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ACTA'S CONSTITUTIONAL PROBLEM: THE TREATY IS NOT A TREATY

Sean Flynn
American University Washington College of Law, sflynn@wcl.american.edu

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THE TREATY IS NOT A TREATY

SEAN FLYNN*

INTRODUCTION

On the eve of the United States' entry into the Anti-Counterfeiting Trade Agreement ("ACTA"), there is considerable confusion as to just what legal effect the agreement will have. In written answers to Senator Ron Wyden, the United States Trade Representative ("USTR") went to lengths to describe ACTA as non-binding, asserting that "ACTA does not constrain Congress' authority to change U.S. law," and that it would operate only as an "Executive

* Professorial Lecturer & Associate Director, Program on Information Justice and Intellectual Property, American University Washington College of Law, Sflynn@wcl.american.edu, 202-274-4157. Thanks to Oona Hathaway, Amy Kapczynski, Peter Yu, Henning Grosse Ruse - Khan, David Levine and Chris Sprigman for many helpful comments and discussions. Thanks to Jimmy Koo and Cameron Chong for their stellar research assistance. Errors are, of course, my own. A version of the arguments canvassed in this article was submitted to USTR in a statement signed by 30 law professors, available at http://infojustice.org/rchives/1166.

Agreement" that "can be implemented without new legislation."[1] But European negotiators have described the agreement to their legislature in very different terms, asserting that ACTA is "a binding international agreement on all its parties, as defined and subject to the rules of the Vienna Convention on the Law of Treaties (1969)."[2]

ACTA is not a binding international agreement under U.S. law. The U.S. Constitution describes a limited number of ways in which the United States can be bound to international law. The subjects of ACTA—the regulation of intellectual property and domestic and foreign commerce—are Article I powers under the U.S. Constitution, meaning they can be regulated only with congressional participation. Yet, according to the USTR, ACTA will be entered by the United States as a sole executive agreement without congressional authorization or approval. Because the entry of ACTA unilaterally exceeds the President's constitutional authority, ACTA cannot bind U.S. law. The statements of the USTR as described above are thus correct: ACTA cannot change, or prevent the change of, U.S. law.

Under international law ACTA is a treaty. Customary international law recognizes the right of every state to bind itself to international law through the consent of its executive. If the President or a delegate signs ACTA without reservations—that is, if he expresses the intent of the United States to be bound—then the lack of congressional approval is unlikely to prevent the agreement from being binding under international law. The lack of constitutional authority of the executive to enter ACTA on its own accord may not prevent the United States from being bound. ACTA will thus be a treaty under international law, although not a treaty under U.S. domestic law.

This article explains these points in more depth. Part I gives a brief

1. James Love, *US Congress Is Not Bound by ACTA, According to White House Answers to Senate Finance on ACTA and TPP Negotiations*, KNOWLEDGE ECOLOGY INT'L (Apr. 19, 2011, 12:16 PM), http://keionline.org/node/1115.

2. James Love, *Greens/EFA MEPs Engström, Sargentini, Beliér, Albrecht Ask Question on ACTA and Vienna Convention*, KNOWLEDGE ECOLOGY INT'L (Feb. 10, 2011, 7:22 AM), http://keionline.org/node/1077 (explaining that the United States is not a signatory to the Vienna Convention, but accepts its terms as describing applicable and binding principles of customary international law). S*ee generally* GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY (2nd ed. 2008).

background of ACTA and its mandatory framework for minimum legislative standards that would alternatively pledge the United States to change, or to rigidly maintain, current U.S. law. Part II explains the U.S. Constitutional requirements for entry into binding international agreements and shows how the current plan for entering ACTA fails to abide by those norms. Part III describes the international law on treaty-making, which would render ACTA a binding international treaty even absent congressional consent. The article concludes with a few thoughts on why this state of affairs is a problem from the perspective of good governance and democratic accountability.

I. ACTA AND THE ENFORCEMENT AGENDA

As we mark the 15th anniversary of the World Trade Organization ("WTO") agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"),[3] international intellectual property law is being shaped by an "enforcement agenda."[4] In its simplest terms, the enforcement agenda represents a shift of the efforts of multinational intellectual property holders and their allied governments from a goal of escalating substantive intellectual property requirements in global legislation, to a focus on lowering the costs and raising the penalties for the enforcement of existing rights. But this simple description masks the agenda's primary goal, which is to shift a higher percentage of intellectual property enforcement costs toward the public. The enforcement agenda promotes expanding the public's role in enforcement through criminalization and other forms of public prosecution; expanded use of border searches and seizures; sponsorship of publicly funded education and technical assistance campaigns; creation of new government "IP Czars" and other specialized government offices, task forces and courts; and increasing coordination between enforcement agencies and private

3. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, Apr. 15, 1994, 1869 U.N.T.S. 299.

4. Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* 3 (Program on Info. Justice & Intellectual Prop. ("PIJIP"), Working Paper No. 15, 2010), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research.

industry. At the same time, its measures seek to decrease the cost and improve the "deterrent" efficacy of private enforcement through minimizing due process rights of those accused of infringement; escalating penalties for infringement, including for end users of infringing products; and extending liability to third party platforms and intermediaries that are easier to find and litigate against and which potentially cut off larger collections of accused infringers.[5]

The crafting of the enforcement agenda began in multilateral forums, including the World Intellectual Property Organization ("WIPO") and the WTO.[6] But in these institutions the enforcement agenda quickly stalled.[7] WIPO is focused instead on the elaboration of a "development agenda,"[8] and the WTO has become a key forum for developing countries to challenge the legality and potential ill effects of the agenda.[9]

5. *See* SOC. SCI. RESEARCH COUNCIL, MEDIA PIRACY IN EMERGING ECONOMIES 19–29 (Joe Karaganis ed. 2011), *available at* http://www.scribd.com/doc/50196972/MPEE-1-0-1; Sell, *supra* note 4, at 6–16; Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA)* (PIJIP, Working Paper No. 17, 2011), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context=research.

