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Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries

Final Report

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Acronyms

€	Euro
€ m	Million Euros
AIDCO	EuropeAid Co-operation Office
ASEAN	Association of Southeast Asian Nations
COM	Communication of the European Commission
Commission	European Commission
DAC	Development Assistance Committee of the OECD
DG	Directorate General of the European Commission
EC	European Commission
ECAP	EC ASEAN Project on the Protection of IPRs
ENTR	DG Enterprise
EPA	Economic Partnership Agreement
EPO	European Patent Office
EQ	Evaluation Question
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
I	Indicator
IP	Intellectual Property
IPR	Intellectual Property Right
IPR2	EU-China Project on the Protection of IPRs
JC	Judgement Criterion
LDCs	Least Developed Countries
LEA	Law Enforcement Agency
MARKT	DG Internal Market
MS	Member States
OECD	Organisation for Economic Co-operation and Development
OHIM	Office of Harmonisation for the Internal Market
PCA	Partnership and Cooperation Agreement
TA	Technical Assistance
TAXUD	DG Taxation and Customs Union
ToR	Terms of Reference
TRADE	DG for Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Executive Summary

This study is an independent evaluation of the European Commission's Intellectual Property Rights Enforcement Strategy in Third Countries. It was commissioned by the European Commission's Directorate-General for Trade with a view to (i) assessing the efficiency, effectiveness, impact and relevance of the measures undertaken since the publication of the Strategy in 2005, and (ii) suggesting possible changes or adaptations to be made to that Strategy. It considered all categories of intellectual property rights (IPRs), notably trademarks and geographical indications, copyright and related rights, patents, and designs. It focussed on the fourteen "priority countries" as defined by the European Commission in 2006. The main challenge, besides the intrinsic complexity of such a policy-level evaluation, and of evaluating activities relating to an illegal activity, was the availability of information, mainly due to the lack of performance indicators although this, in turn, is due to a lack of empirical evidence for many of the key indicators of enforcement. It was addressed through a carefully-designed approach based on state-of-the-art methodology and tools. The evaluation process was structured in four distinct phases, which included five meetings with an EC Steering Committee and a workshop with stakeholders. In total, more than 150 documentary information sources were consulted, 88 interviews were conducted with more than 140 interlocutors from different backgrounds, and three country missions were undertaken, to Ukraine, Thailand and Argentina, in addition to China which was visited last year.

The Strategy under evaluation arose in 2005 from a logical sequence of developments in intellectual property protection in the EU and at international level since the mid-1990s. The comparative advantage of the EU economy lies increasingly in high-value-added and intellectual-property-intensive goods and services, in the context of increased international trade and investment and of the emergence of new economies such as China and India. Additionally, globalisation has also created opportunities for criminal organisations and activities. It has resulted in a dramatic increase over the last decade in the level of counterfeiting and piracy affecting EU markets.

The evaluation concludes that the Strategy and the set of actions it consists of can globally be considered as relevant, despite some limitations, particularly for responding to the needs of industry. But the interests of other stakeholders such as consumer organisations, and even of small and medium enterprises, were not sufficiently considered in the Strategy. Overall, and despite EC efforts, a very substantial gap remains in data and information on the scope of the problem and on the challenges of IPR Enforcement, which makes it difficult to influence policies, back them up with statistics, or optimise the prioritisation of measures.

The Commission was an active contributor to IP enforcement at multilateral level, in particular at the World Trade Organisation's TRIPS Council, but it reaped only limited rewards, mainly owing to third country opposition and the subsequent stalemate in negotiations. For that reason it launched, together with like-minded developed countries, the hotly-debated Anti-Counterfeiting Trade Agreement (ACTA) initiative, and reinforced bilateral trade agreements including strengthened IPR provisions. The Enforcement

Strategy and the ACTA negotiation process were largely based on a hard-line approach and did not take much account of the emerging development agenda. They were at odds with the positions increasingly taken by many third countries on the issue and dissipated the goodwill the Commission had built up in earlier years, although third countries' cooperation proved important for attaining results in terms of IPR enforcement.

It remains highly debatable whether the Commission and other EU institutions can be specifically named as having contributed directly and significantly to improvements in the enforcement of IPRs in third countries. Nevertheless, the EC has been partially effective; it was in reality most successful when providing technical co-operation projects on IP enforcement with appropriate funding as part of bilateral arrangements involving third country input. But the Strategy has underestimated the importance of raising the awareness of key target audiences of the need for IPR enforcement, and has hence made, with a few exceptions, only a limited contribution in this important field.

The evaluation finally concludes that there was a lack of cohesion in all aspects of IP promotion and IPR protection within the EU Institutions and Member States, which undermined the credibility of the message conveyed to third countries.

The evaluators recommend on the basis of those conclusions that the EC Strategy be upgraded through a more consistent and comprehensive approach, including clear objectives and priorities. It should put much more emphasis on 'building respect' for IP, by taking into account the emerging development agenda and increasing its pursuit of the shared interest and active collaboration of third country governments.

Moreover, EC efforts would become more effective and efficient through limiting the pursuit of legislation improvements to those countries where the absence of adequate legislation is a real issue. It is also recommended that steps be taken to further develop technical cooperation, including training and awareness-raising, through bilateral agreements such as FTAs, EPAs and IP dialogue, at least if negotiation efforts at multilateral level remain stalemated. Such ambitious (joint) technical cooperation programmes on IPR enforcement would gain by taking account of lessons learnt from recent programme evaluations, in terms of design, target groups and customisation to local needs.

Finally, it is recommended that the recently created EU Observatory be upgraded into an EU-wide instrument, a single point of contact within the EC for external parties, and an international point of creation and dissemination of best practice. EU harmonisation should also be increased, for instance on criminal sanctions. The Commission should also ensure that adequate resources are available and appropriately allocated for implementing the proposed recommendations.

1. Objectives and scope

This study on the *Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries* was commissioned by the European Commission (hereafter referred to as “the Commission”) Directorate-General (DG) for Trade (DG Trade). It is being closely followed and validated by a Steering Committee (SC) consisting of staff from the EC DGs for Trade (DG Trade), for the Internal Market (DG MARKET), for Taxation and the Customs Union (DG TAXUD) and for Enterprise and Industry (DG ENTR), and chaired by DG Trade’s Unit E2 in charge of public procurement and intellectual property.

This document is the Final Report for this evaluation (*its structure is presented under section 1.2 below*).

1.1 Objectives and scope of the evaluation

The subject of this evaluation is the “Strategy for the Enforcement of Intellectual Property Rights in Third Countries”, adopted by the Commission in November 2004 and published in May 2005, OJ C129 of 26.5.2005 (hereafter referred to as “the IPR Enforcement Strategy” or “the Strategy”). The evaluation relates directly to assessment of the Commission’s approach to *enforcement* of intellectual property (IP) rights (IPR). It covers ‘enforcement’ in the broad sense of ensuring effective application of IPRs (including for instance translation of multilateral treaties in national legislation), but in accordance with the Terms of Reference (ToR) it does not cover general IP considerations as such, for instance in terms of philosophical or societal issues.

The evaluation has the following two objectives:

- **to assess**, against the objectives defined in the Enforcement Strategy, the efficiency, effectiveness and relevance of the measures undertaken, and their impact on the enforcement of IPRs in third countries; *and*
- **to suggest** possible changes or adaptations to be made to the Enforcement Strategy (including, where appropriate, the introduction of new measures or approaches).

The **thematic scope** of this evaluation is all categories of IP rights, notably trademarks and geographical indications, copyright and related rights, patents, and designs.

In terms of **geographical scope**, the emphasis is on the fourteen "priority countries" as defined by the European Commission in 2006 on the basis of its IPR Enforcement Survey¹.

The **time-frame** is defined by the evaluation team as 2005-2009, that is from the publication of the IPR Enforcement Strategy until the end of last year.

¹ *Priority 1*: China; *Priority 2*: Thailand, Philippines, Turkey, Indonesia; *Priority 3*: Ukraine, Argentina, Vietnam, Korea, Brazil, Chile, Malaysia, Paraguay, Russia. This list was partially revised in 2009.

1.2 Structure of the report

The Final Report is structured as follows:

- Chapter 1 provides a brief overview of the evaluation **objectives** and the **scope** covered;
- Chapter 2 presents the **context** and **subject** of the evaluation, including a descriptive account of the **underlying policy framework** and a reconstructed **Intervention Logic** of the Commission objectives underlying the IPR Enforcement Strategy in Third Countries;
- Chapter 3 presents the main features of the **methodology** applied and the challenges and limits of the evaluation;
- Chapter 4 provides the **answers to the Evaluation Questions** – for each question a self-standing summary box with the answer is provided;
- Chapter 5 presents the **Conclusions** of the evaluation, based on the answers to the Evaluations Questions in chapter 4; *and*
- Chapter 6 presents the **Recommendations** of the evaluation, based on the Conclusions in chapter 5.

2. Context

Since the mid-1990s the institutions of the European Union have taken significant steps to strengthen and harmonise the protection of IPR within the EU. Nevertheless the EU markets have been confronted by a steadily growing amount of counterfeit and pirated goods. Increased international trade and investment, globalisation and the emergence of new economies such as China and India have created opportunities but also great challenges for the advanced economies, the comparative advantage of which will increasingly lie in high value added and IP-intensive goods and services. There is a strong consensus amongst the more developed countries that the knowledge capital should be better protected. To respond to this challenge the Commission, following a global trend since the start of the new millennium, has shifted its attention away from adapting legislation within the EU borders and on a multilateral level towards tackling the crucial issue of enforcing IPRs, internally and in third countries. Indeed, intellectual property systems have no value without adequate protection and ultimately, enforcement. There is no point in establishing a comprehensive and detailed system for the legal protection of IPRs if these rights are not backed by strong and effective enforcement provisions.

However, the current debate over enforcement of IPRs increasingly takes place within what has become the 'Development Agenda' or how to protect private rights in knowledge-based societies while balancing this with the need for sustainable development in emerging economies.

The effective enforcement of IPRs has gained significance in recent years in the global trade and intellectual property agenda. A number of developments at global, regional and bilateral levels carry far-reaching implications for the regulation of the knowledge economy. The G8 Summit leaders have called for the conclusion of talks on a new Anti-Counterfeiting Trade Agreement (ACTA) by the end of 2010. At the same time one of the recommendations of the WIPO Development Agenda underlines the need "to approach intellectual property enforcement in the context of broader societal interests and especially development oriented concerns" in accordance with Article 7 of the TRIPS Agreement.

The global IP landscape, in which the push for stronger enforcement standards is taking place, differs significantly from that in which the TRIPS Agreement was concluded in 1994. Today, the understanding of IPR norms and their impact on development policy has significantly improved. The limits of a «one-size-fits-all» approach to international IPR norm-setting are increasingly recognised. Open collaboration and alternative innovation models are acquiring greater importance in generating wealth.

Significantly, there is an increasing understanding that enforcement rules for IP are extremely important for our knowledge-based economies, given that issues of competitiveness, innovation, access to knowledge, and technological development are at stake.

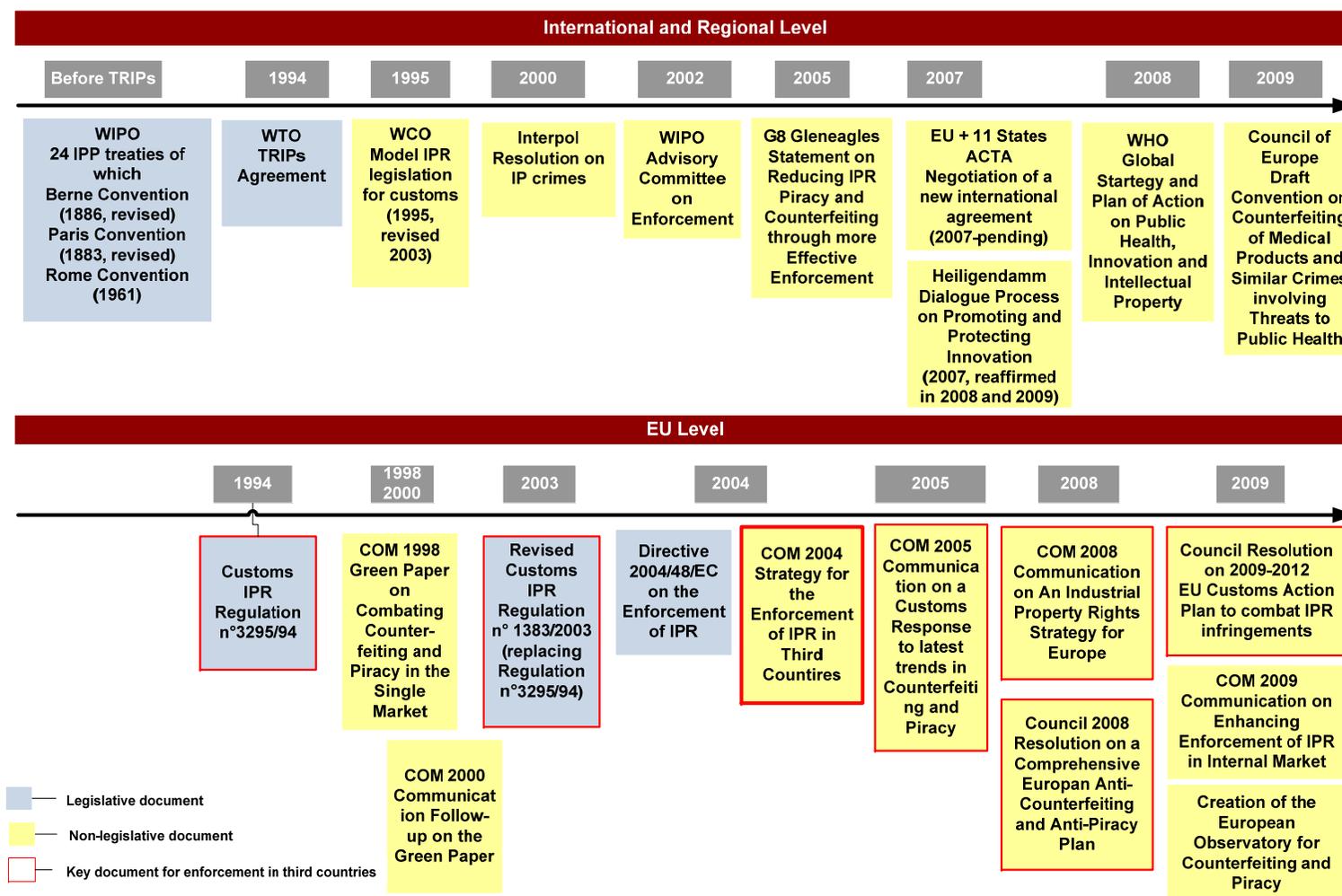
IPRs have never been more economically and politically important – or controversial – than they are today. Patents, copyrights, trademarks, and geographical indications are frequently mentioned in discussions on such diverse topics as public health, climate change, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, and creative industries.

Enforcement is an integral part of any effective IP regime. However although IPRs are private rights and upholding them is, first and foremost, the responsibility of private rights holders, they are granted on the basis of a contract with governments (and by extension with the EU) and there is, especially where IP infringement leads to a criminal act, a responsibility on the part of the State to ensure that adequate sanctions are in place to protect and enforce IPRs. Given that public institutions and governments play an important role in ensuring the enforcement of these private rights, the current debate is how to achieve an appropriate balance between private rights and public interest.

The **figure** presented on the following page outlines a single schematic overview of the most relevant initiatives promulgated by the Commission and by the Council, along with international references marking out the regulatory framework and context for the Commission's interventions in the field of IPR, and specifically for the Enforcement Strategy which is the focal point of this study. These documents are briefly described subsequently.

The set of objectives pursued by the Commission with its Enforcement Strategy is further detailed in section 2.4 in the form of an **Intervention Logic**. This was the backbone for this evaluation, delineating as it does the set of objectives against which the Commission intervention has been assessed.

Figure 2.1 : Regulatory and Policy Framework



2.1 Definition of Intellectual property

It is not intended in this document to discuss in detail the definition of intellectual property, the distinctions between the different rights to which legal protection has been granted over time, or the rationale underlying their protection. However a short description of the concept of intellectual property and of infringement of intellectual property rights is provided below as an introduction to the general subject matter of the present study.

As defined by the WIPO, **intellectual property**, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those products. Those rights do not apply to the physical object in which the creation may be embodied but rather to the intellectual creation as such².

The 2003 Council Regulation relating to Customs actions against IPR infringement³ provides the meaning to be given, for the purposes of that Regulation, to the concepts of *counterfeiting* and *piracy*, detailing thereby the types of **intellectual property rights**. ‘Goods infringing an intellectual property right’ means, in summary:

- a) ‘*counterfeit goods*’, namely goods bearing without authorisation a registered **trademark**, or which cannot be distinguished in its essential aspects from such a trademark, or which bears itself or on its packaging any of the trademark’s symbols;
- b) ‘*pirated goods*’, namely goods which are or contain copies made without the consent of the holder of a **copyright or related right** or **design** right;
- c) goods which infringe:
 - (i) a **patent**, including a supplementary protection certificate (SPC)⁴;
 - (ii) a **plant variety** right;
 - (iii) **designations of origin** or **geographical indications**;
 - (iv) **geographical designations**.

The 2004 European Parliament and Council Directive on the enforcement of intellectual property rights⁵ further specifies that, for the purposes of that Directive, the term ‘intellectual property rights’ includes **industrial property** rights.

² WIPO, Intellectual Property Handbook : Policy, Law and Use, Publication n° 489, p. 3, <http://www.wipo.int/about-ip/en/iprm/index.html>

³ 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

⁴ An extension of a patent available in the EU for medicinal products and plant protection products (e.g. herbicides),

⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

2.2 International and regional framework

2.2.1 First legislative efforts of protection of intellectual property rights

In the 19th Century, during which international trade took off rapidly, the great diversity in legal protection made it difficult or nearly impossible to obtain protection for industrial creations and inventions. The need for a basis of uniform rights was becoming urgent. This situation led to the organisation of an international conference which produced the **Paris Convention for the Protection of Industrial Property of 1883**, setting the basis for the international protection of patents. The **Berne Convention for the Protection of Literary and Artistic Work** signed in 1886 followed in the footsteps of the Paris Convention and brought elements of harmonisation to the other main branch of intellectual property, namely copyright.

These early conventions are at the forefront of the international integration of IPR. They were completed by numerous general or specific treaties administered by the **World Intellectual Property Organization** (WIPO), a specialised agency of the United Nations. After decades of legislative effort, it was felt that specific attention should be devoted to effective enforcement. In 2002 the WIPO established an Advisory Committee on Enforcement. The Commission acceded to full participation in this Committee in 2006.

2.2.2 WTO and TRIPS

The contribution of the **World Trade Organisation** (WTO) to the protection of intellectual property is found in the **Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement**, which was agreed in 1994 at the end of the Uruguay Round of WTO negotiations, as a part of the General Agreement on Tariffs and Trade (GATT). The TRIPS sets out minimum standards in relation to the subject-matter that must be covered by each type of IP Right; some general principles of enforcement, including border measures; and the possible use of the WTO's dispute settlement procedure for intellectual property issues. TRIPS are a compulsory requirement of WTO membership; any country seeking access to the international markets opened up by the WTO must enact the intellectual property laws mandated by TRIPS. It has thus become the international IP instrument with the widest membership and the TRIPS minimum requirements are now found in the legal system of most WTO Member States⁶.

⁶ In 2005 a decision of the WTO's Council for TRIPS extended the transition period for least-developed countries which now have until 1 July 2013 to provide protection for trademarks, copyright, patents and other intellectual property under the WTO's agreement. The transition period is longer for pharmaceutical products (2016).

2.2.3 Involvement of other international organisations

Other international bodies are involved in IP protection. Only the more representative bodies are mentioned here.

The **World Customs Organization** (WCO) has a clear mission in combating counterfeiting in support of IPR. In 1995⁷ the WCO issued an IPR Model Legislation based on the border control provisions of the TRIPS which is intended to help countries in drafting or revising their existing Customs legislation. This model was revised in 2003.

The **International Criminal Police Organisation** (Interpol) has identified counterfeiting and piracy as an enforcement priority. In 2000 the Interpol General Assembly approved the addition of IP crime to the organisation's official mandate. Shortly afterwards the Interpol Intellectual Property Crime Action Group was formed as a public-private partnership.

In response to the threat of counterfeit pharmaceuticals, the **World Health Organization** (WHO) officially launched a global task force IMPACT in November 2006 (the International Medical Products Anti-Counterfeiting Taskforce) involving more than 20 international partners. The WHO also adopted a Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property in 2008.

Finally in 2009 the **Council of Europe**⁸ issued a Draft Convention on counterfeiting of medical products and similar crimes involving threats to public health.

2.2.4 The G8 Agenda

Since the **2005 Gleneagles Summit** in the United Kingdom, intellectual property issues have received special attention within the G8⁹ forum discussions. The Commission has been actively participating in setting IPR high on the G8 agenda. At the end of the Gleneagles Summit the G8 issued a statement on "Reducing IPR piracy and counterfeiting through more effective enforcement"¹⁰. At the G8 Summit in Heiligendamm (Germany), it was confirmed that an efficient and fully functioning IP system, through the promotion of innovation, plays a critical role in the economic development of all countries. The objective of developing an effective IP System was then inscribed in the **2007 Heiligendamm**

⁷ The WCO Model IPR legislation for customs was revised in 2003.

⁸ The Council of Europe is an international organisation founded in 1949 and which presently consists of 47 member states. It is independent from the EU and should not be mistaken for the European Council or for the Council of the European Union. It works on European integration with a particular emphasis on legal standards, human rights, democratic development, the rule of law and cultural co-operation.

⁹ The G8 is an annual meeting of the top political leaders of the eight major industrialised countries of the northern hemisphere: Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States. The EU is not an official member of the G8. Since 1977 the EU has participated in meetings and has been represented by the country holding the EU Presidency, the Commission and the Council. The EU however does not take the G8 Presidency or host Summits.

