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# Intellectual Property in European Union Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What way Forward after the Cariforum EPA and the interim EPAs?

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## I. INTRODUCTION

For much of late 2006 and 2007, the European Community and its member states (EU) represented by the European Commission, attempted to conclude what it called comprehensive Economic Partnership Agreements (EPAs) with the 76 member African, Caribbean and Pacific (ACP) group of countries. In line with its Global Europe strategy, which states that, "[t]he EU should seek to strengthen IPR [Intellectual Property Right] provisions in future bilateral agreements and the enforcement of existing commitments ...,"[1] the European Commission insisted on the inclusion of intellectual property in negotiations. The aim was to conclude full and comprehensive agreements by the end of 2007 to meet the deadline for bringing the EU's preferential trade arrangements for goods with ACP countries into conformity with the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT).[2] Due to a confluence of factors, chief among which was the lack of sufficient time for the formulation of regional positions by ACP countries, a series of hastily signed 'goods-only" interim agreements was signed with a mix of ACP countries. These agreements did not include intellectual property provisions. The only region to conclude a full EPA was the Caribbean region represented by Cariforum. All the ACP regions plan to continue negotiating towards full EPAs, but it remains unclear what the status of intellectual property will be in future negotiations and how the IPR provisions of the EU-Cariforum will influence the negotiation of other EPAs.

This paper explores the implications of continuing negotiations for further IPR protection in EPAs. The discussion begins with a description of the interim regional configurations and continues with an analysis of the provisions on future negotiations in the interim EPAs within each region. This approach enables the paper to determine the exact nature of commitments that the ACP regions have made regarding the basis and scope of future negotiations on IPRs. The paper then examines some of the more significant provisions on IPRs in the EU-Cariforum EPA and ends with a discussion of the potential use or misuse of the agreement as a template for further negotiations by the EU or other ACP regions. It concludes with recommendations for future actions that ACP countries can take in their approach to IPRs in future EPA negotiations.

## II. WHAT IS THE STATUS OF THE EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS?

The initial set of negotiations were conducted on a regional basis, at the insistence of the EU. Dividing the ACP into regional negotiating groups was seen as a means of increasing regional integration and trade. The six negotiating groups were: SADC (Southern Africa), ESA (East

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

[2] The deadline came about because of a 2001 waiver from the WTO that was obtained by the EU and ACP regarding the Cotonou Agreement, allowing for the continuation of the preference regime but only until the end of 2007. The preference regime largely excluded Latin American countries who objected to what they argued was unfair discrimination between similarly situated developing countries. Beyond that date, the EU would not have been allowed to continue the preference regime without establishing a regional trade agreement under Article XXIV of the GATT. The waiver is "European Communities — the ACP-EC Partnership Agreement, Decision of November 14" WTO Document Number WT/MIN(01)/15, available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm.

Africa), ECOWAS (West Africa), CEMAC (Central Africa), CARIFORUM (Caribbean) and the Pacific Forum (Pacific countries).[3] New, and relatively inexperienced, regional negotiating machineries were set up to work in these new configurations.

The final set of interim EPAs was concluded with very different configurations than those initially conceived. For example, several ESA states decided in late 2007 to shift to negotiations as the East African Community. In addition, in almost every region, except for Cariforum, a significant portion of the member states did not sign interim EPAs. For the purposes of examining the obligations with respect to IPR, the states that have signed up to the interim EPAs in each region are[4]:

- ***Eastern and Southern African Group*** (ESA)[5] – an interim EPA between the EU and the Seychelles, Zimbabwe, Mauritius, Comoros and Madagascar.
- ***East African Community*** (EAC)[6] – an interim EPA between the EU and Burundi, Kenya, Rwanda, Tanzania, Uganda and Zambia (not included in both EAC and ESA are Djibouti, Eritrea, Ethiopia, Malawi, Sudan.)
- ***Southern African Development Community*** (SADC)[7] an interim EPA between the EU and Botswana, Lesotho, Namibia, Mozambique and Swaziland, but excluding South Africa. Several SADC members (e.g. Zimbabwe and Tanzania) are also members of the ESA group, while Botswana, Swaziland, Mozambique and Lesotho and South Africa also form the Southern African Customs Union.
- ***Economic Community of West African States*** (ECOWAS) - an interim EPA between the EU and Ghana[8], and a separate interim EPA with Cote d' Ivoire.[9]
- ***Communauté économique et monétaire de l'Afrique Centrale*** (CEMAC) -– an interim EPA between the EU and Cameroon.[10]
- ***Pacific***[11] – an interim EPA between the EU and Papua New Guinea and Fiji.
- ***Cariforum***[12] - a final EPA between the EU and all Cariforum states.

[3] Lists of the member countries in each region in March 2007 are available at http://ec.europa.eu/trade/issues/bilateral/regions/acp/plcg_en.htm.

[4] For further details on the configurations that signed see http://www.acp-eu-trade.org/index.php?loc=epa/. Not all interim agreements are publicly available, and where this is the case, the paper notes this. In addition, the exact status of all the agreements is not clear. All have been initialed but many have not been formally signed because they are pending legal review. None of them have, however, been ratified in any of the ACP countries. Nevertheless, there are provisions for provisional application of the interim agreements while awaiting signing and ratification processes.

[5] For full text see http://www.acp-eu-trade.org/library/files/EU-ESA_EN_282207_bilaterals.org_EU-ESA-framework-agreement.pdf.

[6] For full text see http://www.acp-eu-trade.org/library/files/EAC-EU_EN_271107_bilaterals.pdf.

[7] For full text see http://www.acp-eu-trade.org/library/files/SADC-EU_EN_231107_bilaterals.org_interim-agreement.pdf.

[8] Almost identical to the Cote d'Ivoire text, but no official text available as yet. A copy has been made available to CIEL for analysis.

[9] For full text (in French) see http://www.acp-eu-trade.org/library/files/Cote-d-Ivoire-CE_FR_071207_bilaterals.org_APE-d-etape.pdf.

[10] No official text available yet, but a copy has been made available to CIEL for analysis.

[11] For text see http://www.acp-eu-trade.org/library/files/Fiji-PNG-EU_EN_231107_bilaterals.org_interim-agreement.pdf.

[12] For full text see http://trade.EU.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf.

## III. THE STATUS OF INTELLECTUAL PROPERTY IN THE INTERIM EPAS AND FUTURE NEGOTIATIONS

Those countries that have not initialled an interim EPA have no obligations with respect to further negotiations on IPR. Their participation in further negotiations towards a full EPA in their respective regions may include discussions about IPR, but they would be within their legal rights to refuse to discuss such issues.

