

ACTA: Res inter alios acta

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What was ACTA?

Res inter alios acta. *aliis nec nocet nec prodest*, as the Latin saying goes. Whatever is agreed among certain parties would not favor or harm those who did not take part in it.

There would be nothing *less* apropos to qualify the Anti-Counterfeiting Trade Agreement (ACTA), which was initially discussed among a few parties - on an arcane fashion - since 2007. As the final text issued, the nations excluded from the negotiating exercises might end by being harmed by ACTA, benefiting from it in no significant way ².

1 This article updates Borges Barbosa, Denis, *Untoward Restrictions to Trade and Abuses of Intellectual Property Rights: A Brazilian Perspective to the ACTA Exercise* (June 22, 2010). Available at SSRN: <http://ssrn.com/abstract=1628744> or <http://dx.doi.org/10.2139/ssrn.1628744>

2 “ From the outset, however, the negotiations were embroiled in controversy, for at least four reasons. First, while the negotiations were initially carried out behind closed doors, industry representatives were apparently being supplied with information that was not being disseminated to the public. Second, the “plurilateral” nature of the negotiations aroused suspicions that the ACTA negotiations were but the latest example of “forum-shifting”— a well-documented tactic that is apparently being deployed by owners of intellectual property (IP) in an effort to ratchet up international standards for the protection of private intellectual property rights (IPRs)(...). A particularly jolting development in the effort by critics to secure more specifics concerning the ACTA negotiations occurred in March 2009, when, notwithstanding President Obama's campaign promises of greater transparency in U.S. government policymaking, the Office of the U.S. Trade Representative (USTR) denied a Freedom of Information Act (FOIA) request for a copy of the ACTA discussion draft and related materials on the ground that they were “classified in the interest of national security.” While the invocation of national security may have been simply a ruse to camouflage and avoid exacerbating growing divisions among the negotiating parties, it proved useful to take this national security claim at face value, as it offered a starting point for this article’s predecessor — which sought “to provide two alternative tales of the treaty with a view to identifying and clarifying the various controversies currently surrounding the negotiations.” McManis, Charles R. and Pelletier, John S., *Two Tales of a Treaty Revisited: The Proposed Anti-Counterfeiting Trade Agreement (ACTA)* (May 1, 2012). Washington University in St. Louis Legal Studies Research Paper No. 12-04-10. Available at SSRN: <http://ssrn.com/abstract=2049673> or <http://dx.doi.org/10.2139/ssrn.2049673>. See also: Levine, David S., *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law* (April 6, 2012). *Cardozo Arts & Entertainment Law Journal*, Vol. 30, No. 2, p. 105, 2012. Available at SSRN: <http://ssrn.com/abstract=2038020>.

In October 2007, United States, Japan, Switzerland and the European Union announced they would launch negotiations for an "Anti-Counterfeiting Trade Agreement (ACTA) for the purpose of "Providing a response to the increase in global trade of counterfeit goods and pirated copyright protected works"³.

The very peculiar aspect of the initial phases of the exercise was the confidentiality imposed on the negotiating text. It was probably this aspect that brought about growing dissatisfaction among civil society, particularly in the United States, Australia, Canada and EU countries. The fact that influential business associations such as the International Trademark Association, the Pharmaceutical Research and Manufacturers of America and International Intellectual Property Alliance, had access to the text under negotiation, whereas other NGOs and third party countries were held apart, have contributed to the sense of impending impropriety⁴.

ACTA has a broad scope⁵: deemed to supplement and develop the TRIPs level of enforcement⁶, its Chapter II covers (a) general obligations; (b) civil enforcement; (c) border measures; (d) criminal enforcement; and (e) enforcement of intellectual property rights in the digital environment.

