



*Understanding the EU's Association Agreements
and Deep and Comprehensive Free Trade Areas
with Ukraine, Moldova and Georgia*

3DCFTAs Youth Essay Competition – Prize winner

Landscaping IPR Chapters of the EU's new generation FTAs: Georgia, Moldova and Ukraine

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My name is Anastasiia Kyrylenko, I am 27 y.o. and I hold a bachelor's degree in Translation and Interpretation from the Taras Shevchenko National University of Kyiv, Ukraine. I then drew inspiration from five years of working for various EU-funded Twinning Projects, with the last one being dedicated to the Intellectual Property Rights (IPR) reform under the EU/Ukraine Free Trade Agreement, and enrolled into an LLM programme on intellectual property and internet technologies at the University of Alicante, Spain.

In 2017, I was selected to become one of the Marie Skłodowska-Curie PhD Researchers for the EIPIN Innovation Society, the first network of IP Institutes, which brings together Universities of Alicante, Strasbourg, Maastricht, Augsburg and Queen Mary University of London. The winning essay below is part of a broader doctoral research I undertake and aimed at the IPR provisions in free trade agreements, which are negotiated by the European Union.



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“Trade is about exporting our standards, be they social or environmental standards, data protection or food safety requirements”

Jean-Claude Juncker, State of the Union Address, 13 September 2017

1. Introduction

The “Global Europe. Competing in the world” Communication¹, which was published by the European Commission in 2006, opened a new chapter in the history of free trade agreements (FTA) negotiated by the European Union: it set the path to what is now called the “new generation” agreements, with a broader scope and more comprehensive norm-setting. Since the EU – South Korea FTA, the first agreement to see the light after the 2006 Communication, extensive chapters on trade-related matters are always present in the text, building on the WTO rules and including provisions on intellectual property, investment, sustainable development, public procurement, etc.

Aimed at ensuring the Union’s competitiveness in the global economy, not only did the 2006 Communication called for a further trade liberalization with third countries, it also stated as one of its objectives a “contribution to a range of the Union’s external goals, in particular *development and neighbourhood objectives*” [emphasis added]². It is at the intersection of these two objectives, that we find the three Association Agreements, signed by the European Union with, respectively, Georgia³, Moldova⁴ and Ukraine⁵, and which include a deep and comprehensive free trade area.

In line with the aforementioned Global Europe communication, as well as with the European Commission’s Strategy for Intellectual Property Protection and Enforcement in Third Countries⁶, the three agreements include an extensive chapter on intellectual property. These chapters, covering both substantive and procedural provisions, are constructed on the basis of the EU *acquis* in the field, thus responding to the recommendations set out in the 2006 Communication. Such norm-setting approach further correlates with one of the two main objectives, defined by the European Union for the three DCFTAs: a far-reaching regulatory

¹ European Commission. (2006) Communication ‘Global Europe. Competing in the World’.

² See *supra* note 1, p. 2

³ Association Agreement between the European Union and European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other, OJ L 261, 30.8.2014, p. 4-743

⁴ Association Agreement between the European Union and European Atomic Energy Community and their Member States, of the one part, and Moldova, of the other, OJ L 260, 30.8.2014, p. 4-738

⁵ Association Agreement between the European Union and European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other, OJ L 161, 29.5.2014, p. 3-2137

⁶ European Commission. (2004) Strategy for the Enforcement of Intellectual Property Rights in Third Countries

European Commission. (2014) Communication ‘Trade, growth and intellectual property – Strategy for the Protection and Enforcement of Intellectual Property Rights in Third Countries’, COM (2014) 389 final

approximation to EU law in trade-related areas⁷. The three intellectual property chapters also go in line with the current strategy of developed countries to include the so-called “TRIPS-plus” provisions in multilateral and bilateral trade agreements, raising the intellectual property standards in developing countries beyond the level required from WTO members. At the same time, the European Union committed itself to adopt a “tailor-made” approach to its partners and make the IPR chapters of the agreements country-specific⁸.

Although the three free trade agreements have been negotiated separately by the national governments and *de facto* are unrelated bilateral tools⁹, I believe that it is their joint analysis that would permit the stakeholders to understand region-specific challenges faced by Georgia, Moldova and Ukraine when implementing the intellectual property provisions into their national legislations. This essay is thus only a first step towards a comparative analysis of three intellectual property chapters, contained in the respective agreements.