¹⁰ Gleneagles statement on "Reducing IPR piracy and counterfeiting through more effective enforcement" <http://www.g8.utoronto.ca/summit/2005gleneagles/index.html>

Dialogue Process on Promoting and Protecting Innovation. This dialogue process is aimed at institutionalising high-level dialogue between the Member States of the G8 group of countries and the important emerging economies¹¹ on the biggest challenges of the global economy. A G8 Intellectual Property Experts Group (IPEG) was also created to discuss and develop strategies and measures for improving the global IP system. The reports on the discussions of this group in preparation for the G8 summits in Hokkaido (Japan, 2008) and L'Aquila (Italy, 2009) indicate a continuing focus on combating counterfeiting and piracy. The L'Aquila statement of the IPEG endorsed the initiative to negotiate bilateral, multilateral and plurilateral instruments such as the Anti-Counterfeiting Trade Agreement (ACTA).¹²

2.2.5 The negotiation of a new international agreement

The **ACTA** is a proposed plurilateral trade agreement for establishing international standards on IPR enforcement throughout the participating countries. It should be noted that none of them are priority third countries. The negotiating countries believe that cooperation between trading partners is a key element in combating the proliferation of IPR infringements such as counterfeiting and piracy, as also is establishment of enforcement laws and practices that promote strong intellectual property protection. The negotiation of this new agreement started in July 2008 at the initiative of Japan and the United States. The following parties have joined the negotiations: Australia, Canada, the European Union, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore and Switzerland. The initiative is partly seen as an attempt to set the agenda among like-minded countries and to circumvent obstacles encountered in multilateral fora. Draft texts of the proposed agreement were released since April 2010 and a final draft was released on 15 November 2010¹³. As envisaged it contained three primary components: international cooperation, enforcement practices and legal framework. Earlier in the process, the confidentiality surrounding the negotiation procedure of this new agreement and leaks on the potential content of certain sections of the draft document have attracted much criticism from civil society interest groups and from a few non-participating countries.

2.3 The European framework

Since the beginning of the 1990s the Commission and the Council have been very active in upgrading, harmonising and implementing IPR within the EU. The full list of initiatives can be found on the Commission's website¹⁴. The first aim of the Commission in the field has been the standardisation of intellectual property law at European level. Efforts were also made in terms of insuring simplification, effectiveness and rapidity of procedures. Finally, as from 1994 in the field of Customs and from 1998 on a more comprehensive basis, the scope of action widened to include **IPR enforcement** as a tool to combat

¹¹ Most important emerging economies, known as the O5 (Outreach 5), composed of China, Mexico, India, Brazil and South Africa.

¹² Aquila report of discussions of the G8 IPEG, <http://www.g8.utoronto.ca/summit/2009laquila/2009-experts-ipr.pdf>

¹³ <http://trade.ec.europa.eu/doclib/html/147002.htm>

¹⁴ http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm

counterfeiting, piracy and illegal trade, in a way consistent with efforts under way at international level. This document does not enter into the detail of the Commission's or Council's interventions for the protection of specific IP rights and the harmonisation of national substantive law, but rather focuses on the logical sequence of initiatives to enhance enforcement of these rights and the fight against counterfeiting and piracy.

2.3.1 Regulation 3295/94

The first EU legislative document specifically addressing the issue of enforcement and border measures is the 1986 Council Regulation 3842/86 "laying down measures to prohibit the release for free circulation of counterfeit goods". Subsequently, Regulation 3295/94 of 22 December 1994 "laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods" extended the scope of the 1986 Regulation to additional IP rights and Customs procedures, other than entry for release for free circulation, and introduced the ex-officio procedure. This 1994 Regulation was amended in 1999 and then superseded by Regulation 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 (referred to in this document as Regulation 1383/2003 (see 2.3.3. below). Regulation 3295/94 lays down the conditions under which the Member States' Customs authorities take action where goods suspected of being counterfeit or pirated are entered for free circulation, export or re-export and lays down the measures to be taken where it has been established that the goods are indeed counterfeit or pirated. The Customs Regulation makes it possible for a rights holder to apply directly to the competent Customs authority to suspend release of the goods where they are suspected of being counterfeit.

2.3.2 Green Paper on Combating Counterfeiting and Piracy in the Single Market (1998) and Action Plan (2000)

Four years later, in 1998, the Commission issued a Green Paper on Combating Counterfeiting and Piracy in the Single Market¹⁵. In this document the Commission, aware that the specific rules regarding policing external frontiers to keep out pirated and counterfeit goods were insufficient to address adequately the international phenomenon of piracy and counterfeiting, sought to launch a debate on the best tools to put into place. This consultation exercise confirmed *inter alia* that the disparities between the national systems of IPR were having a harmful effect on the proper functioning of the internal market.

As a follow-up on the responses received to the Green Paper, the Commission presented an ambitious **Action Plan** on 30 November 2000.¹⁶ The main items of the 2000 Action Plan were: (i) the proposal for a directive aimed at strengthening the means of enforcing

¹⁵ COM(98) 569 final and IP/98/922 - http://europa.eu/documents/comm/green_papers/pdf/com98_569_en.pdf

¹⁶ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Follow-up to the Green Paper on Combating Counterfeiting and Piracy in the Single Market, COM(2000) 789

IPR and defining a general framework for the exchange of information and administrative cooperation; (ii) enhanced training programmes for supervisory authorities; and public information and awareness activities; (iii) a treatment of these questions in the enlargement negotiations; (iv) development of a methodology for collecting; analysing and comparing data on counterfeiting and piracy; and (v) identification of a contact point at Commission level to provide an interface between the various departments for the work of combating counterfeiting and piracy and to promote transparency *vis-à-vis* the outside world.

The Action Plan laid the foundation for (i) Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, (ii) an amended version of the Customs Regulation, and (iii) a Strategy for the Enforcement of Intellectual Property Rights dedicated to the situation outside the borders of the Community.

2.3.3 Regulation 1383/2003

This piece of legislation constitutes an amended version of Regulation 3295/94 mentioned above in point 2.3.1. It clarified the law, extended its application to IP rights not previously covered (such as plant variety rights, designation of origin and geographical indications), and made the rules more accessible to rights holders notably by providing simplified procedures, reducing business costs, and enabling Member States to allow infringing goods to be destroyed with minimum bureaucracy. This Regulation 1383/2003 is currently under review with a view to possibly preparation of a proposal for a new Regulation of the Council and of the European Parliament.

2.3.4 The Enforcement Directive (2004)

On 29 April 2004 **Directive 2004/48/EC on the enforcement of IPR** was adopted within the EU. Until the adoption of this Directive, the means of enforcing IPR had not been harmonised in any respect at European level. At internal level the said Directive is thus a landmark document as it brings enforcement measures into line throughout the European Union, seeking to create a level playing field for applying IPR. The Directive puts an obligation on the Member States to set up the measures and procedures needed to ensure the enforcement of IPR before the stipulated deadline for transposition (29 April 2006).

2.3.5 The Commission's Strategy for the Enforcement of IPR in Third Countries (2004)

As a logical complement to the cornerstone Enforcement Directive which is directed towards European Union Member States, and in order to address the global issue of enforcement of IPR in its entirety, the Commission announced in November 2004¹⁷ the adoption of a Strategy for Enforcement in its relations with third countries. This document will constitute the object of this evaluation report and is developed in detail subsequently.

¹⁷ The Strategy for the enforcement of intellectual property rights in third countries was published in the Official Journal on 26 May 2005.

2.3.6 Communication of 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 (2005)

Building on its efforts to address the phenomenon of counterfeiting and piracy in an overall holistic approach, the Commission presented an Action Plan on 11 October 2005¹⁸ containing a package of Customs-related measures to strengthen protection for the EU and its citizens against counterfeiting and piracy. The measures proposed for action in 2005 and 2006 would increase Community-level protection through improved legislation and operational controls; strengthen the Customs-business partnership; and reinforce international co-operation in this area.

2.3.7 Communication of the Commission to the Council, the European Parliament and the European Economic and Social Committee on an Industrial Property Rights Strategy for Europe (2008)

On 16 July 2008 the Commission adopted a Communication¹⁹ on a new Industrial Property Rights strategy. The Communication followed a High Level Conference organised in May 2008 on Counterfeiting and Piracy organised together with Members of the European Parliament. The policy document outlined a number of steps the Commission is planning to take in pursuit of the aim of strengthening the European intellectual property arsenal. The Communication calls for intensified action in the field of enforcement considering that the levels of counterfeiting and piracy are still soaring.

2.3.8 Council Resolution on a Comprehensive European Anti-Counterfeiting and Anti-Piracy Plan²⁰ (2008)

On 25 September 2008 the Council emphasised the need to make IPR enforcement work better by complementing legislation with a range of non-legislative measures. The Council invited the Commission and Member States to apply a series of measures, including at international level, stepping up the protection of IPR internationally, promoting the inclusion of IPR measures in bilateral and multilateral agreements, and taking an active part in the negotiations for concluding a plurilateral anti-counterfeiting trade agreement.

¹⁸ COM(2005) 479 final of 11 October 2005, http://ec.europa.eu/taxation_customs/resources/documents/COMM_NATIVE_COM_2005_0479_3_en_ACTE.pdf

¹⁹ COM (2008) 465 final of 16 July 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0465:FIN:EN:PDF>

²⁰ Council Resolution of 25 September 2008, O.J. C 253, 4 October 2008, p1.

2.3.9 Council resolution on the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012 (2009)

On 16 March 2009 the Council endorsed the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012 (2009/C 71/01) following the Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan. The Council invited the EU MS and the Commission to implement the action plan effectively; the Commission to conduct an annual review of the implementation of the action plan in collaboration with the Presidency; and the Commission in co-operation with the EU MS to submit to the Council in 2012 a final report on the implementation of the action plan. The new EU Customs Action Plan took into account relevant developments in the Customs area, such as the modernised Community Customs Code, as well as external factors such as the increase in sales over the Internet. It focuses on (i) improving, and where necessary modifying, existing IPR legislation; (ii) improving cooperation with rights holders; (iii) strengthening operational cooperation between Customs in the EU and with third countries; (iv) developing further international cooperation on IPR enforcement; (v) improving publicity and awareness; and (vi) responding to the problem of Internet sales and delivering ad hoc training to Customs officers.

2.3.10 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on Enhancing the Enforcement of Intellectual Property Rights in the Internal Market (2009)

This Communication dated 14 September 2009 builds on the 2008 Communication on an Industrial Property Rights Strategy for Europe and reflects on the recent 2008 Council Resolution calling for additional non-legislative measures. The document sets out a series of practical initiatives for enhancing enforcement in the internal market within the existing legal framework. One of the actions set out in the Communication is the creation of a new EU Observatory on counterfeiting and piracy. At global level the Commission limits itself to recalling action taken under its long-term 2004 Strategy.

2.3.11 Bilateral agreements between the EU and third countries

Besides the legislative framework at European, regional and international levels, the EU has also engaged in a number of bilateral agreements with third countries providing detailed sections on IPR enforcement modelled on EU legislation which went beyond the minimum TRIPS requirements. These bilateral agreements were mainly FTAs, EPAs and PCAs:

- **Free Trade Agreements (FTAs).** The EU signed FTAs with Mexico (entered fully into force in 2000), South Africa (2004), and Chile (2005). Since 2007 the Commission has proposed a new generation of FTAs following a Communication on EU Competitiveness, with increased provisions for IPR enforcement. The first of the new generation of FTA completed was signed on October 6th 2010 with South Korea²¹.

²¹ This FTA has been made public: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en>

Discussions are under way with Canada, India, Singapore, Ukraine, ASEAN countries, and the Gulf Co-operation Council. Additionally there are discussions on Association Agreements with FTA components, notably with the Andean Community and with the Mercosur²²; such an Association Agreement has already been concluded with Central America, in May 2010²³.

- **Economic Partnership Agreements (EPAs)** between the EU and African, Caribbean, and Pacific (ACP) groups of countries. Discussions started in 2002 based on the trade chapter of the 2000 Cotonou Agreement. The EPAs have been heavily debated since then. At the end of the evaluation period (2009), only one EPA had entered into force (EU-CARIFORUM²⁴) and a few ‘interim’ EPAs had been signed, but negotiations were still on-going for most other EPAs²⁵.
- **Partnership and Cooperation Agreements (PCAs)**: The EU has concluded in the years 1997-1999 nine Partnership and Cooperation Agreements with countries of Eastern Europe, the Southern Caucuses and Central Asia²⁶. All the PCAs except that with the Republic of Moldova contain a chapter on the protection of intellectual, industrial and commercial property and on legislative cooperation²⁷.

Besides EU bilateral agreements, certain third countries have also signed other bilateral trade agreements with specific provisions on IPR enforcement, such as the FTA signed between Chile and the USA in 2004. Such agreements also contribute to improving the IPR enforcement situation in those countries, with direct and indirect benefits for European rights holders.

²² For more information on EU FTAs, see: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm

²³ The EU and Central America have concluded in May 2010 an Association Agreement (the most advanced type of agreement that the EU can engage in with a country or a region in the world), which includes a chapter on IP. The press release mentions that with regard to IP that “provisions reaffirm the standards acquired by the country in other international commitments and implemented at national level and do not carry any legislative reform to the current legislation”.

²⁴ The EU-CARIFORUM agreement was officially signed on 15 October 2008 between the EU and the 15 Caribbean states Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago. Haiti and Cuba, which are part of the CARIFORUM confederation, too, did not sign this agreement.

²⁵ For more information on EU EPAs, see http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf

²⁶ Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine, and Uzbekistan

²⁷ For more information on EU PCAs, see http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm

2.4 Intervention Logic of the 2004 EC Strategy

This section presents the reconstructed intervention logic (IL) for the 2004 IPR Enforcement Strategy in Third Countries. The evaluators aimed hereby at reconstructing the **hierarchy of objectives and expected impact pursued by the Commission with its Strategy**. This goes beyond the 22 operational ‘specific actions’ defined in the Strategy, which actually constitutes more an ‘action plan’ than a ‘strategy’ or ‘policy’ as such.

The intervention logic is the backbone of this evaluation. It delineates the set of objectives against which the Commission intervention will be assessed (*through Evaluation Questions – see Chapter 4*).

The intervention logic is presented in the form of an Objectives’ Diagram (*see figure 3.1 on the following pages*) and of an Expected Impact Diagram (*see figure 3.2 on the following pages*), with those two diagrams mirroring each other (e.g. ‘Results’ correspond to achievement of ‘Specific Objectives’).

- Global objectives (*corresponding to global impact, in the long term*);
- Intermediate objectives (*corresponding to intermediate impact, in the medium term*);
- Specific objectives (*corresponding to results*);
- Activities

The hierarchical links for attaining these objectives and expected impacts are made explicit in the diagram. The diagrams also show the link with the Strategy’s 22 actions, which are presented in a synthesis table on the following page (*Table 3.1*). Furthermore, the diagrams show the coverage of the Intervention Logic by the Evaluation Questions (through the red dots with ‘EQ’), which are detailed in Chapter 4.

The evaluators tried to stay as close to official texts as possible in reconstructing the intervention logic, referring mainly to the IPR Enforcement Strategy itself and to DG Trade Annual Management Plans (AMPs), as described hereafter.

Table 2.1 : IPR Enforcement Strategy – Action Lines and ‘Specific Actions’ (numbered by the evaluation team)

# AL	Action line	# A	Action
AL1	Identif. prior. Countries	1	Implement periodic updating of IPR Enforcement Survey, as a basis for updating the list of priority countries in the subsequent period
AL2	Multilateral/ bilateral agreements	2	Consult trading partners about possibility of launching a TRIPS Council initiative on enforcement
		3	Reinforce monitoring of the extent of TRIPS compliance by WTO signatories (esp. priority countries)
		4	Improve clarity and practicability of IPR chapters in EU bilateral agreements
		5	Create support mechanism to enable Commission to raise IPR enforcement issues more effectively in its high-level meetings with multilateral, bi-regional and bilateral counterparties
AL3	Political dialogue	6	Prioritise the message IMPROVE YOUR ENFORCEMENT! In high-level contacts with priority countries
		7	Provide training on IPR Enforcement to EC Delegation, and facilitate networking and teamwork to support information-gathering and preparation of targeted actions for particular countries or regions
AL4	Incentives / technical cooperation	8	Ensure that IPR-related technical assistance is available for priority countries, especially Latin America
		9	Reinforce the IPR component of existing IPR-related technical assistance (TA) programmes
		10	For countries identified as producers of IPR infringing goods, shift the emphasis in IPR-related TA from implementation of legislation to application and enforcement
		11	Co-operate with other key providers of TA, to avoid duplication of effort and to share best practice
		12	Improve dialogue with WCO, WIPO, EPO, OHIM, etc., to ensure coherence of TA programmes
		13	Examine possibility of an initiative on TA for IPR enforcement with DDA framework
AL5	Dispute settlement / sanctions	14	Raise awareness among rights-holders of the possibility to use TBR to take action against IPR violations
		15	Raise awareness of the EC's right to take action either under WTO dispute settlement procedures, or under equivalent dispute settlement procedures included in EU's bilateral agreements, in case of flagrant non-compliance with mutually accepted standards of IP protection
AL6	Creation of PPP	16	Provide support for creation of local IP networks in relevant 3rd countries involving companies, associations and chambers of commerce
		17	Improve the exchange of information with companies and associations fighting piracy and counterfeiting, in particular so as to ensure their active participation in future IPR events
AL7	Awareness raising /Exp.	18	Include awareness-raising in IPR-related technical assistance programmes and PPP programmes
		19	Make the Guidebook IPR Enforcement available to authorities in 3rd countries and to the general public
AL8	Institutional cooperation	20	Improve inter-service co-operation on IPR through regular meetings, incl. the services responsible for TA
		21	Develop a webpage on IPR enforcement
		22	Improve co-ordination with other EC IPR-related initiatives (esp. the Innovation Relay Centres and IPR Helpdesk)

Figure 2.2 : Intervention Logic: Objectives Diagram

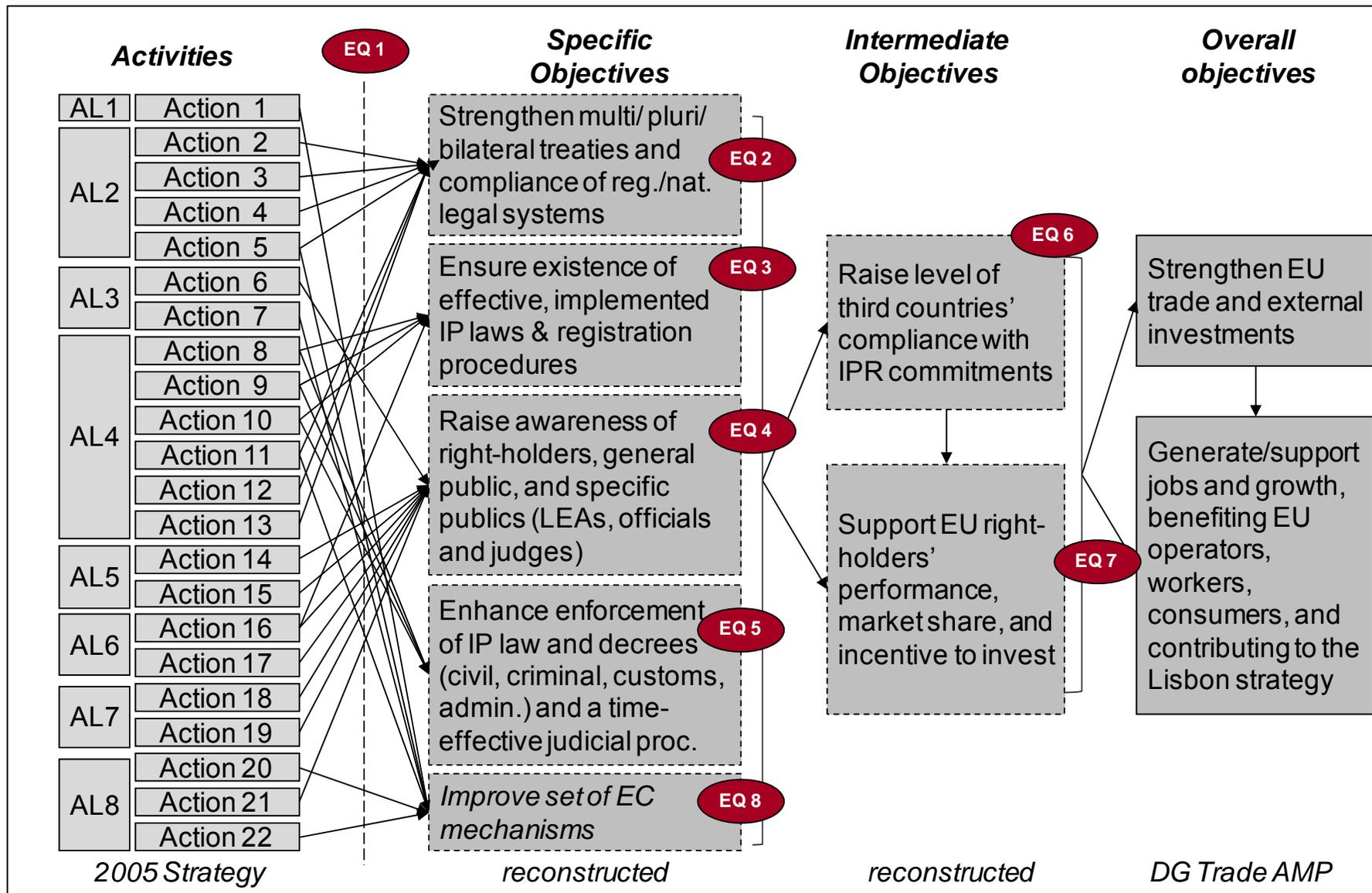
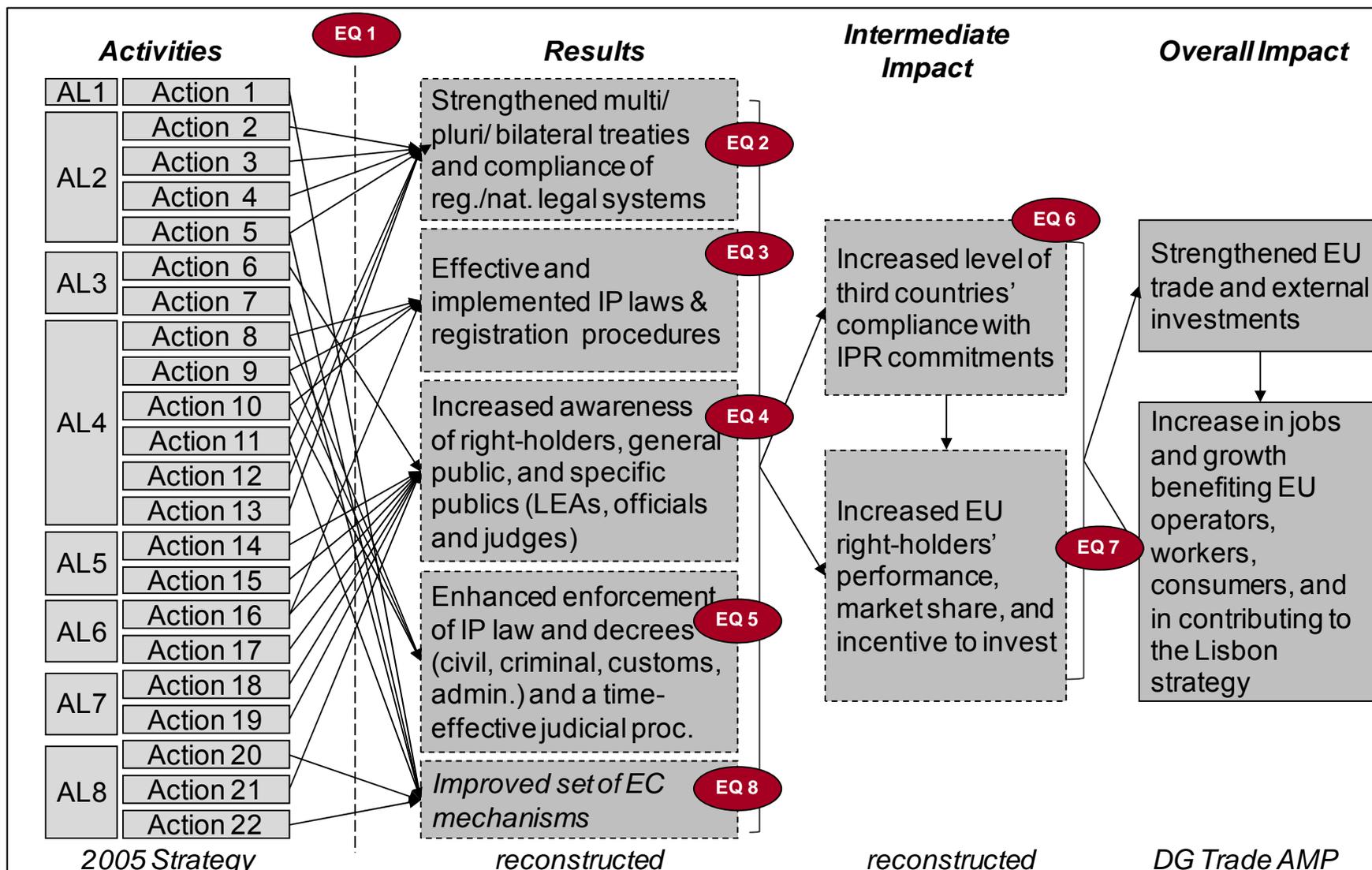


