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# **Interest Groups in International Intellectual Property Negotiations**

**-Working Paper-**

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## 1. Introduction

Since the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) entered into force in 1994 as an outcome of the Uruguay Round (1986-1994) establishing the World Trade Organization (WTO)<sup>1</sup>, intellectual property (IP) legislation has become a global issue with many different forces at work. While traditionally the most prominent interest groups were a number of private companies in developed countries, whose business activities include or depend on intellectual assets, negotiations on IP legislation in the last years have shown changing interest groups patterns: New actors, opposing international negotiations that seek to increase the protection and enforcement of intellectual property rights (IPR), have started to increasingly influence the agenda setting and dynamics of international IP negotiations. Becoming a controversy in many parts of the world, the topic of international IP legislation is growing in salience and has generated a countermovement to the dominant right-holders interest groups that during the TRIPS negotiation could act with very little opposition. IP Politics today awake the interest of a much wider audience than during TRIPS times and have sparked well-organized transnational movements against the predominance of developed countries private industry interests in the formulation of possible solutions. The recent protest in Europe against the Anti-Counterfeiting Trade Agreement (ACTA) is just one of the latest examples of this trend. ACTA represents an especially interesting case, as the rejection of the agreement by the European Parliament constitutes a somewhat startling change concerning the European standpoint regarding international IP law-making, as shall be demonstrated in the course of this paper. The ACTA case furthermore clearly demonstrated that resistance against increasing international protection of IP Rights (IPR) beyond international minimum standards is not anymore a phenomenon occurring exclusively in developing countries, where initially most of the criticism and opposition against standard-raising legislative initiatives was concentrated.

This paper parts with the assumption that a perspective that takes interest group dynamics into account has great explanatory power for the interpretation of international IP negotiation outcomes like TRIPS and ACTA. The research questions will consequently revolve around contextual conditions that affect the generation of different interest group systems, which in turn heavily influence the negotiation outcomes: Who exactly are today's relevant interest groups in comparison to the TRIPS era and what are their stakes and interests? Why did they gain influence in the area of international IP policymaking and what are their strategies to exercise their influence? What implications does the changed interest group system have for international IP policy-making? What insights can be gained from the analysis of the

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<sup>1</sup> WORLD TRADE ORGANIZATION. TRIPS material on the website. [online] <[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)> [access: 12 November 2012]

TRIPS and ACTA negotiations about the role of interest groups in international IP negotiations?

In order to allow a profound analysis of these research questions, the scope of this paper will be narrowed down to the case study of the European Union (EU) concerning two international IP negotiations: The TRIPS agreement, currently providing the status quo on minimum standards of IP rights and the ACTA negotiations. The EU has been chosen as the object of analysis, because the recent rejection of the ACTA agreement by the European Parliament seems contradictory to the pro-TRIPS standpoint and support for high international IPR standards that usually constituted the EU interest in international IP negotiations since the TRIPS negotiations 18 years ago. The hypothesis that will be tested with this paper is that certain contextual factors altered the EU interest group system concerning international IP politics in the time period between TRIPS and ACTA, which in turn considerably contributed to the transformation of the EU standpoint in international IP negotiations. By analysing the interest group system of two negotiations that fall into different political contexts concerning the same issue, the objective is to identify underlying causal factors of the just described change in negotiation behaviour of the EU in international IP matters by using an interest-group-based approach. As the focus of this paper is put on contextual factors, there will be no profound analysis of the specific content and legal provisions under discussion in both negotiations. This would not only go beyond the scope of this paper, but also not be in line with the intention of this paper to look at IP negotiations through a more political perspective by focusing on interest group dynamics. Undertaking a political analysis of IP matters is relatively scarce approach taken in literature over international IP law-making, as it is an issue strongly connected with the area of international trade and commerce, as well as international law making. However, this paper seeks to contribute to the newly arisen research niche of IP politics and by this give consideration to the growing politization of the issue, which is manifested in the growth in interest groups active in the field and the much greater awareness given to the former “experts topic” of intellectual property in general. After all, as Haunss and Shadlen rightly point out, behind every law concerning IP stand social processes and dynamics that help to explain the origins and challenges of the law that stands at the end of these processes as the solidified result.<sup>2</sup> It therefore seems a legitimate objective to highlight the political process that leads to international IP law-making in order to gain insights on how to adequately design it.

In the first chapter the aim will be to arm the reader with a good level of understanding about the general dynamics of IP politics. Building onto these findings, the second chapter will be

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<sup>2</sup> HAUNSS, Sebastian and SHADLEN, Kenneth C. *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information*. Cheltenham, Edward Elgar Publishing Limited, 2009. 233p. P.2.

dedicated to the generation of a theoretical framework that allows the analysis of the interest group dynamics in the TRIPS and ACTA negotiations by applying findings of interest group theory. Both sets of information will be combined in the third chapter, the analytical part, where the interest group systems of TRIPS and ACTA will be analysed in a comparative way. The conclusions of the three chapters will consist in establishing policy recommendations about which factors need to be taken into consideration concerning interest group influence in international IP negotiations.

## **2. The Politics of Intellectual Property**

Today, many people are able to give an opinion on Intellectual Property (IP) issues, because the area has evolved into a popular discussion topic. This is a fairly recent development that came along with the growing politicization of the topic. Whereas two decades ago it was a small group of mainly lawyers and experts of the field discussing the topic, these days a wider range of people have taken interest in IP and its protection.

Interest Groups have been essential players in what Susan Sell calls the “Cat and Mouse”-game in the battle over IP enforcement<sup>3</sup> and Carolyn Deere the “Implementation Game”<sup>4</sup> and considerably contributed to the greater attention given to IP issues in the political context. In this first chapter it will be the aim to give an introductory overview about the world of IP politics, in order to outline the change in nature of the topic of IPR and their protection.

### **2.1. The growing significance of IP**

Property is a fundamental instrument of a state in the task of planning its own development.<sup>5</sup> In the case of IP, the significance for a country's development lies in the fact that intellectual efforts create new technologies, products, services, describe new ways of doing things and increase the cultural richness of a society. Today, the source of wealth creation has shifted increasingly away from physical capital towards intellectual capital.<sup>6</sup> IPR in this context attribute ownership to intellectual assets and make it possible for the inventor to create economic value from them.<sup>7</sup> Through these rights governments can grant inventors or creators private rights to use, transfer, or profit from their work for a limited period. The range

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<sup>3</sup> SELL, Susan K. Cat and Mouse: Industries', NGOs', and States' forum shifting in the battle over intellectual property enforcement. At: American Political Science Association Meeting, 3-6 September 2009. Toronto, Canada. 31p.

<sup>4</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p.

<sup>5</sup> DRAHOS, Peter. Thinking strategically about IP Rights. Telecommunications Policy 21(3): 201-211, 1997. P. 201.

<sup>6</sup> GURRY, Francis. The Growing Complexity of International Policy in Intellectual Property. Science and Engineering Ethics 11(1): 13-20, 2004. P. 14

<sup>7</sup> MASKUS, Keith E. IP Rights in a Global Economy. Washington, Institute for International Economics, 2000. 241p. P. 27.

of IPRs has expanded since the first patents were issued in the fifteenth century in Venice and later in the seventeenth century in England.<sup>8</sup> The different forms of IPR today include<sup>9</sup>:

- Copyrights and Related Rights, protecting forms of expression, such as written materials and artistic works. They extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such (TRIPS, Art. 9 (2))
- Trademarks, protecting any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings (TRIPS, Art. 15 (1))
- Geographical Indications, which are understood as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (TRIPS, Art. 22 (1))
- Industrial Designs, which are protected if they constitute independently created industrial designs that are new or original (TRIPS, Art. 25 (1))
- Patents, which are available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application (TRIPS, Art. 27 (1))
- Layout-Designs of integrated circuits (topography)<sup>10</sup>

These rights enable their holders to legally control the circumstances under which others can use their knowledge. Once the term of protection ends, the knowledge falls into the public domain where they may be freely used without permission or payment.<sup>11</sup> The task governments have to fulfil in designing an IPR system consists in finding a balance between the private rights of the inventors of IP and the public interest.<sup>12</sup> In the TRIPS agreement in article 27 (2) the impact IPRs can have on other public policy areas is explicitly pointed out:

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<sup>8</sup> DEERE, Carolyn. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York, Oxford University Press, 2009. 323p. P. 5.

<sup>9</sup> In the following: Section 1 to 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Moroc

*“Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.”<sup>13</sup>*

Relevant questions that governments therefore have to address consist in what kind of intangible products warrant protection to, the extent to which a country should extend private rights to foreigners and the central question of how to find the balance between providing incentives for innovation and creativity while ensuring availability of the inputs necessary for further innovation and affordable access to the products that emerge.<sup>14</sup> It is precisely in the context of these questions where interest groups become most active, trying to present arguments to policy-makers which attract them more to their side. Traditionally, policy choices in the area of IPRs are a matter of national policymaking and the established legal body applies solely within the designated territory.<sup>15</sup> Roughly since the 1980s, however, certain developments have led to a greater attention to issues concerning the protection and enforcement of IPRs in the international arena. The most central of these developments is the growing importance that IP has gained through the transformation of today's economic activities towards becoming more and more knowledge-intensive. Throughout the world, economies increasingly depend on the production, distribution and use of knowledge of information. As Haunss and Shadlen put it: “Information and knowledge constitute the building blocks of culture, industry and science”<sup>16</sup>. This tendency is shown in the growth in high-technology industries and the increasing demand for high-skilled human capital, growing investments in knowledge (such as research and development, R&D), education, training and innovative work approaches.<sup>17</sup> For modern market economies and their policy-makers, innovation is an important driver for transformation and consequently one of their key objectives.<sup>18</sup> Many sectors depend heavily on IPRs: Patents are for example important in machinery, equipment, motor vehicles and virtually all goods and services that use trademarks for their Marketing; Magazines, industrial manuals and blueprints are furthermore protected by Copyrights. The fields where patent protection is seen as particularly critical are

<sup>13</sup> See text of TRIPS, available at: <[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm3\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm)>; See also: GURRY, Francis. The Growing Complexity of International Policy in Intellectual Property. *Science and Engineering Ethics* 11(1): 13-20, 2004. P. 14.

<sup>14</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323 p. P.6.

<sup>15</sup> MASKUS, Keith E. IP Rights in a Global Economy. Washington, Institute for International Economics, 2000. 241p. P. 3.

<sup>16</sup> HAUNSS, Sebastian and SHADLEN, Kenneth C. Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information. Cheltenham, Edward Elgar Publishing Limited, 2009. 233p. P.1

<sup>17</sup> ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). National Innovation Systems. [online] OECD Publications. 1997. <<http://www.oecd.org/science/innovation/sciencetechnologyandindustry/2101733.pdf>> [access: 29 October 2012]. P. 11.

<sup>18</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO). World Intellectual Property Report 2011: The changing face of Innovation. [online] WIPO Economics & Statistics Series, Publication No. 944, 2011. <[http://www.wipo.int/freepublications/en/intproperty/944/wipo\\_pub\\_944\\_2011.pdf](http://www.wipo.int/freepublications/en/intproperty/944/wipo_pub_944_2011.pdf)> [access: 29 October 2012]. P. 6.



pharmaceuticals, agricultural and industrial chemicals and biotechnology, as these industries have high R&D costs, while facing considerable challenges in protecting their inventions effectively.<sup>19</sup> As global economy integration has become much more widespread, the scope of economic competition has also substantially broadened. In this context the innovation capacity of countries has become one of their vital elements in global competition.<sup>20</sup>

With laws on IP, governments can manage the ownership, availability and use of ideas and technologies and also the possibilities to generate profits from these intellectual assets.<sup>21</sup> In this context, law on IPR has an impact on the competitiveness of a country, as they on the one hand influence the pace and focus of innovation and on the other hand influence the affordable access to new technologies, knowledge and creative works.<sup>22</sup> Possessing a functioning innovation system in today's competitive global economy is seen as a trait of a developed, internationally well-positioned country. In order to achieve or maintain this kind of status, policy-makers need to create a functioning innovation system within which IPRs inevitably play a fundamental part. Today IP and its protection have a strategic significance and importance for countries<sup>23</sup>, which is one of the central reasons why the international regulation of IPR has been one of the most negotiated issues in international trade in the last decades.

A second development that led to a greater attention to the issue of global IPR protection and enforcement frameworks, which furthermore developed in parallel to the first point, is the connection that the U.S. began to make between trade and IP in the 1980s. According to Drahos, this development marked the start of a new "global" period of IP protection.<sup>24</sup> Before the beginning of this period, international IP protection was not very widespread. It was in Europe where the first IP regulations started to become international in contrast to purely territorial (or absent) by concluding two important agreements<sup>25</sup>: The Paris Convention for the protection of industrial property (1883)<sup>26</sup> and the Bern Convention for the protection of the rights of authors in their literary and artistic works (1886)<sup>27</sup>.

For the administration of these first international IP conventions, the European countries created an international secretariat, which in 1967 transformed into the World Intellectual

<sup>19</sup> MASKUS, Keith E. IP Rights in a Global Economy. Washington, Institute for International Economics, 2000. 241p. P. 52.

<sup>20</sup> ATKINSON, Robert D. & EZELL, Stephen J. Innovation Economics: The Race for Global Advantage. New Haven, London, Yale University Press, 2012. 366p. P. 190.

<sup>21</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323 p. P. 5.

<sup>22</sup> Ibid.

<sup>23</sup> CORREA, Carlos M. and YUSUF, Abdulqawi. Intellectual Property and International Trade: The TRIPS Agreement. 2<sup>nd</sup> Edition. The Netherlands, Kluwer Law International, 2008. 469p. P. 4.

<sup>24</sup> DRAHOS, Peter. Thinking strategically about IP Rights. *Telecommunications Policy* 21(3): 201-211, 1997. P. 202.

<sup>25</sup> Ibid.

<sup>26</sup> WORLD INTELLECTUAL PROPERTY ORGANISATION. Paris Convention for the Protection of Industrial Property. Paris, 20 March 1883. Text available at: <[http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html)>

<sup>27</sup> WORLD INTELLECTUAL PROPERTY ORGANISATION. Berne Convention for the Protection of Literary and Artistic Works. Berne, 9 September 1886. Text available at: <[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)>

Property Organization (WIPO). From this moment on, until the mid-1980s, in total some 18 international IP treaties were concluded in the WIPO.<sup>28</sup> Furthermore, a Copyright treaty was concluded in 1952 under the auspices of United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>29</sup> Those treaties were in great part initiatives of the developed countries with developing countries largely uninvolved. It was in the 1970s when they started to become more active in the context of their fight for a New International Economic Order (NIEO)<sup>30</sup>, which gave rise to claims for designing a less rigorous international IPR framework that would help the development countries in their catching-up-processes.<sup>31</sup>

However, in the 1980s the developed countries, led by the U.S., responded to these claims with a campaign on intensifying international IP protection.<sup>32</sup> In the US various private companies started to make a link between IP and trade, which according to Drahos marked the beginning of the “global period” of IP protection and enforcement<sup>33</sup>. The recognition of the economic importance of knowledge encouraged the U.S. to increase the presence of IPR as an issue on the agendas of international commercial negotiations.

In 1984 the U.S. designated inadequate protection of patents, trademarks and copyrights as unfair trade practice that could invoke retaliation under Section 301 of the Trade Act of 1974.<sup>34</sup> These possible sanctions augmented the international pressure for stronger and internationally harmonized IPRs. By linking IP protection to market access the U.S. furthermore found leverage that it did not have in WIPO to push through its objectives.<sup>35</sup> The

<sup>28</sup> Paris Convention for the Protection of Industrial Property (1883), Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891), Madrid Agreement Concerning the International Registration of Marks (1891), Hague Agreement Concerning the International Registration of Industrial Designs (1934), Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), Locarno Agreement Establishing an International Classification for Industrial Designs (1968), Patent Cooperation Treaty (1970), Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971), Strasbourg Agreement Concerning the International Patent Classification (1971), Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (1973), Brussels Convention Relating to the Distribution of Programme -Carrying Signals Transmitted by Satellite (1974), Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (1977), Nairobi Treaty on the Protection of the Olympic Symbol (1981), Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989), Treaty on Intellectual Property in Respect of Integrated Circuits (1989), Trademark Law Treaty (1994). Fuente: World Intellectual Property Organization. WIPO-Administered Treaties. [en línea] <<http://www.wipo.int/treaties/en/>> [access: 12 November 2012]

<sup>29</sup> CORREA, Carlos M. and YUSUF, Abdulqawi. Intellectual Property and International Trade: The TRIPS Agreement. 2<sup>nd</sup> Edition. The Netherlands, Kluwer Law International, 2008. 469p. P. 5.

<sup>30</sup> See also: UNITED NATIONS. Resolution 3201 (S-VI) adopted by the General Assembly the 1st of May 1974: Declaration on the Establishment of a New International Economic Order. Available at: <<http://www.un-documents.net/s6r3201.htm>>

<sup>31</sup> CORREA, Carlos M. and YUSUF, Abdulqawi. Intellectual Property and International Trade: The TRIPS Agreement. 2<sup>nd</sup> Edition. The Netherlands, Kluwer Law International, 2008. 469p. P. 4.; DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.7.

<sup>32</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.8.

<sup>33</sup> DRAHOS, Peter. Thinking strategically about IP Rights. *Telecommunications Policy* 21(3): 201-211, 1997. P. 202.

<sup>34</sup> MASKUS, Keith E. IP Rights in a Global Economy. Washington, Institute for International Economics, 2000. 241p. P. 1.

<sup>35</sup> SELL, Susan. The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play. [online] PIJIP Research Paper No. 15, 2010, Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>> [access: 1st November 2012]. P. 5.

influential article of David J. Teece “Profiting from technological innovation: Implications for integration, collaboration, licensing and public policy” stems from that period and reflects the common line of argumentation that motivated these tactics. According to Teece, appropriability regimes, complementary assets and the presence or absence of a dominant paradigm in the sector in which firms operate are the three main groups of factors that determine if greater or smaller profits can be retained from an innovation.<sup>36</sup> IPR play the fundamental role of being one of the two key dimensions<sup>37</sup> of the so-called “appropriability regime”, which he defines as the “environmental factors, excluding firm and market structure, that govern an innovator’s ability to capture the profits generated by an innovation”<sup>38</sup>. The main challenge the appropriability regime responds to relates to the semi-public good characteristics of knowledge. Exclusion to knowledge is feasible but difficult to achieve to perfection. On the other side, if inventors or innovators cannot count on means to protect the knowledge they create, they would be disadvantaged in comparison to their rivals who would presumably be able to imitate without having to incur the very high fixed costs of creating that knowledge.<sup>39</sup> IPRs like Copyrights and Patents in this context are seen as the legal mechanisms of protection to innovators<sup>40</sup>, providing them with a temporary “monopoly power”<sup>41</sup>. The efficiency of the appropriability regime will decide whether or not the innovator will be able to translate its innovation into market value.<sup>42</sup> In order to enhance innovative performance and, more generally speaking, overall competitiveness of countries, their policy-makers need to understand the national innovation system and find the leverage points that have the potential to intensify the innovative process.<sup>43</sup> Within this task, the regulation of IPRs has become an important component of national economic policies trying to enhance the capacity of innovation through offering effective IP protection to innovators. This recognition of the economic importance of knowledge has increased the presence of IP issues in the agendas of international commercial negotiations. The creation of TRIPS and its incorporation into the WTO is a direct result of the initiatives sparked in the U.S. to link IP with trade and achieve a stronger protection of IPRs.

<sup>36</sup> TEECE, David J. Profiting from technological innovation: Implications for integration, collaboration and public policy. Research Policy 15: 285-203, 1986. P. 287.

<sup>37</sup> The other dimension of the appropriability regime is the nature of the technology. According to Teece, codified knowledge is easier to transmit and to receive and therefore more exposed to industrial espionage. Tacit knowledge is by definition hard to articulate and therefore harder to transfer. The nature of technology can vary between being a product or a process and between being codified or tactical.

<sup>38</sup> TEECE, David J. Profiting from technological innovation: Implications for integration, collaboration and public policy. Research Policy 15: 285-203, 1986. P. 287.

<sup>39</sup> LOPEZ, Andres. Innovation and appropriability: Empirical evidence and research agenda. [online] WIPO Publication, The Economics of Intellectual Property: Suggestions for Further Research in Developing Countries and Countries with Economies in Transition, Chapter 1, 2009. <<http://www.wipo.int/ip-development/en/economics/index.html>> [access: 1st November 2012]. P. 2.

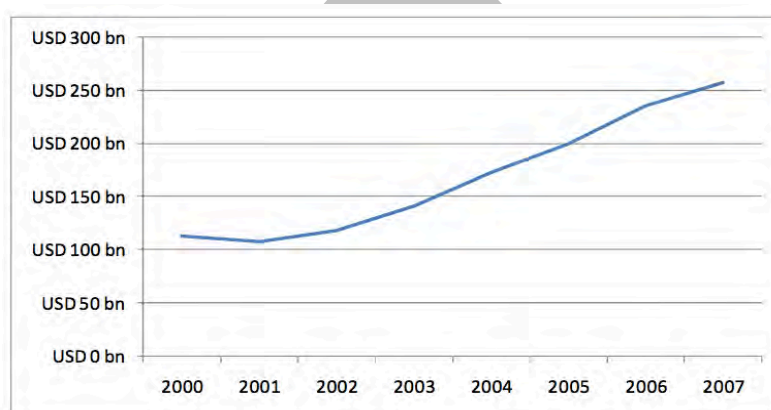
<sup>40</sup> TEECE, David J. Profiting from technological innovation: Implications for integration, collaboration and public policy. Research Policy 15: 285-203, 1986. P. 287.

<sup>41</sup> LOPEZ, Andres. Innovation and appropriability: Empirical evidence and research agenda. [online] WIPO Publication, The Economics of Intellectual Property: Suggestions for Further Research in Developing Countries and Countries with Economies in Transition, Chapter 1, 2009. <<http://www.wipo.int/ip-development/en/economics/index.html>> [access: 1st November 2012]. P. 2.

<sup>42</sup> TEECE, David J. Profiting from technological innovation: Implications for integration, collaboration and public policy. Research Policy 15: 285-203, 1986. P. 290.

<sup>43</sup> ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). National Innovation Systems. [online] OECD Publications. 1997. <<http://www.oecd.org/science/innovationinsciencetechnologyandindustry/2101733.pdf>> [access: 29 October 2012]. P. 7.

A third point that spurred a sense of urgency for establishing an effective international IPR system and hence increased the attention given to international IP negotiations is the growth in counterfeit trade and piracy in international trade. Although violations of IPR have long been known as an issue and received at least some attention, the level of attention skyrocketed considerably in recent years. Additionally a series of high profile lawsuits raised the general awareness of copyright violations.<sup>44</sup> A problem with international counterfeit and product piracy was that the overall magnitude for a long time was not clear.<sup>45</sup> However, in 2008 the Organisation for Economic Co-operation and Development (OECD), published a statistical report, which was updated in 2009, quantifying the magnitude of counterfeiting and piracy of tangible products. The study focused on the infringement of trademarks, copyrights, patents and design rights through counterfeiting and piracy to the extent that they involved physical products. It was suggested that counterfeit and pirated goods in international trade could amount to up to 250 billion US\$ in 2007. Furthermore, as shown in the following graph, trade of counterfeit products and pirated products grew steadily over the period 2000 – 2007<sup>46</sup>:



**Figure 1: Evolution of trade in counterfeit and pirated products (upper limit)**

Source: ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). The Economic Impact of Counterfeiting and Piracy: An Update. [online] OECD Publications, November 2009. <<http://www.oecd.org/industry/industryandglobalisation/44088872.pdf>> [access: 3 November 2012].

The figure does not include counterfeit and pirated products that are produced and consumed domestically, nor does it include non-tangible pirated digital products being distributed via the Internet, which suggests that if these items were added, the total magnitude of counterfeiting and piracy worldwide could be considerably higher.<sup>47</sup> IP theft

<sup>44</sup> PIOQUERO, NICOLE LEEPER. Causes and Prevention of Intellectual Property Crime. *Trends in Organized Crime* 8(4): 40-61, 2005. P. 41.

<sup>45</sup> Ibid.

<sup>46</sup> ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). The Economic Impact of Counterfeiting and Piracy: An Update. [online] OECD Publications, November 2009. <<http://www.oecd.org/industry/industryandglobalisation/44088872.pdf>> [access: 3 November 2012]. P. 1.

<sup>47</sup> ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). The Economic Impact of Counterfeiting and Piracy: An Update. [online] OECD Publications, November 2009. <<http://www.oecd.org/industry/industryandglobalisation/44088872.pdf>> [access: 3 November 2012]. P. 15.

reduced global trade by 5 to 7 % in 2007.<sup>48</sup> These figures show that in many parts of the world the IPR-system or the enforcement of existing IPR laws are ineffective. The recognition of that problem constitutes the third reason for the increased attention and generation of international IPR negotiations.

In summary it can be said therefore that the protection of IPR since the 1980s has moved from being an area of mainly legal analysis to being one of the biggest issue in global economic policymaking.<sup>49</sup> IP is increasingly internationally negotiated because of three basic interconnected reasons:

- (1) The global economy has become more knowledge-based, giving strategic importance to intellectual assets that are legally protected by IPR.
- (2) The growing strategic importance of IP generated concerns by creators of new industrial or technological breakthroughs about their possibilities to capitalize inventions, who in the 1980s started to push for stricter legal mechanism. The growing competitiveness of newly industrialized developing countries in the manufacturing sector furthermore highlighted the importance of an extended protection of IPR for sustaining the competitive advantage<sup>50</sup> in the increasing globalization of the market place in general.
- (3) This concern was further intensified by the growing magnitude of trade in counterfeit and pirated products, triggered through the introduction of copy-prone electronic-based technologies and products into the world market.

## 2.2. The Evolution of IP Politics

When referring to effective protection and enforcement of IPR it is possible to talk of a “global issue”. This is due to the fact that IP issues affect almost every person in some way or another. Rules about IPR ownership and control for example have an impact on macro-scale topics like growth, prosperity and development. But they also affect how individuals and collectives access and use cultural products, media –and entertainment products, critical

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<sup>48</sup> ATKINSON, Robert D. & EZELL, Stephen J. *Innovation Economics: The Race for Global Advantage*. New Haven, London, Yale University Press, 2012. 366p. P. 209.

<sup>49</sup> MASKUS, Keith E. *IP Rights in a Global Economy*. Washington, Institute for International Economics, 2000. 241p. P. 1.

