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Collateral Damage: The Impact of ACTA and the Enforcement Agenda on the World's Poorest People

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**COLLATERAL DAMAGE:
THE IMPACT OF ACTA AND THE
ENFORCEMENT AGENDA ON THE WORLD'S
POOREST PEOPLE**

ANDREW RENS*

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INTRODUCTION

More than 1.4 billion people in the world live below the poverty line, defined by the World Bank as 1.25 U.S. dollars per day.¹ People living at or below the poverty line are vulnerable to disease, starvation, and the natural elements and are deprived of medicines, knowledge, and power over the international laws and economic dispositions that affect their daily lives. However, what does this have to do with the Anti-Counterfeiting Trade Agreement (“ACTA”)²—the subject of secretive negotiations by the United States, Europe, and a few close allies? ACTA is, after all, described by its advocates as a trade agreement. Little attention has been paid to its potential impact on the world’s poorest people. This article points to some of the ways in which ACTA will almost certainly threaten their interests.

ACTA itself is part of a far bigger agenda: the “enforcement agenda.” The enforcement agenda, under the guise of strengthening the enforcement of existing rights, attempts to enact national laws and create policies and practices which effectively eliminate existing limitations and exceptions in the current international intellectual property regime, at least with regard to cross border regulation of intellectual property.³ ACTA is the pre-eminent vehicle of the

1. See Shaohua Chen & Martin Ravallion, *The Developing World Is Poorer Than We Thought, But No Less Successful in the Fight against Poverty* 34 (World Bank Policy Research, Working Paper No. 4703, 2008), available at http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1201490097949/080827_The_Developing_World_is_Poorer_than_we_Thought.pdf (documenting by region a general reduction in the number of poor living below \$1.25 a day from 1.9 billion in 1981 to approximately 1.4 billion in 2005).

2. The text of ACTA referred to throughout this article, unless otherwise specified, is the December 3, 2010 text released by the Australian government. See *Anti-Counterfeiting Trade Agreement*, Dec. 3, 2010 [hereinafter ACTA Text—Dec. 3, 2010], available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>.

3. See William New & Kaitlin Mara, *Near-Finished Anti-Counterfeiting Trade Pact Could Have Broad Reach*, INTELL. PROP. WATCH (Oct. 12, 2010, 7:27PM), <http://www.ip-watch.org/weblog/2010/10/12/rights-holders%E2%80%99-anti-counterfeiting-trade-pact-could-have-broad-reach/> (highlighting that the October draft of ACTA goes well beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) by exercising more power over third parties, providing specific damages for an injured party, and relaxing limits on government officials in charge of inspecting goods, all resulting in reductions of safeguards).

enforcement agenda. Developing countries have had a number of recent experiences with the enforcement agenda that provide concrete examples of the likely impact of ACTA. This article sets out to describe in plain terms this likely impact. Doing so requires an understanding of the enforcement agenda and its primary vehicle, i.e., ACTA, and this requires drawing on a great deal of work by others, some of which is yet to even be published. This paper describes ACTA as both a process and a set of provisions, examines its emergence in the enforcement agenda, and discusses how ACTA threatens multinational development, especially access to medicines and access to knowledge.

I. WHAT IS AT STAKE?

At one time intellectual property (“IP”) law was viewed by both the public in the developed world and by most developing country policy-makers as a purely technocratic domain. Reliance on expertise effectively disguised political choices. While this view has changed, it is too often forgotten that IP laws disproportionately impact the world’s poorest people. How will the enforcement agenda affect the lives of these individuals? Will it fracture the multinational IP regime? Will it derail international cooperation on health, renewable energy, or food security?

II. THE ENFORCEMENT AGENDA

The “enforcement agenda” is a sustained, wide-ranging effort by lobbyists for certain industries in crisis to deploy state resources, secure legislation, and institutionalize practices that support their current business models under the banner of enforcing IP rights. Consequently, “[t]he overall picture that emerges is a web of numerous multilateral forums, regional and bilateral agreements and unilateral institutions being captured to pursue a global TRIPS-plus⁴ enforcement agenda.”⁵

4. The term “TRIPS-plus” refers to provisions in international instruments, or regulatory schemes adopted in accordance therewith, that exceed the minimum standards required by the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

5. Viviana Muñoz Tellez, *The Changing Global Governance of Intellectual*

The agenda is being realized through a range of means, including ACTA, increasingly onerous enforcement provisions in Free Trade Agreements (“FTAs”),⁶ and far reaching national legislation on “counterfeits” (often the results of “expert technical assistance”).⁷ Muñoz Tellez lists thirteen different international fora in which enforcement efforts are being pursued.⁸

Multinational tobacco, pharmaceutical, film, and record corporations are setting the enforcement agenda. The Global Business Leaders’ Alliance Against Counterfeiting (“GBLAAC”), whose members include Coca-Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon, sponsored the meeting on counterfeiting, held in Geneva and hosted by Interpol and the World Intellectual Property Organization (“WIPO”), which led to the public ACTA process.⁹ The primary lobbying bodies include the Motion Picture Association, the Recording Industry Association of America, the International Intellectual Property Alliance, and the Business Software Alliance, in addition to global pharmaceutical giants and

Property Enforcement: A New Challenge for Developing Countries, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 3, 10 (Xuan Li & Carlos M. Correa eds., 2009).

6. A “Free Trade Agreement” is a type of bilateral trade agreement that is not confined to trade as traditionally understood as exchange of goods, but rather includes requirements for changes to the national legislation of signatories, most notably IP legislation.

7. See, e.g., Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, §§ 301, 402, 122 Stat 4256 (codified as amended in scattered sections of 15, 17, and 18 U.S.C.) (creating the Intellectual Property Enforcement Coordinator, a specialized office charged with combating piracy and counterfeiting, in addition to providing for investigative and forensic resources to improve prosecution of such crimes).

8. See Tellez, *supra* note 5, at 11 (illustrating that institutions, such as the World Health Organization, World Intellectual Property Organization, the World Trade Organization, International Police Organization, and the Council for TRIPS are now involved in IP enforcement, for instance by promoting IP enforcement through border measures).

9. See Aaron Shaw, *The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)*, 2 KESTUDIES, at 2 (2008), <http://kestudies.org/ojs/index.php/kes/article/view/34/57> (suggesting that the GBLAAC-sponsored conference in Geneva spurred a movement for stricter regulations to tackle “piracy” and counterfeiting that included subsequent summits and publications on prevention and enforcement).

global tobacco companies.¹⁰

One significant feature of the agenda includes a reduction or elimination of exceptions and limitations to IP law through over-broad provisions purportedly aimed to discourage and punish infringement.¹¹ Examples from East Africa illustrate this effect, where advocates have sought to move the focus of international and national IP policy away from efforts to ensure access to medicines and access to knowledge, and instead to dedicate resources to expanding the reach and impact of the statutory monopolies granted by IP legislation.¹² The enforcement agenda is often framed in terms of security, which justifies inroads into civil liberties, recruits new constituencies to the political economy of IP maximization, and attempts to stigmatize critics.¹³ As the enforcement agenda unfolds across a range of arenas, the impact on real life situations becomes all too clear, presaging the effects of ACTA.

