

THE PROBLEM OF INTELLECTUAL PROPERTY IN ECONOMIC PARTNERSHIP AGREEMENTS WITH THE AFRICAN, CARIBBEAN AND PACIFIC COUNTRIES (MAY 2007)

The inclusion of TRIPS-plus intellectual property (IP) provisions in bilateral agreements between the European Union and developing countries has become an issue of increasing concern. Ending an informal moratorium¹, the EU began in late 2006 to increase its activity in negotiating bilateral trade agreements. 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... .”² *The most significant set of negotiations that the EU is currently conducting are for Economic Partnership Agreements (EPAs) with the 76 member African, Caribbean and Pacific (ACP) group of countries.* These agreements will significantly change the traditional non-reciprocal trade preference relationship that existed between the EU and ACP group of countries. They have the potential to:

- alter the entire landscape of international intellectual property by short-circuiting developing country attempts to ensure full consideration of development-appropriate standards in multilateral agreements at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and other fora;
- impose further intellectual property obligations on countries that are unprepared for them, at a time when many have barely begun to fully consider the impact of implementing their TRIPS obligations.

Initial public statements by the EU suggested that there would be no significant push by the EU to seek standards beyond those established by TRIPS. However, the evidence of recent draft proposals by the EU in EPA negotiations shows that the EU is seeking higher IP standards. This brief aims to describe the approach of the EU to IP in the proposed EPAs and point out the development problems it poses for ACP countries.

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

The EPA negotiations result from the interaction of the Cotonou Agreement with the WTO Agreement. The

Cotonou Agreement enacted a system of non-reciprocal trade preferences between the EU and the ACP, which were considered by some to be WTO-incompatible in their treatment of goods. The basic objective of the EPAs is to correct that gap. However, the EU has transformed that goal into an ambitious package that aims, among other things, to implement the highest standards of IP protection 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). Negotiations with the groups began in 2002 and are aimed to end in December 2007.

The IP Mandate in EPAs

The only direct mandate from the Cotonou agreement for the inclusion of IP is that of strengthening further cooperation pursuant to Article 46.6, not the ratcheting up of IP standards. With respect to the WTO, the concerns about WTO compatibility do not apply to IP issues. The concern was purely about the propriety of the preference regime with respect to goods, not IP. *The inclusion of IP provisions in the EPAs is not required to comply with WTO rules.*

The EU Approach to IP in EPAs

In the draft proposals to the CARIFORUM, ECOWAS³ and SADC regions, the EU approach covers substantive obligations in the areas of: Copyright and related rights (Article 7), Trademarks (Article 8), Geographical Indications (Article 9), Industrial designs (Article 10), Patents (Article 11), Plant Varieties (Article 12), and Enforcement. The proposals that the EU has made are virtually identical, ignoring the differences between the regions, as well as the developmental differences within the regions. The EU draft approach is of particular concern in the following areas:

Copyright and Related Rights

The EU asks ACP countries to accede only to the substantive portions of the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty.⁴ These treaties deal with issues of the production, use and distribution of digital content, an area in which few ACP countries have been able to participate because of the digital divide. The EU is asking them to adopt EU level policies on the internet and digital content before most of these countries have been able to fully explore and use

¹ 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.

² 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.

³ Document for information, DGTRADE/D2, Draft EPA text for West Africa

⁴ Draft EPA text for West Africa Chapter 2, Section 2, Article 6

such technologies. In addition, the EU proposal leaves out the balancing statements outlining the basis public interest objectives of the treaties. It also omits the language in the agreed statements to the treaties ensuring that countries can extend their existing exceptions and limitations to digital content and formulate new exceptions appropriate for such content. Other areas of concern include:

- The inclusion of protection for non-original databases, a system which has not been shown to work in the EU context, and which even the US does not provide;
- The failure to ensure that African and Caribbean countries can implement exceptions and limitations of at least equal breadth as EU countries have historically applied.
- The imposition of obligations to protect digital rights management (DRM) and technological protection mechanisms (TPMs) which make it impossible to exercise traditional public interest exceptions, while placing enforcement of copyright in the hands of the owner rather than the judicial system.

These provisions would make it more difficult for students and academics to access and afford educational materials on the internet and impede their researchers from accessing information and tools needed for their work, limiting the means available for poor countries to achieve their own technological development.

Plant Varieties

The EU proposes accession to the 1991 version of the International Convention for the Protection of New Plant Varieties (UPOV 1991). The proposal also appears to provide for exceptions regarding farmers' rights to save, reuse and exchange seeds.⁵ However, UPOV 1991 does not allow outside agreements to alter its provisions. Therefore, the UPOV 1991 provisions, which severely restrict farmers' rights, will apply. The assurance provided here is illusory.

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.

Traditional Knowledge and Genetic Resources

The EU proposes extensive language, several paragraphs long, on traditional knowledge and genetic resources.⁶

However, a close reading shows that not one substantive obligation has been proposed. This is the one area in which justice and equity should drive the EU to address ACP countries' real concerns about biopiracy and misappropriation of their traditional knowledge and genetic resources. In particular, the proposal lacks any suggestion that the EU has any responsibility to police the behavior of its companies and bio-prospectors in this area, and to prevent patent applications without novelty from being granted.

Enforcement

The section on enforcement takes up the majority of the proposal. Even a cursory reading shows that it is essentially a transposition of the EU Enforcement Directive with one important difference: it omits the limitations, flexibilities and safeguards available to EU member countries in implementing the directive. This means that ACP countries will be subject to pressures from rightsholders without any protections available to EU countries for legitimate competitors or the public interest. This leaves the ACP countries wide open to the inevitable and systematic abuse that some rightsholders have been known to engage in their pursuit of competitive advantage.⁷ In addition, the proposal:

- expands enforcement provisions into the patent arena without public health safeguards;
- extends far beyond the requirements of the TRIPS Agreement;
- requires the application of standards and norms beyond the capacity of most ACP countries to meet without severely distorting the priorities of their judicial and policing systems; and
- places quasi-judicial powers in the hands of rightsholders.

Development in the balance?

The development rationale for the inclusion of IP in the EPA negotiations is unclear. In contrast, the threat that the proposed provisions present for the development of ACP countries is very clear. ACP countries require time to properly implement their TRIPS obligations (where these exist), determine the future policy directions of their innovation systems, and then they will be able to determine what kinds of additional IP obligations to take on, in the interests of their economic development. The EU proposals are premature and their inclusion in the EPAs is more likely to do damage than they are to promote development.

(For further information see CIEL Discussion Paper "The European Approach to Intellectual Property in European Partnership Agreements with the African, Caribbean, and Pacific Group of Countries" available at www.ciel.org or contact Dalindyabo Shabalala at dshabalala@ciel.org or +41 22 321 4774)

⁵ Id. Article 11

⁶ Draft EPA text for West Africa Chapter 2, Section 2, Article 12 (April 2007)

⁷ See e.g. AstraZeneca Omeprazol, punished by the European Commission in 2005.