United or Divided We Stand? Perspectives on the EU's Challenges

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It started out with a kiss. How did it end up like this?; An analysis of TRIPS-Plus provisions within EU FTAs

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Currently the European Union is engaging in Free Trade Agreements with a number of nations. While the actual title of the agreements will vary based objectives of the negotiation parties, the political aspirations, or the desire for catchy anagram, at their core[1] they are Free Trade Agreements in effect and intention, as "a rose by any other word would smell as sweet."[2] At present the EU is engaged in the negotiation of nine FTAs across the globe at various stages of completion. While the negotiations process is still open and subject to many moving parts, particularly in light of the TTIP and TTP, as well as global political and economic trends, we can state each of these negotiations are based on two fixed positions. Firstly, the TRIPS Agreement itself, it provides the last two decades of international intellectual property development has based itself on. Secondly, each agreement currently in negotiation will be greatly influence by prior agreements completed by the EU and its various trading partners. This in turn will be affected by the broader economic and political climate, international treaties of the day, and international matters affecting IP within the EU, each feeding into and influencing the other.

As such, prior to examining current negotiations, we must first complete a comprehensive analysis of the history TRIPS-Plus provisions within the EU FTAs and other Trade Agreements.[3] This scale of analysis offers a number of benefits. Firstly, this analysis will highlight the full development of TRIPS-Plus provisions within EU FTAs. This is important, as while the early FTAs did not have a large or well developed scope of IP protection provisions, they served a important function to ensure the terms and standards of TRIPS were being upheld. As the FTAs developed, the importance of IP became more apparent and integral to the negotiation process. This leads to the second benefit of this approach. By discussing all the completed FTAs we can see chart the growing importance, and the growing recognition of the importance of IP as a global tool for economic development. From this, we can see the broader impact of economic and political developments have on the international IP sphere. By examining twenty plus years of development, this approach charts the gradual shifts in negotiations[4], and the corresponding impact they have had on the FTAs. Thirdly, this approach mitigates the problems which may arise from examining a select few nations. By solely focusing on developed or IP producing nations, the results will show an acceptance of TRIPS-Plus provisions, as all parties of the negotiation will be seeking higher levels and operate similar standards of IP. Similarly, a study focusing solely on developing nations who have negotiated FTAs with the EU, would fall victim to false readings, particularly the acceptance of TRIPS-Plus provisions beyond what the negotiating state needed in exchange for economic benefits.

TRIPS-Plus provisions within EU negotiated FTAs, can be roughly divided into three categories. While there will be varying degrees of difference between each FTA, reflective of the specific negotiation parties, the the broader discussion of international IP protection, the involvement the non-EU negotiating party has in the broader discussion (namely their own FTAs), and a degree of economic and political will. The first era relates to FTAs completed during the mid to late 1990's. During this period, TRIPS would be a fresh idea, a fresh Agreement in force. Its flaws not fully realised or addressed. As such, the notion of IP as a developing issue was not a large or pressing factor in many of these FTAs.

1 The core aims of the various agreements can be broadly described as seeking to open new markets for goods and services, increasing investment opportunities, removing custom duties and trade barrier thereby making trade cheaper and more desirable, and developing a more predictable policy environment by taking joint commitments on areas that affect trade such as intellectual property rights, competition rules and the framework for public purchasing decisions.

2 Romeo & Juliet Act II Scene II.

3 The EU also engages in a number of Stabilisation & Association Agreement and Association Agreements. While such Agreements operate under different competencies and goals, from the perspective of this research, they are similar to FTAs in their introduction of TRIPS-Plus provisions. As such, their discussion is warranted and justified in this chapter.

4 Forum shifts, political shifts, economic shifts, or legal shifts.

The second era relates to FTA in the early 2000s. At this point, the flaws in TRIPS are starting to be coming clear and rise to the forefront. Spurred on by US developments such as the RIAA's response to piracy and the attempts to mitigate this at the international level with the US-Jordan FTA, IP was on the track to become a core, or at least consistent aspect of FTAs. The third era relates to FTAs in the late 2000's / early 2010's. A key factor of this era was the development and subsequent rejection of ACTA and the upcoming TTIP & TTP negotiations.

This paper discusses the gradual and not so gradual increases in TRIPS-Plus provisions found within EU FTAs on a number of grounds. Firstly, this chapter looks at the language of the TRIPS-Plus provisions. Whether the language is reflective of the aspirational goals of the FTA's preamble or if the FTA expresses the requirement for strict adoption of provisions. Secondly, this chapter will test the FTA's in addressing the growing concern of balance between the parties. This will have a high degree of cross examination with the first assessment, particularly whether both sides are treated to similar provisions or requirements. Thirdly, this chapter will assess the impact each FTA had on the immediate IP sphere and its broader impact in the future evolution of FTAs, chiefly, was the FTA under scrutiny the start of a new trend in negotiation and TRIPS-Plus provisions or if it was a unique feature as a result of the negotiating parties in question. In addition, this chapter will determine the influence each stage has had on the broader IP sphere, chiefly how the FTAs have affected the evolution and scope of multilateral agreements and the subsequent rounds relating to the GATT and TRIPS agreements and the place of IP during such negotiations.

