

IP Enforcement in European trade agreements 欧洲贸易协议中的知识产权执法

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Intellectual property and FTAs: origins and expansion

知识产权与自贸协议:源起与扩展



It is safer to anticipate more, rather than fewer, trade agreements

Brexit 英国脱欧

- Foreseeable adoption of numerous FTA by UK
- 可以预见英国会通过大量自贸协议
- UK is a "great, global trading nation" and will seek "a bold and ambitious free trade agreement" with the EU and other partners (T. May, 2017): Australia, Brazil, China, US, India and New Zealand.
- 英国是"全球性贸易大国",将寻求与欧盟和其他伙伴,如澳大利亚、巴西、中国、美国、印度、新西兰,签订"大胆、雄心勃勃的自由贸易协议" (特蕾莎·梅,2017年)

EU ongoing negotiations 欧盟的持续谈判

- Just concluded: Vietnam, Japan, Mexico
- 刚签订:越南、日本、墨西哥
- Update: Chile更新: 智利
- · New: Mercosur, India, Indonesia, China
- 新谈判:南方共同市场、印度、印尼、中国

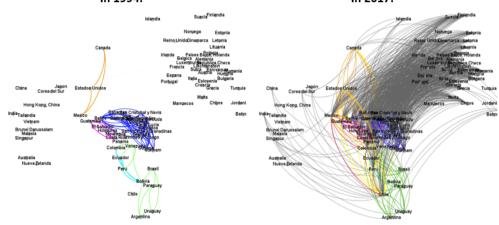
EFTA ongoing negotiations 欧洲自由贸易联盟的持续谈判

- Mercosur, Ecuador, India, Indonesia, Malaysia, Vietnam, Central America
- 南方共同市场、厄瓜多尔、印度、印度尼西亚、马来西亚、越南、中美洲

US 美国

• Renegotiation of NAFTA 北美自由贸易协议的重新谈判

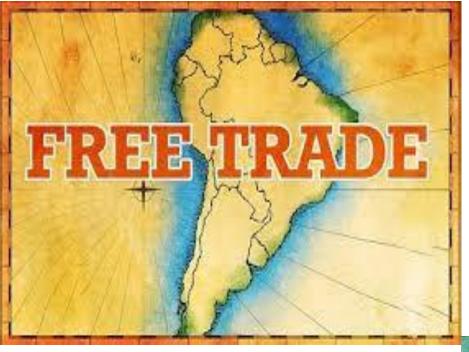
The Regional Network of LAC FTAs 拉美-加勒比海自由贸易协议的地区性网络 In 1994: In 2017:







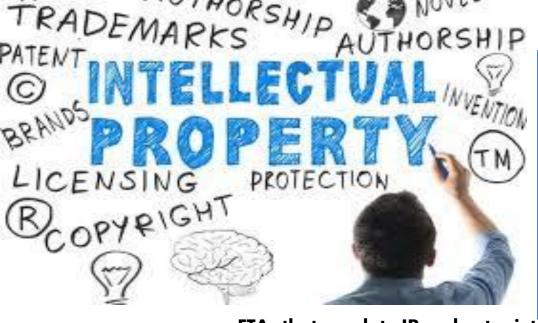
¿'Free trade' or 'economic harmonization' agreements?
"自由贸易"还是"经济协调"协议



- Tariff cuts and quota elimination are just some of the areas addressed in contemporary FTA, which would probably be better named as 'economic harmonization agreements'
- 关税减让和配额取消只是当前自贸协议中提出的部分内容。也许自贸协议最好更名为"经济协调协议"。
- Services, regulatory aspects, IP, subsidies, investment... are central and frequently more important than tariffs and quotas
- 服务、监管、知识产权、补贴、投资……这些都是核心问题,而且往往比关税和配额更重要。

