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Vertical Dimensions in the Quality of Law

Bartram Brown, *Chicago-Kent College of Law*

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Draft of 7/12/2012

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Introduction and Thesis

There are compelling reasons for concern about the quality of law. Law is essential to structuring the social relations of the state. Thomas Jefferson famously wrote that life, liberty and the pursuit of happiness are God-given unalienable rights, and that the purpose of governments is to secure these rights on behalf of the governed.¹ Whether the law of a state will be successful in this task depends upon the quality of that law.

Concern for the quality of law is not a new idea. The Roman orator and statesman Cicero built upon the ideas of the Greek Stoic philosophers when he stated that “human legislation” should be evaluated for its consistency with fundamental precepts of natural justice.²

When the English King John signed Magna Carta in 1215 AD, he was forced, by rebellious nobles and clergy, to acknowledge that the quality of English law, and of its application, was inadequate. The great charter proclaimed that even the King himself was bound to observe the rights of subjects and communities under the “law of the land”, but in practice it would take several more centuries before the implied principle of the “rule of law” would be fully implemented even in England.

There are many different aspects to the quality of law, but some are, to use Jefferson’s phrase, self-evident. In the *Spirit of Laws*, which many consider to be the first real example of comparative legal scholarship, the French writer Montesquieu formulated, and justified through historical examples, his criteria for quality legislation. Quite sensibly, he proposed that legislation should be concise, written in

¹ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” The Declaration of Independence, IN CONGRESS, July 4, 1776.

² “There in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible.” Cicero, *THE REPUBLIC*, II, 22.

plain, simple and unambiguous language, and have few if any special exceptions.³ On the grander theme of how to preserve liberty through law, he derived from his understanding of the Constitution of England a complete theory on the necessity of the separation of powers between the legislative, executive and judicial branches.⁴ That theory was soon thereafter incorporated into the Constitution of the United States of America and eventually into many other national constitutions as well.

And of course focus upon the quality of law falls squarely within the tradition of legal reform pioneered by Jeremy Bentham. Bentham rejected the soaring rhetoric of natural law and natural rights.⁵ He was concerned about real law, man-made positive law, and how to make it better.⁶

Due to the vast changes in the international legal system so presciently anticipated by Wolfgang Friedmann in the 1960s,⁷ concern about the quality of law must, increasingly, focus not only upon national legislation, but also upon the formulation of rules and standards of international law as well. This is particularly relevant in cases where international law requires states to harmonize their national law with internationally agreed standards in critical areas such as international human rights, international criminal law, international trade law and international intellectual property law. In particular, quality of law analysis should also apply to the creation, functioning and development of international institutions.

The quality of international law may seem like an issue remote from the day-to-day concerns of most people, but recent developments concerning the Anti-Counterfeiting Trade Agreement (ACTA) have brought into focus just how badly international treaty negotiations can be organized and conducted in this day and age. We are accustomed to hearing that “transparency” is essential to the rule of law, that fundamental human rights should in all cases be respected, and that civil society has an essential role to play in government, including international governance. Nonetheless, and as will be discussed below, these values were somehow set aside in preparing the text of ACTA. The result is a treaty that, when it finally was made public, produced vehement, sometimes violent protests in multiple countries.

³ See, Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, (1748), Translated by Thomas Nugent, revised by J. V. Prichard, Book XXIX. Of the Manner of Composing Laws, Chapter 16. Things to be observed in the composing of Laws. Internet Source: <http://www.constitution.org/cm/sol.txt>.

⁴ *Id.*, Book XI, Chapter 6.

⁵ As part of his scathing critique of natural rights discourse Bentham wrote: “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.” - Jeremy Bentham, *A CRITICAL EXAMINATION OF THE DECLARATION OF RIGHTS.*, The Works of Jeremy Bentham, vol. 2 [1843], Article 2, http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1921&chapter=114230&layout=html#a_2345508.

⁶ As one prominent writer noted in 1908, Bentham “demanded that all statute law, whatever the form of government, should be based on scientific and philosophical principles, for the benefit of mankind.” Frederick N. Judson, *A Modern View of the Law Reforms of Jeremy Bentham*, COLUMBIA LAW REVIEW, Vol. 10, No1 (Jan. 1910) pp. 41-54, at page 49, <http://www.jstor.org/stable/1110951>.

⁷ See, Wolfgang Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, New York, Columbia University Press, 1964.

The thesis of this paper is twofold. First, it is that the various criteria that apply to assessing and improving the quality of national law, apply *mutatis mutandis* when addressing the quality of a multilateral treaty. In addition, I argue that the specific nature of the international legal system suggests that some additional, and special, “vertical criteria” should also apply. These revolve around three general pillars of legitimacy under contemporary international law. The first requires respect for the sovereignty-based notion of **positivism** as the basis of state obligations. The second requires respect for fundamental **principle**, which must be a characteristic of any true system of law purporting to promote justice, and the third in turn requires some reasonable accommodation of the **practical** policy-based necessities of cooperation in an interdependent world.

The latter part of this paper will present a brief case study on the drafting of the Anti-Counterfeiting Trade Agreement (ACTA) in a first effort to apply this analytical framework.