The Post TRIPS era

In 1997, the EU brought into force its FTA with the Faroe Islands.[5] This was the first to be completed following the ratification of TRIPS. While the Faroe Islands were not not a member of the WTO, and thereby not obligated to protect IP to the level of TRIPS, the EU was bound by the terms and obligations of TRIPS. As such, it is somewhat surprising that EU-Faroe Islands did not contain a single direct reference to IP protection. This is surprising, as the EU was a strong proponent of TRIPS and the introduction of IP protection at the international level. While EU-Faroe Islands does express the desire of harmonious trade and economic development,[6] the lack of direct reference to economic growth based on IP industries, clearly shows it was not a high priority at this point. While EU-Faroe Islands did not contain direct reference to IP, it will still offer valuable insight into the development of TRIPS-Plus provisions with EU FTAs. Firstly, if we look at the language of the FTA, while the preamble contains the aspirational goals and objectives of the FTA, its nature is reflected in the broad and aspirational language used. That said, these goals are later addressed in more concrete and enforceable terms throughout the FTA. From this enforceability, a broad interpretation of trade and economic development may include IP protection and enforcement methods. Secondly, this FTA shows that bilateral agreements are still a viable option following the GATT and TRIPS agreements. While this is not an significant element of this FTA, it did set the stage for future developments discussed below.

The same year the EU completed a FTA with the Palestine Authority.[7] Unlike the previous FTA, under Title II Chapter 2, EU-Palestine begins to specifically address the idea of IP protection. Under Article 33, parties are required to introduce effective protection and enforcement methods for IP “in

5 Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, signed 1 January 1997, Official Journal L 053, 22/02/1008. Hereafter EU-Faroe Islands.

6 EU-Faroe Islands Article 1.

7 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed 1 July 1997, Official Journal L 187, 16 July 1997. Hereafter EU-Palestine.

accordance with the highest international standards, including effective means of enforcing such rights." However, we must note that this standard would be beyond that of TRIPS which operated as a minimum. In addition, Article 33(2) contained a mechanism to allow a revision of this standard, for the parties to re-examine this protection if is found to be creating trade difficulties. While a cursory glance may suggest a mechanism to reduce the burden of IP protection if they are found to create trade difficulties, the language of the rest of Article 33 suggests the opposite. That the operation of IP protection in relation to the "highest standards" suggests a bias towards the IP right holder. This is further strengthen, when we examine the lack of direct reference to the end user or to broader access to IP. While the preamble and FTA includes various references to the economic and social development, access to IP would not have been a high priority of social development at the time. As such, Article 33(2) was allowing an upward ratchet of IP protection and enforcement measures. As stated above, this was the first EU FTA to include IP provisions, they were linked or possibly lumped with industrial and commercial property rather than as a separate aspect of the FTA. While their inclusion was a start, we can see it was the beginning of a gradual process of not only introducing IP into EU negotiated FTAs but the growing linkage of trade and IP matters.

As with the previous FTAs, the FTA negotiation with Tunisia,[8] opens with a broad statement of the goals and objective. Again, these goals are reflected in the aspirational language of the preamble. While the broadly defined goal of economic development is discussed early in the FTA, it is not until Article 28 of the FTA that IP is first mentioned. Even then it is mentioned in passing rather than a specific IP provision. Article 39 of this FTA addresses IP identically to the Article 33 of EU-Palestine, that IP should be protected to the "highest international standards" and to do so "shall encompass effective means of enforcing such rights." Similarly, this Article contains a provisions which allows a revision of the protection methods the parties are obligated to provide and enforce. Article 51, specifically subsection (c) introduces a new element into the IP discussion, that under this FTA that Tunisia will cooperate in the standardisation and conformity of assessing if the obligations are met. However, unlike the previous two FTAs discussed, Tunisia has been a member of the WTO since 1990, as such, it is bound by TRIPS. As mentioned above, the identical adoption of the requirement to protect IP under this FTA and EU-Palestine shows the EU as the primary party of this negotiation, in that the terms are relative to the position of the EU. Given the EU's economic weight and bargaining power, it is clear why this is the case.

This in turn lead to the EU- Morocco FTA,[9] the EU-Israel FTA,[10] the EU-Mexico FTA,[11] and the EU-South Africa FTA.[12] Each brought into force in 2000 and each a member of the WTO, and as such, bound by TRIPS. For the sake of brevity, and to avoid repetition, due to the FTAs being negotiated concurrently and are identical in all aspects relevant to this research, they will be discussed as one

8 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, Signed 17 July 1995, Official Journal L 097, 30 March 1998. Hereafter EU-Tunisia.

9 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part , signed 26 February 1996, Official Journal L 70, 18 March 2000. Hereafter Eu-Morocco.

10 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, signed 20 November 1995, Official Journal L 147, 21 June2000. Hereafter EU-Israel.

11 Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, signed 8 December 1997, Official Journal L 157, Official Journal L 276, 28 October 2000. Hereafter EU-Mexico.

12 Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part , signed 11 October 1999, Official Journal L 311, 4 December 2012. Hereafter EU- South Africa.

section. Each FTA contains a preamble stating the aspirational goals with reflective aspirational language. The FTAs in turn move to discuss the introduction of allowances to prohibit or restrict the importation of goods, which expressly includes IP, provided this is not an arbitrary decision nor a disguised barrier to trade.[13] The FTAs would later reaffirm the importance of providing "adequate and effective protection in accordance with the highest international standards, including effective means to enforce them."[14] Again subsection (2) of the Articles included a provision for this standard of protection to be revised or reviewed if and when, with an underlying emphasis on when, this Article creates a problem with trade. In the broader development of the international IP sphere, these FTAs show the relativity of the EU's position in the discussion. That the EU does not have to alter is laws to comply with the terms of these FTAs, as far as IP protection is concerned. In addition, the EU has seen the willingness to accept a higher standard of IP protection than needed in exchange for favourable trading terms and tariffs.

