

Draft:
**Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the
CEMAC Region from the EC-CARIFORUM EPA**

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Executive Summary

Negotiations on economic partnership agreements (EPAs) between the European Communities (EC) and African, Caribbean and Pacific (ACP) countries have been going in for several years now. These were supposed to be concluded by the end of 2007. However, except for the agreement with Caribbean countries (grouped together as CARIFORUM), this deadline was not met in most of the ACP regions. The failure to conclude comprehensive EPAs with most ACP countries, including the members of the Economic and Monetary Community for Central Africa (CEMAC), was, in part, due to the proposals from the EC to include provisions on the so-called trade related issues, such as competition, intellectual property (IP), environment and procurement.

In particular, the inclusion of IP obligations in EPAs has received wide criticism. As negotiations continue towards comprehensive EPAs in various regions a range of questions remain regarding the development impact of including any substantive provisions on the trade related issues. In the case of IP, the key question is whether these countries should negotiate substantive provisions and if so, on which IP issues.

This paper addresses this question with respect to IP enforcement provisions in the EC-CEMAC EPA negotiations. The enforcement provisions are important since the obligations that may arise for the CEMAC countries will have a direct impact on the implementation of flexibilities in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Focusing on the substantive provisions adopted on IP issues in the EC-CARIFORUM EPA, the paper aims to provide lessons for the CEMAC countries with regard to: the problem areas and concerns that arise with the enforcement provisions as adopted in the EC-CARIFORUM EPA; and how a positive agenda on IP enforcement in EPAs could look like. To do this, the paper: provides a brief background on the TRIPS enforcement framework; a development analysis of the IP enforcement provisions in the EC-CARIFORUM EPA; and then offers ideas on what a positive enforcement agenda for CEMAC countries might entail.

Overall, the paper makes three main conclusions. The first conclusion is that CEMAC countries are already shouldering a heavy burden related to the implementation of the TRIPS enforcement provisions as well as those of other multilateral and regional treaties. Care must therefore be taken when contemplating any additional obligations for these countries. Secondly, if provisions on enforcement are included in the EPA, CEMAC countries can learn important lessons from the experience of CARIFORUM countries. In the main, the EC-CARIFORUM EPA provisions on IP enforcement should not be used as a template in CEMAC. At the very least, a number of problems and concerns with the EC-CARIFORUM provisions, identified in section 3.2 of the paper, need to be specifically addressed. Finally, CEMAC countries should not just be recipients of proposals on IP enforcement. They could also develop their own offensive (positive) agenda. Such an agenda could be built around the seven elements identified in section 4 of the paper.

1. Introduction

The Economic and Monetary Community for Central Africa (CEMAC) countries¹, similarly to other African, Caribbean and Pacific (ACP) countries, have been negotiating Economic Partnership Agreements (EPAs) with the European Community (EC) and its member states for a number of years now. These negotiations were scheduled to be concluded by the end of December 2007. However, as of that date only the 15 Caribbean countries, grouped together as CARIFORUM,² had concluded a comprehensive EPA with the EC.³ Various sub-regional groups in Africa and some countries, including one CEMAC country – Cameroon - concluded interim EPAs. The Interim agreements, generally, only included substantive provisions on trade in goods. The other areas of negotiations remain open based on commitments in the interim agreements.⁴

The failure of the EC to conclude comprehensive EPAs with the vast majority of ACP countries relates, in part, to the inclusion of the so-called trade related issues, such as competition, intellectual property (IP), environment and procurement as well as investment and trade in services. In particular, the inclusion of IP provisions in EPAs has received wide criticism in ACP countries as well as within Europe.⁵ As negotiations continue towards comprehensive EPAs with ACP countries, such as those in the CEMAC region, a range of questions remain regarding the development impact of including any substantive provisions on the trade related issues, investment and services. In the case of IP, the key question is whether these countries should

¹ CEMAC countries include Cameroon, Central Africa Republic, Chad, Congo, Equatorial Guinea and Gabon. Fuller information is available on the organisation's website at <http://www.cemac.cf/> (last accessed on 17 April 2008). All these countries are members of the WTO except Equatorial Guinea which is in the accession process. Central African Republic and Chad are LDCs.

² The 15 CARIFORUM States are: Antigua and Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, The Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago.

³ The EC-CARIFORUM EPA includes provisions covering trade in goods and a wide range of other trade and related disciplines. In particular, in addition to trade in goods and provisions on general matters and dispute settlement, the EPA also covers issues related to investment, trade in services, e-commerce, current payments and capital movement as well as other trade related issues including competition policy, innovation and IP, public procurement, environment, social aspects and the protection of personal data.

⁴ The other regions and countries which signed interim agreements include Cote d'Ivoire, the East African Community (EAC) states, the Eastern and Southern Africa (ESA) states, Ghana, Papua New Guinea and Southern Africa Development Community (SADC) states.

⁵ For a general discussion on the EC's approach to IP in EPAs and the implications for developing countries see e.g., Santa-Cruz, Maximilliano., (2007) "Intellectual Property Provisions in European Union Trade Agreements – Implications for Developing Countries", *Issue Paper No. 20*, ICTSD, Geneva. For a wide collection of commentary and criticisms of the EPAs including the EC-CARIFORUM EPA see also http://www.bilaterals.org/rubrique.php?id_rubrique=17 (last accessed on 31 March 2008). See also the of the European Parliament's Resolution of 12 July 2007 on the TRIPS Agreement and access to medicines. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0353+0+DOC+XML+V0//EN> (last accessed on 4 April 2008).

negotiate substantive provisions and if so, on which IP issues. The key concern relates to how obligations that may be assumed under an IP Chapter of the EPA could extent the obligations that ACP countries have assumed under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁶ in a manner that compromises their ability to use flexibilities in that agreement to address their development needs, a situation commonly referred to as TRIPS-plus.⁷

This paper focuses on this question with respect to IP enforcement provisions in the EC-CEMAC EPA. The enforcement provisions are important since the obligations that may arise for the CEMAC countries will have a direct impact on the implementation of flexibilities in the TRIPS Agreement. Focusing on the substantive provisions adopted on the subject in the EC-CARIFORUM EPA, the paper will aim to provide lessons for the CEMAC countries with regard to:

- The problem areas and concerns that arise with the enforcement provisions as adopted in the EC-CARIFORUM EPA; and
- How a positive agenda on IP enforcement in EPAs could look like.

The paper builds on three earlier papers by this author on various aspects of IP in the EC-ACP EPAs, including enforcement. The first of those papers is titled “Developing a Positive Agenda on Enforcement Provisions of EPAs”.⁸ The second paper is “An Analysis of the EC Non-Paper on the Objectives and Possible Elements of an IP Section in the EC-Pacific EPA”.⁹ The third and final paper is the one titled “Innovation and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP regions”.¹⁰

⁶ The full official text of the TRIPS Agreement, which is Annex 1C to the Agreement Establishing the WTO, can be found in WTO, (1999) *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge.

