Does ACTA still matter?
Protecting intellectual property rights in international trade

Abstract
The European Parliament’s rejection of the Anti-Counterfeiting Trade Agreement (ACTA) in July 2012 (by 478 votes to 39, with 165 abstentions) drew attention to the EU’s distinctive approach to issues of intellectual property. In the years to come, the Union will implement its strategy through bilateral trade agreements, as it has in previous years, with a pragmatic and constantly changing approach. The terms of future agreements will evolve in step with the changing pattern of the world economy and with Europe’s singular contributions to that economy. Yet ACTA is likely to live on regardless of the EU’s rejection. The treaty’s provisions may still impact — and, indeed, benefit — EU companies when they export to ACTA Members’ markets. This may be the case in the US, for example. The US approach to intellectual property determined many of ACTA’s internet provisions, and these proved to be the undoing of the treaty in Europe. The gap between the US — largely concerned with copyright and, until recently, less perturbed by issues of freedom of expression — and the EU — focused on trademark and deeply attentive to personal liberties — are difficult to reconcile. Despite this, there may well be ways to advance *ex post* ACTA.
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INTRODUCTION

The rejection of ACTA will lead to a reconsideration of the EU’s strategy on intellectual property.

When the European Parliament (EP) rejected the Anti-Counterfeiting Trade Agreement (ACTA) in July 2012, it exercised for the first time its new-found power to grant or deny consent to trade agreements, as provided by the Lisbon Treaty (Article 207 of the TFEU). This decision has had a greater impact than simply gone beyond the treaty itself and has generated rippled effects throughout the EU, impacting on the Union’s strategy for the protection of intellectual property (IP) in international trade agreements.

This briefing aims to describe the post-ACTA state of affairs and the possible impact of the treaty, when it will go into force, on EU trade interests. The matter is extremely important. As a plurilateral treaty, ACTA will enter into force even without the EU’s approval, and it will affect EU companies exporting to ACTA member states, thanks to the ‘most favourite nation’ (MFN) clause of WTO law.

The definition of the EU’s past and future IP strategy will be described in the following pages with an in-depth analysis of the IP provisions included in the EU’s free trade agreements (FTAs) — those concluded as well as those yet to be finalised.

The EU strategy is difficult to reconcile with the US strategy — a divergence that was made evident by the failure of ACTA. The EU and the US are likely to try to export their IP preferences as they forge ahead with trade agreements with third countries, but it is unlikely that a bilateral accord on these important issues will come to bind the transatlantic blocks.

1. Why ACTA was rejected in EUROPE

ACTA is the first plurilateral agreement drafted to improve and update the enforcement provisions of the World Trade Organisation’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) by introducing rules regarding the internet and by strengthening the existing civil, criminal and customs protections. ACTA was negotiated and signed by the EU and most of its Member States (except for Germany, The Netherlands, Cyprus, Slovakia and Estonia), as well as by the US, Australia, Canada, Japan, Mexico,

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1 The treaty was considered a mere trade agreement and was mostly negotiated according to Art. 207 of the TFUE by the EU Commission, assisted by the Trade Policy Committee of the Council. The chapter on Criminal Sanctions was negotiated by the rotating Council’s Presidency.
Morocco, New Zealand, Singapore, South Korea and Switzerland.

All WTO member states may participate in ACTA if ACTA’s signatories accept their participation. Yet the lacunae in the current list of ACTA members constitute its chief weakness; the signatories do not include the principal sources of counterfeit goods. (The EU’s identification of these sources follows in the chart below2.)

These countries may, in theory, still sign the agreement. But the accession of China and India — which cumulatively account for more than three quarters of counterfeit goods — appears today highly unlikely, since those countries have heavily criticised ACTA in the TRIPS Council of the WTO3.

ACTA’s membership list was further limited by the EU’s failure to ratify the agreement. The EP rejection on 4 July 2012 was motivated by the agreement’s potential limitations of fundamental rights and freedoms, such as data protection, the right to property and the freedom of expression and information4, 5.

In an attempt to reassure the Parliament, EU Trade Commissioner Karel De Gucht declared on 22 February 2012 that ACTA would not change the use of internet and social websites, since it did not introduce new rules6. In a further effort to reassure those who were wary of the agreement, the Commission referred the draft treaty to the EU Court of Justice that same day, although the treaty had already been signed and passed to the EP and to EU Member States for

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2 See EU Commission, DG Taxud, Report 2011
3 See WTO Trips Council Report 8 and 9 June 2010
4 EP Recommendation on the draft Council decision on the conclusion of the Anti-Counterfeiting, 22 June 2012
5 See ACTA before the European Parliament 4 July 2012
6 See Commissioner Karel De Gucht’s declaration, Brussels, 22 February 2012
The Parliament was concerned about generic medicines, individual criminalisation and the definition of ‘commercial scale’ in the treaty.

2. ACTA: State of play

2.1. Signature and ratifications

The EP’s rejection of ACTA will not prevent the treaty from entering into force. The agreement will go into effect 30 days after the sixth ratification. In May, the Commission asked the Court if the treaty was consistent with the Charter of Fundamental Rights\(^7\) and, specifically, Article 8 (Protection of personal data), Article 11 (Freedom of expression and information) and Article 17 (Right to property).