The Vertical Dimension and its Specificities

Concern about the quality of law focuses, in the first instance, upon the quality of law produced by internal legal systems. At a recent conference in Italy on the Quality of law the principal paper on international law focused only on “The impact of international law instruments on National Legislation.”⁸ The quality of law lens, so to speak, was focused on national law not on international law as such. But quality of law analysis does apply to international law, not only indirectly, when that law affects the quality of national law, but also more directly when international legal standards are set by multilateral “law-making” treaties.⁹

The nature of the international legal system

According to the currently prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states. That consent may be expressed explicitly, as it is in treaties, or implicitly through the practices of states which give rise to rules of customary international law.¹⁰ Since states have traditionally been reluctant to consent to limitations on their sovereignty, the international legal system has

⁸ See, Carl Henrik Ehrenkrona, *The Impact of International Law Instruments on National Legislation*, Report, Seminar, “The Quality of Law”, Trieste, Italy, 14 – 17 June 2010, European Commission For Democracy Through Law (Venice Commission), Doc. CDL-UDT(2010)021, Strasbourg, 7 July 2010, available @ <http://www.venice.coe.int/docs/2010/CDL-UDT%282010%29021-e.asp>.

⁹ “The distinction between ‘law-making treaties’ and ‘contract treaties’ is a frequently used analytical tool in treaty practice and doctrine. At the same time, little trace of it is found in the positive law of treaties.” Brölmann, Catherine M., *Law-Making Treaties: Form and Function in International Law* (January, 28 2009). *NORDIC JOURNAL OF INTERNATIONAL LAW*, No. 74, 2005, page 1. Available at SSRN: <http://ssrn.com/abstract=1334266>.

¹⁰ See Article 38 of the Statute of the International Court of Justice which defines the law which that court is to apply in deciding disputes between states. This authoritative statement of the sources of international law refers to three principal sources, i.e. “a. international conventions ... establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law” and “c. the general principles of law recognized by civilized nations.” Each of these involves building law upon the recognition or acceptance of states or nations, i.e. upon their consent. Judicial decisions and the teachings of publicists are referred to in Article 38(d) as “subsidiary means for the determination of rules of law.”

generally been decentralized, i.e. it has had to operate without an international legislature to make international law, an international executive to enforce that law, or international courts with effective jurisdiction to decide even the legal aspects of the most important disputes between states. But the rules of international law, and the international legal order itself, must evolve and adapt over time. These changes, much like changes in the legislation of individual states, raise important issues concerning the quality of law.

The changing structure of international law

The International Law of Coexistence

To the extent that international law is based on the consent of states, its form and effectiveness tends to be determined by the traditional pre-occupations of states. Foremost of these has generally been their desire to advance the “national interest” usually defined in terms of the preservation of sovereignty and national security through the management of international conflict. This minimalist version of international law is what Wolfgang Friedmann so famously labeled the “international law of coexistence”.¹¹ Since the initial formulation of the modern law of nations *circa* 1648 there have always been doubts about the utility, and thus about the quality, of positive international law. Do binding rules of international law unduly restrict the prerogatives of stronger states? Are the rules adequate to protect the interests of smaller, weaker states, or of non-Western peoples whether formally organized within a “state” or not? Does the entire system reflect principles of justice as any true legal system should? These questions can never be fully resolved, but at least the international law of coexistence has the virtue of being positive international law based on the consent of sovereign states. But is that law enough, and what standards could we legitimately apply to reach that conclusion?

Friedmann answered that it was not enough, because international law changes. Indeed, it must be capable of changing and adapting to the realities of the international system, just as it has adapted to such changes in the past.¹² This change has accelerated since the Second World War with the establishment of the United Nations. In a parallel development, the emergence of new states from decolonization has transformed what was “the exclusive club of Western Christian nations” into something much more complex, a “vast conglomeration composed of states” representing “completely different religious and social cultures.”¹³

Since the Second World War there has also been a major thrust toward the enactment of a positive international law of human rights. By articulating human rights norms in treaties and other international normative instruments, States and international organizations have done more than simply create a few more rules of positive international law. They have begun to transform the nature of the international system. As the body of international legal rules expands and as its scope broadens into more and more matters once regarded as the exclusive preserve of state sovereignty and internal law,¹⁴ concerns about the quality of law must increasingly apply not only to national legislation but also to changes in the growing body of international legal rules. One basic criterion for judging the quality of this law must focus upon the practical imperative of international cooperation.

¹¹ Friedmann, CHANGING STRUCTURE, *op. cit.* note 7, p. 5.

¹² See, Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, CHICAGO-KENT L. R. VOL. 68, p. 204 (1992).

¹³ Friedmann, CHANGING STRUCTURE, *op. cit.* note 7, p. 5.

¹⁴ “The changes in the dimensions of international law require a corresponding reorientation of its study; neither the international lawyer trained in the classical methods of international law and diplomacy, nor the corporation, tax or constitutional lawyer are equipped to handle this subject without cooperation with each other, and with economists and political scientists. International law is becoming a more and more complex and many-sided subject.” Friedmann, CHANGING STRUCTURE, *op. cit.* note 7 p. 70.

The International Law of Co-operation and Beyond

Based on the changes he saw coming in the international system Friedmann proposed that we view international law, not as one body of principles, but on three different levels:

(a) **The international law of coexistence**, i.e. the classical system of international law regulating diplomatic interstate relations, orders the coexistence of states regardless of their social and economic structure.