Except for the Cariforum final EPA, none of the other interim EPAs have substantive provisions on intellectual property. However, they all have provisions on future negotiations. The specific language used is key to understanding whether ACP countries have legally bound themselves to the inclusion of provisions on IPR in future EPAs or whether they have simply committed themselves to further negotiations on IPR. The distinction is crucial. Whereas the first scenario commits ACP regions to agreeing on something related to intellectual property, the second scenario enables them to negotiate but exclude provisions on intellectual property if no satisfactory conclusion is reached. As has been previously argued, the inclusion of intellectual property in the EPAs was not necessary to comply with the WTO rules on preferential treatment for goods from ACP countries.[13] The EU's insistence on the inclusion of IPRs placed undue pressure on ACP countries to negotiate IPR provisions under an artificial and unnecessary deadline. As the South Centre points out[14], the signing of the 'goods-only' interim EPAs means that ACP countries no longer have the pressure of the WTO deadline, leaving a space for thorough reconsideration of the negotiations so far. This analysis in conducted on the basis that the documents represent actual commitments but here may still be significant room for renegotiation of initialled agreements that have neither been signed or ratified.

The EU still continues to argue that the Cotonou Agreement requires that countries sign up to higher IPR provisions in EPAs. However, Article 46 of Cotonou (Intellectual Property) does not commit ACP countries to increasing their protection of intellectual property.[15] The EU's argument rests with provisions such as Article 46.4, which states:

> The Community, its Member States and the ACP States may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party.

The explicit reference is directed at further agreements on trademarks and geographical indications. However, the language here is still permissive, using "may" rather than mandatory language, such as "shall", or "commit to". ACP countries may thus pursue such further agreements if they wish, but there is no actual obligation to pursue negotiations, and even less so to conclude provisions, on trademarks or geographical indications. Thus, while the EU has the

[13] D. Shabalala "The European Approach to Intellectual Property in Economic Partnership Agreements with the African, Caribbean and Pacific Group of Countries" CIEL April 2007. Available at http://www.ciel.org/Publications/EU_EPAs_Draft_18Apr07.pdf.

[14] para 6, South Centre "EPA Negotiations: State of Play and Strategic Considerations for the Way Forward", South Centre Analytical Note, February 2008, available at http://www.southcentre.org/publications/AnalyticalNotes/Other/2008Feb_State_of_Play_and_Way_Forward.pdf.

[15] See Annex 2 for the full text of Article 46 of the Cotonou Agreement

right to request that ACP countries conclude such agreements, ACP countries are well within their rights to refuse to do so, or to require significant concessions in return for being willing to consider, let alone conclude, such further agreements.

The EU's other argument rests with Article 46.1, which states,

> Without prejudice to the positions of the Parties in multilateral negotiations, the Parties recognize 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.

It is a far cry from "recognizing a need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS in line with the international standards", to taking on obligations to negotiate or implement *higher* IPR obligations.[16] The language of "recognition" can hardly form the basis of any obligation. It does not impose any further obligations on ACP states beyond that statement in Cotonou. In addition, it should be clearly understood that 'recognition' in Article 46.1 does not imply that any further action must take place in the negotiation of EPAs or any other bilateral instrument between ACP countries and the EU.

The following section focuses on the specific interim EPAs to examine the language on future negotiations. The text of the provisions examined in this section is all available in Annex 1 to this paper.

### III.1 East African Community (EAC)

Article 37 of the interim EPA with the Seychelles, Zimbabwe, Mauritius, Comoros and Madagascar commits the countries to continuing negotiations but not to inclusion of IPRs in the final agreement. This leaves room open to exclusion of IPRs from a final agreement. At the very least it leaves open the option of a variety of less restrictive commitments ranging from "cooperation" to "best endeavour". From the text, it appears that the EAC has not committed to specific approaches or elements on intellectual property, although the first paragraph notes that the parties will take into account progress made in the negotiations so far. However, given the fact that the last Joint Draft Text[17] before the interim EPA contained no text on IPRs, the EAC is free to begin negotiations on whatever basis it chooses.

One cautionary note to the above discussion is the general wording of Article 3.2 which notes that the parties commit to conclude an EPA by the end of 2009, which shall "comprise" the areas for future negotiations in Chapter V. This could be conceivably read as requiring EAC countries to conclude an EPA that has a chapter on intellectual property. If so, there is still room for EAC

[16] As one commentator argues, those countries that are already members of the WTO TRIPS Agreement are already in line with international standards. p13, S. Musungu "An Analysis of the EU Non-Paper on the Objectives and Possible Elements of an IPR Section in the EU-Pacific EPA" ICTSD August 2007, Available at http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf.

[17] Available at http://www.bilaterals.org/article.php3?id_article=9720.

countries to have provisions that range from "cooperation" to 'best endeavour" clauses without committing to higher or broader protection of intellectual property.

### III.2 The Eastern and South African group (ESA)

Chapter V on areas for future negotiation references Article 3 for the scope and coverage of future negotiations. The provisions commit the signatories to continue negotiations on IPRs with a view to "concluding a full and comprehensive EPA" which covers a list of subject matters that include intellectual property. The language here is far more specific than in the EAC interim EPA and more clearly commits ESA to an EPA that includes IPR provisions. However, it does not commit ESA to any kinds of obligations, leaving room for "cooperation-based" provisions or "best endeavour" clauses, rather than substantive obligations.

### III.3 Central African Countries (CEMAC)

Title V, Chapter 3 has a section that is very specific about how intellectual property will be negotiated. Article 1.1 recapitulates the language of Article 46.1 of the Cotonou Agreement. Article 1.2 commits the parties to concluding negotiations on a set of obligations on IPRs by 1 January 2009. Thus, Cameroon has committed to the inclusion of substantive obligations on IPRs in its future EPA, and not just to negotiations. Cameroon has given itself some room to work with by ensuring that the future negotiations, at least, take into account the different development levels of the countries.

Another important consideration for Cameroon is that no official document exists that contains substantive IPR proposals or language, other than the interim agreement. Thus Cameroon is not bound to consider any other text as a basis for negotiations going forward. In any case, despite the commitments to include provisions on IPRs, nothing in the interim agreement commits Cameroon to specific levels of obligations on IPRs and thus it is free to agree to obligations that are limited to "cooperation" activities or "best endeavour" clauses.