<sup>50</sup> BAUMGÄRTNER, Heiko. *Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity*. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 Novemver 2012]. P. 11.

information and knowledge-intensive goods such as books, medicine, seeds.<sup>51</sup> It is easily possible to continue this list and fill it up with many more areas where IPR play an essential role. The important point to make at this point, however, lies in the fact that the great relevance of IPR in today's world leads to a multitude of actors interested in them. The great number and diversity of actors and standpoints taken in the debate can be categorized into two big groups: the ones that campaign for a strong international IPR protection and enforcement framework and, in simple words, their opponents. Advocates and opponents of a strong international system on IPR protection and enforcement develop their arguments in line with two distinct philosophies about the nature of intellectual property and its protection<sup>52</sup>:

- (1) Natural Rights View: Assigns ownership of mental creations to their inventors under the precept that failure to do so constitutes theft of the fruits of their effort and inspiration. According to this perspective creators should have the right to control any reworking of their ideas and expression.
- (2) Public Rights View: Under this view it is inappropriate to assign private property rights to intellectual creations. Information belongs in the public domain because free access to information is central to social cohesion and learning.

These two views constitute extreme positions concerning the nature of IP and its protection. Most legal systems adopt a utilitarian view, intending to find a balance between the needs for innovation and creation on the one hand and the needs for diffusion and access of information and knowledge on the other hand.<sup>53</sup> In IP policy-making these two perspectives have translated into two big categories of interest groups, which constantly compete with each other in order to move the balance point further to their side, especially in the global arena.<sup>54</sup> An important point necessary to understand in the global politics of IP is the fact that in general terms these two positions can be clearly attributed to country groups: developed, industrialized countries usually represent the Natural Rights View and developing countries the public rights view. This makes sense when looking at the following graph:

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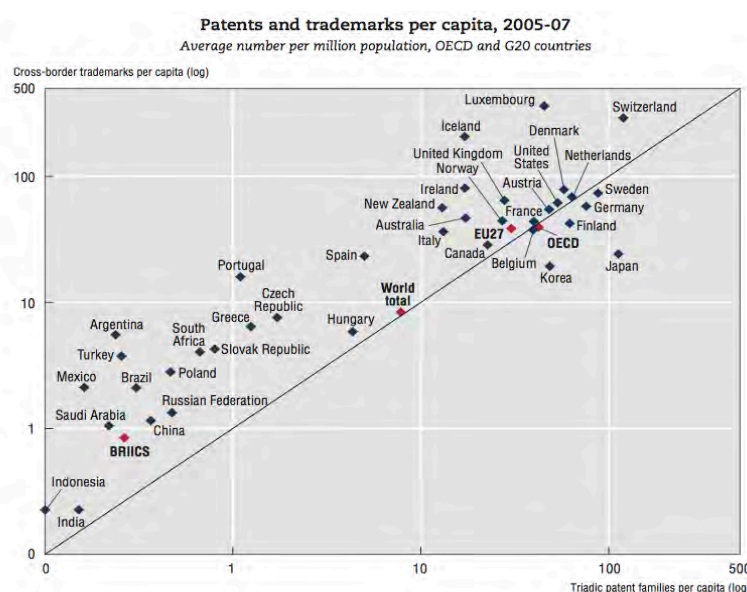
<sup>51</sup> HAUNSS, Sebastian and SHADLEN, Kenneth C. *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information*. Cheltenham, Edward Elgar Publishing Limited, 2009. 233p. P.1

<sup>52</sup> In the following: MASKUS, Keith E. *IP Rights in a Global Economy*. Washington, Institute for International Economics, 2000. 241p. P. 28.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>54</sup> There is abundant literature available that addresses the validity of the argumentations that representatives of each group draw on in order to defend their standpoint. However, the theoretical discussion about the extent to which knowledge or intellectual assets in general can be classified as public good will not be intensified at this point in order to maintain the focus on the setting of international IP negotiations in terms of the interest group systems and its impact on the policy outcome. The analysis sought to make with this paper emphasizes contextual factors, rather than content-related aspects. This focus has been chosen merely out of practical reasons and does not depreciate the importance of the theoretical discussion on the arguments brought forwards in IP politics in order to further deepen the understanding thereof.



**Figure 2: Patents and trademarks per capita, 2005-07**

Source: ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). OECD Science, Technology and Industry Scoreboard 2011, Innovation today, Protection of Innovation. [online] <<http://www.oecd-ilibrary.org/docserver/download/9211041ec008.pdf?expires=1355712479&id=id&accname=guest&checksum=D6CC6E01FB4E6202019443C97A698E45>> [access: 3 November 2012]. P. 45.

As seen in the graph, developed countries continue to dominate global registrations of patents and trademarks and developing countries continue to be predominantly importers of new technologies and products, which lead to an inherent tension between these two camps and to their different set of interests.<sup>55</sup> Although it has to be pointed out that these are generalizations and that not all developing countries oppose strong IPR protection and enforcement, just as not all developed countries share exactly the same opinion. For the time being this simplification however facilitates the attempt to give an overview of the evolution of IP politics on the global scale. There are however more labels that are used in order to describe the two opposing groups, always depending on the type of contestation referred to.

The following table gives a brief overview about the “labels” the two group get in literature or in the press:

Business NGOs	Public Interest NGOs
IPR owners	IPR users
IPR exporters	IPR importers
Developed Countries	Developing Countries
Strong-IPR advocates	Strong-IPR opponents
Pro-TRIPS/ TRIPS-plus	TRIPS opponents
Profit-sector group	Representatives of the access-to-medicines movement, Free-software movement, Creative Commons, Open-science and Open-publishing

**Figure 3: IP interest groups labels**

Source: Own illustration

<sup>55</sup> MASKUS, KEITH E. 2000. IP Rights in a Global Economy. Institute for International Economics. Washington. 241p. P. 85

A look at the evolution of IP Politics can give insights into how these labels arose:

The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) is the centrepiece of the global system of rules, institutions and other practices governing the ownership and flow of knowledge, technology and other intellectual assets.<sup>56</sup> TRIPS was an outcome of the Uruguay Round (1986-1994) establishing the WTO.<sup>57</sup> In the time leading up to the TRIPS negotiation -and also afterwards in the process of its implementation- the work of interest groups played a crucial role. In fact TRIPS itself can be interpreted as the result of the lobbying efforts of multinational companies determined to raise international IP standards and increase IP protection in developing countries.<sup>58</sup> The relevant interest group initially putting IPR as an issue on the international agenda were private U.S companies. They acted as pressure group in the 1980 converting IPRs into an international trade issue. As representatives of the Natural Rights View, they demanded stronger rights to creators to ensure that they could bear the fruits of their invention. At that time, strong-IPR advocates could act relatively unchallenged, as there was little opposition to their claims. Only in the last two years before the adoption of TRIPS some critical voices came up. As the negotiations advanced, a core group of developing countries, led by Brazil and India, put themselves in charge of getting the interests of developing countries represented. Their interests included for example to narrow the scope of the IP agenda and secure some provisions that would leave them with flexibility in their policymaking concerning their national IPR system.<sup>59</sup> All in all, however, TRIPS is regarded as victory for the interest groups pressuring for a strong international IPR framework, because the agreement introduced for the first time ever international minimum standards on IPR protection and enforcement. Their opponents, the developing countries, simply did not have the negotiation power and the sufficient technical knowledge necessary to impact significantly in the outcome.<sup>60</sup> Furthermore they faced growing unilateral political and trade pressures to accept rules for stronger IP protection, for example through the tactic of issue linkage: they were granted improved market access for textiles and agriculture in turn for giving in on the IP debate. In the context of the GATT negotiations, the developed countries simply had more bargaining power.<sup>61</sup>

<sup>56</sup> CORREA, Carlos M. and YUSUF, Abdulqawi. Intellectual Property and International Trade: The TRIPS Agreement. 2<sup>nd</sup> Edition. The Netherlands, Kluwer Law International, 2008. 469p. P. 4.; <sup>56</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.7.

<sup>57</sup> WORLD TRADE ORGANIZATION. TRIPS material on the website. [online]. <[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)> [access: 12 November 2012].

<sup>58</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.1.

<sup>59</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.5.

<sup>60</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P. 8.

<sup>61</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p. P.9.



However, the creation of the TRIPS agreement did not put an end to the issue. Quite to the contrary TRIPS stayed a controversial topic and gave way to a “history of contestation”<sup>62</sup> in the field of international IPR protection and enforcement. The main reason for this development was the fact that no interest group involved felt truly satisfied with the outcome and consequently searched for ways to reshape the status quo towards their interests. Although the right-holders interest group and their respective national governments achieved many of their goals with TRIPS, the developed countries were not fully content with the agreement and called TRIPS the absolute minimum baseline acceptable. What they actually wanted were IPR protection and enforcement provisions that go beyond the standards established in TRIPS (“TRIPS-plus norms”).<sup>63</sup> On the other hand, developing countries called for the modification of TRIPS and for more flexibility to better reflect their different level of development.<sup>64</sup> In the years after TRIPS the implementation process became an intense political game, with both sides growing in size and professionalism. Whereas the group of developed countries was mainly backed by multinational companies, the developing countries were backed by NGOs claiming to represent the public interest. Numerous international organizations and individual experts furthermore supported both sides.<sup>65</sup> As Sell states, TRIPS in many ways, was not the end but rather just the beginning of global IPR regulation<sup>66</sup>.

Both sides, in order to pursue their interests, turned to a variety of discussion forums and developed activities in other venues than the traditional IP institutions WTO and WIPO.<sup>67</sup> The group of developing countries turned to institutions such as the Convention on Biological Diversity (CBD), the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the Food and Agricultural Organization (FAO), the World Health Organization (WHO), or various U.N. human rights bodies in order to initiate IP work programmes favouring their interests in those venues.<sup>68</sup> The developed countries focused primarily on bilateral and regional trade agreements as soon as they realized that in multilateral

<sup>62</sup> DEERE, Carolyn. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York, Oxford University Press, 2009. 323p. P. 5.

<sup>63</sup> BAUMGÄRTNER, Heiko. *Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity*. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 11.

<sup>64</sup> DEERE, Carolyn. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York, Oxford University Press, 2009. 323p. P. 304.

<sup>65</sup> Ibid.

<sup>66</sup> SELL, Susan. *Private Power, Public Law*. Cambridge Studies in International Relations. Cambridge, Cambridge University Press, 2003. P. 121.

<sup>67</sup> BAUMGÄRTNER, Heiko. *Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity*. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 4.

<sup>68</sup> BAUMGÄRTNER, Heiko. *Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity*. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 4.

discussion-forums they would encounter resistance to their TRIPS-plus agenda.<sup>69</sup> According to Helfer, “the expansion of intellectual property law-making into diverse international fora is the result of a strategy of regime shifting by developing countries and NGOs that were dissatisfied with many provisions in TRIPS or its omission of other issues”<sup>70</sup>. Although these other regimes do not have core jurisdictions in IP, they address the topic of intellectual IP from the perspective of other public policy areas, many times leading to a more favourable outcome concerning the interests of developing countries and their allies.<sup>71</sup> The most important consequences in relation to IP Politics that this strategy brought along was the increased “issue density”, the growing concern it started to pose to governments and to a growing variety of interest groups and the linkages it spawned to other issues.<sup>72</sup> What has evolved in the field of IP is a huge regime complex, within which each country group moves strategically in order to gains from differing foci and outlooks on the issue.<sup>73</sup> One of the biggest successes of the group of developing countries in the pursue of the regime shifting strategy was the “Declaration on the TRIPs Agreement and Public Health”<sup>74</sup>, which was adopted on the 14<sup>th</sup> of November 2001 as part of the launch of the new round of WTO negotiations in Doha. The declaration was a success for the developing countries, because it responded to their claim of being unable to afford the patented pharmaceuticals needed to stem the massive HIV/AIDS crisis in some of the countries. The Declaration reaffirmed the principle of balanced IP protection and establishing a set of flexibilities in areas where TRIPS provisions could conflict with public health interests.<sup>75</sup> A second initiative of the group of developing countries that resulted in a concrete outcome to their favour is the “Development Agenda” of the WIPO, which was formally adopted in 2007 “with the aim of placing development at the heart of the Organization’s work”<sup>76</sup>.

Although the developed countries had also used the regime shifting tactic in the 1990, when they shifted the IPR issue from the WIPO to the WTO in order to give effect to their “TRIPS-plus-agenda”, in the last decade they used a different set of strategies to counter-move the

<sup>69</sup> COTTIER, Thomas and FOLTEA, Marina. Global Governance in Intellectual Property Protection: Does the decision-making forum matter? [online] NCCR Working Paper 2011/45, June 2011 <[http://www.wti.org/fileadmin/user\\_upload/nccr-trade.ch/wp3/publications/wp\\_2011\\_45.pdf](http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp3/publications/wp_2011_45.pdf)> [access: 3 November 2012]. P. 34-35.

<sup>70</sup> HELFER, Lawrence. Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking. *Yale Journal of International Law*. Vol. 29(1): 1-83, 2004. P. 5.

<sup>71</sup> GURRY, Francis. The Growing Complexity of International Policy in Intellectual Property. *Science and Engineering Ethics* 11(1): 13-20, 2004. P. 7.

<sup>72</sup> HELFER, Lawrence. Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking. *Yale Journal of International Law*. Vol. 29(1): 1-83, 2004. P. 8.

<sup>73</sup> BAUMGÄRTNER, Heiko. Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 10.

<sup>74</sup> WORLD TRADE ORGANIZATION. Declaration on the TRIPS agreement and public health. Doha, 14 November 2001. Text available at: <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)>

<sup>75</sup> See Paragraphs 4 to 6 of the Doha Declaration. Text available at: <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)>.

<sup>76</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION. Overview of the Development Agenda. [online] <<http://www.wipo.int/ip-development/en/agenda/overview.html>> [access: 3 November 2012].

developing countries initiatives. The U.S. and, to a lesser extent, the European Union (EU) used the following institutional pathways<sup>77</sup>:

- (1) Unilateral pressure, for example by threatening economic sanctions under Section 301 of the U.S. trade act of 1974
- (2) Technical assistance to patent offices and “missionary work” in key target countries
- (3) Vertical forum shifting, for example by incorporating TRIPS-plus standards into bilateral and regional free trade and investment agreements
- (4) Horizontal forum shifting: As soon as one discussion forum becomes less responsive to TRIPS-plus agenda, IP protectionists shift to another in search of a more favourable discussion forum<sup>78</sup>

One of the last and according to Baumgärtner potentially most important examples of a new law-making initiative by the developed countries is the proposed Anti-Counterfeiting Trade Agreement (ACTA).<sup>79</sup> The idea for ACTA arose in 2005 with a proposal of Japan to introduce an international treaty to combat worldwide counterfeiting and piracy, which would complement the TRIPS Agreement.<sup>80</sup> After many developing countries opposed an attempt made by the European Union and other developed countries to fulfil the task of dealing with enforcement of IPR<sup>81</sup> by adapting the TRIPS agreement, the proposal of establishing a completely new international agreement gained support amongst the developed countries. U.S. Trade Representative Susan C. Schwab announced in 2007 that the U.S. and some of its key trading partners would seek to negotiate an Anti-Counterfeiting Trade Agreement (ACTA).<sup>82</sup> The European Commission<sup>83</sup> and Japan<sup>84</sup> also separately announced the negotiations on an agreement of that kind and it was indicated that Canada, South Korea, Mexico, New Zealand, and Switzerland were also included in this new counterfeiting-

<sup>77</sup> In the following: BAUMGÄRTNER, Heiko. Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 12.

<sup>78</sup> SELL, Susan. The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play. [online] PIJIP Research Paper No. 15, 2010, Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>> [access: 1st November 2012]. P. 4.

<sup>79</sup> BAUMGÄRTNER, Heiko. Patents, Power, and Rhetoric: Intellectual Property Rights and the Politics of Regime Complexity. [online] Working Paper Series “Global Governance and Democracy” 04, Institute of Political Science University of Lucerne, January 2011 <[http://www.unilu.ch/eng/working-papers\\_608627.html](http://www.unilu.ch/eng/working-papers_608627.html)> [access: 3 November 2012]. P. 6.

<sup>80</sup> INTELLECTUAL PROPERTY WATCH. Japan Proposes New IP Enforcement Treaty. 15 November 2005. [online] <<http://www.ip-watch.org/2005/11/15/japan-proposes-new-ip-enforcement-treaty/>> [access: 9 de November 2012].

<sup>81</sup> THIRD WORLD NETWORK. Clash in TRIPS Council on IPR enforcement issue. 2 November 2006 [online] <<http://www.twinside.org.sg/title2/twninfo478.htm>> [access: 9 November 2012].

<sup>82</sup> UNITED STATES TRADE REPRESENTATIVE (USTR). Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes. 23 October 2010. [online] <<http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>> [access: 9 November 2012].

<sup>83</sup> EUROPEAN COMMISSION. European Commission seeks mandate to negotiate major new international anti-counterfeiting pact. 23 October 2007 [online] <[http://europa.eu/rapid/press-release\\_IP-07-1573\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-07-1573_en.htm?locale=en)> [access: 7 November 2012].

<sup>84</sup> CHANNEL NEWSASIA. Industrialised countries announce anti-piracy enforcement plan. 24 October 2007 [online] <[http://www.channelnewsasia.com/stories/afp\\_world\\_business/view/307429/1/.html](http://www.channelnewsasia.com/stories/afp_world_business/view/307429/1/.html)> [access: 9 November 2012].

coalition.<sup>85</sup> Formal negotiations were launched in 2008 and the final round was held in Japan in October 2010 after in total 11 negotiation rounds<sup>86</sup>:

Round	Date	Location	Key Topics of Discussion
1	June 3-4, 2008	Geneva, Switzerland	Border measures
2	July 29-31, 2008	Washington, D.C.	Civil remedies for infringement, border measures
3	October 8-9, 2008	Tokyo, Japan	Criminal enforcement, scope of agreement
4	December 15-18, 2008	Paris, France	International cooperation, enforcement practices, institutional issues, transparency
5	July 16-17, 2009	Rabat, Morocco	International cooperation, enforcement practices, institutional issues, transparency
6	November 4-6, 2009	Seoul, Korea	Enforcement in digital environment, criminal enforcement, transparency
7	January 26-29, 2010	Guadalajara, Mexico	Civil enforcement, border measures, internet provisions, transparency
8	April 12-16, 2010	Wellington, New Zealand	Civil enforcement, border measures, criminal enforcement, special measures for digital environment, scope of IPR

**Figure 4: ACTA Negotiation Rounds**

Source: SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 2.

According to the negotiation parties ACTA would contribute in three ways to fight counterfeiting and piracy<sup>87</sup>:

- (1) Building international cooperation leading to harmonised standards and better communication between authorities.
- (2) Establishing common enforcement practices to promote strong intellectual property protection in coordination with right-holders and trading partners.
- (3) Creating a strong modern legal framework, which reflects the changing nature of intellectual property theft in the global economy, including the rise of easy-to-copy digital storage mediums and the increasing danger of health threats from counterfeit food and pharmaceutical drugs.

<sup>85</sup> Ibid.

<sup>86</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 2.

<sup>87</sup> In the following: EUROPEAN COMMISSION TRADE COMMITTEE. The Anti-Counterfeiting Trade Agreement (ACTA): Factsheet Updated November 2008. [online] <[http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_140836.11.08.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf)> [access: 7 November 2012]

ACTA is supposed to complement TRIPS by addressing new copyright and trademark infringement issues that emerged in the digital environment and according to the negotiating parties are not adequately represented in TRIPS.<sup>88</sup> In 2008 the trade committee of the European Commission released a factsheet which stated that the ultimate objective is that large emerging economies such as China or Russia, where IPR enforcement could be improved, will sign up to the ACTA agreement.<sup>89</sup> Several countries joined informal ACTA negotiations, leading to the following final list of negotiating partners: United States, Australia, Canada, the European Union and its 27 member states, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, and Switzerland.<sup>90</sup> The group of developing countries associated with being strict opponents of strong international IPR frameworks, for example India and Brazil, were not amongst the negotiations parties. ACTA is primarily a Copyright Treaty<sup>91</sup> and contains provisions on civil enforcement, border measures, criminal enforcement in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale and enforcement for the infringement of copyrights or related rights over digital networks. Additionally it provides for enhanced enforcement best practices and increased international cooperation.<sup>92</sup>

With the advance of the negotiations the critical voices increased in number and strength. The key issues pointed out by opponents referred to the negotiation process itself and also the content of the proposed agreement.

The negotiation process was seen as highly intransparent as the negotiations already started in 2008, but draft papers were not published until the end of 2010. In 2008 more than 100 public interest groups officially demanded the publication of the draft text.<sup>93</sup> Various alleged draft text documents leaked in 2010<sup>94</sup>, but the final text of the agreement was released in

<sup>88</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 2.

<sup>89</sup> EUROPEAN COMMISSION TRADE COMMITTEE. The Anti-Counterfeiting Trade Agreement (ACTA): Factsheet Updated November 2008. [online] <[http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_140836.11.08.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf)> [access: 7 November 2012].

<sup>90</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 2.

<sup>91</sup> KAMINSKI, MARGOT. An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement. [online] PIJIP Research Paper No. 17, Program on Information Justice and Intellectual Property American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context=research>> [access: 7 November 2012]. P. 2.

<sup>92</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 2.

<sup>93</sup> ARSTECHNICA. 100 groups demand to see secret anticounterfeiting treaty. 16 September 2008. [online] <http://arstechnica.com/uncategorized/2008/09/100-groups-demand-to-see-secret-anticounterfeiting-treaty/> [access: 7 November 2012].

<sup>94</sup> KAMINSKI, MARGOT. An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement. [online] PIJIP Research Paper No. 17, Program on Information Justice and Intellectual Property American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context=research>> [access: 7 November 2012]. P. 5.

May 2011 after having concluded the last round of the ACTA negotiations in October 2010.<sup>95</sup> According to the critics these proceedings offered a very limited possibility for the stakeholders not actually sitting at the negotiation table to participate in the formulation of the provisions. In a public letter to U.S. president Barack Obama, 75 US law professors criticized that “ACTA’s negotiation have been conducted behind closed doors, subject to intense but needless secrecy, with the public shut out and a small group of special interests very much involved”<sup>96</sup>. It was criticized that the draft was only published when the negotiations were already concluded. According to the critics of the letter “This is not meaningful, real-time transparency, and it is certainly not the kind of accountability that we were expecting from your Administration.”<sup>97</sup> Similarly the Electronic Frontier Foundation (EFF), a big NGO active in the field of Internet freedom, informs on its website that “negotiated in secret, ACTA bypassed checks and balances of both domestic and existing international IP norm-setting bodies without any meaningful input from national parliaments, policy-makers, or their citizens”<sup>98</sup>. Some critics furthermore alleged that the negotiating governments engaged in consultation with right-holders, like representatives of the entertainment, software and pharmaceutical industries, but did not engage in the same kind of consultations with consumer and public interest groups.<sup>99</sup> This is connected with the second aspect of the criticism, which questions the inclusiveness of the negotiations. The fact that ACTA was negotiated as a plurilateral agreement primarily among largely advanced industrialized countries –the “club of the willing”<sup>100</sup>– and in the absence of developing countries in the negotiations led to many groups expressing concern that the ACTA negotiation did not sufficiently take into account the interests, views, and needs of developing countries.<sup>101</sup> NGOs like the Electronic Frontier Foundation interpreted this as a tactic to shift the discussion about strong IPR frameworks from more democratic multilateral forums, such as WTO and the WIPO, to secret regional negotiations.

The criticism directed towards the content of ACTA was characterized by very dramatic descriptions about the consequences of a possible implementation of the agreement.

<sup>95</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. Summary.

<sup>96</sup> AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY. Over 75 Law Profs Call for Halt of ACTA. [online] <<http://wcl.american.edu/pijip/go/academics10282010>> [access: 7 November 2012].

<sup>97</sup> Ibid.

<sup>98</sup> ELECTRONIC FRONTIER FOUNDATION. Anti-Counterfeiting Trade Agreement (ACTA). What is ACTA? [online] <<https://www.eff.org/issues/acta>> [access: 9 November 2012]

<sup>99</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 16.

<sup>100</sup> WEATHERALL, KIMBERLEE. ACTA as a New Kind of International IP Law-Making. [online] PIJIP Research Paper No. 12., Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1013&context=research>> [access: 7 November 2012]. P. 2.

<sup>101</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 18.

According to several NGOs, ACTA would “have global consequences for digital freedoms”<sup>102</sup> as ACTA’s provisions would require to enact new IP enforcement measures that call for restrictive rules for the Internet, raising significantly the reasons to be concerned about users’ free speech, privacy, ability to innovate.<sup>103</sup> Many critics also raised concerns about the fact that the digital enforcement provisions of the ACTA would require Internet Service Providers (ISPs) to terminate customers’ Internet accounts after repeated allegations of copyright infringement. In the European Union these kind of provisions are controversial, because some members of Parliament consider Internet access to be a fundamental human right that should only be terminated by judges.<sup>104</sup> Other stakeholders, including some consumer rights, public health, and civil liberty groups, contend that the border enforcement provisions of ACTA, under which governments may give customs officials *ex-officio* authority to seize and detain goods suspected of infringing IPR, may interfere with trade in legitimate goods and consumer activity.<sup>105</sup> This concern was further spurred by the fact that the negotiations included discussions about whether or not to include patents in the border enforcement section, which led to concerns that the ACTA could undermine legitimate trade in generic medicines and public health.<sup>106</sup> In response to this criticism the European Commission published intensive explicatory material, which shows that most of the fears were unfounded as in fact ACTA would not alter already existing EU law.<sup>107</sup>

Although maybe not founded in well-studied facts and rather driven by an emotional debate, many considered ACTA as part of the “ratcheting-up” strategy and another example of regime shifting, a tactic of high importance in IP politics already explained at an earlier point of this paper. The “ratcheting-up” strategy was the denomination found for the (primarily U.S.)-strategy to increase international IP-protection by simply increasing the sheer number of free trade agreements (FTAs) that make use of TRIPS-plus-norms. Bilateral FTAs between developed countries, particularly the United States and European Union, and developing countries proliferated over the past decade, with many of them including „TRIPS-plus“-provision.<sup>108</sup> FTAs including IPR provisions were signed by the U.S. with 17 countries: Jordan, Singapore, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica,

<sup>102</sup> ELECTRONIC FRONTIER FOUNDATION. Anti-Counterfeiting Trade Agreement (ACTA). What is ACTA? [online] <<https://www.eff.org/issues/acta>> [access: 9 November 2012].

<sup>103</sup> Ibid.

<sup>104</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 19.

<sup>105</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 20.

<sup>106</sup> Ibid.

<sup>107</sup> EUROPEAN COMMISSION. Trade: ACTA. [online] < <http://ec.europa.eu/trade/tackling-unfair-trade/acta/>> [access: 7 November 2012].

<sup>108</sup> EL SAID, Mohammed. The Morning After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries. [online]. PIJIP Research Paper no. 2012-03, Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington D.C. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=research>> [access: 9 November 2012]. P. 3.

