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Blessing or curse? The effects of transparency on the European Commission's success at the international ACTA negotiations

Papers on International Political Economy (PIPE), No. 14/2012

Provided in Cooperation with:
Center for International Political Economy, Free University Berlin

Suggested Citation: Eibauer, Josef (2012) : Blessing or curse? The effects of transparency on the European Commission's success at the international ACTA negotiations, Papers on International Political Economy (PIPE), No. 14/2012, Freie Universität Berlin, Center for International Political Economy, Berlin

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Papers on International Political Economy

Arbeitspapiere der Arbeitsstelle Internationale Politische Ökonomie
Working Papers by the Center for International Political Economy

Hrsg. von Prof. Dr. Susanne Lütz

Josef Eibauer

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No. 14
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Freie Universität Berlin

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14. Dezember 2012
Papers on International Political Economy
ISSN 1869-4985 (Print)
ISSN 1869-8468 (Internet)

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Papers on International Political Economy are working papers from the current research of the Center for International Political Economy at the Free University of Berlin. They appear in irregular intervals and are available for download free of charge from the homepage of the Center.

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Abstract

The present study tries to investigate on the dynamics between the level of transparency of international treaty negotiations and the success of European Commission negotiators in achieving their particular political interests. Drawing upon an alternated version of Robert Putnam's two-level game approach, two distinct hypotheses are established. First, a low level of transparency of international treaty negotiations increases the amount of gains available to European Commission negotiators at the international level. Second, a low level of transparency of international treaty negotiations decreases the likelihood of ratification at the non-international level. These hypothesis are tested against the case of the international Anti-Counterfeiting Trade Agreement (ACTA) negotiations and the subsequent ratification procedure that took place between the years 2005 and 2012. Empirically, it can be confirmed that the ACTA talks' low level of transparency detached the usually intertwined international, supranational, and domestic negotiation levels and thus increased the political leeway available to the Commission, leading to a treaty text that reflected its tough stance on intellectual property rights regulation. However, the low level of transparency also resulted in the Commission's lack of information about the true nature of negotiation outcomes that were acceptable to both the public and parliamentary majorities. Indeed, following a lively campaign against the treaty that was predominantly coordinated via the internet and social networks, ACTA ultimately failed ratification both on Member State and Community levels. In a nutshell: When the debated issues are controversial and salient to the public, the European Commission is likely to fail reaping the benefits of international negotiation secrecy.

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1. Introduction

Ever since the representatives of the governments of the European Union (EU) declared as part of the Final Act of the Treaty of Maastricht (ToM) that "transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration" (ToM 1992), EU bodies have agreed upon numerous declarations of intent to enhance the transparency of its political affairs. Especially the European Commission (EC), responsible for both proposing legislation and implementing decisions at the European level, and thus holding an "unprecedented" (Karayanidi 2011: 1446) level of regulatory power, has been keen to proclaim its willingness to contribute to that endeavor. Acknowledging that the planning and development of regulations is an issue of concern for foreign and domestic public spheres, the EC agreed within the 2002 Transatlantic Guidelines on Regulatory Cooperation and Transparency that "[t]ransparency is necessary to ensure that these concerns are properly understood and taken into account in this process" (European Commission 2002: 5). Furthermore, to create more opportunities for stakeholders to participate actively in EU policy and to "ensure that the Union is open to public scrutiny and accountable for its work" (European Commission 2006a: 5), the EC launched the European Transparency Initiative in 2005, promising progress on a broad spectrum of transparency-related issues.

The track record appears to be mixed. The Commission has been improving public accessibility of information about meeting records, the recipients of EU funds, members of expert groups and lobbyists through initiatives such as the "Transparency Portal" (European Commission 2012a). Particularly when the EC acted as an authorized representative negotiating international treaties on behalf of the EU, however, its conduct continued to provoke calls for increased openness and more opportunities of political participation in diverse cases such as the Multilateral Agreement on Investment (Walter 2001), fisheries agreements with West African nations (Lankester and Diouf 2002), the US-EU SWIFT Agreement (Fox 2012), or the India-EU Free Trade Agreement (Eberhardt and Kumar 2010).

The Treaty of Lisbon (ToL), effective since December 2009, established amendments to the 1957 Treaty of Rome that provided for a strengthened role of the European Parliament (EP) when it comes to the negotiation and adoption of international agreements. Although some observers estimate that this step increases the EC's incentive to increase the openness of negotiations (Richardson 2012: 24), others hold that the "extent of the impact of reforms […] on the EU's external trade relations is still not entirely clear" (Pollet-Fort 2010: 3). Considering the potentially tense relationship between the EC's role as leading negotiator and transparency-related demands of both legislative bodies overseeing the ratification process and the general public alike, seeking to understand possible gains and pitfalls transparency can hold for the EC's prospects of goal achievement in international treaty negotiations appears to be a rewarding endeavor. Therefore, the present paper seeks to answer the following research question:

How does the level of transparency of international treaty negotiations affect the success of EU negotiators?

The remainder of the present paper proceeds as follows: Fist, the current body of academic literature on the effect of transparency on political processes within the EU will be reviewed. Second, drawing upon an adapted version of the two-level game model by Robert D. Putnam, two hypotheses will be devised and accompanied by a description of the utilized research methods. Third, the hypotheses will be tested on the case of the Anti-Counterfeiting Trade Agreement (ACTA) negotiations that took place between June of

2005 and December 2010. Fourth, the results of the analysis will be summarized and outlook for future research will be given.

2. Literature review

Transparency as an analytical category of the European political process has traditionally been receiving a considerable amount of scholarly attention. Arguably, this is due to the ubiquitously present issue of a generally perceived democratic deficit within the supranational level of European policy-making. As reflected by the following overview of the scientific discourse, the arguments proposed predominantly refer to normative considerations and potential changes in process efficiency.

As for the former group, many scholars implicitly assume transparency to be unambiguously beneficial to political processes. One of the most frequently praised benefits is the increased accountability of public officials. As an early proponent, Jeremy Bentham argued already in the early 19th century that within a legislative context, "publicity would constrain members of the assembly to perform their duty" and secure people's "assent to the measures of the legislature" (Bentham 1816: 29). More recently, scholars such as Robert Keohane (2006) and Adrienne Héritier argue that transparency, combined with mutual horizontal control and competition among multiple authorities serves to reinforce democratic support and accountability (Héritier 1999; 2003). On the same note, Gronbech-Jensen (1998) asserts that "Scandinavian style transparency" with its provision of extensive public access to official documents, files and registers is perceived in Northern Europe as an important means of holding public policy-makers accountable and therefore should be implemented also on the supranational level.

The analytical concept of "input-oriented legitimacy", introduced by Fritz Scharpf (1999) to describe the increasing legitimacy of political systems through a linkage of political decisions with citizen's preferences (direct participation, representation on the basis of elections, and recognition of the interests of social groupings) has spurred a great deal of publications in favor of enhanced transparency. Grace Skogstad (2003) for example argues that "output-oriented legitimacy" (legitimacy through satisfactory policy outcomes) is no longer a sufficient basis for EU-level governance. He shows along the case of regulation on genetically modified organisms (GMO) that instead, the EU polity's input legitimacy ought to be improved through measures such as increased accessibility and network governance. Jan Scholte highlights that previous efforts to improve openness have been merely the "tip of the proverbial iceberg", and demands greater positive legitimation "with more civil society engagement, covering more [...] institutions and extending through more stages of the policy process" (Scholte 2007: 306).

On a less normative note, a considerable amount of studies have been undertaken to evaluate the impact of increased transparency on negotiation efficiency. Authors are mainly divided in two camps, accentuating the potential advantages or disadvantages, respectively. Representing the former group, Jon Elster puts forward the notion of a "civilizing force of hypocrisy". He argues that the "presence of a public makes it especially hard to appear motivated merely by self-interest. Even if one's fellow assembly members would not be shocked, the audience would be" (Elster 1998: 111). While John Peterson shows that the EC's efforts to improve transparency were designed to "cope with its chronic management problems" such as the division between different organizational units of the Commission, strong loyalties of policy-concerned Directorates-General (DGs) to their specific clientele, unclear rules governing access to information, and intense rivalries between DGs (Peterson 1995: 473), Hagemann and Lenz (2012) make a dedicated case that transparency may increase the likelihood to reach agreement, the robustness of agreements, and the procedural efficiency of negotiation processes.

Applying a contrary focus, other scholars argue that apart of possible upsides, transparency generates various constraints for the efficiency of negotiations, such as posturing of representatives through overly aggressive bargaining behavior (Stasavage 2004: 695; Checkel 2001: 554). Furthermore, authors show through the application of thorough case analysis of the EU Council of Ministers (Stasavage 2005), the US Federal Reserve (Stasavage and Meade 2008), crisis negotiations (Leventoglu and Tarar 2005), and the EU Committee of Permanent Representatives (COREPER) (Lewis 2005; Lewis 2010) that the willingness of negotiators to strike bargains, deliberate on positions and offer dissenting opinions might decrease with the introduction of transparency measures. Considering the example of US administrative politics, Martin Shapiro warns repeatedly (Shapiro 1996; 1997) that an increase in interest group access and representation necessarily entails cumbersome rule-making procedures and thus may create a trade-off between the goals of efficiency and legitimacy. He argues that the rule-making process, intended to be quick and informal, becomes "incredibly slow, formal and judicially supervised" and "so tendentious that the agencies are seeking ways to make policy without having to make a rule" (Shapiro 1996: 39).

