ICTSD Programme on IPRs and Sustainable Development

An Analysis of the EC Non-Paper on the Objectives and Possible Elements of an IP Section in the EC-Pacific EPA

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EXECUTIVE SUMMARY

The European Communities (the EC) has proposed in a Non-Paper a set of objectives and possible elements for an intellectual property (IP) section of the proposed Economic Partnership Agreement (EPA) between the EC and the Pacific countries. The EC is now seeking the Pacific countries views on these objectives and possible elements. Specifically, the EC is seeking an indication on whether the Pacific countries consider the non-paper "as a reasonable starting point" on the basis of which textual proposals can be developed. In terms of why the Pacific countries have to accept substantive provisions on IP in the EPA, the EC argues that the only way to give effect to Article 46 of the Cotonou Agreement is to ensure that the EPA will "include both substantive IP rules, including on enforcement, and co-operation aspects." This interpretation, if accepted by the Pacific countries has important consequences on the outcomes of the EPA negotiations on IP.

The analysis in this paper concludes that the EC's interpretation of Article 46 of the Cotonou Agreement is not only over-ambitious but largely incorrect. In this regard, it is submitted that to give effect to Article 46 of the Cotonou Agreement does not require substantive IP rules in the EC-Pacific EPA or the EPAs in other regions. At the best, general provisions on whether and how those Pacific countries that are not WTO Members would adhere to the TRIPS Agreement in terms of Article 46.2 of the Cotonou Agreement would suffice. There is no other mandatory requirement under Article 46 of Cotonou. Other matters to consider would include whether:

- On the basis of empirical evidence the Pacific countries levels of development are consistent with joining the four conventions mentioned in Part I of the TRIPS Agreement; and
- It is necessary and beneficial, especially to the Pacific countries, to conclude agreements for protecting trademarks and geographical indications.

The objectives proposed by the EC Non-Paper, that is ensuring an adequate and effective level of IP protection and strengthening regional capacity to deal with IP, are also difficult to rationalise as justifying substantive provisions in the EPA. This is because first, the EC provides no reasoned basis or evidence that the TRIPS standards are insufficient to ensure an adequate and effective level of protection of IPRs in the Parties and second, because there is no basis to argue that a regional approach to IPRs in the Pacific needs to be introduced and fostered based on legal obligations owing to the EC. In sum, both the objectives suggested by the EC for an IP Section in the EPA with the Pacific countries, in the absence of further explanations and/or evidence, offer little or no justification for including IP in the EPA beyond the minimum level required by Article 46 of

the Cotonou Agreement. In particular, the proposed objectives do not offer a basis for clarifying and complimenting the TRIPS provisions on the various issues listed in the Non-Paper as possible elements.

In this context, the paper arrives at the following conclusions and recommendations with respect to each of the eight elements proposed by the EC as the basis for an IP section in the EC-Pacific EPA. On:

WIPO Internet Treaties & Protection of Computer Programmes & Databases

1. Considering the lack of empirical evidence on the advantages of the Internet treaties, taking into account the minimum requirements of the Cotonou Agreement regarding the protection of performers and producers of phonograms, there is no convincing case for the inclusion of detailed rules in the EC-Pacific EPA on these issues. Benefits for the Pacific countries are at best uncertain and hence this element should not be considered for inclusion.
2. With respect to databases especially the protection through a *sui generis* right, EC's own evaluation has shown such a right to have limited, if not, negative value. The economic value (impact) of the *sui generis* right is unproven 10 years since the promulgation of the Directive on databases. In light of such damning evaluation, it is difficult to see how such protection could benefit Pacific countries with their limited sophistication in electronic and other databases.

Well-Known Marks

3. Caution should be exercised in considering the application of the WIPO Joint Recommendations. The possible implications of elevating these soft law rules into treaty obligation should be addressed.
4. Regarding the adherence to the Madrid Protocol, while Article 46 of the Cotonou Agreement does not require such adherence, Pacific countries could consider adherence to the Protocol though more work needs to be done on the actual benefits that may accrue to them.

Protection of Geographical Indications

5. Only an empirical study can help Pacific countries make a determination of whether the advantages of protecting geographical indications outweigh the disadvantages and *vice-versa.*
6. Overall, since negotiations on geographical indications in the EPAs should be predicated on identification of products of interest to the Parties, before considering any commitments in this area, Pacific countries have to identify their products of interest, if any, and to consider the market value (potential) as well as other challenges that may arise. The enormity of this

task suggests that this process can not be completed in the six months that remain before the end of the EPA negotiations.

Protection of Textile Designs

7. The protection of textile designs has the potential to benefit Pacific countries. However, the proposal to introduce new EPA obligations on areas of interest to the EC in the area of industrial designs while maintaining the TRIPS standard for textile protection does not make sense. There is little to gain for these countries from the proposed approach to textile designs protection.

Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD)

8. Simply saying that the TRIPS Agreement should be implemented in line with the CBD would add little, if anything to the quest by developing countries and LDCs including Pacific countries to secure mandatory disclosure requirements. Since both the EC and the Pacific countries, by virtue of Article 46.2, agree to adhere to both the TRIPS Agreement and the CBD, it is implicit that they would have to implement the treaties in a mutually supportive way as they would do with any other treaties. It appears that the EC has placed this element into the Non-Paper essentially as a bargaining chip with no intention to move anywhere closer to what developing countries and LDCs are seeking on the subject.

Public Health

9. As in the case of the relationship between the TRIPS Agreement and the CBD, there is very little a provision such as that proposed by the EC would add to existing international obligations and objectives with respect to IP and health. The only value that could be added for Pacific countries with respect to the Doha Declaration and related decisions is if the EC agreed to provide the benefits under the 30 August 2003 Decision to all Pacific countries irrespective of their membership of WTO. It should be noted, however, that the Agreement of the EC to extent the benefits of the Decision to all Pacific countries should not be a basis for the EC to claim reciprocity *vis-à-vis* its interests on IP.

IPRs and Genetic Resources, Traditional Knowledge and Folklore

10. No positive and practical solution is offered by the EC's proposal in the Non-Paper on this subject. The EC justifies it approach by taking refuge in the Cotonou Agreement Article 46.1 caveat that the EPA should not prejudice the position of parties in multilateral negotiations.

Consequently, the proposed approach to genetic resources, traditional knowledge if implemented as proposed by the EC in other regions, would add no value and offer no benefit to Pacific countries.

Plant Variety Protection

11. For Pacific countries which do not have developed plant variety protection systems, it is difficult to see why they should take on more onerous obligations than required under the TRIPS Agreement. Unless, there is more compelling evidence there seems to be no basis to ask the Pacific countries to consider adherence to UPOV 91 which is TRIPS-plus.

Enforcement

12. Judging from the ECOWAS and CARIFORUM texts, and in light of the areas proposed to be covered on enforcement under the EPA with Pacific countries, the direction taken by the EC on enforcement would result in a range of specific problems and challenges for Pacific countries including the following, among others: loss of flexibility to determine appropriate method of implementing enforcement under TRIPS; lack of safeguards and balancing mechanism to protect the rights and freedoms of third parties including to prevent abuse of procedures by right holders; creation of liability for intermediaries; far-reaching and unproportional evidence gathering capabilities; and basing the assessment of damages on the consideration of extraneous factors.

Overall, it can be concluded that while there are a number of areas such as protection of traditional knowledge and folklore in which Pacific countries have a beneficial interest, the proposed elements on these issues add no value. Going by the textual proposals on these issues in other regions it is unlikely that Pacific countries could get positive commitments from the EC on these issues. Consequently, the combination of the time-factor (six months), the TRIPS-plus implications of many of the elements suggested by the EC in the Non-Paper, the challenges that would face non-WTO Pacific countries to even adhere to TRIPS and the general level of development in these countries, it is strongly recommended that Pacific countries do not agree to the inclusion of an IP section in the EC-Pacific EPA.

