 17, 1996): 54159.

11 http://www.copyright.gov/wipo/, which provided the following preparatory documents
Draft agenda
Draft rules of procedure of the Diplomatic Conference
Basic proposal for the administrative and final clauses of the treaty
Basic proposal for the substantive provisions of the treaty on certain questions concerning the protection of literary and artistic works
Basic proposal for the substantive provisions of the treaty for the protection of the rights of performers and producers of phonograms
Basic proposal for the substantive provisions of the treaty on intellectual property in respect of databases

Assembly are public, as are minutes and reports of proceedings, and submissions by Member States and the Secretariat. To appreciate the extent of the available documentation, see the WHO web page on governance.[12]

This transparency is also available in some but not all WHO meetings on specialized topics.

In 2003, the WHO concluded negotiations on the WHO Framework Convention on Tobacco Control. The process for the treaty negotiation was highly transparent, as extensively documented on the Convention web page.[13] NGOs played an important role in the negotiations of the Convention, including for example by publishing a widely read daily newsletter during the diplomatic conference.

In May 2006, the WHO established an Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG). The Working Group's mandate was to prepare a global strategy and plan of action on public health, innovation and intellectual property to address conditions disproportionately affecting developing countries. All meeting agendas, submissions by the public and member states, and reports and minutes of the IWGW meetings were public. In order to expand public participation, the WHO created an inclusive fast track system for accreditation for NGOs. Civil society experts and interested parties were allowed to attend negotiating sessions.

Accreditation of NGOs at WHO is more difficult than other Geneva institutions, but delegation can be quite large, and members of the public can also attend many meetings in their personal capacity, including the World Health Assembly (WHA). NGO participation is significant, and often features reports in blogs, listserves and twitter. NGOs are allowed to directly address the WHO Executive Board and the major WHA committees, and can speak on each agenda item.

United National Commission on International Trade Law (UNCITRAL)

UNCITRAL develops global norms to address the modernization and harmonization of rules on international business. In terms of norm setting, UNCITRAL is a prodigious maker of both soft law and treaties, working largely in the following areas:

> International Commercial Arbitration and Conciliation
> International Sale of Goods (CISG) and Related Transactions
> Security Interests
> Insolvency
> International Payments
> International Transport of Goods
> Electronic Commerce
> Procurement and Infrastructure Development

The agendas, minutes and reports of meetings, negotiating texts, and papers by experts,

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12 "Governance of the World Health Organization," http://www.who.int/governance/en/index.html.
13 "WHO Framework Convention on Tobacco Control: Documentation in all official languages of the Conference of the Parties.," http://apps.who.int/gb/fctc/.

stakeholders and government, are available on the UNICTRAL web page.

NGOs are accredited to attend UNICTRAL meetings.

UNIDROIT Principles of International Commercial Contracts (2004)

The International Institute for the Unification of Private Law (Unidroit) is an independent intergovernmental organisation based in the Villa Aldobrandini in Rome, which describes its pursose as "to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States." Its members are 63 governments, including 31 European governments, the United States and Japan. Since 1964, UNIDROIT has adopted 11 conventions, two model laws, and various other norms.

The 2004 UNIDROIT Principles of International Commercial Contracts sets forth norms that are "widely used in international contracts and arbitration practice."[14] The negotiations were very transparent, and driven almost exclusively by civil society; out of a 17-member working group, 14 were members of civil society, and the remaining 3 were members of the judiciary in their home nation.[15]

Negotiations ran from 1998-2003. Complete documentary records of the negotiations are available on the UNIDROIT website, including 43 separate drafts and draft chapters, six meeting reports, several supplementary documents, a list of participants, and translations of final principles into 16 languages.[16] Meeting notes are very in-depth, covering everything from major disagreements to disagreements on semantic choices. Proposed revisions are attached to the end of each meeting summary.

UNCTAD

The UN Conference on Trade and Development is a UN body created in 1964, to promote development. UNCTAD is engaged in variety of activities, including some norm setting. One example of UNCTAD norm setting are non-binding norm for competition policy.[17]

The UNCTAD Civil Society Outreach office functions specifically as a liaison to civil society in UNCTAD deliberations. NGOs may participate either as accredited bodies, or as observers. The last two conferences have featured consultations with NGOs. Materials for conferences, side-meetings, and seminars at UNCTAD are readily available, including the meeting agendas, minutes, reports, and participant lists that can be found on the UNCTAD website.