3 "As of May 2012, the European Union and 22 of its 27 member states have joined Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States as signatories of ACTA. Yet, the outlook for ratification by the May 1, 2013 deadline appears dismal. Mexico dropped out of early negotiations and is unlikely to sign, and in February 2012, the EU suspended ratification following widespread protests across Europe and riots in Poland. Effectively, ACTA has been declared dead on arrival." Stacy Wu, United States: ACTA: The Public Revolt, 23 May 2012, found at <http://www.mondaq.com/unitedstates/x/178644/Copyright/ACTA+The+Public+Revolt>, visited 26/11/2012.

4 Until May 2008, these meetings for the negotiation of the agreement were made in absolute secrecy, until in May 22, 2008, a discussion paper with proposals on the settlement was disclosed in the site <http://wikileaks.org/LEAK/ACTA-PROPOSAL-2007.PDF>. The Brazilian Foreign Service has requested access to such text from the US Government, what was officially denied. The NGO Knowledge Ecology International also requested the USTR for such an access, on the basis of the US Freedom of Information Act. The application was refused on the grounds that the draft under negotiation it was "Properly Classified] in the interest of national security." In the EU, similar request was presented by the Foundation for a Free Information Structure before the EU Council, which request was also rejected on the grounds that "disclosure of information could prevent the proper conduct of the negotiations, would weaken the position of the European Union and might affect negotiations and the relations with the third parties concerned. Similar requests were denied by the governments of Australia, Canada and New Zealand.

5 See, generally, THE U.S. TRADE REPRESENTATIVE, THE ANTI-COUNTERFEITING TRADE AGREEMENT—SUMMARY OF KEY ELEMENTS UNDER DISCUSSION (2009), available at http://www.ustr.gov/webfm_send/1479.

6 "Although ACTA is clearly an indictment of the TRIPS Agreement's failure to meet the enforcement needs and expectations of developed countries and their intellectual property industries, the Agreement is also quite ambitious in scope. In addition to addressing the TRIPS Agreement's shortcomings in the area of crossborder enforcement, ACTA seeks to incorporate new measures to target digital and transnational challenges. While article 23.3 facilitates the introduction of anti-camcording laws, article 23.4 includes new provisions that may create new criminal penalties for "aiding and abetting" intellectual property infringements—penalties that do not yet exist in the United States." Yu, Peter K., Enforcement, Enforcement, What Enforcement? (October 23, 2011). IDEA: The Journal of Law and Technology, Vol. 52, 2012; Drake University Law School Research Paper No. 12-22. Available at SSRN: <http://ssrn.com/abstract=1948326>

As finally concluded in late 2010⁷, ACTA did not include all the initially purported matter, but continued to attract such a negative consideration from considerable portions of the general public and NGO⁸ that the European Parliament ended by refusing it⁹; the European Court of Justice is considering the issue at the moment when this article is being written¹⁰.

Even assuming that ACTA is as dead as the Roman Empire (and probably Gibbons would add: for the very same reasons), this article is by no means an obituary: as current film goers would note, there is more live after death than conventional theology has heretofore noticed¹¹. Furthermore, ACTA has contrived to create a living organism that may overreach the actual effect of its provisions¹².

Beyond that, the Trans-Pacific Partnership Agreement¹³, the Canada-EU Trade Agreement (CETA), the India-EU, Thailand-EU, Moldavia-EU Free Trade Agreements, among many others forward the same genetic character to an unprecedented limit. Compared to them ACTA may be held a lamb, and a sacrificial one for that; as an old Portuguese saying notes: *after me there shall come someone who would do well to me*¹⁴.

7 Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, opened for signature Mar. 1, 2011, available at http://www.ustr.gov/webfm_send/2417.

8 See European Academics, (2011), Opinion of European Academics on Anti-Counterfeiting Trade Agreement, Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) 2011, Vol. 2, 65 or <http://www.iri.uni-hannover.de/acta-1668.html>, visited Nov. 26, 2012.

9 On July 4, 2012. See, generally, Matthews, Duncan, The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union (October 15, 2012). Queen Mary School of Law Legal Studies Research Paper No. 127/2012. Available at SSRN: <http://ssrn.com/abstract=2161764> or <http://dx.doi.org/10.2139/ssrn.2161764>.