(b) **The universal international law of co-operation**, i.e. the body of legal rules regulating universal human concerns, the range of which is constantly expanding, extends from matters of international security to questions of international communication, health and welfare.

(c) **Closely knit regional groupings** can proceed further with the common regulation of their affairs because they are linked by a greater degree of community of interests and values, and regional also of regional proximity, than mankind at large. They can therefore act as pioneers in the transition from international to community law”¹⁵ (Bold emphasis added)

Friedmann was certainly correct to anticipate the increasing importance of regional groupings as pioneers in the building of a stronger international law based on community. The importance of this regional normative layer has been clearly illustrated by the EU Parliament’s recent role in addressing problems with the ACTA treaty (as will be discussed below). For now, however, it is important to focus upon the growing international law of co-operation which he also anticipated. He saw that, in a world of growing interdependence, international law needed to do more than help states to coexist and to stay out of each other’s way. International law would also need to be effective in bringing states together in a cooperative way to address and advance universal human concerns. His clarion call for an international law of co-operation highlighted the **practical** need for international law to transcend its focus on simple coexistence.

Others have echoed the call for this new law. Mohamed Bedjoui, president of the International Court of Justice, once noted “[t]he resolutely positivist, voluntarist approach of international law still current at the beginning of the [20th] century ... has been replaced by ... a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.”¹⁶

Positivism, principle and the practical imperative of co-operation:

“Vertical” criteria for the quality of international law

The international law of coexistence is all about respect for the sovereignty and the sovereign prerogatives of states. As such, it is defined and limited by the extreme **positivism** which sovereignty has traditionally been thought to entail. While sovereignty is no longer the supreme value in international law today,¹⁷ positivism remains relevant as the basis of state obligations. It must therefore

¹⁵ Friedmann, *CHANGING STRUCTURE*, *op. cit.* note 7 p. p. 367.

¹⁶ *Legality Of The Threat Or Use Of Nuclear Weapons*, International Court of Justice, Advisory Opinion (8 July 1996); Declaration by President Bedjaoui, § 13.

¹⁷ Cf. the doctrine of *jus cogens* discussed below.

be one of the primary criteria of quality of law analysis applicable to treaties. But, as noted above, positivism cannot be the only such criterion.

International law, no less than national law, must to the extent possible aspire to reflect fundamental principles of law and justice. So at times even sovereignty and positivism must yield.¹⁸ Thus although the Permanent Court of International Justice ruled in 1923 that “the right to enter into international engagements is an attribute of State sovereignty”¹⁹ international law now formally recognizes that a treaty that conflicts with a peremptory norm of international law, is null and void.²⁰ This doctrine of *jus cogens*, acts as a limit upon the freedom of contract of sovereign states, and is strong evidence of a renewed commitment to **principle** even within the still generally positivistic framework International law. Consistency with principle, must in any case be an important criterion for evaluating the quality of all positive law. As applied to international law, however, the task is even more complex, as the language of a treaty, for example, should be consistent with principle in the dualist perspective of both international law and national legal systems.

In the interdependent world of the 21st century the “universal international law of co-operation” first described by Wolfgang Friedmann 50 years ago is more indispensable than ever. Both the sovereignty of states and the understanding and realization of international principle must, at times, accommodate the **practical** requirements of international cooperation.

Focus on the drafting of ACTA as a Case Study

The following case study will not attempt to make a comprehensive assessment of the text of the Anti-Counterfeiting Trade Agreement (ACTA). Instead, the principal focus will be upon the process of drafting and negotiating ACTA.

Background on ACTA

ACTA is a proposed treaty on standards for the enforcement of intellectual property rights. The chronology of ACTA negotiations is long and complicated. Suffice it to say here that following preliminary discussions beginning in 2007, the treaty text emerged from formal negotiations between

¹⁸ Cf. the quote from Cicero, *supra*. note 2.

¹⁹ *Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 25.

²⁰ The doctrine of *jus cogens*, long often thought to be a necessary principle of justice, has achieved status as part of positive international law. According to Article 53 of the Vienna Convention on the Law of Treaties:

Article 53

Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969),
http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

June 2008 and May 2011 among several leading industrialized countries plus Morocco and Mexico.²¹ Six rounds of closed negotiations were held before a draft of the agreement was first released to the public in April of 2010. In addition to the negotiating states a limited number of individuals representing corporations, NGOs, and cleared advisors were permitted to view the developing texts before that first public disclosure. All were required to sign a very strong nondisclosure agreement prohibiting them from making any of these documents public.²² An earlier “discussion paper” and another draft identifying the negotiating positions of individual countries²³ were leaked to the public by Wikileaks before the April 2010 draft. These, even more than the final text of the treaty, raised serious concerns about the nature and scope of the state obligations it would establish. Many academics, practitioners and public interest organizations concluded that the terms of the publicly released draft of ACTA were unacceptable, and a group of over 75 US law professors signed a letter to President Obama demanding that ACTA not be accepted without fundamental changes.²⁴ Some modifications were made to the draft before the final text of ACTA was publicly released in November of 2010, but the basic thrust and structure of ACTA, as established during years of closed negotiations, remained unaltered. That basic thrust is to replicate the rules and enforcement approaches used to combat trade in physical counterfeit goods and to extend them, without significant modification, to electronic file-sharing.

