

INTELLECTUAL PROPERTY QUARTERLY UPDATE



AN INTERGOVERNMENTAL ORGANIZATION
OF DEVELOPING COUNTRIES



CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW

INTELLECTUAL PROPERTY IN EUROPEAN PARTNERSHIP AGREEMENTS WITH THE AFRICAN, CARIBBEAN AND PACIFIC GROUP OF COUNTRIES

I. Introduction

The inclusion of TRIPS-plus intellectual property (IP) provisions in bilateral agreements between the United States (US) and several developing countries has been the focus of much concern over the past few years. So far, the US has signed ten bilateral agreements with such provisions, largely with countries from Latin America and the Middle East.¹ However, the scope of US activity may pale beside that of the European Union (EU), which covers a large group of countries from South America, Africa and Asia.

¹ These include Australia, Bahrain, Central America and Dominican Republic, Chile, Colombia, Lao People's Democratic Republic, Morocco, Oman, Peru and Singapore. The US is seeking or negotiating bilateral agreements with Ecuador, Panama, Malaysia; Republic of Korea, Southern African Customs Union (SACU), Thailand and United Arab Emirates (UAE). (see http://www.ustr.gov/Trade_Agreements/Section_Index.html).

Ending an informal moratorium², the EU has begun, in recent months, to increase its activity in negotiating bilateral trade agreements and the European Commission has explicitly included a TRIPS-Plus mandate in its trade goals, stating that, "[t]he EU should seek to strengthen IPR [Intellectual Property Right] provisions in future bilateral agreements and the enforcement of existing commitments ...".³ The most significant set of negotiations that the EU is currently conducting is with the 76 member African, Caribbean and Pacific (ACP) group of countries under arrangements titled European Partnership Agreements (EPAs). These agreements will significantly change the traditional non-reciprocal trade preference relationship that existed be-

² Evenett, S "Global Europe: An Initial Assessment of the European Commission's New Trade Policy" forthcoming January 2007, in the *Aussenwirtschaft*. (available at <http://www.evenett.com/articles/ECNewTradePol.pdf>) 11

³ European Commission "Global Europe: competing in the world" EC Policy Review, October 4, 2006 (available at http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm), Section v.

INSIDE

INTELLECTUAL PROPERTY IN EUROPEAN PARTNERSHIP AGREEMENTS WITH THE AFRICAN CARIBBEAN AND PACIFIC GROUP OF COUNTRIES	1
Introduction	1
What are the European Partnership Agreements (EPAs) with the ACP?.....	2
The Approach of the ACP to IP in the EPAs.....	4
The Approach of the EU to IP in the EPAs.....	7
AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA.....	10
World Trade Organization (WTO).....	10
World Intellectual Property Organization.....	11
Other Multilateral Fora	13
Regional and Bilateral Trade Agreements with Intellectual Property Provisions.....	15

tween the EU and ACP group of countries. They have the potential to alter, in one swoop, the entire landscape of international intellectual property. Countries that commit to certain standards and norms in bilateral agreements are likely to seek to have those same norms and standards enshrined in multilateral agreements at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and other fora.

While important analysis has highlighted the potential negative impacts of the new agreements for the ACP countries on agriculture, trade in goods and services⁴, the issue of IP and its implications for ACP countries has not received much attention. Initial public discussion on the matter suggested that there would be no significant push by the EU to seek standards beyond those established by TRIPS, but recent proposals, papers and statements from the EU, including the new EU Trade Policy review paper⁵, point in a different direction. These suggest that the EU may indeed be seeking higher IP standards in areas of great concern to ACP countries. Based on this information, this focus piece aims to outline and clarify the approach of the EU to IP in the proposed EPAs and describe the approach of the ACP countries to IP in the EPAs. It concludes that the EU attaches central importance to IP in the EPA negotiations and that the success of the EU's approach to the EPAs will have a negative effect on developing country prospects in IP negotiations in multilateral processes.

II. What are the European Partnership Agreements (EPAs) with the ACP?

II.1 Background and Rationale of EPAs

The EPA negotiations result from the interaction of the Lome Conventions⁶ and the Cotonou Agreement with the WTO Agreement. The Conventions, of which Cotonou was the last iteration, set up a system of non-reciprocal preferences between the EU and the ACP. This system of preferences was established in part to enable the

economic development of the ACP countries by providing preferential access for their products to European markets as compared to other countries. The aims of the Cotonou Agreement included sustainable development, poverty eradication, and integration of ACP countries into the world economy.⁷

With respect to intellectual property, the Cotonou Agreement (which entered into force in 2000) made very few demands on ACP countries and presented a very simple architecture, recognizing the need to ensure adequate protection for IPRs but not entailing an obligation to accede to any international agreements.⁸ ACP countries remained free to decide for themselves what standards to implement according to their level of development or other obligations under other agreements such as TRIPS.

Two major factors contributed to the decision to restructure the trade relationship between the EU and the ACP. The first was criticism that the agreements were WTO incompatible⁹ with regard to the GATT Article XXIV exception for regional trade agreements and the WTO Enabling Clause, which allows discrimination in favour of developing countries.¹⁰ To prevent the possibility of a dispute being brought to a panel, the EU and ACP negotiated a waiver¹¹ with other WTO members, allowing the agreement to remain in force until the beginning of 2008.

A second factor in the demise of the Lome Convention system was the view by some in the EU that the Lome systems failed at enabling economic development in the ACP.¹² The preferential

⁷ Cotonou Agreement, Article 1. (available at http://ec.europa.eu/development/body/cotonou/agreement_en.htm).

⁸ Article 46(1) states "[w]ithout prejudice to the positions of the Parties in multilateral negotiations, the Parties recognise the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS including protection of geographical indications, in line with the international standards with a view to reducing distortions and impediments to bilateral trade." In this case, recognition does not entail an obligation to accede to any agreements containing such international standards.

⁹ See also, Onguglo and Ito "How to make EPA WTO-compatible: reforming the rules on regional trade agreements," Discussion paper No. 40, ECDPM available at www.ecdpm.org.

¹⁰ Decision of 28 November 1979 (L/4903) (available at http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm).

¹¹ WTO document WT/MIN(01)/15.

¹² European Commission, "Information Note to the College from Commissioners Lamy and Nielson on Progress in EPA Negotiations," 21 October 2004, Brussels, Sec-

⁴ See for example the Sustainability Impact Assessments conducted by PriceWaterhouseCoopers and commissioned by the European Commission available at <http://www.sia-acp.org/acp/uk/documents.php>.

⁵ European Commission "Global Europe: competing in the world: A contribution to the EU's Growth and Job Strategy" EC Policy Review, October 4, 2006 (available at <http://trade.ec.europa.eu/doclib/html/130376.htm>).

⁶ The Lome Conventions are four successive agreements that governed trade between the EU and the ACP from 1975 to 1999.

system was based on the premise that protecting developing countries from competition and trade liberalization enables them to nurture and grow their industrial base. Over the course of the Lome Conventions and the Cotonou Agreement, the ideology of the EU has progressively changed to reflect the belief that the only way to economic development for ACP countries is to liberalize and open their markets.¹³

II.2 Objectives of EPAs

The basic objective of the EPAs is to make the trading relationship between the ACP and the EU compliant with WTO rules. However, the EU has transformed the Cotonou mandate into an ambitious package that aims to rationalize the regional relationships¹⁴ between ACP countries to liberalize trade¹⁵ and to implement the highest standards of IP protections and enforcement. For the purposes of the negotiations the EU has determined that it will negotiate with six groups: SADC (Southern Africa), ESA (East Africa), ECOWAS (West Africa), CEMAC (Central Africa), CARIFORUM/CARICOM (Caribbean) and the Pacific Forum (Pacific countries).¹⁶ Negotiations with the groups began in 2002.

II.3 The IP Mandate in EPAs

As in the Cotonou Agreement, IP was not initially envisioned as a significant element of the EPAs.¹⁷ IP was subsumed under "Other Trade-related measures" along with competition and investment - the issue had never been an issue of contention in the Cotonou context.

tion 1 (available from http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_120003.pdf).

¹³ European Commission "Global Europe: competing in the world" EC Policy Review, October 4, 2006 (available at

http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm) Section 4.2.

¹⁴ European Commission, "Information Note from Commissioners Lamy and Nielson on Progress in EPA Negotiations" 21 October 2004, Brussels, Section 2 (available from ??

¹⁵ European Commission, "Information Note from Commissioners Lamy and Nielson on Progress in EPA Negotiations" 21 October 2004, Brussels, Section 1 (available from ??