Morocco, Australia, Dominican Republic, Bahrain, Ecuador, Peru, Colombia, Oman, Panama and Korea.<sup>109</sup> Research has shown that the U.S. engaged in these negotiations with, in comparison to themselves, small economies with mostly little or modest resident patent activity (excepting Korea). This indicates an asymmetry of bargaining power between negotiating partners and the possibility of the U.S. to impose its interests in higher IP protection standards in those negotiations. With high probability this was the main strategic reason for the U.S. to place its focus on increasing IP protection by negotiating regional and bilateral trade agreements.<sup>110</sup> Although the trade agreements vary in the extent of IP protection that they provide, all of them include IPR protection and enforcement provision higher than the TRIPS-Benchmark.<sup>111</sup>

ACTA has been referred to as “TRIPS-plus-plus” agenda as it is the next level of raising international IP standards in new created forums after a decade of seeking to push for TRIPS-Plus provisions in FTAs and bilateral agreements.<sup>112</sup> Whereas TRIPS constitutes hard law, TRIPS-plus refers to the provisions included in various trade agreements and the TRIPS-Plus-Plus agenda incorporates norm- setting and soft law efforts.<sup>113</sup> ACTA is a plurilateral agreement that is narrowly focused on IPR and has been portrayed by the United States Trade Representative (USTR) as a leadership and standard-setting agreement, which furthermore gives the chance to expand the IP provisions of the trade agreements to a larger group of countries.<sup>114</sup> ACTA was a forum for the developed countries where they could advance outside of the WTO and WIPO with considerably less opposition<sup>115</sup> and additionally were outside of institutional checks-and-balances mechanisms built into these institutions<sup>116</sup>.

<sup>109</sup> UNITED STATES TRADE REPRESENTATIVE. (USTR). Free trade agreements [online] <<http://www.ustr.gov/trade-agreements/free-trade-agreements>> [access: 9 November 2012].

<sup>110</sup> ESCOBAR ANDRAE, Bernardita. North-South Bilateral Negotiations on Trade and Intellectual Property Protection: A political Economy Approach. Documentos de Trabajo: 24. Instituto de Políticas Públicas, Facultad de Economía y Empresa, Universidad Diego Portales. 2010. P. 34.

<sup>111</sup> Ibid.

<sup>112</sup> SELL, Susan. The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play. [online] PIJIP Research Paper No. 15, 2010, Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>> [access: 1st November 2012]. P. 3.

<sup>113</sup> SELL, Susan. The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play. [online] PIJIP Research Paper No. 15, 2010, Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>> [access: 1st November 2012]. P. 4.

<sup>114</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sfp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P.15.

<sup>115</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sfp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P.21.

<sup>116</sup> KAMINSKI, MARGOT. An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement. [online] PIJIP Research Paper No. 17, Program on Information Justice and Intellectual Property American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context=research>> [access: 7 November 2012]. P. 5.



The negotiating parties have from May 1, 2011, until May 1, 2013, to sign the agreement.<sup>117</sup> The EU<sup>118</sup>, Japan, Australia, Canada, Morocco, New Zealand, Singapore, South Korea and the U.S. have signed the agreement.<sup>119</sup> Mexico recently signed ACTA despite the earlier vote of the Mexican Senate to reject ACTA.<sup>120</sup> The agreement would enter into force thirty days after the deposit of the sixth instrument of ratification, acceptance, or approval.<sup>121</sup> At the moment, however, ACTA finds itself in a state of uncertainty because it raised legal challenges and question in many countries.<sup>122</sup>

The ratification process in the European Union, for example, was shaken by controversy and widespread protest of the civil society ever since it was negotiated and especially after the signature of the ACTA by the European Union and 22 representatives of European Union Member States in Tokyo on the 26th of January 2012.<sup>123</sup> Because of the widespread protests that ACTA caused, various EU member states decided in early 2012 to suspend their domestic ratification processes<sup>124</sup>, including Poland, Latvia, Bulgaria, the Czech Republic<sup>125</sup>, Germany<sup>126</sup>, Lithuania<sup>127</sup>, Slovakia<sup>128</sup>, Slovenia<sup>129</sup>, Romania<sup>130</sup>, Cyprus<sup>131</sup> and Austria<sup>132</sup>. On February 22, 2012, the European Commission reacted to these developments by placing the ACTA ratification process on hold.<sup>133</sup> Additionally, on the 10th May, the European

<sup>117</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sfp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 1.

<sup>118</sup> EUROPEAN PARLIAMENT. ACTA - EP's role. 27 January 2012 [online] <<http://www.europarl.europa.eu/news/en/headlines/content/20120127STO36430/html/ACTA-EP's-role>> [access: 9 November 2012].

<sup>119</sup> UNITED STATES TRADE REPRESENTATIVE (USTR). Anti-Counterfeiting Trade Agreement (ACTA). [online] <<http://www.ustr.gov/actahttp://www.ustr.gov/acta>> [access: 9 November 2012].

<sup>120</sup> INSTITUTO MEXICANO DE LA PROPIEDAD INDUSTRIAL. México firma el Acuerdo Comercial Contra la Falsificación (ACTA). [online]. Comunicado de Prensa IMPI-010/2012. <[http://www.impi.gob.mx/work/sites/IMPI/resources/LocalContent/3693/10/IMPI\\_010\\_2012.pdf](http://www.impi.gob.mx/work/sites/IMPI/resources/LocalContent/3693/10/IMPI_010_2012.pdf)> [access: 9 November 2012].

<sup>121</sup> Art. 40: Entry into Force. Text on ACTA available at: <[http://www.mofa.go.jp/policy/economy/i\\_property/pdfs/acta1105\\_en.pdf](http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf)>

<sup>122</sup> TECHDIRT. EU, Mexico & Switzerland Will Not Sign ACTA This Weekend, Despite The 'Signing Ceremony'. 29 September 2012 [online] <<http://www.techdirt.com/articles/20110929/00562116128/eu-mexico-switzerland-will-not-sign-acta-this-weekend-despite-signing-ceremony.shtml>> [access: 9 November 2012].

<sup>123</sup> EUROPEAN PARLIAMENT. ACTA - EP's role. 27 January 2012 [online] <<http://www.europarl.europa.eu/news/en/headlines/content/20120127STO36430/html/ACTA-EP's-role>> [access: 9 November 2012].

<sup>124</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sfp/crs/misc/R41107.pdf>> [access: 7 November 2012]. Summary.

<sup>125</sup> RT. EU suspends ACTA ratification, refers treaty to court. 22 February 2012 [online] <<http://rt.com/news/eu-suspends-acta-ratification-955/>> [access: 9 November 2012].

<sup>126</sup> EU OBSERVER. German government suspends ACTA ratification. 10 February 2012 [online] <<http://euobserver.com/tickers/115223>> [access: 9 November 2012].

<sup>127</sup> THE BALTIC COURSE. Lithuania on Wednesday became the latest European country to suspend ratification of the controversial Anti-Counterfeiting Trade Agreement, amid fears it could hit Internet freedom. 16 February 2012 [online] <<http://www.baltic-course.com/eng/Technology/?doc=53202>> [access: 9 November 2012].

<sup>128</sup> ZDNET. Czechs, Slovaks join Poland in pausing ACTA process. 8 February 2012 [online] <<http://www.zdnet.com/czechs-slovaks-join-poland-in-pausing-acta-process-4010025374/>> [access: 9 November 2012].

<sup>129</sup> TECHDAILY. Slovenia suspends the ratification of ACTA. 16 March 2012 [online] <<http://www.techdaily.eu/articles/news/slovenia-suspends-the-ratification-of-acta-192.html>> [access: 9 November 2012].

<sup>130</sup> ROMANIAN TIMES. Romania suspends ACTA. 23 February 2012 [online] <[http://www.romaniantimes.at/news/General\\_News/2012-02-23/19950/Romania\\_suspends\\_ACTA](http://www.romaniantimes.at/news/General_News/2012-02-23/19950/Romania_suspends_ACTA)> [access: 9 November 2012].

<sup>131</sup> CHETCUTI CAUCHI. Cyprus suspends ratification of ACTA Treaty. 18 September 2012 [online] <[http://www.ccmalta.com/news/cyprus\\_acta\\_treaty](http://www.ccmalta.com/news/cyprus_acta_treaty)> [access: 9 November 2012].

<sup>132</sup> DER STANDARD. Österreich setzt ACTA-Entscheidung aus. 22 February 2012. [online] <<http://derstandard.at/1329870018080/EuGH-prueft-Oesterreich-setzt-ACTA-Entscheidung-aus>> [access: 9 November 2012].

<sup>133</sup> EURACTIV. EU suspends ACTA ratification. 23 February 2012 [online] <<http://www.euractiv.com/infosociety/eu-suspends-acta-ratification-news-511054>> [access: 9 November 2012].

Commission submitted a request for an opinion on ACTA to the European Court of Justice, which is still pending and shall determine if the ACTA is compatible with EU law.<sup>134</sup> On the 4<sup>th</sup> of July 4, 2012, the European Parliament voted to reject ACTA in its current form.<sup>135</sup> Switzerland hereupon postponed the signature of the Anti-Counterfeiting Trade Agreement (ACTA) until it has more information from several on-going processes in Europe, like for example the future procedures in the five EU member states, which have delayed the signing of ACTA and/or the outcome of the European Commission's referral of ACTA to the European Court of Justice.<sup>136</sup> Japan is the only country that recently managed to finalise the ratification process, amongst accusation of using undemocratic procedures.<sup>137</sup> Even the U.S., who stated that U.S. Free Trade Agreements (FTA) served as model for ACTA<sup>138</sup>, is currently dealing with some legal issues concerning ACTA. In the United States, President Barack Obama signed ACTA as an "executive agreement," which means that the agreement would not be subject to congressional approval.<sup>139</sup> However, the legitimacy of this process was contested by the Congress and led to a stalemate between the U.S. administration and legislators about ratification procedures.<sup>140</sup>

The ACTA agreement and the events surrounding it are very interesting, as one would not expect rejection of an agreement aimed at increasing IPR protection and enforcement by one of the most important advocates of the TRIPS-plus agenda internationally: Europe. To highlight this observation, the following part will outline the general direction IP Politics took in the years since TRIPS until ACTA in the European Union.

### 2.3. European IP Strategy: Is there a Policy Change?

Whereas directly after the conclusion of the TRIPS agreement the most contested IPR issue took place in the field of patents in biodiversity, medicine and pharmaceuticals, the new "IPR battles", like ACTA, revolve around the protection of copyright and trademarks in the digital environment. As the ACTA agreement is one of the main foci of analysis in this thesis, the emphasis in this brief analysis of the European IP strategy will be put on Copyright.

<sup>134</sup> EUROPEAN COMMISSION TRADE COMMITTEE. European Commission officially referred ACTA to the European Court of Justice. 11 Mayo 2012. [online] <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=799>> [access: 9 November 2012].

<sup>135</sup> EUROPEAN PARLIAMENT. European Parliament rejects ACTA. 4 July 2012. [online] <<http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>> [access: 9 November 2012].

<sup>136</sup> SCHWEIZERISCHE EIDGENOSSSCHAFT. Schweiz wartet mit der Unterzeichnung des ACTA-Abkommens. 9 May 2012 [online] <<http://www.news.admin.ch/message/index.html?lang=de&msg-id=44484>> [access: 9 November 2012].

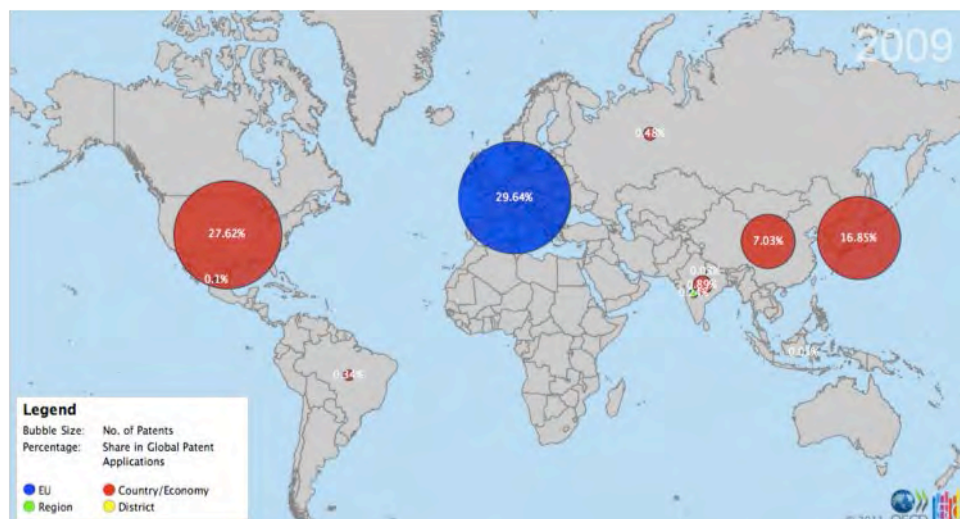
<sup>137</sup> INTELLECTUAL PROPERTY WATCH. ACTA: Will It Ever Become A Valid International Treaty? 13 September 2012 [online] <<http://www.ip-watch.org/2012/09/13/acta-will-it-ever-become-a-valid-international-treaty/>> [access: 9 November 2012].

<sup>138</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 14.

<sup>139</sup> SHAYERAH, Ilias. The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues. [online] Congress Research Service, 7-5700, R41107, CRS Report for Congress, Prepared for Members and Committees of Congress <<http://www.fas.org/sgp/crs/misc/R41107.pdf>> [access: 7 November 2012]. P. 11.

<sup>140</sup> INTELLECTUAL PROPERTY WATCH. ACTA: Will It Ever Become A Valid International Treaty? 13 September 2012 [online] <<http://www.ip-watch.org/2012/09/13/acta-will-it-ever-become-a-valid-international-treaty/>> [access: 9 November 2012].

In general it can be said, that the European Union (EU) belongs to the group of actors seeking strong IPR protection and enforcement, alongside with the U.S. and Japan.<sup>141</sup> The quite obvious reason for that is that almost one third of all patent applications in the world are generated in Europe, as the following graph shows:



**Figure 5: Regional Innovation Mapper**

Source: ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). Regional Innovation Mapper, 2009. [online] <<http://oecdwash.org/innovationmapper/>> [access: 9 November 2012].

This clearly leads to a strong interest in the protection of European IPRs worldwide, although the innovation activity and patenting is not spread evenly in the European Union.<sup>142</sup> IPRs are important for Europe in order to protect its innovations and remain competitive in the global economy.

EU policy on Copyright began to move forward in 1998 with the publication of a “Green Paper on Copyright and the Challenge of Technology”. Back then, copyright was a new policy area for the European Commission. Before these first initiatives, the Berne Convention, TRIPS and the so-called Copyright Treaty and Performances and Phonograms Treaty that were governed by the WIPO basically determined EU copyright policy.<sup>143</sup> In order to justify the own mandate, the EU argued that copyright may be used against specific goods and services for remuneration, which would make it part of the Single Market regulatory area. This furthermore established EU copyright as an economic, and not cultural topic. The

<sup>141</sup> WEATHERALL, KIMBERLEE. ACTA as a New Kind of International IP Law-Making. [online] PIJIP Research Paper No. 12., Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1013&context=research>> [access: 7 November 2012]. P. 4.

<sup>142</sup> South Germany, Switzerland and the Netherlands are the regions that file most international patent application. Patent intensity is also high in Southern Sweden, Finland, in the Paris Region and in Rhone-Alpes. Source: ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). Regional Innovation Mapper, 2009. [online] <<http://oecdwash.org/innovationmapper/>> [access: 9 November 2012].

<sup>143</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215pp. P. 56.

proclaimed aim was to reach a harmonisation of copyright and neighbouring right across the EU.<sup>144</sup> From that moment on the constant argumentation of the EU consisted in affirming that piracy causes distortion of competition in the Internal Market, because of the unauthorized cheaper copies in those member states with weak IPR protection and enforcement mechanisms. Furthermore it was called for stronger enforcement measures, including criminal sanctions, search and seizure provisions and cooperation between the right-holders and public authorities. The green paper established the way of thinking about copyright in the EU.<sup>145</sup>

A great influence on the direction European copyright law took in the following years stems also from the Bangemann Report. In December 1993, the European Council requested a report on the specific measures to be taken into consideration by the Community and the Member States in the wake of the emerging Information Society. The Report was prepared by a group of prominent persons, chaired by Martin Bangemann (European Commissioner for Industrial affairs and information and telecommunications technologies) and included a number of specific recommendations concerning new challenges that had come up in the new era of the Information Society.<sup>146</sup> Some of these recommendations also address IPR issues, stating that as the European Community is moving into the information society, a regulatory response in key areas like intellectual property, privacy and media ownership is required at the European level. The Bangemann Report recommended that future action should be aimed at establishing a common and agreed regulatory framework for the protection of intellectual property rights, privacy and security of information, in Europe and, where appropriate internationally.<sup>147</sup> Guided by these recommendations, a number of Directives<sup>148</sup> concerning Copyright or other IP-related issues were agreed upon in the following years:

- Computer Program Directive (1991)
- Rental and lending rights directive (1992)
- Satellite and Cable Directive (1993)
- Term Directive (1993, but after amendments the last version is from 2006)
- Database Directive (1996)

<sup>144</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the "Telecoms Package". Palgrave Macmillan, 2011. 215pp. P. 57.

<sup>145</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the "Telecoms Package". Palgrave Macmillan, 2011. 215pp. P. 58.

<sup>146</sup> EUROPEAN COMMISSION. EU: Europe and the Global Information Society (Bangemann Report), 1994. [online] <<http://www.epractice.eu/en/library/281360>> [access: 12 November 2012].

<sup>147</sup> EUROPEAN COMMISSION. EU: Europe and the Global Information Society (Bangemann Report), 1994. [online] <<http://www.epractice.eu/en/library/281360>> [access: 12 November 2012]. P. 17.

<sup>148</sup> Directives are only addressed to the Member States. They require an implementation into national law and are legally binding only in respect of the result to be achieved, rather than in respect of the form and methods of their implementation. Source: WALTER, Michel M. and VON LEWINSKI, Silke. European Copyright Law: A Commentary. New York, Oxford University Press, 2010. 1525p. P. 14.

- Resale Directive (2001)
- Information Society Directive (2001)
- Enforcement Directive (2004)
- Product Piracy Regulation
- Access Control Directive (1998)

An interesting insight on the direction European Copyright Law is taking can be drawn for example from the Term Directive. The Term Directive established that the term of protection of copyright and certain related rights should run for the life of the author and for 70 years after his death.<sup>149</sup> In point 11 of the preamble it is furthermore explicitly established that “the level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.”<sup>150</sup> The Term Directive goes far beyond the minimum term of 50 years laid down in the Berne Convention and indirectly in the TRIPS agreement.<sup>151</sup> It shows that in Europe the idea consisted in introducing high terms of protection, following the example of some Member States, which already applied elevated levels of protection.<sup>152</sup> In 2000, the Information Society Directive was the first directive addressing the phenomenon of global networks and structures of communication created by new technologies, which was denominated “information society”<sup>153</sup>. Similarly, The Product Piracy Regulation and its many amendments step by step broadened the scope of the regulations and went beyond Article 51 of the TRIPS Agreement (which requires customs action to be taken only on goods being imported).<sup>154</sup> All these legal initiatives show the commitment of the European Community to strengthen and continuously broaden the scope of IP protection and enforcement. The eagerness to establish an effective IP protection and enforcement framework for the European Community is has also manifested in the “Europe 2020”-strategy, established in 2010.<sup>155</sup> This mid-term growth strategy stipulates the aim of achieving a “smart, sustainable and inclusive” growth in the coming years and establishes as a priority the development of an

<sup>150</sup> Text available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT>>

<sup>151</sup> WALTER, Michel M. and VON LEWINSKI, Silke. *European Copyright Law: A Commentary*. New York, Oxford University Press, 2010. 1525p. P. 515.

<sup>152</sup> When the Directive was enacted, Germany (70 years), Austria (70 years), France (70 years for musical works without text), Spain (60 years), Belgium (80 years) and Greece (70 years) already provided for longer regular terms of protection than the minimum standards of the Berne Convention. Source: WALTER, Michel M. and VON LEWINSKI, Silke. *European Copyright Law: A Commentary*. New York, Oxford University Press, 2010. 1525p. P. 515.

<sup>153</sup> WALTER, Michel M. and VON LEWINSKI, Silke. *European Copyright Law: A Commentary*. New York, Oxford University Press, 2010. 1525p. P. 937.

<sup>154</sup> WALTER, Michel M. and VON LEWINSKI, Silke. *European Copyright Law: A Commentary*. New York, Oxford University Press, 2010. 1525p. P. 1374.

<sup>155</sup> EUROPEAN COMMISSION. *EUROPE 2020 A strategy for smart, sustainable and inclusive growth*. 3 March 2010 [online] Communication from the Commission COM(2010) 2020. <[ec.europa.eu/europe2020/](http://ec.europa.eu/europe2020/)> [access: 12 November 2012].

economy based on knowledge and innovation.<sup>156</sup> As R&D spending in Europe is below 2% it is concluded that Europe needs to focus on improving the conditions for private sector R&D. An initiative called “Innovative Union” with the overall goal to improve the framework conditions for businesses to innovate. The measures aimed at include<sup>157</sup>:

- creating a single EU Patent and a specialised Patent Court,
- modernising the framework of copyright and trademarks,
- improving access of small and medium-sized enterprises (SMEs) to IP Protection
- speeding up the setting of interoperable standards
- improving access to capital and
- making full use of demand side policies, e.g. through public procurement and smart regulation

The argumentation and vocabulary of this strategy shows that the Natural Rights View, consisting in a focus on capitalizing the IP assets produced within EU borders, underpins the IP Strategy of the European Community –at least regarding the official discourse. Innovation is seen as the raw material of Europe<sup>158</sup>, which is threatened by the increase in counterfeit and piracy products trade in the EU.<sup>159</sup> Therefore the Commission is currently campaigning for the introduction of a Community patent system, which would have the advantage of being less costly and more legally effective, “as a guarantee of competitiveness for European industry“. The European Union possesses two important bodies that are active in IP protection: the Office for Harmonisation in the Internal Market (OHIM), which is responsible for the registration of Community trademarks and designs, and the European Patent Office (EPO).<sup>160</sup> The rejection of the ACTA agreement by the European Parliament, which would have been in line with the strategy, stands therefore in contrast to strategies that has been pronounced in the last years by the European Union. This change in standpoint will be the starting point of the further analysis of this paper, revolving around finding explanations in the interest group system factors for this change in standpoint of the EU concerning international IP negotiations.

<sup>156</sup> EUROPEAN COMMISSION. EUROPE 2020 A strategy for smart, sustainable and inclusive growth. 3 March 2010 [online] Communication from the Commission COM(2010) 2020. <[ec.europa.eu/europe2020/](http://ec.europa.eu/europe2020/)> [access: 12 November 2012]. P. 3.

<sup>157</sup> EUROPEAN COMMISSION. EUROPE 2020 A strategy for smart, sustainable and inclusive growth. 3 March 2010 [online] Communication from the Commission COM(2010) 2020. <[ec.europa.eu/europe2020/](http://ec.europa.eu/europe2020/)> [access: 12 November 2012]. P. 10.

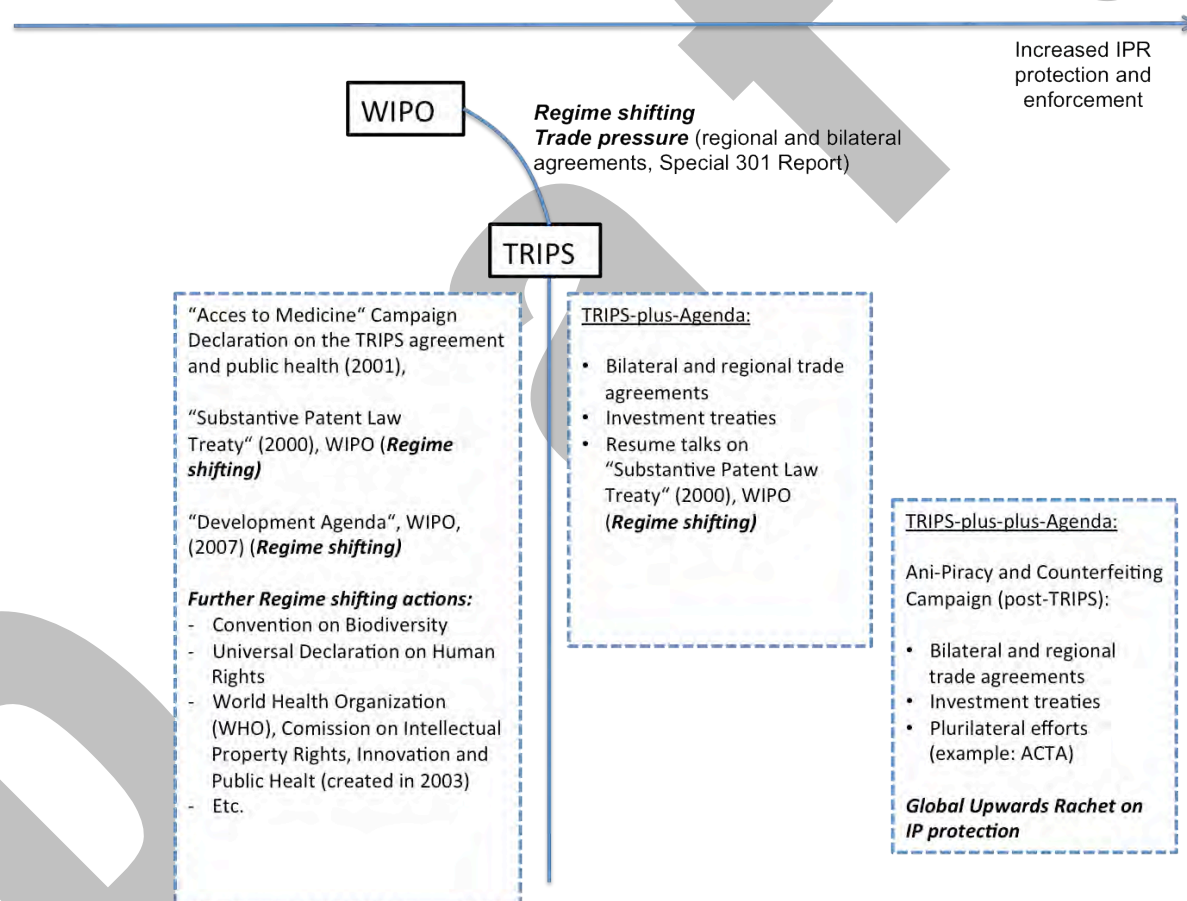
<sup>158</sup> EUROPEAN COMMISSION. Trade: ACTA. [online] < <http://ec.europa.eu/trade/tackling-unfair-trade/acta/>> [access: 7 November 2012].

<sup>159</sup> According to the EU's national customs authorities, counterfeit goods entering the EU have tripled between 2005 and 2010. Source: EUROPEAN COMMISSION. Detention of counterfeit and pirated goods 2010: Frequently asked Questions. [online] <[http://europa.eu/rapid/press-release\\_MEMO-11-506\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-506_en.htm?locale=en)> [access: 12 November 2012].