Reviewing the scholarly debate, it appears as that its contributors who focus on either normative considerations in terms of accountability and legitimacy of political systems and those who make isolated evaluations of possible gains or losses of efficiency with regards to a singular political arena tend to ignore the complex interplay of institutional checks and balances that is constantly at work within Western democracies over the course of such deliberations. The contribution of transparency (or lack thereof) to the EC's chances of attending its political goals can not be answered sufficiently with this kind of theoretical and empirical toolkit. Michelle Egan supposes accordingly regarding international negotiations that "domestic policies are not exogenous, and the ability to maneuver at the European level may be constrained by what is domestically acceptable in each member state" (Egan 1998: 495). In order to be able to systemically address the dynamics between member states (MS) with their domestic constituencies, the EU polity, and the realm of international negotiations sufficiently, I will turn to an analytical model that was specifically modeled to recognize these factors.

3. Research design

3.1 Generation of hypothesis

Robert Putnam's (1988) two-level game model has been applied frequently for analyzes of negotiations between nation states (Zartman 1993; Schmidt 1996; Patterson 1997; Collinson 1999; Meunier 2000; Pollack 2003; Frennhoff Larsén 2007). In order to understand the conduct and political outcomes of negotiations more accurately than competing models, it spreads the focus on two different levels of analysis: The international level focuses on the ways how representatives of national governments interact with each other on the international negotiation stage and at the same time seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments" (Putnam 1988: 434). The domestic level, in turn, focuses on the national realm in which political and societal actors seek to pursue their interests by pressuring its representatives to negotiate favorable results (Putnam: 434).

In the case of the EU as a participant in negotiations, however, there is an additional level of analysis required. The Community level with its unique "federal-like polity" structure (Patterson 1997: 141), in which MS attempt to achieve domestic goals while they simultaneously pursue cooperative integration, serves both as an additional international arena of negotiations between MS and as another domestic forum scrutinizing the negotiations between EU representatives and a third party (Frennhoff Larsén 2007:

859). Usually, and so will be done here, scholars of EU politics applying a three-level game approach refer to the level of international negotiations as Level I, the level of negotiations within and across EU institutions as Level II, and the level of negotiations between different domestic groups within MS as Level III (Patterson 1997; Frenhoff Larsén 2007).

What makes Putnam's multi-level approach both intriguing and the political complexities for the players "staggering" (Putnam 1988: 434), is the notion that negotiations do not proceed in a linear way from one level to the other, but instead happen simultaneously at all levels. Occurrences at one stage of the negotiation "reverberate" (Putnam 1988: 456) at the others with the consequence that strategies and outcomes at different levels of the game simultaneously affect one another. Considering this intertwined relationship of dependence, the author introduces the concept of "win-sets" in order to be able to hypothesize upon the range of possible Level I deals that satisfy the remaining level's key players sufficiently enough to become adopted. He therefore argues that larger win-sets make international agreement more likely and conversely, a smaller win-set renders negotiations more prone to break down (Putnam 1988: 437).

According to Putnam, the size of the win-sets is affected by three main factors. First, it "depends on the distribution of power, preferences, and possible coalitions" among Level III constituents (Putnam 1988: 442). Second, the size of the win-set depends on Level II and III political institutions, especially considering ratification procedures, possible veto players, and the independence of central decision makers from their constituents. Evidently, low hurdles of domestic ratification, absence of veto players, and a high level of decision maker's autonomy increase the size of the win-set (Putnam 1988: 448-450). Third, the size of the win set depends on the strategies of the Level I negotiators. Although representatives are expected to act merely as serving agents on behalf of their domestic constituencies, a multi-level game follows the logic of principal-agent analysis and posits that negotiators are able to pursue their own interests. If their willingness to compromise is limited enough, this can even lead to "voluntary defection" from the talks (Putnam 1988: 456). Representatives can also take advantage of a small domestic win-set in order to impose pressure on other parties to back down from contested claims, which may lead to an increase of gains from the international bargain.

Keisuke Iida, however, made a valuable contribution to our understanding of multi-level games in terms of transparency through highlighting the importance of information available to the actors included in the game. First, he notes, the negotiation strategy to push adversaries around on one's own domestic constraints can only work effectively if these have sufficient information about the actual limits of one's win-set (Iida 1993: 417). Second, insufficient knowledge of a representative about the own domestic political environment can be fatal to international agreement. One the one hand, this is the case because the size of the Level I win-set decreases when societal actors perceive costs of no agreement to be low. If a negotiator does not take this perception carefully into account at the international bargaining table he might be forced into "involuntary defection" (Putnam 1988: 438). On the other hand, even considering for the costs of no agreement to be significant, a negotiator who is unaware of the real nature of Level III constituent's preferences might settle on a Level I deal that finds itself outside of the domestic win-set. Obviously, the danger of involuntary defection increases further when powerful Level II and III veto players are to be coped with on the way to ratification. To conclude, "it is likely that in situations where there are high domestic constraints, significant uncertainty, and domestic veto authority, international negotiations will break-down frequently" (Schmidt 1996: 120).

Looking back on the previous remarks about the analytical model of three-level games, where does this take us in terms of the present research question? In what way is it possible to hypothesize about the

effects of (non-)transparency on the success of EU negotiators in international negotiations? First, it is appropriate to assume that the extent of constraints imposed by actors at Level II and III on the conduct of Level I negotiation depends on the amount of information and access these actors get about the state of deliberations. If Putnam's logic builds on the notion that multiple negotiation stages are intertwined, then a lack of transparency of Level I negotiations untwines this relationship of dependence, consequently leading to an enlarged win-set and thus increasing the gains available at the international level.

Hypothesis 1:
A low level of transparency of international treaty negotiations
increases the amount of gains available to EU negotiators at the international level.

Second, for the very same dynamic, a low level of transparency and the resulting Level I negotiator's lack of sufficient information about the real nature of non-international stakeholder's true win-set should increase the likelihood of involuntary defection.

Hypothesis 2:
A low level of transparency of international treaty negotiations
decreases the likelihood of ratification at the non-international level.

3.2 Methodology

In order to be able to examine these hypotheses in a scientifically credible way, some clarifications on methodological proceedings shall be made in advance. First, it shall be set that the hypotheses will be tested against the case of the negotiations of the Anti-Counterfeiting Trade Agreement (ACTA) and the following ratification procedure. Therefore, the time frame of analysis shall begin with the Japanese Prime Minister Junichiro Koizumi's initial treaty proposal at the Gleneagles G8 summit on July 6th 2005 (Gerhardsen 2005) and end with the European Parliament's rejection of the treaty on July 4th 2012 (European Parliament 2012a). Second, the term "transparency" needs to be clarified. Arguably the best toolkit available to evaluate the record on transparency of EU negotiators are the guidelines that the EU chief representative in such negotiations, the EC, has agreed upon itself. Further, transparency-related practices at alternative venues of international negotiations on intellectual property law (IP) shall be used to put the ACTA negotiation's level of transparency into perspective. Third, when are the hypotheses to be considered verified?

Hypothesis 1 shall be considered verified, when
a) the level of transparency of the international treaty negotiation can be evaluated as low, and
b) the low level of transparency is taken advantage of by EC negotiation representatives in order to achieve gains at the international stage that would not be reachable considering a higher level of transparency.

Hypothesis 2 shall be considered verified, when
a) the level of transparency of the international treaty negotiation can be evaluated as low,
b) the low level of transparency directly results in significant obstacles to ratification at the non-international stage that would not exist considering a higher level of transparency.

Fourth, the case study will be examined predominantly through qualitative content analysis. This research method appears to be most appropriate to exploit the wide variety of text-based sources such as draft treaties, meeting records, position papers, interviews, and secondary sources as efficiently as possible. However, wherever possible and deemed reasonable, qualitative data such as poll and voting results or statistics shall be drawn upon.

4. Test of hypothesis

4.1 Enlarging the win-set: The Commission negotiating ACTA at the international stage

4.1.1 The interests of the Commission

In order to properly test the hypothesis that a low level of transparency of international treaty negotiations increases the amount of gains available to EU representatives at the international level through lessening the extent of constraints imposed by actors at Level II and III, it is important to determine whether the negotiators follow political goals that are independent from domestic actors. In the case of ACTA, a plurilateral regulatory agreement that covers standards for intellectual property rights (IPR) enforcement, the Commission's stance has become clear early on.

