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Introduction

ACTA and the International Debate on Intellectual Property Enforcement

Pedro Roffe and Xavier Seuba

FRAMING THE ENFORCEMENT DEBATE

The intellectual property enforcement debate is probably less about the goals than the methods used to achieve those goals. In effect, while it seems irrefutable that "the attractiveness of intellectual property rights risks being seriously undermined if they cannot be enforced in an appropriate manner,"[1] given that "without effective enforcement, intellectual property rights are nothing but empty shells,"[2] views diverge widely when the discussion focuses on the legal mechanisms, human resources and financial means that should be deployed.

Disagreement may start even before deciding on how to react to intellectual property infringements, because data concerning the magnitude of the problem and the consequences of infringing activities differ widely.[3] For some, the economic and social impacts are profound[4] and are not only limited to innovation and

The introduction represents a reflection by the editors, drawing particularly on the various chapters that integrate this volume, on the genesis and aftermath of the negotiations to establish a first ever treaty on IP enforcement. The authors, being personally responsible for this work, thank the various contributors to the book for their lucid and incisive contributions to a better understanding of ACTA. Authors wish to thank particularly comments made to an earlier version by Jonathan Band, Michel Geist and Elena Dan.

1 Geiger, Chapter 21 in this volume.

2 R. M. Hilty, 'Economic, Legal and Social Impacts of Counterfeiting', in C. Geiger (Ed.), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research*, Cheltenham: Edward Elgar, 2012, p. 11.

3 *See* C. Fink, 'Enforcing Intellectual Property Rights: An Economic Perspective', in ICTSD, *The Global Debate on the Enforcement of Intellectual Property Rights and Developing Countries*, Geneva: ICTSD, 2008; C. Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, Advisory Committee on Enforcement, WIPO/ACE/5/6, August 26, 2009, www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.pdf (accessed March 2013).

4 *See*, e.g., Li and Moscoso, Chapters 17 and 18 in this volume, respectively.

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creativity,[5] since in some cases they amount to an unacceptable global-scale problem possibly linked to organised crime[6] and even to terrorism and drug trafficking.[7] Others, by contrast, think that statistics on counterfeiting are exaggerated,[8] and the problem is not pressing enough when compared to other issues both within the intellectual property arena and more broadly with respect to law and order enforcement in general. There are also those, probably the majority, who assume that there is a problem, but are cautious about expressing conclusive views on the specifics of its economic and social impacts.

While the debate on the lack of respect for intellectual property is fuelled by astonishing figures,[9] the data and statistics often result from controversial methodologies and tend to be supplied by partisan sources. The often quoted maxim – intellectual property rights are private rights and, as such, should be privately enforced – has had a side effect: in general, private actors have been precisely those quantifying the problem.[10] This is probably why, until recent times, there were hardly any public institutions estimating and monitoring the global extent and relevance of infringement activities. Now, the World Intellectual Property Organization and

[5] See Explanatory Memorandum of the Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights of 26 April 2006, COM(2006) 168 final, 2.

[6] In the failed EU Intellectual Property Rights Enforcement Directive (IPRED2), the preamble affirmed that "infringements of intellectual property in general, are a constantly growing phenomenon which nowadays has an international dimension, since they are a serious threat to national economies and governments. (…) In addition to the economic and social consequences, counterfeiting and piracy also pose problems for consumer protection, particularly when health and safety are at stake. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Finally, this phenomenon appears to be increasingly linked to organised crime. Combating this phenomenon is therefore of vital importance for the Community. Counterfeiting and pirating have become lucrative activities in the same way as other large-scale criminal activities such as drug trafficking (…)." *See Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission)*, Brussels, 26.4.2006, COM(2006) 168 final, 2005/0127 (COD), http://register.consilium.europa.eu/pdf/en/06/st08/st08866.en06.pdf (accessed March 2013). *See also* M. R. Roudaut, "From Sweatshops to Organized Crime: The New Face of Counterfeiting", in C. Geiger (ed.), *Criminal Enforcement of Intellectual Property*, *op. cit.*, p. 184.

[7] The International Anti-Counterfeiting Coalition affirms that "[t]he profits from counterfeiting have been linked to funding organized crime, drug trafficking and terrorist activity". *See* IACC, "About counterfeiting", https://www.iacc.org/about-counterfeiting/ (accessed May 2013).