At a ceremony in Tokyo on October 1, 2011, the United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed the final text of ACTA. Representatives of the remaining ACTA negotiating parties, the European Union, Mexico, and Switzerland, confirmed at that time their continuing intention to sign the Agreement as soon as practicable.²⁵

The Outcry Against ACTA

ACTA was largely a US initiative, reflecting the fact that powerful US interests such as the Motion Picture Association of America and the Recording Industry Association of America have long demanded greater protections for their intellectual property rights, under both national and international law. Within US domestic law some aspects of implementing ACTA would have been

²¹ The negotiating states included Australia, Canada, the European Union (EU), represented by the European Commission and the EU Presidency and the EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.

²² Letter of October 9, 2009, from Carmen Suro-Bredie, Chief FOIA Officer, Office of the US Trade Representative, to Mr. James Love, Director, Knowledge Ecology International, in response to a US Freedom of Information Act request for the names of all persons not employed by the US government who have been given access to documents relating to the position of the U.S. government for the Internet provisions of the Anti-Counterfeiting Trade Agreement and copies of those agreements, http://keionline.org/sites/default/files/ustr-oct9letter_foia.pdf

²³ See, ACTA Informal Predecisional/Deliberative Draft: January 18, 2010, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFcQFjAH&url=http%3A%2F%2Fchristianengstrom.files.wordpress.com%2F2010%2F03%2FActa-20100118-consolidated-text.doc&ei=txnrT-rBAeam4gTZ8lJuAg&usg=AFQjCNFgcACpaJE-v177UqoDAmxCuJVS8g>

²⁴ *Letter from Law Professors to President Barak Obama Calling for the Halt of ACTA*, October 28, 2010, <http://wcl.american.edu/pijip/go/academics10282010>

²⁵ Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties, October 1, 2011, <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>.

addressed by two proposed legislative bills known as the Stop Internet Piracy Act (SOPA)²⁶ and the Protect Intellectual Property Act (PIPA).²⁷ In early 2012 the US Congress was moving towards a vote on those bills which provoked an unprecedented Internet blackout protest by internet companies such as Google and Wikipedia followed by mass protests in a number of US cities. There were rumors that the bill would lead to internet censorship, to policing of internet communications and electronic media and even to searches of computers and smartphones at border crossings to detect illegally copied media. In response to the protests the vote on SOPA /PIPA was indefinitely delayed.²⁸

Inspired in part by the success of the earlier US protests regarding SOPA, in February of 2012 thousands of protestors marched in the streets of Budapest, Paris, Prague, Vilnius, Transylvania and other cities in Europe to protest ACTA.²⁹ Once again, concern about Internet freedoms was the principal cause of public opposition to the treaty. Support for ACTA in Europe quickly began to erode.

Some of the most damning critiques of the ACTA negotiating process, and of the text of ACTA itself, have emanated from the European Parliament. Kader Arif, a French member of the European Parliament, quit as that body's special rapporteur for ACTA. Afterwards, he was scathing in his critique of the treaty.³⁰ He stated that that ACTA was "wrong in both form and substance" and that the European officials who began negotiating the agreement in 2007, kept EU legislators in the dark for years and ignored their concerns, ultimately presenting them with a finished deal for ratification with no real possibility of modifying it. "Voila, that's the masquerade that I denounce," he said.³¹

And this reaction was not an isolated response to ACTA. Another European Parliament statement on ACTA was prepared for the Committee on Civil Liberties, Justice and Home Affairs, for the Committee on International Trade of the European Parliament. That report is much less scathing in

²⁶ Stop Online Piracy Act , H.R.3261, Sponsored by Rep. Lamar Smith, introduced 10/26/2011, <http://judiciary.house.gov/hearings/pdf/112%20HR%203261.pdf>

²⁷ PROTECT IP Act, Introduced in the Senate as S. 968 by Patrick Leahy on May 12, 2011, <http://www.gpo.gov/fdsys/pkg/BILLS-112s968rs/pdf/BILLS-112s968rs.pdf>

²⁸ See, David Jolly, Intellectual Property Pact Draws Fire in Europe, The New York Times, February 6, 2012, Section B; Column 0; Business/Financial Desk; Pg. 5. "In the U.S. protests, Web sites including Wikipedia went dark Jan. 18, and more than seven million people signed Google's online petition opposing the Stop Online Piracy Act and the Protect Intellectual Property Act. Ultimately, even the bills' sponsors in the U.S. Congress backed down under the onslaught of public criticism."

²⁹ *Ibid.*

³⁰ Among the most critical of his comments were these:

"Everyone knows the ACTA agreement is problematic, whether it is its impact on civil liberties, the way it makes Internet access providers liable, its consequences on generic drugs manufacturing, or how little protection it gives to our geographical indications."

"This agreement might have major consequences on citizens' lives, and still, everything is being done to prevent the European Parliament from having its say in this matter. That is why today, as I release this report for which I was in charge, I want to send a strong signal and alert the public opinion about this unacceptable situation. I will not take part in this masquerade."

