

Policy Department External Policies

THE FIGHT AGAINST COUNTERFEITING AND PIRACY IN THE BILATERAL TRADE AGREEMENTS OF THE EU

INTERNATIONAL TRADE

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Executive summary

Concerns about counterfeiting and piracy are becoming increasingly widespread and have now taken on an international dimension. Higher standards of intellectual property protection are being set multilaterally and through the inclusion of intellectual property provisions in bilateral trade agreements. The *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries* has undertaken to revisit the approach to the intellectual property rights chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses. This approach should be reconsidered in the light of on-going negotiations on bilateral trade agreements with a number of trading partners such as Korea, India, and ASEAN, while negotiations on bilateral trade with Ukraine and Russia are also being considered. If the Lisbon Treaty on the Functioning of the European Union (TFEU) comes into force, the European Parliament will have a significantly enhanced role to play in the negotiation of such agreements, including the power of veto. In scrutinising and giving consent to agreements, it is recommended that the European Parliament takes account of the following: (1) if intellectual property enforcement provisions are to be included in agreements, this must be done on the basis of adequate evidence on the level of counterfeiting and piracy and its effects; (2) intellectual property rights are private rights and the main responsibility for taking measures to protect and enforce intellectual property rights should lie with individual right holders; (3) the European Parliament should consider carefully the need to balance flexibilities in the TRIPS Agreement with the need for additional provisions in bilateral agreements to fight counterfeiting and piracy; (4) agreements that contain provisions on recourse to bilateral dispute settlement mechanisms risk weakening the multilateral dispute settlement system; (5) provisions in agreements that expand the scope of border measures to cover exports as well as goods in transit or transshipment should not be unnecessarily burdensome and should be subject to the availability of judicial review; (6) the European Parliament should encourage the EU to undertake needs assessments in third countries to ensure that adequate and appropriate technical and financial cooperation is made available on mutually agreed terms and conditions in order to assist with the training of police, customs officers, judiciary and other government officials; (7) it would be advantageous to establish a parliamentary forum or an inter-parliamentary observatory to monitor and assess the impact of bilateral agreements in the fight against counterfeiting and piracy.

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The significance of intellectual property rights enforcement

The exploitation of intellectual property is considered an important tool for wealth creation. But intellectual property rights are of little economic value if they cannot be enforced effectively. Well-functioning intellectual property enforcement mechanisms are seen as essential to ensure that right holders and society as a whole can reap the benefits from the intellectual property system ⁽¹⁾.

However, concerns about counterfeiting and piracy are becoming increasingly widespread and have now taken on an international dimension. They are seen to represent a serious threat to the intellectual property system and hence to national economies. Particular attention has been given to national disparities in the enforcement of intellectual property rights which mean that counterfeit and pirated products are more likely to be manufactured and sold in countries that are less effective than others in combating counterfeiting and piracy ⁽²⁾.

Higher standards of intellectual property protection are being set multilaterally and through the inclusion of intellectual property provisions in bilateral trade agreements. Recent trends are marked by an increase in the number of multilateral institutions participating in the policy and norm setting on intellectual property enforcement, including the World Customs Organization (WCO), the World Intellectual Property Organisation (WIPO), the World Health Organisation (WHO), the World Trade Organisation (WTO) and Interpol. The United States (US) and the European Union (EU) have also taken steps to strengthen the enforcement of intellectual property rights in third countries through regional and bilateral trade agreements ⁽³⁾.

Intellectual property rights include copyright and related rights, patents, design rights, trademarks and trade secrets. The term intellectual property refers to the specific legal rights that authors, inventors and other right holders may hold and exercise. Intellectual property rights are granted by governments and operate in the territory within which they are granted.

While the terms “counterfeiting” and “piracy” do not follow a single agreed definition and are used in different ways, generally “counterfeiting” relates to the infringement of trademarks whereas “piracy” is associated with infringements of copyright or related rights.

The WTO Agreement on Trade-Related Intellectual Property Rights (the TRIPS Agreement) defines “counterfeit trademark goods” as “any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question

¹ See also The World Intellectual Property Organisation, *Enforcement of IP Rights*. Available at: <http://www.wipo.int/enforcement/en/>

² See also European Commission, *Enforcement of Intellectual Property Rights (Summary)*: <http://europa.eu/scadplus/leg/en/lvb/l26057a.htm>

³ See also Tekeste Biadgleng, E. and Munoz Tellez, V., 2008, *The Changing Structure and Governance of Intellectual Property Enforcement*, South Centre, Geneva, page 2.

under the law of the country of importation” (4). The WHO uses a similar definition to describe a counterfeit medicine as one that is “deliberately and fraudulently mislabelled with respect to identity and/or source” (5).

The TRIPS Agreement defines “pirated copyright goods” as “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation” (6).

Patent infringement is not generally included in definitions of “counterfeiting” and is clearly not included in the definition provided by the TRIPS Agreement (7). Recently, however, the term “counterfeiting” has been used misleadingly to describe patent infringement, particularly in relation to generic medicines. In fact, patent infringement cases lie outside the scope of counterfeiting and are dealt with more appropriately by civil proceedings before national courts brought by the right holder.

Furthermore, the fight against counterfeiting must not undermine the legitimate use of TRIPS flexibilities to ensure access to medicines in developing countries. In this regard it is noteworthy that the European Parliament Resolution of 8 May 2008 on *Trade and Economic Relations with the Association of East Asian Nations (ASEAN)* “[a]ttaches particular importance to the fight against counterfeit pharmaceuticals which represent unfair competition and a danger to consumers” but “at the same time points out that nothing in the agreement should create legal or practical obstacles to the maximum use of flexibilities set out in the Declaration amending the TRIPS Agreement and access to medicines” (8).

The economic importance of the fight against counterfeiting and piracy

The Organisation for Economic Co-operation and Development (OECD) report on *The Economic Impact of Counterfeiting and Piracy* states that international trade in counterfeit and pirated products could have been up to USD 200 billion in 2005, this amount is larger than the national GDPs of about

⁴ Article 51, footnote 14, of the TRIPS Agreement. Available at:

http://www.wto.org/english/tratop_e/trips_e/t_agm4_e.htm#Footnote14

⁵ The definition is included in the WHO Quality Assurance of Medicines Terminology Database, available at:

<http://www.who.int/medicines/services/expertcommittees/pharmprep/TermListcategory.pdf>

⁶ Article 51, footnote 14, of the TRIPS Agreement, op. cit.

⁷ However it should be noted that EU Regulation 1383/2003 *Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights and the Measures to be Taken Against Goods Found to Have Infringed Such Rights* extends beyond the scope of intellectual property rights infringement as defined in Article 51, footnote 14, of the TRIPS Agreement to include, among others, goods infringing a patent, a supplementary certificate (plant protection or medicinal products and geographical indications).

⁸ European Parliament Resolution of 8 May 2008 on *Trade and Economic Relations with the Association of East Asian Nations (ASEAN)*. Available at:
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0195>

150 economies ⁽⁹⁾. The figure does not, however, include counterfeit and pirated products that are produced and consumed domestically, nor does it include non-tangible pirated digital products being distributed via the Internet. If these items were added, the OECD report concludes that the total magnitude of counterfeiting and piracy worldwide could well be several hundred billion dollars more ⁽¹⁰⁾.

In the EU context, Directorate General Taxation and Customs Union (TAXUD) of the European Commission has reported that “[c]ounterfeiting is a growing and increasingly dangerous phenomenon” and that “[c]ounterfeited and pirated articles threaten the health and safety of EU citizens, their jobs, Community competitiveness, trade, and investment in research and innovation” ⁽¹¹⁾. Directorate General TAXUD also reports that, in 2006, EU Customs seized around 128.6 million counterfeit and pirated goods and handled more anti-counterfeiting cases than ever before. A total of more than 37,334 cases were dealt with in 2006, up 40% from 2005. Compared to 2005, Directorate General TAXUD saw an increase in almost all product sectors. In 2006, more than 2.7 million counterfeit medicines and more than 1.6 million counterfeit cosmetics and personal care products were seized ⁽¹²⁾. For Directorate General TAXUD, the increasing use of the internet to sell fakes (mainly medicines) and the fact that the high quality of fakes often makes identification impossible without technical expertise and increases the challenge customs face. Directorate General TAXUD has asserted that one of the reasons for this explosion in trade in fakes is that criminals can now produce them on an industrial scale, providing increased profits. It has also stated that international criminal organisations are now involved in counterfeiting. Directorate General TAXUD also believes that terrorist groups are involved in counterfeit and piracy as a means of financing their activities.