[8] D. Chow, "Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries", *Virginia Journal of International Law*, vol. 51, no 4, 2011, p. 785.

[9] See in particular the figures quoted in OECD, "The economic impact of counterfeiting and piracy", Paris, OECD Publishing, 2008, updated in 2009: OECD, "Magnitude of counterfeiting and piracy of tangible products: an update", November 2009, 1.

[10] For instance, the International Federation of the Phonographic Industry affirmed in 2012 that "[t]he overall impact of digital piracy has been to contribute substantially to the dramatic erosion in industry revenues in recent years. Despite the surge by more than 1000 per cent in the digital music market

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the European Observatory on Infringements on Intellectual Property could start correcting this apparent deficit.[11] But for many years the plausible lack of interest and action on the part of the global community with regard to intellectual property enforcement norms has propelled those affected by activities associated with infringement to become more vociferous, not only in the quantitative aspect but also qualitatively speaking. The use of alarming terms such as "piracy" or "theft," even in normative texts,[12] to allude to all sorts of infringement[13] is a clear manifestation of this semiotic burden.[14]

In this context, it has been difficult for observers to arrive at an objective assessment of the exact prevalence of the problem. In fact, governmental sources have recognised, for instance, that the socio-economic impact of counterfeiting cannot be scientifically determined for lack of reliable data.[15] The tendency to exaggerate figures has reduced the credibility of some sources and, concomitantly, may have downplayed the extent of infringement. Obviously, others also may have had an interest in minimising the problem, even denying its existence. The lack of reliable data and the polarisation of the debate may scare off non-partisan stakeholders and complicate the management of the problem. There is indeed a methodological aspect difficult to solve, which ultimately relates to the valorisation of intellectual property rights. To assess the dimension of infringement activities, it is necessary to agree on how to value the distinct categories of intellectual property. This

from 2004 to 2010 to an estimated value of US$4.6 billion, global recorded music revenues declined by 31 per cent over the same period." IFPI, Digital Music Report 2011, "Music at the touch of a button", 2011, p. 14

[11] See in the same sense Moscoso, Chapter 18 in this volume. In September 2013, the European Observatory on Infringements on Intellectual Property released its first impact study, jointly with the European Patent Office, which affirms to be "the first to quantify the overall contribution made by IPR-intensive industries to the EU economy, in terms of output, employment, wages and trade, taking into account the major IP rights (patents, trade marks, designs, copyrights, geographical indications)", which, "despite the conservative approach, reflected in the rigorous methodology applied", *See* OHIM-EPO, *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*', *Industry-Level Analysis Report*, September 2013, available at: http://oami.europa.eu/ows/rw/resource/documents/observatory/IPR/joint_report_Epo_ohim.pdf (accessed October 2013). The methodology was earlier described in this document: http://oami.europa.eu/ows/rw/resource/documents/observatory/meetings/meeting_27–09–2012/02_ip%20impact%20study-%20pptx.pdf (accessed March 2013).

[12] Take, for instance, the case of the *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* of 2011, S.968, 112h Cong. (PROTECT IP Act of 2011, commonly referred to as PIPA).

[13] *See* Alliance Against IP Theft, *Comments on the European Commission's proposal for a Directive on criminal measures* (October 2005), http://www.eurim.org.uk/activities/ipr/0510crimsanc-AAIPT.pdf

[14] As noted by Loughlan, "words like 'theft', 'thief', 'stealing', 'burglar's tools' and occasionally even 'robbery' [are] increasingly employed to describe the unauthorised use of intellectual property"; P. Loughlan, "'You Wouldn't Steal a Car': IP and the Language of Theft", *EIPR*, 2007, p. 401.

[15] United States Government Accountability Office, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, April 2010, p. 37.

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valorisation cannot be constrained to the already difficult commercial valorisation, but has to be enlarged to include its welfare implications and, ultimately, the social value of intellectual property. All this implies entering into the intricate areas of, for instance, the ecological and health impact of the protected technologies, as well as consumers and competitors' views and interest in enforcement issues.