See, ACTA: une mascarade à laquelle je ne participerai pas - Kader Arif blog

http://www.kader-arif.fr/actualites.php?actualite_id=147, translation from

https://www.laquadrature.net/wiki/ACTA_rapporteur_denounces_ACTA_mascarade.

³¹ David Jolly, Intellectual Property Pact Draws Fire in Europe, THE NEW YORK TIMES, February 6, 2012, Late Edition – Final, Section B; Column 0; Business/Financial Desk; Pg. 5.

tone, it is also highly critical of ACTA although in a more balanced, nuanced and ultimately more persuasive way.³²

Analysis: Evaluating the Quality of ACTA as Law

Most of the potential problems with the quality of ACTA as law reflect, at least in part, the failure to follow basic principles of legislation and legislative drafting. These principles are essentially the same whether applied to national legislation, or with minor adjustments to international treaty drafting. The most relevant of these recognizes that high quality legislation should be clear, succinct, readable, understandable and effective at achieving a clearly defined goal.³³ Process-wise this requires the gathering of information necessary to the drafting effort, consideration of alternative approaches or mechanisms to accomplish the identified goals, and most importantly, a careful pre-assessment of the likely effects of the law. Other requirements may apply as well,³⁴ but some go beyond the scope of this paper.

The need for transparency is an over-arching consideration generally applicable to decision-making in a democratic context. As will be discussed immediately below, ACTA fares poorly as measured by most of the above criteria.

What of the additional “vertical criteria” mentioned earlier? As a matter of positivism and respect for state sovereignty there would not initially appear to be any difficulty with ACTA. States are free to consent to whatever obligations they wish to accept. Viewed holistically, however, the ACTA process created the impression that a small number of ACTA negotiating states were attempting to legislate for the broader international community. Of course, as a formal matter, ACTA cannot create obligations for non-party states, but even false impressions can become a source of problems. Thus the ACTA experience could eventually have the unintended consequence of making it more difficult for the negotiating states to achieve their goal of stronger multilateral cooperation and coordination in IP rights enforcement.

If this occurs it will be unfortunate. There is a practical need for states to cooperate on IP enforcement matters as on so many other issues. Indeed; Wolfgang Friedmann’s international law of cooperation could be cited as a reason for something along the lines of ACTA. Of course if the needed

³² See, Dimitrios Droutsas, Rapporteur, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs, for the Committee on International Trade (European Parliament) on the compatibility of ACTA with the rights enshrined in the Charter of Fundamental Rights of the European Union(bold emphasis added)(COM(2011)0380 – C7-0027/2012 – 2011/0167(NLE), PA\889383EN.doc, PE480.574v01-00, 07.05.2012, available @ <http://acta.ffii.org/?p=1325>

³³ Cf. Eugene C. Thomas, *The Center For Quality Of Law -- A New ABA Service*, ABA JOURNAL, Vol. 72 (1986) page 6, essentially restating the criteria of Montesquieu, discussed *supra*. note 3 and the associated text. .

³⁴ Other points apply as well. “As seen from a holistic perspective there are five points which are of vital importance to the law-drafting process and its methods: (1) the informational background for the law during the drafting process; (2) the identification of the alternative regulatory and other mechanisms available to the particular lawdrafting effort; (3) the assessment and forecast of the effects of the law; (4) the implementation of the rules and supportive measures; and (5) the subsequent study and evaluation of the impact of the law.” Jyrki Tala, Juhani Korhonen & Kaijus Ervasti, *Government Perspective: Improving The Quality Of Law Drafting In Finland*, COLUMBIA JOURNAL OF EUROPEAN LAW, Vol. 4, (1998) page 633.

cooperation is not done according to fundamental principles, such as transparency, and respect for international human rights in holistic perspective, then it will lack democratic legitimacy and overall credibility as does ACTA.

Principal Problems with the Negotiating Process

Secrecy and Lack of Transparency

When the European Parliament's Rapporteur on ACTA resigned from that post his strongest protest concerned the ACTA negotiating process:

I want to denounce in the strongest possible manner the entire process that led to the signature of this agreement: no inclusion of civil society organisations, a lack of transparency from the start of the negotiations, repeated postponing of the signature of the text without an explanation being ever given, exclusion of the EU Parliament's demands that were expressed on several occasions in our assembly.³⁵

Transparency and the participation of broad sectors of civil society in the identification of key societal interests, objectives, and priorities are essential to the process of drafting quality legislation. Without an open, inclusive public debate between the relevant stakeholders on what is to be accomplished and how, the drafters of legislation are simply not in a position to know what needs to be done and what problems need to be avoided. The resulting legislation will therefore lack both balance and democratic legitimacy. This is even more true when the negotiation of a treaty is concerned.

Defenders of ACTA have argued that the closed and secret nature of negotiations on the treaty were justified by its supposed status as a trade agreement, and there is some precedent for the use of closed negotiations to reach agreement on sensitive trade matters. The problem with this argument is that ACTA is not, fundamentally, a trade agreement. It does not deal with tariffs, trade barriers or subsidies. ACTA is fundamentally an intellectual property enforcement treaty, and it is precisely the provisions of the treaty on intellectual property enforcement that are problematical.

