The Anti-Counterfeiting Trade Agreement: Ambitious Aims vs. Political Reality

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Abstract

The Anti-Counterfeiting Trade Agreement (ACTA) faced heavy criticism from many quarters, most notably for its choice of forum and potential impact on issues such as access to medicine and civil liberties. This article takes a radically different approach, assessing the ACTA against its publicly disclosed negotiating aims and objects. The negotiating governments promoted the ACTA as a "21st century" agreement with two main aims: 1) deepen international cooperation in the area of IP enforcement among negotiating parties; and 2) promote strong enforcement practices in the form of an international standard. In essence, the governments sought to harmonize and raise IP enforcement standards in order to combat the proliferation of counterfeiting and piracy. The final text of the ACTA accomplishes neither objective. Instead, the negotiating governments simply sought to export their own laws to the other negotiating parties. The result is a permissive agreement which adds very little substance to international intellectual property law.

Key Words: Intellectual Property, ACTA, WTO, Access to medicines, Civil Liberties, Public Policy, TRIPS-Plus, and Minimum standards

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I. Introduction

Controversial from its inception, the final text of the Anti-Counterfeiting Trade Agreement (ACTA) led to more debate and protests than any other intellectual property agreement.[1] The criticism and widely publicised protests against the ACTA should not have been a surprise[2] as the negotiations were heavily criticized from the beginning for lacking legitimacy and transparency,[3] for encroaching upon territory traditionally viewed exclusively in the purview of domestic legislatures and authorities,[4] for being excessively

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1. The text of the ACTA is available at the following: Anti-Counterfeiting Trade Agreement, opened for signature 31 March 2011, (not yet in force), *Anti Counterfeiting Trade Agreement* [Hereinafter ACTA], preamble, http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf.

2. *See* Dave Lee, *Acta protests: Thousands take to streets across Europe*, BBC News, Feb. 11, 2012, http://www.bbc.co.uk/news/technology-16999497.

3. Negotiated "behind closed doors," NGOs and interested observers repeatedly requested draft negotiating texts. For some time, these requests were summarily rejected. In the US, the administration even rejected request for the ACTA discussion draft and related materials under the US Freedom of Information Act (FOA) on the grounds that the documents are "classified in the interest of national security." See European Parliament Resolution of 10 March 2010 on the Transparency and State of Play of the ACTA Negotiations, 2010 O.J. C 349E/46, ¶ 3-4, which among other things called on the EU Commission to provide "public and parliamentary access to ACTA negotiation texts and summaries" and to "engage proactively with ACTA negotiation partners to rule out any further negotiations which are confidential," draft texts were released in April 2010 [Hereinafter ACTA April 2010 Draft], (*see* http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf.) and November [Hereinafter ACTA November 2010 Draft], (*see* http://commondatastorage.googleapis.com/leaks/Anti-Counterfeiting%20Trade%20Agreement.pdf.) Negotiating countries were countered by releasing press releases and negotiating summaries. Draft texts were also leaked in July 2010 [Hereinafter ACTA July 2010 Draft], (*see* http://publicintelligence.net/anti-counterfeiting-trade-agreement-acta-july-2010-draft/) and August 2010 [Hereinafter ACTA August 2010 Draft], (*see* http://publicintelligence.net/anti-counterfeiting-trade-agreement-acta-august-2010-draft/.) In response to earlier concerns over transparency, the USTR released a summary of negotiations on its website, *ACTA: Summary of Key Elements under Discussion* (Apr. 2009), http://www.ustr.gov/webfm_send/1479. The governments of Canada, EU, Japan, New Zealand and the United Kingdom released identical summaries. On the FOA request and the secrecy surrounding the ACTA negotiations, see David Levine, *Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking*, 26 Am. U. J. Int'l. Pol'y 811 (2011).

4. *See*, Kimberlee Weatherall, *Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement*, 33 Sydney L. Rev. 229 (2011).

industry-driven,[5] and for attempting to shift the forum for IP enforcement away from existing multilateral organizations, most notably the WIPO and the WTO.[6] Critics also claimed that the ACTA – and in particular its provisions relating to the digital environment – threatened civil liberties (such as freedom of speech), with some even warning that customs authorities at airports would individually inspect every incoming passenger's iPod and computer for possible IP infringements[7] and to access to information (i.e. the "right" to use the internet).[8] For others, the ACTA represented an unwelcome impediment to access to medicines.[9]

The ACTA is likely never to come into force. The European Union (EU) Parliament effectively killed the treaty when it voted on 4 July 2012 to reject the treaty, with 478 MEP votes against, 39 votes in favor of ACTA and 165 abstentions.[10] For some time, the European Commission maintained hopes for the treaty's revival and continued with its referral to the Court of Justice of the European Union (CJEU) on whether the ACTA was compatible with the EU's fundamental human rights and freedoms; but in late December 2012

5. For instance, several industry representatives had access to and influenced the US as private sector advisors. *See* James Love, *Who Are the Cleared Advisors That Have Access to Secret ACTA Documents?*, KEI Blog Posting, Mar. 13, 2009, http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors.

6. *WTO Members at Odds Over Anti-Counterfeiting Pact*, 16(9) Bridges Weekly Trade Digest 6 (Mar. 7, 2012); Michael Blakeney, *Intellectual Property Enforcement: A Commentary on the Anti-Counterfeiting Trade Agreement (ACTA)*, at 44-54 (Edward Elgar, 2012). *See also*, O.J. C 349E/46, *supra* note 3, ¶ 6: The EU Parliament even weighed in on this issue, stating that it "deplore[d] the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation".

7. *See* Michael Geist, http://www.michaelgeist.ca/index.php?option=com_tags&task=view&tag=acta&Itemid=408.

8. *See* Charles Arthur, *Acta goes too far, says MEP*, The Guardian, Feb. 1, 2012, http://www.guardian.co.uk/technology/2012/feb/01/acta-goes-too-far-kader-arif.

9. *See* Oxfam, *Secret Plans to Criminalize Generic Medicines Could Hurt Poor Countries and People*, July, 15, 2009, http://www.oxfam.org/en/pressroom/pressrelease/2009-07-15/criminalize-generic-medicines-hurt-poor-countries.