1. INTRODUCTION

The European Communities (the EC) in a Non-Paper has proposed a set of objectives and possible elements for an intellectual property (IP) section of the proposed Economic Partnership Agreement (EPA) between the EC and the Pacific countries[1]. The EC considers that its proposal is a reasonable starting point for bilateral IP negotiation between the EC and the Pacific. The EC is now seeking the Pacific countries views on these objectives and possible elements. Specifically, the EC is seeking an indication on whether the Pacific countries consider the non-paper "as a reasonable starting point" on the basis of which textual proposals could be developed. In a manner of speaking, 'the ball is now in the Pacific countries court'.

A staged process where first, objectives and elements are agreed before the elaboration of textual proposals, gives the Pacific countries an important opportunity to shape the nature and final outcomes of any IP provisions or section in the EPA. The Pacific countries also have the advantage that the Non-Paper has come to them after significant discussions, including on textual proposals, in the other regions of the African, Caribbean and Pacific (ACP) group. Consequently, the Pacific countries can draw lessons from the experience elsewhere and on the growing literature on IP issues in EPAs. To some degree, it is therefore possible for these countries to more usefully predict or anticipate the EC's interpretation of certain wording in the objectives and elements proposed in the Non-Paper. In the analysis that follows, lessons that can be learned from other regions will be pointed to, as appropriate, as will examples of what to avoid.

The analysis is divided into four main parts. The first, in section II which follows, provides some background focussing on broad considerations that should guide the thinking and analysis of the EC Non-Paper. Section III discusses the interpretation of Article 46 of the Cotonou Agreement and what its implementation would entail. This is followed in section IV with detailed specific comments on the objectives and proposed elements of the IP section of the EPA between the EC and the Pacific. Finally, section V offers a conclusion.

2. DEVELOPMENT-RELATED CONSIDERATIONS FOR ANALYSING THE EC NON-PAPER

There are a number of development-related considerations, which are important to keep in mind when considering IP issues in EPAs or more generally. These considerations are particularly important in a case, such as in the ERC-Pacific EPA, where the parties involved have large differences in their socio-economic structures and levels of development. These considerations as an analytical framework are also important for the Pacific countries considering that there is currently no policy direction from the Pacific ACP trade Ministers. The Ministers have so far not considered and set out a mandate on how the region should approach IP issues in the EPA.[2] However, notwithstanding the lack of clear policy direction specifically on IP, the Ministers made it clear when endorsing the architecture of the EPA that any aspect of the EPA must have a strong development focus.

In the context of a development focused EPA, the considerations that could be used as an analytical framework for the proposed objectives and elements of an IP section in the EC-Pacific EPA include the following:

1. The implementation of the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS) raises many issues and challenges for developing countries and LDCs such as the Pacific countries, ranging from predicting the impact of the various categories of the IPRs covered under the Agreement on the development of various sectors, to administrative and financial challenges especially with respect to enforcement.[3] Consequently, a party such as the EC that seeks further obligations beyond TRIPS should have the burden of proving the gap in the TRIPS Agreement on the specific subject-matter and the need for further rules;

2. The TRIPS Agreement is premised on the idea in Article 1.1 that each World Trade Organization (WTO) Member would "determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". Disputes and differences between WTO Members regarding interpretation are therefore expected to be addressed through dispute settlement system. In this regard, a bilateral agreement on the interpretation and/or clarification of the TRIPS Agreement's provisions may preclude parties from looking for a different interpretation at the WTO or benefiting from a favourable interpretation in the future;

3. The ultimate objective of the Pacific countries as a group of developing countries and LDCs should be, on an evidence and impact-based view, to use IPRs for development while at the same time eliminating or

minimising the costs not only of integration into the international IPR system but also of living with the IPR rules (the social cost of IPRs). For this reason, the objectives of any EPA IP section should be linked to development outcomes in Pacific countries. At the very least, therefore, the TRIPS consensus that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology should be the guiding principle;

4. There are significant factual differences between the EC and the Pacific countries in terms of their needs relating to IP, their levels of development and their national priorities which have to be taken into account in determining the objectives and elements of an IP Section of an EPA. Further, there are significant and important factual differences among the Pacific countries themselves. In this regard, unlike in the late 1980s and early 1990s when TRIPS was negotiated, there is now a wide acceptance that the level and manner of protection and enforcement of IPRs should depend on the level of development of a particular country, sectors involved and the different needs and that *one-size-does-not fit all*;

5. Similarly, unlike at the time of the TRIPS negotiations, there is now significant literature and emerging evidence on the pros and cons of IPRs for development, the impact or lack of it in different sectors including health, agriculture, software etc. and on other factors of development such as inward investment. There is also better historical literature and evidence regarding the development paths of many of the OECD countries including recent entrants like South Korea.[4] In addition, there is a better understanding and continuing work on innovation systems in developing countries and the relevant factors including the role of IPRs. Finally, there is some emerging evidence about the impact of the TRIPS Agreement itself although there are no major specific empirical studies.[5] This means that the Pacific countries are now in a much better position to make judgements about which rules have the potential to bring benefits and those that, on average, are likely to have negative impacts;

6. Both in the context of the EPAs and generally at the national and multilateral level, there is a serious and legitimate debate regarding the efficacy of IPRs not only for development but more generally. This debate is reflected in various major international processes such as the WIPO Development Agenda discussions and the World Health Organization (WHO) process on innovation, public health and IPRs. In that regard, it is fair to say that the international IPRs system is changing and dynamic.[6] Account should therefore be taken of these international debates and multilateral negotiations and the changes taking place in the system;

7. While the TRIPS Agreement has generally been taken as the starting point in other regions, in the case of the Pacific where the majority of countries (11 out of 14) are not WTO members, the issue might in fact not even be implementation of the TRIPS Agreement but considering which of the TRIPS provisions would be appropriate to consider implementing over time. For the 11 countries in which the development of IP policy and rules is at best in its infancy, a requirement to comply with TRIPS would be onerous. To add further obligations beyond TRIPS would require extreme, costly and dangerous adjustments that these countries would be unlikely to bear.

Overall, beyond the specific analysis below these considerations should be kept in mind and could be useful throughout the discussions on IP between the EC and the Pacific countries in the EPA.

3. THE BASIS FOR IP IN EPAS: THE INTERPRETATION AND IMPLEMENTATION OF ARTICLE 46 OF THE COTONOU AGREEMENT

The EC states that in its view, Article 46 of the Cotonou Agreement should be the basis for EPA discussions on IPRs. This is obviously the correct position since the whole EPA framework draws its basis from the Cotonou Agreement. However, as is clear from the EC Non-Paper, the provisions of the Cotonou Agreement are subject to interpretations and those interpretations can differ. In this regard, the EC argues, as it has done in other ACP regions, that the only way to give effect to Article 46 is to ensure that the EPA will "include both substantive IP rules, including on enforcement, and co-operation aspects." This interpretation, if accepted by the Pacific countries will have important consequences on the outcomes of the EPA negotiations on IP. The first task for the Pacific countries is therefore to develop their own interpretation of Article 46. The question is whether they should agree with the EC's interpretation.

Article 46 of the Cotonou Agreement which addresses the protection of IP contains five paragraphs which cover, the objectives of the Parties and their agreements and understandings regarding IP protection in the Cotonou framework.[7] Article 46.1 of the Agreement contains the overall aspirations of the Parties regarding IPR protection and indicates the broad caveat to this aspiration. The overall aspiration and aim of the Parties, it is stated, is "the need to ensure adequate and effective level of protection of intellectual, industrial and commercial rights, and other rights covered by TRIPS including protection of geographical indications, in line with international standards with a view to reducing distortions and impediments in bilateral trade". The caveat to this aspiration is that the recognition of the need to ensure adequate and effective protection should not "prejudice the position of the Parties in multilateral negotiations".

