

THE CHANGING DYNAMICS OF THE GLOBAL INTELLECTUAL PROPERTY LEGAL ORDER: EMERGENCE OF A 'NETWORK AGENDA'?

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Abstract The Anti-Counterfeiting Trade Agreement (ACTA) had sought to augment intellectual property (IP) enforcement practices, to counter the proliferation of counterfeit and pirate goods and to regulate digital infringements. This paper examines the collapse of ACTA and challenges the traditional orientation of the debate concerning the tension between the 'enforcement' and 'development' agendas. The ACTA negotiating partners, mainly developed states, created a forum outside the aegis of international IP norm-making bodies to avoid the distractions posed by developing countries whilst promoting an alternative 'enforcement agenda'. Despite this effort, ACTA collapsed from 'within'. The paper argues that ACTA failed due to the extemporaneous emergence of a random configuration of civil society groups, academics, 'netizens' and legislators within ACTA negotiating countries independently pursuing an agenda that can be called the 'network agenda'. This new agenda aimed to protect the right to privacy, data protection and freedom of speech within the digital medium. While current debates on the global IP legal order are generally limited to, and characterised by the Global North-South considerations, the 'network agenda' cuts longitudinally through territorial configurations and squarely places the interests of the IP owner against those of the public. Consequently, the paper highlights the potential of the network agenda to dilute the existing polarities in the IP debate and impact on the dynamics of international intellectual property law by creating an inclusive platform within IP discourse that attempts to integrate colliding rationalities present within the world society.

Keywords: anti-counterfeiting trade agreement, development agenda, enforcement agenda, intellectual property, network agenda.

I. INTRODUCTION

The Anti-Counterfeiting Trade Agreement (ACTA) sought to augment intellectual property (IP) enforcement practices, to counter the proliferation

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of counterfeit and pirate goods and to regulate digital infringements.¹ This plurilateral treaty negotiated by Japan, the United States, the EU and its Member States, Australia, Canada, Korea, New Zealand, Morocco, Singapore, Mexico and Switzerland between October 2007 and December 2010 was to remain open for signature from 1 May 2011 until 1 May 2013.² Japan, the United States, Australia, Canada, Korea, New Zealand, Morocco and Singapore signed ACTA during a signing ceremony in Japan on 1 October 2011. The EU 22 Member States³ and Mexico signed ACTA in January and July 2012 respectively, leaving Switzerland as the only ACTA negotiator that did not sign ACTA. It was agreed that the agreement would enter into force 30 days after the date of deposit of the sixth instrument of ratification, acceptance or approval.⁴ Despite negotiating partners having committed 'to work cooperatively to achieve the Agreement's prompt entry into force',⁵ Japan is the only country to have ratified it to date. In view of the persistent campaign against ACTA which has resulted in the rejection of the agreement by the EU Parliament, it can safely be stated that the agreement has died a political death.⁶

It is necessary to analyse the failure of ACTA to enter into force, given that the plurilateral negotiating strategy between like-minded parties was deliberately deployed, in order to avoid the 'development' agenda being pursued within established IP norm-making bodies such as the World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO).⁷ ACTA negotiators were portrayed as a 'country-club'⁸ engaging in 'forum shifting'⁹ strategies in order to create a new pillar of international IP institution that works in parallel with WIPO and WTO.¹⁰ The pursuit of the ACTA provisions

¹ Anti-Counterfeiting Trade Agreement (ACTA) Final Text <<http://www.ustr.gov/acta>>.

² Art 39 ACTA [other WTO members may sign if ACTA partners agree by consensus].

³ As a 'mixed agreement', the EU and all Member States had to approve the ACTA. Cyprus, Estonia, Germany, Netherlands and Slovakia delayed signing ACTA due to procedural issues. Croatia joined EU only in July 2013. ⁴ Art 40 ACTA.

⁵ Joint Press Statement of ACTA Negotiating Parties <<http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>>.

⁶ No other WTO Member State expressed interest in signing ACTA. See also M Ermert, 'German Ministry Advises Developing Countries Not to Sign ACTA' (8 May 2012) Intellectual Property Watch.

⁷ Council for Trade-Related Aspects of Intellectual Property Rights (Minutes 24–25 October 2011; 17 November 2011) IP/C/M/67 (15 February 2012), IP/C/M/61 (12 February 2012); C Saez, 'ACTA as a Sign of Weakness in Multilateral System, WIPO Head Says' (30 June 2010) Intellectual Property Watch.

⁸ P Yu, 'ACTA and Its Complex Politics' (2011) JWIP 3; P Yu, 'The ACTA/TPP Country Clubs' in D Beldiman (ed), *Access to Information and Knowledge* (Edward Elgar 2013) ch 10.

⁹ J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press 2000) 564–71; S Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts' (2010) PIJIP Working Paper 15; X Li and C Correa (eds), *Intellectual Property Enforcement: International Perspectives* (Edward Elgar 2009) 145; C Correa (ed), *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules* (Edward Elgar 2010) vol 2, 24.

¹⁰ ACTA, Chapter V: Institutional Arrangements; J Love, 'KEI Comment on US Signing of ACTA' (3 October 2011) <<http://keionline.org/node/1291>> Knowledge Ecology International; Electronic Frontier Foundation, 'In the Matter of the Anti-Counterfeiting Trade Agreement'

outside the existing IP structures was seen by commentators as a deliberate disengagement from the 'development agenda' mandated under the *WIPO Development Agenda* and the *Doha Declaration on the TRIPS Agreement*,¹¹ in favour of an alternative agenda dubbed the 'enforcement agenda'.¹² The categorization of developed countries' goals as an 'enforcement agenda' illustrates the policy misalignment between the Global North and South and reinforces the existing notion that the proponents of the former are engaged in a process which undermines the agenda of the latter, despite its adoption by international IP norm-making bodies.

This paper examines the collapse of the ACTA and challenges the traditional orientation of the debate that revolves around the distinction between the 'enforcement' and 'development' agendas. Despite the fact that ACTA provisions could have had multilateral impact within world trade systems and affect countries other than the negotiating partners, concerns raised by developing countries¹³ did not have any influence over ACTA negotiations or its provisions.¹⁴ In other words, the influence of the 'development agenda' was not instrumental in undercutting the growth of the 'enforcement agenda'. On the contrary, ACTA collapsed from 'within'. Indeed, the ACTA negotiators, mainly composed of developed countries, were unable to bring into effect a plurilateral anti-counterfeiting trade agreement, even though an alternative forum was created with the intent of ignoring disagreements traditionally presented by developing countries.

The collapse of ACTA was influenced and almost entirely scripted by civil society groups, academics, 'netizens'¹⁵ and legislators within ACTA negotiating countries, despite assurances that the provisions in the agreement were consistent with domestic legislation.¹⁶ This paper argues that the failure of the ACTA should be attributed to the spontaneous emergence of a random

(15 February 2011) <<https://www.eff.org/sites/default/files/filenode/EFF%20ACTA%20submission%20110215.pdf>>.

¹¹ WTO Declaration on the TRIPS Agreement and Public Health WT/MIN(01)/DEC/2 (2001); WIPO, 'Development Agenda for WIPO' <<http://www.wipo.int/ip-development/en/agenda/>>; WIPO, 'Patent Agenda: Options for Development of the International Patent System' WIPO Doc A/37/6 (19 August 2002).

¹² The Enforcement Agenda will shift the focus from increasing substantive IP provisions to enforcement of rights through measures such as criminalization, border search and seizures thereby increasing public costs. See Braithwaite and Drahos (n 9); S Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting: FTAS, ACTA, and TPP' (2011) 18 *JIPL* 447; S Flynn, 'ACTA's Constitutional Problem: The Treaty Is Not a Treaty' (2011) 26(3) *AmUIntlLRev* 903, 905; see also (nn 223 and 224).

¹³ Especially in relation to access to essential medicines. See eg HG Ruse-Khan, 'A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit' (2011) 26(3) *AmUIntlLRev* 646.

¹⁴ Elaborated in section IIC below.

¹⁵ M Hauben and R Hauben, *Netizens: On the History and Impact of Usenet and the Internet* (Wiley-Blackwell 1997).

¹⁶ For example, US Congressional Research Service, 'The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues' 7-5700 (19 July 2012) 4 ['CRS Report for Congress']; Australia National Interest Analysis: *Anti-Counterfeiting Trade Agreement* [2011] ATNIF 22 Summary section 7 and 29–30; Knowledge Ecology International, 'De Gucht Responds to MEP

configuration of activists, netizens and others pursuing an agenda that can be called the ‘network agenda’. The paper charts the extemporaneous and unorganized rise of the internet and networking community’s pursuit of the so-called ‘network agenda’ which aimed to protect fundamental rights to privacy, data protection and freedom of speech within the digital medium.¹⁷

Unlike the current debate on the global IP legal order that is generally limited to, and characterized by, the Global North-South considerations within the ‘enforcement’ and ‘development’ agendas—the ‘network agenda’, as identified in this article, cuts longitudinally through territorial configurations and squarely places the interests of the IP owner against those of the public. Despite the sporadic and decentralized character of the ‘network agenda,’ its distinctly singular message derailed ACTA and curtailed the powerful hold of the pro-IP lobbyists in influencing the evolution of the global IP order.¹⁸ This demonstrates the potential of the ‘network agenda’ to dilute the existing polarities in the IP debate and to impact upon the dynamics of international intellectual property law. Further evidence of the viability and robustness of the ‘network agenda’ can be gleaned from an examination of its role in potentially influencing the IP chapter of the Trans-Pacific Partnership Agreement that is currently being negotiated as an international trade agreement.¹⁹

Thus, the key argument laid out in this paper is that the events leading to the collapse of ACTA can be seen as the creation of a new agenda in IP discourse which has potentially significant implications for the dynamics of the international IP legal order. For the purposes of this argument, it is not necessary to undertake an examination of the substantive provisions of ACTA nor to take a position on whether or not they had the potential to affect the fundamental rights of the digital users.²⁰ Suffice to say, there was a general perception, justifiably or otherwise, that ACTA provisions had the potential to undermine the fundamental rights of digital users and this perception led to a chain of events resulting in its collapse.

Françoise Castex: Says ACTA Is Binding Agreement, Consistent with EU “Acquis” (7 February 2011) <<http://keionline.org/node/1073>>.

¹⁷ European Parliament Resolution (18 December 2008) P7_TA (2008) 0634, section 27, 54, 67; European Parliament Resolution P7_TA (2010) 0058 section 12; Amnesty International, ‘EU Urged to Reject International Anti-Counterfeiting Pact’ (10 February 2012) <<https://www.amnesty.org/en/news/eu-urged-reject-international-anti-counterfeiting-pact-2012-02-10>>; Free Speech ‘Does ACTA Threaten Online Freedom of Expression & Privacy?’ <<http://freespeechdebate.com/en/media/acta-the-internet-freedom-of-expression-privacy/>>; <<http://freeknowledge.eu/acta-a-global-threat-to-freedoms-open-letter>>.

¹⁸ This lends further credence to the ‘internet exceptionalism’ theory. See eg B Szoka and A Marcus, *The Next Digital Decade: Essays on the Future of the Internet* (Tech Freedom 2010) ch 3; also R Mansell, *Imagining the Internet: Communication, Innovation, and Governance* (Oxford University Press 2012).

¹⁹ The Trans-Pacific Partnership Agreement (TPP) is a proposed Free Trade Agreement which is being negotiated between US, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore and Brunei. Trans-Pacific Partnership Agreement Negotiations <<http://www.dfat.gov.au/fta/tpa/index.html>>.

²⁰ This issue has however been covered extensively in the literature.

The blueprint of this paper is as follows: the second section highlights the global consensus to curb IP infringement and examines the rationale of the ACTA negotiators in creating a new IP institution outside existing IP norm-making bodies. This section shows that ACTA's genesis as a plurilateral arrangement was a direct response to the failure to reach a consensus on IP enforcement issues at a multilateral level. Given that developed countries actively promote, as a political value, the same fundamental rights as those pursued by the proponents of the 'network agenda',²¹ it is then not surprising that the schema to protect fundamental rights within the digital sphere developed within the philosophical and geographical parameters of the developed States. In addition, the fact that ACTA was a plurilateral agreement meant that other developing countries pursuing the 'development agenda' could not adversely affect either the negotiation process or the substantive provisions that were focussed on IP enforcement.

The third section examines the criticism levied at ACTA negotiators for negotiating under the protective cloak of a 'confidentiality agreement', ostensibly to ensure effective dialogue between participants. The lack of transparency in the ACTA negotiation process has been extensively covered in the literature.²² As some stakeholders were denied access to negotiating documents, it was alleged that ACTA negotiators were engaging in 'policy laundering'.²³ This section highlights the reasons that make it difficult to attribute the controversies surrounding the lack of transparency in the ACTA negotiation process to its ultimate collapse.²⁴ Nonetheless, it is likely to have had a significant impact on the creation of an ACTA-lite final text.

The fourth section focuses on the rejection of ACTA by the European Parliament in July 2012, despite prior commitments towards IP protection and enforcement and claims that the agreement could result in export,

²¹ Organisation for Security and Cooperation, 'Draft Declaration on Fundamental Freedoms in the Digital Age' PC.DEL/1022/12/Rev.2 (7 December 2012); UN Human Rights, 'Freedom of Expression and New Media' (1 September 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/FreedomExpressionandnewmedia.aspx>>.

²² See references in Section III.

²³ 'Policy laundering' describes efforts by policy actors to have policy initiatives seen as exogenously determined by routinely pushing for the establishment of regulatory standards in international policy venues and thereafter aligning them to domestic policies 'under the requirement of harmonisation and the guise of multilateralism'. See B Herman and O Gandy Jr., 'Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings' (2006) 24 *CardozoArts&EntLJ* 121, 128; For general discussion on policy laundering, see I Hossein, 'The Sources of Laws: Policy Dynamics in a Digital and Terrorized World' (2004) 20 *Information Society* 187; P Yu, 'The Political Economy of Data Protection' (2010) 84 *Chi-KentLRev* 777; see also <www.policylaundering.org/PolicyLaunderingIntro.html>.

²⁴ For instance, see A Bridy, 'Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA and PIPA' (2012) 30 *CardozoArts&EntLJ* 153; D Levine, 'Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law' (2012) 30 *CardozoArts&EntLJ* 105 (pointing out that the bills entitled Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) failed to pass despite engaging in a 'transparent and accountable process' in comparison to ACTA); also A Powell, 'Assessing the Influence of Online Activism on Internet Policy Making: SOPA and ACTA' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031561> (updated version of the paper as at 8 April 2013).

economic and employment gains.²⁵ Significantly, this was the first time that the European Parliament had used its Lisbon powers to reject the whole text of an international agreement negotiated by the European Commission with external partners.²⁶ The section examines how digital activism functioned as the tool to embed the ‘network agenda’, pursued by the internet and ‘networking society’,²⁷ into the fertile ground of inter-institutional dissonance in the EU. It argues that the ‘network agenda’ provided the ideal opportunity for the European Parliament, weighed down by assertions of ‘democratic deficit’, to project its bond with its citizens and simultaneously assert its Lisbon powers.