10. For background and commentary on the EU parliamentary process, *see* Duncan Matthews, *The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 127/2012, at 3-6, www.ssrn.com.

the case was abandoned.[11] Without the EU, the ACTA is effectively dead. While the public protests and criticisms as a whole (both the valid and patently untrue[12]) heavily influenced the decision of the EU Parliament to reject the agreement and therefore played a large part in the "death" of the ACTA, reflection on this never-to-be treaty should not be limited to these aspects of the international lawmaking process. Indeed, although much less publicized and discussed, internal difficulties in agreeing to certain standards and procedures contributed to the downfall of the agreement. These internal negotiating difficulties should not be forgotten, and they form the basis of this article.

This article does not intend to review all of the perceived shortcomings of the agreement as these criticisms have been subjected to scrutiny in academic scholarship and elsewhere.[13] Instead, the article will focus on the text of the final version of the ACTA, and assess its success against the publicly disclosed negotiating aims and objects. What emerges from this exercise is that the ACTA is a failed agreement in that it does not achieve the negotiating aims and objectives. The negotiating governments promoted the ACTA as a "21st century" agreement with two main aims: 1) deepen international cooperation in the area of IP enforcement among negotiating parties; and 2) promote strong enforcement practices in the form of an international standard.[14] In essence, the governments sought to harmonize and raise IP enforcement

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11. *Commission Takes Formal Step Signaling No 'Realistic Chance' For ACTA*, Inside US Trade, http://insidetrade.com/index.php?option=com_user&view=login&return=aHR0cDovL2luc2lkZXRyYWRlLmNvbS8yMDEyMTIyNjI0MjAwNjEvV1RPLURhaWx5LU5ld3MvRGFpbHktTmV3cy9jb21taXNzaW9uLXRha2VzLWZvcm1hbC1zdGVwLXNpZ25hbGluZy1uby1yZWFsaXN0aWMtY2hhbmNlLWZvci1hY3RhL21lbnUtaWQtOTQ4Lmh0bWw=.

12. Misinformation regarding the obligations contained in the ACTA persist and even intensified following the successful movement to defeat a recent legislative attempt to strengthen penalties for IP infringers via the Stop Online Piracy Act [Hereinafter SOPA]. For a basic review of the SOPA, *see* Julianne Pepitone, *SOPA Explained: what it is and why it matters*, CNN Money, Jan. 20, 2012, http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm.

13. *See* Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA: J. L. & Tech. 1 (2011); Christina Eckes *et al*, *International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA*), Current: Int'l Trade L.J. (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145047; Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit*, 26 Am. U. L. Rev 645 (2011); Weatherall, *supra* note 4.

14. *See* ACTA, *supra* note 1, Preamble.

standards in order to combat the proliferation of counterfeiting and piracy.

The final text of the ACTA accomplishes neither objective. The ACTA is therefore a failed agreement, not because it did not contain maximalist IP provisions but only as it failed to meet its objectives of harmonization and international standard setting. This is a disappointing result from an international lawmaking perspective but inevitable when the several of the negotiating parties seemed intent on harmonization and standard setting through the export of its domestic law – combined with an unspoken resistance to the importation of any other law. Given that several of the governments actually stated during the negotiations that the ACTA would not require any amendments to their own law, the negotiators simply drafted treaty language to allow for positions and interpretations suitable to all parties' current law. The resulting ambiguous and permissive text makes the goal of harmonization and standard setting unattainable. Therefore, the ACTA failed long before the widespread protests in Europe occurred and the EU Parliament voted to reject the treaty. While much has already been written on the ACTA, this part of the story remains largely underemphasized in the literature.

Part II introduces the ACTA, including the background to the negotiations, the controversial nature of the negotiations, and ultimately its rejection by the European Parliament in July 2012. Part III argues that despite all the criticisms and rhetoric leveled against the ACTA, the treaty is for the most part (but not exclusively) an agreement which does not require the major negotiating parties to amend their domestic law. Therefore, the ACTA failed to meet its negotiating objectives and if it is ever revived and comes into force it will fail to significantly impact upon counterfeiting and piracy – for how can an agreement which embeds the status quo and requires few if any legislative amendments have any effect on the rate of IP infringements worldwide? Part IV argues that alternative negotiating objectives posed by governments during the latter stage of the negotiations are merely *ex post* justifications, offered only when ambitions to meet the aims and objectives became unattainable and the negotiations became a codification of existing laws. Part IV concludes.

II. The Negotiations and Aftermath

With estimates on the cost of counterfeiting and piracy ranging from

US$250 billion (as per the OECD in 2009[15]) to over US$600 billion (as per the International Anti Counterfeiting Coalition[16]) the problem is real.[17] And while people often only view counterfeits and pirated goods are "harmless" – think of knock-off designer-brand clothing and accessories, shoes and apparel, pirated films and books, and fake consumer electronics – there is a growing realization that counterfeits and pirated goods can be dangerous to human health and life – think substandard aircraft and car parts, food, medicines, and tobacco products.

China is by some measure the world's leading producer of counterfeit and pirated goods (it is estimated that China accounts for over 80 percent of the world's counterfeits).[18] Ironically, increased IP protection and membership in the WTO has done nothing to curtail counterfeiters. In fact, liberalized trade policies (which include fewer export restrictions and the cessation of the state-trading monopoly on exporting) coupled with the rise of the internet and e-commerce has led to a dramatic rise in counterfeiting over the last decade. Indeed, estimates from the Chinese government, United States Congressional Research Service and others conclude that counterfeits constitute between 15 percent and 20 percent of all Chinese made products and that upwards of 90 percent of software in China is pirated.[19]

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15. *See* Press Release, World Intellectual Property Organization, Counterfeiting and Piracy Endangers Global Economic Recovery Say Global Congress Leaders, WIPO Press Release PR/2009/621, Dec. 3, 2009, http://tinyurl.com/yd9edmq.

16. *See* International Anti Counterfeiting Coalition, http://www.iacc.org/about-counterfeiting/. The coalition also estimates that counterfeiting results in a loss of US$250 billion and 750,000 American jobs.