To fulfil the Article 46.1 aspiration both Parties have to take some measures aimed at ensuring adequate and effective level of protection of IPRs in line with international standards. The Pacific countries that are WTO Members and the EC have already agreed on what is the mechanism for ensuring adequate and effective protection of IP with a view to reducing distortions and impediments to trade. That mechanism is the TRIPS Agreement. For the Pacific countries which are WTO Members therefore they already recognise the need for IP protection in the manner anticipated in Article 46.1 of the Cotonou Agreement. This means that as long as they adhere to their obligations under TRIPS, any further substantive provisions are not required by the Cotonou Agreement.

At the general level therefore, the EC's assertion in the Non-Paper that the only way to give effect to Article 46 of the Cotonou Agreement is to include in the EPA both substantive provisions, including on enforcement, and cooperation

aspects is not the correct. If Parties have already committed and are implementing international standards, which standards both Parties have agreed are aimed at ensuring adequate and effective level of IP protection, further substantive provisions, including on enforcement and cooperation aspects, are not mandatory to give effect to the Cotonou Agreement.

In the context of Article 46.1, the only matter that needs to be addressed relates to what the 11 Members of the Pacific which are not WTO Members are expected to do to give effect to Article 46 of the Cotonou Agreement. Since they have not committed to the TRIPS Agreement they do not have any common basis with the EC to determine what the appropriate mechanism to do this is. At the basic level, it could be argued that since some of the Pacific countries have already recognised the TRIPS Agreement as a framework for ensuring adequate and effective level of IP protection it makes sense for the other Pacific countries to do the same. Joining the WTO, is however, not dependent on the wishes of the Pacific countries. On the other hand, unilateral implementation of the TRIPS Agreement would deny these countries the other benefits that come with WTO membership. In this context, in order to implement Article 46.1 of the Cotonou Agreement, the 11 Pacific countries which are not WTO members could consider starting a process that could eventually lead to the implementation of TRIPS obligations.

Some of the Pacific countries (Samoa, Tonga and Vanuatu) are already doing this through the accession process. For these countries it would be sufficient implementation of Article 46 of Cotonou for them to commit to continue and accelerate the accession process after which they would implement the TRIPS Agreement as per the Accession Protocol.[8] For the other eight countries, implementation of Article 46.1 of Cotonou could be achieved by their committing to consider acceding to WTO and hence the TRIPS Agreement or to progressively seek to implement IP in line with the TRIPS Agreement. This interpretation of Article 46.1 is supported by the provisions of Article 46.2 which states that the Parties underline the importance of adherence to the TRIPS Agreement.

Article 46.2, in addition to underlining the importance of adherence to the TRIPS Agreement, also underlines the importance of adherence to the Convention on Biological Diversity (CBD). The EC and all the Pacific countries are Parties to the CBD[9]. The implementation of Article 46.2 would therefore only have to address the question of the Pacific countries which are not members of the WTO since adherence to the CBD is 100% for all the parties to the EC-Pacific EPA. In this context, the approach suggested above on the non- WTO members would suffice to achieve the intentions of Article 46.2. The only other issue from the perspective of the Pacific countries relates to whether they wish to address the relationship between the two Agreements, TRIPS and the CBD in the context of the on-going negotiations at the WTO on the issue. In light of the caveat that the

EPA IP provisions should not prejudice the position of parties in multilateral negotiations it appears unnecessary to do this. I return to this issue in section IV.2.5 below.

Under Article 46.3, the Pacific countries also agreed to accede to all relevant international conventions on IP as referred to in Part I of the TRIPS Agreement, in line with their level of development. Part I of the TRIPS Agreement refers to four conventions on IP, namely:

- The Paris Convention (1967);
- The Berne Convention (1971);
- The Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961); and
- The Treaty on Intellectual Property in Respect of Integrated Circuits (1989) otherwise known as the Washington Treaty.

The membership of Pacific countries in these four WIPO conventions is limited.[10] This is against the backdrop that only four countries – Fiji, PNG, Samoa and Tonga are members of WIPO. As at June 2007, PNG and Tonga are Parties to the Paris Convention while the Federated States of Micronesia, Fiji, Samoa and Tonga are parties to the Berne Convention. Only Fiji is party to the Rome Convention and none of the Pacific countries is party to the Washington Treaty. In the case of the EC, it is notable that while many EC countries are parties to the Paris, Berne and Rome conventions none of them is a party to the Washington Treaty.

The Pacific countries that are developing country Members of the WTO, that is, Fiji and PNG are already required to implement a bulk of the provisions of the four conventions. The Solomon Islands which is an LDCs will be required to implement these provisions once the LDCs transition period under Article 66.1 of TRIPS runs out. The countries that are in the process of accession will also have to implement the bulk of the conventions' provisions once they join the WTO. For these two groups of countries implementing the rest of the provisions of the four agreements appear to be unnecessary. Consequently, unless there is some evidence that there are provisions not required to be implemented by the TRIPS Agreement which are of particular developmental benefit or which are indispensable in ensuring adequate and effective level of IP protection, these countries need not take on additional obligations.

With respect to the Pacific countries which are neither Members of the WTO nor in the process of accession, whether they should accede to the four conventions should be determined by their levels of development. Since the impact of the relevant provisions in the WTO Members in the Pacific is not known, on the face of it, it would appear that there is no basis for these countries to accede to the Agreements and more so to do it as an EPA legal obligation. Consequently, it would be more reasonable that these other countries consider accession or

implementation of provisions of these treaties in the context of their consideration on the adherence to TRIPS.

Finally, Article 46.4 provides that under the EPA, the Parties may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest to either Party. While it is well known that the EC has an interest in the protection of a large range of geographical indications, Pacific countries would need to consider what products are of particular interest and whether legal commitments to the EC would, on balance, provide particular benefits. This analysis has not been done so the question is whether Pacific countries should consider such agreements remain open. The implementation of Article 46.4 as is clear, however, does not require the inclusion of substantive or other provisions on trademarks and geographical indications in the EPA.

In sum, Article 46 of the Cotonou Agreement does not require substantive IP rules, including on enforcement, and co-operation aspects to be given effect. Article 46 of the Cotonou Agreement can be given effect if:

1. There are provisions in the EPA addressing whether and how those Pacific countries that are not WTO Members would adhere to the TRIPS Agreement;
2. Their levels of development is found to be consistent with joining the four conventions mentioned in Part I of the TRIPS Agreement, provisions are included on how and when these countries would accede to those conventions;
3. Consideration is given to whether it is necessary and beneficial for the Pacific countries to conclude agreements for protecting trademarks and geographical indications. A determination of benefits should be empirically done as well.

Consequently, it is clear that the objectives and elements proposed by the EC as being necessary to give effect to Article 46 of the Cotonou Agreement are based on an over-ambitious and incorrect interpretation. This would suggest that Pacific countries should only consider these elements for inclusions in the EPA if it is found that they would bring particularly important benefits to these countries. The costs of adjustment and eventual implementations of the obligations must be reasonable and be offset by the benefits.[11]

Issues that arise under each objective and element are discussed in the section that follows taking into account the several considerations under section II and the interpretation of Article 46 of the Cotonou Agreement in this section.

4. ANALYSIS OF THE EC PROPOSALS ON OBJECTIVES AND POSSIBLE ELEMENTS OF AN IP SECTION IN THE EC-PACIFIC EPA

The EC Non-Paper proposes two main objectives and eight possible elements as the basis for an EC-Pacific EPA. I first discuss the proposed objectives and their adequacy in light of the considerations set out in section II above and the interpretation of Article 46 of the Cotonou Agreement in section III. I will then turn to a detailed discussion of each the proposed possible elements.

