

## ACTA PUBLIC COMMENTS: SUBMISSION OF LEGAL ACADEMICS

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### SUMMARY

We write to call on the Obama administration to comply with the Constitution by submitting the Anti-Counterfeiting Trade Agreement (ACTA) to Congress for approval.

The executive branch lacks constitutional authority to enter international agreements on intellectual property without congressional consent. The regulation of intellectual property and of foreign commerce, which are at the heart of ACTA's terms, are Article I Section 8 powers of Congress; the President lacks constitutional authority to enter international agreements in this area as sole executive agreements lacking congressional authorization or approval.

The unconstitutionality of the process by which the Obama Administration intends to implement ACTA is further highlighted by the fact ACTA will constrain U.S. law by locking in the policy choices ACTA makes and the requirements it imposes. The choice of whether to adopt

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substantive constraints on U.S. law must be made with Congressional participation. That participation is even more critical here, because ACTA was drafted and negotiated under unprecedented and deliberate secrecy -- a non-accountable process that excludes the meaningful participation of a wide range of interests. The process by which ACTA was created and the means by which the Obama administration intends to implement it is undemocratic and unconstitutional. Together, they create a dangerous new process for international intellectual property lawmaking that should be rejected.

## ANALYSIS

### I. ACTA IS AN UNCONSTITUTIONAL MEANS TO BIND THE U.S. TO INTERNATIONAL LAW ON INTELLECTUAL PROPERTY

The President lacks constitutional authority to bind the U.S. to ACTA without congressional consent.

Since the early days of the U.S. involvement in ACTA's negotiation, first under President Bush and now under President Obama, the Administration's position has been that it can enter ACTA without any Congressional involvement at all, *ex ante* or *ex post*.<sup>1</sup> This is a bold claim

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<sup>1</sup> See Andrew Moshirnia, *Let's Make a Deal! Will ACTA Force an End to Executive Agreements?*, CITIZEN MEDIA LAW PROJECT (Feb. 9, 2010), [http://www.citmedialaw.org/blog/2010/lets-make-deal-will-acta-force-end-executive-agreements?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A%20CitizenMediaLawProject%20%28Citizen%20Media%20Law%20Project%29](http://www.citmedialaw.org/blog/2010/lets-make-deal-will-acta-force-end-executive-agreements?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20CitizenMediaLawProject%20%28Citizen%20Media%20Law%20Project%29) (criticizing ACTA as a sole executive agreement and advocating for transparent negotiations as well as a formal legislative process through Congress to enact ACTA); Sherwin Siy, *The Trouble with ACTA*, AM. CONSTITUTION SOC'Y BLOG (Apr. 6, 2010, 5:33 PM), <http://www.acslaw.org/node/15774> (noting that "ACTA is being implemented in the U.S. as a sole executive agreement, and not a treaty of a congressional-executive agreement that would require legislative debate, consent, or approval"); see also The Vienna Convention on Law of Treaties, May 23, 1969, 1155 U.N.T.S., 8 I.L.M. 679, art. 2(1)(a) (defining

which has drawn criticism from numerous legal experts.<sup>2</sup> Nevertheless, as of this writing, the administration has not articulated a plan for implementing ACTA that includes congressional approval.

This course of action charts new ground. Entering international agreements containing minimum standards on intellectual property legislation has become fairly routine since 1992.<sup>3</sup> In the majority of these agreements, as with ACTA, the intellectual property provisions were entered with commitments that they would not alter existing U.S. law.<sup>4</sup> However, the agreements were nevertheless submitted for Congressional approval.

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'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation').

<sup>2</sup> See Jack Goldsmith and Lawrence Lessig, *Anti-counterfeiting agreement raises constitutional concerns*, WASH. POST, Mar. 26, 2010 available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>; Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L L. 24 (2009); *Over 75 Law Profs Call for Halt of ACTA*, PIJIP BLOG (Oct. 28, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/over-75-law-profs-call-for-halt-of-acta>.

<sup>3</sup> North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>4</sup> See *U.S.-Australia FTA Summary of the Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Jul. 15, 2004), [http://ustraderep.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/US-Australia\\_FTA\\_Summary\\_of\\_the\\_Agreement.html](http://ustraderep.gov/Trade_Agreements/Bilateral/Australia_FTA/US-Australia_FTA_Summary_of_the_Agreement.html) (last visited Feb. 3, 2011) (noting that the U.S.-Australia FTA 'complements and enhances existing international standards for the protection of intellectual property and the enforcement of intellectual property rights, consistent with U.S. law'). *But see generally* Agreement on Trade-Related Aspects of Intellectual Property Rights art. TBD, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 1869 U.N.T.S. 299 [hereinafter TRIPS] (enforcement of TRIPS required several alterations of U.S. intellectual property law, including an alteration in how the U.S. calculates patent terms).

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The reason congressional approval is required for intellectual property agreements is that the power to regulate this subject, along with interstate and foreign commerce, is an enumerated power of Congress (through legislation in which the President participates) under Article I Section 8 of the Constitution. To make policy in any area expressly delegated to Congress requires Congressional participation. Sole executive agreements are valid only in areas of policy exclusively under the President's control – for example in incidents of his authority as commander in chief or to accept ambassadors from foreign nations.<sup>5</sup> The President does not have sole executive authority to make intellectual property law, and so he cannot bind the U.S. to an intellectual property agreement without congressional approval.

### A. *ACTA Regulates Domestic Intellectual Property Legislation*

A key aim of ACTA is to define and require adherence of domestic law to “a state-of-the-art international framework” of minimum standards in intellectual property and customs legislation.<sup>6</sup> Although the parties negotiating the agreement are highly unrepresentative of the world at large,<sup>7</sup> the agreement seeks to establish global minimum standards applicable to

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<sup>5</sup> See U.S. CONST. art. II, §§ 1,3.

<sup>6</sup> *ACTA Fact Sheet and Guide to Public Draft Text*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (October 2010), <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text> (last visited Feb. 3, 2011); see also *Fact Sheet: The Anti-Counterfeiting Trade Agreement (ACTA)*, EUROPEAN COMMISSION (Nov. 2008), [http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_140836.11.08.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf) (last visited Feb. 3, 2011) (describing ACTA as “being for the purpose of establishing international standards on intellectual property rights enforcement”).