On 20 June 2012, on the eve of the EP International Trade Committee (INTA) vote, the Commissioner asked Members of the European Parliament to pause for reflexion and to postpone the vote on ACTA while waiting for the Court’s decision and for further clarifications on contentious issues. (The clarifications were to be provided by the Commission\(^8\).) Despite his request, on 22 June 2012 the INTA Committee recommended that the EP deny consent to the treaty\(^9\). The EP Assembly decided accordingly on 4 July 2012\(^10\). The Judgement of the Court on the agreement’s compatibility with fundamental rights was — and is — still pending, with a decision expected sometime between the second half of 2013 and the beginning of 2014.

The principal concerns expressed by the EP centred on provisions on individual criminalisation, the definition of ‘commercial-scale’, the role of internet service providers and a possible disruption to the transit of generic medicines\(^11\). For all these reasons, and given the sensitivity of the issue and its potential to affect far more than international trade, the EP’s final statement reported that, ‘Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the European Parliament cannot guarantee adequate protection for citizens’ rights in the future under ACTA’. Ultimately, ‘the intended benefits of this international agreement are far outweighed by the potential threats to civil liberties’.

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\(^7\) See Charter of Fundamental Rights of the European Union, 30 March 2010
\(^8\) See De Gucht declaration of 22 of June 2012
\(^9\) See the INTA Recommendation, 22 June 2012
\(^10\) ACTA before the European Parliament, 4 July 2012
\(^11\) Those provisions were analysed in the following study: The Anti-Counterfeiting Trade Agreement (ACTA): an assessment, External Study, DG EXPO, Policy Department, June 2011
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The treaty may still go into effect.

The treaty may still go into effect. According to Article 40(1), the first party to ratify the treaty is Japan, on 5 October 2012. The next signatory likely to ratify the treaty is South Korea, followed by Morocco, Singapore, Canada and the US. Canada’s ratification will apparently require the modification of some internal rules, while the US has yet to lodge the ratification instrument.

Concerning the ratification process, Switzerland has not yet signed, as the country’s federal government expressed concerns on the agreement’s impact on fundamental freedoms and basic legal values. In the absence of a positive decision from the EU Court of Justice or the signatures of the missing EU Member States, Switzerland is unlikely to sign in the near future.

In Australia, the ongoing debate on ratification has recently become quite controversial. In June 2012, the Joint Standing Committee on Treaties (JSCOT), comprising members of both houses of Parliament, presented a report to the parliament that recommended delaying ratification because of a ‘lack of clarity in the text; insufficient protection for individuals; and ACTA’s potential to shift the balance in the interpretation of copyright law, intellectual property law and patent law’. The EU Parliament’s own rejection is likely to have contributed to the Australian postponement.

12 See Signing of the Anti-Counterfeiting Trade Agreement (ACTA), Ministry of Foreign Affairs of Japan
13 See Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) by Japan, Ministry of Foreign Affairs of Japan, 5 October 2012
14 See M. Masnick, Will ACTA Ever Be A Real Treaty?, 14 September 2012
15 See G. Juárez ACTA: El Senado Mexicano rechaza la adopción de un tratado ilegal, 21 July 2011, “ALTIO40”
16 See E. Broad, ACTA slammed by Australian Parliamentary Committee, 28 June 2012 and R. Chirgwin, Australia goes cold on ACTA, 27 June 2012
In **New Zealand**, the first consultation process, which is required to assess the national interest, will be submitted to the parliament\(^{17}\). It seems likely that any pronouncement will be put off until after the Australian decision\(^{18}\).

In **US**, the treaty does not require congressional ratification because it has been negotiated as an enforcement agreement based on previous law (the Prioritizing Resources and Organization for Intellectual Property Act of 2008, or PRO-IP)\(^{19}\). The US administration has the power to sign such an enforcement treaty, provided it does not require a modification of US intellectual property (IP) legislation. A single member of the Senate, sustained by a group of legal scholars, criticised this approach, but his criticism was dismissed by the Obama administration and not endorsed by the Congress. This apparent lack of interest and the absence of a debate about ACTA in the US is likely the result of the current focus of US external trade policy: the Trans Pacific Partnership (TPP), a plurilateral treaty with a similar group of parties but a wider scope, incorporating tariff reductions, investments and IP issues. In other words, ACTA seems to have become less important to the US global trade strategy since the European Union rejected the treaty. The reasons for these are likely two fold. On the one hand, if Europe does not participate in ACTA, the treaty will be notably weaker. And on the other hand, the US is actually seeking stronger provisions; the US proposal for the TPP, for example, is more restrictive than were its 'compromise provisions' included in ACTA\(^{20}\).

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\(^{17}\) See S. Bell, [ACTA ratification faces NZ hurdles], 18 July 2012

\(^{18}\) See S. Bell, 18 July 2012

\(^{19}\) See [http://www.opencongress.org/bill/110-h4279/show, "Open Congress"], 2008

\(^{20}\) Negotiating parties in the TPP are Brunei, Chile, Singapore, New Zealand, United States, Australia, Peru, Vietnam, Malaysia, Mexico and Canada.
2.2. ACTA provisions will impact — and benefit — the EU

The vote of the European Parliament on ACTA, by 478 votes to 39, with 165 abstentions, prevented the treaty from becoming a law of the Union. Neither the EU nor its Member States may be bound by ACTA unless it is eventually approved by EP and ratified by the Member States. In theory, the Commission may resubmit the treaty to the EP for a vote if the treaty were renegotiated or if the EU Court of Justice provided a clear and favourable opinion on the agreement’s compatibility with fundamental rights. However, even in these conditions, it is unlikely that the Commission would request a new vote during the EP’s current legislature.