2. EU/Georgia Deep and Comprehensive Free Trade Agreement

The EU/Georgia Deep and Comprehensive Free Trade Agreement, which fully entered into force on July 1, 2016, includes a dedicated Chapter on intellectual property, with more than 50 articles covering copyright and related rights, trademarks, geographical indications, industrial designs, patents, plant varieties, civil, digital and border enforcement. Furthermore, Annexes XVII-C and XVII-D to the Agreement contain a list of mutually recognised geographical indications for agricultural foodstuff and alcoholic beverages, an IP right which holds a special place in the EU external trade policy.

Member of the WTO and signatory of the TRIPS Agreement since 2000, Georgia had already complied with the internationally-required intellectual property standards before signing the free trade agreement with the EU. Such compliance may, among other indicators, be demonstrated by the absence of Georgia from the recent US Special 301 Reports, a unilateral tool used by the US to signal countries where IPR protection and enforcement are deficient; from the latest EU’s Reports on the protection and enforcement of IPR in third countries, a similar tool used by the EU to prioritise its IPR-related efforts abroad¹⁰. Similarly, no IP-related trade barriers have been reported for Georgia by the EC Directorate General for Trade¹¹.

⁷ European Commission. (2017) Communication ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements’, COM(2017) 654 final, p. 14

⁸ See *supra* note 6 (2014), p. 15

⁹ In its negotiations with the Eastern European Neighbours, the European Union has followed the so-called “hub and spoke” model of free trade agreements, whereby the EU plays the role of a “hub”, having separate agreements with three “spoke” countries, namely Georgia, Moldova and Ukraine. See Evans, D. (2016). Bilateral and plurilateral PTAs. In: S. Lester, B. Mercurio and L. Bartels, ed., *Bilateral and Regional Trade Agreements: Commentary and Analysis*, 2nd ed. Cambridge: Cambridge University Press, p.53.

¹⁰ European Commission. (2018) ‘Report on the protection and enforcement of IPR in third countries’ retrieved from <http://trade.ec.europa.eu/doclib/html/156634.htm>

¹¹ http://madb.europa.eu/madb/barriers_crossTables.htm?isSps=false

Finally, the country has not been subject to WTO disputes for an alleged non-compliance with the TRIPS Agreement.

Extensive civil enforcement provisions of the agreement¹² reflect the EU's objective to achieve legal transplant of the Enforcement Directive¹³ in third countries¹⁴. Among others, this sub-section exports the EU approach to setting damages in civil proceedings, already found in Art. 13 of the Enforcement Directive, and to the right to receive information on the infringement, which under the Agreement, applies not only to the infringer himself, but also to third parties. At the same time, and just as the two remaining agreements, the EU/Georgia DCFTA does not cover criminal enforcement of intellectual property beyond referring itself to the TRIPS Agreement. Not including such provisions beyond what is already foreseen by the TRIPS Agreement is an approach from the EU side, which may be noted since the failure to ratify the Anti-Counterfeiting Trade Agreement, after widespread critics of its approach to criminal liability of users¹⁵.

The scope of border enforcement provisions¹⁶ in the agreement is limited to cooperation matters and data exchange; thus, it is not built on the Customs Regulation¹⁷ requirements, as it is the case of the EU/Moldova and EU/Ukraine DCFTAs. Nevertheless, the Georgian government has been proactive in this regard, broadening the scope of border enforcement from TRIPS-mandated trademarks and copyrighted objects to also cover industrial designs, geographical indications, patents, plant varieties and topography of integrated circuits¹⁸; introducing *ex-officio* competences for customs officers to detain shipments suspected of infringing intellectual property rights.¹⁹

Placed at the heart of the IPR chapter, geographical indications have an important role not only for the European Union, keen on exporting its legal system to third countries, but also for the Georgian exporters. Unlike Moldova, who has not yet submitted any geographical indications for their reciprocal protection in the EU²⁰, and Ukraine, who, for the time being,

¹² Art. 192-199. Hereinafter, the articles cited are from the corresponding Association Agreement.