The dawn of TRIPS-Plus era

The FTA between Jordan and the EU,[15] marked a new era from in FTAs. EU-Jordan came about after the US-Jordan FTA, which many saw as the dawn of the TRIPS-Plus era. And to a certain extend this was true. US-Jordan sought to address many of the growing concerns which had arisen in the years following TRIPS, both national and international issues. US-Jordan also sought to address the global change in IP infringement and the requirement of new protection and enforcement methods.

Article 27, as discussed in the above FTAs, allows a prohibition or restriction on trade including IP. Again, this is showing and continuing to put forward the link between trade and IP and the need of protection which arise from this link. As with the previously discussed FTAs, EU-Jordan under Article 56, also included an expresses provision for IP protection beyond the minimum required under TRIPS. This protection was to the "highest international standard." Article 56(2) also required the revision of the protection if it negatively impacted trade. Once again, the revision contained an underlying bias toward increasing the protection rather than lowering the protection. This underlying bias is particularly visible when read in conjunction with Article 57, which seeks to resolve differences in standardisation and ensuring compliance with the FTA, and Article 68, which seeks to develops structures and bodies to aid in the protection and enforcement of IP.

The process of the subsequent EU-Egypt[16] and EU-Algeria[17] FTAs reverted to the near identical language of the FTAs of the early 2000s, that parties shall "ensure adequate and effective protection of IP rights in according with the prevailing international standards, including effective means of enforcing such rights."[18] Both FTAs also include provisions for the standardisation of protection and enforcement methods,[19] again to standards beyond these FTAs. These FTAs were essentially Egypt and Algeria agreeing to accept higher levels of IP protection and enforcement, to levels in line with those of

13 EU- Morocco Article 28, EU-Israel Article 27, EU-Mexico Article 34, and EU-South Africa Article 27.

14 EU- Morocco Article 39, EU-Israel Article 29, and EU-South Africa Article 46.

15 Council and Commission Decision of 26 March 2002 on the conclusion of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part , signed 24 November 1997, Official Journal L 120, 15 May 2002. Hereafter EU-Jordan.

16 Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part , signed 25 June 2001, Official Journal L 304, 30 September 2004. Hereafter EU-Egypt.

17 Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, signed 12 April 2002, Official Journal L 265, 10 October 2005. Hereafter Eu-Algeria.

18 EU-Egypt Article 37, EU-Algeria Article 44.

19 EU-Egypt Article 47, EU-Algeria Article 55.

the EU, in exchange for favourable trade terms.

This minimalist trend appeared to continue in EU-Albania.[20] However, we must note, while this agreement contributes to the removal of trade barriers, it is part of Albania's application to become a member of the EU. As such, Albania was not in a position to dictate the terms of the FTA, rather it was to serve as preparing Albania for EU law and ensuring it would be compliant with EU obligations. This is particularly evident under Article 70, which broadly speaking, requires Albania to begin a shift to adopting EU law or to apply domestic legislation to a close approximation to EU law.

It was not until 2008 and the FTA with the Cariforum nations,[21] that we can see the development of IP protection and enforcement provisions take its next step forward. This FTA is particularly noteworthy in two key areas, firstly, it is the first time the EU is not negotiating with a single nation, rather the Cariforum is an economic bloc created for trading with the EU. As such, it will have a stronger voice in the negotiations. Secondly, this is the first EU FTA to treat IP as the significant area of trade which it had developed into over the last decade. This FTA treats IP as an specific area of the negotiation rather than combining it with industrial and commercial properties. EU-Cariforum, while opening with a similar preamble to previous FTAs, aspirational goals and aspirational languages, and not expressly mentioning IP but intending it to be an aspect of the economic and social development. While the previously discussed IP as part of economic development, EU-Cariforum was the first to address how IP would actually engage and foster this development. This method is evident from the title of section, the IP provisions are discussed under the Chapter 2 heading of IP and Innovation. This is further reflected in the expressed importance of innovation and creativity leading to economic development and was recognised by the parties as "a crucial element in their economic partnership."[22] This importance is once re-affirmed in Article 131(2) but further links the protection and enforcement of IP as the method to foster creativity and innovation. This protection is said to be at levels "appropriate to their levels of development."[23] EU-Cariforum in its discussion of IP, which we must note at this point is no longer connected or discussed in combination with industrial and commercial property, once again shows the commitment of the parties to fully explore this aspect of trade. As such, while Article 132 introduces the same IP protection and enforcement provisions as the FTAs discussed above,[24] it does so in a broader and more expanded manner. This sentiment carried out through the rest of the FTA and is one of the key aspects which denotes a shift in the broader IP negotiation.

This is the first EU negotiated FTA which makes specific reference to the access of the the non IP right holder. This access comes about in an interesting manner, firstly, IP in this FTA is defined as it is presented in Annex 1C of TRIPS, which all negotiating parties have already ratified. Secondly, as per TRIPS, this FTA allows any party to implement higher levels of IP protection and enforcement provided it does not conflict with the provisions of this FTA or TRIPS.[25] However, as a result of the flexibility afforded under TRIPS, the EU must allow the protection and enforcement to reflect the

20 2014/737/EU: Council Decision of 9 October 2014 on the position to be adopted on behalf of the European Union within the Stabilisation and Association Council established by the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, signed 12 June 2006, Official Journal L 165, 4 June 2014. Hereafter EU-Albania.