10. A peculiar difficulty surrounds ACTA with respect to both the text and the process; the text was withheld from the public and largely from the public's duly appointed representatives, and the negotiation process did not take place on the public record.

11. See Int'l Ctr. for Trade and Sustainable Dev. [ICTSD], *India Moves to Protect Traditional Medicines*, 13 BRIDGES WKLY. TRADE NEWS DIG., no. 7, Feb 25, 2009, available at <http://ictsd.org/i/news/bridgesweekly/41660/> (detailing that the Indian government, who licensed 2,000 traditional treatments and has future plans to patent yoga techniques, is one of several countries including Kenya, Brazil, Pakistan, and Switzerland pushing for a TRIPS amendment that will protect "traditional knowledge").

12. See, e.g., Press Release, Oxfam, *Secret Plans to Criminalize Generic Medicines Could Hurt Poor Countries and People* (July 15, 2009), <http://www.oxfam.org/en/pressroom/pressrelease/2009-07-15/criminalize-generic-medicines-hurt-poor-countries> (noting that proponents of ACTA will likely push for provisions that make it harder for companies to send generic medicines to poor people in developing states through "parallel importation," leading to a lack of access to medicine).

13. See Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* 8 (IQsensato, 2008), available at http://www.iqsensato.org/wp-content/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf (asserting that ACTA will grant border agents the authority to conduct searches of electronic devices, such as laptops, iPods, and cellular phones, and to initiate wiretaps without due process of law, thereby using taxpayer dollars to enforce private rights).

III. ACTA

What is ACTA? Although the few official government announcements on ACTA have described it as a draft treaty agreement, developing countries might see it as an immensely complex strategy for forum-shifting by certain multinational corporations. Susan Sell described the current negotiations as the latest iteration in a longer process:

Since the early 1980s advocates of a maximalist IP agenda have shifted forums both horizontally and vertically in order to achieve their goals. Those who seek to ration access to IP are engaged in an elaborate cat and mouse game with those who seek to expand access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue.¹⁴

Sell explained how those seeking ever-increasing IP rights shifted forum from WIPO to the World Trade Organization (“WTO”), back to WIPO, and then to bilateral trade agreements and multiple other fora.¹⁵

A. THE ACTA PROCESS

ACTA was negotiated by trade representatives from the United States, Australia, Canada, the European Commission, Japan, Mexico, Morocco, New Zealand, Singapore, and South Korea. Official statements by negotiators, such as the European Commission Trade Office, claim that ACTA “does not purport to create new intellectual property rights but to create improved international standards as to

14. *Id.* at 4.

15. *See id.*

Once the access to medicines coalition of developing countries and NGOs mobilized in the WTO, the IP maximalists renewed their earlier WIPO deliberations on a Substantive Patent Law Treaty (“SPLT”) in an effort to secure IP protection that went beyond TRIPS. However, the mobilized medicines coalition paid attention to WIPO and tried to counter this quest with a Development Agenda for WIPO. The ensuing stalemate at WIPO over the SPLT led the IP maximalists to pursue other avenues, including continued bilateral and regional trade and investment treaties marked by TRIPS-Plus provisions as well as this new pluri-lateral effort behind the IP enforcement agenda. Industry has been relentless pursuing its IP agenda and circumventing developing country and NGO opposition, favoring non-transparent forums of ‘like-minded’ actors.

Id.

how to act against large-scale infringements of [IP rights].”¹⁶ Despite this claim, ACTA provisions stipulate penalties for non-commercial infringement,¹⁷ provide measures against a wide range of third parties,¹⁸ create new categories of rights,¹⁹ and effectively eliminate exceptions and limitations granted by TRIPS.²⁰ Some states at times present ACTA as a tough but practical means to secure their trade interests in economically difficult times. The reality is more complex:

The main actors in the ACTA process are “nodal actors” or networks of state and private sector actors who coordinate their positions and enroll nodal actors to help the cause. These are not single issue coalitions of states, but rather a *mélange* of private and public sector actors who share compatible goals and continue to coordinate their negotiating positions over time and across forums.²¹

ACTA is being negotiated outside all of existing multinational frameworks and would create an entirely new international organization. Once the parties settle on the provisions, the rules will be applied to developing countries, especially emerging economies. According to the European Commission Trade Office, “[t]he

16. *Anti-Counterfeiting Trade Agreement (ACTA) Fact Sheet*, EUR. COMM’N TRADE OFF. 1 (Nov. 2008), http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf [hereinafter *ACTA Fact Sheet*].

17. See, e.g., ACTA Text—Dec. 3, 2010, *supra* note 2, arts. 7-12, 13. Article 10, for example, requires that judicial authorities have the power to order the destruction of “pirated copyright goods” and “counterfeit trademark goods,” both of which are so defined as to include non-commercial infringement.

18. See, e.g., *id.* art. 8.1 (requiring that parties give their judicial authorities power to “prevent goods that involve an infringement of an intellectual property right from entering into the channels of commerce”); *id.* art. 12 (setting forth the requirement that parties give their judicial authorities power to order “prompt and effective provisional measures . . . against a third party”).

19. See, e.g., *id.* § 3 on Border Measures enables a right holder in a country through which goods are transported to prevent the transit of goods through that country and to require their seizure and destruction.

20. See *infra* Part V.C (discussing ACTA’s potential to undermine TRIPS safeguards for the right to access information).

21. Sell, *supra* note 13, at 5. Sell derives the term “nodal actors” from Peter Drahos, *Four Lessons for Developing Countries from the Trade Negotiations over access to Medicines*, 28 LIVERPOOL L. REV. 11, 35 (2007). “Drahos states that ‘there is considerable evidence that the US runs its trade negotiation as a form of networked governance rather than as a simple process of domestic coalition building.’” Sell, *supra* note 13, at 5.

ultimate objective is that large emerging economies, where [IP rights] enforcement could be improved, such as China or Russia, will sign up to the global pact."²² Although official notification of the process leading to ACTA was first announced in 2007, April 21, 2010 was the first time an official draft became publicly available, and then only after widespread protest and the leaking of previous drafts.²³

B. ACTA PROVISIONS

Any discussion of ACTA's provisions suffers from the secrecy of the process. At the time of writing only three public drafts had been released and two of those were redacted. The third, distributed in October 2010, purported to require no further negotiations but was indeterminate in key respects. Yet another draft dated November 15, 2010 has been made public, with at least one significant change but without resolving other important issues.²⁴

A putatively "final" text was released by the Australian government in December 2010. However, even this text is opaque, rendering possible multiple interpretations. In the context of international trade and intellectual property, this ambiguity will serve the enforcement agenda through further enabling the culture of technocratic expertise to disguise the policy choices at stake. For developing countries, therefore, the potential rupture zone around each provision, rather than the precise wording of provisions, requires attention.