First, on the political field of inner-European lawmaking, the Intellectual Property Rights Enforcement Directive (IPRED), a long-running proposal by the EC to improve intellectual property law within the EU passed in March 2004. However, while it arranged for additional confiscatory and subpoena powers to litigants in civil IPR cases, the EC's proposal to increase penalties and criminalize commercial-style IPR infringements got dropped during the legislative procedure (EUR-Lex 2006). Holding on to the issue, the official EC "[s]trategy for the enforcement of intellectual property rights in third countries" of May 2005 asserted that IPR violations "continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement. It is, therefore, essential for the European Union to increasingly focus on vigorous and effective implementation of the enforcement legislation" (European Commission 2005a: C129/3). The subsequent months have witnessed an avid promotion of this view by EC members. EU Trade Commissioner Peter Mandelson stated in September 2005 in a speech at the Foreign Policy Centre Brighton that "we desperately need better recognition of intellectual property rights […] and an improved IPR enforcement. This is key to Europe's position in the knowledge economy" (European Commission 2005b: 4). The report "Global Europe – competing in the world" of October 2006 which also became part of the EC's growth strategy "Europe 2020", stated that future trade agreements should "include stronger provisions for IPR and competition, including for example provisions on enforcement of IP rights along the lines of the EC Enforcement Directive" (European Commission 2006b: 11). This EC position, however, was not mirrored by many stakeholders. A "[p]roposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights" (IPRED2) of July 2005 that sought to oblige MS "to consider all intentional infringements of an intellectual property right on a commercial scale as a criminal offense" (EUR-Lex 2005) drew stark opposition from other actors of the European polity. When the proposal reached its first debate in the EP in April 2007, Level III stakeholders such as various Non-Governmental Organizations and interest groups (FFII 2009a), the British Home Office (FFII 2009b), and the Dutch parliament voiced their critique of the far-reaching wording of the document and that the present proposal "falls outside the powers of the community" (Ermert 2006). With these pressures constraining

the Level II of the European political sphere, the draft was watered down from the EC version through amendments by EP rapporteur Nicola Zingaretti and subsequently died in the ordinary legislative procedure between the Council and EP because MS failed to reach consensus on the designated scope of its provisions (EUR-Lex 2005; FFII 2010).

Second, also on the field of bilateral and multilateral agreements with third parties, the EC attempted and often succeeded to raise the standards of international IP law on various issues from the current level that the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the agreements within the World Intellectual Property Organization (WIPO) provide for. These raised standards, coined by observers as "TRIPS-plus", include provisions such as the UPOV Convention to protect EU-based breeders of plant varieties, the Budapest Treaty to protect patents on microorganisms, or IPR protection clauses similar to IPRED, and have been "forced" (GRAIN 2003: 1) upon almost 90 developing countries. Some observers argue this approach can aggravate the exclusion of low-income citizens from access to products such as generic medicines and inputs for agricultural production (Correa 2009: 3; Said 2010: 92-98). The EC's interest to strengthen international IPR enforcement beyond TRIPS becomes obvious in an interview of April 21st 2009 with ACTA negotiator of the EC's DG on Trade, Luc Devigne, who complained that "enforcement in WTO, not to talk about WIPO, is extremely difficult". He added that there was no intention to duplicate TRIPS, rather, "to go beyond it" while TRIPS shall represent "the floor, not the ceiling" (Ermert 2009). However, again, influential actors within the domestic and institutional levels of the European political arena have predominantly been opposing the Commission's goal to expand TRIPS. NGOs such as Intellectual Property Watch, Oxfam International, Déclaration de Berne, QUNO, Third World Network, the International Centre for Trade and Sustainable Development, and Health GAP have addressed EP members and disseminated their critique of the EC's strategy for years (Lafortune 2006). Having picked up on these calls, a resolution passed by the EP on July 12th 2007 with cross party support asserts that through the Economic Partnership Agreement (EPA) negotiations and other bilateral or regional Free Trade Agreements (FTAs), the EU "proposes to impose new intellectual property "WTO+" obligations" on the countries of Africa, the Caribbean and the Pacific (ACP) and other poor developing and least developed countries. Amongst other provisions, it therefore calls on the Council to "meet its commitments to the Doha Declaration and to restrict the Commission's mandate so as to prevent it from negotiating pharmaceutical-related TRIPS-plus provisions affecting public health and access to medicines, such as data exclusivity, patent extensions and limitation of grounds of compulsory licenses". Further, it stresses that proposals designed to tackle the issue of counterfeiting should be directed at a reinforcement of existing regulatory capacity and not at "increasing levels of intellectual property protection" (European Parliament 2007).

Reviewing the above stated activities and proposals on both the inner-European and international realm, it becomes clear that the EC has the political interest to push for a greater discussion on criminal enforcement of IPR infringements. As Peter Yu noted, the "European Union might have been even more eager than the United States to establish an international standard, due in large part to its continued struggle to establish a community-wide criminal enforcement directive" (Yu 2011: 984). However, it also becomes clear that other stakeholders on both the domestic and institutional levels within the European political sphere are not standing unified behind the EC plan.

4.1.2 Conceptualizing transparency

In order to take the focus from the Commission's political preferences to an analysis of its negotiation strategy during the ACTA talks, the level of transparency of these negotiations shall be scrutinized. First, a concept for the assessment of transparency in international treaty negotiations shall be established through drawing upon existing guidelines. Although a variety of observers (Malcolm 2010; Yu 2011; Levine 2011; Weatherhall 2011) agrees with the assertion that "ACTA was locked inside the proverbial black box" (Levine 2011: 829), the Commission's very own agreement "Transatlantic Guidelines on Regulatory Cooperation and Transparency", originating in the year 2002, shall serve as a neutral indicator of whether public concerns about the ACTA negotiations could be, as the memorandum reads, "properly understood and taken into account" (EU Commission 2002: 5). Under chapter five, titled "Operational Elements of Transparency", the guidelines specify a total amount of 9 provisions that can be summarized in two broad concepts – information and interaction. First, the EC commits to "[p]rovide information about current and future activities to develop regulations", to "[c]onsult with the public, including interested stakeholders, [...] in an early and broad manner", to "[p]rovide timely announcement to the public about regulations at an early appropriate stage [...] when amendments to the regulation can still be introduced and public comments taken into account", and to "[m]ake increased use of the Internet to provide access to documents, research, data, and analysis, and regulatory explanations". Second, on the concept of interaction, the EC commits to "[i]nvite the public to submit comments on the regulation [...] and specify a reasonable period of time for the submission of comments" and to aid commenters by "[p]roviding a public explanation of the reasoning underlying the regulation" and "[i]dentifying the relevant research, data, and analysis relied upon by the regulators in developing the regulation and facilitating public access to that material". Further, it pledges to "[r]espond in an adequate and timely manner to public questions and recommendations" and to "[t]ake public comments into account in the development of technical regulations and address them in an explanation of the reasoning underlying the final action" (European Commission 2002: 6).

The concept of transparency shall be enhanced further with a deeper understanding of the negotiation procedures that take place in regulatory venues dealing with IPR. To begin with, the WTO with its administration of TRIPS is, according to observers from NGOs, arguably "the most non-transparent of international organizations" (Third World Network 1999). For example, the TRIPS Council generally refuses to offer NGOs the opportunity to either participate in, distribute documents, or hold speaking rights during its meetings. However, the WTO maintains a web page for access to information about the TRIPS Council, publishes regular reports about its ongoing activities, and shares documents that countries submit to organization. Furthermore, while the public can apply for permission to attend Ministerial meetings, NGOs and members of the press may be accredited for entry into the WTO building when TRIPS Council meetings take place. This gives an opportunity for stakeholders from various backgrounds to engage with WTO delegates first hand. Finally, the WTO receives and distributes NGO position papers related to its activities on the web site (Knowledge Ecology International 2009: 1-2; Malcolm 2010: 15). Also the WIPO provides an internet presence which disseminates meeting records, detailed minutes, lists of participants of its standing committees, information on stated preferences of governments and draft agendas. Further, access of NGOs is "fairly simple and widely used" (Knowledge Ecology International 2009: 2), which includes the General Assembly and meetings of WIPO committees. Finally, conferences are also very transparent to the general public. As an observer notes, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty for example, which both touch upon IPR regulation "were

negotiated in a completely open meeting at the Geneva Convention Center. The public was allowed to attend without accreditation. The draft texts [...] were public" (Knowledge Ecology International 2009: 2). According to the previous analysis of the EC's own transparency guidelines on international regulatory negotiations and a comparison of the rules of procedure that other venues covering IPR regulation have adopted, it becomes clear that a satisfactory level of transparency should include both a proactive information policy that seeks to make documents timely enough available to the public that it is possible for outsiders to gain an understanding of the interests at stake and to follow the process of ongoing negotiations in a prompt manner. Also, domestic stakeholders whether organized or not, ought to have ample opportunities to state their views on the ongoing debate and be seriously acknowledged by negotiators for their input.

