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# Public Interest Representation in Global IP Policy Institutions

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# PUBLIC INTEREST REPRESENTATION IN GLOBAL IP POLICY INSTITUTIONS<sup>1</sup>

*Dr. Jeremy Malcolm*<sup>2</sup>

## ABSTRACT

This paper compares the institutional and procedural arrangements that a range of global institutions make for civil society representation and input into policy development processes on intellectual property issues. The context for this analysis comes from two sets of norms for multi-stakeholder public policy development that exist in other regimes of governance: those of the Aarhus Convention (for environmental matters), and those of the Tunis Agenda for the Information Society (for Internet governance). These global norms, along with the actual practices of the institutions involved in global governance of intellectual property rights, are then contrasted with the proposed new institutional mechanisms for ACTA, the Anti-Counterfeiting Trade Agreement. It is found that ACTA falls short even of the practices of the other institutions analysed, but far shorter of the ideals promulgated in the Aarhus Convention and the Tunis Agenda. Whilst the shortcomings of the ACTA negotiation process are largely to blame for this, an underlying problem is the lack of a normative framework for civil society representation and participation in intellectual property policy development.

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<sup>1</sup> At the time this paper was researched and written, the July 1, 2010 draft of ACTA was the most recent draft of the text. Any references to “the most recent text” and related analysis refer to the July 1, 2010 draft. After this paper was submitted for publication, a new draft of ACTA was leaked on Aug. 25, 2010. This paper may be revised by the author to reflect changes made by the Aug. 25, 2010 draft text.

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## I. INTRODUCTION

One of the most persistent complaints that activists and scholars have brought against the process of negotiations for an Anti-Counterfeiting Trade Agreement (ACTA) is that there has been insufficient openness to civil society, by way of transparency<sup>3</sup> or public consultation.<sup>4</sup>

The negotiators have repeatedly denied these charges,<sup>5</sup> but in doing so have sometimes appeared surprised that broader civil society even expects

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<sup>3</sup> See Emily Ayoob, *Recent Development: The Anti-Counterfeiting Trade Agreement*, 28 CARDOZO ARTS & ENT. L. J. 175 (2010).

<sup>4</sup> This has been treated as a “the responsibility of each ACTA country itself.” Mike Masnick, *ACTA Negotiators Respond to Questions about ACTA; More of the Same*, TECHDIRT (June 29, 2010, 12:28 PM), <http://www.techdirt.com/articles/20100629/10381810004.shtml>. However some of the negotiating countries that have held their own public consultation meetings (and not all have) have done so under conditions unfavourable to civil society. See Issa Villarreal, *Concerns About Anti-Counterfeiting Trade Agreement (ACTA)*, GLOBAL VOICES ONLINE (Feb. 25, 2010), <http://globalvoicesonline.org/2010/02/25/global-concerns-about-anti-counterfeiting-trade-agreement-acta/>.

<sup>5</sup> See Masnick, *supra* note 4, Monika Emert, *European Commission on ACTA: TRIPS Is Floor Not Ceiling*, INTELLECTUAL PROPERTY WATCH (April 22, 2009, 7:18 PM), <http://www.ip-watch.org/weblog/2009/04/22/european-commission-on-acta-trips-is-floor-not-ceiling/>.

to be consulted on this agreement. After all, they suggest, ACTA “is not about limiting civil liberties or harassing consumers.”<sup>6</sup>

In other contexts, this would seem a rather naïve attitude. For example, as this paper will show, the importance of accountability of and transparency in decision-making, and the public's right to be consulted during the preparation of normative instruments, are quite rudimentary concepts in both environmental law and in Internet governance.

However, having been raised, the question should be squarely addressed: since governments (or at least those that are negotiating ACTA) are the democratically elected representatives of their citizens, what need is there for civil society to be directly involved in the negotiation and implementation of an international agreement at all?

The simplest answer is that at the international level, policy-making suffers from serious democratic deficits. That is to say, with each layer that representatives are removed from the citizens they represent, their democratic legitimacy is reduced. The diplomats who represent nation states in intergovernmental organisations are not directly accountable to their electorates at home, and nor does their national parliament necessarily have any opportunity to ratify the decisions they make.<sup>7</sup>

Indeed, this has been a positive selling point for the countries negotiating ACTA, in that, according to many commentators, ACTA has been used as a vehicle for “policy laundering” by allowing controversial policy changes to be negotiated away from domestic venues, until an international obligation to implement those changes is in place, at which time any domestic opposition will come too late.<sup>8</sup>

Lacking adequate accountability to their citizens through domestic democratic processes, the policy-making activities of governments within international institutions can only be legitimized through additional public accountability at that level. As one scholar puts it:

The reliance on democratic principles and the

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6 Benita Ferrero-Waldner, Answer to a Written Question, ACTA Negotiations and Telecoms Package Principles (Feb. 4, 2010), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-6094&language=EN>.

7 This varies from one country to another, but the United States, for example, is negotiating ACTA as an “Executive Agreement” that requires only the consent of the President, not the Congress. See Eddan Katz and 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. 24 (2009).