6. *See* World Intellectual Prop. Org. [WIPO], Gen. Assembly, Rep. on the Twenty-Eighth (13th Extraordinary) Sess., 19-26, WO/GA/28/7 (Oct. 1, 2002) (chronicling the discussion on the establishment of the WIPO Advisory Committee on Enforcement); *see also* Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 11 n.54 (forthcoming 2011), *available at* http://www.ssrn.com/abstract=1624813 (describing ten WTO TRIPS Council documents related to the review of TRIPS-related national laws).

7. *See* SOC. SCI. RESEARCH COUNCIL, *supra* note 5, at 81; Graeme B. Dinwoodie, *Some Remarks on the Limits of Harmonization*, 5 J. MARSHALL REV. INTELL. PROP. L. 596, 603 (2006) (referencing stalled negotiations on upward harmonization in WIPO and other international agencies).

8. *See Development Agenda for WIPO*, WORLD INTELL. PROP. ORG., http://www.wipo.int/ip-development/en/agenda/ (last visited Mar. 1, 2011); *The 45 Adopted Recommendations Under the WIPO Development Agenda*, WORLD INTELL. PROP. ORG., ¶ 15, http://www.wipo.int/ip-development/en/agenda/recommendations.html (last visited Mar. 1, 2011) (recommending that international intellectual property norm setting processes "be inclusive" and "be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs"). *See generally* IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA (Jeremy DeBeer ed. 2009).

9. *See Intervention by India to the WTO TRIPS Council*, SOUTH CENTRE (June 9, 2010), http://www.southcentre.org/index.php?option=com_content&view=

The rejection of the enforcement agenda at the multilateral level led to a regime shift into unilateral, bilateral and plurilateral processes in which formal participation by strong developing country coalitions are excluded and openness to public observation and input are highly restricted. For the last several years, ACTA has been the center of these efforts.[10]

The negotiation process for ACTA has been a case study in establishing the conditions for effective industry capture of a lawmaking process.[11] Instead of using the relatively transparent and inclusive multilateral processes, ACTA was launched through a closed and secretive "'club approach' in which like-minded jurisdictions define enforcement 'membership' rules and then invite other countries to join, presumably via other trade agreements."[12]

article&id=1354 (critiquing "the multitude of initiatives launched by a group of largely developed country Members to enforce TRIPS Agreement in a manner that is considerably more extensive than the level enshrined in TRIPS Agreement"); *Intervention by Brazil - TRIPS Council*, INTELL. PROP. WATCH BLOG (Oct. 2010), http://www.ip-watch.org/weblog/wp-content/uploads/2010/10/Brazil-onTRIPS-Enforcement-Trends.doc (objecting to the creation of enforcement norms outside of multilateral channels through the ACTA negotiations).

10. *See* Peter K. Yu, *supra* note 6, at 4-15.

11. For canonical work on the theme of regulatory capture in U.S. regulatory environments, and the link to lack of adequate public participation avenues, see generally WILLIAM T. GORMLEY, JR., THE POLITICS OF PUBLIC UTILITY REGULATION (1983); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971); Nicholas Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971); Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970) .

12. *See* Daniel Gervais, *International Decision: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 555 (2009); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT 4 (2008), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (explaining that ACTA is designed to strengthen intellectual property rights through the creation of global enforcement standards); *Anti-Counterfeiting Trade Agreement*, MINISTRY OF ECON. DEV. N.Z., http://www.med.govt.nz/templates/ContentTopicSummary____34357.aspx (last visited Mar. 1, 2011) (stating that ACTA sets a high goal for intellectual property rights enforcement); *Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement. (2007)*, WIKILEAKS, *available at* http://ipjustice.org/wp/wp-content/uploads/ACTA-discussion-paper-1.pdf (last visited Mar. 1, 2011) (proposing "[s]pecial measures for developing countries in the initial phase").

The most influential developing countries, including Brazil, India, China and Russia, were excluded.[13] Likewise, a series of maneuvers ensured that public knowledge about the specifics of the agreement and opportunities for input into the process were severely limited. Negotiations were held with mere hours notice to the public as to when and where they would be convened, often in countries half away around the world from where public interest groups are housed. Once there, all negotiation processes were closed to the public. Draft texts were not released before or after most negotiating rounds, and meetings with stakeholders took place only behind closed doors and off the record.[14] A public release of draft text, in April 2010, was followed by no public or on-the-record meetings with negotiators. The only notice and comment process on ACTA text in the United States was invited after the negotiation was declared to be fully completed.[15] USTR officials themselves described the agency's goal

13. ACTA is a proposed multilateral international agreement between Australia, Canada, the 27 countries of the European Union (E.U.), Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States of America. *ACTA Fact Sheet (March 2010)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/acta-fact-sheet-march-2010 (last visited Mar. 1, 2011). Using Immanuel Wallerstein's "World Systems" typology, all but two of the negotiating countries are part of the high income and highly industrialized "core" of the world system. Two countries, Mexico and Morocco, are part of the second tier of middle income rapidly industrializing countries. The majority of the world's countries and population centers located in the periphery of the world system are not represented at all. This has lead to the criticism that the ACTA negotiations have disregarded the interests of developing countries that could be greatly affected by the agreement. *Cf.* Immanuel Wallerstein, *Globalization or the Age of Transition?: A Long-Term View of the Trajectory of the World System*, 15 INT'L SOC. 249, 265 (2000) (arguing that the world is generally divided into two camps, the stronger of which will work to continue the status quo of an inegalitarian system in order to maintain their power and privileges); Emily Ayoob, Note, *The Anti-Counterfeiting Trade Agreement*, 28 CARDOZO ARTS & ENT. L.J. 175, 192 (2010) ("[O]ne 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.").

14. *See, e.g.*, *ACTA Update*, WASH. INT'L TRADE ASS'N (Oct. 29, 2010), http://www.wita.org/en/cev/1126 (advertising an event featuring USTR chief ACTA negotiator Kira Alvarez "appearing Off-The-Record"). There was, to this author's knowledge, one on-the-record meeting of ACTA negotiators with public interest representatives—in Lucerne, Switzerland, Summer 2010.