4.1 Proposed Objectives of an IP Section in the EC-Pacific EPA

The EC Non-Paper proposes two objectives for the IP section of the EC-Pacific EPA. These are that the EPA provisions shall have the objective of:

- Ensuring 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 international standards with a view to reducing distortions and impediments to bilateral trade and fostering investment and economic development; and
- Strengthening of regional capacity for dealing with IP issues in the Pacific region. The EPA should both build on regional integration initiatives and aim at pushing such initiatives forward. As a condition precedent to this capacity building activity, the EC proposes that it would be useful, first, to establish precisely the current level of IP protection and also of the level of regional integration in the Pacific region in this field.

In order to meet these two objectives, the EC argues that it is necessary to consider clarifying and complementing, through the EPA, certain TRIPS provisions in a manner that takes into account the specific interests of the parties. In plain language, the EC's argument is that in its view, *the TRIPS Agreement provisions are either inadequate or need clarification to ensure adequate and effective protection of IPRs and that better regional integration in the Pacific is required for the TRIPS objectives to be met.*

Two major issues arise with the proposed objectives. The first is the basis on which the EC has determined that the TRIPS standards are insufficient to ensure an adequate and effective level of protection of IPRs in the Parties. The second is the basis on which the EC has determined that a regional approach to IPRs in the Pacific needs to be introduced and fostered based on legal obligations owing to the EC.

The TRIPS Agreement in its Preamble provides that it was inspired by the desire to reduce distortions and impediments to international trade and the need to promote effective and adequate protection of IPRs. Taking into account the other preambular provisions and the objectives in Article 7, the TRIPS

Agreement was specifically designed to do exactly what the EC suggests that the EPA IP section should do. Consequently, unless the EC can demonstrate, based on evidence, that the TRIPS standards are insufficient to ensure adequate and effective levels of IPR protection taking into account that one-size-does-not-fit-all, there is no basis for Pacific countries to take on additional bilateral obligations *vis-à-vis the* EC beyond the specific requirements of Article 46 of the Cotonou Agreement as interpreted in section III above.

The impact of clarifications, *a term which seem to be a synonym for interpretation,* on the flexibility under Article 1.1 of the TRIPS Agreement which provides that "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice" needs to be carefully considered. Further, the implications for dispute settlement in the WTO need to be considered.

This argument is doubly important for the Pacific countries since 11 out of 14 actually do not yet have TRIPS obligations. For these 11 countries additional bilateral rules will essentially mean that they will be taking on TRIPS in addition to TRIPS-plus obligations at once. This proposal has also been made when there is no clarity as to the level of protection of IPRs in the Pacific countries. The question, then is, if the EC does not know the level of protection of IPRs in Pacific countries on what basis has it determined that the TRIPS provisions are inadequate to provide protection in these countries and that additional clarifications etc. are required?

Pacific countries are obviously interested in regional integration and regional approaches to addressing various issues including trade. These countries also have an interest in regional activities relating to IPR policies and legislation. The Pacific countries have free trade agreement (FTA) covering trade in goods and there are plans to extend it to cover trade in services. With respect to IP specifically, these countries are in the process of developing a regional mechanism to administer trademarks and have a model law on traditional knowledge and expressions of culture which is at different stages of implementation in the individual countries. The Pacific Plan[12] also foresees a regional body in IPRs and traditional knowledge. At a general level therefore the idea of an EPA building on such regional integration initiatives makes sense.

The question, however, is whether Pacific countries should pursue regional integration initiatives in the field of IP based on treaty obligations owed to the EC. A particular model of regional approach to IP locked into a treaty raises important question for Pacific countries not least because these countries do not yet have national clarity on their policies and objectives relating to IPRs let alone experience on implementation at the regional level. The experience of the EC, while useful, can not be the basis for Pacific countries to formulate and lock-in a policy in a space of six months which remain to the deadline of EPA

negotiations in December 2007. Even within Europe, IP initiatives such as a community patent have not materialised due to various national considerations and differences. In sum, regional approaches to IPR issues including sharing of experiences, conducting studies and negotiating can bring benefits to Pacific if these initiatives are home grown and are implemented progressively. Undertaking treaty obligations to adopt a particular approach, at the very least, should be addressed with utmost caution.

Overall, both the objectives suggested by the EC for an IP Section in the EPA with the Pacific countries, in the absence of further explanations and evidence, offer little or no justification for including IP in the EPA beyond the minimum level required by Article 46 of the Cotonou Agreement. In particular, the proposed objectives do not offer a basis for clarifying and complimenting the TRIPS provisions on the various issues listed in the Non-Paper as possible elements. At the very least, these objectives raise significant questions as to what benefit the Pacific countries would gain in a partnership on IP and what the costs for implementing TRIPS in addition to TRIPS-plus obligation would be for these small island economies.

4.2 Proposed Possible Elements of an IP Section in the EC-Pacific EPA

The EC in the Non-Paper has included what appears to be a non-exhaustive list of elements, that is, TRIPS subjects suggested for clarification and complementing through the EPA. I say "what appears to be a non-exhaustive list" because of the use of the phrase "such as through". In this regard, before proceeding to the specific comments on the possible elements two general comments on the approach to identifying the elements of a possible IP Section in the EPA.

First, while the EC Non-Paper refers to clarifying and complimenting certain TRIPS provision it does not specifically identify those provisions nor does it explain why the identified provisions need clarification or complimenting as opposed to other provisions of the TRIPS Agreement. As already noted, the idea of clarifying and complimenting TRIPS provisions has implications for WTO dispute settlement and also affects the TRIPS principle under Article 1.1 that each WTO Member has the right and freedom to determine the method of implementing the TRIPS provisions. Before responding to the proposed elements the Pacific countries might therefore want to get clarity from the EC on specifically which provisions of TRIPS are proposed to be clarified or complimented and why. They should also seek from the EC an explanation on how the EC foresees the proposed clarifications affecting the participation of Pacific countries in the dispute settlement at the WTO and their primary right under Article 1.1 of TRIPS to determine the method of implementation in accordance with their legal systems and practice.

A second general comment on the approach to possible elements is the challenge that arises with the non-exhaustive list of possible elements. The EC needs to be clear as to what else it anticipates clarifying or complementing. Using phraseology implying that other elements may be introduced at a later stage suggests that Agreement to this Non-Paper somehow would open the door for those other unknown elements. Consequently, further clarification is also needed here as to whether the proposed elements are exhaustive or non-exhaustive.

4.2.1 WIPO Internet Treaties and Protection of Computer Programmes and Databases

The EC Non-Paper proposes that the EPA IP section could contain provisions on the protection of performers, producers of phonograms and broadcasting organizations, including compliance with the rules set by the WIPO Copyright Treaty -WCT (1996) and the WIPO Performances and Phonograms Treaty - WPPT (1996), commonly referred to as the Internet treaties. Specific focus on the protection of computer programmes and databases is also suggested.

The Pacific countries, in the context of Article 46 of the Cotonou Agreement are required to offer protection to performers, producers of phonograms and broadcasting organisations in accordance with the TRIPS Agreement. These countries, by virtue of Article 46.3 are also required to consider acceding to the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. In section III above, I have already proposed how these minimum Article 46 requirements with respect to the protection of performers, producers of phonograms and broadcasting organisations should be dealt with.