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14 *Report of the United Nations Commission on International Trade Law on the work of its fortieth session* (Vienna, Austria: United Nations Commission on International Trade Law, 7, 2007).
15 "Membres of the Working Group for the preparation of Principles of International Commercial Contracts (2nd)," http://www.unidroit.org/english/principles/contracts/principles2004/wg02/wg-members.htm.
16 "Principles of International Commercial Contracts - Archive of documents 1998-2004," http://www.unidroit.org/english/principles/contracts/principles2004/study50-archive1998-2004.htm.
17 "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive, Business Practices, TD/RBP/CONF/10/Rev.2" (United Nations, 2000).

OECD

The membership of the OECD is very similar to the countries currently negotiating ACTA. However, the OECD is a far more transparent organization.

The OECD meeting agenda and participant lists are published on its extensive web page, as are countless papers by experts, OECD staff, stakeholders and member states.

There is a process for accreditation and participation at OECD meetings, as well as active outreach by the OECD to expand the involvement by the public.

The recently established Civil Society Information Society Advisory Council (CSISAC)[18] of the Information, Computer and Communications Policy (ICCP) of the Information, Computer and Communications Policy (ICCP) of the OECD provides an important template for the equitable nature of civil society participation in multi-national fora. The CSISAC, through its representative process, enables civil society to be on equal footing in terms of communication and consultation with the OECD as the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TIAC). As the outgrowth of the 2008 Seoul Declaration on the Future of the Internet Economy of the OECD Ministerial, the incorporation of CSISAC at the OECD is a milestone of recognition in international relations of the significant role of civil society in shaping the future of the Internet.

One notable exception to this level of transparency was the earlier controversial and ultimately unsuccessful effort by the OECD to negotiate a Multilateral Treaty on Investment (MIA) in secret.

Hague Conference on Private International Law

The Hague Conference on Private International Law (HCCH) is a global inter-governmental organization that develops and services multilateral legal instruments that are designed to foster cross-border cooperation in civil and commercial matters. The HCCH membership includes 68 countries plus the European Union. Some 130 countries have signed one or more of its instruments.

Between 1951 and 2008, the Conference adopted 38 international conventions. According to the HCCH, even when they not ratified, the conventions are often seen as soft norms followed by both Member and non-Member States, and may also form a source of inspiration for efforts to unify private international law at the regional level, including the Organisation of American States (OAS) or the European Union (EU).

While the HCCH is not as transparent as the typical multilateral institution, the negotiations are not themselves held in secret. For example, the Convention of June 2005 on Choice of Court Agreements,[19] which the US signed in 2009, was open in several ways. KEI and the American

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18 http://csisac.org/
19 "Convention of 30 June 2005 on Choice of Court Agreements," Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

Library Association (ALA) both served on the US delegation, along with a number of other private sector participants. A number of NGOs and academic experts were allowed to attend some negotiating sessions, and the draft texts of the agreement were widely circulated among all stakeholders and the public, and discussed on public listserves, such as Hague-jur-commercial-law@lists.essential.org, advertised as "Discussion of Hague Convention on Jurisdiction and Foreign Judgments."

Meetings on the HCCH on specific topics are often extensively documented, such as this meeting on electronic commerce.[20]

Free Trade Areas of the Americas (FTAA)

The Free Trade Area of the Americas was a proposed agreement to eliminate or reduce trade barriers across the Americas. In this regional trade negotiation, with 33 other member countries participating, the transparency of the process included publication of negotiating texts and opportunity for comment from civil society. The third draft FTAA agreement text was made available for comment[21] and the negotiation process included a website which solicited and published the views of civil society participants.[22] The FTAA also enabled the hosting of meetings organized by interested groups to organize policy discussions surrounding the negotiations process.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

The Mine Ban treaty was created in 1997, following a public campaign that has been described as an unusual and cohesive strategic partnership between governments, international organizations like the International Red Cross, UN agencies and civil society represented by the International Campaign to Ban Landmines (the ICBL).[23]

The negotiations for the treaty, which are sometimes referred to as the "Ottawa Process," took place outside the UN system. The ICBL played a role in the actual drafting of the treaty, was given a formal role in all of the diplomatic meetings leading up to the negotiations, and then during the negotiations themselves.