The fact that European Parliament rejected the treaty does not mean that the EU will not benefit from (some of) its provisions, should the treaty finally enter into force. In addition to its heavily criticised rules on civil liberties, ACTA includes useful provisions for protecting exports from counterfeited goods in the markets of its signatory countries.

In this respect, the key provision is article 4 TRIPS which establishes the most favoured nation (MFN).

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21 By refusing to consent, it was argued that the European Parliament had blocked the treaty from going into force as such, and that only a new and renegotiated version could be considered. In fact, it is possible that once the treaty enters into force, amendments will be approved by the parties under Article 42 ACTA. In this case ACTA could be renegotiated by its signatories without the participation of the EU in such a way as to favour the EU accession. That is clearly an unlikely option, at least in the short term.

22 Trade Commissioner De Gucht expressed an intention to re-request consent, under the present or future legislature, prior to the vote of INTA Committee the last 22 June.
**Article 4**  
**Most-Favoured-Nation Treatment**

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

a. deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

b. granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

c. in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

d. deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

This clause establishes that any privilege or favour granted by a WTO Member State in the field of intellectual property protection must be extended to other members. An exception is foreseen for international agreements related to the protection of intellectual property that entered into force before TRIPS Article 4 (d). Conversely, treaties on IP protection that entered into force after TRIPS will be subjected to MFN, and their advantages will be extended to all (other) members.

In practice, this implies that European companies wishing to defend their interests may use of the civil, criminal or border remedies included in ACTA in signatory countries once the treaty is entering into force. For example, an EU company holding the trademark of a renowned luxury bag that is exported to the US could use ACTA provisions (injunctions, provisional measures or custom seizures) to defend its US market share from counterfeited bags imported in the US from China.

### 3. European strategy for IPR protection

#### 3.1. From a multilateral to a bilateral approach within IP trade agreements

Since 1995, WTO Member States have tried to address the problem of trade of counterfeited goods by including an agreement on intellectual property in multilateral trade law.
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The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) establishes multilateral standards on intellectual property for WTO Members. The main provisions define specific intellectual property rights (IPRs), such as copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and protection of undisclosed information. Provisions also establish standards on the scope and use of IPRs, and on their protection. Part III of the treaty concerns the protection of IPRs and defines civil, criminal and custom remedies to be applied by all Members if these rights are not respected; it specifies the need for fair and equitable procedures, the need for a court review of such administrative procedures and the criminal treatment of commercial-scale trademark counterfeiting and copyright piracy.

Because the question of the internet was not considered relevant during the Uruguay Round of WTO negotiations, when TRIPS was negotiated, the treaty does not incorporate provisions devoted to the internet. This omission constitutes the treaty’s chief limitation.

TRIPS was heavily contested by the public at large, and particularly by developing countries, because it imposed high international standards of protection for medical patents, and thereby, it was believed, limited access to medicines. Riots and demonstrations occurred during the WTO Ministerial Conference in Seattle in 1999, leading attempts to renegotiate a comprehensive improvement of IP multilateral rule to be postponed23.

Yet the issue of public health and access to medicines was largely quelled in the following years. The 2001 Doha Declaration on Public Health underscored TRIPS signatories’ flexibility in ensuring access to medicine. This was followed by the Ministerial Declaration of 2005, which amended the agreement and allowed some countries to obtain generic medicines more easily24.

The only IP mandate remaining for the Doha negotiations involves the multilateral register for wines and spirits (Article 23.4 TRIPS). However, the deadlock of the Doha Development Agenda (DDA) means that the matter is also effectively blocked. Given the significant

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23 See WTO, Negotiations, implementation and TRIPS Council work
24 The amendment is still not in force because only 60 countries (the EU and the chief developing countries) have ratified it; two thirds of WTO members are needed, ie.105 states. The Declaration introduces a permanent system of compulsory licences that allow companies to produce vital medicines covered by patent, and to export them in countries with limited or no capacity to produce them. It is true that this system has not been widely used, but the remedy of compulsory licence was per se effective since medical companies preferred to reduce prices on medicines instead of risking a case that might deprive them their monopoly of production on vital medicines. This explains why developing countries’ protests against TRIPS have dies down.
IP provisions are appearing more frequently in regional trade agreements (RTAs).

The surge of piracy and trade in counterfeit goods, the world’s largest trading blocks, the EU and the US, have therefore tried to address the problem by introducing IP provisions in their new trade agreements.

While ACTA was the first comprehensive effort to update the TRIPS rules on enforcement on a plurilateral basis, many other regional trade agreement (RTAs) have recently included provisions on IP. A recent WTO study\(^\text{25}\) reveals a global surge\(^\text{26}\) of IP clauses in recent RTAs, which include free trade agreements and economic integration agreements.

The magnitude of the trade of counterfeited goods which lies beyond the inclusion of IP provisions in FTAs is analysed in Annex 1.