Compliance with the rules set out in the WCT and WPPT is not required under Article 46 of the Cotonou Agreement. For Pacific countries, compliance with these two treaties must therefore be based on some other justification, which in the context of the general approach to the EPA would be development benefits. In other words, what are the development benefits of the Pacific countries complying with the WCT and WPPT? As at June 2007, none of the Pacific countries is a party to either of the treaties.[13]

The WCT and WPPT were adopted to address protection in the digital environment. WCT provides protection to authors of literary and artistic works, computer programmes and compilations of data. WPPT, on the other hand, provides protection to performers and producers of phonograms. In addition to the basic rights granted by the treaties they also require the parties to address circumvention of technological protection measures (TPMs) used by right holders and digital rights information.[14]

According to WIPO, adherence to the treaties has advantages including securing international protection of national right holders, promotion of electronic commerce, contribution to national economy, encouragement of investment and the protection of local creativity and folklore.[15] These claimed advantages are, however, not based on empirical evidence. Indeed on questions such as encouragement of investment studies and field work such as that by Maskus and Fink show that claims of causal relationship between IPRs and inward investment are difficult to justify in many cases[16]. Okediji in her analysis of the Internet treaties points to the challenges that these treaties pose for public access for various purposes including education, research, and culture to digital information.[17] In light of low internet access and penetration rates in the Pacific the benefits of the treaties are difficult to see. TPMs also pose special problems.[18]

Considering the lack of empirical evidence on the advantages of the Internet treaties, taking into account the minimum requirements of the Cotonou Agreement regarding the protection of performers and producers of phonograms, there is no convincing case for the inclusion of detailed rules in the EC-Pacific EPA on these issues. Benefits for the Pacific countries are at best uncertain. It should also be noted that in addition to the protection of original databases contemplated under the WCT, in the EU there is also protection of non-original databases by a *sui-generis* right under the Directive on the Legal Protection of Databases.[19] The object of the *sui generis* right is to provide protection to any maker of a database who shows that there has been qualitatively and or quantitatively a substantial investment in obtaining, verifying or presenting of the contents. This right is available whether the said database qualifies or not for protection by copyright.[20]

The value of this *sui generis* right has been proven by the EC's own evaluation to be limited if not negative. In the first evaluation of the Directive by the European Commission it was found that the economic value (impact) of the *sui generis* right is unproven 10 years since the promulgation of the Directive.[21] For this and other reasons such as the difficulty in understanding the right, the evaluation proposes various policy options to be considered one of which is to repeal the whole Directive.[22] In light of such damning evaluation, it is difficult to see how such protection could benefit Pacific countries with their limited sophistication in electronic and other databases.

4.2.2 Well-Known Marks

The EC Non-Paper, with respect to well-known marks, suggests that clarification regarding well-known trademarks, the use of trademarks on the internet and trademark licensing and adherence to the Protocol to the Madrid Agreement (1989) is required in the EPA. Clearly, the provisions and issues suggested here

are not required by Article 46 of the Cotonou Agreement. The Parties can however consider them if they are of mutual benefit.

From the textual proposals that the EC has made to implement this element in other regions, such as in Article 8 of the CARIFORUM text, the provisions have sought, among others, to impose on the trademark registration authorities an obligation to provide a reasoned opinion in writing with respect to rejection of a trademark application, to require the recognition of the Joint Recommendations of WIPO on Well-Known Marks and to require the ratification of the Protocol to the Madrid Agreement Concerning the Registration of Marks (1989) as well as the Trademark Law Treaty (1994).

While the application of the recommendations on the well-known marks may be reasonable, one problem with their introduction in the EPA would be that what is generally soft law would be elevated into treaty law for the Pacific countries and other ACP countries. The possible implications are not clear but caution must be exercised.

The Madrid Protocol is a treaty aimed at facilitating the acquisition of trademarks in the member countries.[23] In general, procedures intended to make the grant of rights easier will result in the increase of the number of rights, in this case trademark rights. In general, however, trademarks are seen as having less negative social and economic impact than patents and copyrights. For this reason, while Article 46 of the Cotonou Agreement does not require adherence to the Madrid Protocol Pacific countries could consider adherence to the Protocol though more work needs to be done on the actual benefits that may accrue to them.

4.2.3 Protection of Geographical Indications

Protection of geographical indications is one of the areas where the EC has pushed the hardest not just in the EPAs but also at the WTO and in its other bilateral dealings. In the Non-Paper, the EC proposes that the EC-Pacific EPA should contain provisions on the protection of geographical indications to cover a range of issues including the scope of protection, the rights to be granted to holders and the relationship with trademarks, among other issues. The Non-Paper argues that such provisions are necessary as a requirement of Article 46.4 of the Cotonou Agreement. As already noted in section III above, Article 46.4 of the Cotonou Agreement does not require or mandate compulsory inclusion of provisions on geographical indications in the EPA. The essence of the Article is that the Parties may consider such protection if they deem fit by consensus. Consequently, Article 46 of the Cotonou Agreement can be implemented without specific provisions on geographical indications.

In terms of the scope of the issues to be covered in the EPA, the EC indicates that at the minimum it would seek a level of protection granted to all goods to be that of Article 23 of the TRIPS Agreement.[24] Other issues to be addressed would include the co-existence between geographical indications and certain prior registered trademarks and the role of geographical indications for development and their potential for the protection of TK and biodiversity.

In the Doha Round of Multilateral Trade Negotiations, there are negotiations on additional protection of geographical indications for other products other than wines and spirits. In these negotiations there are three sets of issues under consideration. First, is the issue of establishing a register for wines and spirits. Second, is whether the higher protection granted to wines and spirits should be extended to other products. Finally, is the issue of the link between the agriculture negotiations and the geographical indications negotiations. The proponents in these negotiations led by the EC are therefore essentially seeking to achieve what the EC suggests the EC-Pacific EPA should do. Before discussing the specific issues that arise for Pacific countries with respect to the protection of geographical indications, it is important to address the question of prejudice to positions in multilateral negotiations under Article 46.1 of the Cotonou Agreement.

Article 46.1 of the Cotonou Agreement provides that IP-related commitments or undertakings under the Cotonou process should not "prejudice the position of the Parties in multilateral negotiations". The first task for the Pacific countries is therefore to determine their position *vis-à-vis* geographical indications, consider whether that position is similar to the EC position in the WTO (multilateral negotiations) and whether a commitment under the EPA would prejudice the position of the Pacific countries Members of WTO.

The protection of geographical indications can bring benefits to a country's economy and uplift living standards. Some of the possible benefits of protection could include maintaining the reputation of products, securing premium prices for products, ensuring greater returns to local producers, offer niche marketing opportunities and could be a possible tool for protecting traditional knowledge.[25] On the other hand, for developing countries and LDCs, in particular, protection could also have significant disadvantages and challenges such as imposing restrictions on local producers from renaming, labelling, remarketing or rebranding. Protection also raises the spectre of legal challenges and in foreign markets could be used as a trade barrier. There are also significant costs in administering the protection system.[26] In the specific case of Pacific countries only an empirical study can help them make a determination of whether the advantages outweigh the disadvantages and *vice-versa.*

Overall, since negotiations on geographical indications in the EPAs should be predicated on identification of products of interest to the Parties another task

for the Pacific is to identify their products of interest, if any, and to consider the market value (potential) as well as other challenges that may arise. The enormity of this task suggests that this process can not be completed in the six months that remain before the end of the EPA negotiations deadline. The EC has an elaborate and well-defined system for granting geographical indications and it is more obvious that its enterprises would benefit significantly from extended protection.[27]

4.2.4 Protection of Textile Designs

The fourth element proposed by the EC to be part of the EC-Pacific EPA relates to the protection of textile designs. The EC here suggests that the EPA should include provisions dealing with the protection of industrial designs including the treatment of textile designs. With respect to textile designs in particular, the EC proposes that the implementation of Article 25.2 of the TRIPS Agreement would suffice. Article 25.2 of TRIPS , which falls under the heading of industrial designs, provides that:

> "Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law."

