



The impact of the ACTA on the EU's international relations

Negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) started off with the intention to set a “gold” standard for the enforcement of intellectual property rights. The initial intention was to create a “coalition of the willing” to address important countries, such as India, China or Brazil, that take a different approach from that of the EU. However, the secrecy and exclusionary nature of the negotiations, as well as the rejection of agreed multilateral forums have served to alienate exactly those countries that were the ultimate target of ACTA.

As far back as 2009, India publicly attacked ACTA saying that it “was being negotiated in secrecy and with the exclusion of a vast majority of countries, including developing countries and LDCs” [less developed countries].¹ In 2010, India held talks with like-minded countries, such as Brazil, China and Egypt, to jointly oppose ACTA.² Then, on 25 October 2011, at the WTO TRIPS Council, India raised concerns on the scope of ACTA's civil enforcement measures, the potential role of border measures in the seizure of generic medicines, third party liability, and potential damage to WTO Most Favoured Nation status for countries that are not parties to ACTA.³

The best approach to gaining broader acceptance would have been to include those countries in the negotiations, “not leave them on the outside in the hope of later pressuring them to comply with an agreement from which they were deliberately excluded.”⁴ The European Parliament study on ACTA confirms that “the major emerging economies, China, Brazil and India appear not to have been formally invited to participate”.⁵

In October 2010, the Mexican Senate demanded a suspension of negotiations.⁶ In June 2011, the Mexican Congress approved unanimously a resolution rejecting ACTA.

If the EU ratifies ACTA, it would ignore its obligation to support the rule of law in its international relations. The EU is protected by safeguards in the field of fundamental rights such as the EU Charter and the European Convention on Human Rights. The preamble of ACTA, as well as the “Digital Chapter” specifically promotes policing and enforcement through “cooperation” between private companies. This is an obvious violation of Article 21 of the TEU which re-states the EU's obligation to support democracy and the rule of law in its international relations.

Not only were multilateral forums bypassed by ACTA, their norms have been partly rewritten. The European Parliament study⁷ points out “the apparent re-interpretation of the meaning of the term ‘commercial scale’ as interpreted by the recent China IPRs WTO case⁸”. In contrast to that ruling, the logically open-ended norm of ‘indirect economic or commercial advantage’ (also covering indirect infringements) in ACTA focuses on the intent of the alleged infringer, rather than on assessment of the adverse effects on the market⁹. ACTA's approach therefore is both extremely unclear and in contradiction with agreed international norms.

In other words, the EU finds itself further away from its destination than it was when the ACTA process started - which is the definition of being on the wrong track.

1 ‘Minutes of Meeting Held In The Centre William Rappard on 27-28 October and 6 November 2009’ Council on Trade-related Aspects of Intellectual Property, IP/C/M/61, 12 February 2010, para. 264.

2 India Times, *India plans to nip new piracy law*, 29 May 2010 http://articles.economictimes.indiatimes.com/2010-05-29/news/27599709_1_patent-acta-anti-counterfeiting-trade-agreement

3 Knowledge Ecology International, *WTO TRIPS Council: India raises concerns* <http://keionline.org/node/1300>

4 Prof. Michael Geist, *India Seeking Allies to Oppose ACTA* <http://www.michaelgeist.ca/content/view/5076/125/>

5 DG Expo Study, *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*, June 2011, p.6.

6 Resolution adopted by the Mexican Senate, 5 October 2010 <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5385&lg=61>

7 European Parliament, DG for External Policies of the Union, Information and Communication Technologies and Human Rights, EXPO/B/DROI/2009/24, PE 410.207, June 2010 (PE 410.207)

8 China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs), WT/DS362/R, 09/0240, 26/01/2009

9 DG EXPO study, Section 4.1.2