¹⁶ Tralac, "EPA Background Note," March 2006, <http://epa.tralac.org/scripts/content.php?id=4596>

¹⁷ For example, the 2004 Joint Roadmap between the EU and the SADC region covers the following nine negotiating areas¹⁷: Development dimension/regional integration; Sanitary and phytosanitary measures; Standards and technical barriers to trade; Market access for agricultural, non-agricultural and fisheries products; Rules of origin; Trade facilitation and customs cooperation; Legal and institutional issues; Other trade related measures; and Trade in services.

The Cotonou IP architecture has not been, and is still currently not the subject of any preference regime. Article XXIV of GATT 1994 and the Understanding on the Interpretation of GATT 1994 are contained in Annex 1A, covering multilateral agreements on trade in goods. The TRIPS Agreement, contained in Annex 1C, is a separate agreement from those covering goods. As such, exceptions and other provisions contained in Annex 1A do not apply to obligations in the TRIPS Agreement unless explicitly brought in, as in the manner of the obligations regarding dispute settlement in Annex 2. The TRIPS agreement contains no exceptions to MFN for regional free trade agreements, thus ACP countries have always extended Cotonou IP provisions to all WTO members. There was never any problem of discriminatory treatment to the detriment of other countries.

In addition, there is no direct mandate from the Cotonou Agreement for the inclusion of IP in the EPAs. Thus, given that the inclusion of IP provisions is not required to comply with WTO rules and there is no mandate under the Cotonou Agreement to do so, the inclusion of IP in the EPAs requires a different justification than for market access for goods. In reply, the EU argues that low (i.e. TRIPS) IP protections, along with other trade-related measures, constitute unnecessary barriers to trade, which is a novel approach to the concept, considering that intellectual property, by definition, restrains competition and creates artificial scarcity.

II.4 The State of the EPA negotiations

The Caribbean group is widely believed to be at the most advanced stage of negotiations with proposals for text on IP already developed. The ESA group has also transmitted a proposed text and is awaiting a response from the EU. The other ACP groups still appear to be at the stage of negotiating either the framework, as in the case of the SADC region's membership structure¹⁸, or the modalities of the matters to be included for negotiation, as in the case of the Pacific region. The EU, while apparently waiting to respond to proposals from the ACP groups, has already made it clear that there are issues that must be included in the EPAs, one of which is IP.¹⁹

¹⁸ The region has proposed that South Africa join as an active negotiating member.

¹⁹ Kruger, P., "SADC-EPA Update," tralac, 22 December 2006 (available at http://epa.tralac.org/pdf/20061222_SADC_EPAUPDATE.pdf), 4.

III. The Approach of the ACP to IP in the EPAs

Most of the ACP groups have yet to fully consider IP as part of the EPA negotiations. The exception to this is the Caribbean group which has focused on copyright and related rights ostensibly because of the interests of the local music industry, and the Eastern and Southern African group.

III.1 The Caribbean Group

A Proposal from the Caribbean group

The Caribbean group produced two concept notes in 2006, reviewing their basic approach to IP, without going into specific provisions. The notes have been made public, although they cannot be considered the official position of the Caribbean group. Nevertheless, they provide an indication of the basic approach of the group.

The notes focus on innovation as the primary lens through which IP should be viewed. They seek further support for national and regional innovation systems in the Caribbean and emphasize the importance of assistance in commercialization of Caribbean innovations in the EU market. The focus on innovation is a key insight that highlights the fact that the majority of technical innovations in small economies are of an incremental nature²⁰ reliant on access to information and knowledge to carry out improvements and alterations.

Other elements of the paper include:

- the importance of operationalizing and monitoring transfer of technology mechanisms, and notes that this should not exclude transfers of innovations in the areas of copyright of particular interest to the Caribbean group.
- best endeavour clauses for accession to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- The full implementation of the Convention on Biological Diversity and requiring that patent applicants disclose the origin of "biological material or traditional knowledge used in the development of the invention."

²⁰ Correa, C., "Integrating Public Health Concerns into Patent Legislation in Developing Countries," (South Centre Geneva 2000) 44 (available at <http://www.southcentre.org/publications/publichealth/publichealth.pdf>).

While the concept notes are novel in their focus on innovation, they do not appear to be breaking much ground in making any demands. Nevertheless, the insertion of the requirement to include disclosure of origin of biological materials or traditional knowledge in patent applications is notable, and reflects a demand that many developing countries have been making at both the TRIPS Council²¹ and in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). It suggests that ACP countries can use the EPA process to advance their interests in these areas, turning the assumption on its head that ACP countries only have defensive interests in the IP negotiations.

The EU response

The EU produced a non-paper²² outlining their response to the Caribbean proposal. There are some provisions in the paper which suggest some consideration of the concerns of developing countries. For example, the paper maintains the transition period for LDCs to implement the TRIPS Agreement²³ and the flexibility for countries to determine their own regime on exhaustion.²⁴ Article 11.2 acknowledges the importance of the Doha Declaration on the TRIPS Agreement and Public Health and notes that the countries are entitled to rely on the Declaration in interpreting and implementing patent rights and obligations.

However, other provisions of the EU's non-paper do give serious reasons for concern. For example, Article 9 on Geographical Indications extends protection to all products by requiring protection of any product that has protection in its home country. The protection is also absolute, excluding even statements indicating origin while using terms such as "kind", "type", "style", and "imitation".²⁵ This expands protection far beyond anything that is required by TRIPS and essentially harmonizes with the EU standard of protection. On patents, Article 11 requires the parties to adopt the main provisions of: the Patent Cooperation Treaty (Washington, 1970, last modified in 1984); the Patent Law Treaty (Geneva, 2000); and the Budapest Treaty on the International Recognition of the Deposit of Micro-

²¹ WTO document WT/GC/W/564 or TN/C/W/41.

²² "EC Non-Paper CARIFORUM-EC EPA: Elements for a section on IPRs" (available at http://www.ip-watch.org/weblog/index.php?p=463&res=1024_ff&print=0).

²³ *Id.*, Article 4(2).

²⁴ *Id.*, Article 6(1).

²⁵ *Id.*, Article 9.2(3).

organisms for the Purposes of Patent Procedure (1977, amended in 1980). These are all procedural treaties that make it easier for outside actors to register patents in all areas, including genetically modified organisms and other genetic resources.

On plant varieties, the non-paper's Article 12 requires accession to UPOV 1991, but also makes provision for exceptions for farmer's rights to save, reuse and exchange seeds. However, the caveats and the requirement to sign up to UPOV 1991 may actually make the provision on exceptions primarily ineffective. In Article 13 on genetic resources, traditional knowledge and folklore, the EU refrains from making any substantive commitments to recognize or protect such knowledge, leaving all standards to national legislation.

The approach on copyright, while not entirely positive is consistent with the historical practice of the EU.²⁶ The EU makes no substantive commitments to transfer of technology other than to provide incentives to transfer technology to LDCs.

On enforcement, the paper focuses on acceptance and implementation of obligations under Part III of the TRIPS Agreement. The provisions also mirror those contained in the EU Enforcement Directive, on issues such as the presumption of authorship or ownership²⁷, and the communication of banking, financial or commercial documents under the control of the opposing entity.²⁸ The provisions on enforcement are very extensive and suggest that the EU will be using a template, in a manner similar to the approach that the US has taken in bilateral free trade agreements.

Overall, the EU Non-paper dismisses any attempts by the Caribbean group to seek a positive agenda. It focuses on pushing for TRIPS-plus standards in the EU's areas of interest. In the context of what is meant to be a development agreement, the EU's pursuit of self-interest in this area suggests that higher IP standards are one of the major aims of the EU in the EPA negotiations.

²⁶ The EU proposes that the parties comply with the substantive elements of: the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961); the WIPO Copyright Treaty (Geneva, 1996); and the WIPO Performances and Phonograms Treaty (Geneva, 1996).²⁶

²⁷ "EC Non-Paper CARIFORUM-EC EPA: Elements for a section on IPRs" (available at http://www.ip-watch.org/weblog/index.php?p=463&res=1024_ff&print=0) Article 17.

²⁸ Id., Article 18.

III.2 The Eastern and Southern African (ESA) Group

In August 2006 the *Eastern and Southern African* (ESA) group proposed a draft approach to EPAs.²⁹ With respect to IP, the ESA proposal covers the following subject matter: copyright and related rights; industrial property rights; plant breeders' rights; rights to traditional knowledge, folklore and genetic resources; and other rights recognised under the TRIPS Agreement, CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture.³⁰ While this coverage makes sure to include traditional knowledge, folklore and genetic resources it may prejudice the issue of the best way forward to enable protection of traditional knowledge and genetic resources. Not all commentators and analyses agree that an exclusive rights based intellectual property approach is the best way forward in this arena. The coverage may also have the unintended consequence of opening the door to recognition of patents on genes, gene fragments and other life-patents. Careful consideration of the wording of any provisions on this issue will be of primary importance. Nevertheless, the approach to the issue of subject matter presents an attempt to have the concerns of developing countries in this area taken seriously.

