Vertical Dimensions in the Quality of Law

Bartram Brown, Chicago-Kent College of Law

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Introduction and Thesis

Concern for the quality of law is not a new idea but it is increasingly relevant today as law emanates from national, international and regional sources. 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. Thomas Jefferson 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. The success of a state in this task depends upon the quality of its law.

There are many different standards for evaluating the quality of law, but some are almost self-evident. In The Spirit of Laws the French writer Montesquieu formulated his criteria for quality legislation. Quite sensibly, he proposed that legislation should be concise, written in plain, simple and unambiguous language, and have few if any special exceptions.

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

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1 “There is 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.

2 “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.

3 See: Montesquieu C. The Spirit of Laws, (1748), Book XXIX. Of the Manner of Composing Laws, Chapter 16. Things to be observed in the composing of Laws.
natural law and natural rights. He was concerned about real law, man-made positive law, and how to make it better.

If certain policies or approaches can improve the quality of law in one national system, this experience can become the basis for similar success in other national systems. The “horizontal” borrowing by states of legal concepts and approaches is a principal focus of comparative law. The “vertical” dimension is in play when insights, approaches and ideas embraced at the national level are adapted and applied at the international level or vice-versa.

Due to the vast changes in the international legal system anticipated by the late Wolfgang Friedmann, 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. 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 the Anti-Counterfeiting Trade Agreement (ACTA).

The thesis of this paper is twofold. It observes the various criteria used to assess and improve the quality of national law apply mutatis mutandis when addressing the quality of a multilateral treaty. It argues 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.

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8 ACTA Negotiating Parties, Anti-Counterfeiting Trade Agreement (ACTA), Signed Tokyo, Japan: 2011.
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The Vertical Dimension and its Specificities

In the first instance quality of law analysis is focused upon the law produced by national 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.” The quality of law lens, so to speak, was focused on national law, not international law. 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.

The nature of the international legal system

The International Law of Coexistence

According to the 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.

To the extent that international law is based on the consent of states, its form and effectiveness tend 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 labeled the “international law of coexistence.” 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. This change has accelerated

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10 “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, C.M. Law-Making Treaties: Form and Function in International Law (January, 28 2009). Nordic Journal of International Law, No. 74, 2005, p. 1.

11 See: Article 38 of the Statute of the International Court of Justice.

12 Friedmann, Changing Structure, supra note 8, p. 5.

since the Second World War with the establishment of the United Nations and the transformation of its membership after decolonization.\textsuperscript{14}

**The International Law of Co-operation**

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 different levels including:

(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.\textsuperscript{15} (Bold emphasis added)

Friedmann 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.

**Positivism, principle and the practical imperative of co-operation: “Vertical” criteria for the quality of international law**

**The limits of positivism**

The international law of coexistence is all about respect for the sovereignty and the sovereign prerogatives of states. 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,\textsuperscript{16} positivism remains relevant as the basis of state obligations. It must therefore be one of the primary—but not the only—criteria of quality of law analysis applicable to treaties.

**The demands of principle**

At times even sovereignty and positivism must yield to the dictates of justice.\textsuperscript{17} Thus although the Permanent Court of International Justice ruled in 1923 that “the

\textsuperscript{14} Friedmann, *Changing Structure*, supra note 8, p. 5.

\textsuperscript{15} Ibid, p. 367.

\textsuperscript{16} Cf. the doctrine of *jus cogens* discussed below.

\textsuperscript{17} Cf. the quote from Cicero, *supra* note 2.
right to enter into international engagements is an attribute of State sovereignty,” international law now formally recognizes that a treaty that conflicts with a peremptory norm of international law is null and void. 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 be an important criterion for evaluating the quality of all positive law. As applied to international law, however, the task is even more complex, since the language of a treaty, for example, should be consistent with principle in the dualist perspective of both international law and national legal systems.

**The practical imperative of cooperation**

In the interdependent world of the 21st century, the “universal international law of cooperation” 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 assess 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 June 2008 and May 2011 among several leading industrialized countries plus Morocco and Mexico. 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

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19 The doctrine of *jus cogens*, long believed to be a necessary principle of justice, has achieved status as part of positive international law. See, Article 53 of the Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

20 See: Cicero, as quoted *op. cit*., note 1.

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.
a very strong nondisclosure agreement prohibiting them from making any of these documents public.\textsuperscript{22} An earlier “discussion paper” and another draft identifying the negotiating positions of individual countries\textsuperscript{23} 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.\textsuperscript{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. A large part of 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.

Representatives of several ACTA negotiating parties signed the treaty on October 1, 2011, and the others confirmed at that time their continuing intention to sign the Agreement as soon as practicable.\textsuperscript{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 issues raised by ACTA would have been addressed by two proposed legislative bills known as the Stop Internet Piracy Act (SOPA)\textsuperscript{26} and the Protect Intellectual Property Act (PIPA).\textsuperscript{27} 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. These concerns provoked an unprecedented Internet blackout protest by Internet companies such as Google and Wikipedia followed by mass protests in a number of US cities. In response to the protests the vote on SOPA /PIPA was indefinitely delayed.\textsuperscript{28}

\textsuperscript{22} Letter of October 9, 2009, from the Office of the US Trade Representative 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 including copies of those agreements.


\textsuperscript{24} Letter from Law Professors to President Barak Obama Calling for the Halt of ACTA, October 28, 2010.

