

Transparency in Negotiations Involving Norms for Knowledge Goods

What Should USTR Do?

21 Specific Recommendations

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To: United States Trade Representative

From: Electronic Frontier Foundation (EFF)

Essential Action

Knowledge Ecology International (KEI)

Public Knowledge

Salud y Fármacos

Trans Atlantic Consumer Dialogue (TACD)

Universities Allied for Essential Medicines (UAEM)

U.S. PIRG

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a Introduction

This memorandum asks the United States government to reduce secrecy and increase transparency for negotiations that set global norms for the governance of knowledge goods. The specific focus in this memorandum is on issues relevant to access to knowledge goods, including the norms concerning the protection of intellectual property rights, or the pricing of those goods.

There are two separate but related traditions in global norm setting for knowledge goods. One tradition involves multilateral or plurilateral institutions and fora that seek to achieve global consensus on the appropriate approaches to the granting and enforcing of intellectual property rights through processes that provide some transparency to stakeholders, academic experts, journalists and others. In this tradition, followed by the World Intellectual Property Organization (WIPO) and others, the transparency of the negotiation is considered a positive attribute that allows a wider community of persons with expertise to think through the consequences of various policy proposals, and which invites different stakeholders to offer informed comments on the proposals.

A second tradition involves bilateral trade negotiations, during which the U.S. and a single trading partner negotiate *sui generis* rules for market access that may have significant domestic political consequences, as well as rules for intellectual property rights and the enforcement of those rights, or other related measures, such as those relating to the pricing of medicines. For a variety of reasons, none of which we defend, these bilateral negotiations have developed into highly secretive affairs, with the details of the agreements only emerging after the negotiations conclude, and with limits on the ability of Congress to modify the agreement.

Today USTR is the lead federal agency in the negotiations for a new agreement on the enforcement of intellectual property rights, called the Anti-Counterfeiting Trade Agreement (ACTA). Based upon a review of documents that have been obtained from corporate lobbyists in Europe, and the outline of the topics on the USTR web page, it is clear that the ACTA negotiation will address a wide range of substantive topics in intellectual property, including norms for damages, the granting of injunctions and the enforcement of rights in border transactions, plus a set of unknown measures that focus on the use of the Internet.

The ACTA negotiations have adopted the secretive norms of bilateral trade negotiations, rather than the more transparent models often found in the multilateral and plurilateral negotiations normally used to set global norms for knowledge governance.

The transparency of documents relating to trade negotiations on knowledge governance is essential for the institutional legitimacy of process and democratic participation in important matters of public policy. Transparency to the general public is needed to ensure that the broad interests of American business and consumers are met, and that the rights and liberties of citizens are preserved. Transparency is also needed to offset the disproportionate influence exercised by powerful lobbies that focus on narrow interests.

This memorandum recommends that the USTR and other federal agencies reduce secrecy and

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increase transparency in negotiations that involve knowledge governance norms.

The following are recommendations for transparency at USTR.

b Regional, Plurilateral, and Multilateral negotiations

Documents: Negotiations are not transparent unless the following documents are public:

1. The dates and locations of negotiation meetings;
2. Objectives and rules of negotiations;
3. Agendas of meetings;
4. Lists of participants;
5. Reports or minutes of meetings;
6. Policy, research, background and other papers, including surveys, questionnaires and other negotiation-relevant documents, in cases where the documents have been distributed to all members of the negotiation; and
7. Negotiating texts, when distributed to all members of the negotiation.

As summarized in **Attachment 1**, it is the routine practice of many global norm setting fora to make such documents publicly available. There is no reason why any of these documents should be kept from the public, particularly when the public will clearly be impacted by the norms that emerge from the negotiation.

8. The historical legacy of trade negotiations is often significant for understanding national priorities and negotiating objectives, as well as for evaluating the public interest in declassification of documents. The aforementioned categories of documents should also be made available for trade negotiations that have already been completed.

The USTR should not agree to enter or continue negotiations without prior agreement among negotiating parties that the USTR is free to make the documents referred to in 1-7 available to the citizens it is supposed to represent. Documents should be made available in a timely manner and in formats that are useful and generally accessible.

Participation: The ability of the public to attend meetings, as observers or participants, varies considerably. However, in most multilateral fora, there are processes for the public to attend negotiating meetings as accredited NGOs, or as members of the public. We consider this an essential element of a policy on transparency.