<sup>7</sup> Cf. IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY* (1979); Immanuel Wallerstein, *Globalization or the Age of Transition? A Long Term View of the Trajectory of the World System*, 15 INT'L SOCIOLOGY 249-265 (2000) (using Wallerstein's ‘World Systems’ typology, all but two of the negotiating countries are part of the high income and highly industrialized “core” of the world system; two, Mexico and Morocco, are part of the second tier of middle income rapidly industrializing countries, while the majority of the world's countries and population centers which reside in the periphery of the world system are not represented at all).

developing as well as developed countries.<sup>8</sup>

The final agreement contains 25 single spaced pages, the majority of which create a new minimum “Legal Framework for Enforcement of Intellectual Property Rights.”<sup>9</sup> The Legal Framework chapter contains new “TRIPS-plus”<sup>10</sup> requirements for minimum legislative enactments covering all intellectual property rights contained in TRIPS.<sup>11</sup> This includes patents, copyrights and trademarks, industrial designs, geographical indications, layout-designs (topographies) of integrated circuits, pharmaceutical and agricultural test data, sui generis protection of plant varieties, and trade

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<sup>8</sup> *Anti-Counterfeiting Trade Agreement*, MINISTRY OF ECONOMIC DEVELOPMENT OF NEW ZEALAND, (2008) [http://www.med.govt.nz/templates/ContentTopicSummary\\_\\_\\_34357.aspx](http://www.med.govt.nz/templates/ContentTopicSummary___34357.aspx) (last visited Feb. 3, 2010) [hereinafter New Zealand ACTA] (explaining that ‘the goal of ACTA is to set a new, higher benchmark for intellectual property rights enforcement that countries can join on a voluntary basis’); see U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 4 (2008), [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file553\\_14869.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf) (arguing that ‘ACTA is envisioned as a leadership effort among countries that will raise the international standard for IPR enforcement’).

<sup>9</sup> *Anti-Counterfeiting Trade Agreement*, ch. II, Dec. 3, 2010 [hereinafter ACTA], available at <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>.

<sup>10</sup> See Pedro Roffe, *Bilateral agreements and a TRIPS-plus world: the Chile-USA Free Trade Agreement*, QUAKER INTERNATIONAL AFFAIRS PROGRAMME 5 (Oct. 2004), <http://www.quno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf> (defining ‘TRIPS-plus’ as an informal term used in international intellectual property discussions to refer to minimum legal standards in national or international laws that exceed the baseline requirements of the TRIPS agreement); see also Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) (manuscript at 7) (quoting USTR negotiator Stan McCoy’s statement that ‘USTR in May 2006 encouraged the interagency Trade Policy Staff Committee (TPSC), a committee representing the interests of twenty U.S. government agencies, to endorse the concept of a multi-party “TRIPS-plus” ACTA’).

<sup>11</sup> See *Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft*, art. 1.X: Definitions, Oct. 2, 2010 [hereinafter ACTA Oct. 2010 Draft], available at <http://sites.google.com/site/iipenforcement/acta>

secrets.<sup>12</sup> For U.S. law the list is significant not only in its breadth, but because it covers areas like trade secrets and remedies that are often addressed by State as well as Federal law.<sup>13</sup>

Within this broad field of domestic laws, ACTA regulates a diverse array of liability, remedy and law enforcement legal standards. The areas of law regulated by ACTA include the availability of, and evidentiary standards for, injunctions (including third party injunctions and ex party preliminary injunctions),<sup>14</sup> damages (including “pre-established” damages),<sup>15</sup> duties to divulge confidential information to the government,<sup>16</sup> seizures and destructions of goods (both before and after determinations of violation),<sup>17</sup> border searches and detentions, including of “small consignments,”<sup>18</sup> criminal liability, including for infringements of copyright that bestow any “indirect economic or commercial advantage,”<sup>19</sup> liability for infringement on the internet,<sup>20</sup> and liability for acts or products that

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<sup>12</sup> See James Love, *The October 2, 2010 Version of the ACTA Text*, KNOWLEDGE ECOLOGY INTERNATIONAL (Oct. 7, 2010), <http://keionline.org/node/962> (Noting that “this covers a lot of ground;” “The broad inclusion of all of these intellectual property rights in ACTA creates unintended consequences, as some of the enforcement provisions make no sense outside of the context of copyrights and trademarks.”).

<sup>13</sup> See Letter from Forum on Democracy and Trade to Ambassador Kirk (Nov. 22, 2010), available at <http://forumdemocracy.net/article.php?id=569>.

<sup>14</sup> See ACTA Oct. 2010 Draft, *supra* note 8, arts. 2.X: Injunctions, 2.5: Provisional Measures.

<sup>15</sup> See *id.* at art. 2.2: Damages.

<sup>16</sup> See *id.* at art. 2.4: Information Related to Infringement.

<sup>17</sup> See *id.* at arts. 2.3: Other Remedies, 2.5(3): Provisional Measures, 2.16: Seizure, Forfeiture, and Destruction.

<sup>18</sup> See *id.* at § 3: Border Measures; see also arts. 2.10: Determination as to Infringement, 2.11: Remedies (requiring destruction of goods after a “determination” of violation by a “competent authority,” which need not be a court or other body following strict due process norms).

<sup>19</sup> See *id.* at art. 2.14: Criminal Offenses.

<sup>20</sup> See *id.* at § 5: Enforcement of Intellectual Property in the Digital Environment.

circumvent technological or digital locks against copying.<sup>21</sup>

The areas of domestic policy regulated by ACTA are broader still. Intellectual property doctrines do not exist for their own sake. They are created and tailored to serve numerous diverse public interests, and are limited by such ends. The establishment of legal frameworks on the enforcement of intellectual property impacts domestic policies on health, access to information, free expression, innovation, production of and access to cultural products, competition, consumer protection and a myriad of other domestic policies.<sup>22</sup> Although ACTA's model is identifiably that of the U.S. now in force, many of its elements are subject to serious reform proposals that ACTA could make more difficult.<sup>23</sup>

ACTA was drafted under unusual levels of secrecy for a legislative minimum standards agreement. In the normal forums for international intellectual property law making – such as in the World Intellectual Property Organization and the WTO – draft texts are regularly released during negotiating rounds and civil society groups can be accredited to participate in meetings and workshops. Moreover, the World Health Organization, WTO, which includes the TRIPS Council, and the United Nations Commission on International Trade Law, all major IP treaty entities, publish agendas, participants, meeting minutes, and draft

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<sup>21</sup> See *id.* at art. 2.18(5)-(7): Enforcement in the Digital Environment.