21 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed, Official Journal L 289, 30 October 2008. Hereafter EU-Cariforum.

22 EU-Cariforum Article 131.

23 EU-Cariforum Article 131(2).

24 EU-Cariforum Article 132 (d) "achieve an adequate and effective level of protection and enforcement of IP rights".

25 EU-Cariforum Article 139(5).

development of the Cariforum nations,[26] and in doing so much "provide a balance of rights and obligations between rights holders and users..."[27] While EU-Cariforum seeks the "harmonization of intellectual property law and regulations,"[28] it encourages the transfer of technology, a noted factor in economic development, EU-Carifoum seeks to introduce a mechanism to prevent abuse.[29]

The discussion of enforcement, while discussed in relation to general obligations of IP protection, is said to be a high standard afforded to rights holders provided it does not conflict with the economic development. This is followed with a expressed statement of who can take the remedies for failure to protect IP and which remedies are available.[30] Article 153 also requires the existence of commercial scale, for the remedies afforded to the IP rights holder under EU-Cariforum to come into effect. However, it does not state what is and is not commercial scale, effectively leaving it to the individual parties to resolve this matter. While there may be a practical aspect to not defining commercial scale, such as recognising the potential differences between industries, nations, and forms of IP, the fact that no minimum requirement exists only serves to show the position of EU-Caroforum in relation to economy development and the IP rights holders. This was a common trend within EU-Cariforum, while it provided a wider scope of access than previous FTAs for non IP rights holders, the access was still in relation to the IP protection. In addition, while encouraging development through the use of IP, EU-Cariforum retained the limitations or revisions clauses of the previous FTAs, if this came into conflict with trade.

As briefly touched on in the above analysis, EU-Cariforum introduced a number of new IP related elements to EU FTAs. The question now turns to what the end result of these new elements will have on future FTAs. This was the first to expressly link the importance of economic development with creativity, and more so, innovation. While this FTA allowed, even suggested, the use of IP as a tool of creativity and innovation, it did so with the protection of the IP right holder in mind. This can be seen as the start of a trend, where exceptions or allowances to access IP are framed in language which benefits the IP rights holder first rather than someone seeking to innovate.[31] However, unlike previous FTAs, this was not a one sided mandate. Rather, the Cariforum nations sought and received a higher than expected, based on previous FTA negotiation outcomes, protections for the IP they considered valuable, chiefly traditional knowledge and geographical indicators. While this FTA does include the obligation to ensure "an adequate and effective level of protection and enforcement of IP rights"[32], the FTA shows why IP is needed to be protected to this level. This importance is also reflected in the high levels of detail the individual aspects of IP are discussed, geographical indicators are particularly well defined and protected. As touched upon above, the language of the FTA, while providing access to the IP and seeking to achieve some social good, is still firmly rooted in favour of the right holder and how best to protect these rights to aid in economic development.

While the EU-Bosnia & Herzegovina FTA[33] followed the form of previous FTAs such as the identical provisions allowing the restriction or prohibition on IP,[34] as a form of trade, and the previous standard

26 EU-Cariforum Article 140.
27 EU-Cariforum Article 139(2).
28 EU-Cariforum Article 141.
29 EU-Cariforum Article 142.
30 EU-Cariforum Article 152.
31 This balance between access to innovate and protection of IP is discussed in greater detail in Chapter 6.
32 EU-Cariforum Article 132(d).
33 Interim Agreement of Trade and Trade-related matter between the European Community, of the one part, and Bosnia and Herzegovina, on the other part, signed 18 June 2008, Official Journal L 169, 30 June 2008. Hereafter EU- Bosnia & Herzegovina.
34 EU- Bosnia & Herzegovina Article 28.

of “ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights”[35] it take on some of the developments of some of the more robust FTAs and lessons from the broader, international IP discussion. These lessons came in the form of the expanded provisions of Article 38. Article 38(2) expanded the protection and enforcement measures to IP of third parties, effectively the states discussed above and whomever else Bosnia & Herzegovina has completed FTAs with. Article 38(3) obligates Bosnia & Herzegovina to introduce protection and enforcement levels to the standard of the EU within a five year period. Article 38(4) and Annex VI require Bosnia & Herzegovina to adopt a number of IP conventions within specific time frames. Annex VI is notable for two reasons, firstly, the list of IP conventions is longer and has a wider scope than the respective annexes of previous FTAs. Secondly, Annex VI included TRIPS, this is a notable inclusions, as other FTAs which required IP conventions did not require the adoption of TRIPS for non WTO members. We must also note a revision to the use of 'intellectual, industrial and commercial property' rather than the specific use of IP. A possible reasoning for the use of this older phrase, may be the Article 38(3) which requires Bosnia & Herzegovina to raise their IP, and specifically IP, to EU levels within the specified time. This may be to mitigate or remove the possibility of a conflict arising between Article 38(1) and 38(3). On the other hand, it may be a simple oversight during the negotiations as the operation of both provisions would not be greatly altered, or even at all, if 'industrial or commercial property' was removed. Additionally, the language of EU-Bosnia & Herzegovina is written from the perspective of the EU's position, in that Bosnia & Herzegovina are obligated towards achieving this level of protection and enforcement standards. This is expressly stated in Article 38(3), but a close reading of Article 38(5), the provision which allows a review or revision of IP protection standards in the event of conflict with trade, is rooted very much in favour of trade by the EU. When examined in the broader IP sphere, we can see the start of a return to regional or multiple identical IP treaties by developed nations who were, and still are, pushing their TRIPS-Plus agenda.