17. *See* Peggy Chaudhry & Allen Zimmerman, *The Economics of Counterfeit Trade*, at 13 (Heidelberg, Springer 2009).

18. *See* Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously* 32 Ohio N.U. L. Rev. 2003 (2006). Seizure statistics from the EU and elsewhere largely substantiate these estimates.

19. Chetan Kulkarni, *Calls for Chinese crackdown on piracy*, May 17, 2005, United Press International, http://www.upi.com/Business_News/Security-Industry/2005/05/17/Calls-for-Chinese-crackdown-on-piracy/UPI-44181116369129/#ixzz1fuPgSkr2. In 2001, the PRC State Council estimated counterfeit trade at $19 billion-$24 billion per year, accounting for 8 percent of China's gross national product. *See also*, PRC State Council Research and Development Committee, *Survey of the Effects of Counterfeiting on the National Economy*, at 5 (2003). The problem for the movie industry is compounded by the fact that China creates a barrier to market access by censoring or prohibiting the importation and distribution of many foreign films. Of course, pirated versions of these films are readily available throughout China.

Moreover, it is clear that the negotiating parties to the ACTA do not believe that the current international IP framework is adequately addressing and managing the issue of enforcement. This is unsurprising as both WTO Members and legal commentaries have long expressed concern that the TRIPS Agreement does too little to enforce its norms and standards effectively.[20] While it would seem prudent for the negotiating parties to turn to the WTO or WIPO to more effectively address the issue of IP enforcement, such efforts have proven fruitless in recent years and the negotiating parties to the ACTA believed a stand-alone treaty outside the existing architecture was the only workable approach. More specifically, several attempts have been made to even discuss increased enforcement standards at the TRIPS Council of the WTO and at WIPO's Advisory Committee on Enforcement. Such overtures have been rejected out of hand by a large contingent of developing countries as not appropriate for discussion in that particular forum. In such an environment, if neither the WTO's TRIPS Council nor WIPO's Advisory Committee on Enforcement are the appropriate forum to discuss norm-setting in the area of IP enforcement, it follows that those countries desiring to establish a global standard had no choice but to move to a different, more suitable forum.[21] Given this reality, the negotiation of the ACTA could be a signal that certain Members do not believe that the WTO has the institutional capacity to correct the perceived deficiencies; that is, that consensus could never be reached at the WTO to amend the TRIPS Agreement in a manner supportive of efforts to increase IP enforcement.[22]

The genesis of the ACTA is a proposal by Japan in July 2005 at the Group of Eight (G8) meeting at Gleneagles, Scotland, which the G8 published as its own in a four-paragraph statement on "Reducing IPR Piracy and Counterfeit-

20. *See* Monika Ermert, *European Commission on ACTA: TRIPS Is Floor Not Ceiling*, Intellectual Property Watch, Apr. 22, 2009, http://www.ip-watch.org/2009/04/22/european-commission-on-acta-trips-is-floor-not-ceiling/ (quoting Luc Devigne from the trade division of the European Commission as saying "There was no intention to duplicate TRIPS… we want to go beyond it"… "TRIPS is the floor, not the ceiling"). *See also* Peter K. Yu, *TRIPS and its Achilles' Heel*, 18 J. Intell. Prop. L. 479 (2011).

21. Interestingly, several WTO Members that complained at the WTO TRIPS Council that specific provisions contained in the ACTA "go too far" have similar provisions in own domestic law. *See* US Second Intervention at WTO TRIPS Council Meeting, *IP enforcement trends* (Feb. 28, 2012), http://keionline.org/node/1379.

22. *See* Bryan Mercurio, *Beyond the Text: The Significance of the Anti-Counterfeiting Trade Agreement (ACTA)*, 15(2) J. Int'l. Econ. L (2012).

ing through More Effective Enforcement."[23] The statement essentially recognizes the ills brought about by piracy and counterfeiting and sets out a number of steps that countries could take to "reduc[e] substantially global trade in pirated and counterfeit goods, and efficiently combat[] the transnational networks that support it."[24] The statement also calls for future action to implement the identified steps.[25] In November 2005, Japan followed up on the G8 statement and call for action by proposing a "Treaty on Non-Proliferation of Counterfeits and Pirated Goods."[26] Japan's call for a treaty was met by virtual indifference by most governments and onlookers, including the US.[27]

Despite the lack of response to Japan's proposal in 2005 the issue remained on the G8 agenda and in July 2006 at a meeting in St. Petersburg, Russia, the G8 issued a statement announcing a comprehensive IP rights enforcement strategy entitled "Combating Intellectual Property Rights Piracy and Counterfeiting."[28] The focus of this statement continued to be combating counterfeiting and piracy through increased cooperation among governmental agencies and international organizations. Interestingly, the statement also mentioned concern for the "public health and safety" effects from counterfeiting and piracy and the possibility for "technical assistance pilot plans" to be developed in cooperation with WIPO, WTO, Organisation for Economic Cooperation and Development (OECD), Interpol and World Customs Organization (WCO).[29] The G8 also issued a lengthy document entitled "Fight against infectious diseases," which among other things calls for increased

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23. G8 (Gleneagles 2005), *Reducing IPR (Intellectual Property Rights] Piracy and Counterfeiting through more Effective Enforcement*, Post-meeting Statement, http://www.g7.utoronto.ca/summit/2005gleneagles/ipr_piracy.pdf.

24. *Id.* ¶ 3.

25. *Id.* ¶ 4.

26. *See* Tove Iren S Gerhardsen, *Japan Proposes New IP Enforcement Treaty*, Intellectual Property Watch, Nov. 15, 2013, http://www.ip-watch.org/weblog/index.php?p=135:reporting that the Japanese originally envisaged either Interpol or the World Customs Organization overseeing the treaty.

27. *Id.*

28. G8, *Combating Intellectual Property Rights Piracy and Counterfeiting* (July 16, 2006), http://en.g8russia.ru/docs/15.html. *See also*, Tove Iren S. Gerhardsen, *G8 Outcome Has IP Implications for Enforcement, Trade and Health*, Intellectual Property Watch, July 19, 2006, http://www.ip-watch.org/2006/07/19/g8-outcome-has-ip-implications-for-enforcement-trade-and-health/.