The negotiating parties went to great lengths to maintain the secrecy of the ACTA negotiations. As noted above they did not release any working text of the treaty until years into the negotiating process. Ironically, it was leaked documents which first revealed potential problems with the treaty. This led the European Parliament to pass a resolution on 10 March 2010 deploring "the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and the WTO, which have established frameworks for public information and consultation." The resolution also calls for the European Commission and European Council to "grant public and parliamentary access to ACTA negotiation texts and summaries," and reserves for the European Parliament the "right to take suitable action, including bringing a case before the European Court of Justice in order to safeguard its prerogatives."³⁶

³⁵ See, *ACTA: une mascarade à laquelle je ne participerai pas*, op. cit. note 30.

³⁶ European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, Doc. P7_TA(2010)0058, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>

There are doubtless situations when national security, or other important considerations, may justify even a liberal democracy in maintaining, at least for a while, some limited secrecy in treaty negotiations. Nonetheless, these should be narrow and very limited exceptions. There could be no excuse for invoking national security as justification for the years of secret negotiations used in drafting ACTA. Shockingly, however, that is exactly what the US government did. When an NGO formally requested ACTA negotiating texts from the US government under the US Freedom of Information Act the request was denied on the grounds of national security.³⁷ It is difficult to imagine any valid rationale for taking such extreme measures to maintain the secrecy of ACTA negotiations. In retrospect, these measures have had a very detrimental effect upon the prospects for any viable agreement on international IP enforcement. This secrecy fed the fears of those who would later take to the streets in protest of ACTA. It also deprived the ACTA debate of many needed voices and perspectives. As one European Parliament official noted:

Against such a monumental challenge, **what we absolutely need is that every expert we have, every affected organisation or institution we can spare, every citizen that desires to voice an opinion participates, from the beginning, in the creation of a modern social pact, a modern regime of protecting intellectual property rights. ACTA is not, and was not conceived to be, this.** Instead, the Rapporteur believes that an adoption of ACTA would prematurely strangle the debate and tip the balance on one side, would allow for Member States to experiment on laws that could potentially harm fundamental freedoms and set precedents that could be undesirable for future societies.³⁸ (Bold emphasis added)

In addition to the matter of secrecy, the critique above also touches upon a second major flaw in the ACTA negotiations. When an official draft text was finally released and critical comments began to multiply, the negotiating states decided to finalize the text and move to quick adoption. When several countries signed ACTA in October of 2010 the public debate on it had barely begun. The decision to finalize ACTA at that time was clearly premature.

Precipitous Action on Issues of Great Importance

The basic rationale for ACTA, its *raison d'être*, is that a lot is at stake because it is so vitally important to protect intellectual property rights.³⁹ It is undoubtedly true that a lot is at stake. But this very fact should have provided all the more reason to get the process right. There was a lot at stake not only in economic terms related to intellectual property rights, but also in terms of the potential human rights implications of the treaty.

³⁷ "Please be advised that the documents you seek are being withheld in full pursuant to 5 U.S.C. §552(b)(1), which pertains to information that is properly classified in the interest of national security pursuant to Executive Order 12958." Letter of March 10, 2009, from Carmen Suro-Bredie, Chief FOIA Officer, Office of the US Trade Representative, to Mr. James Love, Director, Knowledge Ecology International, in response to a US Freedom of Information Act request for electronic copies of documents relating to ACTA trade negotiations, available online @ http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf.

³⁸ See, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, *op. cit.* note 32.

³⁹ As the New York Times reported, "Ron Kirk, the U.S. Trade Representative, said in October that protecting intellectual property was 'essential to American jobs in innovative and creative industries' and that the treaty 'provides a platform for the Obama administration to work cooperatively with other governments to advance the fight against counterfeiting and piracy.'" David Jolly, *Intellectual Property Pact Draws Fire in Europe*, *op. cit.* note 31.

The draft report of another European Parliament Committee on ACTA stresses that too much is at stake to rush prematurely into an unbalanced approach to these complex issues as ACTA does:

The culture of file-sharing, enabled by the remarkable technological advance of the last decades, **certainly poses direct challenges** to the way we have dealt with compensation of artists and proper enforcement of intellectual rights for the past decades. **Our task, as policymakers, is to overcome this challenge by striking an acceptable balance between the possibilities that technology unravels and the continuation of artistic creation**, which is an emblematic token of Europe's place in the world.

We are therefore, at a defining moment of this debate, an exciting juncture of change. In this sense, **your Rapporteur believes that ACTA comes at a very premature stage and a possible adoption of the Treaty would essentially freeze the possibility of having a public deliberation that is worthy of our democratic heritage.**⁴⁰ (Bold emphasis added)

What was needed was the active participation of representatives of key sectors of civil society on both sides of this issue. Instead only one side, essentially representing IP rights holders, was invited to review the early drafts of ACTA. These early drafts were decisive in that they established the structure, tone and approach of the treaty. The lawyers for the Motion Picture Association of America are no doubt skilled and talented negotiators and drafters, but they were simply not in a position to raise and address the potential human rights implications of the stronger intellectual property protections favored by their clients.

Lawyers have a professional responsibility to represent the interests of their clients, and cannot be expected to do otherwise. But the negotiating countries and private-sector intellectual property lawyers involved may not have appreciated the vital role that internet freedoms play in countries where civil rights and liberties of various kinds have not been, or at least have not long been, established. There are many civil society organizations who could have raised this and other related points in the negotiations, but none of them were invited to participate. The failure of ACTA is evidence of their absence.