<sup>22</sup> See *Public Interest Analysis of the Intellectual Property Enforcement Agenda – Webcast of the Opening Plenary*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY (June 17, 2010), <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=c844e4ea15494ac68916f9b1d62ef533> (referring to the presentation by Bernt Hugenholtz, starting at 00:36:27 of the video).

<sup>23</sup> See, e.g., Paul Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y 168 (2008); Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J., available at [http://www.law.berkeley.edu/files/bclt\\_CPP.pdf](http://www.law.berkeley.edu/files/bclt_CPP.pdf); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy In Need of Reform*. 51 WM. & MARY L. REV. 439, 497-510 (2009).

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documents on their respective web sites.<sup>24</sup> Indeed, as Jeremy Malcolm noted in his recent study of a number of international institutions, including WIPO and WTO, “even the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions [including WIPO] also make available negotiating texts.”<sup>25</sup> Malcolm concludes that “ACTA meets none of the basic best practices for transparency of the existing institutions of the intellectual property policy regime.”<sup>26</sup> The USTR had virtually no precedent for such an extreme maneuver, and the public rightly expected more information based upon past precedents.<sup>27</sup>

The ACTA negotiations have moved in the opposite direction of current trends in IP lawmaking. WIPO has recently embarked on the implementation of a “development agenda” in which participation processes are to be expanded. Agenda items adopted by the WIPO General Assembly call for all intellectual property norm-setting activities to:

be inclusive and member-driven; take into account different levels of development; take into consideration a balance between costs and benefits; be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of

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<sup>24</sup> See *ACTA is Secret. How Secret are Other Global Norm Setting Exercises?*, KNOWLEDGE ECOLOGY INTERNATIONAL, [http://www.keionline.org/misc-docs/4/attachment1\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf); see also David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, (Am. Univ. Washington Coll. Law Program on Info. Justice and Intellectual Prop., Research Paper No. 2011-20, Feb. 2011), available at <http://digitalcommons.wcl.american.edu/research/18/>; Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions*, 4 (Am. Univ. Washington Coll. Law Program on Info. Justice and Intellectual Prop., Research Paper No. 2010-06, Sept. 2010), available at <http://digitalcommons.wcl.american.edu/research/6/>.

<sup>25</sup> Malcolm, *supra* note 25, at 15, 17.

<sup>26</sup> *Id.* at 20.

<sup>27</sup> Indeed, the existence of leaks that undermined the attempted secrecy of the process should cause the USTR to reconsider whether such absolute secrecy is even possible with the advent of the Internet. See Levine, *supra* note 25 at 15.

other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs; and be in line with the principle of neutrality of the WIPO Secretariat.<sup>28</sup>

The negotiation of ACTA has taken place through a process that was nearly the opposite of these norms. ACTA was negotiated under a bilateral trade agreement model in which negotiations were held secretly,<sup>29</sup> text was not released before or after most negotiating rounds, meetings with stakeholders took place only behind closed doors and off the record.<sup>30</sup> Public participation was deliberately locked out, particularly by officials at USTR who hatched and largely implemented a plan to deal with demands for transparency in the incoming Obama administration through the creation of a “transparency soup.”<sup>31</sup> The plan included announcing “open door” policies to meet with anyone, but saying little or nothing for the public record; actively thwarting the release of negotiating text; and waiting until after decisions had been made to hold public meetings.<sup>32</sup> Sadly, by design, this process has not allowed for even a modicum of real-time input from the public.

During the last year of the negotiation, the substance of ACTA came under broad criticism as the text of ACTA was gradually leaked, and then

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<sup>28</sup> *The 45 Adopted Recommendations under the WIPO Development Agenda, Cluster B, no. 15*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.

<sup>29</sup> In many cases the city and country of the negotiation was not even released until days before the meeting.

<sup>30</sup> See *ACTA Update*, WASHINGTON INTERNATIONAL TRADE ASSOCIATION (Oct. 29, 2010), <http://www.wita.org/en/cev/1126> (featuring USTR chief ACTA negotiator Kira Alvarez, “appearing off-the-record”).

<sup>31</sup> See James Love, *USTR's February 10, 2009 memo on Transparency Soup*, KNOWLEDGE ECOLOGY INTERNATIONAL (Sept. 8, 2010), <http://keionline.org/node/929>; Mike Masnick, *Transparency Pea Soup: The USTR Planned From The Beginning How Not To Be Transparent On ACTA*, TECHDIRT (Sept. 10, 2010), <http://www.techdirt.com/articles/20100909/05374310954.shtml>; see also Mike Masnick, *Obama Administration Claims Copyright Treaty Involves State Secrets?!?*, TECHDIRT (Mar. 13, 2009), <http://www.techdirt.com/articles/20090313/1456154113.shtml>.

<sup>32</sup> See *Id.*

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officially released. In June 2010, nearly 650 international intellectual property experts and public interest organizations from six continents adopted a sharply worded public statement criticizing the proposal as “a threat to numerous public interests,” including to freedom on the internet, basic civil liberties including privacy and free expression, free trade in generic medicines, and the policy balances between protection and access that lie at heart of all intellectual property doctrines.<sup>33</sup> A group of nearly 80 intellectual property law professors later reviewed the final text of the agreement and reported that “it is clear that ACTA would usurp congressional authority over intellectual property policy in a number of ways.” The letter specifically noted

Some of ACTA’s provisions fail to explicitly incorporate current congressional policy, particularly in the areas of damages and injunctions.<sup>34</sup> Other sections lock in substantive law that may not be well-adapted to the present context, much less the future.<sup>35</sup> And in other areas, the agreement may complicate legislative efforts to solve widely recognized policy dilemmas, including in the area of orphan works, patent

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<sup>33</sup> *Text of Urgent ACTA Communique, International Experts Find That Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY (June 23, 2010), <http://www.wcl.american.edu/pijip/go/acta-communique>.

