

RECENT DEVELOPMENT:
THE ANTI-COUNTERFEITING TRADE AGREEMENT[♦]

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INTRODUCTION

The framework for international intellectual property (“IP”) protection and enforcement is in the shadow of a radical change. Sometime before February 2008, the United States (“U.S.”), the European Union (“E.U.”), Japan, and other countries began discussing the possibility of a new treaty or agreement, tentatively called the Anti-Counterfeiting Trade Agreement (“ACTA”), that

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would establish stronger global IP enforcement in the realm of counterfeit goods. However, instead of proposing the new agreement within established trade and IP fora such as the World Trade Organization (“WTO”) or the World Intellectual Property Organization (“WIPO”), these countries decided to negotiate independently and out of the view of non-participants. Until a “Discussion Paper” on the treaty was anonymously posted onto a whistleblowing website, WikiLeaks,¹ other states and stakeholders had no idea that such an agreement was taking shape. To the shock of all non-participants, the discussion paper revealed proposed substantive measures that augment or, in some areas, go beyond standards in existing IP trade agreements, such as increased border enforcement powers, enhanced criminal sanctions and statutory damages, and additional methods for facilitating cooperation between internet service providers (“ISPs”) and enforcement officials. And while criticism has mostly focused upon these strict substantive measures listed in the discussion paper, the procedural secrecy of negotiations—such as the lack of a publication of a draft text, the speed at which negotiations were progressing, the rejection of established IP/trade fora to negotiate the agreement, and the exclusion of developing-country and non-rights-holding stakeholder input—presents a grim vision of how the current IP trade negotiating field operates.

Part I of this Recent Development describes the development of international IP treaties and lays out the precise origins and development of ACTA. Part II discusses the possible substantive provisions of ACTA. Finally, Part III presents the procedural elements of ACTA’s negotiation that underlie the international controversy the proposed treaty has raised.

I. HISTORY OF THE ACTA NEGOTIATIONS

In the 1980s, the U.S., the E.U., Japan, and other developed countries sought an alternative forum for international IP regulation outside of WIPO and lobbied for the creation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”) negotiations. This strategy marked the beginning of forum-shifting, one method for developed countries to seek increased IP protection.² Before the

¹ For more information about WikiLeaks, see WikiLeaks, www.wikileaks.org (last visited Mar. 15, 2010).

² See PETER DRAHOS, STUDY PAPER 8: DEVELOPING COUNTRIES AND INTERNATIONAL INTELLECTUAL PROPERTY STANDARD-SETTING, *available at* http://www.iprcommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf; SISULE

creation of TRIPS under the WTO,³ WIPO had been the main forum for international IP regulation.⁴ While WIPO is a specialized agency of the United Nations, whose goal is to “promote the protection of intellectual property throughout the world,”⁵ it does not itself set minimum standards for IP protection, but administers a collection of treaties that does so.⁶ The number of treaties under the WIPO umbrella provided members with “rule diversity,” allowing a state to pick and choose treaties and thus tailor its IP regulation to the specific needs of that state.⁷ This fact, coupled with WIPO’s lack of an IP enforcement mechanism, drove many developed states to seek an alternative forum for the regulation of IP on an international scale, namely, GATT.⁸ While many of the standards eventually set by TRIPS were largely already embodied in the collection of treaties administered by WIPO, GATT as a forum provided important alternative methods for obtaining increased IP protection, including trade remedies and concessions.⁹ In addition, while under WIPO developing states could use their one-state-one-vote power to counterbalance the interests of the few developed states, those states had much less influence in GATT.¹⁰ The advent of TRIPS established minimum standards of IP protection.¹¹ All subsequent IP-related agreements, whether bi- or multi-lateral, would at the very least incorporate the minimum standards set by TRIPS, but often set even higher standards.¹²

F. MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) 11 (2003), *available at* <http://www.quno.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf>.

³ The WTO was formed during the Uruguay Round of GATT negotiations, and came into being on January 1, 1995. WTO | Understanding the WTO: Basics – What Is the World Trade Organization?, http://www.wto.int/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Mar. 15, 2010). All WTO members must comply with TRIPS. *See* WTO | Understanding the WTO: The Agreements – Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar. 15, 2010).

⁴ MUSUNGU & DUTFIELD, *supra* note 2, at 11.

⁵ MUSUNGU & DUTFIELD, *supra* note 2, at 5 (quoting Art. 3 of the Convention Establishing the World Intellectual Property Organization art. 3(i), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3).

⁶ MUSUNGU & DUTFIELD, *supra* note 2, at 5.

⁷ *Id.* at 10.

⁸ *See id.* GATT was a series of trade negotiations that preceded and eventually gave birth to the WTO in the Uruguay Round. *See* WORLD TRADE ORGANIZATION, THE WORLD TRADE ORGANIZATION IN BRIEF (2009), *available at* http://www.wto.org/english/res_e/doload_e/inbr_e.pdf.

⁹ MUSUNGU & DUTFIELD, *supra* note 2, at 10.

¹⁰ *Id.* (citing DRAHOS, *supra* note 2).

¹¹ WTO | Understanding the WTO: The Agreements – Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Mar. 15, 2010).

¹² *See* DRAHOS, *supra* note 2.