Figure 2.3 : Intervention Logic: Expected Impact Diagram



Global objectives (→ Global impact)

The intervention logic presents the two global objectives pursued by the Commission with its IPR Enforcement Strategy in Third Countries, which can be directly derived from DG Trade's Annual Management Plans (AMPs). They correspond to DG Trade's general objectives over the last five years; they are to some extent complementary, the latter also being an objective of the former:

- **“Strengthen EU trade and external investments”**: This global objective for the IPR Enforcement Strategy originates in the general objectives of DG Trade in pursuit of its mission as stated in its AMPs for 2005/2006/2007, namely “to take part in devising and monitoring internal or external policies which have a bearing on the [European] Union's trade and external investments (single market, consumers, health, environment, technology, intellectual property, competitiveness, competition, energy, transport, agriculture, sectoral measures)”.
- **“Generate/support jobs and growth benefiting EU operators, workers, consumers and contributing to the Lisbon strategy”**: This global objective for the IPR Enforcement Strategy originates in the general objectives of DG Trade as stated in its AMP 2008 and 2009, namely “increase EU competitiveness in global markets, generating jobs and growth with a modernised trade policy benefiting EU operators, workers, consumers and contributing to the Lisbon strategy”.

Intermediate objectives (→ Intermediate impact)

The two intermediate objectives for the IPR Enforcement Strategy correspond to objectives in terms of (high-level) impact that are directly related to IPR Enforcement, notably:

- **“Raise the level of third country compliance with IPR commitments”**: this intermediate objective relates to direct expected impact in terms of reduction of IPR infringements. It is referred to in the IPR Enforcement Strategy as one of its four purposes, namely “provide a long-term line of action for the Commission with the goal of achieving a significant reduction of the level of IPR violations in third countries”;
- **“Support EU rights holder performance, market share, and incentives to invest”**: this intermediate objective relates to the direct expected benefits for EU rights holders.

These intermediate objectives are not explicitly stated or defined as such in official Commission documents relating to the IPR Enforcement Strategy, but are defined by the evaluators as the ‘missing link’ between the level of specific objectives and the global objectives from DG Trade's AMPs.

Specific objectives (→ Results)

Five specific objectives are defined by the evaluators for the IPR Enforcement Strategy. They correspond to short-to-medium term objectives. Each of them can be considered as a direct strategic or policy objective of a number of the official 22 operational actions. The first four specific objectives relate to IPR and IPR enforcement as such, while the fifth is an internal EC organisational objective:

- ***“Strengthen the multi/pluri/bilateral treaties and compliance of the regional/national legal systems”***: this objective is, as such, reconstructed by the evaluators as a ‘missing link’ in the hierarchy of objectives – it relates to certain elements of the IPR Enforcement Strategy and DG Trade’s most recent AMPs;
- ***“Ensure the existence of effective, implemented IP laws and registration procedures”***: same observation as for the previous objective;
- ***“Raise the awareness of rights holders, the general public, and specific publics (Law Enforcement Agencies, officials and judges)”***: this objective is referred to in the IPR Enforcement Strategy in one of its four purposes, namely *“Inform rights holders and other entities concerned of the means and actions already available and to be implemented, and raise their awareness for the importance of their participation”*;
- ***“Enhance the enforcement of IP law and decrees (civil, criminal, Customs, and administrative) and a time-effective judicial process”***: same observation as for the first specific objective; *and*
- ***“Improve the set of EC mechanisms”***: this internal EC objective is referred to in the IPR Enforcement Strategy in one of its four purposes, namely *“describe, prioritise and coordinate the mechanisms available to the Commission services for achieving their goal”*.

Activities

The 22 ‘specific actions’ of the IPR Enforcement Strategy can be considered as activities from a methodological point of view. While they inherently do not pertain to the hierarchy of objectives and expected impacts, they nevertheless relate directly in this case to expected outputs. This link is suggested with the arrows shown in the diagrams above. The action lines in which they are clustered in the IPR Enforcement Strategy are also shown; these clusters in fact consist of types of action (e.g. technical assistance, political dialogue, public private partnerships) rather than of underlying objectives as such.

3. Methodology

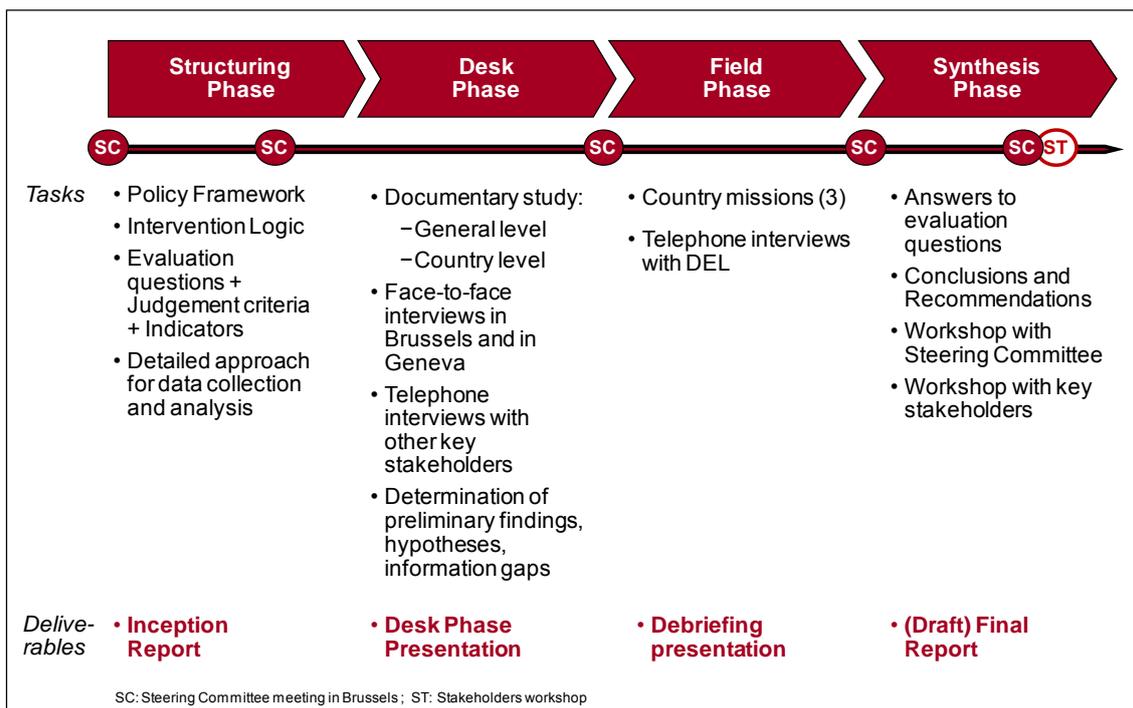
This chapter presents briefly (i) the evaluation process; (ii) the methodological approach in terms of data collection and analysis; and (iii) the challenges and limits of the evaluation.

3.1 Evaluation process

The evaluation employed a carefully designed approach. The methodology and tools used were in accordance with state-of-the-art guidelines, practices and tools used for strategic-level evaluations.

The evaluation process was structured in four distinct phases. The figure below provides a schematic overview of these phases, specifying for each the activities carried out and the deliverables produced. Each phase ended with approval of the (intermediate) deliverables by the Steering Committee (SC) and/or the EC project manager.

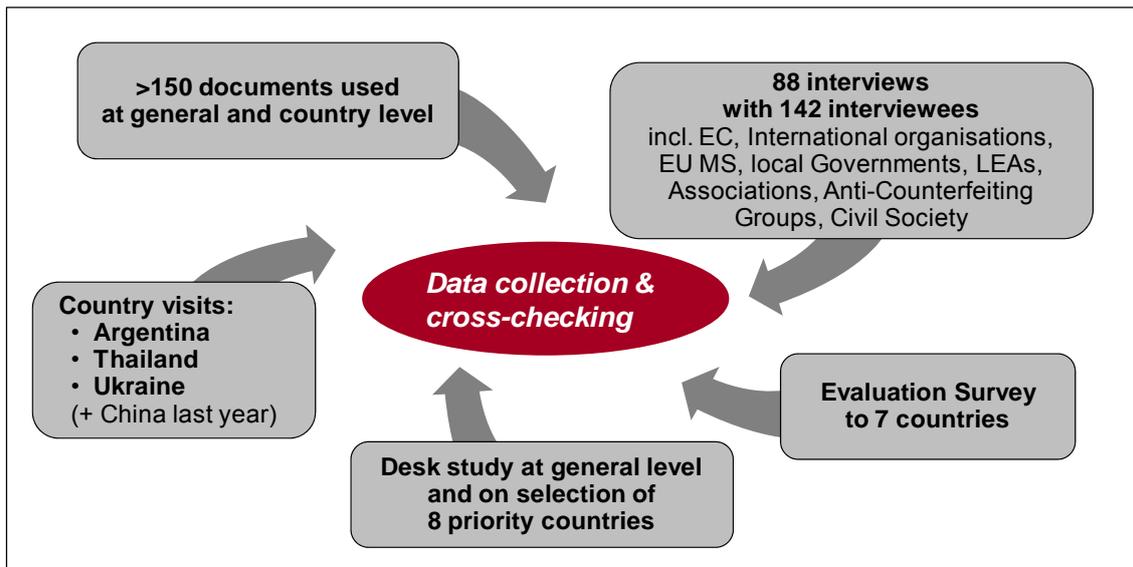
Figure 3.1 : Evaluation process



3.2 Data collection and analysis

Data and information have been collected and cross-checked through a number of evaluation tools, which are summarised in the figure below and described thereafter.

Figure 3.2: Data Collection



The following data collection tools were used:

- **Interviews:** a large number of interviews have been conducted with a variety of interlocutors, face-to-face in Brussels and Geneva and in third countries visited, or by telephone – see *List of Persons Met in Annex 4*;
- **Documents:** more than 150 documents were used in total, providing information at both general and country levels – see *Bibliography in Annex 5*;
- **Evaluation Survey:** in addition to the EC IPR Enforcement Surveys, a specific survey (referred to as the “Questionnaire”) has been conducted in this evaluation, which has provided interesting information on seven countries;
- **Desk study:** a documentary review has been undertaken on a selection of eight²⁸ of the EC priority countries defined in 2006, along with general or multi-country documentation; *and*
- **Country visits:** focused visits have been undertaken to three EC priority countries in the context of IPR enforcement, namely Argentina, Thailand and Ukraine, as well as the mission to Geneva and China which had been visited last year by two members of the evaluation team in the context of the IPR2 mid-term evaluation²⁹.

²⁸ China, Argentina, Korea, Philippines, Thailand, Turkey, Ukraine, and Vietnam

²⁹ Mid-Term Evaluation of the EU-China Project on the Protection of Intellectual Property Rights (IPR2), ADE / Olivier Pêtre, 2009

3.3 Challenges

Availability of information was the main challenge. As in most similar exercises, the adequacy and usefulness of any analysis and hence of the conclusions and recommendations depends to a large extent on the availability and quality of relevant information. Overall, there is a lack of reliable and comprehensive data on the subject, such as on the level of IPR infringements (*see the answer to EQ 6*). Some statistical data are also non-existent, given that IP enforcement fights against outlawed businesses and criminal activities, which are always hidden. Besides, the absence of definition of a (statistical) baseline and of performance indicators at the time when the Enforcement Strategy was set up in 2004 hampered quantitative measurement of the efficiency, effectiveness and impact of the Strategy's actions. Moreover, the evaluators received very limited evidence and data from industry associations and rights holders on certain focus sectors³⁰, despite repeated requests. This might partially be explained by the fact that rights holders might be reluctant to reveal the level of IPR infringement of their products or in their business so as to avoid negative publicity.

This evaluation mainly tackled this challenge with a carefully designed methodology, consisting of distinct phases, structured questioning, and several evaluation tools. Data and evidence were collected from a variety of sources, notably a general-level desk study; a country-level desk study; a survey sent to EC country Services; headquarters-level face-to-face interviews in organisations based in Brussels and in Geneva; telephone interviews with organisations located elsewhere and with EU Delegations; and three focused country visits (*see above*). The evaluation team has tested and validated its on-going analysis at every step of the process with the Steering Committee which is composed of representatives of several Commission DGs; it has additionally tested its conclusions and recommendations at the end of the evaluation in a Stakeholder Workshop, with selected interlocutors mainly from various industries and civil society bodies, whom the team had met earlier during the evaluation process. This multiplication of sources and sounding boards has largely allowed triangulation of the information collected.

Additionally the evaluation approach includes certain *foci* such as the selection of countries and industries (*see above*). Visits to third countries focused on interviews in the country's capitals. Analysis for this thematic evaluation, covering all IP rights in fourteen third countries, has essentially concentrated on overall, transverse findings, conclusions and recommendations; the objective was not to provide an assessment at the level of individual IPRs or countries as such.

³⁰ Documentary study and interviews were focused on certain industries, selected with the Steering Committee on the basis of a number of criteria. These industries were toys, power tools, and recorded music. Nevertheless, many documents and country mission interviews provided information also on other industries or at a general level.

4. Answers to the Evaluation Questions

The answers to the eight Evaluation Questions (EQs) are presented in this chapter. They are presented in the Answer Summary Boxes under each EQ. The remainder of the text provides the findings and analysis on which each answer is based. Indication is provided on the number of the Judgment Criteria (JC) on which they are based (*referring to the structured questions in Annexe 3*).

The table below provides a synthesised overview of the set of structured Evaluation Questions. They represent the backbone of this evaluation³¹. They address and structure the fundamental issues in respect of the strategy, objectives, implementation and other aspects of the IPR Enforcement Strategy in Third Countries.

Table 4.1: Overview of the Evaluation Questions

EQ 1	Relevance
EQ 2	International treaties and legal systems
EQ 3	Implementing rules and registration procedures
EQ 4	Awareness raising
EQ 5	Enforcement of IPRs
EQ 6	Level of infringement
EQ 7	EU rights holder and local interests
EQ 8	Implementation efficiency

Details on the Evaluation Questions as such and their Judgment Criteria and Indicators are provided in Annexe 3, along with the justification for and coverage of each question. They were defined at the beginning of the evaluation during the structuring phase and were validated by the Steering Committee. They address the OECD-DAC evaluation criteria of relevance, effectiveness, impact, sustainability, and efficiency, as shown in the table below.

³¹ They consist of the ‘finalised list of research issues’ mentioned in the ToR (p13)

Table 4.2 : Coverage of DAC evaluation criteria by the EQs

ADE EQs	EQ1 Relevance	EQ2 International treaties	EQ3 Implement. rules & reg. procedures	EQ4 Awareness raising	EQ5 Enforcemen t of IPRs	EQ6 Level of Infringem.	EQ7 Right-holder and local interests	EQ8 Implem. Efficiency
Relevance	■							
Effectiveness		■	■	■	■			
Impact						■	■	
Sustainability		■	■	■	■	■	■	
Efficiency		□	□	□	□			■

The Evaluation Questions also cover the questions specified in section 4.1 of the Terms of Reference as shown in a summarised way in the table below.

Table 4.3 : Coverage of ToR questions by the EQs

ADE EQs	EQ1 Relevance	EQ2 Internationa l treaties	EQ3 Implement. rules & reg. procedures	EQ4 Awareness raising	EQ5 Enforcem. of IPRs	EQ6 Level of Infringem.	EQ7 Right- holder and local interests	EQ8 Implem. Efficiency
ToR questions								
a) Indicators	■	■	■	■	■	■	■	■
b) 8 action lines' results and impact		■	■	■	■	■	■	
c) results and impact		□	■	□	□	□	■	
d) relevance	■							□
e) still potential impact?		■	■	■	■			
f) implementation issues		□	□	□	□			■
g) benefits third countries				□			■	
h) allocation of resources								■
i) recommendations	■	■	■	■	■	■	■	■

The evaluation questions have also been defined so as to assess the main specific and intermediate objectives of the IPR Enforcement Strategy, as reconstructed in the Intervention Logic (*see figure 3.1 above*).

4.1 EQ 1 on Relevance

EQ1: *To what extent was the IPR Enforcement Strategy defined adequately (in terms of the right set of Commission mechanisms and good intervention logic) so as to contribute to DG Trade’s overall policy objectives?*

This question assesses the extent to which the Commission’s IPR Enforcement Strategy was relevant in terms of objectives pursued and definition of appropriate actions for achieving them.

EQ 1 on Relevance – Answer Summary Box

The Commission’s Strategy addressed a real problem in terms of enforcement of EU IPRs in third countries. There remained, however, some confusion in terms of the hierarchy of objectives it is pursuing thereby, for instance in protection of rights holders or other stakeholders. Nevertheless, the 22 actions it consists of are relatively clearly geared towards industry’s needs. Rights holders and associations have also been regularly consulted, but not other stakeholders such as consumer organisations.

The Strategy’s actions addressed relatively comprehensively the main categories of IPR enforcement needs. But some aspects were inadequately addressed. This aspect is examined in detail in the following Evaluation Questions (EQ2 to EQ8). However, overarching issues are substantiated here, and these relate variously to dilution of goodwill as a result of the EU’s moving to a more hard-line approach; a lack of differentiation between types of country or economy; the absence of actions addressing the demand side within the EU; the mismatch between external requirements and harmonisation limitations within the EU and the EC; the limited attention to SMEs; and the linkage of IP exclusively with trade matters, leaving aside important aspects such as organised crime, money laundering, internal fraud, or tax evasion, the combating of which arguably attracts wider acceptance.

4.1.1 Commission objectives on IPR enforcement (JC 1.1)

It is not clear which hierarchy of objectives the Commission was pursuing in terms of IPR enforcement in Third Countries. The Commission and the Council have been very active over the last two decades in upgrading, harmonising and implementing IPRs within the EU. Attention was clearly extended beyond EU borders in 2004 with the announcement of a Commission Strategy for the Enforcement of IPRs in Third Countries. However, the Strategy does not explicitly state the objectives the Commission is pursuing in this field or the hierarchy between objectives. Such objectives are also not stated in other documents. It is for instance not clear whether the overall objective is to support EU rights holders, to strengthen EU trade and external investments, to generate or support EU jobs, or to benefit or protect EU consumers. These objectives might indeed be conflicting. It is also not clear what the objective(s) may be with regard to third country stakeholders. There is hence confusion with regard to the objectives that the Commission is pursuing. In this regard, see the Intervention Logic compiled for the purpose of this evaluation, which reconstructed what the evaluators consider being the most probable hierarchy of objectives underlying the Strategy (*see Section 2.4*). In any case, all stated objectives can be considered as relevant for the EC and the EU in general.

The Strategy for the Enforcement of IPR in Third Countries was rather an “action plan” than a “strategy” as such. The Strategy consisted of a list of 22 ‘specific actions’, structured in eight action lines such as political dialogue, technical cooperation, or institutional cooperation. It was hence rather a list of activities which may or may not have already been initiated or planned, rather than a strategy document targeted on the overall and specific objectives it aimed at attaining and which should have led to specific actions related to the stated strategy.

4.1.2 Addressing priority needs of EU stakeholders (JC 1.2)

Rights holders were regularly consulted, unlike other stakeholders. There is a long history of on-going rights holder consultations behind the Strategy, for the internal market and for third countries. The Commission conducted for instance IPR Enforcement Surveys in 2003, 2006 and 2008 with EU rights holders and associations, besides EU Delegations and EU MS Embassies. Several industry representatives recognised thereby the openness of the Commission, and were accordingly also cooperative and willing to give support. Many associations nevertheless regretted that consultations were repeatedly announced too late or were too tightly scheduled, leaving little opportunity for extended consultation with their members. Besides rights holders (and EU MS), consultation was limited. A consumer organisation noted for instance that while they are invited to regular meetings with the Commission, they were not involved in drafting the Strategy or in the IPR Enforcement Surveys. Non-EU stakeholders in third countries were also not consulted. Progress has recently been made in this regard, as a new survey has recently been launched (deadline: 31 October 2010) which might also be filled in by other organisation such as universities or user-consumer associations.