### III.4 Pacific Countries

The provisions regarding future negotiations are contained in Part IV: General and Final Provisions, Article 69 of the Pacific Countries interim EPA. Article 69.1 presents the scope of continuing negotiations to be concluded by the end of 2008. However, the commitment is to continue to negotiate in line with the scope as determined by "the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components." This does not commit the parties to the inclusion of IPR provisions in the final and full EPA. There is no specific mention of intellectual property, but it may be included as a subject matter due to Ministerial Declarations and Conclusions, as well as previous draft texts.

There has been a non-paper from the EU proposing elements and objectives on IPRs[18], but the only official text that contains elements of IPRs is the Draft EU Proposed Text[19] from August

[18] For an excellent analysis of the EU's IPR approach to the Pacific see S Musungu "An Analysis of the EU Non-Paper on the Objectives and Possible Elements of an IPR Section in the EU-Pacific EPA" ICTSD August 2007, Available at http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf.

2007, which contains language only on innovation and cooperation. There exists no official text with substantive IPR provisions that would form the basis for negotiations. Thus, Pacific countries are free to negotiate IPR issues on any basis that they see fit and to not include them in any final EPA. In addition, as with all the other groups so far, they have not committed to any types of obligations, leaving them free to choose "cooperation"-based or "best endeavour" provisions in any final EPA.

### III.5 Southern African Development Community (SADC)

The issue of future EPA negotiations is addressed in Part IV, Title IV, Article 67 of the interim EPA where the parties commit themselves to continue negotiations in 2008, but do not specify a date for conclusion. In particular, intellectual property is not one of the subject matters to be addressed in continuing negotiations. Thus, the SADC countries are not committed to negotiating on IPRs and may exclude it entirely from negotiations or make the inclusion of IPRs as a negotiating area subject to further concessions from the EU.

Any action by SADC states will have to take into account that, in June 2007, the EU put forward a proposed text on IPRs[20] that the SADC group received but did not officially acknowledge. That text does not, however, represent an agreed basis for negotiations. Nevertheless, the EU will, in all likelihood, seek to have it form the basis for negotiations as it represents the template that it has used in the ECOWAS and Cariforum negotiations.

### III.6 Economic Community of West African States (ECOWAS)

In ECOWAS, interim EPAs were signed only by Ghana and Cote d'Ivoire. The texts are largely identical especially in the areas for future negotiations and so the Ghana text will form the basis for this analysis.

Title IV of the agreement covers services, investment, and trade related rules which have usually included intellectual property. Article 44 contains the general provision on the scope of the subject matter or future negotiations. However, the language chosen only commits the parties to "cooperation" to "facilitate" the necessary measures that would lead to the conclusion of a full EPA that would include provisions on intellectual property. This is some distance from any commitment to negotiate on these areas, let alone to commit to the inclusion of intellectual property provisions. To meet this goal, the ECOWAS states will therefore only have to show a measure of cooperation in preparing to negotiate, but they are not actually obligated to negotiate. They can exclude IPRs from negotiations or make the inclusion of IPRs as a negotiating area subject to further concessions from the EU.

One caution, however, is that the French language version of the Cote d'Ivoire text uses slightly different language which could be construed to commit the country to "taking all necessary measures" rather than committing to cooperate to facilitate the necessary measures. This may

[19] Available at http://www.bilaterals.org/article.php3?id_article=9529.
[20] Available at http://www.bilaterals.org/article.php3?id_article=9719.

suggest that Cote d'Ivoire has committed to take all measures necessary to ensure conclusion of a full EPA that has IPR provisions.[21]

With respect to timelines, the parties only commit to try to complete further negotiations by the end of 2008. While the EU-ECOWAS roadmap includes intellectual property as a negotiating matter, the parties only state that they "support" the use of the roadmap as a basis for negotiations, but do not commit to it as the only basis for negotiations.

As with the SADC group, in April 2007, the EU put forward a proposed draft with IPR provisions[22], but these have not been accepted as a basis for negotiations by ECOWAS. There is no official joint text with IPR provisions that would form the basis for further negotiations. ECOWAS states are thus free to use any basis that they wish for negotiating IPR provisions, if they decide to continue negotiations on IPRs in the future EPA.

## IV. ANALYSIS OF THE IPR PROVISIONS IN THE CARIFORUM EPA

Cariforum approached its negotiations on intellectual property with the EU with a high level of ambition. Part of the success of its approach is reflected in the inclusion of innovation as part of the conceptual framework of the Innovation and Intellectual Property Chapter, which was included in its first non-paper on Trade and Innovation to the EU. A mark of Cariforum's failure, however, is the fact that the innovation concept has ended up as a separate section from that on intellectual property, and that the innovation chapter contains few substantive obligations and consists primarily of provisions on development assistance and cooperation.

A major step along the way to a full EPA agreement between the EU and Cariforum was the joint negotiating text on trade-related issues produced in November 2006.[23] A forthcoming CIEL analysis of where the final Cariforum EPA differs from the November 2006 Joint Draft text with respect to the Innovation and Intellectual Property Chapter finds that, in most respects, the texts do not differ significantly in the scope and content of subject matter addressed although there are some small changes in levels of obligations. The vast majority of provisions in this text were proposed by the EU. The lack of significant changes in the final EU-Cariforum EPA reflects the lack of success by Cariforum in shifting the EU from its positions on IPR provisions. This paper will carry out an analysis of the significant elements of the final EU-Cariforum EPA, but it is important to point out that several analyses of the EU's proposals over the past two years also point out the dangers of the EU approach to IPRs in EPAs.[24]

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[21] For full text (in French) see http://www.acp-eu-trade.org/library/files/Cote-d-Ivoire-CE_FR_071207_bilaterals.org_APE-d-etape.pdf.

[22] Available at http://www.bilaterals.org/article.php3?id_article=9721.

[23] Not available online but copies available from CIEL on request.

[24] See e.g. D Shabalala "The European Approach to Intellectual Property in Economic Partnership Agreements with the African, Caribbean and Pacific Group of Countries" CIEL April 2007. Available at http://www.ciel.org/Publications/EU_EPAs_Draft_18Apr07.pdf.
South Centre "Development and Intellectual Property under the EPA Negotiations" March 2007. Available at http://www.southcentre.org/info/policybrief/06Dev_IPR_EPA_Negotiations.pdf.