- In the case of the TTIP (UE-US), specifically in pharma, economic studies report that the benefit for the US arising from pharma harmonization would multiply per 10 tariff cuts in health products
- 以(美-欧)跨大西洋贸易与投资伙伴协定(TTIP)为例,经济学研究表明,制度协调化后,每达成10项关税减让,美国从中的获益就会翻倍。
- Impact is particularly high in FTAs where IP standards (and industry) are notably different –as it happens in most of emerging and developing economies
- 在知识产权标准(及行业标准)存在显著差异时,自 贸协议影响尤巨——多数新兴和发展中经济体的情况 正是如此。

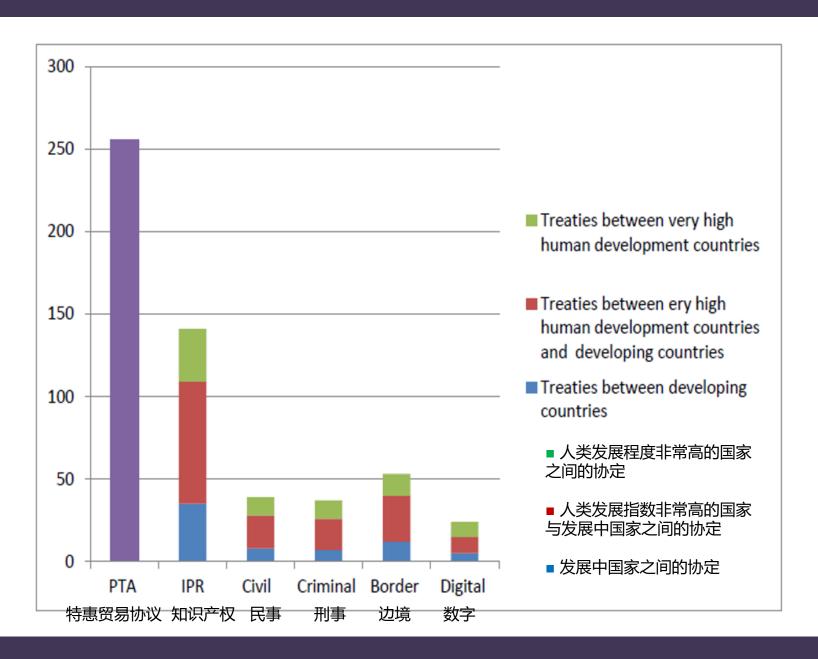




- There are about 160 FTAs with relevant IP provisions
- 全球含相关知识产权条款的自贸协议 大约有160份
- Since the beginning of the 2000', from 6 to 14 FTAs enshrining relevant IP undertakings enter into force annually
- 自2000年初开始,每年有6到14份载 有知识产权相关条款的自由贸易协议 生效

FTAs that regulate IP and enter into force annually





First	Second Generation	Third Generation	Respect EU level
第一代	第二代	第三代	适用欧盟 水平
Switzerland, 1973 Syria, 1977 Andorra, 1991 Iceland, 1994 Turkey, 1995 Faroe Islands, 1997 Tunisia, 1998 Kazakhstan, 1999 San Marino, 2002 瑞士,1973年 叙利亚,1977年 安道尔,1991年 冰岛,1994年 土耳其,1995年 法罗群岛,1997年 突尼斯,1998年 哈萨克斯坦,1999年 圣马力诺,2002年	Mexico, 2000 Morocco, 2000 Israel, 2000 Jordan, 2002 Egypt, 2004 Algeria, 2005 Chile, 2005 Lebanon, 2006 墨西哥, 2000年 摩洛哥, 2000年 以色列, 2002年 埃及, 2004年 阿尔及利亚, 2005年 智利, 2005年 黎巴嫩, 2006年	CARIFORUM, 2008 Central America, 2013 Colombia, Ecuador and Peru, 2013 Georgia, 2016 Moldova, 2016 Ukraine, 2016 Singapore, 2016 ++ South Korea, 2016 ++ Vietnam, 2016++ Japan, 2017 ++ Canada, 2017 ++ Mexico 2018 ++ 加勒比论坛, 2008年 中美洲, 2013年 哥伦比亚, 厄瓜尔多和秘鲁, 2013年 格鲁吉亚, 2016年 摩尔多瓦, 2016年 新加坡, 2016年++ 韩国, 2016年++ 地南, 2017年++ 加拿大, 2017年++ 加拿大, 2017年++	Armenia, 1999 Azerbaijan, 1999 Macedonia, 2004 Albania, 2009 Montenegro, 2010 Serbia, 2013 Bosnia-Herzegovina, 2015 Kosovo, 2016 亚美尼亚,1999年 阿塞拜疆,1999年 马其顿,2004年 阿尔巴尼亚,2009年 黑山,2010年 塞尔维亚,2013年 波斯尼亚和黑塞哥维那,2015 年 科索沃,2016年