The process for the treaty included an initial February 12-14 1997 meeting to exchange views of a draft treaty text on in Vienna with representatives of 111 governments, the United Nations, the ICRC and the International Campaign to Ban Landmines. A revised draft treaty text was then prepared on the basis of those discussions and was the subject of detailed negotiations at meetings in Brussels (June) and Oslo (October) prior to its adoption and signature in Ottawa in

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20 "INTERNATIONAL CONFERENCE ON THE LEGAL ASPECTS OF AN E-COMMERCE TRANSACTION. 26 AND 27 OCTOBER 2004," http://www.hcch.net/upload/wop/e-comm_intro_e.html.
21 http://www.ftaa-alca.org/FTAADraft03/Index_e.asp
22 http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP
23 "Treaty Basics, International Campaign to Ban Landmines," http://www.icbl.org/index.php/icbl/layout/set/print/ Treaties/MBT/Treaty-Basics.

December 1997.[24]

The treaty was negotiated within a year, and within nine months 40 states ratified the treaty, facilitating its entry into force.

UN Convention on the Rights of Persons with Disabilities (Treaty negotiations)

The negotiations leading to the UN Convention on the Rights of Persons with Disabilities was exceptionally transparent, and involved significant NGO participation. Archives of minutes, agendas, reports, and participant lists can be found on the UN's Enable website. Accredited NGOs were represented in a number of fora, as both separate entities[25] and advisers to national delegations.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was drafted as "one of the three pillars of the preservation and promotion of creative diversity."[26] UNESCO, through its website, provides centralized, extensive documentation of the Convention's evolution through nine major meetings, beginning with the initial 2003 suggestion at UNESCO's 32nd General Conference, through three meetings of Intergovernmental Experts, three meetings of Independent Experts, the drafting committee meeting, and its final proposal and adoption in 2005. Reports, opening and closing remarks, participants, and every draft are all available online, for every meeting, in both English and French.[27] Full documentation of sessions of the ongoing Intergovernmental Committee, Expert Meetings, and Meetings of Parties is also available through their central website.

International Treaty on Plant Genetic Resources for Food and Agriculture

The International Treaty on Plant Genetic Resources for Food and Agriculture was an outgrowth of the Commission on Plant Genetic Resources, itself part of the UN's Food and Agriculture Organization. Full meeting records of the Comission have been kept since its inception in 1987, and all are available online through the FAO's online document repository.[28] Inter-session

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24 Human Rights Watch Staff and International Campaign to Ban Land Mines International Campaign to Ban Land Mines, *Landmine Monitor report 1999* (Human Rights Watch, 1999).
25 See, for example, "UN Enable - Ad Hoc Committee - Report of the Second Session. Annex 1," http://www.un.org/esa/socdev/enable/rights/a_58_118_e.htm.
26 "About the Convention Diversity of Cultural ExpressionsCultural Diversity: UNESCO-CULTURE," http://portal.unesco.org/culture/en/ev.php-URL_ID=35405&URL_DO=DO_TOPIC&URL_SECTION=201.html.
27 "United Nations Educational, Scientific and Cultural Organization | Culture," http://portal.unesco.org/culture/en/ev.php-URL_ID=33875&URL_DO=DO_TOPIC&URL_SECTION=201.html.
28 "FAO Document Repository," http://www.fao.org/documents/index.asp?lang=en

contributions from member states are also available online. Each meeting summary contains a list of participants (governmental, intergovernmental, and civil society) as well as draft texts, delegates' full contact information, attendance, and lists of all relevant working documents. NGOs were—and continue to be—regularly admitted as observer attachments to national delegations, and solicited for presentations.[29] [30]

The FAO's establishment of the Global Crop Diversity Trust—a fund established to "ensure the conservation and availability of crop diversity for food security worldwide"[31] is also documented online. Reports of the Interim Panel of Eminent Experts, which recommended the establishment of the Trust and oversaw it until 2006, are available through the Trust's website, and contain names of all Panel participants.[32]

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29 *REPORT OF THE FIFTH EXTRAORDINARY SESSION OF THE COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE* (Rome: Commission on Genetic Resources for Food and Agriculture, 6, 1998).

30 *REPORT OF THE COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE, Eighth session* (Commission on Genetic Resources for Food and Agriculture, 4, 1999).

31 "The Global Crop Diversity Trust - Our Mission," http://www.croptrust.org/main/mission.php.

32 "The Global Crop Diversity Trust - Interim Board Reports," http://www.croptrust.org/main/board.php?itemid=11.