### Table 2:
Number of regional trade agreements (RTAs) containing any type of IP provisions

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<td>Free trade agreement (FTA)</td>
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<td>22</td>
<td>19</td>
<td>20</td>
<td>4</td>
<td>79</td>
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<tr>
<td>RTAs containing IP provisions</td>
<td>26</td>
<td>29</td>
<td>44</td>
<td>58</td>
<td>8</td>
<td>165</td>
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**Memorandum items:**

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<td>All RTAs</td>
<td>34</td>
<td>34</td>
<td>51</td>
<td>67</td>
<td>8</td>
<td>194</td>
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*Source: Intellectual property provision in regional trade agreements\(^\text{27}\)*

#### 3.2. The EU IPR strategy in earlier agreements

Individual provisions in the IP chapters of European FTAs have been tailored according to the markets of the negotiating countries, and the Union’s approach has varied from country to country. In general, however, these provisions have evolved from those of first generation agreements (South Africa 1999, Mexico 2000, Chile 2002), in which the EU tried to simply reaffirm TRIPS obligation and not to overload those countries with WTO-plus provisions. More recent, second-generation agreements (Peru-Colombia 2012, Korea, Central America), on the other hand, incorporate a complete description of IPRs, enforcement measures, lists of protected geographical indications and their relations with trademarks, border

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\(^{25}\) See WTO, *Intellectual property provisions in regional trade agreements*

\(^{26}\) The apparent decline after 2009 can be explained by the lengthy time in notification of RTAs to WTO, which means that data related to 2009 and 2010 are deemed incomplete.

\(^{27}\) WTO, Economic Research and Statistic Division, *Intellectual property provisions* in regional trade agreements, p. 8
measures and, in some cases, internet provisions and protection of biological resources as determined by the Convention on Biological Diversity.

An example of a first generation treaty is the Comprehensive Free Trade Agreement with Mexico, which entered into force in October 2000. Article 12 of this agreement foresees an engagement to 'establish the appropriate measures in accordance with a view to ensuring an adequate and effective protection with the highest international standards, including effective means to enforce such rights'. The article also establishes a consultation system to address contentious issues and to adopt further, detailed measures at a later stage.

The most significant example of second-generation treaty is the EU-Korea FTA, which foresees detailed IP rules, such as criminal sanctions for wilful trademark counterfeiting and copyright piracy on commercial scale (see Article10.54, in line with TRIPS Article 61), clear procedures for trademark registration and opposition, a list of geographical indications to be protected, and clear rules on enforcement at the civil, border and criminal levels.

3.3. A comprehensive strategy and its evolution

In May 2005, the European Commission approved the ‘Strategy for the enforcement of IPR in third countries’, a comprehensive document aimed at fighting counterfeiting and piracy in third countries. The strategy marked a turning point for the EU, as it moved from first- to second-generation free trade agreements. The strategy defines, in line with the EU acquis, which countries and which actions constitute priorities, for both multilateral negotiations (mainly in the WTO, within the TRIPS Council, but also in the World Intellectual Property Organisation — WIPO — and the World Customs Organisation — WCO) and bilateral negotiations. Plurilateral actions — such as ACTA, which was principally driven by the US and Japan — were not envisaged by the Commission in the strategy.

The strategy led to various actions. A debate on the problem of piracy and counterfeiting was launched in the TRIPS Council after coordinating with the EU’s main trading partners. Enforcement clauses also began to be introduced in bilateral agreements with third

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28 See: Economic Partnership, Political Coordination and Cooperation Agreement, OJ of the European Communities, 28 October 2000
29 See: Strategy for the enforcement of intellectual property rights in third countries, OJ of the European Communities, 26 May 2005
30 See: Strategy for the enforcement of intellectual property rights in third countries
In 2009, the list of priority countries was updated. Countries. In case of disputes, the EU prefers to adopt preventive solutions within political dialogue and with technical assistance, but recourse to sanctions — such as actions within the Trade Barrier Regulation mechanism and WTO dispute settlement mechanism — are not excluded when justified.

The list of priority countries defined in the strategy framework was updated in 2009, as follows:

1. China.
2. Indonesia, the Philippines, Thailand and Turkey.
3. Argentina*, Brazil*, Canada, India, Israel, Korea, Malaysia, Russia*, the United States and Vietnam.

*Countries with an asterisk have demonstrated substantial improvement in the ongoing IPR dialogue.

The Strategy is now subject to revision. Following a public hearing in May 2011, a decision of the Commission College should lead to the publication of a new strategy during the first half of 2013. The update will most likely devote greater attention to Russia, will include the digital environment (which was absent in the previous version), and add substantial provisions on IPR to the enforcement objective contained in the 2005 strategy.

Recent FTAs (Korea, Peru-Colombia and Central America) include such new rules. IP provisions are also incorporated in the EU’s economic and partnership agreements (the first to be concluded being the Cariforum Economic Partnership Agreement, or EPA) and the partnership and cooperation agreements (PCAs having already been concluded with eastern European countries, the southern Caucasus and Central Asia). All the EU’s PCAs — with the exception of that with the Republic of Moldova — contain a chapter on the protection of intellectual, industrial and commercial property and on legislative cooperation.

The following table summarises the evolution of FTAs (and of one EPA) over the last decade.

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31 Compared to the 2006 lists, Canada, Israel, India and the United States have been added, while Paraguay and Chile have been removed. See European Commission - IPR enforcement strategy.
32 See: Report on the EC’s strategy for the protection and enforcement of IPRs in third countries, 27 June 2011
33 See Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries, November 2010

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**Table 3: Evolution of EU FTAs** *(Source: European Parliament, Policy Department - External Policies)*

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<td>Technology transfer</td>
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<td>Technical assistance</td>
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<td>Cooperation</td>
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<td>Public health</td>
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<td>Convention on Biological Diversity</td>
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<tr>
<td>Biodiversity and traditional knowledge</td>
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</table>
In the first phase (running from the 1999 EU-South Africa agreement to the 2002 EU-Chile one), the IP chapter consisted simply of a mention of a general obligation deriving from international treaties (WTO and WIPO). Individual IPRs are mentioned without detailed provisions, and most agreements mention only ‘general commitment’ to cooperation on the subject.