9. Negotiating sessions **including the Anti-Counterfeiting Trade Agreement (ACTA)** should either be open to the public, or open to accredited NGOs. There are existing models of *ad hoc* accreditation procedures that can be efficiently created to promote fair

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participation. This was done for the World Health Organization (WHO) Intergovernmental Working Group (IGWG) on Public Health, Innovation and Intellectual Property, and the Hong Kong World Trade Organization (WTO) Ministerial, for example.

10. The economic costs of participation are often prohibitive for civil society participants, and there is also a need for earlier input. The USTR could hold public consultations prior to negotiation meetings at locations accessible to a broader set of interest groups. These public meetings can be made open to remote participation through live streaming, video-conferencing, and chat room forums. The public consultations should not be *pro fora* events that USTR and other agencies carry out only to satisfy a legal requirement, but should be legitimate explorations and conversations among different stakeholders. In this regard, USTR might reflect on the example of the Federal Trade Commission (FTC) and consider a moderated discussion format with multiple stakeholders.

Voice: In many negotiations, the public is given an opportunity to circulate papers to negotiators, and also to share their comments with other members of the public. The WTO, WIPO, WHO, OECD, and countless other organizations publish public comments and papers in negotiations.

11. The negotiating parties should create a website with documents relevant to the negotiations, and a procedure for the public to submit papers and comments that are made visible to the public.
12. The participatory innovations from Whitehouse.gov should be used in negotiations such as ACTA. For example, by using online forums for facilitating questions from the general public and coordinating formal answers from the US Trade Representative.

Note: In regards to the ACTA negotiations, the US and the EU have both been fairly accessible, and have been willing to hold public meetings. Unfortunately, these meetings are held in a context where the public is asked to comment without information about the meeting agendas, the negotiating texts, or even the true objectives of the agreement. The current documents on the USTR web page about the ACTA negotiation are only vaguely descriptive of the content of the negotiations, and are misleading in their omission of important and controversial issues, such as the specific proposals regarding damages for infringement, or the use of injunctions. Without the negotiating texts, there is a lack of meaningful transparency of the public policy issues being decided.

c Negotiation Objectives and Impact Assessment

The negotiation objectives of trade discussions are at the core of meaningful public debate about policy issues and should be made available to the general public and updated along with trade negotiation developments.

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13. For agreements that are of a binding nature, it would be appropriate to include the information described in the Department of State in the Circular 175 procedure:¹

- The proposed agreement's principal features, indicating any special problems that may be encountered and, if possible, the contemplated solutions to those problems;
- The policy benefits to the United States, as well as potential risks;
- Whether congressional consultations on the agreement have been or will be undertaken;
- The funding sources that will be committed by execution of the proposed agreement;
- Whether the proposed agreement reasonably could be expected to have a significant regulatory impact on domestic entities or persons; and
- The environmental impact that may arise as a result of the agreement.

In addition, information such as that included in the Circular 175 Memorandum of Law should be made public:

- A discussion and justification of the designation given to the proposed agreement (treaty vs. executive agreement);
- An explanation of the legal authority for negotiating and/or concluding the proposed agreement, including an analysis of the Constitutional powers relied upon as well as any pertinent legislation;
- An analysis of the issues surrounding the agreement's implementation as a matter of domestic law (e.g., whether the agreement is self-executing, whether domestic implementing legislation or regulations will be necessary before or after the agreement's execution).

14. In the substantive area of intellectual property and the enforcement of intellectual property rights, the USTR should make available an impact assessment on:

- i. The effectiveness of the proposed measures to the protection of intellectual property rights.
- ii. The extent to which the agreement conforms to and or changes the rights and flexibilities of obligations in international instruments. For example, how would ACTA change norms in the WTO TRIPS agreement on injunctions and damages, or change the ability of countries to implement the Doha Declaration on TRIPS and

¹ <http://www.state.gov/s/l/treaty/c175/>

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Public Health?

- iii. The ability of innovative and creative communities and businesses to use existing exceptions & limitations.
- iv. The exportation of goods, or the movement of goods in transit.
- v. Liability for information or knowledge good intermediaries.
- vi. The privacy of individuals.
- vii. The access of the public to essential medical technologies, and access to technologies critical to preventing climate change.

d Bilateral Negotiations

There may be an argument that bilateral negotiations require different transparency rules, particularly when the negotiation includes a wide range of issues, including many *sui generis* trade issues that are not relevant to global norm setting for intellectual property.