¹⁰ The Court of Justice of the EU (CJEU) has to answer to the European Commission's request, on 22 February 2012, to clarify whether ACTA is incompatible, in any way, with the EU's fundamental rights and freedoms, including freedom of expression and information and data protection, and the right to property in the case of intellectual property.

11 “ (...) the real significance of the ACTA lies not in its textual obligations but more in the effect it will potentially have as a starting point in multilateral and bilateral trade negotiations, as an alternative forum for IP rule making and on the ‘governance’ of international IP more generally.” Mercurio, Bryan Christopher, Beyond the Text: The Significance of the Anti-Counterfeiting Trade Agreement (October 30, 2012). Journal of International Economic Law, Vol. 15, No. 2, pp. 361-390, 2012. Available at SSRN: <http://ssrn.com/abstract=2168587>.

12 “Chapter V is the second longest chapter in ACTA. Included in this chapter are provisions creating and governing a little institution called the “ACTA Committee.” On its face, those provisions are boring, mundane, and highly administrative. In reality, those provisions govern matters ranging from membership to amendments to rules and procedures. They also help institutionalize ACTA as a freestanding, self-evolving forum. Those provisions therefore have the potential to determine the future development of not only ACTA, but also the international intellectual property system.” Yu, Peter K., The ACTA Committee (September 30, 2012). Drake University Law School Research Paper No. 12-34. Available at SSRN: <http://ssrn.com/abstract=2154500> or <http://dx.doi.org/10.2139/ssrn.2154500>

13 See Trans-Pacific Partnership, OFF. THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Sept. 19, 2011).

14 Trás mim virá quem bom me fará.

The Brazilian view

A very important aspect of the Brazilian foreign policy towards international IP obligations is the reliance on the terms negotiated during the TRIPs exercises as a *ceiling*. As stressed by Brazil during the FTAA exercises¹⁵, whatever is to be discussed after TRIPs, even under the argument that its standards of enforcement were defective, are not to go beyond the multilateral bargain achieved in 1994.

The following considerations purport to reflect the general reaction of the relevant Brazilian sources to the matter as the main set of negotiations took course; however, it should not be taken as what was the official Brazilian Government standpoint then or now¹⁶.

The Anti-Counterfeiting Trade Agreement (ACTA) was at all times a concern for the Brazilian Government. Brazil thought that the eventual conclusion of a multilateral instrument on "enforcement" of rights might affect the balance of the intellectual property system and cause negative impact on international trade¹⁷. The role of Brazil and other similarly emerging countries (none of which negotiated or signed ACTA) may be significantly affected by an unbalanced enforcement treaty¹⁸.

(A) "Forum-Shopping"

Brazil has argued that the issues of intellectual property should be treated in specialized multilateral fora - WIPO and the WTO - where discussions are open to more than 140 countries and deliberations are transparent and inclusive, with broad participation, both as representatives of industrial interests and broader civil society values.

¹⁵ "Brazil considers that IPRs constitute a "systemic subject," that will have to be discussed in the multilateral context, in the scope of the negotiations of the OMC, not in the context of the hemispherical negotiations. The MERCOSUL, however, would be available use, in the scope of the negotiations of the ALCA, to accept the creation of mechanism of consultations in questions related to IPS, but it does not consider desirable the creation of mechanism of "enforcement," as considered by the North American party. Brazil considers that all the countries are liable the eventual imperfections in its IPRs system of protection. It is open to develop the cooperation in the area, but it does not consider desirable the creation of mechanism of "enforcement" in the matter, on a hemispheric scope, as it considers that such mechanism could result in abuses and crossed retaliations in the case of eventual misunderstandings in the area IPRs". Brazilian Foreign Office letter to this author, of Feb. 6, 2006. Quoted at Borges Barbosa, Denis, "TRIPs art. 7 and 8, FTAs and Trademarks" (March 9, 2006). Available at SSRN: <http://ssrn.com/abstract=889107>.