15. Anti-Counterfeiting Trade Agreement: Request for Comments From the Public, 75 Fed. Reg. 79,069 (Dec. 17, 2010).

in responding to public calls for broader participation as the serving up of an opaque "transparency soup."[16]

This is a very different process of international lawmaking than would be the norm in multilateral processes like the WTO or WIPO. Jeremy Malcolm has identified three core elements of best practices for participation at the multilateral level that were absent from the ACTA negotiation and other forums in which the enforcement agenda is being negotiated. These include ongoing releases of negotiation texts and background materials to inform the public about the direction of the negotiation and its substantive proposals; institutionalized and regular briefings of civil society and the general public to afford meaningful opportunities to be heard on all aspects of policymaking; and access to the negotiation venue to observe proceedings and make responses to policy discussions.[17]

Despite the opaque and non-participatory process used to negotiate the agreement, the potential domestic effects of ACTA are far-reaching.

The final text runs twenty-six single spaced pages, at least half of which create a new minimum "Legal Framework for Enforcement of Intellectual Property Rights."[18] The Legal Framework chapter contains new "TRIPS-plus"[19] requirements for minimum legislative

16. *See* James Love, *USTR's February 10, 2009 memo on Transparency Soup*, KNOWLEDGE ECOLOGY INT'L, (Sept. 8, 2010, 10:00 PM), http://keionline.org/node/929 (referencing an internal Obama Administration email from the Assistant USTR for Intellectual Property and Innovation, Stanford McCoy, with the subject line "Transparency Soup," offering a strategy for how USTR could respond to demands for more public access to ACTA negotiations).

17. Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions* 19–21 (PIJIP, Research Paper No. 6, 2010), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1006&context=research.

18. Anti-Counterfeiting Trade Agreement, December 3, 2010 6–17 [hereinafter ACTA Text—Dec. 3, 2010], *available at* http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf (containing eleven pages of text in Articles 6–27, which comprise "Chapter Two: Legal Framework for Enforcement of Intellectual Property Rights").

19. *See, e.g.*, PEDRO ROFFE, BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE CHILE-USA FREE TRADE AGREEMENT 4-5 (2004), *available at* http://www.quno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf (using "TRIPS-plus" as an informal term to refer to minimum legal standards in national or international laws that exceed the baseline requirements of the TRIPS agreement); Peter K. Yu, *supra* note 6, at 7 (quoting

enactments covering all intellectual property rights currently contained in TRIPS.[20] The specific doctrinal fields covered by ACTA thus include patents, copyrights, trademarks, industrial designs, geographical indications, layout-designs or topographies of integrated circuits, pharmaceutical and agricultural test data, and sui generis protection of plant varieties.[21] In the United States, the coverage includes regulation at multiple jurisdictional levels, including fields like trade secrets and remedies that are often regulated by state law.[22] The doctrines regulated by ACTA include those relating to injunctions, including ex parte preliminary injunctions;[23] damages, including "pre-established" statutory damages;[24] duties to divulge confidential information to the

USTR negotiator Stanford McCoy as initiating ACTA negotiations to create a "TRIPS-plus" agreement that would "set a new standard for IPR enforcement that was better suited to contemporary challenges").

20. *See* James Love, *The October 2, 2010 version of the ACTA text*, KNOWLEDGE ECOLOGY INT'L (Oct. 6, 2010, 7:13 AM), http://keionline.org/node/962 [hereinafter Love, *Oct. 2 version of ACTA*] (defining intellectual property as "refer[ring] to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of [TRIPS]"). All of the negotiating countries of ACTA are members of the World Trade Organization and therefore are also signatories to the WTO's agreement on Trade Related Aspects of Intellectual Property Rights. *See Members accepting amendment of the TRIPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last updated Mar. 15, 2011) (listing all WTO members that approved the TRIPS agreement). Enforcement of intellectual property laws was a central concern of TRIPS, primarily expressed in Part III. ACTA is essentially a re-write of TRIPS Part III for its member countries to expand the amount of mandatory enforcement measures required. *See* James Love, *ACTA and Part III of TRIPS Compared by Frequency of Terms*, KNOWLEDGE ECOLOGY INT'L (Sept. 10, 2010, 10:25 AM), http://keionline.org/node/940 (noting, for example, that the August leaked text of ACTA contained more than twice as many instances when the word "shall" was used to require action on enforcement issues).

21. *See* Love, *Oct. 2 version of ACTA*, *supra* note 20 (arguing that by the "broad inclusion" of a wide array of intellectual property rights, "ACTA creates unintended consequences . . . [because] some of [ACTA's] enforcement provisions make no sense outside of the context of copyrights and trademarks").

22. *See* Letter from Dana Eidsness, Dir., Forum on Democracy & Trade, to Ron Kirk, U.S. Trade Representative (Nov. 22, 2010), *available at* http://forumdemocracy.net/downloads/2010%20Forum%20Letter%20to%20USTR%20on%20ACTA.pdf (expressing concern about the breadth of topics covered by ACTA, which could preempt many areas of state law, including common law, without due consideration).

23. *See* ACTA Text—Dec. 3, 2010, *supra* note 18, art. 8.

24. *See id.* art. 9 ¶ 3(a).

government;[25] seizure and destruction of goods, both before and after determinations of violation;[26] border searches and detentions;"[27] criminal liability, including infringements of copyright that bestow any "indirect economic or commercial advantage;"[28] liability for infringement on the internet;[29] and liability for acts or products that circumvent technological or digital locks against copying.[30]

Although the basic framework of ACTA is modeled on much of existing U.S. law, the agreement does not track U.S. law in fine detail, leaving the possibility that public interest protections in U.S. law could be interpreted to run afoul of ACTA mandates.[31] Equally important, ACTA exports many provisions of U.S. law that are subject to active debate about potentially needed revisions.[32] In June 2010, nearly 650 international intellectual property experts and public interest organizations from six continents adopted a sharply worded public statement criticizing the proposal as "hostile to the public interest" including in areas dealing with freedom on the internet; basic civil liberties including privacy and free expression;

25. *See id.* art. 11.

26. *See id.* arts. 12 ¶ 3, 25.

27. *See id.* arts. 13–22 (covering enforcement measures at states' borders); *see also id.* arts. 19-20 (requiring destruction of goods after a "determination" of violation by a "competent authority," which need not be a court or other body following strict due process norms).

28. *See id.* art. 23 ¶ 1.

29. *See id.* art. 27.

30. *See id.* art. 27 ¶¶ 5–7.