8 See David Kravets, *Copyright Treaty is Policy Laundering at its Finest*, (Nov. 4, 2009, 7:59 PM), <http://www.wired.com/threatlevel/2009/11/policy-laundering>.

consent of the governed, which legitimize political decisions in the Western tradition, are of little help in international affairs. The “democratic deficit” of international organizations is a commonplace. Rather, the international lawyer must justify his authority by the acceptance of the results of his activity by his audience and addressees, in particular states, and increasingly non-governmental actors.<sup>9</sup>

Thus it is here that the place of civil society comes in. Even the United Nations has acknowledged the importance of civil society's role in legitimizing policy-making within international institutions. The Cardoso report on civil society presented to the U.N. General Assembly in 2004 recommended “that the United Nations can make an important contribution to strengthening democracy and widening its reach by helping to connect national democratic processes with international issues and by expanding roles for civil society in deliberative processes.”<sup>10</sup>

It is in this context that institutions in several global governance domains (or regimes, as they will be termed here)<sup>11</sup> have begun to reform their structures and processes to increase their transparency and accountability to civil society, and to allow NGOs—that is, the actors who constitute organised global civil society—greater levels of participation in policy development.

The next section will briefly describe two sets of norms or principles that have guided this ongoing process, respectively within the regimes of international environmental law and Internet governance.

## II. OTHER REGIMES

### A. *Environmental Law*

The 1992 United Nations Conference on Environment and Development (or Earth Summit) was a major event in which the governments of 172

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9 Andreas L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, in GOVERNANCE AND INT'L LEGAL THEORY 59, 61 (Ige F. Dekker, et al. ed., 2004).

10 Chair of the Panel of Eminent Persons on United Nations—Civil Society, *Report of the Panel of Eminent Persons on United Nations—Civil Society Relations*, 24, U.N. Doc. A/58/817 (June 11, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/376/41/PDF/N0437641.pdf>.

11 Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG., 185 (1982).

countries joined with 2,400 NGO representatives to develop several agreements addressing issues of environmental conservation and climate change.<sup>12</sup> One of these agreements was the Rio Declaration on Environment and Development,<sup>13</sup> which relevantly provides

**Principle 10. Public participation**

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Although non-binding in itself, this declaration formed the basis for the subsequent binding UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, otherwise known as the Aarhus Convention.<sup>14</sup>

The parties to the Aarhus Convention are over forty European and Central Asian members of the United Nations Economic Commission for Europe (UNECE), including the European Union. The United States, although a member of the UNECE, is not a party to the Convention. It did, however, attend the first conference of the parties in 1992 to voice its exception to the significant role that the Convention accorded to NGOs, stating that it would “not regard this regime as precedent.”<sup>15</sup>

That said, the Convention is indeed somewhat remarkable. Whereas

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12 See STANLEY JOHNSON, *THE EARTH SUMMIT: THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED)* (1993).

13 United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (June 13, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

14 See Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 [hereinafter Aarhus convention].

15 Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 3 (2007).

most international agreements grant rights only to states,<sup>16</sup> the Aarhus Convention provides significant rights to the public, including:

1. The right to access environmental information (Article 4), coupled with a duty upon each party to collect and disseminate such information (Article 5).
2. The right to public participation in decisions with environmental impact:
  - a. relating to specific environmentally-sensitive activities such as mineral extraction or refinement (Article 6);
  - b. concerning plans, programmes and policies relating to the environment (Article 7); and
  - c. during the preparation of executive regulations and/or generally applicable legally binding normative instruments (Article 8).
3. Access to justice—that is, to independent review of a party's decisions (Article 9).

In the case of non-compliance by a state party, any member of the public may make a communication about this to the Convention's Compliance Committee, which will make a recommendation on the merits of the case to a full Meeting of the Parties. Meetings of the Compliance Committee are completely open to the public, and NGOs are readily accredited to attend Meetings of the Parties.

Article 8 is worth setting out in full. It provides:

**Public Participation During the Preparation of . . .  
Binding Normative Instruments**

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

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<sup>16</sup> However, the first Optional Protocol to the International Covenant on Civil and Political Rights grants individuals direct rights of audience before the Human Rights Committee of the United Nations in respect of alleged infringements of their rights. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S 171. The United States is not a party to this instrument, either.

- a) Time-frames sufficient for effective participation should be fixed;
- b) Draft rules should be published or otherwise made publicly available; and
- c) The public should be given the opportunity to comment, directly or through representative consultative bodies.
- d) The result of the public participation shall be taken into account as far as possible.

Substituting “access to knowledge” for “the environment,” the most ardent opponent of ACTA could hardly ask for more than already exists as binding international law in the environmental governance regime.

### *B. Internet Governance*

The World Summit on the Information Society (WSIS), like the Earth Summit, was a large scale United Nations summit meeting, attended by 175 governments and over 12,000 participants, which resulted in the development of several agreements: two at the first phase of the meeting held in Geneva in 2003, and another two at the second phase held in Tunisia in 2005.

These documents are not treaties, and they do not bind the governments that agreed to them, still less the private sector and civil society delegates who contributed their own submissions during the WSIS preparatory conferences at which the texts were drafted. They are, in other words, instruments of “soft” rather than “hard” international law.<sup>17</sup> Even so, supported by the large majority of the world's governments, they carry considerable normative weight within the Internet governance regime.

Of these agreements, those which call for attention here are the Geneva Declaration of Principles<sup>18</sup> from the first phase, and the Tunis Agenda for the Information Society<sup>19</sup> from the second. The Declaration of Principles is

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<sup>17</sup> See ANTHONY C. AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 24 (1999).

<sup>18</sup> See World Summit on the Information Society, Geneva, Switz., Dec.10-12, 2003, *Geneva Declaration of Principles*, U.N. Doc. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003), available at <http://www.itu.int/wsis/docs/geneva/official/dop.html> [hereinafter *Geneva Declaration*].