29. *Id.* ¶¶ 1, 5.

access to medicines through reduced costs.[30] More specifically, the statement calls for the elimination of tariffs and non-tariff barriers on medicines and devices as well as noting the possibility of countries to make use of the flexibilities existing in the TRIPS Agreement.[31]

Japan followed the G8 efforts the next year when on 23 October 2007 its Ministry of Foreign Affairs announced its intention to bring about "a new international legal framework to strengthen the enforcement of intellectual property rights."[32] This time, the European Commission and the US Trade Representative (USTR) supported the initiative. In fact, in February 2008, the European Commission published a Recommendation to the Council to authorize the Commission to begin negotiations on a plurilateral, anti-counterfeiting trade agreement.[33] Meanwhile, the US began publishing official requests for comments and notices of public meetings on the forthcoming negotiations.[34]

In the end, 37 countries (Australia, Canada, EU (27 Member States), Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, Switzerland, and the US) were involved in the ACTA negotiations.[35] The negotiations purported to enhance international cooperation regarding both the civil and criminal enforcement of IP and to establish a new best practice enforcement framework in order to better combat global counterfeiting and piracy. Covering enforcement processes involving purely domestic procedures and also those requiring international cooperation, eleven formal negotiating rounds were

30. G8, *Fight against infectious diseases*, (July 16, 2006), http://en.g8russia.ru/docs/10.html.

31. *Id*. ¶¶ 32, 37.

32. Press Release, Ministry of Foreign Affairs of Japan, *Framework of the Anti-Counterfeiting Trade Agreement (ACTA)* (Oct. 23, 2007), http://www.mofa.go.jp/announce/announce/2007/10/1175848_836.html. For more background on the initial stages of the ACTA negotiations, *see* Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 Yale J. Int'l L. 247, 250-1 (2009).

33. Brussels, *Recommendation from the Commission to the Council to authorize the Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement (SEC(2008) 255 final/2)* (Feb. 27, 2008), http://ec.europa.eu/transparency/regdoc/rep/2/2008/EN/2-2008-255-EN-F2-0.Pdf.

34. *See* Anti-Counterfeiting Trade Agreement (ACTA): Notice of Public Meeting, http://www.regulations.gov/#!documentDetail;D=USTR-2008-0030-0001; Anti-Counterfeiting Trade Agreement (ACTA): Request for Public Comments, http://www.regulations.gov/#!documentDetail;D=USTR-2008-0007-0001.

35. It should be noted that Jordan and the United Arab Emirates participated in the first negotiating round before withdrawing.

held and the agreement was concluded in late 2010.

The agreement was officially adopted on 15 April 2011, with Australia, Canada, Japan, South Korea, Morocco, New Zealand, Singapore, and the US signing the ACTA.[36] The Council of the EU unanimously adopted the agreement in December 2011 and 22 Member States signed the ACTA at a ceremony held on 26 January 2012. The agreement, however, will only come into force following ratification of six negotiating parties.[37] To date, only Japan has ratified the ACTA and it is unlikely that it will ever gain the necessary six ratifications to come into force. With widely publicized protests across Europe in 2012, followed by the EU Parliament rejecting the ACTA and the EU Commission abandoning the case at the CJEU, the EU will certainly not ratify the ACTA. Ratification remains uncertain but technically possible for many of the other negotiating parties, including Switzerland, Australia and Mexico.[38] But in the wake of the EU's effective withdrawal none of these countries seem particularly keen to ratify the ACTA. Thus, it seems extremely unlikely the ACTA will ever come into force. The ACTA is dead.

III. Ambitious Objectives Meets Political Reality

The ACTA failed not because of the public criticisms and protests which occurred throughout the negotiation and ratification process and played a large role in the ultimate death of the ACTA, but more so as a result of internal divisions in the negotiations which led to the failure of the agreement to meet its aims and objectives. Simply stated, while the governments all agreed to ambitious aims and objectives the reality was that these aims and objectives were simply too ambitious. Harmonization and the promotion of "21st century" standards were the often repeated aim of the agreement, but political

36. *See* Press Release, Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties (Oct. 2011), http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag.

37. ACTA, *supra* note 1, art. 40.

38. *See Uncertainty Looms over EU Ratification of Anti-Counterfeiting Pact*, 16(6) Bridges Weekly Trade Digest 5 (2012); *Anti-counterfeiting Pact Referred to European Court of Justice*, 16(7) Bridges Weekly Trade Digest 10 (Feb. 22, 2012). *See also* The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, *Report 126: Anti-Counterfeiting Trade Agreement (Tokyo on 1 October 2011)* (Nov. 21, 2011).

realities turned these slogans into hollow rhetoric. In truth, a large number of the negotiating parties viewed "harmonization" and "standard setting" from their own lens, meaning it could only occur through the export of their own laws. Of course, the realization that the domestic laws of the negotiating parties diverged in several respects between and among the negotiating parties meant that the agreement's original objectives could not be reached. Thus, the aims for an ambitious agreement faded and as the negotiations lingered, the priority became simply to conclude *an* agreement as opposed to conclude a *meaningful* agreement. The result, unsurprisingly, is a patchwork of vague legal standards allowing for multiple approaches and interpretations. Hence, the ACTA is to some extent an agreement without the need for domestic implementing legislation.

Again it is worth stressing that the negotiating parties did not collectively enter into an agreement which would require little to no amendments to domestic legislation. On the contrary, the negotiating parties all publicly promoted the ACTA negotiations as a powerful instrument to combat the growing scourge of counterfeiting and piracy.