Treaties dealing with enforcement such as the Anti-Counterfeiting Trade Agreement (ACTA) continue to be adopted based on general perceptions of their necessity and relevance to trade negotiations. In the context of ACTA, society at large and particularly those in a position to adopt decisions were suddenly flooded with contradictory and distorted information. Confronted almost for the first time with the responsibility of decision making in an area as obscure as intellectual property enforcement, they were under pressure to act by those linking counterfeiting to harmful effects on public health or activities such as terrorism or drug trafficking. At the other end of the spectrum were those who associated ACTA with serious concerns over fundamental rights. The non-informed citizen and the non-expert politician had to make judgements and formulate perceptions in the context of this polarised scenario.

THE MAIN ACTORS AND THEIR INVOLVEMENT IN THE ACTA DEBATE

As any other international covenant, ACTA is a treaty which binds states. Both in its promotion and progression, however, the agreement was subject to intense scrutiny from non-state actors. This was the case particularly for industry, civil society and academic stakeholders who rose to an almost unprecedented prominence in the genesis and fate of the treaty. In many respects the influence exerted by non-state actors reminds us of the origins of the TRIPS negotiations,[16] or even the OECD Multilateral Investment Agreement. However, contrary to ACTA, in the case of the TRIPS agreement, the industrial sector monopolised the scene.

It is widely acknowledged that major industrial groups – whose business models depend on a strong system of enforcement – played a key role in persuading governments of the necessity of a new international instrument to control, and possibly eradicate, intellectual property infringements. As Andrew Rens[17] and Marietje Schaake[18] explain, the information and privileged access to ACTA negotiations provided to a select group of companies and industrial associations, even while the negotiations were secret, proves their powerful and influential position. In the late 1980s and early 1990s, Susan Strange pointed to the acquisition by companies of roles and quotas of

[16] See references below to the works of P. Ryan, S. K. Sell and A. C. Cutler, V. Haufler, and T. Porter.
[17] *See* Rens, Chapter 12 in this volume.
[18] *See* Schaake, Chapter 19 in this volume.

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authority in the international political economy that had traditionally been the realm of states.[19] These early views have undergone a very rich evolution, both within and external to the academic domain. In the late 1990s, the notion of private international authorities emerged. This concept tried to reflect both the capacity of private actors to collaborate and privately manage, among themselves, topics of common interest, as well as their public interaction and influence on institutional and normative issues.[20] The role and relevance of private international actors in the area of intellectual property has been thoroughly addressed, among others, by Susan K. Sell, who framed the adoption of TRIPS in this context.[21] Today, no debate in this area is complete without recognition of the fact that companies belonging to a wide range of sectors promote and trigger the adoption of specific intellectual property norms.

With regard to the involvement of private corporations, the most noticeable feature in ACTA was not the lobbying carried out by traditional demanding stakeholders, but the fact that the negotiations became a battleground between (mainly copyright-dependent) content provider firms on the one hand and technology firms (service and platform providers) on the other. The former had privileged access to the negotiators and draft texts, while the latter tried to influence ACTA as outsiders, mixing their concerns with those of non-profit civil society groups or those governments which were not invited to join the negotiations. Important Internet service providers and communication companies demanded to have a voice in the negotiations and resisted the privileged position of IP right holders. While it can hardly be said that the two sides wielded equal influence, the final outcome seems to reflect different winners than those originally expected.

[19] J. Stopford and S. Strange, *Rival States, Rival Firms: Competition for World Market Shares*, Cambridge: Cambridge University Press, 1991; S. Strange, "Big Business and the State", *Millennium Journal of International Studies*, vol. 20, no 2, 1991, pp. 245–250; S. Strange, "States, Firms and Diplomacy", *International Affairs*, vol. 68, no 1, 1992, pp. 1–15; S. Strange, *The Retreat of the State*, Cambridge: Cambridge University Press, 1996; S. Strange, "Territory, State, Authority and Economy: A New Realist Ontology of Global Political Economy", in R. Cox (ed.), *The New Realism. Perspectives on Multilateralism and World Order*, Tokyo; New York; Paris: Macmillan / United Nations University Press, 1997, pp. 3–19.

[20] A. Claire Cutler, V. Haufler and T. Porter (eds.), *Private Authority and International Affairs*, Albany: New York State University Press, 1999; "transnational companies exercising not only power but also authority in processes of self-regulation and co-regulation", in the words of J. Ibanez, "Transnational Private Authorities and the Erosion of Democracy", in I. Filibi, N. Cornago and J. O. Frosini (eds.), *Democracy with(out) Nations? Old and New Foundations for Political Communities in a Changing World*, Universidad del País Vasco Servicio Editorial, 2011, p. 204.

