

Development and Intellectual Property under the EPA Negotiations

I. Introduction

The relationship between the European and the ACP countries was promoted by a series of non-reciprocal arrangements known as the Lomé Convention (I- IV) and the Cotonou Agreement.¹ These arrangements had limited influence on the main controversial policies of the EU and practices of European companies in technology transfer and competition. The current economic situation of the ACP countries demonstrates the limited role of the arrangements for economic development and an apparent lock-in effect, whereby most of the

ACP countries continue to be suppliers of unprocessed and semi-finished goods to the EU.² The Lomé-Cotonou arrangements did not create a binding standard for intellectual property rights. Instead they emphasized the need and importance of cooperation in the field with due respect to the position of the parties in multilateral negotiations and the differences in levels of development.³

Currently the EU is pushing for reciprocal EPAs with six regional groups of the ACP countries that would replace the Cotonou agreement. It is planned to finalize these negotiations by De-

Executive Summary

The negotiations for Economic Partnership Agreements (EPA) between the European Union (EU) and the African Caribbean and Pacific (ACP) Countries are likely to result in additional layers of intellectual property right protection, at least in the case of the agreement with Cariforum countries. A review of the ongoing negotiations and various draft texts and papers demonstrates an inadequate focus on the need for technological development, promotion of public health, protection of genetic resources and traditional knowledge as well as for ensuring access to knowledge. Considering the level of economic development in ACP countries, the negotiations should not include IP rights as part of the partnership agreement. Instead they should focus on industrial and technological development and aim to address the longstanding issues on various EU policies that have impeded participation of the ACP countries in the value-chain of products, protection of biodiversity and traditional knowledge and the use of TRIPS flexibilities.

Table of Contents:

I.	Introduction.....	1
II.	Innovation and Technological Development.....	2
III.	Genetic Resources and Traditional Knowledge	3
IV.	Public Health and Intellectual Property Rights.....	4
V.	Access to Knowledge, Copyright and Database Protection.....	4
VI.	Trademarks, Geographic Indications and Industrial Designs.....	5
VII.	Least Developed Countries under the EPAs.....	5
VIII.	Enforcement of Intellectual Property Rights.....	6
IX.	Conclusion.....	7

cember 2007. The current EPA draft texts with the Eastern and Southern Africa regional group of countries (ESA) do not show any significant departure from the Cotonou Agreement on intellectual property rights.⁴

However, if the EPA is concluded without establishing workable cooperation on technological and industrial development in ACP countries, it would be likely to result in strengthening the EU's competitive advantage in ACP markets. The negotiations between the EU and the Caribbean ACP countries (Cariforum) have followed a different track. The Cariforum countries have developed their concept paper for the EPA negotiation based on the policy options and legal framework on trade and innovation. In response, the EU tabled a non-paper on intellectual property that showed a marked departure from the Cotonou Agreement.⁵ The non-paper proposes binding provisions on intellectual property, going beyond what is required under the Agreement on Trade-Related Aspect of Intellectual Property Rights (the TRIPS Agreement).

This Policy Brief examines the approach under ongoing EPA negotiations with respect to innovation, biodiversity and traditional knowledge, public health, Least Developed Countries (LDCs) and on enforcement of intellectual property rights. It uses the currently available draft EPA texts with ESA countries and the EU non-paper on intellectual property rights introduced for negotiation with the Cariforum countries. The South Centre and CIEL IP Quarterly, Fourth Quarter 2006, already provide a broad background to the negotiations and pertinent elements of the current draft negotiation texts.⁶ This Policy Brief is therefore intended to focus on some of the TRIPS-plus implications of EPAs and evaluate their possible contribution, if any, to the technological development of ACP countries as well as the protection of genetic resources and traditional knowledge and public health, especially access to medicines.

II. Innovation and Technological Development

The ongoing EPA negotiations follows the approach on innovation and technological development of the ACP countries under the Cotonou agreement that focus on non-binding commitments on general areas of technology related cooperation, technology transfer and technical assistances.⁷ However, the implementation of such cooperation and the relevance for innovation and technological development depends on the EU's commitment to its promises and the further development of specific projects.⁸ There are also references to the exchange of views on practices in technology transfer and options under Article 40

of the TRIPS Agreement, an approach for which there is little evidence of successful implementation.⁹

The Cariforum countries propose to develop an approach based on innova-

tion and technological needs. Their concept paper makes separate proposals on what the partnership with the EU should involve in order to encourage innovation in the Cariforum countries. It recommends partnership in innovation and technological development and identifies the possible sectors where the Cariforum countries could benefit from further innovation and development and the nature of partnership that they need with the EU. Cultural industry, alternative renewable energy and biological resources development cover broad areas of industrial capacity development. The link between the sectors and the overall support for a national and regional system of innovations may require further identification of institutional and technological capacity needs in research and development (R&D). This will help to target human resource development in science and technology, joint regional R&D projects in areas such as biotechnology, and resource development, and building a sustainable knowledge economy considering the size of the region. At the same time the EU's approach on intellectual property rights need to be addressed in order to avoid hindrances for learning and upgrading of technological capacity and access to knowledge. The ACP countries

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could benefit from a development of holistic framework that enables the partnership to work for upgrading technological capacity and industrial development as opposed to creating additional layers of intellectual property rights.