The provision was largely intended to afford rapid and cheap protection for textile designs as opposed to procedures for the protection of other industrial designs. This procedure would permit people in developing countries and LDCs to be able to protect their textile designs more easily. For that reason the provision can bring benefits to Pacific countries. However, the possibility of benefits to Pacific countries under Article 25.2 can not provide a justification for entering into binding obligations under the EPA. This is particularly so because while maintaining the TRIPS standard on textiles, the EC in other EPAs has proposed textual proposals that go beyond TRIPS in the conventional design areas where the EU would benefit most.

In the Non-Paper to the CARIFORUM, for example, the EC sought to impose approaches in its Design Regulation on CARIFORUM countries through the EPA.[28] In the CARIFORUM text the EC proposes a combined registration and copyright system, with unregistered designs protected for three years. The EC also proposed to introduce a requirement to adhere to the Hague Agreement.[29] Consequently, while the protection of textile designs has the potential to benefit Pacific countries new EPA obligations on areas of interest to the EC while maintaining the TRIPS standard for textile does not make sense.

4.2.5 Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and Public Health

The relationship between the TRIPS Agreement and the CBD has been an issue on the agenda of the Council for TRIPS for a long time. Developing countries have been the main demandeurs and they have essentially sought to introduce a mandatory disclosure requirement with respect to genetic resources and associated traditional knowledge used in inventions. The latest proposal[30] which is now supported by a large majority of developing countries in WTO proposes that:

> "Where the subject matter of a patent application concerns, is derived from or developed with biological resources and/or associated traditional knowledge, Members shall require applicants to disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin. Members shall also require that applicants provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge."[31]

Negotiations are on-going on this proposal in the context of the Doha Round.

On this subject, the EC's Non-Paper proposes that in accordance with Article 46.2 of the Cotonou Agreement consideration should be given to referring to the need of implementing TRIPS in line with the CBD. In the context of the aim and objective of developing countries and LDCs in the WTO in the context of the amendment proposal above, including a provision in the EPA simply saying that the TRIPS Agreement should be implemented in line with the CBD would add little, if anything. In the EC's proposal to the CARIFORUM the textual proposal proposed simply said that "the patent provisions of the Title and the Convention on Biological Diversity shall be implemented in a mutually supportive way." Since both the EC and the Pacific countries by virtue of Article 46.2 agree to adhere to both treaties it is implicit that they would have to implement the treaties in a mutually supportive way as they would do with any other treaties.

On the other hand, such language could be used by the EU to argue that since it has recognised the concerns of the Pacific countries, these countries also have to recognise its interests particularly on geographical indications and enforcement. In other words, it appears that the EC has placed this element into the Non-Paper essentially as a bargaining chip with no intention to move anywhere closer to what developing countries and LDCs are seeking on the subject.

With regard to Public Health, the EC proposes in the Non-Paper that the EPA integrates the principles of the Doha Declaration on TRIPS and Public Health[32]

and the relevant WTO Decisions reached with regard to compulsory licensing of pharmaceuticals for countries with no or insufficient manufacturing capacities. In the textual proposals in other regions, the EC has proposed to implement this element by recognising the importance of the Doha Declaration and agreeing to take steps to implement the WTO General Council Decision of 30 August 2003 on paragraph 6 of the Doha Declaration[33] and to accept the Protocol, done in Geneva on 6 December 2005, amending the TRIPS Agreement[34].

As in the case of the relationship between the TRIPS Agreement and the CBD, there is very little a provision such as that proposed by the EC would add to existing international obligations and objectives. The only value that could be added for Pacific countries with respect to the Doha Declaration and related decisions is if the EC agreed to provide the benefits under the 30 August 2003 Decision to all Pacific countries irrespective of their membership of WTO[35]. It should be noted, however, that the Agreement of the EC to extent the benefits of the Decision to all Pacific countries should not be a basis for the EC to claim reciprocity *vis-à-vis* its interests on IP.

4.2.6 IPRs and Genetic Resources, Traditional Knowledge and Folklore

Pacific countries, as in the case of many other developing countries and as noted in section IV.2.5 above, have specific interests in the protection of genetic resources, traditional knowledge and folklore. Indeed, the Pacific countries have already taken steps to implement a regime for such protection through the promulgation of a regional model law. At the same time, there are a range of international negotiations and discussions on these issues notably those taking place at the WTO, in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at WIPO[36] and in the CBD. Though progress has been made in all the three forums, the outcomes remain uncertain. The EPA could therefore offer an opportunity to address some of the Pacific countries concerns.

On this subject, the EC Non-Paper however only proposes to encourage the preservation and promotion of genetic resources, traditional knowledge and folklore, without prejudice to the current relevant multilateral discussions. All these objectives are foreseen in the CBD to which all the Pacific Countries and the EC are party. The value-addition of a provision addressing these issues is difficult to see. This is particularly so because when it comes to the crucial issue of positive protection of traditional knowledge and folklore especially the development of an international instrument, the EC takes refuge in the Cotonou Agreement Article 46.1 caveat that the EPA should not prejudice the position of parties in multilateral negotiations. In the CARIFORUM text, for example, the EC suggested to implement a similar element by providing that "The Parties agree to regularly exchange views and information on their position with view to multilateral discussions, without prejudging the outcome."

Consequently, the proposed element if implemented as proposed by the EC in other regions would add no value and offer no benefit to Pacific countries.

4.2.7 Plant Variety Protection

With respect to plant variety protection (PVP) the EC proposes that the EC-Pacific EPA should refer to the protection of PVP accordance with Article 27.3(b). In implementing the TRIPS requirement that "Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof" it is suggested that the Parties to the EPA should consider accession to the International Convention for the Protection of New Varieties of Plants (UPOV). This is a milder demand from the EC than, for example, the demand on the CARIFORUM countries where the EC demanded mandatory compliance with UPOV 91.

Since the adoption of the TRIPS Agreement, an increasing number of developing countries have been adopting PVP legislation. A significant number of the countries that have introduced PVP legislations have based their legislations on one or the other version of UPOV. UPOV requires that for a variety[37] to be protectable it must be distinct, sufficiently homogenous (uniform) and stable.[38] The purpose of UPOV Convention is therefore to recognise and to ensure that breeders of a new plant variety receive exclusive rights.

Just slightly over 20 developing countries are members of UPOV out of a total of 64 countries as at 16 June 2007. While the EC is a Member of UPOV and has implemented plant variety protection through Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, none of the Pacific countries are members of UPOV.

A recent study by Louwaars *et al*[39] sheds some light on what is happening in developing countries with respect to PVP. The study, which was aimed at describing and evaluating the initial experience with strengthened IPRs for developing country agriculture focuses on five case studies of countries namely, China, Colombia, India, Kenya and Uganda. Though the study concludes that it is too early to make any general conclusions about the impact of PVP in developing countries, it finds, among other things that overall there is inconclusive evidence as to the effects of PVP both in developed and developing countries.[40] So, for example, United States studies indicate that while private sector breeding in a number of non-hybrid crops has increased following the PVP Act of 1970 for most crops it appears that PVP has played only a moderate role in stimulating breeding activity. For Pacific countries which have no developed systems, it is difficult to see why they should take on more onerous obligations than required under the TRIPS Agreement. Unless, there is more

compelling evidence there seems to be no basis to ask the Pacific countries to consider adherence to UPOV 91 which is TRIPS-plus.

4.2.8 Enforcement

On enforcement, the EC proposes the introduction of:

> "improved mechanisms in the area of IPR enforcement, such as extension of enforcement to other IP rights than copyright and trademarks, and in particular with regard to pharmaceutical products; the right of representation for rights management or other representatives; presumption of copyright ownership; the obligation to provide border measures for exports or goods in transit etc".