4.1.3 Assessing the negotiation's level of transparency

Measured against these criteria, at what level then can we assess the transparency of ACTA negotiations? First, on the responsibility of disseminating timely information to public stakeholders, it is suitable to put the date of Japanese Prime Minister Junichiro Koizumi's initial ACTA proposal in front of the Group of Eight (G8) into perspective with the subsequent disclosures of negotiation texts. While the subject was debated for the first time at the Gleneagles G8 summit that took place in July 2005, over the course of the next four years, no documents regarding ACTA of any kind would reach the public eye. As leaked meeting notes disclose, it was only due to the lasting pressure by EP Members that a preliminary 6-page document summarizing "Key Elements Under Discussion" (European Commission 2009) was published in June 2009 (EDRI 2012). The first official draft, however, was not released until April of 2010, almost five years after the initial proposal and just months before the final conclusion of the whole negotiation process (Kaminski 2011: 5). Members of the EP, all having the right to be "immediately and fully informed at all stages of the [negotiation] procedure" by the EC did not receive the adequate treatment guaranteed by the Treaty on the Functioning of the European Union (EUR-Lex 2008: C115/146). The first proof of this is given by the EC itself which admits that a variety of ACTA negotiation documents "were not accessible to ALL [sic] Members of the European Parliament"(European Commission 2012a). Regarding those documents that were shared, MEP Christian Engström noted, not only were the draft texts presented to the legislators only orally and closed from the public, but also would it "not be allowed to spread the information given". Clearly, the EP Member's inability to draw upon expert advice in the evaluation of draft agreements represents a major caveat for a proper understanding of the issues at stake. As Engström continues, it is "obvious that the Commission has no intention of living up to its obligations under the Treaty when it comes to informing the Parliament" (Engström 2010). Overall, one can conclude that, apart from coordination with MS representatives, a total of five texts (the draft, the final text, and three publications of talking points) and oral briefings of MEPs account for the EC's official efforts to inform public stakeholders.

To a considerable extent, the responsibility for the lack of public information is traceable to the EC. A leaked Dutch memorandum of January 2010 reporting back from the 7th ACTA negotiation round reveals that "Member states want that the EC pro-actively advocates transparency (amongst others publication of documents), but the EC is not in favour". Fearing it to have potentially significant consequences for the interests of the EU, the EC stated "[i]t is not the intention that the position of the EU in those will be completely public". Interestingly, also some MS delegations voiced their skepticism of increased disclosure and participation. As the Dutch memorandum continues, "Belgium, Portugal, Denmark and Germany are

still not convinced that complete transparency has to be achieved. It seemed Germany, Belgium and Portugal were to be persuaded, but Denmark is not very flexible" (De Winter 2010).

Second, in terms of Level II and III actor's options to participate with their opinions in the negotiation procedure of ACTA, there also can be identified major limitations. Although the EC stated that NGOs have had repeated opportunity to engage in "stakeholder's meetings" accompanying the final four negotiation rounds where representatives "met and extensively debriefed NGOs, academia and representatives from political parties" (European Commission 2012a), reports from participants conclude that the meetings had been "getting less and less substantive" with negotiators "not inclined to say much," and criticize chaotic scheduling procedures that "appear designed to ensure that no NGOs show up" (American University Washington College of Law 2010a; American University Washington College of Law 2010b). Interestingly, not only NGOs have seen themselves excluded from weighing into the negotiation process, but also potentially crucial veto players such as EP Members and MS delegations. Compared to the massive influence the EP has in drafting law within the ordinary legislative procedure (OLP) that foresees a legislative interplay between the Parliament and the Council until an agreement on a common language is settled, the scheduling of three plenary debates on the topic just months away from the finalization of the talks appears inadequate when put in perspective with the expected scope of the treaty. On the issue of possible criminal sanctions for IPR infringements, both MEPs and MS delegations made clear early on that the topic falls within the competency of MS while it was concluded that the EC therefore would have no mandate to deliberate it. In order to circumvent this caveat, the Commission consulted loosely behind closed doors with a so-called "Article 133 Committee" consisting of trade experts from each member state who are appointed by the Council (European Council 2009). Leaked statements from national officials shows that this conduct was not seen as a sufficient participation of MS in the negotiation process. Italian delegate to WIPO Mauro Masi noted a significant gap between the views of the EC and those of several MS on the way how ACTA competencies should be allocated and stated that "there is a problem" between those entities "that will take time to work out" (Wikileaks 2011a). Fabrizio Mazza, head of the Intellectual Property Office at the Ministry of Foreign Affairs noted that MS are opposed to the EC negotiating matters related to criminal enforcement and that the level of confidentiality in the ACTA negotiations has been "set at a higher level than is customary for non-security agreements". According to Mazza, it is impossible for MS to conduct necessary consultations with IPR stakeholders and legislatures under this level of confidentiality (Wikileaks 2011b). This assertion is mirrored by a recently declassified EU Justice and Home Affairs Counsellor's meeting record which proves that various MS such as Denmark, Sweden, the Netherlands, the United Kingdom, Italy, and Luxembourg deplored that there has been "no opportunity for the national experts to examine [ACTA drafts] in depth". They further condemned that relevant documents had an extraordinarily high classification level and thus "were not easily accessible to the delegations, who consequently were notified those documents very late and were not able to prepare themselves at time for the meetings" (European Council 2011).

Compared with the rules of procedures at other venues of IPR regulation (see above), it becomes clear that the level of transparency of the ACTA negotiations was unusual for a regulatory endeavor of such a magnitude. Stefan Johansson, representing the EU Council Presidency of Sweden during the ACTA negotiations in the second half of 2009 agreed in a leaked statement that "[i]f the instrument for example had been negotiated within the World Intellectual Property Organization [...], WIPO's Secretariat would have made public initial draft proposals" (Wikileaks 2011d). An analysis of examples from the WTO such as the 2001 Doha Declaration negotiations on TRIPS and Public Health shows that its procedures are

"relatively transparent, when compared to ACTA" (Keionline 2009). Finally, Jeremy Malcolm concludes after a thorough comparison between the processes at two venues of IPR regulation (the WTO and WIPO) and three other venues of international negotiations such as the Organization for Economic Cooperation and Development (OECD) on the one hand and the procedures at ACTA negotiations on the other that the latter "fails to comply with the basic norms and best practices of transparency and participation that have been established by other institutions in the intellectual property policy regime" (Malcolm 2010: 23).

4.1.4 The track record of the Commission

After having established that the comparatively low level of transparency of the ACTA negotiations and the resulting minimized constraint by Level II and Level III stakeholders on the course of deliberations, the question remains whether this increases the amount of gains available to EU negotiators at the international level. Put into perspective with the previously established interests of EC policymakers to achieve an IPR enforcement agreement which is more potent than existing regulatory regimes, and to envisage its implementation along a broad spectrum of both EU and non-EU nations, the final version of the treaty appears to come close to these goals. The most crucial of the provisions are laid out in ACTA Chapter II "Legal Framework For Enforcement of Intellectual Property Rights" which begins with stipulating that each party shall make civil judicial or administrative procedures concerning the enforcement of IPR infringement available (European Commission 2011: Article 6). The section "Civil Enforcement" provides judges with the ability "to issue an order against a party to desist from an infringement" (Id.: Article 8), require pirated copyright goods and counterfeit trademark goods to be destroyed (Id.: Article 10), ask (alleged) infringers to provide information on the goods it controls (Id.: Article 11), and order anyone who "knowingly or with reasonable grounds to know" engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement (Id.: Article 9). Furthermore, judicial authorities shall become vested with the ability to order measures against a third party over whom the authority exercises jurisdiction in order to not only prevent an IPR infringement from occurring, but also "entering into the channels of commerce" (Id.: Article 12). At border controls of both destination and in-transit countries, authorities become vested with the ability to act on suspect goods and commercial shipments of any size on their own initiative or upon request of a rights holder and "goods of a non-commercial nature contained in travelers' personal luggage" (Id.: Article 14). The treaty section on criminal enforcement provides that each party shall make criminal procedures and penalties directed at IPR infringement available, targeting activities such as unauthorized copying of cinematographic works. The envisaged penalties for such offenses should "include imprisonment as well as monetary fines", which are to be set high enough for a discouragement of future actions forbidden under the treaty (Id.: Article 23). Finally, the section on enforcement of "Intellectual Property Rights in the Digital Environment" demands the creation of enforcement measures targeting any IPR infringement "which takes place in the digital environment", specifically highlighting the circumvention of Digital Rights Management (DRM) protections (Id.: Article 27). In combination with Article 23(4), requiring criminal liability for aiding and abetting of IPR infringements to be established as criminal offenses, this "may expand secondary liability of Internet intermediaries, consumer device manufactures and software developers" (Liu 2012: 6). Interestingly, Chapter V "Institutional Arrangements" additionally provide that an ACTA committee is to be constituted as governing body of the treaty in which all signatories are represented. The responsibilities of the body include, but are not limited to, monitoring of implementation, proposal of changes to the

convention, and admittance of WTO-members which were not present at the negotiation stage (Id.: Article 36).

Of all of the above, especially striking are three provisions for that they clearly exceed the conventions settled in competing IPR regulatory regimes. First, the adoption of third-party enforcement clearly goes beyond the TRIPS protocol (or could be termed "TRIPS-plus"), because no comparable provisions address rules for established violations and provisional measures for threatened infringements. TRIPS Article 44 does provide that members are not obligated to allow for injunctions against persons who acquire or order protected goods without having known or having had reason to know that they were dealing in infringing products. Article 50 permits provisional measures to prevent the infringement of IP rights and to prevent the entry of infringing products, but like Article 44, it does not directly address enforcement against third parties. The necessity of having personal and territorial jurisdiction over a third party, however, can be found in the final version of ACTA (Baker 2011: 586f). Second, ACTA makes use of the phrase of "entering into the channels of commerce" (European Commission 2011: Article 8). Although the TRIPS agreement originally had included the channels of commerce provision in its chapter on enforcement, the concept was subsequently clarified considerably by limiting if to goods that had entered commercial channels within the territory of the enforcing country. By now extending this concept beyond such territory, as Brook Baker holds, "ACTA is not only TRIPS-plus, but it also introduces substantial ambiguity about the length, depth, and width of the channels of commerce" (Baker 2011: 587). Third, although a comparison of leaked negotiation texts links to a gradual weakening of provisions regarding the liability of internet service providers (ISP) for actions taken by their costumers, significant language permitting such an interpretation of the treaty remained in the final text, prompting many agents of internet freedom to argue it would establish unseen possibilities for officials to "regulate the internet" (Martin 2012). Fourth, the EC's draft of IPRED2 sought to criminalize any copyright infringement "on a commercial scale", which was one of the reasons why the project was halted over the course of the OLP. In ACTA's final text, however, it is stated that any infringement carried out "as a commercial activity" falls within the provision, which even widens the already controversial phrasing of EC's earlier IPRED2 proposal (Weatherhall 2011: 869-870).