Methodologies used to calculate levels of counterfeiting and piracy

There are concerns that statements about levels of counterfeiting and piracy are based either on customs seizures, with the actual quantities of infringing goods in free circulation in any particular market largely unknown, or on estimated losses derived from industry surveys. Industry estimates of levels of counterfeit and piracy are considered to exhibit an upward bias, with the difficulty in estimating levels of actual counterfeiting and piracy exacerbated by the failure to use the definition of the terms as set down in the TRIPS Agreement ⁽¹³⁾. The high levels reported in most industry-based surveys has been identified as a problematic aspect of the recent expert reports used as the basis of the 2007 OECD report on counterfeiting and piracy. The OECD report has also been criticised for framing the problem of intellectual property-

⁹ Organisation for Economic Co-operation and Development (OECD) (2007) *The Economic Impact of Counterfeiting and Piracy*, DSTI/IND(2007)9/PART4/REV1.

¹⁰ OECD Project on Counterfeiting and Piracy. Available at: http://www.oecd.org/document/50/0,3343,en_2649_34173_39542514_1_1_1_1,00.html

¹¹ Available at: http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/combating/index_en.htm

¹² Available at: http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm

¹³ Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 20.

related crime exclusively through the lens of “piracy” and lost corporate revenue, in doing so overlooking the social costs of intellectual property enforcement that restricts access to knowledge, creates barriers to follow-on innovation, and encourages anti-competitive business practices ⁽¹⁴⁾.

A key assumption in most estimates is that the sale of counterfeit and pirated goods displaces legitimate sales, regardless of how the price of goods may be affected by stronger copyright and trademark protection. An issue of concern for the OECD has been the extent that assumptions can be made about the degree of substitutability between infringing and legitimate items ⁽¹⁵⁾. Likewise, the methodology used in the surveys to calculate levels of intellectual property rights infringement in third countries has been criticised on grounds that it is largely based on the industry’s subjective opinion ⁽¹⁶⁾. For developing countries there is a risk that the promotion of increased emphasis on intellectual property rights enforcement, based on imperatives driven by industry figures, increases the need for the allocation of additional human and financial resources and limits the scope for utilising TRIPS flexibilities. There is also the problem that systematic research on the health and safety effects of counterfeit products is considered to be almost non-existent ⁽¹⁷⁾.

EU initiatives to combat counterfeiting and piracy

The EU has undertaken a number of initiatives in relation to the fight against counterfeiting and piracy, the most important of which can be summarised as follows:

- Combating Counterfeiting and Piracy in the Single Market - Green Paper. COM (98) 569 final, 15 October 1998;
- Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. Follow-up to the Green Paper on combating counterfeiting and piracy in the single market COM(2000)789 final;
- Council Regulation (EC) No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights has been in force since 1 July 2004 ⁽¹⁸⁾;

¹⁴ Shaw, A., 2008, “The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it),” *KEStudies*, 2: pages 1-9 at page 5.

¹⁵ Olsen, K., 2005, *Counterfeit and Piracy: Measurement Issues*, Background Report for the WIPO/OECD Expert Meeting on Measurement and Statistical Issues, Geneva, 17-18 October 2005, OECD. Available at: <http://www.oecd.org/dataoecd/42/44/35651123.pdf>

¹⁶ Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 20.

¹⁷ Olsen, K., op. cit.

¹⁸ Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ L 196, 2 August 2003. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R1383:en:NOT>
Specifically, the Regulation: extends the scope of the former Regulation to cover more intellectual property rights such as plant variety rights, geographical indications, and designations of origin.

- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ⁽¹⁹⁾;
- Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences ⁽²⁰⁾;
- Council Resolution of 13 March 2006 on a customs response to latest trends in counterfeiting and piracy ⁽²¹⁾;
- The European Parliament legislative resolution of 25 April 2007 on the draft of the Directive on criminal measures amended and clarified various provisions of the Directive ⁽²²⁾;
- The *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, prepared by Directorate General Trade of the European Commission ⁽²³⁾.

The *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries* is the most significant EU initiative for the purposes of this briefing paper and, accordingly, the relevant section of the paper prepared by Directorate General Trade of the European Commission is quoted below since it sets out the approach to be taken to the enforcement on intellectual property rights in bilateral trade agreements:

“The numerous bilateral agreements established by the European Community contain a chapter dedicated to IP. This chapter usually establishes that a very high standard of protection of IP (including enforcement thereof) must be achieved. Most agreements also include a clause allowing for technical cooperation in this field. These clauses must be carefully monitored and effectively implemented, notably with respect to the more ‘problematic’ countries.

¹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 157, 30 April 2004. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:EN:PDF>

²⁰ {SEC(2005)848} COM(2005)276 final 12 July 2005.

²¹ Council Resolution of 13 March 2006 on a customs response to latest trends in counterfeiting and piracy, OJ L 67, 18 March 2006. Available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2006/c_067/c_06720060318en00010002.pdf

²² European Parliament (2007) P6_TA(2007)0145, legislative resolution of 25 April 2007 on the amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, first reading, which clarifies that the Directive does not apply to any infringement of an intellectual property right related to patents, utility models and supplementary protection certificates or to parallel imports of original goods which have been marketed with the agreement of a right holder in the third country. See also ²² European Parliament (2007) A6-0073/200 Report on the amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, Committee on Legal Affairs, Amendment 11, Article 1, paragraph b.

²³ European Commission Directorate General for Trade (2004) *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, OJ C 129, 26 May 2005. Available at: http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636

“It is also envisaged to make the enforcement clauses in future bilateral or bi-regional agreements more operational and to clearly define what the EU regards as the highest international standards in this area and what kinds of efforts it expects from its trading partners.

“Specific actions [include]: ...Revisit the approach to the IPR chapter of bilateral agreements, including *the clarification and strengthening of the enforcement clauses* [emphasis added]. Although in designing the rules for each specific negotiation it is important to take into account the situation and the capacity of our partners, instruments such as the new EU Directive harmonising the enforcement of IPR within the Community, as well as the new customs Regulation on counterfeit and pirated goods may constitute an important source of inspiration and a useful benchmark...Raise more systematically enforcement concerns at Summit meetings and in the Councils/Committees created in the framework of these bilateral agreements. In order to allow the Commission to obtain an effective reaction from its counterparts, it is essential that it receives credible and detailed information from right-holders, either directly or via the EC Delegation or the embassies of the Member States in the countries concerned” ⁽²⁴⁾.

The EU Strategy for the enforcement of intellectual property rights in third countries provides for several action areas that include:

- periodically conducting surveys in order to develop a list of priority countries for the implementation of the strategy;
- the possibility of launching an initiative in the TRIPS Council highlighting the fact that the implementation of the TRIPS Agreement requirements in national laws has proved to be insufficient to combat piracy and counterfeiting, and of considering possible amendments to the TRIPS Agreement so that countries apply border measures not only on imports but also on exports and transit trade;
- full implementation and strengthening of bilateral customs co-operation agreements with China, the United States, Japan and other trading partners;
- turning technical assistance from ‘demand-driven’ to ‘dialogue driven’ and, in the case of ‘production’ countries, shifting the focus in any cooperation programmes from assistance in drafting legislation to a more enforcement-oriented strategy, including training programmes for judges, police and customs. The strategy also aims at improving dialogue with international organisations to ensure that their technical assistance is compatible with the strategy for enforcement of intellectual property rights;
- considering trade dispute settlement and sanctions within the WTO.

²⁴ European Commission Directorate General for Trade (2004), op. cit., pages 5-6.

On 11 October 2005 the European Commission presented a package of measures to strengthen protection for the EU and its citizens against counterfeiting and piracy. The measures proposed would:

- increase Community level protection through improved legislation and operational controls;
- strengthen the customs/business partnership; and
- reinforce international co-operation in this area ⁽²⁵⁾.

In 2005 the *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on a Customs Response to Latest Trends in Counterfeiting and Piracy* elaborated how the clarification and strengthening of the enforcement clauses in the intellectual property rights chapter of bilateral trade agreements could be achieved. Recognising that EU controls relating to imports would only ever be a means of stopping individual consignments or tackling individual criminal sectors, the Communication noted that it is necessary to act at the source of the problem by, at the very least, stopping the export of counterfeit goods and, where possible, by shutting down the production ⁽²⁶⁾. This, the Communication stated, requires international cooperation and, whilst the TRIPS minimum standards of intellectual property rights protection provides for controls on imports by customs, the Communication noted that EU Customs experience showed that more needs to be done ⁽²⁷⁾. In this respect, the Communication set out five action points.

Firstly, the enhancement of Article 51 the TRIPS Agreement by extending the present obligation for countries to apply customs anti-counterfeiting controls on imports to cover also controls on exports, transit and transshipment movements ⁽²⁸⁾.

Secondly, close, active co-operation with the most involved international enforcement bodies such as the WCO, Europol and Interpol could be used to both pick up international trends and help spread the EU's practical approach to a broader audience ⁽²⁹⁾.