With the statistics on counterfeiting and piracy and the institutional limitations of the existing relevant organizations in mind (both set out in the preceding section), the negotiating parties set out to create a treaty which would increase international cooperation in the field of IP enforcement and establish a new standard of international enforcement. These aims were often publicly repeated during the negotiations. For instance, the website of the US Trade Representative (USTR) states that the ACTA includes "innovative provisions to deepen international cooperation and to promote strong enforcement practices."[39] Likewise, the USTR website claims the "negotiations aim to establish a state-of-the-art international framework that provides a model for effectively combating global proliferation of commercial-scale counterfeiting and piracy in the 21st century."[40] Another page of the USTR website reads:

> ACTA aims to establish a comprehensive international framework that will assist Parties to the agreement in their efforts to effectively

39. USTR, *ACTA webpage*, http://www.ustr.gov/acta. *See also* USTR, *ACTA: Meeting U.S. Objectives*, Fact Sheet (Oct. 2011), http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/acta-meeting-us-objectives.

40. *ACTA webpage*, *supra* note 39.

> combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy. It includes state-of-the-art provisions on the enforcement of intellectual property rights, including provisions on civil, criminal, border and digital environment enforcement measures, robust cooperation mechanisms among ACTA Parties to assist in their enforcement efforts, and establishment of best practices for effective IPR enforcement.[41]

Having agreed that the proliferation of counterfeiting and piracy is a problem which needs to be addressed, the negotiating parties therefore agreed to negotiate a treaty containing "state-of-the-art provisions" in order to curtail the problem. These aims seem sensible and, if properly drafted and implemented, could have been useful in combating global counterfeiting and piracy.

Unfortunately, problems with these aims appeared soon after the negotiations were launched. These problems are exemplified by US President Barack Obama's decision to designate the ACTA as a "sole executive agreement" instead of a treaty. While this constitutionally questionable decision sidesteps the requirement for Congressional (oversight and) approval,[42] for our purposes the importance of this designation is ascertaining whether the US always

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41. Press Release, USTR, U.S., Participants Finalize Anti-Counterfeiting Trade Agreement Text (Nov. 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/november/us-participants-finalize-anti-counterfeiting-trad.

42. The constitutionality of this decision has been questioned by commentators and sitting Congressman. *See* Sean Flynn, *ACTA's Constitutional Problem: The Treaty That Is Not a Treaty (Or An Executive Agreement)*, PIJIP Research Paper Series, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1021&context=research; Letter from Ron Wyden, Sen., to Barack Obama, President (Oct. 12, 2011), *available at* http://www.wyden.senate.gov/news/press-releases/wyden-to-president-isnt-congress-supposed-to-approve-international-trade-agreements; Jack Goldsmith and Lawrence Lessig, *Anti-counterfeiting agreement raises constitutional concerns*, Wash. Post, Mar. 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html. *See also*, Letter from Ron Wyden, Sen., to Harold Koh, Legal Advisor, US Dep't of State (Jan. 5, 2012), *available at* http://infojustice.org/wp-content/uploads/2012/01/Wyden-01052012.pdf; Letter from Harold H. Koh, Legal Advisor, to US Dep't of State, in response to Sen. Wyden's letter (Jan. 5, 2012), *available at* http://www.scribd.com/doc/84365507/State-Department-Response-to-Wyden-on-ACTA.

viewed the ACTA as an agreement which would require no changes to any existing legislation[43] or whether it is proof that the administration intended to sidestep Congress because it knew the agreement would require changes to domestic law and suspected Congress would resist such changes. Given that an ACTA concluded on the basis of a sole executive agreement, which would have required amending domestic law, would require Congress to legislate to that effect, the latter interpretation does not seem sensible. Thus, the more plausible explanation is that the Obama administration decided early in the negotiations that the final text of the ACTA would not require any legislative amendments to existing US law. In due course, numerous other negotiating parties (including Australia, Canada, the EU and Switzerland) followed suit in claiming that compliance with the ACTA would not require any legislative amendments. While these parties did at least designate the ACTA as a treaty[44] and no doubt were influenced by the unexpectedly large amount of negative public sentiment towards the agreement, the decision to announce that compliance with the ACTA would require no change to existing legislation powerfully reinforces the message that far from being a threat to civil liberties, access to medicines, etc., the negotiators actually failed to produce an agreement with any "state-of-the-art provisions" which would meaningfully assist in the fight against piracy and counterfeiting.

The problem of desiring and expecting to enter into a meaningful international agreement without the need to modify existing legislation is further compounded when multiple negotiating parties share this viewpoint. Unsurprisingly, the objective of harmonization through the exportation of one's own law and regulations proved problematic; even though the negotiating parties all maintain high levels of IP protection and enforcement standards, the particulars of each regime significantly differs in a number of areas. Not only that, but the intent of several parties to harmonize through the export of their own laws runs contrary to the aim of harmonization in the form of a "gold standard" of norm setting. If the latter was to be accomplished, the parties would have had to agree on a position and set a single international standard.

43. Letter from Harold H. Koh, *supra* note 42.

44. *See* Answer given by Mr De Gucht on behalf of the Commission, (Dec. 15, 2010), *available at* http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9179&language=EN. The website of Knowledge Ecology International, http://keionline.org/. *See also* The Australia Joint Standing Committee on Treaties.

This did not occur and in several areas the final text of the ACTA simply allows for multiple positions to be maintained. Thus, the desire to reach an agreement which does not require modification to domestic law trumped the stated aims of a "state-of-the-art" agreement which effectively combats counterfeiting and piracy. This entrenchment of the status quo was not the desired result of the negotiating parties, who it seems genuinely sought to set a new standard through the exportation of their own domestic law. This meant that quite a number of issues were intensely debated and negotiated over the course of several negotiating rounds. It was only when it became clear that there was a general unwillingness among several negotiating parties to agree to a standard which requires a legal change did the negotiators agree to provisions which entrenched the status quo. Thus, and simply stated, the original aim was not to allow multiple negotiating parties to merely entrench the status quo. It was only when it became clear that multiple parties would refuse any provision which required modification of domestic law did the negotiators compromise with provisions allowing for differing interpretations and wide discretion.

Before continuing with examples of provisions which simply entrench the status quo, it is necessary to make one additional point: the failure of the ACTA to effectively harmonize or set a "gold standard" in IP enforcement does not mean that the ACTA does not contain any provisions that advance the agenda beyond the TRIPS Agreement.