Putting these provisions into perspective, there are three broad conclusions to draw. First, as Fabrizio Mazza who was in charge of ACTA at the Italian ministry of Foreign Affairs confessed, "ACTA is a de facto 'TRIPS Plus' in the view of many European nations" (Wikileaks 2011c). Second, the Level I agreement on the criminal chapter of ACTA shows striking similarities to IPRED2, but circumvented the legislative competences that the European Parliament was granted through the adoption of the ToL (FFII 2010). Third, the indefinite and ambiguous wording used in many provisions of the final version of the treaty can be understood as an application of "strategic ambiguity" (Governance Across Broders 2012) that seeks to pave the way for a continuous "ratcheting up" (Weatherhall 2011: 858) of IP standards. In fact, as of September 2012, the EC put forward a proposal for a revision of IPRED2 that is directed more specifically on the "fight" against IPR infringement in the "on-line environment" than the previous proposal of the regulation. Interestingly, with plans of more nuanced provision on issues such as the liability of intermediaries and a clearer definition of "commercial scale", the new proposal builds upon vague specifications put forward in ACTA (EU Commission 2012b; Prantl 2012).

4.1.5 Intermediate conclusion

Chapter 4.1 dealt with the question how the level of transparency of international treaty negotiations affects the success of EU negotiators. In the first place, it could be shown that the EC followed political

goals that were independent from Level II and Level III stakeholders. However, instead of trying to persuade potential veto players through an open political process and make a high level of transparency a conditio sine qua non over the course of the negotiations, the EC appears to have followed the same logic as US Trade Representative Ambassador Ron Kirk who feared that negotiation parties would start "walking away from the table" should the texts become public too early (Knowledge Ecology International 2009). Therefore, the EC also chose not to publicize or even actively concealed the far-reaching provisions of the draft treaty from the European public. In order to achieve that, the talks were cloaked behind the invention of ACTA as a new plurilateral regulatory regime, while existing forums such as the TRIPS council or WIPO have been entirely ignored. What stands at the end of this artificial expansion of the EU representative's negotiation win-set is a treaty text that includes a variety of provisions that were not acceptable to a majority of stakeholder and institutional veto players at Levels II and III, but come closer to EC political preferences than otherwise possible. It was hypothesized above that a low level of transparency increases the amount of gains available to EU negotiators at the international level. According to the previous analysis, hypothesis 1 has to be judged as validated.

4.2 Confronted with reality: ACTA facing ratification at the domestic stage

4.2.1 European legal provisions on international treaty ratification

Moving from the international stage of treaty negotiation at Level I to the non-international levels, it is should be recalled that the size of the actual win-set depends on Level II and III political institutions, especially considering ratification processes, veto players, and the independence of central decision makers from their constituents. In terms of veto players that possibly emerge from certain constitutional rules of procedure on treaty ratifications, both of the non-international levels of the three-level game potentially might be of interest. First, considering individual member states, the question whether or not level III legislators may have a say in an international ratification depends on the issue at stake. While Article 3, Clause 1 of the Treaty on the Functioning of the EU (TFEU) holds that the supranational level shall have "exclusive competence" in policy areas such as competition, fisheries, and commerce, Clause 2 posits that the Union "shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union" (EUR-Lex 2008: C83/51). Here, the question to what extent the ACTA agreement goes beyond the current EU legislative catalog ("acquis communautaire") is crucial. If it transcends the agreed scope of the Community's law, its conclusion can not be achieved solely in the political arena of level II. Although the representatives of the European Commission repeatedly stated publicly during the ACTA negotiations that their envisioned provisions for the final version of the treaty would not require changes of the acquis (De Gucht 2012), various observers have challenged this assertion. One of the most informed discussions of this question was publicized by seven leading European scholars of IP law and signed by more than 180 senior academics and concluded that "[c]ontrary to the European Commission's repeated statements [...], certain ACTA provisions are not entirely compatible with EU law and will directly or indirectly require additional action" (Metzger 2011). A study, requested by the EP Committee on International Trade (INTA), summed up that "in some cases, ACTA is arguably more ambitious than EU law, providing a degree of protection that appears to go beyond the limits established in EU law" (European Parliament 2011). In light of these analyses, the EC agreed that the text "contains a number of provisions on criminal enforcement that fall […] under the area of shared competences" and thus decided ACTA to "be signed and concluded both by the EU and by all the Member States" (European Commission 2011b: 2).

Second, considering the level of the EU supranational polity, the ratification procedure for international agreements was altered significantly with the adoption of the ToL, which is in effect since December 1st 2009. Through an amendment of former Article 300 of the Treaty of Rome, the resulting Article 218 TFEU provides that the EU Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement after obtaining the consent in the case of "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required" (EUR-Lex 2008: C83/145). Since the ToL also provides that OLP shall apply in the whole spectrum of Common Commercial Policy, the EP since recently has to give its consent to all trade agreements, including ACTA. It does not, however, have the possibility to propose amendments to the draft Treaty and can only approve or reject the whole agreement on a "take it or leave it basis" (Pollet-Fort 2010: 11). As a consequence, this makes clear that the opinion of the EP will be necessary in the conclusion of trade agreements. Although it is formally still the Council that mandates the EC to negotiate on behalf of the Union, commentators conclude that through the procedural change originating in the ToL, the Parliament's opinion may have to be taken into account even before the initiation of any future trade negotiations. To avoid a "blocking [of] the whole agreement at the conclusion stage", it will be essential "to ensure that the EP is well aware of the content of the agreement and that its majority backs the whole content" (Pollet-Fort 2010: 11).

4.2.2 ACTA caught in crossfire between domestic coalitions

4.2.2.1 Media coverage

As established in chapter 4.1.3, the ACTA negotiations of 2005-2010 were conducted under a low level of transparency. However, in the time of ubiquitous information that is available through the internet to more than 70 percent of EU citizens (Eurostat 2010), official channels are not the only sources from which the public can draw its conclusions about the content and status of a debated draft treaty. Since both the interest from level III stakeholders in the content of the draft was unusually high and the parties involved in the negotiations were numerous, it is not surprising that several leaks of varying gravity occurred that made numerous negotiation documents available in the internet. The first leak occurred on May 22nd 2008 on the website Wikileaks and revealed the 2007 "Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement" summarizing key points of discussion (Wikileaks 2008). Between negotiation rounds four to seven over the course of the year 2009, several leaks revealed the status of negotiations on specific issues such as criminal enforcement proposals, border measures, and ISP liability (Geist 2009a; Wikileaks 2009; Geist 2009b). On March 23rd 2010, little more than six months before the conclusion of the negotiations, the first full draft (dated January 18th 2010) appeared ready to download (La Quadrature du Net 2010) and was followed by leaks of the July 1st 2010, August 25th 2010, and October 2nd 2010 versions (La Quadrature du Net 2012a).

Several other domestic actors such as online news outlets, pressure groups and private bloggers have quickly picked up on the spreading information about ACTA and its possible scope. With the websites of law professor at the University of Ottawa Michael Geist and the internet freedom advocacy groups "La Quadrature du Net", "Knowledge Ecology International", and "Iptegrity.com" being one of the few outlets that offered from very early on a well-informed, rather nuanced and sober coverage of the ACTA's state of negotiations, a multitude of blogs, online videos and forum entries engaged in dramatic and sometimes exaggerated warnings that the introduction of ACTA would bring an "end to the internet as we know it" (Digi10ve 2012). A telling example is the comment from a blogger who claimed that ACTA's

"censorship provisions are [...] extremely troubling" and added that they "introduce virtual fiefdoms for copyright holders, encouraging a chilling effect on freedom of expression online" (Harvey 2012). The advocacy group "Article 19" held that "[t]he ACTA enforcement regime imposes a nineteenth century view of intellectual property", disproportionately protects the IP interests of the private sector "at the expense of individuals' rights to freedom of expression and information" and finds the ACTA "encouraging governments and private parties to engage in large-scale surveillance of the internet". If enacted by the EU, the text continues, "ACTA will undermine online freedom and stifle creativity and innovation" (Article 19 2012). Finally, the writer for an Australian newspaper was confident that "[t]he ACTA draft is a scary document". If a treaty based on its provisions were adopted, it would consequently "enable any border guard, in any treaty country, to check any electronic device for any content that they suspect infringes copyright laws. They need no proof, only suspicion. They would be able to seize any device […] and confiscate it or destroy anything on it, merely on suspicion. On the spot, no lawyers, no right of appeal, no nothing" (Philipson 2008). Just as leaked documents spurred both weighted analysis and biased comments throughout the internet and offline media, the amount of citizens concerned with the previously unknown trade agreement grew steadily. Accordingly, an organizer of German-wide protests against ACTA reveals within correspondence with the author that he learned about the issue through the "admittedly populist and dramatizing video made by the group Anonymous"[1]. This video of more than seven minutes length, narrated in German language, and uploaded in January 2012, features a detailed, yet polemic explanation of ACTA's contents and its possible effects and has been viewed more than 3.4 million times as of September 2012 (Youtube 2012). The risen interest of the public also can be tracked through a frequency analysis of the search term "ACTA" in an internet search machine. The graph below, constructed by the author using data from the database "Google Trends", depicts the popularity of the query in Germany (red color), France (blue color) and Poland (green color) between January 2009 and September 2012 (following the y-axis) and the term's peak popularity being set as 100 percent (along the x-axis).