Thirdly, in relation to bilateral agreements, sharing practical tools (risk management guide, statistics, trends analysis etc.) developed in the EU with the EU's trading partners in order to tackle counterfeiting in key problem areas. The Communication noted that Customs Co-operation Agreements and

²⁵ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Customs response to latest trends in counterfeiting and piracy COM(2005) 479 of 11 October 2005.

²⁶ COM2005 (479) final, op. cit., page12.

²⁷ Ibid., page 13.

²⁸ Ibid., page 13. The Communication also notes, at footnote 14, that the European Commission has already introduced this question before the TRIPS Council in June 2005, when it presented a Communication on the enforcement of intellectual property rights which stated in the Chapter describing the expected results that "among the issues that should be given special attention by the TRIPS Council should be...the customs measures and their availability for export and transit" (paragraph 26 of Commission Communication IP/C/W/448).

²⁹ Ibid., page 13.

Partnership and Co-operation Agreements with a mutual assistance component provide a legal basis to co-operate and exchange information. Examples of such co-operation given in the Communication were training, the exchange of officials, sharing expertise and latest trend information. The Communication also noted that the Commission will seek to include in the intellectual property rights chapter of future bilateral arrangements commitment for the parties to apply customs controls not only on imports but also on exports, transit and transshipment of goods infringing certain intellectual property rights ⁽³⁰⁾.

Fourthly, given that Chinese exports comprise the majority of all EU seizures of fakes, the recent Customs Co-operation Agreement between the EC and China was considered by the Communication to provide a legal framework for in-depth co-operation that could be utilised in other contexts. In particular, in addition to exchanging officials and expertise, the Communication noted that a specific information system through which the EU and China can exchange information to help stop illegal traffic and close down production would be a major practical step to reduce the international flows of fakes. If successful, the Communication noted, this approach could be extended to other key trading partners ⁽³¹⁾.

Fifthly, the Communication noted that the EU/US declaration shows the clear intent of the US and the EU to work together to combat counterfeiting and piracy, and that taking this forward in practice implies fostering exchange of customs expertise and information under the existing EC-US Customs Co-operation Agreement. The Communication suggested that it would also be desirable to see where the EU should join forces with other partners ⁽³²⁾.

Recently the European Parliament has also taken a close interest in counterfeiting and piracy in third countries. The European Parliament Resolution of 8 May 2008 on *Trade and Economic Relations with the Association of East Asian Nations (ASEAN)* gives priority to tackling pirated copyright goods and “[s]tresses the importance of IPRs and calls for their effective enforcement to be given priority, particularly for design, sound recordings and other cultural goods as well as geographical indications and appellations of origin” [and] “asks the Commission to tackle barriers notwithstanding the right of countries to regulate sectors - such as audiovisual - that play a key role in preserving cultural diversity” ⁽³³⁾.

Enforcement of intellectual property rights under the TRIPS Agreement

The WTO TRIPS Agreement: enforcement provisions

Part III of the TRIPS Agreement requires the domestic laws of all WTO Members to be in compliance with the provisions on enforcement of

³⁰ Ibid., page 14.

³¹ Ibid., page 14

³² Ibid., page 14.

³³ European Parliament Resolution of 8 May 2008 on *Trade and Economic Relations with the Association of East Asian Nations (ASEAN)*. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-398.447+01+DOC+PDF+V0//EN&language=EN>

intellectual property rights. Part III of the TRIPS Agreement established minimum standards in respect of national measures and procedures for the enforcement of intellectual property rights that can be summarised in the following three categories:

- civil proceedings such as injunctions, damages, evidence, right of information and provisional measures, must be available to right holders;
- criminal proceedings for commercial scale trademark and copyright infringement;
- border measures to prevent the commercialisation of imported products that infringe trademarks and copyrights.

However, TRIPS only establishes minimum standards to be implemented according to the mechanism determined by each Member. The TRIPS Agreement does not attempt to harmonise procedural rules for enforcement of intellectual property rights. The TRIPS Agreement left room for countries to utilise in-built flexibilities. One of the most significant flexibilities is the freedom of WTO Members to determine for themselves the method of implementing the provisions of the TRIPS Agreement, including procedures for the enforcement of intellectual property rights.

The scope and applicability of the enforcement provisions of the TRIPS Agreement are also complicated by the fact that, as explained earlier in this paper, some provisions of Part III of TRIPS only apply to certain types of intellectual property rights. The availability of procedures for border measures and criminal sanctions under Articles 51 to 61 apply only to “counterfeit trademark or pirated copyright goods” as defined under footnote 14 of Article 51 of the TRIPS Agreement.

The definition provides several elements of what constitute “counterfeit trademark goods” and “copyright piracy”. First, counterfeit goods shall mean goods bearing a trademark identical to, or that cannot be distinguished in its essential aspects from, the validly registered trademark. Pirated goods shall mean copies of the copyrighted material or copies made directly or indirectly from an article. Secondly, the goods are to be considered counterfeit or pirated only where the use of the trademark was without authorisation and the reproduction of the copyright material was without the consent of the right holder or person duly authorised by the right holder in the country of production. Third, the definitions clearly provide that the existence of infringement is to be determined by the law of the country of importation.

Similarly, according to Article 61 of the TRIPS Agreement, Members must provide criminal procedures and penalties, at least, for cases of “*wilful* trademark counterfeiting or copyright piracy on a *commercial scale*”.

Failure of a WTO Member to meet its TRIPS Agreement obligations regarding intellectual property rights enforcement can lead to a request for consultations under the WTO dispute settlement mechanism.

On 10 April 2007, the United States requested consultations with China concerning certain measures pertaining to the protection and enforcement of intellectual property rights in China ⁽³⁴⁾. The European Communities are a third party in this dispute.

The four matters on which the United States requested consultations were:

- the thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties;
- goods that infringe intellectual property rights that are confiscated by Chinese customs authorities, in particular the disposal of such goods following removal of their infringing features;
- the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyrighted works; and
- the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China.

Enforcement of intellectual property rights under bilateral trade agreements

Due to the blocked Doha talks in the WTO, bilateral trade agreements are becoming more and more common. The EU has initiated negotiations on bilateral trade agreements with a number of trading partners such as Korea ⁽³⁵⁾, India ⁽³⁶⁾, and ASEAN ⁽³⁷⁾, while the initiation of negotiations on bilateral trade with Ukraine ⁽³⁸⁾ and Russia ⁽³⁹⁾ are also being considered.

³⁴ WTO Dispute Settlement Dispute DS362 *China – Measures affecting the protection and enforcement of intellectual property rights*. Request for consultations received 10 April 2007. Summary of the dispute available at:

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm

³⁵ In May 2007 the Commission sought to facilitate EU trade with the Republic of Korea (South-Korea) by launching negotiations for an EU-South-Korea Free Trade Agreement (FTA). Bilaterally, the EU and South-Korea expect to promote bilateral trade through the prospective FTA, notwithstanding ongoing expert level co-operation in order to remove existing and prevent new trade barriers especially with regard to the preparation and application of requirements to products or services or protection of intellectual property rights. Source:

http://ec.europa.eu/trade/issues/bilateral/countries/korea/index_en.htm

³⁶ http://ec.europa.eu/trade/issues/bilateral/countries/india/index_en.htm

³⁷ A continuous negotiation in Joint Committee for The ASEAN-EU Free Trade Agreement is being carried out. Last negotiation was held in Brussels, Belgium from 30 January until 1 February 2008. Source: http://www.bilaterals.org/article.php3?id_article=11687

³⁸ In March 2007 the EU and Ukraine launched bilateral negotiations of a new Enhanced Agreement that will replace the present PCA and will include a deep and comprehensive bilateral trade agreement as a core element. However, the negotiations of the bilateral trade agreements elements of the new Agreement were only to due start once Ukraine completed its WTO accession process, which occurred on 16 May 2008. This has been preceded by technical preparations for the negotiations on both sides. Source:

http://ec.europa.eu/trade/issues/bilateral/countries/ukraine/index_en.htm

Provisions on the enforcement of intellectual property rights in bilateral trade agreements would allow the EU to by-pass the multilateral trading system and to consolidate key elements of multilateral intellectual property rights treaties by targeting specific countries where there are particular concerns about counterfeiting and piracy. Commentators on the enforcement of intellectual property rights in bilateral trade agreements have summarised possible measures as including one or more of the following:

- provisions that extend coverage of intellectual property rights to new areas not addressed by the TRIPS Agreement, and the requirement for accession to, or the ratification of, WIPO-administered treaties that include intellectual property enforcement provisions, and the UPOV Convention 1991;
- provisions that change the flexibilities contained in provisions of the TRIPS Agreement on intellectual property rights enforcement to mandatory obligations;
- provisions that extend the scope of enforcement and require wider use of the criminal justice system to tackle intellectual property rights violations as a deterrent to possible future infringements;
- provisions in the dispute settlement chapters of bilateral trade agreements that explicitly establish non-violation and situation complaints;
- definitions of “investment” in the *Investment* chapters of bilateral trade agreements that include intellectual property rights as investment assets ⁽⁴⁰⁾.