What was needed here was careful and open consideration of how best to achieve an acceptable balancing of these key interests. No such discussion has occurred so far, and of course, the negotiations have already concluded.

Inadequate Precaution Regarding the Possible Negative Effect Upon Human Rights Worldwide

Although the text of ACTA does not use the term "human rights" it does call for enforcement action which "preserves fundamental principles such as freedom of expression, fair process, and privacy." So far so good, but the reference to these specific rights seems *pro forma* and functionally isolated from the operative thrust of the treaty.⁴¹ It is not enough merely to mention a few human

⁴⁰ See, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, *op. cit.* note 32.

⁴¹ Article 27(2), for example, states that "each Party's enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy."

rights in the text of a treaty. A precautionary approach, similar to the precautionary principle that applies under international environmental law,⁴² should apply to actions which may have detrimental effects upon fundamental human rights. Had such a precautionary approach been taken the ACTA negotiating states might well have anticipated the potential for harm to fundamental human rights. If they had worked with civil society organizations to address these issues from the start, some of the more troubling aspects of the ACTA treaty might have been avoided.

It should be stressed here that even though ACTA itself may not require actions in violation of fundamental human rights, this is only one small part of the potential human rights impact of the treaty. The potential effects of any legislative text should be considered in “holistic context.”⁴³ Insofar as ACTA would require states to protect admittedly difficult-to-protect intellectual property rights it could, especially if more broadly adopted, be invoked as justification for repressive enforcement measures that the US and EU states themselves might never tolerate. Thus ACTA cannot be properly evaluated in isolation from the broader context of the global struggle for human rights.

The ACTA negotiating states are among the world’s leaders in promoting international human rights. Their efforts in this regard have been critically important, and in negotiating ACTA, they did not set out to undermine international human rights. Nonetheless, this might have been an unintended consequence of the treaty. It would be a sad and perverse development if the efforts of those states to promote human rights world-wide, were to be inadvertently undermined by the ACTA treaty they formulated in isolation from the broader issues concerned.

The Deceptive Scope of ACTA

As the name Anti-Counterfeiting Trade Agreement indicates, ACTA is supposed to be about halting the trade in counterfeit goods. Unfortunately, its scope goes far beyond this. ACTA combines and conflates action with regard to at least three essentially different phenomena. The first of these is the trade in counterfeit goods which is a widespread, well-known and universally condemned form of criminal activity. The second, which may or may not be a widespread problem, is the for-profit commercial distribution of pirated movies, music, software and other intellectual property via the internet. This is in many ways analogous to the trade in counterfeit goods, and could be addressed in much the same way

But ACTA’s principal innovative thrust, and the principal cause of concern about the agreement, concerns an entirely different matter, *i.e.* not-for-profit internet file-sharing which is a relatively new and admittedly widespread activity. There is, as yet, no consensus on how best to address this issue at either the national or the international level. In other words, not-for-profit file sharing is simply not yet a matter ripe for the promulgation of international treaty standards. ACTA attempts to gloss over this problem, with the completely undefined concept of “commercial-scale” piracy discussed briefly below. This compounds the problem of the deceptive scope of the treaty by requiring the criminal enforcement of a dangerously vague notion of law.

⁴² On the Precautionary principle as applied to detrimental effects upon public health, see, for example TATAR C. ROUMANIE, App. No. 67021/01. European Court of Human Rights, January 27, 2009 <http://www.echr.coe.int>.

⁴³ See, *Improving the Quality of Law Factor in Finland*, *op. cit.* note 34 at page 634.

How Bad is the Actual text of ACTA?

Without attempting to make a comprehensive assessment of the text of ACTA, it seems appropriate at this point to offer a few brief comments on the actual text itself.

Most of the Rumored Defects do Not Appear in the Treaty Text

Vague Language in a Penal Law Context

Potential criminalization of non-commercial copyright infringement

The point has often been made, in defense of ACTA, that the treaty does not establish new rules of intellectual property law, but is only intended to coordinate the enforcement of existing national IP law.⁴⁴ While this may have been the original “intent” of the parties as the negotiations began, it is clear that parts of the treaty do go beyond existing national laws in requiring the criminalization of non-commercial copyright infringement.

Article 23 on criminal offences requires states to provide criminal procedures and penalties to be applied to what it refers to as “rights related piracy on a commercial scale,” but the text never offers any definition of what “on a commercial scale means.” How, if at all, would this apply to not-for-profit participation in bitnet style file-sharing, for example? This activity is not commercial insofar as no money changes hands and no one profits. Is this Article to be read to suggest that at some point, the sheer scale and volume of an individual’s participation in file-sharing should be deemed to be virtually “commercial.” That seems to be the most plausible interpretation of the treaty language. And yet it cannot be said that there is an international consensus on the meaning of this language since there is no accepted definition, in ACTA or elsewhere, of “commercial scale” piracy.

The use of vague language is inherently incompatible with good legislation,⁴⁵ and even less compatible with good penal legislation. Were the language of ACTA’s Article 23 to be enacted into national legislation it would raise serious issues of legality.