In addition, as the interception of medicines by the Dutch and German customs authorities²⁵ shows, government officials often

22. *ACTA Fact Sheet*, *supra* note 16, at 2.

23. See *ACTA - Text and Leaked Documents*, PROGRAM ON INFO. JUST. & INTELL. PROP. [PIJIP] IP ENFORCEMENT DATABASE, <https://sites.google.com/site/iipenforcement/acta> (last visited Mar. 1, 2011) (showing that an ACTA text was leaked in March before an official release was provided in April and recording that in 2010, the text of ACTA was leaked at least thirteen times and official government memos on ACTA were leaked at least five times).

24. See *Anti-Counterfeiting Trade Agreement: Subject to Legal Review* art. 2.18 ¶ 2, Nov. 15, 2010, *available at* http://www.ustr.gov/webfm_send/2379. In startling contrast to previous practice, this November version was made available on the website of the office of the United States Trade Representative. Australia released a "final" version on December 3, 2010.

25. See *EC Customs Law*, TPA CUSTOMS NEWSLETTER (TPA Global,

disregard the nuances of legislative drafting.

ACTA's first chapter sets out initial provisions and definitions. Several key definitions were introduced only in the October 2010 version of the text.²⁶ The second chapter, on enforcement, sets out provisions that require changes to national laws. In the "final" text of ACTA, most of these provisions are crafted as requirements that judicial authorities be given "authority" to grant certain remedies, such as injunctions, without hearing all the parties affected. A court is not required to grant the remedy in each case—but must have the power to grant such a remedy. The effect on procedural guarantees is subtle but pernicious. In each instance a signatory must require its courts to make available certain remedies, and thus a court must entertain claims for such required remedies, refusing them only if it has good reason to do so. Furthermore, ACTA does not provide any guidance on when a judicial authority may refuse a demand for such remedies, and neither the legislature nor the judiciary may rule that a particular remedy is generally inappropriate. These procedural requirements therefore disregard the competence of courts to regulate their own procedure, especially the granting of injunctions in common law countries. Interference in the constitutional separation of powers is generally regarded as well beyond the ambit of trade agreements.

The final version of Article 9 on damages may well have disappointed some organized industry representatives. The final structure of the section is somewhat convoluted and requires careful parsing. Article 9.1 requires damages not only for intentional infringement but for infringement by a party with "reasonable grounds to know" that the conduct was infringing.²⁷ A court "shall

Amsterdam, Neth.), Nov. 2009, at 2, *available at* http://www.tpaglobal.com/PDF/Publications/011109_TPA-Customs_Newsletter.pdf (recounting the Dutch seizure of generic medicines, patented in the Netherlands but not in India, the port of origin, because the items were suspected of being counterfeit).

26. For the first time, "counterfeit trademark goods" and "pirated copyright goods" were defined in the text. Anti-Counterfeiting Trade Agreement: Informal Predecisional/Deliberative Draft art. 1.X, Oct. 2, 2010 [hereinafter ACTA Draft—Oct. 2, 2010], *available at* http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf.

27. See ACTA Text—Dec. 3, 2010, *supra* note 2, art. 9.1 ("Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the

have the authority to consider” “any legitimate measure” of damages which by fiat if not by logic “may include lost profits, the value of the infringed goods or services measured by the market price or the suggested retail price.”²⁸ Does this subsection use the word “shall” in a directory way or in a peremptory way—as it is used in Article 9.3?²⁹ If the word is used in a peremptory manner then at least under that interpretation it requires a court to consider the listed “measures of value” as legitimate measures. Article 9.3 requires a signatory in respect of copyright and trademark infringement claims to provide damages which are “pre-established,” presumed,³⁰ or additional damages.³¹ A rights-holder or a court must be able to elect to use “pre-established” or “presum[ed]” damages as an alternative to the legitimate measures of value set out in Article 9.1.³² The result is

infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement.”).

28. *Id.*

29. *See id.* art 9.3 (“At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party *shall* also establish or maintain a system that provides for one or more of the following:(a) pre-established damages; or (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or(c) at least for copyright, additional damages.”) (emphasis added).

30. What is meant by “presumed” is elaborated in ACTA’s footnote 3.

The presumptions referred to in subparagraph 3(b) may include a presumption that the amount of damages is: (i) the quantity of the goods infringing the right holder’s intellectual property right in question and actually assigned to third persons, multiplied by the amount of profit per unit of goods which would have been sold by the right holder if there had not been the act of infringement; or (ii) a reasonable royalty; or (iii) a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question.

Id. n.3.

31. *Id.* art. 9.3.

32. *Id.* art. 9.4 (“Where a Party provides the remedy referred to in subparagraph 3(a) or the presumptions referred to in subparagraph 3(b), it shall ensure that either its judicial authorities or the right holder has the right to choose such a remedy or presumptions as an alternative to the remedies referred to in paragraphs 1 and 2.”) Paragraphs 1 and 2 are based on the logically fallacious claim that every infringing copy distributed is equivalent to a lost sale or royalty payment. Of course, the infringing copy would not necessarily be sold by a guilty defendant at the plaintiff’s typical price. The defendant would likely sell for less so as to make sales to those for whom the plaintiff’s price is too high. Therefore, sales

that courts are bound to abandon the principle established in many jurisdictions that damages must only compensate the claimant for the diminution of value of his assets and not speculative losses. In this section, ACTA seeks to overturn by fiat the basic economic principle that as prices rise, demand decreases.³³

The section also requires that courts must have the power to grant injunctions without hearing the other party, in certain circumstances,³⁴ and to oblige alleged infringers to give information about other parties without first proving the allegations of infringement against them.³⁵

The third section of Chapter Two regards so-called “border measures.” A previous version of the agreement designated that such measures apply to all the rights listed in the TRIPS agreement, including trademarks, patents, copyrights, data protection, integrated circuit protections, trade secrets, and geographical indications.³⁶ In an apparent response to widely raised concerns about access to medicines, the final version of the text now states in footnote 6 that

to persons who would not or could not buy at plaintiff’s price are not really sales lost as a result of the defendant’s actions.