The initial idea to establish a new agreement on IP enforcement arose from the first Global Congress on Combating Counterfeiting (“GCCC”).¹³ The GCCC, hosted by the World Customs Organization (“WCO”), WIPO, Interpol, and a number of international business organizations, was created in 2004 to address the “myriad adverse costs to social welfare and economic development that was resulting from the rampant theft of intellectual property.”¹⁴ After the first Congress in May 2004, the G8 Summit in Gleneagles met in July 2005 and produced a document that declared the need for increased enforcement against IP piracy and counterfeiting.¹⁵ At the second and third GCCCs in November 2005 and January 2007 respectively, the attendees took note of both the G8 statement and Japan’s proposal for a new international agreement on counterfeiting and piracy and vowed to explore the proposal.¹⁶ The United States Trade Representative (“USTR”) has admitted that the U.S. and Japan, in as early as 2006, had already jointly considered the idea of a new multilateral treaty to combat counterfeiting and piracy,¹⁷ and that preliminary talks occurred throughout 2006 and 2007 between the U.S., Canada, the E.U., Japan, and Switzerland.¹⁸ At the fourth GCCC in February 2008, the Outcomes Statement acknowledged that negotiations for an anti-counterfeiting trade agreement had already commenced by recommending that “[m]embers of the Global Congress Steering Group partnership should work . . . to develop

¹³ See Australian Government, Department of Foreign Affairs and Trade, Discussion Paper: An International Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA), Nov. 13, 2007, <http://www.dfat.gov.au/trade/acta/discussion-paper.html> [hereinafter DFAT Discussion Paper].

¹⁴ Global Congress Combating Counterfeiting & Piracy, About the Global Congress, <http://www.ccapcongress.net/about/about.htm> (last visited Mar. 15, 2010).

¹⁵ Reducing IPR Piracy and Counterfeiting through more Effective Enforcement, http://www.eff.org/files/filenode/EFF_PK_v_USTR/foia-ustr-acta-response1-doc46.pdf (last visited Apr. 1, 2010).

¹⁶ Global Congress Combating Counterfeiting & Piracy, The Second Global Congress on Combating Counterfeiting and Piracy, The Lyon Declaration, Nov. 15, 2005, <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>; Global Congress Combating Counterfeiting & Piracy, Third Global Congress on Combating Counterfeiting and Piracy, Suggestions Extending from the Third Global Congress, Jan. 31, 2007, http://www.ccapcongress.net/archives/Geneva/Files/Congress%20Recommendations_Geneva%20Jan%202007.pdf. The Australian Department of Foreign Affairs and Trade suggests that Japan first proposed a new international treaty on anti-piracy and counterfeiting at the July 2005 G8 Summit, producing the Gleneagles document on IPR enforcement. DFAT Discussion Paper, *supra* note 13.

¹⁷ Office of the United States Trade Representative, The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion, http://www.ustr.gov/webfm_send/1479 (last visited Mar. 22, 2010) [hereinafter USTR Summary of Key Elements].

¹⁸ *Id.*

a holistic strategy on the negotiation and revision of international conventions and treaties related to counterfeiting and piracy” and, in doing so, must “take into account the project work of the G8 and initiatives aiming at higher standards in the field of IP enforcement such as . . . preparations for the conclusion of an Anti-Counterfeiting Trade Agreement (ACTA).”¹⁹

Throughout late 2007 and early 2008, information about ACTA began surfacing in official and (mostly) unofficial forms. On October 23, 2007, the United States Trade Representative, Susan C. Schwab, announced that the U.S. and “some of its key trading partners will seek to negotiate . . . [a] new, higher benchmark for [IP] enforcement” and emphasized that negotiations would not be part of any existing international organizations.²⁰ On this same day, Canada, the European Commission and the Ministry of Foreign Affairs of Japan all made public their intentions to be part of a new international agreement setting new legal standards for the piracy and counterfeiting of intellectual property.²¹ Around this same time, the office of the USTR released the first Fact Sheet on ACTA (“First Fact Sheet”).²² However, not until February 15, 2008, did the USTR publish a notice requesting public comments be submitted concerning “specific matters that should be the focus of [ACTA].”²³ In addition, on November 13, 2007, Australia requested that public comments be submitted addressing whether Australia should join ACTA negotiations.²⁴ It has also been reported that Australia requested additional public

¹⁹ Global Congress Combating Counterfeiting & Piracy, Fourth Global Congress on Combating Counterfeiting and Piracy – Dubai Declarations, Mar. 30, 2008, <http://www.ccapcongress.net/archives/Dubai/Files/Final%20Dubai%20Outcomes%20Declaration.pdf>.

²⁰ Press Release, Office of the United States Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), *available at* <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>.

²¹ See DUNCAN MATTHEWS, BRIEFING PAPER ON THE FIGHT AGAINST COUNTERFEITING AND PIRACY IN THE BILATERAL TRADE AGREEMENTS OF THE EU 19 (2008), *available at* <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=21459>; Standards Council of Canada, Canada Joins Discussions Toward International Anti-Counterfeiting Trade Agreement, Oct. 23, 2007, <http://www.scc.ca/en/news-events/news/archives-2007> (follow “2007-10-23” hyperlink); Press Release, Ministry of Foreign Affairs of Japan, Framework of the Anti-Counterfeiting Trade Agreement (ACTA) (Oct. 23, 2007), *available at* http://www.mofa.go.jp/announce/announce/2007/10/1175848_836.html.

²² Office of the United States Trade Representative, Fact Sheet: Anti-Counterfeiting Trade Agreement (Oct. 2007), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file122_13414.pdf [hereinafter USTR First ACTA Fact Sheet].

²³ Anti-Counterfeiting Trade Agreement (ACTA): Request for Public Comments, 73 Fed. Reg. 8910 (Feb. 15, 2008).

²⁴ DFAT Discussion Paper, *supra* note 13.

comments be submitted concerning substantive positions Australia should take in ACTA.²⁵

On May 21, 2008, a supposed ‘Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement’ (“Discussion Paper”) was posted onto WikiLeaks.²⁶ According to IP Justice,²⁷ this document was distributed to a few select companies and organizations with an interest in increased IP enforcement, but not to other public interest organizations that may have counterbalancing interests.²⁸ While bloggers speculated about ACTA and called for increased transparency in the process,²⁹ no new official information or statements came out until the conclusion of the G8 Hokkaido Summit in June 2008, where leaders urged for conclusion of ACTA by the end of the calendar year.³⁰ On August 4, 2008, the USTR published a second Fact Sheet (“Second Fact Sheet”) on ACTA that included a Q&A section that glossed over some of the concerns that had been discussed by many critics.³¹ On September

²⁵ See Michael Geist, *Public Left Out of Anti-Counterfeiting Trade Talks*, TORONTO STAR, July 28, 2008, available at <http://www.thestar.com/printarticle/468267>. Geist even argues that the U.S. has been more inclusive than Canada, who has yet to publish the public comments that have been submitted. *Id.* On September 24, 2008, the USTR posted on its website a file containing all public comments submitted. Office of United States Trade Representative, Re: Anti-Counterfeiting Trade Agreement (ACTA): Request, http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file989_15121.pdf (last visited Apr. 1, 2010). The majority of the public comments reflected criticisms expanded upon in this recent development, *infra*.