<sup>160</sup> EUROPEAN COMMISSION. Summaries of EU legislation. [online] Intellectual Property. <[http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/index_en.htm)> [access: 12 November 2012].

## 2.4. Summary and Research Questions

In this first Chapter it was established that international IPR protection and enforcement has become a widely discussed international policy issues in the last two decades. It has evolved from being a merely legal-technical issue into a highly politicized global policy issue, sparking the interest of a great range of different stakeholders. As a consequence, the number and variety of interest groups seeking to influence IP policy outcomes has risen. The point of departure for the on-going contestation that characterizes IP Politics is the TRIPS agreement concluded in 1994. From the TRIPS agreement until now, two big categories of Interest Groups have been very eager to achieve favourable outcomes for them, applying different sets of strategies in following their respective agendas, as the following overview summarizes:



**Figure 6: Overview of IP Politics**  
Source: Own Illustration.

The fact that the European Parliament rejected ACTA in 2012, an agreement that sought to continue the strategy regarding IPR protection and enforcement followed by the EU in the last years, constitutes a "policy phenomenon" that leads to the question of the causal factor for this development. The EU started the ACTA negotiations with the intention to carry out its IPR strategy on a more plurilateral level, but saw their negotiated provisions gradually



watering-down due to the pressure of opposed interest groups.<sup>161</sup> ACTA not only seems to break with the consistency that characterized the EU IP strategy as part of Europe's orientation towards innovation, but also with the tradition that in EU politics private companies constitute strong interest groups, well-connected with the world of politics and equipped with a lot of resources to conduct their tactics and strategies. How come, then, that the opposing interest groups achieved the rejection of ACTA, when they had so many obstacles to overcome? It seems as if the interest group constellation in terms of who has an impact on policy making has fundamentally changed since the TRIPS agreement. But what were the conditions that made this change possible? This research question shall be addressed by applying Interest Group Theory, trying to identify theoretical frameworks that help to address the "ACTA phenomenon". The following second chapter will be dedicated to the revision of interest group theory in order to establish a theoretical framework for the further development of this paper.

### 3. Interest Group Theory

There is a wide array of scholars that agree that it is important to have an understanding of interest groups in order to explain policy outcomes. The influence of interest groups is an especially important factor when anticipating the political feasibility of an outcome.<sup>162</sup> The growing activity of interest groups in the field of IP negotiations and IPR law making has been outlined in the previous chapter about the evolution of IP politics. The ACTA rejection by the European Parliament, for example, was a case where interest group action in the ratification stages turned the agreement into an unfeasible one for the members of the European Parliament. The significance of this occurrence lies in the fact that the ACTA rejection constitutes a move away from traditional EU IP strategy, which repeatedly has been laid down and reflected in various policy papers and legislative initiatives over the past two decades. This raises questions about the underlying processes that generated this somewhat startling change in tendency. Although it could be argued that the rejection of ACTA on merely legal terms did not have implications that alter the status quo, it does seem to constitute a change in interest representation of the EU concerning international IP law-making. This paper parts with the premise that interest group dynamics can serve as explanatory factor for international IP negotiations outcomes like TRIPS and ACTA. In order to understand how these interest groups dynamics are generated and in turn affect the political process, the following chapter will draw on interest group theory in order to find an

<sup>161</sup> WEATHERALL, KIMBERLEE. ACTA as a New Kind of International IP Law-Making. [online] PIJIP Research Paper No. 12., Program on Information Justice and Intellectual Property, American University Washington College of Law, Washington, DC. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1013&context=research>> [access: 7 November 2012]. P. 4.

<sup>162</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. 12p. P 1.



adequate theoretical framework that allows addressing the theoretical findings to the TRIPS and ACTA negotiation and thereby gain insights on interest group action, participation and influence in international IP negotiations.

In general it can be said, that the theoretical and empirical analysis of interest groups is divided into two major themes: The first one considers the formation and maintenance of interest groups and the second one considers their role and impact on public policy making, investigating the patterns of relationships among governmental agents and interest groups, how interest groups gain access to policy makers and the extent to which they exert influence.<sup>163</sup> For this paper the focus will lie on the second theme of the theoretical and empirical findings of interest group literature and focus on the different interest group systems that can evolve once interest groups have formed. Collective action theory is always essential when looking at interest groups and will to some extent also be addressed for this paper. The main focus in order to address the laid down research question, however, will lie in getting an understanding about interest group influence once interest group have already overcome collective-action hurdles and obstacles.

### 3.1. Interest Group Definition and Concept

Until today many approaches that include interest group concepts have evolved. Depending on the area of research or the approach the concept is embedded in, different synonyms for the term “interest group” are used, for example: political interest group, interest associations, interest organizations, organized interest, special interest group, citizen groups, public interest groups, non-governmental organizations, social movement organizations, pressure group, public interest group and civil society organization.<sup>164</sup> Concepts vary from each other by attributing different characteristics to interest groups. The three following features, however, are included in the all definitions<sup>165</sup>:

- (1) Organization: This feature relates to the organized nature of the group and therefore excludes broad movements or waves of public opinion that can also potentially influence policy outcomes

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<sup>163</sup> GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander, SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 287.

<sup>164</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 4.

<sup>165</sup> In the following: BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 4-5.

- (2) Political Interest: this feature refers to the attempt of interest groups to influence policy outcomes.
- (3) Informality: this feature relates to the fact that interest groups do not seek public office or political election, which does not exclude that they seek frequent interaction with politicians.

The concept of interest group can be misleading, as not all interest group scholars study groups as such. Actors that might be considered in studies about interest groups can also be institutions (like hospitals, school or universities), firms or local governments. The decisive factor in order to fall under the interest group concept is to comply with all three features mentioned above.<sup>166</sup> Other definitions are much more narrow, like for example the definition of the Handbook of Political Sociology which defines “any political actor, usually consisting of a formally structured organization with a bounded membership and distinct leadership and participatory rules, whose goals include seeking to influence public policy-making activities of elected or appointed public official”<sup>167</sup> as an interest group. For the purposes of this paper it is not estimated as useful to use a narrow definition including specific features relating to the level of organization (membership, distinct leadership and participatory rules), as in the EU significant numbers of direct membership organizations only exist in the business domain, where some associations admit companies.<sup>168</sup> Furthermore informal cliques or coalitions may also function as less-organized interest groups<sup>169</sup> and therefore should not be excluded. For the further development of this paper the more common term “interest group” will be used, always if the features organization, informality and political interest are in some form or another given. It is furthermore important to differentiate between organized interests and latent interests. Latent interests are interests that are present in society, but not represented by a formal organized interest group, or in other words, not actively trying to achieve some kind of political objective. However, organized interest groups can intent to retrieve legitimacy, participation, funds and public support as valuable resources from these latent interest groups.<sup>170</sup> A latent interest group can become an organized interest groups by

<sup>166</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. *Interest Group Politics in Europe*. Oxon, New York, Routledge, 2010. 199p. P. 6.

<sup>167</sup> GRANADOS, Francisco J. and KNOKE, David. *Organized Interest Groups and Policy Networks*. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 287.

<sup>168</sup> GREENWOOD, Justin. *Interest Presentation in the European Union*. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.14.

<sup>169</sup> GRANADOS, Francisco J. and KNOKE, David. *Organized Interest Groups and Policy Networks*. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 287.

<sup>170</sup> GRANADOS, Francisco J. and KNOKE, David. *Organized Interest Groups and Policy Networks*. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 288.

entering into the political process. An example would be a swimming club, which starts lobbying the local governments in order to obtain subsidies for maintaining the club.<sup>171</sup> As soon as this swimming club stops its lobbying activities, its status would return to being a latent interest group instead of an organized interest group. Also not included in the definition of an organized interest group are apolitical associations with religious, fraternal, philanthropic, self-help or recreational purposes. Only if these voluntary organisations start to pursue political objectives they would then be classified as organized interest groups.<sup>172</sup>

Many scholars make a differentiation between interest groups and social movement organizations (SMOs) or civil society organisation, claiming that these represent forms of collective action with distinct characteristics. Typically, those kinds of organizations consist in a group of activists who advance the claims of powerless or unrepresented constituencies in order to challenge powerholders and promote or resist social change. The strategies they use include demonstrations, public proclamation of grievances in the mass media, lobbying or hiring consultants to write impact report.<sup>173</sup> Also seen as conceptually divergent is the term “special interest groups”. This term usually refers to organized interest groups that represent a narrow faction of the body politic. Often they are considered to be threatening the more general interest as they are seen to mobilise and influence government policies more effectively as diffuse interests.<sup>174</sup> For the further development of this paper it will be avoided to use these terms as they often seem to have some kind of normative undertone<sup>175</sup> and it is not seen as offering any further advantage to make this distinction.

### **3.2. Participation of interest groups in the policy process**

In advanced democracies, an understanding of the interest groups system is crucial to the understanding of the political process and has furthermore grown in importance in today's era of increased supranational policy networks<sup>176</sup> and growing participation of interest groups in the policymaking process.<sup>177</sup> In order to understand modern findings of interest group theory, however, it is important to understand the classical theories of the role interest groups have in the political process and the dynamics of differing interest group systems, as they are

<sup>171</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. *Interest Group Politics in Europe*. Oxon, New York, Routledge, 2010. 199p. P. 5.

<sup>172</sup> GRANADOS, Francisco J. and KNOKE, David. *Organized Interest Groups and Policy Networks*. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 288.

<sup>173</sup> Ibid.

<sup>174</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. *Interest Group Politics in Europe*. Oxon, New York, Routledge, 2010. 199p. P. 7.

<sup>175</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. *Interest Group Politics in Europe*. Oxon, New York, Routledge, 2010. 199p. P. 7.

<sup>176</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. *Interest Group Politics in Europe*. Oxon, New York, Routledge, 2010. 199p. P. 2.

<sup>177</sup> GROSSMANN, Gene M. y HELPMAN, Elhanan. *Interest Groups and Trade Policy*. New Jersey, Woodstock and Oxfordshire, Princeton University Press, 2002. 255p. P. 1.

often implicitly incorporated in newer research models.<sup>178</sup> The following subchapter will therefore be dedicated to the foundational approaches of interest group systems.

### 3.2.1. Foundational approaches on interest group systems

The theory of interest groups is a field of Political Science that compared to other areas, like for example electoral, legislative and party politics, is relatively small and has a niche status.<sup>179</sup> Nonetheless, it is relevant and researched in many fields: economics, sociology and in various subbranches of political science like industrial relations and social movement research, amongst others.<sup>180</sup> Big part of the research on interest groups is conducted in the U.S., where the importance of interest groups for the political process is considered to be very high. In fact, one of the first theoretical approaches concerning interest groups is included in “The Federalist Paper Number 10” by James Madison (U.S. president from 1809-1817). Referring to interest groups as “factions”, he defines them as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”<sup>181</sup>. He also states that: “the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society” and therefore astonishingly well fits as starting point for the application of interest group theory to IP Politics. Although Madison revealed a negative perception of interest groups (“factions”) in his work, he opposed the idea of banning them, as this would destroy the liberty of the democratic political system.<sup>182</sup> These considerations are the roots of what should later become the “pluralist” theory in political science, represented by scholars like Bentley, Truman and Dahl.

As early as 1908 Arthur Bentley recognized the importance of interest groups for the political process in democratic societies claiming that “all phenomena of government are phenomena of groups pressing one another, forming one another, and pushing out new groups and group representatives (the organs or agencies of government) to mediate the adjustments. It is only as we isolate these group activities, determine their representative values, and get the whole process stated in terms of them, that we approach to a satisfactory knowledge of

<sup>178</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 2.

<sup>179</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 1.

<sup>180</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 2.

<sup>181</sup> MADISON, James. The Federalist, Paper Number 10. The McGraw-Hill Companies, 1987. [online] <<http://www.glencoe.com/sec/socialstudies/btt/celebratingfreedom/pdfs/045.PDF>> [access: 13 November 2012]. P. 1.

<sup>182</sup> Ibid.

government".<sup>183</sup> He therefore makes interest groups the central component of the political process. After the Second World War, Truman took Bentley's idea of the central role of interest groups in the political process and developed them further.<sup>184</sup> Truman's work<sup>185</sup> became famous as it sparked the beginning of the "pluralist discussion" in the context of which Truman and other scholars like Dahl and Lindblom<sup>186</sup> established in the 1950s and 60s a theory of power in American politics that puts a focus on the pluralist nature of the political process.<sup>187</sup> According to them, democracies are made up out of different interest groups that organize in order to participate in the political process by competing with each other. Policy decisions result from complex interactions and bargaining within the different sets of groups. These dynamics can be seen as analogous to a market place where many preferences on each policy issue are represented by organized interest groups. In these dynamics the resources of the different interest groups obviously decide about the capability to influence, however they do not necessarily have to be just material resources. The government has the rather minor role of arbitrating the competition between the different organized interest groups. Certain institutional checks-and-balances will prevent any group from becoming too powerful or dominating.<sup>188</sup>

This so-called "classical pluralism" was criticised in the following years by other scholars for a variety of reason, the most important one being that the model was based on the presumption of perfect competition between the active organized interest groups and that it does not sufficiently take into account governments capacity to make decisions independently of group influences.<sup>189</sup> The elite pluralist model developed by Marsh, for example, incorporated the criticism that not all citizens may be represented in the interest group system and that groups might be less open and responsive to their members than the classical pluralists assumed, or in other words: some people and groups have more power than others. Authors like Richardson and Jordan<sup>190</sup>, Lowi<sup>191</sup>, McConnell<sup>192</sup> and Dahl

<sup>183</sup> BENTLEY, Arthur F. *The Process of Government: A Study of Social Pressures*. Chicago, University of Chicago Press, 1908. 494p. P. 269.

<sup>184</sup> LAVAQUE-MANTY, Mika. Bentley, Truman and the study of groups. *Annual Review of Political Science* Vol. 9:1–18, 2006. P. 1.

<sup>185</sup> TRUMAN, David B. *The Governmental Process: Political Interests and Public Opinions*. Westport, CT, Greenwood Press, 1951.

<sup>186</sup> DAHL, Robert A. and LINDBLOM, Charles E. *Politics, Economics and Welfare*. Chicago, IL. University of Chicago Press, 1976.

<sup>187</sup> MCFARLAND, Andrew S. Interest Groups and Theories of Power in America. *British Journal of Political Science* 17: 129–147, 1987. P. 129.

<sup>188</sup> GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 289.

<sup>189</sup> For further details see: GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. *A Handbook of Political Sociology: States, civil societies and globalization*. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 290.

<sup>190</sup> RICHARDSON, Jeremy J. and JORDAN, Grant A. *Governing under pressure*. Oxford, Martin Robertson, 1979.

<sup>191</sup> LOWI, Theodore J. The public philosophy: Interest-group liberalism. *American Political Science Review* Vol LXI (1):5–24, 1967.

<sup>192</sup> MCCONNEL, Grant. *Private Power and American Democracy*. New York, Alfred A Knopf, 1966.

transformed the original model into the neo-pluralist approach.<sup>193</sup> The neo-pluralist model differs from the original by pointing out that because of insufficient countervailing powers and higher structural power in the capitalist economy, the policy agenda is dominated by business interests, excluding the general public's interests and reinforcing social inequalities.<sup>194</sup> The neo-pluralist model therefore responds to the criticism of the perfect competition assumption of classical pluralism. However the minor role of the government in the political process stayed the distinctive feature of pluralism.

Another very influential publication that made the classical pluralism seem to some extent implausible was the one by Mancur Olson, who in his book 'The Logic of Collective Action: Public Goods and the theory of groups' established a set of hypothesis that to some extent persist until today. Olson's work can be interpreted as challenging the pluralist argument, that organized interest group action will form almost automatically. According to Olson, widely shared interests have less probability to be organized, because from the rational cost-benefit calculation of each individual it is not beneficial to incur the time and monetary costs of the immense task of organizing a group for the representation of this interest. Secondly, in the case of a group producing public goods, some member will act as "free riders", because of a lack of incentive to contribute to the organization of the group, considering that they will receive the benefit anyway. This "free-rider"-problem can lead to a loss of influence of the interest group. Considering the first two points Olson concludes that in contrast to big groups, small interest groups are less prone to high organizational costs and to free-riding and therefore tend to be better organized.

Although Olson's work had a huge impact on interest group theory, the limits of his hypothesis became visible in the 1970s when huge interest groups claiming to represent the interest of civil society grew in number and could not be rationalized as anomalous, like Olson could do in 1965 when their number was considerably smaller.<sup>195</sup>

Other theories that were developed in order to explain the role of organized interest groups in policymaking processes included the Marxist theory and the class-dominance-model.<sup>196</sup> Both of these theories focus on the extraordinary political power provided by the ownership over

<sup>193</sup> GRANADOS, Francisco J. & KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press. 2005. 670p. P. 290.

<sup>194</sup> GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 290.

<sup>195</sup> HOJNACKI, Marie, KIMBALL, David C., BAUMGÄRTNER, Frank R., BERRY, Jeffrey M., LEECH, Beth L. Studying Organizational Advocacy and Influence: Re-examining Interest Group Research. *Annual Review of Political Science* 15: 9.1–9.21, 2012. P. 9.4.

<sup>196</sup> For more information see: GRANADOS, Francisco J. & KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press. 2005. 670p. P. 290-293.

means of production, class conflict and the issue of inequality in liberal democracies and developed a theory about the influence of different group along these lines.<sup>197</sup> However, instead of going into more detail about these different explanatory models and their exact differences, it is considered more important at this point to signal that in the 1970s and 1980s the overall perspective changed from a pluralist view on interest organizations to a neo-, functional and liberal corporatism paradigm, developed as a European and class-based antipode to the American pluralist approach.<sup>198</sup> In the light of new empirical study findings on policy networks that revealed strong involvement of business organizations as well as labour unions in many policy areas, the research perspective switched from the question about the influence of interest groups on politics to the question of push and pull between the state and interest groups. Interest groups like unions and employers' organizations were seen as embedded in a tripartite relationship with the state<sup>199</sup> coming to agreements in a cooperative way. Under corporatist forms of interest representation the state recognizes representational monopolies of interest groups in exchange for certain state controls over the groups' leadership recruitment and interest articulation.<sup>200</sup> The interest groups therefore take the role of supplementing or replacing other representation forms like for example political parties or parliament.<sup>201</sup> This new approach of studying interest groups went beyond the study of the internal organization of interest groups (like for example the work of Olson) and was dedicated to exploring the relations of interest groups with the state and its impact on policymaking.<sup>202</sup> The distinct feature of this approach is the state's leadership role in mediating interest group participation in the political process, which is in stark contrast to the minor role attributed to governments in the political process by pluralist approaches. The interest groups become explicitly incorporated into the political process as agents with responsibility concerning a certain public issue.<sup>203</sup> Corporatist approaches are particularly common in issue areas like incomes policies and economic planning, while pluralism prevails

<sup>197</sup> For more information see: GRANADOS, Francisco J. & KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press. 2005. 670p. P. 293.

<sup>198</sup> EISING, Rainer. Clientelism, Committees, Pluralism and Protests in the European Union: Matching Patterns? In: BEYERS, Jan; EISING, Rainer; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. Pp. 64-85. P. 68.

<sup>199</sup> WESSELS, Bernhard. Systems of Economic Interest Groups and Socio-Economic Performance. Paper prepared for delivery at the 1996 Annual Meeting of the American Political Science Association, The San Francisco Hilton and Towers, August 29-September 1, 1996; Division 25 „Comparative Politics of Advanced Industrial States, Panel 25-12 „Liberalization and National Organizational Responsiveness. [online] <<http://www2000.wzb.eu/~wessels/downloads/apsa1b.pdf>> [access: 15 November 2012]. P. 1.

<sup>200</sup> WILSON, Frank L. Interest Groups and Politics in The Western Europe: The Neo-Corporatist Approach. *Comparative Politics*, Vol. 16(1): 105-123, 1983. P. 111.

<sup>201</sup> WILSON, Frank L. Interest Groups and Politics in The Western Europe: The Neo-Corporatist Approach. *Comparative Politics*, Vol. 16(1): 105-123, 1983. P. 106.

<sup>202</sup> WILSON, Frank L. Interest Groups and Politics in The Western Europe: The Neo-Corporatist Approach. *Comparative Politics*, Vol. 16(1): 105-123, 1983. P. 120.

<sup>203</sup> GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p. P. 293.

in other issue domains.<sup>204</sup> They combine the pluralist emphasis on the plurality of groups and the importance of information with the corporatist attention to resource exchange and compliance.<sup>205</sup> Corporatist theories reached their peak in Europe in the mid-1970s and entered in decline in the 1980s.<sup>206</sup>

Pluralism and Corporatism are often seen as a kind of scale along which different political processes can be placed more to the one or the other side. Later on, statism was added to this scale as an additional foundational approach.<sup>207</sup> In this approach, state actors are highly autonomous, above society and pursuing a national interest. In this system interest groups play only a minor role as their influence might jeopardize the national interest.<sup>208</sup>

In sum we can say that some 50 years ago, the “pluralism”-group approach was so dominant that it virtually defined the contemporary political science of that time.<sup>209</sup> Although the pluralist concept was criticized and evolved over time in the intent to improve its imperfections, it was only in the 1970s that the overall perspective changed with the development of the corporatism approach, whose distinctive feature was the more independent role that it attributed to the government. In the statism approach, the state was seen as the crucial actor in forming the national interest due to a separation between the state and society. Pluralism, Corporatism and the other approaches that evolved as different versions of them, were aimed at understanding the broader political system, not just interest group behaviour.<sup>210</sup> In the more recent literature, however, the traditional debate between pluralism and corporatism<sup>211</sup> has faded and instead considerable advance has been achieved in empirical studies about interest groups. Many studies have been conducted in the context of comparative European politics, European Union studies and American politics.<sup>212</sup> The numerous case studies and large-n-projects have led to new ideas about lobbying strategies and tactics, coalitions and networks and mobilization of interests. According to Eising, this constituted a shift from the macro-level to the meso-level: While the three foundational theories represented macro-level studies with a focus on the government

<sup>204</sup> WILSON, Frank L. Interest Groups and Politics in The Western Europe: The Neo-Corporatist Approach. *Comparative Politics*, Vol. 16(1): 105-123, 1983. P. 110.

<sup>205</sup> BOUWEN, Pieter. Corporate lobbying in the European Union: the logic of access. *Journal of European Public Policy* 9(3): 365-390, June 2002. P. 366.

<sup>206</sup> GRANADOS, Francisco J. and KNOKE, David. Organized Interest Groups and Policy Networks. In: JANOSKI, Thomas, ALFORD, Robert, HICKS, Alexander & SCHWARTZ, Mildred A. A Handbook of Political Sociology: States, civil societies and globalization. Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo. Cambridge University Press, 2005. 670p P. 293.

<sup>207</sup> EISING, Rainer. Clientelism, Committees, Pluralism and Protests in the European Union: Matching Patterns? In: BEYERS, Jan; EISING, Rainer; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. P. 68.

<sup>208</sup> Ibid.

<sup>209</sup> BAUMGÄRTNER, Frank R. and LEECH, Beth L. Basic Interests: The importance of groups in politics and in political science. Princeton, New Jersey. Princeton University Press, 1998. 188p. Introduction, p. Xv.

<sup>210</sup> HOJNACKI, Marie, KIMBALL, David C., BAUMGÄRTNER, Frank R., BERRY, Jeffrey M., LEECH, Beth L. Studying Organizational Advocacy and Influence: Re-examining Interest Group Research. *Annual Review of Political Science* 15: 9.1–9.21, 2012. P. 9.2

<sup>211</sup> BEYERS, Jan; EISING, Rainer; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 2.

<sup>212</sup> BEYERS, Jan; EISING, Rainer; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 1.



mechanisms, the empirical studies took the analytical focus to the meso-level.<sup>213</sup> In the following, the identified interest group types and strategies that have evolved in this stream of research will be outlined.

### **3.2.2. Interest Group Types and Strategies**

There are two common ways to make distinction between interest groups: the first one is the distinction between cause and sectional groups and the second one between insider and outsider group.

The sectional/cause distinction is based on the purpose of the group in question, and reflects the nature of the group's goals. Whereas **sectional groups** (sometimes called 'pressure', 'protective' or 'functional' groups) are groups that represent a particular section of society; cause groups (sometimes called 'promotional', 'attitude' or 'issue' groups) are groups that are based on shared attitudes or values, rather than some common specific interest of its members.<sup>214</sup> According to Grant, the term 'pressure' group has always implied the use of some kind of improper sanctioning power, while the term 'interest' group carries the implication of a narrow section group seeking to defend its own particular position.<sup>215</sup>

Sectional groups would be what Walker called profit-sector groups that emerge from relatively small and closely knit occupational or industrial communities. For the phenomena of cause groups he used the term non-profit and citizen groups. This shows that usually the smaller sectional groups are expected to follow some kind of self-interest; whereas large cause groups are seen to act without any monetary interest.<sup>216</sup> In the last years the term 'non-governmental organisation' (NGO) has gained popularity for describing these kinds of groups. The term NGO has been particularly developed by the United Nations (UN), who in their regulation 1996/31 define NGOs "as any international organization which is not established by a governmental entity or international agreement"<sup>217</sup>. NGOs can achieve consultative status, if the following criteria are met:

- The organization shall be concerned with matters falling within the competence of the Economic and Social Council and its subsidiary bodies.

<sup>213</sup> EISING, Rainer. Clientelism, Committees, Pluralism and Protests in the European Union: Matching Patterns? In: BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. P. 70.

<sup>214</sup> <http://www.palgrave.com/PDFs/0230201733.pdf>, P. 132-133

<sup>215</sup> GRANT, WYN. Civil Society and the Internal Democracy of Interest Groups. Paper prepared for the annual conference of the Political Studies Association of the UK, Aberdeen, April 2002.

<sup>216</sup> WALKER, Jack L. The Origins and Maintenance of Interest Groups in America. *The American Political Science Review*, Vol. 77 (2): 390-406, 1983), P. 397-398.

<sup>217</sup> UNITED NATIONS Economic and Social Council. Resolution 1996/31: Consultative relationship between the United Nations and non-governmental organizations. 1996. [online] <<http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>> (access: 20 November 2012).

- The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.
- The organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities, in accordance with its own aims and purposes and the nature and scope of its competence and activities.