⁷ TRIPS-plus is a concept which refers to the adoption of multilateral, plurilateral, regional, bilateral and/or national IP rules and practices which have the effect of reducing the ability of developing countries to protect the public interest. In particular, TRIPS-plus standards include any new standards which would limit the ability of these countries: to promote technological innovation and to facilitate the transfer and dissemination of technology; to take necessary measures to protect public health, nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development; or, to take appropriate measures to prevent the abuse of IP by right holders or the resort by right holders to practices which unreasonably restrain trade or adversely affect the international transfer of technology. This definition of TRIPS-plus is adapted from Musungu, Sisule F., and Graham Duffield, (2003) “Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)”, *TRIPS Issues Papers* 3, QUNO, Geneva and QIAP, Ottawa.

⁸ The paper, commissioned by ICTSD, was presented at the ICTSD, ENDA and QUNO Regional Dialogue on EPAs, Intellectual Property and Sustainable Development for ECOWAS Countries, 30-31 May 2007, Saly-Senegal. It is available at <http://www.iprsonline.org/resources/FTAs.htm> (last accessed on 17 April 2008).

⁹ This paper was commissioned by the Catholic Agency for Overseas Development (CAFOD) and co-sponsored by the International Centre for Trade and Sustainable Development (ICTSD). It is available at <http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf> (last accessed on 17 April 2008).

¹⁰ *Forthcoming*, 2008.

This paper, for purposes of analysis, is divided into five sections. Following this introduction, section 2 provides a brief background on the current IP enforcement obligations that CEMAC countries have by virtue of the TRIPS Agreement and the Bangui Agreement¹¹. Section 3 then turns to a development analysis of the IP enforcement provisions in the EC-CARIFORUM EPA and the lessons for CEMAC countries. Section 4 offers some ideas on how a positive enforcement agenda for CEMAC countries could look like. The paper concludes with final remarks in section 5.

2. Background: The IP Enforcement Framework in CEMAC Countries

Cameroon, Central Africa Republic, Chad, Congo and Gabon already have significant obligations relating to the enforcement of IP in their territories. These are the obligations assumed by these countries under the TRIPS Agreement and under the Bangui Agreement by virtue of their membership of the African Intellectual Property Organization (OAPI).¹² Equatorial Guinea will assume TRIPS obligations on joining the WTO once its accession process is concluded. It is in the context of these existing obligations that the discussion on whether additional obligations are warranted on IP enforcement in this region should be considered. In this regard, we briefly summarise below the main elements of the IP enforcement obligations under both the TRIPS Agreement and the Bangui Agreement before turning to an analysis of the EC-CARIFORUM EPA provisions on IP enforcement in section 3.

2.1 The main elements of the TRIPS enforcement regime

A key strategic goal behind the inclusion of the TRIPS Agreement into the multilateral trade framework was to ratchet-up enforcement of IP rights in developing countries and least-developed countries, including the ACP countries. This was because the main demanders, the United States, the EC and other developed countries, believed that their comparative trade advantage in IP embedded goods and services, and hence the earnings of their enterprises were being eroded. For this reason, the TRIPS Agreement includes detailed rules on the minimum enforcement requirements at the national level in WTO members.¹³

In general, it can therefore be concluded that there is a broad agreement among WTO Members that enforcement of IP is important and that the enforcement measures put in place should be effective. However, this understanding is dependent on three important conceptual parameters that are important to underline when thinking about enforcement in EPAs as well as free trade agreements (FTAs).

¹¹ All the CEMAC countries, except Equatorial Guinea, are parties to the Bangui Agreement. The text of the Bangui Agreement can be found at http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf (last accessed on 17 April 2008).

¹² Information on OAPI is available on the organization's website at <http://www.oapi.wipo.net/fr/OAPI/index.htm> (last accessed on 17 April 2008).

¹³ The whole of Part III of the TRIPS Agreement, containing 21 articles out of the Agreement's 72 articles, relates to enforcement.

The first is the recognition that “intellectual property rights are private rights.”¹⁴ This means that since IP enforcement essentially relates to private property, demands for state intervention should follow the dictates of common welfare. The second parameter is the recognition that while the TRIPS Agreement is intended to provide effective and appropriate means of enforcing IP, the structures to be put in place must take “into account differences in national legal systems”¹⁵ and recognise the right of each WTO member “to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”¹⁶

Finally, there is the basic rule of interpretation which states that the interpretation of treaty provisions must be done in light of the object and purpose of such a treaty. The purpose and objective of the TRIPS Agreement, as set out in Article 7, is the protection of IP in order to contribute to technological innovation, the transfer and dissemination of technology. This means that enforcement provisions should help ensure the achievement of these objectives.

It is in the context of these conceptual parameters that enforcement provisions under Part III of the TRIPS Agreement should be understood. Part III of the TRIPS Agreement has five sections, namely: General Obligations (Section 1 – Article 41); Civil and Administrative Procedures and Remedies (Section 2 – Articles 42-49); Provisional Measures (Section 3 – Article 50); Special Requirements Related to Border Measures (Section 4 – Articles 51-60); and Criminal Procedures and Penalties (Section 5 – Article 61). Each of these sections has a number of important elements to note.¹⁷

2.1.1 The general enforcement obligations under the TRIPS Agreement

There are four main elements in the general obligations section. In summary, these are that:

- (a) The enforcement procedures put in place by WTO Members must permit effective action against any act of infringement of IP covered by the TRIPS Agreement. However, these procedures must be applied in a manner that avoids the creation of barriers to legitimate trade and provides for safeguards against abuse;
- (b) The enforcement procedures must be fair and equitable and should not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. The issues around costs, unreasonableness and delays are applicable both with respect to IP rights holders and alleged infringers (defendants) as well as intermediaries if enjoined in infringement actions;
- (c) Parties to any enforcement proceedings must have an opportunity for review of a first instance decision provided that such an opportunity for review is not required with respect to criminal acquittals; and
- (d) There is no obligation for any WTO member either to put in place a special judicial system for IP enforcement, separate from the normal court and administrative systems, or to expend a higher proportion of state resources towards IP enforcement as compared to

14 See the Preamble to the TRIPS Agreement, para 4.

15 See para 2(c) of the Preamble to the TRIPS Agreement.

16 Article 1.1 of the TRIPS Agreement.

17 For a detailed discussion on the enforcement provisions of the TRIPS Agreement including their negotiating history, see **Part 4 of UNCTAD and ICTSD, (2005) *Resource Book on TRIPS and Development*, UNCTAD & ICTSD, Cambridge University Press, New York.**

the enforcement of other laws.