31. *See* Memorandum from Brian T. Yeh, Legislative Attorney, Am. Law Div., Cong. Research Serv., to the Hon. Ron Wyden, United States Senate, Potential Implications for Federal Law Raised by the October 2010 Draft of the Anti-Counterfeiting Trade Agreement (ACTA) (Oct. 29, 2010), *available at* http://www.techdirt.com/articles/20110421/16580813994/crs-report-withheld-ustr-confirms-that-acta-language-is-quite-questionable.shtml.

32. *See, e.g.*, Paul E. Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y 165 (2008); Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH L.J. (2010), *available at* http://www.law.berkeley.edu/files/bclt_CPP.pdf. *Compare* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy In Need of Reform*, 51 WM. & MARY L. REV. 439, 480–97 (2009) (arguing that certain statutory damage awards based on existing U.S. domestic IP laws, which include statutory minimums, are inconsistent with due process principles), *with* ACTA Text—Dec. 3, 2010, *supra* note 18, art. 9, ¶¶ 1, 3 (stating that when determining damages, authorities may consider, among other things, "the infringer's profits," "pre-established damages," and "additional damages" in the case of copyright infringement).

free trade in generic medicines; and the policy balances between protection and access which lie at the heart of all intellectual property doctrines.[33] A group of nearly 80 intellectual property law professors later reviewed the text of the agreement and reported: "it is clear that ACTA would usurp congressional authority over intellectual property policy in a number of ways."[34]

According to the negotiating parties, the drafting of ACTA is now complete and it is "ready to be submitted to the participants' respective authorities to undertake relevant domestic processes."[35] And that is where this story begins. Many of the parties negotiating the agreement, including the E.U., will follow the normal procedures for entering a treaty, including consent by the legislative branch.[36] But the United States will not. The USTR has stated repeatedly that ACTA will enter into force in the United States without any congressional action.[37] Congress will not have the opportunity to review or amend the agreement before it goes into effect, even though this power would be granted in any other traditional

33. Press Release, Program on Info. Justice & Intellectual Prop., Text of Urgent ACTA Communiqué: International Experts Find that Pending Anti-Counterfeiting Trade Agreements Threatens Public Interest (June 23, 2010), http://www.wcl.american.edu/pijip/go/acta-communique.

34. *Over 75 Law Profs Call for Halt of ACTA*, PROGRAM ON INFO. JUST. & INTELL. PROP. (Oct. 28, 2010), http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta.

35. Press Release, Office of the U.S. Trade Representative, U.S., Participants Finalize Anti-Counterfeiting Trade Agreement Text (Nov. 15, 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/november/us-participants-finalize-anti-counterfeiting-trad.

36. *See* Resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, EUR. PARL. DOC. P7_TA(2010)0058 (2010) (resolving that the ACTA Treaty will not enter into force in the European Union until the European Parliament gives its consent).

37. Jack Goldsmith & Lawrence Lessig, *Anti-counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html (reporting on the Obama Administration's intention to adopt ACTA as a sole executive agreement without submitting it to Congress for approval); Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L L. ONLINE 24, 27 (2009), http://www.yjil.org/docs/pub/o-35-katz-hinze-ACTA-on-knowledge-economy.pdf.

international agreement binding the United States.[38] USTR's strategy raises the constitutional problem with ACTA: the President lacks the constitutional authority to bind the United States to an international intellectual property agreement without congressional consent.

II. ACTA IS NOT A TREATY (UNDER U.S. LAW)

The process that has been described by USTR for entering ACTA—without submitting it to Congress for ratification—is insufficient to bind the United States to the agreement under U.S. law. The definition of a "finely wrought" system for the creation of binding law is a core subject of the Constitution.[39] That document has been interpreted to establish only three types of international agreements that can bind the United States: traditional treaties, confirmed by two thirds of the Senate; congressional-executive agreements entered under congressionally delegated authority or approved in legislation after the fact; and sole executive agreements entered under the President's own authority. ACTA is none of these.

A. ACTA IS NOT AN ARTICLE II TREATY

As used in the U.S. Constitution, the term "treaty" refers to one way in which an international agreement becomes law. Article II, Section 2, gives the President the power to "make" treaties, and provides that such agreements become part of the supreme law of the United States with a two-thirds vote of the Senate.[40] The USTR is not claiming, however, that it has any intent to ask the Senate to approve ACTA as a treaty. Thus, to be a binding international law under the U.S. Constitution, ACTA must be one of the two types of "executive agreements" contemplated by constitutional processes.

38. *See* CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5 (Committee Print 2001) (noting that in most cases "executive agreements are either explicitly or implicitly authorized in advance by Congress or submitted to Congress for approval").

39. *See* INS v. Chadha, 462 U.S. 919, 955 (1983) (discussing the Senate's treaty ratification power as one of a limited set of Constitutional unicameral actions that have the full force of law).

40. U.S. CONST. art. II, § 2.

B. ACTA IS NOT A CONGRESSIONAL-EXECUTIVE AGREEMENT

So-called "congressional-executive" agreements become binding law by virtue of having complied with Article I's lawmaking process. Since Congress has the expressly delegated power to regulate foreign commerce, it can implement legal changes to international trade laws by statute as well as treaty.[41] In a congressional-executive agreement, Congress passes through both houses, and the President signs, legislation either delegating ex ante authority to enter into agreements or approving the agreement itself ex post. Having been passed through legislation, these agreements become binding federal law and, for example, preempt contrary state legislation.[42]

There is growing academic literature documenting and analyzing the recent shift by the United States toward the use of congressional-executive agreements in international lawmaking.[43] Academics debate the extent to which Congress *should* delegate broad authority to the President to make law through congressional-executive agreements, particularly through the vague and open ended delegations of ex ante authority that has become common in modern times.[44] It is generally accepted, however, that agreements made with

41. *See* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 768–71 (2001) (describing the historical debate over treaties infringing on statutory power).

42. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1596 (2007) (stating that "congressional-executive agreements (if enacted as 'Laws') qualify as 'the supreme Law of the Land'").

43. *See, e.g.*, Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 548 (2004); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 149–50 (2009) (explaining that executive agreements now account for the great majority of international agreements entered into by the United States); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252–56 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1265–69 (1995); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 337–59 (2006); Yoo, *supra* note 41, at 768–71 (2001); *see also* CONG. RESEARCH SERV., *supra* note 38.