[21] *See* Michael P. Ryan, *Knowledge Diplomacy: Global Competition and The Politics of Intellectual Property*, Washington, DC: The Brookings Institutions, 1988; S. K. Sell, "Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights", in A. C. Cutler, V. Haufler and T. Porter (eds.), *Private Authority and International Affairs*, Albany: State University of New York Press, 1999, pp. 169–198; S. K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge: Cambridge University Press, 2003.

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Further, the ACTA negotiations and the ultimate fate of the treaty cannot be fully understood without underlining the role of NGOs. As Frederick Abbott observed, many of the most troubling provisions envisaged in early drafts did not materialise owing to a "pushback from NGOs, academics and developing country governments."[22] The civil society movement against ACTA was, in fact, not an accidental phenomenon. As Marietje Schaake explained, there was a borderless network of people fighting against other conflicting intellectual property initiatives.[23] In the United States this was the case of the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA). In the international context, intellectual property enforcement provisions laid out in preferential trade agreements had already been targeted as problematic. In fact, "[t]he anti-ACTA movement is part of a broader backlash against secretive intellectual property agreements,"[24] and probably stemmed from the generalised discontent[25] and social distrust provoked by features of the recent evolution of intellectual property.[26]

In the course of the past decade, a very active and well-informed global network of NGOs has gained considerable influence.[27] Intellectual property interfaces with public interests constitute a new area of intense activism, joining other traditional topics such as women's rights, environment or development.[28] There is, however, considerable diversity regarding the role and legitimacy of the organisations involved in different fora and negotiations. This variety is accompanied by the heterogeneity that exists within the non-profit civil society community. Some NGOs, in close partnership with academia, have emerged as specialists, often advocating smart solutions to specific problems. In addition, a number of popular NGOs of a more general nature have also become interested in the interface between IP and basic freedoms. In the context of ACTA, the fundamental contribution of the second group was founded on its ability to reach out to the general public. In this sense, the ACTA process amounted to a paradigm shift characterised by collaboration among very

[22] Abbott, Chapter 1 in this volume.
[23] Schaake, op. cit.
[24] Geist, Chapter 24 in this volume.
[25] *See*, among others, A. B. Jaffe and J. Lerner, *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It*, Princeton: Princeton University Press, 2004.
[26] See, e.g., work by Barbosa and Rens, Chapters 11 and 12 in this volume, respectively.
[27] In the area of health, for instance, the genealogy of the proposed negotiations for the conclusion of an international treaty on R&D reveals its NGO origin. With regards to free trade agreements, diverse coalitions of numerous NGOs have been following, assessing and proposing amendments to the IP chapters of each agreement. In WIPO, initiatives such as the Development Agenda or the Treaty on limitations and exceptions for visually impaired persons–persons with print disabilities cannot be fully understood without the participation of some NGOs.
[28] M. E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca: Cornell University Press, 1998.

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diverse NGOs, somewhat evoking the campaign that in the mid-1990s frustrated the adoption of the OECD Multilateral Investment Agreement.

The global relevance intellectual property acquired among the members of the internationally linked NGO network also has national determinants. In this context, it is interesting to highlight the reflection Schaake made with regard to the reasons behind the protests against the agreement in Poland. She saw those as a manifestation of the links between ACTA and "the relatively high prices Eastern Europeans pay for legal access to culture online (lower wages but same price for media as in Western Europe) as well as the recent memory of the secret police monitoring people and their communications in the Soviet era."[29]

Private economic actors and civil society organisations are not the only entities to have had a relevant role in the discussions leading to the conclusion of ACTA. Scholars and technical experts have also become relevant actors, both stimulating the debate and forcefully expressing their views.[30] Declarations such as the Opinion of European Academics on Anti-Counterfeiting Trade Agreement[31] or open fora such as the Congress on Public Interest Analysis of the Intellectual Property Enforcement Agenda, held in 2010 in the American University College of Law,[32] played an important role in the debate. In this particular regard, it is interesting to note that in parallel to the emergence of a global network of highly specialised NGOs and think tanks, together with the emergence of international private authorities, there is also a global community of experts that influences the adoption of norms. This network of experts has achieved, and not only in the context of ACTA, an authority and influence similar to that Peter Haas identified in the early 1990s with regard to global communities of experts sharing some basic

[29] *See*, Schaake, op. cit.