To ACTA and beyond

We must note, that EU-Bosnia & Herzegovina and EU-Central America, were finalised around the beginning of the discussion of the Anti-Counterfeiting Trade Agreements (ACTA). As such, developed nations may have been negotiated with this model, if not ACTA itself, in mind. The EU joined the ACTA negotiations in 2010, but would have been aware of the earlier negotiations. As such, the EU's involvement in ACTA can be seen as the start of the third era of TRIPS-Plus provisions. This in turn leads us to the development of the EU-Montenegro FTA.[36] While part of the ascension process of Montenegro to EU membership, offers valuable insight to the then status of IP within the EU, and more importantly, new elements which have developed. EU-Montenegro follows format of the previous FTAs, opening with aspirational language in the preamble, not specifically addressing IP, but with the intention of IP as vital part of trade. Article 45 allows the restriction or prohibition of trade, including IP on the condition such measures are not arbitrary or a form of disguised trade barrier. Article 75 is noteworthy in analysis for a number of reasons, firstly in its use of “intellectual, industrial and commercial property” as opposed to the expressed IP of previous FTAs. A strong possibility for the use of this phrase over IP, could simply relate to the unilateral adoption of Community law. EU-Montenegro offers a clear indication of the position of the EU at the start of its negotiation of ACTA, and the shift the response to global trends with the inclusion of provisions adopting Community law, allowing EU-Montenegro to adapt to subsequent changes in Community law, but also to attempt to

35 EU- Bosnia & Herzegovina Article 38.

36 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, signed 15 October 2007, Official Journal 108, 29 April 2010. Hereafter EU-Montenegro.

address problem areas which may not be resolved during the implementation period of the FTA.

The EU-Korea FTA[37] is an interesting development, as both were strong negotiating partners within the ACTA framework, the EU as a larger trading bloc and Korea as one of three Asian nations invited to the negotiations. As both parties were engaging in the ACTA negotiations at this point, it was no surprise to see the level of discussion for IP in the FTA. Under EU-Korea , IP is discussed as a separate element of trade under Chapter 10. EU-Korea opens with a broad statement of using IP to "facilitate the production and commercialisation of innovation and creative products" while also seeking to "achieve an adequate and effective level" of IP protection.[38] While EU-Korea doesn't attempt to re-define IP, accepting the definitions under TRIPS Annex 1C, it does seek to introduce the protection at a much higher level than that under TRIPS. While this increased level is evident from EU-Korea, we must note Article 10(5), which lists IP conventions the parties must accede, each of which the EU has had a strong hand in the negotiation and implementation in the broader IP sphere. The emphasis of the commercial aspects of IP is again brought into the discussion under Article 10(11), which allows the exemption or limitations of IP. However, this is strongly from the perspective of the right holders, so far that the limitation may only be legislated provided it does "not conflict with a normal exploration of the work" nor if the limitation does "not unreasonably prejudice the legitimate interests of the rights holders."[39] As with the EU-Montenegro, we see the inclusion of provisions reflecting technological developments, in this instance, the protection of technological measures. Both parties are obligated to provide protection to prevent any and all forms of technological circumvention, including instances of where the parties would be affixed with reasonable knowledge of the infringement.[40] This leads to the second problem with Article 10(45), the explicit reference to "commercial scale." While there may be practical aspects for not detailing commercial scale,such as allowing high levels of difference in products, formats, uses etc, Article 10(45)(1) gives a very broad definition of instances in which commercial scale would apply which would mitigate the protection of proportionality and the alleged infringer could, and likely would, face higher charges for the infringement. Article 10(46) obligates the parties to introduce a mechanism for domestic courts to grand injunctions against alleged infringers. This follow the trend in the early 2000s, where the domestic courts were unable to adequately enforce IP protection laws in new media, specifically online infringement. Article 10(46)(1) goes as far as explicitly stating such injunctions could apply to intermediaries such as website or hosting services if their users are said to be infringing content. Article 10(54) separates civil and criminal instances of infringement based on the concepts of commercial scale and "wilful trademark counterfeiting and copyright and related rights piracy." However, EU-Korea does not go into any detail on the distinction between the two, and this is further complicated by the inclusion of commercial scale without any guidance on its scope. EU-Korea includes a number of provisions relating to the limitation or protections against liabilities for online service providers. These provisions are a transposition of the E-Commerce Directive, and in line with the broader IP agenda.

The EU-Serbia FTA,[41] as part of a broader stabilization agreement between the parties, returns to a

37 2011/265/EU: Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 12 October 2010, Official Journal L 127,14 April 2011. Hereafter EU-Korea.

38 EU-Korea Article 10(1).

39 EU-Korea Article 10(11).

40 EU-Korea Article 10(12)(1).

41 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, signed 23 July 2012, Official Journal L 278, 18 October 2013. Hereafter EU-Serbia.

simpler format for FTA. IP is primarily discussed under Article 75, which once again combines intellectual, industrial and commercial properties and confirms the importance the parties place on them. That the parties will ensure "adequate and effective protection and enforcement of intellectual, industrial and commercial property rights."[42] Under Article 75(3) Serbia commits to within five years to introduce a "level of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights." The obligation to reach a high standard of IP protection and enforcement, was further seen in Annex VII, which obligates Serbia, within a period of five years, to adopt a number of IP conventions in line with those of the EU. As with EU-Montenegro, the EU was the dominant party, effectively providing a map for Serbia to follow in its application to EU membership. However, we must also be aware of the ongoing ACTA negotiations, which Serbia would have to abide by within the five year period.[43] The language of the FTA is identical to that of EU-Montenegro, furthering the point of the EU providing a roadmap for ascension to membership.