33. *See, e.g.*, *United States v. Dove*, 585 F. Supp. 2d 865, 870 (W.D. Va. 2008) (explaining that “[i]t is a basic principle of economics that as price increases, demand decreases [and] [c]ustomers who download music and movies for free would not necessarily spend money to acquire the same product”).

34. *See* ACTA Text—Dec. 3, 2010, *supra* note 2, art. 12.2 (“Each Party shall provide that its judicial authorities have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. In proceedings conducted *inaudita altera parte*, each Party shall provide its judicial authorities with the authority to act expeditiously on requests for provisional measures and to make a decision without undue delay.”).

35. *See id.* art. 11 (“Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls.”).

36. *See* Anti-Counterfeiting Trade Agreement: Public Predecisional/Deliberative Draft art. 2.X ¶ 2 (Border Measures), Apr. 21, 2010, *available at* http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf (“For the purposes of this section, ‘goods infringing an intellectual property right’ means goods infringing any of the IP rights covered by TRIPS.”).

for the purposes of this agreement, “[t]he Parties agree that patents and protection of undisclosed information do not fall within the scope of this Section.”³⁷

ACTA requires signatories to grant customs officials quasi-judicial powers to decide complex matters of IP law, which they are ill-suited to exercise.

Section 3 sets up requirements in respect of the novel category of “suspect goods” that is nowhere defined in ACTA.³⁸ Signatories must grant powers to customs officials to seize “suspect goods,”³⁹ and may empower those officials to seize goods in transit.⁴⁰ Only Article 16 refers explicitly to customs authorities, while the remainder of Section 3 refers to “competent authorities”—defined so as to enable signatories to include judicial authorities.⁴¹

Furthermore, ACTA mandates that customs authorities are able to seize goods suspected of being potentially counterfeit. Signatories are required to give competent authorities power to detain suspected goods,⁴² provide information on origin of goods,⁴³ determine infringement, and order the destruction of property.

Border measures apply to the novel category of “counterfeit trademark goods,” defined as the following:

37. ACTA Text—Dec. 3, 2010, *supra* note 2, art. 13 n.6.

38. The phrase “suspect goods” is first used in Section 2 in Article 12.3 and thereafter exclusively used in Section 3 on border measures.

39. *See id.* art. 16.1 (“Each Party shall adopt or maintain procedures with respect to import and export shipments under which: (a) its customs authorities may act upon their own initiative to suspend the release of suspect goods; and (b) where appropriate, a right holder may request its competent authorities to suspend the release of suspect goods.”).

40. *See id.* art 16.2 (“A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which: (a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and (b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods.”).

41. *See id.* art. 5(c) (stating that “competent authorities includes the appropriate judicial, administrative, or law enforcement authorities under a Party’s law”).

42. *Id.* art 17.1.

43. *See id.* art. 22 (requiring a party to either give rights holders information about specific shipments or give rights holders information on the origin and destination of goods or, if not then for imported goods, on origin and destination of goods that have been seized or determined to be infringing).

[A]ny goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in Section 2, 3, 4 and 5 of Chapter 2 are invoked.⁴⁴

Since border measures may apply to goods in transit, this requirement effectively grants trademark holders a new right—the right to prevent the transit of goods through a country in which they are not offered for sale. Consequently, trademark law would substantially change in most jurisdictions which require that goods be offered for sale or commercially distributed in that jurisdiction and that usually reserve penalties, such as the forfeiture and destruction of goods, to courts upon proving intent to infringe a trademark.⁴⁵

Section 4, entitled “Criminal Enforcement,” requires imprisonment as a possible sentence for infringement.⁴⁶ Section 5 deals with the “digital environment.” The final text states that parties may require service providers to provide information about third parties, including commercially confidential and private information, to rights holders alleging infringement.⁴⁷ This Section makes use of an ambivalent phrase, “adequate legal protection and effective legal remedies,” which leaves the definition open for proponents of the enforcement agenda to insist that such “adequate” remedies include criminal sanctions.⁴⁸

The third chapter, entitled “Enforcement Practices,” requires signatories to commit resources to create specialized expertise on IP

44. *Id.* art. 1.X.

45. *See, e.g.*, Counterfeit Goods Act 37 of 1997, as amended in 2001 §20(1) (S. Afr.) (allowing a court, upon conviction, to declare counterfeit goods to be forfeited or order the destruction of the tools used to make the goods).

46. *See* ACTA Draft—Oct. 2, 2010, *supra* note 26, art. 2.15 (mandating that a party must apply the penalties of imprisonment and high monetary fees where necessary to deter future acts of counterfeiting and piracy).

47. For the outcome of an apparently fraught debate on imposing liability on Internet service providers, see ACTA Text—Dec. 3, 2010, *supra* note 2, art. 27.4.

48. *See* ACTA Draft—Oct. 2, 2010, *supra* note 26, art. 2.18 ¶¶5-8 (using such language to refer to a party’s duty to safeguard the rights of authors, performers and producers of phonograms, including infringement on their electronic ownership and identifying mechanisms).

enforcement and to convince their citizens of the importance of IP as currently configured.⁴⁹ Thus, a developing country that signs ACTA will be obliged to commit resources to creating or subsidizing domestic constituencies which would have incentives to further the enforcement agenda.

The fourth chapter creates obligations for international cooperation, information sharing, and capacity-building in making ACTA operational for participating states.⁵⁰ States parties are required to dedicate resources to spread ACTA's reach to nonparties, in cooperation with the private actors whose interests ACTA serves.⁵¹ Chapter Five essentially creates a new multinational organization, consisting of a committee which can control its own procedures, and sub-committees, which are empowered to invite non-governmental bodies to participate in their processes.⁵² This chapter also creates a mandatory consultation procedure that seems to oust the operation of the WTO's Understanding on Rules and

49. *See id.* arts. 3.1, 3.4 (stipulating that parties should enact measures, collect statistical data, and form advisory groups to promote specialization in and public awareness of IP rights enforcement).

50. *Id.* arts. 4.1-4.3.

51. *See id.* art. 4.3.

1. Each Party shall endeavor to provide, on request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance in improving enforcement of intellectual property rights for Parties to this Agreement and, where appropriate, for prospective Parties to this Agreement. Such capacity building and technical assistance may cover such areas as:

- (a) enhancement of public awareness on intellectual property rights;
- (b) development and implementation of national legislation related to enforcement of intellectual property rights;
- (c) training of officials on enforcement of intellectual property rights; and
- (d) coordinated operations conducted at the regional and multilateral levels.