Reference to transfers of technology appeared in the 2000 EU-Mexico agreement, and a detailed agreement on wine geographical indications was included the in 2002 EU-Chile text.

The 2008 European Partnership Agreement (EPA) with Cariforum countries signalled the transformation to second-generation treaties, with detailed provisions on individual IPRs and enforcement. With the EU-Korea agreement, the internet was also included.

In recent agreements, the Commission seems to have grown committed to strengthening substantive rules on IPRs\(^{34}\), including provisions on **copyrights** (through which the EU wishes to protect music, films, media and software while also limiting the liability of internet service providers and not restricting internet freedom), **geographical indications** (aimed at protecting the strong reputation of EU agro-food names in non EU markets), **technology transfers**, **industrial design** and **patents**. (Because internal competence on patents is not yet harmonised, however, the Commission has essentially only negotiated rules on the pharmaceutical sector and patent procedural terms).

A set of enforcement measures is also often introduced in FTAs in order to provide civil remedies (such as provisional measures, injunctions and damages), border measures and, when needed, criminal provisions. In other words, the EU has introduced rules to protect, on one hand, innovation and creativity (via patents, trademarks and industrial design) and, on the other, tradition and territorial peculiarity (via geographical indications).

A particular provision, included for the first time in Article 10.40 of the EU-Korea agreement, and then incorporated into Article 201 of the EU-Peru-Colombia text, is the **protection of genetic resources**\(^ {35}\) foreseen by Article 15.7 of the Convention on Biological Diversity (CBD), an international treaty concluded under the UN’s aegis and intended to protect genetic resources of developing countries. Since these resources may be patented under the TRIPS agreement (Article


\(^{35}\) See the comprehensive Commission Strategy on Biological Diversity: [EC - intellectual-property- biodiversity](http://ec.europa.eu/environment/biodiversity/strat/doc/2012-07-05-steg_2012_en.pdf)
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Second-generation FTAs also incorporate internet provisions and descriptions of the liability of internet service providers.

27.3), the CBD introduced the principle of benefit sharing that would allow developing countries that own a patented genetic resource to benefit from new pharmaceutical patents. In the July 2008 WTO Ministerial Conference in Geneva, the EU supported developing countries attempting to modify the TRIPS wording, aligning it with the CBD by introducing the principle of benefit sharing and prior informed consent on the use of genetic resources. However, this effort was subsequently blocked by the general DDA deadlock. The EU has as a result introduced provisions on benefit sharing and prior informed consent in its FTAs with Andean Countries and Korea. The Commission has also presented a proposal to the Council and Parliament to implement the Nagoya protocol in Europe. This protocol, which was added to the CBD in 2010, establishes a clear legal framework and procedures for accessing genetic resources and benefit sharing.

Internet rules are also included in second-generation FTAs. These derive from the EU acquis (and principally the Electronic Commerce Directive of 2000). The aim is to create harmonised rules on transparency and information requirements for online service providers, commercial communications and electronic contracts.

Significantly, the rules also limit the liability of intermediary service providers. As established in the EU-Korea and EU-Peru-Colombia FTAs, the EU has established a regime of no liability for internet service providers (ISPs) if they are mere conduits (simply transmitting information provided by the recipient of the service). ISPs have conditioned liability if they are caching (temporarily storing information for the sole purpose of making the transmission more efficient) or hosting (storing information). Liability is excluded if the hosting ISP has no knowledge of the illegal activity.

The EU-Korea FTA excludes a general obligation to monitor the retransmission and storage activities of ISPs.

Measures adopted to protect technological measures are also established, in order to prevent or restrict acts of removal not authorised by the right holder. (EU-Korea FTA Article 10.12). The ‘prohibition of violating technology measures’ — by bypassing cryptography, digital signatures or serial copy management system, for

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36 The W52 proposal amended TRIPS on CBD issues, but also at establishing the wine and spirit GIs register and the extension of GI protection of art.23 TRIPS to product other than wine and spirit was lodged on 19 July 2008 and was supported by 108 WTO members. See WTO - Draft Modalities for TRIPS related issues
37 See EC - Biological Diversity
38 See EC - E-Commerce Directive
example — on the internet or on physical supports such as CDs is also included in ACTA, as in the EU-Peru-Colombia. Theses provisions derive from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which both entered into force in 2002.\(^{39}\)

It is obvious that the Commission has already begun implementing an internet strategy in bilateral agreements, introducing WTO-plus provisions in order to export the EU *acquis* to other countries. No TRIPS-minus provision has yet been introduced; these would, in any case, violate the EU's WTO obligations.

### 3.4. The EU’s intellectual property strategy in ongoing negotiations

IP rules in ongoing negotiations are likely to be consistent with the EU strategy.

The EU’s IP approach in current trade negotiations is likely to be consistent with the strategy described in the previous paragraphs, and to continue to include internet provisions incorporated in second-generation agreements. Because ongoing negotiations are often confidential, the information provided below is incomplete, as it is based solely on publicly available information.

The first post-ACTA agreement likely to be signed by the EU is the **EU-Canada Comprehensive Economic and Trade Agreement** (CETA), launched in May 2009. Negotiations are expected to be concluded by the end of 2012. According to a leaked version of CETA circulated in February 2012,\(^ {40}\) the agreement contained provisions similar to ACTA’s. The treaty was therefore heavily criticized, especially for its chapter on criminal enforcement and internet infringements.\(^ {41}\) After the EP rejected ACTA in July, the Commission noted that CETA’s internet-related provisions were based on the EU *acquis* (Articles 12-15 of the E-commerce Directive) and not on ACTA. The Commission also announced that it had requested the EU Presidency to withdraw the criminal enforcement provisions.