2.1.2 Civil and administrative procedures and remedies

With respect to civil and administrative procedures and remedies, there are at least seven main elements. These include:

- (a) The right to due process by ensuring fair and equitable procedures including each party having the right to be represented by legal counsel, to be protected from burdensome requirements of personal appearances in court, to present their case and evidence and have their confidential information protected;¹⁸
- (b) The requirement to grant judicial authorities power to order either party (right holder or defendant) to produce evidence relevant to the other party's case and to enter summary judgment in certain cases;¹⁹
- (c) The requirement to grant judicial authorities power to order injunctions to prevent further infringement including entry of goods in the channels of commerce, provided that Members do not need to grant such authority with respect to unintentional infringement and they have the right to expressly prohibit injunctions with respect to compulsory licenses and government use licenses contemplated under Article 31 of TRIPS;²⁰
- (d) The requirement to grant judicial authorities power to order damages to compensate for injury to right holders in cases of intentional infringement, to order the infringer to pay the right holders expenses including legal fees provided that WTO members are under no obligation to grant judicial authorities power to order recovery of profits or pre-established damages;²¹
- (e) The requirement to grant judicial authorities power to order the destruction of infringing goods and materials and implements whose predominant use has been the creation of the infringing goods provided that the need for proportionality between the seriousness of the infringement and the remedies ordered and the interest of third parties are taken into account in determining the request for destruction of goods or material and implements;²²
- (f) The requirement to grant judicial authorities power to order a right holder or their representatives who brought infringement proceedings and who have abused enforcement procedures to pay adequate compensation to the defendants wrongfully enjoined or restrained in their activities and to pay the defendant's expenses including legal fees;²³ and
- (g) The right to exempt public authorities and officials from liability for IP infringement provided that the actions are intended or taken in good faith in the course of administration of the law.²⁴

2.1.3 Provisional measures

18 See Article 42 of the TRIPS Agreement.
19 See Article 44 of the TRIPS Agreement.
20 See Article 44 of the TRIPS Agreement.
21 See Article 45 of the TRIPS Agreement.
22 See Article 46 of the TRIPS Agreement.
23 See Article 48 of the TRIPS Agreement.
24 See Article 48 of the TRIPS Agreement.

The main element with respect to provisional measures in Section 3 of Part III of the TRIPS Agreement is the requirement that WTO members must grant judicial authorities power to order prompt and effective provisional measures to prevent infringement from occurring particularly with respect to preventing goods from entering the channels of commerce and to preserve evidence of infringement. To achieve this goal, detailed provisions are made regarding *ex-parte* orders, requirements for proof that one is the right holder, and compensation for defendants.

2.1.4 Special requirements related to border measures

There are at least six important elements with respect to border measures under the provisions of the TRIPS Agreement, namely that:

- (a) WTO members must adopt procedures that permit the suspension by customs authorities, the release into circulation of counterfeit trademark or pirated copyright goods. However, these procedures are not required with respect to allegations regarding other categories of IP such as patents or with respect to goods destined for export;²⁵
- (b) The competent authorities shall have the power to order security or equivalent assurance from the applicant for suspension by customs authorities to protect the defendant (alleged infringer) and the authorities and prevent abuse provided that such security should not be a deterrent to requests for suspension;²⁶
- (c) The competent authorities shall have the power to order the indemnification of the importer or owner of goods for wrongful detention of goods;²⁷
- (d) Institution of *Ex-officio* actions, that is cases where competent authorities are permitted to act on their own initiative, is not required by the Agreement and WTO members can only include these enforcement procedures at their discretion;
- (e) The competent authorities must have the power to order the destruction of infringing goods provided that the safeguards and procedures of Article 46 of the TRIPS Agreement are observed;²⁸ and
- (f) WTO members have the freedom and right to exclude the application of provisional border measures to small quantities of goods of a non-commercial nature contained in travellers personal luggage or sent in small quantities (*de minimis imports*).²⁹

2.1.5 Criminal procedures and penalties

With respect to criminal procedures and penalties for IP infringement, three elements are notable under the TRIPS enforcement regime.³⁰ These include that:

- (a) Criminal procedures and penalties are only required with respect to wilful trademark counterfeiting and copyright piracy on a commercial scale. In all other cases, the

²⁵ See Article 51 of the TRIPS Agreement. With respect to goods destined for export, under the 30 August 2003 (WTO document WT/L/540) decision with respect to the mechanism created for the use of compulsory licenses by countries without manufacturing capacity in the pharmaceutical sector, an exception is created to the general TRIPS rule so that WTO Members are now required to take certain measures with respect to goods imported under that mechanism to prevent re-exportation.

²⁶ See Article 53 of the TRIPS Agreement.

²⁷ Article 56 of TRIPS.

²⁸ See Article 59 of the TRIPS Agreement.

²⁹ See Article 60 of TRIPS.

³⁰ See Article 61 of the TRIPS Agreement.

- application of criminal procedures and penalties, even in cases of wilful infringement on a commercial scale, is at the discretion of WTO members;
- (b) Remedies and penalties in criminal IP infringement cases must include imprisonment and/or fines sufficient to provide deterrent. However, such penalties should correspond to the level of penalties applied for crimes of similar gravity under other laws; and
 - (c) In appropriate cases, remedies must include the seizure, forfeiture and destruction of infringing goods or implements and materials whose predominant use has been the commission of the offence.

2.2 Enforcement under the Bangui Agreement

The Bangui Agreement, as revised in 1999, contains detailed rules on enforcement of various categories of IP recognised under that Agreement. These range from specific rules relating to the enforcement of patents to utility models, trademarks and service marks, industrial designs, trade names, geographical indications, copyright and related rights, cultural heritage, layout-designs of integrated circuits through to plant variety protection (PVP). These rules are aimed at, not only implementing the TRIPS enforcement obligations but also, obligations in WIPO treaties and other rights, such as those related to cultural heritage, deemed to be important for the OAPI countries. For purposes of this paper we, however, only briefly examine the rules related to those categories of IP that are addressed in EPAs including copyright and related rights, trademarks and geographical indications, patents, utility models and PVP.

The main elements of the enforcement rules on these categories of IP that are applicable to the four CEMAC countries, which are party to the Bangui Agreement, include the following:

2.2.1 Patent infringement

The patent section (Annex I) of the Bangui Agreement deals with patent infringement under Title V consisting of Articles 58 to 67. The main elements of the provisions in these articles include:

- (a) Rules relating to criminal proceedings. The Agreement provides that criminal proceedings may be brought by the public prosecutor, upon the complaint of an injured party, in cases of patent infringement. First offenders may be liable to a fine while repeat offenders may be liable to a prison term of up to six months. In addition, the courts in criminal proceedings also have power to rule on invalidity or forfeiture if the accused raises these as a defense.
- (b) In general, acts occurring prior to the grant of a patent do not constitute infringement.³¹
- (c) Seizure of alleged infringing goods may be ordered by courts subject to their power to order the right holder or complaining party to furnish security and a time limit within which the applicant for seizure must take action. Foreigners must always provide security in cases of applications for seizure.
- (d) In appropriate circumstances, confiscation and destruction of infringing goods and implements, whose predominant purpose is to make the infringing goods, may be ordered by courts.