To the contrary, several provisions in the ACTA go beyond what is required in the TRIPS Agreement.[45] While some criticize the ACTA for advancing beyond the standards set out in the TRIPS Agreement, there simply would have been no point even to begin negotiations if the aim was merely to repeat existing international obligations. Any agreement which addresses IP will by its very nature advance beyond the TRIPS Agreement. But even here, most if not all of the advancements beyond TRIPS already form part of the domestic law in most of the negotiating parties. So while the provisions advance beyond what is required by TRIPS; in practice, they merely codify existing domestic law of the respective negotiating parties. Thus, the fact that the ACTA contains some TRIPS-Plus provisions does not detract from the broader point

45. ACTA, *supra* note 1, art. 8 (injunctions applying to imports and exports whereas Article 44(1) of TRIPS only applies to imports); *Id*. art. 9 (potential calculation of damages is more prescriptive than Article 24(1) of TRIPS).

that the ACTA maintains the status quo of the negotiating parties to the detriment of harmonization and international standard setting.

The remainder of this section will provide examples supporting the main argument of the article – the ACTA does not meaningfully advance enforcement norms or set a standard beyond existing domestic law of the negotiating parties. In fact, for the most part the agreement simply allows for each party to maintain its existing law, even where standards diverge quite significantly between and among the negotiating parties.

The first example of such a provision is Article 9 relating to damages. While it seems clear from the negotiations that the issue of damages was widely discussed and debated. It is also clear that at least some of the parties favored a harmonized approach which would set a clear and unambiguous standard. As the current approach to damages differs widely among the negotiating parties, such an approach would have forced domestic legislative changes on a number of countries. Ultimately, the parties failed to compromise and the resulting provision seriously fails as an instrument of harmonization and international standard setting. Article 9(3) relating to damages, states:

> At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following: (a) pre-established damages; or (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or (c) at least for copyright, additional damages.

Article 9(3) therefore allows for a variety of different methods in line with existing practice of the ACTA negotiating parties. Moreover, and perhaps for the better, the provision is limited to "at least" copyright and trademark, which allows each party to determine whether to establish or maintain any of the three options (pre-established damages, presumptive damages or additional damages) for other IPRs. Even more, the article does not even attempt to harmonize the rationale behind the three options. To illustrate, whereas both the US and EU utilize "pre-established damages" their respective reasons for doing so differ quite radically: in the US, pre-established damages are used

in part to punish infringers and as a deterrent, the EU uses them only against unintentional infringers as a way of compensating IP owners. Similarly, the rationale for including "additional damages" in Australia (compensation awarded following the principles of aggravated and exemplary damages at common law) differs from that of England and Wales (restitution through the use of aggravated damages). Given such varying interpretations of the terms in the domestic setting of each of the parties, it will be difficult if not impossible to find a common meaning of the language used in the treaty text. While this will cause obvious interpretative difficulties, the main point for our purposes is the attempt by each party to allow for the continuation of its own laws and correspondingly the failure of the parties to harmonize or set an international standard.

Likewise, the parties heavily negotiated Section 3 of the ACTA relating to border measures. This aspect of the negotiations received worldwide media coverage, as many in the public health community worried that the ACTA would destabilize the hard-fought gains of developing countries and public health campaigners in the area of access to essential medicines. While there were numerous worries and criticisms, they essentially centred on whether the terms "counterfeiting" and "piracy" would be extended to include the manufacture, sale, and import/export of generic pharmaceuticals and thus potentially severely curtail trade in generic pharmaceuticals, adding significant costs to the procurement of essential medicines.[46]

Such concerns were legitimate given the ACTA negotiations coincided with the seizure/detention of several shipments of generic pharmaceuticals while transiting through the EU on their way from and to developing countries where a patent was not in place.[47] While the legality of the customs measures

46. *See Consumer Groups Fear ACTA Could Encourage Generic Drug Seizures*, Inside U.S. Trade (Apr. 30, 2010); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 63 SMU L. Rev 1, 84 (2010); Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit*, 26 American University International Law Review 645 (2011).

47. From late-2008 through 2009 the EU (primarily the Netherlands) detained at least 19 shipments of generic pharmaceuticals exported from India and other developing countries transiting through the EU on their way to other developing countries. Following months of heated exchanges between European, Brazilian, and Indian diplomats, India and Brazil filed complaints at the WTO over the matter. A final settlement was reached in July 2011. *See* Bryan Mercurio, *'Seizing' Pharmaceuticals in Transit: Analysing the WTO Dispute that Wasn't*, 61(2) Int'l & Comp. L.Q. 389 (2012).

with WTO[48] and EU law[49] continues to evoke considerable debate, the relevant point for this chapter is that the negotiation of ACTA could have opened up a separate avenue to legitimize the seizures/detentions. For instance, the definitions of "counterfeit" and/or "piracy" could have been drafted or interpreted in an expensive manner so as to clearly allow for the seizure of generic pharmaceuticals transiting through the territory of ACTA members. Additionally, the ACTA could have been drafted in such a manner so as to *require* the seizure of transiting goods which violate the IPRs in the country of transit.

Neither materialized concern and the final text of the ACTA represents far less of a threat to the trade in generic pharmaceuticals for a number of reasons. First, while the ACTA includes all of the IPRs explicitly mentioned in the TRIPS Agreement in its mandate[50] it restricts the definitions of both "counterfeit" and "piracy" to trademark in the former and copyright in the latter. Thus, infringements of patents are not included in the terms "counterfeit" or "piracy." Second, the language of Article 16.2 provides that Parties *may*, but are not required to, adopt or maintain procedures leading to the suspension of release with respect to in-transit goods. Finally, a footnote to Article 13 (which provides for the scope of border measures and calls for enforcement in a manner that does not discriminate unjustifiably between IPRs and in a manner which avoids the creation of barriers to legitimate trade) excludes patents and protection of undisclosed information from the scope of Section 3.[51]

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48. On the measures' consistency with TRIPS, *see Id.*

49. A recent ECJ decision held that in normal circumstances EU IPRs do not apply, however in some cases (i.e. destination of goods not declared, false information submitted, lack of cooperation with customs, or proven risk of diversion) the EU rules can apply. The availability of the suspension is clearly intended to enable a domestic court in the member-concerned to conduct a proper examination of whether there is sufficient evidence of infringement of an IPR. Judgment in Joined Cases C-446/09, *Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Company Ltd and others*; C-495/09 *Nokia Corporation v Her Majesty's Commissioners of Revenue and Customs*, http://www.eulaws.eu/?p=1165 (visited Dec. 31, 2011). Interestingly, Indian law includes in-transit goods within the meaning of "importation". *See Gramophone Company of India v. Birendra Bahadur Pandey*, AIR 1984 SC 66 (interpreting import as "bringing into India … that it is not limited to importation for commerce only but includes importation for transit across the country").