According to some sources,\(^ {42}\) the draft echoed the language of TRIPS, requesting dissuasive criminal sanctions for trademark and copyright infringements. Legally, however, decisions on criminal sanctions must be taken by the EU Council, and for the moment, there is no official news.

The internet chapter of CETA is expected to depart from ACTA in terms of the obligation of ISPs for ‘notice and takedown’. Indeed CETA is likely to adopt a less stringent system of ‘notice to notice’. ISPs would be solely required to inform users that they are posting content that infringes IPRs, rather than launch an action against users. CETA is also unlikely to

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\(^{39}\)See [WIPO - Which is the legal framework for technological protection measures?](https://www.wipo.int/copycenter/en/)


\(^{41}\)See for example C. Rossini, [Canada-EU Trade Agreement Replicates ACTA’s Notorious Copyright Provisions](https://opennet.net/blog/2012/10/canada-eu-trade-agreement-replicates-actas-notorious-copyright-provisions), 13 October 2012

\(^{42}\)World Trade online, [In Shadow Of ACTA, EU Drops Criminal IPR Provisions In CETA Talks](https://www.worldtradeline.com/article/in-shadow-of-acta-eu-drops-criminal-ipp-provisions-in-ceta-talks), 02 November 2012
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Geographical indications are likely to be a stumbling block for CETA.

Negotiations for an EU-India FTA must overcome differences related to medicines.

Negotiations with ASEAN countries also include IP

provide right holders the possibility of obtaining the names of users alleged to be infringing on the law, as ACTA’s Provision 27(4) would have permitted in case of a substantiated claim. CETA is also expected to include detailed provisions on all IPRs (trademarks, copyright, patents, designs, geographical indications and so on), as well as on enforcement, as in the EU-Korea FTA. Contentious issues that have apparently not yet been agreed upon are rules on wine and spirits, those on patents for pharmaceutical products and those on geographical indications. These last are thorny issues. As many Canadians emigrated from the EU, a number of European GIs were also ‘imported’ with them, creating some embarrassing conflicts (such as the Prosciutto di Parma case43). A positive outcome for the EU would include a list of agreed GIs for foods, an agreement on the use of generic names, an agreement on coexistence and prior use of trademarks and GIs, and *ex officio* GI protection. The actual outcome of negotiations will be revealed in the coming months.

Minor progress has been made so far in ongoing FTA negotiations with India, launched in June 2007. The chief issues in this process revolve around India’s defensive stance on medical patents, enforcement measures and, notably, border measures for goods in transit44. The detention of goods of Indian origin by EU customs is a particularly delicate point: on the one hand, considerable quantities of counterfeit pharmaceuticals of Indian origin are confiscated every year in the EU (7750000 in 2011)45; and on the other hand, a number of generic pharmaceuticals transiting through Europe were wrongly seized in 2008. Both parties made efforts to narrow the gaps in anticipation of the February 2012 Summit. Although some have expressed doubts over the concrete benefits that Indians will gain from the FTA46, the final joint declaration of the summit referred to the imminent completion of the trade talks47.

IP chapters are also included in all ongoing FTA negotiations with ASEAN countries48 — namely, Vietnam, Singapore and Malaysia. While the

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43 The famous Italian ham has been forbidden from exported with its own name as the name was registered by ‘Maple Leaf’, a Canadian producer of canned meat, HuffPost Politics, 17 October 2011
46 See B. Dowling and A. Mathur, *Beyond-brics - India should be wary of Europe trade negotiations*, 2012
47 See EEAS *India-European Union Joint Statement, 10 February 2012, New Delhi*
48 In December 2009 the European Council gave the Commission the green light to pursue negotiations for free trade agreements with individual ASEAN countries, beginning with Singapore. In 2012, negotiations were launched with Vietnam. However, the ultimate goal remains a region-to-region FTA. Alongside the free trade agreement, negotiations are also
provisions, and an FTA with Mercosur will also delve into the issue. Agreement with Singapore is nearly concluded, little progress has been reported with Vietnam or Malaysia on the IP chapter. In fact, negotiations with Malaysia, launched on 10 September 2010 generated controversy on this chapter. Negotiations for an FTA with Mercosur (Argentina, Brazil, Paraguay and Uruguay) were restarted on 17 of May 2012. IP is expected to be part of the agreement, although concrete offers have yet to be tabled.

In all these FTAs, the EU is likely to follow the IP strategy described in Chapter 4.3: incorporating TRIPS-plus provisions, improving protections for GIs and including internet chapter consistent with the EU acquis. Other IP dialogues have been established with countries that are part of the EU strategy, but for which no FTA mandate exists, including China, Thailand, Russia; Ukraine and Turkey. These dialogues lie beyond the scope of this note, despite the centrality of China to the problem (see Table 1).

4. The EU and US strategies on IP protection in international treaties. A possible compromise?

4.1. The US strategy on IP protection

The USA deserves a special mention because its IP strategy differs in a number of key aspects from the European. ACTA — and particularly its most controversial internet provisions — represented, in fact, a hard-won compromise between the EU and the US. The outcome was unsatisfactory for both parties. The treaty echoed the US approach to counterfeiting and piracy issues, although provisions included in draft bill legislation and ongoing trade negotiations are much stronger than ACTA.