This massive spur of interest coincided with a ceremony that was held on October 1st 2011 in Tokyo, where the United States, Australia, Canada, Japan, Morocco, New Zealand, Singapore, and South Korea signed the ACTA treaty. The adoption of ACTA through the EU Council during a meeting on agriculture and fisheries in mid-December 2011 (European Council 2011) and another ceremony celebrating the signature of the EU and 22 of its member states on January 26th 2012 contributed further not only to the publicity of the project, but also to critique's conviction that it was "high time" to rally for an halt of the ratification procedure (Tanithblog 2012).

[1] Correspondence with the author, 09/23/2012. Translated by the author. Original statement: "Ich bin auf das Thema ACTA erst durch das - man muss es so sagen - populistische und auch zu stark dramatisierende Video von Anonymous aufmerksam geworden. "

4.2.2.2 Citizen Petitions

With the orderly ratification of ACTA looming, its domestic opponents went from mere debate and information on the issue to more active forms of opposition. These include the introduction and advertisement of petitions against the treaty, the hacking of government websites, and calls to street protests. In terms of the first activity, there have been several petitions directed at the legislative bodies of both MS and the EU. A petition to the German Bundestag by citizen Herbert Bredthauer, who indicated as his motivation "to make the people aware to be attentive when something like that [the ACTA] gets passed without the consent of the society" received 55.000 signatures forcing a Bundestag committee to debate the petition in an open meeting (Tagesschau 2012). Most notably, a petition against the ratification of ACTA through the EU Parliament on the online activism portal "Avaaz" garnered more than 2.8 million signatories between its start on January 25th 2012 and September 2012 (Avaaz 2012). More directly, the EP committee on Petitions was confronted with five different petitions calling for a halt of the ACTA ratification and debated these public inputs thoroughly in a meeting in June 2012 (European Parliament 2012b).

4.2.2.3 Activities of Hacker groups

More extremist opponents of ACTA engaged in the illegal hacking of governmental websites in order to make their case more prominent. Just two days before the Polish Prime Minister Donald Tusk was to sign the text during a ceremony in Tokyo on January 26th 2012, a hacker group called "Anonymous Poland" targeted several websites of the executive and legislative branches with denial-of-service attacks and threatened to publicize hacked private data concerning Members of the Sejm, should the ACTA ratification not be stopped (Mattern 2012). Also in the Czech Republic, hackers got themselves access to private information about all members of the ruling Civic Democratic Party (ODS) and leaked it to Czech newspapers (Heise Online 2012). In the same way, the websites of the European Parliament and several Slovenian parties were rendered inaccessible on January 27th 2012 and 13th of February 2012, respectively (EU Infothek 2012; Futurezone 2012).

4.2.2.4 Street protest

Finally, throughout many blogs, but especially within social media networks, public street protests against ACTA were advertised. As annex 1 shows, only the calls for protests in Germany on February 11th 2012 which were spread through the social media platform facebook.com already covered more than 48 different cities and drew a total of almost 100.000 users who announced their participation. Similar large-scale online invitations for urban protests against ACTA were coordinated in various other European nations (Netzwelt 2012). The coordinated effort through social media invitations to events and advertising on blogs and other websites resulted in remarkable amounts of both protest events themselves and citizens attending these gatherings. With Poland being the first country where mass protests with thousands of participants came to happen on January 25th 2012, observers have termed this the "greatest citizen movement since the Solidarność's founding in 1980" (Vexr 2012). On February 11th 2012, however, these protests were arranged to take place in hundreds of European cities under the headline "ACTA ad acta" (Tagesschau 2012) and drew hundreds of thousands of participants (Le Blond 2012). As the graphic below crafted by the blog "stopacta.de" depicts, these protests were actually spread throughout the whole European Union (Stopacta.de 2012a).

Furthermore, subsequent coordinated Europe-wide rallies have taken place on February 25th 2012 and June 6th 2012, drawing again thousands of protesters throughout the subcontinent (Stopacta.de 2012b; Stopacta.de 2012c)

4.2.2.5 The level of transparency as driving force of opposition

While the outcry taking place throughout the internet and on the streets of European cities was termed by EU Trade Commissioner Karel de Gucht as a "Europe-wide debate on ACTA", dominated by "disinformation on social media and blogs" (La Quadrature du Net 2012b), however, academic comments mostly hint at the EC's mistakes in its communication strategy during the negotiations when seeking to identify the main reason for the escalation of the public debate on ACTA. As Peter Yu holds, the applied "'cloak of secrecy' initially insulated ACTA negotiators from external pressure and outside criticism", but "eventually backfired on them by fueling concerns, fears, rumors, allegations, speculations, and paranoia and by distracting them from focusing on substantive discussions" (Yu 2011: 999). In the same way David Levine argues that the low level of transparency that was upheld during the talks "has mutated what would otherwise have been a largely public debate about ACTA's merits and terms info a hearsay-laden, speculative melee" (Levien 2011: 825). Also public officials from negotiation parties have understood that the EC's negotiation strategy could eventually backfire. A leaked document shows that Stefan Johansson, who has represented the EU at the ACTA negotiations during the Swedish EU Presidency complained "that the secrecy issue has been very damaging to the negotiating climate in Sweden. All political parties have vocal minorities challenging the steps the government has taken to step up its IPR enforcement. For

those groups, the refusal to make ACTA documents public has been an excellent political tool around which to build speculation about the political intent behind the negotiations. [...] [T]he secrecy around the negotiations has led to that the legitimacy of the whole process being questioned" (Wikileaks 2011d). On the matter of trust, two important dynamics are interesting. First, the public suspicion that the ACTA treaty was driven by lobbyists who took control of the EC in order to dictate their agenda on legislators was reinforced by the low level of transparency. The fact that the Head of Unit to deal with copyright and enforcement issues on behalf of the EC, Maria Martin-Prat, previously worked for the record industry's lobby organization IFPI, where she directed its global legal policy (Engström 2011), was furthermore not conducive to the credibility of the EC as "honest broker". Second, not only has the low level of transparency itself raised suspicions and provoked opposition against ACTA, but also did it deprive the EC from the ability conduct a thorough information campaign that would seek to tackle the reservations and anxieties of the public. Especially the great amount of vague provisions that the final version of the treaty contains makes it important to set trustworthy additional boundaries to these provisions in the aftermath of negotiations. However, the secrecy of the negotiations left the job of interpreting and communicating the significance of the leaked document's content to online activists and made it impossible to counterbalance effectively the unfavorable image that ACTA gained along the majority of European societies. Publications such as the January 2012 "10 myths about ACTA" (European Commission 2012c) within which the EC tried to counter the most popular reservations against the treaty came too late, were undermined in their effect through lasting suspicions regarding the EC's trustworthiness, and thus did not gain traction (FFII 2012).

Finally, even discounting for the spread of exaggerated or wrong statements about ACTA, also the actual scope of the agreement has contributed to the public outcry against it. As reflected by the repeated decisions of the EP to reject the EC's endeavors to strengthen the criminalization and enforcement provisions of IPR regulation, and the unique European level of sensitivity in terms of freedom of speech and the public right to (data) privacy, it could have become clear to the negotiators that the scope of the ACTA agreement might find itself outside of the level III winset. However, in the same way that information for the public about the status of negotiations was scarce, so was information for the EC on the actual attitudes of the people vis à vis the treaty's concrete provisions.