Despite Europe’s rejection of the agreement, ACTA would have survived if six other signatories had ratified it. The vociferous opposition and debate against the agreement in Europe has adversely influenced other ACTA negotiating partners²⁸ to the extent that to date only Japan has submitted formal instrument of ratification, amidst domestic protests for engaging in a hasty ratification process.²⁹ The fifth section therefore highlights the ripple effect

²⁵ 478 MEPs voted against ACTA and 39 in favour. 165 abstained following refusal to delay the final vote until the ECJ had ruled on ACTA’s compatibility with EU treaties as requested by the centre-right European People’s Party group. Parliament Press Release ‘European Parliament Rejects ACTA’ (4 July 2012); EU Observer, ‘ACTA in Tatters after MEPs Wield Veto’ (4 July 2012); Frontier Economics & Business Action to Stop Counterfeiting and Piracy ‘ACTA, in the EU: Assessment of Potential Export, Economic and Employment Gains’ (June 2012) <http://www.iccwbo.org/Data/Documents/Bascap/International-engagement-and-advocacy/ACTA/ACTA-in-the-EU-Assessment-of-Potential-Export_Economic-and-Employment-Gains_June-2012/>.

²⁶ See EU Observer, ‘Sighs of Relief as EU Parliament Approves “Swift” Deal’ (8 July 2010); European Parliament News, ‘MEPs Reject Extension of the EU-Morocco Fisheries Agreement and Call for a Better Deal’ (14 December 2011).

²⁷ Referring to the social structure connecting ‘networked individualists’ of the network society which in turn refers to varied social, cultural, political and economic changes attributed to electronically processed informational networks. For theory on ‘networked individualism’ see L Rainie and B Wellman, *Networked: The New Social Operating System* (MIT 2012); For further discussion on network society, see M Castells, *The Rise of the Network Society: Economy, Society and Culture* vol 1 (Blackwell 1996, 2000); M Castells and G Cardoso (eds), *The Network Society: From Knowledge to Policy* (Johns Hopkins CTR 2005); J van Dijk, *The Network Society* (3rd edn, Sage 2012); D Barney, *The Network Society* (Polity Press 2004); E van der Vleuten and G Verbong, ‘Introduction: Networking Technology, Networking Society, Networking Nature’ (2004) 20(3) *History and Technology* 195–203; B Dalhborg, ‘Postface: From Infrastructure to Networking’ in C Ciborra (ed), *From Control to Drift: The Dynamics of Corporate Information Infrastructures* (Oxford University Press 2000) 225 states: ‘A networking nomadic society may perhaps be better described with verbs rather than nouns. It is a networking society, not a network society. It is activities and actions rather than organizations and agents that make up that society.’

²⁸ For example, Switzerland Federal Department of Justice and Police Press Release, ‘Switzerland Defers Signature of the ACTA Agreement’ (9 May 2012); S Bell, ‘ACTA Ratification Faces NZ Hurdle’ PC Advisor (17 June 2012); see Recommendation 9, Australian Government, ‘Response to the Joint Standing Committee on Treaties Report: Report 126: ACTA’ (November 2012).

²⁹ Ministry of Foreign Affairs of Japan Press Release, ‘Conclusion of the Anti-Counterfeiting Trade Agreement by Japan’ (5 October 2012); Electronic Frontier Foundation ‘Japan’s Copyright Problems: National Policies, ACTA and TPP in the Horizon’ (21 August 2012); J Hilvert, ‘Anonymous Protests ACTA Ratification in Tokyo’ IT News (10 September 2012); Z Walton, ‘ACTA Ratified in Japan, Citizens Plan Protest’ WebProNews (6 September 2012); Anti-ACTA Protest Video for Japan <<https://whyweprotest.net/community/threads/anti-acta-protest-video-for-japan.106316/>>.

caused by Europe's rejection of ACTA on other ACTA negotiating partners and which has stymied the ratification process.

The final section brings together the various strands of analysis and argues that the changing nature of the digital landscape exposes colliding rationalities, as the protection of proprietary interests vested in intellectual property conflicts with the protection of individual and systemic freedom within cyberspace structures. While the debate between the enforcement agenda and the development agenda has so far appeared to rest on territorial configurations, the demise of the ACTA is an indicator of the need to shift the debate at a longitudinal level that includes a conflux of the enforcement, development and network agendas. Thus, the IP debate will need to move beyond the realm of bi-, pluri- and multilateral discussion based on territorial stratagem to an inclusive platform that attempts to integrate colliding rationalities of different stakeholder constituencies in the world society.³⁰

II. ACTA GENESIS: FROM DEVELOPMENT TO ENFORCEMENT AGENDA

A. Global Consensus to Curb IP Infringement

Though IP infringement affects consumers, industry, government and the economy as a whole, there are not many studies that produce original estimates of the magnitude of 'counterfeiting' and 'piracy', mainly due to the intrinsic difficulty in creating a reliable methodology that quantifies clandestine activity.³¹ However, discussions on intellectual property rights (IPR) enforcement are invariably preceded by statistics that offer estimates of the economic losses caused by the presence of 'counterfeit and pirated products' in international trade.³² In 2005, the OECD undertook a comprehensive study and in their 2008 report concluded that the value of IP infringing goods in international trade equalled \$200 billion annually (updated in 2009 to \$250 billion).³³ The OECD calculation gained wide acceptance, though more recently these figures have been discredited on the basis that the calculation relied, to some extent, on statistics and sources of uncertain origin.³⁴

³⁰ G Teubner, *Law as an Autopoietic System* (Z Bankowski (ed) (trans. A Bankowska and R Adler) (Blackwell 1993) 100.

³¹ RAND Corporation Report, *Measuring IPR Infringements in the Internal Market: Development of a New Approach to Estimating the Impact of Infringements on Sales* (2012) section 4.2 and 4.6; US Government Accountability Office 'Intellectual Property Observation on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods' GAO-10-423(2010) 16 ['2010 GAO Report'].

³² M Blakeney, *Intellectual Property Enforcement: A Commentary on the Anti-Counterfeiting Trade Agreement* (Edward Elgar 2012).

³³ OECD, *The Economic Impact of Counterfeiting and Piracy* (Paris, 2008) and *Magnitude of Counterfeiting and Piracy of Tangible Products: An Update* (Paris, 2009).

³⁴ 2010 GAO Report (n 31) 18–19 (For example, The GAO Report found that the FTC 'was unable to locate any record or any source of th(e) estimate [MEMA's reference to FTC estimates, see section 9.10 *2008 OECD Report*] within its reports or archives, and officials could not recall the agency ever developing or using this estimate').

The International Chamber of Commerce estimates that ‘counterfeiting accounts for between 5–7 per cent of world trade’.³⁵ Once again, this calculation is based on data that are not strictly underpinned by adequate research or statistical analysis.³⁶ The 2011 Frontier Economics Report merely adopts the OECD methodology and updates the 2008 OECD Report.³⁷ All these estimates and impact studies have been criticized for lacking rigorous methodologies especially because they rely on data that is sparse, incomplete or inconsistent.³⁸ The problem is compounded by research that indicates potential gains made by the industries affected by ‘counterfeiting’ and ‘piracy’.³⁹ Indeed, the figure of the \$200 billion loss appears to have been officially used as early as 1995, without being substantiated by a clear-cut methodology.⁴⁰ Despite the difficulty in calculating the economic impact of IP infringement, there is general agreement among developed and developing countries⁴¹ that the legal framework to protect IP rights should be complemented by effective enforcement measures in order to provide the incentives to promote innovation and stem economic losses faced by IP right-holders in developing countries.⁴² Indeed, the broad aim of curbing counterfeiting and piracy reflects global consensus evidenced by the participation

³⁵ This would be worth an estimated \$600bn a year. See International Chamber of Commerce <<http://www.iccwbo.org/products-and-services/fighting-commercial-crime/counterfeiting-intelligence-bureau/>>; see eg COM (2000) 789 final 4.

³⁶ CEBR Report for the European Commission, ‘Counting Counterfeits: Defining a Method to Collect, Analyse and Compare Data on Counterfeiting and Piracy in the Single Market’ (15 June 2002) 18; see F Salmon, Finance Blogger, Reuters (9 June 2005) at <<http://www.felixsalmon.com/2005/06/all-counterfeiting-statistics-are-bullshit/>>.

³⁷ Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (2011) section 4.2, report commissioned by Business Action to Stop Counterfeiting and Piracy (an initiative of the International Chamber of Commerce).

³⁸ P Strykowski, ‘Measuring Counterfeiting and Piracy’ (OECD Directorate for Science, Technology and Industry) Presentation at CCAP Congress (Cancun, 1–3 December 2009).

³⁹ T Rogers and A Szamosszegi, ‘Capital Trade Inc., Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use’ Reports (2007), (2010) and (2011) <www.cciinet.org>; F Oberholzer-Gee and K Strumpf, ‘The Effect of File Sharing on Record Sales: An Empirical Analysis’ (2007) 115(1) *JPolEcon* 1–42; Y Qia, ‘Counterfeiters: Foes or Friends? How Do Counterfeits Affect Different Product Quality Tiers?’ NBER Working Paper 16785 (2011; revised 1 July 2013); See K Raustila and C Sprigman, ‘Fake It Till You Make It: The Good News about China’s Knock off Economy’ (2013) 92(4) *Foreign Affairs* 25.

⁴⁰ Statement of the International Trademark Association, HR 2511 (7 December 1995) (the figure of \$200bn was attributed to *Forbes* magazine article dated 25 October 1993, 170); H Williamson, ‘Forgery Trade Losses “under \$200bn”’ (7 May 2007) *Financial Times*; J Sanchez, ‘750,000 Lost Jobs? The Dodgy Digits behind the War on Piracy’ (8 October 2008) *ars technica* <<http://arstechnica.com/tech-policy/2008/10/dodgy-digits-behind-the-war-on-piracy/4/>>.

⁴¹ See also *The Economist*, ‘Intellectual Property in Brazil: Owning Ideas, Getting Serious about Patents’ (3 November 2012); N Hoffelder, ‘Amazon and Apple Are Once Again the Subject of Piracy Complaints in China’ *The Digital Reader* (1 July 2013); *The Indian Express*, ‘US to Work with India to Crackdown on Piracy, Counterfeit Pharma’ (14 January 2011); BBC News, ‘Police in Bollywood Piracy Raid’ (15 March 2005) and ‘Piracy “Rife” at Bollywood Stalls’ (17 June 2008); International Federation of the Phonographic Industry, ‘“Operation Counterfeit” Hit Russian Pirates’ (6 November 2007).”

⁴² See eg COM (2007) 165 final (3 April 2007) at 14; OJ EU C 129 (26 May 2005) at 3.

of intergovernmental organizations, national governments, enforcement agencies and businesses from more than 100 countries at the meetings of the Global Congress on Combating Counterfeiting and Piracy (GCCCCP).⁴³

B. The Move towards a Plurilateral Agreement

The first GCCCCP met in 2004 with the aim of consolidating anti-counterfeiting measures and towards this end, it sought to improve international cooperation between governments and organizations.⁴⁴ Similarly, ACTA's aim to provide protection against digital infringement is roughly in alignment with the aims of WIPO's 1996 'Internet Treaties' and is bolstered by the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provision for minimum standards of IP rights protection.⁴⁵ However, the WIPO Internet Treaties and WTO TRIPS had not anticipated the generational shift that has taken place in the digital environment over the last decade and face significant challenges in dealing with new and emerging technologies. Though the WTO incorporates compliance issues to be addressed through the Dispute Settlement Body, the ever-growing trade in IP infringements had led developed countries to attempt to form a multi-party enforcement arrangement since 2005.⁴⁶

It was within this context that the initial idea of a new anti-counterfeiting treaty was proposed by Japan at the Gleneagles Summit Meeting of the Group of Eight (G8) in 2005.⁴⁷ Japan made an official presentation of the idea of a new treaty entitled 'Treaty on Non-Proliferation of Counterfeits and Pirated Goods' at the Second GCCCCP in 2005 in Lyon and proposed that the treaty could function under either one of the key conveners of the Congress—World Customs Organisation or International Criminal Police Organisation. There was a general consensus at the Lyon GCCCCP that the TRIPS Agreement was 'inadequate[ly]' dealing with counterfeiting issues, and it agreed to 'consider further' the proposal by Japan to introduce a new international treaty on counterfeiting and piracy.⁴⁸ Japan proposed the treaty once again at the

⁴³ See <http://www.ccapcongress.net/6_Paris.htm> (Sixth GCCCCP, Paris). This is a steady increase from the second GCCCCP which was attended by around 500 delegates from 66 countries.

⁴⁴ First Global Congress on Combating Counterfeiting (Brussels, 2004) Final Doc 4-5 (17 June 2004).

⁴⁵ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (Morocco, 1994); The Internet Treaties refer to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty that supplement the Berne Convention for the Protection of Literary and Artistic Works and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

⁴⁶ *EFF v USTR* Civil Action number 1:08-cv-01599-AMC (D.D.C. 29 May 2009) Declaration of Stanford McCoy section 9.

⁴⁷ See M Blakeney, 'Covert International Intellectual Property Legislation: The Ignoble Origins of Anti-Counterfeiting Trade Agreement' (2013) 21(1) Michigan State International Law Review 87.

⁴⁸ T Gerhardsen, 'Japan Proposes New IP Enforcement Treaty' Intellectual Property Watch (15 November 2005); The Second GCCCCP (Lyon, 2005) – The Lyon Declaration, 2.

Third GCCCP held in Geneva in 2006, but there was muted response to the need for a new treaty.⁴⁹ Though initially reluctant,⁵⁰ the US endorsed Japan's proposal in 2006 and began to reach out to other partners to develop the idea.⁵¹ This change in strategy was in response to the failure by developed countries to introduce a discussion on IP enforcement within WIPO and WTO, as their attempts were thwarted by developing countries on the basis that it was necessary to integrate the 'development dimension' into IP policy making at the international level.⁵² More specifically, efforts since June 2005 by Japan, Switzerland, the EU and the US⁵³ to introduce enforcement issues on the TRIPS agenda were unsuccessful as developing countries argued that the TRIPS Council was 'not the right forum' to discuss IP enforcement and it could not be a 'permanent agenda' of the Council.⁵⁴

Furthermore, developed countries felt that WIPO was also not adequately 'meeting the needs and expectations of its members' as its 'Advisory Committee on Enforcement'(ACE),⁵⁵ which was set up in October 2002, deliberately excluded norm-making capacity and provided a restrictive mandate limited to education, technical assistance, training programmes and coordination in relation to enforcement of IP rights.⁵⁶ The adoption of the *WIPO Development Agenda* coincided with Japan not being able to introduce

⁴⁹ H Arai, 'Japan's Perspective on Combating Counterfeiting and Piracy' Third GCCCP (Geneva, 30 January 2007); 'Third GCCCP: Shared Challenges, Common Goals' (Geneva, 2007).