[30] See, among others, the various contributions to this book. *See also* D. Matthews, 'The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union', Queen Mary University of London, School of Law Legal Studies Research Paper No. 127/2012, and M. A. Carrier, "SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements", *Northwestern Journal of Technology and Intellectual Property*, vol. 11, no 2, 2013, http://scholarlycommons.law.northwestern.edu/njtip/vol11/iss2/1 (accessed May 2013).

[31] Opinion of European Academics on Anti-Counterfeiting Trade Agreement, http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf; this opinion even prompted a reply by the EU Commission. *See* Comments on the "Opinion of European Academics on Anti-Counterfeiting Trade Agreement", 27 April 2011, http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (accessed May 2013).

[32] In addition to the network that emerged, the meeting resulted in the adoption of a text that "reflects the conclusions reached at a meeting of over 90 academics, practitioners and public interest organizations from six continents gathered at American University Washington College of Law, June 16–18, 2010". *Text of Urgent ACTA Communique: International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests*, 23 June 2010, American University Washington College of Law, http://www.wcl.american.edu/pijip/go/acta-communique

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methodologies, principles and beliefs.[33] In spite of sharing some of the positions of civil society groups and private economic actors,[34] the role of academic networks has become complementary and distinct, and its influence continues to be exerted in other negotiations and fora.

It is also important to recall that, as many of the scholars argue, "ACTA appears [to be] primarily addressed to non-signatory third countries which will be later invited to 'join the club', either by ratifying the Agreement a *posteriori* or by concluding bilateral agreements."[35] The fact that ACTA is a treaty conceived to be applied not only by its members but also by third countries that did not participate in its drafting is the reason why governments not part of the "country club" sought to have their say in the negotiations. Indeed, the position of developing countries towards ACTA rapidly evolved from caution to open defiance and hostility.[36]

In multilateral fora, mainly the WTO and WIPO, developing countries and emerging economies expressed their preoccupation and framed this concern in the context of the wider campaign of strengthening intellectual property enforcement. Ahmed Abdel-Latif points at the role that these countries had in the TRIPS Council. Indeed, the use of the Council as a platform for contestation is remarkable and unprecedented, since developing and emerging country concerns about "TRIPS-plus" obligations had never been articulated so forcefully from the point of view of their systemic implications on multilateral trade-related intellectual property rules.[37] In fact, from a substantive point of view, as noted by Kampermann Sanders, "[p]aradoxically ACTA has prompted the tabling on the agenda of the issue of enforcement in the TRIPS Council for the first time."[38]

In the wider context of the multilateral trade system, both the ACTA negotiations and the final text offer valuable lessons for the design and negotiation of plurilateral trade agreements. Ricardo Meléndez-Ortiz and Ahmed Abdel-Latif reflect on the broad parameters that should guide negotiations of plurilateral agreements, including a persuasive narrative, trust and transparency, inclusiveness and empirical evidence, and introduce the complex question of the legal relationship of plurilateral agreements with the multilateral trade system. As the authors illustrate, debates exclusively focused on the Vienna Convention on the Law of the Treaties and the

[33] P. M. Haas, "Introduction: Epistemic Communities and International Policy Coordination", *International Organization*, vol. 46, no 1, 1992.

[34] In this same line, Matulionyte states that the initial provisions had been strongly watered down "due to strong criticisms expressed by both civil groups and academics during the period of negotiations". Matulionyte, Chapter 7 in this volume

[35] Geiger, op. cit.

[36] Abdel-Latif, Chapter 25 in this volume.

[37] Ibid.

[38] Sanders, Chapter 16 in this volume.

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limits set forth therein to *inter se* agreements hardly reflect the complexity and the fundamentally political nature of the debate regarding plurilateral agreements.

SECRECY, TRANSPARENCY AND LEGITIMACY

The lack of transparency provoked widespread criticism, and will probably remain throughout time as ACTA's distinguishing feature. Many scholars and other actors touch upon not just this lack of transparency but also the initial silence on the very existence of the negotiations. The opaqueness surrounding ACTA fuelled opposition to the undertaking and generated an understandable suspicion among governments and economic actors excluded from the discussions, as well as members of civil society at large.