Ongoing negotiations (February 2019) 持续谈判 (截至2019年2月)

- Update of an existing agreement: Chile
- 现有协议更新:智利
- Ongoing negotiations: Mercosur, India, Indonesia
- 持续谈判:南方共同市场,印度,印度尼西亚
- Ongoing but slow: Philippines, Burma, Morocco, Tunisia
- · 持续谈判但进展缓慢: 菲律宾、缅甸、摩洛哥、突尼斯
- Frozen: TTIP, GCG, Asean
- · 冻结:跨大西洋贸易与投资伙伴协定、GCG、东南亚国家联盟

Content of the European Foreign Policy on Intellectual Property Rights, 2014年欧洲知识产权对外政策

Norm-setting 建立规范

- Conclusion of new agreements incorporating TRIPS-plus standards (bilateral, multilateral and "other agreements", i.e. plurilateral)
- 达成包含TRIPS-plus标准的新协议(双边、多边、"其他协议", 如复边协议)

Control of existing norms

管控现有规范

• Monitoring; blacklisting; retaliation to recalcitrant States

• 监控: 黑名单; 对不守规则的国家进行报复

Soft-policy measures

软性政策措施

- Political dialogue; incentives; technical cooperation; awareness raising; exchange of best-practices; institutional and public-private cooperation
- 政治对话;激励;技术合作;意识提升;交流最佳做法;机构性合作、政企合作



1. Modernize norms & IP institutions

1. 现代化规范与知识 产权机构



"assume the challenges posed by the FTAs by adopting less limited reforms and accepting some risks, in a more creative and dynamic way"

"以更具创造力、更为动态的方式,开展受限更少的改革,并接受一些风险,以应对自贸协议带来的挑战。"

"The implementation of the FTAs should be used as an opportunity for reform and modernization that would involve investment in securing appropriate institutions and human resources"

"应以自由贸易协议的落实作为开展改革和现代化的契机,保障适当的机构与人力资源"

P. Roffe, Intellectual property provisions in bilateral and regional trade agreements: the challenges of implementation, CIEL, 2007

P. Roffe, *双边和区域性贸易协议中的知识产权条款: 落实上的挑战*, 国际环境法中心, 2007年

Going customs digital 走向数字海关

- Growing international commitment to digitalisation in customs IP enforcement
- 越来越多的国家和地区承诺对海关知识产权执法进行数字化变革
- Electronic systems for customs management should be fully implemented by 2020 in the EU
- 欧盟应在2020年全面实施电子海关管理系统
- New IP chapter of EU-Mercorsur treaty (and many other) establishes
- 欧盟-南方共同市场协定(以及许多其他协议)的新知识产权条款规定:
 - "3. Each Party shall encourage the use of electronic systems for the management by customs of the applications granted or recorded.
 - 7. Customs authorities shall use risk analysis to identify suspect goods."
 - "3. 各方应鼓励海关使用电子系统对所授权或记录的申请进行管理。"
 - 7. 海关部门应使用风险分析,识别可疑商品。"