²⁶ The WikiLeaks website is currently offline due to funding problems. For a general discussion on ACTA, including reference to The WikiLeaks Document, see Knowledge Ecology International, The Anti-Counterfeiting Trade Agreement (ACTA), <http://keionline.org/acta>.

²⁷ IP Justice is an “international civil liberties organization that promotes balanced intellectual property law.” IP Justice, Our Mission, <http://ipjustice.org/wp/about/mission/> (last visited Mar. 15, 2010). “The organization’s focus is on international treaties, directives, and other trade agreements that address intellectual property rights or impact freedom of expression guarantees.” *Id.*

²⁸ ROBIN GROSS, IP JUSTICE WHITE PAPER ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT 4-5(2008), available at http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf.

²⁹ See e.g., Nate Anderson, *The Real ACTA Threat (It's Not iPod-Scanning Border Guards)*, ARS TECHNICA, June 2, 2008, available at <http://arstechnica.com/news.ars/post/20080602-the-real-acta-threat-its-not-ipod-scanning-border-guards.html>; Michael Geist, Government Should Lift Veil on ACTA Secrecy, MichaelGeist.ca, June 9, 2008, <http://www.michaelgeist.ca/content/view/3013/99999/>; The Patry Copyright Blog, An Offer Countries Can't Refuse, <http://williampatry.blogspot.com/2008/05/offer-countries-cant-refuse.html> (May 27, 2008, 8:10 EST).

³⁰ G8 Hokkaido Toyako Summit, G8 Hokkaido Toyako Summit Leaders Declaration § 17, Jul. 8, 2008, http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714_en.html.

³¹ Office of the United States Trade Representative, Trade Facts, Anti-Counterfeiting Trade Agreement (Aug. 4, 2008), available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_15084.pdf [hereinafter USTR Second ACTA Fact Sheet].

5, 2008, the USTR announced that it would hold a public meeting on ACTA to “inform stakeholders about ACTA and to receive comments from stakeholders about their views regarding this initiative.”³² Perhaps in anticipation of the meeting, more than one hundred organizations wrote a letter to the USTR calling for publication of a draft text.³³ In addition, the Electronic Frontier Foundation and Public Knowledge filed a lawsuit under the Freedom of Information Act (“FOIA”) requesting release of records concerning ACTA.³⁴ On October 2, 2008, Senators Patrick Leahy and Arlen Specter, members of the Senate Committee on the Judiciary, wrote a letter to Ambassador Schwab requesting that the USTR refrain from making the ACTA coverage so rigid as to render it difficult for Congress to later adapt domestic law to technological innovations without being constrained by ACTA.³⁵ They also requested that the USTR not include any provisions about liability for internet service providers, due to the state of the law being in flux.³⁶ Finally, on October 8-9, 2008, ACTA representatives met in Tokyo to continue discussions on criminal and civil IP enforcement.³⁷ From December 15-18, 2008, participating countries held the fourth round of ACTA negotiations in Paris.³⁸ A fifth round of negotiations was held in Rabat in July 2009 after the Obama administration pushed back the March 2009 round in or-

³² Anti-Counterfeiting Trade Agreement (ACTA): Notice of Public Meeting, 73 Fed. Reg. 51860 (Sept. 5, 2008), *available at* <http://edocket.access.gpo.gov/2008/E8-20572.htm>.

³³ Press Release, Essential Action, Secret Counterfeiting Treaty Public Must be Made Public, Global Organizations Say (Sept. 15, 2008), *available at* <http://www.essentialaction.org/access/index.php?/archives/173-Secret-Counterfeiting-Treaty-Public-Must-be-Made-Public,-Global-Organizations-Say.html>.

³⁴ Complaint for Injunctive and Declaratory Relief, Elec. Frontier Found. v. Office of the U.S. Trade Representative, No. 08-01599 (D.D.C. Sept. 17, 2008) [hereinafter EFF Complaint]; *see also*, Press Release, Public Knowledge, Public Interest Groups Sue Government to Force Open Secret Trade Deal (Sept. 18, 2008), *available at* <http://www.publicknowledge.org/node/1747>; Press Release, Electronic Frontier Foundation, U.S. Trade Office Withholds Documents on Secret IP Enforcement Treaty (Sept. 18, 2008), *available at* <http://www.eff.org/press/archives/2008/09/17>. The thrust of the complaint asserts that ACTA involves “a matter of substantial public interest,” and there is an “urgency to inform the public . . .” EFF Complaint, *supra*.

³⁵ Letter from Senator Patrick Leahy, Chairman of the Committee on the Judiciary, and Senator Arlen Specter, Ranking Member of the Committee on the Judiciary, to Ambassador Susan C. Schwab, United States Trade Representative (Oct. 2, 2008), *available at* <http://www.publicknowledge.org/pdf/senate-acta-letter-20081002.pdf>.

³⁶ *Id.*

³⁷ Press Release, United States Trade Representative, Statement from USTR Spokesman Scott Elmore on the Anti-Counterfeiting Trade Agreement (ACTA) (Oct. 10, 2008), http://www.ustr.gov/sites/default/files/uploads/pdfs/press_release/2008/asset_upload_file878_15167.pdf [hereinafter Oct USTR Press Release].

