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Intellectual Property Provisions in European Union Trade Agreements

Implications for Developing Countries

By Maximiliano Santa Cruz S.
Counsellor, Permanent Mission of Chile to the WTO

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ABBREVIATIONS AND ACRONYMS

ACP:	African, Caribbean and Pacific Group of States[1]
ASEAN:	Association of Southeast Asian Nations[2]
CARIFORUM:	Caribbean Forum of African Caribbean and Pacific States[3]
CBD:	Convention on Biological Diversity[4]
CEMAC:	Communauté Economique et Monétaire de l'Afrique Centrale[5]
EFTA:	European Free Trade Association[6]
EC:	European Community[7]
ECOWAS:	Economic Community of West African States[8]
EEA:	European Economic Area[9]
EPC:	European patent Convention
ESA:	Eastern and Southern Africa countries
EPO:	European Patent Office[10]
EU:	European Union[11]
FAO :	Food and Agriculture Organisation of the United Nations[12]
GCC:	Gulf Cooperation Council[13]
GI:	Geographical indications
IGC:	Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP:	Intellectual property
IPR:	Intellectual property rights
JPO:	Japan Patent Office[14]
LDCs:	Least Developed Countries
MERCOSUR:	Southern Common Market or Mercado Común del Sur[15]
MFN:	Most Favoured Nation
PCT:	Patent Cooperation Treaty[16]
PLT:	Patent Law Treaty
Rome Convention:	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
SADC:	Southern African Development Community[17]
SCP:	Standing Committee on the Law of Patents[18]
SPLT:	Substantive Patent Law Treaty
TCE:	Traditional Cultural Expressions
TE:	Traditional Expressions
TK:	Traditional Knowledge
TLT:	Trademark Law Treaty
TPM:	Technological Protection Measures
TRIPS:	WTO Agreement on Trade-Related aspects of Intellectual Property Rights[19]
UDRP:	Uniform Domain Name Dispute Resolution Policy[20]
UPOV:	International Union for the Protection of New Varieties of Plants[21]
USPTO:	United States Patent and Trademark Office[22]
WIPO:	World Intellectual Property Organisation[23]
WCT:	WIPO Copyright Treaty
WPPT:	WIPO Performances and Phonograms Treaty
WTO:	World Trade Organization[24]

FOREWORD

Intellectual Property Provisions in European Union Trade Agreements and Implications for Developing Countries addresses the scope, content and potential impact of proposed intellectual property (IP) provisions in Economic Partnership Agreements (EPAs) with the European Union (EU).

The EPA negotiations offer an important opportunity for consolidating and expanding market access in African, Caribbean and Pacific (ACP) countries and can lock-in or improve domestic market reforms. However, one aspect of the EPAs that has generated deep concern among various stakeholders is the potential impact of TRIPS-plus provisions on the use of flexibilities and exceptions that have been designed to safeguard certain public interests and development objectives. In this regard, EPAs raise many negotiating and implementation challenges regarding policy coherence and the maintenance of flexibilities in such agreements, as well as in improving predictability in the IP field.

This study is one further contribution of the ICTSD Programme on Intellectual Property Rights (IPRs) and Sustainable Development to a better understanding of the proper role of intellectual property in a knowledge-based economy. The objective of the study is to generate and expand understanding of the policy of the EU regarding IPRs in bilateral and regional trade agreements. Additionally, it attempts to evaluate the impact of IP provisions proposed by the EU at a critical phase of EPA negotiations.

The premise of ICTSD's work in this field, together with its joint project with UNCTAD, is based on the understanding that IPRs have never been more economically and politically important – or controversial – than they are today. Patents, copyrights, trademarks, industrial designs, integrated circuits and geographical indications are frequently mentioned in discussions and debates on such diverse topics as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, and the entertainment and media industries. In a knowledge-based economy, there is no doubt that a better understanding of IPRs is indispensable to informed policy making in all areas of development.

Empirical evidence on the role of intellectual property protection in promoting innovation and growth remains inconclusive. Diverging views also persist on the impacts of IPRs on development prospects. Some point out that, in a modern economy, the minimum standards laid down in TRIPS will bring benefits to developing countries by creating the incentive structure necessary for knowledge generation and diffusion, technology transfer and private investment flows. Others stress that intellectual property, especially some of its elements, such as the patenting regime, will adversely affect the pursuit of sustainable development strategies by: raising the prices of essential drugs to levels that are too high for the poor to afford; limiting the availability of educational materials for developing country school and university students; legitimising the piracy of traditional knowledge; and undermining the self-reliance of resource-poor farmers.

It is urgent, therefore, to ask the question: how can developing countries use IP tools to advance their development strategy? What are the key concerns surrounding the issues of IPR for developing countries? What are the specific difficulties they face in intellectual property negotiations? Is IP directly relevant to sustainable development and to the achievement of agreed international development goals? How we can facilitate technological flows among all countries? Do they have the capacity, especially the least developed among them, to formulate their negotiating positions and become well-informed negotiating partners? These are essential questions that policy makers need to address in order to design IPR laws and policies that best meet the needs of their people and negotiate effectively in future agreements.

To address some of these questions, the ICTSD Programme on Intellectual Property and Sustainable Development was launched in July 2000. One central objective has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries – including decision makers, negotiators but also the private sector and civil society – who will be able to define their own sustainable human development objectives in the field of IPRs and effectively advance them at the national and international levels.