Risk management 风险管理

- Risk analysis has become common in border enforcement, fed by big data, image recognition, biometric screening and predictive modelling
- 在大数据、图像识别、生物特征筛选和预测性模型 技术的支持下,**风险分析**已成为边境执法的常见手 段。
- Risk analysis predicts threats, monitors trends and targets high risk transactions
- 风险分析可预测**威胁**,监控趋势,**锁定**高风险交易
- Digitalisation allows access to information of IP status of goods in destiny
- 数字化可使目的地海关获取相关商品的知识产权状态信息。
- Advanced analytics allows to correlate internal data with other categories of data: correlate customs situation, national IP AND patent or TM protection status in third countries
- · 高级分析可以将海关内部数据与其他类别数据相关 联: 如关联本国海关资料与位于第三国的知识产权、 专利或商标保护状态。



"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 kind of efforts it expects from its trading partners"

"让未来的双边或区域间协议的执法条款更具操作性,**清楚地定义欧盟认为这一领域的最高国际标准是什么**,以及欧盟期望贸易伙伴做出何种努力"

EU Commission, EU Strategy for the enforcement of IPR in third countries, 2004 欧委会,欧盟对第三国知识产权执法的战略,2004年

"We always use bilateral free trade agreements to **move things beyond WTO standards**. By definition, a bilateral trade agreement is 'WTO plus'."

"我们一直使用双边自贸协议来超越世贸组织标准。本质上说,双边贸易协议是"WTO+"。

Pascal Lamy, DG Trade Commissioner, 2004 帕斯卡尔·拉米,世界贸易组织总干事, 2004年

Expansion of IP categories covered 所涵盖的知识产权种类扩大

- From pirated and counterfeit products to all IP protected goods
- 从盗版和假冒产品到所有受知识产权保护 的商品

Increase of **border situations** under control 受到管控的边境执法场景增加

- Import + export and, in some cases, transit
- 进口+出口,有时还包括转运

Law of customs procedures... 海关程序法...

- ... and not the law of importation
- ...不是进口法

Border enforcement 边境执法

Strengthen standards: right of information 加强标准: 获得信息的权利

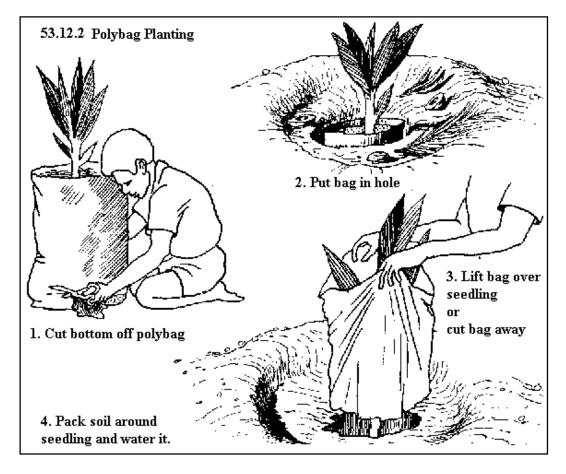
CHANGES 改变	TRIPS article 47 《知识产权协定》第47条	EU, Peru, Colombia and other agreements 欧盟、秘鲁、哥伦比亚和其他协议
Nature 性质	Permission: "Members <i>may</i> provide that the judicial authorities shall have the authority () to order the infringer to inform" 准许:"成员可以规定司法部门有权()命令侵权人提供信息"	Obligation: The Parties <i>shall</i> provide that () the competent judicial authorities may order that information () be provided 义务:各方应规定()主管司法部门可以命令提供()信息
Who 谁来做	Only the infringer as such must provide the information 只有侵权人本身必须提供信息	a) Person found in possession of the infringing goods; b) person found to be using the infringing services; c) person providing services used in infringing activities; d) person indicated by any of the previous ones as involved in the production, manufacture or distribution a) 被发现占有侵权商品的人员; b) 被发现使用侵权服务的人员; c) 为侵权活动提供服务的人员; d) 由前述人员指出的,涉及侵权商品生产、制造或分销的人员
When 何时做	After an infringement has occurred 侵权发生后	In the process to determine the existence of an infringement 在确定侵权存在性的过程中
What 做什么	identity of persons and channels of distribution 识别分销的人员与渠道	- names and addresses of the producers, manufacturers, distributors, suppliers, previous holders, wholesalers and retailers - 生产商、制造商、分销商、供应商、先前持有人、批发商和零售商的名称与地址 - Quantities and price - 数量与价格