³⁸ Press Release, United States Trade Representative, Statement from USTR Spokesman Scott Elmore on the Anti-Counterfeiting Trade Agreement (ACTA) (Dec. 18, 2008), http://www.ustr.gov/sites/default/files/uploads/pdfs/press_release/2008/asset_upload_file353_15250.pdf [hereinafter Dec USTR Press Release].

der to transition in the new USTR, Ron Kirk.³⁹ A sixth round was held in Seoul in November 2009, after which the USTR released a summary of the key elements under discussion.⁴⁰ A seventh round took place in Guadalajara, Mexico on January 26-29, 2010.⁴¹ In early 2010, a number of documents relating to ACTA were leaked, including a consolidated draft of the text dated January 18, 2010.⁴² As of March 31, 2010, an eighth round of negotiations has been scheduled for April 12-16, 2010, in Wellington, New Zealand.⁴³

II. SCOPE OF PROPOSAL

TRIPS established a minimum standard of IP enforcement for all member countries,⁴⁴ but allows for member countries to go above and beyond TRIPS standards and create even stricter standards⁴⁵ (often called “TRIPS-plus”).⁴⁶ Membership in ACTA would be an example of “TRIPS-plus,” since the provisions in ACTA go beyond TRIPS’ minimum standards. In fact, the USTR has indicated that one reason for ACTA has been a general desire for cer-

³⁹Michael Geist, March Round of ACTA Negotiations Delayed at U.S. Request, MichaelGeist.ca, Feb. 20, 2009, <http://www.michaelgeist.ca/content/view/3691/125/>.

⁴⁰USTR Summary of Key Elements, *supra* note 17.

⁴¹New Zealand Ministry of Foreign Affairs & Trade, ACTA Negotiations, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Anti-Counterfeiting/0-ACTAagendaroundseven.php> (last visited Mar. 22, 2010).

⁴²See Intellectual Property Watch, ACTA Internet Document Leaked, New EU Transparency Call, Feb. 23, 2010, <http://www.ip-watch.org/weblog/2010/02/23/acta-internet-document-leaked-new-transparency-call/>; Michael Geist, Major ACTA Leak: Internet and Civil Enforcement Chapters with Country Positions, MichaelGeist.ca, Mar. 1, 2010, <http://www.michaelgeist.ca/content/blogsection/0/125/10/30/>; Michael Geist, New ACTA Leaks: Criminal Enforcement, Institutional Issues, and International Cooperation, MichaelGeist.ca, Mar. 19, 2010, <http://www.michaelgeist.ca/content/blogsection/0/125/10/10/>; New ACTA Leak: 01/18 Version of Consolidated Text, laquadrature.net, Mar. 23, 2010, <http://www.laquadrature.net/en/0118-version-of-acta-consolidated-text-leaks>. The leaked text concerning the Civil Enforcement and Digital Environment provisions is available at <http://blog.die-linke.de/digitalelinke/wp-content/uploads/ACTA-6437-10.pdf> (last visited March 31, 2010). The US-Japan Joint Proposal Consolidated Text is available at laquadrature.net, http://www.laquadrature.net/files/201001_acta.pdf (last visited March 31, 2010) [hereinafter Consolidated Text].

⁴³Memorandum from the Council of the EU General Secretariat Trade Policy Committee, (Mar. 3, 2010), available at http://keionline.org/sites/default/files/nz_agenda.pdf [hereinafter New Zealand ACTA Draft Agenda].

⁴⁴WTO | Understanding the WTO: The Agreements, *supra* note 11.

⁴⁵See Agreement on Trade Related Aspects of Intellectual Property Rights art. 1.1, Apr. 15, 1994, 33 I.L.M. 1125, 1197 (“Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”) [hereinafter TRIPS].

⁴⁶For a definition of TRIPS-plus, see Mohammed El-Said, *The Road from TRIPS-Minus, to TRIPS-Plus: Implications of IPRs for the Arab World*, 8 J. WORLD INTELL. PROP. 53 (2005), available at http://www.bilaterals.org/article.php3?id_article=1790.

tain countries to regulate beyond TRIPS' minimum standards.⁴⁷

The USTR's Summary of Key Elements Under Discussion ("USTR Summary") states ACTA's goal to be to "establish, among the signatories, agreed standards for the enforcement of intellectual property rights that address today's challenges by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of intellectual property rights, and strengthening relevant enforcement measures."⁴⁸ The USTR Summary proposes doing so through three major provisions under ACTA: legal framework for enforcement of intellectual property rights, international cooperation, and enforcement practices.⁴⁹

Immediately before publication of this Recent Development, a consolidated draft text of the agreement was leaked ("Consolidated Text" or the "Agreement").⁵⁰

A. Chapter One: Initial Provisions and Definitions

Chapter One of the Consolidated Text generally sets out the definitions to be used in the Agreement, of which there are no substantive points of contention.⁵¹ While the definition of "intellectual property" refers back to the definition set out in TRIPS, Mexico points out that the definition should be honed to reflect other phrases used in the Agreement, such as "intellectual property right" and "copyrights and related trademarks."⁵²

B. Chapter Two: Legal Framework for the Enforcement of Intellectual Property Rights

ACTA's justification for increasing protection through additional legal remedies is set out in the Discussion Paper, which states, "It is critical to have a strong and modern legal framework so that law enforcement agencies, the judiciary, and private citizens have the most up-to-date tools necessary to effectively bring counterfeiters and pirates to justice."⁵³

1. Section 1: Civil Enforcement

The Agreement will generally require that the parties make

⁴⁷ See Dec USTR Press Release, *supra* note 38.

⁴⁸ USTR Summary of Key Elements, *supra* note 17.