<sup>34</sup> See Letter from Senator Bernard Sanders and Senator Sherrod Brown to David Kappos, Director of Patent and Trademark Office (Oct. 19, 2010), *available at* [http://keionline.org/sites/default/files/senator\\_sanders\\_brown\\_kappos\\_19oct2010.pdf](http://keionline.org/sites/default/files/senator_sanders_brown_kappos_19oct2010.pdf) [hereinafter Letters from Senators Sanders and Brown] (requesting analysis on the potential implications of ACTA on areas of U.S. law that appear in conflict with the facial language of the agreement, including in reference to sovereign immunity); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (limitations of patent remedies against medical providers under 35 U.S.C. § 287 (c), and for non-disclosed patents on biologic products 35 U.S.C. § 271(e)(6)(B)-(C), for non-willful trademark violation, 15 U.S.C. § 114 (2), and in certain cases of infringement in the digital environment, 17 U.S.C. § 512).

<sup>35</sup> See ACTA Oct. 2010 Draft, *supra* note 12, art. 2.14.1: Criminal Offenses (extending criminal copyright liability for any violations that bestow an “indirect” economic advantage).

reform, secondary copyright liability and the creation of incentives for innovation in areas where the patent system may not be adequate.<sup>36</sup> The agreement is also likely to affect courts' interpretation of U.S. law.<sup>37</sup>

These problems have not been adequately remedied in the final text.

In many of the countries negotiating the agreement, including the EU, the normal procedures for entering a treaty, including consent by the legislative branch, will be used.<sup>38</sup> But the USTR has stated repeatedly that ACTA will enter into force in the U.S. as a sole executive agreement that does not require any congressional role.<sup>39</sup> Congress will not receive the opportunity to review and amend the agreement before it goes into effect, as it would in any traditional international agreement binding on the U.S. If USTR succeeds in this bold plan, it will dramatically expand presidential power to make internationally binding law without congressional consent.

More broadly, rather than amplifying public buy-in and input, disclosure of information authorized or by leak, after policy decisions have been made, has discredited the USTR without allowing for the benefit of meaningful real-time public input at the critical point when policy is being formulated and law written. The kind of secrecy envisioned and practiced by the USTR needlessly created and fostered an adversarial relationship

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<sup>36</sup> See Shawn Bentley Orphan Works Act of 2008, S.2913, 110th Cong. (2008); World Health Assembly Resolution on Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, WHA Res. 61.21, 61st World Health Assembly, 8th plen. mtg, WHO Doc. WHA61/2008/REC.21 (May 24, 2008), *available at* [http://www.who.int/gb/ebwha/pdf\\_files/A61/A61\\_R21-en.pdf](http://www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf); ACTA Oct. 2010 Draft, *supra* note 12, art. 2.14(1,4) (applying broad conception of aid-and-abet liability).

<sup>37</sup> See *generally* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding that U.S. statutes should be interpreted to avoid conflicts with international law).

<sup>38</sup> See Resolution of 10 March 2010 on the Transparency and State of Play of the ACTA Negotiations, EUR. PARL. DOC. (Mar. 10, 2010), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0058&language=EN&ring=P7-RC-2010-0154> (asserting that "as a result of the entry into force of the Lisbon Treaty, [the EU Parliament] will have to give its consent to the ACTA Treaty text prior to its entry into force in the EU").

<sup>39</sup> See Katz & Hinze, *supra* note 2.

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with the public that reinforced the worst fears and criticism about international intellectual property lawmaking. This has further undermined the legitimacy of the ACTA negotiating process, and ACTA itself.

#### *B. ACTA is not a Binding Treaty (or an Executive Agreement) Under U.S. Law*

The process that has been described by USTR for entering ACTA – without submitting it to Congress for ratification – is insufficient to bind the U.S. to the agreement under U.S. law. The definition of a “finely wrought” system for the creation of binding law is a core subject of the Constitution.<sup>40</sup> The Supremacy Clause describes the “supreme Law of the Land” as being made up of the “Constitution,” “Laws of the United States which shall be made in Pursuance thereof,” and “Treaties.” These are the forms, and *only* forms, of binding federal law.

There are three types of international agreement that can bind the U.S. under Constitutional standards: traditional treaties, confirmed by two thirds of the senate; executive agreements entered under congressionally delegated (ex ante) authority or approved in legislation after the fact; and sole executive agreements entered under the President’s own authority. ACTA is none of these.

#### 1. Treaties Bind the U.S. Only With Senate Consent

The first and most obvious place to find the power to bind the U.S. to an international agreement is through the treaty power. Article II says the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>41</sup>

The USTR is not claiming that it has any intent to ask the Senate to advise and consent to ACTA as a treaty, although this would be the most appropriate constitutional process. So its lawmaking power must lie in

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<sup>40</sup> See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>41</sup> U.S. CONST. art. II, § 2.

recognition of ACTA as one of two types of executive agreements that bind as “Laws of the United States.”

## 2. Congressional-Executive Agreements Bind Only by Virtue of Underlying Legislative Grants

So-called “congressional-executive” agreements become binding law by virtue of having complied with Article I’s lawmaking process. Since Congress has the expressly delegated Article I power to regulate foreign commerce, it can implement legal changes to international trade laws through statute as well as treaty.<sup>42</sup> In a congressional-executive agreement, Congress passes through both houses, and the President signs, legislation either delegating *ex ante* authority to enter agreements or approving of the agreement itself *ex post*.

There is academic debate as to the extent to which Congress *should* delegate so much authority to the President to make law through congressional-executive agreements, particularly through the vague and open ended delegations of *ex ante* authority that has become common in modern times.<sup>43</sup> However, it is generally accepted that our positive law recognizes such agreements as binding proclamations of law.<sup>44</sup> Even the

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<sup>42</sup> See John C. Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements* 56 (2000) available at <http://works.bepress.com/johnyoo/24> (noting, e.g., that a statute reducing tariffs or changing customs laws would be no less a statement of binding law in the U.S. than a treaty doing the same) [hereinafter Yoo Article]. [pages reference working paper version. Paper published in 99 MICH. L. REV. 757].