### IV.1 Intellectual Property and Most Favoured Nation

The TRIPS Agreement has no exception to the MFN discipline for regional trade agreements unlike the GATT or the GATS.[25] Those ACP countries that are WTO members and that sign extended IPR provisions (TRIPS-Plus IPRs) provisions with the EU will be obligated to extend the same treatment to all WTO members, including industrialized countries. In addition, any further IP-protection that the EU provides to ACP countries will also have to be extended to all WTO members. In signing up to IPR provisions Cariforum will have to provide to the United States the same privileges that is has just agreed to provide to the EU.

### IV.2 IPR Principles and Objectives

Cariforum manages to retain some useful principles and objectives in the EPA. This includes reiterating, in Article 139.2 of the IPRs section, the principles of TRIPS Article 8 on the right to take measures to protect public health and nutrition. It also emphasizes issues of balance as well as taking into account the development needs of Cariforum states. Crucially, the article furthermore ensures that nothing in the agreement could be construed to prevent Cariforum countries from ensuring access to medicines.

The commitment to ensure adequate and effective protection in Article 139.1 is limited to implementation of the international agreements to which the countries are already parties. They therefore do not commit themselves to any further international standards beyond TRIPS in this clause.

The Cariforum parties have until 2014 to implement the provisions of the Chapter. The LDC members have a transition period for their TRIPS obligations in line with the TRIPS transition periods for LDCs, but notes that the provisions of the Chapter should be implemented no later that 2021. This does not defer to the decisions of the TRIPS Council on further extensions of the LDC transition by the WTO TRIPS Council. The decision on extension of the LDC transition period will be made by a Joint committee which only has to "take into account' the decision of the TRIPS Council on LDC extension periods.

### IV.3 Technology Transfer

The issue of technology transfer is covered under Article 142 of the Chapter, and does not present an additional step beyond technology transfer provisions in existing multilateral agreements. Article 142.2 goes one step beyong the language in the TRIPS Agreement (Article 8.2 and Article 40.2) in that it requires both parties to "take measures, as appropriate, to prevent or control licensing practices or conditions pertaining to intellectual property rights which may

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S. Musungu "An Analysis of the EU Non-Paper on the Objectives and Possible Elements of an IPR Section in the EU-Pacific EPA" ICTSD August 2007, Available at http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf

[25] WTO GATT Agreement Article XXIV and GATS Article V. Available at http://www.wto.int/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIV and http://www.wto.int/english/docs_e/legal_e/26-gats_01_e.htm.

adversely affect the international transfer of technology and that constitute an abuse of intellectual property rights by right holders or an abuse of obvious information asymmetries in the negotiation of licences." While the EU already has strong regulations, TRIPS makes such action voluntary, whereas the Cariforum EPA makes it mandatory. In addition, the Cariforum EPA adds an additional consideration of "abuse of obvious asymmetries in information", which is also an advance of particular interest to enterprises in developing countries. However, as always, states have always been free to determine the role that competition law will play with respect in intellectual property and it remains to be seen how this standard will be applied under EU competition law and whether Cariforum enterprises will be able to bring complaints about such practices within the EU processes of competition regulation. Insofar as any process is available, Cariforum states are still left with the relatively weak consultation process of article 40.3 of the TRIPS Agremeent.

All the other provisions relate to the sharing of information, exchange of views and endeavours to promote measures that ensure technology transfer. EU member countries are party to several multilateral environmental agreements (MEAs) that obligate them to transfer technology (e.g. the Convention on Biological Diversity and the UN Framework Convention on Climate Change) and yet the language in this article is even less obligatory than that contained in existing multilateral provisions on technology transfer. For example, where TRIPS Article 66.2 states that industrialized countries "*shall* provide incentives" to enterprises in their countries to facilitate technology transfer to Least Developed Countries (LDCs), the language in the Cariforum EPA states that the EU party shall "promote" and "facilitate" incentives, which is much weaker language. This article presents a failed opportunity for Cariforum, despite having the coverage of the original proposal extended to cover all Cariforum states, not just the LDCs.

### IV.4 Copyright and Related Rights

Article 143.1 of the Cariforum EPA requires the parties to comply with both the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). There have been many criticisms of both these agreements[26], which contain highly restrictive standards on access to knowledge and public interest exceptions, as well as addressing new subject matter. A particular concern is that it extends unprecedented copyright-like protection to technological protection mechanisms, which allow rightsholders to determine for themselves the terms of access to materials without making provisions for enabling public interest exceptions such as for education, libraries or the visually impaired. Developing countries complying with these agreements essentially commit themselves to regulation and protection of digital and internet content at the same level as that provided for in the US and EU at a time when they may stand to benefit immensely from the availability and distribution of material over the internet. However, this final provision is somewhat better than the original EU proposal, which omitted the balancing and public interest provisions of the WCT and WPPT by limiting compliance only to a selected group of provisions in the agreements.

[26] See D Shabalala "Towards a Digital Agenda for Developing Countries" South Centre 2007. Available at http://www.southcentre.org/publications/researchpapers/ResearchPapers13.pdf.

### IV.5 Geographical Indications

In negotiating provisions on geographical indications (GIs), the EU has sought to extend the existing protection for wines and spirits in the TRIPS Agreement to all other goods potentially protectable by geographical indications. The Cariforum group may have GIs that it may also want to be protected.

Article 145.1 of the Cariforum EPA establishes that GIs are only protected in the other party if they are protected at home. While seemingly straightforward, this provision privileges the EU, which has an extensive system of protection in comparison to Cariforum, which has yet to establish a full system of identifying and accrediting GIs. More worrisome, Cariforum has committed to protecting GIs in the broadest possible way, to the same extent such protection is extended within the EU.

The provisions on GIs are quite detailed and are reflective of the importance that the EU attaches to this issue. Cariforum may have made an assessment that it had few products that would be harmed by such protection, but given the lack of development of GIs in the region, it may have been premature to negotiate such extensive commitments without a more thorough assessment and evaluation.

### IV.6 Enforcement

The Cariforum EPA contains a full sub-section 3 devoted to enforcement, containing essentially identical language to the original EU proposed text from November 2006. In addition to the unprecedented inclusion of enforcement provisions in the EPA, the provisions are worrisome because of their breadth and scope and the ways that they transfer essentially European standards and norms to ACP countries. In particular, the level of resources required to implement and meet these obligations will distort the administrative and judicial systems of most ACP countries, shifting the focus from crucial areas such as enforcement of criminal law.

Specific areas of concern raised by the provisions include[27]:

- The expansion of the categories of persons entitled to bring cases and request provisional, precautionary and border measures (Article 152);
- The extension of the ability of complainants to access private information, such as to banking and financial documents and act to have goods seized to preserve evidence (Article 153 and 154)
- The expansion of the use of provisional and precautionary measures such as injunctions, to all IPRs without a requirement to prove harm.(Article 156)
- The expansion of the use of injunctions, corrective and preliminary and provisional measures against third party intermediaries who are not themselves infringers.