⁴⁹ *Id.*

⁵⁰ Consolidated Text, *supra* note 42.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Fact Sheet: Anti-Counterfeiting Trade Agreement, Office of the United States Trade Representative (October 2007), http://wwwustr.gov/sites/default/files/asset_upload_file122_13414.pdf.

civil procedures available to rights holders to enforce their rights, in either a strictly judicial setting, as the U.S. and Japan desire, or in the alternative an administrative setting, as other countries have suggested.⁵⁴ Also discussed in Section 1 of the Consolidated Text are the availability of injunctions to cease and desist infringement.⁵⁵ In addition to injunctive remedies, the U.S. and Japan desire a provision that mandates statutory damages for certain types of IPR, while the E.U., Canada, and New Zealand would only make this provision optional.⁵⁶ Finally, other remedies may be available, including returning infringing goods to the rights holder, or destroying them.⁵⁷ Tempering the remedies provisions is an effort by the E.U., Canada, and New Zealand would require judicial authorities to take into account the proportionality of the infringement and the interests of third parties when considering the above remedies.⁵⁸

Section 1 also includes a notable provision that may require parties to provide procedures under which a judicial authority may require an accused infringer to provide any information it has relating to any involved third parties, and the means of production and distribution.⁵⁹ In addition, one party has proposed that judicial authorities act “expeditiously” upon requests for provisional measures and to rule upon such requests within 10 days, according to the U.S. proposal.⁶⁰

2. Section 2: Border Measures

The Agreement sets out the scope of the application of the Border Measures provisions. The U.S., New Zealand, and Canada propose that the provisions would not apply to cases where the traveler’s personal baggage contains “non-commercial” goods in quantities “reasonably attributable” to personal use, and there are no “material” indications that suggest the goods are part of commercial traffic.⁶¹ The thrust of the Border Measures provisions is that at a rights holder’s request, border officials may suspend the

⁵⁴ Consolidated Text, *supra* note 42, at Article 2.1.

⁵⁵ *Id.*

⁵⁶ *Id.* at Article 2.2.

⁵⁷ *Id.* at Article 2.3

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Article 2.5.

⁶¹ *Id.* One critic has suggested that this provision, in requiring the goods to be “reasonably attributable to the personal use of the traveler,” goes beyond the *de minimis* exception as defined by TRIPs. Posting of Margot Kaminski to Balkanization, The Anti-Counterfeiting Trade Agreement, <http://balkin.blogspot.com/> (Mar. 25, 2010, 21:57 EST) [hereinafter Kaminski].

release of the suspected infringing goods into circulation.⁶² The rights holder must provide sufficient evidence that the goods infringe *prima facie*, and that the suspension will last for one year.⁶³ In addition, border officials may seize suspected infringing (or even “confusingly similar,” as proposed by the U.S. and Japan) goods without a complaint from a rights holder.⁶⁴ Border officials may have the authority to provide rights holders with information about potential infringers, however, there is disagreement among parties as to at what point the officials’ authority kicks in.⁶⁵ The Agreement also provides for procedures for determining whether the detained goods are infringing, and specifies who shall pay for fees associated with storage or destruction fees.⁶⁶

3. Section 3: Criminal Enforcement

Article 2.14 of the Consolidated Text states that the parties must provide for criminal procedures and penalties for “willful trademark counterfeiting or copyright or related piracy on a commercial scale.”⁶⁷ Such activities may include infringement that has no direct or indirect financial gain, or even infringement for simple private (as the U.S. and Japan have suggested) financial gain.⁶⁸ Trafficking in counterfeit labels is included as a criminally sanctionable activity, as well as making bootleg copies of films screened for the public.⁶⁹ In addition, the parties may be required to include imprisonment as an available criminal sanction.⁷⁰ Finally, competent authorities may have the *ex officio* power to seize the infringing goods and any related materials or assets derived, and the power to order the goods’ forfeiture to the rights holder or destruction without compensation.⁷¹

⁶² *Id.* at Article 2.6.

⁶³ Consolidated Text, *supra* note 42.

⁶⁴ *Id.* at Article 2.7. One critic has pointed out that this provision goes beyond TRIPs, which allows *ex officio* action only after a *prima facie* showing of infringement. Kaminski, *supra* note 63.

⁶⁵ Consolidated Text, *supra* note 42, at Article 2.13. Kaminski again points out that Article 57 of TRIPs would require there to be a determination of infringement on the merits before such information could be provided. Kaminski, *supra* note 63.

⁶⁶ Consolidated Text, *supra* note 42, at Articles 2.10, 2.12.

⁶⁷ *Id.* at Article 2.14.

⁶⁸ *Id.* Kaminski argues that this significantly expands the definition of “commercial scale” as defined in TRIPs, which was generally accepted as sale to third parties. Kaminski, *supra* note 63.

⁶⁹ Consolidated Text, *supra* note 42.

⁷⁰ *Id.* at Article 2.15. Kaminski points out that unlike TRIPs, which allowed parties to choose between criminal fines or imprisonment as sanction, here parties must include some form of imprisonment. Kaminski, *supra* note 63.

⁷¹ Consolidated Text, *supra* note 42, at Articles 2.16, 2.17.

4. Section 4: Special Measures Related to Technological Enforcement Means and the Internet

The Internet Enforcement provisions generally provide for third party exceptions to infringement claims for online or internet services providers.⁷² The provisions state which types of activity will allow such third parties to be excepted, for instance, if the infringing activity was through mere automatic technical processes, or other passive activities of the provider. However, if the provider has actual knowledge of infringing activity on its server, it may not avail itself of the provisions' protection. As such, a provider will generally be required to instate a policy that addresses infringement taking place on its servers and expeditiously remove infringing material or disabling access upon notice.⁷³ There is, however, debate about exceptions concerning fair use.⁷⁴ In addition, there is also must debate around the addition of sanctions, possibly criminal, for circumvention digital rights management systems.⁷⁵

C. Chapter Three: International Cooperation

Under the Agreement, the parties recognize that cooperation between the parties competent authorities will be required in order to effectively protect IPR.⁷⁶ Parties may be required to share information among them, including statistical data, best practices, and information about relevant legislative and other regulatory measures taken by each party.⁷⁷ In addition, parties may be required to provide assistance to certain countries not party to the agreement enact domestic legislation to enforce IPR.⁷⁸

D. Chapter Four: Enforcement Practices

This chapter, among other things, may require parties to put in place public and/or private advisory groups of rights holders and other stakeholders in order to promote the goals of the Agreement.⁷⁹ Enforcement practices may also include: a fostering of expertise among competent authorities in order to ensure effective enforcement of IPR; collection and analysis of statistical data and other relevant information such as best practices concerning infringement of IPR; internal coordination among com-

⁷² *Id.* at 2.17. Kaminski notes that the agreement models the U.S.'s Digital Millennium Copyright Act. Kaminski, *supra* note 63.