The principal difference with the EU’s strategy revolves around the productive structure in the US. EU — the main exporter of quality
agri-food, fashion trademark — is committed to the international protection of GIs, trademarks and patents, while the US is more focused on copyright and related rights, the fight against piracy, and patent enforcement. Indeed, 6% of the US GDP is generated by an industry supported by IP laws\(^\text{56}\), and 24% of global internet traffic infringed on IP laws\(^\text{57}\). The US earns more from its foreign royalties than it does from farm exports; and the net surplus in royalties in 2011 was double that generated by the agriculture sector\(^\text{58}\).

As a result, the US has quite stringent laws on copyright protection, such as the Millennium Digital Act of 1998. Even stricter domestic bills are being introduced, and the US administration is making an effort to reproduce their own digital laws — just as the EU is doing with its own acquis — in international agreements such as ACTA and the TPP.

Within the US, there exists a fierce debate between the entertainment industry (the Hollywood lobby) and the internet industry, including the ISP (the telecom/internet lobby)\(^\text{59}\). The former wishes to regulate the digital environment by introducing heavy sanctions against acts of piracy committed at both the commercial and individual level, while the latter wishes to broaden free content on the internet. The internet lobby is a quite recent arrival on the US political scene, having created a formal lobby only in September 2012, when Google, Amazon, Yahoo and Facebook created 'The internet association'\(^\text{60}\).

Yet the relative newness of this lobby also underscores the US's focus on copyright protection. ACTA and the on-going negotiations for TPP have adopted an approach aimed at strengthening rules to effectively fight piracy and counterfeiting, and to create jobs and innovation in the copyright-protected industry.

In addition to its international strategy, the US is pursuing domestic forms of copyright protection. Important bills to fight piracy were

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\(^{60}\) See Financial Times of 23 September 2012
discussed during the 112th term of the Congress, which will end on 3 January 2013 the PROTECT IP Act61, (PIPA), the stop online piracy act (SOPA)62 and the Online Protection and Enforcement Act (OPEN)63, all driven by the entertainment lobby and intended to eliminate the ‘safe harbour’ provision that partially shields internet service providers from liability. Yet it is unclear whether the next Congress will return to these bills. As could be expected, the bills faced heavy opposition from internet service providers and civil society, who argued that more stringent rules would limit freedom of expression. As a form of protest, a number of well-known US websites launched a blackout on 18 January 2012. More than 10 000 websites worldwide took part in the action64.

At the international level, the US intends to have similar and even more stringent provisions (ACTA-plus) to be included in the Trans Pacific Partnership (TPP) Treaty, whose talks are conducted with eight other Asia-Pacific countries. These provisions face resistance from New Zealand, Malaysia and Vietnam65 and the recent inclusion of Mexico and Canada among the negotiating countries has apparently complicating the process. As a result, the US is expected to table a milder proposal on IP in March 201366. Details of those negotiations are carefully kept secret, but according to some sources67, the US is trying to export a set of rules on electronic commerce, on television retransmission and on copyright exceptions that may result in excessive limitation to domestic policies in areas such as the privacy of data flow on the Internet or the ISP criminal liability. In any case, even given the US’s long-standing preference for private driven legal action, the country has reportedly accepted that the ‘investor-state’ provision will not apply to IP rights. (This was the case for the US-Korean FTA.) This concession will prevent Hollywood companies from

61 Introduced in the Congress in May 2011 by Senator Patrick Leahy, the draft Bill S.968 (the ‘PROTECT IP Act’, or PIPA), is aimed at providing the Department of Justice with the power to close websites accused of hosting protected material.
62 HR 3261, ‘Stop Online Piracy Act’ (SOPA), lodged in October 2011 by Representative Lamar Smith follows the same lines as PIPA in providing the Department of Justice new powers, while also increasing criminal penalties for online streaming and other piracy practices.
63 The bills S 2029 and HR 3782 (‘Online Protection and Enforcement Act’, or OPEN) are aimed at addressing copyright infringements in foreign countries by providing the International Trade Commission with the power to investigate foreign websites.
66 See Inside US Trade - 12/07/2012 "U.S. Failure To Table Patent Proposal Could Hinder IPR Progress".
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directly suing TPP Members for copyright infringements.

4.2. The future EU-USA negotiations

As described above, both EU and US are determined to export their internal rules on IPR protection. Yet given the size of their trade — the biggest in the world — and the fact that the legal framework of this trade is made up only of WTO rules and dispute case law, the two have begun to discuss a possible bilateral trade agreement.

The interim report of the High Level Working Group on Jobs and Growth, published on 19 June 2012, opens the door to negotiate ‘a comprehensive agreement that addresses a broad range of bilateral trade and investment policies’.

Such policies would include an IP chapter. As the report states, both partners ‘are committed to a high level of intellectual property protection, including enforcement, and cooperate extensively through the Transatlantic IPR Working Group’. The US and the EU often adopt similar positions in WIPO talks, and both have industry protected by trademarks, patent and copyright.

Yet the failure of ACTA has demonstrated that European and US approaches to copyright protection and Internet regulations are not easily reconcilable. Divergent legal cultures, different approaches to fundamental rights and distinct conceptions of freedom of expression are not easy to align, even for the important goal of protecting intellectual works and goods.

As a result, the High Level Working Group also declared that ‘both sides agree that it would not be feasible in negotiations to seek to reconcile across the board differences in the IPR obligations that each typically includes in its comprehensive trade agreements.’

It is still possible that negotiations will be launched in this area, but only after further consultation.