The ESA proposal also breaks new ground in the topics that that it addresses. The proposal represents an attempt to not only defend against provisions that restrict access to knowledge, but to also seek provisions that are favourable to developing countries. For example, Article 65(5) states that one of the objectives of cooperation on IP shall be "[t]o ensure adequate and effective protection of genetic resources, traditional knowledge and folklore of ESA countries and prevent bio-piracy". Article 66(1)(e) of the proposal also contains an obligation to require "the disclosure of origin and proof of prior informed consent of the indigenous community concerned and equitable sharing of benefits; where a genetic resource is derived from a genetic material of an individual and the rights conferred by this paragraph are conferred on that individual."

There has been no public response to the ESA proposal as yet from the EU, but the approach presents an attempt to implement the strong development aims of the EPAs in an area that had generally been considered peripheral to the

²⁹ Draft EU-ESA Economic Partnership Agreement, August 2006, 4th Draft EPA/8th RNF/24-8-2006/, (available at http://grain.org/br_files/DRAFT-EU-ESA-EPA-24-Aug-2006.pdf).

³⁰ Id., Article 64(1).

overall scope of the agreements. Instead of signing any provisions on IP proposed by the EU under "other trade-related matters", the ESA group has made this element of the agreement into a real arena for negotiation.

III.3 The SADC Group

In March 2006, the SADC group proposed a framework for negotiations that, notably, proposed to include South Africa as an active member.³¹ The framework proposed that the EPA negotiations be coordinated and based on the 2006 review of the Trade Development and Cooperation Agreement (TDCA)³² that South Africa signed with the EU in 1999. This would also include the provisions on IP contained in the TDCA. Thus, it could reasonably be expected that the TDCA IP provisions would be the basis for negotiations going forward. However, the SADC framework makes it clear that the SADC group does not consider itself in a position to negotiate substantive obligations in what they call "new generation" trade issues, which include IP. This means that, for the moment, there is no IP text proposed by the SADC group and it is likely that there will be no text in the foreseeable future because the SADC group has been consistent in its argument that such regulatory issues are inappropriate in the development-focused market access system envisioned by Cotonou.

In December 2006, the EU made an unofficial response³³ to the proposed framework. The EU has stated that it is unacceptable for trade-related measures, including IP, to be excluded from substantive obligations. The response states that, "[t]hese issues are the essence of the EPA sustainable development package." It goes on to further note that failure to address these issues would affect the EU's ability to offer greater market access commitments. This response is very much in line with the approach of the US which has used the leverage of the loss of

market access to gain greater concessions in areas such as investment, competition and IP. While the EU response does state that the EU is not looking for more substantive commitments than those contained in the TRIPS Agreement, this statement is contradicted by the scope of obligations it has included in its negotiations with the Caribbean group.

III.4 Other Groups

The **Central African Group** appears not to have had any substantive discussion on IP although some agreement seems to have been reached that the approach should be to harmonize legislation across the region.³⁴ Whether the Central African Group will end up with harmonization at the highest level of protection remains to be seen.

In June 2006, the **Pacific Group** submitted a draft EPA text³⁵ to the EU but it contains no provisions on IP. The group may still be considering any position it may take on trade-related measures, which includes IP.

In their November 2006 proposal to the EU³⁶, the **West African Group** generally agreed that IP could be a subject of discussion but has focused on ensuring the development of a regional agreement and strategy on IP before any commitments to the EU are implemented.³⁷ In discussions with the EU, the group requested special consideration for public health, technology transfer, copyright, industrial property, and counterfeiting.³⁸ It remains unclear what such special consideration would entail but, in its response, the EU has generally recognized such concerns while rejecting any obligations on genetic resources, traditional knowledge and folklore.³⁹ Reports suggest that a joint report on IP is nearly agreed.⁴⁰

³¹ SADC "A framework for the EPA negotiations between SADC and the EU" March 2006 (Doc. n° 43/06 ACP). South Africa, having concluded a Trade Development and Cooperation Agreement with the EU, and not receiving preferential treatment from the EU, has been participating in the EPA negotiations as an observer SADC member country.

³² Available at http://www.tralac.org/pdf/20061009_tdca.pdf

³³ European Commission "Communication from the Commission to the Council: Communication to modify the directives for the negotiations of economic partnership agreements with ACP countries and regions" 28 November 2006, COM(2006) 673 final, Annex 2 (Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0673en01.pdf)

³⁴ ECDPM "Update on Regional EPA negotiations: Central Africa-EU Economic Partnership Agreement" InBrief No. 15A November 2006 available at www.ecdpm.org/epainbriefs

³⁵ Available at

http://www.bilaterals.org/article.php3?id_article=6111

³⁶ UEMOA, "Report on the Review of the negotiations of the West Africa-EU Economic Partnership Agreement Consistent with Article 37.4 of the Cotonou Agreement: proposal by West Africa," *Negotiations of the Economic Partnership Agreement* 0 West Africa- European Communities, November 2006.

³⁷ ECDPM, "Update on Regional EPA negotiations: West Africa-EU Economic Partnership Agreement" InBrief No. 15B November 2006 (available at www.ecdpm.org/epainbriefs).

³⁸ Id

³⁹ Id.

⁴⁰ Id.

IV. The Approach of the EU to IP in the EPAs

The EU has a long history of including IP in its bilateral agreements. Historically, the EU approach to IP has been to have its partners sign up to or accede to agreements containing the highest international standards of IP. Most recently, the majority of the negotiated EU FTAs reflect undertakings to adopt higher standards of IP protection, i.e. "to provide," or "to ensure," "suitable and effective" or "adequate and effective levels of protection of IP rights in accordance with the highest international standards."⁴¹ While both the EU and US have been progressively pushing for higher levels of IP protection in their bilateral negotiations, their negotiations strategy differs.⁴² In the US, for example, FTAs appear to be negotiated on the basis of precedent agreements, i.e. model texts.⁴³ The EU on the other hand has generally relied on requiring accession to a set of multilateral agreements. The Lome Conventions and the Cotonou Agreement have generally been an exception to that global strategy, containing few if any obligations and relying on recognition of the importance of international IP standards. Despite this, the treatment of IP under the EPAs is more likely to converge with the historical practice of the EU in other agreements. In fact, recent developments, and the response to the Caribbean proposals, suggest that the EU may seek more detailed and comprehensive provisions in specific sectors such as enforcement and geographical indications.

The EPAs are now part of the larger EU trade strategy. In particular, they form an integral part of its bilateral trade strategy which is the emphasis of the latest trade strategy communication from the European Commission, "Global Europe – Competing in the World".⁴⁴ The report emphasizes the importance of market access and IP

⁴¹ See, e.g., Article 32 the US-Chile Association Agreement.

⁴² The U.S. has been a fervent advocate of stronger protections. See Pedro Roffe, *Bilateral Agreements and a TRIPS-plus World: The Chile-USA Free Trade Agreement TRIPS Issues Papers* (Quaker International Affairs Programme, Ottawa) 2004, available at [http://geneva.quno.info/pdf/Chile_\(US\)final.pdf](http://geneva.quno.info/pdf/Chile_(US)final.pdf).

⁴³ Speech by Robert B. Zoellick, U.S. Trade Representative, before the Committee on Finance of the United States Senate March 9, 2004 at <http://www.useu.be/Article.asp?ID=D0AA280D-4883-4211-987D-4EF8BF1CE293>. See also Peter Drahos, *The New Bilateralism in Intellectual Property* available at <http://www.maketradeair.com/assets/english/bilateralism.pdf>.

⁴⁴ European Commission, "Global Europe: competing in the world," EC Policy Review, October 4, 2006 (available at http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm).

both as tools for greater European advancement but also as means for the general economic development of the EU's partners.⁴⁵ The key change in the new strategy is the focus on regulatory reform to create opportunities for EU firms to be treated on at least an equal basis as firms in trading partner countries, and in the case of IP, to require standards that approximate those of the EU, especially in enforcement. This approach is clearly converging with that of the US FTAs.

Part iii of Section 3.2 of the EU report relates to "Opening Markets Abroad" and states that the EU "will require a sharper focus on market opening and stronger rules in new trade areas of economic importance to us, notably IP" Part ii of Section 4.2 relating to "Free Trade Agreements" states that, "FTAs should include stronger provisions for IPR and competition, including for example provisions on enforcement of IP rights along the lines of the EC Enforcement Directive." Part v of the same section also states that, "[t]he EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments in order to reduce IPR violations and the production and export of fake goods."