44. *Compare* Yoo, *supra* note 41, at 763 (supporting congressional-executive agreements as a means to "[preserve] Congress's constitutional powers over matters such as international commerce"), *with* Hathaway, *supra* note 43, at 146–47 (criticizing the growth of ex ante congressional-executive agreements because

ex ante Congressional authorization or ex post consent are binding proclamations of law.[45] But they are binding only because of the congressional action validating them.[46]

ACTA is not being negotiated as a congressional-executive agreement. Congress has not authorized its entry ex ante and there are no plans to submit the agreement to Congress ex post.[47] Accordingly, to be a lawful and binding agreement under the U.S. Constitution, ACTA must be a valid sole executive agreement.

C. ACTA IS NOT A SOLE EXECUTIVE AGREEMENT

In a "sole executive agreement," the President binds the United States to an international agreement unilaterally—with no formal ex ante or ex post authorization by Congress. As noted, this is the form of agreement that USTR has used to describe ACTA. This claim is dubious, however, because of the "[s]trict legal limits [that] govern the kinds of agreements that presidents may enter into" without some form of Congressional consent.[48] Although ACTA may be entered by the President through sole executive action, it will not be a valid sole executive agreement merely by virtue of that fact.

Because sole executive agreements "lack an underlying legal basis

Congress grants broad executive authority to negotiate the agreements while reserving no further role for itself).

45. *See* CONG. RESEARCH SERV., *supra* note 38, at 5 (stating that the constitutionality of congressional-executive agreements is considered "well established"). *But see* Tribe, *supra* note 43, at 1265–70 (describing how congressional-executive agreements may violate the Treaty Clause).

46. *See* Yoo, *supra* note 41, at 823 ("Not only are congressional-executive agreements acceptable, but in areas of Congress's Article I, Section 8 powers, they are—in a sense—constitutionally required."); *see also infra* Part II(C)–(D).

47. *See* Sherwin Siy, *The Trouble with ACTA*, AM. CONST. SOC'Y BLOG (Apr. 6, 2010, 5:33 PM), http://www.acslaw.org/node/15774 (noting that ACTA will not require any legislative action to be implemented). Some commentators on ACTA have argued that it should be considered a "treaty," which undermines the Administration's argument that it is instead a "sole executive agreement" and does not require Congressional approval. *See* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (defining a treaty under international law as any written agreement between States).

48. *See* Hathaway, *supra* note 43, at 146 (reasoning that the principle of separation of powers requires that the three branches of government cooperate among each other before entering into broad binding international agreements).

in the form of a statute or treaty,"[49] they can be made only by the President within the restrictive set of circumstances in which the President has independent Constitutional authority.[50] "The President cannot make an international agreement that exceeds his own constitutional authority without Congress's assent."[51]

The problem with ACTA as a sole executive agreement is that the regulation of its subject matter does not lie within the President's own constitutional authority. Article II of the Constitution provides for the exercise of certain powers by the President unilaterally. Many executive agreements are uncontroversial extensions of the President's independent authority to act as Commander in Chief of the Army and Navy;[52] to receive ambassadors from, and thereby recognize, foreign nations;[53] or to issue pardons.[54] There are also a large number of often mundane[55] executive agreements grounded in the President's general power to "take Care that the Laws be faithfully executed."[56] In a small number of other borderline cases, such as settling foreign claims against the United States, the long

49. CONG. RESEARCH SERV., *supra* note 38, at 88.

50. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) (stating that the President may enter a binding international agreement without congressional assent only for a "matter that falls within his independent powers under the Constitution"); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (admonishing that when the President acts pursuant to an "express or implied authorization of Congress, his authority is at its maximum," but "in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers").

51. *Declaration and Principles: Future U.S. Commitments to Iraq: Joint Hearing Before the H. Comm. on Foreign Affairs, Subcomm. on Middle East and South Asia and Subcomm. on Int'l Orgs., Human Rights and Oversight*, 110th Cong. 40 (2008) (statement of Oona A. Hathaway, Professor, Yale Law School), *available at* http://www.internationalrelations.house.gov/110/41061.pdf.

52. U.S. CONST. art. II, § 2; *see* Hathaway, *supra* note 43, at 151–52 (citing "defense" as the area of foreign policy with the most executive agreements).

53. U.S. CONST. art. II, § 3.

54. U.S. CONST. art. II, § 2; *see* Clark, *supra* note 42, at 1581–82 (describing the "vast majority" of sole executive agreements as "unobjectionable . . . means of exercising [the President's] independent statutory or constitutional powers").

55. Hathaway, *supra* note 43 at 153 (including, for example, "'energy-efficient labeling programs' [or] air transport agreement[s]" with a foreign country).

56. U.S. CONST. art. II, § 3; *see* Hathaway, *supra* note 43, at 154-55 n.29 (finding approximately 375 sole executive agreements between 1990 and 2000 on matters including "Agreed Minutes" and "Implementing Procedures"); *cf.* Van Alstine, *supra* note 43, at 352 n.285 (citing over 15,000 executive agreements between 1946 and 2004).

historical practice of acquiescence by Congress has been used to justify sole executive action.[57] Such acts, performed within the bounds of constitutionally delegated power, "have as much legal validity and obligation as if they proceeded from the legislature."[58] Thus, if ACTA is a valid sole executive agreement, it could preempt contrary state law[59] and otherwise operate as federal law.[60]

None of these categories of valid sole executive agreements apply to ACTA. If ACTA was composed only of the kind of coordination and information exchange between customs offices contained in its Chapter IV, perhaps it could be justified as incident to the President's executive power to manage agencies in their implementation of law. But ACTA's information sharing and international cooperation mandates amount to only a few of its pages.[61] As described above, the majority of ACTA consists of specific provisions on intellectual property remedies and enforcement procedures to which the

57. CONG. RESEARCH SERV., *supra* note 38, at 90; Clark, *supra* note 42 at 1582, 1615, 1660 (noting that the practice of settling claims through executive agreements began over 200 years ago).