III. Genetic Resources and Traditional Knowledge

The ESA draft proposes strengthening cooperation on the availability of legal, institutional and policy frameworks necessary for the implementation of the TRIPS Agreement, whilst respecting the flexibilities therein, the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture. It also proposes effective protection of ESA countries' genetic resources, folklore and traditional knowledge, by excluding natural resources endemic to the ESA region from European claims of ownership. If the intention is to restrict claims of inventions for patents or plant varieties, the proposal would require the EU to exclude such intellectual property rights as those involving natural resources (seeds and plant products) of the ESA.

The ESA draft provides for the disclosure requirement with respect to patents utilising genetic resources. The proposal will require patent applicants to disclose the source and country of origin of biological resource and/or traditional knowledge used in an invention, evidence of compliance with the national law requirement for prior informed consent in accessing the biological resources and associated traditional knowledge and the existence of arrangements on fair and equitable benefit sharing. The disclosure requirement would enable the tracking of biological resources, improve the quality of patents, prevent misappropriation and ensure benefit sharing with local and traditional communities. Although the introduction of the disclosure obligation is an important step, the draft has to be improved to

cover a broader scope of the use of biological resources, namely inventions that concern, use or are derived from biological resources and the use of traditional knowledge associated with genetic resources. It should also address the legal effects of non-compliance with the disclosure requirement.

Article 13 (1) of the EU non-paper on intellectual property provisions for the partnership agreement with the Cariforum repeats Article 8 (j) of the CBD that calls for the preservation of knowledge, innovations and practices of indigenous and local communities relevant for biological diversity. It also requires the patent provisions and the CBD to be implemented in a mutually supportive way and states the agree-

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ment of the parties to further work towards the development of an internationally agreed *sui generis* model for the legal protection of traditional knowledge. The concept note of the

technical negotiation group of the Cariforum, on the other hand, proposes a provision stating the agreement of the parties "to require applicants for the protection of inventions by patent to make a declaration of the source of any biological material or traditional knowledge used in the development of the invention." The proposal includes a few of the elements captured under the proposed amendment of the TRIPS Agreement for the disclosure requirement.¹⁰

On a related issue, it is proposed to resolve the status of the plant varieties and the flexibilities provided under Article 27 (3) (b) of the TRIPS Agreement by the ratification of the International Convention for the Protection of New Varieties of Plants – UPOV (Act of 1991). The implications of the protection of plant varieties under the UPOV involve the shifting of the balance of rights and obligations from farmers to breeders with serious consequences for food security, the livelihood of subsistence farmers and protection of the biodiversity of countries.¹¹

Overall, the approaches under the ongoing EPA negotiation on genetic resources and traditional knowledge need further work in clarifying conceptual matters, legal issues and scope of the agreement to be achieved under the EPA. The EU's proposal, under Article 13 of the non-paper, for exchange of views and information on the position of the parties in the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC) of WIPO and on the relationship between the TRIPS Agreement and the CBD in the WTO without prejudging the outcome of the processes should also be critically examined. Such an approach, if accepted, could undermine the developing countries' effort to develop internationally-binding solutions on genetic resources and traditional knowledge in the WTO and WIPO.

IV. Public Health and Intellectual Property Rights

The EU's non-paper confirms, under Article 11, that the parties can rely on the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Ministerial Conference of the WTO, in interpreting and implementing the rights and obligations under the intellectual property section of the EPA. It further requests each party to contribute to the implementation of the Decision of the WTO General Council of 30 August 2003 on paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and to take the necessary steps to accept the Protocol amending the TRIPS Agreement (2005). This, however, does not go far enough in order to ensure cooperation in the implementation of the August 2003 Decision. There are serious criticisms of EU legislation for the implementation of the Decision, allowing production of generic drugs for export to countries with no or limited manufacturing capacity, since it includes additional conditions while ignoring the implemen-

tation of provisions related to production capacity building and technology transfer.¹² The ACP countries should seek to achieve full implementation of the August 2003 Decision and to have a more practical and long-term partnership for increasing the production capacity of these countries in pharmaceuticals.