Grant points out that in the media the term NGO is often wrongly used as a synonym for cause groups, while in fact the UN classifies many sectional groups as NGOs. Examples are business groups ranging from the International Chamber of Commerce to more specific organisations such as the European Federation of Fibreboard Manufacturers.<sup>218</sup>

The insider/outsider model on the other hand focuses on the differences in strategies different interest groups apply. Insider groups are seen as interest groups with a privileged status and there are relatively few of them. Outsider groups on the other hand are consigned to less influential positions. The distinction between insider and outsider groups is often used to differentiate group strategies.<sup>219</sup> Even though this distinction has been criticised since it was introduced by Wyan Grant in 1977, it survived as a robust model giving insights into how interest groups fit into the political process.<sup>220</sup> According to Grant the insider-outsider distinction was developed in order to replace the older distinction between sectional and cause group, which did not seem to help sufficiently in explaining interest group strategies.<sup>221</sup> Insider group have three key characteristics: Firstly, they are recognised by government as legitimate spokespersons for a particular interest or cause; Secondly they are allowed to engage in a dialogue on issues of concern for them and thirdly they implicitly agree to abide by certain rules of the game, as the opposite would lead ultimately to political exclusion.<sup>222</sup> Outsider groups form a more disparate and heterogeneous category and are not subject to the disciplines imposed by accepting the informal rules of the game. Grant furthermore divided them into outsider group by necessity, which would like to become insider groups, and outsider group by ideology, that are ideological protest groups.<sup>223</sup> Maloney et al. introduced a subdivision into the insider group category: Core insider group, dealing with a broad range of issues, specialist insider groups in policy niches and peripheral insiders with little influence.<sup>224</sup> The insider/outsider model implies that insider groups are more likely to be

<sup>218</sup> GRANT, WYN. Civil Society and the Internal Democracy of Interest Groups. Paper prepared for the annual conference of the Political Studies Association of the UK, Aberdeen, April 2002. P.

<sup>219</sup> MALONEY, William A., JORDAN, Grant, MCLAUGHLIN, Andrew M. Interest Groups and Public Policy: The Insider/Outsider Model Revisited. *Journal of Public Policy* 14(1): 17-38, 1994. P. 17

<sup>220</sup> GRANT, WYN. Civil Society and the Internal Democracy of Interest Groups. Paper prepared for the annual conference of the Political Studies Association of the UK, Aberdeen, April 2002. P. 408

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> GRANT, WYN. Civil Society and the Internal Democracy of Interest Groups. Paper prepared for the annual conference of the Political Studies Association of the UK, Aberdeen, April 2002. P. 409.

<sup>224</sup> Ibid.

successful in achieving their political objectives, as the better access to decision-makers would bias the political arrangements.<sup>225</sup>

There has been some controversy in recent years about whether or not the implications of this theory are still valid. Scholars have argued, for example, that today almost any group can gain the status of at least a peripheral insider.<sup>226</sup> Binderkrantz argues furthermore that even though insider strategies are generally seen as the more effective, outsider strategies seem to be on the rise in use and also in effectiveness. Because of their negative connotation, Bindenkrantz introduced therefore a new terminology for the terms “insider” and “outsider” strategies. The distinction now is between direct strategies, where groups approach public decision-makers, and indirect strategies where influence on policy is sought in more indirect ways. Furthermore, a distinction is made between actions directed toward bureaucratic actors and actions targeting politicians and parties.<sup>227</sup> The influence strategies and activities different interest groups can undertake are summarizing in the following table:

<i>Direct strategies</i>		<i>Indirect strategies</i>	
<i>Administrative strategy</i>	<i>Parliamentary strategy</i>	<i>Media strategy</i>	<i>Mobilization strategy</i>
Contacting the relevant minister	Contacting parliamentary committees	Contacting reporters	Arranging public meetings and conferences
Contacting national public servants	Contacting party spokespersons	Writing letters to the editor and columns	Organizing letter-writing campaigns
Actively using public committees, etc.	Contacting other members of parliament	Issuing press releases and holding press conferences	Arranging strikes, civil disobedience, direct action and public demonstrations
Responding to requests for comments	Contacting party organizations	Publicizing analyses and research reports	Conducting petitions

**Figure 7: Categorization of Influence Strategies and Examples of Activities**

Source: BINDERKRANTZ, Anne. Interest Group Strategies: Navigating Between Privileged Access and Strategies of Pressure. *Political Studies* 25: 694-714, 2005. P. 696.

Evidence from a survey of all national Danish interest groups, conducted by Bindenkrantz, demonstrated that most interest groups utilize a wide repertoire of tactics and strategies that

<sup>225</sup> GRANT, WYN. Civil Society and the Internal Democracy of Interest Groups. Paper prepared for the annual conference of the Political Studies Association of the UK, Aberdeen, April 2002. P. 409.

<sup>226</sup> MALONEY, William A., JORDAN, Grant, MCLAUGHLIN, Andrew M. Interest Groups and Public Policy: The Insider/Outsider Model Revisited. *Journal of Public Policy* 14(1): 17-38, 1994. P. 32

<sup>227</sup> BINDERKRANTZ, Anne. Interest Group Strategies: Navigating Between Privileged Access and Strategies of Pressure. *Political Studies* 25: 694-714, 2005. P. 694.

include direct approaches and indirect approaches alike.<sup>228</sup> Groups customize their political strategies to the situation at hand, adapting their activities to the policy goals they are pursuing. In the following subchapter, the European interest group system will be illustrated in order to get an idea about the interest group systems of the European Union.

### 3.2.3. European Interest Group System

In the EU, almost every conceivable interest with a stake in regulation is organized.<sup>229</sup> In November 2012 this fact translated into 5.478 registered interest groups belonging to the following categories:

<b>I - Professional consultancies/law firms/self-employed consultants</b>	<b>620</b>
Professional consultancies	409
Law firms	43
Self-employed consultants	168
<b>II - In-house lobbyists and trade/professional associations</b>	<b>2,606</b>
Companies & groups	746
Trade, business & professional associations	1,546
Trade unions	122
Other similar organisations	192
<b>III - Non-governmental organisations</b>	<b>1,550</b>
Non-governmental organisations, platforms and networks and similar	1,550
<b>IV - Think tanks, research and academic institutions</b>	<b>389</b>
Think tanks and research institutions	275
Academic institutions	114
<b>V - Organisations representing churches and religious communities</b>	<b>36</b>
Organisations representing churches and religious communities	36
<b>VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.</b>	<b>277</b>
Local, regional and municipal authorities (at sub-national level)	126
Other public or mixed entities, etc.	151

**Figure 8: European Transparency Register**

Source: EUROPEAN COMMISSION. Transparency Register. [online]

<<http://ec.europa.eu/transparencyregister/public/consultation/statistics.do?action=prepareView&locale=en#en>> [access: 20 November 2012].<sup>230</sup>

These figures are taken from the transparency register of the EU, which has been launched in 2011 in a joint effort of the EU Parliament and the EU Commission in order to make the

<sup>228</sup> BINDERKRANTZ, Anne. Interest Group Strategies: Navigating Between Privileged Access and Strategies of Pressure. *Political Studies* 25: 694-714, 2005. P. 710.

<sup>229</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.8.

<sup>230</sup> It is useful to have in mind the advice of Greenwood that this scheme is not controlled by any government mechanism. Hence, the database is a useful indicator but probably does not reflect the exact reality.

EU's decision-making process more transparent and provide information on the groups that seek to influence European policy. The Commission had already installed a register in 2008 with –back then- around 4000 registered organisations. The new joint transparency register replaced the old one and extended the coverage of information.<sup>231</sup> The transparency register is the most comprehensive documentation available about the European interest group system. Still, it has been criticized for not giving the complete overview of active interest groups in the EU, as inscription in the transparency register is not mandatory.<sup>232</sup> A report released in June 2012 by the pro-transparency group Alter-EU showed that altogether 120 companies, with many of them amongst the world's largest and actually actively engaging in lobbying in Brussels, do not appear in the register. Another interesting piece of information of this report is that over 60 per cent of the companies lobbying to get the ACTA ratified are missing.<sup>233</sup>

At the start of the European integration process in the 1950s and 60s only a very small number of interest groups was active. This changed considerably after the founding years and the move towards the Internal Market and Monetary Union, which represented very dynamic times in terms of interest group activities. However, in that time it was mostly economic interest groups that responded to the integration process by forming EU-level interest groups. With greater social regulation of the interest group system, the number of diffuse interests has grown in recent years.<sup>234</sup> Many authors therefore suggest that the EU institutional setting and the interest group system co-evolved.<sup>235</sup>

In the initial stages, EU interest groups were mainly sectoral or cross-sectoral peak associations of national interest groups. However, today many are mixed membership groups that include combinations of national associations, multinational corporations, other interest groups as well as cities and regions.<sup>236</sup> The European interest group system can be classified as essentially pluralist, as no one type of interest can ever routinely dominate the EU political system. This is due to the high degree of fragmentation of power, which is actively supported by measures that include the funding of NGOs that challenge producer interests, and the empowerment of all types of interests to act as accountability agents on

<sup>231</sup> EUROPEAN COMMISSION. Commission and European Parliament launch Joint Transparency Register to shed light on all those seeking to influence European policy. 23 July 2011. [online] <[http://europa.eu/rapid/press-release\\_IP-11-773\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-11-773_en.htm?locale=en)> [access: 3 December 2012].

<sup>232</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. Palgrave Macmillan. 3<sup>rd</sup> Edition. 2011. New York. 235p. P.9.

<sup>233</sup> EUOBSERVER. EU lobbyist register gives incomplete picture. 25 July 2012. [online] <<http://euobserver.com/institutional/116742>> [access: 3 December 2012].

<sup>234</sup> EISING, Rainer. Interest groups in EU policy-making, *Living Reviews in European Governance*, Vol. 3 (4), 2008 [online]. <<http://www.livingreviews.org/lreg-2008-4>> [access: 15 December 2012].

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

EU institutions through transparency-oriented measures.<sup>237</sup> Today formal groups range from those representing horizontal interests across particular constituencies (like confederations of producer interest or citizens) to sectoral type interests and specialist issue organizations. Large groups representing “horizontal” or cross-sectoral interests include Business Europe, ERT (The European Round Table of Industrialists) and the EU Committee (of the American Chamber of Commerce)<sup>238</sup> Secotral organization of interests at EU level follows, on the other hand, show a tendency for federative structures (associations of national associations).<sup>239</sup> Although the interest-group system in Brussels has developed considerably, it can be classified as less stable and consolidated than some national interest group system. Precisely because of the fact that the interest group system co-evolves with the EU institutional system, it is more prone to transformations as a consequence of the mutating EU constitutional structure.<sup>240</sup> As will be demonstrated in the chapters to come, this had an considerable effect on the evolution of the interest group system in the area of IP Politics.

### 3.3. Interest Group Influence

Having looked at the different theories that have evolved concerning interest group participation in the political process it is save to say that interest groups are seen as influential in politics and that they play a role in virtually all policy areas.<sup>241</sup>

The question in recent years has therefore rather revolved around the extent of influence different interest groups exert in the political processes, instead of how interest groups are integrated in the political process. In a recent study of the interest group research since 1998 it was found out that a major part of interest group research addresses the topic of interest groups influence: more than a third of the conducted studies in that timeframe tried to measure interest group influence in the policy-making process and another third focused on tactics and lobbying behaviour in order to understand how interest groups try to achieve influence.<sup>242</sup>

<sup>237</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.22.

<sup>238</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.14.

<sup>239</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.15.

<sup>240</sup> EISING, Rainer. Interest groups in EU policy-making, Living Reviews in European Governance, Vol. 3 (4), 2008 [online]. <<http://www.livingreviews.org/lreg-2008-4>> [access: 15 December 2012].

<sup>241</sup> BAUMGÄRTNER, Frank R. and LEECH, Beth L. Basic Interests: The importance of groups in politics and in political science. Princeton, New Jersey. Princeton University Press, 1998. 188p. Introduction, p. xv

<sup>242</sup> The other third was concerned with mobilization or participation in interest groups, especially focusing on social movement theory, which has evolved as an alternative to Olson's approach of considering the individual decision-making process in collective action. See: HOJNACKI, Marie, KIMBALL, David C., BAUMGÄRTNER, Frank R., BERRY, Jeffrey M., LEECH, Beth L. Studying Organizational Advocacy and Influence: Re-examining Interest Group Research. Annual Review of Political Science 15: 9.1–9.21, 2012. P. 9.5



In recent literature, many scholars have engaged in empirical testings of the established hypotheses concerning interest group influence, especially for the case of the EU. However, the resulting literature can be characterized as contradictory. While some studies suggest that concentrated interests of small interest groups exert more influence on EU decision-making, others argue that the influence of these interests is far more circumscribed. They argue that the European Commission an autonomous actor and that interest groups can only exert technical influence<sup>243</sup> or even depend on the goodwill of the relevant policy-makers.<sup>244</sup> Furthermore, while some authors came to the conclusion that diffuse interests were surprisingly influential in the multi-level system of the EU, others content that diffuse interests are largely unable to influence EU policy outcomes.<sup>245</sup>

Mahoney points out in this context, that scholars often slip into a simplistic discussion that suggests a zero-sum game in which policy outcomes are winner-take-it-all games, although in fact non-zero-sum games with some type of compromise emerging as the end result are much more common.<sup>246</sup> Similarly, Dür and de Bièvre describe the difficulty of operationalizing the concepts of 'influence' and 'power', as the construction of reliable indicators in order to conduct empirical measurement, whether qualitatively or quantitatively, constitutes a hard to overcome obstacle in this undertaking.<sup>247</sup> With the intention to offer an alternative and more pragmatic concept for addressing the topic of interest group influence, Dür and de Bièvre developed an approach, which focuses on the contextual factors that shape influence. Their argumentation is that instead of actually trying to measure influence, scholars should focus on identifying the factors that can enhance or diminish influence. The advantage of this approach is that it permits to break the concept of influence down into manageable components.<sup>248</sup>

This is an interesting approach as there are various cases, where the same interest group achieved different extents of influence concerning the same policy issue.<sup>249</sup> This shows that the context of the policy process does make a difference and constituted a variable that has explanatory power. This also seems to hold true for the two negotiation cases TRIPS and ACTA. While the policy process leading to the TRIPS agreement is seen as an excellent example of a power game in which resource-rich private actors were able to get their way (to

<sup>243</sup> MICHAELOWITZ, Irina. Accessing conditions for influence of interest groups in the EU. Institute for Advanced Studies, Vienna. Political Science Series 106. P. 23.

<sup>244</sup> DÜR, Andreas. Interest Groups in the European Union: How Powerful are They? *West European Politics*, Vol. 32(1): 31p, 2009. P. 10.

<sup>245</sup> DÜR, Andreas. Interest Groups in the European Union: How Powerful are They? *West European Politics*, Vol. 32(1): 31p, 2009. P. 9-11.

<sup>246</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P. 36.

<sup>247</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 2.

<sup>248</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. Cambridge University Press. P.36.

<sup>249</sup> KLÜVER, Heike. The contextual nature of lobbying: Explaining lobbying success in the European Union. *European Union Politics* 12(4): 483-506, 2011. P. 484.

the disadvantage of the involved NGOs)<sup>250</sup>, the same resourceful and powerful actors were not that successful in exerting influence 18 years later during the negotiations of the ACTA agreement. The question is not if interest groups actually influenced the policy process and/or the generation of these two negotiations and how to measure the influence, but rather what conditions made the change in the influence pattern of the involved interest groups possible. In other words the object of analysis are the conditions in both negotiation settings that enhanced or diminished the influence of the different interest groups involved. Considering the usefulness that this approach has for explaining the outcome of the TRIPS and ACTA negotiations from an interest-group-perspective, the further analysis of this thesis will rely on the theoretical framework of the influence-shaping factors presented by Dür and De Bièvre.

### **3.4. Towards a theoretical framework**

In the approach of Dür and De Bièvre, influence is understood as control over political outcomes. The approach regards actors as being powerful if they manage to influence outcomes in a way that brings them closer to their ideal points. The emphasis is put on studying the effect of power rather than assessing power itself. This conceptualisation of influence does not attempt to measure an abstract, unobservable object, 'power', but focuses on its empirically observable effects in actual public policy. The approach furthermore assumes that actors have clear preferences over outcomes. The preferences of the interest groups active in IP politics have been thoroughly outlined in the first chapter.

What will be analysed are the factors and conditions that in each negotiation affected the control the different interest groups could have over the outcome. Two different hypotheses will be established in order to address the research question of the influence-shaping factors in the two negotiation settings

- (1) The influence opportunities for interest groups in the European Union regarding the public policy field of international IPR regulation and enforcement have changed in the time between the TRIPS and the ACTA agreement due to contextual reasons.
- (2) ACTA was rejected because the ACTA-opposing interest groups were able to use newly evolved influence opportunities in order to exert control over the policy outcome and shift it towards their preferences.

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<sup>250</sup> HAUNSS, Sebastian and SHADLEN, Kenneth C. Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information. Cheltenham, Edward Elgar Publishing Limited, 2009. 233p. P.107.



The term “interest group opportunities” in this context refers to the sum of conditions that affect interest group influence in a given negotiation setting. These opportunities can increase, but also diminish. It is argued that those factors have explanatory power when regarding the situation that in two negotiations of the same policy field, different outcomes were achieved due to the respective contexts that in one case favoured the influence capacity of the IPR-holders interest group and in the other case the influence capacity of the opposing interest groups.

The analysis will be limited to the generation and outcome phases of the two negotiations and will not include the implementation stages. The reason for this limitation is that the ACTA agreement has until today only been ratified by Japan, whereby the implementation stage has not been entered yet. The theoretical framework will consider the institutions of the European Union as the governmental forces the relevant interest group interact with. The interaction with the national governments will be excluded, as in the policy field of international IPR protection and enforcement the European Union institutions have played a key role, due to the fact that the proclaimed aim is to achieve harmonization of the IPR standards in the home market. The dominant role of the European institutions is not unusual in trade-related topics. This has also been recognized by the interest groups themselves, which have focused a lot of their lobbying activities on the policy-makers of the European institutions.

By choosing this contextual approach it is also responded to a plea made by Baumgärtner and Leech in their book “Basic Interests: The Importance of Groups in Politics and in Political Science” (1998), in which they evaluate the research on interest groups published between 1950 and 1995. One of their key findings is that “the behaviours of groups have often been studied in isolation from the complexities of the policy process”<sup>251</sup>, which leads them to recommending that the next generation of studies should include sensitivity to the context of the case. With the approach chosen it is hoped to respond to this appeal. By choosing to analyse two negotiations of the same policy field -international IPR protection and enforcement- it will furthermore hopefully be possible to not only identify influence-shaping factors in both moments in time, but also establish some conclusions about how the interest group influence pattern has evolved in that specific policy area over time.

Dür and De Bièvre point out that the existing literature offers a whole range of hypotheses on the factors that may affect influence of interest groups over political outcomes. They can be put into three factor-groups: institutional factors, interest group characteristics, and issue-

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<sup>251</sup> BAUMGÄRTNER, Frank R. and LEECH, Beth L. *Basic Interests: The importance of groups in politics and in political science*. Princeton, New Jersey. Princeton University Press, 1998. 188p. P. 174.

specific factors.<sup>252</sup> This approach therefore focuses on exogenous factors<sup>253</sup>, or in other words, outside constraints and/or possibility for the success of the strategies applied by the active interest groups. In the following it will be explained in more detail what these conditions could consist in.

### **3.4.1. Variation in influence across institutional structures**

According to Dür and De Bièvre interest group influence is expected to vary depending on the governmental institutions that they interact with. Institutions may empower or disenfranchise specific interests and therefore influence the balance of interests in a given governmental system. The underpinning idea of this reasoning is that policy-makers give in to welfare-reducing demands from special interest groups only to the extent that voters do not punish them for doing so.<sup>254</sup> The degree of democratic accountability of a political system therefore should have an impact on the influence of an interest group. While policy-makers that are accountable to the public should be more responsive to civil society organisations, political systems that are not electorally accountable may be less responsive to the pressure of civil society lobbying. When there is low democratic accountability policy-makers will retain their positions with or without the support of the public. Non-elected policy-makers can be expected to be less responsive to organized interests and thus advocates should be less likely to attain lobbying success.<sup>255</sup>

Institutions may also enhance or lower the access interest groups enjoy to policy-makers. The U.S. institutional system, for example, is considered to lead to a pluralist interest group system. From one point of view it could be argued that the pluralist system of the U.S. enhances interest group access to political actors, as all interest group have equal access. On the other side interest groups in a pluralist system will have less possibility to monopolise the policymaking process, which from their point of view would enhance their control over the outcome, e.g. their influence. Other scholars point out that the several layers of decision-making of the European Unions institutional system open up new channels of influence and make it easier for diffuse interests to influence policy outcomes. According to Richardson, the existence of additional venues in the EU can also lead to the break-up of established policy communities at the domestic level and allow previously excluded actors to influence policy outcomes. Additional layers of government furthermore enhance incentives for venue

<sup>252</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 3.

<sup>253</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p P. 29.

<sup>254</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 4.

<sup>255</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.38.

shopping: the different actors can try to shift their issues to government bureaucracies and institutions that are more favourably biased to their interest. At the same time, additional venues may increase the autonomy of public actors by enabling them to refer to commitments reached at one level to reject demands voiced by societal actors.

Another point consists in the fact that institutions can shape the resource needs of politicians. When decision-makers rely on interest group resources due to the institutional system, interest groups should gain influence over policy outcomes.<sup>256</sup>

### **3.4.2. Variation in influence across interest groups**

There are several hypotheses that link the influence of an interest group with its group characteristics. Groups that have more resources should under normal conditions have more influence than groups with little resources. Dahl defines resources as “anything that can be used to sway the specific choices or the strategies of another individual”<sup>257</sup>. Resources not only relate to monetary capacity like for example campaign funding, but can also be information on the constituency interests, expertise on policy issues and information on the opinions of other policy-makers.<sup>258</sup> This concept has become known as the resource exchange perspective. The idea is that interest groups and government actors engage in an exchange whereby both parties offer something of value. From this it can be concluded that interest groups that offer something of value to the government will be more able to affect the political process and thereby exert influence. In turn they will not even start to engage in the political process, if the government cannot offer something valuable to the interest group.<sup>259</sup> Generally it is assumed however, that policy-makers rely on resources (money, information or political support) for either re-election or achieving their policy aim, whereby interest groups can exchange their resources with influence.<sup>260</sup>

The influence of a group may also vary according to the type of interest group. In literature, groups have been categorized into groups defending diffuse or groups standing for concentrated interests. According to Olson’s collective action hypothesis, diffuse interests should find it more difficult to get organised than concentrated interests. As mentioned before, the general expectation is for non-profit NGOs to be less well equipped with

<sup>256</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P. 5.

<sup>257</sup> DAHL, Robert A. Who Governs? Democracy and Power in an American City. New Haven, Yale University Press, 1961. 355p. P. 226.

<sup>258</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 5

<sup>259</sup> BEYERS, Jan; EISING, Rainer ; MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 32.

<sup>260</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 5

resources than profit-sector groups. However, diffuse interests have other resource advantages like the sheer number of their members and possibly the possession of the “moral high ground”. Business groups can benefit from the structural power of firms, which allows them to threaten with the relocation of investment and employment.<sup>261</sup> However, the expectation is that policy-makers are more responsible to citizen groups than business interest to the extent of their democratic accountability.<sup>262</sup>

Mahoney adds as an influence-shaping factors the position of the interest group on a given case and the tactics employed during the lobbying. Regarding the position it is important to take into consideration whether an interest group is pushing for the status quo or promoting a policy change. Interest groups who are fighting for the status quo should be more likely to attain their lobbying goals than those that are pushing for a policy change.<sup>263</sup> Concerning the employed lobbying tactics it can be said that although nearly all organized interest groups engage in some type of direct lobbying, not all interest groups engage in more specialized lobbying techniques like hiring a consultant, working through a coalition, or employing outside lobbying. It is expected that these additional techniques are helpful for increasing the group’s influence.<sup>264</sup>

### **3.4.3. Variation in influence across issues**

Dür and De Bièvre point out the importance of the distinction between an issue or a policy field being distributive, regulatory or redistributive for explaining varying interest group influence. They refer to the theory of Theodore J. Lowi who in his work “American Business, Public Policy, Case-Studies, and Political Theory” (1964) established three major categories of public policies: distributional, regulatory and redistributive public policies.<sup>265</sup> Each category of public policy corresponds to a certain power constellation, which develops its own characteristic political structure, political process, elites and group relations.<sup>266</sup>

In distributive public policies, a pluralistic system is most likely to evolve in the context of which a large number of small, intensely organized interests are operating.<sup>267</sup> In distributive

<sup>261</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 6

<sup>262</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.41.

<sup>263</sup> Ibid.

<sup>264</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.41-42.

<sup>265</sup> LOWI, Theodore. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 689.

<sup>266</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 690.

<sup>267</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 692.

policies it may be easier for groups to find coalition partners that all support each other in a logroll, as major constituencies have homogeneous interests. According to Dür and de Bièvre interest group influence in such a scenario should be substantial.<sup>268</sup>

In regulatory public policies the group systems will be composed of a multiplicity of groups organized around tangential relations and coalitions will form around shared interests.<sup>269</sup> The primary political union therefore is the group and power structure will be pluralistic or multi-centred.<sup>270</sup> Dür and De Bièvre point out that opposing groups are most likely in regulatory public policies, where both sides on an issue face either concentrated costs or concentrated benefits from a certain public policy.<sup>271</sup>

Issues that involve redistributionary public policies will lead to a system that cuts closer than any other along class lines and activates interests in what are roughly class terms.<sup>272</sup> In a scenario of redistributive public policies, the power structure will be conflictive as an elite and a counter elite will form. The primary political unit is the association.<sup>273</sup> As redistributive policies produce diffuse costs for many people and small benefits for many people, interest group collective action and influence should be rather limited in comparison to distributive or regulatory policies.<sup>274</sup>

Another factor that can determine interest group influence is the salience of an issue.<sup>275</sup> Like Mahoney points out, highly salient issues are hypothesized to exhibit a similar pattern: the more salient, the less influential interest groups should be in their lobbying. If a topic is of interest to a large proportion of the public, policy-makers should be less likely to take the advice of a specific interest group and instead focus on taking public opinion into consideration. This factor can to some extent be influenced by outside lobbying strategies that increase public attention to an issue.<sup>276</sup>

The 'technicality' of an issue may explain variation in influence across issues, as it determines the resource requirements of politicians. In public policy issues with a high level of technicality, policy-makers need input from societal actors, which should increase the

<sup>268</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 6.

<sup>269</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 695.

<sup>270</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 715.

<sup>271</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 6.

<sup>272</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 707.

<sup>273</sup> LOWI, Theodore J. July 1964. American Business, Public Policy, Case Studies, and Political Theory. *World Politics* 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 715.

<sup>274</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 6.

<sup>275</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 7.

<sup>276</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.40.

influence of interest groups capable to supply the necessary information should gain in influence. Variations in interest group influence may also stem from changing strategies chosen by lobbies, as groups do not always pick the most effective strategy to influence policy outcomes.<sup>277</sup>

Another factor Mahoney adds to the list of influence-affecting factors is the presence of countervailing forces. Highly conflictive issues present a very different interest group environment than issues in which only one perspective is promoting its policymaking vision.<sup>278</sup> As a last point Mahoney points out that focusing events<sup>279</sup> can have an effect on the influence of a interest groups, because a focusing event might alert policy-makers and the public to a policy problem. It will depend on the event itself whether the effect will be positive or negative.<sup>280</sup>

#### 4. Comparative Analysis between TRIPS and ACTA

Having established the theoretical framework in detail, the following analytical part will analyse how contextual conditions affected the influence of interest groups in the TRIPS and ACTA negotiations.