⁷³ Consolidated Text, *supra* note 42.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at Article 3.1.

⁷⁷ *Id.* at Article 3.2.

⁷⁸ *Id.* at Article 3.3.

⁷⁹ *Id.* at Article 4.1.

petent authorities; measures to allow customs authorities to better identify and target shipments that are suspected to contain counterfeit or pirated goods; and promotion of public awareness of the detrimental effects of IPR infringement.⁸⁰ Finally, the Consolidated Text contains a provision that makes reference to efforts at transparency in the administration of the IPR enforcement systems.⁸¹ However, no such disclosure would be necessary if doing so would be contrary to enforcement efforts or to public interest.⁸²

E. *Chapter Five: Institutional Arrangements*

This Chapter essentially establishes an Oversight or Steering Committee, with a representative from each party.⁸³ The Committee would generally oversee the implementation and amendment of the Agreement and may form working groups, make recommendations, and perform other various tasks.⁸⁴ The committee would establish rules and procedures, and meet at regular intervals. A secretariat would also be established.⁸⁵ A certain level of transparency would be required between the parties.⁸⁶ Non-parties who are potential candidates to become parties may be permitted to observe meetings, as well as other organizations.⁸⁷

F. *Chapter Six: Final Provisions*

The Agreement proposes that it become into effect when the first five parties ratify the Agreement.⁸⁸

While the provisions set forth for both international cooperation and enforcement practices give a broad range of possibilities for facilitating protection measures, most criticism of ACTA has centered upon the actual substantive proposals set out above in Part II.A.

III. PROCEDURAL CONTROVERSIES

A. *Transparency*

The strongest and most widely-held critique of ACTA has

⁸⁰ *Id.* at Articles 4.1., 4.2. See also USTR Summary of Key Elements, *supra* note 17.

⁸¹ Consolidated Text, *supra* note 42, at Article 4.3.

⁸² *Id.*

⁸³ *Id.* at Article 5.1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at Article 5.4.

⁸⁷ *Id.* at Article 5.6.

⁸⁸ *Id.* at Article 6.2.

been the lack of disclosure by participating states. From the first indications that developed states had commenced negotiating a new IP trade agreement, numerous public interest organizations, academics, and bloggers have called for a release of negotiation documents, including a draft text of the treaty.⁸⁹ Though a consolidated draft text has been leaked, a leaked draft is by no means the same as an officially disclosed negotiating draft.

Certain public interest organizations attempted to use other legal means to acquire information. In July, 2008, Michael Geist, the Canada Research Chair in Internet and E-Commerce Law at the University of Ottawa, retrieved some documents concerning ACTA⁹⁰ through the use of Canada's Access to Information Act.⁹¹ Other attempts to gain information, however, have been less successful. In September 2008, two public interest groups, the Electronic Frontier Foundation and Public Knowledge, sued the USTR under the Freedom of Information Act⁹² to acquire documents such as "[p]articipant lists, agendas, presentations and documents distributed at, or received at, meetings of USTR staff with" representatives of the entertainment, luxury, and pharmaceutical industries, "agents, representatives and officials of international entities dealing with the enforcement of intellectual property," and any other "agency memoranda, briefing notes, and analysis concerning ACTA."⁹³ However, the two organizations dropped the lawsuit in June 2009⁹⁴ after the Obama administration classified the ACTA negotiations a matter of national security,⁹⁵ despite an indication

⁸⁹ See, e.g., Office of the United States Trade Representative, July 2008 Federal Register Notices, Vols. 1-4, http://ustraderep.gov/Document_Library/Federal_Register_Notices/2008/July/Section_Index.html (last visited Apr. 1, 2010). For general criticism of ACTA, see Michael Geist, ACTA Posts, MichaelGeist.ca, http://www.michaelgeist.ca/index.php?option=com_tags&task=view&tag=acta&Itemid=408 (last visited Mar. 22, 2010); Electronic Frontier Foundation, Anti-Counterfeiting Trade Agreement: What is ACTA?, <http://www.eff.org/issues/acta/> (last visited Mar. 22, 2010); and Public Knowledge, Anti-Counterfeiting Trade Agreement, <http://www.publicknowledge.org/issues/acta> (last visited Mar. 22, 2010).

⁹⁰ Michael Geist, *Public Left Out of Anti-Counterfeiting Trade Talks*, TORONTO STAR, July 28, 2008, available at <http://www.thestar.com/Business/article/468267>.

⁹¹ Access to Information Act, R.S.C., ch. A 1 (1985) (Can.).

⁹² FOIA, 5 U.S.C. § 522 (2006), requires the disclosure, upon request, of documents controlled by the U.S. government, with certain exceptions.

⁹³ EFF Complaint, *supra* note 34, at 18.

⁹⁴ Press Release, Electronic Frontier Foundation, EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA, June 17, 2009, available at <http://www.eff.org/press/archives/2009/06/17>.