The Strategy reflected mainly industry needs. Various actors such as Commission staff members, industry representatives and consumer organisations shared the view that the Strategy was mainly based on industry demands, sometimes with direct input, rather than on consumer needs for instance (*see also section 4.7.3*). Rights holders were generally satisfied that the Commission had elaborated a strategy for IPR enforcement in third countries. A similar picture is emerging from the ACTA negotiations: rights holders are pressing for ACTA to integrate a number of elements that they consider are missing from the Strategy; and consumer organisations claimed from their side that EU citizens’ needs were being insufficiently taken into account. This has now to be reconsidered in light of the draft ACTA text that has been made public in April 2010 and on the results of further negotiations stages and, crucially, further consultation with both industry and consumers

4.1.3 Adequacy of the set of “specific actions” (JC 1.3)

The Strategy’s 22 specific actions addressed the main categories of IPR enforcement needs. As shown in the evaluators’ Intervention Logic (*see section 2.4*), all 22 actions responded to one or more of the five types of reconstructed operational objectives, relating to (i) multi/pluri/bilateral treaties and legal systems (cf. EQ 2); (ii) registration procedures (cf. EQ 3); (iii) awareness-raising (cf. EQ 4); (iv) civil, criminal, Customs, and administrative enforcement (cf. EQ 5); and (v) the set of EC mechanisms (cf. EQ 8). However, these links have been reconstructed and are not directly based on the Strategy.

Certain needs were not sufficiently or inadequately addressed. This is being examined at the level of the operational or impact objectives in the subsequent Evaluation Questions (EQ2 to EQ 8). Overall, all 22 actions can be considered as relevant (although some additional actions were lacking – *see below*). There is however limited data on the effectiveness and efficiency of individual actions given that the Strategy did not include performance indicators and did not provide monitoring mechanisms. Nevertheless, certain overarching or cross-cutting issues could be substantiated with regard to the Strategy overall, which are provided here:

- **Diluted goodwill:** the EC had built a high reputation in terms of IPR enforcement with a holistic, cooperative approach (e.g. ECAP II, IPR 2 programmes), but this goodwill has become dissipated through the EU’s moving more to a hard line, US “301 Report”-style approach, pushing third countries into a defensive position;
- **Countries:** the Strategy did not differentiate between types of country or economy, although there are distinctions between IPR enforcement issues: e.g. manufacturing vs. transit countries, developing vs. emerging economies, countries with relatively strong vs. limited political, economic and cultural ties with the EU;
- **SMEs:** despite certain activities targeted at SMEs, such as the China IPR SME Helpdesk, the Strategy addressed SME issues in a limited manner;
- **Demand side:** the Strategy did not address the demand for counterfeit or pirated goods in the EU, which is essential for reducing third countries’ supplies;
- **EU harmonisation:** many commentators stated that the EU should have been putting its own house in order first, before preaching to third countries. This related for example to criminal measures, statistics, and awareness. It showed poor EU consistency in its political messages to third countries;
- **DGs:** similarly many stakeholders whom the evaluators met considered as confusing the different Commission policies and actions between DGs and between the internal market and third countries (*see also EQ8*); *and*
- **Trade:** the Strategy closely linked IPR enforcement to trade matters. Other fundamental linkages (relating to Commission or EU MS competences) have been virtually ignored: e.g. money laundering, organised crime, internal fraud, or tax evasion, although the suppression of most of these abuses would arguably be more widely acceptable.

4.1.4 Coherence with other trade-related Commission policies (JC 1.4)

The Strategy is generally coherent with other EC trade-related policies. Very little incoherence has been observed. On the contrary, trade-related multilateral or bilateral treaties and agreements all support IPR enforcement in the context of the Commission’s Strategy. Examples include Free Trade Agreements, Economic Partnership Agreements, Partnership and Cooperation Agreements, European Neighbouring policies, or WTO negotiations and accessions. However, for the sake of comprehensiveness but outside the scope of this evaluation, it should be mentioned that there are coherence issues with certain other EC policies and possibly also with trade policy in its wider context, such as in the field of generic medicines (e.g. development and competition aspects) or climate change (e.g. patents).

4.2 EQ 2 on International treaties and legal systems

EQ2: To what extent has the Commission contributed to strengthening the multi/pluri/ bilateral treaties and compliance of regional /national legal systems?

This question assesses the extent to which the Commission's contributed to strengthening the IP legal framework at the multilateral level (incl. WTO, TRIPS Council, WIPO, WCO), 'plurilateral' level (e.g. G8, ACTA) and bilateral level (with priority countries in particular).

EQ 2 on International treaties and legal systems – Answer Summary Box

The Commission was an active contributor to IP enforcement at multilateral level, in particular at the WTO TRIPS Council, but it reaped only limited rewards owing mainly to third country opposition. For that reason it launched, together with like-minded developed countries, the hotly-debated ACTA initiative which aims at establishing IPR enforcement policies which go beyond the TRIPS requirements; negotiations are still ongoing. The Commission facilitated more progress on IPR enforcement in third countries through specific chapters in bilateral agreements.

The Commission had some positive role in IP-related legislative adjustments particularly in countries with which it has substantial trade agreements (e.g. FTA, CPA, EPA) or with which it has or had ambitious technical cooperation agreements (e.g. IPR2, ECAP II), and which had their own interests in strengthening their IP legal framework.

4.2.1 Strengthening the multi- and plurilateral legal framework (JC 2.1)

The Commission was an active contributor on IP enforcement at multilateral level, but it reaped limited rewards owing mainly to third country opposition. Overall, the EU is a strong advocate of the multilateral approach, including that relating to IP enforcement matters. In particular it actively contributed in the TRIPS Council and at the WIPO. Its contributions at multilateral level can be summarised as follows, with indication of its relative successes and failures:

- **TRIPS Council (WTO)**³²: The EU has tried to lead the debate on enforcement by submitting a Communication in June 2005 proposing a detailed assessment of enforcement practices among the WTO membership. The Commission further managed to put IPR enforcement on the agenda at each Council meeting. Many commentators recognised the positive role that the Commission played in this respect. The Commission was mainly on its own in the beginning, but has been joined since then by other countries such as the US, Switzerland or Japan. However, negotiations soon reached a stalemate given the profound divergence between the interests of developed and developing countries in this respect (*see EQ 7*). In particular, some emerging economies, led by Brazil and Argentina with the support of China and India, opposed discussion of the topic. Several third countries also indicated that they prefer

³² The Council for trade-related aspects of intellectual property rights (TRIPS) is the body, open to all members of the World Trade Organisation (WTO), which is responsible for administering the TRIPS Agreement.

bilateral to multilateral agreements on IP enforcement. However some countries have recently changed their position, notably where they now benefit from increased IPR protection, an example being India on generic medicines.

- **WIPO:** The Commission was finally granted full participation at the WIPO (World Intellectual Property Organisation) Enforcement Advisory Committee in 2006, after the US withdrew its opposition to its participation. The Commission had some operational contacts with the Committee, such as exchange of information. But here also there was a lack of shared willingness for action, particularly from developing countries. Nevertheless, commentators note that participation in this forum was useful at least in terms of awareness-raising on the importance of IPR enforcement.
- **WCO:** the EU effectively supports the capacity-building initiatives carried out by the World Customs Organisation (WCO) through concrete participation and substantive funding of the organisation. The efforts of the WCO Enforcement Committee through a proposed IPR Enforcement initiative called SECURE³³ - the aim of which was to carry out the necessary work for further developing and promoting IPR legislative and enforcement regimes, risk analysis and intelligence sharing, international cooperation and capacity building programmes for IPR enforcement - were halted owing to opposition from a group of South American countries led by Brazil and Ecuador. They feared that SECURE was being used to set norms, standards and best practices and to put new obligations on the WCO Members. Furthermore, these countries expressed disagreement with the involvement of some observers, particularly NGOs or representatives from the private sector. Consequently SECURE was replaced by a WCO group called CAP (Counterfeiting and Piracy), a dialogue mechanism on border measures on trademark counterfeiting and copyright piracy that provides exchange of views, experiences, practices and initiatives of Customs administrations, and discussions on WCO capacity-building activities for Members requesting assistance in this field.
- **OECD:** The Commission reports that it has collaborated closely with the OECD (including financially) on an extensive study to assess the impact of piracy and counterfeiting on the global economy³⁴. During 2008 it worked on phase II of the project, dedicated to digital piracy; a scoping exercise on phase III of the study is ongoing. Although the project is being criticised by many commentators (notably with regard to the methodology applied) there are no other credible overall assessments of the impact of counterfeiting on the world economy.
- **DDA:** There is no evidence that the Commission acted on its intention, expressed in the Strategy, to take an enforcement-oriented initiative in the framework of the Doha Development Agenda (DDA).

It should be noted that **there is no evidence that the Commission turned to the TRIPS Council's dispute prevention and settlement mechanism or to the EU Trade Barrier Regulation (TBR) mechanism**, which were possible 'actions' envisaged in the Commission's 2004 Strategy for Enforcement of IPR in Third Countries.

³³ Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE)

³⁴ The economic impact of counterfeiting and piracy, OECD, 2008

Given the limited progress at multilateral level, the Commission joined the start of the ACTA initiative for stricter IPR enforcement policies with like-minded countries. The Commission decided to circumvent the stalemated negotiations at multilateral level, considering they had lost momentum. It was one of the initial group of interested parties in launching the plurilateral negotiations for an Anti-Counterfeiting Trade Agreement (ACTA). This initiative originated from Japan and the United States in 2005 and was taken up by Australia, Canada, the European Union, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore and Switzerland by the time the negotiations started in July 2008. Negotiations are at their final stages, after 11 rounds; a final draft of the agreement dated, 15 November 2010, has just been released³⁵. Negotiations were criticised for their lack of transparency by stakeholders and ultimately also by the European Parliament in March 2010³⁶, which led to a first release of the draft agreement in April 2010. The draft agreement specifies that the initiative aims to establish international standards for enforcing IPR, including for instance provisions on civil, criminal and Customs enforcement, and on procedural rules (e.g. seizure of goods, range of IPR covered, ex officio actions and damages). Many criticisms have been voiced since the beginning of the (initially very secret negotiations on the) ACTA, including by third countries and consumer organisations, for example over the fact that it does not represent a balanced approach for developing countries (EU and US negotiators have acknowledged that ACTA is designed to be expanded to include those countries), that consumers' interests are only marginally incorporated, and that there is no clear distinction between the different types of IPRs (e.g. clothing design trade marks vs. drug patents). DG Trade's assessment is that *“ACTA is a positive agreement overall that will improve the international standards of IPR enforcement in areas such as civil, Customs, penal and digital enforcement, but also in terms of international cooperation between enforcement authorities. At the same time, the agreement will include clauses to safeguard interests of other stakeholders (consumers, internet providers, developing countries) and take into account the concerns expressed by Members of the European Parliament and civil society. ACTA will have no impact on the EU acquis, but its penal chapter contains provisions agreed unanimously by MS that will be useful for future EU harmonisation of this subject.”*

The Commission was also actively involved in the G8 IPR agenda. In parallel with ACTA, the Commission reports that the EU has been one of the main contributors to the IPR section of the G8 Summit Statements since the 2005 Gleneagles Summit, and that it is also representing the EU in the Heiligendamm Process involving additionally five key emerging economies³⁷. In its 2009 L'Aquila statement the G8 IP Expert Group (IPEG) endorsed the ACTA initiative.

³⁵ <http://trade.ec.europa.eu/doclib/html/147002.htm>

³⁶ European Parliament Resolution on 10 March 2010 on the transparency and state of play of the ACTA negotiations

³⁷ The Heiligendamm Process brings together G8 partners and some of the main emerging economies (Brazil, China, India, Mexico and South Africa) in a dialogue about innovation.

4.2.2 Strengthening the national legal framework (JC 2.2, JC 2.3, JC 2.4)

The Commission's IP dialogues achieved limited success on their own. In the context of the Strategy the Commission has launched structured IP dialogues with countries it defined as priorities in the context of IPR enforcement. The objective was to discuss IP matters with third countries including, among other aspects, the national legal frameworks on IPR. There has been active dialogue with China, Russia and Ukraine; it proved more difficult with several other countries such as Argentina, Korea, Mexico or Turkey, which were reluctant to take part in such IP dialogue. Overall there is little evidence of progress in IPR enforcement that can be directly linked to the Commission's political dialogue on IP. In China for instance, one step forward led typically to one step backward. Nevertheless, IP dialogue has contributed to raising the awareness levels of national authorities on these matters and to clarifying mutual interpretations and positions.

More progress was achieved in countries with which substantial trade agreements were negotiated or signed, such as Economic Partnership Agreements (EPAs), Free Trade Agreements (FTAs) or Partnership and Cooperation Agreements (PCAs); these agreements included detailed sections on IPR enforcement modelled on EU legislation which went beyond the minimum TRIPS requirements. This was for instance the case with Ukraine, Vietnam, the CARIFORUM³⁸ and Central America³⁹, and in particular with the recent FTA signed with South Korea on 6 October 2010, which is the first of a new generation of FTAs with increased provisions for IPR enforcement⁴⁰ (*see section 2.3.11*). Substantial progress was also observed with Chile, which signed an FTA with the USA in 2004. The Commission has currently ongoing discussions in this area with other countries such as China, India, Canada, the ASEAN countries, the Andean Community and the Mercosur.

The Commission also achieved some progress in strengthening the national legal frameworks through large technical cooperation programmes. Examples include the large technical cooperation programmes ECAP II in ASEAN countries, IPR 2 in China and the EU-funded PROTLUDEM project in Mexico⁴¹.

Least success was achieved in countries where governments showed little willingness to strengthen their IP legal framework. Those were notably the countries that considered that they have little interest in so doing. A clear example relates to the lack of compliance in practice *versus* on paper in the field of patents in Thailand and in Argentina; the latter country had for instance a patent backlog clearly exceeding the TRIPS' "reasonable timing" requirement and it did not ratify the Patent Cooperation Treaty.

³⁸ Caribbean Forum of ACP States

³⁹ The EU and Central America have concluded in May 2010 an Association Agreement (the most advanced type of agreement that the EU can engage in with a country or a region in the world), which includes a chapter on IP. The press release mentions that with regard to IP that "provisions reaffirm the standards acquired by the country in other international commitments and implemented at national level and do not carry any legislative reform to the current legislation".

⁴⁰ This FTA has been made public: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en>

⁴¹ Programme for the Facilitation of the EU-Mexico Free Trade Agreement (PROTLUDEM)

4.3 EQ 3 on Implementing rules and registration procedures

EQ3: *To what extent has the Commission contributed to ensuring the existence of effective implementing rules and registration procedures at the national level?*

Even though IP laws might be adequate, it is important to assess the level of their implementation in national and regional systems in terms of implementing rules and (for registered IP rights) registration procedures. This question assesses the extent to which the Commission has contributed to improvement in this area. It also assesses the Commission's contribution to reduction of the level of bureaucratic complexity, a factor hampering the effectiveness of IP laws.

EQ 3 on Implementing Rules and Registration Procedures – Answer Summary Box

International pressure, particularly from the EU and WTO, has contributed to improvements in the implementation of rules and regulations on registration of IPRs in third countries during the period under review. The developing EU IP dialogues and WTO (TRIPS)/FTA negotiations have supported these efforts, procedures have been streamlined and registration processes are increasingly efficient. The EU has been particularly successful in improving implementing rules and registration procedures in China. However there are notable exceptions, especially on patent grants in certain third countries and on the use of non-IP barriers to registration or implementation of rights.

4.3.1 Implementation of rules and registration procedures in the IP laws of third countries (JC 3.1)

IP related and rules and registration procedures have generally improved over the period 2004-2009 and there is some evidence of direct EC influence in the improvements in certain cases (e.g. China, Vietnam). TRIPS-plus enforcement measures have become a common element of free trade agreements (FTAs) between the EU and third countries, in the Economic Partnership Agreements (EPAs) negotiated by the European Union (EU) with African, Caribbean, and Pacific states, in the nine Partnership and Cooperation Agreement (CPAs) with countries of Eastern Europe, the Southern Caucasus and Central Asia (see section 2.3.11), and in the process of accession to the World Trade Organization (WTO). The European Neighbourhood Policy (e.g. for Turkey) also includes an IP component and enforcement obligations. IP dialogue has been referred to by all the interviewees in China and Ukraine as an important political platform for aligning local IP practices with EU views and the *acquis*. The most recent changes in China were the promulgation and implementation of the new Anti-Monopoly Law on August 1, 2008, and the revision of the Patent Law, which entered into force on October 1, 2009. The revision of the Trademark Law is currently ongoing and expected to be passed in 2011. Preparations are further under way to amend the Copyright Law⁴². All this contributes to effective implementation of IP rules and procedures. But it is difficult to evaluate to what extent the Commission itself has contributed to ensuring the existence of effective implementing rules and registration procedures at national level. There is some

⁴² The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

evidence to suggest that pressure from the international community has encouraged Third Country governments to take IPR issues more seriously. It is likely that the Commission has directly influenced the governments of Vietnam, China and Russia, among others, to take action on IPR issues.

4.3.2 Duration of the process for obtaining IPRs (JC 3.2)

Overall, there has been progress in implementing relevant regulations which have directly and positively impacted on the duration of the process for obtaining IPRs, hence on the number of IP registrations.

Worldwide, in 2004 there were 1.1 million national trade mark registrations and 635,000 foreign registrations. In 2009 these figures had risen to 1.4 million and 765,000 respectively⁴³. International trademark filings under WIPO's Madrid system dropped by 16% in 2009 as a result of the global economic downturn, though increases were observed among some major users, notably the EU (up 3.1%). The EU accounted for over half the international applications received: 21,824 out of a total of 35,195 in 2009. EU applications rose dramatically between 2005 and 2008 but fell back to below 2005 levels in 2009.⁴⁴ The general trend has been a rise in registrations in priority countries.

In China a total of around 730,000 applications for trademarks was filed in 2009. The goal of the trademark office is that in three years the processing time to register a trademark will decrease from 30 months to 12 months.⁴⁵

In Thailand for example there were 10,500 foreign registration applications in 2004 and 11,400 in 2009; registrations by the EU in 2004 totalled 3,000 rising to 5,500 in 2008 (4,200 in 2009).⁴⁶

In Turkey, total trademark registrations in 2004 was 27,000, rising in 2009 to 41,000.⁴⁷

In South Korea the number of registrations has significantly increased between 2004 and 2008 owing to more efficient registration procedures, and the time taken to process applications has decreased. Fees related to IPR registration have decreased by 21%, the time required to obtain the rights has been reduced by 15.1%, the provision of support for SMEs has increased by 14.8%, and application of relevant laws and regulations against violations has increased by 8.3%.⁴⁸

In Ukraine the IP dialogue, the Partnership and Co-operation Agreement (PCA) and the EU-Ukraine Association Agreement have helped to improve registration procedures. Since 2005, certain changes have taken place in the practices of the Ukrainian examining

⁴³ WIPO Statistics Database – January 2010

⁴⁴ WIPO Press release 18 March 2010

⁴⁵ Mid-term Evaluation of EU-China Project on the Protection of Intellectual Property Rights (IPR2), Olivier Pêtre, 2009

⁴⁶ Department of Intellectual Property Thailand

⁴⁷ Turkish Patent Office

⁴⁸ Press release of the Korean Chamber of Commerce & Industry on a Survey concerning “Difficulties experienced by businesses concerning intellectual property rights”, 2006

authority, the Ukrainian Industrial Property Institute. For example, to speed up procedures and avoid serious backlogs at the Patent Office, a “planned system” was implemented in 2002 and revised in 2005, which provides a minimum compulsory number of patent, design and trademark applications which have to be examined during each month by every examining division. As experience shows, this has been efficient and has significantly decreased the time taken to examine applications at the Patent Office. The time taken to obtain an invention patent has decreased significantly and consistently over the past ten years. Before 2000 it took 6-7 years, during the period 2003-2005 4-5 years, and in 2010 it now takes 2-3 years on average. In terms of industrial designs, the duration of registration has been reduced by 50%+, from one year in 2005 to 3-6 months in 2010. Prosecution times for trademark infringements have also been significantly reduced, from 2.5 years in 2005 to 1.5 years on average in 2010. Total registrations in 2004 were 9,400 of which 1,700 were foreign (mostly EU); in 2008 the total rose to 15,400, of which 3,400 were foreign.⁴⁹

In several countries there are challenges to obtaining patents, especially for pharmaceuticals and agrochemicals. Many third countries are applying politically motivated compulsory licensing for pharmaceutical patents. For example, in Thailand and Argentina, EU rights holders claim the quality of enforceability of their rights is being seriously hampered in this way. In Ukraine the use of non-IP barriers such as protection laws for local medicines is having the same effect. The lack of protection for trade secrets in countries such as Ukraine also means that illegal use of patented materials can effectively be authorised. In many countries, for example Argentina, a large backlog of patent applications is hampering efforts to decrease the time required to obtain registration. There is little evidence that the EU has made any serious attempt to resolve these issues within the IPR enforcement strategy.

4.3.3 Quality of IPR enforceability after registration (JC 3.3)

Although there is ample evidence of increased registrations by EU rights holders in third countries, it is debatable whether the quality of enforcement has improved. Virtually all of the statistics reviewed showed an increase in the number of IP registrations by EU or foreign rights holders in Third Countries: for example in Thailand there were 3,000 EU applications in 2004 rising to 5,500 in 2008 and in Ukraine 1,700 in 2004 rising to 3,400 in 2008. The most measurable available aspect of the quality of enforceability is access to IPR registers by EU rights holders, and this appears generally to be good and improving, with many national offices providing *inter alia* registers and previous decisions on applications online. However the quality of enforceability clearly depends on a whole range of indicators, not all either available or measurable statistically.

⁴⁹ SDIP Annual report 2008

4.4 EQ 4 on Awareness raising

EQ4: To what extent has the Commission contributed to raising awareness of rights holders, the general public, and specific public bodies (Law Enforcement Agencies, officials and judges) on the importance of IP, and enhancing capacities of IPR institutions?

This question aims at assessing the extent to which the Commission contributed to increasing the level of awareness on the importance of IP (enforcement) amongst the general public but also to rights holders. It also assesses the Commission's role in enhancing capacities of third country IPR institutions such as through specific IP training for judges, Customs authorities and the police.

EQ 4 on awareness raising – Answer Summary Box

The prioritisation given by the EU to awareness-raising on IPR issues in third countries and the degree of success of any measures is highly variable. In South Korea and China, EU efforts have been particularly successful. However, the EU objective of focusing on encouraging all third country governments to prioritise awareness-raising is not proving successful. The reports of various studies conducted by the European Commission, in collaboration with other international organisations, are now freely available although not as proactively disseminated as they could be. Information on IP issues is increasingly being made available by national governments, particularly as a tool for business development. Training measures, some supported by the EU, are effectively being implemented in some countries, although low levels of professional education and lack of commitment to specialised training restricts the contributions of national institutions. Various EU-funded capacity building projects are proving successful. Economic and cultural factors are highly influential in decision-making and consumer behaviour.