Perhaps it is fitting that the FTA between the EU and the Central American nations was first EU FTA following the rejection of ACTA, as South and Central America have always shown a strong desire for equal balance in IP provisions within FTA.[44] While EU-Central America opens with the aspirational preamble of previous FTAs, it quickly moves to expand the intentions in real terms. This ever increasing emphasis on IP was seen in discussion of trade[45] and customs[46] between the parties. The importance of IP in EU-Central America can been seen in Title VI, which specifically deals with IP matters. Title VI opens with a clear indication of not only its objects regarding the protection and enforcement of IP rights, but also the limits to which such protections will apply "taking into consideration the economical situation and the social or cultural need of each Party."[47] EU-Central America then turns to the obligations under TRIPS, both to provide the agreed minimum standard but also to be aware limitations of TRIPS, both the flexibility afforded to developing countries and to areas later excluded from the standards of TRIPS such as health and access to medicine.[48] EU-Central America then turns to the enforcement measures, all parties "shall provide for the following complementary measures, procedures and remedies necessary to ensure the enforcement of the IP rights."[49] While this provision includes limitations to prevent abuse by IP right holders, the creation of trade barriers, and the broader development of the nations, we must note it is in that order. That while limitations for the enforcement exist, they are to prevent abuse and to further economic development rather than a social good or to allow access to IP. The enforcement section goes beyond what previous FTA have included, such as Article 264, allowing instances in which an intermediary may be required to disclose the information of an infringing 3rd party.[50]

The language of EU-Central America is an interesting development in the international IP sphere, in that while it is still strongly from the perspective of the EU and favouring the right holders, it has also

42 EU-Serbia 2010 Article 75(1).

43 However as ACTA was not ratified by the EU, Serbia is not bound or obligated by its terms. Rather, this point served to highlight the growing EU and global trend of interlinked IP agreements and series of interconnected provisions as part of the TRIPS-Plus agenda.

44 2012/734/: Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, signed 29 June 2012, Official Journal 346, 15 December 2012. Hereafter EU-Central America.

45 EU-Central America Article 78.

46 EU-Central America Article 55.

47 EU-Central America Article 228(a).

48 EU-Central America Article 229(2).

49 EU-Central America Article 260.

50 EU-Central America Article 264.

retained some elements of EU-Cariforum, notably the direct references to the flexibilities afforded to developing nations under TRIPS. The language of the EU-Central America FTA, also places a noted importance on the protection of IP for the purpose of facilitating creativity or innovation, which in turn leads to greater development. While, this link between creativity, innovation, and development is not explicitly stated as in the EU-Cariforum FTA, a very similar sentiment can be seen in the language, especially in the discussion of technological developments and technology transfers between parties.[51] The language of the FTA also offers some reflections of the differences in development between the parties, this can be seen in the numerous references to the flexibilities under TRIPS, but also under Article 272, relating to the limitations of liabilities for intermediaries for online infringement. The EU is bound by the E-Commerece Directive, while the Central American nations are to adopt domestic stands which comply with their respective international obligations, again circling back to the flexibilities afforded to them under TRIPS.

The FTA between the EU Columbia & Peru[52] was originally part of a larger, regional based FTA but broke down due to ongoing difficulties. EU-Columbia & Peru, while following the form of previous FTA, recognising the importance of "adequate and effective protection of IP rights" it retains and seeks to ensure "a balance between the rights of IP rights holders and the public interest."[53] The importance of IP is again highlighted by its own section in EU-Columbia & Peru, Title VII. Under Article 195, all parties affirm the importance of the IP, and the creativity and innovation it allows for, while ensuring such IP is adequately protected. While Article 195 does make reference to the broader public interest in material, the protection is still heavily in favour of the IP rights holder. The importance of IP is seen again, under Article 196, in which the parties affirm and accept a number of IP conventions. While this is a norm for nations engaging in FTAs with the EU, Article 196(3) includes a provision which states "the parties recognise the need to maintain a balance between the rights of IP rights holders and the interests of the public." The balance between IP rights holders and the public interest is again seen in Article 197 which, while recognising the importance of IP, obligates parties to makes specific exceptions for healthcare and the access to medicine.

EU-Columbia & Peru is unique in that it contains a dedicated chapter for IP relating to biodiversity and traditional knowledge. Article 201 strongly emphasises the need for protection of traditional knowledge, ensuring it is also receives 'adequate and effective protection' but retains the ability to review the matter in the future.[54] Geographical indicators are included within the chapter, as they are broadly defined by the parties but still given a high level of protection due to their economic importance to the parties.[55] EU-Columbia & Peru details the level of protection and enforcement the parties must agreed to introduce, allowing the flexibilities of TRIPS for developing nations. Annex VII provides a full list of IP conventions the parties must complete within a period of five years.