³¹ See Article 63 of the Bangui Agreement.

2.2.2 Enforcement in the case of Utility models

Infringement and rules relating to legal proceedings in the case of utility models are addressed under Title VI of the utility models section of the Bangui Agreement (Annex II). Specifically, the rules are contained in Articles 41 through to 49 of that section. The main elements of the enforcement regime here are, essentially, the same as those applicable to patents. The main differences relate to the level of fines in criminal proceedings, where there is a higher ceiling in case of utility models than patents, and to the maximum prison term for repeat offenders which is three months for utility models as opposed to six for patents.

2.2.3 Trademarks and service marks

Enforcement for this category of IP rights, covered in Annex III of the Bangui Agreement, is dealt with under Titles VI and VII. Similar rules are provided for with respect to seizure, confiscation and destruction as well as repeat offenders, as in the case of patents and utility models. In addition, there are a number of other important elements in the rules. These include:

- (a) The requirement to impose criminal sanctions (both fines and prison terms going up to 2 years) for trademark counterfeiting as described in Article 37 of Annex III. These requirements also apply in case of collective marks;
- (b) The rule that penalties in criminal proceedings shall not be cumulative.
- (c) The powers of courts to deprive convicted infringers of voting rights in professional groups such as chambers of commerce; and
- (d) The powers of courts to order publication of final judgements including in newspapers at the offenders expense.

2.2.4 Enforcement for industrial designs

Matters relating to infringement of industrial designs are covered under Titles V and VI of Annex IV of the Bangui Agreement. The main rules include those with provisions, among others, on penalties for infringement, repeat offenders, deprivation of voting rights in professional groups, confiscation, seizure and time limits. Overall, the rules and procedures are similar to those described above with respect to patents, utility models and trademarks.

2.2.5 Enforcement with respect to geographical indications

Geographical indications are addressed under Annex VI of the Bangui Agreement with the question of infringement dealt with in Articles 15, 16 and 17. Article 15 defines what constitutes an unlawful use of a geographical indication while Articles 16 and 17 deal with civil and criminal actions, respectively.

In the case of civil action, the Bangui Agreement entitles right holders to: (a) bring actions to prevent unlawful use or imminent unlawful use as well as for destruction of labels and documents that have contributed to or likely to contribute to unlawful use; and (b) recover damages.

With respect to criminal proceedings, the Agreement provides for a fine or imprisonment of

between 3 months and one year upon a conviction for unlawful use of a geographical indication.

2.2.6 Enforcement for copyright and related rights

Annex VII, Title I, of the Bangui Agreement deals with copyright and related rights. Enforcement is addressed under part five of the Annex. It includes provisions on entitled applicants, protective measures, civil penalties, criminal penalties, and prohibition of circumvention of technological protection measures (TPMs). Some of the main rules here include those:

- (a) Entitling the national collective rights management body and professional associations of right holders to institute infringement proceedings;
- (b) Requiring that court have powers to issue injunctions and seizure of alleged infringing works as well as documents, accounts, and business papers relating to such alleged infringing copies;
- (c) Requiring that states parties apply, *mutatis mutandis*, the national civil and criminal procedures on seizure and border measures in the case of alleged copyright infringement;
- (d) Entitling right holders to damages calculated taking into account the material and moral injury caused to the right holder or other claimant and profits made by the infringer;
- (e) Requiring that courts be given powers to order the destruction of infringing copies as well as equipment used to commit infringement;
- (f) Requiring criminal sanctions, as defined in Article 64 of the Annex, in cases of intentional infringement on a commercial scale or infringement on a commercial scale as a result of gross negligence; and
- (g) Prohibiting circumvention of TPMs and entitling right holders to damages as in the case of actual infringement.

2.2.7 PVP Enforcement

PVP is covered under X of the Bangui Agreement with specific enforcement provisions contained in Title IX (Articles 43 – 51). Similarly to the enforcement provisions relating to patents, utility models and trade marks provisions, rules are made with respect to liability for fines or imprisonment, seizure, confiscation and destruction, and procedures for criminal proceedings. In addition, there a number of other important rules and obligations regarding PVP infringement including:

- (a) Creation of offenses and liability to a fine for usurpation (falsely claiming to be a holder of a PVP certificate or of an application for the same) under Article 47 of Annex X, and fraud in relation to variety denominations under Article 51; and
- (b) Granting courts powers to order the sale of infringing items or devices through a public auction for the benefit of the state.

3. A Development Analysis of the IP Enforcement Provisions in the EC-CARIFORUM EPA and Lessons for CEMAC countries

The TRIPS enforcement framework, as is clear from the various elements outlined in the background section above, imposes onerous obligations on developing countries and LDCs from a technical, financial and administrative standpoint. However, notwithstanding these onerous

obligations, recent years have seen a massive campaign by developed countries, through the G-7, the Organization for Economic Cooperation and Development (OECD), the World Intellectual Property Organization (WIPO), the World Customs Organization (WCO), INTERPOL as well as in the WTO, to further ratchet-up IP enforcement in developing countries and LDCs. The entry points for this campaign vary from proposals for best practice in technical assistance and cooperation activities through to proposals for additional obligations anchored in treaties. The proposals on enforcement in the EPAs fall under the latter category.

In specific terms, the EC has, under the EU *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, made it clear that it would revisit its approach on IP in bilateral agreements with a view to *inter alia* to strengthening enforcement clauses.³² It is this strategy that the EC is pursuing in the EPA negotiations. The obligations that may arise for developing countries such as CEMAC countries will impact, directly, on the implementation of flexibilities in the TRIPS Agreement in these countries, as well as the competitive relations among firms in the economy. In other words, there are significant TRIPS-plus implications that will arise out of such new clauses on enforcement. Consequently, the issue of IP enforcement in EPAs is neither a mundane nor a neutral subject. It is highly complex and economically significant. It therefore warrants special attention by CEMAC countries as well as other ACP countries.

A brief analysis of the IP enforcement provisions of the EC-CARIFORUM EPA, which are the only finalised provisions on the subject in the EC-ACP trade negotiations can help one understand the full potential implications of additional IP enforcement provisions for CEMAC countries.

3.1 The IP enforcement provisions in the EC-CARIFORUM EPA

Although some of the most egregious provisions contained in the earlier drafts of the EC-CARIFORUM EPA were excluded from the final text,³³ the EPA nevertheless includes detailed additional provisions to those contained in the TRIPS Agreement on IP enforcement. These are set out in sub-section 3 of the IP section of the EPA made up of 14 articles and covering a range of issues, including provisions on: general obligations; entitled applicants; evidence; measures for preserving evidence; right of information; provisional and precautionary measures; corrective measures; injunctions; alternative measures; damages; legal costs; publication of judicial decisions; and border measures.