Correspondence of the author with several organizers of protests and hosts of websites opposing ACTA confirms these assumptions. Asked for his main point of interest in ACTA, one of the international coordinators of the February 11th 2012 "ACTA ad acta" protests in Berlin highlights that "the problem with the treaty was, beneath the unavailability of information for the public, the vague formulation of Articles. […] Therefore, there was the danger of room for interpretation"[2] On the estimated interest of the EC to negotiate ACTA with a low level of transparency, he added "it was only about enforcement and strengthening of traditional structures, because traditional stakeholders earn money with it. An adaption of IPR […] to the 21st century fails due to struggle for power and structures. Lobbies were to be served – but

[2] Correspondence with the author, 09/11/2012. Translated by the author. Original question: "Gegenüber welchen Inhalten von ACTA haben/hätten Sie persönlich (oder die Organisation, für die Sie eintreten) sich informiert/sich informieren wollen bzw. haben Einfluss ausgeübt/hätten Einfluss ausüben wollen? Gab es Ihrer Meinung nach auch in der finalen Version Änderungsbedarf?" Original answer: "Das Problem mit dem Vertragswerk war neben der "Nicht"-Verfügbarkeit für die Öffentlichkeit die schwammige Formulierung von Pharagraphen. Grundsätzlich wäre ein solches Vertragswerk in Deutschland gar nicht notwendig, da alle relevanten Punkte bereits gesetzlich bei uns geregelt sind. Daher bestand die Gefahr in der neuerlichen Interpretationsmöglichkeit, die sich durch die ungenauen Formulierungen eröffnete. Dies hätte gesetzlichen Neuregelungen, gedeckelt durch eine EU Vorgabe, Tür und Tor geöffnet und diese Neuregelungen wären nicht im Interesse des Verbrauchers gewesen. Stichpunkt: Möglichkeit der Providerüberwachung."

the citizen had got wind of it"[3]. A member of the German "Chaos Computer Club" who helped organizing one of the biggest protest events taking place in Hamburg on February 11th 2012 suspected that "the EU Commission – under the influence of lobby groups […] had the goal to establish a treaty which should become the framework for future legislation"[4].

4.2.3 The reaction of political actors at the Member State level

As established previously, the size of the win-set depends on Level II and III political institutions, especially considering ratification procedures, possible veto players, and the independence of central decision makers from their constituents. Since it could be made clear that ratification procedures rendered both the national level III and the supranational level II to possible veto players in the ACTA ratification procedure, and the attitude of the (vocal) majority of MS citizens opposed the treaty's adoption, the remaining variable is the independence of decision-makers from the will of their constituents. Although it has to be conceded that the majority of domestic political actors within the European Union saw the ACTA as favorable, in the same clarity it can be shown how fast the attitudes of policymakers changed after the start of coordinated online and offline protest activities. In the case of Poland, for example, especially the hacking of governmental websites seems to have had a major impact. While Prime Minister Donald Tusk still defended the agreement on January 24th 2012 (Chancellery of the Prime Minister 2012), on February 3rd 2012, he announced that "his government had made insufficient consultations before signing the agreement in late January, and it was necessary to ensure it was entirely safe for Polish citizens" (ZDNet 2012). Two weeks later, Tusk even "regretted" his previous stance on the agreement, said it was wrong to hold on to a mistake, and claimed that the arguments have "persuaded" him (ORF 2012). Another telling example of a sudden turn of political ideology can be witnessed through the statement of Helena Drnovšek Zorko, Slovenian ambassador to Japan, who signed ACTA on behalf of the Slovenian government. In a fairly personal and non-political statement, she told that "[e]very day there is a barrage of questions in my inbox and on Facebook from mostly kind and somewhat baffled people, who cannot understand how it occurred to me to sign an agreement so damaging to the state and citizens". She explained that she "signed ACTA out of civic carelessness" and blamed herself that she "did not clearly connect the agreement I had been instructed to sign with the agreement that, according to my own civic conviction, limits and withholds the freedom of engagement on the largest and most significant network in human history" (Metina Lista 2012). Finally, German Minister of Justice Sabine Leutheusser-Schnarrenberger was also one of the proponents of a rapid ratification of the ACTA agreement. However, explaining that "whenever we see that there are many people in Europe who do not want ACTA, then it is

[3] Correspondence with the author, 09/11/2012. Translated by the author. Original question: "Welches Interesse, glauben Sie persönlich (oder die Organisation, für die Sie eintreten), hatte die EU-Kommission, ACTA in der Art und Weise zu verhandeln wie sie es tat?" Original answer: "Die Gründe liegen völlig auf der Hand - es ging hier lediglich um die Durchsetzung und Zementierung von altbackenen Strukturen, weil ebenso altbackene Herrschaften Geld damit verdienen. Eine Anpassung des Urheberrechts sowie der Patentregelung an das 21. Jahrhundert, unser Informationszeitalter, ist längst überfällig, es scheitert aber an Kompetenzgehabe und Machtstrukturen. Hier sollten Lobbies bedient werden - nur hat der gemeine Bürger Wind davon bekommen und einen Aufstand angezettelt."

[4] Correspondence with the author, 09/10/2012. Translated by the author. Original question: Welches Interesse, glauben Sie persönlich (oder die Organisation, für die Sie eintreten), hatte die EU-Kommission, ACTA in der Art und Weise zu verhandeln wie sie es tat?" Original answer: "Ich bin mir sicher, dass die EU-Kommission - unter dem offensichtlichen Einfluss von verschiedenen Lobbygruppen, insbesondere aus der Pharmabranche, der Markengueterindustrie und der Contentindustrie - das Ziel hatte einen Vertrag zu etablieren der dann wieder die Grundlage fuer eine Gesetzgebung in den Vertragsstaaten war. Auch wenn in vielen Bereichen des Vertrages man den Eindruck hatte das die beteiligten Politiker nicht wirklich gesehen haben - oder sehen wollten – welche Konsequenzen dieser Vertrag im Detail hatte war ihnen klar das ein solche Gesetzgebung eine kontroverse Diskussion ausgeloest haette was wiederum deutlichen Widerstand gegeben hätte."

right to take these protests seriously and say: we do not carry this project forward for the moment" (Beckedahl 2012).

Although not all European domestic politicians followed the same logic of switching positions on the topic vis à vis public protests, these examples give an indication of why the signature and ratification procedures of Poland, the Czech Republic, Germany, Latvia, Lithuania, Slovenia, Belgium, the Netherlands, and Austria were put on halt within only a matter of several weeks (Mason 2012). It becomes clear that an international agreement negotiated by the European Union that at the same time requires consent from MS governments is especially prone to the influence of level III public stakeholders. The EC's decision to withhold crucial information on the progress of negotiations not only from citizens, but also in some cases from MS delegations therefore cannot be highlighted enough as factor that may have led to the break-up of the issue-specific political alliance between the EC and national governments that was formed on behalf of ACTA.

4.2.4 The reaction of political actors at the Community level

However, as established previously, not only level III public stakeholders and related veto players on the domestic stage are to be considered, but also the ones at the supranational European stage. While the European Council, as noted above, quickly and discretely executed its part of the ACTA ratification, the EP, vested with new post-Lisbon powers, demanded its say. The estrangement of the EP's stance on the issue of ACTA from the one of the Commission, however, started already way earlier than the protests by the European public. Already in 2008, when it became clear that the EC would fail to provide a level of transparency and participation to the service of the MEPs, the EP adopted a resolution condemning the secretive approach taken by the EC while threatening to take the issue to the European Court of Justice. The resolution, which was adopted with the clear majority of 633 to 13 votes, the Parliament "[e]xpresse[d] its concern over the lack of a transparent process in the conduct of the ACTA negotiations". Further, it "[c]all[ed] on the Commission and the Council to grant public and parliamentary access to ACTA negotiation texts and summaries" and "[d]eplore[d] the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation". Finally, the EP clarified the EC's negotiation mandate highlighting that ACTA should only concentrate "on IPR enforcement measures and not on substantive IPR issues such as the scope of protection, limitations and exceptions, secondary liability or liability of intermediaries" and appealed that it is "not used as a vehicle for modifying the existing European IPR enforcement framework" (European Parliament 2008).

Representing both an example of the EC's failure to comply with the EP's demands in terms of transparency and as a symbol of the rift between the two supranational institutions, the EP chief rapporteur on the ACTA agreement, Kader Arif, stepped down from his post on January 27th 2012. Arif commented his decision with stressing that "I condemn the whole process which led to the signature of this agreement: no consultation of the civil society, lack of transparency since the beginning of negotiations, repeated delays of the signature of the text without any explanation given, reject of Parliament's recommendations as given in several resolutions of our assembly. […] However, everything is made to prevent the European Parliament from having its say in this matter. I want to send a strong signal and alert the public opinion about this unacceptable situation. I will not take part in this masquerade" (BBC 2012). As shown in the Chapter covering the EC's track record as a negotiator at the international level, this lack of parliamentary inclusion resulted in the agreement on provisions that were clearly beyond

the EP's consensus on IPR regulation that was publicly known latest since its rejection of the Commission's proposal on IPRED2 in 2007.
Consequently, whenever EP decisions regarding ACTA were due, they usually had one result. On May 31st 2012, three Committees concerned with the issue – ITRE (Industry, Research and Energy), JURI (Legal Affairs), and LIBE (Civil Liberties, Justice and Home Affairs) all agreed to recommend the plenary to reject ACTA. On June 4th 2012, the DEVE (Development) committee followed suit, while on June 21st 2012, also the main Committee in terms the treaty content, INTA (International Trade), voted on the report containing the recommendation to reject ACTA by a majority of 19 to 12. Finally, the assembly of the European Parliament decided on July 4th 2012 to reject the ratification of ACTA by a margin of 478 Nayes, 39 Yays, and 165 abstentions (Votewatch 2012). As the Social Democrats group of the EP concluded in a published statement commenting the vote, "[f]or the first time the Parliament has used the powers granted by the Lisbon Treaty to reject an international trade agreement. The Commission and the Council will now be aware that they cannot override the Parliament, which represents and defends citizens. […] We regret that the EPP has consistently disregarded people's concerns and Parliament's advice on ACTA's threat to fundamental rights. They tried to bring secrecy and delay to this vote until the very last minute. Fortunately we put together a big majority to defeat their call" (S&D 2012).