4.4.1 Availability of official IPR-related information (JC 4.1)

In general, official IPR-related information is now widely available and is being published and regularly updated, for example on the Internet. In South Korea, information, legislation, application forms and statistics are regularly published online, significantly increasing public access to IPR-related information. This includes a well-documented website for the Korean Intellectual Property Office.⁵⁰ In Ukraine the government has held workshops to broaden awareness of TRIPS and to empower the public to better understand the legislation concerning IPR, with a view to legally opposing patent rights with compulsory licensing. In China the IPR2 project has greatly improved the availability of official IPR-related information.

In any event there is some doubt about the extent to which the EU has contributed proactively to either promoting availability of official information or to initiating realistic and robust information and statistics (except notably in China with the IPR2 project). The establishment of the EU Observatory on counterfeiting and piracy is seen as a positive but marginal step for improving enforcement in third countries. Many third countries are

⁵⁰ www.kipo.go.kr

watching closely the development of the EU Observatory – particularly as regards the availability of quality information and statistics on counterfeiting and piracy.

4.4.2 Promotion of IP as a tool for right holder business development (JC 4.2)

There are now various websites, databases and online helpdesks available to empower rights holders to better understand and use IP as a constructive tool for business development. The existence of Euro-info centres for chambers of commerce and the InnovAccess project (supported by the EC) facilitate access to IP information for EU and third country rights holders. The EC had been active in expanding the use of IPR helpdesks – for example for SMEs. It is understood that the current level of usage of the IPR information dissemination services in China is undergoing evaluation, and the outcome of this assessment will demonstrate whether or not these online services represent an effective strategy for empowering rights holders. The most challenging aspect of awareness-raising is to influence third country governments to invest in IP awareness-raising campaigns.

Public-private partnerships (PPPs) were not exploited to their full potential. Action line 6 of the Strategy relates to the ‘Creation of public-private partnerships’, with two ‘specific actions’, namely to “support the creation of local IP networks” and to “improve cooperation with companies and associations”⁵¹. Some activities already existed in this field, as indicated in the Strategy, such as the Innovation Relay Centres and the IPR Help-Desk. Since 2006 the Commission has also progressively launched local Market Access Teams (MAT) in Third Countries, in the context of its Market Access Strategy. They aim at providing a general platform for coordination mainly between the Commission and EU MS, involving business where needed. However they cannot be considered as fully-fledged IP networks as such (*see section 4.8.1 below*). Additionally, companies and associations based in the EU and active in the fight against counterfeiting and piracy were regularly consulted (*see section 4.1.2 above*). Nevertheless, there is not much evidence of more substantial efforts to create partnerships between the public and private sectors in the third countries. Some government officials met in third countries suggested that it would be worth putting this action line more into practice. However rights holders and some EC staff members strongly opposed actions, pointing out that this could be also done with improved exchange of information between LEAs and rights holders, particularly to ensure active participation in enforcement.

An issue still remains regarding banks’ acceptance of the economic value of IPRs. Different information sources show that banks and other financial institutions were not ready to accept the economic value of IP rights as intangible assets, for instance with regard to debt leverage, including for research and development. This hinders the creation of start-up enterprises for commercialising inventions.

⁵¹ “Specific actions: (i) Support the creation of local IP networks involving companies, associations and chambers of commerce - this practice is already being implemented in certain key countries and will be actively supported by DG TRADE ; (ii) improve cooperation with companies and associations that are active in the fight against piracy/counterfeiting inter alia by exchanging information about future initiatives and ensuring the cross-participation of experts from the Commission and from private entities in events organised by the other party.”

4.4.3 Understanding by the general public of the importance of IP (JC 4.3)

In some third countries general public awareness of IPR issues has been raised but in many others these issues remain ‘virtually invisible’. The OECD 2007 study, confirmed by interviews conducted during the evaluation, offers insightful evidence on the relative importance of IPR violations across different product categories. Two findings are particularly noteworthy. First, trade in IPR-infringing goods appears to be concentrated in a small number of “sensitive” product categories: the top five product groups account for more than three-quarters of all Customs seizures. Seizure rates may be a biased indicator of the relative distribution of IPR-infringing goods, as interceptions by Customs authorities may be more frequent in product categories known to be sensitive to trade in counterfeit or pirated goods. Second, the four most-affected product categories—accounting for 65% of all seizures—pertain to fashion apparel and related items on the one hand, and audiovisual recordings and software on the other. This pattern suggests that, for a substantial proportion of IPRs-infringing goods, consumers know that they are purchasing counterfeit and pirated goods, and may well derive some benefit from doing so. In fact, this notion is confirmed by consumer surveys that reveal that lower prices are a critical motivation for purchasing counterfeit or pirated products.⁵² This also appears in an OECD study, which identifies the main drivers for counterfeit and pirating activities from the supply (incl. producers) and the demand side (incl. consumers) – it shows that both producers and ‘knowing’ consumers benefit from keeping counterfeiting alive and acceptable in society. For these categories, awareness-raising has limited effectiveness.

Table 4.4 : Summary table of drivers for counterfeit and pirate activities

Counterfeit or pirate supply	Knowing demand for counterfeit or pirated products
<i>Driving factors</i>	<i>Driving factors</i>
Market characteristics High unit profitability Large potential market size Genuine brand power	Product characteristics Low prices Acceptable perceived quality Ability to conceal status
Production, distribution and technology Moderate need for investments Moderate technology requirements Unproblematic distribution and sales High ability to conceal operation Easy to deceive consumers	Consumer characteristics No health concerns No safety concerns Personal budget constraint Low regard for IPR
Institutional characteristics Low risk of discovery Legal and regulatory framework Weak enforcement Penalties	Institutional characteristics Low risk of discovery and prosecution Weak or no penalties Availability and ease of acquisition Socio-economic factors

Source: The Economic Impact of Counterfeiting and Piracy, OECD, 2008

⁵² <http://www.allianceagainstiptheft.co.uk/downloads/pdf/Fake-Nation.pdf>

The general public may understand the basic importance of IP to business, but the wider social and economic benefits of IPR enforcement may be very different according to the general quality of life and legitimate channels of access to resources.

In Least Developed Countries or in remote provinces of third countries, for example in China or India, although social factors like unemployment and illiteracy influence counterfeiting, the phenomenon occurs mainly for economic reasons such as poverty and the high prices of genuine products. For the counterfeiter, pirating is an easy way of making quick money. For consumers it is gainful opportunity of using products which otherwise remain unaffordable to the majority. Basically, this 'win-win' situation for both counterfeiters and consumers keeps counterfeiting alive and acceptable in society.

In Thailand a commentator suggested that there is a strong cultural block against acknowledging the impact of counterfeiting and piracy.

South Korea has undertaken some initiatives in this area, including national awareness-raising campaigns. For example, the year 2006 was designated as the year of IPR protection by the Koreans Customs Service (KCS), with Seoul hosting an international conference on Customs protection and IPR enforcement, along with an exhibition of fake goods organised by KCS. They also appointed IPR ambassadors. However, since 2006 no news has been posted on the KCS website regarding recent IPR activities.

In Argentina the public do not have any increased awareness of IPR, nor do they understand its social and economic impacts, according to an audio-visual industry association. Likewise, in Turkey and Vietnam little progress has been made in raising awareness of these issues.

4.4.4 Enhanced technical capacity of third country national institutions & LEAs (JCs 4.4 & 4.5)

EC funded projects and TA have enhanced the technical capacity of national institutions and law enforcement agencies (LEAs) to handle IPR cases. In general, however, there is still a lack of technical capacity in national institutions for handling IPR cases. There exist many diverse initiatives aimed at technical capacity-building, such as TAIEX⁵³, IPR2, ECAP, twinning programmes, and IP technical cooperation projects (e.g. EU-Chile agreement 2003), but a lack of coordination between EU and other providers hampers their efforts and can create confusion. In some countries, levels of technical IPR capacity-building remain very low. The European Community and its Member States were already providers of technical assistance in LDCs when the Strategy was set-up, and continue to support these countries in implementation of the TRIPS Agreements. Their delegations were available to help those LDCs who had not yet submitted their needs assessments to identify their needs and priorities⁵⁴.

⁵³ The Technical Assistance and Information Exchange Programme (TAIEX) is an EU institution-building instrument for candidate countries, acceding countries, the ten new Member States and the countries of the Western Balkans.

⁵⁴ Minutes of the TRIPS Council meeting held in the Centre William Rappard on 13 March 2008, , WTO IP/C/M/56

There is still a significant lack of awareness and professional education on IP but progress is being made.

Lack of awareness is especially notable amongst mid-level government officials, along with consumers, research institutes, universities or private companies; it is sometimes even true of those officials directly responsible for enforcing IPRs. IPRs are still widely perceived in Third Countries as serving the interests of foreign companies, to the detriment of local interests, as for example was evident in Thailand and other ASEAN countries.

In South Korea and Argentina, levels of technical IPR capacity are very low. No specialised courts exist, the judiciary do not have specialised knowledge and expertise, few civil cases are brought, and IPR issues are not well publicised. Few training or other measures are in place to improve this system. Some individual members of the judiciary strive to advance their understanding of these issues but many consider them to be of lesser importance than other criminal problems.

On the contrary, in Russia and Ukraine, systematic and extensive training measures have greatly contributed to enhancing both the capacity and quality of judicial IPR considerations when conducted on a regular basis. In Russia, TAIEX training conducted in 2008, 2009 and 2010 was attended by approximately 290 judges, in addition to whom some 260 representatives of investigative bodies and the prosecution were trained. Participation in these seminars enabled, for example, the Business Software Alliance to enhance cooperation with prosecution and investigative bodies responsible for prompt initiation of criminal cases, and their investigation and supervision. All seminar participants were provided with electronic copies of the seminar presentations and best verdicts. Such seminars are a unique opportunity for establishing new important contacts with high-ranking officials of the investigation and prosecution bodies.

4.5 EQ 5 on Enforcement of IPRs

EQ5: To what extent has the Commission contributed to enhancing enforcement of IP law and rules (civil, criminal, Customs and administrative) and a timely and effective judicial process?

This question aims at assessing the Commission's contribution to improvements made in the civil, criminal, Customs and administrative enforcement procedures, and in the judicial process in third countries.

EQ 5 on Enforcement of IPRs – Answer Summary Box

Civil, administrative, criminal and Customs institutions in many third countries are improving IPR enforcement, but significant issues still remain. While the number of prosecutions is increasing and programmes are in place to develop the technical capacity of law-enforcers, the allocation of resources to IPR protection is a critical factor in successful implementation. Often third countries do not have sufficient resources to ensure that IPRs are rigorously protected. Socio-cultural factors also impact on the degree of IPR enforcement. In general, civil enforcement has improved more effectively than criminal prosecutions and in some key countries the EU has contributed to this. Besides, there is no clear evidence that the EU, with its activities in this field such as the EU-China IP dialogue or the Customs Action Plan, has had any specific influence on most of the improvements.

4.5.1 Cooperation of national enforcement institutions and effect on court cases (JC 5.1)

Efficiency of IP enforcement depends on priorities set by third country governments. Relevant legislative, judicial, Customs and administrative enforcement agencies exist in third countries, but often effective enforcement is dependent on budget resources, particularly allocation of human resources and investment to combat piracy and infringements. There is little evidence that the EU has been able to influence any significant change in this area.

The number of IPR cases brought to courts in third countries has increased. The total number in the EU in 2007 was 43,671 cases, following a steady increase in previous years.⁵⁵ In China, the total number of IP related lawsuits jumped from 14,056 cases in 2006 to 23,518 in 2008⁵⁶. A 2006 survey by the Korean Chamber of Commerce & Industry on the “Difficulties experienced by businesses concerning intellectual property rights” shows that local businesses experience an average of 1.9 cases of IPR-related disputes (2.9 for conglomerates and 1.2 for SMEs) every year.⁵⁷ In Ukraine, in 2007 733 criminal cases were instigated regarding illegal use of objects of intellectual property, 59 of which were about illegal use of trademarks. In 2006 local courts reviewed 234 civil cases of infringement of

⁵⁵ Report on Community Customs Activities on Counterfeit and Piracy (EC Taxation and Customs Union), 2007

⁵⁶ The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

⁵⁷ Press release of the Korean Chamber of Commerce & Industry on a Survey concerning “Difficulties experienced by businesses concerning intellectual property rights”, 2006

intellectual property rights, according to an industry association. In Argentina, a system named Maria exists to facilitate cooperation between different agencies on trademarks, allowing triangulation of information and increasing the potential for identifying suspicious cases.

Despite some noticeable progress, much remains to be done to bring the enforcement system of most countries in line with TRIPS requirements. In the case of Thailand stakeholders reported a drawing-back, due partially to frequent changes in some agencies of top officials responsible for enforcement. The situation of IPR enforcement in most countries remains far from satisfactory, even in some of the more IP-advanced countries such as the Philippines. Weak IPR enforcement in third countries reflects fundamental institutional deficiencies, including official corruption. It is not clear how far obligations in trade agreements or technical assistance activities can remedy such deficiencies. The evaluation team believes that in many cases, sustained reductions in IPR violations may have to await broader institutional development, such as in Vietnam, India, Brazil and Ukraine. In the last-mentioned country, for instance, the Ministry of Environmental Protection theoretically accepts the tackling of IPR infringements for agro-chemicals and pesticides as one of its responsibilities; but when it comes to practical internal reform (meaning allocating additional dedicated Human Resources) to tackle these infringements, then the Ministry becomes reluctant either to re-organise itself or to accept the additional responsibilities or burdens needed for example to destroy physically seized infringing pesticides.

4.5.2 Civil and administrative enforcement (JCs 5.2 & 5.5)

The results are very varied for the improvement of civil and administrative enforcement in third countries. In some cases enforcement has improved significantly, while in others the situation remains unchanged.

In China, administrative enforcement is hailed as one of the most efficient tools for enforcement. Rights holders prefer this track to the judicial route in account of its low costs, speed and efficiency. Administrative enforcement is available for all types of IPRs: patents, utility models, trademarks, designs, copyrights, software, topographic designs, geographical indications and even trade secrets.⁵⁸ Civil judicial procedures are considered to be available in law but are not implemented.⁵⁹

In the Philippines, administrative measures are reported to be inadequate due to poor implementation and very high costs. The main weaknesses are deficient enforcement of domestic IPR regulations, lack of trained officials, lack of financial resources and corruption.⁶⁰

⁵⁸ The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

⁵⁹ Questionnaire

⁶⁰ Questionnaire

In Vietnam the situation is complex; administrative sanctions are considered to be the most effective means of enforcing IPR in terms of cost-effectiveness and time efficiency. Enforcement through civil action is time-consuming and prone to long delays.⁶¹

In Russia civil enforcement is satisfactory overall; but it still has serious faults, for example in its failure to apply provisional measures.⁶²

In Argentina, sources suggest that there are no courts specialised in IPR enforcement in the country and that judges' IPR technical capacity may not be specialised enough. Other commentators noted that the judiciary is very little specialised in IPR; they know more about trademarks than about patents or copyrights. And IPR are considered of low priority, in particular copyright.⁶³

In Ukraine, statistics suggest that civil and commercial court enforcement has improved over the period evaluated (2005-2009) for all types of IP rights. Statistical evidence of the significance, the number and the value of each case is unavailable. The Supreme Commercial Court (SCC) and related operative and regional courts have made great improvements in IPR Enforcement cases. Specialised IP judges have been trained in the State Institute of Intellectual Property.

4.5.3 Criminal enforcement (JC 5.3)

IPR criminalisation (but not successful prosecutions) has grown rapidly in third countries, even if IPR violations are not perceived to be morally reprehensible within certain communities.

Some interviewees of the Central Intellectual Property and International Trade Court of Thailand have summarised some of the concerns of developing countries in the area of criminalising IPR infringements, beyond TRIPS' clearly circumscribed scope of Article 61 definition, for example in respect of patent infringements. In their opinion IPR enforcement should in principle be civil. This is the preferred method of protecting IPRs in the EU and other developed countries and it should be the same in third countries. For example, with regard to patent infringements the European Parliament refused to criminalise such infringement when considering a revised text of the draft 'Directive (2005/0127/COD) on criminal measures aimed at ensuring the enforcement of intellectual property rights' adopted on 25 April 2007. But in several of the third countries visited (e.g. Argentina, Brazil, and Thailand), patent infringement is subject to criminal sanctions. The criminalisation of patent infringement is a particularly delicate matter, specifically because the interpretation of patent claims requires special skills that are generally lacking in criminal courts and the cost of defence in criminal courts may be prohibitive for alleged infringers, particularly for SMEs.

Although it has grown rapidly, the practice of criminal enforcement of IPRs is not as developed as administrative and civil enforcement.

⁶¹ Questionnaire

⁶² Questionnaire

⁶³ MN 020, 021

Criminal enforcement of IPRs in China is available mostly for serious or very serious trademark, trade secret and copyright infringements, ref. Articles 213 et seq. Criminal Code. Criminal case numbers per annum were significantly low and featured less than 1,000 "real" IP criminal cases in 2009, while the rest of the often-cited 3,000 other criminal cases per year (approx) were related to sub-standard goods, illegal business operations and other crimes under the Criminal Code, which may also have contained an IP element. The majority of cases related to trademark infringements⁶⁴.

In the Philippines, criminal procedures are considered as deficient on account of the low level of fines.⁶⁵

In Turkey, according to commentators IPR issues are not integrated in criminal procedures.

Vietnam has made substantial efforts to reform its legal system. A major step was the introduction of the Intellectual Property Law and its implementing decrees in 2005; the most recent example being the issuance of a Criminal Circular offering guidelines on criminal prosecution against acts of piracy and counterfeiting on a commercial scale.

Although uncertainties remain and penalties still lack a sufficiently deterrent effect, this is certainly a step in the direction of criminal enforcement.⁶⁶

In Argentina, criminal IPR enforcement measures are still insufficient. Corruption within national institutions hinders efforts, and the role of the Commission is considered to be low⁶⁷. However Argentina has repeatedly refused the setting-up of technical cooperation programmes focusing on enforcement.⁶⁸

4.5.4 Customs enforcement (JC 5.4)

Customs enforcement in general has been enhanced, and procedures have been simplified and harmonised in many of the priority countries. Customs enforcement has improved but this is primarily the work of the WCO rather than the EC. DG TAXUD has launched a dialogue on enforcement of IPR with a number of countries including a Customs cooperation Action Plan on IPR with China and another with the USA. Cooperation between Customs and industry is generally improving as increasing numbers of applications for actions are being filed by rights holders.⁶⁹

In China, Customs seizures increased by almost 50% in 2008 compared to 2007, with 11,135 seizures and 600 million articles seized. Customs – unlike civil and administrative enforcement authorities – are centrally organised and are not part of the provincial governments. This aspect can play a crucial role in areas where local protectionism is strong and counterfeits readily available. As a result of their greater independence, it is generally

⁶⁴ Li Chunlei/Liu Nannan, *Zhishi Chanquan* 2007 No. 3, p. 21, citing about 83% of all criminally prosecuted cases, in *The Intellectual Property Enforcement System in the People's Republic of China*, Thomas Pattloch, 2010

⁶⁵ Questionnaire

⁶⁶ Questionnaire

⁶⁷ Questionnaire

⁶⁸ IPR, Priority Countries, EC, 2006

⁶⁹ Report on Community Customs Activities on Counterfeit and Piracy (EC Taxation and Customs Union), 2007

recognised that Customs are highly efficient once action is taken. In 2007 WCO recognised China's General Administration of Customs as a top performer⁷⁰; a number of the ten best cases awards of the Quality Brand Protection Committee in China have gone to this agency.⁷¹

In the Philippines, the competent authorities are showing some commitment to combating counterfeiting and piracy and to addressing rights holders' concerns. However, enforcement remains weak, Customs are unable to prevent massive smuggling of counterfeit and pirated merchandise at the borders, and the judicial system is slow, complex and lacking expertise in the field, leading to low conviction rates and imposition of non-deterrent sentences. Customs procedures are reported as available in law but not being implemented.⁷²

Following the United States Trade Representative's Special 301 Report for 2009, Argentina has taken steps to improve enforcement at the borders.⁷³

In Vietnam, under the new IP law 50/2005, IPR holders have the right to request custom offices to monitor and suspend goods; Customs offices also have the authority to handle infringement as much as all other competent enforcement authorities. However, seizures carried out by Customs are insufficient, Customs have been notoriously corrupt, and for many years no actions have been pursued. It is hoped that the new Customs law will improve the situation, but there is a lack of efficient IT devices or of a single database on goods infringing IPRs.⁷⁴

⁷⁰ China Customs received the 2007 Special Contribution Award for Cracking Down on Counterfeits and Piracies from the World Customs Organization at its 109th/110th Council Session. Since 2000, the annual growth rate of seizures of exports has risen about 30%.

⁷¹ The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

⁷² Questionnaire

⁷³ USTR, Special 301 Report, 2009

⁷⁴ Questionnaire

4.6 EQ 6 on Level of infringement

EQ6: To what extent has third countries' compliance with IPR commitments increased during the evaluation period?

This question aims at verifying whether the Commission actions in the field of IPR Enforcement have had an impact in terms of an increase of third countries' compliance with IPR commitments, or in other words in terms of a decrease in IPR infringements. It thus considers as far as possible to what extent improved compliance can be attributed to the Commission's actions. Answering this question will rely on quantitative information on data readily available in existing analyses or statistics.

EQ 6 on Level of infringement – Answer Summary Box

While there are numerous indications that the volumes of IPR infringements are increasing, the overall degree to which products are being counterfeited and pirated is unknown, and there are, as yet, no methodologies that could be employed to develop an accurate overall estimate. Third countries' compliance with IPR commitments has generally increased over the evaluation period, but again it is very difficult to assess the degree of compliance or the influence of the EU/EC owing to the lack of availability of reliable statistical evidence; the standardising of indicators, data collection methods and evaluation tools would have a significant effect on this. In general the trends indicate that Asia is the largest infringer and, despite its efforts, China remains the single largest source economy. Levels of infringement by certain counterfeit products, particularly pharmaceuticals, have significant health implications, but they were not prioritised. The best that can be said at this stage is that the rate of increase in the levels of counterfeiting and piracy may be slowing down! And although there has been some increase in the number of IP criminal proceedings, the actual level remains unsatisfactory and the effect of any of the EU-specific actions has been very limited.