⁹⁵ See Declan McCullagh, Copyright Treaty Is Classified for 'National Security', cnet.com, Mar. 12, 2009, http://news.cnet.com/8301-13578_3-10195547-38.html; Letter from Carmen Suro-Bredie, Chief FOIA Officer, Office of the United States Trade Representative, to Mr. James Love, Director, Knowledge Ecology International (Mar. 10, 2009), available at http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf.

that the Obama administration would take a more disclosure-favorable approach to FOIA requests.⁹⁶

In November 2008, the Foundation for a Free Information Infrastructure (“FFII”) applied to the European Union Council for access to documents concerning ACTA,⁹⁷ relying on a 2008 European Court of Justice decision⁹⁸ regarding Regulation (EC) 1049/2001, a regulation designed to give the public access to European Council, Commission, and Parliament documents.⁹⁹ A week later, however, FFII’s request was refused by the European Council.¹⁰⁰ The council claimed that the documents were classified because “unauthorised disclosure . . . could be disadvantageous to the interests of the European Union or of one or more of its Member States,” or, more specifically, that “[these] documents contain negotiating directives for the negotiation of the above-mentioned agreement[,] [the] negotiations are still in progress[, and d]isclosure of this information could impede the proper conduct of the negotiations.” In addition, the European Council stated that “[r]elease of these documents would weaken the position of the European Union in these negotiations and might affect relations with the third parties concerned.”¹⁰¹ FFII sent a confirmatory application for the Council to review its decision.¹⁰² On January 13, 2009, following the European Parliament’s December 18 complaint that ACTA negotiations should be more transpar-

⁹⁶ Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, The Freedom of Information Act, 74 Fed.Reg. 4683 (Jan. 26, 2009).

⁹⁷ Press Release, Foundation for a Free Information Infrastructure, FFII Opposes Stealth Legislation, Demands ACTA documents (Nov. 3, 2008), available at http://press.ffii.org/Press_releases/FFII_opposes_stealth_legislation%2C_demands_ACTA_documents.

⁹⁸ Case C-39/05 & C-52/05, *Turco v. Council*, 2008 E.C.R. I-4723, available at <http://www.scribd.com/doc/3851227/Court-of-Justice-Decision-July-1-2008>.

⁹⁹ See European Commission, Review of the Rules on Access to Documents, http://ec.europa.eu/transparency/revision/index_en.htm#1 (last visited Mar. 22, 2010). The text of the regulation can be found at Regulation (EC) 1049/2001, 2001 O.J. (L145) 43, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_145/l_14520010531en00430048.pdf.

¹⁰⁰ Letter from Ramón Jiménez Fraile, on behalf of the General Secretariat of the Council of the European Union, to Ante Wessels, Foundation for a Free Information Infrastructure (Nov. 5, 2008), available at <http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=08-1835en.wes-wj.pdf>.

¹⁰¹ *Id.* Such reasoning is pursuant to Article 4(1)(a) of Regulation 1049/2001 (protection of the public interest with regard to international relations). *Id.*

¹⁰² Press Release, Foundation for a Free Information Infrastructure, EU Council Refuses to Release Secret ACTA Documents (Nov. 10, 2008), available at http://press.ffii.org/Press_releases/EU_Council_refuses_to_release_secret_ACTA_documents.

ent,¹⁰³ FFII filed a complaint with the European Ombudsman, claiming that the Council was “deliberately obstructing access to Anti-Counterfeiting Trade Agreement (ACTA) documents[,]” counter to Regulation (EC) 1049/2001.¹⁰⁴ In addition, in March 2009, the European Parliament demanded more disclosure of ACTA negotiating documents.¹⁰⁵ Finally, eight months later, two U.S. senators requested that ACTA documents be disclosed,¹⁰⁶ and a third senator requested the same in January of 2010.¹⁰⁷

Increased public outcry may have recently led to smaller steps towards possible transparency. After the July 2009 round of negotiations, the parties had agreed to release draft agendas of future rounds of negotiation,¹⁰⁸ and the transparency of the negotiations remains an issue on the negotiation agenda, even it only constitutes an hour and a half out of five days of negotiations¹⁰⁹ While draft agendas are still far from drafts of the actual negotiated terms themselves, such attempts at least illustrate the members’ awareness of the public outcry concerning the lack of transparency. Moreover, in September 2009, the USTR used non-disclosure agreements to provide private sector stakeholders with access to ACTA negotiating documents.¹¹⁰ In response to a FOIA request,¹¹¹ the USTR produced the names of all persons and/or

¹⁰³ See European Parliament, Texts Adopted – Impact of Counterfeiting on International Trade, art. 28, Dec. 18, 2008, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0634>.

¹⁰⁴ Press Release, Foundation for a Free Information Infrastructure, EU Council Deliberately Obstructs Access to ACTA Documents (Jan. 13, 2009), *available at* http://press.ffii.org/Press_releases/EU_Council_deliberately_obstructs_access_to_ACTA_documents.

¹⁰⁵ European Parliament, Access to Documents: The European Parliament Demands Greater Transparency, Nov. 3, 2009, http://www.europarl.europa.eu/news/expert/infopress_page/019-51409-068-03-11-902-20090310IPR51408-09-03-2009-2009-false/default_es.htm.

¹⁰⁶ Letter from Bernard Sanders & Sherrod Brown, U.S. Senators, to Ron Kirk, United States Trade Representative (Nov. 23, 2009), *available at* http://keionline.org/sites/default/files/sanders_brown_acta.pdf.

¹⁰⁷ Letter from Ron Wyden, U.S. Senator, to Ron Kirk, United States Trade Representative (Jan. 6, 2010), *available at* http://keionline.org/sites/default/files/Wyden_Letter_to_USTR_on_ACTA_Jan_2010.pdf. The USTR responded to Senator Wyden’s letter. See Letter from Ron Kirk, United States Trade Representative, to Ron Wyden, U.S. Senator (Jan. 28, 2010), *available at* http://www.ustr.gov/webfm_send/1700.

¹⁰⁸ Intellectual Property Watch, ACTA Talks May Open Up, Slightly, Jul. 20, 2009, <http://www.ip-watch.org/weblog/2009/07/20/acta-talks-may-open-up-slightly/>.

¹⁰⁹ New Zealand ACTA Draft Agenda, *supra* note 43.

¹¹⁰ James Love, USTR’s System of NDAs to Provide Private Sector Access to ACTA Position, Knowledge Ecology International, Sept. 12, 2009, <http://keionline.org/node/570>.