<sup>19</sup> See World Summit on the Information Society, Tunis, Tunis., Nov. 16-18, 2005, *Tunis Agenda for the Information Society*, U.N. Doc. WSIS-05/TUNIS/DOC/6(Rev. 1)-E (Nov. 18, 2005), available at <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html> [hereinafter *Tunis Agenda*].



based around eleven “key principles for building an inclusive Information Society.” The first of these concerns the role of governments and all stakeholders in the promotion of ICTs for development, and provides:

Governments, as well as private sector, civil society and the United Nations and other international organizations have an important role and responsibility in the development of the Information Society and, as appropriate, in decision-making processes. Building a people-centred Information Society is a joint effort which requires cooperation and partnership among all stakeholders.<sup>20</sup>

The Declaration goes on to provide that “international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations,”<sup>21</sup> but—significantly—conditions this with the proviso that “Policy authority for Internet-related public policy issues is the sovereign right of States.”<sup>22</sup>

In between the first and second phases of WSIS, a Working Group on Internet Governance (WGIG) was convened. In its report, it clarified the content of the regime of governance in which all stakeholders were to cooperate in partnership, settling on this definition:

Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.<sup>23</sup>

With this groundwork laid, it fell to the second agreement, the Tunis Agenda, to address *how* governments, the private sector and civil society were to exercise their respective roles in Internet governance. This topic is addressed in two ways. The first is by calling for the establishment of “a process of enhanced cooperation” by which governments are to lead the

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20 *Geneva Declaration*, *supra* note 18, art. 20.

21 *Id.* art. 48.

22 *Id.* art. 49(a).

23 World Summit on the Information Society, *Report of the Working Group on Internet Governance*, U.N. Doc. WSIS-II/PC-3/DOC/5-E (Aug. 3, 2005), available at <http://www.itu.int/wsis/docs2/pc3/html/off5/index.html>.

development of globally applicable public policy principles for the Internet, in consultation with other stakeholders.<sup>24</sup>

Since 2005, very little concrete progress had been made towards establishing this process of enhanced cooperation. But this changed in May 2010 when the Commission for Science and Technology for Development (CSTD), a committee of the UN's Economic and Social Council (ECOSOC) tasked with responsibility for following up on the implementation of WSIS, called upon the Secretary-General to

convene open and inclusive consultations involving all member states and all other stakeholders to proceed with the process towards the implementation of enhanced cooperation in order to enable governments, on an equal footing to carry out their roles and responsibilities in international public policy issues pertaining to the Internet . . . through a balanced participation of all stakeholders in their respective roles . . . before the end of 2010.

The second mechanism established at Tunis, which is a part of the broader process of enhanced cooperation, was the establishment of an Internet Governance Forum (IGF), as a new venue for multi-stakeholder policy dialogue in which governments could take an equal role and responsibility for Internet governance and policy making in consultation with all other stakeholders.<sup>25</sup>

The Tunis Agenda states that the IGF should be multilateral, multi-stakeholder, democratic and transparent in its working and function, with a lightweight and decentralized structure that is subject to periodic review. It is not to replace other relevant fora in which Internet governance issues are discussed or to exercise oversight over them or have any binding decision making power. In particular, it is to have no involvement in day-to-day or technical operations of the Internet, but should work in parallel with those organisations that do, taking advantage of their expertise.<sup>26</sup> Its mandate, *inter alia*, is to:

- a) Discuss public policy issues related to key elements of Internet governance in order to foster

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<sup>24</sup> *Tunis Agenda*, *supra* note 19, art. 61, 69–71.

<sup>25</sup> *See id.* art. 67–68.

<sup>26</sup> *See id.* art. 73, 77 and 79.

the sustainability, robustness, security, stability and development of the Internet.

- b) Facilitate discourse between bodies dealing with different cross-cutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body.
- c) Interface with appropriate intergovernmental organizations and other institutions on matters under their purview.
- ...
- g) Identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations.<sup>27</sup>

The initial five-year term of the IGF winds up in 2010. In his review of the desirability of the continuation of the IGF, the Secretary-General observed some deficiencies in its performance to date, as the CSTD had noted deficiencies in the realisation of the process of enhanced cooperation. He acknowledged both “a perception among some civil society stakeholders that the agenda-setting process of the MAG is not sufficiently inclusive or transparent,” as well as the assessment of many “that the contribution of the IGF to public policy-making is difficult to assess and appears to be weak,” and made recommendations to address these and other problems.<sup>28</sup>

Even so, the principles of multi-stakeholder governance laid down in the Geneva Declaration, and the progress made towards implementing them through the Internet Governance Forum and the process towards enhanced cooperation, mark a revolutionary shift away from the hierarchical mode of intergovernmental rule-making that is still taken for granted in the global regime for intellectual property rights.

### *C. Summary of Principles*

Two sets of norms have been established, respectively, for the regimes of environmental and Internet governance, prescribing institutional principles for civil society access to and participation in policy development

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<sup>27</sup> *Id.* art. 72.

<sup>28</sup> U. N. Secretary-General, *Continuation of the Internet Governance Forum: Note by the Secretary-General*, 8-9, A/65/78- E/2010/68 (May 7, 2010), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan039400.pdf>.

processes. Relevantly, the Aarhus Convention requires policy makers to provide the public with:

- **Transparency**—or access to information, including draft rules.
- **Participation**—in decision-making processes at a time when options are still open.
- **Recourse**—or access to justice in the event that either of the first two norms is not observed.