⁵⁰ Gerhardtsen (n 48) [Japan met EU and US officials 'a number of times' to discuss the proposed treaty. US officials 'applaud[ed] the energy that Japan brings to this issue', but focused on the implementation of anti-counterfeiting issues 'right now' targeting 'actions and results']. The US Strategy Targeting Intellectual Property Initiative was introduced.

⁵¹ By June 2007, the US was in discussion with Canada, Switzerland and the EU. See P Yu 'Six Secrets (and Now Open) Fears of ACTA' (2011) 64 SMULRev 975, 982; ACTA not pursued in the 2006 G8 Meeting, 'Combating IPR Piracy and Counterfeiting' (16 July 2006, St. Petersburg) (Note: Russia was not a WTO member until 22 August 2012).

⁵² WIPO WO/GA/31/11 (27 August 2004) Thirty-First Session, 2004 Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO'; See also T Gerhardtsen 'EU Gets Little Support for Enforcement Proposal at WTO' Intellectual Property Watch (16 June 2006) and 'Developed Countries Seek to Elevate Enforcement Measures in TRIPS Council' Intellectual Property Watch (25 October 2006) and 'WTO TRIPS Council Stumbles over Inclusion of Enforcement' Intellectual Property Watch (27 October 2006).

⁵³ Communication from Japan IP/C/W/501 (11 October 2007); Switzerland IP/C/W/492 (31 May 2007); Switzerland and the United States IP/C/W/488 (30 January 2007); EU, Japan, Switzerland and US Joint Communication IP/C/W/485 (2 November 2006), and EU IP/C/W/468 (10 March 2006) and IP/C/W/448 (9 June 2005).

⁵⁴ TRIPS Council, Minutes of Meeting 13 February 2007 IP/C/M/53 (22 March 2007) sections 2, 5, 91, 107.

⁵⁵ Combining the 'Advisory Committee on Enforcement of Industrial Property Rights' and 'Advisory Committee on Management and Enforcement of Copyright & Related Rights in Global Information Networks'.

⁵⁶ WIPO General Assembly Twenty Eighth Session, Geneva (23 September 2002–1 October 2002) WO/GA/28/4 'Matter Concerning the Status of the Advisory Committee(s) on Enforcement' and on 1 October 2002 WO/GA/28/7 at section 114(ii), section 120; WIPO General Assembly Thirty First Session, Geneva (27 August 2004) WO/GA/31/11; also WO/GA/34/16 (12 November 2007) 46; WIPO A/43/16 at 148.

a proposal on border enforcement of IP rights in October 2007.⁵⁷ Developing countries cautioned against IP enforcement measures that would result in ‘disguised barriers to trade’, especially from developing countries.⁵⁸ The fact that the US, EU and Japan began pre-negotiation technical discussion immediately after the 2007 WIPO General Assembly,⁵⁹ and formally announced their intention to negotiate ACTA within two weeks of the adoption of the WIPO ‘Development Agenda’, illustrates the discontent of developed countries regarding the effectiveness of WIPO to deal with IP infringement on a global level.⁶⁰ Indeed, developed countries have clarified that it had become necessary to seek out their own forum to discuss enforcement issues due to the unwillingness of developing countries to engage with the issue in the established norm-making bodies.⁶¹ It is the growing perception that the emphasis on the ‘development agenda’ was stymieing efforts to combat IP infringement that led ACTA negotiators to create a plurilateral platform outside the aegis of the established norm-making bodies.⁶² The new agreement aimed to provide civil, criminal and border measures to enhance IP enforcement and curb the proliferation of ‘counterfeit’ and ‘pirated’ products.

C. Effect of Opposition by Developing Countries

The June 2010 TRIPS Council Meeting eventually placed enforcement issues on the agenda, this time, however, at the behest of developing countries in order to discuss their concerns regarding ACTA. Here, China and India criticized the ‘efforts by developed countries’ to engage in a ‘TRIPS-plus enforcement trend’ outside of the existing multilateral framework.⁶³ The ACTA negotiators countered that WTO members ‘should not be surprised’ to see measures for a plurilateral arrangement to deal with IP enforcement, as the issue had been repeatedly ignored by previous TRIPS Councils.⁶⁴ The Indian

⁵⁷ WTO TRIPS Council, IP/C/W/501 (11 October 2007). (Item 45 of the *WIPO Development Agenda* called for enforcement to be approached ‘in the context of broader societal interests and especially development-oriented concerns’.)

⁵⁸ M Kaminski, ‘Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement’ (2009) 34 *YaleJIntL* 247; Li and Correa (n 9) 133.

⁵⁹ Australia DFAT, *An International Proposal for a Plurilateral ACTA* (2007).

⁶⁰ WIPO General Assembly Thirty Fourth Session (24 September 2007–3 October 2007) WO/GA/34/16 (12 November 2007).

⁶¹ For general discussion: P Yu, ‘TRIPS and Its Discontents’ (2006) 10 *Marquette Intellectual Property Law Review* 369; ‘Ambassador Schwab Announces US Will Seek New Trade Agreement to Fight Fakes’ (Press Release, USTR, 23 October 2007); Rapid Press Release, ‘European Commission Seeks Mandate to Negotiate Major New International Anti-Counterfeiting Pact’ (23 October 2007).

⁶² Yu (2011) (n 8) 1082; See Kaminski (n 58) 247.

⁶³ TRIPS Council, Minutes of Meeting 8–9 June 2010 IP/C/M/63 (4 October 2011) section 252–279.

⁶⁴ *ibid* at section 282.

and Indonesian delegations once again discussed the implications of ACTA in the October 2010 TRIPS Council.⁶⁵ However, ACTA negotiators merely encouraged WTO members to join ACTA, and the EU delegation took the opportunity once again to clarify why ACTA negotiators felt forced to seek out a new platform to promote enforcement issues.⁶⁶ The Sixth GCCCP meeting in 2011 involved a discussion panel to debate issues relating to ACTA.⁶⁷ Here, India questioned the asymmetries of the negotiating process, the balancing of provisions between rights-owners and the public and furthermore expressed concern that the plurilateral agreement had multilateral manifestations.⁶⁸ Overall, the broad picture that emerges is that the opposition by developing countries within the WTO and WIPO forums did not have a substantive effect on the ACTA negotiation process nor on the agreement itself, mainly because it was being formulated at the plurilateral level.⁶⁹

The above position is reaffirmed in the letter from the WTO General Secretary in response to Members of the European Parliament requesting that WIPO and WTO provide an 'expert assessment and analysis of the current provisions of ACTA'.⁷⁰ The MEPs were motivated by their 'disappointment that ACTA had bypassed the multilateral WTO and WIPO institutions'.⁷¹ There is a record of the reply in May 2010 by the WTO General Secretary, making it clear that since ACTA is a plurilateral agreement, the organization is unwilling to provide technical assistance or comment on its provisions.⁷² Thus, it is clear that ACTA negotiators had successfully insulated themselves from acknowledging the development agenda by manoeuvring their strategy and engaging in forum shifting.⁷³ However, they faced stinging criticism for negotiating under the cloak of a 'confidentiality agreement' and thus creating unequal access to the negotiation process for stakeholders.

⁶⁵ TRIPS Council, Minutes of Meeting 26–27 October 2010 IP/C/M/64 (17 February 2011) section 440–459.

⁶⁶ *ibid* at section 469; K Mara, 'TRIPS Council Discusses Efficacy of ACTA, Public Health Amendment' Intellectual Property Watch (29 October 2010).

⁶⁷ The Fourth and Fifth GCCCP did not comment on ACTA. See 'GCCCP: Dubai Declaration' (2008) and 'GCCCP: Cancun Declaration' (2009) <www.ccapcongress.net>.

⁶⁸ Sixth GCCCP (Paris, 2011) <<http://www.youtube.com/watch?v=HEMc-qOoQUY>>; Ruse-Khan (n 13) 647.

⁶⁹ *The Economic Times* (India), 'Anonymous Protest Fail to Gather Support in Bangalore' (9 June 2012); MediaNama, 'Motion For Annulment Of India's IT Rules Defeated in Rajya Sabha; IT Minister Promises Consultation' (18 May 2012); TechDirt, 'As Feared, Brazil's "Anti-ACTA" Marco Civil Killed off by Lobbyists' (27 November 2012); L Pelicci, 'China and the ACTA – ACTA Faith or ACT Futility?: An Exposition of Intellectual Property Enforcement in the Age of Shanzhai' (2012) 1(1) Penn State Journal of Law & International Affairs 121; *The Economic Times* (India), 'India Plans Front to Nip New Piracy Law' (29 May 2010).

⁷⁰ Letter from JP Albrecht, MEP *et al.* Greens/European Free Alliance to WTO (15 April 2010).

⁷¹ *ibid.*
⁷² Letter from WTO to EU MEPs (4 May 2010) <<http://keionline.org/node/838>>; K Mara, 'WIPO, WTO Requested to Advise on Anti-Counterfeiting Treaty' Intellectual Property Watch (15 April 2010).

⁷³ See (nn 9, 223 and 224).

III. TRANSPARENCY ISSUES AND THE MAKING OF AN 'ACTA-LITE'

The criticism against ACTA that the negotiations lacked transparency stemmed from the protection granted to the negotiation proceedings via a confidentiality agreement set to last ten years.⁷⁴ The general premise of the negotiators was that the 'confidentiality agreement' would enable negotiators to engage in frank exchange of views, positions and specific negotiating proposals.⁷⁵ In May 2008, a discussion paper on ACTA was made available to the public by *Wikileaks*.⁷⁶ Civil society groups in the US and Europe that felt excluded from the process began submitting Freedom of Information requests to seek information on the negotiation process.⁷⁷ The Office of the United States Trade Representative (USTR) sought to look into their legislation⁷⁸ and legislative history⁷⁹ to argue that the negotiating documents could be exempt from disclosure under the US Freedom of Information Act on grounds of 'national security' and confidential 'foreign government information'.⁸⁰ They argued that release of the materials sought would result in 'strained relations between the United States and foreign governments, leading to diplomatic, political, or economic repercussions'.⁸¹ Similarly in Europe, the EU Council of Ministers denied requests for ACTA-related documentation on the basis of a need to protect the public interest 'with regard to international relations'.⁸²

The lack of communication with the public was also causing general concern within the ACTA negotiating space⁸³ and partners were concerned that the 'secrecy around the negotiations has led to the legitimacy of the whole process being questioned'.⁸⁴ Interestingly, the *Wikileaks* US embassy cables refer to EU Member States accusing the US government of being in 'close consultations with US industry' while constraining other negotiating partners, through the confidentiality agreement, from engaging with their domestic industry to discuss the ACTA provisions.⁸⁵ The secrecy that shrouded ACTA

⁷⁴ USTR Memo: W Maruyama, 'Memorandum for All Anti-Counterfeiting Trade Agreement Negotiators' (2 August 2008) 27.

⁷⁵ *EFF et al. v USTR* Case 1:08-cv-01599-RMC (29 May 2009) Declaration of Maruyama at section 6–8; Stanford McCoy (n 46) at section 11–13.

⁷⁶ <<http://www.theguardian.com/world/blog/2010/dec/22/you-ask-we-search-december-22>>; see also <[http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement_\(2007\)](http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement_(2007))>.

⁷⁷ Stanford McCoy (n 46) at section 35, 46, 63–65 and 67.
⁷⁸ 5 USC section 552(b)(1), Executive Order 12958, as amended by EO 13292 section 1.4, section 6.1(r); see also *Vaughn v Rosen* 484 F.2d 820, 827 (D.C. Cir. 1973); *Southern News v INS* 674 F Supp 881, 885 (D.D.C. 1987).

⁷⁹ Senate Report number 93-1299, reprinted in 93 USCCAN 7186, 7251.

⁸⁰ USTR Memo (n 74) at 27.

⁸¹ See Stanford McCoy (n 46) at section 15.
⁸² Foundation of Free Info Infrastructure, 'EU Council Refuses to Release Secret ACTA Documents' (10 November 2008).

⁸³ *The Guardian*, 'US Embassy Cables: Italy, the EU and the Anti-Counterfeit Trading Agreement' (22 December 2010) <<http://www.guardian.co.uk/world/us-embassy-cables-documents/176810>>.

⁸⁴ *ibid*; *The Guardian*, 'US Embassy Cables: Sweden's Concerns about ACTA Negotiations' (22 December 2010) <<http://www.guardian.co.uk/world/us-embassy-cables-documents/236363>>.

⁸⁵ *The Guardian* (n 83).

resulted in the provision of unequal access to various stakeholders as 'select lobbyists in the intellectual property industry' were invited to contribute to the negotiations.⁸⁶ Indeed, as required under US legislation, USTR called for a consultative process in relation to ACTA provisions, with federal agencies and advisors,⁸⁷ and sought recommendations from private organizations or groups whose interests may not be fully represented by advisory committees.⁸⁸

Another 'leak' appeared in February 2009, highlighting the six chapters that eventually appear in the final text, with a focus on the chapter relating to the enforcement of IP rights. Following this leak, the European Commission organized conferences on ACTA that took place on 23 June 2008 and 21 April 2009.⁸⁹ However, these sessions did not include any details of the ACTA negotiations nor the position taken by various countries during the negotiating process. The position taken by ACTA negotiators ignored the Court of Justice of the European Union's (CJEU) position regarding the fact that openness confers legitimacy on institutions.⁹⁰ In November 2009, ACTA negotiating partners released a statement that 'it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation'.⁹¹ Commentators refuted this position on the basis that other agreements, such as the WIPO Internet Treaties, were made readily available to the public in advance of the final agreement.⁹²

An extended pool of stakeholders was thereupon given access to some provisions in the ACTA draft. However, the requirement to sign a non-disclosure agreement, along with not providing them with the opportunity to provide input in a meaningful way meant that there was still not sufficient transparency in the process.⁹³ The outcry that the secrecy in the negotiation process was an attempt to engage in policy laundering was followed by two further leaks: the '18 January 2010 Consolidated Text' leak in March 2010⁹⁴ and the internal Dutch government documents describing the positions of the ACTA participants on treaty transparency.⁹⁵ The leaked documents indicated

⁸⁶ J Love, 'Who Are the Cleared Advisors That Have Access to Secret ACTA Documents?' Knowledge Ecology International (13 March 2009).