¹³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 36-36

¹⁴ See *supra* note 6 (2014), p.13

¹⁵ Correa, C. (2012). Anti-counterfeiting: A Trojan Horse for Expanding Intellectual Property Protection in Developing Countries?. In: C. Geiger, ed., *Criminal Enforcement of Intellectual Property A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

¹⁶ Art. 200

¹⁷ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, OJ L 181, 29.6.2013, p. 15–34

¹⁸ Law of Georgia of 25/12/2017 "On border measures related to intellectual property", Art. 2

¹⁹ See *supra* note 14, Art. 5

²⁰ Annexes XXX-C, XXX-D

has limited itself to 2 GIs for wines²¹, Georgia seized the opportunity to conquer the EU market and submitted a total of 18 geographical indications for protection²².

3. EU/Moldova Deep and Comprehensive Free Trade Agreement

The EU/Moldova Deep and Comprehensive Free Trade Agreement, in force since July 2016, includes an IPR chapter, the structure and scope of which partially mirrors the one analysed under the previous section and has 56 dedicated articles.

Moldova, already being party to most of the WIPO-administered treaties²³, joined the WTO and subsequently signed the TRIPS Agreement in July 2001. Prior to this, Moldova was included on the US 301 list as one of the Watch list countries, but no major listings or cases against Moldova may be mentioned since. On the other side of the Atlantic, Moldova have been subject of an alleged trade barrier related to IPR by DG Trade, the lack of protection of the Italian GI “prosecco”, although very specific, this reported barrier shows that DG Trade - and EU IPR holders - monitor closely the developments that might affect their interests in such countries²⁴.

As to the agreement’s content and its main peculiarities, for both Moldova²⁵ and Georgia²⁶ the provisions on the liability of intermediary services providers are included not in the intellectual property chapter, as it is the case with Ukraine, but under the E-commerce regulation. Thus, the text of the agreements reflects the horizontal approach chosen by the EU legislator also for the internal market²⁷, where the liability of ISPs is regulated not only for cases of IPR infringements, but also for hate speech, child abuse, etc.

Unlike the Agreement with Georgia, a strong section on border enforcement is included²⁸, modelled upon the EU Customs Regulation. Border measures shall be extended to all categories of IPR, as opposed to only trademark and copyright infringements mandated by TRIPS Agreement, and shall also cover not only imported goods, but also other border regimes, including exportation. *Ex-officio* actions of customs officers are moreover required²⁹, optional under the TRIPS Agreement.

²¹ Annexes XXII-C, XXII-D

²² Annexes XVII-C, XVII-D

²³ <http://www.wipo.int/wipolex/en/profile.jsp?code=md>

²⁴ http://madb.europa.eu/madb/barriers_details.htm?isSps=false&barrier_id=12000

²⁵ Art. 256-260

²⁶ Art. 129-133

²⁷ Art. 12-15 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16

²⁸ Art. 250-252

²⁹ Art. 250.3

Interestingly and contrary to the agreements with Georgia³⁰ and Ukraine³¹, the free trade agreement with Moldova does not contain provisions on biotechnological inventions, which would mirror the Directive 98/44/EC³². This might be explained by the fact that Moldova is also one of the so-called “EPO validation states” since September 2015, having brought its internal legislation to the requirements of the European Patent Convention and its Chapter V on biotechnological inventions. The status of a validation state permits patent applicants to extend their patent protection, received through the European Patent Organisation, also to Moldova. The EPO, without limiting its membership to the EU Member States and without being an EU agency, is in close cooperation with the EU, which, in turn, contributes to bringing Moldavian patent prosecution requirements closer to the EU approaches, on top of the DCFTA’s very limited provisions on patents³³.

4. EU/Ukraine Deep and Comprehensive Free Trade Agreement

The EU/Ukraine Deep and Comprehensive Free Trade Agreement, the last out of three agreements to fully enter into force in September 2017, also includes the longest intellectually property chapter analysed hereby, with almost 100 articles, the content of which primarily relies on the EU *acquis*.

Member of the WTO and allegedly TRIPS-compliant since 2008, Ukraine has nevertheless repeatedly appeared in the already mentioned US Special 301 Report as the world’s leading pirate³⁴. The latest EU’s Report on the protection and enforcement of IPR in third countries also cites Ukraine³⁵ as one of its priority countries due to a high level of counterfeiting and copyright piracy, but also due to the country’s lack of implementation of the DCFTAs commitments.