Intellectual property as “investment” in bilateral trade agreements

The inclusion of intellectual property rights in the definition of “investment” in bilateral investment treaties (BITs) reflects the importance of protecting such intangible assets in many investment operations, considering intellectual property to be a significant strategic asset.

The effect of having intellectual property included in the definition of investment is that it could potentially subject intellectual property to general guarantees afforded to investors under the BIT. These include protection in

³⁹ *The Roadmap on the Common Economic Space* was adopted at the EU-Russia Summit in Moscow on 10 May 2005. The document sets out a number of principles and priority activities. It also sets up various dialogues on specific issues, including *IPR Dialogue*. Enforcement of intellectual property rights is the central focus point of the dialogue, which fosters closer cooperation of customs, police, administrative and judiciary bodies to ensure that right-holders benefit from effective protection of their rights. It also encompasses exchange of information on strategies to fight against counterfeiting and piracy. Source: http://ec.europa.eu/trade/issues/bilateral/countries/russia/index_en.htm

⁴⁰ Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 31. See also Shabalala, D. *Intellectual Property in European Union Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What way Forward after the Cariforum EPA and the interim EPAs?*, April 2008, Center for International Environmental Law, Geneva.

the case of expropriation, national treatment and most-favoured nation (MFN) treatment among others. Furthermore, including intellectual property in the definition of investment could provide a legal basis to foreign investors for a cause of action against the host country for failing to protect their intellectual property⁽⁴¹⁾.

An example of a BIT that includes intellectual property rights as investment assets is the US BIT with Uruguay (2004, as amended), which provides the following definition of investment:

“investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment...Forms that an investment may take include:

...
(f) intellectual property rights;”

Unlike BITs, preferential trade and investment treaties (such as free trade agreements, regional trade agreements, economic framework agreements and economic partnership agreements) tend to include specific intellectual property chapters that contain substantive obligations to be borne by contracting parties⁽⁴²⁾.

Although free trade agreements of the US and the EU both contain TRIPS-plus provisions, there are significant differences in their overall approaches to intellectual property rights. The agreements to which the US is a party generally have an entire chapter on intellectual property and include specific provisions on enforcement.

For instance, US free trade agreements with Australia, Bahrain, Chile, Colombia, Morocco, Jordan, Oman and Singapore, as well as the Central American-Dominican Republic Free Trade Agreement (CAFTA) all have specific provisions on intellectual property rights and include obligations on enforcement of those rights.

Free trade agreements to which the EU is a party tend to have more limited provisions on intellectual property and exclude specific obligations on enforcement of intellectual property rights. Generally free trade agreements to which the EU is a party require an adequate and effective protection of intellectual property rights in accordance with the “highest international standards, including effective means to enforce such rights”⁽⁴³⁾. They also tend to focus on particular issues such as geographical indications and protection of plant varieties, while there are sometimes separate agreements

⁴¹ See United Nations Conference on Trade and Development (UNCTAD) (2007) *Intellectual Property Provisions in International Investment Arrangements*, International Investment Agreements Monitor No. 1, UNCTAD/WEB/ITE/IIA/2007/1, page 3. Available at: http://www.unctad.org/sections/dite_pcbb/docs/webiteiia20071_en.pdf

⁴² Ibid., page 5.

⁴³ See, for example, Article 168 of the *Association Agreement between the European Union and Chile* provides that: “The Parties shall grant and ensure adequate and effective protection of intellectual property rights in accordance with the highest international standards, including effective means of enforcing such rights provided for in international treaties.” Available at: http://www.sice.oas.org/Trade/chieu_e/cheuin_e.asp

specifically relating to wines and spirits ⁽⁴⁴⁾. Overall, the treatment of intellectual property rights in the EU agreements has not been as extensive as the provisions of US bilateral trade agreements and the specific provisions on intellectual property rights enforcement found in US agreements have not been found in comparable agreements to which the EU is a party.

Dispute settlement mechanisms in bilateral trade agreements

Bilateral trade agreements to which the EU is a party provide recourse to dispute settlement mechanisms established in the agreements ⁽⁴⁵⁾. Dispute settlement can be triggered in cases of the non-compliance with the required “highest” standards of intellectual property rights protection.

However there are concerns that, on the promise of reciprocal concessions, developing countries are entering into bilateral trade agreements whereby they assume “TRIPS-plus” obligations with respect to intellectual property rights to which they are effectively bound under the dispute settlement mechanism of the bilateral agreement. In this respect bilateral trade agreements are perceived as weakening the multilateral dispute settlement system by limiting the flexibility of developing countries to regulate intellectual property rights according to the development priorities of each country that are permitted under the TRIPS Agreement ⁽⁴⁶⁾.

In the case of Decision 2/2000 of the EC-Mexico Joint Council, an independent Consultation Mechanism for Intellectual Property Matters is provided “with a view to reaching mutually satisfactory solutions to difficulties arising in the protection of intellectual property” ⁽⁴⁷⁾. Decision 2/2000 defines “protection” as including the maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights ⁽⁴⁸⁾.

⁴⁴ UNCTAD, op. cit., page 6.

⁴⁵ See, for example, Article 182(1) of the *Association Agreement between the European Union and Chile* which provides that: “The Parties shall at all times endeavour to agree on the interpretation and application of this Part of the Agreement and shall make every attempt through cooperation and consultations to avoid and settle disputes between them and to arrive at a mutually satisfactory resolution of any matter that might affect its operation.”

⁴⁶ See, for example, Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 30.

⁴⁷ Article 40(1) of *Decision 2/2000 of the EC-Mexico Joint Council of 23 March 2000 (2000/415/EC)* provides that: “The Joint Council hereby establishes a Special Committee on Intellectual Property Matters. The Special Committee shall be comprised of representatives of the Parties. The Special Committee shall be convened within 30 days following a request of either Party with a view to reaching mutually satisfactory solutions to difficulties arising in the protection of intellectual property. The office of Chairman of the Committee shall be held alternatively by each of the Parties. The Special Committee shall report to the Joint Committee.” OJ L 157, 30 June 2000. Available at:

http://www.sice.oas.org/Trade/MEX_EU/English/Decisions_Council/2_2000_e.pdf

⁴⁸ *Ibid.*, Article 40(2) of *Decision 2/2000 of the EC-Mexico Joint Council of 23 March 2000 (2000/415/EC)* provides that: “For the purposes of paragraph 1, ‘protection’ shall include matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights.”

The dispute settlement chapters in US bilateral trade agreements tend to go further than those of the EU by establishing the application of non-violation and situation complaints that are suspended under the TRIPS Agreement⁽⁴⁹⁾.

Disputes in the WTO generally involve allegations that a country has violated an agreement or broken a commitment. But in some situations a government can go to the Dispute Settlement Body even when an agreement has not been violated. This is called a non-violation complaint. It is allowed if one government can show that it has been deprived of an expected benefit because of another government's action, or because of any other situation that exists⁽⁵⁰⁾.

The aim is to help preserve the balance of benefits struck during multilateral negotiations. For example, a country may have agreed to reduce its tariff on a product as part of a market access deal, but later subsidised domestic production so that the effect on the conditions of competition are the same as the original tariff. A non-violation case against this country would be allowed to restore the conditions of competition implied in the original deal.

Non-violation complaints are possible for goods and services (under GATT for goods and market-opening commitments in services). However, for the time being, members have agreed not to use them under the TRIPS Agreement. Under Article 64.2 of the TRIPS Agreement this "moratorium" (i.e. the agreement not to use TRIPS non-violation cases) was to last for the first five years of the WTO (i.e. 1995–99). It has been extended since then.

At the same time, the TRIPS Council has discussed whether non-violation complaints should be allowed in intellectual property, and if so, to what extent and how ("scope and modalities") they could be brought to the WTO's dispute settlement procedures.

At least two countries (the US and Switzerland) say non-violation cases should be allowed in order to discourage members from engaging in "creative legislative activity" that would allow them to get around their TRIPS commitments. Most would like to see the moratorium continued or made permanent. Some have suggested additional safeguards.

EU-US Action Strategy on the Enforcement of Intellectual Property Rights

The EU-US Vienna Summit Declaration 21 June 2006 defined intellectual property rights enforcement as one of their core areas of transatlantic

⁴⁹ See, for instance, Annex 22.2(1) of the *Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile* provides that: "If either Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

...