The requirements of the Geneva Declaration and the Tunis Agenda of WSIS are broadly similar, though at a higher level of principle. They require Internet governance processes to comply with the process criteria of:

- **Transparency.**
- **Participation**—that is multilateral, democratic and inclusive of all stakeholders in their respective roles.<sup>29</sup>

Notably, there is no provision in the WSIS process criteria for the public to take recourse in the event that their rights to transparency and participation are not met; instead, the IGF is directed as part of its mandate to “Promote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes.”<sup>30</sup>

The norm of recourse will therefore be set aside for now, both because it is not common to each of the above regimes, and because in the short term its proposal as a norm for the intellectual property regime seems over-ambitious—not least because the United States has made clear that it will not abide the public having right of action against a state for non-compliance with international law.<sup>31</sup>

What remains, then, are the norms of transparency and participation (which could also be called “access”).<sup>32</sup> On the positive side, these are general enough to be posited as appropriate guiding principles for global intellectual property policy development, drawing on the model of the

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<sup>29</sup> See *Geneva Declaration*, *supra* note 18, art. 48; *Tunis Agenda*, *supra* note 19, arts. 61, 68, 73.

<sup>30</sup> *Tunis Agenda*, *supra* note 19, art. 72.

<sup>31</sup> See Kravchenko, *supra* note 15.

<sup>32</sup> See Jens Steffek & Patrizia Nanz, *Emergent Patterns of Civil Society Participation in European and Global Governance* in CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE 1, 10 (Jens Steffek, et al. ed., 2008).

environmental and Internet governance regimes. However, they lack sufficient substantive content to be of much use as standards for assessing the democratic legitimacy of the negotiation (and later operation) of ACTA.

After all, the ACTA negotiators, implausible as it may sound, have claimed that they *already* satisfy or even exceed all appropriate standards of transparency and participation; stating “for international trade negotiations we normally do not have such a democracy [sic] exercise where everybody can raise their concern,”<sup>33</sup> and even “This has been an extremely transparent process.”<sup>34</sup>

What is needed therefore are some appropriate metrics of transparency and participation that can be used for comparison.

### III. METRICS OF TRANSPARENCY AND PARTICIPATION

This is easier said than done, in that there is no cookie-cutter template of structures and procedures that policy-making institutions can apply to support transparency and participation. So much depends on the purpose of the organization, its composition, and the type of role it plays in governance; for example, does it have a policy setting role in its own right, or a role of advocacy directed towards policy makers elsewhere, or does it simply coordinate the activities of its constituents—or some combination?<sup>35</sup>

Despite the difficulty of applying absolute standards to such diverse governance institutions, there have been scholarly efforts to develop checklists of criteria that can be applied to rate transparency and the openness to participation in a quantitative fashion. One such study of transparency and the democratic deficit of global institutions identified no fewer than twenty-seven criteria, grouped into four categories—public access, internal governance, member conduct and accountability.<sup>36</sup>

Another study, looking at civil society participation in global governance institutions, found that such participation could be facilitated in at least five ways:

1. Making special institutional arrangements for civil society consultation; such as joint workshops, seminars or public

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33 Emert, *supra* note 5.

34 Masnick, *supra* note 4.

35 See Jens Martens, *Multistakeholder Partnerships: Future Models of Multilateralism?* in *DIALOGUE ON GLOBALIZATION* 21 (Jan. 2007), available at <http://library.fes.de/pdf-files/iez/04244.pdf>.

36 See Chris Skelcher, Navdeep Mathur & Mike Smith, *The Public Governance of Collaborative Spaces: Discourse, Design and Democracy*, 83 *PUB. ADMIN.* 584 (2005).

symposia.

2. Allowing NGOs to submit their own documentation to the international organization.
3. Allowing NGOs to attend their intergovernmental political meetings as observers.
4. Allowing NGOs to intervene actively in the intergovernmental process of policy deliberation and address delegates directly.
5. Allowing NGOs to put topics for future deliberation onto the organization's agenda.<sup>37</sup>

The present paper will take a simpler approach, similar to that already taken above when drawing out the two broad principles of transparency and participation from the regimes of environmental and Internet governance. In this case, however, we will look *within* the regime of intellectual property policy making, to draw out some specific best practices related to transparency and participation, from other institutions in that regime.

#### A. *Intellectual Property Policy Institutions*

The institutions selected for analysis here<sup>38</sup> are:

- WIPO (World Intellectual Property Organization). As the intergovernmental organization that administers the major global treaties on copyright and related rights (the Berne and Rome Conventions<sup>39</sup> and the WIPO Internet Treaties<sup>40</sup>) as well as on patents and trademarks (the Paris Convention),<sup>41</sup>

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<sup>37</sup> Steffek, *supra* note 32, at 13.

<sup>38</sup> Of course, this list is not complete. Amongst the other institutions that could have been included are ICANN (Internet Corporation for Assigned Names and Numbers, which sets domain name policy and has a large contingent of trade mark owners amongst its stakeholders), the Council of Europe (whose work in promoting human rights is relevant to issues of intellectual property enforcement), the WHO (World Health Organization, which is required to deal with pharmaceutical patent issues), UNESCO (United Nations Educational, Scientific and Cultural Organization, which has been a venue for debates over “communications rights”) and the UNDP (United Nations Development Programme, which promotes the use of open source software for development).

<sup>39</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 1161 U.N.T.S. 30; Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 Oct. 1961, 496 U.N.T.S. 43.

<sup>40</sup> See WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76; WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

<sup>41</sup> See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

WIPO is perhaps the central international actor in the regime.