In addition, the non-paper attaches a condition that parties should consider when determining the regime for exhaustion of intellectual property rights. In a bid to prevent parallel importation, the

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partnership agreement would require the Cariforum countries to consider the impact on the supply of medicines at strongly reduced

price by foreign companies. It is important for the ACP countries to avoid additional conditions on the use of flexibilities.

The draft EPA with the ESA countries is less specific on issues such as the implementation of the August 2003 Decision. It only states that the EU shall support ESA countries to enable them to benefit from the relevant provisions of the WTO Agreement on TRIPS and the in-built flexibilities, especially with regard to public health, including access to pharmaceutical products at a reasonable price. It requires further specific provisions creating the framework for an effective implementation of the August 2003 Decision and the use of other flexibilities for public health under the TRIPS Agreement.

V. Access to Knowledge, Copyright and Database Protection

The non-paper on intellectual property rights under the Cariforum EPA negotiation requires, under Article 3, the protection of *sui generis* rights for non-original databases. On the other hand, according to Article 7, the protection granted on copyright and related rights shall comply with the WIPO Copyright Treaty (WCT, Geneva, 1996) and the WIPO Performances and Phonograms Treaty (WPPT, Geneva, 1996). These treaties extend the

exclusive rights on communication to the public and reproduction rights. The treaties also require protection against the circumvention of technological protection measures (TPMs) and the removal or alteration of digital management of rights (DMR). Moreover, the protection proposed under the non-paper for related rights required protection in accordance with the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961). The TRIPS Agreement does not require the level of protection defined under the WCT and WPPT. The acceptance of these standards would change the nature and range of copyright protection without providing sufficient scope for access to knowledge, and the educational needs of the Cariforum countries. Although the Cariforum countries are interested in their cultural industries, the accession to higher IP rights standards through binding international agreement would limit their flexibility to adjust their laws based on evidences and impact on creativity.

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in common language as the common name for goods or services in the territory of the Parties. In effect, the EU can achieve the reinstatement of terms

The provisions on geographic indications extend the higher level of protection of wines and spirits under the TRIPS Agreement to all geographic indications. It also proposes to upgrade the obligation of the Cariforum countries from “providing the legal means for interested parties to prevent use of geographic indications” (under the TRIPS Agreement) to a positive obligation to protect geographic indications. Moreover, the non-paper further proposes the inclusion of an Annex providing a list of terms that do not constitute terms customary

that happen to be common name for goods or services in the each territory of the Cariforum by negotiating each term.

With respect to industrial designs, the non-paper seeks to achieve protection of unregistered designs, standards on disclosure and a 12-month grace period. Unlike the TRIPS, that focuses on protection from acts that are undertaken for commercial purposes, the non-paper expands the scope of protection to include “offering” and “using” articles bearing, embodying or *stocking* the protected design when such acts unduly prejudice the normal exploitation of the design or are not compatible with fair trade practice.

VI. Trademarks, Geographic Indications and Industrial Designs

The EU’s non-paper on intellectual property rights under the Cariforum EPA negotiation also proposes to change the standards for trademarks, geographic indications and industrial designs. The provisions on trademarks introduce the three joint recommendations of WIPO with respect to well-known trademarks, marks on the internet and trademark licensing. This would increase the number of marks to be recognized as well known and accord a broader scope of protection against conflicting marks, business identifier and domain names or their usage in a manner that is likely to *impair or dilute in an unfair manner* the distinctive character of the well-known mark (as opposed to the TRIPS standard of protection against the use of marks that would result in a *likelihood of confusion*). Moreover, the non-paper has linked internet use of trademarks and geographic indications with e-commerce.

VII. Least Developed Countries under the EPAs

The draft ESA partnership agreement declares principles and objectives to maintain special treatment of LDCs (Articles 2 and 3) and the need for implementation and enforcement of intellectual property rights based on the level of development of the ESA countries. The various recognitions of need and levels of development under the draft, although non-binding, can shape the nature of cooperation between the EU and the ESA LDCs.

The Cariforum non-paper on intellectual property rights, on the other hand, provides that LDCs shall not be required to apply the provisions on standards concerning intellectual property rights and enforcement other than at an equal pace with what may be required from them with regard to the implementation of the TRIPS Agreement under the relevant decisions by the TRIPS Council under Article 66.1 of the TRIPS Agreement. However, the implications of the non-paper for LDCs are more than what the implementation of the TRIPS agreement would have required. The EU has tied in the implementation of the TRIPS-plus standard under the EPA with the pace the LDCs will be required to implement the TRIPS Agreement. The effect of such a tie in will be that when Haiti, the only LDC in the group, is required to implement the TRIPS Agreement, it will also be automatically required to implement the TRIPS-plus standard of the EPA.