Language which leaves the door open to abusive IP related border searches

Perhaps the most commonly heard objection to ACTA is that it would authorize customs agents to search computers and smartphones at border crossing in search of pirated music, movies software and the like. On this score, the actual text of ACTA is neither clearly threatening nor clearly reassuring.

Section 3 of ACTA is addressed to “Border Measures,” and the bulk of that section refers only to “suspect goods” which one might normally expect to refer to physical goods and therefore to exclude copies of electronic media. Unfortunately the text of ACTA frequently seems to conflate the two. Furthermore, Article 13 on the “Scope of Border Measures” suggests that border enforcement of IP

⁴⁴ See, European Commission Factsheet, *What is ACTA About*, http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_149003.pdf

⁴⁵ Cf. Montesquieu’s criteria for good legislation, *supra*. note 3 and accompanying text.

rights should “not discriminate unjustifiably between intellectual property rights.” This could be interpreted to mean that the rules of that section should apply more broadly to all materials alleged to violate IP rights.

Article 14(2), in turn, states that “[a] Party may exclude from the application of this section small quantities of goods of a non-commercial nature contained in traveler’s personal luggage.” This provision seems on its surface to encourage moderation and respect for privacy by allowing states to relax border enforcement targeting personal luggage. But in stating this “permissive” rule the implication is that such searches of personal luggage are OK. Whether such border searches are acceptable is not wholly an issue of international trade law. Viewed in broader perspective it is an issue of civil liberties, a key aspect of international human rights.

Requiring Alleged Infringers to Inform on Third Persons Alleged to be Involved

Article 11 of the ACTA text calls for the judicial authorities of the parties to have the authority, upon the request of the right holder, to order the infringer, or even the alleged infringer, to provide any information relating to the infringement that he or she possesses or controls including the “identification of third persons alleged to be involved.” This could raise a number of troubling issues, but in any case it would be excessive to order anyone to inform on third parties before there has been a judicial determination of actual infringement.

The Future of ACTA

The European Court of Justice has been asked to rule on whether ACTA is consistent with “the EU’s fundamental rights and freedoms,”⁴⁶ and a ruling against ACTA could doom the treaty. Meanwhile four different European Parliament committees (International Trade, Civil Liberties, Industry, Legal Affairs and Development) all recommended that the European Parliament should reject ACTA⁴⁷ and it did so on July 4, 2012^{***}. Without European participation, it is doubtful whether the treaty will ever receive the 6 ratifications it needs to enter into effect⁴⁸ even for those states (if any) which may finally decide to ratify it.

Observations and Conclusions

It is not surprising that IP rights holders, left to formulate their wish-list of changes in intellectual property law and its enforcement, made extreme proposals which completely failed to balance the broader interests of national and international societies. What is surprising is the way the negotiating

⁴⁶ *Statement by Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship, on freedom of expression and information via the Internet, attempts to block websites, “three-strikes-laws”, and ACTA,*

http://ec.europa.eu/commission_2010-2014/reding/pdf/quote_statement_en.pdf

⁴⁷ *Parliament should say NO to ACTA, says International Trade Committee*, European Parliament, Committee on International Trade, Press release of 22-06-2012, REF.: 20120614IPR46889, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20120614IPR46889%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

⁴⁸ Article 40 of ACTA states that it will come into effect thirty days after it has received six ratifications.

governments provided a forum, and a process, which allowed these unbalanced proposals to be formulated in secret and without input from the broader public until the very late stages. The almost inevitable result was an unbalanced and flawed text which, by the time it was released to the public, was susceptible only to minor revisions. From the start, this was a recipe for bad law.

It should be apparent that the process and approach taken in negotiating ACTA violated basic principles of legislation, and could scarcely have been expected to produce law of an acceptable quality. This problem would be serious indeed even if the law concerned were national legislation. Since ACTA purports to set standards at a “plurilateral” level it is doubly dangerous

This is not to say that the entertainment industry does not have a legitimate interest in addressing its concerns regarding file-sharing. But if the matter is one of great importance then the need for an open and transparent debate about the values concerned is all the more important. The basic thrust, goal and approach of ACTA is to replicate the rules and enforcement approaches used to combat trade in physical counterfeit goods and to extend them, unmodified, to electronic file-sharing. One can certainly understand that rights holders would favor this approach, but there is no broad international agreement on this yet. Most IP standards developed prior to the development of cyberspace as we know it today. The application of these same standards to the new domain of cyberspace may well be appropriate, but not without carefully adapting them, as needed, to the unique circumstances which prevail in that space.

Surprisingly, the separation of powers between European Union institutions proved to be a key factor in the demise of ACTA. Were it not for the European Parliament the European negotiators, (including the European Commission), seemed determined to complete the ACTA treaty process at all costs.

What lessons can we learn from ACTA about the vertical dimension in the quality of law? First of all it has been confirmed that the use of almost conspiratorial secrecy to negotiate a treaty of broad scope and effect is inconsistent with democratic values. It is also evident that important new international standards should not be established before individual states have had a chance to debate them openly and hopefully, to achieve internal consensus on the problem, the objective, the approach, the risk/return balance, etc. In sum, the lesson is that some proposed international standards are simply not ripe for vertical integration into national, or even regional, legal orders.