##### 4.1. Issue Factors

Concerning both negotiations, TRIPS and ACTA, it could be said that the issue of international IP protection and enforcement had gained considerably more importance in comparison to previous decades. The growth in attention was especially sparked by the increased presence of high technology products and the development of new forms of technology, but also by the general intensification of international trade, which increased the scale of IPR infringement regarding all kinds of IPR. Non-surprisingly, those countries with important IP-based industries started to give growing importance to IP issues in their multilateral or bilateral negotiation agendas.<sup>281</sup> In the following chapter both negotiations will be analysed concerning the influence certain interest groups could achieve in the respective negotiation setting and context. In order to identify influence-enhancing issue factors the

<sup>277</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 7.

<sup>278</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.40.

<sup>279</sup> The concept of focusing event was first introduced by John W. Kingdon, in his book "Agendas, Alternatives, and Public Policies (1995)

<sup>280</sup> MAHONEY, CHRISTINE. Lobbying Success in the United States and the European Union. *Journal of Public Policy* 27(1): 33-56, 2007. P.40.

<sup>281</sup> DOANE, Michael L. TRIPS and international intellectual property protection in an age of advances technology. *American University International Law Review* 9(2): 465-497, 1994. P. 465



following aspects will be addresses: policy type, the salience of the issue, the technicality of the issue and important focusing events.

#### 4.1.1. Policy Type

Dür and De Bièvre point out the importance of the distinction between an issue or a policy field being distributive, regulatory or redistributive for explaining varying interest group influence. Concerning IP it can be said that it is a regulatory issue as the policymaking process seeks to establish rules concerning the regulation, protection and enforcement of IPR. According to Lowi it is necessary to look at the function a policy is to have in order to undertake this classification.<sup>282</sup> TRIPS was introduced in order to function as a international system that sets global minimum standards for IPR protection and enforcement. Through its adoption the pre-existing patchwork of agreements that regulated international IPR protection and enforcement before was consolidated. Not only did it incorporate the Paris and Bern Convention, but it also introduced enforcement obligations and mechanisms and brought about a shift to substantive harmonization in various aspects.<sup>283</sup>

Regulation policies in the EU are strongly connected with the ideas of the Single European Market Program (SEM), which was formally adopted in May 1985 and had as one of its principal objectives to work towards regulation standards harmonization amongst the European member states.<sup>284</sup> The SEM is about regulation and, in accordance with Lowi's characterization of regulatory politics, the policymaking of regulatory issues leads to a competitive interest group environment. According to Dür and de Bièvre, opposing groups are most likely with respect to regulatory policies, because often both sides on an issue face either concentrated costs or concentrated benefits from a policy. In turn this offers the opportunity to the governmental actor to pursue their preferred policies by compensating opponents and creating coalitions in support of specific policy outcomes.

In a way, this is exactly what happened in the context of the TRIPS agreement. With respect to TRIPS the divide between "proponents" and "opponents" emerged along the division between developed and developing countries. Developed country corporations, research centres and individuals held together over 80 % of the worlds IPR and therefore were eager

<sup>282</sup> LOWI, Theodore. *American Business, Public Policy, Case Studies, and Political Theory*. World Politics 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 689.

<sup>283</sup> DEERE, Carolyn. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York, Oxford University Press, 2009. P. 1.; See also: OKEDIJI Ruth L. *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*. Singapore Journal of International & Comparative Law 7: 315–385, 2003. P.315 (Note 1).

<sup>284</sup> YOUNG, Alasdair R. In: WALLACE, Helen, WALLACE, William, POLLACK, Mark A. *Policy-Making in the European Union*. Fifth Edition. The New European Union Series. Oxford, New York, Oxford University Press, 2005. 503p. P. 105.

to strengthen the “private-right”-component of the TRIPS agreement under negotiation.<sup>285</sup> The actively lobbied their respective governmental representatives in order to get their interests represented in the negotiations. As will be shown in more detail in a later part of this thesis, IPR-holders interest groups managed to convince the EU Commission to negotiate in their interest and throughout the negotiation process teamed up with the policy-makers. Their argument for the justification of strong IPR protection followed the logic that developing countries (their main opponents) in the long term would also benefit from a strong regulation, as this would encourage foreign direct investment (FDI), innovation and technology transfer. Therefore it would outbalance the short-term costs developing countries had to face by implementing the TRIPS provisions.<sup>286</sup> These short-term costs consisted in building and implementing a substantial legal framework and enforcement mechanisms by constructing the necessary infrastructure, while as well educating their citizens and businesses regarding the importance of intellectual property protection in order to gain compliance.<sup>287</sup> The opposing group was a core group of developing countries that wanted to narrow the scope of the IP agenda and secure provisions that would help them defend their policy space. However, they found themselves in a significantly weaker bargaining position and were also tempted by the issue-linkages that the Uruguay negotiation made possible. TRIPS was negotiated in the context of the creation of the WTO and its proponents defended TRIPS as part of a “WTO package” deal in which developing countries would receive freer access to the markets of industrialized countries in exchange to their agreement to protect the IPR of foreign nationals.<sup>288</sup> Not only IP, but also a whole set of other trade-related subjects were under discussion. This issue context situation made it possible to work on deals with the not very resourceful (but still present) countervailing force in form of the developing countries. In order to push through the strong IPR protection, the developed country made concessions to the developing countries in other matters. A loss on a particular issue could be used to leverage a win concerning another issue. The governmental actors could therefore, just as pointed out by Dür and de Bièvre, pursue their preferred policies by compensating the opponents in other issue areas of the Uruguay Round and by creating coalitions in support of IP policy outcome.

The developing countries eventually gave in to the IPR-demands of developed countries. Although they were not in favour of the outcome of TRIPS, they did not organize a real

<sup>285</sup> BRAITHWAITE, John & DRAHOS, Peter. *Global Business Regulation*. New York, Cambridge University Press, 2000. 629p. P. 10.

<sup>286</sup> DEERE, Carolyn. *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*. New York, Oxford University Press, 2009. 323p. P. 1.; See also: OKEDIJI Ruth L. *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*. *Singapore Journal of International & Comparative Law* 7: 315–385, 2003. P. 9.

<sup>287</sup> HALBERT, Debora. *Globalized Resistance to Intellectual Property*. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].

<sup>288</sup> HELFER, Lawrence. *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*. *Yale Journal of International Law*. Vol. 29(1): 1-83, 2004. P. 3.



countervailing movement in order to stop it, due to the reasons just mentioned. A further aspect, which made developing countries hesitant to organize significant resistance, were the 301 processes. The provisions included under the section 301 of the U.S. trade process required the office of the US Trade Representative (USTR) to identify problem countries, assess the level of abuse of US IP interests, enter into negotiations and if they turned out to be unfruitful impose trade sanctions on the country in question.<sup>289</sup> It was hoped to decrease the probabilities of the US making use of their 301 legislation, by showing willingness to give in on the IP issue.<sup>290</sup> Taken together, these factors created an environment in which IPR-holders and their respective countries had an enhanced control over the outcome and consequently higher probabilities to succeed. Few other parties were involved and the private interest lobbies could advance with little opposition.

While in the case of TRIPS the issue-linkages worked to the favour of the strong-IPR interest group, the strategy backfired in the post-TRIPS era. As described in detail by Helfer, the TRIPS agreement had the unanticipated effect that NGOs and officials of intergovernmental organizations raised concerns about the issue in an expanding list of other international venues. In the decade after the adoption of TRIPS the interest in IP issues had exploded and had furthermore entered in a broad array of international fora, like for example the World Health Organization, Food and Agriculture Organizations, international negotiation fora such as the Convention on Biological Diversity's Conference of the Parties and the Commission on Genetic Resources for Food and Agriculture, the United Nations Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights.<sup>291</sup> The question of designing an international regulatory IP framework increasingly got linked with other overlapping issues and seen from different perspectives.

This did not only lead to a greater politization of the issue, but also changed the overall nature of the policy debate. Opponents of a strong international IPR regulation started to point out the fallacies of the argument that strong IP protection and enforcement would bring more investment and innovation. It was argued that copying and imitation are central to the process of learning and the acquisition of skills, and that any innovator is always a borrower of ideas and information.<sup>292</sup> It was furthermore shown in a variety of case studies, that TRIPS implications vary extremely across countries, depending on a variety of complex factors, which weakened the logic of the argumentation of pro-TRIPS and plus-TRIPS interest

<sup>289</sup> BRAITHWAITE, John & DRAHOS, Peter. *Global Business Regulation*. New York, Cambridge University Press, 2000. 629p. P. 62.

<sup>290</sup> DRAHOS, Peter. *Prometheus*, Volume 12 (1): 6-19, June 1995. P. 14

<sup>291</sup> HELFER, Lawrence. *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*. *Yale Journal of International Law*. Vol. 29(1): 1-83, 2004. P. 6.

<sup>292</sup> BRAITHWAITE, John & DRAHOS, Peter. *Global Business Regulation*. New York, Cambridge University Press, 2000. 629p. P. 2.

groups.<sup>293</sup> The concept of IP therefore started to encounter insistently the concept of development<sup>294</sup>, turning IP into a policy debate beyond solving a merely regulatory issue. It was criticized that IP law devoted its exclusive attention to the danger of under-incentivizing authors and inventors, without taking into considering the economic development dimension and ethical and distributional consequences of economic growth.<sup>295</sup> Especially concerning the Access to Medicine Campaign a human rights and social justice debate over IPR protection and enforcement arose, giving reasons to reconsider the welfare generating justification.<sup>296</sup> It was established that IP agreements, that regulate the ownership, control and use of knowledge have consequences that are fundamental for the growth, prosperity and development in the global economy.<sup>297</sup> From these streams of reasoning a big variety of opinions arose and it is safe to say that IPRs have never been more economically and politically important or controversial than in the post-TRIPS era.<sup>298</sup> “Patents, copyrights, trademarks and geographical indications are frequently mentioned in discussions and debates on such diverse topics as human rights, public health, agriculture, education, trade, industrial policy, biodiversity management, biotechnology, information technology, the entertainment and media industries, and increasingly the widening gap between the income levels of the developed countries and the developing, and especially least-developed, countries”<sup>299</sup>.

With respect to IPR issues the opinions today vary broadly along a political spectrum with those who believe that strong IPR protection and enforcement is indispensable for a modern, neoliberal economy (and the stronger the better) at one end, and those who suspect that IPRs are in practice just another device by which the rich make themselves richer and the poor poorer, and may even be unnecessary to foster innovation anyway.<sup>300</sup> Sparked from the North-South disputes that marked the origin of the TRIPS agreement, an international resistance to TRIPS developed and merged with the larger resistance to neo-liberal globalization.<sup>301</sup> The countervailing movement broadened its scope and not only campaigned for access to medicine, but also more generally evolved into a global movement that

<sup>293</sup> MASKUS, Keith E. IP Rights in a Global Economy. Washington, Institute for International Economics, 2000. 241p. P. 191.

<sup>294</sup> CHON, Margaret. Intellectual Property and the Development Divide. *Cardozo Law Review* Vol. 27(6): 2813-2904, 2006. P. 2814.

<sup>295</sup> CHON, Margaret. Intellectual Property and the Development Divide. *Cardozo Law Review*. Vol. 27(6): 2813-2904, 2006. P. 2904.

<sup>296</sup> CHON, Margaret. Intellectual Property and the Development Divide. *Cardozo Law Review*. Vol. 27(6): 2813-2904, 2006. P. 2817.

<sup>297</sup> HAUNSS, Sebastian and SHADLEN, Kenneth C. Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information. Cheltenham, Edward Elgar Publishing Limited, 2009. 233p. P.1

<sup>298</sup> UNCTAD/ICTSD. United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD): Intellectual Property Rights and Development – Policy Discussion Paper. September 10 2002. [online] <[http://www.iprsonline.org/unctadictsd/docs/policypaper\\_sept02.pdf](http://www.iprsonline.org/unctadictsd/docs/policypaper_sept02.pdf)> [access: 25 November 2012]. P. 5.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> HALBERT, Debora. Globalized Resistance to Intellectual Property. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].

demands (free) access to knowledge (A2K).<sup>302</sup> The A2K movement includes software programmers who protested against software patents in Europe, AIDS activists who forced multinational pharmaceutical companies to permit copies of their medicines to be sold in South Africa, and college students who have created a new “free culture” movement to “defend the digital commons”, amongst many others. The mobilisation rejects the key justifications for IP law and seeks to develop a different handling of the distribution of information and knowledge.<sup>303</sup>

As IP had changed from being perceived as a merely regulatory policy matter into a policy matter that affects the development and economic growth of countries, the interest group environment changed considerably. IP policymaking turned from being an undertaking of global harmonization of rules into a policy field that would decide over the distribution of knowledge, one of the central building blocks of any modern economy in today's global system. It could be argued, therefore, that IP policymaking was step by step turned into a regulatory policy with distributional features. Distributional policy-making can be characterized as “allocation of resources to different groups, sectors, regions, and countries, sometimes as explicitly and intentionally, and sometimes as a by-product of policies designed for other purposes”<sup>304</sup> Viewed from this perspective IP law-making could be considered as a regulatory policy that -as a by-product- allocates the resource “knowledge” to different groups, sectors, regions and countries. It became visible in the last years that any IPR agreement was no longer just a trade agreement, but that the changed issue context had turned IPR debates into discussion embedded in a moral framework focusing on global social justice.<sup>305</sup> As a consequence, the IPR-holders interest group that managed to control the outcome of TRIPS, saw their initially unchallenged influence slowly diminishing over IP-battles with a global countervailing movement.

The ACTA negotiation process takes place in the middle of the transformation of IP from a regulatory policy issue into an issue with a lot more dimensions to it.

The negotiations started in 2008, almost at the same time as the WIPO Development Agenda was adopted (2007), which reflected the change in perception of what was at stake concerning IP law-making. It could even be argued, that it was this change that sparked the intention of the ACTA negotiation countries to conduct their negotiations outside of the traditional IP negotiation fora like the WTO or the WIPO. The on-going differences about the

<sup>302</sup> KRIKORIAN, Gaëlle, KAPCZYNSKI, Amy. 2010. Access to Knowledge in the Age of Intellectual Property. Zone Books.

<sup>303</sup> KRIKORIAN, Gaëlle, KAPCZYNSKI, Amy. Access to Knowledge in the Age of Intellectual Property. New York, Zone Books, 2010. 366p. P. 9.

<sup>304</sup> WALLACE, Helen. An institutional Anatomy and Five Policy Modes. In: Wallace, Helen, William Wallace, and Mark A. Pollack. Policy-making in the European Union. Oxford: Oxford UP, 2005. 501p. P.49-90. P.82.

<sup>305</sup> HALBERT, Debora. Globalized Resistance to Intellectual Property. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].

improvement of international enforcement mechanisms of IPR led to a stalemate in these multilateral fora. Furthermore the discussion had transformed from being between “pro-strong IPR” (pro-TRIPS) and “anti-strong-IPR” (anti-TRIPS) into a discussion between “pro-globalization”-“anti-globalization”. In the time when ACTA negotiations were taking place, the topic had transformed into a highly politicized issue, taking the ACTA negotiations as a platform to exchange more general views about the dynamics of international trade and about the principles it should be guided by. Concerning the interest group pattern this led to an environment with a more diverse set of interest groups actively participation in the debate than during the TRIPS negotiation, which will be discussed in detail at a later stage. Lowi describes the power arena of distributive politics as pluralistic in the sense that a large number of small, intensely organized interests are operating.<sup>306</sup> In distributive policies it is considered to be easier for groups to find coalition partners that all support each other, as major constituencies have homogeneous interests. Dür and de Bièvre point out that interest group influence should be substantial in such a scenario.<sup>307</sup> In the case of ACTA this holds true as both sides, the ACTA-“opponents” side and the ACTA-“defenders” side, were by far a homogenous group of stakeholders. Both sides were made up out of very different stakeholders and constituted a heterogeneous set of actors. However, the interest amongst the stakeholders of each group was homogenous –either “reject” or “support” the ACTA agreement. As a consequence the different interest groups on each side started to support each other, trying to give weight to their opinion. In a scenario like that, policy-makers are less likely to give in to a special interest lobbying. Their hands are more tied, as there action will be observed with scrutiny.

In sum it can be said therefore, that the change of the policy nature of the IP issue that took place in the time from TRIPS until ACTA lead to a change in the control interest groups could take over the policy outcome of these two negotiations. The TRIPS negotiating setting allowed the IPR-holders interest groups to exercise influence over the outcome, as the policy-makers had the compensating-option at hand in order to justify giving in to the preferences of this sectional interest group. Concerning the ACTA case, however, the changed nature of the issue led to a policy arena where the ACTA negotiators had to deal with a wider and more diverse set of pressures, limiting considerably their possibility to favour a certain interest groups. The policy-makers were under a lot more pressure in the ACTA case to find a balanced outcome and furthermore did not have the opportunity to use the issue-linkage option in order to facilitate the search for a solution that would survive this increased scrutiny.

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<sup>306</sup> LOWI, Theodore. American Business, Public Policy, Case Studies, and Political Theory. World Politics 16(4): 677-715, July 1964. 38p. Cambridge University Press. P. 692.

<sup>307</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 6.

#### 4.1.2. Issue Saliency

As seen in previous parts of this paper, the opposing groups during the TRIPS negotiations formed along the divisional line between “developed” and “developing” countries. Yet, within these groups the position and the interests were quite clear and homogenous. In the case of the EU there was no major doubt that the European position was pro-TRIPS (and as we have seen in the first chapter afterwards even TRIPS-plus). The pro-TRIPS interest group active during that time in the EU did not have to contest with major countervailing forces within its borders. TRIPS, or in general terms IP issues, failed to generate any significant public interest in the EU, with the exception of legal scholars that had focused on intellectual property issues and businesses interests that had lobbied for the agreement. According to Habert, intellectual property issues had not become controversial enough to generate much public attention.<sup>308</sup> Several reasons for this can be mentioned: Firstly, it could be argued that TRIPS had no huge direct implication for a big part of the EU citizens. From the European perspective, TRIPS was a consolidation of the international IP agreements it was part of anyway. The revolutionary part about TRIPS was that the scope was widened in terms of the countries that would be obliged to apply the same standards in force in the U.S. or the EU. All WTO member countries have to accept TRIPS with adherence to the WTO. Many countries that did not have an IP system before upon entry to the WTO took on the responsibility to develop one. With this mechanism IP protection spread around the globe, a phenomenon that got labelled as “IP globalization.”<sup>309</sup>

The fact that the TRIPS standards from 1994 were generally those already existing throughout the United States, Europe, Australia and Japan and harmonization meant only minor adjustments for those countries<sup>310</sup>, allowed the policy-makers to grant influence to the IPR-holders interest group in that time, as they did not have to fear the unpopularity of other interest groups. This responds to the thesis of Mahoney that the considerably low saliency of the issue made the policy-makers more accessible for interest groups with a rather sectional interest. As Mahoney explains, the two influence-shaping factors of the scope of the issue and the countervailing forces are connected with each other: if an issue is not perceived as having any mayor implications, the issue will not turn into a conflictive one in the context of which countervailing forces usually arise. The fact that the issue in those times from the EU perspective was not conflictive enough to give rise to strong countervailing forces can be considered as an issue-context factors that enhanced the influence of the interest groups

<sup>308</sup> HALBERT, Debora. Globalized Resistance to Intellectual Property. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].

<sup>309</sup> CHON, Margaret. Intellectual Property and the Development Divide. *Cardozo Law Review* Vol. 27(6): 2813-2904, 2006. P. 2816.

<sup>310</sup> HALBERT, Debora. Globalized Resistance to Intellectual Property. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].



pushing for the agreement during the TRIPS negotiation,.

In the case of ACTA the opposite was the case: Since the adoption of TRIPS the public awareness concerning IP issues had already grown considerably, making it more difficult for policy-makers to favour sectional interests. In the time between ACTA and TRIPS a politization of the topic of IPR protection and enforcement had taken place, which Haunss explains by identifying societal changes as the cause for this development.

According to Haunss, the phenomenon of “politicization of IP” consists on the one hand of the fact that more and more diverse actors got involved in IP issues (industry, legal specialists, national administrations, patent and trademark offices, and specialist courts were joined by academics, farmers, indigenous people, consumers, political activists, and NGOs) and on the other hand the expanding range of issues and forms of action.<sup>311</sup> In his attempt to explain this increased politization of IP issues, Haunss claims that IP conflicts increasingly addressed a set of new cleavages that originated in the social transformation of the industrial-based society towards the knowledge society.<sup>312</sup> Pointing out that IP issues are far from being new political issues he refers to four parallel processes that led to IP becoming a contentious issue<sup>313</sup>:

- 1) the growing economic importance of knowledge based industries;
- 2) the growing internationalisation of IP issues, exemplified in the growing number and reach of international treaties and trade agreements that centrally address IP;
- 3) the growing attention IP issues receive in non specialist and high level political fora;
- 4) and the trend to personalise IP rules.

Haunss explains that the growing political importance of IP (in non specialist fora) is for example reflected in the changing prominence in the G8 summit declarations. In 1996 intellectual property rights are first mentioned, however only as a minor sub issue. A decade later, in 2007, they reach a prominent position and are addressed as a major point after global growth and stability, financial markets, and freedom of investment, and before climate change, responsibility for raw materials, corruption, and trade. In 2011 they have risen to be the top issue in the G8 declaration, even before nuclear safety, climate change, development, and peace.<sup>314</sup>

<sup>311</sup> HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal*: Analysis and debate of Intellectual Property issues. Volume 3(1): 129-138, 2011. P. 131.

<sup>312</sup> HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal*: Analysis and debate of Intellectual Property issues. Volume 3(1): 129-138, 2011. P. 129.

<sup>313</sup> In the following: HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal*: Analysis and debate of Intellectual Property issues. Volume 3(1): 129-138, 2011. P. 130.

<sup>314</sup> HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal*: Analysis and debate of Intellectual Property issues. Volume 3(1): 129-138, 2011. P. 130

With “personalisation of IP rules” Haunss refers to the trend that IP laws increasingly affect individual citizens in more direct ways. Traditionally, IPRs regulated relationships between industrial market actors and were of interest for a small group of corporate actors, or in other words, the sectional interest group that originally put the IPR regulation issue on the negotiation agendas. With digitalisation and the proliferation of the Internet, however, this has changed fundamentally. IP laws now increasingly target individual citizens who do not engage in using or providing IP protected content for profit purposes.<sup>315</sup> Various focusing events further increased the awareness of a wider public towards IP issues:

One of these examples is the conflict about software patents in Europe, lasting from 1997-2005. It was one of the most conflictive issues that the European Parliament had seen so far and considerably raised the sensitivity of the public towards IP issues. More and more actors became involved in the mobilisation that brought the former specialist issue into the TV evening news. The conflict started in June 1997 when the European Commission published a Green Paper on the Community patent and the patent system in Europe and ended eight years later on June 6, 2005, when the European Parliament rejected the directive with a majority of 648 to 14 votes. Between these dates lies a contentious mobilisation in which new collective actors emerged and entered the area of IP politics in Europe. According to Haunss, this mobilisation has lastingly altered the power relations in this field and therefore surely is an important antecedent for the ACTA negotiations.<sup>316</sup>

Another example are the pirate parties that emerged in Europe and have contributed to bringing IP issues closer to the centre of the parliamentary system. Their electoral campaigns not only bestowed on them an elected representative in the European Parliament, but also forced other parties to position themselves in relation to the issues raised by the pirate parties.<sup>317</sup> The Pirate Parties managed to deconstruct the negative “pirate”-term that had been established in the process of connecting IP with trade as part of a narrative about the danger that counterfeiting trade represents.

Furthermore, the confrontation between the media and the information technology was fought out in Europe since the 1990s and for the first time highlighted how IP enforcement can have legal consequences for individual citizens. These battles took place between a small oligopoly of companies that controlled the creative industry versus a perceived threat

<sup>315</sup> HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal: Analysis and debate of Intellectual Property issues*. Volume 3(1): 129-138, 2011. P. 131.

<sup>316</sup> HAUNSS, Sebastian. The Politicisation of Intellectual Property: IP Conflicts and Social Change. *WIPO Journal: Analysis and debate of Intellectual Property issues*. Volume 3(1): 129-138, 2011. P. 134.

<sup>317</sup> Ibid.

from “outsiders” who were distributing works without permission. The first one of these battles occurred over music downloading in the early 1990, which started to become popular and therefore raised serious concerns in the music industry. The recording and film companies fought back through litigation against Internet Service Providers. With a number of widely followed lawsuit cases, the issue turned into a very contentious policy matter.

Landmark cases were for example the lawsuits against peer-to-peer service providers like Napster, Kazaa The Pirate Bay and eDonkey.<sup>318</sup> In the context of the Kazaa lawsuit, 12.000 Kazaa individual users were suited by the music industry.<sup>319</sup> As the music and movie industry were not able to control and implement enforcement mechanism, they turned to political lobbying in order to act against the loss of copyright enforcement powers and sparked a new political debate.<sup>320</sup> They sought to get the government to make enforcement possible by programming software codes in order to control what users do.<sup>321</sup> In the context of such discussions the questions of “freedom on the internet” or “freedom of expression” arose with increasing frequency.<sup>322</sup>

In Europe the issue of IPR protection and enforcement therefore step by step increased its scope, due to the fact that a growing number of people started to feel potentially directly affected. The stakes were high as discussions from the perspective of the IPR-holders industries was about their economic survival due to the substantive losses that IPR infringement constitute to their business model. On the other hand basically every citizen had a stake in the discussion, as the debate revolved around fundamental rights in the digital environment.<sup>323</sup> The component of implicating more far-reaching and direct consequences for European citizens had a “multiplier effect” in terms of raising concerns and awareness about international IPR regulation. Although the awareness about IP policymaking had already increased with the access-to-medicine campaign or the Doha development agenda, the number of European citizens interested in the North-South contestation dimension of IPR legislation was smaller than the broad group of people interested in the IPR issue when it revolved around the contestation of Copyright protection in the Internet era. ACTA, having amongst one of its principle objectives to address the new challenges of the digital environment, therefore arose in a highly sensitive issue context. Whereas during TRIPS the issue of international IP protection and enforcement was not very salient, the start of the just

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<sup>318</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 32-35.

<sup>319</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 33.

<sup>320</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 39.

<sup>321</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 39.

<sup>322</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 41.