2. For the purposes of paragraph 1, each Party shall endeavor to work closely with other Parties and, where appropriate, countries or separate customs territories not a Party to this Agreement.

3. Each Party may undertake the activities described in this Article in conjunction with relevant private sector or international organizations. Each Party shall strive to avoid unnecessary duplication of the activities described in this Article with respect to other international efforts.

Id.

52. *See id.* art. 5.1 (establishing the ACTA Committee, which may take any action that the committee deems necessary to carry out its functions, such as reviewing implementation of ACTA, promoting its development, considering amendments to it, approving accession of parties, establishing working groups, and seeking the advice of non-governmental organizations).

Procedures Governing the Settlement of Disputes.⁵³ The sixth and final chapter sets out the procedure for the signature and entry into force of the proposed treaty.⁵⁴

IV. THE CONSTRUCTION OF COUNTERFEITING

The use of the term “piracy” in reference to copyright has historically taken place outside of legal discourse—in rhetorical efforts by interest groups seeking to change the law or public perception. The term, as applied to copyright, has not had a clear legal meaning.⁵⁵ Earlier texts of ACTA used the term in reference to an unspecified and undefined kind of infringement. The appearance of such a vague, yet central rhetorical term in a draft international instrument signals that the text is written entirely from the perspective of the interest group that uses the term, if not by that group itself. The term “piracy” parallels the term “counterfeit” in the enforcement agenda and the text of ACTA.⁵⁶ The October consolidated text defines “pirated copyright goods” as:

53. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (outlining the course of action a state must take in requesting and entering into a consultation, such as emphasizing the confidentiality of consultations and giving “special attention” to the problems faced by developing countries). *But see* ACTA Draft—Oct. 2, 2010, *supra* note 26, art. 5.3 ¶ 2 (providing that if a party requests a consultation with another party, the consultation proceeding will stand without prejudice to rights under any other proceeding, including under the WTO Rules).

54. *See* ACTA Draft—Oct. 2, 2010, *supra* note 26, arts. 6.1-6.2 (establishing that ACTA will become enforceable 30 days after the sixth ratification, acceptance, or approval of the agreement).

55. *See* PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 26 (2002) (reiterating that the concept of IP laws are difficult to define because of the inherent “fuzzy” nature of ideas); *see also* ANTHEA WORSALL & ANDREW CLARK, ANTI-COUNTERFEITING: A PRACTICAL GUIDE 1 (1998) (noting that some jurisdictions, and even the use of terms in different languages, do not associate piracy with copyright infringement). *See generally* Debora Halbert, *Intellectual Property Piracy: The Narrative Construction of Deviance*, 10 INT’L J. FOR SEMIOTICS L. 55, 55 (1997) (pointing out that the idea of IP piracy is only recently becoming widespread as new products and information technology expand).

56. *See* ACTA Draft—Oct. 2, 2010, *supra* note 26, arts. 2.14, 4.1, 5.1 ¶ 3 (delineating that parties should impose penalties on and work to prevent both trademark counterfeiting and copyright piracy because they are both components of IP rights infringement).

[A]ny goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set out in Sections 2, 3, 4 and 5 of Chapter 2 are invoked.⁵⁷

The procedures referred to in the definition refer to obligations on states to impose injunctions on violators. These injunctions can be enforced without giving the defendant a right to a hearing and without actual proof of damages. Punishment can also take the form of destruction of property without compensation or an order for third parties to furnish private information.

“Counterfeit” has borne a number of legal meanings, one of which describes the large-scale production and sale of goods that bear an intentionally deceptive resemblance to trademarked goods. Another meaning relates to the integrity of state-issued currency.⁵⁸ As the East African experience shows, the term is used through ACTA as part of the enforcement agenda’s goal of not only referring to goods subject to copyright, patents, and other IP rights, but also to characterize otherwise non-infringing conduct as an infringement and, in some cases, a criminal offense. The term “counterfeit trademark goods” was defined for the first time in the October consolidated text of ACTA;⁵⁹ however, the singular term “counterfeit” has not been

57. *Id.* art. 1.X.

58. Compare Stephen Mihm, *No Ordinary Counterfeit*, N.Y. TIMES, July 23, 2006, <http://www.nytimes.com/2006/07/23/magazine/23counterfeit.html> (describing a well-made counterfeit dollar bill, known as a “supernote,” as featuring the same high-tech, color-shifting ink as real American bills and with the same composition of fibers), with Johanna von Braun & Peter Munyi, Note, *New Enforcement Mechanisms Challenge the Legality of Generics in the Name of Public Health: The Emergence of Anti-Counterfeiting Legislation in Africa*, 18 AFR. J. INT’L & COMP. L. 238, 245 (2010) (referring to the Ugandan anti-counterfeiting bill, which defined counterfeiting to include the manufacturing, producing, or making an imitation of a protected good, both inside and outside Uganda).

59. ACTA Draft—Oct. 2, 2010, *supra* note 26, art. 1.X. The December text defines “counterfeit trademark goods” in Article 5(d) as:

[An]y goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set forth in Chapter II (Legal Framework for

defined.

The use of “counterfeit” in the title of ACTA raises doubt whether the term refers only to trademarked goods or to goods subject to patents and other forms of IP, especially because the agreement applies to a wide variety of forms of IP. “Counterfeit” as used in the title and preamble has a vague but ominous meaning intended to homogenize a heterogeneous set of regulations and practices.

WIPO adopted an agenda focusing on development, which precipitated the enforcement agenda.⁶⁰ The rights language employed by the access to medicines and access to knowledge movements rendered less effective the putative technocratic language of “minimum standards,” which previously had been deployed to maximize IP rights. The terms “counterfeiting” and “enforcement” were therefore mobilized to invoke the language of security during an era in which democratic governments in developed countries have exhibited a tendency to let security trump human rights.

Enforcement of Intellectual Property Rights) are invoked. ACTA Text—Dec. 3, 2010, *supra* note 2, art. 5(d). Any discussion of ACTA’s provisions suffers from the secrecy of the process. At the time of this writing only three public drafts had been released and two of those were redacted. The third, distributed in October 2010, purported to require no further negotiations but was indeterminate in key respects. Yet another draft dated November 15, 2010 has been made public, with at least one significant change but without resolving other important issues.