- WTO (World Trade Organization). The WTO administers the TRIPS agreement,<sup>42</sup> which largely incorporates the substantive content of the WIPO-administered conventions, except that it allows signatories to seek redress against each other for the breach of the agreement through the WTO's dispute resolution process.
- OECD (Organization for Economic Cooperation and Development). The OECD differs from WIPO and the WTO in that it concludes few “hard law” treaties amongst its 32 member countries, but more “soft law” instruments such as recommendations and standards. Its work on intellectual property rights is of this kind.<sup>43</sup>
- CSTD (Commission on Science and Technology for Development). The CSTD has already been mentioned with respect to its role of coordinating the system-wide follow-up on WSIS, including action lines on intellectual property issues.<sup>44</sup> It also does not have a role in producing “hard law,” but simply advises the UN General Assembly and ECOSOC.
- IGF (Internet Governance Forum). Although formed under the auspices of the United Nations pursuant to an intergovernmental compact at WSIS, the IGF is a multi-stakeholder body, with governments and civil society participants possessing equal formal status. It is not specifically mandated to deal with intellectual property issues,<sup>45</sup> but has done so in practice.

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42 See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

43 See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPENDIUM OF OECD WORK ON INTELLECTUAL PROPERTY (IP), (2007), available at <http://www.oecd.org/dataoecd/60/61/34305040.pdf>.

44 Notably under the third action line on “Access to information and knowledge.” See World Summit on the Information Society, *Geneva Plan of Action*, U.N. Doc. WSIS-04/GENEVA/DOC/5-E (Dec. 12, 2003), available at <http://www.itu.int/wsis/docs/geneva/official/poa.html#c3>.

45 See JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM 71 (2008).

The following table summarizes some of the most significant strengths and weaknesses of each of these institutions with respect to their transparency and the opportunities that they provide for civil society to participate in their processes.<sup>46</sup>

Organization	Transparency		Participation	
	Strengths	Weaknesses	Strengths	Weaknesses
WIPO	Distributes both official documents and negotiating texts	Not pro-active in disseminating such information	Ready accreditation of NGOs	NGO input comes last after all governments have spoken
	Distributes academic studies and reports		NGOs have speaking and submission rights	
			NGO side meetings facilitated	
WTO	Distributes official documents	Most negotiating texts not formally released	Ministerial Conference open to NGO observers	No NGO access to TRIPS Council meetings
			NGO position papers posted online	No distribution of NGO documents at meetings
			NGO side meetings at Ministerial Conference	Generally no speaking rights for NGOs
OECD	Most documents published openly	Poor transparency of hard law negotiations	Permanent advisory committee, CSISAC	Structure excludes developing countries
			Ministerial Meeting open to NGO observers	
CSTD	All documents published openly	Negotiation texts made available, but not online	Ready accreditation of NGOs	NGO input comes last after all governments have spoken

46 More information can be found in a study published by Knowledge Ecology International, covering a slightly different set of organizations—the WTO, WIPO, WHO, UNCITRAL (United Nations Commission on International Trade Law), Unidroit (International Institute for the Unification of Private Law), UNCTAD (United Nations Conference on Trade and Development), OECD and Hague Conference on Private International Law. The negotiations of five international treaties, within and outside the UN system are also considered. See Knowledge Ecology International, *ACTA is Secret. How Transparent are Other Global Norm Setting Exercises?* (July 21, 2009), [http://www.keionline.org/misc-docs/4/attachment1\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf); Knowledge Ecology International, *Transparency of negotiating documents in selected fora* (July 21, 2009), [http://www.keionline.org/misc-docs/4/attachment2\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment2_transparency_ustr.pdf); Knowledge Ecology International, *Participation by the Public in Selected Negotiations* (July 21, 2009), [http://www.keionline.org/misc-docs/4/attachment3\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment3_transparency_ustr.pdf).



			NGOs have speaking and submission rights	
IGF	All documents published openly	MAG mailing list is private, with anonymized summaries	Open forum, all participants formally equal	No official outputs
			NGO side meetings facilitated	Weak links between NGO input and policy makers

A few words about each of the institutions in this table are in order. Probably the least transparent and participatory body shown here is the WTO, which although having improved its documentary transparency in recent years, remains notorious for its limited engagement with civil society,<sup>47</sup> and for its exclusion of developing countries from the closed-door “green room” negotiations it hosts.

WIPO fares better, in that it allows accredited NGO representatives into all its plenary negotiating sessions (though there are, as in the WTO, also closed-door sessions between country blocs). However, the interaction between NGOs and governments is stilted at best, because civil society interventions are left until last, and the time given for them is strictly limited. Moreover, that time must be shared with interventions from business groups, which WIPO also classes as “NGOs.”

The OECD takes a different approach to WIPO, in that rather than granting NGOs observer status at intergovernmental meetings, it has established a dedicated body, the CSISAC (Civil Society Information Society Advisory Council) to contribute to its policy work.<sup>48</sup> On the other hand, when the OECD has negotiated hard law agreements, notably a failed Multilateral Agreement on Investment, its transparency and openness to participation have been much poorer.<sup>49</sup>

The CSTD, like the other organizations considered so far, is intergovernmental in structure. However, it was mandated at WSIS to conduct its follow-up activities using a “multi-stakeholder approach,”<sup>50</sup> and as such, has followed a practice of allowing NGOs to actively observe its

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47 See Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank*, 53 INT’L SOC. SCI. J. 505, 580 (2001).

48 See Civil Society Information Society Advisory Council, <http://csisac.org/> (last visited Sep. 10, 2010).

49 See Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Policy Policy Network*, Global Public Policy Institute (April 10, 2000), [http://www.gppi.net/fileadmin/gppi/Tieleman\\_MAI\\_GPP\\_Network.pdf](http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf).