To have a beneficial partnership, ACP LDCs should consider in the negotiations, the EU's commitment to strengthening their technological base as required under the transitional provisions of the TRIPS Agreement.

VIII. Enforcement of Intellectual Property Rights

The EPA negotiations, in the case of the Cariforum countries, clearly show the desire of the EU to push for further higher intellectual property standards in the area of enforcement. The non-paper proposes standards of intellectual property rights enforcement that are not required under the TRIPS Agreement. Although, there are often references declaring the adoption of standards without prejudice to the provisions of the TRIPS Agreement, the non-paper leaves out the balance recognized under the TRIPS Agreement with respect to the rights of the alleged

infringers and the evidence threshold as well as security requirements against claimants. With a view to upgrading the enforcement standard, the non-paper:

- Expands the judicial authority to include the authority to order, upon request, the communication of banking, financial or commercial documents;
- Provides that the claimant under infringement proceedings has the right of information not only against the alleged infringer, but also any other person who was found or indicated by such persons as being involved in the production, manufacture or distribution of the goods;
- Expands the application and scope of provisional measures and injunctions against intermediaries, issuance of orders for the seizure or delivery of goods, and even the precautionary seizure of the movable and immovable property of the alleged infringer;
- Requires, unlike the TRIPS Agreement, pecuniary compensation or damage against the infringer who "acted unintentionally and without negligence," (according to Article 24 of the non-paper – in other words the person who did not engage knowingly or with reasonable grounds to know) in infringing activity;
- Expands the application of the special border measures to include goods which infringe a patent, a plant variety right, a design and geographic indications.

While enforcement rules should ensure the protection of the legitimate interests of right holders, they should also, among others: protect against abuses of the enforcement procedures; ensure the enforcement of obligations of right holders; and the implementation of limitations and exceptions.¹³

IX. Conclusion

The EPA negotiations present challenges for the ACP countries if they result in an additional layer of intellectual property rights. For the net-technology-importing ACP countries, the economics of another layer of intellectual property rules can be explained only in terms of increasing the cost of technological learning and national industrial development as well as challenges in safeguarding the national public welfare. As a result, the ACP countries need to strategize on the type of partnership they are interested in building with the EU with respect to innovation and technology development. *The negotiations should not include provisions on intellectual property rights.* Moreover, for the ACP countries, in addition to defen-

sive strategies against expanding intellectual property rights, it is very important to clearly address various EU policies that affect their interests, in particular those dealing with:

- Genetic resources and traditional knowledge, as well as folklore;
- Public health and the implementation of various flexibilities under the TRIPS Agreement;
- Technology transfer and practices of European companies that may trap the economies of ACP countries on the lower rungs of the ladder of production; and
- Innovation and access to knowledge issues.

End Notes

1. The Cotonou Agreement was last revised in 2005. See the ACP Secretariat website www.acpsec.org for all treaties and agreements between the EU and the ACP countries.
2. Most ACP countries perform poorly under the Human Development Index (2006) of the UNDP and are ranked as poor performers in the Industrial Development Report (2005) of the UNIDO.
3. See Article 46 of the Cotonou Agreement on intellectual property rights.
4. The ESA consists of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.
5. The EU non-paper is available at <http://www.ip-watch.org/weblog/index.php?p=463&res=1280&print=0>, last visited on 17 November 2006.
6. The Update is available at <http://www.southcentre.org/IAIP/newipquarterlyupdate.htm>.
7. See the sections on Economic and Development, Fisheries, and Investment and Private Sector Development under the draft text with ESA countries.
8. The ECDPM (2005) studies already reveal the inconsistency and gaps in dealing with SPS and the fisheries issue (See ECDPM InBrief 13A and ECDPM InBrief 13B).
9. See Article 14 of the EU non-paper on intellectual property rights introduced for negotiation with the Cariforum countries.
10. See WTO document IP/C/W/474.
11. GRAIN (2007), The end of farm-saved seed? Industry's wish list for the next revision of UPOV, at http://www.grain.org/briefings_files/upov-2007-en.pdf.
12. The regulation was adopted only in April 2006 (See the Commission's Press Release, IP/06/550, 28/04/2006). For further recommendations on what is required from the EU in implementing the decision see, Musungu, Sisule F. and Cecilia Oh, The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Knowledge?, South Centre and WHO, Geneva, 2006, pp.87 and 88.
13. South Centre (2007), Free Trade Agreement and the Changing Structure of Intellectual Property Enforcement, (forthcoming).



Chemin du Champ d'Arnier 17
PO Box 228, 1211 Geneva 19
Switzerland

Telephone: (4122) 791 8050
Fax: (4122) 798 8531
E-mail: south@southcentre.org

Contact us in the web:
<http://www.southcentre.org>

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