60. Two weeks after WIPO adopted the Development Agenda, United States Trade Representative (“USTR”) Susan Schwab announced that USTR would seek to negotiate ACTA in order to “set a new, higher benchmark for enforcement that countries can join on a voluntary basis.” Press Release, Office of the U.S. Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), <http://www.ustr.gov/ambassador-schwab-announces-us-will-see-new-trade-agreement-fight-fakes>; *see* Ermias Tekeste Biadgleng & Viviana Muñoz Tellez, *The Changing Structure and Governance of Intellectual Property Enforcement* 26 (S. Ctr. Research Paper No. 15, Jan. 2008), available at <http://www.iadb.org/intal/intalcdi/PE/2008/02151.pdf> (lauding the WIPO Advisory Committee on Enforcement in taking on a broad mandate of IP rights enforcement, which will encourage developing countries to implement TRIPS-plus standards, and emphasizing the importance of international cooperation, especially with developing states, to encourage best practices of the enforcement of IP rights using soft-law norm-setting principles in a “holistic manner”).

V. THREATENED EFFECTS OF ACTA ON DEVELOPING COUNTRIES

A. NEGATING MULTINATIONAL DEVELOPMENT

The immediate effect of ACTA, even before considering the pressure exerted on developing countries, is the exclusion of most developing countries from international decision-making. Indeed, ACTA is a means of circumventing WIPO and WTO processes. India raised this concern in a letter to the WTO: “Another systemic concern is that [IP rights] negotiations in [regional trade agreements] and plurilateral processes like ACTA *completely bypass the existing multilateral processes.*”⁶¹ Because WIPO is a United Nations organization, it is duty-bound to pursue development. One consequence of the abandonment of the commitment to multinational decision-making is an effective disregard of the United Nations Millennium Development Goals adopted by the United Nations General Assembly.⁶² The response by leading emerging economies such as India and China⁶³ cannot be characterized as merely representing national trade interests coincidentally at odds with those of the negotiating countries. Instead, countries with emerging economies are home to many of the world’s poorest people—those who will be directly impacted by ACTA. For example, in India, the world’s most populous democracy, some 456 million people live below the poverty line.⁶⁴

61. *Intervention on TRIPS plus Enforcement Trends*, KNOWLEDGE ECOLOGY INT’L (June 10, 2010), <http://keionline.org/node/864>.

62. See United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 5, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) (underscoring that countries must create policies on a global level to ensure equitable and inclusive progress for developing countries and countries in transition due to the uneven distribution of benefits and disadvantages created by globalization).

63. See, e.g., Zhao Hong, Permanent Mission of China to the World Trade Org., Proposal by China to WTO TRIPS Council (June 28, 2010), *available at* <http://keionline.org/node/883> (questioning the TRIPS-plus standards because they will compel developing countries to use their limited resources for the benefit of IP rights).

64. See *New Global Poverty Estimates – What it Means for India*, WORLD BANK, <http://go.worldbank.org/51QB3OCFU0> (last visited Mar. 1, 2011) (marking that even though the overall poverty rate in India is declining, the number of poor people living below the poverty line has increased, and arguing that it is necessary for India to deal with “inequalities in opportunities” in order to

B. LIMITING ACCESS TO MEDICINE

ACTA threatens access to medicines through the indeterminacy of the terms “counterfeit” and “enforcement.” Similarly problematic are provisions that mandate injunctions against a broad class of actors, including third parties, and mandate interception of goods in transit by customs officials applying the IP law of the transit country.⁶⁵ In the “final” text, patents are excluded only from Section 3 of Chapter 2, which concerns border measures. The exclusion operates through a footnote, raising the question: why it is not firmly placed in the text?

Even if these provisions ultimately exclude pharmaceutical patents—an exclusion that is not guaranteed given the lack of accountability of the negotiators to elected lawmakers—trademark and copyright claims can still be used to block generic medicines. For example, in 2009 German customs officials seized and held a shipment of the generic drug Amoxicillin, which was being shipped through Germany to a least developed country.⁶⁶ The drugs were held for four weeks because German customs officials were confused by the alleged similarity of the generic name Amoxicillin with the GlaxoSmithKlein brand Amoxil.⁶⁷ The incident highlights the negative consequences for global health when customs authorities are empowered and required to engage in determinations of IP rights with respect to goods in transit.

How these provisions and subsequent developments will affect access to medicines is further evidenced by two instances of the enforcement agenda in the developing world: the East African experience of new counterfeit legislation and the Dutch seizure of generic drugs in transit. The East African countries of Tanzania,

promote growth).

65. See ACTA Text—Dec. 3, 2010, *supra* note 2, arts. 8, 12.

66. See ICTSD, *European Generic Drug Seizures Take Centre Stage at TRIPS Council Meeting*, 13 BRIDGES WKLY. TRADE NEWS DIG., no. 21 June 10, 2009, at 6, available at <http://ictsd.org/i/news/bridgesweekly/48330/> (commenting that the official reason for seizing the Amoxicillin, which was en route to Republic of Vanuatu, was to check the shipment for counterfeits, and describing that the products were worth €28,000 and were held for four weeks until there was confirmation that no trademark infringement occurred).

67. See *id.* (observing that this confusion is “the latest in the list of cases that demonstrate that EU regulations are actively hampering timely access to medicines to developing countries”).

Kenya, and Uganda rely on generic drugs.⁶⁸ Efforts by the European Union and a group claiming a World Health Organization mandate have resulted in “anti-counterfeiting” legislation in Tanzania and Kenya and the beginnings of an “anti-counterfeiting” legislative process in Uganda. The World Health Organization Secretariat described the International Medical Product Anti-Counterfeiting Taskforce (IMPACT) as “a partnership comprised of all the major anti-counterfeiting players, including: international organizations, non-governmental organizations, enforcement agencies, pharmaceutical manufacturers associations and drug and regulatory authorities.”⁶⁹ Historically, counterfeiting has referred to an intentional violation of exclusive trademark rights on a commercial scale. However, in East Africa, enacted or draft legislation defines counterfeiting as infringement, including unintentional infringement, of not only trademark, but also other IP rights, such as copyrights and patents.⁷⁰ The Kenyan legislation defines goods as “counterfeit” if they infringe an IP right “in Kenya or elsewhere.”⁷¹ Consequently, if a trademark or patent is not registered in Kenya, goods that allegedly infringe such a right elsewhere in the world may be subject to an injunction or seizure. This trend represents a marked departure from the general rule of territoriality—where copyright, trademark, and patent rights apply only within the jurisdiction that grants the right.⁷²

68. Wambi Michael, *EU Supports Law Threatening Access to Medicines*, INTERPRESS SERVICE (Mar. 15, 2010), <http://ipsnews.net/news.asp?idnews=50661> (“The European Union [] is funding the drafting of Uganda’s controversial Counterfeit Goods Bill, a proposed law that has caused an outcry as it threatens access to life-saving generic medicines in this low income East African country. Some [ninety] percent of medicines used in Uganda’s health-care system are imported, of which about [ninety-three] percent are generics.”).