While the preambles of FTA, through their broad objectives and aspirational language, often suggest they seek a balance between parties, it is not often followed up. However, the language used throughout EU-Columbia & Peru actually attempts to reflect this desired balance. While reflecting and recognising the importance of IP protection for economic development, the language of EU-Columbia & Peru does not give a carte blanch approach to protection at the expense public good, going as far as explicitly

51 EU-Central America Article 228(b) promote and encourage technology transfer between both regions in order to enable the creation of a sound and viable technological base in the Republics of the CA Party; and
(c)promote technical and financial cooperation in the area of intellectual property rights between both regions.

52 Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June 2012, Official Journal L 354, 21 December 2012. Hereafter EU-Colombia & Peru.

53 EU-Colombia & Peru Article 4.

54 EU-Colombia &Peru. Article 201 (d).

55 EU-Colombia &Peru. Article 207.

creating a limitations on enforcement measures weighted against the public good. In the broader IP sphere, this is an interesting development, as the ACTA negotiations made little to no reference to such balance. One rationale for this is the strong importance Southern and Central American FTAs have placed on such balance, and in the post-ACTA environment this could be the new method of operation. Another aspect of this FTA which appears to counter the ACTA influenced trend, was the equal protection afforded to traditional knowledge to other elements of IP law such as copyright or patents.

The EU-Iraq FTA[56] offers some interesting developments to the international IP sphere. While IP is a specific chapter of the FTA, it is very short, simply affirming the standard currently set under TRIPS,[57] but recognising the broader international TRIPS-Plus standards. While this may suggest a balance approach based on the language, when viewed in relation to the ACTA negotiations, we can see EU-Iraq creating room to adopt the final outcome of ACTA without being a negotiation party. This intention is further seen in Article 60(4) which obligates the parties to re-enter negotiations for "more detailed IPR provisions" within five years, or as it was intended, after the ACTA negotiations. The language of the IP provisions, while brief, shows a clear intention to match EU-Iraq with broader international standards, allowing and often mandating revisions. EU-Iraq show the bargaining process of the EU when ACTA was still a likely and desirable destination, that requiring 3rd party nations to agree to broad and unqualified international standards, would increase the scope and actionability of ACTA without having to invite the 3rd party nations to the negotiations.

The EU-Ukraine Deep and Comprehensive FTA,[58] formed part of the Ukraine's application process to the EU under a broader Association Agreement. While this was an agreement for membership to the EU and as such, very much agree with the EU's terms, it offers invaluable insight into the position of the EU at the time. Specifically, problem areas the EU was and still is attempting to resolve. Under EU-Ukraine, IP provisions are discussed in the highest level of detail found in an EU based FTA. As such, EU-Ukraine isn't seeking to create new or novel forms of IP which they can create specific protection around rather EU-Ukraine seeks to expand the protection to existing IP in a novel manner when adapted to new media formats.[59] This is particularly evident from inclusion of a detail set of provisions relating to the rights to the distribution of broadcasts and performance.[60]

EU-Ukraine goes a step further than previous EU FTAs by including specific provisions related to the limitation or the termination of rights. Article 176 prohibits the creation, proliferation, or use of technology which seeks to circumvent the IP protection on material. The provisions itself is nothing new, and is bound by previous limitations of excluding technology which may circumvent IP protection but not as its primary or prominent use. However, the provision goes a step further than it has in the past examples, and now protects against technology where reasonable knowledge is affixed to creators of new technology to prevent their product, primarily or predominately, being used to circumvent IP protection. Article 181-184 discuss in great detail the protection and enforcement measures, but also their limitations in relation to software and computer programming. These provisions are in line with

56 Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed 11 May 2012, Official Journal L204, 31 July 2012. Hereafter EU-Iraq.

57 EU-Iraq Article 60 "Ensure adequate and effective protection of intellectual, industrial and commercial property rights, according to the highest international standards including those set by [TRIPS], as well as effective means of enforcing such rights."

58 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, signed 21 March 2014, Official Journal L161, 29 March 2014. Hereafter EU-Ukraine.

59 EU-Ukraine Article 158 defines IP as that found within Annex 1C of TRIPS.

60 EU-Ukraine Article 169-172.

the recent developments within the EU, and the wider software discussion. Article 191 was an interesting addition, the provisions relates to the broadcasting of material by satellites within the jurisdictions of the parties. Its inclusions is a clear reaction to recent case law within the EU regard the transmission of sport broadcasts.

EU-Ukraine then moves to discuss the idea of enforcement measures. As with the previous sections, the enforcement provisions are some of the most detailed and expansive of FTAs to date. The enforcement section opens with a re-statement of the parties obligations under TRIPS, specifically Section III of TRIPS.[61] However, under Article 235, we see the introduction of the right to information for identification of infringement. Under this provision, the IP rights holders may seek the disclosure of the identity of infringers. Article 236 introduced the availability of a scope of remedies available to the IP rights holder, the remedies follow not only the Directives of the EU but also how they have been interpreted by the courts over the years. However unlike previous provisions, there was no limitation on their application to prevent abuse, or more appropriately, to prevent the creation of temporary barriers to trade. EU-Ukraine also contains a specific subsection on online service providers and how IP protection needs some specific framework for online infringement. As this is part of a broader application to EU membership, this is a direct adoption of the EU Commerce Directive, specifically Articles 12-15.