50 *Tunis Agenda*, *supra* note 19, art.105.

proceedings. Whilst it is similar in this respect to WIPO, it does not have the same “hard power” that WIPO does, being limited to a role of making recommendations only.

Finally the IGF is the most open of any of the bodies considered here, in that civil society participates at IGF meetings in a position of equality with governmental and private sector representatives. It is at least as transparent as any of the other institutions considered—though not completely so, as its Multi-stakeholder Advisory Group (MAG) meets in private. Even so, for all its formal openness, the civil society's actual influence at the IGF on the development of intellectual property policy is very limited, largely because the IGF has yet shied away from its mandate to produce recommendations,<sup>51</sup> and failed to develop links to other institutions that would allow policy makers to take such recommendations into account.<sup>52</sup>

In this context, recall that the Aarhus Convention requires not only that policy development processes be open to participation, but also that “[t]he result of the public participation . . . be taken into account as far as possible.” As even the UN Secretary-General has observed, the IGF has not yet developed the structures or processes by which for this to occur.<sup>53</sup>

### *B. Summary of Best Practices*

Having progressed from the generality of the Aarhus and WSIS principles on transparency and public participation in governance to the more specific structures and processes of the existing institutions of the intellectual property regime, it is possible to draw out some best practices. This does not mean that the existing institutions are the best they could be. On the contrary, if the institutions of the intellectual property regime are to be assessed against the principles of transparency and participation we derived earlier, each such institution has considerable room for improvement. (This even extends to the IGF, notwithstanding that it was an outcome of the WSIS process.)

Having said this, some best practices are already in place. Taking transparency, there is no longer much room for argument about the appropriate content of this norm. Even the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions also make available negotiating texts. Adding to this, most of those institutions (especially WIPO, the OECD and the IGF)

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51 *See id.* art. 72(g).

52 Malcolm, *supra* note 45, at 513-521.

53 *See* U. N. Secretary-General, *supra* note 28.

also freely provide background materials and studies, as well as briefing sessions on their policy activities. Thus, it can be confidently posited that these are the basic best practices for transparency of governance in the intellectual property regime.

As for participation, more variance can be seen, but there are four main options amongst the institutions considered here:

1. A “passive” observer role, in which opportunities for speaking with delegates and distributing documents are limited (as at the WTO Ministerial Conference).
2. An “active” observer role, in which NGO representatives can more directly interact with delegates and distribute documents (as at WIPO and the CSTD).
3. Formal permanent advisory groups, providing a defined pathway for input from civil society on all policy proposals (such as the OECD's CSISAC).
4. A multi-stakeholder governance structure that affords governmental and civil society delegates a position of equality (as at the IGF).

An important observation to be made here is that in general, an inverse relationship exists between the openness to participation of an organization, and the degree of “legalization”<sup>54</sup> or “hardness” of its output. In other words, the institutions that produce hard law (the WTO and WIPO) tend to be more closed than those that produce soft law (the OECD and CSTD), with the IGF—which doesn't even yet produce recommendations—being the most open of all, but to the least advantage of civil society. Therefore, in considering best practices on participation, we must make practical allowance for the fact that governments will not be inclined to grant civil society free rein within institutions that have the power to conclude hard or binding law. Even so, options 2 and 3 above can still be considered possible best practices for institutions of any character within the intellectual property regime.

This leads to the question, how does ACTA stack up against these principles and best practices?

#### IV. ACTA

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<sup>54</sup> See Kenneth W Abbot, et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

Before attempting to answer this, it must be understood that ACTA actually represents two, quite separate, institutions. The first is the group of countries that is (at the time of writing) negotiating the text of the Anti-Counterfeiting Trade Agreement itself, at a series of closed meetings around the world.

The second, and perhaps ultimately more important institution is the multilateral treaty organization that will come into being once the ACTA negotiations are concluded and the agreement is signed.<sup>55</sup> This organization will comprise of an ACTA Committee constituted by each of the signatories, and possibly further *ad hoc* committees and working groups that the Committee may establish.<sup>56</sup>

The transparency and participatory openness of ACTA will therefore be considered first in relation to the negotiation phase of ACTA, and then with respect to the ACTA Committee and any sub-groups.

#### A. Negotiation Phase

Beginning with the transparency of the negotiation phase, the best practices established above would require:

- Access to the negotiation texts, before and after each round of negotiation, as is the practice at WIPO. Instead, there has only been one official release of text in April 2010,<sup>57</sup> following the Wellington round of talks, which occurred only after five years of closed-door negotiations and in the wake of the full text being leaked in March.<sup>58</sup>
- Institutionalized and regular briefing sessions to civil

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<sup>55</sup> These comments are based on the latest full text of ACTA available at the time of writing (August 17, 2010), which is the leaked version from the July 2010 round of negotiations in Lucerne. See Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: July 1, 2010, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated July 1, 2010” hyperlink) [hereinafter ACTA Draft – July 1, 2010].

<sup>56</sup> See ACTA Draft – July 1, 2010, *supra* note 55, art. 5.1(1), (3)(a).

<sup>57</sup> See Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: April 21, 2010, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Official Consolidated ACTA Text Prepared for Public Release, April 21, 2010” hyperlink) [hereinafter ACTA Draft – April 21, 2010].

<sup>58</sup> See Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: Jan. 18, 2010, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated Jan. 18, 2010” hyperlink) [hereinafter ACTA Draft – Jan. 18, 2010].

society, such as those conducted by WIPO<sup>59</sup> and the OECD.<sup>60</sup> Instead, the only briefing sessions held have been those that some of the negotiating parties have chosen to hold in their own countries, on an irregular and *ad hoc* basis.