In the area of intellectual property rules, there is no legitimate reason for the U.S. government to table an “ask” in secret during a bilateral trade negotiation. In all cases the U.S. proposal is circulated to the trading partner, instantly eliminating any claim that making the text public would enable the trading partner to know the U.S. position. Second, the U.S. proposal is often, if not always, made available to dozens, if not hundreds, of corporate lobbyists serving on U.S. advisory committees. We note that the Chairman of ITAC 15 (Intellectual Property Rights) and several of ITAC members represent foreign owned firms.

In keeping the bilateral texts secret from U.S. citizens, while sharing the texts with our foreign negotiating partner, as well as many foreign owned corporations, U.S. citizens are kept in the dark about important norm setting exercises. The confidence of U.S. citizens and small and medium enterprises that the US government will pursue their best interests is undermined by the priority given to foreign trade negotiators and lobbyists for many large European and Japanese owned firms.

Therefore, we submit proposal number 15.

- 15. Recommendations 1-7 and 13-14 concerning documents should also apply to bilateral trade negotiations.

e Proactive Transparency of USTR Activities

There are several areas where USTR can enhance transparency in areas not specific to a particular negotiation. Among them are the following:

- 16. Public submissions in all public comment proceedings, such as the comments requested

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for the USTR Special 301, the National Trade Estimates on Foreign Trade Barriers (NTE Report), and any other public comment process, should be managed in such a way that the public has access to electronic copies of all filings. The comments should be indexed and available in formats that can be searched by key words, and which can be read using assistive technologies such as text-to-speech or refreshable braille. For example, documents in text PDF files (but not bit mapped images), html, plain text or Microsoft word .doc formats would be accessible.

Many federal agencies already make comments available in such a manner. For example, the USTR may consider looking at the the system used by the Federal Trade Commission, which is accessible at <http://www.ftc.gov/os/publiccomments.shtm>. The Copyright office asked that comments be available in accessible formats in this proceeding: <http://www.copyright.gov/docs/sccr/comments/2009/>

17. The daily appointment calendar of the USTR (Ambassador Kirk) should be published on the USTR web page. Some federal office holders do this now, although not as many as we would like. In reviewing the Ambassador's schedule early in his appointment, which we obtained from a FOIA request, we observed what seemed to be a lack of balance regarding the frequency of meetings held with industry lobbyists, as compared to public interest and consumer organizations. We believe more transparency of the schedule will be a self correcting measure in this regard.
18. The speaking engagements of senior USTR officials should be made public by publishing them on the USTR website. Slide presentations and supporting materials used by USTR officials should also be made available.

f Advisory Boards

Many NGOs have observed that the advisory board system for USTR lacks balance, particularly with regard to voices that represent consumer and citizen interests. We believe that the issues surrounding Advisory Boards are extensive and complicated, and merit attention on their own in a separate meeting with the USTR on those issues.

The make-up of the advisory boards today is highly correlated with the amount of money that interest groups spend on lobbyists to influence the outcomes of trade negotiations. The advisory boards are acting as formal mechanisms for lobbyists, corporate employees and issue consultants to work directly with the USTR and other trade officials to influence trade policy. These advisory boards have access to documents that are kept secret from the American public, and they operate in secret. The USTR and the Department of Commerce should change the membership of these advisory boards to ensure that consumer and public interest voices are given greater representation. But even significant changes in the balance of bodies such as IFAC-15 should not be seen as a substitute for other measures that reduce the secrecy of trade negotiations. The Advisory boards should not be seen as a substitute for transparency, but rather as a means to manage the process receiving input from all important constituencies. Indeed, the

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advisory boards themselves should be subject to much greater transparency, including, for example, the following measures:

19. DOC/USTR should report on the periods when each member has served on an advisory board. Greater transparency of the terms of membership will help the public evaluate the extent to which the advisory board membership represents an unelected permanent government for trade policy in specific areas, such as intellectual property rights.
20. The agendas of the advisory board meetings, and the lists of participants in such meetings, should be public.
21. Much of the communication between the DOC/USTR and the advisory board should also be made public, if not immediately, then after a reasonable period of time. The current systems of classifying communications between corporate lobbyists and government officials undermines other policies that are designed to make government more transparent, and to reduce the influence of corporate lobbyists. Members of advisory boards should not be given a broad license to communicate with government officials in channels that are outside of the transparency offered by the Freedom of Information Act for communications that involve members of the general public.

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http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf

http://www.keionline.org/misc-docs/4/attachment2_transparency_ustr.pdf

http://www.keionline.org/misc-docs/4/attachment3_transparency_ustr.pdf