<sup>43</sup> Compare Yoo Article, *supra* note 52, at 4 (supporting congressional-executive agreements as a means to “preserve Congress’s constitutional powers over matters such as international commerce”) with Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146 (2009) (criticizing the growth of congressional-executive agreements as “inconsistent with basic democratic principles”).

<sup>44</sup> See CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (Jan. 2001) [hereinafter Senate Report]. *But see* Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing congressional-executive agreements violate the Treaty Clause).

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strong executive camp recognizes that congressional participation through a congressional-executive agreement is the bare constitutional minimum for the legal validity of any agreement on a matter relating to an Article I, Section 8 power.<sup>45</sup>

The USTR does not claim that Congress has authorized the negotiation of ACTA through an *ex ante* statutory grant of authority. And it has stated that it does not plan to ask the U.S. Congress to approve ACTA *ex post*. It must therefore rely on the validity of ACTA as a sole executive agreement.

### 3. Sole Executive Agreements Bind Only in Matters Delegated to the Unilateral Power of the President

In a “sole executive agreement,” the President binds the U.S. to an international agreement unilaterally – with no formal *ex ante* or *ex post* authorization by Congress. This is the form of agreement represented by ACTA. But this claim is highly dubious because of the “strict legal limits [that] govern the kinds of agreements that presidents may enter into” without some form of Congressional consent.<sup>46</sup>

Because sole executive agreements “lack an underlying legal basis in the form of a statute or treaty,”<sup>47</sup> they can be made by the president only within the restrictive set of circumstances in which the President has independent Constitutional authority.<sup>48</sup> “The President cannot make an

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<sup>45</sup> See Yoo Article, *supra* note 52, at 56 (commenting that “[n]ot only are congressional-executive agreements acceptable, but in areas of Congress’s Article I, Section 8 powers, they are – in a sense –constitutionally required.”); see also *infra* §§ III(C), (D).

<sup>46</sup> Hathaway, *supra* note 43, at 146.

<sup>47</sup> Senate Report, *supra* note 44, at 88.

<sup>48</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1986) [hereinafter R(3)F] (The President may enter a binding international agreement without congressional assent only for a “matter that falls within his independent powers under the Constitution.”); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (admonishing that when the President acts pursuant to an “express or implied authorization of Congress, his authority is at its

international agreement that exceeds his own constitutional authority without Congress's assent.”<sup>49</sup>

Most binding domestic law must flow from the shared responsibilities described in Article I. Article II, however, provides for the exercise of certain powers by the President unilaterally. Such acts, performed within the bounds of Constitutionally delegated power, “have as much legal validity and obligation as if they proceeded from the legislature.”<sup>50</sup> For Supremacy clause purposes, “[s]ole executive agreements validly concluded pursuant to one or more of the President's independent powers under Article II of the Constitution may be accorded status as Supreme Law of the Land.”<sup>51</sup> Thus, if ACTA is a validly executed sole executive agreement, then ACTA would preempt contrary state law,<sup>52</sup> and may even supersede an existing federal statute.<sup>53</sup>

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maximum”; but “in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers”).

<sup>49</sup> *International Law Making and the Proposed Agreement with Iraq Before the H. Comm. on Foreign Affairs, Subcomm. on Middle East and S. Asia and the Subcomm. on Int'l Org., Human Rights and Oversight* (Mar. 4, 2008) (statement of Professor Oona A. Hathaway, Professor, Yale Law School), available at <http://www.internationalrelations.house.gov/110/hat030408.htm>.

<sup>50</sup> *Pink v. United States*, 315 U.S. 203, 230 (1942) (citing *The Federalist* No. 64 (Jay) (describing the equal legal validity of “[a]ll Constitutional acts of power, whether in the executive or in the judicial department”).

<sup>51</sup> Senate Report, *supra* note 44, at 92.

<sup>52</sup> *See Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003) (Preemption of state law could be a real concern over the areas of intellectual property law, particularly trade secret law, administered primarily through state common law).

<sup>53</sup> *See* Senate Report, *supra* note 44, at 95 (analyzing case law and finding that “the question as to the effect of a Presidential agreement upon a prior conflicting act of Congress has apparently not yet been completely settled”); *see also* R(3)F, *supra* note 48, at § 115, Reporter's Note 5 (explaining arguments that because a sole executive agreement “is Federal law,” and all valid Federal laws are of equal weight, a sole executive agreement could be interpreted “to supersede a statute”). *But see* *United States v. Guy Capps, Inc.*, 204 F. 2d 655, 659-660 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955) (“whatever the power of the executive with respect to making executive trade agreements regulating foreign

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The authority to enter sole executive agreements can be most easily and commonly found in the parts of the Constitution that grant the President independent power to act without Congressional participation. Thus, many executive agreements are uncontroversial extensions of the President's independent authority to act as Commander in Chief of the Army and Navy,<sup>54</sup> to "receive ambassadors" from (and thereby recognize) foreign nations,<sup>55</sup> or to issue pardons.<sup>56</sup> There are also a large number of (often mundane)<sup>57</sup> executive agreements grounded in the President's general power "to take Care that the Laws be faithfully executed."<sup>58</sup> In a small number of other borderline cases, long historical practice of acquiescence by Congress has been used to justify sole executive action to settle foreign claims that otherwise implicate congressional powers.<sup>59</sup>

None of the settled cases apply to ACTA. If the agreement was

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commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress').

<sup>54</sup> U.S. CONST. art. II, § 2.

<sup>55</sup> U.S. CONST. art. II, § 3.

<sup>56</sup> U.S. CONST. art. II, § 2; *see* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581-82 (2007) (describing the "vast majority" of sole executive agreements as "unobjectionable . . . means of exercising their independent statutory authority or constitutional powers, such as the power to receive ambassadors, to issue pardons, or to command the military forces"); Hathaway, *supra* note 43 (citing "defense" as the area of foreign policy with the most executive agreements).

<sup>57</sup> *See* Hathaway, *supra* note 43, at 149.