⁸⁷ See 19 USC, ch 12, The Trade Act of 1974 section 2155(g).

⁸⁸ 73 Federal Register 8910 (15 February 2008); 19 USC, ch 12, section 2155.

⁸⁹ <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149102.pdf>.

⁹⁰ *Sweden v Council*, Joined Cases C-39/05P and C-52/05 P, 2008 ECR I-4723, section 59.

⁹¹ ACTA Negotiating Parties Press Release, 'ACTA: Summary of Key Elements Under Discussion' (6 November 2009).

⁹² Knowledge Ecology International, 'ACTA Is Secret. How Transparent Are Other Global Norm Setting Exercises?' (21 July 2009); see (n 24).

⁹³ Knowledge Ecology International, 'White House Shares the ACTA Internet Text with 42 Washington Insiders, under Non-Disclosure Agreements' (13 October 2009).

⁹⁴ See <<http://sites.google.com/site/iipenforcement/acta>>.

⁹⁵ B de Winter, 'Dutch Internal ACTA Documents' (25 February 2010) & 'New ACTA Leak Reveals Internal Conflicts among Negotiators' Computerworld (26 February 2010) [UK, Netherlands, Poland, Estonia, Finland, Sweden, Austria and Japan were in favour of disclosure.

that ACTA had set out to be a new ‘state-of-the-art’⁹⁶ agreement with enhanced criminal and border measures, provision for intermediary liability outside the court’s jurisdiction, provision for internet service providers to monitor networks for copyright infringement and adopt the ‘three-strikes-internet disconnection’ policy. The ‘secret’ nature of the negotiation enhanced scrutiny of the various provisions as seen in the leaked documents. Legislators from Canada, France, Germany, New Zealand, US and Sweden began openly to seek for the agreement to be made public.⁹⁷ ACTA negotiators attempted to graft some degree of legitimacy to the process by conducting workshops and public consultations though they did not provide the draft texts.⁹⁸ The position taken by ACTA negotiators—that the process was being kept confidential to promote political expediency—was rejected by academics and civil society groups such as Electronic Frontier Foundation, IP Left, Knowledge Ecology International, Free Information Infrastructure, La Quadrature du Net and Public Knowledge.⁹⁹ The problem was exacerbated when the European Parliament adopted a Resolution in March 2010 calling on the Commission to make ACTA documents public and increase the Parliament’s role in negotiating ACTA provisions.¹⁰⁰ As a result, ACTA negotiating partners officially released the draft text of the agreement for the first time in April 2010. Interestingly, ACTA negotiators did not release updated texts from the July 2010 ACTA Lucerne round or the August 2010 ACTA Washington round of negotiations. The final draft was released by ACTA negotiators after negotiations concluded in October 2010.¹⁰¹

Despite the workshops and the draft texts, the secrecy raised fear that ACTA would make travellers vulnerable to intrusive border checks by customs officials, as there was no clear definition of what would constitute a ‘commercial’ level of piracy. There was paranoia within internet communities that the border police could potentially ‘seize any device—laptop, iPod, DVD recorder, mobile phone, etc—and confiscate it or destroy anything on it, merely on suspicion’.¹⁰² US officials and EU officials were hard pressed to reply

Germany, Denmark, Singapore and South Korea opposed and US was silent and EC had not made a decision.].⁹⁶ See Stanford McCoy (n 46) at section 41.

⁹⁷ M Geist, *ACTA Guide Part Three: Transparency and ACTA Secrecy* (27 January 2010) <<http://www.michaelgeist.ca/content/view/4737/125/>>; Blakeney (n 47) 104–5.

⁹⁸ European Commission held two further stakeholder conferences on 22 March 2010 and 25 January 2011. For other examples, see <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/consult-03.aspx?lang=eng>>; <http://www.computerworld.co.nz/article/492224/med_seeks_further_comment_acta/>; and <<http://www.dfat.gov.au/ip/factsheet.html>>.

⁹⁹ For example, Opinion of European Academics on ACTA (2011) 2(1) JIPITEC 65; S Flynn *et al.*, ‘ACTA Public Comments: Submission of Legal Academics’ Docket number USTR-2010-0014 (2011).

¹⁰⁰ European Parliament Resolution of 10 March 2010 ‘Transparency and State of Play of the ACTA Negotiations’ (P7_TA(2010) 0058) 2.

¹⁰¹ Consolidated Texts for Public Release (21 April 2010); Deliberative Draft (2 October 2010) and Final Version (3 December 2010).

¹⁰² G Philipson, ‘Digital Copyright: It Is All Wrong’ *Sydney Morning Herald* (10 June 2008); M Kaminski (n 58) 247.

to queries regarding border police search of consumers' personal computers or music players.¹⁰³ These concerns were addressed in the final text, which included a specific *de minimis* provision to exempt small consignments and personal luggage.¹⁰⁴ There is no doubt that the intense scrutiny of the provisions led to the final product being a watered-down 'ACTA-lite' agreement.¹⁰⁵ For instance, the final text did not include the 'graduated response' system for combating file sharing on the internet, and furthermore provides for rules intended to guarantee balance in procedures. This may be seen in Article 2(3) ACTA whereby objectives and principles of the TRIPS agreement (particularly Articles 7 and 8), shall apply, *mutatis mutandis*, to ACTA; Article 6(2) ACTA adopts the implementation of 'fair' and 'equitable' procedures with regard to IP enforcement; Article 6(3) ACTA sets out the principle of proportionality and Article 27(2) ACTA calls for the preservation of fundamental principles such as freedom of expression, fair process and privacy in procedures for copyright enforcement in digital networks. Thus, the initial attempt to insulate the agreement from public discussions by means of a 'confidentiality agreement' had backfired dramatically, and though it did not per se cause the agreement to collapse, it did have the effect of 'watering down' the text from what had originally been conceived into an 'ACTA-lite' version.

Cameron Kerry, former General Counsel of the US Department of Commerce stated that in his opinion ACTA was a good balance between IP rights and freedom of expression; but the public protests had led to the situation where 'rhetoric ha[d] exceeded the reality'.¹⁰⁶ Similarly, EU Trade Commissioner Karel De Gucht found the debate on ACTA to be based on 'misinformation and rumour that has dominated social media sites and blogs in recent weeks'.¹⁰⁷ This was confirmed by the European Commission Vice-President, Maroš Šefčovič, who stated that the ACTA debacle highlights the importance of social media and the need for the Commission to be much more communicative with the public.¹⁰⁸ Even so, most of the ACTA negotiating partners had signed the ACTA-lite version by October 2011 and it was not until January 2012, when the EU signed ACTA that the momentum against the agreement gathered pace in the EU and eventually led to its rejection by the European Parliament. Thus, whilst lack of transparency was a factor that

¹⁰³ S Condon, 'Bush Administration Defends Secrecy over Anti-Counterfeiting Treaty' CNET (22 September 2008); European Commission: K De Gucht 'Think before You Tear into ACTA' (Editorial) (28 February 2012).

¹⁰⁴ Art 14 ACTA.
¹⁰⁵ M Emert, 'Treaty Negotiators Turn to ACTA-Lite in Hopes of Closure' Intellectual Property Watch (8 September 2010); R Rangnath, 'What We Won in ACTA' Public Knowledge Policy Blog (3 October 2011).

¹⁰⁶ B Fox, 'EU Parliament Joins Commission on ACTA Court Probe' EU Observer (2 March 2012).

¹⁰⁷ D Lee, 'ACTA: EU Court to Rule on Anti-Piracy Agreement' BBC News (22 February 2012); *New York Times*, 'EU to Seek Legal Opinion on Anti-Piracy Treaty' (23 February 2012); B Fox, 'New MEP Appointed to Head-up ACTA Dossier' EU Observer (8 February 2012).

¹⁰⁸ G Hatton, 'ACTA Is a Crucial Step Forward' EU Observer (27 March 2012); H Mahony, 'EU Commission Admits Mistake on ACTA' EU Observer (20 March 2012).

contributed to the collapse of ACTA, it was not the catalyst that triggered the rejection of ACTA in Europe.

IV. EUROPE AND ITS REJECTION OF ACTA

A. Europe's Commitment to IP Enforcement

Combating IP infringement has been one of the key priorities on the European IP agenda, alongside harmonization of IP legislation and creation of unitary IPR rights within the EU. The 1998 *Green Paper on Combating Counterfeiting and Piracy in the Single Market* and its follow-up in 2000 recognized the need to strengthen IP enforcement as a matter of urgency, and to revise policies for customs officials to deal with infringing products coming into the EU.¹⁰⁹ These goals were promoted via the 2003 Customs Regulations,¹¹⁰ and the 2004 Enforcement Directive.¹¹¹ As part of its strategy to curb infringement of IP rights occurring outside of Europe, it was clarified that there was no intention to 'impose unilateral solutions to the problem'.¹¹² More steps followed, such as the 2006 *US-EU Action Strategy for the Enforcement of IP Rights* and the 2006 Council Resolution on the Customs Response to latest trends in counterfeiting and piracy.¹¹³ In 2009, the European Commission set up the European Observatory on Counterfeiting and Piracy to improve understanding on IP rights infringement.¹¹⁴ Further proposals have been put forth recently with regard to improving customs enforcement of IP rights.¹¹⁵ The measures taken by the European Council, the Commission and the Parliament show that the EU deals with the issue of enforcement of the IP owner's rights in a proactive manner.¹¹⁶ However, they have also acknowledged that the EU legislation may be ill-suited to deal with the challenges posed by the internet and digital technologies.¹¹⁷ Therefore, it was natural to see Europe joining the

¹⁰⁹ COM(98) 569 final; COM (2000) 789 final.

¹¹⁰ Council Regulation 1383/2003 OJ L 196 (2 August 2003); see also Council Resolution 2006/C 67/01 (18 March 2006).

¹¹¹ Directive 2004/48/EC OJ L 157 (30 April 2004), corr OJ L 195 (2 June 2004); considerable delay in transposition of the Directive in Member States, and difficulty in assessing impact of Directive COM (2010) 779 final (22 December 2010).

¹¹² COM (2007) 165 final (3 April 2007); see also OJ C (2005) 129 (26 May 2005); COM (2006) 567 final.

¹¹³ <http://ec.europa.eu/sum06_06/docs/ipr_strategy_200606_en.pdf>; see also US-EU Working Together to Fight against Global Piracy and Counterfeiting <<http://2001-2009.state.gov/p/eur/rls/or/48387.htm>>; 2006/C 67/01 OJ 67 (18 March 2006).

¹¹⁴ Now, European Observatory on Infringement of Intellectual Property Rights COM (2008) 465 final; COM (2009) 467 final; See Reg. 386/2012 (19 April 2012), OJEU L 129 (16 May 2012).

¹¹⁵ COM (2011) 285 final, 2011/0137 (COD), C7-0139/11.

¹¹⁶ Application of Directive 2004/48/EC on the Enforcement of IP Rights COM (2010) 779 final; Enforcement of IP Rights OJ C 56 (6 March 2010); see also European Parliament Resolution 2009/2178(INI), A7-0175/2010.

¹¹⁷ Council Resolution OJ C 253/1 (4 October 2008); European Commission Conference 'Making European Copyright Fit for Purpose in the Digital Age: The Next Steps' (6 December 2012); Commission Conference: 'IPR Enforcement in the Digital Era' (22 November 2011);

negotiating table to discuss the enactment of the ACTA, a new international agreement to deal with IP enforcement and issues relating to protection of IP rights in the digital era. The rejection of ACTA by the European Parliament proved to be a fatal blow to the cause of the ratification of the agreement by the other ACTA signatories. The next subsection examines how ‘netizen’ involvement, within the context of the ongoing general debate on the ‘democratic deficit’ within EU institutions, provided the catapult power to launch the ‘network agenda’. In other words, it is argued that the successful embedding of the ‘network agenda’ into the fertile ground of existing inter-institutional dissonance within the EU resulted in the rejection of the ACTA in Europe.

B. The Impact of Digital Activism in Europe

The internet networking community in Europe was concerned that ACTA could potentially affect fundamental rights such as the right to data privacy and freedom of speech and expression. It resulted from the fear that the application of ACTA in the digital world would threaten human rights and make the regular surveillance of web users a real possibility. Though the networking community and various civil society bodies had regularly castigated ACTA provisions and procedures, there was a dramatic change in January 2012 when the EU signed ACTA. The cause of the network agenda appears to have been strengthened by the collapse (in January 2012) of the Stop Online Piracy Act (SOPA)¹¹⁸ and the Preventing Real Online Threats to Economic Creativity and Theft of IP Act (PIPA)¹¹⁹ in the US.¹²⁰

The SOPA and PIPA bills, backed by the entertainment industry were introduced into the US House of Representatives and the US Senate in 2011 to deal with enforcement of US laws against websites originating outside US. The bills were opposed by an assorted alliance of various technology and internet firms and associations, digital rights groups, social network sites, content creators, free-software authors and free speech organizations, as well as by the public at large. In response to two online petitions against SOPA, on 13 January 2012, the White House announced that it would ‘not support legislation that reduces freedom of expression, increases cyber-security risk,

S&D Conference ‘Copyrights and Intellectual Property in the Digital Age’ European Parliament (29 June 2011).

¹¹⁸ H.R 3261 introduced 26 October 2011 by Rep. Lamar Smith, 112th Congress (2011–2013).

¹¹⁹ Senate Bill 968 introduced on 12 May 2011 by Senator Patrick Leahy, 112th Congress (2011–2013) <<http://www.govtrack.us/congress/bills/112/s968>>; PIPA is a rewrite of the Combating Online Infringement and Counterfeits Act (COICA) that narrowly failed to become law in 2010.

¹²⁰ C McManis and J Pelletier, ‘Two Tales of a Treaty Revisited: The Proposed Anti-Counterfeiting Trade Agreement’ in Jan Rosen (ed), *Intellectual Property at the Crossroad of Trade* (Edward Elgar 2012) 182.

or undermines the dynamic, innovative global internet'.¹²¹ On 18 January 2012, a series of online protests and street demonstrations were launched in a coordinated manner in response to the prospect of the imminent enactment of this legislation which enjoyed overwhelming bipartisan support.¹²² On this day, the English Wikipedia temporarily blacked out its own contents aiming to 'raise public awareness and to encourage people to share their views with their elected representatives'.¹²³ The Wikipedia blackout page was accessed more than 162 million times during the 24-hour period with the effect that more than eight million looked up their elected representatives' contact information via the Wikipedia tool.¹²⁴ Google joined the protest by draping its search site trademark in black and directing visitors to visit a webpage on SOPA/PIPA and sign a petition opposing the bills.¹²⁵ Other websites, such as Mozilla, Flickr, Craigslist and Reddit, also joined the protest with the result that by the end of the day on 18 January 2012, co-sponsors of the bills began to withdraw support, thus leaving SOPA and PIPA on the backburner.¹²⁶

Buoyed by the success of derailing SOPA/PIPA, civil society organizations and 'netizens' triggered online and offline protests to fight against ACTA provisions that could potentially affect the fundamental rights of the networking community.¹²⁷ Just before signing was due to take place on 25 January 2012 (barely a week from the SOPA/PIPA debacle), protests gained momentum with thousands of protesters gathering in a number of cities, including Warsaw and Krakow, and 'hacktivists'¹²⁸ attacking Polish

¹²¹ Official White House Response to 'Stop the E-PARASITE Act' and 'VETO the SOPA Bill' <<https://petitions.whitehouse.gov/response/combating-online-piracy-while-protecting-open-and-innovative-internet>>.