- Coordinated and regular release of background materials on the negotiations, such as those released by the IGF before each of its meetings.<sup>61</sup> In fact only one joint fact sheet has been produced, in March 2010, with some of the negotiating parties having sporadically released other materials.<sup>62</sup>
- Such materials must also be disseminated to the public. Short of doing so actively through a public relations office, a minimum requirement met by all the other institutions analyzed is the use of a central institutional Web site. No such thing exists for ACTA. Rather, what few materials have been released have been disseminated mainly by civil society, and through Web sites of some of the negotiating governments.<sup>63</sup>

Thus ACTA meets none of the basic best practices for transparency of the existing institutions of the intellectual property policy regime.

The provision made for public participation in the ACTA negotiations is no better. Based on the model established by the other institutions examined here, civil society is entitled to expect:

- Access to the negotiation venue, through a lightweight

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<sup>59</sup> See *WIPO Information Meeting on Intellectual Property Financing*, WIPO, [http://www.wipo.int/meetings/en/2009/ip\\_fin\\_ge\\_09/index.html](http://www.wipo.int/meetings/en/2009/ip_fin_ge_09/index.html) (last visited Sep. 10, 2010) (describing a recent open informational meeting on intellectual property financing).

<sup>60</sup> An OECD Forum, open to the public, is held in conjunction with the annual Ministerial Meeting. See *OECD Forum*, OECD, [http://www.oecd.org/department/0,3355,en\\_2649\\_34493\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_34493_1_1_1_1_1,00.html) (last visited Sep. 10, 2010).

<sup>61</sup> INTERNET GOVERNANCE FORUM, IGF, PROGRAMME FOR THE 2010 MEETING, JULY 15, 2010 (2010), *available at* <http://www.intgovforum.org/cms/2010/ProgrammePaper.15.07.2010.v2.doc>.

<sup>62</sup> For one such document distributed in South Korea, see ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) FACT SHEET (March 25, 2010), <http://www.mofat.go.kr/webmodule/htsboard/hbd/hbdread.jsp?typeID=6&boardid=10252&seqno=327174> (last visited Sep. 10, 2010).

<sup>63</sup> Australia has published information on its government site. See *Anti-Counterfeiting Trade Agreement (ACTA) – Australian Department of Foreign Affairs and Trade*, <http://www.dfat.gov.au/trade/acta/> (last visited Sep 11, 2010).

accreditation process, and the ability to observe the proceedings. No such provision has been made for any of the ACTA negotiation rounds. Indeed, even the location of the venue of most of the rounds has been kept secret.

Rights for NGO representatives to speak to the negotiating assembly and to submit documents, as for example is the case at WIPO. Needless to say, in view of the failure to even grant access to the negotiation venue, these rights have not been afforded. Some of the negotiating parties have conducted their own consultation processes at a national or regional level.<sup>64</sup>

### *B. Implementation Phase*

Once ACTA has been concluded and signed, amongst the powers of the ACTA Committee will be:

- To set its own rules and procedures.<sup>65</sup>
- To consider any amendments to the Agreement.<sup>66</sup>
- To make recommendations regarding implementation and operation of the Agreement, including endorsing best practice guidelines relating thereto.<sup>67</sup>
- To share information and best practices on reducing intellectual property rights infringements, including techniques for identifying and monitoring piracy and counterfeiting.<sup>68</sup>

Transparency and participation are no less important to civil society in respect of these ongoing policy setting and coordination activities as they have been in respect of the negotiation of the original Agreement.

In this context, the following points describe the transparency that civil society is entitled to expect from ACTA, based on the best practices identified from other institutions in the intellectual property policy regime:

- All official documents of the ACTA Committee should be openly published, as are similar documents from all the other

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64 See Ermert, *supra* note 5 (describing a 2009 European consultation meeting).

65 See ACTA Draft – July 1, 2010, *supra* note 55, art.5.1(4).

66 *Id.* art.5.1(2)(c) 6.4.

67 *Id.* art.5.1(3)(c).

68 *Id.* art.5.1(3)(d).

institutions studied in this paper. These will include the rules, procedures, recommendations and best practice guidelines described above, as well as proposed amendments to the Agreement. Whether such documents will in fact be openly released is yet unknown, as the ACTA text is silent on this point.

- Additionally, negotiating drafts of the above should be released, to borrow a phrase from the Aarhus Convention, “at an appropriate stage, and while options are still open.”<sup>69</sup> Again, we do not know whether this will be the case (but might reasonably guess, from the conduct of the ACTA negotiations to date, that it will not be).
- The domestic implementation of ACTA by its members should also be transparent. On this count, the draft ACTA text does actually have something to say—though we do not yet know exactly what, as the current draft of the agreement contains two alternative sets of provisions.<sup>70</sup> In general, however, it will probably require national laws, procedures and judicial decisions on IP enforcement to be published openly.

Thus, the standard of transparency that civil society can expect from ACTA into the future can best be described as unknown. As to its expectations of participation in the operation of ACTA:

- If it is too much to expect that NGOs should be able to join the ACTA Committee as members, following the model of the IGF, then it should at least be possible for delegations to appoint NGO advisors to attend Committee meetings with them. In fact, wording in the officially released draft text did accommodate this.<sup>71</sup> However, this has been removed from the current draft.
- There should be a simple and accessible procedure for NGOs to seek accreditation to attend the meetings of the ACTA Committee as active observers. At present, this is not

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<sup>69</sup> See Aarhus convention, *supra* note 14, art.8.