The protection from the perspective of the IP rights holder is again highlighted in the order of protection of IP compared to the order of exceptions to allow innovation.[62] We must also note the language used in Article 235, while suggesting a fair approach to right information in proceedings, that in response to a "justified and proportionate request" by the IP rights holder, the courts may compel the disclosure of the identity of the infringer. While the disclosure is is limited instances of infringement at the commercial scale, it is still problematic on a two key grounds. Firstly, commercial scale is not defined in this provision nor in the rest of EU-Ukraine. As stated above, there may be practical aspects to not defining commercial scale for all forms of infringement, but when commercial scale infringement may be viewed as civil and/ or criminal matters the definition, or rather lack of, becomes very problematic. Would making copyrighted material available on an open platform such as youtube.com be considered commercial scale? Would it be a criminal or civil matter if the distribution was found to be at commercial scale? Secondly, the provisions limiting the right to information, are vague at best. They appear to be included at a later stage, possibly after the right to information provision was drafted. The limitations are effectively left to the parties to be determined at the domestic level. The inclusion of the idea of commercial scale, whether for civil or criminal proceedings, follows the broader trend of including commercial scale because it may be relevant in the coming years rather than a requirement for it now. While attempting to future proof agreements is a valid ground for broad provisions, doing so with the intention of defining provisions at a once its widely adopted at a later stage is not.

Conclusion

The completed EU FTAs have highlighted a number of key issues which will affect and influence the future development of EU IP negotiations. Firstly, the FTAs show an accepted move towards what the EU considers the correct methods of IP protection and enforcement measures. This in turn shined a light on the level of IP protection many of the developing nations would agree to, often to levels far beyond their needs or ability to actual enforce. This early position of high levels of protection,

61 EU- Ukraine Article 230.
62 EU-Ukraine 230(2).

matching that of what the EU had sought during the TRIPS negotiation, indicated that the entire process was from the EU perspective. Secondly, as we have seen above, FTAs may revert to previous formats depending on the negotiating parties and the broader IP sphere at the time. As we saw during the late 2000's/ early 2010's IP provisions where brief and allowing themselves to be adapted to the then planned ACTA format and operation method. However, upon the failure of ACTA, we saw the return to broad and comprehensive IP provisions such as those found in EU-Korea and EU-Columbia & Peru. Additionally, we have seen the broad and comprehensive IP provisions within FTAs in relation to stabilisation or association agreements as part of the application process to EU membership. While it was possible to simply create a provisions that the parties would agree to EU law by a specific date, these FTAs went further and expanded not only on the then position of the EU, but also indicated its intention for development within the near future.

Thirdly, the trends within the more recent FTAs outside of the broader EU membership application process, have shown a number of interesting elements which will be acted upon within the coming years. The outcome of EU-Korea shows a growing acceptance of the ASEAN region to adopt and recognise a western view of IP protection and enforcement. This acceptance is seen as a victory by the EU on a number of grounds, firstly, many see it as a matter of pride in exporting EU values to the region. Secondly, Korea was a strong proponent of ACTA and a vital player in the TTP negotiations, knowing that they are negotiation from a similar position to the EU perspective for future agreements would be seen as a strong boon. Thirdly, by gaining a foothold in exporting EU standards of IP protection and enforcement within the South East Asia Region (SEAR), the EU is in a strong position to target what can be seen as a major source of infringement. This in turn plays into the broader agenda of negotiation around China.[63] The above FTAs have also shown a strong and consistent development in Central and Southern Americas, notably the recognised importance of traditional knowledge, folklore, and genetic diversity. Outside of EU-Cariforum and EU-Columbia & Peru, these elements of IP are given passing mention and minimal protection, however under these two FTAs they are recognised on equal terms as copyright or medical patents would be in other FTAs. We must also note that the EU-Cariforum was completed prior to the rejection of ACTA, as such, much of its framework would have been intended to operate with the new ACTA standards. Both FTAs show that while the respective nations will agree to TRIPS-Plus provisions with FTAs, it will not be as one side, effectively adopting the EU standards, in all cases. We must also note in these FTAs, the mutual acceptance of the importance of geographical indicators, perhaps suggesting the parties found a larger common area to negotiation around. These FTAs appear to be a trend rather than the occasional blimp in South and Central American FTAs and will likely continue to uphold the same standards for often marginalised aspects/ elements of IP in future negotiations.

Fourthly, the above FTAs, those from the mid-2000s onwards discussed the idea of 'commercial scale' often in relation to distinctions between civil and criminal levels of infringement. However, none of the FTAs have given a definition of what commercial scale infringement actually is. While mentioned above, there may be some logistical or practical basis, this rationale does not hold up when examining the ever growing digital sphere of IP infringement. When the material said to be infringed exists solely as a digital good, the requirement or limitation of what commercial scale actually is are radically different from tangible goods. The lack of clarity on such provisions will become problematic over the coming years, even more with the growing push for increased criminal liability for commercial scale infringement.[64]

63 The Anti-China agenda in international IP developments, will be discussed in greater detail in chapter 5 and in relation to TTIP.

64 The growing issues relating to digital access and infringement, examining the technical and legal implications of such provisions will be discussed in a later chapter.

As we can see, in the years following TRIPS, there has been a high level of development and change within the international IP sphere reacting to economic and technological shifts, the EU seeking to export its view of the correct IP protection and enforcement measure, forum shifting, and regime swapping. While the situation is beginning to level out or plateau, it will only last until the next 'big thing' which, by all accounts will be the combination of TTIP and TTP within the next number of years. Suffice to say, IP provisions with EU FTAs have weathered difficult journey in the years following TRIPS, and this may be journey rather than a destination, we can say with certainty that the days of 'intellectual, industrial, and commercial property' discussion are gone. What comes next, depends entirely on the success or failure of TTIP and TTP. And what is a success or failure, will depend entirely on who you ask.