¹⁶ The Brazilian Foreign Office announced that will refuse to accept ACTA. According to the Director of the Economic Department of the Foreign Ministry, Carlos Marcio Cozendey, ACTA lacks legitimacy because it is not being discussed in the forums for negotiation that integrates Brazil (Folha de S. Paulo - Money - 11/05/2010).

¹⁷ The dubious nature of the negotiating strategy, further than the secrecy issue, was noted by Yu, Peter K., ACTA and Its Complex Politics (November 3, 2011). WIPO Journal, Vol. 3, p. 1, 2011. Available at SSRN: <http://ssrn.com/abstract=1953899>. It is to be noted that similar secret set of negotiations were repeated in the TPP treaty, the scope of which was limited to the Pacific countries: Chile and Peru are parties to the negotiation, although excluded from the ACTA negotiating round. Mexico signed ACAT.

¹⁸ BARBOSA, Denis Borges, BRIIC: laying a new patent system. Source: IIC : International Review of Intellectual Property and Competition Law. Vol. 43. No. 4, 2012

ACTA is part of the strategy of "forum shopping" by developed countries, which seek to promote their offensive interests in intellectual property outside the scope of WIPO and WTO, in bilateral forums (FTAs or EPAs), plurilateral or multilateral non-specialist (WCO, UPU) ¹⁹.

The "forum shopping" threatens the legal relevance of WIPO's Development Agenda ²⁰, the TRIPS Agreement and Doha Declaration on TRIPS and Public Health, and does not favor a balance between rights and obligations of the intellectual property system, inasmuch as, in non-traditional forums, tends to be disproportionate influence of developed countries and the interests of their industry.

The parties negotiating the ACTA were either included in the category of developed countries, or have high per capita income (Singapore, United Arab Emirates and Republic of Korea), or are members of OECD (Mexico), or signed a free trade agreement with the Member United States (Jordan and Morocco).

The secrecy surrounding the negotiations were held to be a steep obstacle to the participation of nongovernmental organizations, pro-consumer perspective and other "stakeholders", beyond the Intellectual Property right holders. All the non-governmental entities which have been voicing their support for ACTA are associations of right holders ²¹.

(B) Repression

ACTA proposes a single remedy for counterfeiting and piracy - enforcement.

Brazil recognizes the importance of deterrence. The National Council to Combat Counterfeiting and Piracy, comprising government representatives, industry associations and civil society organizations has been coordinating successful actions to seize counterfeit and pirated goods at the borders and within the national territory, enforced by the Federal Police, Federal Highway Police and the Internal Revenue.

Brazil advocates, however, that a strategy to promote the observance of rights (the "enforcement") should be always integrated with socio-economic and

19 As this author has already in 2005 noted this trend (BARBOSA, Denis Borges, Counting ten for TRIPS: Author rights and access to information a cockroach s view of encroachment. In: KORS, J. ; REMICHE, B. . ADPIC, première décennie: droits d'auteur et accès à l'information. Perspective latino-américaine. L'Accord ADPIC: dix ans après. Belgica: LARCIER, 2007) "Professor Drahos has noticed that the USA used a "forum-shifting" tactic to probe for a more advantageous instance in copyright issues, raising its TRIPS-plus interests in different international fora (e.g. WIPO, WTO, and UNESCO). The idea is to enlist the help of some "progressive" developing countries to act as allies".

20 By the way, ACTA negotiations were launched two months after the Development Agenda, an Argentine-Brazil proposal, was adopted in WIPO.

21 According to USTR site, among the organizations that had offered support to the agreement were the Business Software Alliance, the International Trademark Association, the Entertainment Industry Guild Union, the Motion Picture Association of America, the Recording Industry Association of America and U.S. Chamber of Commerce.

educational measures, informed by a sophisticated and well-informed diagnosis about the global problem of piracy and of counterfeiting.

Plurilateral strategies based *exclusively* on repression threatens: (i) the balance between rights and obligations of the intellectual property system, (ii) the international trade in legitimate products, as, for instance generic drugs, and (iii) the rights of the citizens, such as the presumption of innocence, the adversarial system and due process of law.