[27] Sourced from a presentation by C. Correa on EPAs and IPR Enforcement at the CIEL/Oxfam/ChristianAid Workshop on Intellectual Property, EPAs and Sustainable Developments in Brussels in May 2007. Materials available at http://www.ciel.org/Tae/IPR_Brussels_Jun07.html.

On the positive side, Cariforum was apparently able to remove the provisions that created a presumption of authorship or ownership on the part of a complainant, which posed serious risks for abuse. In addition the extension of border measures to patents was also stopped, although Cariforum has committed to working with the EU to extend the use of such measures to all IPRs (Footnote to Article 163.1).

As was the case with the original EU proposal, the final Cariforum EPA contains no provisions balancing the new expansions for rightsholders or providing for limitations and exceptions that would protect defendants. The failure of Cariforum to moderate many of the most troubling elements of the EU proposal is especially worrisome.

### IV.7 Genetic Resources, Biodiversity and Traditional Knowledge

In an innovation in line with the Free Trade Agreement between the United States and Peru (US-Peru FTA), Article 150 of the Cariforum EPA has provisions on genetic resources, biodiversity and traditional knowledge. These are areas where developing countries, especially megadiverse ones, have been considered to have offensive interests. In particular, developing countries, including almost all ACP countries, have sought to prevent biopiracy and to have recognition and protection of traditional knowledge.

Nothing in the language of the Article goes beyond already existing language and obligations in multilateral agreements. Article 150.1 simply reiterates Article 8(j) of the Convention on Biological Diversity (CBD), while Article 150.4, restates what countries have been able to do in any case, which is to establish a national disclosure of origin requirement if they wish to do so.

The Cariforum EPA provides nothing new on these issues and does nothing to further the goals of Cariforum countries as they seek them out at the multilateral level. However, Cariforum has at least not locked itself into a situation that would run counter to its positions at the international level.

### IV.8 Plant Varieties and Food Security

The EU proposal had initially proposed that Cariforum sign up to the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 1991), a treaty that provides IPR protection to plant breeders. The system has generally privileged large corporations such as Monsanto over the groups that have historically been responsible for development of new plant varieties, *i.e.* farmers. UPOV 1991 prevents farmers from exercising their traditional form of saving and exchange of seeds, limiting them to saving seeds only for use on their own fields, locking them into vertical relationships with seed corporations rather than cooperative and sustainable relationships with their local farming communities. UPOV 1991 would diminish independent food production by small-scale farmers and prevent the adaptation, localization and diversification that is key to small-scale sustainable farming in developing countries.

The TRIPS Agreement, in Article 27.3.b, gives countries the flexibility to determine for themselves the appropriate system for the protection of plant varieties. Given the vulnerability

of farmers and rural workers in ACP countries, it is imperative that any system of seed production, use and distribution is sensitive to local needs and does not impose a one-size fits all approach. ACP countries should be free to craft more appropriate *sui generis* systems of their own.

The Cariforum EPA provisions on plant varieties are in Article 149. Article 149.1 establishes that Cariforum can establish exceptions to plant variety protection for farmers to save, re-use, and exchange seeds and propagating material, which is an important provision and statement to have maintained. While Article 149.2 refers to UPOV 1991 and asks Cariforum to consider accession to it, the Article reiterates the TRIPS Agreement as the basis for protection of plant varieties. Cariforum is thus free to establish a *sui generis* system for protection of plant varieties.

### IV.9 Effect of the EU-Cariforum EPA

In informal discussions with civil society organizations and with other ACP negotiators, the Cariforum negotiators have been adamant that they do not consider that the IPR provisions that they have negotiated with the EU should form a template for negotiations with other ACP regions. They have emphasized the special circumstances in the region that have led to a full Cariforum EPA and to such comprehensive provisions on IPRs.

However, given the short time frame in which most ACP regions have agreed to negotiate full EPAs (end of 2008), the EU is likely to continue to use the template that it used in its negotiations with Cariforum. That template is reflected in the 2007 EU IPR draft proposals to the ECOWAS and SADC regions, which are virtually identical. In addition, given the importance of geographical indications and enforcement to the EU, the EU is not likely to want significant variation on IPR rules agreed in EPAs. Thus, the EU may agree to minor alterations to the template, such as modification of the level of commitments to accede to UPOV 1991, but would not be willing to subject its companies to differing levels of IPR protection in different ACP regions.

What is clear is that the IPR provisions of the Cariforum EPA can in no way be considered as aimed at sustainable development for ACP countries. Rather, they almost exclusively entirely reflect the EU's mercantile interests, as expressed in its Global Europe Strategy.[28] ACP countries should resist any attempt to make this agreement the basis for further negotiations on IPRs. As has been noted, the maintenance of existing market access commitments in the interim EPAs or other preference regimes is not dependant on concluding EPAs with IPR provisions.

## V. RECOMMENDATIONS FOR ACP COUNTRIES ON THE WAY FORWARD

As an initial matter, the relationship of EPAs to the larger multilateral discussion on IPRs should be made clear. The EU has been seeking several intellectual property provisions that it has not been able to achieve in multilateral negotiations, including the discussions on geographical indications, copyright and enforcement at the WTO and WIPO. These have generally been

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

opposed by developing countries, including the African Group both at WIPO and the WTO. The African Group has consistently opposed the inclusion of further enforcement provisions in the WTO. At WIPO, the Group has been instrumental in pushing for a development agenda that includes access and sustainable development concerns in IPR norm-setting processes.

The inclusion of TRIPS-Plus intellectual property provisions in the EPAs will alter, in a single action, the entire landscape of international intellectual property negotiations. Countries that commit to higher standards and norms in bilateral agreements will no longer be able to take positions in multilateral fora that oppose further ratcheting up of IPR standards in WIPO or the WTO. On the issues covered in the EPAs, especially enforcement, geographical indications and copyright, the shift of ACP countries to the EU position would leave only a few Latin American and Asian countries as the only states opposing the expansion of international IPRs in fora such as WIPO and the WTO.

The signing of the goods-only interim EPAs presents an opportunity for ACP countries to re-think their approach to IPRs in EPAs, so that they can ensure that they do not damage their prospects in multilateral fora and that any IPR provisions in EPAs actually reflect their interests and positions.