(e) Chapter Seventeen (Intellectual Property Rights), is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter." Available at:

http://www.sice.oas.org/Trade/chiusa_e/Text3_e.asp#22.2

⁵⁰ "TRIPS: 'Non-Violation' Complaints (Article 64.2). Background and the current situation." Available at: http://www.wto.org/english/tratop_e/TRIPS_e/nonviolation_background_e.htm

cooperation ⁽⁵¹⁾ and the EU and US have begun to undertake bilateral customs activities to combat counterfeiting and piracy. On 22 February 2008 DG TAXUD of the European Commission and US Customs and Border Protection announced the results of Operation *Infrastructure*, which took place in November/December 2007 and resulted in the seizure of over 360,000 counterfeit integrated circuits bearing over 40 different trademarks ⁽⁵²⁾. This was the first intellectual property rights enforcement operation undertaken by the EU and US Customs and Border Protection.

G8 Initiative on Combating Piracy and Counterfeiting

At the 2006 G8 meeting in St. Petersburg, a comprehensive intellectual property rights enforcement strategy was announced that delivered upon the strategy adopted in the G8 Gleneagles Statement on “Reducing IPR Piracy and Counterfeiting through more Effective Enforcement” (July 2005). The G8 2006 Statement on “Combating Intellectual Property Rights Piracy and Counterfeiting” had the following objectives:

- to keep the spotlight on trade in counterfeit and pirated goods and secure agreement on projects that promote greater cooperation among national law enforcement and customs officials;
- to link victims of intellectual property rights infringement to national enforcement authorities;
- to build capacity in developing countries to combat trade in counterfeit and pirated goods;
- to conduct further research into the economic impact of piracy and counterfeiting on national economies, brands, rights holders and public health/safety;
- to refer relevant law enforcement work (including online piracy) to the Lyon-Roma Anti-Crime and Terrorism Group (LR/ACT).

Subsequently, at the G8 Summit in June 2007, members agreed to:

- endorse the Guidelines for Customs and Border Enforcement Cooperation designed to strengthen cooperation and coordination among national customs and law enforcement administrations;

⁵¹ “We endorse the new Action Strategy on the Enforcement of Intellectual Property Rights against piracy and counterfeiting. Implementation has already started with concrete action aimed at promoting strong and effective enforcement in third countries, strengthening cooperation to reduce global piracy and counterfeiting, and offering public-private partnerships to protect intellectual property. We will enhance our dialogue to promote a more efficient international patent system.” Source: EU-US Vienna Summit Declaration 21 June 2006, page 7. Available at: http://www.eu2006.at/includes/Download_Dokumente/2106EUUSDeclaration.pdf

⁵² U.S. Customs and Border Protection and European Commission Announce First Joint Operation Combating Counterfeit Goods, Press Release 22 February 2008.

- endorse new Guidelines for Technical Assistance on intellectual property rights protection to interested developing countries, as well as mechanisms to better coordinate and leverage existing G8 assistance to such countries with a view to building the capacity necessary to combat trade in counterfeited and pirated goods to strengthen intellectual property enforcement;
- endorse the recommendations aimed at improving G8 member countries' cooperative actions to combat serious and organised intellectual property rights crimes and the further work on their basis to facilitate structured international cooperation regarding the investigation and prosecution of these crimes;
- in the light of the OECD report estimating the economic impacts of counterfeiting and piracy on national economies and rights holders, as well as public health and safety, encourage the OECD to work with member states to further identify and target in its report specific areas for concrete actions;
- recognise the need for continued study of the possibilities of strengthening the international legal framework pertaining to intellectual property rights enforcement;
- consider the establishment of an IPR Task Force focusing on anti-counterfeiting and piracy to look together at how best to improve the working of the international intellectual property rights protection and enforcement, and produce recommendations for action including improved peer review ⁽⁵³⁾.

Proposed Anti-Counterfeiting Trade Agreement

The G8 Gleneagles Statement on “Reducing IPR Piracy and Counterfeiting through more Effective Enforcement” has been attributed as being the start of the process leading to proposals for an Anti-Counterfeiting Trade Agreement (ACTA) ⁽⁵⁴⁾.

On 23 October 2007, the Ministry of Foreign Affairs of Japan, the European Commission and the USTR each announced their intention to bring about “a new international legal framework to strengthen the enforcement of intellectual property rights” in the form of an Anti-Counterfeiting Trade Agreement (ACTA).

According to sources, the USTR has pointed out that the agreement would not involve changes to the TRIPS Agreement; rather, the goal was to set a new, higher benchmark for enforcement that countries could join on a voluntary basis and negotiations would not be conducted as part of any international

⁵³ Summit Declaration, *Growth and Responsibility in the World Economy*, 7 June 2007, G8 Summit Heiligendamm. Available at: http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,templateld=raw,property=publicationFile.pdf/2007-06-07-gipfeldokument-wirtschaft-eng

⁵⁴ Shaw , A., op. cit., page 2.

organisation.⁵⁵ The reasoning of the USTR is that a new treaty is needed to address the worldwide proliferation of counterfeit and pirated products poses an ever-increasing threat not only to sustainable economic development but also to consumers' health and safety. Moreover, the USTR asserts that new issues have been emerging rapidly on a global scale, such as the violation of intellectual property rights through the trading of counterfeit goods over the Internet.

However, concerns have been raised that the ACTA would impose a narrow trade agenda at the expense of global cooperation and evidence-based policies, criminalising non-commercial copyright and trademark infringements, reinforcing Digital Rights Management (DRM) technologies contrary to fair use principles in copyright law, and protecting Internet Service Providers (ISPs) from liability for the actions of their subscribers (⁵⁶).

There are further concerns that the ACTA would require signatories to undertake an unprecedented expansion of customs and law enforcement officials' abilities to police goods and information, and that it would create a dispute settlement system outside of existing multilateral institutions such as the WTO Dispute Settlement Procedure to enforce these new obligations (⁵⁷).

WIPO and intellectual property rights enforcement

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) include specific intellectual property rights enforcement provisions. These provisions require members to "ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements" (⁵⁸).

In addition to enforcement provisions of the WCT and WPPT, the WIPO has an Advisory Committee on Enforcement (ACE) which was established in 2002 to structure discussions on enforcement of intellectual property rights and to discuss and share national experiences on intellectual property enforcement. The establishment of the ACE merged the Advisory Committee on Enforcement of Industrial Property Rights and the Advisory Committee on Management and Enforcement of Copyright and Related Rights in Global Information networks into a single forum (⁵⁹). The mandate of the ACE is limited to discussions on technical assistance and coordination does not include norm-setting in the field of enforcement. To date the focus of ACE has been on strengthening the enforcement of intellectual property rights and the problems right holders face in enforcing their rights in third countries.

⁵⁵ Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 25.

⁵⁶ Shaw, A., op. cit. page 3.

⁵⁷ Shaw, A., op. cit, page 4.

⁵⁸ Article 14(2) WCT and Article 23(2) WPPT.

⁵⁹ WIPO (2003), WIPO/ACE/1/7/ Rev., paragraph 7.

Following adoption of the Development Agenda by the WIPO General Assembly in October 2007 ⁽⁶⁰⁾, the ACE is now required to examine the development dimension of intellectual property enforcement and technical assistance and consider such issues as competition and transfer of technology in relation to enforcement.

Specifically, the Development Agenda requires the WIPO “to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns...in a manner conducive to societal and economic welfare and the balance of rights and obligations in accordance with Article 7 of the TRIPS Agreement” ⁽⁶¹⁾.

Since the WIPO is the main multilateral intellectual property-related technical assistance provider to developing countries, the principles and guidelines established under the Development Agenda may also result in pressure on the WIPO to tailor technical assistance to be more development oriented, demand-driven, transparent and country-specific.

Bilateral intellectual property-related technical assistance

In order to facilitate enforcement of intellectual property rights, bilateral agreements established by the EU usually contain, alongside an obligation to establish a high standard of protection of intellectual property rights, a provision allowing for technical cooperation in this field. The *EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries* states that these clauses must be carefully monitored and effectively implemented, notably with respect to the more “problematic” countries ⁽⁶²⁾.

Under the TRIPS Agreement, Article 67 of TRIPS provides that developed countries shall provide, on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Analysis of the notifications of technical assistance undertaken under Article 67 submitted to TRIPS Council by the United States, Japan and the European Communities has demonstrated that strengthening the capacity of developing countries to enforce the protection of intellectual property rights has been the main technical assistance provided bilaterally, although the European Communities have also engaged in development-oriented activities regarding utilisation of TRIPS flexibilities ⁽⁶³⁾.

⁶⁰ The General Assembly of the WIPO agreed to adopt immediately the 45 proposals for a Development Agenda. See Assemblies of the Member States of WIPO, Forty Third Series of Meetings, Geneva 27 September to 3 October 2007, General Report, A/43/25, page 151, paragraph 334. Available at:

http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf

⁶¹ Ibid., page 157, Annex A, paragraph 45. See also Article 7 of the TRIPS Agreement which provides that: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” Available at: http://www.wto.org/english/docs_e/legal_e/27-trips.doc

⁶² European Commission Directorate General for Trade (2004), op. cit., page 6.