"(objective) the adequate and effective **protection** of intellectual property rights, in accordance with the **highest international standards**" (目标)依据最高的国际标准,充分有效地保护知识产权"

Association Agreement EU – Chile, arts. 55 & 168 // EU – Mexico, art. 12 《欧盟-智利联合协议》第55条和第168条//《欧盟-墨西哥协议》第12条

Transplantation 移植



"moving of a rule or a system of law from one country to another" A. Watson (1974) "将一种规定或者一套法律体系从一个国家移到另一个国家" A.Watson (1974年)

Enforcement Directive, Border measures Regulation... but also Community Medicines Code, Trademark Regulation (EU) 2015/2424, EU GIs...

执法指令、边境措施条例……但是也包括共同体药品编码、商标条例(欧盟第2015/2424号条例)、欧盟 地理标识… ©Seuba2019

- Claimant must prove "good case" (fbi/pim)
- ·申请人必须证明"充分理由"(FBI/PIM)
 - Immediately inform the other party
 - ・立即告知对方
 - Compensation if the measure is revoked, expires or there was no infringement or threat of infringement
 - ·如果措施撤销、到期,或者不存在侵权或侵权 威胁,则需要赔偿

EU Agreements concluded with Korea, Peru, Central America, Cariforum... 欧盟与韩国、秘鲁、中美洲、加勒比 论坛等签订的协议

- Claimant must provide guarantee
- ・申请人必须提供保证
- Right to ask for revision of the measure
- ・有权要求修改措施
- Revoke the measure if no process on the merits of the claim is promptly launched
- 如果没有立即就申索依据开展任何确认程序,则撤回措施

Interim Injunctions

临时禁令

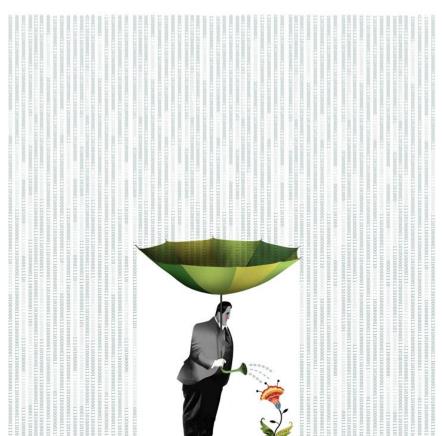
Missing guarantees in comparison to Directive 2004/48 与2004/48号指令相比,缺少保证



Conclusions 结论









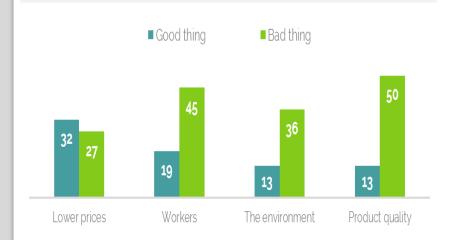
Proliferation of conflicting standards

冲突标准的扩散

The impact of free trade

YouGov yougov.com

Have free trade agreements between the U.S. and other countries been a good thing or a bad thing in the following areas? %



May 3-4, 2016



Strasbourg, 1.7.2014 COM(2014) 389 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries

{SWD(2014) 204 final}

The Commission, in the 2014 EU Strategy for the enforcement of IPRs in third countries, recognized the influence of social perceptions and attitudes towards IP, and its impact on "the derailment of some initiatives aimed at the enforcement of IPR". It also acknowledged the "perception of overreach by right-holders, impacting on access"

在《2014年欧盟对第三国的知识产权执法战略》中,欧委会承认社会对知识产权的感知和态度所产生的影响,及其对"以知识产权执法为宗旨的部分行动的背离"影响。欧委会还认承认"感觉到权利人的过分要求,影响到他人对信息的获取"