An important issue to note is that the EU has an incentive to seek further IP provisions with the ACP. Those countries that signed significant IP provisions with the US are obligated to extend the same treatment to all WTO members, because there is no exception for regional free trade agreements in the TRIPS Agreement. The EU has therefore been able to free ride on IP provisions that the US has imposed on its trading partners. The US has not signed any such agreement with any ACP countries, and therefore the EU will have to seek its own IP deal with those countries. Of course, any IP provisions that ACP countries sign with the EU will have to be extended to the US and other WTO Members as well.

The evidence that higher IP standards is a major goal of the EU in negotiating EPAs is buttressed by the specificity of demands it is making on ACP countries. For example, in its latest unofficial communication to the SADC group, the EU has stated that it insists on the inclusion of other trade-related measures in the framework, particularly IP.⁴⁶ The responses to the ACP proposals and the new EU trade strategy point to several

⁴⁵ Id., Section 3.2 and Section 3.2(iii).

⁴⁶ Kruger, P., "SADC-EPA Update," *tralac*, 22 December 2006 (available at http://epa.tralac.org/pdf/20061222_SADC_EPAUPDATE.pdf), 4.

EU target points in the area of IP, which are explored further below.

IV.1 Copyright and Related Rights

In this arena, the EU seems to be largely following the traditional, historical pattern of asking its partners to sign up to international agreements that reflect the highest international standards in the area. The response to the Caribbean proposal proposes an obligation to accede to both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which contain highly restrictive standards on access to knowledge and public interest exceptions, as well as addressing new subject matter. Nevertheless, the EU seems to be focusing much of its efforts in this arena on enforcement, rather than new substantive obligations.

IV.2 Patents and Pharmaceuticals

Despite statements that it will not seek TRIPS-Plus measures in the area of public health, test data exclusivity may be an area where the EU will seek specific provisions.⁴⁷ Test data exclusivity provides the rightsholder of a drug, even if it is off-patent, with the exclusive right to the information it has developed in meeting the requirements to gain marketing approval from health safety regulatory authorities. This means that, for a limited period (6 to 10 years in the EU),⁴⁸ regulatory authorities can not rely on the data to grant approval to generics. They would have to pay the cost of duplicating the tests carried out by the rightsholder. This delays the entrance of generic competition into the market beyond the term of a patent. While the issue has yet to be raised in any specific proposals, the full scope of what the EU may put on the table is not yet known. What is clear is that test data exclusivity is an important element of the EU's pharmaceutical industry strategy and it is likely that, at the very least, the EU may seek early implementation of the TRIPS article 39.3 obligation to protect test data and to define it as data exclusivity, despite consensus that the article does not require such exclusivity. Such provisions run counter to the principles and requirements of the Doha Declaration on Public Health and would make it extremely difficult for ACP countries to enable further access to generic drugs. However, there is little clarity on the aims of the EU on pat-

ents and there remains a distinct possibility that no significant elements of patents will be introduced by the EU.

IV.3 Enforcement

The EU has placed a great amount of emphasis and political capital on the issue of IP enforcement. This has been reflected in its "Strategy for the enforcement of IP rights in third countries"⁴⁹ and the EU-US Action Strategy for the Enforcement of Intellectual Property Rights.⁵⁰ The EU views what it considers the lack of enforcement as a primary barrier to trade. The new EU trade strategy notes that, "FTAs should include stronger provisions for IPR and competition, including for example provisions on enforcement of IP rights along the lines of the EC Enforcement Directive."⁵¹ This is a departure for the EU which has not generally asked its partners (other than prospective member states) to implement legislation at the same level and scope as the EU itself. The EU enforcement directive has many provisions that go beyond TRIPS requirements, including the fact that it covers wider subject matter and creates new presumptions in favour of rightsholders.⁵² The extensive provisions in the response to the Caribbean text, which closely track the EU's Enforcement Directive, are a strong indication that the EU will likely require IP implementation at the same level and scope as the EU itself. It is probable that the EU will use its proposal to the Caribbean as a template for its position in negotiations with other groups. Given its concern for equal treatment and harmonization, the EU is likely to be very unwilling to make any changes to the template that would result in differing versions or levels of implementation amongst ACP regions.

⁴⁹ Strategy for the enforcement of intellectual property rights in third countries, Official Journal of the European Union, 2005/C 129/03).

⁵⁰ The strategy documents highlights the importance of adopting an approach that is flexible and that takes into account different needs and levels of development of the countries in questions and See http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_129013.pdf.

⁵¹ European Commission, "Global Europe: competing in the world," EC Policy Review, October 4, 2006 (available at http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm) Section 4.2(ii).

⁵² Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, at [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R\(01\):EN:NOT](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:NOT).

⁴⁷ SEATINI, "A Study on the Technical Issues in the 6 Negotiating Clusters under the ESA-EU EPA Negotiations," 2005 (available at <http://www.epawatch.net/general/text.php?itemID=298&menuID=6>) 77.

⁴⁸ Id.

IV.4 Geographical indications

Based on the response to the Caribbean text, the EU is likely to seek to extend the existing protection for wines and spirits to all other goods potentially protectable by geographical indications. The aim will be to extend protection to all products that have protection in the EU. This has been the goal of its approach at the WTO and it is likely to seek such protection as an element of its removal of barriers to trade strategy.

V. Conclusion

The approach of the EU to IP is informed by the fact that its primary interest in the EPA negotiations is regulatory reform to ensure, at a minimum, similar or advantageous treatment for its firms in ACP markets. In IP this has manifested itself in the pursuit of higher, TRIPS-Plus standards on enforcement, geographical indications and copyright and related rights. In particular, the EU approach has converged with that of the US in that it is using the leverage of market access to make gains in areas that developing countries have largely managed to remove or block at the multilateral level and it is doing so based on a template, regardless of the level of development of the regions.

If all 76 countries in the ACP sign up to proposed European standards, the IP discussion in international fora (especially WIPO and the WTO TRIPS Council) will be transformed. One consequence will be the destruction of strong alliances between developing countries built at the multilateral level. On the issues covered in the EPAs, especially enforcement, geographical indications and copyright, the shift of ACP countries to the EU position would leave a handful of Latin American and Asian countries as the only states opposing the expansion of international IP rights in fora such as WIPO and the WTO.

While the EU has so far managed to publicly suggest that IP is not a significant element of the EPAs it is clear from its responses to the proposals from SADC and the Caribbean group that IP provisions are in fact one of the primary aims of the EU in these negotiations. As such, it is important that the profile of these issues is increased in the public discussion on EPAs and that ACP countries and civil society become aware of the possible bargaining power this may provide, as well as the possible positive demands that they can make on the EU.

AN OVERVIEW OF RELEVANT DEVELOPMENTS IN THE VARIOUS IP FORA

The following is an overview of the developments in the various fora dealing with intellectual property issues in the Fourth of 2006.

World Trade Organization (WTO)

There has been very little progress despite various attempts to restart the Doha Development Round talks which were halted in July 2006.

WTO Council for TRIPS

The Council for TRIPS held a formal meeting in Geneva from 25 to 26 October 2006. The European Union (EU), strongly opposed by developing countries, continued its efforts to place enforcement issues on the agenda of the Council for TRIPS. Divergences continued to exist as members discussed the EU submission entitled "Enforcement of Intellectual Property Rights",⁵³ co-sponsored by Japan, the United States and Switzerland. The joint communication highlighted the challenges caused by piracy and counterfeiting for policy issues such as public health and safety.

While the EU paper acknowledged member states' discretionary right to determine their own appropriate enforcement measures, it argued that these have to fulfil the attainment of the objectives of the TRIPS Agreement. The paper also highlighted what it viewed as the complementary role played by the Council for TRIPS in assisting member states to effectively implement IPR enforcement mechanisms. The submission also emphasized the need for WTO member states to co-ordinate their efforts at all levels. In addition, the EU invited members "to engage in a constructive discussion of accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement efforts ...". This submission builds on previous efforts by the EU to seek greater IPRs enforcement measures at various levels including the Council for TRIPS.⁵⁴

On the topic, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the Council for TRIPS addressed a paper submitted by Peru⁵⁵. The submission responded to comments made by the United States to one of its earlier submission entitled "Analysis of Potential Cases of Biopiracy".⁵⁶

Peru reiterated the important role universal disclosure requirements played in ensuring the determination of source and/or origin of biological resources and associated TK in patent applications. For Peru, such a prerequisite would enable the assessment of a Member's effective compliance with the patentability requirements and CBD obligations of PIC and ABS. While it recognized the role of databases and public information systems, Peru questioned the usefulness of such systems if disclosure requirements are not fulfilled.