(C) Seizure of Goods in Transit

Brazil and India have presented at the WTO a request for consultations with the European Union and the Netherlands on the seizure of generic drugs in transit²².

Several provisions of the published version of ACTA seem to allow and encourage the seizure of goods in transit, which allegedly infringe intellectual property (IP). This affects unfavorably one of the cornerstones of the IP system, namely the principle of territoriality.

Intellectual Property rights are essentially territorial, and made applicable in a particular jurisdiction. To seize goods in transit, the customs authorities assert jurisdiction on the flow of intellectual property goods bound exclusively to third countries, incurring therefore in an extraterritorial application of national legislation.

(D) Threat to the Right to Privacy in the Digital Environment

Brazil is especially concerned with such rules of "enforcement" that could lead to violations of privacy and restriction of individual freedom on the Internet. Section 4 of the published version of ACTA handles the issue of regulation of cyberspace, and raises controversial topics such as technological protection measures, rights management information, obligations of providers to reveal the identity of their subscribers and procedures to disable access to the Internet.

The Constitutional recuse of ACTA: a Brazilian perspective

Even though the Brazilian Government should eventually decide to accede to ACTA or a similarly worded international instrument, it would seem that

22 "Several recent detentions of generic pharmaceutical products transiting through the European Union (EU) for suspected infringements of intellectual property rights raised serious concerns for public health advocates and threatened to expose systemic problems existing in the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The detentions not only garnered international attention, but India and Brazil formally began WTO dispute settlement proceedings against the EU. The parties recently reached a mutually agreed solution to the matter and the proceedings have been halted, leaving unanswered the complex legal and technical questions raised by the detentions of pharmaceuticals in transit." Mercurio, Bryan Christopher, 'Seizing' Pharmaceuticals in Transit: Analysing the WTO Dispute that Wasn't (2012). (2012) 61(2) International and Comparative Law Quarterly 389-426. Available at SSRN: <http://ssrn.com/abstract=2152457>

significant Constitutional issues would prevent its enactment as a part of the Brazilian legal system²³.

First of all, there is a possible compromise of the privacy standards enshrined in the Constitution as to the users of Internet²⁴, which are being specified at the statutory level by a bill currently under discussion in the Brazilian Congress²⁵.

The industrial property provisions Brazilian Constitution have a wording comparable to the IP clause of the US Constitution²⁶, which establishes as the purpose of the patents and trademarks to fulfil the social interest and to promote the technical and economic development of Brazil²⁷. Therefore, it is also felt that any eventual unbalance of IP rights created by ACTA in favour of the title holders that defeats such Constitutional targets would prevent the acceptance of the agreement.

The important aspect here is that the Constitutional requirement does not covers only the empowerment of the patent or trademark holder, but imposes he reasonability of such protection in face of other Constitutional interests; what does not seem entirely incompatible with the US Constitutional

23 See Patrícia Porto, O interesse público brasileiro na adesão ao Anti-Counterfeiting Agreement - (ACTA) - , Revista Eletrônica do IBPI, found at <http://www.ibpibrasil.org/media/bceac241c78c151affff802bac144226.pdf>, visited 26 Nov. 2012. As to similar arguments raised in the European environment, Douwe Korff and Ian Brown, OPINION on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights, found at <http://rfc.act-on-acta.eu/fundamental-rights>, visited on Nov. 23, 2012.

24 Porto. Cit. « Se o governo brasileiro aderir a esse acordo violará vários direitos fundamentais previstos na Constituição nacional, como o direito à privacidade e ao sigilo das informações privadas, previstos nos incisos X, XII, do artigo 5, da CFRB/88. Ao permitir que se viole a privacidade dos usuários de computadores e Internet, por exemplo.»