69. *About Us*, INT’L MEDICAL PRODUCTS ANTI-COUNTERFEITING TASKFORCE, <http://www.who.int/impact/about/en/> (last visited Mar. 1, 2011).

70. *See, e.g.*, von Braun & Munyi, *supra* note 58, at 243-46 (explaining that Kenyan and Ugandan bills on counterfeiting govern trademark counterfeit, copyright piracy, and “all other forms of intellectual property, such as patents and plant breeders’ rights”).

71. *See* The Anti-Counterfeit Bill, No. 16 (2008), KENYA GAZETTE SUPPLEMENT No. 51, pt. I(2) (making illegal the manufacturing, producing, labeling, and re-packaging of protected goods, even outside Kenya).

72. *See* Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 887 (2004) (quoting various sources, such as the United States Supreme Court, secondary sources on

On April 23, 2010, the Kenyan High Court suspended the application of the Act with respect to medicines, as it bans import and manufacture of generic medicines and therefore infringes constitutional rights.⁷³ The campaign to pass the legislation claimed that it was necessary to prevent sub-standard medicines and other defective or even dangerous goods.⁷⁴ The legislation requires the state to devote resources to create agencies or to change the power of existing agencies with the aim of establishing unknowing infringement as a criminal offense.

ACTA explicitly requires countries to enable customs officials to seize goods in transit at the behest of purported rights holders. This provision is based on European regulations that have previously been used to intercept generic medicines in transit.⁷⁵ European Council Regulations have been used on a number of occasions by Dutch customs authorities to stop the transit of generic medicines lawfully produced in India, being lawfully imported into developing countries, but which happen to pass through European facilities.⁷⁶ These seizures negate the freedom of transit guaranteed by Article 5 of the General Agreement on Tariffs and Trade.⁷⁷ The Doha

trademarks and monopolies, and federal appellate courts, contending that “it is an axiomatic principle of domestic and international trademark law that trademarks and trademark law are territorial”).

73. The Kenyan High Court found that Act 13 of the 2008 Anti-Counterfeit Act arguably bans the importation of generic medicines and so infringes constitutional rights. They therefore issued an order suspending the application of the Act to medicines, pending a full hearing on the issue. *See Asero Ochieng’ v. Attorney-Gen.*, (2010) Petition No. 409 of 2009 (H.C.K.) (Kenya) (ruling on file with American University International Law Review).

74. *Cf.* von Braun & Munyi, *supra* note 58, at 250 (noting that Kenyan individuals who are HIV-positive challenged the legislation on the grounds it will hinder access to generics).

75. *See* Sean Flynn, *ACTA and Access to Medicines*, AM. U. WASH. C. L. PROGRAM ON INFO. JUST. & INTELL. PROP. BLOG (April 28, 2010, 2:57 PM) <http://www.wcl.american.edu/pijip/go/blog-post/acta-and-access-to-medicines> (explaining that the United States moved to expand injunctions against third parties who may be unknowingly aiding infringers by using patented active pharmaceutical ingredients in generics).

76. *See* Council Regulation 1383/2003, art. 11, 2003 O.J. (L 196) 7(EC) (authorizing customs authorities to implement a “suspensive procedure” by destroying goods they have detained because the goods may violate IP rights).

77. *See* General Agreement on Tariffs and Trade art. 5, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (requiring that a vessel’s country of origin may not interfere with the freedom of transit and specifying no distinction “based on the

Declaration allows countries to manufacture, export, and import generic medicine under compulsory licenses in certain circumstances.⁷⁸ The Dutch customs authorities, apparently unable or unwilling to parse the complexities of the legal issues involved, therefore seized the medicines unlawfully.⁷⁹

Seeing the enforcement agenda in action confirms that aspects of that agenda embedded in ACTA, including the seizure of goods in transit and an expansive notion of “counterfeit,” already impede access to medicines for people in developing countries.

C. LIMITING ACCESS TO KNOWLEDGE

The range of policy discretion for developing countries was massively reduced by TRIPS, which requires “minimum standards” of IP protection.⁸⁰ Developed countries have generally complied, indeed many have exceeded the requirements of international treaties, as borne out by research into African domestic practice.⁸¹ TRIPS imposed obligations to pass and adhere to laws, based not on the conditions prevailing in developing countries, but rather according to the requirements of trade offices in developed countries which were acting at the behest of corporate constituencies. Studies

flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport”).

78. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (supporting the use of TRIPS to further the public’s access to medicine by providing access, research, development, and establishing a new Declaration).

79. TRIPS art. 31, read with paragraph 6 of the Doha declaration, allows member states to issue compulsory licenses to manufacture and import generic medicines in certain circumstances.

80. See TRIPS § 5 (setting out the minimum standards for patent protection by establishing the minimum duration of protection, offering exclusions from patents such as “diagnostic, therapeutic and surgical methods,” excepting unreasonable exploitative patents as prejudicial, and providing judicial review of revocation of a patent).

81. See, e.g., Tobias Schonwetter et al., *Copyright and Education: Lessons on African Copyright and Access to Knowledge*, 10 AFR. J. INFO. & COMM. 37 (2010), available at <http://link.wits.ac.za/journal/AJIC10-Schonwetter.pdf>. This work concluded that Egypt, South Africa, Morocco, Kenya, Ghana, Uganda, Senegal, and Mozambique “afford copyright protection that complies with, and in many cases exceeds, the standards reflected in the relevant international treaties and agreements, including the Berne Convention and TRIPs.” *Id.* at 38-39.

revealed the following:

Perhaps the most important revelation from this research is that copyright laws in all study countries comply with international copyright standards. In many cases, the African countries studied provide even greater protection than international legal norms require. Thus, the countries studied do not need advice or assistance in drafting legislation to bring levels of legal protection up to par. Simply put, Africa does not need stronger copyright laws. Realising this point is urgent, as some of the study countries—Kenya, Ghana, South Africa—are in the midst of revising, or planning revisions, to their copyright laws.⁸²

In these circumstances it is not surprising that IP legislation and practice diverge in developing countries. Research in Africa found the following:

Access to learning materials is obtained primarily through activities that infringe copyright. When—and if—the enforcement of sanctions against copyright violation becomes a greater reality in the study countries, then, without mechanisms in place to promote and ensure non-infringing access to knowledge, many learners, particularly at the tertiary level, will be in a precarious position and entire systems of education will be vulnerable.⁸³

ACTA will require precisely the enforcement that will cut off access to learning materials in such countries. While TRIPS constrains what exceptions and limitations to exclusive rights a country may exercise, it does not set out minimum exceptions. Instead, ACTA makes the entire process of writing exceptions and limitations far more complex than it was for developed countries, which were free to create whatever exceptions they deemed appropriate during their own development. Because of the speed with which developing countries are expected to create complex IP legislation—legislation that has been formulated over centuries by developed countries—most developing countries have not established appropriate balancing provisions that enable access to knowledge. As a result, infringement in developing countries, even widespread infringement, is a symptom of a system imposed from outside, not suitable or even meaningful to many in the developing world.⁸⁴ Enforcement required by ACTA will deprive millions of

82. *Id.* at 49-50.