4.6.1 Impact on the rate of increase in IPR infringements (JCs 6.1 to 6.5)

Globally, statistics on counterfeiting are patchy, incomplete, and measure different things for different reasons. The primary difficulty lies in the clandestine nature of most counterfeiting and piracy activities. Organisations like the OECD have been unable to establish a global picture using reliable statistics, even at EU level. Hence it is difficult to influence policies and back them up with statistics. It is also difficult to compare results between sectors. Some industries possess figures which they choose not to publish in order to avoid negative publicity.

The overall degree to which products are being counterfeited and pirated is unknown, and there do not appear to be any methodologies that could be employed to develop an accurate overall estimate. Studies present different figures: for instance, in an interview with the evaluators, the Business Coalition to Stop Counterfeiting and Piracy (BASCAP) estimated that US\$600 billion per year is lost globally due to counterfeiting and piracy.⁷⁵ Another study by the Organisation for Economic Co-operation and Development (OECD) on the economic impact of counterfeiting and piracy estimated that the volume of internationally-traded counterfeit or pirated products amounted to US\$200 billion in

⁷⁵ <http://www.uscib.org/index.asp?DocumentID=3492>).

2005.⁷⁶ At the same time the study recognised that ‘to date, no rigorous quantitative analysis has been carried out to measure the overall magnitude of counterfeiting and piracy, in essence a secret business’. It is important, when reading statistics on economic losses due to IP infringements for genuine IP holders, to keep in mind that the claimed losses are generally calculated taking the retail price of ‘original’ products into account. Since copies are priced below the originals, many consumers of illegitimate copies would most likely not buy originals, even if copies were unavailable.

Nevertheless, there are numerous indications that infringements have not been reduced in general; on the contrary, the globalisation of the economy has probably increased the pace of counterfeiting since 2005. Improvements in tackling IP infringements are also being made, but these are not keeping pace with the problem itself. This is also probably due to the fact that EU TA projects and enforcement in third countries (supported by the Strategy as it does not prioritise infringers) often targets small distributors or consumers of counterfeited goods, whilst neglecting to target larger producers. In particular, and as recognised by interviews in Thailand, Ukraine and China, an increase in the number of raids on sellers of pirated goods leads some distributors to exit the market, either because they are deterred by the raids or because they are caught and temporarily incarcerated. However, if the production and demand of illicit goods remain undeterred, other distributors will expand their sales and make up for those who exited the market. The best that can be said at this stage is that the rate of increase in the levels of counterfeiting and piracy may be slowing down!

Customs data are one of the main sources available in the field of counterfeiting and piracy. However, they are subject to interpretation as they are dependent on a number of factors and biases, such as the fact that interceptions by Customs authorities may be more frequent in areas known to be sensitive to trade in counterfeit or pirated goods. Customs data hence do not allow direct findings to be drawn in terms of the magnitude of counterfeiting and piracy. Nevertheless, they provide some indications and food for thought. A 2008 OECD study showed for instance that Asia emerged as the largest source of counterfeit and pirated products, with China as the single largest source (*see table below*).

Table 4.5: Seizures of imported counterfeit and pirated products from the top 20 source economies⁷⁷

Region of top 20 source economies	Number of source economies in region	Seizures (% of total)
Asia (excl. Middle East)	12	69.7 %
Middle East	2	4.1 %
Africa	2	1.8 %
Europe	2	1.7 %
North America	1	1.1 %
South America	1	0.8 %
Top sources	20	79.2

Source: The Economic Impact of Counterfeiting and Piracy, OECD, 2008.

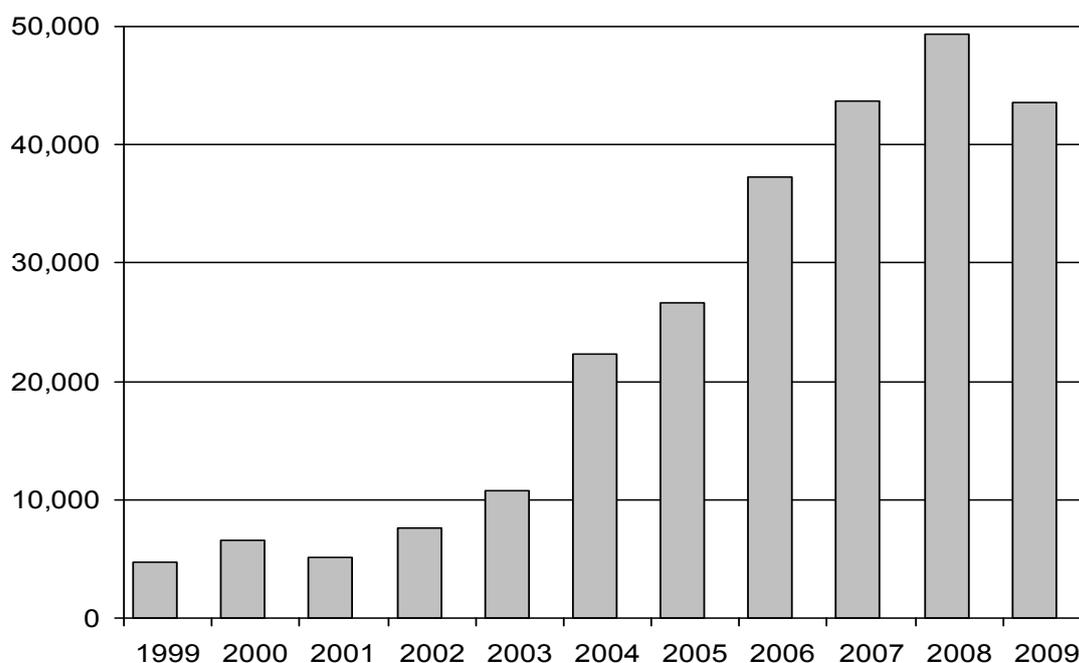
⁷⁶ <http://www.oecd.org/dataoecd/11/38/38704571.pdf>.

⁷⁷ The seizure percentages are based on trade-weighted data from 19 reporting economies.

Additionally, the latest European Commission's Customs statistics show a continuous increase in the number of detained articles up until 2008. There was a slight decrease in 2009, but this was rather a stabilisation given the global economic downturn in that year (see figure 4.1). Cooperation with industry has continued to develop, with nearly 15,000 applications in 2009 (13,000 in 2008 and 10,000 in 2007) requesting Customs actions against suspected IPR infringements. This represents 90% of Customs interventions in 2009 (80% in 2008). There was a sharp increase in 2008 in the actual number of IPR-infringing goods detained by Customs – 178 million compared to 79 million in 2007. In terms of products, the most significant increases from 2007 to 2008 in *the number of registered cases* can be seen in toys with an increase of 136%, electrical equipment with an increase of 58%, medicines with an increase of 57 %, and personal care products with an increase of 42%. The *number of articles detained* increased even more significantly, in particular DVDs with a dramatic increase of 2,600%, medicines by 118%, and cigarettes by 54%. The decrease from 2008 to 2009 in *number of cases* concerns almost all categories, except electrical and computer equipment and shoes. But the decrease in terms of *number of articles detained* concerns mainly the category DVD/CD and, to a lesser extent, the categories of electrical and computer equipment and shoes; all other sectors stayed stable or showed an increase. Moreover, it seems that the internet traffic and subsequently transport via post was not affected by the crises, at least not in relation to detentions made by Customs (the number of cases registered in 2009 was 15.000 compared to 6679 in 2005, for example). According to the Stockholm Network study and the IPR index for the Information Technology Sector, the achievements of IPR Enforcement related to copyright are still not satisfactory. As a result of its findings, the Stockholm Network calls for the EU to do more to address its intellectual property environment in order to meet the Lisbon Agenda goals.⁷⁸

⁷⁸ The Intellectual Property Index for the Information Technology Sector (IP-IT Index) Updated for 2008 – 2009

Figure 4.1: Number of cases of detentions of goods suspected of infringing an IPR at the EU's external border registered by EU Customs



Source: 2009 Report on EU Customs enforcement of IPRs - Results at the EU Border, EC, 2010

China was the main source country for suspected IPR-infringing articles, with 64% of the total of goods seized by EU Customs in 2009. However, in certain product categories, other countries were the main source, for example Turkey for foodstuffs and beverages, the United Arab Emirates for medicines and Egypt for toys. The top categories of articles detained were cigarettes which accounted for 19% of the overall amount, followed by other tobacco products (16%), labels, tags and emblems (13%) and medicines (10%). If we exclude from the detentions all articles that were released, the top categories are the same with only a difference in the percentages, namely cigarettes (17%), other tobacco products (19%), labels (16%) and medicines (8%)⁷⁹. In China, CD/DVDs were the top category of articles detained, with a total of 79 million items which accounted for 44% of the total, followed by cigarettes (23%) and clothing and accessories (10%).⁸⁰ In China, developments have been positive. For example 56,634 trademark infringement cases were handled by the Administration for Industry and Commerce in 2008.⁸¹ The majority of administrative enforcement actions are taken in the area of trademarks, where government officials are often only required to compare trademarks on goods and services listed in an official government document with the trademark registration certificate, and decide on the

⁷⁹ Report on EU Customs Enforcement of Intellectual Property Rights Results at the EU Border, 2009

⁸⁰ Commission press release, Customs: Commission publishes 2008 statistics of Customs actions to enforce intellectual property rights at the EU's external border IP/09/1106 of 9 July 2009.

⁸¹ The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

basis of visual observation⁸². Again in China, there were 12,490 copyright infringement cases in 2008 compared to roughly 10,600 cases in previous years on average, which demonstrates the increased efforts to tackle infringements through the administrative authorities. In the area of copyright, enforcement becomes highly complex. The National Copyright Administration of China NCAC, under the leadership of its sister organisation General Administration of Press and Publication GAPP, is the principal body of enforcement and accepts applications for cease-and-desist orders and raids against distributors of pirated goods.⁸³ The revision of the copyright law is slowly starting to progress. The Legislative Affairs Commission is cooperating with the IPR2 project in acquiring European expertise for the revision.⁸⁴

In Vietnam there were 2,627 cases of trademark violations in 2007. 2,423 of these were handled with fines totalling VND 1.2 billion, approximately US\$75,000. As regards copyright enforcement, a new directive was issued (04/2007/OCT-TTg), nearly 400 cases were handled by cultural inspection teams, 3,900,416 discs were destroyed, and fines totalling nearly VND 700 million (approx. US\$43,750) were imposed. 16 civil cases and 10 criminal cases were handled in court, compared to a total of 8 cases in 2006.

An industry representative explained that in Argentina, Chile and Paraguay, EC actions and representatives are not visible, and the US embassies are considerably more active in terms of copyright.

In Ukraine the recent level of trademark infringements was 42 in 2008, 56 in 2009 and only 24 in 2010.⁸⁵ In 2007 courts reportedly reviewed over 400 cases with regard to infringement of trademark rights. In terms of copyright and related rights, there were 435 cases in 2008, 476 in 2009 and 197 in 2010.⁸⁶

The European Chamber of Commerce in Korea indicates that copyright piracy is one of the main concerns in South Korea, creating a need for the Copyright Act to be amended. Downloads from unauthorised sources have increased sharply over recent years, resulting in legitimate music sales falling by more than 55% since 2001.⁸⁷ The International Intellectual Property Alliance gives an estimate of market share of pirated goods, suggesting that the level of business software piracy rose by 44% in 2007 (46% in 2005). For entertainment software it rose by 66% in 2007 (55% in 2005).⁸⁸

In Russia, a representative of an international organisation stated that Government support for public intervention against copyright-related infringements is very high. In two years

⁸² This is also true as regards Customs actions, which in the vast majority of cases target trademark infringements. Source: The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

⁸³ The Intellectual Property Enforcement System in the People's Republic of China, Thomas Pattloch, 2010

⁸⁴ Mid-term Evaluation of EU-China Project on the Protection of Intellectual Property Rights (IPR2), Olivier Pêtre, 2009

⁸⁵ Prosecutor's General Office of Ukraine (letter of: 12.05.10 Ref. 14/1-95 out. 10 to the: Delegation of the European Union to Ukraine, S.F. Kravchuk)

⁸⁶ Prosecutor's General Office of Ukraine (letter of: 12.05.10 Ref. 14/1-95 out. 10 to the: Delegation of the European Union to Ukraine, S.F. Kravchuk)

⁸⁷ European Chamber of Commerce in Korea (EUCCK), Market Access Issues 2009

⁸⁸ International Intellectual Property Alliance (IIPA), 301 Special report on South Korea, Estimated Trade losses due to copyright piracy and levels of piracy (2003-2007)

(2007-2009) the level of piracy was reduced by 19%. An industry representative felt that the EC had been very active and successful in tackling copyright-related issues through initiatives including IPR dialogue, TA, reinforced TA, political meetings with Russian authorities, agencies involved in IPR, and extensive involvement of judges, police and 700-1,000 officials in the Russian government.

Interviews which the evaluators conducted highlight the importance in the future of better quantification of the budgetary costs of different types of enforcement activities in third countries.

For example, in Ukraine the Ministry of Environmental Protection is a good example of ineffective practical enforcement. On IP enforcement the Ministry theoretically accepts tackling IPR infringements for agro-chemicals and pesticides as one of its responsibilities. But when it comes to practical internal reform (meaning allocating additional dedicated Human Resources) to tackle these infringements, then the Ministry becomes reluctant to re-organise itself, or to accept the additional responsibilities or burden needed for example to destroy physically seized infringing pesticides.

4.6.2 Evolution of criminal prosecutions for all IPR infringements (JC 6.6)

In general the level of criminal prosecutions for all IPR infringements remains unsatisfactory. However, progress is being made in some priority countries.

There have been no criminal sanctions in Turkey since December 2009 in respect of design, patents and GIs (under TRIPS criminal sanctions for copyright and trademark are compulsory). A commentator noted that the previous law was annulled in 2009 and there was a gap of 23 days before the new law came into force. As a consequence of this 23-day gap, all suspected infringers were released and millions of seized counterfeited goods (mainly clothes) went back on the market.

Enforcement is unsatisfactory in Ukraine as sources suggest that “nothing has changed over the last 10 years”. They further suggest that “corruption remains very high and IP infringements in pharmaceuticals are related to officials’ or politicians’ side businesses, making it difficult to improve enforcement in this country”.

In Russia there has been a general improvement in enforcement efforts owing to a concerted effort by the Russian authorities to combat piracy and counterfeiting. This can be seen as a direct result of the repeated requests from the EU for Russia to implement effective enforcement practices. A number of TAIEX events relating to IPR piracy have been organised, with co-operation between EU and Russian enforcement agencies. Draft IP legislation has been screened, with a view to WTO accession.⁸⁹

In Argentina there have been very few convictions in criminal cases related to copyright recently. According to the International Intellectual Property Alliance, “Argentina’s current criminal provisions for copyright infringement are totally inadequate to address the piracy

⁸⁹ IPR Achievements in Third Countries, EC draft, Denis Dambois

problem. The minimum penalty is only one month in prison (per Article 72bis of the Criminal Code). While certainly some criminal sentences have been issued, the industries are not aware of any major, deterrent sentences issued last year. The recording industry reports that no convictions for music piracy were recorded in 2008; the few criminal cases for which decisions were reached were suspended because of the low level of penalties. MPA [Motion Picture Association] reported one 10-month sentence (see above). Furthermore the average criminal piracy case takes two to four years to reach a verdict in the first instance, and that usually results in no jail sentenced or the jail sentence being suspended because the judges do not consider intellectual property crimes as serious offences. MPA notes that although the Argentine criminal system is slow and unsatisfactory (most cases take less than three years), there seemed to be some slight improvement in speeding up the process in 2008”⁹⁰.

4.7 EQ 7 on EU rights holder and local interests

EQ7: To what extent have EU rights holder performance, market share, and incentive to invest increased as a result of third countries’ improved compliance with IPR commitments? To what extent did third country stakeholders benefit?

This question aims at verifying whether EU rights holder performance, market share, and incentive to invest benefited from third countries’ increased compliance with IPR commitments. It will also establish as far as possible to what extent any increase might be attributed to the Commission’s action on IPR Enforcement.

This evaluation question also aims at addressing a question expressed in section 4.1 of the ToR: the benefits obtained by third country stakeholders in increased IPR enforcement (which is not as such an objective of the Commission IPR Enforcement Strategy).

EQ 7 on EU rights holder and local interests – Answer Summary Box

The economic implications of increased IPR enforcement are complex and it is very difficult to gather reliable statistical evidence to demonstrate any conclusion robustly. Furthermore, advantages for EU stakeholders could imply disadvantages for local interests and this may have a significant impact on the degree of commitment to IPR enforcement in third countries. Although enforcement contributes to protection of rights holders’ investments in third countries, consumer organisations argue that the strong focus on industry interests has negative consequences for consumers, and may impact on local employment and living standards. It is important to note that in all countries the volume of counterfeiting has increased more rapidly than the level of enforcement. Thus the Strategy may have had little effect on the performance and market share of EU rights holders in third countries because the volume of counterfeit goods have increased over time more rapidly than the benefits of enforcement. It would be difficult, if not impossible, to attribute any benefit to EU rights holders or local interests to the implementation of the strategy.

⁹⁰ International Intellectual Property Alliance (IIPA), 301 Special report on Argentina, Estimated Trade losses due to copyright piracy and levels of piracy (2004-2008)

4.7.1 Impact of IPR enforcement on EU right-holder performance (JC 7.1)

It is important to note that there is little empirical evidence on the economic impact of piracy and counterfeiting, as the production and sale of counterfeit and pirated goods largely escapes official statistical recording systems. It is extremely difficult to find and assemble reliable information related to this subject. Nevertheless, many sources suggest that the overall costs of counterfeiting in the world today are estimated to be 5-7% of world trade.⁹¹ It is very difficult to evaluate whether the performance, market share and incentive to invest of EU rights holders have increased as a result of improved third country compliance with IPR commitments. In fact some rights holders have come back to Europe rather than cooperate with third countries on IPR matters.

Industry representatives admit that the main challenge of this evaluation is the linkage between Commission's effort in improving IPR enforcement and concrete business benefits. "Probably, there is only maximum 1% impact of Commission efforts on business results". The Commission has reacted to some industry complaints and, for example, because of the Commission's efforts there was reportedly an improvement in the situation with the presence of IPR desks in most trade fairs. Furthermore, the EU Counterfeiting and Piracy Observatory in 2009 was launched to assess the problem continuously and to develop evidence-based policies in the area of Intellectual Property Rights.

4.7.2 Impact of IPR enforcement on incentives to invest (JC 7.2)

The evidence is insufficient to make a convincing claim that investment incentives for EU rights holders have increased due to stronger IPR enforcement. Impact in terms of investment incentives remains controversial – sharp disagreements persist. Some theoretical studies or academic research, such as from Lee G. Branstetter, demonstrate that where stronger IPR in the South leads to an acceleration in multinational production-shifting and FDI, it tends to lead to faster industrial development in the South, a greater degree of North-South wage convergence, and higher rates of innovation in the North. Over the long run, production shifting should free up Northern resources for investment in innovative activity.⁹² Furthermore, an OECD study in 2008 found that FDI from Germany, Japan and the United States was relatively higher in economies with lower rates of counterfeiting and piracy. However, additional results of the study's econometric test suggest that counterfeiting and piracy serve only a limited role in explaining FDI behaviour⁹³. This is for instance the case with China where investment flows into the country continue whereas the level of IP enforcement can be regarded as low overall. Additionally, a German trade association mentioned that levels of investment by EU rights holders have increased in some countries, but also that some German companies are said to have relocated their production plants back to the EU because of a lack of IPR enforcement in third countries.

⁹¹ OECD, *The Economic Impact of Counterfeiting and Piracy*, 2006, page 23

⁹² "IPR, Imitation and Foreign Direct Investment; theory and evidence", Lee Branstetter, Raymond Fisman, 2008

⁹³ "The economic impact of counterfeiting and piracy", OECD, 2008

In Ukraine, commentators met expressed the opinion that the economic impact of more effective IPR protection enforcement would be increased investment by EU companies within the country, as they become more confident that their intellectual property will be protected by law. Moreover, EU companies would also be more likely to use innovative technologies and practices knowing that their IP rights are well protected. The impact of both this increased investment and the use of more innovative technologies would ultimately be a reduction in the costs of production, according to those commentators.

In Argentina the EU is the biggest foreign investor, accounting for about half of foreign direct investment (FDI), notably in the automotive sector. However, it seems that these EU investments have generally been reduced since 2005:

- EU investment flows to Argentina 2007: €1.6 bn (€1.7 bn in 2005, €2.1 bn in 2006);
- Argentina investment flows to EU 2007: €0.2 bn (€0.4 bn in 2005, €0 bn in 2006);
- EU investment stocks in Argentina 2007: €30.2 bn (€38 bn in 2005, €32.4 bn in 2006);
- Argentina investment stocks in EU 2007: €2.0 bn (€2 bn in 2005, €1.9 bn in 2006).⁹⁴

DG Trade 2009 figures report the following on FDI with South Korea, including a sharp decrease in EU investments in the country since 2005:

- EU investment flows to South Korea in 2007: €1.7 bn (€5 bn in 2005, €2 bn in 2006);
- South Korea investment flows to EU in 2007: €0.3 bn (€1.3 bn in 2005, €0.9 bn in 2006);
- EU outward investment stocks in South Korea in 2007: €30.8 bn (€28.5 bn in 2005, €28.4 bn in 2006);
- EU inward investment stocks from South Korea in 2007: €7.9 bn (€6.2 bn in 2005, €7.4 bn in 2006).⁹⁵

4.7.3 Benefits from IPR enforcement for third country stakeholders (JC 7.3)

TRIPS and its supporters argue that stronger IPRs world-wide will not only increase incentives for innovation but also foster industrial development in developing countries by encouraging multinationals to shift production there with more efficient technologies and hence reduce ultimately overall country production costs. Various theoretical models suggest that a strengthening of IPR protection in the South discourages imitation. Second, it increases FDI to a degree that the Southern production base actually expands, that is the decline in Southern imitative activity is more than offset by the increase in the production activity of Northern multinationals who are drawn to the South because local IPR reform renders it a more attractive production location by reducing the risk of counterfeiting. In other words, IPR reform in the South

⁹⁴ European Commission, DG Trade statistics in Argentina, Sept. 2009

⁹⁵ European Commission, DG Trade statistics in South Korea, Sept. 2009

has positive effects on consumer welfare when viewed solely through the price channel. However, what actually matters for consumer welfare is purchasing power.⁹⁶

In practice strong IPR protection in third countries faces a lot of criticism from the side of various consumer associations and social sector representatives.