For a number of reasons, the secrecy regarding almost every aspect of ACTA[39] has probably been the worst ally to those wishing it to be a success comparable to that of TRIPS.[40]

First, trying to maintain secret a treaty dealing with the digital environment is not only doomed to failure but also fails to acknowledge the very nature of the Internet and the major transformation that it has made in the way society perceives transparency in public affairs.

Second, not disclosing what happens in a room is obviously the best way to stimulate speculation on, precisely, what happens in that room. If the non-disclosure, moreover, affects fundamental rights and important economic interests, the outcome seems obvious. In this sense, it has been rightly pointed out that secrecy was one of the factors behind "the widespread dissemination of misleading and false information."[41]

Third, the lack of information and participation reduces the legitimacy of the treaty when this attribute increasingly depends on something that exceeds the formal legitimacy of the source. In effect, intellectual property has become a clear example of the need to open channels of participation to a wide range of stakeholders, not only governments and select actors. This would allow an improvement in the quality of the outcome as well as the level of adherence to the treaty of those who are likely to be ruled by its norms.

ACTA provides a helpful example to reflect on the present methodology for the negotiation of intellectual property norms in the context of trade agreements. One

[39] Secrecy maintained until pressure was untenable: only when the European Parliament demanded in March 2010 full information about ACTA, the first official version was released. *See* European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058).

[40] Geiger, op. cit.

[41] Mercurio, Chapter 22 in this volume.

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of the crucial questions refers to whether it is necessary, as trade diplomats frequently state, that negotiations should take place behind closed doors.

The frequently held argument surrounding the requirement to keep discussions secret is that parties need to put forward proposals freely, knowing that these are part of a broader deal. In other words, negotiations should be confidential to allow "each party to feel comfortable to make concessions and/or to try options before finally settling for an agreement."[42] As such, trade diplomats are reluctant to anticipate conclusions, since the final outcome will necessarily be different. Although this argument is increasingly disputed by civil society and parliamentarians,[43] and has proved counterproductive in the context of ACTA, the European Court of Justice has upheld the EU Commission's position with regard to the confidentiality of the ACTA negotiations. For the Court, secrecy is important "to allow mutual trust between negotiators and the development of a free and effective discussion," because "any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust."[44]

In our view, the position of the EU Commission and the arguments of the European Court may have their origins in a conception of intellectual property akin to that of tariff negotiations, where hundreds of tariffs are negotiated in the context of a haggling or bargaining exercise. In that situation, parties sometimes exaggerate or try to feign interest in issues that are not really their priority. They assume, however, that this is part of a process to achieve what they really want, given that the other parties behave in the same way. Moreover, the nature of tangible goods makes this sort of negotiation plausible.

Although intellectual property has a totally different nature and rationale, discussions leading to the adoption of IP norms in the context of trade negotiations have assumed considerations and attitudes proper to tariff deals. Negotiations taking place in WIPO are more transparent than those in other contexts, and the same

[42] K. de Gucht, EU DG Trade Commissioner, quoted in his response to EU parliamentarians. *See* ICTSD, "EU Parliament Criticises Secrecy of ACTA Negotiations in Landslide Vote", *Bridges Weekly Trade News Digest*, vol. 14, no 10, March 2010.

[43] See the questions posed by the EU Parliamentarians Sophia in 't Veld (ALDE), Cecilia Wikström (ALDE), Michael Cashman (S&D) on the "Confidentiality agreements concluded prior to international negotiations" in 13 January 2013: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013–000254+0+DOC+XML+V0//EN (accessed March 2013).

[44] Case T-301/10, Judgment of the General court (Second Chamber), 19 March 2013, Par. 119. In a decision dated 7 June 2013, the Court of Justice of the European Union dismissed an action for annulment of a decision of the European Commission (EC), refusing the applicant in the case (Corporate Europe Observatory) full access to several documents relating to the negotiations on the Free Trade Agreement between the EU and the Republic of India. *See* http://curia.europa.eu/juris/document/document.jsf?text=&docid=138132&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=665977 (accessed May 2013).

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