¹²² Huffington Post, 'SOPA And PIPA Protest Organized by NY Tech Meet up outside Senators' Offices' (18 January 2012).

¹²³ See <http://en.wikipedia.org/wiki/Wikipedia:SOPA_initiative/Learn_more>.

¹²⁴ N Ingraham, 'On SOPA Blackout Day, Senate Web Sites Experience "Technical Difficulties"' *Washington Post* (18 January 2012); J Wortham, 'With Twitter, Blackouts and Demonstrations, Web Flexes its Muscle' *New York Times* (18 January 2012) ('Engine Advocacy, that helps people call their local members of Congress, said that as many as 2,000 a second were trying – demand so heavy that many of the calls could not be completed.');

¹²⁵ J Weisman, 'In Fight over Piracy Bills, New Economy Rises against Old' *New York Times* (18 January 2012); J Wortham, 'Public Outcry over Anti-Piracy Bills Began as a Grass-Roots Grumbling' *New York Times* (20 January 2012); S Sengupta, 'Big Victory on Internet Bouys Lobby' *New York Times* (27 January 2012).

¹²⁵ Google 'Take Action' <<https://www.google.com/takeaction/past-actions/end-piracy-not-liberty/index.html>>.

¹²⁶ L Johnson, 'SOPA and PIPA Bills: Lawmakers Shift Stance on Anti-Piracy Legislation' Huffington Post (18 January 2012); D Rushe and R Devereaux, 'SOPA Support Drops off as Blackout Protest Rattles the Internet' *The Guardian* (18 January 2012).

¹²⁷ Hauben and Hauben (n 15).

¹²⁸ The word is used to refer to the internet activist who hacks websites either to effect social change or at an extreme to engage in cyberterrorism. See generally A Greenberg, *This Machine Kills Secrets: How WikiLeaks, Hacktivists and Cypherpunks Are Freeing the World's Information* (Dutton Books 2012).

Government websites.¹²⁹ The Polish Government issued a statement that it ‘would not submit to blackmail’ and went ahead to sign the ACTA along with the EU and 22 other Member States as scheduled.¹³⁰

The signing of ACTA sparked an immediate reaction from bloggers and internet campaigners who adopted various measures to register their protest across Europe, including a series of hacks against various governmental websites, led by a group known as *Anonymous*—known for protesting against censorship and anti-piracy laws.¹³¹ Public interest organizations and civic society groups alleged that the agreement did not safeguard fundamental freedoms and rights in a substantive manner and thus affected human rights, consumer protection, competition and privacy.¹³² The protest acquired a degree of symbolism when many of the protesters, including Parliamentarians in some EU Member States¹³³ wore Guy Fawkes¹³⁴ masks, which are associated with anarchists challenging authoritarian governments—as seen in a 2006 Warner Brothers movie entitled ‘V for Vendetta’. Though these masks had been popularized by *Anonymous*, it is not clear whether the public, or Parliamentarians, wearing these masks during ACTA demonstrations had in any way integrated the ‘hactivist’ form of protest. Moreover there is no evidence that this constituency was connected with, or remotely involved in, the legally questionable tactics of the *Anonymous* group. The general call of the protest was, however, clear—the internet and networking community sought the European Parliament’s intervention to ensure protection of fundamental rights granted under the European Charter of Fundamental Rights, such as the right to free speech and expression, data privacy rights and due process rights.¹³⁵

The protests gained a measure of success when some EU Member States (Cyprus, Estonia, Germany, the Netherlands and Slovakia) decided not to sign

¹²⁹ BBC News, ‘Thousands March in Poland over ACTA Internet Treaty’ (26 January 2012); M Masnick, ‘Polish Government’s Plan to Sign ACTA gets the SOPA Treatment’ TechDirt (23 January 2012).

¹³⁰ Cyprus, Germany, Estonia, the Netherlands and Slovakia did not sign ACTA due to procedural issues. Croatia joined the EU in July 2013.

¹³¹ N Perloth, ‘Hackers Step up Attacks after Megaupload Shutdown’ *New York Times* (24 January 2012); R Adekoya, ‘Poland Signs ACTA Treaty: That’s Despite Protests across the Country’ *Warsaw Business Journal* (26 January 2012).

¹³² European Digital Rights, ‘ACTA and its “Safeguards”’ <http://www.edri.org/files/EDRI_acta_series_5_20120120.pdf>; Amnesty International ‘EU Urged to Reject International Anti-Counterfeiting Pact’ (10 February 2012) <<http://www.amnesty.org/en/news/eu-urged-to-reject-international-anti-counterfeiting-pact-2012-02-10>>; The Data Protection Working Party ‘Letter to EU Commissioner De Gucht’ (15 July 2010) <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010_07_15_letter_wp_commissioner_de_gucht_acta_en.pdf>; Consumers International <<http://a2knetwork.org/acta>>; See also Washington Declaration on Intellectual Property and the Public Interest (2011) <<http://infojustice.org/washington-declaration.html>>.

¹³³ <<http://gizmodo.com/5879851/polish-politicians-don-anonymous-masks-to-protest-eu-counterfeiting-agreement>>; <<http://www.techdirt.com/articles/20120203/10091517652/bulgarian-mps-wear-anonymousguy-fawkes-masks-to-protest-acta.shtml>>.

¹³⁴ The seventeenth century Englishman who tried to blow up the Houses of Parliament.

¹³⁵ <<https://sites.google.com/site/antiactademo/>>.

ACTA until the European Parliament had voted on it. Meanwhile, Member States that had signed the ACTA, such as Poland, Czech Republic, Latvia, Romania and Austria, responded to the public protest by suspending ratification process.¹³⁶ Slovenia's ambassador to Japan went as far as apologizing for her 'civic carelessness' in signing the ACTA without paying 'enough attention'.¹³⁷ Members of the European Parliament therefore proceeded to post several queries regarding ACTA to the Commission and obtained clarification on how ACTA ensured the protection of fundamental rights and freedoms.¹³⁸ Meanwhile, the public protests in Europe culminated in a petition, signed by about two and half million people in March 2012, urging the European Parliament to reject ACTA.¹³⁹ The European Commission were eventually resigned to the fact that their inability to give a timely response to domestic protests had left the agreement 'twisted and misunderstood'.¹⁴⁰ In February 2012, the Commission proposed that the agreement could be taken to the CJEU for an opinion under Article 218(11) TFEU. It is within this context that the inter-institutional dissonance within EU institutions is examined to question whether it had an effect on the eventual decision of the Parliament to reject ACTA in July 2012 or if it was simply an illustration of democracy at work.

C. Inter-Institutional Dissonance in the EU

When the Lisbon treaty came into effect on 1 December 2009, it resulted in a significant restructuring of the power balance and thus, further changing the inter-institutional relationship within the EU, by placing the European Parliament on equal footing with the Council.¹⁴¹ The European Council is no longer the final stage in the decision-making process, though, as the body which ensures the integration of policies, it is required to steer strategy and manage the interdependence between Member States and the EU. The 'European Parliament Rules of Procedure'¹⁴² and the 'Framework Agreement

¹³⁶ EU Observer's articles: 'Bulgaria Postpones ACTA Ratification' (15 February 2012); 'Czech Republic Stops Ratification of Anti-Counterfeiting Treaty' (7 February 2012); 'Poland Suspends Ratification of ACTA Bill' (6 February 2012); 'German Government Suspends ACTA Ratification' (10 February 2012).

¹³⁷ Full Statement of H Zorko 'Why I Signed ACTA' (31 January 2012) <<http://metinalista.si/why-i-signed-acta/>>.

¹³⁸ <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149102.pdf>; EIS European Report 'ACTA Continues to Divide MEPs' (27 April 2012).

¹³⁹ European Parliament News, 'Parliament to receive 2.4 million petition signatures against ACTA' (27 February 2012).

¹⁴⁰ B Fox, 'Battle Lines Drawn up in EU Row on ACTA' EU Observer (3 February 2012).

¹⁴¹ House of Lords: European Union Committee, Tenth Report of Session 2007–08 'The Treaty of Lisbon: An Impact Assessment' vol 1, HL Paper 62-I (2008) 65–72; see art 269 TFEU.

¹⁴² Rules of Procedure of the European Parliament, Rule 90 International Agreements, available at <<http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>>.

Establishing the Relation between the Parliament and Commission'¹⁴³ clarify that though the Commission will represent the EU during negotiations, the Parliament is to be kept immediately and fully informed at all stages of negotiation and on conclusion of any international agreements, irrespective of the conclusion of international agreements requiring Parliamentary consent.¹⁴⁴ Significantly, the 'Framework Agreement' was rejected by the Council on the basis that the Parliament was appropriating more power than allowed under the Treaty on the Functioning of the European Union (TFEU) and limiting the autonomy of the Commission and its President.¹⁴⁵ This is an important illustration of how the Lisbon restructuring resulted in an institutional collision that feeds into the existing and pervasive dissonance within EU institutions.¹⁴⁶

With regard to ACTA negotiations, the EU did not enjoy absolute competence to negotiate on behalf of the Member States, as ACTA provisions included criminal enforcement measures for which EU enjoyed limited competence.¹⁴⁷ Therefore, the ACTA is a 'mixed agreement'¹⁴⁸ that would take effect within the EU only if it was ratified both by the European Parliament and by every Member State of the EU.¹⁴⁹ The Commission submitted the initial Recommendation to the Council for authorization to negotiate ACTA in November 2007 but, for reasons not yet declassified, a revised Recommendation had to be submitted in February 2008.¹⁵⁰ Until it received the mandate to negotiate from the Council, the Commission participated in ACTA negotiations in 'silent mode'.¹⁵¹ The 'confidentiality agreement' signed by the Commission meant that the 'European Parliament ... had no access to [ACTA] mandate, neither had it information of the position defended by the Commission or the demands of the other parties to the

¹⁴³ Framework Agreement on Relations between the European Parliament and the European Commission OJ L 304/47 (20 November 2010) ['Framework Agreement'].

¹⁴⁴ Section 23–25 Framework Agreement *ibid*; Rules of Procedure of the European Parliament (March 2012) Seventh Parliamentary Term, Rule 90(1); Point 6 of Annex III of the Framework Agreement; art 207(3) TFEU; art 133(3) Nice Treaty required reporting only to the Special Committee.

¹⁴⁵ Objections to the Framework Agreement raised by the Council 15018/10 (Brussels, 18 October 2010) at <<http://register.consilium.europa.eu/pdf/en/10/st15/st15018.en10.pdf>>.

¹⁴⁶ V Pop, 'Member States Threaten MEPs and Commission with Legal Case' EU Observer (21 October 2010); Literature on inter-institutional politics include S Hix, *The Political System of the European Union* (Palgrave 2005); G Tsebelis and G Garrett, 'Legislative Politics in the European Union' (2000) 1 *European Union Politics* 9.

¹⁴⁷ Art 83(2) TFEU (discussions on ACTA's general provisions being led by the European Commission, and matters relating to criminal provisions being led by the Rotating Presidency on behalf of the Member States).

¹⁴⁸ See generally C Hillion and P Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010).

¹⁴⁹ See arts 207 and 218 TFEU.
¹⁵⁰ Doc 15486/07 PI 47 UD 116 MI 303 JUSTCIV 311 COPEN 165 DROIPEN 112 WTO 249; see SEC(2007) 1377 final A.7 (Declassified); also T Christiansen, 'Intra-Institutional Politics and Inter-Institutional Relations in the EU: Towards Coherent Governance?' (2001) 8(5) *JEPP* 747.

¹⁵¹ SEC (2008) 255 final.

agreement'.¹⁵² Though it came into being only after the confidentiality agreement had been signed, the Framework Agreement required that the Parliament be kept 'immediately and fully informed at all stages of the negotiation' of an international agreement. The delicate power balance between the EU institutions was destabilized when the European Parliament went so far as to adopt a Resolution in March 2010, calling on the Commission to make ACTA documents public and to increase the Parliament's role in negotiating the contents of the Agreement.¹⁵³ The Parliament Resolution deplored 'the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO', and expressed 'concern over the lack of a transparent process in the conduct of the ACTA negotiations' which it clarified as being a state of affairs at odds with the letter and spirit of the TFEU. The Parliament's Resolution succeeded in eliciting the release of the draft text of the agreement in April 2010, but not the subsequent two negotiation texts until after negotiations were completed in October 2010. The final version of the agreement was released in October 2010 and the European Commission assured the European Parliament that it would receive all relevant trade policy documents that are shared with the Council's Trade Policy Committee.¹⁵⁴

Though the Parliament had registered its displeasure with regard to 'lack of transparency' in relation to ACTA in its March 2010 Resolution, it had stepped back from its confrontational attitude and made an attempt to re-establish the delicate balance of powers between EU institutions by October 2010 when ACTA negotiations were complete. This is evident from the Parliament's November 2010 Resolution which welcomed the release of the October 2010 draft ACTA, reiterated that combating counterfeiting is a priority in the EU's internal and international political strategy, acknowledged that ACTA was a 'step in the right direction' and welcomed the Commission's statements that ACTA provisions are fully in line with the *acquis communautaire*.¹⁵⁵ Furthermore, the Resolution considered 'ACTA as a tool for making the existing standards more effective, thus benefiting EU exports and protecting right-holders when they operate in the global market, where they currently suffer systematic and widespread infringement of their copyrights, trademarks, patents, designs and GIs.'¹⁵⁶ With regard to the issue of fundamental rights, the Resolution went no further than to call on the Commission to 'confirm that ACTA's implementation will have no impact on fundamental rights and data

¹⁵² C Arthur, 'ACTA Goes Too Far, Says MEP' *The Guardian* (1 February 2012) referring to Arif statement; Open Rights Group, 'MEPs Demand Fundamental Rights for Citizens in ACTA Deal' (8 September 2010) <<https://www.openrightsgroup.org/blog/2010/mep-demand-fundamental-rights-for-citizens-in-acta-deal>>.