Article 46 of the Cotonou Agreement does not use the term enforcement even once. Consequently, while the need for adequate and effective level of protection of IP also implies adequate and effective enforcement mechanisms it is clear that Article 46 of the Cotonou Agreement does not require the inclusion of additional enforcement mechanisms in the EPA. The introduction of enforcement measures, particularly TRIPS–plus enforcement measures must therefore be clearly justified by the EC based on other grounds and not Article 46. Evidence demonstrating the inadequacy of TRIPS provisions and that Pacific countries, taking into account their levels of development, could sustain such additional mechanisms is necessary.

It is well established that a key plank of the strategy behind the introduction of IP in the Uruguay Round of Multilateral Trade Negotiations resulting into the TRIPS Agreement was to ratchet-up enforcement of IPRs particularly in developing countries. Consequently, in addition to the application of the of the WTO dispute settlement system to IP disputes between WTO Members, detailed requirements regarding enforcement of IP at the national level were inserted into the TRIPS Agreement. The whole of Part III of the Agreement, containing 21 articles out of the Agreement's 72 Articles, relates to enforcement.

Notwithstanding the massive ratcheting-up of the enforcement requirements for developing countries and LDCs and the efforts that have already been put into implementing the TRIPS enforcement provisions as well as understanding on enforcement under the Agreement, we are seeing a growing campaign by developed countries, through the G-8, the Organization for Economic Cooperation and Development (OECD), WIPO, the World Customs Union (WCU), INTERPOL as well as in the WTO, to increase IPRs enforcement in developing countries and LDCs. At the same time, through free trade Agreements (FTAs) and now the EPAs new and additional standards of IP enforcement are sought. In this context, the EU *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, which informs the EC's position in the EPA negotiations, makes it clear that the EU would revisit its approach IPR in bilateral agreements

with a view to *inter alia* strengthening enforcement clauses.[41] However, as noted, revisiting was never agreed under the Cotonou Agreement and is therefore a unilateral aspiration and goal of the EU alone.

The campaign and greater focus on IPR enforcement by the EC in EPAs as well as the United States in the context of FTAs and Special 301 Report[42] are predictable reactions in a dynamic global economy. The WTO TRIPS framework as well as the FTAs and EPAs are all built a round a static view of comparative advantage. The implication is that each country will seek rules that lock in its comparative advantage in perpetuity. Where countries feel that their trading partners, while retaining their comparative advantage, say in agriculture or commodities, but are also gaining advantage in other sectors, in this case higher technology goods and services, one defensive strategy is to ratchet-up enforcement of the lock-in rules or to create new rules to maintain the lock-in. Consequently, in the context of IPRs, the sense in the EU and the United States as well as other OECD countries that certain emerging economies (Brazil, Russia, India, China and South Africa – the so-called BRICS, among others) are catching up in various technological sectors and hence gaining export advantage in knowledge embedded goods and services, is a major factor in the various initiatives directed at IPRs enforcement.[43] This context is important in considering the EC Non-Paper on enforcement.

The EU'S formal IPR enforcement framework is contained in the Intellectual Property Enforcement Directive (IPRED1) which only covers civil and administrative procedures. Upon approval by the EU Council, IPRED2 will add to this framework criminal procedures and penalties. The two directives, however, are only intended to address IPR enforcement within the EU internal market.[44] With respect to IPR enforcement in third countries, the European Commission has elaborated a specific strategy.[45] These three sets of documents provide the basis for the EU IPR enforcement proposals in the EPAs.

The objective of IPRED1 is to approximate legislative systems within the EU Members States so as to ensure "a high, equivalent and homogenous level of protection" for IPRs in the internal market.[46] The scope of the Directive, as noted, however, excludes criminal procedures and penalties which until the adoption of IPRED2 are only governed by the provisions of the TRIPS Agreement.

In terms of the substance, IPRED2 seeks to define the offences relating to IPR infringement and also provides for, among other issues, penalties including custodial sentences, fines, confistication, destruction of goods, temporary or permanent closure, permanent or temporary ban on engaging in commercial activities, judicial supervisions, a ban on access to public assistance or subsidies and publication of judicial proceedings. It is also foreseen that in the implementation of IPRED2, the Framework Decision of 13 June 2002 regarding joint investigation where right holders assist in investigations would apply.[47]

On the other hand, the EU Enforcement Strategy in Third Countries seeks to: provide a long-term line of action by the Commission with the goal of achieving a significant reduction in IPR violations in third countries; to describe, prioritise and co-ordinate the mechanisms available to the Commission for achieving the said goal; and to inform right holders and other concerned entities the means and actions available and to be implemented and to raise awareness on the importance of participation. The Strategy document, however, provides that the enforcement strategy is not intended to impose unilateral solutions or to propose one-size-fits-all approach in promoting IPR enforcement or to copy other models of IPR enforcement or to create alliances against certain countries. The goals of the Strategy and what it is not intended for are therefore clearly set out.

The EC's intentions with respect to enforcement can be gleaned from the textual proposals presented to Economic Community of West African States (ECOWAS) group in April 2007. The provisions on enforcement in the draft EPA text for ECOWAS countries are substantially TRIPS-plus. To a large measure the provisions directly mirror and in some cases, are cut and paste versions of IPRED1 provisions.[48] IPRED1 constitutes the EU's exercise of its right to determine the appropriate method of implementing the TRIPS enforcement provisions and to achieve its own other goals. IPRED1, as noted, was also specifically aimed at addressing the issues in the context of the EU internal market, taking into account the circumstances and legal practices of EU Member States. If the EC intentions are to impose the IPRED1 approach on Pacific countries as it proposed for ECOWAS countries the resulting EPA provisions on enforcement would fundamentally deny Pacific 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 and knowledge diffusion.

Judging from the ECOWAS text and in light of the areas proposed to be covered on enforcement under the EPA with Pacific countries, the direction taken by the EC on enforcement would result into range specific problems and challenges for Pacific countries.[49] The approach, as shown, is even contrary to EU's own stated position in its strategy on enforcement in third countries.

5. CONCLUSION

Article 46 of the Cotonou Agreement does not require detailed substantive provisions including on enforcement and cooperation as suggested by the EC. At best the only question that needs to be addressed in the EC-Pacific EPA is whether and how the Pacific countries that are not Members of the WTO would meet the requirement of Article 46.2 to adhere to the TRIPS Agreement. Considering the level of development of these countries and the time left to the deadline for negotiations, at most the non- WTO Members would commit to working towards joining the WTO, taking into account accession procedures and other challenges.

While there are a number of areas such as protection of traditional knowledge and folklore in which Pacific countries have a positive interest, the proposed elements on these issues add no value. Going by the textual proposals on these issues in other regions, it is unlikely that Pacific countries could get positive commitments from the EC on these issues. Overall therefore, the combination of the time-factor (six months), the TRIPS-plus implications of many of the elements suggested by the EC in the Non-Paper, the challenges that would face the non-WTO Pacific countries to even adhere to TRIPS and the general level of development in these countries, it is strongly recommended that Pacific countries do not agree to the inclusion of an IP section in the EC-Pacific EPA.

REFERENCES

[1] The 14 Pacific countries are Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Republic of Marshall Islands, Nauru, Niue, Palau, Papua New Guinea (PNG), Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. For more information about the countries and the region see the Pacific Forum Secretariat website at http://www.forumsec.org/pages.cfm/about-us.

[2] The Master Agreement endorsed by the Ministers in 2005 as the basis for the EPA negotiations did not include IP issues and only contemplated four subsidiary agreements in the areas of trade in goods, trade in services, including tourism and mode 4, investment and financial services and fisheries.