⁶³ Matthews, D. and Munoz Tellez, V., 2006, “Bilateral Technical Assistance and TRIPS: the United States, Japan and the European Communities in Comparative Perspective”, *Journal of World Intellectual Property*, Vol. 9, No. 6, pages 629-653.

World Customs Organisation

Customs administrations can play an important role in combating counterfeiting and piracy. The role of customs administrations in fighting counterfeiting and piracy in international trade has been discussed in various fora at the international level, notably the WTO, the WIPO and the World Customs Organization (WCO). The WCO is an international organisation representing 171 customs administrations with a mandate to undertake dialogue and exchange of experiences between national customs authorities. It is a significant provider of technical assistance to customs administrations.

Recently, however, the WCO has gone beyond its information exchange and technical assistance activities, with the WCO Standards Employed by Customs for Uniform Rights Enforcement (SECURE) Working Group developing “Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the TRIPS Agreement”⁽⁶⁴⁾.

In fact, despite the above statement, far from being consistent with the TRIPS Agreement, the Model Provisions contain significant TRIPS-plus elements⁽⁶⁵⁾. The introductory section to the Model Provisions explains that “[t]he experience of customs administrations in numerous countries has indicated, however, that only by granting certain powers and measures that go beyond the minimum requirement set forth in the TRIPS Agreement, Governments can provide an effective and efficient level of IPR protection and enforcement at their borders.”

The WCO Model Provisions include the following TRIPS-plus measures:

- a definition of infringing goods to be subject to border measures that exceeds the definitions of “counterfeiting” and “piracy” contained in Article 51, footnote 14, of the TRIPS Agreement and in particular would place significant burdens on customs in relation to patent infringements⁽⁶⁶⁾;
- customs to have the ability to suspend counterfeit and pirated goods destined for export and goods which are in transit⁽⁶⁷⁾;
- specific time limit of 30 days for handling applications to customs for suspension of import, export, or transit of infringing goods and a shorter time limit of 3 days with respect to applications concerning specific shipments, in contrast to Article 52 of the TRIPS Agreement which

⁶⁴ Available at: <http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc>.

⁶⁵ See also Munoz Tellez, V., 2008, “The World Customs Organisation: Setting New Standards of Intellectual Property Enforcement through the Back Door?” *South Bulletin: Reflections and Foresights*, Issue 13, South Centre, Geneva, page 6. Available at: http://www.southcentre.org/index.php?option=com_content&task=view&id=592&Itemid=105

⁶⁶ The WCO Model Provisions would apply to any goods which are made, reproduced, put into circulation or otherwise used in breach of intellectual property laws and without the consent of the right holder or a person duly authorised to do so by the right holder. Intellectual property rights are to be such rights as defined in the national laws such as copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and protection of undisclosed information.

⁶⁷ The WCO Model Provisions give the following examples covered by the definition of transit:

1. Goods that reside in a Customs controlled area in a port or airport.
2. Goods that are under Customs procedures, such as inward processing, outward processing, period entry, and various simplified procedures.

requires only that authorities reply to the applicant within a reasonable period, while Article 41 of the TRIPS Agreement sets a general obligation that enforcement procedures shall not entail unreasonable time limits or unwarranted delays.

Despite the Model Provisions, the WCO is seen as lacking the authority to set or enforce policies that contradict the WTO, with the effect that SECURE would hold little more than symbolic value⁽⁶⁸⁾. It is recommended that the SECURE Working Group should play a limited role in elaborating international standards on border measures related to enforcement of intellectual property rights and focus instead on training and capacity building for customs officials.

WHO International Medicinal Products Anti-Counterfeiting Taskforce (IMPACT)

The WHO International Medicinal Products Anti-Counterfeiting Taskforce (IMPACT), created in 2006, has also been active in forging international collaboration to seek global solutions to this global challenge and in raising awareness of the dangers of counterfeit medical products. IMPACT aims to build coordinated networks between countries in order to halt the production, trading and selling of fake medicines around the globe. IMPACT is to help to identify and coordinate action between customs, police and the judiciary of different countries to monitor borders, track counterfeit goods and apprehend counterfeiters.

By working with the World Customs Agency, Interpol, and through informal networks of enforcement officers, IMPACT is intended to facilitate communication between enforcement and health authorities, improve international collaboration and develop appropriate mechanisms that will enable importing countries, especially in the developing world, to trigger investigation and identification of the actual source of counterfeit medicines plaguing their markets⁽⁶⁹⁾. The IMPACT website notes that: “counterfeit medical products are a major public health risk for all communities. The phenomenon has grown in recent years due to counterfeiting methods becoming more sophisticated and to the increasing amount of merchandise crossing borders”⁽⁷⁰⁾.

According to IMPACT, counterfeiting of medicines is greater in those regions where regulatory and legal oversight is weaker, and therefore:

- most developed countries with effective regulatory systems and market control (e.g. USA, EU, Australia, Canada, Japan, New Zealand) currently have a very low proportion, i.e. less than 1% of market value;
- many developing countries in Africa, parts of Asia, and parts of Latin America have areas where more than 30% of the medicines on sale can be counterfeit. Other developing countries, however,

⁶⁸ Shaw, A., op. cit., page 3.

⁶⁹ *Counterfeit Medicines*, World Health Organisation Fact Sheet No. 275, revised 14 November 2006, available at: <http://www.who.int/mediacentre/factsheets/fs275/en/index.html>

⁷⁰ WHO International Medicinal Products Anti-Counterfeiting Taskforce (IMPACT) website. Available at: <http://www.who.int/impact/en/>

have less than 10% overall, a reasonable estimate for all developing countries is therefore between 10% and 30%;

- many of the former Soviet republics have a proportion of counterfeit medicines which is above 20% of market value – this falls into the developing country range; However other sources estimate that the real figure could be much higher;
- medicines purchased over the internet from sites that conceal their actual physical address are counterfeit in over 50% of cases (⁷¹).

In relation to specific countries, IMPACT reports that:

- the Russian Federal Service for Health Sphere Supervision (FSHSS) reported that 10% of all drugs on the Russian market were counterfeit;
- China's Research and Development-based Pharmaceutical Association estimated that about 8% of over-the-counter drugs sold in China were counterfeit.
- Indian pharmaceutical companies have suggested that in India's major cities, one in five strips of medicines sold is fake. They claim a loss in revenue of between 4% and 5% annually. The industry also estimates that spurious drugs have grown from 10% to 20% of the total market (⁷²).

The US Strategy on Targeting Organised Piracy (STOP!)

The United States launched the Strategy Targeting Organized Piracy (STOP!) initiative in October 2004. The strategy aims at engaging trading partners in increasing efforts to seize counterfeit goods at United States borders, pursuing criminal enterprises involved in piracy and counterfeiting (⁷³). The Department of Justice of the United States has developed a “comprehensive, multi-dimensional strategy to fight intellectual property crime”, which includes the following principles:

- laws protecting intellectual property rights must be enforced;
- government and intellectual property owners have a *collective responsibility* to take action against violations of intellectual property rights laws;
- the Department should take a leading role in the prosecution of the most serious violations of the laws protecting copyrights, marks, and trade secrets;

⁷¹ IMPACT fact sheet: *Counterfeit Medicines: an update on estimates* (15 November 2006), available at:

<http://www.who.int/medicines/services/counterfeit/impact/TheNewEstimatesCounterfeit.pdf>

⁷² Ibid.

⁷³ United States National Intellectual Property Law Enforcement Coordination Council (2006).

- government should punish the misappropriation of innovative technologies rather than innovation itself;
- intellectual property rights enforcement must include the coordinated and cooperative efforts of foreign governments through informal assistance and formal cooperation, such as treaties and international agreements ⁽⁷⁴⁾.

As part of STOP!, both the USTR and the State Department are actively promoting the adoption of best practices, sharing information, streamlining procedures and strengthening technical assistance efforts for enforcement internationally. These efforts include new initiatives in multilateral forums to improve global intellectual property rights environment, such as the G8, the United States-European Union Summit, the OECD, the Asia-Pacific Economic Cooperation (APEC) forum and the Security and Prosperity Partnership (Canada and Mexico) ⁽⁷⁵⁾.

The intellectual property enforcement strategy of Interpol

Interpol has established a new unit on intellectual property crime to deal specifically with intellectual property infringements that may be connected to terrorist and other criminal activities. Interpol considers “[tr]ademark counterfeiting and copyright piracy [to be] serious Intellectual Property (IP) crimes that defraud consumers, threaten the health of patients, cost society billions of dollars in lost government revenues, foreign investments or business profits and violate the rights of trademark, patent, and copyright owners” ⁽⁷⁶⁾.