50. ACTA, *supra* note 1, art. 5. (defining IP as "all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement").

51. *Id*. § 3, n.6.

Thus, while the ACTA does not require Parties to enforce domestic IPRs with respect to goods in-transit, it takes an equivocal position by maintaining the status quo. Through silence, the ACTA thus allows Parties to adopt such procedures if and when they see fit and in so doing does not depart very far from the position taken in Part IV of the TRIPS Agreement.[52]

While public health campaigners would have preferred the ACTA to prohibit the seizures/detentions of generic pharmaceuticals in-transit, the final text is perhaps the best realistic outcome for such interested observers given the (then) ongoing dispute between the EU/Netherlands, India, and Brazil at the WTO. What is more, the result could have been far more threatening as it appears the issue of border measures was among the most contentious negotiating topics, and one that threatened to derail the entire agreement.[53] Moreover, the early-drafts of the negotiating text were expansive in scope and covered all forms of IPRs contained in the TRIPS Agreement (including patents) and provided for the possibility of mandatory injunctions for IPR infringements of in-transit goods.[54]

In the end, the aims of harmonization and an international standard gave way to a political compromise which allowed the EU to claim victory through the inclusion of at least a portion of its domestic regulations regarding the seizure/detention of in-transit goods suspected of patent infringement into the ACTA and for extending Section 4 to cover all IPRs (less patents and undisclosed information), which potentially allows for enhanced recognition and protection of geographical indications through the ACTA.[55] At the same time, the compromise allowed the US, EU, Australia, and others to announce that nothing in these provisions will require amending domestic law.[56] While

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52. It should be noted that Article 5 of the ACTA defines counterfeiting and piracy "under the law of the country in which the procedures … are invoked." This clarifies the uncertain standard set out in the TRIPS Agreement and prevents customs officials in one country being forced to interpret the laws of another country which could occur under a possible reading of the relevant language of the TRIPS Agreement. Mercurio, *supra* note 48.

53. *See De Gucht Lashes Out at US over ACTA Geographical Indications*, 28(28) Inside U.S. Trade (July 16, 2010).

54. Bracketed language, with "may" being the alternative. Thus, discussion revolved around whether seizure of in-transit goods should be mandatory or discretionary. ACTA July 2010 Draft, *supra* note 3, art. 2.2.

55. *See De Gucht Lashes out at US over ACTA, Geographical Indication*, *supra* note 53.

56. Weatherall argues this point while claiming the ACTA does not represent any new, clear international standard. Weatherall, *supra* note 4, at 248-49.

many are content with this result, the point for our purposes is that the provision again fails to harmonize laws or set any meaningful standard. Thus, the fragmentation within the field of international IP law is maintained.

This pattern of an issue being heavily negotiated – and potentially containing provisions which would have caused significant shifts in the law of several negotiating parties – before being whittled down to little more than the status quo repeats to a certain extent in almost every section of the ACTA, and certainly can be further illustrated in the sections on civil enforcement (Section 2) and the digital environment (Section 5).

Section 5 received considerable attention in the media (and on the streets), and it is worth highlighting a few provisions that illustrate the significant backtrack in the negotiations and ultimate agreement which allows for countries to maintain their existing regime without amendment. For example, it is clear that for some time the negotiations included the possibility of requiring a graduated response (also referred to as "three strikes law"), notice-and-takedown provisions, and other measures relating to copyright violations over the internet which potentially encroach on civil liberties.[57] Intense negotiations over these issues, however, produced a final text which is much more restrained. All of the provisions some saw as being nefarious in nature have not been retained in the final text. Again, while most onlookers view this backtrack as a positive result, the point here is simply that the agreement fails to produce a coherent standard or harmonize the laws of the negotiating parties.

Another example of this backtrack can be seen in the inclusion of a number of general "safeguards"[58] in the text generally as well as several specific safeguards included in Section 5. Thus, and unlike all of the leaked draft texts, while Section 5 extends the enforcement proceedings mandated in Sections 2 (Civil Enforcement) and 4 (Criminal Enforcement) to the digital environment,[59] it also calls for implementation "in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy."[60] Article 27.4 provides another example of the flexibility of the ACTA in providing:

57. ACTA January 2010 Draft, *supra* note 3, § 4.

58. ACTA, *supra* note 1, Preamble, art.1, 2.3, 4, 6.2, 6.3.

59. *Id*. art. 27.1.

60. *Id*. art. 27.2.

> A Party *may* provide, *in accordance with its laws and regulations*, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be *implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy*. (emphasis added)[61]

While the provision calls on parties to order online service providers to disclose information which could identify the identity of a subscriber alleged to have infringed IPRs, the provision is discretionary; that is, parties are not required to implement the provision. Moreover, where a party chooses to implement the provision, Article 27.4 explicitly states that such implementation is subject to existing laws and regulations of the party. Finally, the Article repeats the language used in Article 27.2 as a general safeguard and nod to civil liberties. While such drafting may be preferable to harmonization and setting a mandatory international standard in this emerging and important area, it perfectly illustrates the failure of the parties to meet their negotiating objectives and instead agreeing to text which requires few (or in this case, no) change of practice.[62] Again, the status quo is maintained.