¹¹¹ James Love, United States Trade Representative (USTR) FOIA Requests, Knowledge Ecology International, Sept. 12, 2009, <http://www.keionline.org/foia/ustr>.

organizations that were provided with documents.¹¹² While the January 2010 meeting provided no official progress on the issue of transparency,¹¹³ following the January 2010 round of negotiations, a leaked Dutch memorandum specified exactly where certain countries stood on the issue of releasing a draft of the text.¹¹⁴ Perhaps in response to European Parliament members' requests for increased transparency,¹¹⁵ the European Parliament approved on March 10, 2010, a resolution calling for increased transparency for ACTA documents by a wide margin.¹¹⁶ The United Kingdom Intellectual Property Minister soon thereafter made public its support for disclosure of a draft text.¹¹⁷ Finally, an E.U. trade official asserted that the E.U. would attempt to convince participating countries to agree on a release of a draft text at the upcoming April 2010 round of negotiations.¹¹⁸

To what extent do states negotiating agreements normally provide disclosure? One critic has indicated that organizations normally set up a website where draft texts may be posted, as well as any other information or news regarding negotiations.¹¹⁹ Other public interest organizations have diligently documented the ways in which other fora and/or negotiations have provided for significantly more disclosure in the negotiation process compared with

¹¹² James Love, White House Shares the ACTA Internet Text with 42 Washington Insiders, Under Non Disclosure Agreements, Knowledge Ecology International, Oct. 13, 2009, <http://keionline.org/node/660>.

¹¹³ Intellectual Property Watch, ACTA Negotiators Report No Breakthroughs On Transparency, Jan. 31, 2010, <http://www.ip-watch.org/2010/01/31/acta-negotiators-make-no-breakthroughs-on-transparency/>.

¹¹⁴ Michael Geist, New ACTA Leak: U.S., Korea, Singapore, Denmark Do Not Support Transparency, MichaelGeist.ca, Feb. 25, 2010, <http://www.michaelgeist.ca/content/view/4819/125/>. According to the memorandum, the U.S., Singapore, and South Korea all oppose releasing draft texts. Germany, Denmark, Belgium and Portugal do not fully support releasing a draft text. The United Kingdom has led the efforts to release a draft text and is supported by Sweden, Finland, Ireland, the Netherlands, Hungary, Poland, Estonia, and Austria. *Id.*

¹¹⁵ Andy Carling, MEPS Opposition to Secretive Anti-Counterfeiting Trade Agreement Grows, Neurop.eu, Feb. 24, 2010, <http://www.neurop.eu/articles/MEPS-opposition-to-secretive-AntiCounterfeiting-Trade-Agreement-grows/99294.php>.

¹¹⁶ Motion for a Resolution – Anti-Counterfeiting Trade Agreement, VoteWatch.eu, Mar. 10, 2010, http://votewatch.eu/cx_vote_details.php?id_act=456&lang=en.

¹¹⁷ Intellectual Property Watch, UK IP Minister Lammy Backs EU Release of ACTA Text, Mar. 17, 2010, <http://www.ip-watch.org/2010/03/17/uk-ip-minister-lammy-backs-eu-release-of-acta-text/>.

¹¹⁸ Associated Press, *EU to Seek Publication of Anti-Piracy Deal*, ABCNews.com, Mar. 22, 2010, <http://abcnews.go.com/Technology/wireStory?id=10171103>.

¹¹⁹ See Letter from Robert Weissman, Director, Essential Action, to the United States Trade Representative (Sept. 17, 2008), *available at* http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file989_15121.pdf.

ACTA.¹²⁰ In response to criticisms, the European Commission has stated, “For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion.”¹²¹ The USTR has also offered up evidence of the fact sheets and press releases it has posted.¹²²

B. *Participating Countries*

One final other provision is listed at the end of the Discussion Paper. This provision is called “special measures for developing countries in the initial phase.”¹²³ While it is unclear what exactly this provision could mean, one possibility is that ACTA negotiators would be prepared to make allowances for developing countries that are in the initial phases of creating IP rights-enforcing structure. An example in TRIPS of such an allowance is that developing countries were given more time to implement the treaty’s standards.¹²⁴ However, one of the most common and most serious criticisms of ACTA has been that developing countries have not been included in the negotiations and will later be forced, through other trade sanctions, to join an agreement in which they had no part in creating.¹²⁵ However, the USTR has responded to such criticism by expressing the “hope that other countries will join over time, reflecting the growing international consensus on the need for strong IPR enforcement” and that it “look[s] forward to partnering with developing countries through ACTA, and cooperating with ACTA partners to provide technical assistance to developing countries.”¹²⁶

IV. THE FUTURE OF ACTA

At the time of publication of this Recent Development, ACTA participating countries are due to meet in April 2010 and have expressed a wish to finalize the text early in this year. Questions remain as to whether the public and other stakeholders will get a chance to analyze and submit comments on a draft text before the

¹²⁰ See James Love, NGO Letter to USTR on Transparency, Knowledge Ecology International, July 22, 2009, <http://keionline.org/content/view/246/1>.

¹²¹ European Commission, The Anti-Counterfeiting Trade Agreement Fact Sheet, Nov. 2008, http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf.

¹²² USTR Second ACTA Fact Sheet, *supra* note 31.

¹²³ DFAT Discussion Paper, *supra* note 13.

¹²⁴ See TRIPS, *supra* note 45.

¹²⁵ The irony of this is that certain countries that have recently been or are currently on the USTR’s Special 301 Report are negotiating members. See USTR Second ACTA Fact Sheet, *supra* note 31.

¹²⁶ *Id.*

agreement is concluded. Further questions remain as to whether recent increased calls for transparency, including among participating parties themselves, will possibly result in an accelerated negotiation schedule, or simply stall negotiations even further. Finally, if draft texts continue to be leaked after each negotiating round, will parties holding out on releasing a draft eventually consent to an official disclosure? And, even if the parties do release an official draft, knowing they did so only because unofficial leaked copies were widely available does nothing to assuage the fear of agreements being negotiated in secret.

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