<sup>58</sup> U.S. CONST. art. II, § 3; *see* Hathaway, *supra* note 43, at 149-153, n. 29 (finding 375 sole executive agreements between 1990 and 2000 on matters including "Agreed Minutes" and "Implementing Procedures"); *cf.* Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev 309, n. 61, n. 285 (2006) (citing over 15,000 executive agreements between 1946 and 2004).

<sup>59</sup> *See* *Pink v. United States*, 315 U.S. 203 (1942); Senate Report, *supra* note 44, at 90; Clark, *supra* note 56, at 1582, 1615, 1660 (noting examples including receiving ambassadors, issuing pardons, settling claims of American nationals against foreign governments, and conducting military exercises).

composed only of the kind of coordination and information exchange between customs offices contained in Chapter IV, perhaps the agreement could be justified as an incident to the President's executive power to manage agencies in their implementation of law. But the information sharing and international cooperation mandates of ACTA make up just a couple of ACTA's pages.<sup>60</sup> The majority of ACTA is composed of specific provisions on intellectual property remedies that the *legislation* of each country must adhere to. This cannot be justified as an implementation of mere executive power. "In the framework of our Constitution, the President's power to see to it that the laws are faithfully executed refutes the idea that he is to be a lawmaker."<sup>61</sup> Thus, the USTR must be locating the power to bind U.S. legislation to ACTA's dictates to some unenumerated power.

Claims to unenumerated powers to conduct foreign affairs without congressional participation reached its zenith in the George W. Bush administration.<sup>62</sup> Those in favor of strong executive power argue that extensive unenumerated powers in matters of foreign affairs should vest in the sole discretion of the executive.<sup>63</sup> But "uncertainties and the sources of controversy about the constitutional blueprint lie in what the Constitution *does not say*."<sup>64</sup> Even the adherents to the strong executive theory accept

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<sup>60</sup> See ACTA, *supra* note 10, at ch. 3: Enforcement Practices, ch 4: International Cooperation.

<sup>61</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>62</sup> See Van Alstine, *supra* note 58, at n. 8; Curtis Bradley & Martin Flaherty, *Executive Power Essentialism & Foreign Affairs*, 102 MICH L. REV. 545, 548 (2004).

<sup>63</sup> See Memorandum from John Yoo to John Bellinger, Senior Associate Counsel to the President and Legal Adviser to the National Security Council (Nov. 15, 2001), available at <http://www.globalsecurity.org/space/library/policy/national/olc-abm-treaty011115.htm> ("the executive exercises *all* unenumerated powers related to treaty making"); see also John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1677-78 (2002); Van Alstine, *supra* note 58, at 337-340 (2006) (describing the strong claim that Article II's "vesting clause" grants plenary powers to the President over foreign affairs).

<sup>64</sup> See Louis Henkin, "A More Effective System" for Foreign Relations: *The*

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that the President cannot use a sole executive agreement to usurp lawmaking functions from Congress in any area expressly delegated to Congress by Article I.<sup>65</sup> This is the source of the constitutional problem with ACTA.

### 4. ACTA Implicates Article I Powers

ACTA does not deal with issues that lie in the unenumerated lacunae of the Constitution. As described above in Part II, ACTA is a wide ranging international agreement mandating statutory minimum standards in areas of federal and state law. ACTA standards would place restraints on the development of rules that stem from the Constitution itself, such as in the evidentiary standards required for property seizures and criminal prosecution. It would primarily affect the evolution of federal law, including the large federal statutory enactments on patents, copyrights and trademarks. ACTA would also affect state common law, where many trade secret obligations reside.

As an agreement setting minimum legislative standards for intellectual property law and the regulation of IP-protected goods on the internet and in international trade, ACTA directly implicates Congress's Article I, Section 8 powers. These include, most specifically, those to "regulate Commerce with foreign Nations" and "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." There is no residuum of power in these areas that the executive can claim, even under the broadest theories of the strong executive camp. Thus John Yoo, one of the leaders of the strong executive camp, explains:

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*Constitutional Framework*, 61 VA. L. REV. 751, 753 (1975) (emphasis added).

<sup>65</sup> See Saikrishna Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L. J. 231, 253 (2001); Yoo Article, *supra* note 52, at 56-58; see also Van Alstine, *supra* note 58, at 342-43 (explaining that "even the strong claim to implied executive powers acknowledges, as it must, that the president's Article II powers are 'residual' only. Whatever their general scope, they are qualified by, and otherwise must yield to, the more specific allocations of power elsewhere in Article II and in Article I.").

In order to respect the Constitution's grant of plenary power to Congress, the political branches must use a statute to implement, at the domestic level, any international agreement that involves economic affairs. Otherwise, the mere presence of an international agreement would allow the treaty-makers to assume the legislative powers so carefully lodged in Article I for Congress. . . . Congressional-executive agreements preserve Congress's Article I, Section 8 authority over matters such as international and interstate commerce, intellectual property, criminal law, and appropriations, by requiring that regardless of the form of the international agreement, Congress's participation is needed to implement obligations over those areas.<sup>66</sup>

#### 5. USTR's Justifications do not Establish ACTA's Constitutional Basis as a Sole Executive Agreement

The USTR has made three assertions justifying entering ACTA as a sole executive agreement despite the lack of "plenary" authority of the President over its subject matter. USTR has argued: (1) the agreement will be consistent with existing U.S. law; (2) the President has "plenary" powers over foreign affairs; and (3) the President is authorized by virtue of the Trade Act of 1974. None of these arguments establishes an adequate constitutional basis for sole executive action on ACTA.

The first argument is wrong as a matter of both fact and law. Factually, it is not true that ACTA has been crafted in a way to avoid usurpations of congressional authority. As noted in the letter of 80 Law Professors to President Obama, ACTA fails "to explicitly incorporate current congressional policy," including through provisions that appear to conflict with U.S. limitations and exceptions to copyright and trademark law damages and injunctions.<sup>67</sup> ACTA, USTR officials say, is consistent with

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<sup>66</sup> Yoo Article, *supra* note 52, at 56.

<sup>67</sup> See Letters from Senators Sanders and Brown, *supra* note 34 (requesting analysis on the potential implications of ACTA on areas of U.S. law that appear in conflict with the facial language of the agreement, including in reference to sovereign immunity); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (concerning non-willful trademark violation, 15 U.S.C. § 114 (2), and in certain cases of infringement in the digital environment, 17 U.S.C. § 512).