25 Bill 2126/2011, “Marco Civil da Internet”, found at http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;sessionid=48E53BDC65BC9914DC424FF0B78CC3A3.node1?codteor=912989&filename=PL+2126/2011, visited Nov. 26, 2012. Some comments classify such bill as an Anti-Acta proposal, see <http://www.techdirt.com/articles/20121112/07295821015/will-brazils-anti-acta-marco-civil-be-subverted-copyright-lobbyists-last-moment.shtml>, visited Nov. 22, 2012.

26 "[t]o promote the Progress of Science and the Useful Arts." U.S. Const. Art. 1, '8. See Edward C. Walterscheid, To Promote the Progress of Science and the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1, 37-38 (1994). For a comparison of the Brazilian and US IP clauses, see BARBOSA, Denis Borges; BARBOSA, Ana Beatriz Nunes; KARIN Grau-Kuntz. A Propriedade Intelectual na Construção dos Tribunais Constitucionais. Rio de Janeiro: Lumen Juris, 2009.

27 The Brazilian text is: “Art. 5º (...) XXIX – a lei assegurará aos autores de inventos industriais privilégio temporário para sua utilização, bem como proteção às criações industriais, à propriedade das marcas, aos nomes de empresas e a outros signos distintivos, tendo em vista o interesse social e o desenvolvimento tecnológico e econômico do País;” [“The statute shall ensure to the authors of industrial inventions a temporary privilege for its utilization, as well as the protection of industrial creations, of the propriety of trademarks, of the trade names and of other distinctive signs, considering the social interest and the technological and economic development of the country”]

interpretation of its own basic law²⁸. This unbalance would also arguably conflict some multilateral commitments of TRIPs²⁹.

Another important aspect is the eventual disproportion of sanctions, criminal or otherwise, which would be required by ACTA or its sequels³⁰; even though some of the criminal sanctions included in Brazilian statutes seem also unbalanced³¹, any further aggravation to such levels would probably bring close attention from Constitutional jurisdictions.

There are also other important issues in the ACTA wording that would probably defy Constitutional inquiry³², especially in which it would further than the *maximum standards* provided by TRIPs especially in due process protection³³.

Moreover, considering the present status of the Brazilian civil society, the public reaction to the introductions of ACTA or any of its sequels would

28 "Since *Pennock v. Dialogue*, 2 Pet. 1, was decided in 1829, this Court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents, but is 'to promote the progress of science and the useful arts' (Constitution, Art. I, § 8) — an object and purpose authoritatively expressed by Mr. Justice Story in that decision, saying: 'While one great object [of our patent laws] was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius the main object was 'to promote the progress of science and useful arts.'" *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917)

29 BARBOSA, Denis Borges; CHON, Margaret; von HASE Andrès Moncayo. Slouching Towards Development in International Intellectual Property. *Michigan State Law Review*, Vol. 2007, No. 1, 2008, v. 2007, p. 71-143, 2008.

30 Porto, cit.: "O ACTA fere os princípios da proporcionalidade e da razoabilidade, pois as sanções previstas no acordo são muito mais severas que as infrações. A sociedade como um todo seria criminalizada. O ACTA não distingue o uso justo e constitucional da contrafação e da pirataria e criminaliza toda e qualquer utilização de bens protegidos por direitos de exclusivas."

31 A number of state courts have been discussing the proportionality of such sanctions, especially the Supreme Court of the State of Minas Gerais.

32 Porto, cit.: « Se o governo brasileiro aderisse ao ACTA, violaria, ainda o artigo 5, inciso XXXII da CFRB/88, pois trataria os consumidores como criminosos e não observaria seus direitos. Violaria o artigo 5, LIV da CFRB/88, pois permitiria o confisco imediato e a destruição de produtos e bens de terceiros sem o devido processo legal. »