<sup>323</sup> HORTEN, Monica. The Copyright Enforcement Enigma: Internet Politics and the “Telecoms Package”. Palgrave Macmillan, 2011. 215p. P. 48.



described copyright battles, accompanied by the huge media coverage, turned IPR law-making into an undertaking that raised concerns about rising costs of copyright consumption, while the benefit would stay the same. ACTA, emerging in the midst of this suspicious atmosphere, consequently represented a high-salience issue. This was even further enhanced once it became public that the negotiations were held secretly. The secrecy and perceived non-transparency of the ACTA negotiations certainly did not help to ease concerns and mistrust against pro-strong IPR advocates and policy-makers. Several fears arose when negotiation papers leaked in 2010 and the content was found to be contradictory to affirmations the negotiations parties had made beforehand. Amongst those fears were for example that ACTA would include provision for cutting off Internet access for repeated copyright infringers, although trade officials affirmed these concerns to be unfounded in EU stakeholder dialogue meetings. Another point that sparked outrage were the provisions on border controls, as commentators and media reports suggested that these strict provisions would allow for searches of i-Pods at borders, and therefore once again contributed to the personalization of IPR rules. As a consequence of these developments a huge latent interest group evolved that embraced a huge part of the European civil society. After all, roughly 50 to 100 million people in the EU use personal music players on a daily basis (2008) and in 2009, one person in two in the 27 EU member countries used the internet daily, while for young people the proportion is three quarters.<sup>324</sup> These circumstances created an interest group environment that increased the influence of the ACTA-opposing interest groups. For the sectional IPR-holder interest group it became considerably more difficult to influence the outcome, as the policy-makers could not deviate from the public's interests in this high-salience issue without fearing punishment and therefore were less responsive to the demands of sectional interest groups.

#### 4.1.3. Technicality

The technicality of an issue has an influence on the relationship between the policy-makers and the interest groups. As the level of technicality of an issue increases, the policy-makers need input from societal actors. The interest groups able to supply the necessary information should gain influence, as the technicality of an issue makes the policy-makers more dependent on the interest groups in order to understand the issue content.

In the case of the TRIPS negotiations, the policy-makers depended heavily on the technical knowledge of interest groups. The experts were mainly lawyers, but also industry experts

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<sup>324</sup> EUROSTAT. Internet access and use in 2009 one person in two in the EU27 uses the internet daily While for young people the proportion is three quarters. December 8 2009. [online] <[http://europa.eu/rapid/press-release\\_STAT-09-176\\_en.htm](http://europa.eu/rapid/press-release_STAT-09-176_en.htm)> [access: 25 November 2012].

from developed countries, that knew about the IP topic through their everyday handling with such assets. The need for expertise was furthermore enhanced by the fact that the TRIPS provisions were negotiated in the context of the creation of the WTO system, where technical knowledge was even more valuable than in the already specialised WIPO. Additionally, many different issues were negotiated during the Uruguay Round and it was close to impossible for the EU Commission officials to have profound expert level knowledge about every topic under discussion. The the best-prepared country taking part in the negotiations was the U.S., because it sent negotiators with strong IP expertise, who furthermore already had experience in negotiating on intellectual property issues trough bilateral negotiations.<sup>325</sup> Developing countries had only limited negotiation capacity and lacked the technical knowledge about IP that would have been necessary to organize a countermovement.<sup>326</sup>

This setting had changed considerably when the negotiations of ACTA started in 2008. The politization of IP let the need for technical expertise fade away. The counter-movement that was created in the post-TRIPS era managed to create a parallel language that bypasses the technical discourse of the TRIPS agreement in favour of moral claims regarding human rights.<sup>327</sup> In the case of ACTA, large part of the criticism furthermore did not even address the content of the ACTA proposal, but instead challenged the proposal on procedural grounds. Taking all critical comments concerning ACTA together, they revolve around four main issues: lack of transparency, very limited public non-industry participation, a huge democratic deficit and virtually no domestic or global accountability.<sup>328</sup> But even disregarding the fact that the debate on ACTA was overall much less technical than the TRIPS-discussion, the technical knowledge of strong-IPR opponents had increased considerably and did not anymore represent an obstacle for organizing a countervailing force. As will be shown later in the part of the interest group characteristics, the countermovement that evolved in the years after TRIPS is characterized by consisting of members of the information community that could discuss and exchange argumentations on the same know-how-level like the industry interest groups. This community arose due to the fact that the topic of Copyright and enforcement of IPR on the Internet was not a battle fought for the first time.

#### 4.1.4. Focusing event

Concerning focusing events it was especially the ACTA-case that was heavily shaped by focusing events, that occurred during the negotiation and signing phase of the ACTA

<sup>325</sup> DRAHOS, Peter. Prometheus, Volume 12 (1): 6-19, June 1995.P. 14.

<sup>326</sup> DEERE, Carolyn. The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries. New York, Oxford University Press, 2009. 323p.

<sup>327</sup> HALBERT, Debora. Globalized Resistance to Intellectual Property. 2005 [online] <<http://globalization.icaap.org/content/v5.2/halbert.html>> [access: 25 November 2012].

<sup>328</sup> YU, Peter K. Six Secret (and now open) fears of ACTA. SMU Law Review Vol. 64: 975-1094, 2011.

agreement and can be considered to have affected strongly the EU Parliament rejection of the ACTA agreement. In several occasion, secret negotiation documents leaked and where used by the ACTA opponents to spur concern about the implications ACTA would bring about. Although the leakage of a document might not consisted an event as such, the effect of increasing the salience of the issue was the similar. The salience of the issue was also increased by the controversy revolving around similar national agreements that were negotiated in the US in the time of the ACTA negotiations. Especially the Stop Online Piracy Act (SOPA) and the PROTECT IP act (PIPA) sparked huge controversies as they sought to impose new obligations on Internet intermediaries to block access to websites that facilitate online piracy and counterfeiting.<sup>329</sup> As some of this websites possibly affected by SOPA and PIPA are located abroad or are accessed through domain names registered overseas, these two agreements had potential extraterritorial reach and therefore not only sparked concern within the United States, but also in other parts of the world, including Europe.<sup>330</sup> Big Internet companies reacted to these legal initiatives with the creation of a viral campaign. The 16<sup>th</sup> of November was proclaimed as “the American Censorship Day”<sup>331</sup> and US citizens were called upon flooding US Congress with E-Mails and phone calls (according to the figures of the website a million people e-mailed Congress and 87,000 telephone called following this initiative).<sup>332</sup> Other huge Internet companies such as Tumbler, Reedit and Mozilla posted their concerns on their websites and were able to rally tens of thousands of users.<sup>333</sup> On the 18<sup>th</sup> of January Wikipedia made its English-language content unavailable for one day and Google’s home page was scarred by a black censor bar that covered the search engine’s label.<sup>334</sup> All of these activities received huge media coverage and therefore made the debate about Internet and Censorship very present. Considering that ACTA was signed on January 26<sup>th</sup> of 2012 by the EU and 22 member states, this PIPA and SOPA opposition wave surely constituted focusing events that increased considerably the salience of the ACTA issue within the EU.

One day after the signature of ACTA Kader Arif, the European Parliament's rapporteur for the ACTA resigned from the post over the issue, which surely was another focusing event that increased the salience of the issue. Stating that he condemns the whole process that led to the signature of ACTA, he points out the –according to his opinion- major flaws of the ACTA agreement: no consultation of the civil society, lack of transparency since the

<sup>329</sup> YU, Peter K. The Alphabet Soup of Transborder Intellectual Property Enforcement. *Drake Law Review Discourse* Vol 60: 16-33, June 2012. P. 28.

<sup>330</sup> Ibid.

<sup>331</sup> See: <http://americancensorship.org/>

<sup>332</sup> WASHINGTON POST. SOPA opposition goes viral. 22 November 2011 [online] <[http://articles.washingtonpost.com/2011-11-22/business/35282878\\_1\\_bill-sites-ordinary-users](http://articles.washingtonpost.com/2011-11-22/business/35282878_1_bill-sites-ordinary-users)>[access: 6 December 2012].

<sup>333</sup> Ibid.

<sup>334</sup> THE NEW YORK TIMES. In Fight Over Piracy Bills, New Economy Rises Against Old. 18 January 2012 [online] <<http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all>>[access: 6 December 2012].

beginning of negotiations, repeated delays of the signature of the text without any explanation given, rejection of Parliament's recommendations as given in several resolutions of our assembly.<sup>335</sup> Kadir Arif's political position in connecting with the ACTA negotiation before his resignation gave huge credibility to his negative comments about ACTA, which played into the hands of the ACTA-opposing interest groups. Just like the countervailing forces that emerged in the US in the context of PIPA and SOPA, this focusing event surely favoured the ACTA-opposing interest groups in the sense that the described message-loaded incidents backed their argumentation and helped them to gain the "moral high ground" in the discussion. This, in turn, enhanced their power to influence in the political debate as policy-makers would be badly advised to ignore demands of interest groups that dispose of publically recognized legitimacy concerning their affirmations.

#### 4.2. Interest Group Factors

In the following chapter the interest group pattern of the TRIPS and ACTA negotiations will be analysed in a comparative way. It has to be pointed out, though, that this analysis will be limited to the interest groups that directed their activities at the European institutions, especially at the European Commission –the negotiator of conducting the TRIPS and ACTA negotiations. European interest group also had the possibility of directing their activities towards their domestic governments, as in both negotiations it was the European Commission and the member states themselves who took part in the negotiation. However, in order to maintain the focus, these interest group activities will be excluded from the analysis and only if it is important for the understanding of the exposed information, reference will be made to interest groups activities geared towards other governmental actors than the EU institutions. Braithwaite and Drahos very correctly describe international IP law-making as a "complex game fought between user and owner groups"<sup>336</sup>. In the following chapter the active active interest groups during the TRIPS and ACTA negotiations will be analysed according to the type of interest group they represent, their resources and the position they took in the respective negotiation setting. These pieces of information will give insights about how these characteristics enhanced or diminished their influence in the two different cases.

##### 4.2.1. Type of Interest Group and Strategy

<sup>335</sup> BBC NEWS. European Parliament rapporteur quits in Acta protest. 27 January 2012. [online] <<http://www.bbc.co.uk/news/technology-16757142>> [access: 6 December 2012].

<sup>336</sup> BRAITHWAITE, John & DRAHOS, Peter. Global Business Regulation. New York, Cambridge University Press, 2000. 629p. P. 62.

<sup>336</sup> DRAHOS, Peter. Prometheus, Volume 12 (1): 6-19, June 1995. P. 14

As mentioned before, the influence of a group may vary according to the type of interest group. Groups defending diffuse interests according to Olson should have a collective action challenge, which consists in encountering considerably more difficulties in getting organised than concentrated interests. In order to provide a point of departure the following graphs gives an overview of the actors forming up the interest groups concerning the TRIPS and ACTA negotiations:

	PRO			CONTRA		
TRIPS	Interest Group Name	Interest Group Type	Position	Interest Group Name	Interest Group Type	Position
	Business Europe (former UNICE)	Horizontal peak business organisation at EU level	Comprehensive and broadened protection of intellectual property rights (concentrated interest)			
ACTA	International Trademark Association (INTA)	Horizontal peak association at international level, profit interest	Strong international protection of trademarks	American University Washington College of Law, Program on Information Justice and Intellectual Property	Network of interested academics	Pointing out fallacies in the argumentation of governmental actors on the ACTA negotiations
				European Digital Rights (association founded in 2002)	Association of cause groups	Citizen Rights in the Internet
	The Anti-Counterfeiting Group (ACG)	Specialist group/Campaign group	Trade of counterfeit and piracy products is a crime	La Quadrature du Net	Cause group	
	European Brands Association (AIM)	Horizontal peak association at international level, profit interest	Strong international protection of brands	Corporate Europe Observatory	Campaign/Cause group	Targeting lack of transparency in corporate lobbying
	Business Software Alliance (BSA)	Sectional interest group, profit interest	Stop Software piracy	European AIDS Treatment Group	Cause group	Access to medicine
	The European Apparel and Textile Organisation (Euratex)	Sectional interest group, profit interest	Promote legislation and its application in the field of intellectual property	Health Action International (Europe)	Association of cause groups	Access to medicine
	The Association of European Chambers of Commerce and Industry (EUROCHAMBRES)	Horizontal organization, cause group	Promote IPR protection and enforcement in order to incentivize innovative activities	Foundation for a Free Information Infrastructure e.V.	Network of associations	Free information flows on the internet
	European Community Trade Mark Association (ECTA),	Horizontal peak association at European level, profit interest	Strong international protection of trademarks	Free Software Foundation Europe	Cause Group	Computer user freedom and defence of free software users
	Federation of the European Sporting Goods Industry (FESI)	Peak sector association, profit interest	Protecting trademark, design, patent and trade names rights in the interest of	EuroISPA (Business association of European Internet Service Providers)	Sectional group profit sector	Appealing for a more balanced IPR law-making

			European businesses and consumers			
	International Anticounterfeiting Coalition (IACC)	Non-profit cause group, cross-sectional	Combating trademark and product counterfeiting	ECTA (European Competitive Telecommunications Association)	Sectional group profit sector	
	International Federation of the Phonographic Industry (IFPI)	International sector association, profit interest	Increasing the rights of record producers.	ETNO (European Telecommunications Network Operators' Association)	Sectional group profit sector	
	Interactive Software Federation of Europe (ISFE)	Sectional interest group, Profit interest	Protect the inventions of Europe's video game industry through effective international IPR protection	GSMA Europe (representing the interests of the worldwide mobile communications industry)	Sectional group profit sector	
	Association of European Trademark Owners (MARQUES)	Horizontal interest group, Profit interest	Strong international protection of trademarks			
	Toy Industries of Europe	Sector group, profit interest	Counterfeit toys present risks to children's health and safety as well as the cost to industry of counterfeiting and parasitic copying			

**Figure 9: Types of Interest Groups in the TRIPS and ACTA negotiation**

Source: Own Illustration with information gathered from: EU Transparency Register; Letter of 75 industry lobby groups to the European Parliament supporting ACTA<sup>337</sup>; Attendees lists of June 2010 International IP Enforcement Conference.<sup>338</sup>

Surely, not all actors that have taken some kind of political action with respect to the TRIPS and ACTA negotiations appear in this table. However, rather than giving a complete picture of all active actors, the intention of this overview is to familiarise the reader with the types of interest groups predominantly active in the interest group system of each negotiation. This will facilitate to understand the strategies employed by the different interest groups in each negotiation setting and how interest group characterized came to be influence-enhancing/diminishing factors in the negotiation context.

In the leading up to the TRIPS negotiations, it was a group of U.S. private companies, consultants and lawyers that managed to organize a global lobbying network and actively shaped the TRIPS negotiation process through their activities.<sup>339</sup> The most intense lobbying activities were undertaken by an alliance of business communities of developed countries.

<sup>337</sup> INTA. Please support ACTA for the good of Europe. 15 February 2012. [online] <<http://www.inta.org/Advocacy/Documents/February152012Parliament.pdf>> [access: 16 December 2012].

<sup>338</sup> AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, PROGRAM OF INFORMATION JUSTICE AND INTELLECTUAL PROPERTY. Attendees of June 2010 International IP Enforcement Conference. [online] <<http://www.wcl.american.edu/pijip/go/june2010-attendees>> [access: 16 December 2012].

<sup>339</sup> BRAITHWAITE, John & DRAHOS, Peter. Global Business Regulation. New York, Cambridge University Press, 2000. 629p. P. 61.



The formation process of this international alliance was initiated in the U.S. As at the time of the Uruguay Negotiations IP was not much of an issue in Europe, the U.S. lobbyists had to actively recruit their counterparts in Europe (and Japan) by illustrating them the common economic and political interests in developing some form of international IP protection.<sup>340</sup> It was the U.S. Intellectual Property Committee (IPC), formed in March of 1986, who took on that task of putting a consensus in place amongst the business communities of Europe, Japan and the U.S. with respect to the Uruguay negotiations and IP.<sup>341</sup> Organising an international alliance of that kind can be seen as a substantial achievement, considering that overcoming collective action obstacles meant incurring into considerable monetary and organizational efforts. The concentrated benefits that strong international IPR regulation constituted for IP-dependent industries -existing predominantly in developed countries as pointed out before- functioned as such a strong incentive that all actors with these concentrated benefits at stake united their resources in order to conjointly gain control over the outcome and exercise their influence. The actors that made up the business interest group can be considered as extremely well-resourced, relatively small and professionally organized interest group, which all constitute influence-enhancing interest group characteristics. As many of these associations had already existed for many years<sup>342</sup>, they could rely on substantive experience on how to successfully lobby policy-makers.

TRIPS is considered as a result of the strong lobbying of business communities, which in Europe was represented by the peak association BusinessEurope. As Braithwaite and Drahos state: "Without the work of these business organizations the intellectual property/trade-paradigm might never have happened".<sup>343</sup> Supplementing each of their Government's proposals, the business communities of the United States, Japan, and the European Community worked together in order to submit a joint proposal to the TRIPS Agreement negotiators.<sup>344</sup> The proposal was called "Basic Framework of GATT provisions on Intellectual Property" and was the result of a series of meetings held between March and September 1986.<sup>345</sup> The peak industry association for Europe was the UNICE, or as it is called today BusinessEurope, which apart from participating in the international alliance of business communities set into motion by the IPC, became also individually active within the

<sup>340</sup> DOANE, Michael L. TRIPS and international intellectual property protection in an age of advances technology. *American University International Law Review* 9(2): 465-497, 1994. P. 476.

<sup>341</sup> DRAHOS, Peter. *Prometheus*, Volume 12 (1): 6-19, June 1995. P.13.

<sup>342</sup> The peak business association lobbying the EU Commission in that time, BusinessEurope, was for example founded in 1949 and could look back on over 50 years of lobbying experience during the TRIPS negotiations. Source: EUROPEBUSINESS. History of the organisation. [online] <<http://www.busesseurope.eu/Content/Default.asp?PageID=601>> [access: 16 December 2012]

<sup>343</sup> BRAITHWAITE, John & DRAHOS, Peter. *Global Business Regulation*. New York, Camebridge University Press, 2000. 629p. P. 71.

<sup>344</sup> DOANE, Michael L. TRIPS and international intellectual property protection in an age of advances technology. *American University International Law Review* 9(2): 465-497, 1994. P. 475.

<sup>345</sup> See: BRAITHWAITE, John & DRAHOS, Peter. *Global Business Regulation*. New York, Camebridge University Press, 2000. 629p. Chronology of Key Events.

EU by publishing a position paper on “GATT and Intellectual Property“. In this position paper BusinessEurope argued that the EC’s approach to the negotiations has to be broadened to include the full range on intellectual property rights.<sup>346</sup>

The interest group formations during the TRIPS negotiations therefore pursued primarily direct lobbying strategies, as they proactively elaborated proposals aimed at convincing policy-makers to negotiate in their favour. This shows that they constituted a highly organized interest group that was able to translate their preferences into concrete and precisely formulated policy recommendations. With the strategy of direct lobbying they were acting towards becoming an insider group for the policy niche of IP, which they ultimately reached. They can be considered as an insider group as they were recognised by the governmental as legitimate spokespersons for the European interest in international IPR protection and enforcement.<sup>347</sup> In the times of TRIPS their status as insider group was not questioned and remained unchallenged. They contributed to policymaking process with their expertise knowledge and the policy-makers gave them control over the outcome, or in other words, influence through a kind of “lets leave it to the experts“-approach.

On the side of the IP consumers, there were no interest groups in Europe engaging in activities directed towards influencing the TRIPS negotiations outcome. In the time when TRIPS was negotiated, the cost and benefit implications of international IPR regulation were not yet fully understood by any other interest group than the business community. First consumer interest groups emerged in India, like for example the Indian National Working Group on Patent Laws, which has become a focal point in India and other developing countries for resistance to the TRIPS patents provisions in the post-TRIPS era.<sup>348</sup> In the case of the EU, however, the European business community could advance without any significant opposition in their lobbying activities. Countervailing forces, as has been described in earlier parts of this thesis, only started to emerge in the EU in the post-TRIPS era.

During the ACTA negotiations the business interest group still had their insider status, but did not anymore enjoy the unchallenged position of TRIPS times. The legislators increasingly got criticized for being biased and accused of responding only to the direct lobbying of business groups. As, like explained earlier, the politization of the IP policy process contributed to the emergence of a lot more stakeholder, it became increasingly illegitimate to give an insider group status to any kind of interest group.

<sup>346</sup> See: BRAITHWAITE, John & DRAHOS, Peter. Global Business Regulation. New York, Camebridge University Press, 2000. 629p. Chronology of Key Events.

<sup>347</sup> See also: EUROPEBUSINESS. History of the organisation. [online] <<http://www.bussinesseurope.eu/Content/Default.asp?PageID=601>> [access: 16 December 2012]

<sup>348</sup> BRAITHWAITE, John & DRAHOS, Peter. 2000. Global Business Regulation. New York, Camebridge University Press. 629p. P. 72.



The ACTA opponents used a whole set of strategies, that were all constructed on them being the “outsider” interest group. They therefore could be classified as “outsiders by ideology”. In reality they soon acquired an insider status. Not only could they enter into discussion with policy-makers of the European Union in stakeholder meetings, but were also backed by certain political parties in EU parliament, like for example the Greens/EFA group.<sup>349</sup>

A big network of ACTA opposing interest groups emerged, that questioned the overall idea of IP being trade issue. NGOs and activist coalitions that had emerged independently of one another to contest the contours of IP rights in seeds, medicines, software, genetic material, and cultural goods began to build links to one another and formed a horizontal network structure through overlapping webs of association.<sup>350</sup>

The ACTA opposing interest group therefore can be classified as mainly cause-groups, as their line of reasoning was not only directed against ACTA, but against the general IP/Trade-paradigm. Only very few profit-oriented interest groups from the Internet industries were part of ACTA opposition movement.<sup>351</sup> Having financially resourceful actors amongst the ACTA opposition surely cannot be seen as a disadvantage for enhancing the power over the outcome.

The ACTA-opposing interest groups claimed for themselves, that they would represent the “public interest”, as they not only criticized ACTA on substantial grounds, but also the lack of transparency that they identified with respect to the ACTA policy-making process. Although they constituted a large group with more diffuse interests than the business interest group, they managed to overcome the collective action problem through the Internet and social networking, achieving a high degree of organisation. Online web movements opposing ACTA, like for example accessnow.org and avaaz.org demonstrated the power of the Internet in terms of overcoming collective action hurdles. Almost 114,500 people have signed the avaaz petition against ACTA at the time of writing this paper.<sup>352</sup> Within less than a minute and just a few mouse clicks it is possible to become part of this petition. This has huge implications for interest group dynamics, as the hurdle for becoming organized have been dramatically lowered in the Internet age. The fact that the interest groups opposing ACTA in large parts comprised actors highly familiar with the new opportunities that the Internet offers in terms of campaigning and gaining wide-spread support, can be considered an influence-enhancing factor connected with the characteristics of the interest group.

<sup>349</sup> See: [http://act-on-acta.eu/Main\\_Page](http://act-on-acta.eu/Main_Page)

<sup>350</sup> KAPCZYNSKI, Amy. The Access to Knowledge Mobilization and the New Politics of Intellectual Property. *The Yale Law Journal* 117(804): 804-885, 2008. P. 835.

<sup>351</sup> EUROISPA. Internet Industry concerns on the Anti-Counterfeiting Trade Agreement. April 2012. [online] <<http://www.euroispa.org/news/63-internet-industry-concerns-on-the-anti-counterfeiting-trade-agreement>> [access: 16 December 2012].

<sup>352</sup> See: <http://www.avaaz.org/en/acta/>

Although these groups represented diffuse interests they managed to bring across a clear and easy-understandable message: “Stop ACTA”. They could be described as some kind of new “Mobilization” or “Slogan”-interest groups, which managed to mobilize support by translating the complex IP issue into easy understandable and attention-raising slogans.

Furthermore, they employed a very aggressive mobilization strategy, encouraging European citizens to participate in demonstrations against ACTA and to contact their Member of European Parliament (MEP). By giving concrete advice to the general public on which measures to take in order to oppose ACTA, they integrated the general public in their lobbying activities. Especially by activating big part of the European population to write to the MEP they exercised indirect influence on European policy-makers by reminding MEPs through thousands of E-Mails and telephone calls of their constituents that ACTA could put their re-election on the line. The ACTA opponent’s employed indirect strategies consisting in gaining sufficient public support in order to make it politically undesirable for policy-makers to ignore their demands. In June 2012, the European Parliament finally voted on ACTA with a very clear result: 478 MEPs voted against ACTA, 39 in favours, and 165 abstained.<sup>353</sup>

Strangely enough, there has not been any significant counter movement by the business interest groups to this aggressive mobilisation strategy. It were mainly the governmental actors, especially the negotiation officials, that intended to react to the continuously growing public opposition to ACTA, by fore example releasing detailed information about the ACTA negotiations and factsheets.<sup>354</sup> However, those reactions were only reactive and could not really counter the big ACTA-opposition movement that reached its peak at the end of 2011 and in the first half of 2012 after the signature of the ACTA agreement by various negotiating parties. Furthermore, the governmental actors mainly focused on the criticism that had been directed against them on procedural and legitimacy ground. However, in order to organize a significant countervailing movement, it would have been necessary for the business community to employ a more vocal indirect strategy, presenting to the public their logic of reasoning concerning intellectual property protection. Although they had arguments at hand, those were not presented in the same vocal way as the ACTA-opposing argumentations. It could be argued that this is due to the fact that the pro-ACTA interest groups were mainly profit-orientated actors. With the watering-down of the ACTA provisions due to the opposition pressure, the agreement lost its attractiveness of offering concentrated benefits for the profit-orientated actors. The ACTA opponents could therefore advance with little resistance; especially as the sheer quantity and quality of the opposition movement was difficult to

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<sup>353</sup> IPODNN. European Parliament strikes down ACTA in significant vote. 4 July 2012 [online] < <http://www.ipodnn.com/articles/12/07/04/meps.vote.478.to.39.against.controversial.anti.piracy.measure/> > [access: 16 December 2012].

<sup>354</sup> See: EUROPEAN COMMISSION. Trade: ACTA. [online] < <http://ec.europa.eu/trade/tackling-unfair-trade/acta/> > [access: 7 November 2012].

handle for the policy-makers. Confronted with the big public outcry about ACTA, they were eager to restore the negative image the policy-making process of ACTA had gained in the public. As ACTA became a politically explosive agreement it became increasingly more difficult to argue pro-ACTA, which consequently had a decreasing effect on the influence capacity of the business interest groups.

The result of this dynamic was that, similarly like in the TRIPS negotiation, one side could influence the outcome, because of the incapacity or unwillingness of the opposed group to engage in the formation of a significant countervailing force. The interesting observation is, that the roles the different interest group took exactly switched around. During TRIPS the business interest groups found conditions that favoured their influence, while during ACTA the large “public interest” group had more possibilities to control the outcome. It is also interesting to observe that in the case of ACTA the interesting groups actively created the conditions that made the policy-makers more responsive to their cause.