Other issues dealt with by the Council included announcements by Switzerland and El Salvador regarding their respective ratification of the public health amendment to the TRIPS Agreement.⁵⁷

Informal consultations on geographical indications also took place during a Council for TRIPS special session in Geneva on 11 December 2006. Reports indicate a lack of progress on ways to move the debate forward on the proposed register for geographical indications (GIs) on wines and spirits. Member states continue to remain divided on approaches to adopt. The EU and Switzerland, in favour of the establishment of a legally binding mandatory register, are reported to have requested the Chairman, Ambassador Manzoor Ahmad of Pakistan, to produce a draft text. Argentina, Australia, Canada, Chile and the United States did not support the request. They proposed instead that consultations be held on the meaning of "facilitation" and that a summary of arguments made by delegations on the various points be reflected in the document prepared by the WTO secretariat with a side-by-side comparison of the three proposals tabled to date.⁵⁸

⁵³ WTO document IP/C/W/485. It is reported that developing countries opposed the manner in which the EU sought to introduce the topic to the council. See ICTSD Bridges Weekly at <http://www.ictsd.org/weekly/06-11-01/story1.htm> and IP Watch at <http://www.ip-watch.org/weblog/index.php?p=434&res=1024&print=0>.

⁵⁴ WTO documents IP/C/W/448, IP/C/W/468 and the "EU Strategy for the Enforcement of Intellectual Property in Third Countries" at [\[info.cec.eu.int/doclib/docs/2004/july/tradoc_117828.pdf\]\(http://info.cec.eu.int/doclib/docs/2004/july/tradoc_117828.pdf\).](http://trade-</p>
</div>
<div data-bbox=)

⁵⁵ WTO Document IP/C/W/484.

⁵⁶ WTO Document IP/C/W/458.

⁵⁷ Article 31bis of the TRIPS Agreement, available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm. For more information on this amendment, please refer to the South Centre and CIEL Intellectual Property Quarterly Update 2005, Fourth Quarter, available at http://www.ciel.org/Publications/IP_Update_4Q05.pdf.

⁵⁸ See WTO document TN/IP/W/12

The next formal meeting for the Council of TRIPS is scheduled for 13-14 February 2007.

World Intellectual Property Organization

Standing Committee on Copyright and Related Rights

The first of two sessions of the SCCR leading up to the 2007 General Assemblies will be held 17-19 January 2007. The result of that meeting will be covered in the first Quarter of this publication for 2007.

The following session of the Standing Committee on Copyright and Related Rights will meet in June 2007, in conjunction with the preparatory committee for the diplomatic conference, tentatively scheduled for November 2007.

Standing Committee on Patents

The work of the committee remains on standby mode as informal consultations continue in search of a compromise that can be taken to the 2007 WIPO General Assemblies. However, the secretariat is holding a series of colloquia on selected patent issues between October 2006 and September 2007.⁵⁹ The colloquia, which are open to the public, are intended to provide information on different patent-related topics and to provide a forum for an exchange of information among participants on these topics.

The colloquium on "The Research Exemption", held on 11 October 2006, had two presentations by Mrs. Elisabeth Thouret-Lemaitre from Sanofi-Synthelabo and Professor Sean O'Connor from the University of Washington School of Law.⁶⁰ The discussion focused largely on the issue of pharmaceuticals, emphasizing the necessity of the exemption but with Mrs. Thouret-Lemaitre emphasizing that so-called "research tools" should never be the subject of a research exemption, despite the fact that such exemptions apply to all fields of technology. Prof. O'Connor provided an overview of various applications of research exemptions, noting that various options would fit different policy needs.

The colloquium on "Standards and Patents", held on Wednesday, November 29, 2006, had two

presentations by Mr. Tim Frain from Nokia Corporation and Mr. Paul Davey from the Vodafone Group.⁶¹ The absence of a consumer group perspective was notable, reflecting the Secretariat's view that privatization of technical standards is a problem to be solved between firms rather than a major danger to consumer choice and competition.

The colloquia for the 1st quarter of 2007 are:

- **"Flexibilities in the Patent System" February 16, 2007, Geneva.**
- **"Technology and Policy Information Available in the Patent System", March 14, 2007, Geneva.**

Intergovernmental Committee on Intellectual Property and Genetic Resources and Traditional Knowledge and Folklore (IGC)

The tenth session of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) took place in Geneva from 30 November to 8 December 2006. Despite existing divergences, committee members were able to reach a compromise agreement that will mark the beginning of discussions on substantive issues for the protection of Traditional Cultural Expressions (TCE) and Traditional Knowledge (TK).

The objectives of the meeting were to determine the nature and status of the outcome of the IGC process, to begin the preparation of recommendations for the September 2007 General Assembly meeting, and to accelerate the work of the committee since the General Assembly is expected to consider its current work and renegotiate a future mandate.

Discussions mostly centred around the IGC's work on Traditional Cultural Expressions (TCE) and Traditional Knowledge (TK), leaving aside the issue of genetic resources. Developed countries called on the committee to continue discussions and seek further clarification on terms and definitions used in the objectives and guiding principles for the protection of TK and TCE. In contrast, the majority of developing countries favoured discussing all three pillars of the working documents, i.e., objectives, guiding principles

⁵⁹

See

<http://www.wipo.int/patent/colloquia/en/2006/11/index.html>.

⁶⁰ Presentations available at

<http://www.wipo.int/patent/colloquia/en/2006/10/index.html>

⁶¹ Presentations available at

<http://www.wipo.int/patent/colloquia/en/2006/11/index.html>

and substantive provisions for the protection of TCE and TK against misappropriation.⁶²

Two proposals were put forward with the objective of structuring the discussions:

The proposal by the African group was an attempt to balance the discussions. It suggested: that the working documents be updated and incorporate comments made during the 9th session; that the plenary sessions discuss the general objectives and guiding principles for the protection of TK and TCE in the morning; and that the afternoon sessions be devoted to discussing the substantive provisions of the working documents. Group B member states (including Japan and the United States) did not support this approach.

The proposal by the Chair requested that the secretariat draw up a list of issues on TCE and TK, on the basis that whatever would be discussed would not be prejudicial to the outcome of the process. The lists highlight 10 issues, on TCE and TK respectively, members will begin to discuss and they included:

- 1) Definition of TK and TCE that should be protected;
- 2) Who should benefit from any such protection or who holds the rights to protectable TK and TCE?
- 3) What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights?)
- 4) What forms of behaviour in relation to the protectable traditional knowledge should be considered unacceptable/illegal?
- 5) Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge?

Most members expressed their disappointment on the progress of the IGC's work on genetic resources and emphasized the importance of treating TK, TCE and genetic resources on an equal basis. Members called on the committee to propose a practicable work plan on genetic resources.

Some developing and developed countries reiterated the importance of discussing mandatory disclosure requirements in patent applications in the IGC. They also stressed that the IGC's work on disclosure should be mutually supportive and not prejudice the work achieved in other fora, for example, the Convention on Biological Diversity

(CBD) and the WTO Council on TRIPS.⁶³ Japan, which does not support mandatory disclosure requirements in patent applications, highlighted the importance of establishing databases of genetic resources. The US argued that such disclosure requirements might have a negative impact on ABS and may not achieve the objective sought i.e., dealing with erroneously granted patents and avoidance of misappropriation. The US reiterated its support for contract-based systems as offering the best solution to deal with misappropriation and non-compliance with principles of PIC and ABS.

On the future work program for genetic resources, Brazil proposed that the IGC concentrate its effort on the two areas where a lot of progress has been achieved i.e. TCE and TK. For Brazil, genetic resources should be left to the WTO Council on TRIPS. The proposal was contested by countries that argued for an equal treatment by the IGC of all three issues since they all fall within its mandate.

Outcome of the IGC 10th session

The compromise agreement on the Committee's framework for future work included:

- 1) An agreement by members to begin discussions on the basis of the 2 lists of issues proposed by the chair and the secretariat. The draft working documents, i.e., Objectives and Guiding principles for the protection of TCE (WIPO/GRTKF/IC/10/4), Objectives and Guiding principles for the protection on TK (WIPO/GRTKF/IC/10/5) and on the options for giving effect to the international dimension of the committee's work, (WIPO/GRTKF/IC/10/6) will remain on the table and members will continue to work on them in parallel with the lists of issues without excluding any outcome;⁶⁴
- 2) an invitation to delegates and observers to submit comments on the list of issues by the end of March 2007, and the issues will be discussed at the next session of the IGC;
- 3) instructions to the WIPO secretariat to incorporate, in two tables on TK and TCE respectively, comments made by delegations and observers on the draft provisions of the working documents

⁶³ Brazil, India, Pakistan, Thailand, Peru and Tanzania submitted a proposal to the Council for TRIPS for the amendment of the TRIPS agreement to incorporate mandatory disclosure requirements in patent applications. See WTO document IP/C/W/474.

⁶⁴ Adopted Decision of the Tenth Session of the Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore, at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_decisions.pdf.