¹⁵³ European Parliament Resolution on Transparency and State of Play of the ACTA Negotiations P7_TA (2010) 0058, 2.

¹⁵⁴ Arts 207 and 218 TFEU.
¹⁵⁵ European Parliament Resolution on the Anti-Counterfeiting Trade Agreement (24 November 2010) P7_TA (2010) 0432.

¹⁵⁶ *Ibid* at section 7.

protection’ and finally instructed its President to ‘forward this resolution to the Council, the Commission and the governments and parliaments of the state parties to the ACTA negotiations.’¹⁵⁷ Clearly, the power differential between institutions in Europe was not sufficient to derail the ACTA process, and it needed an external irritant to trigger the tilt in the balance of power. Within this context, citizen protests culminating in the submission of a petition in March 2012 with two and half million signatures urging the Parliament to reject ACTA provided the ideal opportunity for the Parliament to not only demonstrate its Lisbon powers but also simultaneously project its bond with the citizens at a period when it was persistently dogged with the allegation of ‘democratic deficit’.

D. Embedding the ‘Network Agenda’ in the Fertile Ground of Inter-Institutional Dissonance

The European institutions have evolved over the decades, though they persistently face concerns regarding their ‘democratic deficit’.¹⁵⁸ In response to this challenge, the European Constitutional Convention had established the principle of ‘participatory democracy’ as an additional pillar, next to the principle of ‘representative democracy’ with a view to making the Parliament work closely with European civil society.¹⁵⁹ Similarly, the Europe 2020 Strategy Paper envisages a clear demarcation of the role of the Council, Parliament, Council of Ministers and Commission in addition to national parliaments, stakeholders and civil society.¹⁶⁰ It highlights the European Parliament’s dual role as co-legislator and ‘also as a driving force for mobilising citizens and its national parliaments’. However, historical accounts of the involvement of civil society in Europe indicate that actors ‘were driven by (institutional) self-interest as much as by principled beliefs’ thus resulting in conflicts, ‘though it would not have been “politically correct” to question the democratic virtues for civil society involvement’ given that it was the remedy to the legitimacy crisis.¹⁶¹ With the definition for civil society being rather vague, the democratic quality of the European institutions have come in for further scrutiny on the basis that most of the ‘organized’

¹⁵⁷ *ibid* at 14–15.

¹⁵⁸ <http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm>; see generally J Steffek *et al.*, *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (Palgrave Macmillan 2007).

¹⁵⁹ Draft Treaty Establishing a Constitution for Europe, art 46; European Council, The Laeken Declaration on the Future of Europe (15 December 2001); European Parliament, ‘The Participation of Citizens and Social Actors in the EU Institutional System’ Rapporteur Herzog (29 October 1996) DOC PE A403338/96; B Kohler-Koch, ‘The Three Worlds of European Civil Society – What Role for Civil Society for What Kind of Europe?’ in U Liebert and H Trezz (eds), *The New Politics of European Civil Society* (Routledge 2011) 56.

¹⁶⁰ European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth* COM (2010) 2020 final (3 March 2010) 26–28.

¹⁶¹ Kohler-Koch (n 159) 56–7.

civil society supported by public funds from Europe were 'elitist', having no real connection with citizens and yet purporting to support European integration.¹⁶²

When ACTA was signed by the EU in January 2012, tens of thousands of European citizens across several cities in Europe, including Warsaw, Prague, Bratislava, Bucharest, Vilnius, Paris, Brussels, Sofia, Cluj, Zagreb, Split, Rijeka, London and Dublin, protested on the streets leading the European Parliament president, Martin Schulz, to state that the ACTA is not 'good in its current form'.¹⁶³ Indeed the European Parliament's rapporteur for ACTA, Kader Arif, resigned in protest to denounce 'in the strongest manner, the process that led to the signing of this agreement' which he termed as a 'masquerade'.¹⁶⁴ Kader Arif accused the Commission for not consulting with civil society and engaging in lack of transparency since the beginning of ACTA negotiations.¹⁶⁵ Stavros Lambrinidis, then vice-president of the European Parliament, expressed Parliament's disconnect with the Commission when he stated that the 'Parliament will not sit back silently while the fundamental rights of millions of citizens are being negotiated away behind closed doors' and that the MEPs would 'oppose any 'legislation laundering on an international level of what would be very difficult to get through most national legislatures or the European Parliament'.¹⁶⁶ Concerns of 'policy laundering' had merit even if ACTA did not require changes in current domestic legislation. This is because the agreement would have had the potential to affect future legislation in Europe, as it would have become necessary to chart future reforms on the path drawn out by the international agreements, if Europe had committed itself to it.¹⁶⁷

The Commission finally sought the opinion of the Court of Justice of the EU in May 2012 on whether or not ACTA provisions interfered with EU legislation, especially the EU Charter on Fundamental Freedoms, but the

¹⁶² For example, D Porta, 'The Europeanization of Protest: A Typology and Empirical Evidence' and M Greven, 'Some Considerations on Participation in Participatory Governance' in B Kohler-Hoch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield 2007) 197, 241; C Snowden, 'Euro-Puppets: The European Commission's Remaking of Civil Society' Institute of Economic Affairs Discussion Paper 45 (6 March 2013); E Monaghan, "'Communicating Europe": The Role of Organised Civil Society' (2008) 4(1) *Journal of Contemporary European Research* 18; J Dempsey 'EU Elites Keep Power from the People' *New York Times* (22 August 2011); W Maloney and J Van Deth, *Civil Society and Activism in Europe: Contextualising Engagement and Political Orientations* (Routledge 2010).

¹⁶³ C Arthur and agencies, 'ACTA Criticised after Thousands Protest in Europe' *The Guardian* (13 February 2012); D Lee, 'ACTA Protests: Thousands Take to Streets across Europe' BBC News (11 February 2012); RT News, 'Caught in the ACTA: Protests Sweep Europe' (9 June 2012).

¹⁶⁴ D Lee, 'European Parliament Rapporteur Quits in ACTA Protest' BBC News (27 January 2012).

¹⁶⁵ C Arthur, 'ACTA Goes Too Far, Says MEP' *The Guardian* (1 February 2012).

¹⁶⁶ A Willis, 'MEPs Demand More Transparency on ACTA Talks' *EU Observer* (11 February 2010).

¹⁶⁷ O Hathaway and A Kapczynski, 'Going it Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement' (24 August 2011) 15(23) *ASIL Insights*.

European Parliament refused to wait until the Court delivered its opinion.¹⁶⁸ The European Parliament stated that whilst it would have been ideal to seek a legal opinion on ACTA at an earlier stage, it was no longer an option under the current circumstances where a referral would mean a delay of about one to two years.¹⁶⁹ Since it is the Parliament that has the final say in approving the international treaty, with no scope to require changes, they maintained that they had the political responsibility to vote on ACTA ratification, given the strong views held against it by the citizens of the EU.¹⁷⁰ In July 2012, the European Parliament voted overwhelmingly to reject ACTA. The Commission did not immediately withdraw its request for an opinion from the CJEU as it may have retained some hope that the Court might have aided the process of rejuvenating the agreement by declaring it to be in alignment with European fundamental rights. However, in December 2012, the request for a Court opinion was eventually withdrawn—thus endorsing the death of ACTA in Europe.¹⁷¹ The rejection of ACTA in Europe is thus an illustration of the Parliament appropriating the ‘network’ agenda, espoused by the European citizens, to demonstrate its power among European institutions. As stated by Martin Schulz, the president of the European Parliament, ACTA’s rejection is a ‘milestone for European democracy’ as ‘Europe’s people look to the European Parliament as *their* forum, the place where *their* will is represented, and thus where democracy in the EU is safeguarded. That makes the European Parliament an institution that everyone must take into account.’¹⁷² The rejection of the ACTA by the European Parliament was thus a show of its bond with the concerns of European citizens.

However, ACTA’s death in Europe did not necessarily mean the death of the agreement on a global level. The question is whether Europe’s rejection of the ACTA irreparably damaged the prospect of the agreement coming

¹⁶⁸ Art 218(6)(a)(v) TFEU; see also Rule 90(8) of Rules of Procedure of the European Parliament (March 2012); art 11, Charter of Fundamental Rights of the European Union OJ 2000/C 364/01; V Reding, European Commissioner for Justice, Fundamental Rights and Citizenship <http://ec.europa.eu/commission_2010-2014/reding/pdf/quote_statement_en.pdf>; *New York Times*, ‘EU to Seek Legal Opinion on Anti-Piracy Treaty’ (23 February 2012); European DG Trade News, ‘European Commission Officially Referred ACTA to the European Court of Justice’ (Brussels 11 May 2012).

¹⁶⁹ European Parliament News, ‘ACTA: Reasons for Committee Vote against Referral to Court of Justice’ (28 March 2012) [21 MEPS against, 5 in favour and 2 absent]; see European Parliament, *Rules of Procedure of the European Parliament* (March 2012) Rule 81, 90(6), 91 and 128.

¹⁷⁰ Art 218(11) TFEU; M Schulz, Head of the European Parliament (‘by taking the court step, the Commission had removed the immediate chance for Parliament to discuss an issue that citizens feel strongly about’); European Commission Press Release, ‘Update on ACTA’s referral to the ECJ’ (4 April 2012).

¹⁷¹ S&D Group ‘S&Ds Welcome Commission’s Withdrawal of ACTA Appeal to EU Court’ (19 December 2012).

¹⁷² M Schulz, ‘European Democracy’s Victory in a Treaty’s Defeat’ (5 July 2012) (original emphasis) <<http://www.project-syndicate.org/commentary/european-democracy-s-victory-in-a-treaty-s-defeat>>.

into effect as a result of its being ratified by six other ACTA signatories.¹⁷³ However, the ACTA negotiating partners appear to have been influenced by the vociferous debate against the agreement in Europe and have decided not to proceed with the ratification process within their own jurisdictions.¹⁷⁴ For example, having noted the opposition and debate against the Agreement in the EU, Switzerland decided to indefinitely defer signing the ACTA.¹⁷⁵ With Europe and Switzerland out of the picture by July 2012, in relation to ACTA ratification, the US in tandem with Japan, began to focus on other signatories to ‘ensure that ACTA can come into force as soon as possible’.¹⁷⁶

V. POSITION OF OTHER ACTA NEGOTIATORS REGARDING RATIFICATION

A. South Korea and Singapore: ‘Advanced Economies’

Two signatories that could potentially have completed the ratification process were Singapore and South Korea. Although not falling under the definition of ‘developed country’ under the WTO self-reporting requirement, both these countries have been classified as ‘High-Income Economies’ and as ‘Advanced Economies’ by the World Bank and International Monetary Fund respectively.¹⁷⁷ Both Singapore and South Korea were concerned about the disclosure of their negotiating positions during ACTA negotiations and hence were keen to continue to keep ACTA documents confidential.¹⁷⁸ It appears that the fear of disclosing ACTA provisions and negotiation dialogues were mainly due to fears of a political backlash within their respective home countries, anticipated due to the criticism that they had faced during past negotiation of Free Trade Agreements (FTAs) with the United States.¹⁷⁹ This was especially the case

¹⁷³ Art 40 ACTA: ‘This Agreement shall enter into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval.’

¹⁷⁴ Australia Joint Standing Committee on Treaties ‘Report 126: Review of Treaty’ tabled on 21 November 2011.

¹⁷⁵ Switzerland Federal Department of Justice and Police ‘Switzerland Defers Signature of the ACTA Agreement’ Press Release (9 May 2012).

¹⁷⁶ Office of the United States Trade Representative, *The 2013 Trade Policy Agenda and 2012 Trade Policy Report* (March 2013) 169 [‘2013 USTR Trade Report’].

¹⁷⁷ <http://data.worldbank.org/about/country-classifications/country-and-lending-groups#High_income>; <<http://www.imf.org/external/pubs/ft/weo/2013/01/pdf/text.pdf>>.

¹⁷⁸ M Geist, ‘New ACTA Leak: US, Korea, Singapore, Denmark Do Not Support Transparency’ (25 February 2010) <<http://www.michaelgeist.ca/2010/02/acta-transparency-leak>>; M Geist, ‘Talks on Anti-Counterfeiting Treaty Spring a Leak’ *Toronto Star* (12 April 2010) at B2; The UK, Poland, the Netherlands, Estonia, Finland, Sweden and Austria were in favour of full disclosure. See leaked Dutch document available at <<http://www.bigwobber.nl/2010/02/25/dutch-internal-acta-documents>>.

¹⁷⁹ J Love, ‘Ambassador Kirk: People would be “walking away from the table” if the ACTA text is made public’ Knowledge Ecology International (3 December 2009) <<http://www.keionline.org/node/706>>; C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) 314.

in relation to the South Korea–EU FTA that came into force in July 2011.¹⁸⁰ Several ACTA type provisions were already made available in the US–Korea FTA. The implementation of these FTAs has resulted in higher levels of criminal copyright enforcement, but the increasing numbers have been attributed to misuse of criminal provisions rather than to an increase in copyright infringement.¹⁸¹ Indeed, though ACTA provides TRIPS-plus provisions, South Korea acknowledged that ACTA establishes standards that are lower than those provided under the US and EU Free Trade Agreements, thus making it unnecessary to make any changes or create additional legislative provisions in Korean legislation.¹⁸²

Singapore's attitude to transparency issues was similar to that of South Korea. This is illustrated in the manner in which discussions and details of the FTA between the EU and Singapore were kept secret until final negotiations were completed on 16 December 2012.¹⁸³ The draft FTA between Singapore and the EU was not immediately made available, though there was official confirmation that the FTA envisions a 'high level of intellectual property rights protection' and provides for 'strong rules on the enforcement of intellectual property rights'.¹⁸⁴ ACTA provisions were included in the FTA with the EU; and are similar to the US–Singapore FTA containing significant TRIPS-plus provisions.¹⁸⁵ Given the lack of debate on ACTA in South Korea and Singapore, it is likely that both countries might have successfully completed the ratification process. However, if South Korea and Singapore had been the only countries to ratify ACTA alongside Japan, this would have generated considerable comment, thus making it necessary to wait until other ACTA negotiators made their positions clear with regard to the ratification process. In other words, the political circumstances dictated the need for other developed States among ACTA signatories to take the step towards ratification.

¹⁸⁰ EU–Korea FTA (2011/265/E) OJ L 127 (14 May 2011).

¹⁸¹ D O'Brien, 'Blogging ACTA across The Globe: Lessons from Korea' (29 January 2010) Electronic Frontier Foundation <<https://www.eff.org/deeplinks/2010/01/acta-and-korea>>.