The role of rights holders in intellectual property enforcement

Intellectual property rights are conferred on individuals by law and the enforcement of these rights remains primarily the responsibility of the private rights holder. The role of national governments is in assisting a rights holder in enforcing their rights but the onus lies with the rights holders themselves to assume the initiative and costs associated with enforcing their private rights through national courts. This approach is in accordance with the recent statement of Internal Market Commissioner McCreevy that more regulation is not the answer and that industry should lead the battle against counterfeiting and piracy ⁽⁷⁷⁾.

There are concerns that intellectual property rights holders, especially large companies, are demanding further government-led efforts for strengthening intellectual property right protection rather than these rights holders themselves taking the lead by bringing enforcement actions before national

⁷⁴ United States Department of Justice (2006), *Progress Report of the Department of Justice’s Task Force on Intellectual Property*, pp. 15-16. Available at: <http://www.justice.gov/opa/documents/ipreport61906.pdf>

⁷⁵ Tekeste Biadgleng, E. and Munoz Tellez, V., op. cit., page 18.

⁷⁶ See Interpol Intellectual Property Crime website. Available at:

<http://www.interpol.int/public/financialcrime/intellectualproperty/default.asp>

⁷⁷ Standeford, D. “EU Internal Market Chief: Counterfeiting and Piracy Need Industry-Led Solutions”, *Intellectual Property Watch*, 14 May 2008.

courts. As a result, there are fears that developing countries are facing increased pressure to enhance their efforts on the enforcement of intellectual property rights.

Developed countries have sought to make use of criminal law as a deterrent to infringement, but such use may work against the intellectual property system itself by creating public resentment. Police raids and the use of criminal law enforcement mechanisms require extensive use of public funds. For developing countries this may entail diverting resources away from other law enforcement priorities. Yet there are other means, particularly recourse to civil law, that may be strengthened to allow private parties to enforce their rights and which do not require extensive use of public funds.

Developing countries retain the discretion under the TRIPS Agreement to determine for themselves the most appropriate enforcement policies and procedures based on the public interest and the capacity of government agencies. However this policy space is in danger of being eroded by bilateral trade agreements that include provisions requiring the increased pressure to use the state machinery to reduce the cost of private enforcement.

The role of the European Parliament in the conclusion of provisions on enforcement of intellectual property rights bilateral trade agreements

If the Lisbon Treaty on the Functioning of the European Union (TFEU) comes into force, the European Parliament will have a significantly enhanced role to play in the negotiation of trade agreements, including the power of veto over such agreements ⁽⁷⁸⁾. This will give the Parliament significant influence over the content of provisions in agreements relating to the commercial aspects of intellectual property, including measures to fight counterfeiting and piracy in third countries. This enhanced role for the European Parliament will arise for a number of reasons.

Firstly, if the TFEU comes into force, the EU will have exclusive competence in relation to common commercial policy ⁽⁷⁹⁾, including the conclusion of tariff and trade agreements relating to the commercial aspects of intellectual property (together with goods, services and investment) ⁽⁸⁰⁾.

Secondly, if the TFEU comes into force, measures defining the framework for implementing the common commercial policy will be adopted by the European Parliament and the Council ⁽⁸¹⁾, acting by means of regulations in accordance with the ordinary legislative procedure (the co-decision procedure under the EC Treaty) ⁽⁸²⁾. The adoption of measures defining the framework for implementing the common commercial policy by the European Parliament and the Council by means of the ordinary legislative procedure will offer an

⁷⁸ See also Leal-Arcas, R., (2008) *Theory and Practice of EC External Trade Law and Policy*, Cameron May, London, pages 411-412.

⁷⁹ Article 3(1) TFEU.

⁸⁰ Article 207(1) TFEU. See also Article 133(5) of the EC Treaty, as amended by the Treaty of Nice.

⁸¹ Article 207(2) TFEU.

⁸² Under the TFEU the co-decision procedure, as provided for in Article 251 of the EC Treaty, is retained unchanged, becoming the "ordinary legislative procedure".

important opportunity for the European Parliament to ensure that the common commercial policy deals explicitly with the fight against counterfeiting and piracy and that aspects relating to intellectual property rights enforcement are proportionate, effective and balance the interests of EU stakeholders with the avoidance of onerous enforcement burdens on third countries, particularly low-income developing or least-developed countries.

Thirdly, where agreements with one or more third countries or international organisations need to be negotiated and concluded⁽⁸³⁾, if the TFEU comes into force this will be done by means of the Council authorising the opening of negotiations, adopting negotiating directives, authorising the signing of agreements and concluding them⁽⁸⁴⁾. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted⁽⁸⁵⁾. The Council, on a proposal by the negotiator, will then adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force⁽⁸⁶⁾. In the case of association agreements, except where agreements relate exclusively to the common foreign and security policy, the Council will then adopt the decision concluding the agreement after obtaining the consent of the European Parliament⁽⁸⁷⁾. In an urgent situation, the European Parliament and the Council may agree on a time limit for this consent to be given. Nevertheless, even where time limits are agreed, consent must still be given by the European Parliament before the Council can adopt the decision concluding the agreement.

The requirement that the Council obtain the consent of the European Parliament before concluding agreements in effect gives the European Parliament a veto over the conclusion of trade agreements. If the European Parliament is not satisfied that agreements contain appropriate provisions, for instance on measures to combat counterfeiting and piracy, it will have the power to prevent these agreements being concluded by the Council.

This veto over agreements is in contrast with the current provisions of the EC Treaty, which provides little opportunity for the European Parliament to influence provisions of agreements to fight counterfeiting and piracy. Under the EC Treaty, the conclusion of tariff and trade agreements is by means of the Commission submitting proposals to the Council for implementing the common commercial policy⁽⁸⁸⁾, including the negotiation and conclusion of agreements in the fields of trade in the commercial aspects of intellectual property⁽⁸⁹⁾. The Council is required merely to consult the European Parliament before concluding such agreements and the European Parliament must then deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter and, in the absence of an opinion being delivered by the European Parliament within that time limit, the Council

⁸³ Article 218(1) TFEU.

⁸⁴ Article 218(2) TFEU.

⁸⁵ Article 218(4) TFEU.

⁸⁶ Article 218(5) TFEU.

⁸⁷ Article 218(6)(a)(i) TFEU.

⁸⁸ Article 133(2) of the EC Treaty, as amended by the Treaty of Nice.

⁸⁹ Article 133(5) and (7) of the EC Treaty, as amended by the Treaty of Nice.

may act ⁽⁹⁰⁾. Under the EC Treaty, the European Parliament cannot, therefore, generally veto agreements and must deliver an opinion by a time limit imposed by the Council ⁽⁹¹⁾.

Fourthly, if the TFEU comes into force a decision by the Council concluding agreements between the European Union and international organisations, including future amendments to the TRIPS Agreement, would also require the consent of the European Parliament ⁽⁹²⁾. The assent of the European Parliament (i.e. the approval vote by the European Parliament on the basis of a simple majority) will be required because the TFEU provides that the Council will adopt the decision concluding the agreement after obtaining the consent of the European Parliament in the case of agreements covering fields to which the ordinary legislative procedure applies, or the special legislative procedure where the consent of the European Parliament is required ⁽⁹³⁾. As with the conclusion of association agreements, the European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent. Given that agreements between the European Union and international organisations are not subject to the European Parliament's assent in the current EC Treaty ⁽⁹⁴⁾, this would be an important and significant increase in the European Parliament's role in the conclusion of agreements with international organisations.

Fifthly, if the TFEU comes into force, there will also be possibilities for the European Parliament to have a veto over subsequent modifications to agreements that have already been concluded. However, whether or not the European Parliament will have a veto over subsequent modifications to agreements will depend on whether consent is specifically required by the provisions of agreements as initially concluded.

The inclusion of a provision in agreements that requires the consent of the European Parliament before subsequent modifications are made will be necessary because, by way of derogation from the procedure set out in the TFEU for adoption of the decision concluding an agreement, the Council may authorise the negotiator to approve on the Union's behalf any subsequent modifications to the agreement where an agreement explicitly provides for such modifications to be adopted by a simplified procedure or by a body set up by the agreement. The Council may also attach specific conditions to such authorisation ⁽⁹⁵⁾.

If the TFEU comes into force, the European Parliament should scrutinise agreements to ensure that they do not contain provisions allowing for modifications to the agreement to be adopted by a simplified procedure or by

⁹⁰ Article 300(3) of the EC Treaty, as amended by the Treaty of Nice.

⁹¹ However, there are some exceptions under the EC treaty for agreements that fulfill certain criteria, for example establishing an institutional framework, association agreements, or agreements with budgetary consequences for the Community. This is why the assent procedure for has been used for the TRIPS Agreement in the past.

⁹² Article 216(1) TFEU. For a discussion see Leal-Arcas, R. (2008) "The EU Constitutional Treaty and International Trade", in *The Rise And Fall of the EU's Constitutional Treaty*, Laursen, F., Brill/Nijhoff, Leiden, pages 34-35.