4.2.5 Intermediate conclusion

The previous analysis makes clear that the way how some European policymakers such as the Italian Deputy Director for Economic Affairs Minister, Massimo Spinetti, saw ACTA "as a tool like-minded countries could use" to advance the IPR agenda "dynamically and with fewer political difficulties than high-standards countries would encounter at the World Intellectual Property Organization (WIPO), the Organization for Economic Cooperation and Development (OECD), the European Union (EU), or even the G-8" (Wikileaks 2011e), did not meet the actual reality. It could be shown that in times of abundant information available on the internet, whatever the level of secrecy advanced for the purpose of an international treaty negotiation with European involvement, provided the existence of a public interest, a certain amount of content is very likely to become public. The dilemma for a representative who negotiates in secrecy is therefore that he is very unlikely to take advantage of the merits of a completely insular deliberation environment, but at the same time is very likely cut from level III and level II feedback, since there are only few official channels granting access of outsider's opinions to reach the delegation. The result can be an international agreement such as ACTA that finds itself outside of the domestic or supranational win-sets, with involuntary defection as the consequence. Finally, a low level of transparency obviously contributes itself massively to a suspicious attitude of both the general public, but also professional policymakers. This dynamic additionally narrows down the actual size of the win-set and thus decreases the likelihood of ratification. Since it was hypothesized previously that a low level of transparency of international treaty negotiations decreases the likelihood of ratification at the non-international level, according to these findings, hypothesis 2 has to be judged as validated.

5. Conclusion

Observing a discrepancy between the EC's commitments to a transparent conduct of negotiations when it acts as a representative on behalf of the EU and shortcomings in the fulfillment of these commitments, the present study tried to investigate on the dynamics between the ability of EU negotiators to achieve their goals and the level of transparency these talks are conducted in. Asking specifically "how does the

level of transparency of international treaty negotiations affect the success of EU negotiators?", the present framework of analysis was drawn from a slightly alternated version of Robert Putnam's two-level game approach and led to the establishment of two hypothesis. First, a low level of transparency of international treaty negotiations increases the amount of gains available to EU negotiators at the international level. Second, a low level of transparency of international treaty negotiations decreases the likelihood of ratification at the non-international level. These hypothesis were tested against the case of the international ACTA negotiations and the following ratification procedure which all took place between the years 2005 and 2012.

In terms of the first hypothesis, it could be shown that the EC's interest within the talks deviated from the ones of domestic and European-level stakeholders. Further, it was found that the EC actively engaged in a strategy of low transparency in order decouple its activities at the international negotiation level from the constraining effects of these stakeholders in order to achieve greater outcomes until the closure of the agreement. Since the EC was successful with this strategy, hypothesis 1 was acknowledged as verified. In terms of the second hypothesis, it could be shown that this strategy was not efficient to such an extent that the debated issue could be avoided from the public agenda. Rather, the secrecy resulted in a fair amount of interest for the language of the agreement and its consequences. Combined with the activation of domestic stakeholders through modern channels of communication such as blogs and social networks, the low level of transparency left negotiators with the "worst of both worlds" struggling to defend an agreement that nobody ought to talk about while opponents were radicalized by the EC's methods. Furthermore, it became clear that regardless of the possible advantages a low level of transparency may have in the initial stage of an international negotiation process, the occurrence that the preliminary agreement may be unacceptable to both broad parts of society and legislators alike and thus fail ratification, is quite possible. For these reasons, hypothesis 2 also was acknowledged as verified.

Although throughout this study a rather analytical stance was maintained, a final judgment on the desirability of a certain level of transparency may be appropriate. First, it should be noted that certain negotiation situations indeed may benefit from the exclusion of the public. With elected officials being prone to posture in order to appeal to their domestic audiences, level I agreement on issues such as a peace treaty, an arms-reduction commitment or a realignment of borders may become fairly impossible. However, the EC would be well advised to negotiate agreements that touch upon to publicly sensitive issues such as far-reaching regulations dealing with IP law and the freedom of the internet though actively pursuing a conduct of transparency and inclusion. The earlier stakeholders such as the public, NGOs or Members of Parliament have the feeling that the agreement was negotiated in their best interest and that their concerns were taken seriously in the process, the easier the ratification procedure should evolve. On a final note, one of the core findings of this study is the increased role of the EP in the European polity since the adoption of the ToL. With the example of the failed ACTA ratification being one and the rejection of the US-EU SWIFT agreement in 2010 being another case where the EP found its newly established role as a full-fledged political veto player, observers of the European polity can expect more occasions to analyze the ways how the EP's new capabilities lead to new dynamics in the interplay between European political institutions.

Annex

Annex 1) ACTA protest invitations in German cities – www.facebook.com

Title of event invitation	City	„Going“	facebook.com/events/
Protest gegen ACTA - Berlin	Berlin	9718	338799346153966/
STOP ACTA - Demonstration gegen Acta in Stuttgart	Stuttgart	7586	144489442335635/
STOP ACTA - Demonstration gegen Acta in Düsseldorf	Düsseldorf	6396	228942327190942/
STOP ACTA - Ruhrgebiets-Demonstration in Dortmund	Dortmund	5569	182716005161256/
Protest gegen ACTA in Nürnberg	Nürnberg	5356	244916202249229/
Protest gegen ACTA - Leipzig	Leipzig	4034	316277768408479/
ANTI ACTA Demo Hannover (Zeit und Datum unter Vorbehalt)	Hannover	3949	360437973983925/
Augsburg gegen ACTA	Augsburg	3734	245798608830506/
11.02. - Anti ACTA Protest Bremen	Bremen	3602	320064574703829/
STOP ACTA - Demonstration gegen ACTA in Mannheim	Mannheim	3526	267555573314186/
Protest gegen ACTA Dresden	Dresden	3129	155805177868102/
STOPP ACTA Demo Köln	Köln	3043	207644835998103/
Demo Gegen ACTA	Würzburg	2660	234203816662508/
Kassel - Massenprotest gegen Acta	Kassel	2584	320293564679124
ACTA ad acta! DEMO gegen ACTA in Regensburg!	Regensburg	2584	100139926781604/
Protest gegen ACTA!!! (Osnabrück)	Osnabrück	2562	182606345180976/
Anti ACTA Protest Freiburg	Freiburg	2519	313894588647456/
Protest gegen ACTA - Mainz	Mainz	1878	169154469860540/
STOP ACTA DEMO BIELEFELD	Bielefeld	1792	231717836912664/
Protest gegen ACTA in Aachen am 11.02.2012	Aachen	1768	290803420973299/
Anti ACTA Demo & Operation Paperstorm Ulm	Ulm	1729	199865750111770/
Anti-ACTA Protest in Braunschweig	Braunschweig	1634	297423820306461/
Protest gegen ACTA - Münster	Münster	1622	261880393883349/
Protest gegen ACTA in Oldenburg	Oldenburg	1497	347827715239385/
Massenprotest gegen Acta	Magdeburg	1340	104321526360193/
Stopp ACTA! - Rostock	Rostock	1046	337811569584831/
STOP-ACTA-Heidenheim	Heidenheim	916	242282912517339/
STOP ACTA DUISBURG	Duisburg	826	360323100663808/
Stopp ACTA Demo Bonn	Bonn	823	123092011146059/
Stop ACTA Trier - Gemeinsam mit ganz Europa für Informationsfreiheit!	Trier	791	216400925122310/
Stopp ACTA! - Demonstration in Karlsruhe am 11. Februar	Karlsruhe	724	163551970426885/
Stoppt Acta! - Neubrandenburg	Neubrandenburg	653	164327027014288/
ANTI ACTA Protest in Ingolstadt	Ingolstadt	626	239207726161954/
ACTA Protest Minden	Minden	603	310027772381359/
Protest gegen ACTA CRAILSHEIM!!!!	Crailsheim	538	241560099256920/
Massenprotest gegen ACTA im Lustgarten Potsdam!	Potsdam	518	350079258349898/
Anti-ACTA Demo Hof	Hof	485	235402929880096/
Stop ACTA Weinheim	Weinheim	300	101646299963355/
Protest gegen ACTA - Konstanz	Konstanz	278	137777673009011/
STOP-ACTA Demo in Neuss	Neuss	230	289961161066372/
Demo gegen ACTA	Wilhelmshaven	206	289837671077786/
STOP ACTA - Demonstration gegen Acta im Kreis Mettmann!	Mettmann	183	334580503240450/
Auch in Annaberg - Buchholz gegen Acta demonstrieren! STOPP ACTA!	Annaberg - Buchholz	160	229143120506127/
» Wuppertal gegen ACTA! «	Wuppertal	157	325185524190183/
Protest gegen ACTA in Nordenham	Nordenham	156	182942588474388/
STOP ACTA - PROTEST GEGEN Geheimabkommen und Zensur	Gera	147	223899837704637/
Protest gegen ACTA - Frankfurt(Oder)	Frankfurt/Oder	87	182685911831356/
Protest gegen ACTA in Freyung am 11.02.2012	Freyung	34	182716005161256/
Total		**96298**	

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