33 See BARBOSA, Denis Borges. Minimum Standards Vs. Harmonization in the TRIPs context: the nature of obligations under TRIPs and modes of implementation at the national level in monist and dualist systems. In: Carlos M. Correa. (Org.). *Research Handbook on the Interpretation and Enforcement of Intellectual Property under WTO Rules*. : Edward Elgar Publishing Ltd, 2010, v., p. 01-288. See also Josef Drexl, *The Evolution of TRIPs: Towards Flexible Multilateralism*, in KORS, J; REMICHE, B... *ADPIC, première décennie: droits d'auteur et accès à l'information. Perspective latino-américaine. L'Accord ADPIC: dix ans après*. Belgica: LARCIER, 2007, p. 13-45: : "Nevertheless, existing TRIPs standards may conflict with TRIPs-plus standards in bilateral agreements in cases in which the former do not only define minimum, but also maximum standards. Although it seems, according to Art. 1.1 TRIPs, that such maximum standards are inherently foreign to the concept of the TRIPs, the Agreement nevertheless prohibits "more intensive protection" in its provisions on enforcement of Part III to the extent that it fixes general procedural provisions to the benefit of any party to IP litigation. In some instances, the Agreement even explicitly provides for procedural rights of the defendant, like with regard to the level of legal certainty as a requirement for provisional measures (Art. 50.3 TRIPs) and the rights of the alleged infringer to be informed and to be heard within a reasonable time after provisional measures have been adopted *in audita altera parte* (Art. 50.4 TRIPs). Most strikingly, Art. 48 TRIPs provides for a right to indemnification of the defendant in case of an abuse of enforcement procedures".

raise considerable difficulties to the Congressional discussion and approval of such international instrument. The Constitutional arguments here mentioned would be certainly brought to discussion.

In the manner of a conclusion

Bringing IPR interests into a trade environment, what happened during the Uruguay round, has certainly enhanced some opportunities to right holders and other interested parties alike. By establishing a multilateral context where the classical XIXth Century Intellectual property Conventions were repositioned and some new obligations were added, IPR interests were advanced and an effective dispute resolution system was established.

This new situation has also included two new requirements to the Intellectual Property arena. In first place, obtaining and enforcing patents, trademarks, copyrights and other similar property was not anymore treated as an exception, albeit relevant, to trade considerations, as they were under the perspective of Art. XX of GATT 1947. Trade considerations were turned to be an ingrained part of Intellectual Property, and IPR values were included as a mainstream (not anymore exceptional) trade issue.

In second place, the need to balance the eventual conflicting interests concerning IPR was built up as a *trade* concern. Expediency and effectiveness in the enforcement of IPR, what are positive values in themselves, have now found a new limitation, that is: any response to the increase in global trade of counterfeit goods and pirated copyright protected works (or to the increase of infringement of any other IP interest) may not be acceptable under WTO if such response results in unreasonable harm to trade itself.

In its balanced approach to this complex set of interests, TRIPs has established a strong set of procedural standards. IPR-related procedure, after 1994, may not ignore such standards, which, considering the interest of right-holders, are to be taken as a *maximum* level of protection.

ACTA signatories, even though purporting to make more efficient the enforcement of IPR interests, are subject to such standards. Any excess or abuse of the remedies provided under the proposed agreement shall be evaluated under the procedural guaranties set by WTO law, and the creation of separate institutional arrangements, or the exclusion of some parties to the benefit of the new rules, will not defeat the application of balanced and trade-filtered rules provided by the General Agreement and TRIPs.

An interesting aspect of International Law helps to assure that no ACTA provision may be applied in disregard of TRIPs maximum standards in contrary.

Under the Vienna Convention on the Law of Treaties,

Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. (...)

ACTA text includes a significant number of mentions to TRIPs and to the WTO main treaty; it is arguable that it would be therefore subject to the TRIPs minimum standards. If so, ACTA's rules might never exceed the procedural ceiling even among its signatories, who are also members of WTO.

But the same provision of the Vienna Convention also covers the relation of succeeding treaties on the same subject ³⁴:

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States Parties to both treaties the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Therefore, ACTA could not be applied to other non-signatory WTO members without full compliance of the TRIPs ceiling procedural guaranties. If not so, the DSU remedies would be available.

34 Nguyen Quoc Dinh, *Droit International Public*, 5a. Ed. LGDJ, 1995 p. 267.