83. *Id.* at 50.

84. *See id.* (arguing that “the copyright environment can be improved by legal

people of their only viable access to knowledge.

D. THE EFFECT OF BORDER MEASURES ON DEVELOPING COUNTRY EXPORTS

Broadly-drafted border measures will allow global corporations to exert pressure on developing country exporters, either barring them from access to markets or extracting licensing fees from them. This power was exercised in a campaign by Monsanto to prevent the importation of soymeal from Argentina into Europe.⁸⁵ Monsanto had obtained a so-called “gene patent” in Europe and the United States, which enabled it to exercise a monopoly over the supply of a particular type of soybean for agricultural use.⁸⁶ Monsanto did not obtain a patent in Argentina, where crops of the bean were processed to produce soymeal. Some of this soymeal was imported into Europe. After a number of years without protest, Monsanto requested the detainment of Argentinean shipments to Denmark, the Netherlands, Spain, and the United Kingdom while making damages claims against European importers of the soymeal.⁸⁷ The claims were based on alleged violation of the patent, and Monsanto argued that the patented DNA sequences would, or could, survive in the meal, even though the meal could not be used to grow a new crop of beans. None of the cases brought by Monsanto have succeeded, and courts

reforms that make copyright more flexible and suitable to local realities [while] less restrictive laws could provide more effective protection, because they would enable entire segments of the population currently operating outside the copyright system altogether to comply with limited, realistic rules”).

85. See *Soy Imports Delayed as Argentina Fights Monsanto over GM*, FOOD PROD. DAILY (May 18, 2006), <http://www.foodproductiondaily.com/Supply-Chain/Soy-imports-delayed-as-Argentina-fights-Monsanto-over-GM> (reporting that Monsanto is bringing claims against Denmark, the Netherlands, and Spain as part of the company’s larger goal of compelling Argentine farmers to pay royalties for Monsanto’s seeds).

86. See Carlos M. Correa, *Enforcing Border Measures: Importation of GMO Soybean Meal from Argentina*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES, *supra* note 5, at 81-82 (explaining that Monsanto patented the soybean in several countries but never attempted to obtain a patent for it in Argentina).

87. See Oliver Balch, *Seeds of Dispute*, GUARDIAN (Feb. 22, 2006), <http://www.guardian.co.uk/science/2006/feb/22/gm.argentina> (highlighting that Monsanto’s suit against these countries alleged importation from Argentina without a license, but noting that if Monsanto were successful, it could claim to own part of any product that the gene was found in).

have rejected the claim that the patent could prevent the importation of an end product not covered directly under the patent.⁸⁸ However, in the interim, the customs officials had seized and delayed the shipments and charged the importers detention fees.

Even if patents are excluded from the ACTA section on border measures, the current wording of that exclusion strongly suggests that other agreements may well require those “border measures” with respect to patents. The Monsanto case illustrates a strategic use of alleged IP rights, and even when courts ultimately do not hold that those rights apply to products further along a value chain to the rights holder, these cases create considerable barriers to market entry for developing country farmers. The campaign shows the potential of border measures for anti-competitive conduct. Intermediaries such as importers are likely to avoid such conflicts even if the law is not clear, switching to new sources, especially those who have made strategic use of broad border measures. The result for developing country farmers, who lack the resources to fight sophisticated legal battles on foreign terrain, is that they will lose markets for their goods, thereby causing potentially devastating effects on rural economies.

CONCLUSION

The impact of ACTA on developing countries will be far reaching, given its broad scope encompassing different types of IP and its inclusion of a range of measures—such as civil and criminal penalties, border and information gathering requirements, and mandatory government speech in favor of entrenched IP regimes. As a consequence, it is not possible to fully describe the likely impact of ACTA. However, an examination of other manifestations of the enforcement agenda, of which ACTA is merely one, leaves little doubt about the consequences for the world’s poor if ACTA proceeds.

Below is a table listing some of the impacts ACTA will likely have on development.

88. The European Court of Justice, for example, tied its holding against Monsanto to the fact that the product in question was not the seed itself and therefore did “not perform the function for which it was patented.” Case C-428/08, *Monsanto Tech. LLC v. Cefetra BV*, [2011] F.S.R. 6, at *191 (2010).

TABLE 1. LIKELY EFFECTS OF ACTA ON DEVELOPMENT

| Short Term | Medium Term | Long Term |
|--|---|---|
| Interception of medicines in transit | Recruitment of some developing countries to support ACTA | Undermining of fragile civil liberties and rule of law |
| Anti-competitive blocking of exports to developed countries | Diversion of resources to "enforcement" | Local political economies of rent seeking "enforcement" |
| Pressure to prevent infringement that gives access to learning materials | Decreased access to knowledge due to measures in force in developed countries | Institutionalization of the enforcement agenda |
| Pressure to adopt ACTA-type measures before signing ACTA | Disruptive restructuring of global trade routes | Loss of policy space remaining under TRIPS |
| | Decreased access to export markets and growing barriers to international trade | Restrictions on access to medicines, access to learning materials, and technology transfer—causing development failure leading to political instability |
| | Recruitment of public and private security sector as new enforcement constituency | |
| | Imposition of ACTA-plus measures through bilateral agreements | |

Many of these effects cannot be avoided simply by refusing to accede to the treaty resulting from the ACTA negotiating process. Instead, developing countries will be affected directly by implementation of ACTA by the club of drafting countries. Some of the effects, such as undermining the WIPO Development Agenda

and sidelining WIPO—as well as the WTO, are already underway. The most immediate impact of ACTA is that the leadership of many of the world's largest democracies, including Brazil and India, are shut out of ACTA during negotiations even though it will be imposed on them later. Since negotiations of the treaty have been conducted largely in secret, it is difficult for developing countries with limited resources to track the process and even harder to respond to it through diplomatic channels.

In the short term, developing countries will continue to experience the effects of enforcement through the interception of goods in transit, including generic medicines. In the medium term, developing countries will come under increasing trade pressure to adopt wide ranging “anti-counterfeiting” measures, which threaten access to medicines and access to learning materials. In the long term, developing countries will also be pressured to agree to ACTA and thereafter will be required to devote scarce resources to furthering the commercial interests of a small but exceptionally powerful group of multinational corporations, thereby further depriving their poorest citizens of access to medicines and learning materials.