However, it is also clear that the signing of the interim EPAs has increased the complexity of negotiations, especially in evolving policy areas such as intellectual property. Many of the ACP regional configurations are in now in flux and may yet prove unsustainable. The basis on which regional positions on IPRs will be formulated will depend very much on the final configurations.

It is important to point out that significant work remains to be done at the national and regional level for ACP countries in carrying out a full analysis and assessment of national aims for innovation and access. Most ACP countries that are members of the WTO have barely begun to implement their obligations under the TRIPS Agreement. Those states that are LDCs have no obligations to implement the TRIPS Agreement until 2013, and those that are not members of the WTO have yet to determine what IPR commitments they will need to make if they plan on acceding. It is an irony that those ACP states with the most extensive national IPR systems (e.g. South Africa) have been most adamant about the exclusion of IPR provisions in EPAs. If these countries do not consider themselves sufficiently prepared to negotiate IPR provisions, it strains credulity to suggest that other ACP countries, the majority of whom are LDCs, are fully prepared to negotiate provisions on intellectual property that go beyond those already negotiated in the TRIPS Agreement. In general, there are several steps that any country should take before engaging in negotiations with respect to intellectual property. These include:

- assessing the impact of planned national innovation and IPR policies on consumer access to knowledge goods in crucial sectors such as education, libraries, public health and the environment;
- identifying and assessing the economic impact of proposed approaches to IPRs in negotiations on business sectors that are high knowledge and technology importers;
- carrying out human rights as well as social and economic impact assessments of proposed approaches to IPRs in negotiations, both offensive and defensive; and

- ensuring that national positions taken in regional negotiations are coherent with national positions taken in multilateral discussions on intellectual property issues in the WTO, WIPO, the Convention on Biological Diversity, the FAO International Treaty on Plant Genetic Resources for Agriculture, and UNESCO, among others.

The complexity and depth of preparatory work to be done so as to guide rational policy decisions about what aims to pursue in intellectual property negotiations suggests that ACP countries will need far more time than is currently envisioned by existing plans to conclude full EPAs by mid-2008. The involvement of the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI) in these negotiations also adds an additional layer of complexity as some members of the same ACP region belong to one organization and not the other.

***Primary Recommendation:***
***ACP countries should refrain from further negotiating on intellectual property in EPAs. Negotiations at a later stage may be appropriate but only once ACP countries have had the opportunity to carry out full national policy impact assessments and completed regional integration on innovation and access to knowledge policies. In pursuit of this, they may seek support or commitments from the EU to provide funding to carry out such assessments and evaluations.***

***For those ACP countries that have committed to negotiating on intellectual property, one important aim should be maintaining policy space. Any commitments on intellectual property should be limited to "cooperation", 'best endeavour" 'recognition" and should avoid language such as "shall" "undertake to" or "commit". They should ensure that they reiterate that any intellectual property commitments should only be taken on at a level and pace appropriate to the level of development of each ACP country.***

***ACP countries that are committed to negotiating IPRs should not take positions in EPAs that contradict or weaken their positions in multilateral negotiations at the WTO, WIPO and other fora. To that end, where there are gaps in capacity, it may be appropriate for some ACP countries to task Geneva-based WTO and WIPO negotiators with IPR experience to participate in EPA negotiations.***

The next two sections outline specific areas of defensive and offensive interest for ACP countries and some secondary recommendations.

### V.1 Defensive Interests

ACP countries, as with most developing countries, are net importers of knowledge goods. Providing greater intellectual property protection for knowledge goods from other countries increases the costs of accessing those goods for citizens of ACP countries. This is especially true in areas such as public health, education, and the environment. The following areas are of particular concern.

*V.1.1 Enforcement*

The inclusion of enforcement in EPAs is an extremely undesirable development. Particularly disturbing is the fact that it imposes industrialized country policy standards on developing and least developing countries in contradiction to the principle of ensuring that countries implement intellectual property obligations in line with their level of development.

***Recommendation***
***ACP countries should not sign on to any provisions on enforcement in an EPA. If required, they should limit commitments to implementing the enforcement provisions of the TRIPS Agreement, in line with the flexibilities and transition periods provided. Any such commitment should exclude those countries that are not members of the WTO, until such time as they have made a decision to accede.***

*V.1.2 Copyright and Related Rights*

The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty contain provisions protecting digital and internet content, an area whose full benefits and implications, developing countries are only beginning to explore. Signing up to these WIPO treaties, especially in a bilateral agreement, threatens to preclude important policy discussions and choices that have yet to be made. Of particular concern in these treaties are the provisions on technological protection mechanisms that enable rightsholders to digitally "lock" content allowing absolute control without the traditional judicial or other safeguards for the public interest.[29] The implementation of such provisions in the United States and the EU has proven controversial and has not been shown to achieve their goals. Developing countries should not sign on to unproven and dangerous policies.

***Recommendation***
***ACP countries should not sign on to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) within the context of the EPA. Those countries that are already parties to the WCT and the WPPT should refrain from making those commitments subject to dispute settlement in the EPA.***

*V.1.3 Plant Varieties and Food Security*

The potential dangers for small-scale farmers of provisions on plant varieties designed for industrial agriculture have been analyzed above. It remains to be said that this issue is already quite thoroughly addressed in TRIPS Article 27.3(b) and is in fact still the subject of examination and review in the Doha Round of negotiations.

***Recommendation***

[29] For a discussion of the dangers of these agreements, see D Shabalala "Towards a Digital Agenda for Developing Countries" South Centre 2007. Available at http://www.southcentre.org/publications/researchpapers/ResearchPapers13.pdf.

***ACP countries should not agree to comply with, or commit to accession to, UPOV 1991 in the EPA. Those states that are already UPOV parties should not make their implementation of UPOV 1991 subject to dispute settlement under the EPA.***

## V.2 Offensive Interests

There are some issues that have been identified as areas of potential offensive interest for ACP countries. However, attempts to gain these in negotiations will of course require concessions in other areas and ACP countries should carefully consider whether there are better fora than EPAs for addressing these issues. This is particularly important when one considers that any privileges on IPRs that the EU extends to ACP countries will have to be extended to all other WTO members.