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U.S. law because the Administration has reviewed the agreement and not seen any problems. If it is not correct, then ACTA's Article 1.2, leaving each member "free to determine the appropriate method of implementing" ACTA, solves any problem.<sup>68</sup> Regardless of the merits of USTR's position on the substance of the issue,<sup>69</sup> the position misses the point. For the question of whether ACTA binds U.S., the issue of its compliance with present U.S. law is irrelevant. The President does not have authority to enter international agreements in Congress's arena of enumerated powers without congressional consent regardless of whether the agreement's provisions conform to the contours of existing domestic law. The reason is obvious – the agreements would restrain Congress's power to alter current law. The President cannot tie Congress's hands through unilateral action any more than the Congress can pass legislation without the President's signature. It is Congress, not the executive, which is entitled to reach the decision of whether the agreement does in fact comply with what the law is and should be.

USTR's second argument – that the President has "plenary" power to enter into international intellectual property agreements – is similarly misplaced. Here, USTR is drawing on a host of Supreme Court statements that the President sometimes acts as the "sole" or "exclusive" representative of the United States in the arena of foreign affairs.<sup>70</sup> Indeed, the specific

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<sup>68</sup> James Love, *USTR's Implausible Claim That ACTA Article 1.2 is an All Purpose Loophole, and the Ramifications If True*, KNOWLEDGE ECOLOGY INTERNATIONAL (Oct. 22, 2010), <http://keionline.org/node/990>.

<sup>69</sup> *See id.*

<sup>70</sup> *See N.Y. Times Co. v. United States*, 403 U.S. 713, 741 (1971) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief"); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (discussing the "conduct of diplomatic and foreign affairs, for which the President is exclusively responsible"); *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 109 (1948) (describing the President as "the Nation's organ in foreign affairs"); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the President as the "sole organ" in foreign affairs).

source of USTR's rhetoric appears to be the oft cited *dicta* of the Supreme Court in the *Curtiss-Wright* case, referring to the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>71</sup>

Properly set in their context, the descriptions of the President as the "sole" and "plenary" voice in foreign affairs are undoubtedly true. The relevant distinction is between the role of the President as the voice and negotiator of the U.S. in foreign negotiations, which the executive practices unilaterally, and President's ability to bind the U.S. to internationally constructed laws and policies, in which the "constitutional power over foreign affairs is shared by Congress and the President."<sup>72</sup>

The President and his appointees are the sole voice of the U.S. in international affairs. The President appoints the U.S. representatives to international law making institutions including the United Nations, the World Trade Organization and the World Intellectual Property Organization. In these capacities, and under the President's power to "make" treaties and represent the U.S., the executive branch regularly engages in the creation of international law and policy.<sup>73</sup> However, such external agreements do not bind U.S. domestic law except in the strictly limited areas where the President has sole Constitutional authority.<sup>74</sup>

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<sup>71</sup> *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

<sup>72</sup> *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993); see also *Regan v. Wald*, 468 U.S. 222, 262 (1984) (Powell, J., dissenting) ("It is the responsibility of the President and Congress to determine the course of the Nation's foreign affairs"); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (discussing "the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *United States v. Minnesota*, 270 U.S. 181, 201 (1926) ("Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States.").

<sup>73</sup> *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003) ("Nor is there any question generally that that there is executive authority to decide what [international] policy should be.").

<sup>74</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) (explaining that the President may "act in external affairs without

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Because ACTA involves international legal obligations on Article I, Section 8 congressional powers, the President cannot bind the U.S. to the agreement absent congressional consent.

Finally, USTR evokes the Trade Act of 1974 as an example of *ex ante* authorization for the President to negotiate trade agreements. Fast track trade promotion authority does not support the ACTA process. Historically, authority to reduce tariffs and regulate foreign commerce rested exclusively with Congress as an enumerated power in Article I, §8. In the early days of the Great Depression, Congress recognized the need for streamlined action to reduce tariffs and delegated some authority to the President. The Trade Act of 1934 gave the President the authority to negotiate trade agreements within carefully prescribed limits, but these agreements were still subject to congressional approval. This law was extended or reauthorized many times since 1934, with additional congressional oversight added during the Kennedy Round in 1962. In the Trade Act of 1974, Congress reserved for itself all non-tariff trade agreements, effectively requiring congressional approval for these agreements. On several occasions, Congress has also granted the President fast track authority, guaranteeing a clear up or down vote in Congress, without any amendments.

Fast track authority last expired on June 30, 2007 and has not been renewed. As noted in a 2008 letter from Senators Feingold and Byrd to President Bush, USTR lacks authority to enter trade agreements without either fast track or congressional approval:

[T]he U.S. Constitution grants Congress *exclusive* authority "to regulate commerce with foreign Nations" and to "lay and collect Taxes [and] Duties.

As you know, for decades U.S. presidents have obtained delegations of this congressional trade authority under what is commonly known as Fast Track. However, your delegation of Fast Track Trade Promotion

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Congressional Authority"); Van Alstine, *supra* note 58, at 345 (noting that "the president requires the consent of Congress as a whole, or two-thirds of the Senate for treaties, to transform this external policy into domestic law").

Authority terminated on June 30, 2007. Congress has refused to provide you with further authority -- either more Fast Track or any other form of trade authority -- nor is there any prospect of that occurring before the end of your term. Indeed, it is likely that in the future the Fast Track process will be replaced altogether with a trade negotiation and approval mechanism that better reflects Congress's constitutional role regarding trade policy.<sup>75</sup>

The Trade Act of 1974 does not delegate power to the President to bind the U.S. to trade agreements absent congressional consent. ACTA, no less than the Trans-Pacific Partnership now being negotiated or the Korea, Panama and Peru free trade agreements the administration is seeking to bind the U.S. to, must be approved by Congress as a regulation of foreign commerce regardless of whether it complies with current law.

## II. ACTA IS A BINDING TREATY UNDER INTERNATIONAL LAW

There have been reports that the Administration is embracing the constitutional ambiguity of ACTA by telling Congressional offices, as a justification for their continued inaction, that ACTA will not be a binding agreement in the U.S. without congressional ratification.<sup>76</sup> That is only partly true.