⁶² See WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/10/5.

(The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles WIPO/GRTKF/IC/9/4 and The Protection of Traditional Knowledge: Revised Objectives and Principles WIPO/GRTKF/IC/9/5). In addition, to integrate these with comments made on the list of issues in another column.

With regard to genetic resources, the secretariat was requested to, for consideration by the committee in its 11th session, prepare a working document listing options for continuing discussions for further work, including in the area of the disclosure requirement and alternative proposals for dealing with the relationship between intellectual property and genetic resources. The secretariat is also directed to provide further information on the interface between the patent system and genetic resources including the intellectual property aspects of access and benefit-sharing contracts. Furthermore, the secretariat was requested to provide a factual update of international developments relevant to IP and genetic resources.

The Eleventh Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources and Traditional Knowledge and Folklore (IGC) will be held in Geneva, Switzerland, 3-12 July 2007.

The WIPO Audit Committee

The 3rd meeting of the WIPO Audit Committee was held from 30 October – 2 November 2006. The committee express concerns about the failure to appoint a head of Internal Audit and concluded that “internal audit at WIPO is deficient.”⁶⁵

The next session of the Audit Committee will be held in February/March of 2007.

Other upcoming WIPO Meetings

The Third Session of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) will be held Feb 19, 2007 to Feb 23, 2007 in Geneva Switzerland.⁶⁶

The WIPO Asia-Pacific Regional Symposium on Emerging Issues of Copyright and Related Rights

in the Library Sector will be held Feb 13, 2007 to Feb 15, 2007 in Vientiane, Laos.

Other Multilateral Fora

World Health Organization

In a special session of the WHO World Health Assembly on 9 November 2006, Margaret Chan of Hong Kong was appointed as the new WHO Director-General.

The first Session of the WHO Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) was held from 4-8 December, 2006. The IGWG was established as a result of the May 2006 World Health Assembly Resolution WHA59.24⁶⁷, which called for a global framework and plan of action on promoting R&D for developing country diseases and access to medicines. Following the World Health Assembly, a secretariat was established and the working group was asked to report back with recommendations to the World Health Assembly in 2008 “giving particular attention to needs-driven research and other potential areas for early implementation.” Dr. Howard Zucker, assistant director for Health Technology and Pharmaceuticals at the WHO since January 2006, and previously assistant Secretary of Health at the United States’ department of Health and Human Services (HHS), was appointed to head the Secretariat of the working group.

Leading up to the 1st session, the WHO Secretariat set up a web-based public hearing encouraging the participation of civil society groups, governmental institutions, academic and research institutions, as well as the private sector and held open hearings between the 1st and 15th of November 2006.⁶⁸ The WHO submitted a summary of the public hearing to the first session of the IGWG.⁶⁹ The secretariat also produced documents on the “Elements of a global strategy and plan of action” (A/PHI/IGWG/1/4), Status of Implementation of resolution WHA59.24 (A/PHI/IGWG/1/4), and Review of recommendations of the Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH) (A/PHI/IGWG/1/2).

⁶⁵ Para 22, WIPO Audit Committee, Report of the 3rd Meeting held 20 October- November 2, 2006, (available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ac_3/wo_ac_3_2.pdf)

⁶⁶ Draft Agenda available at http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_3/pcda_3_1_prov.pdf

⁶⁷ Available at http://www.who.int/gb/ebwha/pdf_files/WHA59/A59_R24-en.pdf

⁶⁸ See http://www.who.int/public_hearing_phi/summary/en/index.html, for the webpage.

⁶⁹ See, WHO (2006), A/PHI/IGWG/1/INF.DOC./2

During the meeting several delegates stressed the need to develop guidance on the implementation of the recommendations of the CIPIH, emphasizing a greater role for developing countries in the prioritization of the recommendations contained in the CIPIH report in order to facilitate development of the global strategy. With respect to the implementation of resolution WHA59.24 delegates supported the development of a structured framework for reporting on the status of the implementation of the resolution, periodic review and collaboration at national and international level as well as addressing the negative impact of certain patent strategies on neglected diseases.

The document on elements of a global strategy and plan of action was received with mixed feelings. The breadth of the document and the limited attention accorded to the existing documents and proposals on the table, including the full report of the CIPIH⁷⁰, the proposal from Brazil and Kenya that led to the IGWG, as well as any elements of those documents that addressed the role of intellectual property was one of the contentious areas. Delegations recommended the inclusion of transfer of technology and the management of intellectual property rights as a core element of the global strategy and plan of action as well as for the WHO to play an important role in enabling developing countries to take advantage of the flexibilities contained in the TRIPS Agreement.

Many of the delegations stressed that at this juncture the IGWG should seek to outline the major strategic direction of the IGWG before embarking on a detailed work plan. There was support for the inclusion, in the areas of action, of the Commission's recommendation that bilateral trade agreements should not seek to incorporate "TRIPS-plus" protection in ways that might reduce access to medicines in developing countries.

The IGWG agreed to split the contents of document A/PHI/IGWG/1/4 into two annexes on the plan of action and on the global strategy. The revised plan of action included elements on technology transfer and the management of intellectual property while the annex on the global strategy emphasized the generation and application of knowledge for achieving global health goals. There was wider support for developing a global treaty on research and development, the possibility of establishing a "trust fund", and a com-

mitment to allocate a certain percentage of GDP to research and development. In addition, the IGWG decided that:

- governments would have until the end of February to provide additional observations and corrections to the document and the Secretariat would update the document including the comments received to be available by June 2007 and;
- Discussion on early implementation of the recommendations shall be made during the January 2007 meeting of the WHO Executive Board
- the IGWG will meet again for a week in October 2007 to finalise the text so that it can be presented to the World Health Assembly in May 2008;
- the IGWG will also explore a "fast-track" accreditation process for members of civil society to participate in future meetings.

The WHO Executive Board meeting to be held 22 -30 January 2007 has a report from the IGWG on its agenda. The next scheduled meeting of the IGWG is October 2007, although all participants agree that significant work will have to be done in the interim period. No further information is yet available as to when any consultations of inter-sessional meetings will be held.

The Sixtieth WHO World Health Assembly will be held from 14 – 23 May, 2007 in Geneva.

United Nations Conference on Trade and Development (UNCTAD)

Experts in the field of IP and public health met at an UNCTAD seminar in Geneva 19-20 October 2006, to analyze the implications of IP standards for developing countries' efforts to set up the practical, legal, and regulatory systems that allow the successful production and distribution of essential medicines.

Various presentations emphasized the difficulties faced by developing countries in accessing and producing pharmaceuticals, how TRIPS flexibilities could be used in this area, ways that FTAs could constrain access and production, the complexities of negotiating reasonable licensing terms, and possible solutions including regional approaches to supply.⁷¹

⁷⁰ Available at <http://www.who.int/intellectualproperty/documents/the-report/en/index.html>

⁷¹ Seminar: Intellectual Property Arrangements: Implications for Developing Country Productive Capabilities in the Supply of Essential Medicines: Report, *available at*

United Nations Committee on Economic, Social and Cultural Rights (CESCR)

The 37th session of the CESCR, which took place in Geneva from 6-24 November 2006, conducted informal consultations on the impact on international trade on the enjoyment of economic, social and cultural rights with a number of experts on the subject matter representing different UN bodies, inter- and non-governmental organizations and academic institutions. Among the issues discussed was the impact of trade-related intellectual property rights on access to affordable medicines.⁷²

UN Internet Governance Forum (IGF)

The Internet Governance Forum (IGF), sponsored by the United Nations, took place in Athens, Greece, from 30 October - 2 November 2006. The IGF was created by the United Nations World Summit on the Information Society (WSIS). It serves as a platform for multi-stakeholder discussions on public policy issues related to Internet governance and is mandated to foster the sustainability, robustness, security, stability and development of the Internet; interface with appropriate inter-governmental organizations and other institutions on matters under their purview; and strengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries.⁷³ The Forum addressed various topics which included the legal dimension on internet governance, access to knowledge and the free flow of information, and content regulations and access to knowledge. Of particular concern to participants in the discussion on Access to Knowledge were technologies that restrict access to particular websites or other internet resources. The issue of net neutrality was raised, as some participants pointed out moves in the US to allow companies to favour some content over others in priority in moving information over networks. The IGF also saw the emergence of Dynamic Coalitions on various issues bringing together, government, business, consumer groups, and NGOs. The Access to Knowledge Coalition includes IP Justice, Google, Council of Europe, Consumer Project on Technol-

http://www.unctad.org/sections/dite_totip/docs/tot_ip_0001_en.pdf.

⁷² Note on the 37th session of the Committee on Economic, Social and Cultural Rights 6-24 November 2006, and its Pre-sessional Working Group 27 November-1 December 2006 available at <http://www.ohchr.org/english/bodies/cescr/docs/note37session.pdf>.