In Ukraine the local economic impact of more effective IPR protection enforcement has been an increase in investment in the country, as EU companies become more confident that their intellectual property rights are protected by the national legislative frameworks. Moreover EU companies are also likely to use innovative technologies and practices in Ukraine; without IPR security they would not be willing to risk this. In terms of the impact of this increased investment and better technologies available in the Ukrainian economy, the net effect has been to reduce costs of production. A recent study has attempted to estimate the impact of effective enforcement and adoption of the EU *acquis* on Ukraine; it concluded that production costs in Ukraine have fallen by 20% across the economy; hence local productivity has increased, benefiting local producers as third country stakeholders.

Authors of the report “Trading Away Access to Medicines How the European Union’s trade agenda has taken a wrong turn” mention that EC IPR protection policy is a double standard which does not bring benefits to the developing countries. The critique is especially strong with regard to protection for patented medicines, which limits the capacity of developing countries to develop their public health systems. Owing to aggressive international pressure, more and more IP enforcement measures are integrated through Free Trade Agreements; this forces the governments of developing countries to spend more resources on protecting the trademarks and patents of multinational pharmaceutical companies.⁹⁷ For example the World Blind Union is extremely concerned about the implications of these IPR regulations for the right to read for persons with disabilities, and has drafted a ‘WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons’ to combat this problem and provide a legal framework for the right of access to information for reading-disabled persons. They argue that current IP laws support a pro-business model which does not sufficiently account for the needs of disadvantaged groups.⁹⁸ Consumer organisations also note that the strategy itself focuses primarily on industry interests while the interests of consumers are not sufficiently incorporated (*see also section 4.1.1*).

⁹⁶ Property Rights, Imitation, and Foreign Direct Investment: Theory and Evidence: Lee Branstetter, Raymond Fisman, C. Fritz Foley, Kamal Saggi, Working Paper 1303,2007

⁹⁷ Trading Away Access to Medicines How the European Union’s trade agenda has taken a wrong turn, Oxfam, 2009

⁹⁸ MN125

4.8 EQ 8 on Implementation efficiency

EQ8: To what extent was the Commission adequately organised to achieve the Enforcement Strategy objectives (as set out in the Intervention Logic)? What were the key factors inhibiting the achievement of those objectives?

This question assesses the efficiency of implementation of Commission efforts for IPR enforcement, in terms of internal organisation, mechanisms, and resources. It also aims at identifying the key (external) factors affecting the implementation of the IPR Enforcement Strategy.

EQ 8 on Implementation efficiency – Answer Summary Box

IPR enforcement responsibilities are scattered between different Directorates-General within the European Commission, which made coordination complicated and interaction with the outside world complex and confusing. This situation has started to improve with the launch of the European Observatory on Counterfeiting and Piracy in 2009, which is beginning to have a marginal effect. But the remit of this Observatory remains modest and confined to the internal market; it was for instance not set up with a view either to its being the vehicle for a strong EC or EU IP coordinator or to providing a single EU voice or an interface on all IP matters with external parties. Coordination with other EU instruments (e.g. EPO, OHIM, Europol, Eurojust) and with EU Member States is also limited overall. Commission resources and expertise are not completely geared to the Strategy's ambition of IPR enforcement in Third Countries. This shows up mainly in the limited time available for IP-dedicated matters at Delegation level; the lack of specific IP expertise overall; and the limited number of technical cooperation projects and programmes in priority countries besides China and the ASEAN countries.

4.8.1 Organisational structure (JC 8.1)

IPR enforcement responsibilities are scattered within the European Commission, reflecting the distribution of responsibilities between its Directorates General (DGs). They are mainly located in the DGs for Trade (DG TRADE), the Internal Market (DG MARKT), for Taxation and the Customs Union (DG TAXUD) and Enterprise and Industry (DG ENTR), but in total about 9-10 DGs are involved, others including the DGs for Justice and for Home Affairs (formerly forming together DG JLS), Health and Consumers (DG SANCO), Information Society and Media (DG INFSO), Agriculture and Rural Development (DG AGRI), External Relations (DG RELEX), and to a limited extent the EuropeAid Co-operation Office (AIDCO). It involves Commission staff at Headquarters level but also in the Delegations to third countries⁹⁹.

External parties suffer a scattered interface with the Commission – Whom do I call?

The Strategy aimed at coordinating Commission mechanisms. But no agreement could be reached at the time on a single point of contact among DGs. This is still a real issue for

⁹⁹ Delegations of the European Commission are being transformed into Delegations of the European Union since entry into force of the Lisbon Treaty in December 2009.

rights holders, as reported by many interlocutors. While the distribution of tasks on IPR enforcement among the different Commission services might have been (increasingly) clear for many Commission staff involved, this is not the case for most external parties. And even for the few of them who are acquainted with the Commission's institutional set-up, it still represents a difficulty in interaction. Quoting a rights holder association: "*A couple of years ago there was DG ENTR on SMEs, then the DG Trade Surveys, also Customs and regulations with DG TAXUD, designs with DG MARKT, and criminal sanctions with DG JLS. This should be streamlined. Such single Strategy is positive, but we haven't seen the effects of it.*" A rights holder representative even mentioned that a group of associations wrote in April 2009 to Mr. Barroso, President of the Commission, to plead for the appointment of a high-level IP coordinator such as exists in the U.S., who would lead the overall EU Intellectual Property protection. He referred to the introduction by the U.S. in 2008 of a so-called position of "IPR Tsar" for coordinating inter-agency work¹⁰⁰.

Different actions under the Enforcement Strategy lack coordination between DGs.

Cooperation and coordination are complicated given the number of Commission Services responsible for IPR enforcement activities, as acknowledged by many Commission staff members and other parties. A rights holder association representative notes for instance that "*there is competition between DGs; they copy each other. There is duplication of events/conferences on the same subject. It would rather be interesting to have several conferences to advance several themes*". The level of coordination between Commission Headquarters and Delegations varies from one country to another, ranging from limited interaction (e.g. with the Permanent Delegation to the International Organisations in Geneva) to strong alignment in negotiations, for instance (e.g. in Ukraine).

Coordination with other EU instruments and EU MS is also limited, and equally so with other parties. The Commission's Strategy envisaged specific action to improve the dialogue mechanisms with other providers of assistance such as the European Patent Office (EPO) and the Trade Marks and Designs Registration Office of the EU (OHIM). Evidence of effective dialogue and cooperation between the Commission and those offices was hard to find¹⁰¹. Evidence of cooperation between the Commission and Europol or Eurojust, for instance, is also scarce¹⁰². Similarly, there is little cooperation or coordination overall with EU Member States (MS), with some exceptions, at Headquarters or Delegation level, and examples of duplication or contradictions such as separate MS and third country agreements or MOUs on IP matters can be observed. There are also difficulties relating to the distribution of competences between EU Institutions and the Member States - such as on criminal sanctions - and to harmonisation of IP enforcement between EU MS (*see also section 4.1.3 above*).

¹⁰⁰ The U.S. approved in 2008 an IP enforcement bill which provided for the creation of an intellectual property coordinator (referred to as the "IP czar" in the bill submitted to the House of Representatives). This is a White House-level position, to be appointed by the President, with the responsibility of overseeing the law-enforcement efforts in the area of piracy and IP infringement of some very disparate government agencies (e.g. the U.S. Trade Representative, the Department of Homeland Security, the State Department and the Department of Justice).

¹⁰¹ It should hereby be noted that *enforcement* does not belong to the primary competence of the EPO and OHIM.

¹⁰² Europol is the European Law Enforcement Agency. Eurojust is a judicial cooperation body for improving the fight against serious crime.

Coordination recently started improving somewhat with the creation of the Observatory, which is beginning to have a marginal effect. The European Observatory on Counterfeiting and Piracy was launched by the Commission in 2009, for (i) improving the quality of information and statistics related to counterfeiting and piracy on the Internal Market of the EU; (ii) identifying and spreading EU MS's best practice strategies and enforcement techniques (from the public and private sectors), and (iii) helping to raise public awareness. It is based on existing Commission structures (within DG MARKT) and is composed of members from both the private and public sectors. A few improvements have already been evident since then, such as increased inter-DG dialogue through the (semi-official) "IP Club" to which representatives of several DGs participate on a voluntary basis. However, the mandate of the Observatory is still relatively modest: it does not aim for instance at being a single EU voice or interface on IP; coordination is not really structured and not stringent; and the focus is on the EU internal market (not Third Countries). It has also to be cost-neutral for the Commission.

The organisation of Market Access Teams at country level is an interesting practice. The Commission has launched local Market Access Teams (MAT) in Third Countries progressively since 2006, in the context of its Market Access Strategy. They aim at providing a general platform for coordination between the Commission and EU MS, involving business where needed. The concept is flexible; the format of a MAT ranges from regular trade counsellor's coordination meetings to very specific, working group-type meetings. IPR has been tackled specifically in MAT meetings in several countries, including in some of the countries defined as priorities in terms of IPR enforcement (Argentina, Brazil, Israel, Korea and the Philippines, according to a 2008 document). A specific MAT meeting was for instance called for the purpose of this evaluation during the field visit to Argentina, with participation of six EU MS embassies and of EU rights holders in the country or their representatives (associations, lawyers and chambers of commerce). Some rights holders voiced their willingness to see Market Access Teams expanded to all priority countries and consolidated to fully-fledged "IP networks", as organised by the American Chamber of Commerce along with a dedicated IP Commission and a legislative sub-commission for preparing IP bills. Besides, the Commission also developed a "Market Access Database" in the context of the EU Market Access Strategy, as a free and interactive operational tool; one of its objectives is to support the Commission in following up complaints from businesses about barriers to trade in third countries, including in relation to IPRs and their enforcement.¹⁰³

¹⁰³ For more information on the Market Access Database, see <http://madb.europa.eu/mkaccdb2/indexPubli.htm>

4.8.2 Commission human and financial resources (JC 8.2)

Commission resources and expertise are not perfectly geared towards the ambition of the Strategy in IPR enforcement in Third Countries. Three main aspects play hereby a role: quantity of resources, level of expertise and technical co-operation projects and programmes:

- **Quantity of resources:** The total number of Full-Time Equivalent (FTE) Commission staff dedicated to IP matters (including enforcement) relating to Third Countries has been estimated by the evaluators at around 20, spread across 9-10 DGs in both Headquarters and Delegations, and including numerous persons working only part of their time on IP. If referring to IPR *enforcement* in the strictest sense of word, the total would be about 2-3 FTEs. It is mainly in the Delegations that staffing levels proved inadequate for following IP matters, including and notably for priority countries (except China where there were three IP specialists, and Thailand). DG Trade staff members insisted that this is actually part of a broader issue of relatively small commercial sections in Delegations to Third Countries.
- **Expertise:** the Commission staff comprise some highly experienced experts in IP and IPR enforcement, benefiting from strong IP experience built up within the Commission or in EU MS national administrations, or possessing international or IP-consultant profiles. Nevertheless a majority of staff in charge of these matters are either Commission civil servants, from a range of backgrounds, assigned to an IP role for a certain number of years, or Commission staff multi-tasking between IP and other matters (trade-related or not). This was essentially due to the Commission's Human Resource policies, notably in terms of compulsory rotation of personnel, and to the constraint of not increasing the DGs' total staff.
- **Technical cooperation:** the Commission implemented several technical cooperation projects or programmes in the field of IPR enforcement, of which two large programmes stood out within the timeframe of this evaluation: IPR2 in China and ECAP II in ASEAN countries. Nevertheless, field visits in the context of this evaluation showed that there is a real demand from rights holders, local authorities and other stakeholders for (more) technical cooperation in priority countries other than the above-mentioned Asian countries, such as Argentina and Ukraine.

Resources are not optimally allocated owing to overall coherence issues. The limits observed in terms of disparate services within the Commission, duplication, and lack of coordination on IP matters or of articulation between actions (*see section 4.8.1*), also somewhat adversely affect a coherent overall allocation of existing resources.

4.8.3 Key implementation issues (JC 8.3)

The main internal and external factors which affected implementation of the Strategy can be summarised as follows:

- the **controversial status of IP enforcement**, which limited the possibilities for and effectiveness of Commission actions in several third countries and efforts at multilateral level;
- the **hard-line approach on enforcement**, which diluted the goodwill the Commission had built up in trade and IP matters, and pushed third countries into a defensive position (*see section 4.1.3*);
- the **strong linkage of IP enforcement with trade matters**, which left aside other fundamental linkages with areas in which suppression is more widely acceptable (e.g. organised crime, money laundering, internal fraud, or tax evasion);
- the **lack of harmonisation within the EU**, which affected the credibility of messages addressed to third countries;
- the **lack of reliable and comprehensive data** on the level of infringements but also on the issue in general, which made it difficult to define relevant policies and optimise prioritisation of actions; *and*
- the lack of or minimal **awareness of the Strategy** by external parties, who knew the Commission was active in IP enforcement but did not know that its action was based on a structured Strategy document, which limited the power of the message and the approach taken.

Several of these (internal and external) factors were not sufficiently addressed by the Commission; indeed, they are also mentioned as shortcomings of the Strategy in section 4.1.3 above.

5. Conclusions

This chapter presents the conclusions emerging from the evaluation findings and analysis (presented above in Chapter 4 “Answers to the Evaluation Questions”). The themes of the conclusions are presented in the following short overview:

Figure 5.1: Conclusions

C 1: Addressing relevant needs
C 2: Lack of information
C 3: The Development Agenda
C 4: Lack of internal cohesion
C 5: Awareness-raising
C 6: Technical cooperation
C 7: Lack of proactivity

Conclusion 1: Addressing relevant needs

The Strategy addressed a real problem in terms of enforcement of EU IPRs in third countries. The definition of such strategy and the set of actions it consists of can globally be considered as relevant, despite some limitations explained in subsequent conclusions.

Based on EQs 1 to 7 and on the Context chapter

The Strategy under evaluation is set within an acceptably logical sequence of developments in intellectual property protection, stretching back to the first treaties of the late 19th century and thereafter moving forward during the 20th century to take account both of technological changes such as broadcasting and of increasing socio-cultural changes relating to the value of intangible assets such as brands. The value of IPRs has predominantly been featured as part of global trade exchanges and the most significant recent developments for enforcement have taken place within the framework of world trade negotiations and the development of some international standards for Customs operations through the World Customs Organisation. The growth – some might say the take-over – by organised criminal groups of the most lucrative thefts of IPRs has necessitated the growing involvement of other world bodies such as Interpol and the World Health Organisation. With the emergence of new super-economies in China and India, and the growth of ‘emerging’ economies, mainly in South East Asia, South America and Eastern Europe, the terms of business with regard to IPRs have become an increasing concern.

Interventions by the European Institution' in matters of IPR protection have increased with the consolidation of the internal market and have tended to focus on three distinct areas: Customs; the Internal Market; and Trade with third countries. It is in this context that the Commission issued in 2004 its Strategy for the Enforcement of Intellectual Property Rights in Third Countries. This Strategy addressed a real problem in terms of enforcement of EU IPRs in third countries, as explained above. There remained, however, some confusion in terms of the hierarchy of objectives the Commission was pursuing thereby, for instance in protection of rights holders or other stakeholders. Nevertheless, despite the limitations explained in the subsequent conclusions, all the 22 actions contained in the Strategy can be considered as relevant, particularly for responding to the needs of industry.

Conclusion 2: Lack of Information

Despite EC efforts, a very substantial gap remains in data and information on the scope of the problem and on the challenges of IPR Enforcement. It makes it difficult to influence policies and back them up with statistics and optimise the prioritisation of actions.

Based on EQs 1, 6 and 7

Many interviewed stakeholders mentioned that there is not enough empirical data either to formulate or assess the IPR enforcement strategy: globally, statistics on the scale of counterfeiting are patchy, incomplete, and measure different things for different reasons. This is intrinsically related to the illegal nature of counterfeiting and piracy, but also to rights holders' fear of negative publicity. Some authorities attempted to tackle this issue, such as the Organisation for Economic Co-operation and Development (OECD) through studies financed partially with EC funding, but none has been able to establish a global picture with reliable statistics, not even at EU level. Equally, the measurement of the impact of counterfeiting and piracy is complex and, as a consequence, is more qualitative than quantitative. There is very little, if any, reliable statistical evidence on the overall economic and social impact of IPR infringements – including for example on market share for EU rights holders or, on the other hand, on consumer protection levels. Thus while the overall degree to which products are being counterfeited and pirated is unknown, there do not appear to be any methodologies that could be employed to develop an accurate overall estimate. Studies come with different figures: for instance, the interviewed Business Coalition to Stop Counterfeiting and Piracy (BASCAP) estimated that US\$600 billion per year is lost globally due to counterfeiting and piracy.¹⁰⁴ The OECD study on the economic impact of counterfeiting and piracy estimated that the volume of internationally traded counterfeit or pirated products amounted to US\$200 billion in 2005.¹⁰⁵ At the same time, the study recognised that “to date, no rigorous quantitative analysis has been carried out to measure the overall magnitude of counterfeiting and piracy, in essence a secret business”. It is therefore difficult to influence policies and back them up with statistics. It is also difficult to compare results between sectors. Some industries possess figures which they choose not to publish in order to avoid negative publicity.

¹⁰⁴ <http://www.uscib.org/index.asp?DocumentID=3492>.

¹⁰⁵ <http://www.oecd.org/dataoecd/11/38/38704571.pdf>.

Conclusion 3: The Development Agenda

The Enforcement Strategy and the ACTA negotiation process were largely based on a hard line approach and did not take much account of the emerging development agenda.

Based on EQs 1, 2 and 8

The current debate over enforcement of IPRs increasingly takes place within what has become the ‘Development Agenda’ or how to protect private rights in knowledge-based societies and balance this against the need for sustainable development in emerging economies.

The Commission has been an active contributor to IP enforcement at multilateral level, but it has increasingly reaped only limited rewards due mainly to third country opposition. Most multilateral negotiations in traditional international government agency fora have reached a stalemate given the profound divergence between the interests and positions of developed and developing countries in this respect. The EU has also drawn criticism for pursuing the ACTA negotiations with the USA without input from the developing economies.

The Commission or EU also appear to have ambiguous relationships with both the main international government IPR enforcement organisations (WIPO; WCO and Interpol) and with the USA (cf. the latter’s opposition to the EU joining the WIPO ACE until 2006). It is also arguable whether the Commission has sufficiently brought the individual Member States into line with its multilateral policy – especially with regard to ACTA.

A growing number of actors in this field are recognising that ‘Enforcement is a dirty word’ and the EU should consider strongly whether it should follow the WIPO in ‘rebranding’ its IP enforcement commitments as ‘raising respect for IP’.

Conclusion 4: Lack of internal cohesion

There is a lack of cohesion on all aspects of IP promotion and IPR protection within the EU Institutions and with Member States, which undermines the message conveyed to third countries.

Based on EQs 1, 4, and 8

The Strategy for the Enforcement of IPR in third countries is an “action plan” rather than a “strategy” as such. The Strategy consists of a list of 22 ‘specific actions’, structured in eight action lines such as political dialogue, technical cooperation, or institutional cooperation. It is hence more a list of activities which may or may not have already been initiated or planned than a strategy document structured along the overall and specific objectives it aimed at achieving and leading to specific actions related to the stated strategy. Moreover these different actions under the Enforcement Strategy lack coordination between DGs. Cooperation and coordination are complicated given the number of

Commission Services responsible for IPR enforcement activities, as acknowledged by many Commission staff members and other parties.

The establishment of the EU Observatory on counterfeiting and Piracy is seen as a positive but marginal step towards the prosecution of the strategy in third countries. Many commentators note that there is a certain amount of hypocrisy in the third country strategy when internal market strategy is still in the process of catching up! Third countries particularly do not welcome lectures on criminal sanctions when the EU has failed to harmonise such sanctions internally. So at this stage many third countries are simply watching closely the development of the EU Observatory, particularly as regards the availability of quality information and statistics relating to counterfeiting and piracy.

As noted, IPR enforcement responsibilities are scattered within the European Commission, other EU Institutions and Delegations, reflecting the distribution of responsibilities between Directorates General (DGs) and other Services such as Police (Europol); and most external parties suffer from this complex interface with the Commission, prompting a paraphrase of the 'Kissinger question' - *Whom do I call?* Once again many third country commentators have noted that perhaps the EU needs to put its own house in order before promoting inter-institutional co-ordination as a panacea.

Coordination with other EU instruments and EU MS is also limited, and equally so with other parties. The Commission's Strategy envisages specific action to improve the dialogue mechanisms with other providers of assistance such as the European Patent Office (EPO) and the Trade Marks and Designs Registration Office of the EU (OHIM). Evidence of effective dialogue and cooperation between the Commission and those offices is hard to find. Evidence of cooperation between the Commission and Europol or Eurojust is also scarce. Similarly, there is little cooperation or coordination overall with EU Member States (MS), with some exceptions, at Headquarters or Delegation levels, and examples of duplication or contradictions can be observed.

Conclusion 5: Awareness-raising

The Strategy has underestimated the importance of raising the awareness of key target audiences of the need for IPR enforcement, and hence has made only a limited contribution in this field, with a few exceptions.

Based on EQs 1,4, 7 and 8

Perhaps most significantly, a lack of awareness of the strategy among stakeholders is very evident. In some respects this is one of the most concerning elements of the evaluation. Not only is there a lack of awareness among those who could not reasonably be expected to be constantly up-to-date with such initiatives – notably 'other' third country stakeholders – but there is clearly a lack of awareness among target organisations that should have been proactively engaged – such as national offices and LEAs in priority countries, as well as, bafflingly, among those who should have been fully involved in the strategy – for example, some rights holders organisations in the EU, and even some enforcement authorities in the Member States.

One of the keys to awareness is recognising the different and diverse elements of this concept, from key awareness messages designed specifically to reduce demand for IPR-infringing material within the EU right through to targeted messages for different audiences in priority countries – each one a different arena of widely divergent cultures and traditions. Awareness is a ‘top level domain’ which must be broken down to specific objectives for specific audiences and used simultaneously first to increase society’s acceptance of the existence of IP, the need for protection and thus the benefits of enforcement; and second, as a consequence, to lead to better implementation of existing rules, regulations, laws and penalties. The strategy markedly fails to recognise awareness as a tool.

And it is important to recognise the place of ‘training’, first within technical co-operation projects and second as a tool for increasing the capacity of the different agencies involved in IPR protection, and ultimately, enforcement. Awareness itself is an integral part of such training but, again, it needs to be specifically targeted on the key audiences. At a political level alone there would be different messages and different channels of delivery for the Executive, the Legislature, the Civil Service and, crucially, the Judiciary.