The background to the negotiations make it clear that the governments which entered into the ACTA were concerned with the widespread and growing scourge of counterfeiting and piracy, and the effects thereof on international trade and other interests. In 2008, an agreement which does not strengthen IP enforcement among the negotiating parties and therefore likewise fails to actively combat global counterfeiting and piracy would have

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61. Despite such permissive language, some commentators still seem to be under the illusion that the ACTA requires signatories to adopt a graduated response approach. *See* Monica Horten, *Final ACTA puts Europe under more pressure for graduated response* (Oct. 10, 2010), http://www.iptegrity.com/index.php/acta/569-final-acta-puts-europe-under-more-pressure-for-graduated-response.

62. ACTA, *supra* note 1, art. 27.5-8.

certainly been viewed by the governments as a failure and perhaps not worth negotiating. It is, of course, uncertain if the negotiations bogged down over several issues, whether the ultimate result at some point became the preferred result for some of the larger negotiating countries or whether the final text is the product of a reluctant compromise in order to reach an agreement and conclude the negotiations. Evidence tends to favor the latter interpretation, as several contentious negotiating requests by both the US and EU (and not agreed to by the other) were dropped in the time period immediately prior to the conclusion of the negotiations.

IV. Ex Post Justifications for the ACTA

During the course of the ACTA negotiations, some governments shifted the focus of the ACTA from one of standard setting to codification of developed world standard in order to develop an international treaty establishing a legal framework based on the high standards already existing in the domestic laws of the Parties.[63] This justification is a perfectly valid reason to negotiate an international agreement such as the ACTA, but it was not mentioned prior to the negotiations being established.

The *ex post* justification does not assist in the production of "gold" standards of enforcement or serve to reduce counterfeiting and piracy – it also ignores the fact that counterfeiting and piracy are flourishing not only in the developing world but also in many of the developed world countries which negotiated the ACTA. Instead, the ex post justifications focus on longer term considerations of establishing developed country norms – even where they differ between and among developed countries – as a standard, with the potential benefit of eventual acquiescence by developing countries. The objective of codifying existing practice, however, is perhaps contradictory to the initial aim of creating a new international standard of IP enforcement. In this regard, Weatherall states, "a goal of not requiring changes to domestic law will inevitably work against the ambition to establish new international standards."[64]

63. *See* European Commission, *The Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet*, at 2 (Nov. 2008), http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf; USTR, *Trade Facts: Anti-Counterfeiting Trade Agreement (ACTA)*, at 3 (Aug. 4, 2008), http://ustraderep.gov/assets/Document_Library/Fact_Sheets/2008/asset_upload_file760_15084.pdf.

64. Weatherall, *supra* note 4, at 234.

Moreover, the "ACTA was always intended to be a codification" justification for the negotiations does not reflect reality. As is evident in the examples above, the early-draft negotiating texts reveal that the US and EU pushed hard for provisions reflecting their own domestic standards which were higher than those of other negotiating Parties (for instance, internet-related provisions for the US and GIs for the EU). For these countries, it seems clear that they saw the negotiations not merely to codify existing developed country practices but as an opportunity to raise standards and export one's own regime. The fact that these attempts failed is a more likely explanation for the shift to a "codification" justification for the negotiation and conclusion of the ACTA.

Admittedly, a "codification" agreement among nations with high standards of IP protection and enforcement can in fact create an "international standard" if other countries with lower IP protection and enforcement standards subsequently accede to the treaty. Thus, if nations with lower standards and problems with counterfeit and pirated goods accede to the ACTA (by choice or as required by virtue of a free trade agreement) then the longer term aim of setting a new international standard will have been accomplished.[65] In this regard, even the vague standards contained in the ACTA would be viewed by IP maximalist countries such as the US, EU, and Japan in a favorable light as the presence of any standard is better than the absence of any standard.

Moreover, it is also freely admitted that the ACTA could have been the first step towards increased enforcement standards, with less flexibilities and discretion and more substantive obligations added in subsequent negotiations.[66]

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65. Article 39 of the ACTA opens accession until March 2013 to any Member of the WTO (conditional on agreement by consensus of the Parties) and Article 43 provides for accession after March 2013 (on terms to be decided) while Article 35 calls upon each Party to provide for capacity building and technical assistance to other Parties and prospective Parties. Types of assistance contemplated in Article 35 specifically includes, (a) enhancement of public awareness on intellectual property rights; (b) development and implementation of national legislation related to the enforcement of intellectual property rights; (c) training of officials on the enforcement of intellectual property rights; and (d) coordinated operations conducted at the regional and multilateral levels.

66. The EU called the ACTA "a significant first step" that "establishes a nucleus of countries that are committed to the highest standards of intellectual property rights enforcement. A nucleus that will grow. The World Trade Organization had a different name, a weaker structure and only nine members when it started out in 1948. After Russia's accession later this year, nearly all world trade will be bound by its rules." EU Intervention at the WTO TRIPS Council Meeting, *Agenda item N 'IP enforcement trends'* (Feb. 28, 2012), *available at* http://keionline.org/node/1380.

Article 43 allows for amendment of the Agreement but does make this scenario difficult by requiring all the Parties to accept and ratify any proposed amendment prior to it taking force.

Again, the point here is not to say that these "benefits" are overstated or are illusory but only that it is disingenuous to use them as justifications for negotiating the ACTA.

V. Conclusion

This article argues that despite public perception, the ACTA does not meaningfully advance the IP enforcement agenda or otherwise create "gold standard" enforcement norms. Instead, and despite long and torturous negotiations, the desire of numerous negotiating parties to "harmonize" and set standards wholly through the exportation of their own laws to the other parties overshadowed all of the original aims and objectives. What emerges from these negotiations is an agreement which allows for varied approaches to be maintained. In reaching an agreement that essentially maintains the status quo, most of the negotiating parties were thus able to defend their role in the ACTA negotiations to domestic constituencies by insisting that the agreement does not require any legislative amendments. Of course, one has to question whether an agreement negotiated almost exclusively between developed countries, which requires no legislative amendments and simply maintains the status quo, could possibly play any meaningful role in combating piracy and counterfeiting. Given the text of the ACTA, the entire and *raison d'etre* of the agreement is now questionable. This is unfortunate, as counterfeiting and piracy is a real and growing problem.

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