In general, the approach to enforcement in the EC-CARIFORUM EPA, which is based mainly on proposals by the EC, reflects the approach laid out in the EU strategy on enforcement and the EU's Intellectual Property Enforcement Directive (IPRED).³⁴ The effect of this is that, although the provisions on enforcement in the EPA are framed as obligations for both the EC and

³² European Commission (2004), *Directorate General for Trade, Strategy for the Enforcement of Intellectual Property in Third Countries*, European Commission, Brussels, p. 4.

³³ For a discussion of some of these earlier provisions see Santa-Cruz, *supra* note 5 and Musungu, *supra* note 8.

³⁴ Directive 2004/48/EC, Official Journal L 195, 02/06/2004 P.0016 – 0025, adopted in 2004. The Directive covers rules on standing, evidence, seizure, injunctions and other matters in civil cases.

CARIFORUM states, the reality is that CARIFORUM countries have simply assumed additional IP enforcement obligations developed for the EC's internal market.

In summary, the main elements of the provisions on IP enforcement in the EC-CARIFORUM EPA include the following:

3.1.1 General enforcement obligations

These are set out in Article 13 of the sub-section. Two main elements are covered under the provisions. These are that: (a) the procedures and measures on enforcement shall be fair and equitable and shall not be unnecessarily complicated, or costly or entail unreasonable time limits or unwarranted delays; and (b) the measures shall be effective, proportionate and dissuasive and shall be applied in a manner that avoids the creation of barriers to legitimate trade and provide safeguards against their abuse.

In general, the language reflects the language used in Article 41 of the TRIPS Agreement regarding general enforcement obligations. However, there is the additional language on effectiveness, proportionate and dissuasiveness added to the requirement in TRIPS that enforcement measures do not create barriers to legitimate trade. The overall effect of this change is likely to be that the interpretation of the TRIPS provisions as between the EC and CARIFORUM countries will now have to include a discussion on effectiveness and dissuasiveness.

3.1.2 Entitled applicants

Article 14 of the EPA sub-section creates an obligation to recognise, as persons entitled to seek the application of the enforcement measures, procedures and remedies, not only the right holders or persons authorised to use IP rights by right holders such as licensees, but also collective right management bodies and professional defense bodies. This right is subject to provisions of applicable law. This means that except where the law specifically addresses the issue of entitled applicants, CARIFORUM countries will have to recognise collective rights management bodies and professional defense bodies without necessarily having any regulations on the conduct of these bodies or to protect other parties from abuse of rights by these bodies.

The TRIPS Agreement treats this subject more generally leaving more discretion to members. In the Agreement, footnote 11 under Article 42 defines right holders to include "federations and associations having legal standing to assert such rights".

3.1.3 Measures and procedures related to evidence

There are three articles which address matters related to evidence: Article 15, which is the main provision, as well as Article 16 on measures to preserve evidence and Article 17 on the right to information. Under Article 15, the key obligation is the requirement to take measures to enable judicial authorities to require, in cases of infringement on a commercial scale, the communication of banking, financial or commercial documents under the control of the opposing party, subject only to the requirement to protect confidential information and the rider on appropriateness.

Article 16 on its part imposes an obligation to ensure that judicial authorities can, subject to a number of conditions set out in the Article, order what are described as prompt and effective provisional measures to preserve relevant evidence. Such measures could include, but are not limited to, requiring detailed description of the alleged infringing goods, physical seizure of such goods as well as seizure of materials and implements used in the production and/or distribution of these goods even if that is not the predominant use of the materials and implements.

Article 17, which addresses the question of right to information, is one of the most detailed articles on enforcement under the EC-CARIFORUM EPA. It requires CARIFORUM countries to ensure that judicial authorities may order the alleged infringer or any person found in possession of infringing goods on a commercial scale or found using infringing services on a commercial scale or providing services used in infringing activities or a person who was indicated by any of the above persons as being involved in production, manufacture or distribution of goods or provisions of services, to provide information on the origin and distribution networks of goods or services which infringe any category of IP. The types of information to be provided is defined in paragraph 2 of Article 17 while paragraph 3 of the article provides some protection to the accused party but only if such protections are statutory required in the country as opposed, for example, to the requirements of common law or equity.

3.1.4 Provisional and precautionary measures

Provisions related to provisional and precautionary measures are addressed in Article 18 of the sub-section. The main obligation here relates to the requirement for the parties to the EPA to take measures to ensure the availability of interlocutory injunctions to prevent 'imminent infringement'. The interlocutory injunctions contemplated here could be issued against the alleged infringer as well as intermediaries whose services are being used by third party to commit the alleged infringement. In addition, the injunctions could also be used to order seizure and delivery up of alleged infringing goods so as to prevent their entry into commerce.

In cases of alleged infringement on a commercial scale, if the applicant demonstrates circumstances likely to endanger recovery of damages, the parties to the EPA are required to ensure that judicial authorities have the power to order seizure of the alleged infringer's movable or immovable property including blocking their bank accounts and other assets. These are new powers which are not required under the TRIPS Agreement with potentially challenging implications.

Apart from the broad powers, the most striking characteristic of this provision is the complete lack of protection for third parties against abusive applications for interlocutory injunctions and the need to require right holders to provide security. This is particularly important because the anticipated disputes are likely to occur between competing business enterprises. There is a real danger here for unbridled interference with legitimate trade and competition. It is also notable that these powers apply to all IP infringement actions as opposed to just cases of counterfeit goods.

3.1.5 Corrective measures

These measures, which apply after the determination of the case, are addressed by Article 19. In the main, the requirement is for ensuring that judicial authorities have the power to order the recall, definitive removal from the channels of commerce or destruction of goods found to have infringed IP. The states parties also have an obligation to ensure that such measures are carried out at the infringer's expense irrespective of the award of damages, except where reason is given to do otherwise.

While the TRIPS Agreement under Articles 46 and 59 contemplates similar corrective measures, the main difference with Article 19 is the lack of a proportionality test and other safeguards that are required under the TRIPS Agreement. This has added importance since there is a TRIPS-plus obligation to ensure that the corrective measures are carried out at the infringer's expense.

3.1.6 Injunctions and alternative measures

The two issues are covered by Articles 20 and 21. On the one hand, Article 20 deals with injunctions, save for interlocutory injunctions, which are addressed in Article 18 as part of the provisional and precautionary measures. The main obligation for the parties to the EPA is to ensure that judicial authorities have the power to issue injunctions to stop continuing infringement of IP. This also includes an obligation to ensure that right holders can apply for such injunctions against intermediaries whose services are used to infringe IP. The parties, where provided for in national law, are also required to ensure that non-compliance with an injunctive order be subject to a recurring penalty to ensure compliance.

The requirements on injunctions are generally the standard rules in most legal systems though they are broader than the requirements of Article 44 of the TRIPS Agreement. The key element which might raise problems relates to intermediaries. Here, it is unclear in the EPA what the scope of the injunction would be, that is, whether it would be limited to specific identifiable acts or could be broader.