68 See EC, DG TRADE - Interim Report, EU-U.S. High Level Working Group on Jobs and Growth, 19 June 2012
69 See EC, DG TRADE, 19 June 2012
70 See EC, DG TRADE, 19 June 2012
FINAL REMARKS

The different views of the EU and the US presaged the failure of ACTA. The two partners will continue to pursue their separate IP strategies with their trade partners, many of which are negotiating with the EU and the US simultaneously (as is the case for Canada and Japan). The US will maintain its efforts to sign the plurilateral TPP, and EU will pursue bilateral FTAs which include the present strategy on IP protection in trade agreements. Furthermore a new European strategy, which will update the one of 2005 and probably include an internet chapter, will be presented by the Commission quite soon. Yet the repercussions of the EU’s rejection of ACTA mean that the next wave of European draft agreements is unlikely to include contentious provisions or rules that are not in line with the EU acquis. Whether or not provisions similar to those contained in ACTA reappear in the upcoming — and still secret — CETA agreement will provide a good taste of IP rules to come.
ANNEX I   IPR infringements in the EU

The EU’s rejection of ACTA does not mean that fight against counterfeiting is no longer a priority for the EU. On 5 June 2012, the new European Observatory on Infringements of Intellectual Property Rights entered into force. The aim of the Observatory is to coordinate EU internal policy regarding the fight against piracy and counterfeiting, and to align efforts related to the enforcement of intellectual property rights.

The EU and many other members of the global economy are increasing their protection of intellectual property to better defend their innovation and their exports of trademarked goods in foreign markets.

The following table demonstrates a worldwide increase in the number of applications for IPRs in 2010. (The number had fallen in 2009 due to the ongoing financial and economic crisis.)

<table>
<thead>
<tr>
<th>Year</th>
<th>Trademark</th>
<th>Patent</th>
<th>Industrial Design</th>
<th>Utility Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>2,000,000</td>
<td>1,500,000</td>
<td>500,000</td>
<td>100,000</td>
</tr>
<tr>
<td>2009</td>
<td>2,100,000</td>
<td>1,600,000</td>
<td>550,000</td>
<td>110,000</td>
</tr>
<tr>
<td>2010</td>
<td>2,200,000</td>
<td>1,700,000</td>
<td>600,000</td>
<td>120,000</td>
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</table>

This increase in applications stems, on the one hand, from the changing pattern of the world economy and the need to protect new products and ideas, and, on the other hand, from the dramatic rise in the trade in counterfeit goods. This second development has particularly affected the EU, whose nationals apply for a great many patents and trademarks.

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71 On 19th April 2012, the European Parliament and the Council signed Regulation (EU) No 386/2012 entrusting the Office for Harmonisation in the Internal Market (OHIM) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives. The Regulation enters into force on 5 June 2012.

72 See WIPO (World Intellectual Property Organization) Facts and Figures 2012
and who own many GIs. IP has been defined as the ‘raw material of the Union’\textsuperscript{73}, although this material is increasingly under pressure. National customs authorities in the EU have noted a trebling in the number of counterfeited goods entering EU between 2005 and 2010.

\textbf{Figure 3:}
Number of registered cases and seized articles\textsuperscript{74, 75}

Even these impressive statistics do not provide an accurate overview of the problem, as they do not include online piracy. Customs can only block, seize, destroy and detain traded physical goods, such as CDs and DVDs. Yet the larger problem for the enforcement of IPR, especially for the US economy\textsuperscript{76}, is internet data flow. Based on customs figures for seizures and detainments, the most violated IPR in the ‘physical world’ is the trademark (see the following graph\textsuperscript{77}). Yet in the digital environment, the most violated IPR is copyright.

\textbf{Figure 4:}
IP rights by value

\textsuperscript{73} See INTA recommendation to the Plenary, 22 of June 2012
\textsuperscript{74} See EU Commission DG Taxud.
\textsuperscript{75} A case represents an interception by customs. Each case contains a certain amount of individual articles that can vary from 1 to several million and can contain articles of different categories. Source: Report on EU customs enforcement of IPR, 2012
\textsuperscript{76} As stated above, the 6% of US GDP is generated by an industry supported by IP laws.
\textsuperscript{77} See: Report on EU Custom Enforcement on IPRs 2011
The impact of piracy is far from negligible for EU. One of the few studies on the matter calculated that in 2008 the EU's core creative industries (which manufacture and distribute creative products, including film, television, music, publishing and advertising) contributed to 4.5% of the EU’s GDP —approximately EUR 560 billion — and represented 3.8% of the total workforce, or approximately 8.5 million workers. In 2008, the Union’s creative industries most impacted by piracy (film, TV series, recorded music and software) experienced retail revenue losses estimated at EUR 10 billion. The same year, it was estimated, more than 185 000 jobs were lost as a result of piracy, much of it digital. The study estimates retail revenue losses will amount to as much as EUR 240 billion, resulting in 1.2 million fewer jobs, by 2015.

Multilateral trade rules have yet to take such losses into consideration. As they do, there will be little alternative to negotiating new international instruments.

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78 See Tera Consultants 2010 - Building a digital economy
79 The figures are even larger when including the non core industry (which includes activities such as the manufacture and sale of hardware — TVs, music-playing devices, etc. — and non-dedicated industries such as transport). In this case, the % of GDP in 2008 was 6.9, the added value EUR 862 billion, and the number of workers 14.4 million.
80 With the remarkable exception of the WIPO treaties aimed at protecting against the violation of technological measures.