⁷³ See <http://www.intgovforum.org/mandate.htm>.

ogy (CP Tech), Sun Microsystems, Yale Law School Information Society Project, Free Software Foundation Europe, Bibliotheca Alexandrina, Franklin Pierce Law School, Electronic Frontier Foundation and the IP Academy of Singapore.⁷⁴ The Coalition focuses on:

- “1. Developing best practice norms for:
 - a) Limitations and exceptions to copyright, patents and other intellectual property rights;
 - b) Third party liability for intellectual property infringement;
 - c) implementation of anti-circumvention provisions in 1996 WIPO WCT and WPPT and other international agreements;
 - d) on-line access to scholarly research, government funded research, and essential documents such as legal information;
 - e) the support of alternative business models for creating knowledge goods, including free and open software, or open scholarly and scientific journals; and
 - f) protecting access to freedom of expression and cultural diversity in issues relating to intellectual property rights.
2. Coordinating participation and awareness of A2K activities at related fora, such as the WIPO Development Agenda or the WIPO proposals for an A2K Treaty.”

A stock-taking session on the IGF open to all stakeholders will be held on 13 February 2007 at the Palais des Nations, United Nations Office in Geneva. The next meeting of the IGF is scheduled for 12 - 15 November 2007 in Rio de Janeiro Brazil.

Regional and Bilateral Trade Agreements with Intellectual Property Provisions

The following section highlights the latest developments in the bilateral and regional trade negotiations of the United States and Europe with developing country counterparts in the fourth quarter of 2006, with specific focus on IP issues.

Free Trade Agreements involving the United States

The fourth quarter of 2006 saw a dramatic political shift in the United States Congress. Democrats took control of both the House and the Senate in the mid-term elections held 7 November 2006. It is expected that this shift will change

⁷⁴ See the website at <http://www.a2k-igf.org/> for further information.

U.S. trade policies in regard to FTAs. Democrats will take over chairmanships of congressional committees, including important committees addressing trade policy issues such as the House Committee on Ways and Means and the House Agricultural Committee. The president's power to negotiate trade agreements without congressional amendments ("Fast Track Authority") is up for renewal in July 2007 and with Democrats in control it is less likely that there will be an extension of this authority. Without this fast-track negotiating authority chances are reduced that Doha Round negotiations will be concluded in the next year.⁷⁵ The election results were hailed as a victory for active opponents of the "US trade status quo of NAFTA, WTO, and fast track."⁷⁶

CAFTA countries

US-Panama

The US concluded free trade negotiations with Panama on 19 December 2006. Regarding IPRs, the agreement will provide greater protection for a broad range of IPRs. These standards are consistent with US standards and include the highest levels of protections for digital content, stronger protection for patents, trademarks and test data, and an electronic system for the registration and maintenance of trademarks.

US-DR/DR-CAFTA

The Dominican Republic authorities finalized their end of the deal to initiate the DR-CAFTA on 7 December 2006 by modifying, in the National Congress certain laws to satisfy suggestions made by the US. Since then, the DR has been waiting for the US to finish translating the documents sent and approve the country's participation in the trade accord.

Andean countries

US-Ecuador

On 21 December 2006, Ecuadorian President Rafael Correa stated that Ecuador will refrain from signing a free trade agreement with the United States and will not renew the agree-

ment for the use of the Manta Air Base by the US military.⁷⁷

US-Uruguay

Although Uruguay⁷⁸ declined an offer from the USTR to initiate FTA negotiations with the U.S., the Uruguayan Minister of the Economy, Danilo Astori, announced on 21 December 2006 that Uruguay will enter into a Trade and Investment Framework Agreement (TIFA) with the U.S. in January.

Peru and Colombia

After the US November elections, key Democrats in the U.S. House of Representatives sent a letter to the USTR requesting that both bilateral trade agreements with Peru and Colombia be renegotiated before both houses will give their approval. The letter focuses on the labour clause but more substantive trade policy changes may need to be made to satisfy the Democrat-controlled Congress.⁷⁹

Middle East

US-Oman

The US-Oman FTA is expected to take effect in the first quarter of 2007. Oman is also pursuing free trade agreements with other trading blocks, "including the EU, Turkey, China, Japan, India, Pakistan, and New Zealand," stated Maqbool bin Ali Sultan, the Minister of Commerce and Industry.⁸⁰

Asia

US-Malaysia

The third round of FTA negotiations was held in Kuala Lumpur in early November and the fourth round was held in Washington in December. Officials were hopeful that the deal would be finished before the 1 July 2007 fast-track TPA

⁷⁵ *Democratic Win to Affect US Trade Policy – But How?*, BRIDGES Weekly Trade New Digest, Vol. 10 No. 38, 15 November 2006, available at <http://www.ictsd.org/weekly/06-11-15/story3.htm>.

⁷⁶ Todd Tucker, *Election 2006: No to Staying the Course on Trade*, Public Citizen, 8 November 2006, available at <http://www.citizen.org/documents/Election2006.pdf>.

⁷⁷ *Ecuador to US: No FTA, No Troops Here*, Prensa Latina, 21 December 2006, available at http://www.bilaterals.org/article.php3?id_article=6766.

⁷⁸ Since 7 July 2005, Uruguay has been an associate member of the Andean Pact along with the four other Mercosur members, Argentina, Brazil, and Paraguay. The other current members are Bolivia, Colombia, Ecuador, and Peru.

⁷⁹ Sarah Anderson & Sara Grusky, *Peru, Colombia trade deals would lock in more bad investment rules*, Foreign Policy in Focus (FPF) Policy Report, 18 December 2006, available at <http://www.fpf.org/fpifxt/3810>.

⁸⁰ *Oman-US Free Trade to Begin in Early 2007*, Oman Daily Observer, 07 December 2006.

expired.⁸¹ US negotiators are likely to push hard for stronger protection of IPRs, including data exclusivity provisions.⁸²

US-South Korea

Trade talks between South Korea and the US came to a halt during the fifth round of FTA negotiations on 9 November 2006, when negotiators were unable to agree on key issues including IP and pharmaceuticals.⁸³ In spite of these troubles, the US and South Korea have scheduled their sixth round of free trade talks in mid January 2007 and will be working to bridge gaps in the key sectors that stalled that last round. The seventh round of talks is scheduled to begin 11 February 2007 in Washington and the countries hope to conclude the deal by the end of March 2007. South Korea is the world's 10th largest economy and the seventh biggest trading partner for the US.

Vietnam

The US Congress, on 9 December 2006, passed legislation normalizing trade ties with Vietnam, granting Vietnam permanent Most-Favoured-Nation status and pushing aside trade curbs that have formally been in place since the Vietnam War.⁸⁴ Since the US/Vietnam BTA went into effect in 2001, normal trade relations have been consistently extended to Vietnam.⁸⁵ The latest bill makes permanent the BTA and its commitments, including TRIPS-plus provisions such as protection of encrypted program carrying satellite signals and extension of trademark terms.⁸⁶

Vietnam will formally join the WTO as its 150th member on 11 January 2007.

US-Thailand

On 29 November 2006, the Thai government announced that it would issue a compulsory license for Merck's HIV/AIDS drug Efavirenz. The Thai ministry of public health authorized the Government Pharmaceutical Organization to manufacture generic versions of the drug until

2011.⁸⁷ The government stated that under the Doha Declaration and TRIPS, "member countries have a right to issue a safeguard measure to protect public health, especially for universal access to essential medicines using compulsory licensing on the patent of pharmaceutical products."⁸⁸

US FTA negotiations with Thailand continue to be stalled. A senior US trade official stated that America will not negotiate with the present Thai government, implying that a democratically-elected government needs to be in place before the US will continue negotiations.⁸⁹

US-India

On 20 December 2006, the United States Patent and Trademark Office (USPTO) announced that it had recently signed a historic Memorandum of Commerce and Industry (MoU) on bilateral cooperation between the U.S. and India on IP issues. "The MoU advances the objective established by President Bush and Prime Minister Singh in March for the United States and India to work together to promote innovation, creativity and technological advancement by providing a vibrant intellectual property rights regime," said Jon Dudas, Under Secretary of Commerce for Intellectual Property and Director of the USPTO. Under the terms of the MoU, the USPTO and the Indian Ministry of Commerce and Industry's Office of the Controller General will cooperate on capacity building, human resource development and public awareness of intellectual property.⁹⁰

US-Russia

In bilateral negotiations with the U.S., in order for Russia to join the WTO, Russia has agreed on a blueprint for action that Russia will take to address US concerns about piracy, counterfeiting, and improving protection and en-

⁸¹ *Malaysia-US FTA Negotiations Hit Turbulence*, Aliran Monthly, 9 January 2007, available at <http://www.aliran.com/content/view/176/10/>.