58. United States v. Pink, 315 U.S. 203, 230 (1942) (citing THE FEDERALIST No. 64, (John Jay) (Independent Journal, 1788)) (describing the equal legal validity of "[a]ll Constitutional acts of power, whether in the executive or in the judicial department"); CONG. RESEARCH SERV., *supra* note 38, at 92 ("Sole executive agreements validly concluded pursuant to one or more of the President's independent powers under Article II of the Constitution may be accorded status as Supreme Law of the Land . . . .").

59. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-17 (2003) (recognizing that an executive agreement may preempt otherwise permissible state laws given the concern for uniformity in dealing with foreign nations).

60. *See* CONG. RESEARCH SERV., *supra* note 38, at 95 (acknowledging that while a sole executive agreement within the President's constitutional authority has been held as valid federal law, "the question as to the effect of a Presidential agreement upon a prior conflicting act of Congress has apparently not yet been completely settled") (internal quotation and citation omitted); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 Reporter's Note 5 (1987) (explaining that constitutional acts, whether done by the executive, judicial or legislative branch, have the same legal status as federal law but could supersede one another depending on the circumstances). *But see* United States v. Guy W. Capps, Inc., 204 F.2d 655, 659-60 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) ("[W]hatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.'').

61. *See* ACTA Text—Dec. 3, 2010, *supra* note 18, arts. 28-35.

legislation of each country must adhere. This cannot be justified as implementation of mere executive power. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[62]

The USTR claim that ACTA can be a valid sole executive agreement lacks a justifying theory of law. Notably, this course of action is not justified by the logic of the controversial claims to executive authority during the George W. Bush administration.[63] Those in favor of strong executive power to suspend treaty provisions, prosecute the war on terror, and otherwise conduct foreign affairs without congressional oversight argue from a premise of unenumerated powers. The essence of the argument is that the structure and history of our Constitution indicate that all unenumerated powers in matters of foreign affairs should vest in the sole discretion of the executive.[64] But these arguments for expanded executive power apply only where the powers at issue are *un*enumerated.[65] Even adherents to the strong executive theory accept that the President cannot use a sole executive agreement to bind the United States to international law in any area expressly delegated to Congress by Article I.[66] As an agreement setting minimum legislative

62. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

63. *See* Van Alstine, *supra* note 43, at 312 n.8 (suggesting the Bush Administration's increasing use of executive authority to act unilaterally was due to national security concerns over international terrorism); Bradley & Flaherty, *supra* note 43, at 546-48 (tracing the rise in popularity in recent years of the "Vesting Clause Thesis," which argues for expansive executive authority, to the state of foreign affairs since September 11, 2001).

64. *See* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, on Authority of the President to Suspend Certain Provisions of the ABM Treaty, to John Bellinger, Senior Assoc. Counsel to the President and Legal Adviser to the Nat'l Sec. Council 13 (Nov. 15, 2001), *available at* http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf (stating that "the executive exercises *all* unenumerated powers related to treaty making"); *see also* Van Alstine, *supra* note 43, at 337-40 (describing the strong claim that Article II's "vesting clause" grants plenary powers to the President over foreign affairs); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677-78 (2002) (arguing that enumerating powers to the executive was not intended to limit the scope of authority granted by the vesting clause).

65. *See* Louis Henkin, *"A More Effective System" for Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 751, 753 (1975) ("The uncertainties and the sources of controversy about the constitutional blueprint lie in what the Constitution *does not say*.") (emphasis added).

66. *See* Yoo, *supra* note 41, at 823-25 (arguing that "the political branches

standards for intellectual property law and the regulation of IP-protected goods on the internet and in foreign commerce, ACTA directly implicates Congress's Article I, Section 8 powers to "regulate Commerce with foreign Nations" and to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[67] There is no residuum of power in these areas that the executive can claim.

D. USTR'S JUSTIFICATIONS DO NOT ESTABLISH ACTA'S CONSTITUTIONAL BASIS AS A SOLE EXECUTIVE AGREEMENT

The USTR has made three assertions justifying entering ACTA as a sole executive agreement despite the lack of plenary authority of the President over its subject matter. In off-the-record meetings and briefings, USTR has argued that a sole executive agreement is an appropriate method for implementation of ACTA because:

(1) the agreement will be consistent with existing U.S. law;[68]

(2) the President has "plenary" powers over foreign affairs; and

(3) the President is authorized by virtue of the Trade Act of 1974.

None of these arguments establish an adequate constitutional basis for sole executive action on ACTA.

The consistency of ACTA with current U.S. law does not justify its entry as a sole executive agreement. Factually, it is not true that ACTA avoids usurpations of congressional authority. As noted in a letter of 80 law professors to President Obama, ACTA "fail[s] to

must use a statute to implement, at the domestic level, any international agreement that involves economic affairs," including "matters such as international and interstate commerce [and] intellectual property"); Prakash & Ramsey, *supra* note 43, at 253 (clarifying that the President's foreign affairs powers do not encompass the powers specifically allocated to the Congress or Senate); *see also* Van Alstine, *supra* note 43, at 342-43 ("[E]ven the strong claim to implied executive powers acknowledges, as it must, that the president's Article II powers are 'residual' only. Whatever their general scope, they are qualified by, and otherwise must yield to, the more specific allocations of power elsewhere in Article II and in Article I.").

67. U.S. CONST. art. I, § 8.

68. *See The President's 2011 Trade Agenda: Hearing Before the S. Comm. On Finance, 112th Cong.* (Mar. 9, 2011) (statement of the Hon. Ronald Kirk, United States Trade Rep.), *available at* http://keionline.org/sites/default/files/RonKirk_SFC_9Mar2011.pdf.

explicitly incorporate current congressional policy" in a number of key areas.[69] Likewise, a study by the Congressional Research Service concluded that "[d]epending on how broadly or narrowly several passages from the ACTA draft text are interpreted, it appears that certain provisions of federal intellectual property law could be regarded as inconsistent with ACTA."[70]

Even assuming that ACTA was entirely consistent with current U.S. law, that fact would not justify the entry of the United States into it as a sole executive agreement. If ACTA is not binding, then it needs to be entered as a "memorandum of understanding" or other form that withholds any U.S. intent *to be bound.* For the question of whether the Administration can enter ACTA through an internationally binding sole executive agreement, the issue of its compliance with present U.S. law is irrelevant. If valid, the agreement would subject the United States to international remedies for changing its law in a way inconsistent with the agreement. Although this may not technically prohibit Congress from making such changes, this is true with any internationally binding agreement. Congress could only change the law outside of the bounds of the agreement in violation of international law. Under our Constitution, the President cannot tie Congress's hands in this way any more than the Congress can pass legislation without the President's signature.