Consequently, the inclusion of provisions on digital enforcement³⁶, regulating the liability of intermediary service providers, is one of the main challenges in the EU/Ukraine agreement. Unlike the horizontal requirements of the E-Commerce Directive, whose Articles 12-15 served as the basis when drafting the corresponding bilateral commitments, the DCFTA’s provisions are applied only to intellectual property rights infringements. Considering the transposition

³⁰ Art. 186

³¹ Art. 221

³² Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.7.1998, p. 13–21

³³ Art. 312-317

³⁴ In 2013, Ukraine received the “Priority Foreign Country” status, which stands for the highest category of IP-infringing nations in the Special 301 Report; no corresponding trade sanctions were applied by the US, considering the political changes that took place in Ukraine in 2013-2014.

³⁵ European Commission. (2018) ‘Report on the protection and enforcement of intellectual property rights in third countries’, p. 4

³⁶ Art. 244-249

deadline, contained in Art. 249, Ukraine has already done the first step to adapt its national legislation to these requirements³⁷.

At the same time, Ukraine managed to secure certain flexibilities, as compared to the other two agreements under scrutiny. A transitional period of 7 to 10 years, allowing Ukraine to gradually phase out the use of geographical indications for certain cheeses and alcoholic beverages, coming from the European Union, is one of such examples³⁸. Also, unlike the agreements with Georgia³⁹ and Moldova⁴⁰, Ukrainian commitments under the DCFTA does not cover the regime for exhaustion of intellectual property; the country is thus free to choose between international and domestic regimes, in accordance with flexibilities granted under the TRIPS agreement.

5. Observations and conclusions

A first analysis of the IPR chapters in the free trade agreements between the EU and, respectively, Georgia, Moldova and Ukraine has demonstrated considerable differences in matters of their scope and obligations included, especially in what enforcement and geographical indications - two centrepieces of European Union's free trade agreements. In order to understand whether such differences are indeed due to the EU's "tailor-made approach" and to varying bargaining powers of the three countries, a deeper research would be required, with a possibility of surveys with the negotiating teams from the countries under consideration.

Furthermore, voices can now be heard in Georgia⁴¹ and Ukraine⁴², suggesting a conclusion of a free trade agreement with the US. The countries shall be cautious in what the IPR chapter of such potential agreement is concerned, as the South Korean experience shows the difficulty to reconcile the EU and the US approaches to intellectual property, especially in the case of geographical indications and establishing damages in civil enforcement⁴³.

The three countries under scrutiny shall also consider another important development of the EU's external IPR policy: a recent inclusion of intellectual property as an explicitly protected investment in bilateral agreements negotiated with Canada and Singapore, together with a potential creation of a Multilateral Investment Court. After the Opinion 2/15 of the CJEU on

³⁷ Law of Ukraine No 1977-VIII "On state support of cinematography in Ukraine", Journal of the Verkhovna Rada, 2017, No 20, p. 240

³⁸ Art. 208

³⁹ Art. 152

⁴⁰ Art. 279

⁴¹ <https://www.heritage.org/trade/report/us-georgia-free-trade-agreement-time-get-moving>

⁴² <https://www.slovoidilo.ua/2018/03/06/novyna/polityka/ukrayina-bude-domahatysya-zony-vilnoyi-torhivli-ssha-klimkin>

⁴³ See, for instance, O'Connor B., de Bosio G. (2017) The Global Struggle Between Europe and United States Over Geographical Indications in South Korea and in the TPP Economies. In: van Caenegem W., Cleary J. (eds) *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development. Ius Gentium: Comparative Perspectives on Law and Justice*, vol 58. Springer, Cham, p. 58

the EU/Singapore FTA, where certain provisions of the investment chapter were recognized as not falling under the exclusive competence of the European Union, a choice was done to transform this chapter into a separate Investment Protection Agreement⁴⁴. For countries already having a free trade agreement with the EU, a door to revise its content to cover investment was opened by the 'Trade for All' Communication⁴⁵, which sets up the European Union's trade policy from 2015. Considering the recent trend from the EU to renegotiate already existing free trade agreements⁴⁶, Georgia, Moldova and Ukraine might also expect to see a proposal for an IPA on their tables.

⁴⁴ Potential inclusion in the bilateral agreements of provisions on an Investment Court System, promoted by the EU and which would be in theory competent over investment disputes related to IPR, is subject to the Opinion 1/17, which is now pending before the CJEU.

⁴⁵ European Commission. (2015) Communication 'Trade for All', p. 31

⁴⁶ Such (re)negotiations are currently in place for Chile and Mexico.