⁸² *Id.*

⁸³ *US-Korea Trade Negotiations Stumble*, BRIDGES Weekly, Vol. 10, No. 42, 13 December 2006, available at <http://www.ictsd.org/weekly/06-12-13/story6.htm>.

⁸⁴ *US Congress Backs Vietnam Trade*, BBC News, 9 December 2006, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6163889.stm>.

⁸⁵ HR 6406, available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.6406>.

⁸⁶ Agreement Between the United States of America and the Socialist Republic of Vietnam Trade Relations, Ch. II, available at http://www.ustr.gov/assets/World_Regions/Southeast_Asia_Pacific/Vietnam/asset_upload_file804_5101.pdf.

⁸⁷ *Thailand Issues Compulsory License for Patented AIDS Drug*, BRIDGES Weekly, Vol. 10 No. 42, 13 December 2006, available at <http://www.ictsd.org/weekly/06-12-13/story2.htm>.

⁸⁸ Tove Iren S. Gerhardsen, *Thailand Compulsory License on AIDS Drug Prompts Policy Debate*, Intellectual Property Watch, 22 December 2006, available at http://www.ip-watch.org/weblog/index.php?p=499&res=1024_ff&print=0.

⁸⁹ *US Postpones FTA Talks with Thailand*, ASIA PULSE, 6 November 2006, available at <http://asia.news.yahoo.com/061106/4/2senb.html>.

⁹⁰ Press Release, *U.S. and India Sign Historic Memorandum of Understanding on Bilateral Cooperation on Intellectual Property*, Dec. 20, 2006, available at <http://www.uspto.gov/web/offices/com/speeches/06-72.htm>.

forcement of IPRs.⁹¹ A study released in October 2006 by the Carnegie Endowment stated that this kind of accommodation and bilateral agreement on IPRs was necessary for Russia to accede to the WTO.⁹² The agreement includes requiring action on protection of pharmaceutical test data, fighting optical disc piracy, fighting internet piracy, IPR enforcement and bringing Russia's laws into compliance with the WTO TRIPS Agreement. Many of these provisions appear to go beyond TRIPS levels of protection. For example, Russia has agreed to block, by June 2007, the unapproved use of undisclosed information provided for marketing approval of patented medicines for a minimum of six years, whereas TRIPS Article 39.3 does not specify type or length of time for protection, one of the flexibilities written into the agreement.

Free Trade Agreements involving the European Union

On 6 December 2006, the EU Commission announced that it had finalized three draft mandates for negotiating bilateral free trade agreements with ASEAN, Korea, and India. The tentative plan is for the EU Council to adopt the mandates by its meeting on 5-6 March, 2007. The Commission is aiming for the highest possible degree of trade liberalization.

EU-ASEAN

EU negotiations are underway for "Partnership and Cooperation" agreements in Thailand, Singapore, Indonesia, Malaysia, the Philippines, and Brunei. The Commission proposed in its draft mandate to start FTA negotiations with these countries, i.e. ASEAN minus the three LDCs of the region: Myanmar, Laos, and Cambodia. It is left open whether the FTAs will be seven bilateral FTAs, EU-ASEAN minus 3, or an all ASEAN-EU FTA.⁹³

EU-South Korea

⁹¹ *Results of Bilateral Negotiations on Russia's Accession to the WTO: Action on Critical IPR Issues*, November 19, 2006, Office of the United States Trade Representative, available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2006/asset_upload_file151_9980.pdf.

⁹² Shermard Katz and Matthew Ocheltree, *Intellectual Property as a key Obstacle to Russia's WTO Accession*, Carnegie Endowment for International Peace, No. 73 Oct. 2006, available at http://www.carnegieendowment.org/files/cp73_katz_final.pdf.

⁹³ *The EU approach to FTA talks with ASEAN, India, Korea*, SUNS #6171, 18 January 2007, available at http://www.bilaterals.org/article.php3?id_article=7009&var_recherche=EU+ASEAN.

Free trade talks between South Korea and the EU are scheduled to begin in March 2007. Important non-tariff barriers to be addressed include the regulatory regime in pharmaceutical pricing.⁹⁴

EU-China

On 9 September 2006, Chinese premier Wen Jiabao announced that China and the EU had agreed to begin negotiations on a new framework for a broad political and economic cooperation agreement, the Partnership and Cooperation Agreement (PCA). On 7 November 2006, China and the EU reached an eight-point consensus and signed new agreements on further developing trade relations and enhancing IPR protection.⁹⁵ After the meeting both parties signed a MoU on jointly strengthening IPR protection which aims to enhance cooperation and exchange of information in order to improve overall effectiveness of IP enforcement.⁹⁶

European Partnership Agreements

(For a complete discussion of the current state of IP in the EU-ACP EPAs negotiations, please see the main article beginning on Page 1.)

Africa

The Ninth Annual Review Meeting of the Africa Trade Network took place in Accra, Ghana, 11-14 December 2006.⁹⁷ The Declaration from the meeting reiterated their rejection to the EPAs and demanded that "rules and disciplines on . . . intellectual property must not form part of such agreements, since the related disciplines in the WTO are sufficient for any interaction with the European Union . . ."⁹⁸

ECOWAS

The regional ministerial committee monitoring the negotiation of the EPA between West

⁹⁴ *EU to Focus on Regulatory Issues in FTA with South Korea*, Yonhap News, 2 February 2007, available at <http://english.yonhapnews.co.kr/Engnews/20070127/64000000020070127022201E7.html>.

⁹⁵ *China, EU Reach New Consensus on Economic Cooperation*, China View, 8 November 2006, available at http://news.xinhuanet.com/english/2006-11/08/content_5302308.htm.

⁹⁶ *European Chamber signs Memorandum of Understanding with Jiangsu and Guangdong Office for IPR Protection*, European Chamber, available at <http://www.eurochamber.com.cn/events/news.php?id=283>.

⁹⁷ Declaration of 9th Annual Meeting of the Africa Trade Network, available at

<http://www.twnafrica.org/print.asp?twID=963>.

⁹⁸ *Id.*

Africa and the EU requested a three year extension from the 2007 deadline for the conclusion of the negotiations.⁹⁹ West Africa wants the EPA to commence on 1 January 2011 instead of the January 2008 date set out under the Cotonou partnership agreement.

Asia

Malaysia and the EU agreed in October to launch negotiations for a broad cooperation pact that could lead to an eventual free trade agreement.¹⁰⁰ The EU also has plans to negotiate similar agreements with other Southeast Asian nations, excluding Myanmar because of its poor human rights record.

⁹⁹ *ECOWAS Seeks Extension of Agreement with EU*, This Day (Nigeria), 2 December 2006, available at http://www.bilaterals.org/article.php3?id_article=6608.

¹⁰⁰ *Malaysia, EU Agree to Launch Talks for Broad Cooperation Pact*, International Herald Tribune, 9 October 2006, available at http://www.bilaterals.org/article.php3?id_article=6164.

ABOUT THE IP QUARTERLY UPDATE

The IP Quarterly Update is published on a quarterly basis by the South Centre Innovation and Access to Knowledge Programme and the Center for International Environmental Law (CIEL). The aim of the Update is to facilitate a broader understanding and appreciation of international intellectual property negotiations by providing analysis and a summary of relevant developments in multilateral, plurilateral, and bilateral fora as well as important developments at the national level. In each IP Quarterly Update, there is a focus piece analysing a significant topic in the intellectual property and development discussions.

Today, in addition to the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO), there are other multiple fronts of discussion and negotiation on intellectual property. These other fora range from international organisations, such as the United Nations Educational and Scientific Organization (UNESCO), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Customs Organization (WCO), INTERPOL, and the UN human rights bodies to regional and bilateral fora such as in the context of free trade agreement (FTAs) or economic partnership agreements (EPAs). In some cases, national processes or decisions, for example, invalidation of a key patent may have important international ramifications.

Consequently, all these processes constitute an important part of the international intellectual property system and require critical engagement by developing countries and other stakeholders such as civil society organisations. Multiple fronts of discussions and negotiations require a coordination of strategies and positions that is not always easy to achieve. The Quarterly Update therefore also to facilitates such coordination and strategy development, and is a vehicle for awareness-raising as well as capacity development.



17-19, Chemin du champ d'Anier
POB 228, 1211 Geneva 19
Switzerland
Tel. +4122 791 8050
Fax. +4122 798 8531
south@southcentre.org
www.southcentre.org



Center for International Environmental Law
15 rue des Savoises,
1205 Geneva, Switzerland
Tel. 41-22-789-0500
Fax. 41-22-789-0739
info@ciel.org
www.ciel.org