Although the President cannot make domestic law without Congress, he can make international law unilaterally.<sup>77</sup> And although that law cannot bind U.S. domestic law without congressional participation, it can bind the U.S. in the international sphere.<sup>78</sup> Non compliance with domestic ratification processes does not prevent an agreement from creating binding

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<sup>75</sup> Letter from Senators Feingold and Byrd to President Bush, July 23, 2008.

<sup>76</sup> Private communication with James Love, Knowledge Ecology International.

<sup>77</sup> See e.g., Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 7, 1155 U.N.T.S. 331 [hereinafter VCLT] (providing that every state has the capacity to conclude international agreements and heads of state are presumptively authorized to represent a state for purposes of concluding an international agreement); accord R(3)F, *supra* note 48, at § 311; Van Alstin, *supra* note 58, at n. 62 (“Under international law, the president, except in extreme circumstances, has the authority to bind the United States even where he exceeds his domestic Authority”).

<sup>78</sup> See VCLT, *supra* note 76, art. 26.

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international legal obligations. A state generally “may not invoke a violation of its internal law to vitiate its consent to be bound” internationally.<sup>79</sup>

As an international agreement between the negotiating parties, ACTA binds all signatories to abide by the framework of this international legal instrument.<sup>80</sup> Parties to an international agreement with binding obligations must not derogate from its obligations and must perform them in good faith. This doctrine of *pacta sunt servanda* (“agreements must be kept”) lies at the core of the law of international agreements and is embodied in the VCLT Art. 26 and in R(3)F § 321.<sup>81</sup> The doctrine of *pacta sunt servanda* implies the existence of international obligations that must be performed in good faith despite restrictions imposed by domestic law.<sup>82</sup> Accordingly, even though ACTA may not be enforceable domestically, it is nonetheless a binding international agreement and the parties must perform its obligations under ACTA in good faith.

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<sup>79</sup> *Id.* at art. 46 (noting that the violation of internal law must be “manifest” and concern “a rule of fundamental importance” to evade obligations under international law); accord R(3)F, *supra* note 48, at § 311(3).

<sup>80</sup> See Anti-Counterfeiting Trade Agreement: Subject to Legal Review, art. 1.2.1, Nov. 15, 2010 [hereinafter ACTA Nov. 2010 Draft], available at [http://keionline.org/sites/default/files/acta\\_15nov2010.pdf](http://keionline.org/sites/default/files/acta_15nov2010.pdf) (stating that “[e]ach Party shall give effect to the provisions of this Agreement”); R(3)F, *supra* note 48, at § 301(1) (defining “international agreement” as “an agreement between two or more states . . . that is intended to be legally binding and is governed by international law.”); 44B Am. Jur. 2d *International Law* (2010) [hereinafter Am Jur] (an “international agreement is a part of international law and creates obligations binding between the parties under international law”).

<sup>81</sup> See VCLT, *supra* note 76, at art. 26 (emphasizing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”); R(3)F, *supra* note 48, at § 321.

<sup>82</sup> See VCLT, *supra* note 76 at art. 27 (stating that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”); R(3)F, *supra* note 48, at § 321, Comment a (explaining that “international obligations survive restrictions imposed by domestic law”).

The existence of a binding obligation in international law leaves parties free to decide how they implement the obligations in domestic law, a point reflected in ACTA Section A, Article 1.2(1). If the U.S. decides that it does not need to take any action to implement ACTA into its law, because ACTA does not change the domestic law, then it is up to the other contracting parties to identify and enforce any discrepancies between ACTA and U.S. law.

Absent a dispute-resolution mechanism, ACTA lacks a forum for enforcement. But that does not mean the agreement lacks binding effect. “[U]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and ordinarily make reparation, including in appropriate circumstances restitution or compensation for loss or injury.”<sup>83</sup> In order to resolve disputes, “a state may bring a claim against another state for a violation of an international obligation . . . either through diplomatic channels” or through an agreed procedure.<sup>84</sup> A party viewing the U.S. in breach of its international obligations from ACTA may resort to countermeasures under customary international law.<sup>85</sup> Under these measures, other parties may punish violations with ACTA through trade sanctions or other measures against U.S. commerce, provided such sanctions are proportional in relation to the breach.<sup>86</sup> Another party could also litigate a case against the U.S. in the International Court of Justice, but that would require the US to submit to ICJ jurisdiction.<sup>87</sup>

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<sup>83</sup> R(3)F, *supra* note 48, at § 901.

<sup>84</sup> *Id.* at § 902(1).

<sup>85</sup> See Report of the International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on State Responsibility].

<sup>86</sup> See Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

<sup>87</sup> See Annex to U.N. Charter, Statute of the International Court of Justice, art. 36, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 (1945) (defining the scope of the jurisdiction of the Court).

There are other implications of the U.S. signing ACTA as binding international law. For example, the State Department and USTR would presumably review and craft subsequent international agreements, including those intended to bind U.S. law, for compliance with ACTA. Its provisions once included in a free trade agreement or other agreement approved by Congress, would then have the force of domestic law. Courts would be required to interpret ambiguities in U.S. law to comply with more specific mandates in ACTA.<sup>88</sup> And pressure from industry and the administration may be brought to bear on Congress and on the states to alter their law, or refrain from future alterations, to comply with ACTA's mandates.

CONCLUSION: ACTA MUST BE SUBMITTED TO CONGRESS

We call on the administration to change course. To comply with the Constitution, ACTA must be submitted to Congress. This request, if followed, reflects not just proper lawmaking, but would illustrate dedication to the more transparent and accountable democracy that the administration sought and championed in its opening days. The Administration may either request super-majority ratification by the Senate as a treaty, or may seek majority approval from both houses of Congress as a Congressional-Executive Agreement. To avoid binding the U.S. to an unconstitutionally entered treaty, the Administration needs to make clear in its signing of ACTA that **the United States does not consider itself to be bound until the agreement is consented to by Congress or domestic legislation implementing the agreement is passed.** Without such a statement, an executive signature of ACTA could create a binding international treaty that is not considered binding under domestic law. This action would chart new ground – for the first time entering an agreement setting expansive international standards for U.S. intellectual property legislation without Congress's approval.

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<sup>88</sup> See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).