### *V.2.1 Technology Transfer*

Developing countries have a need for greater access to technology to ensure sustainable development. This involves ensuring access to knowledge and know-how by developing country individuals and enterprises. The need for technology transfer has been recognized in many multilateral agreements, particularly in multilateral environmental agreements and in article 66.2 of the TRIPS Agreement. Despite this, most industrialized countries have not implemented effective measures to enable technology transfer. They have argued that they do not have sufficient information on developing country technological needs and that, in any case, most technology is held in private hands and that they cannot do anything to force their companies to transfer technologies. At the same time, industrialized countries have worked to limit the ways in which developing countries can use policy tools such as performance and working requirements to ensure that investors transfer technology to local enterprises. Any provisions on technology transfer in EPAs should focus on the implementation of technology transfer by the EU. Making the list of activities outlined in the EU-Cariforum text on technology cooperation in Article 134-138 mandatory would be a useful start.

***Recommendation***
***ACP countries that wish to negotiate IPR provisions should insist on real obligations in the technology transfer section. In particular, they should take as their premise the implementation of clear existing obligations in multilateral agreements, especially the Kyoto Protocol (Article 10), the United Nations Framework Convention on Climate Change (Article 4), and the Convention on Biological Diversity (Article 16). Any approach should include:***

- ***A definition of technology transfer;***
- ***A definition of the modes of technology transfer (capital goods, skills and know-how, information and data, and investment);***
- ***An obligation on the part of the EU to carry out a process of identifying technologies for transfer in specific sectors, and to especially identify those in the public domain;***
- ***An obligation for the EU to provide financing assistance for purchase of licenses for the use of patented technologies; and***
- ***Measures for evaluating the delivery of technology transfer.***

### *V.2.2 Genetic Resources, Biodiversity and Traditional Knowledge*

Significant policy confusion surrounds developing country policies and positions on genetic resources and traditional knowledge, which are generally considered to be areas of offensive interest for them in the WTO and WIPO. Progress has been slow in these fora, suggesting that ACP countries may want to address the issue in bilateral agreements. However, this presumes a greater negotiating power and chance of success at the bilateral level which is not borne out by the experience of most developing countries. The EU response to attempts to pursue the interests of developing countries in this area has been empty of any content that did not already exist in multilateral agreements e.g. the EU-Cariforum text. This is also compounded by some confusion on the part of developing countries as to what it is they are actually trying to accomplish with provisions on genetic resources and traditional knowledge. Many of the provisions that some countries are seeking, such as a disclosure of origin requirement for the use of genetic resources and associated traditional knowledge or the recognition and protection of traditional knowledge have not been implemented in the national legislation of many developing countries. Despite this, ACP and other developing countries persist in including these issues in bilateral negotiations which means that they have to make significant concessions on other issues for what turn out to be illusory gains.

***Recommendations***

***ACP countries should refrain from negotiating provisions on genetic resources, biodiversity and traditional knowledge in EPAs and focus their energies on multinational fora. For those that wish to proceed with such negotiations, they should, at a minimum, include a requirement that the EU party take measures, including disclosure of origin requirements for patent applications, to prevent the misappropriation of ACP genetic resources and traditional knowledge by EU individuals and enterprises.***

## VI. CONCLUSION

The signing of interim 'goods-only' agreements by the EU and some ACP countries presents an opportunity to re-think the approach to intellectual property in EPA negotiations. The majority of ACP countries have not committed themselves to the negotiation of intellectual property provisions in a final EPA, and those that have committed to further negotiations have not committed to any particular level of IPR protection. ACP countries should use this breathing space to assess the impacts of their existing IPR obligations before taking on new ones in EPAs.

The inability of Cariforum to significantly alter the proposals put forward by the EU does not bode well for other regions with even less capacity or policy cohesion on intellectual property. Significant capacity on innovation and access policy needs to be built up in ACP countries so that they are prepared to defend their interests on intellectual property in negotiations with the EU.

## ANNEX 1

### INTERIM EPA AGREEMENTS WORDING ON INTELLECTUAL PROPERTY AND FUTURE NEGOTIATIONS

### I. East African Community

Chapter I: General provisions, Article 3.2.

The Parties undertake to continue the negotiations with a view to concluding a comprehensive EPA, which shall comprise the subject matters listed under Chapter V, no later than 31 July 2009.

Chapter V: Areas for future negotiations, Article 37

Building on the Cotonou Partnership Agreement and taking account of the progress made in the negotiations of a comprehensive EPA text the parties agree to continue negotiations in the following areas;

[...]

e) Trade related issues namely:

[...]

iv. Intellectual property rights;

### II. Eastern and Southern Africa

### Article 3

**Specific objectives of this Agreement**

1. Consistent with Articles 34 and 35 of the Cotonou Agreement, the objectives of this Agreement are:

a) to establish an agreement consistent with Article XXIV of General Agreement on Tariffs and Trade 1994 ("GATT 1994");

b) to establish the framework, scope and principles for further negotiations on trade in goods including, rules of origin, trade defense instruments, customs cooperation and trade facilitation, sanitary and phytosanitary measures, technical barriers to trade, and agriculture, on the basis of the proposals already submitted; and

c) to establish a framework and scope of potential negotiation in relation to other issues including trade in services, trade related issues as identified in the Cotonou Agreement and any other areas of interest to both Parties.

2. The Parties undertake to complete negotiations with a view to concluding a comprehensive EPA, no later than 31 December 2008, including on subject matters listed in paragraphs b) and c) according to the Agreed Joint Road Map adopted by the Parties on 7 February 2004.

**Chapter V: Areas for future negotiations, Article 53-Rendezvous Clause**

Building on the Cotonou Agreement and taking account of the progress made in the negotiations of a comprehensive EPA, the parties agree to continue negotiations in accordance with Article 3 with a view to concluding a full and comprehensive EPA covering the following areas:

[...]
e) Trade related issues namely:
[...]
iv. Intellectual property rights;

**III. Communauté économique et monétaire de l'Afrique Centrale (CEMAC)**

**Article 3 Objectifs spécifiques**
Conformément aux articles 34 et 35 de l'Accord de Cotonou, les objectifs du présent Accord sont les suivants:

(a) Etablir les bases pour la négociation d'un APE qui contribue à la réduction de la pauvreté, promeuve l'intégration régionale, la coopération économique et la bonne gouvernance en Afrique Centrale et améliore les capacités de production d'exportation, et d'approvisionnement, de l'Afrique Centrale, ainsi que sa capacité à attirer les investissements étrangers et celle en matière de politique commerciale et sur les questions liées au commerce ;
(b) Promouvoir l'intégration harmonieuse et progressive de l'Afrique Centrale dans l'économie mondiale, en conformité avec ses choix politiques et ses priorités de développement ;
(c) Renforcer les relations existantes entre les Parties sur une base de solidarité et d'intérêt mutuel ;
(d) Créer un Accord compatible avec les règles de l'Organisation Mondiale du Commerce ;
(f) Établir les bases pour négocier et mettre en oeuvre un cadre réglementaire régional efficace, prévisible et transparent pour le commerce, l'investissement, la concurrence, la propriété intellectuelle, les marchés publics et le développement durable dans la région Afrique Centrale, en soutenant ainsi les conditions pour accroître les investissements et l'initiative du secteur privé, et pour augmenter les capacités d'offre des biens et services, la compétitivité et la croissance économique de la région ;
(g) Établir une feuille de route pour des négociations sur les domaines mentionnés au paragraphe précédent pour lesquels il n'a pas été possible d'achever les négociations en 2007.