Article 21, on the other hand, deals with alternative measures to injunctions and other judicial measures in cases of proven infringement. In this regard, the EC-CARIFORUM EPA provides that parties to the EPA may provide that, on application of the person found to liable for infringement, judicial authorities may order pecuniary compensation instead of injunctions or the other measures provided for in the sub-section or part III of the TRIPS Agreement. This, however, only applies in cases where the infringement was unintentional and without negligence. This is an important safeguard which partly recognises the commercial context in which IP infringement may occur.

3.1.7 Damages and legal costs

The two issues are addressed in Article 22 and 23, respectively.

With respect to damages, the EPA provisions address three main issues. First, is the question of the factors to consider in determining the level of damages. Here, in addition to seeking to repair the injury caused to the right holder, the provision contemplates taking into account other factors

such as “negative economic consequences”, “unfair profits” and “elements other than economic factors”. The second issue relates to cases where the party to an EPA has set damages as a lump sum. Here it is required that the lump sum should be determined on the basis of elements such as the amount of royalties or fees that would have been payable if the infringer had sought authorisation from the right holder. The third issue relates to damages in cases of unintentional infringement. The EPA provides that even in cases where the infringer did not know or have reasonable grounds to know that they were engaging in infringing activity, the judicial authorities may still be empowered to order recovery of profits or payment of pre-established damages.

Regarding legal costs in infringement cases, the EPA, under Article 23, requires the EC states and CARIFORUM states to apply the general rule that the losing party pays the costs, except where equity requires the allocation of costs otherwise.

3.1.8 Publication of judicial decisions

Article 24 of the EPA creates a rather unusual requirement regarding publication of decisions in infringement cases. Beyond the requirement under the TRIPS Agreement for judicial decisions to be, at least, in writing and reasoned, the EPA requires that the parties ensure that judicial authorities have the power, on application of the right holder and at the expense of the infringer, to order what are referred to as ‘appropriate measures for the dissemination of information concerning the decision’. This could include displaying the decision and publishing it in full or in part or other publicity measures including ‘prominent advertising’. Similar measures are however not required in cases where the right holder loses the case including where the IP right is invalidated or where abuse of enforcement procedures is found to have occurred.

3.1.9 Border measures

The issue of border measures is addressed in Article 25. In the main, the EPA requires the application of the provisions of Articles 52 through to 60 of the TRIPS Agreement, in addition to one specific obligation. The obligation is to require the parties to the EPA to ensure that competent administrative or judicial authorities have the power to order the suspension by customs authorities of the release into free circulation or to retain goods suspected to be infringing a particular IP. While in general the requirements are modelled on the TRIPS requirements, the obligation also applies to goods in customs free zones and those destined for re-export.

3.2 Problem areas and concerns with the IP enforcement provisions In the EC-CARIFORUM EPA: Lessons for CEMAC

Article 46 of the Cotonou Agreement, which deals with IP, does not address the question of enforcement directly. The article, in the main, talks about an adequate level of protection of IP covered under the TRIPS Agreement in line with international standards. It also provides that technical co-operation activities in the field of IP would, on mutually agreed terms and conditions extend to preparation of laws and procedures for IP enforcement and to address infringement by competitors. In addition, the EU IP enforcement strategy makes it clear that the EU does not intend to propose a one-size-fits-all approach on enforcement to its trading partners. This,

according to the strategy document, is because it is critical to have a flexible approach that takes into account the different needs, levels of development and membership of WTO as well as the status of the country regarding infringement activities.

Considering that the Cotonou Agreement does not specifically mandate negotiations in the EPAs on enforcement of IP and the caveats in the EU IP enforcement strategy, there is a general difficulty in explaining why, in addition to the TRIPS enforcement provisions, there is need for such extensive provisions on enforcement in the EC-CARIFORUM EPA. The TRIPS enforcement provisions are already onerous for a developing country including CARIFORUM countries. The addition of a layer of new obligations therefore rightly raises questions as to how the EC has taken into account the levels of development of CARIFORUM countries.

Overall, there are a number of important problem areas and concerns with the enforcement provisions in the EC-CARIFORUM EPA. These problem areas and concerns should offer lessons for CEMAC countries in determining whether to negotiate with the EC on IP enforcement and what provisions to watch out for.

The problems areas and concerns include: loss of flexibility for CARIFORUM countries to determine the appropriate method of implementation the TRIPS enforcement provisions; lack of sufficient safeguards and balancing mechanisms to protect the rights and freedoms of third parties including measures to address abuse of enforcement procedures; creation of liability for intermediaries without paying sufficient attention to the interests of competition and consumers; significant new powers given to courts to gather evidence on behalf of right holders; permitting damages based on the consideration of extraneous factors; expansion of IP enforcement to free trade zones and specific targeting of goods for re-export; and one-sided publicity requirements regarding infringement decisions.

These problem areas and concerns are briefly explained in the sub-sections that follow.

- 3.2.1 Loss of flexibility to determine appropriate implementation method

The provisions on enforcement in the EC-CARIFORUM EPA are, as already noted, substantially TRIPS-plus. Many of the provisions mirror the provisions of the EC's enforcement directive - IPRED or other EC practices. This is a problem because IPRED constitutes the EU's exercise of its right to determine the appropriate method of implementing the TRIPS enforcement provisions and to achieve its own internal market goals. IPRED was specifically aimed at addressing issues in the context of the EU internal market, taking into account the circumstances and legal practices of EU member states.

It follows that the imposition of the approach in IPRED and other EC practices on CARIFORUM countries will deny these countries the opportunity to determine their own method of implementation of the TRIPS enforcement provisions and to achieve their own other goals related to technological innovation, knowledge diffusion and competition. In effect, the approach to enforcement here means that CARIFORUM countries have directly bargained away a fundamental parameter on which the TRIPS Agreement is built by accepting detailed prescriptive rules on enforcement in the EPA.

- 3.2.2 Lack of safeguards to protect the rights and freedoms of third parties

The significant safeguard measures foreseen in the TRIPS Agreement to guard against abuse of enforcement provisions, to protect the rights of third parties and competitors and to ensure that unnecessary obstacles are not put in the way of legitimate trade are largely missing in the EC-CARIFORUM EPA provisions on IP enforcement. The provisions in the EPA are mainly right holder centred with little regard for the market contexts in which IP infringement may occur. Indeed, even many of the safeguards foreseen in IPRED to protect third parties in the EC states and promote competition are missing. Hence, while the EPA text on the face of it appears similar to IPRED, the extensive recitals to IPRED, which explain and contextualise the safeguard measures are not included in the EPA provisions.³⁵

This means that CARIFORUM countries have assumed new enforcement obligations without sufficient safeguards for third parties. While it is conceivable that this countries can introduce such safeguards in national law, their compatibility with the assumed obligations can always be questioned.