¹⁸² S Baek, 'The Outline of ACTA and Implementation in Korea' presentation by Korean Ministry of Foreign Affairs and Trade, United Nations Economic and Social Commission for Asia and the Pacific (2012) <<http://www.unescap.org/tid/projects/trips2012-baek.pdf>>.

¹⁸³ Europa Press Release, 'EU and Singapore Agree on Landmark Trade Deal' (16 December 2012); <http://eeas.europa.eu/delegations/singapore/press_corner/all_news/news/2012/20121216_01_en.htm>.

¹⁸⁴ Europa Press Release, 'Facts and Figures: EU Trade Agreement with Singapore' MEMO/12/993 (16 December 2012) <http://europa.eu/rapid/press-release_MEMO-12-993_en.htm>; Singapore Ministry of Trade and Industry Press Release, 'Singapore and the European Union Successfully Conclude EU-Singapore Free Trade Agreement' (16 December 2012); WIPO Seminar for Asia and the Pacific Region on the Internet and the Protection of IP, WIPO/INT/SIN/98/10 (April 1998) for Singapore's views on digital enforcement issues.

¹⁸⁵ US International Trade Commission, 'US–Singapore FTA: Potential Economywide and Selected Sectoral Effects' USITC Publication 3603 (June 2003) 91–100; see also ACTA Blog, 'Text of trade agreement with Singapore will be published before the summer' (15 April 2013) <<http://acta.iffii.org/?p=1822>>.

B. ACTA Negotiators: The Developed States

In March 2013 the US encouraged Canada to meet its 'ACTA obligations', despite ACTA not yet being in effect.¹⁸⁶ Commentators in Canada accused the government of attempting to satisfy US demands when it passed the June 2012 Copyright Modernization Act that ensured that Canada would comply with WIPO Internet Treaties.¹⁸⁷ Furthermore, Canada introduced several measures that are part of the ACTA provisions in its C-56 Bill (Combating Counterfeit Products Act) in March 2013.¹⁸⁸ 'Netizens' have made their presence visible in their protests against these copyright legislation measures that attempt to usher in ACTA provisions into Canada.¹⁸⁹ The use of alternative legislative mechanisms to introduce ACTA provisions means that the likelihood of attempting to ratify ACTA in Canada is very slim.

With regard to Australia's position, commentators wrote to the Joint Standing Committee on Treaties during the consultation process to condemn ACTA for failing to provide for appropriate safeguards with regard to human rights, consumer protection, competition and privacy laws.¹⁹⁰ The Australian Government agreed to delay ratification in order to consider the Joint Standing Committee on Treaties Report on the economic and social benefits and costs of ACTA.¹⁹¹ Recommendation 9 of the Report specifically mentioned that 'a future Joint Standing Committee on Treaties (will) have regard to events related to ACTA in other relevant jurisdictions including the European Union and the United States of America'.¹⁹² Similarly, New Zealand suspended the ratification process on the basis that any decision by its government would take into account developments in 'other ACTA signatory countries'.¹⁹³ Thus, Europe's failure to ratify the Agreement is likely to have had an adverse

¹⁸⁶ 2013 USTR Trade Report (n 176) 139–40.

¹⁸⁷ M Geist, 'What's Really Behind Canada's Anti-Counterfeiting Bill?' (13 March 2013) <<http://www.michaelgeist.ca/content/view/6806/159/>>; Electronic Frontier Foundation, 'US Trade Office Calls ACTA Back from the Dead and Canada Complies' (1 March 2013).

¹⁸⁸ <<http://openparliament.ca/bills/41-1/C-56/>>.

¹⁸⁹ <<http://www.internetlockdown.ca/>> 'Canadians Oppose an Internet Lockdown' petition addressed to the Canadian Prime Minister stating: 'I'm against the Internet lockdown. I am against initiatives that put individual citizens' rights last, such as Bill C-56, ACTA and the TPP. I think it's unfair to allow private interests to police what I do online through website blocking, Internet access terminations, or digital locks. I call on decision-makers to stand up for the open Internet.' <<http://www.petitiononline.com/actanono/petition.html>>.

¹⁹⁰ M Rimmer, 'Submission to the Joint Standing Committee on Treaties on the Anti-Counterfeiting Trade Agreement 2011' Supplementary Submission 1.1 (TT on 21 November 2011) 7.

¹⁹¹ Australian Government, 'Response to the Joint Standing Committee on Treaties Report: Report 126: ACTA' (November 2012) Recommendation 8 at 4; B Winterford, 'Australia Comes Clean on ACTA Role' IT News (11 March 2010); Australia kept options open to complete ratification on time by rejecting calls to wait until the Law Reform Commission completed its review on *Copyright and the Digital Economy* in 2013.

¹⁹² *ibid* (2012 Australia Report) at 4, 5; J Taylor, 'Australian Government Rejects Delaying ACTA Ratification' (29 November 2012) <www.zdnet.com/au/aust-govt-delaying-acta-ratification-700008065/>.

¹⁹³ S Bell, 'ACTA Ratification Faces NZ Hurdle' PC Advisor (17 June 2012) ('Any decision by the [NZ] government about ratification would naturally take into consideration developments in

impact on Australia and New Zealand's position with regard to approval of ACTA.

With regard to the US, commentators and legislators raised doubts on the constitutionality of the decision taken by the Bush Administration, and continued by the Obama Administration, to negotiate ACTA as a 'sole executive agreement'. Sole executive agreements are agreements concluded on the basis of the President's constitutional authority and do not require Congress approval. Since there is no other comparable trade agreement concluded in this manner, it represents a significant expansion of the scope of Executive Agreements illustrating a departure from the way that the United States has pursued IPR goals in other international trade negotiations.¹⁹⁴ It is important to note that the US had not at any point indicated an intention to submit formal instrument of approval for ACTA and did not eventually submit any documentation that committed itself to the Agreement.¹⁹⁵ Eventually, only Japan, which had initially proposed the idea for a new treaty, ended up ratifying the Agreement, amidst street protests organized by *Anonymous* in Japan about the agreement being pushed through Parliament at great speed.¹⁹⁶

C. ACTA Negotiators: Morocco and Mexico

Two developing States that were involved in the ACTA negotiations were Morocco and Mexico. As a WTO Member State, Morocco is committed to the TRIPS Agreement and, in addition, is a party to a number of international IP treaties and conventions.¹⁹⁷ Morocco was the only African country that signed ACTA, but the process of ratification in the Moroccan Parliament has stalled.¹⁹⁸ Given that ACTA faced allegations of having engaged in 'country club' behaviour to pursue an 'enforcement agenda' that does not take development issues into account, it is interesting to examine the circumstances that led Morocco to be an ACTA signatory.

Morocco's position can be explained by taking into account the FTA that it had signed with the US. The FTA provided for the 'most advanced IP chapter

other ACTA signatory countries.');

New Zealand Ministry of Foreign Affairs & Trade 'ACTA: FAQs' (12 March 2010).

¹⁹⁴ CRS Report for Congress (2012) (n 16) 11; J Goldsmith and L Lessig, 'Anti-Counterfeiting Agreement Raises Constitutional Concerns' *Washington Post* (26 March 2010).

¹⁹⁵ CRS Report for Congress (2012) (n 16) 12.

¹⁹⁶ Hilvert (n 29).

¹⁹⁷ With regard to copyright issues, Morocco is signatory to Berne, Brussels (Distribution of Program-Carrying Satellite Signals) and Universal Copyright Convention. Adopted WTO TRIPS. US and EFTA FTAs require Morocco to affirm WIPO Internet Treaties and Rome Convention 1961. S Aghrib *et al.*, 'Morocco' in C Armstrong *et al.* (eds), *Access to Knowledge in Africa: The Role of Copyright* (UCT Press 2010) 126–60. See also US & Foreign Commercial Service and US Dept of State, 'Morocco Country Commercial Guide FY 2004' US & FCS Market Research Reports (2004) ch 7, 1–4.

¹⁹⁸ United States Trade Representative, *Foreign Trade Barriers National Trade Estimate Report* (2013) 262.

in any FTA negotiation so far' going beyond TRIPS requirements, thus making it, from the viewpoint of the US—'truly a precedential agreement for future FTAs'.¹⁹⁹ As a result, Moroccan legislation increased the term of IP protection, introduced broad anti-circumvention provisions, strong civil and criminal sanctions for IP infringements and a limited liability regime for communications service providers.²⁰⁰ Commentators argue that these changes have 'not been accompanied by supporting doctrinal, scientific or policy research' and therefore do not take into account social and economic development policies, despite the fragile state of access to information and the public education system in Morocco.²⁰¹ A study reveals that Moroccan State authorities in charge of public libraries and education are unaware of the breadth and consequences of the international IP provisions inherited by the State and this has resulted in Morocco relinquishing the opportunity to take advantage of the flexibilities within the TRIPS Agreement.²⁰² Morocco's position appears to be common among francophone Africa, where some of the poorest countries have adopted very strong IP standards, even though they were never on the US Special 301 list or subject to a WTO dispute.²⁰³ Indeed, despite adopting strong IP provisions, the Moroccan Copyright Office reported that Morocco's capacity to detect and address digital infringement is insufficient, thus signalling that Morocco's participation in ACTA can be sidelined as the token presence of an African country.²⁰⁴

Mexico's participation in ACTA negotiation presents an interesting picture, as Mexico is one of the G5 'emerging powers' along with Brazil, China, India and South Africa, and furthermore is a member of the North American Free Trade Agreement.²⁰⁵ This is because while the Mexican Executive favoured ACTA, its Senate had unanimously voted to withdraw from ACTA

¹⁹⁹ US–Morocco FTA (15 June 2004) came into force 1 January 2006 <<http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>>; Industry Functional Advisory Committee on IPR for Trade Policy Matters Report (IFAC-3), 'The US–Morocco FTA: The IP Provisions' (6 April 2004) 2.

²⁰⁰ 34-05 (14 February 2006) Copyright Law (Amendment) (Dahir 1-05-192, 2006); UNESCO World Anti-Piracy Observatory: Morocco (2009) <http://www.unesco.org/culture/pdf/morocco_cp_en>; Circular 5051/410 (2007) <http://www.wipo.int/wipolex/en/text.jsp?file_id=191456>; US ITC 'US–Morocco FTA: Potential Economywide and Selected Sectoral Effects' Number TA-2104-14, Pub 3704 (2004) 87–9.

²⁰¹ Aghrib *et al.* (n 197) 131, 145, 146 ('fewer than 10 {theses and dissertations} regarding copyright'); C Ncube, 'ACTA & Access to Learning Materials in Morocco' (2012) PIJIP Research 2012-01, American University Washington College of Law.

²⁰² See for more information Aghrib *et al.* (n 197) 145, 147–8 for details of impact assessment interviews with public officials in Morocco.

²⁰³ Deere (n 179) 232, 240–86, 306. ²⁰⁴ 2013 USTR Report (n 176) 262.

²⁰⁵ D Cevallos, 'G8: Despite Differences, Mexico Comfortable as G5 Emerging Power' Inter Press Service (5 June 2007); see generally J Kirton, *G20 Governance for a Globalised World* (Ashgate 2013); J Aguilar, 'Twenty Years Later, NAFTA Remains a Source of Tension' *New York Times* (7 December 2012); Congressional Research Service, 'NAFTA and the Mexican Economy' (3 June 2010) reporting mixed results in terms of economic growth; H.R.156 – To provide for the withdrawal of the United States from the North American Free Trade Agreement (4 January 2013) and H.R.4759 (3 April 2010).

negotiations in 2010. During the October 2011 ACTA Signing Ceremony, Mexico had not signed the Agreement but limited themselves to expressing support and commitment to ACTA. In July 2012, the Mexican Executive signed ACTA within weeks of the European Parliament rejecting ACTA. While this may come as a surprise, given that other ACTA negotiators had restrained themselves from the ratification process, Mexico's move to sign ACTA came amidst speculation that it was in response to US conditions for Mexico to join the Trans-Pacific Partnership (TPP) negotiations.²⁰⁶ This speculation arises from the US 'invitation' to Mexico to join the TPP talks—a trade partnership in which Mexico had expressed interest in November 2011.²⁰⁷ The USTR reported that it had briefed Mexico about 'the high standards and objectives that the TPP are seeking in the agreement' and furthermore 'negotiate(d) issues that are a priority for the US in the TPP'.²⁰⁸ The decision of the Mexican Executive to sign ACTA, however, did not evoke much confidence in relation to the agreement being ratified by the legislature. The Mexican Congress had ruled that the Executive had negotiated and signed the agreement in violation of the Law on the Approval of International Treaties in the Economic Field as ACTA provisions would violate fundamental rights guaranteed by Mexican legislation.²⁰⁹ The ACTA was never placed before the Mexican Senate for ratification, suggesting that the discussions had died a political death in Mexico.²¹⁰ The presence of Mexico and Morocco, therefore, does not represent the accommodation of development issues in ACTA negotiations and their participation is illustrative of the expansion of IP measures that has piggybacked on developing countries' enthusiasm to open up their economies to the global market.

VI. DIGITAL ACTIVISM AND ITS 'NETWORK AGENDA': SHIFTING THE NATURE OF GLOBAL IP LEGAL ORDER?

The creation of an advisory body in WIPO, to deal with enforcement of IP rights and the ever-increasing participation of State and non-State actors in the Global Congress for Combating Counterfeiting and Piracy, is a clear indicator that there is global consensus on the need to curb IP infringement. However, developed States felt that the campaign against IP infringement was not secure within established IP norm-making bodies due to the promotion

²⁰⁶ Instituto Mexicano de la Propiedad Industrial, 'Mexico signs the Anti-Counterfeiting Trade Agreement (ACTA)' IMPI Press Release: IMPI-010/2012 (11 June 2012); LXI Legislatura Senado de la República, Segundo Año Segundo Receso Comisión Permanente (Gaceta: 15, 22 February 2011).

²⁰⁷ Office of the United States Trade Representative 'U.S. Trade Representative Kirk Welcomes Mexico as a New Trans-Pacific Partnership Negotiating Partner' (18 June 2012) <<http://www.ustr.gov/about-us/press-office/press-releases/2012/june/ustr-mexico-new-tpa-partner>>. ²⁰⁸ *ibid.*

²⁰⁹ See LXII Legislatura Tercer Año Segundo Periodo Ordinario (Gaceta 344; 21 February 2012), LXII Legislatura Tercer Año Segundo Receso Comisión Permanente (Gaceta 21; 25 June, 2012) <<http://www.senado.gob.mx/index.php?ver=busca>>.