USTR's second argument—that the President has plenary power to enter into international intellectual property agreements—is similarly misplaced. Here, USTR is drawing on a host of Supreme Court statements that the President sometimes acts as the "sole" or "exclusive" representative of the United States in the arena of foreign affairs.[71] The specific source of USTR's rhetoric appears to be the

69. *Over 75 Law Profs Call for Halt of ACTA*, *supra* note 34.

70. BRIAN T. YEH, CONG. RESEARCH SERV., ALD-7-5182, POTENTIAL IMPLICATIONS FOR FEDERAL LAW RAISED BY THE OCTOBER 2010 DRAFT OF THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (2010), *available at* http://www.techdirt.com/articles/20110421/16580813994/crs-report-withheld-ustr-confirms-that-acta-language-is-quite-questionable.shtml.

71. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 741 (1971) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief."); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (discussing the "conduct of diplomatic and foreign affairs, for which the President is exclusively responsible"); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109

oft-cited dicta of the Supreme Court in the *Curtiss-Wright* case, referring to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[72]

Properly placed in context, the description of the President as the "sole" and "plenary" voice in foreign affairs is undoubtedly true. The President appoints U.S. representatives to international lawmaking institutions including the United Nations, the World Trade Organization, and the World Intellectual Property Organization. In these capacities, and under the President's power to make treaties and represent the United States, the executive branch regularly engages in the creation of international law and policy.[73] The relevant distinction, however, is between the role of the President as the voice and negotiator of the United States in foreign relations, which the executive holds unilaterally, and the President's ability to bind the United States to internationally constructed laws and policies, where the "constitutional power over foreign affairs is shared by Congress and the President."[74] The external agreements negotiated by presidential appointees in service of foreign policy goals do not bind the United States except in the strictly limited areas where the President has sole Constitutional authority.[75] Because ACTA involves international legal obligations covered by Congress' powers enumerated by Article I, Section 8, the President cannot bind the United States to the agreement absent congressional consent.

(1948) (describing the President as "the Nation's organ in foreign affairs").

72. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

73. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("Nor is there any question generally that that there is executive authority to decide what [international] policy should be.").

74. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 85 (1993) (Blackmun, J., dissenting on other grounds); *see* Regan v. Wald, 468 U.S. 222, 261-62 (1984) (Powell, J., dissenting) (arguing that the President and Congress together have a responsibility to determine the state of our nation's foreign affairs); Zschernig v. Miller, 389 U.S. 429, 432 (1968) (discussing the "field of foreign affairs which the Constitution entrusts to the President and the Congress"); United States v. Minnesota, 270 U.S. 181, 201 (1926) ("Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States.").

75. *See* Van Alstine, *supra* note 43, at 345 ("[T]he president requires the consent of Congress as a whole, or two-thirds of the Senate for treaties, to transform this external policy into domestic law.").

Finally, USTR evokes the Trade Act of 1974 as an example of ex ante authorization for the President to negotiate trade agreements.[76] This argument would be cogent if fast track legislation was still in effect. Fast track legislation was a delegation of Congress's authority to regulate international trade to the executive branch under circumscribed rules, but which still required a final up or down vote by Congress.[77] That legislation has lapsed. The Trade Act of 1974 does not itself delegate power to the President to bind the United States to trade agreements absent congressional consent. ACTA—no different from the Trans-Pacific Partnership now being negotiated or the Korea, Panama, and Peru free trade agreements the Administration is seeking to conclude—must be approved by Congress as a regulation of foreign commerce regardless of whether it complies with current law.[78]

III. ACTA IS A TREATY (UNDER INTERNATIONAL LAW)

The above discussion might lead the layman, or even the lay-lawyer, to conclude that ACTA's existence as an unconstitutional sole executive agreement means that the agreement can have no legal effect on or in the United States. This conclusion is wrong, however, because international law operates under a different set of norms for identifying binding law than does the U.S. Constitution.

As used in the Vienna Convention on the Law of Treaties and in customary international law, a "treaty" means any "international agreement concluded between [two] States in written form and governed by international law."[79] An international agreement is generally considered a treaty, and is binding on the parties, if:

1. The parties intend the agreement to be binding;
2. The agreement deals with significant matters;

76. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 19 U.S.C.).

77. *See* Hathaway, *supra* note 43, at 264-65 (noting that, under fast track authority, Congress agrees to consider legislation with minimal debate, mandatory deadlines, and no amendments).

78. *See, e.g.*, United States – Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007 (pending Congressional approval), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa.

79. Vienna Convention, *supra* note 47, art. 2(1)(a).

3. The agreement clearly and specifically describes the legal obligations of the parties; and

4. The form indicates an intention to conclude the treaty.[80]

The final three factors are clearly met in ACTA. The agreement contains numerous specific and significant requirements for domestic legal regulation bound into the form of a binding trade agreement.[81] With regard to the intent of the parties to be bound, the agreement itself signals such an intent, requiring that "[e]ach Party shall give effect to the provisions of this Agreement."[82] Thus, for the United States, the last remaining question is whether the United States can state an intent to be bound to an international agreement through a process (executive consent alone) that the Constitution does not permit.

International law determines the legal effect of international agreements. Although the President cannot make domestic law without Congress, he can, generally, unilaterally bind the United States under international law. This norm is an incidence of the international law principle that every state has the capacity to conclude international agreements and that heads of state are presumptively authorized to represent a state for purposes of concluding an international agreement.[83] It is also a commonly accepted principle that a country "may not invoke a violation of its internal law to vitiate its consent to be bound" internationally.[84]

As an international agreement between the negotiating parties, ACTA would bind all signatories to abide by its framework.[85] Parties

80. Treaties and Other International Agreements: The Role of the United States Senate. S-Prt. 103-53 (1993).

81. *See, e.g.*, ACTA Text—Dec. 3, 2010, *supra* note 18, pmbl. (describing the intent of parties).