<sup>70</sup> See ACTA Draft – July 1, 2010, *supra* note 55, art.4.3.

<sup>71</sup> See ACTA Draft – April 21, 2010, *supra* note 57, art 5.5(1).

guaranteed. A specific provision of the earlier public draft that would have allowed the Committee to invite “international organizations active in the field of intellectual property and . . . non-governmental groups of intellectual property stakeholders” to attend sessions “or parts thereof.”<sup>72</sup> Whilst this provision was inadequate, in that it arguably left it for the Committee to take the initiative to extend such an invitation, even this weak provision has since been removed.

- Civil society should be consulted by the Committee in discussions over the amendment and development of the Agreement, the drafting of rules, procedures, recommendations and best practice guidelines, and “any other matter that may affect the implementation and operation of this Agreement.”<sup>73</sup> This could best be done through a permanent civil society advisory committee such as the OECD's CSISAC, or the IGF's (multi-stakeholder, in that case) MAG. Another option is the establishment of a dedicated civil society liaison office similar to the External Relations offices of WIPO and the WTO. However, in either case, no such provisions exist. The draft only specifies that the Committee may (not shall) “seek the advice of non-governmental persons or groups.”<sup>74</sup>

The future scope for civil society participation in the activities of ACTA is therefore unknown at best and nonexistent at worst. Certainly, civil society can gain no comfort from the current draft text that its interests will be observed, and has every reason to suspect otherwise from the conduct of the present ACTA negotiations.

Thus in sum, considering both the negotiation and implementation stages, ACTA fails to comply with the basic norms and best practices of transparency and participation that have been established by other institutions in the intellectual property policy regime. Such an institution lacks democratic legitimacy as an actor in the regime, and this will inevitably impact upon its perceived authority by other actors and upon compliance with the norms it promulgates.<sup>75</sup>

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<sup>72</sup> *Id.* art 5.6.

<sup>73</sup> ACTA Draft – July 1, 2010, *supra* note 55, art.5.1(2)(e).

<sup>74</sup> *Id.* art.5.1(3)(b).

<sup>75</sup> *See generally* THOMAS M FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990).



## V. CONCLUSION

Strict intergovernmentalism remains unchallenged as the model for development of global public policy on intellectual property issues. But in other regimes of governance, this is no longer the case. This paper described the regime of international environmental law, in which the Aarhus Convention requires its members to uphold the principles of transparency of information, public participation in decision-making, and the provision of access to justice. It also described the Internet governance regime, in which the process criteria established at WSIS call upon institutions of Internet governance to act in a manner that is multilateral, transparent and democratic, with the full involvement of all stakeholders in their respective roles.

The global regime for intellectual property rights raises transnational public policy issues of no lesser importance than those raised by the environmental and Internet governance regimes, yet it lacks similar broad principles to guide its institutions in designing structures and processes that support public interest representation.

There are signs that this is changing. For example, the WIPO Development Agenda directs that the organization's norm-setting activities “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,”<sup>76</sup> and pledges “[t]o enhance measures that ensure wide participation of civil society at large in WIPO activities in accordance with its criteria regarding NGO acceptance and accreditation, keeping the issue under review.”

But more is needed, and the principles established must apply to all actors in the regime, not only one. Ultimately, such principles should come in the shape of a framework convention,<sup>77</sup> or at least an intergovernmental summit document such as the Geneva Statement of Principles from WSIS. But in the meantime, civil society including academia, and perhaps in cooperation with supportive private sector actors and governments, could begin to develop a statement of such principles independently.

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<sup>76</sup> World Intellectual Property Organization, The 45 Adopted Recommendations under the WIPO Development Agenda, art. 15, 42 (Oct. 3, 2007), <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.

<sup>77</sup> See John Mathiason, *A Framework Convention: An Institutional Option for Internet Governance*, THE INTERNET GOVERNANCE PROJECT (Dec. 20, 2004), <http://www.internetgovernance.org/pdf/igp-fc.pdf>.

For the Internet governance regime (which already starts from a stronger base, in the WSIS process criteria), there exists such a project to develop a code of good practice on information, participation and transparency.<sup>78</sup> The code is a joint project of the Council of Europe, Association for Progressive Communications (APC) and the UNECE (not coincidentally, the host body of the Aarhus Convention).

The absence of anything similar for the global intellectual property rights regime makes it more difficult for civil society to normatively challenge the legitimacy of the Anti-Counterfeiting Trade Agreement, which has failed to meet the public's expectations during its negotiation phase, and seems unlikely to do better once it has been agreed. Even so, it has been possible in this short paper to demonstrate ACTA's flagrant neglect of basic principles of transparency and public participation, which were drawn from other regimes but which are supported by best practices in existing intellectual property policy institutions.

It now falls to civil society, in the short term, to continue to lobby for the inclusion of better structures and processes for public interest representation in ACTA, both during its negotiation phase and in the institution that is formed once it is agreed. These will include the institutionalization of access to information, and measures for public representation through active observation and/or a permanent civil society advisory committee.

In the longer term, it is necessary to advocate for the development and promulgation of general principles of transparency and participation against which not only ACTA, but all other actors in the intellectual property regime can be judged.

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<sup>78</sup> See Council of Europe et al., Code of Good Practice on Information, Participation and Transparency in Internet Governance (June 2010), [http://www.intgovcode.org/images/c/c1/COGP\\_IG\\_Version\\_1.1\\_June2010.pdf](http://www.intgovcode.org/images/c/c1/COGP_IG_Version_1.1_June2010.pdf).