- 3.2.3 Liability for intermediaries

Intermediary liability for infringement action by third parties was introduced in the EC-CARIFORUM enforcement through a number of provisions. This includes under Article 17 on the right to information; Article 18 on provisional and precautionary measures; and Article 20 on injunctions. The key challenge here is that the introduction of intermediary liability, apart from its own problems, is doubly problematic where the safeguard mechanisms for third parties are weak and provisional measures such as injunctions are readily available as foreseen in Article 20 of the EC-CARIFORUM sub-section. Indeed, because of these challenges, among others, the EC member states, under IPRED have left the issue of injunctions against intermediaries to member state's discretion.³⁶

There are particularly important concerns regarding liability of internet service providers (ISP), which is an area of increased efforts by right holders and various governments including EC states. Due to this concerns, the EU parliament recently rejected proposals from the EC to shut off internet access for suspected infringers.³⁷

³⁵ An example relates to provisional and precautionary measures. While the provisions of IPRED on provisional and precautionary measures are premised on Recital 22 in the Directive, which provides that provisional measures shall be undertaken while observing the rights of the defence, ensuring proportionality of the provisional measure as appropriate to the characteristic of the case and subject to providing guarantees sufficient to cover the costs of unjustified requests for provisional measures, the same is not the case for the EC-CARIFORUM text.

³⁶ See Recital 23 of IPRED.

³⁷ For details see e.g., Standerford, Dugie., "European Parliament Rejects Proposal to Make ISPs Shut Off Suspected Pirates" *Intellectual Property Watch*, 10 April 2008. Available at <http://www.ip-watch.org/weblog/index.php?p=1004> (last accessed on 17 April 2008).

- 3.2.4 Disproportionate evidence powers on behalf of right holders

The EC-CARIFORUM EPA provisions on enforcement contain detailed provisions regarding evidence gathering and preservation, as well as the right of information. These provisions, as already noted, are made under Articles 15, 16 and 17. The provisions include the requirement to grant judicial authorities powers to order the communication of banking, financial or commercial documents to those alleging infringement. The only safeguard provided is the phrase “where appropriate” and protection of confidential information. Proportionality and other basic safeguards foreseen in the TRIPS Agreement in similar cases are missing.

The implications of these disproportional evidence gathering and production requirements, both from the standpoint of the administrative and financial burden, as well as on business practices for CARIFORUM countries, could be far-reaching. Evidence requirements and right to information rules developed for the internal market of the EU are likely to be inapplicable to the situation of most CARIFORUM and other ACP countries especially in the context of the informal sectors that predominate the business environment. Concepts of confidential information and where limits should be set, for example, are not easy to apply to the informal sector.

- 3.2.5 Calculation of damages based on extraneous factors

The TRIPS Agreement, in the spirit of fair and equitable procedures and remedies, only foresees, under Article 45, the payment of damages adequate to compensate for the injury the right holder suffered as a result of intentional infringement and to recover legal expenses. The EC-CARIFORUM EPA, however, introduces provisions which would require:

- Courts to take into account extraneous factors such as “the negative economic consequences” of infringement (a particularly difficult concept to measure in the context of IP); and
- Elements other than economic factors.

The concept of negative economic consequences is extremely hard to quantify is clearly extraneous to the primary purpose of enforcement – which is to prevent injury to the right holder. Though in the case of CEMAC countries the parties to the Bangui Agreement recognise the concept of moral prejudice, the addition of these broadly worded considerations to what courts have to consider in the determination of damages simply opens the floodgates of abuse, unnecessary litigation and delays.

- 3.2.6 Expansion of IP enforcement to free trade zones and to goods for re-export

The EPA provisions extend certain enforcement obligations to activities in free trade zones as well as with respect to goods destined for re-export. Apart from the TRIPS-plus implications of this proposed provision, such an obligation is likely to place a significant burden on CARIFORUM countries’ administrative and financial resources. For example, the discussions in the WTO on the question of lack of manufacturing capacity in the pharmaceutical sector showed that placing strict obligations on developing countries and LDCs such as the CARIFORUM

countries to police re-exports, is particularly burdensome and unwarranted.³⁸

3.2.7 Publication of judicial decisions and publicity requirements

The TRIPS Agreement, under Article 41, requires that decisions on the merits of cases on infringement should preferably be in writing and reasoned and be made available to the parties. The decision not to impose specific publication requirements was clearly linked to the burden that such requirements may impose on the courts and other administrative systems particularly in developing countries and LDCs. Other publicity measures such as advertising, including at the expense of the infringer, were clearly deemed not necessary to achieve effective enforcement of IP.

The requirement under the EC-CARIFORUM EPA for the parties to ensure that judicial authorities have the power to order appropriate measures of the dissemination of information on the decision as well as other publicity measures such as advertising therefore raise important concerns. In most situations, excepting counterfeiting cases, the infringer is likely to be a competitor. In such cases, draconian one-sided measures such as what is contemplated in the EPA are likely to result in significant impacts on competition and economic players.³⁹ This is particularly the case since there are no special rules to protect third parties and publicity is only contemplated in cases where the right holder wins. In cases where the right holder loses or is found to have abused procedures no publication or publicity requirements are imposed. These are clearly not fair and equitable procedures as foreseen by the TRIPS Agreement and provided for under general obligations on enforcement in the EPA itself.

4. A Positive Agenda for CEMAC Countries on IP Enforcement in the EPA Negotiations

There is no doubt that enforcement of IP rights is an important part of any IP regime. There are benefits that accrue to foreign IP holders such as EC right holders operating in ACP countries. However, it must also be recognised that these measures, applied reasonably and in a balanced way, also have benefits for local inventors, innovators and creative communities that rely on various forms of IP. The TRIPS Agreement's enforcement provisions, though largely balanced, are still quite onerous for developing countries and LDCs. In the case of CEMAC countries, it has also to be remembered that there are additional enforcement obligations by virtue of the Bangui Agreement.⁴⁰

The TRIPS provisions are predicated on a number of parameters that foresee balance between the protection of rights, legitimate trade and competition, as well as the need to protect defendants and other third parties. As demonstrated by the analysis of the EC-CARIFORUM EPA provisions on enforcement, additional obligations also require careful analysis and balancing. Provisions on

³⁸ For a discussion on the burden of policing re-exports see e.g., Correa, Carlos., (2004) "Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health", *Essential Drugs and Medicines Policy*, WHO, Geneva.

³⁹ While in the case of CEMAC the Bangui Agreement contemplates publicity measures such as newspaper advertisement this is only applicable in the case of trademark counterfeiting.

⁴⁰ *Supra* note 11.

enforcement that may be proposed to CEMAC countries are therefore of fundamental importance.

Consequently, as CEMAC countries contemplate further negotiations with the EC on IP related issues, they need to devise both a defensive and offensive strategies in the area of enforcement.