²¹⁰ 2013 USTR Report (n 176) 257.

of an agenda that aimed to integrate development issues with IP rights. Consequently, strong IP provisions have been pursued through Free Trade Agreements and other bilateral arrangements that manoeuvred developing countries to adopt IP provisions that could potentially undermine their development needs.²¹¹ Following a proposal from Japan for a new treaty, developed States set about creating a new forum that endorsed an ‘enforcement agenda’ at the expense of the development agenda. Through this process, the ACTA negotiators sought to cocoon themselves from the distractions posed by advocates of the ‘development agenda’. The creation of ACTA is thus the latest in a series of forum shifts that allow developed States to optimize their power and advantages and to minimize opposition.²¹²

Despite its plurilateral nature, commentators have argued that the ACTA appears to be ‘geared’ towards non-participants, especially as ACTA negotiators are not among the main sources of trade in counterfeit and pirated products.²¹³ The agreement, however, exuded the appearance of being a standard-setting treaty as confirmed by the European Commission’s argument that ACTA would set ‘an example to other countries where IP rights are less protected’ and ‘protect European products and ideas from being stolen elsewhere’.²¹⁴ Despite this narrative, the agreement which took place within a circle of States promoting the IP enforcement agenda,²¹⁵ ended in a whimper, with nothing to salvage from the years of negotiations and efforts that were devoted to it. Interestingly, criticism by proponents of the ‘development agenda’ did not play a decisive role in causing the failure of ACTA to emerge as a functional treaty.

This paper demonstrates that the lack of transparency in ACTA negotiations, followed by the dramatic ‘leaks’ of draft texts by *Wikileaks*, merely resulted in the final text being watered down. Much of the protest against ACTA rested on the failure of ACTA negotiating partners to discuss the provisions of the agreement with all stakeholders, leading to fears which may not necessarily

²¹¹ IFAC-3 Report (n 199) 3–5; see L Helfer, ‘Regime Shifting in the International Intellectual Property System’ (2009) 7(1) *Perspectives on Politics* 39; L Helfer, ‘Regime Shifting: The TRIPS Agreement and the New Dynamics of International Intellectual Property Lawmaking’ (2004) 29 *YaleJIntlL* 1; S Sell, ‘Intellectual Property and the Doha Development Agenda’ in D Lee and R Wilkinson (eds), *The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda* (Routledge 2007) 56.

²¹² See (nn 9, 12 and 209); S Sell, ‘The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play’ P2P foundation (17 December 2011) <http://p2pfoundation.net/IP_Maximalists>.

²¹³ M Geist, ‘Part III: The Trouble with ACTA: An Analysis of the Anti-counterfeiting Trade Agreement’ DG for External Policies ‘Workshop: The Anti-Counterfeiting Trade Agreement’ 42; WTO News, ‘China Slams Nearly Completed ACTA, Questions its WTO Compatibility’ World Trade Online (4 November 2010).

²¹⁴ *New York Times*, ‘EU to Seek Legal Opinion on Anti-Piracy Treaty’ (23 February 2012).

²¹⁵ ACTA’s IP rights enforcement provisions were modelled out from provisions within US Free Trade Agreements with Australia, Morocco, Singapore and South Korea. CRS Report for Congress (2012) (n 16) 14; Letter from Ron Kirk to Ron Wyden: (28 January 2010) 3 <<http://www.wyden.senate.gov/download/ustr-responds-to-wydens-questions-concerning-acta>>.

have been founded on reality. Criticism relating to secrecy in ACTA negotiations was not entirely well founded, as secrecy is not new to general international negotiation processes, and initial discussions are usually rooted and developed within the protective veil of limited transparency.²¹⁶ However, ACTA secrecy became suspicious by proxy, as the justification to adopt secrecy (ie, national security) was flimsy, and demonstrated State willingness to privilege the protection of the IP lobby against the interests of other stakeholders.²¹⁷

The Directorate-General for External Policies of the EU found that ACTA ‘does not appear, on its own, to have a significant impact on the EU’s innovative capacity or its global competitiveness’.²¹⁸ This is ‘partly due to the relatively modest scale of the [ACTA-lite provisions that were eventually finalized], as well as the fact that ACTA will not require any change in the laws or regulations of significant competitor countries such as Brazil, India and China’.²¹⁹ This report, however, raised concerns that some of ACTA provisions were vague,²²⁰ though it argued that the lack of clarity does not, ‘in the case of the EU ... entail such a significant shift in the EU *Acquis*’. Similarly, though the USTR consistently maintained that the ACTA is in alignment with existing US legislation, the US Congressional Research Service concluded that ‘[d]epending on how broadly or narrowly several passages from the ACTA draft text are interpreted, it appears that certain provisions of federal intellectual property law could be regarded as inconsistent with ACTA’.²²¹ Though vagueness in provisions may be necessary to ensure that all parties ratify the international agreement, vagueness in ACTA provisions could potentially ‘support more extreme interpretations leading to unfair, intolerant or repressive measures’.²²²

²¹⁶ For example, D Levine, ‘Intellectual Property Law without Secrets’ (2012) at 337 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207038>.

²¹⁷ L Floridi, ‘ACTA: The Ethical Analysis of a Failure, and its Lessons’ (2012) ECIPE Occasional Paper 4/2012, 5 <http://www.ecipe.org/media/publication_pdfs/OCC42012.pdf>.

²¹⁸ See European Parliament, Directorate-General for External Policies, Policy Department ‘The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment’ 7, 32–46.

²¹⁹ *ibid* 6–7, 15–18.

²²⁰ For instance, art 14 ACTA includes small consignments of commercial nature, but the broad definition given to ‘commercial nature’ in ACTA does not clarify what quantity of songs, or audio-visual material would constitute enough to become ‘commercial’ (see (n 213) 54); Similarly the lack of specific safeguards when applying provisional measures without the defendant being heard may be inconsistent with art 6 of EU IPR Enforcement Directive which provides for such safeguards (see (n 213) 27–8); see also La Quadrature Du Net ‘ACTA: Updated Analysis of Final Version’ <<https://www.laquadrature.net/en/acta-updated-analysis-of-the-final-version>>.

²²¹ J Love and K Cox, ‘ACTA is Not Consistent with US Laws on Injunctions and Damages’ Knowledge Ecology International Policy Brief (3 October 2011); Memorandum from BT Yeh, Legislative Attorney, Cong. Research Serv., to the Hon R Wyden, United States Senate, Potential Implications for Federal Law Raised by the October 2010 Draft of the ACTA (29 October 2010) <<http://www.techdirt.com/articles/20110421/16580813994/crs-report-withheld-ustrconfirms-that-acta-language-is-quite-questionable.shtml>>.

²²² Floridi (n 217) 6; T Cottier and M Foltea, ‘Global Governance in Intellectual Property Protection: Does the Decision-Making Forum Matter?’ (2012) 3(2) JWIP 161; C Geiger,

Significantly, ACTA failed due to active opposition and protests engineered by legislators, civil society groups, digital activists and ‘netizens’ from within ACTA negotiating States. The advent of digital technology has resulted in widening the chasm between industrial and public interests and developed States have ignored the need to give policy space to differing rationalities whilst engaging in ACTA negotiations. ACTA’s demise indicates that the rapid changes in the digital environment have not only expanded the scope of IP rights, but they have simultaneously empowered the internet consumer to take a stand against the powerful IP lobby.²²³ Future efforts to engage in the creation of a new global copyright order will have to be preceded by ironing out the differing rationalities that exist in the promotion of industrial, public and digital interests. For example, the *Charter of Fundamental Rights of the European Union* classifies the protection of intellectual property as a fundamental right alongside the right to privacy, data protection, freedom of expression, presumption of innocence and effective judicial protection.²²⁴ Indeed, the ‘network agenda’ sought to promote these fundamental rights within the digital space. However, the vagaries and the complexities of the cyberspace has juxtaposed the fundamental rights of the digital user against the economic rights of the IP right-holder, traditionally protected by developed States, on the basis of the maximalist²²⁵ principle that more IP could result in more innovation.²²⁶ This means that the average internet user in developed States who enjoys fundamental rights promoted by the ‘network agenda’ in the form of political values, is suddenly caught in a web that places these rights against the economic interests of IP right-holders.²²⁷ This exposes an idiosyncratic relationship that the developed countries have between the protection of privacy and freedom of speech and expression of the internet user, which creates multifaceted and competing rationalities²²⁸ compounded

‘Weakening Multilateralism in Intellectual Property Law-making: A European Perspective on ACTA’ (2012) 3(2) JWIP 166; For discussion on the use of vague provisions in international agreements, see C Sunstein, ‘Problems with Rules’ (1995) 83 CLR 953; K Raustiala, ‘Form and Substance in International Agreement’ (2005) 99 AJIL 581; A Guzman, ‘The Design of International Agreements’ (2005) 16 EJIL 579.

²²³ S Sengupta (n 124); Centre for Responsive Politics (computer and internet industries spent \$125m on lobbying in 2011, outpacing the \$122m spent by the entertainment industry. Google more than doubled its spending to \$11.4m in 2011, and Facebook’s \$1.4m represented a 288 per cent increase from the previous year. Copyright, patent reform and privacy were the top issues) <<http://www.opensecrets.org/lobby/indusclient.php?id=B12&year=2012>>.

²²⁴ Art 17, OJ C 83/389 2010/C 83/02 (30 March 2010); also arts 8, 11, 13, 47.

²²⁵ J Boyle, ‘A Manifesto on WIPO and the Future of Intellectual Property’ (2004) Duke Law & Technology Review 9; D Halbert, ‘The Politics of IP Maximalism’ (2011) 3(1) JWIP 81.

²²⁶ T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011); L Lessig *Code: Version 2.0* (Perseus 2006) 184.

²²⁷ Example, Opinion of European Academics on ACTA (2011) 2(1) JIPITEC 65.

²²⁸ See generally G Teubner and A Fischer-Lescano, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 MichJIntL 999.

by complex interactions among State and non-State participants in world society.²²⁹

Thus, the collapse of ACTA from ‘within’ signals the changing nature of international IP law-making where the developed economies have promoted the enhancement of IP protection and enforcement, drawn to some extent by a ‘maximalist’ principle that more IP must result in more innovation. ACTA provisions that allowed the use of public resources to protect IP owners’ rights implied the incorporation of a maximalist principle that favours a certain view of rights ownership and tilts the balance against public interests.²³⁰ While the ‘maximalist’ principle has so far successfully seen off the threat from the proponents of the development agenda, the ACTA debacle illustrates how the negotiating partners had underestimated the power of social media to mobilize protesters seeking to promote the ‘network agenda’.²³¹

ACTA’s demise foretells the paradigm shift to the perpetual cyclic game of the developed and developing States—whereby the growth of IP rights is invariably followed by a ‘subtraction phase’²³² pushed by developing countries, further followed by a shift in fora to steer further the growth of IP rights.²³³ The spontaneous emergence of the ‘network agenda’ that relies on cyberspace activism and digital technologies has placed an effective barrier to the ‘regime complex’²³⁴ espoused by regimes alternating between IP ‘maximalism’ and IP ‘developmentalism’. The problem is exacerbated

²²⁹ For varied interpretations on World Society see N Luhmann, ‘The World Society as a Social System’ (1982) 8 *International Journal of General Systems* 131; G Krücken and G Drori, *World Society: The Writings of John W Meyer* (Oxford University Press 2009); J Habermas, *The Divided West* (trans. C Cronin) (Polity Press 2006) 175; B Buzan, *From International to World Society? English School Theory and the Social Structure of Globalization* (Cambridge University Press 2004).

²³⁰ See Opinion of the European Economic and Social Committee on the Communication from the Commission – A Single Market for Intellectual Property Rights COM (2011) 297 final INT/591 section 3.13. The rhetoric normally adopted by lobbyists such as ‘piracy’, ‘robbery’ and ‘theft’ in relation to IP infringement has entered legalese—suggesting a tilt in favour of IP owners. See W Patry, *Moral Panics and the Copyright Wars* (Oxford University Press 2009); also *Network Ten Pty Ltd v TCN Channel Nine* [2004] HCA 14 (High Court of Australia); *Autospin (Oil Seals) Ltd v Beehive Spinning* [1995] RPC 683 at 700; S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press 2003) 175–6; *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] Fleet Street Reports 275 at 289; *Cantor Fitzgerald Intl v Tradition (UK) Ltd* [2000] RPC 95 at 133.

²³¹ H Mahony, ‘EU Commission Admits Mistake on ACTA’ *EU Observer* (20 March 2012).

²³² D Gervais (ed), *Intellectual Property, Trade and Development* (Oxford University Press 2007) 13–15.

²³³ For overview of the transformation of international IP law so far, see generally P Drahos and J Braithwaite *Information Feudalism: Who Owns the Knowledge Economy?* (Routledge 2002); S Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003); K Maskus, *Intellectual Property Rights in the Global Economy* (Peterson Institute for International Economics 2000).

²³⁴ K Raustiala, ‘Density and Conflict in International Intellectual Property Law’ (2007) 40 *UCDavisLRev* 1021; K Raustiala and D Victor, ‘The Regime Complex for Plant Genetic Resources’ (2004) 58 *IntlOrg* 277; S Krasner, ‘Structural Causes and Regime Consequences: Regime as Intervening Variables’ in S Krasner (ed), *International Regimes* (Cornell University Press 1983) 1–21.

by the increasing number of rationalities that collide within the digital sphere. The future of global IP norm-making will thus experience unpredictability caused by proponents of the 'network agenda' subverting the traditional building of the will of the State as long as they are excluded from interstate negotiations.²³⁵ This trend can be further observed by examining the role of the 'network agenda' in potentially influencing the IP chapter of the Trans-Pacific Partnership Agreement that is currently being negotiated as an international trade agreement.²³⁶

The ACTA debacle has illustrated that legitimacy of IP norms does not necessarily rest on the acceptance by States, or on compromises between developed and developing States. It is necessary to restructure the global IP order on the basis of sectoral interests rather than the territorial interests represented by the 'enforcement' and 'development' agenda. The success of global IP norm-making in the digital age will depend on the transparent and inclusive gathering of State and non-State actors representing varying rationalities that bring together a conflux of the enforcement, development and network agendas.²³⁷ After all, law-making derives their 'just powers' only from the 'Consent of the Governed'.²³⁸

²³⁵ E Kain, 'Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules' *Forbes* (28 February 2012); S Sell, 'Cat and Mouse: Forum-Shifting in the Battle over Intellectual Property Enforcement' (International Studies Association Conference, Montreal, March 2011); A Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy' (2011) 26 *AmUIntlLRev* 601.

²³⁶ An early version of the IP chapter of the TPP was leaked by Wikileaks in November 2013.

²³⁷ Office of the U.S. Intellectual Property Enforcement Coordinator, *The 2013 Joint Strategic Plan on Intellectual Property Enforcement* (June 2013).

²³⁸ Action of Second Continental Congress, 'The Unanimous Declaration of the Thirteen United States of America' (4 July 1776 Congress).