\textsuperscript{25} Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties, October 1, 2011.


\textsuperscript{27} PROTECT IP Act, Introduced in the Senate as S. 968 by Patrick Leahy on May 12, 2011.

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 parts of Europe to protest ACTA.29 Once again, concern about Internet freedoms was the principal cause of public opposition to the treaty. European support for ACTA 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. When the European Parliament's special rapporteur for ACTA resigned, 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 Other committees of the European Parliament reacted similarly.32

Analysis: Evaluating the Quality of ACTA as Law

Most of the potential problems with the quality of ACTA 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. The need for transparency is an overarching consideration generally applicable to decision-making in a democratic context. Other requirements may apply as well,34 but these go beyond the scope of this paper. 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? Viewed holistically, however, the ACTA process created the impression that a small number of ACTA

32 See: Droutsas D. 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, (COM(2011)0380 – C7-0027/2012 – 2011/0167(NLE), PA)889383EN.doc, PE480.574v01-00, 07.05.2012.
33 Thomas E. The Center For Quality of Law – A New ABA Service, ABA Journal, Vol. 72 (1986), p. 6, essentially restating the criteria of Montesquieu, discussed supra note 3 and the associated text.
negotiating states were attempting to legislate for the broader international community. Of course, as a formal matter, no treaty can 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 parties to achieve their goal of stronger multilateral cooperation and coordination in IP rights enforcement.

Principal Problems with the Negotiating Process

Secrecy and Lack of Transparency

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 really 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 multilateral 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. 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 problematic.

Shockingly, a formal request to the US government for the ACTA negotiating texts was denied on the grounds of national security. The extreme measures taken to maintain the secrecy of ACTA negotiations deprived the ACTA debate of many needed voices and perspectives. As one European Parliament official noted:

… 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.

When an official draft text of ACTA was finally released in April 2010 and critical comments began to multiply, the negotiating states decided to finalize the text and move to quick adoption. That decision was clearly premature. When several countries signed ACTA in October of 2010 the public debate on it had barely begun.

35 “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 the Office of the US Trade Representative in response to a US Freedom of Information Act request for electronic copies of documents relating to ACTA trade negotiations.

36 See: Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, supra note 30.
Precipitous Action on Issues of Great Importance

Supporters of ACTA argue is that a lot is at stake because it is so vitally important to protect intellectual property rights. It is undoubtedly true that a lot is at stake, but this is all the more reason to get the process right. Much is 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.

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:

... 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.

The active participation of representatives of key sectors of civil society on both sides of this issue was needed. The delegations representing the negotiating states were simply not in a position to recognize and address the potential human rights implications of the stronger intellectual property protections they clearly favored.

Inadequate Precaution Regarding the Possible Negative Effect on Human Rights Worldwide

ACTA cannot be properly evaluated in isolation from the broader context of the global struggle for human rights. The potential effects of any legislative text should be considered in “holistic context.” Under international environmental law a precautionary principle applies to actions which may have severe detrimental effects upon the environment. A similar precautionary approach should arguably apply to actions which may endanger human rights. Although ACTA itself may not require actions in violation of fundamental human rights, it could provide states with a pretext for violating them. ACTA would require states to protect admittedly difficult-to-protect intellectual property rights in cyberspace as in the physical world. Were ACTA to be adopted by governments around the world, some might invoke it as justification for repressive enforcement measures that the US and EU states themselves would never tolerate.

The ACTA negotiating states are among the world’s leaders in promoting international human rights. Their efforts in this regard have been critically important.

37 “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.’” Jolly D. Intellectual Property Pact Draws Fire in Europe, supra note 28.

38 See: Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, supra note 30.

39 See: Improving the Quality of Law Factor in Finland, supra note 32 at p. 634.

40 On the Precautionary principle as applied to detrimental effects upon public health, see, for example, European Court of Human Rights. Tatar C. Roumanie. App. No. 67021/01, January 27, 2009.
negotiating ACTA, they did not set out to undermine international human rights, yet such a result could be an unintended consequence of the treaty. It would be a sad and perverse development if efforts to promote human rights world-wide were to be inadvertently undermined by the ACTA treaty.

The Future of ACTA

On July 4, 2012 the European Parliament voted overwhelmingly to reject ACTA. Without European participation, it is doubtful whether the treaty will ever receive the six ratifications it needs to enter into effect even for those states (if any) which may finally decide to ratify it.

Conclusion

The entertainment industry has every right to seek better international standards and enforcement procedures on digital counterfeiting, but these must first be agreed to, preferably after an open, transparent and global debate about the values concerned. Instead, 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 could be doubly dangerous

ACTA attempts to replicate the rules and enforcement approaches used to combat trade in physical counterfeit goods and to extend them, essentially unmodified, to electronic file-sharing. It may well be both necessary and appropriate to apply these standards to the new domain of cyberspace, but not without carefully adapting them to the unique circumstances which prevail there.

The fundamental lesson of ACTA on the quality of law is that some proposed international standards are simply not ripe for vertical integration into national, or even regional, legal orders.

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

43 See: Article 23 of ACTA on criminal offences which requires states to provide criminal procedures and penalties to be applied to what it refers to as “rights related piracy on a commercial scale” without offering any definition of what “on a commercial scale means.” ACTA, supra note 8.


Cicero M.T. The Republic (De re publica).