#### 4.2.2. Resources

According to Dür and de Bièvre, groups with more resources should have more influence than groups with little resources. Following Dahl<sup>355</sup> resources can be defined as ‘anything that can be used to sway the specific choices or the strategies of another individual.’ There are different types of resources: campaign funding, information on constituency interests, expertise on policy issues, and information on the opinions of other policy makers.<sup>356</sup>

During the TRIPS negotiations the business interest groups constituted very resourceful actors. The private companies that pushed for the conclusion of TRIPS were big international corporations like (for the European case) Microsoft, IBM, and Apple etc. that have a so-called structural power, because they can threaten to relocate investment or employment. Just thinking about the travelling expenses the business interest group had to incur in order to hold the consensus-building meetings between them shows how resource intensive those lobbying activities were. As other resources, apart from money and structural power, they could offer expert knowledge about IP, which was very valuable for the policy-makers in that time.

According to Susan Sell, the political process that led to the adoption TRIPS is an excellent example of a power game in which resource-rich private actors were able to control the

<sup>355</sup> DAHL, Robert A. *Who Governs? Democracy and Power in an American City*. New Haven, Yale University Press, 1961. 355p. P. 226.

<sup>356</sup> DÜR, Andreas and DE BIÈVRE, Dirk. The Question of Interest Group Influence. *Journal of Public Policy* 27(1):1-12, 2007. Cambridge University Press. P. 5

outcome with the support from the powerful governments of industrialized countries. In this case, they managed to successfully install a global IP regime that requires all WTO member countries to adopt strong national systems of IP protection. As IP rights create opportunities for potentially lucrative rents, businesses that could benefit from such rents will generally be willing to spend their resources up to the amount of their potential rents in order to secure these rights.<sup>357</sup> The TRIPS negotiations were from the European business community perspective a high-stake deal, as the adoption meant a positive status quo change for them. With the final version of TRIPS they got their interests fulfilled to a high degree. In order to achieve this result they had incurred in investments for setting up a powerful lobbying community. Their resourcefulness therefore constituted an influence-enhancing factor concerning their interest group characteristics.

When ACTA first became negotiated, the business interest group had to encounter with interest groups that also had considerable resources at hand. Although many of the ACTA opposing interest groups did not possess the same monetary means, they had definitely gained expert knowledge on the field of IP issue. Furthermore, their ability to mobilise grand part of the civil society, as explained in the previous chapter, constituted an important resource in the sense that they could offer policy-makers the possibility to present themselves as guided by the interests of their constituencies, and therefore gain popularity. As will be explained in detail in the following chapter, this is an especially relevant factor in the European Union whose institutional system is considered to provoke a sense of distance to the European citizens and their interests. The resource of being able to provide information about the interest of the general European society therefore enhanced the ACTA-opposing interests groups power in controlling the outcome.

In the ACTA negotiation context, monetary resources had not the same weight as during the TRIPS negotiations. Interest groups today can conduct great part of their administrative and organizational task with the help of the Internet, which considerably lowers the cost of political activity. Another interesting point should be mentioned: Considering that the business interest groups during the TRIPS negotiation used their monetary resources in order to transform themselves into an insider group, suggests that one of the main aims of using monetary consists in accessing otherwise disclosed data and information about the negotiation status. Similarly it is surely no coincidence that today 60 % of all European groups are concentrated in Belgium or have at least an office there.<sup>358</sup> These investments in getting closer to policy-makers are surely connected to the wish of gaining valuable

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<sup>357</sup> KAPCZYNSKI, Amy. The Access to Knowledge Mobilization and the New Politics of Intellectual Property. *The Yale Law Journal* 117(804): 804-885, 2008. P. 820.

<sup>358</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.1.

information on the negotiation process. During the TRIPS negotiation the access to secret information was hugely simplified by disposing of the necessary financial resources to undertake the necessary step. With the introduction of Wikileaks into the political arena, however, information asymmetries caused through difference in monetary resourcefulness get to a certain extent cancelled out. Wikileaks functions as a provider of confidential, valuable information that in earlier decades could not have been obtained by less financially resourced interest groups.

In sum it can be said, therefore, that the changed importance or significance of resources for interest group activity since TRIPS constitutes a factor that can enhance or diminish interest group influence. In the case of ACTA the loss in relevance of monetary resources for achieving positive lobbying results, constitutes a resource factor that played in the favour of the ACTA-opposing interest groups.

#### 4.3. Institutional Factors

There has been a huge growth in lobbying in the EU over the past two decades, both at the national and the EU level. The outcome of this explosion of EU interest groups is a dense interest group system<sup>359</sup>, which Richardson and Coen furthermore define as “a complex and ever-changing environment”<sup>360</sup>. Although interest groups and lobbyists have been active in European policymaking since its creation, the size, range, and type of interest groups have evolved dramatically in the last 20 years.<sup>361</sup> It is assumable that there have been significant changes in the EU interest group system since the TRIPS negotiations, leading to varying influence potentials for different interest groups back then (TRIPS) and today (ACTA). In the next chapter it will be the aim to identify these kinds of changes focusing on two specific areas where according to Dür and de Bièvre influence enhancing factors can be found: Democratic Accountability and Access Points.

##### Degree of democratic accountability

Democratic accountability is a delicate topic for the EU, because of the so-called “democratic deficit” that has frequently been attributed to the institutional system of the EU as one of its main weaknesses. The concept of “democratic deficit” consists primarily in the argument that the EU suffers from a lack of democracy, as the complexity of the policymaking process of

<sup>359</sup> RICHARDSON, Jeremy and COEN, David. Lobbying the European Union: Institutions, Actors and Issues. Oxford, Oxford University Press, 2009. 2009. 348p. P.3

<sup>360</sup> RICHARDSON, Jeremy and COEN, David. Lobbying the European Union: Institutions, Actors and Issues. Oxford, Oxford University Press, 2009. 2009. 348p. P.5

<sup>361</sup> RICHARDSON, Jeremy and COEN, David. Lobbying the European Union: Institutions, Actors and Issues. Oxford, Oxford University Press, 2009. 2009. 348p. P.6.

the European institutional system lets it seems somewhat inaccessible to the ordinary citizen.<sup>362</sup> Usually a democratic political system has two different kinds of channels through which interests can get represented: the traditional pathway of representative parliamentary democracy and supplementary systems aimed at participatory democracy. The EU is particularly dependent on the supplementary participatory channels, because of certain weaknesses in the representative channel. These weaknesses consist for example in the fact that most EU citizens do not vote in the elections of the European Parliament and in general see the EU as an abstract, far-away institutional apparatus. Because of the absence of a 'government', a common language, and a 'public space', which would include for example shared media etc., the participation of the general public is a specific challenge of the EU.<sup>363</sup>

The pressure for the EU institutions to find participatory channels with the help of which it can connect with the civil society generally enhance the influence of interest groups in the EU system. Interest groups can serve as proxies for wider civil society to the EU institutions<sup>364</sup> and therefore take on a key role as they "not only dominate input to the EU's participatory channel, but also perform surrogate democratic mechanisms acting as "agents of accountability"<sup>365</sup>. Furthermore, as the EU has as one of its principal motives to solve common shared problems and consequently engages in a lot of policymaking directed towards regulation<sup>366</sup>, interest group action is considered to be substantive according to the interest group theory laid out in an earlier point of this paper.

Because of the nature of the responsibilities that are attributed to the European Commission in the regulatory oriented regime, the Commission is the centre of relationships with interest groups. In the Uruguay Round the European Commission played a key role in the negotiations, because the European Commission alone speaks for the EC and its Member States at almost all WTO meetings.<sup>367</sup> The competence of the Commission in commercial policy is defined by the treaties of the European Community and the European Court of Justice (ECJ). According to Articles 300 (1) of the Treaty establishing the European Community (Amsterdam consolidated version)<sup>368</sup> and Article 101 of the EURATOM-Treaty<sup>369</sup>,

<sup>362</sup> EUROPEAN COMMISSION. Summaries of the EU legislation. Glossary: Democratic Deficit. [online] <[http://europa.eu/legislation\\_summaries/glossary/democratic\\_deficit\\_en.htm](http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm)> [access: 6 December 2012].

<sup>363</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.2.

<sup>364</sup> Ibid.

<sup>365</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.1.

<sup>366</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. 235p. P.2.

<sup>367</sup> LEAL-ARCA, Rafael. The EC in the WTO: The three-level game of decision-making. What multilateralism can learn from regionalism. [online]. European Integration Online Papers (EIoP) Vol. 8(14): 39p, 2004. <<http://eiop.or.at/eiop/texte/2004-014a.htm>> [access: 27 November 2012]. P. 3

<sup>368</sup> EUR-LEX. Treaty establishing the European Community (Amsterdam consolidated version) - Part Six: General and Final Provisions - Article 300 - Article 228 - EC Treaty (Maastricht consolidated version) - Article 228 - EEC Treaty. [online] <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997E300:EN:HTML>> [access: 27 November 2012].

international treaty negotiations in respect of matters involving an element of Community competence should be conducted *a priori* by the Commission.<sup>370</sup> The EU Commission therefore acts as the negotiator, although it has to be pointed out that in order to adopt an agreement, the consent of the EU Council and the EU Parliament are necessary. Furthermore the Commission has to negotiate within the directions general EU strategy provides given a certain issue. Still, the Commission remains the main target for interest group as they seek to have influence while negotiations are still going, exercising control over the provision that get included or excluded.

The exchanges between the Commission and the interest groups can therefore be classified as mainly technical. The Commission is relatively small in size (33.033 staff members<sup>371</sup>) and therefore extremely depended upon outside technical information, which raises the potential for a so-called “regulatory capture”.<sup>372</sup> This term refers to the danger that well-organized, knowledgeable and resourceful groups might dominate the policy-process, because they are better equipped to serve the information needs of the European Commission. Furthermore, the limited mechanisms of direct accountability concerning the European Commission make it more prone to be distracted from the goal of popular legitimacy.<sup>373</sup> This situation can be prevented by a pluralistic interest group system. However, in highly technical issues, knowledge entry costs are high, and a pluralistic system therefore less probable.<sup>374</sup>

It seems quite probable that this was the situation during the TRIPS negotiations. The resourceful interest group of businesses, with certain stakes in the IPR issue under discussion in the Uruguay Round, managed quite easily to capture the attention of the European Commission as they could offer important technical knowledge for the negotiations on an international IPR standards system. As already pointed out before, the interest group system concerning IPR issues in the leading up and during the TRIPS negotiations can hardly be characterized as pluralistic. The business interest group engaged in lobbying was – at least within the EU- basically unchallenged by any kind of countervailing force. The dependence of the EU Commission concerning technical knowledge created an environment that enhanced the possibilities to influence the negotiation outcome for the business interest

<sup>369</sup> EURATOM. Treaty establishing the European Atomic Energy Community. [online] <[http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_3\\_antlasmalar/1\\_3\\_1\\_kurucu\\_antlasmalar/1957\\_treaty\\_establishing\\_euratom.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_euratom.pdf)> [access: 27 November 2012].

<sup>370</sup> LEAL-ARCA, Rafael. The EC in the WTO: The three-level game of decision-making. What multilateralism can learn from regionalism. [online]. European Integration Online Papers (EIoP) Vol. 8(14): 39p, 2004. <<http://eiop.or.at/eiop/texte/2004-014a.htm>> [access: 27 November 2012]. P. 6

<sup>371</sup> EUROPEAN COMMISSION. HR Key Figures Card, Staff Members, 2012 [online] <[http://ec.europa.eu/civil\\_service/docs/hr\\_key\\_figures\\_en.pdf](http://ec.europa.eu/civil_service/docs/hr_key_figures_en.pdf)> [access: 8 December 2012].

<sup>372</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.2.

<sup>373</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.3.

<sup>374</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.2.



groups during the TRIPS negotiations. As there was no opposing group, the EU institutions furthermore did not run the danger to be accused of being biased towards a special interest of a small interest group.

Furthermore, the democratic deficit issue of the EU institutional system, although already present, had not yet been addressed as vigorously during the TRIPS negotiation as in the forthcoming years. With the progress of the European integration process, the question of democratic legitimacy became increasingly sensitive and gained importance in the formulation of new legal milestones. In the context of the division of competences of the EU institutions concerning trade policy, the concept of a “democratic deficit” was raised in form of the argument that trade policy due to its technical nature is left to the European Commission and not to the legislative branch (European Parliament and EC Council), provoking a democratic deficit.<sup>375</sup> In the Maastricht Treaty (1992), Amsterdam Treaty (1997) and Nice Treaty (2001), the intentions to improve the democratic legitimacy are reflected by the progressive reinforcement of the powers of Parliament with regards to the appointment and control of the Commission and the extension of the scope of the co-decision procedure. In the Treaty of Lisbon the question of improving the democratic accountability and legitimacy is especially emphasized. It strengthens the powers of the European Parliament on legislative and budgetary matters and enables it to carry out effective political control of the European Commission through the appointing the President of the Commission.<sup>376</sup> At the same time, the treaty of Lisbon institutionalizes interest groups (of all kinds) by creating a citizens’ right of initiative and by recognizing the importance of dialogue between the European institutions and civil society. Article 11 of the Treaty of Lisbon states<sup>377</sup>:

- 1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.*
- 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.*
- 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*
- 4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of*

<sup>375</sup> LEAL-ARCA, Rafael. The EC in the WTO: The three-level game of decision-making. What multilateralism can learn from regionalism. [online]. European Integration Online Papers (EIoP) Vol. 8(14): 39p, 2004. <<http://eiop.or.at/eiop/texte/2004-014a.htm>> [access: 27 November 2012]. P. 22.

<sup>376</sup> EUROPEAN COMMISSION. Summaries of the EU legislation. Glossary: Democratic Deficit. [online] <[http://europa.eu/legislation\\_summaries/glossary/democratic\\_deficit\\_en.htm](http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm)> [access: 6 December 2012].

<sup>377</sup> EUROSTEP- EEPA. The Lisbon Treaty – Article 11. [online] <<http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-european-union-and-comments/title-2-provisions-on-democratic-principles/75-article-11.html>> [access: 6 December 2012].

*its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.*

Today, the nature of the institutional system of the EU facilitates pluralistic outcomes, because the decision-making process is more fragmented.<sup>378</sup> In the current debates of the European Community a lot of emphasis is put upon the issue of input legitimacy (participation and the means through which policies are made) rather than output legitimacy (winning by results). Organized citizen interest groups were systematically empowered as a means to achieve the functional model of “participatory democracy”. According to Greenwood this explains why organizations articulating interests stated as those of the citizen have arrived at the centre of EU policymaking.<sup>379</sup> The concrete result of this process is that the Commission has been a significant source of funding for citizen interest groups organized at EU level, in order to ensure the presence of checks and balances in the ways in which demands are brought to the political system, and to perform democratic functions, because of the relative weakness of other mechanisms.<sup>380</sup>

During the ACTA negotiations the interest groups opposing the agreement therefore could act within an environment that enhanced their possibilities to have influence. The salience of the issue of the “democratic deficit” of the EU institutional system and the negative image it had gained concerning the participation of civil society in the policymaking process created a fertile ground for the claims of the ACTA opposing interest groups. In their campaigns these interest groups expressively presented themselves as acting in the interest of civil society and therefore could use the responsiveness of the EU institutional system to the topic of participation of civil society in the policymaking process to their advantage. It was simply politically impossible for the EU institutions to ignore the allegations of the interest groups, which successfully used the discourse of democratic legitimacy for framing their demands in these key terms. This responds to the hypothesis of Prince and Kerremans, who point out that the politization of an issue at stake has an effect on the resources the governmental actor needs. With higher politization of the topic, the greater the need to avoid delegitimizations and therefore the greater is the propensity to grant access to groups that can deliver legitimation.<sup>381</sup>

<sup>378</sup> In the following: GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.4.

<sup>379</sup> In the following: GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.129.

<sup>380</sup> In the following: GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.136.

<sup>381</sup> PRINCEN, Sebastian and KERREMANS, Bart. Opportunity Structures in the EU Multi-Level System. In: BEYERS, Jan, EISING, Rainer and MALONEY, William A. Interest Group Politics in Europe. Oxon, New York, Routledge, 2010. 199p. P. 27-44. P. 34.

The influence of the ACTA opposing interest groups was furthermore enhanced by the clash that was generated concerning the ACTA agreement between the EU Parliament and the Commission. With the growing controversy of ACTA, the EU Parliament became increasingly active in the debate. Although the EU Parliament could not directly participate in the ACTA negotiation, its consent is necessary for the European Commission to adopt the treaty on behalf of the EU.<sup>382</sup> Many members of the parliament (MEPs) felt that the Commission did not sufficiently inform the EU Parliament about the ACTA negotiations, although the Lisbon Treaty, in force since December 2009, legally obliges the EU Commission to inform Parliament immediately and fully at all stages of international negotiations.<sup>383</sup> The parliament even included in its resolution that “unless Parliament is immediately and fully informed at all stages of the negotiations, it reserves its right to take suitable action, including bringing a case before the Court of Justice in order to safeguard its prerogatives”<sup>384</sup>. The ACTA agreement was one of the first legal initiatives after the entry into force of the Lisbon treaty, which increased the co-decision power of the EU Parliament. This led to the unique situation, that the ACTA case was an occasion for the European Parliament to demonstrate its newly attained competencies by insisting in being adequately informed. The lack of information on the part of the EU Commission was presented by the Parliament as lack of transparency towards the European Citizens. As a result, an opposing group formed within the EU Parliament, backing the ACTA countervailing movement. The parties of the EU parliament associated with opposing the ACTA agreement are: European People’s Party (EPP)<sup>385</sup>, the Progressive Alliance of Socialists & Democrats (S&D)<sup>386</sup>, Alliance of Liberals and Democrats (ALDE)<sup>387</sup> for Europe and the Greens/EFA<sup>388</sup>. This equipped the ACTA opponents with political backing in opposing the ACTA agreement and also increasing the salience of the issue. Due to the increased opposition in the EU Parliament, which would have to give its consent to the agreement in order for it to enter into force, many provisions were continuously weakened and watered down. The agreement simply lost its attractiveness for its former supporters. As soon as in November 2010 the chief of the Federation Against Software Theft (Fast), John Lovelock, complained that the final text did not go far enough

<sup>382</sup> EURACTIV. Parliament threatens court action on anti-piracy treaty. 12 March 2010 [online]. <<http://www.euractiv.com/health/meps-defy-commission-internet-piracy-agreement-news-326215>> [access: 6 December 2012].

<sup>383</sup> See articles 1 of resolution: EUROPEAN PARLIAMENT. European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations. 10 March 2010 [online] <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>> [access: 6 December 2012].

<sup>384</sup> Ibid.

<sup>385</sup> GROUP OF THE EUROPEAN PEOPLE’S PARTY IN THE EUROPEAN PARLIAMENT. L’ACTA: un accord commercial international essentiel pour lutter contre la contrefaçon à l’échelle internationale” - Tokia Saïfi (UMP, PPE, F). [online] <[http://www.delegationfrancaise-ppe.eu/IMG/pdf\\_Saifi10032010.pdf](http://www.delegationfrancaise-ppe.eu/IMG/pdf_Saifi10032010.pdf)> [access: 6 December 2012].

<sup>386</sup> GROUP OF THE PROGRESSIVE ALLIANCE OF SOCIALISTS & DEMOCRATS IN THE EUROPEAN PARLIAMENT. ACTA: ignore the Parliament and you ignore the people! 10 March 2010 [online] <<http://www.socialistsanddemocrats.eu/gpes/public/detail.htm?id=133852&section=NER&category=NEWS>> [access: 6 December 2012].

<sup>387</sup> ALLIANCE OF LIBERALS AND DEMOCRATS FOR EUROPE. Negotiations on ACTA agreement lack transparency. 9 March 2010 [online] <<http://www.alde.eu/press/press-and-release-news/press-release/article/negotiations-on-acta-agreement-lack-transparency-22516/>> [access: 6 December 2012].

<sup>388</sup> THE GREENS – EUROPEAN FREE ALLIANCE. EU Parliament demands transparency on Anti-Counterfeiting Trade Agreement . 9 March 2010 [online] <<http://www.greens-efa.eu/acta-1813.html>> [access: 6 December 2012].

and that ACTA in real terms does not actually add anything new to the international IP enforcement framework.<sup>389</sup> The only counter-argumentation the ACTA opponents had to face were those by the EU Commission defending its participation in the negotiation, both on substantial and procedural terms. It was especially the trade commissioner of the European Commission, Karl de Gucht, who responded to the criticism of ACTA by releasing factsheets about the agreement and undertaking various intents to clarify what implications ACTA would bring.<sup>390</sup> However, the clash of the EU Parliament and the EU Commission on ACTA and the negative image of constituting a “undemocratic” agreement had already considerably damaged the feasibility of ACTA. The “democratic accountability”-issue of the EU institutional system therefore can be considered an influence-enhancing factor for the ACTA opponents.

### Access Points

The question of the institutional access points being an influence-enhancing factor in the two IP negotiations under discussion takes a similar pattern as the democratic accountability factor. During the TRIPS negotiations, as already mentioned before, the entry-costs for getting the attention of the European Commission as the negotiator at the Uruguay Round on behalf of the European Community, were high. Not only in terms of information, due to the high technicality of the topic, but also in monetary terms. Just considering the fact that frequent travels to Brussels were necessary for gaining access to the EU institutional system, and also in order to form the organized interest group itself, shows that in those times EU Commission lobbying was an undertaking implying considerable monetary costs. Greenwood explicitly states that Interest Groups with a base in Brussels might have had an advantage through nurturing informal contacts with EU institutions, even though common rules seeking to formalize exchanges with outside groups have been developed in order to create legitimacy which equality of access rules might create.<sup>391</sup> Furthermore, a policy paper of the Commission from 1992 on the dialogue with interest groups states that while the Commission is open for a dialogue with any organization that wishes to engage it, the Commission tends to favour European (con)federations over representatives of individual or national organizations.<sup>392</sup>

<sup>389</sup> ZDNET. European Parliament passes pro-Acta resolution. 25 November 2010 [online] <http://www.zdnet.com/european-parliament-passes-pro-acta-resolution-4010021151/> [access: 6 December 2012].

<sup>390</sup> See: EUROPEAN COMMISSION. Trade: ACTA. [online] < <http://ec.europa.eu/trade/tackling-unfair-trade/acta/> > [access: 7 November 2012].

<sup>391</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.13.

<sup>392</sup> EUROPEAN COMMISSION. An open and structured dialogue between the Commission and interest groups. 1992. [online] <[http://ec.europa.eu/civil\\_society/interest\\_groups/docs/v\\_en.pdf](http://ec.europa.eu/civil_society/interest_groups/docs/v_en.pdf)> [access: 6 December 2012].

During the ACTA negotiations, the access of other interest groups in general considerably increased, not at least because of the EU funding that ensured that resource asymmetries between different types of interests became less extreme.<sup>393</sup> Another big difference between the institutional context of the TRIPS and ACTA negotiations is that during the ACTA negotiations the participation of NGOs in the policy process was already institutionalized by the treaties mentioned before (especially the Lisbon Treaty). While during the TRIPS negotiations the participatory role of Interest groups depended largely on the effective use of strategies by the interest groups themselves, organized interest groups during ACTA had a right to be included in consultations, or in other words: the policy-makers had the obligation to include NGOs into their debates. A reaction to the institutionalization of the participatory role of interest groups in the policymaking process was the increase in the number of “Eurogroups”. Organizations, which had previously relied on occasional trips to Brussels, started to establish their own offices there or to hire lobbyists.<sup>394</sup> Today, 60 % of all European groups are concentrated in Belgium.<sup>395</sup> This leads to the conclusion that over time, interest groups of all kinds have managed to professionalize their operations on EU level, taking more effective advantage of the multi-level system of the EU, which offers various access points. Not the access points themselves, but the facilitation of the use thereof through corresponding legislation and the professionalism in the use of these concessions, constitute influence-enhancing factors that especially played to the advantage of ACTA opponents.

## 5. Conclusion

Analysing the TRIPS and ACTA negotiation by applying interest group theory has generated interesting insights on how the political context can shape IP negotiation outcomes. The analysis demonstrated that in both negotiations interest groups activities directed at the policy-makers occurred and in fact had impacts on the political decision-making process concerning the formulation and adoption of the two agreements. By applying the theoretical approach of Dür and De Bièvre concerning interest group influence, concrete contextual factors determining the extent of influence the active interest groups could achieve were identified. Identifying these factors clearly showed that contextual factors have explanatory power for understanding the generation of international IP negotiation outcomes. Through the comparative perspective it could furthermore be demonstrated, that the ACTA negotiations in comparison to the TRIPS negotiations constituted a context within which a much greater diversity of interest groups could exert influence, which constitutes a

<sup>393</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.17.

<sup>394</sup> YOUNG, Alasdair R. In: WALLACE, Helen, WALLACE, William, POLLACK, Mark A. Policy-Making in the European Union. Fifth Edition. The New European Union Series. Oxford, New York, Oxford University Press, 2005. 503p. P. 105

<sup>395</sup> GREENWOOD, Justin. Interest Presentation in the European Union. The European Union Series. 3<sup>rd</sup> Edition. New York, Palgrave Macmillan, 2011. 235p. P.1.

politization of the issue of international IPR regulation. The first hypothesis of this paper, claiming that the influence opportunities for interest groups in the European Union regarding the public policy field of international IPR regulation and enforcement have changed in the time between the TRIPS and the ACTA agreement due to contextual reasons, could therefore be confirmed. In the same manner the second hypothesis about the ACTA rejection by the European Parliament being the result of the ACTA-opposing interest groups using newly evolved influence opportunities in order to exert control over the policy outcome and shift it towards their preferences found verification through the analysis, as it was shown that a unique mixture of institutional, interest group and issue factors came together in such an impacting way that the ACTA opponents could control the outcome by turning the agreement into an politically unfeasible one.

This has high implications for international IP policy-making, because it suggests that interest group activity can have an affect of the control that policy-makers have about the negotiation process. When external forces like interest groups encounter influence-enhancing factors in the political context of a certain negotiation, policy makers can become significantly challenged in their capacities to follow the negotiation strategies laid out for the negotiation. In order to prevent the undesirable situation of an already negotiated agreement loosing its political feasibility, policy makers should not only aware of the interest group system concerning a certain policy field, but also seek to design their negotiation strategy in a way that gives consideration to all the different forces at work. Although the ACTA case has very unique characteristics that might not occur in every IP negotiation, the general conclusion can be drawn that IPR protection and enforcement issue has been greatly politized. In that context interest group activity becomes an important variable that needs to be considered and understood. Policy-makers today need to be concerned about generating balanced proposals and work together with interest groups in order to gain information about what a balance solution would include. It was also shown in ACTA case that interest groups in IP politics function as transmitters of information to the civil society about the relatively technical IP issue. A major policy recommendation could therefore consist in working towards more transparency so that interest group can transmit correct information and prevent the circulation of misleading information.

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