[3] Enforcement provisions make up about 30% of the provisions of the TRIPS Agreement.

[4] See e.g., Chang, Ha-Joon**,** (2002) *Kicking Away the Ladder – Development Strategy in Historical Perspective,* Anthem Press, London; and Dutfield, Graham and Uma Suthersanen (2005) "Harmonisation or Differentiation in Intellectual Property Protection? Lessons from History" *QUNO Occasional Paper 15,* QUNO, Geneva.

[5] See e.g., the literature available on www.iprsonline.org.

[6] For a discussion on the changing dynamics and possible future scenarios especially in the area of patents see European Patent Office (2006), *Scenarios for the Future – How might IP regimes evolve by 2025? What global legitimacy might such regimes have?* EPO, Munich.

[7] The fifth paragraph, Article 46.5 however, only contains a definition of IPRs.

[8] The EU on its part could be required to assist these countries in gaining accession to the WTO under favourable terms.

[9] Information on the CBD including the Parties to the Convention is available at http://www.cbd.int/default.shtml.

[10] For the membership of various WIPO conventions see the WIPO website at http://www.wipo.int/treaties/en/.

[11] For additional general discussions on IP in EPAs see e.g., South Centre (2007) "Development and Intellectual Property under EPA Negotiations", *Policy Brief 6,* South Centre, Geneva.

[12] For information on what the Pacific Plan is and the key issues see http://www.forumsec.org/pages.cfm/about-us/the-pacific-plan/.

[13] For States Parties to the WCT and WPPT see the WIPO website at http://www.wipo.int/treaties/en/.

[14] For an analysis of these treaties from a development perspective see e.g., Okediji, Ruth (2004) "Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce", *Issue Paper 9,* ICTSD and UNCTAD, Geneva.

[15] See the paper prepared by the International Bureau of WIPO titled "Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)" available at http://www.wipo.int/export/sites/www/copyright/es/activities/wct_wppt/pdf/advantages_wct_wppt.pdf.

[16] Fink, Carsten and Maskus, Keith, Eds, (2005) *Intellectual Property and Development: Lessons from Recent Economic Research,* World Bank and Oxford University Press, Washington D.C. At p.13, for example, they conclude that "Although the existing economic literature on IPRs provides some useful guidance to policymakers in developing countries, there is still a lot we do not know".

[17] Okediji, *supra* note 14, pp. 2 -3.

[18] For a summarised explanation of what some of the problems TPMs may be, see e.g., Gwen Hinze at http://www.cptech.org/ip/ftaa/hinze11182003.pdf.

[19] Directive 96/9 of the EU Parliament and Council of 11 March 1996. The Directive concerns the protection of databases in any form. Under Article 1, a database is defined as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

[20] See Article 7.4 of the Directive.

[21] Commission of the European Communities (2005) "First Evaluation of Directive 96/9/EC on the Legal Protection of Databases" DG Internal Market and Services Working Paper, Commission of the European Communities, Brussels, p. 24.
[22] *Id,* p. 25.
[23] None of the Pacific countries are party to the Madrid Protocol.
[24] Article 23 of the TRIPS Agreement provides for additional protection for geographical indications for wines and spirits which is more extensive than the general protection under Article 22.
[25] See e.g., the presentation of Catherine Grant at the ICTSD, ENDA AND QUNO Regional Dialogue on European Economic Partnership Agreements (EPAs), Intellectual Property and Sustainable Development for Ecowas Countries, 30-31 May 2007, Saly-Senegal. Available at http://www.iprsonline.org.
[26] For a detailed discussion of the socio-economics of geographical indications see e.g., Ragnekar, Dwijen (2004) "The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe", *Issue Paper 8,* ICTSD and UNCTAD, Geneva.
[27] The EU geographical indications regime is contained in Council Regulation (EEC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.
[28] The EC design regime is governed by the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs and the Council Regulation (EC) No 6/2002 of 12 December 2002 on community designs.
[29] The Hague Agreement, which is a WIPO administered treaty, creates an international system for the registration of industrial designs. It facilitates the registration of designs in countries Party to the Agreement through a single filing at WIPO. As at June 2007 it had 47 signatories. None of the Pacific countries are Parties to the Agreement.
[30] See WTO documents WT/GC/W/564/Rev.2, TN/C/W/41/Rev.2, IP/C/W/474, 5 July 2006 IP/
[31] Para 2 of the proposal, *id.* In terms of enforceability, Para 5 of the proposal provides that:

> "Members shall put in place effective enforcement procedures so as to ensure compliance with the obligations set out in paragraphs 2 and 3 of this Article. In particular, Members shall ensure that administrative and/or judicial authorities have the authority to prevent the further processing of an application or the grant of a patent and to revoke, subject to the provisions of Article 32 of this Agreement, or render unenforceable a patent when the applicant has, knowingly or with reasonable grounds to know, failed to comply with the obligations in paragraphs 2 and 3 of this Article or provided false or fraudulent information."

[32] WTO document WT/MIN(01)/DEC/2, 20 November 2001.
[33] WTO document WT/L/540, 1 September 2003
[34] WTO document WT/L/641, 8 December 2005.
[35] For a discussion of the Decision as well as other related issues see e.g., Musungu, Sisule F. and Cecilia Oh (2006) *The Use of Flexibilities in TRIPS by Developing Countries: Can they Promote Access to Medicines?* South Centre and WHO, Geneva.
[36] See WIPO webpage at http://www.wipo.int/tk/en/ .
[37] Under UPOV 1991 Article 2 a variety is defined to apply to any cultivar, clone, line or hybrid which is capable of cultivation and which satisfies the eligibility criteria.
[38] See article 6 of UPOV 1991.
[39] Louwaars, N.P., Tripp, R., Eaton, D., Henson-Apollonio, V., Hu, R., Mendoza, M., Muhhuku, F., Pal, S., and J. Wekundah (2005) *Impacts of Strengthened Intellectual Property Rights Regime on the Plant Breeding Industry in Developing Countries – A Synthesis of Five Case Studies,* Wegeningen UR, Wegeningen. For additional discussion on the TRIPS obligations see also Dhar, Biswajit (2002) "Sui Generis Systems for Plant Variety Protection: Options under TRIPS", a Discussion Paper, QUNO, Geneva and Tansey, Geoff., (2002) " Food Security, Biotechnology and Intellectual Property: Unpacking some Issues around TRIPS", QUNO, Geneva.
[40] *Id*, p. 39.

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

[42] "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 IPRs or that deny fair and equitable market access for US persons who rely on IPRs. 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.

[43] For an insightful discussion of the changing balance of power and possible future scenarios in the world of IP see European Patent Office (2007), *Scenarios for the Future – How might IP regimes evolve by 2025? What global legitimacy might such regimes have?* EPO, Munich.

[44] Nevertheless, in the context of EPAs and elsewhere, these Directives are having important extra-territorial application when transposed into bilateral agreements as will be discussed below.

[45] *Supra* note 41.

[46] See Recital 10 read together with Article 1.

[47] See EU *Official Journal L 162, 20.6.2002.*

[48] See e.g., Article 13 of the draft text. Except for the addition of the phrase 'without prejudice to the TRIPS Agreement', the text mirrors Article 3 of IPTRED1.

[49] For a detailed discussion of these problems and challenges see e.g., Musungu, Sisule (2007) "Developing a Positive Agenda on Enforcement Provisions of EPAs", a think-piece presented at the ICTSD, ENDA AND QUNO Regional Dialogue on European Economic Partnership Agreements (EPAs), Intellectual Property and Sustainable Development for Ecowas Countries, 30-31 May 2007, Saly-Senegal. Available at http://www.iprsonline.org.