82. *Id.* art. 2(1).

83. *See, e.g.*, Vienna Convention, *supra* note 47, arts. 6, 7; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311 (1987); Van Alstine, *supra* note 43, at n.62 ("Under international law, the president, except in extreme circumstances, has the authority to bind the United States even where he exceeds his domestic constitutional authority.").

84. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3); *accord* Vienna Convention, *supra* note 47, art. 46 (noting that the violation of internal law must be "manifest" and concern a rule of "fundamental importance" to evade obligations under international law).

85. *See* ACTA Text—Dec. 3, 2010, *supra* note 18, art. 2 ¶ 1 (stating that

to an international agreement with binding obligations must not derogate from its obligations and must perform them in good faith. This doctrine of *pacta sunt servanda* ("agreements must be kept") lies at the core of the law of international agreements and is embodied in the Vienna Convention.[86] It implies the existence of international obligations that must be performed in good faith despite restrictions imposed by domestic law.[87] Accordingly, even though ACTA may not be enforceable domestically, it will nonetheless be a binding international agreement and the parties, including the United States, must perform its obligations in good faith.

The existence of a binding obligation in international law leaves parties free to decide how to implement it in domestic law, a concept reflected in the December draft of ACTA.[88] However, if the United States decides that it does not need to take any action to implement ACTA domestically, then it is up to the other contracting parties to identify and pursue the reconciliation of any discrepancies between ACTA and U.S. law.

Currently, ACTA lacks a forum for enforcement or dispute resolution. But that hole in ACTA does not mean the agreement lacks binding effect. "Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury."[89] In order to resolve disputes, "[a] state may bring a claim against another state for a violation of an international obligation . . . either through

"[e]ach Party shall give effect to the provisions of this Agreement"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301(1) (defining "international agreement" as "an agreement between two or more states . . . that is intended to be legally binding and is governed by international law").

86. *See* Vienna Convention, *supra* note 47, art. 26; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321.

87. *See* Vienna Convention, *supra* note 47, art. 27 (stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321, cmt. a (explaining that "international obligations survive restrictions imposed by domestic law").

88. *See* ACTA Text—Dec. 3, 2010, *supra* note 18, art. 2 ¶ 1 (giving each party the ability to "determine the appropriate method of implementing the provisions").

89. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901.

diplomatic channels" or an agreed procedure.[90] A party asserting that the United States is in breach of its international obligations under ACTA may resort to countermeasures under customary international law.[91] Through these measures, other parties may punish violations of ACTA by imposing trade sanctions or other penalties against U.S. commerce, provided such punitive acts are proportional in relation to the breach.[92] Another party could also litigate a case against the United States in the International Court of Justice ("ICJ"),[93] but that would require the United States to submit to ICJ jurisdiction.[94]

Furthermore, ACTA's legal status under international law could alter U.S. law, even without congressional ratification. As valid international law, U.S. courts may use ACTA to interpret ambiguous commands in U.S. domestic law.[95] The State Department and USTR would presumably review and craft subsequent international agreements, including those intended to bind U.S. law, to ensure compliance with ACTA. Pressure from industry and the Administration may be brought to bear on Congress and the states to change their laws, or refrain from future revisions, to comply with ACTA's mandates.[96] Indeed, because the question of whether ACTA

90. *Id.* § 902(1).

91. *See* G.A. Res. 56/83, arts. 12-15, U.N. Doc. A/Res/56/83 (Jan. 28, 2002).

92. *See generally* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001) (providing examples of cases where WTO sanctions were utilized, but arguing that their imposition rarely ends the dispute or remedies state non-compliance).

93. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

94. *See* Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is it?*, 5 CHINESE J. INT'L LAW 29, 29 (2006) (noting that if a state consents to the jurisdiction of the International Court of Justice they must answer any disputes submitted to the Court).

95. *See generally* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (acknowledging the modernizing world and recognizing that individuals are not only ruled by municipal laws or ordinances, but also by the "laws of nations"). The "Charming Betsy" convention of statutory interpretation holds that U.S. courts should construe congressional statutes as consistent with U.S. international obligations, whenever possible.

96. This is an example of "policy laundering" that has become quite common in international intellectual property law. *See* Bill D. Herman & Oscar H. Gandy Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 128 (2006) (defining policy laundering as "a term that describes efforts by policy actors to have policy initiatives seen as exogenously determined, or even seen as requirements imposed

is a valid sole executive agreement is unlikely to be subject to challenge by courts under the political question doctrine,[97] it could have the practical effect of a valid sole executive agreement, including preemption of state law.

CONCLUSION

There are many substantive problems with ACTA from the perspective of what U.S. intellectual property and technology policy should be. Many of those problems can be traced back to the fundamental process flaw described in this article. The sole executive agreement model insulates USTR from the normal congressional oversight processes necessary to make binding international law. It therefore has created a kind of public policy moral hazard. Whereas an economic moral hazard is said to exist where insurance or some other factor "cushion[s] the consequences of bad behavior, [which] . . . encourage[s] that bad behavior,"[98] the sole executive agreement model cushions USTR from congressional and public oversight, which encourages bad policymaking. This was not the process the founders intended. The founders established constitutional requirements so that the people's representatives would have a strong and central role in the approval of any international agreement that impacts domestic regulatory authority. Such a process strives to encourage balanced lawmaking by ensuring that a broad array of stakeholders will be represented in decision making. By designing a procedure for the approval of ACTA outside of the finely wrought constitutional process, the current and prior Administrations have been able to insulate themselves from normal democratic channels. This bold course of action charts new ground that will likely be replicated by future Administrations—unless the other branches of government call for a halt to this unconstitutional process.

by powerful others"); *see also* Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 786-87 (2009) (suggesting that the use of "policy laundering" attempts to change the focus of the policy debate from the effects of the policy on the American people to whether the failure to adopt the policy would strain international relations).

97. Made in the USA Found. v. United States, 242 F.2d 1300 (11th Cir. 2001) (refusing to review whether NAFTA was unconstitutionally entered by executive agreement rather than through an Art. II treaty).

98. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 237-39 (1996).