⁹³ Article 218(6)(a) (v) TFEU.

⁹⁴ Article 300(3) EC Treaty, as amended by the Treaty of Nice.

⁹⁵ Article 218(7) TFEU.

a body set up by the agreement where this would remove the requirement for the Council to obtain consent from the European Parliament before concluding such modifications.

Sixthly, if the TFEU comes into force, the procedure for concluding agreements will apply subject to the Commission making recommendations to the Council, which will authorise the Commission to open the necessary negotiations. The Council and the Commission will then be responsible for ensuring that the agreements negotiated are comparable with internal Union policies and rules⁽⁹⁶⁾. The Commission will conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission will report regularly to the special committee and to the European Parliament on the progress of negotiations⁽⁹⁷⁾. It is therefore recommended that the European Parliament put in place procedures to ensure effective scrutiny of these reports on the progress of negotiations submitted to it by the Commission.

The current procedure for concluding agreements under the EC Treaty is generally the same as the procedure described above⁽⁹⁸⁾. However the procedure under the EC Treaty differs from the TFEU in one important respect – at present the Commission is required to report regularly to the special committee on the progress of negotiations, but not to the European Parliament as would be the case under the new arrangements established by the TFEU⁽⁹⁹⁾.

The current EC Treaty also includes derogations where the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property related to trade in cultural and audiovisual services, educational services, and social and human health services. In such instances, the negotiation and conclusion of agreements fall within the shared competence of the Community and its Member States⁽¹⁰⁰⁾. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of the EC Treaty, the negotiation of such agreements requires the common accord of the Member States and agreements negotiated in this way were required to be concluded jointly by the Community and the Member States. If the TFEU comes into force, this derogation for trade in cultural and audiovisual services will be removed although these areas will still require unanimity in the Council⁽¹⁰¹⁾.

Moreover, if the TFEU comes into force, the European Union's Member State parliaments will no longer ratify international trade agreements, such as amendments to the TRIPS Agreement, since the European Union will have exclusive competence in relation to common commercial policy, including the conclusion of tariff and trade agreements relating to the commercial aspects of intellectual property. This will reduce the influence that European Union

⁹⁶ Article 207(3)(2) TFEU.

⁹⁷ Article 207(3)(3) TFEU.

⁹⁸ Article 133(3) of the EC Treaty, as amended by the Treaty of Nice.

⁹⁹ Article 133(3)(2) of the EC Treaty, as amended by the Treaty of Nice.

¹⁰⁰ Article 133(6)(2) of the EC Treaty, as amended by the Treaty of Nice.

¹⁰¹ Article 207(4)(a) TFEU.

Member States have over such agreements. At present national parliaments have relatively limited power to influence trade policy and, under the TFEU, the influence of Member States and their parliaments would decrease further.

Key considerations and policy recommendations

In scrutinising and giving consent to agreements, it is recommended that the European Parliament takes account of the following:

1. Reliable information and statistics as the basis for evidence-based arguments

If intellectual property enforcement provisions in agreements are to be introduced, this must be done on the basis of adequate evidence on the level of counterfeiting and piracy and its effects. At present there is insufficient reliable evidence to confirm whether or not additional enforcement provisions are necessary in trade agreements in order to address problems of counterfeiting and piracy.

The European Parliament should encourage the exchange of information and statistics between the EU and third countries in order to allow the EU to build an accurate picture of levels of counterfeiting and piracy as a precursor to provisions on enforcement of intellectual property rights in bilateral trade agreements.

The lack of reliable information and statistics is exacerbated by the absence of harmonised definitions of “counterfeiting” and “piracy” that would allow accurate estimates to be made of the impact on international trade. When considering the inclusion of provisions on enforcement of intellectual property rights in agreements, the European Parliament should use definitions of counterfeiting and piracy set out in Article 51, footnote 14 of the TRIPS Agreement and, in particular, should ensure that such provisions not include patent infringement, the enforcement of which is more appropriately dealt with by private rights holders by bringing infringement proceedings before national courts, nor hinder legitimate parallel trade.

In addition, a clear distinction must be made between private non-commercial use and commercial use of infringing products. Definitions of counterfeiting and piracy should deal only with commercial use of infringing products.

2. Intellectual property rights as private rights

It has been suggested that consideration should be given to agreements containing provisions to strengthen civil and criminal remedies to more effectively redress the harm caused to intellectual property rights holders.

However, intellectual property rights are private rights and the main responsibility for taking measures to protect and enforce intellectual property rights should lie with individual right holders. While provisions on enforcement of intellectual property rights in agreements should require third countries to provide appropriate legal mechanisms to enable intellectual property rights holders to enforce their rights and bear the costs of doing so, this should be

primarily a matter of private law in the country in which the intellectual property rights are protected rather than a criminal law matter in those jurisdictions.

3. Utilising TRIPS flexibilities

The European Parliament should consider carefully the need to balance flexibilities contained in the TRIPS Agreement concerning the enforcement of intellectual property rights with the need for TRIPS-plus provisions to fight counterfeiting and piracy. In particular, agreements with third countries should be in accordance with the objectives set out in Article 7 of the TRIPS Agreement (¹⁰²). Agreements with third countries should therefore balance the legitimate interests of rights holders with public interest concerns in developing countries.

The European Parliament should ensure that the principles established under the Doha Declaration on the TRIPS Agreement and Public Health and in particular the use of TRIPS flexibilities by developing countries are not undermined by TRIPS-plus provisions in bilateral trade agreements.

4. Border measures concerning exports or goods in transit

It has been suggested that consideration should be given to bilateral trade agreements containing provisions to expanding the scope of border measures to cover exports as well as goods in transit or transshipment. The TRIPS Agreement does not oblige WTO Members to make available border measures concerning exports or goods in transit. In order to enable customs to fight counterfeiting and piracy effectively, it is argued that customs need the authority to suspend goods destined for export and goods in transit, as well as imported goods.

Furthermore, the TRIPS Agreement obliges WTO Members to enable right holders to make applications for border seizures to competent authorities but does not specify what those competent authorities must be, for instance in some countries applications for border seizures are dealt with by courts rather than directly with customs.

However it is recommended that any requirement on customs to deal with this task also ensures that applications are processed in a fair and effective manner without unnecessarily burdening the courts and that enforcement actions should be submitted directly to the customs that will process applications and decide whether to take the requested actions or refuse the application, subject to the availability of judicial review by administrative or civil courts.

5. Avoid undermining the multilateral trading system

The WTO dispute settlement procedure should be the primary mechanism for ensuring adequate enforcement of intellectual property rights in third countries.

¹⁰² Article 7 of the TRIPS Agreement, op. cit.

The dispute settlement chapters in US bilateral trade agreements tend to go further than those of the EU by establishing the application of non-violation and situation complaints that are suspended under the TRIPS Agreement.

The Hong Kong Ministerial Meeting of the WTO extended the moratorium on non-violation complaints relating to intellectual property rights provisions of the TRIPS agreement being brought and this moratorium should be respected in bilateral trade agreements.

Bilateral agreements that contain provisions on recourse to dispute settlement mechanisms established in the agreements, which can be triggered in cases of the non-compliance with the required “highest” standards of intellectual property rights protection may also be problematic. They risk weakening the multilateral dispute settlement system and diminishing the legitimate interests of third countries to utilise TRIPS flexibilities to regulate the enforcement of intellectual property rights according to the development priorities of each country that are permitted under the TRIPS Agreement.

6. Build capacity in third countries

Building capacity in third countries is the most effective way to enhance enforcement of intellectual property rights. Police, customs officers, judiciary and other government officials in third countries, particularly developing countries, are often in need of specialised training and assistance in identifying and enforcing counterfeit and pirated goods.

The European Parliament should encourage the EU to undertake needs assessments in third countries to ensure that adequate and appropriate IP-related technical and financial cooperation is made available on mutually agreed terms and conditions in order to assist with the training of police, customs officers, judiciary and other government officials to enable them to combat counterfeiting and piracy effectively and also to assist in the utilisation of TRIPS flexibilities in accordance with the Doha Declaration on the TRIPS Agreement and Public Health.

In order to generate greater awareness amongst consumers and intermediaries that economic damage can result for counterfeit and pirated goods, the European Parliament should also support initiatives to raise awareness of counterfeiting and piracy issues amongst consumers in third countries.

7. Inter-parliamentary observatory

Given the importance of effective parliamentary scrutiny of provisions concerning enforcement for intellectual property rights in agreements with third countries, and in the light of the changing role of national parliaments and the European Parliament in relation to agreements if the TFEU comes into force, it would be advantageous to establish a parliamentary forum or an inter-parliamentary observatory to monitor and assess the impact of such agreements in the fight against counterfeiting and piracy.