**Chapitre 3 : Propriété Intellectuelle**
Article premier : **Poursuite des négociations sur le domaine de la propriété intellectuelle**

1. Les Parties réaffirment leurs droits et obligations découlant de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce ("ADPIC"), et reconnaissent le besoin de garantir un niveau de protection appropriée et efficace des droits de propriété intellectuelle, industrielle et commerciale et d'autres droits couverts

par l'ADPIC, conformément aux normes internationales, afin de réduire les distorsions du commerce bilatéral et les obstacles aux échanges.
2. Sous réserve du respect des compétences transférées à l'Organisation Africaine de la Propriété Intellectuelle (OAPI), les Parties s'engagent à conclure avant le 01/01/2009 des négociations sur une série d'engagements sur les droits de propriété intellectuelle.
3. Les Parties conviennent également de renforcer leur coopération dans le domaine des droits de propriété intellectuelle. Une telle coopération doit viser à soutenir la mise en oeuvre des engagements de chaque Partie et doit notamment être étendue aux domaines suivants:
(a) renforcement des initiatives d'intégration régionale afin d'améliorer la capacité régionale de réglementation, les lois et règles régionales;
(b) prévention des abus desdits droits par les titulaires et des violations desdits droits par les concurrents;
(c) soutien dans la préparation des lois et règles nationales pour la protection et l'application des droits de propriété intellectuelle.
4. Les négociations seront basées sur une approche en deux étapes, visant d'abord à appliquer le cadre des règles dans le contexte de l'intégration régionale et, après une période de transition déterminée conjointement, appliquer les règles au niveau bilatéral.
5. Au cours des négociations, il convient de prendre en compte le différentiel de développement des États signataires de l'Afrique Centrale.

**IV. Pacific**

Article 69
**Modalities for the continuation of negotiations**

1. The EU Party and the Pacific States covered by this agreement are committed to the continuation and successful conclusion of the currently ongoing negotiations of a comprehensive Economic Partnership Agreement (EPA) in line with the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components and involving all interested countries in the Pacific region. They confirm their commitment to the objective of concluding these negotiations by 31 December of 2008.
2. The Parties recognise that development cooperation will be a crucial element of the comprehensive EPA and an essential factor for the realisation of its objectives. They reaffirm their commitment to supporting the objective that development cooperation for regional economic cooperation and integration as provided for in the Cotonou Agreement shall be carried out so as to maximise the expected benefits of the comprehensive EPA.
3. The Parties note that this Interim Partnership Agreement does not predetermine the positions that the region will be taking in the negotiations of a comprehensive EPA on development co-operation. They agree that provisions on development cooperation will be finalised in the wider context of the Pacific Island ACP States as soon as possible. In the meantime, they further agree to cooperate closely at the national level within the framework of the existing structures as set out in the Cotonou Agreement to facilitate implementation and the realisation of benefits and maximise the synergies between development cooperation and the objectives of this agreement.

4. The full Economic Partnership Agreement shall, upon its entry into force, replace this agreement which will then cease to exist.

## V. Southern African Development Community (SADC)

Article 67

**Second stage of negotiations**

The Parties agree to continue negotiations in 2008 to extend the scope of the present Agreement. For the purpose of this Title, the SADC EPA States will be constituted of Botswana, Lesotho, Mozambique and Swaziland. The remaining SADC EPA States may join the process of negotiation on a similar basis. To this end, they will notify in writing the EU Party and the other SADC EPA States. [...]

## VI. Economic Community of West African States (ECOWAS)

### TITLE IV: SERVICES, INVESTMENT AND TRADE RELATED RULES

Article 44
Building on the Cotonou Agreement, the Parties will cooperate to facilitate all the necessary measures leading to the conclusion as soon as possible of a global Economic Partnership Agreement between the whole West African Region and the EU in the following:

a) trade in services and electronic commerce;
b) investments;
c) competition
d) intellectual property;

The Parties will take all necessary measures to endeavour to conclude a global EPA between the West Africa region and the EU before the end of 2008.
On these issues, as well as on any other issues the Parties may agree on, the Parties support the negotiations of the global EPA on the basis of the EC-West Africa Road Map and subsequent developments since its adoption. They welcome a two step approach starting first with formulating and implementing regional policies and building regional capacity, and in a second step, deepening the EC-West Africa trade provisions mutually agreed on these issues.
This Article does not prejudge the position of the regional organisations on the above issues.

## ANNEX 2

## ARTICLE 46 of the Cotonou Agreement

Protection of Intellectual Property Rights

1. Without prejudice to the positions of the Parties in multilateral negotiations, the Parties recognize 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.

2. They underline the importance, in this context, of adherence to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to the WTO Agreement and the Convention on Biological Diversity (CBD).

3. They also agree on the need to accede to all relevant international conventions on intellectual, industrial and commercial property as referred to in Part I of the TRIPS Agreement, in line with their level of development.

4. The Community, its Member States and the ACP States may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party.

5. For the purpose of this Agreement, intellectual property includes in particular copyright, including the copyright on computer programmes, and neighbouring rights, including artistic designs, and industrial property which includes utility models, patents including patents for bio-technological inventions and plant varieties or other effective sui generis systems, industrial designs, geographical indications including appellations of origin, trademarks for goods or services, topographies of integrated circuits as well as the legal protection of data bases and the protection against unfair competition as referred to in Article 10a of the Paris Convention for the Protection of Industrial Property and protection of undisclosed confidential information on know how.

6. The Parties further agree to strengthen their cooperation in this field. Upon request and on mutually agreed terms and conditions cooperation shall inter alia extend to the following areas: the preparation of laws and regulations for the protection and enforcement of intellectual property rights, the prevention of the abuse of such rights by rightholders and the infringement of such rights by competitors, the establishment and reinforcement of domestic and regional offices and other agencies including support for regional intellectual property organisations involved in enforcement and protection, including the training of personnel.

# CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

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