Conclusion 6: Technical cooperation

The EC has been most successful when providing technical co-operation projects on IP enforcement with appropriate funding as part of bilateral arrangements involving third country input.

Based on EQs 5 and 6

In many third countries, criminal, civil as well as administrative enforcement institutions and especially Customs, are improving IPR enforcement, but significant issues still remain. While criminal prosecutions are increasing and programmes are in place to develop the technical capacity of law-makers, the allocation of resources to IPR enforcement is a critical factor in their successful enforcement. Often third countries do not have sufficient resources to ensure that IPRs are rigorously protected. Socio-cultural factors also impact negatively on the degree of IPR enforcement.

While appropriate funding of competent government agencies and LEAs in developing countries is necessary, it is not a sufficient prerequisite for effective IPR enforcement. Only as countries reach a certain threshold level of income and domestic IPR ownership becomes more widespread, will the domestic incentive for stepping-up the fight against counterfeiting and piracy grow (cf. China, India among others). For example, in developing countries the correlation coefficient between rates of software piracy and *per capita* GDP in 2006 takes on a value of -0.89^{106} . Such a strong correlation suggests that substantial reductions in piracy levels in third countries will, to a large extent, emanate from sustained economic growth.

¹⁰⁶ BSA study 2008, LCDs not covered

It is also worth emphasising that many commentators, including the evaluators, note that what is required in many third countries, and especially in priority countries, is not more legislation (or even ‘better’ legislation). Laws are largely up to the mark in many countries, with some exceptions (e.g. Russia, Turkey, patents in Argentina), and evolve constantly to tackle the ever-changing and innovating infringement pattern. What is lacking is the technical capacity to implement and enforce the rules, regulations, laws and sanctions. The experience of this evaluation is that technical co-operation projects on IP – with appropriate funding – are most successful as part of bilateral arrangements and that these are even more successful when there is input from the third country involved. This has also been highlighted in the recent evaluations of the IPR2 programme in China and of the ECAP II programme in ASEAN countries.

Conclusion 7: Lack of proactivity

From consultations on the strategies to co-operation on specific issues, the EU Institutions lacked a proactive approach. This led to limited consideration of, for instance, SME and consumer interests, and to limited coordination with other EU actors in this field.

Based on EQs 1, 2, 4 and 5

The Commission did not consult widely but only with those who are actively engaged in trade protection issues as a matter of course. The ‘regulars’ on the list of DG Trade consultees are contacted but replies and involvement are limited to the ‘Brussels professionals’ and a few others. Consumer organisations were for instance not involved in drafting the Strategy or in the IPR Enforcement Surveys. SMEs and SME interests also were not sufficiently engaged. Many stakeholders additionally regretted that consultations were repeatedly announced too late or were tightly scheduled, leaving little opportunity for extended consultation of their members. Consultation with other DGs is limited and is non-existent with many other EU Institutions such as Europol (*see Conclusion 4*). There is no evidence that Delegations in priority countries engaged with ‘other third country interests’ except in a very few cases when those interests forcibly engage with Delegations.

Altogether most Commission Services and especially the Delegations have been far too reactive and passive with regard to the strategy and although that is not entirely their fault – there are serious resource implications – more could have been done to engage more stakeholders in the formulation of the strategy and the prosecution of the specific actions.

6. Recommendations

This chapter presents the recommendations emerging from this evaluation. They aim at providing primarily to Commission and EU policy-makers, but also possibly to EU rights holders and other stakeholders in the EU and in third countries, advice based on the Conclusions detailed in Chapter 5. The main recommendations are provided in a logical order from the design of the Strategy to organisational considerations; they are summarised in the figure below and detailed hereafter with relating sub-recommendations.

Figure 6.1: Recommendations

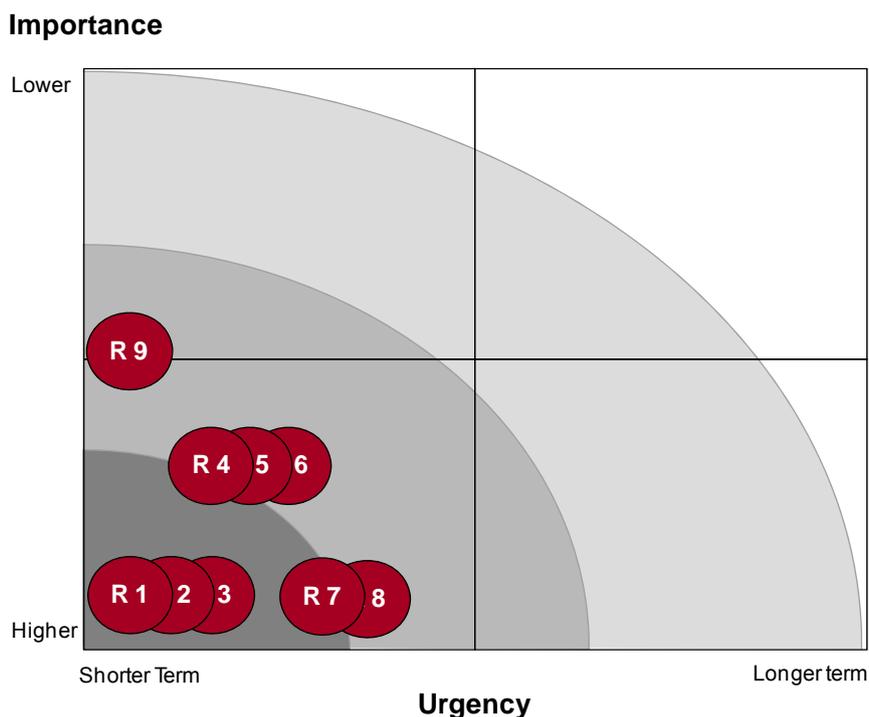
R 1: More comprehensive approach
R 2: Embrace the Development Agenda
R 3: Ensure adequate organisational set-up
R 4: Strengthen consultation with all stakeholders
R 5: Pursue legislative improvement where needed
R 6: Pursue bilateral agreements
R 7: Develop technical cooperation programmes
R 8: More focussed training and awareness-raising
R 9: Improve statistics and information sharing

The recommendations are **prioritised** by importance and by the urgency of the need to address them. The levels of priority for each of the nine main recommendations are presented in the figure on the following page. This provides in turn clear indications to the EC for prioritisation of actions when defining the second generation of the IPR Enforcement Strategy.

The most important and urgent recommendations to address are those on the need for a more consistent and comprehensive EC Strategy with clear objectives and priorities (R1), and on embracing the Development Agenda in the Strategy (R2). Ensuring adequate organisational set-up and resources (R3) is also considered both particularly important and urgent, as it would facilitate implementation of the remaining recommendations. A further recommendation which is particularly important is that for developing ambitious technical cooperation programmes in collaboration with key countries (R7) and ensuring that they are well designed, targeted and customised to local needs (R8); they should also be considered fairly soon. Three further recommendations are indicated as important and for implementation in the relatively short term, given that activities addressing some aspects of them are already ongoing: strengthening consultation with all stakeholders (R4); pursuing

legislation improvements only in countries where adequate legislation does not exist (R5); and pursuing further technical bilateral negotiations leading to technical cooperation with key countries (R6). Finally, improving statistics and information sharing (R9) has been indicated as a short term measure, given that it is currently addressed partially in the tender launched by DG Markt in early 2010 relating to the definition of a methodology for collection and analysis of data (although it relates primarily to the internal market).

Figure 6.2: Prioritisation of recommendations



Recommendation 1: More comprehensive approach

Based on Conclusions 1, 4 and 5

Ensure that there is a more consistent and comprehensive EC approach, with clear objectives and priorities. Ensure also that it is widely known.

- R1.1: **Clarify the objectives** the Commission/EU is pursuing in terms of enforcement of IPRs in Third Countries, notably in terms of the hierarchy of potentially conflicting objectives (e.g. support to EU rights holders, generation of EU jobs, protection of EU consumers).
- R1.2: **Clarify the importance or priority given in Commission/EU efforts to enforce IPR in non-trade areas** such as health and safety risks, money laundering, tax evasion, etc. It should then be decided whether it is opportune to develop specific programmes or measures in this field.
- R1.3: **Ensure the EU has a consistent and comprehensive approach** to IPR enforcement in third countries, with active coordination between the Commission

Services, other EU institutions and organisations, and the Member States. The Strategy should go beyond a mere action plan reflecting mainly industry's needs; it should provide a more strategic, high-level vision and approach, while articulating clearly the objectives it is pursuing and the actions defined for attaining them.

- **R1.4: Clarify the level of priority of the Strategy's actions.** In this respect take account of the hierarchy of objectives, which should be clarified, and of the prioritisation of this evaluation's recommendations (*see the beginning of the present chapter*).
- **R1.5: Take account of the types of countries for certain objectives and actions.** Certain IPR objectives or actions are more relevant for certain types of country or economy, confronted with specific IPR enforcement issues: e.g. manufacturing vs. transit countries; developing vs. emerging economies; countries with relatively strong vs. limited political, economic and cultural ties with the EU. The Strategy should become clearer and more to the point by differentiating certain objectives, actions, and priorities, where relevant. In so doing, the dynamics of counterfeiters and pirates should be carefully considered, given the increasing flexibility and globalisation of this illegal activity.
- **R1.6: Ensure there is a monitoring and evaluation system** for the Strategy and related actions. This includes the definition of performance indicators and target levels. It is hereby recommended that indicators which have been developed or used in the present evaluation, and which have been determined with a view to covering the intervention logic and the actions of the current Strategy (*see Annexe 2*), should be taken over. Such indicators should of course be adapted to the specific characteristics of the second generation of the Strategy. Indicators may also be defined on the basis of available information and statistics from the Observatory (currently or in the future), and be linked with existing or future EC or EU statistics, tools and mechanisms (e.g. DG Trade's Surveys).
- **R1.7: Ensure widespread awareness of the Strategy.** Interviews and field visits made it clear that many stakeholders (including rights holders, governments, LEAs, consumers, EU MS) did not really know of the existence of an 'EC Strategy' as such, nor of the existence of a list of EC priority countries in terms of IPR enforcement. Promotion of the Strategy in different ways and for different target groups should be increased, given that higher visibility and better understanding should increase the strength of its message and hence its effectiveness.

Recommendation 2: Embrace the development agenda

Based on Conclusions 3, 5 and 7

The Commission should strengthen its approach in terms of 'building respect' for IP, taking into account the emerging development agenda.

Enforcement was mostly perceived negatively by the great majority of local stakeholders in third countries. In the context of the increased role of the development agenda in the international debate on IPR enforcement, and of the conclusion that the countries' own willingness to pursue higher protection of IPRs play a significant role in the level of attainment of results, the Commission should increase its pursuit of **shared interest and**

active collaboration of third country governments on matters of IP protection. One way of achieving this is to **integrate into the Commission's approach aspects of relatively direct benefit to third countries, particularly in terms of their development agenda**. Third country governments need to make choices about the level of resources they should allocate to combating IP infringements and piracy, as opposed to enforcing other areas of law or providing other public goods and services. In this respect, deciding on the appropriate allocation of resources for IPR enforcement is especially difficult in emerging and less developed economies, where many public goods are under-provided and enforcement deficiencies exist in many areas of law. This recommendation is further developed as follows:

- R2.1: The Commission should substantially promote **awareness-raising** on the part of local governments, LEAs and other actors (*see Recommendation 8*), along with the building and promotion of **incentives** for third-country governments to respect IP rights.
- R2.2: A key concern for the Commission is to 'build respect' for IP by **creating a demand for IP services in third countries**, i.e. by a bottom-up approach rather than by receiving further policy input. Most stakeholders interviewed are now concerned with how to capitalise on the opportunities that a well-developed IP-system offers, including in areas where they have a strong competitive advantage and that also provide direct benefits to the more disadvantaged segments of the population (for example Geographical Indications and Traditional Knowledge). Stakeholders also emphasised the need to find ways to foster access to technology for the poor and encourage technology transfer to SMEs, possibly in conjunction with existing micro-credit schemes facilitating access to capital for the poor.

Recommendation 3: Ensure adequate organisational set-up

Based on Conclusion 4

The EU Observatory should, in effect, become an EU-wide instrument, a single point of contact within the EC for external parties, and an international point for creation and dissemination of best practice. EU harmonisation should also be increased, for instance on criminal sanctions. Ensure there are adequate resources for achieving this.

- R3.1: **Improve coordination between different EU Services and agencies** in order to increase further the efficiency of enforcement. This should be explored primarily within the **EU Observatory**, which would be given cross-service authority and a realistic long-term budget for bringing together the objectives for the different types of rights holder, both within and outside the internal market.
- R3.2: **The EU Observatory should have an increased, proactive role**. The Observatory should also become a **single point of contact** for external parties on IP

matters within the Commission, or it would at least be worthwhile for IP to be accorded upgraded administrative status in the Commission¹⁰⁷.

- **R3.3 Increase further the involvement of private sector representatives and IP rights holders in the design and delivery of IPR enforcement initiatives**, already enshrined in the working practices of the Observatory (*see also Recommendation 4*). This should also be extended to the Strategy for third countries, particularly related to capacity-building for enforcement agencies and commercialisation of IP assets. Increased involvement does not mean enlarging steering committees, but more informal (and timely!) stakeholder consultation and increased support for activities targeting the private sector and IP rights holders.
- **R3.4: The Commission should consider linking the issue of IPR infringements with other abuses**, especially where these may be classed as criminal, such as organised crime, money laundering, internal fraud, and tax evasion, where this is appropriate under current legislation and distribution of competences between the EC and EU MS. As an example, the EC could set up a mechanism of consultation and co-operation with Europol to make progress on this aspect.
- **R3.5: EU harmonisation on IPR enforcement matters should be increased overall**. This general recommendation relays the many voices heard throughout the evaluation, in particular in third countries, insisting that the EU should have been putting its own house in order first before preaching to other countries. This related for example to criminal measures, statistics, and awareness. It might be explained by difficulties originating in the distribution of competences between EU Institutions and the Member States - such as on criminal sanctions - and in harmonisation of IP enforcement between the EU MS. It also related to limited coordination efforts in practice. In any event it undermined the credibility and strength of the political messages to third countries.
- **R3.6: Ensure there are adequate resources for achieving the proposed recommendations**. This relates first to the quantity of human resources, including at Delegation level, and their level of expertise on IPR enforcement matters; and second to budgetary resources, particularly for technical cooperation programmes. Besides an increase in resources, which could be moderate overall, it is also recommended that allocation of the available resources be optimised, notably in terms of EC/EU coordination and prioritisation of actions.

¹⁰⁷ Within DG Trade, for instance, IP matters are handled by Directorate E which also handles public procurement and bilateral trade relations; a special Directorate for IP within DG Trade would advertise the importance that the Commission intends to give to IP matters.

Recommendation 4: Strengthen consultation with all stakeholders

Based on Conclusions 1 and 7

The Commission needs to speed up and institutionalise better consultation mechanisms with all stakeholders.

- R4.1: The Commission, in this context including the Observatory, should institutionalise existing (semi-) official **consultation mechanisms** and develop them further.
- R4.2: The Commission should also ensure a **timely consultation** process with the different types of stakeholder, *inter alia* so as to allow organisations to consult their members in turn.
- R4.3: The Commission should also envisage setting up an **IT-based solution** to facilitate rapid and appropriate consultation mechanisms. The key objective would be not simply to set up a website or portal but to prescribe and facilitate a fully proactive process.
- R4.4: The EC should ensure that **SME views** are clearly heard and considered in the Strategy, which has so far not been the case to a sufficient degree.
- R4.5: Besides rights holders and other parties already involved, the Commission should also strengthen **consultation with consumers**. European consumers are indeed identified as one of the key target beneficiary groups for IPR enforcement. This would for instance involve reviewing the specific mechanisms and terms of reference for including consumer associations, with a view to taking account of their particular policy objectives or considering their views in the context of ‘public opinion’.

Recommendation 5: Pursue legislative improvement where needed

Based on Conclusion 6

Pursue legislation improvements only in countries where adequate legislation does not exist.

When defining its approach in a country, the Commission should first check existing legislation and determine whether it is satisfactory in terms of IP (this might result from national efforts or also from, for instance, bilateral agreements such as with the USA). If it is not, the EC should promote better legislation on IP in fields of concern; if it is, the EC should shift its focus to implementation, such as by technical cooperation programmes.

This recommendation relates primarily to (priority) countries for which the Commission (and the USA) have not already signed a bilateral agreement with regard to a specific IPR chapter (such as in FTAs, EPAs and CPAs).

Particular points of attention are patents and geographical indications. Third countries might indeed have made progress in terms of IPR legislation relating directly to bilateral agreements with the USA, but the EC should remain vigilant with regard to patents and GIs which are typically of greater concern for European than for American interests.

Recommendation 6: Pursue bilateral agreements

Based on Conclusion 6

Pursue further bilateral negotiations leading to technical cooperation agreements with key countries.

Given that more progress was achieved in countries with which substantial trade agreements were negotiated or signed, the EC would be more effective in its approach by further developing technical cooperation, including training and awareness-raising, through bilateral arrangements such as FTAs, EPAs and IP dialogue, at least if negotiation efforts at the multilateral level remain stalemated. This recommendation relates to key countries with which no such bilateral agreement has yet been signed.

Recommendation 7: Develop technical cooperation programmes

Based on Conclusions 5 and 6

Develop and allocate resources for ambitious technical cooperation programmes.

The Commission should develop and allocate resources for ambitious (joint) technical cooperation programmes on IPR enforcement in respect of practical training of officials, law enforcement agents and judges, with an emphasis on promoting awareness of the economic and social impact of IPR infringements. It should leverage on the overall positive experience from its large technical cooperation programmes such as those on protection of IPRs with China and the ASEAN countries (respectively IPR2 and ECAP II), while taking account of lessons learnt as detailed in the respective evaluations of these programmes (*see also recommendation 8*). This recommendation relates to most key countries (besides China and ASEAN countries), in particular those showing an interest in such cooperation.

Recommendation 8: More focussed training and awareness-raising

Based on Conclusions 5 and 6

Ensure that the technical cooperation programmes are well designed, targeted and customised to local needs.

The Commission should leverage on lessons learnt from its existing large technical cooperation programmes, identified for instance in the evaluations of the IPR2 and ECAP II programmes for the protection of IPRs with respectively China and the ASEAN countries. This relates mainly to the following lessons:

- **R8.1: Prioritise Training of peer Trainers (ToT)** in the training approach. The multiplication effect is indeed greater and the degree of ownership higher. In order to address in the long term the problem of staff rotation in Law Enforcement Agencies, institutionalising capacity-building and awareness-raising among officials at national

level and even more at regional level are crucial (*see also the point below*). At national level a stronger focus should be placed on supporting national authorities in institutionalising training for provincial and district officials, who are often most in need of such specific training.

- **R8.2: Re-direct the focus of awareness-raising on to lower levels** in all relevant Commission actions. High-level officials, judges and prosecutors are in large measure aware of the need for IPR protection. Awareness activities should focus more on IP professionals at provincial and local levels, the private sector and civil society (companies and consumers).
- **R8.3: Focus IP enforcement training on practical activities that directly benefit IPR users.** The evaluators received a unanimously strong message that activities under ECAP III, for example, should be hands-on and practical. This means that instead of theoretical studies, policy papers and academic research by European experts, assistance should be channelled into capacity-building and training that directly benefit IPR users. This would be best done by strengthening institutions that promote and support IP asset creation, commercialisation of IPRs, technology transfer, or access to IPRs for SMEs.
- **R8.4 Distinguish in the Strategy between key target groups in the context of awareness-raising campaigns.** Training materials for IP education and capacity-building should also be “localised” and tailored to the specific needs of countries (including sections on national laws and practices). There is also a need to customise teaching materials for different target audiences (e.g. IP administration officials, private sector, lawyers, universities, schools, technical students). Teaching materials developed within the EC-funded IP projects under the Strategy should be translated into local languages. In general, material for IP education at pre-university level is also needed.
- **R8.5: Also address awareness-raising regarding the demand side.** Support awareness-raising campaigns targeting demand-side audiences with potential for change, for instance the large proportion of consumers which might be open to changing their behaviour in the light of considerations on IPR-infringement-related issues (e.g. health, safety, quality, criminality). Take account of the different drivers of consumer behaviour (*see for instance the table in section 4.4.3*). Consider consumers in third countries but also specifically European consumers - whether in third countries (e.g. hotels, airports) or the EU - who buy goods counterfeited or pirated in third countries. The latter in particular should be undertaken in cooperation with those Commission Services in charge of the internal market.
- **R8.6: Ensure that EC training and awareness-raising are well coordinated** with other EC activities and also with other activities within the EU and other institutions (e.g. WCO, WIPO);
- **R8.7: Raise awareness on the economic value of IPRs.** Banks and other financial institutions, for instance, are not ready to accept the economic value of IP rights as intangible assets of enterprises, for example with regard to debt leverage, which impedes both the creation of start-up enterprises and research and development.

Recommendation 9: Improve statistics and information sharing

Based on Conclusions 2 and 4

The Commission should foster the development of a methodology for improving statistics on counterfeiting and piracy. Information and best practices should also be better shared.

- **R9.1: Foster the development of a methodology for collecting, analysing and comparing data on counterfeiting and piracy.** Better statistics and information allow better understanding of the issue of counterfeiting and piracy and hence form the basis for more relevant and focused policies and prioritisation of actions. As a follow-up on the EC Action Plan on 30 November 2000,¹⁰⁸ the Commission could extend to the external market the actions taken for the internal market, including on IP data collection. This could be done through definition of a general framework for exchange of information, and development of a methodology for collecting, analysing and comparing data on counterfeiting and piracy in third countries. The Commission has already provided support for an OECD study in this field, but there remains substantial work to be done to obtain reliable data and a comprehensive picture. It should be noted that following on from the 2005-2009 evaluation period, DG Markt launched in early 2010 a tender relating to the definition of such methodology.¹⁰⁹
- **R9.2: Use the EU Observatory on Counterfeiting and Piracy to its full potential for sharing information and best practice,** as soon as is practical. It should thereby also promote risk analysis systems that could be considered as models.
- **R9.3: Consider increased externalisation of studies and surveys,** given the scarce Commission resources dedicated to IP matters, notably in terms of experienced staff.

¹⁰⁸ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Follow-up to the Green Paper on Combating Counterfeiting and Piracy in the Single Market, COM(2000) 789

¹⁰⁹ Contract notice 2010/S 46-067187 for “a study to assess the scope, scale and impact of counterfeiting and piracy in the internal market, through a defined methodology for collecting, analysing and comparing data”