On the defensive side, these countries, if they decide to include additional enforcement obligations, need to address the specific problem areas and concerns highlighted in section 3.2 of this paper. On the offensive side, these countries could consider fashioning their own demands. Such demands could include provisions addressing the following seven elements:

4.1 Establishing a conceptual framework for IP enforcement in the EPA

As a conceptual matter, CEMAC countries could seek to ensure that any IP enforcement provisions as framed by the basic conceptual understanding in the preamble or objectives of the IP chapter. Such an understanding could include that enforcement measures must not only deal with counterfeiting, piracy and the interests of right holders but must also address other interests and trade concerns. For this reason these countries could seek to more directly introduce a number of important parameters from the TRIPS Agreement into the EPA including the understandings that:

- IP rights are private rights and their enforcement should follow the dictates of common welfare;
- IP provisions in trade and other agreements such as the EPAs should be aimed at providing effective and appropriate means of enforcing IP, taking into account differences in national legal systems and recognising the right of each country to determine the appropriate method of implementing the provisions of the agreements;
- The enforcement provisions must be linked to the attainment of the objectives of CEMAC countries in protecting IP which includes ensuring that IP contributes to technological innovation, the transfer and dissemination of technology and to balance of benefits for producers (IP right holders) and consumers of knowledge and technology (general public and competitors) in a manner conducive to social and economic welfare.

Including such conceptual underpinnings in the EPA is important for purposes of interpretation of the specific provisions that may be included in the EPA on enforcement.

4.2 Retaining TRIPS flexibilities on IP enforcement

The TRIPS enforcement framework does not only attempt a balance but also contains flexibilities recognising that different countries have different needs and interests. Indeed, the EC and its member states in their IP enforcement strategy have indicated that they recognise this fact and would not seek to impose a one-size-fits-all approach to third countries such as CEMAC countries. The burden of proof should therefore be on the EC to demonstrate that the implementation of the TRIPS enforcement provisions is inadequate for effective IP enforcement in CEMAC countries and more importantly how the flexibilities in the TRIPS Agreement would be safeguarded.

CEMAC countries could therefore seek to include specific provisions in the EPA aimed at preserving all the flexibilities contained in Part III of the TRIPS Agreement.

4.3 Prohibiting of unilateral IP enforcement measures

CEMAC countries, considering the extensive IP enforcement obligations they have already assumed, should seek, through the EPA, an undertaking from the EC that the EC will not seek or impose additional unilateral measures and demands on them on IP enforcement in the manner in which the United States has used the Special 301 procedures.⁴¹ This is particularly significant in light of the EC's stated intention to identify priority countries as part of its strategy for IP enforcement.

4.4 Transfer of technology and promotion of competition

The enforcement provisions under the EPAs need not only focus on right holders but also to address the enforcement of provisions that are important for transfer of technology and competition. Consequently, CEMAC and other ACP countries could consider, as part of their positive agenda, including in EPAs measures specifically targeted at enforcing provisions related to transfer of technology and competition rules. These countries, particularly the LDCs among them, could, for example, seek to reinforce the reporting mechanism under Article 66.2 regarding transfer of technology by imposing additional enforcement requirements on the EC.

These countries could also seek to specifically and, in explicit language, ensure that whatever the enforcement provisions, such provisions are not applied in a manner that negatively impacts competition rules. Language to the effect that any enforcement provisions should not prejudice the application of competition principles would be useful.

4.5 Limiting criminal procedures and penalties

The exclusion of criminal procedures and penalties in the EC-CARIFORUM provisions on IP enforcement is a welcome development. However, this does not mean that demands in these areas could not be made on CEMAC countries. These countries, which already have a range of provisions for criminal procedures and penalties, could therefore take a pro-active stance by

⁴¹ "Special 301" is the part of United States Trade Act that requires the United States Trade Representative (USTR) to identify countries that deny adequate protection for IP or that deny fair and equitable market access for US persons who rely on IP rights. Under the process, countries that have what the United States considers the most egregious acts, policies, or practices, or whose acts, policies, or practices have the greatest adverse impact (actual or potential) on relevant United States products and are not engaged in good faith negotiations to address these problems, must be identified as "priority foreign countries." If so identified, such country could face bilateral trade sanctions if changes are not made that address United States concerns. The USTR has also created a "Priority Watch List" and "Watch List" under Special 301 provisions. Placing a country on the Priority Watch List or Watch List indicates that, according to the United States, particular problems exist in that country with respect to IP protection or enforcement or market access for persons relying on IP.

seeking to specifically state, in the EPA, that criminal procedures and penalties in IP infringement cases should be limited to the cases specified in the TRIPS Agreement and the Bangui Agreement.

4.6 Tackling abusive enforcement practices

A positive agenda for enforcement in the EC-CEMAC EPA could also include provisions setting out a non-exhaustive list of abusive enforcement practices which need to be tackled. These practices, as is well recognised in the TRIPS Agreement and in the EC-CARIFORUM EPA, can unduly restrict competition or restrain legitimate trade. However, while these concepts are repeatedly used in IP treaties, the actual meaning is imprecise and CEMAC countries could benefit by pushing for more in-depth detail on these skeletal concepts. Once defined, the implementation of such measures could also then be the subject of technical and financial cooperation from the EC and other technical assistance providers such as WIPO.

4.7 Leveraging the WIPO Development Agenda

A positive agenda on enforcement for CEMAC countries should also include incorporating into the EPA the relevant recommendations of the WIPO Development Agenda.⁴² For example, in the area of technical assistance and capacity building, guidelines have been established which includes the idea that IP protection and enforcement regimes in developing countries should be administratively sustainable and that use of flexibilities in treaties, including on enforcement, should be included in assistance programmes. On enforcement specifically, the WIPO Development Agenda under Recommendation 45 provides that IP enforcement should be approached:

“[I]n the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement.”

CEMAC countries could therefore seek specific provisions in the EPA to translate this Development Agenda Recommendation into practice. Since the EC and its member states have already agreed to this concept in WIPO, it should not pose any problems for them in the EPA either.

5. Final Remarks

Controversy and debate over the suitability of IP provisions, including on enforcement, in EPAs is likely to continue as the negotiations in regions such as the CEMAC evolve. As the analysis in this paper shows, there is reason to be concerned about the impact of enforcement provisions in

⁴² The Development Agenda recommendations are at http://www.wipo.int/ip-development/en/agenda/cdip_recommendations.html (last accessed on 17 April 2008).

EPAs. Overall, three conclusions can be drawn from the analysis in this paper.

The first conclusion is that CEMAC countries, as is the case with most other ACP countries, are already shouldering a heavy burden related to the implementation of the TRIPS enforcement provisions. There must therefore be a convincing case as to why additional obligations are warranted in the EPA. Secondly, if provisions on enforcement are included in the EPA, CEMAC countries can learn important lessons from the experience of CARIFORUM countries. In the main, the EC-CARIFORUM EPA provisions on IP enforcement should not be used as a template in CEMAC. At the very least, the problems and concerns identified in section 3 of this paper must be specifically addressed. Finally, CEMAC countries should not just be recipients of proposals on IP enforcement. They could also develop their own positive agenda. Such an agenda could be built around the seven elements identified in section 4 of this paper.