We hope you will find this study a useful contribution to the debate on IP and sustainable development and particularly in responding to the need for increased awareness about the new trends and potential implications of proposed IP provisions in EPAs. In addition, it seeks to identify offensive and defensive issues in the negotiations and analyse potential implications of new IP obligations for ACP countries.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

The European Union (EU) is one of the leading blocs in the world economy and international trade. Together with being a key bloc in world economic affairs, the EU is also one of the major players in forging the international intellectual property (IP) scene. The EU has a long tradition of negotiating trade agreements, many of which include IP provisions. However, in recent years it has lost ground to other developed countries. Whilst the EU has concluded very few negotiations recently, it has seen considerable activity in past years, both in negotiating a few specific trade agreements and in continuing the process of EU *enlargement*, including harmonisation in different areas of trade. Furthermore the EU has recently announced that it will engage in new negotiations of Association Agreements, giving preference for negotiations with regional blocs instead of specific countries. Such is the case of negotiations with countries from the African, Caribbean and Pacific (ACP) group of countries, the Andean Community, the Association of Southeast Asian Nations (ASEAN) group and Central America.

The EU shares common interests and collaborates closely with other developed countries and blocs, such as the European Free Trade Association (EFTA), Japan and the US. One of the closest areas of cooperation between developed countries is in the area of IP enforcement, including a strong, joint and international anti-piracy and anti-counterfeiting campaign led by the EU and the US. Indeed, enforcement has been one of the priority areas for the EU, not only internally but also internationally. The joint campaign establishes cooperation in customs and border controls, joint actions in third countries, coordination on enforcement issues in multilateral venues, and public-private partnerships on enforcement.

A second priority area for the EU in past years has been the protection of geographical indications (GIs). This issue has been heralded by the EU on various fronts, including its incorporation in bilateral trade agreements and in specific agreements on trade in wines and spirits. To a lesser extent, copyright has also been an issue of interest for the EU.

Intellectual property rights (IPRs) are a very important factor in the EU's overall growth strategy. It considers IP to be a powerful incentive for innovation. Indeed, innovation was recognized as the key to the success of this growth strategy, which is commonly referred to as the Lisbon Strategy or Lisbon Agenda. The European Commission, together with the European Council and the European Parliament, is the body in charge both of preparing harmonisation legislation in the IP field and of negotiating international trade agreements, including provisions on intellectual property.

The context in which the EU negotiates the trade agreements with IP components varies substantially, as they may be part of very different political and commercial processes. But despite the differences in circumstances, the complexity and sophistication of the respective IP provisions in the various types of agreements do not vary substantially from one agreement to the other. Indeed, the IP chapters in the existing agreements are quite homogeneous, with relatively small variations between them. With very few exceptions, the provisions of the EU agreements do not incorporate substantive provisions. Instead, they are essentially built on commitments to adhere to the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and to multilateral agreements negotiated in the framework of the World Intellectual Property Organisation (WIPO).

This "simple" structure of the EU's current IP chapters contrasts with the more aggressive approach adopted by other developed countries, such as the US, in negotiating chapters that include substantial provisions on types of protection not included in TRIPS in addition to most of those that are.

Until now, an aspect of the EU's bilateral negotiations, besides the IP chapters, has been the negotiation of specific agreements on protection of GIs for wines and spirits. In the future the EU might seek bilateral recognition and protection of GIs for other types of products, mainly agricultural products and foodstuffs.

The EU is currently involved in negotiations with, among others, six regions within the group of ACP countries. An EU proposal to one of these sub-groupings, the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM), surfaced at the end of 2006 and included comprehensive IP provisions. Notably, this proposal departs from the IP chapters that have been seen in almost 30 existing EU agreements. The EU has moved from the former model described above, of essentially seeking accession of its trade partners to multilateral IP conventions, to negotiating far more elaborate chapters on intellectual property.

The proposal made to CARIFORUM is very elaborate, providing for disciplines in various IP categories and going beyond TRIPS in various aspects.

INTRODUCTION

This paper attempts to describe the European Union's (EU)[25] policy regarding intellectual property rights (IPRs) in past bilateral trade agreements and how we may be witnessing a turning point in its approach. Until recently, the EU followed a consistent policy of mainly pursuing the accession to multilateral intellectual property (IP) treaties by its trade partners, but its latest proposal in bilateral negotiations shows that this policy has been re-examined. The EU's latest proposal on IP in bilateral negotiations consists of detailed provisions on almost every issue covered by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Actually, many of these provisions go beyond the minimum standards of TRIPS. A clear indication of this shift in policy had already been included in the EU's *Strategy to enforce Intellectual Property Rights in third countries* of 2004, in which one of the suggested actions was to "revisit the approach to the IPR chapters of bilateral agreements, including the clarification and strengthening of the enforcement clauses".[26]

The first section of the paper describes the importance of the EU in world trade, focusing on its role in the international IP landscape. As we will see, the EU is one of the most relevant actors in defining the global IP agenda, and this issue ranks high both within the internal and international priorities of the EU. Internally, the EU has pursued a clear policy of harmonisation of the most diverse aspects of IPRs, ranging from issues as diverse as biotechnological inventions and protection of computer programs to extensive legislation in the area of enforcement. For instance, it has achieved an important degree of sophistication in the areas of trademarks and industrial designs, with the introduction, respectively, of a Community Trademark and a Community Design. Other areas of IP harmonisation, such as the Community Patent and the patentability of computer-implemented inventions, have seen less success, although to a certain extent there is a reasonable level of centralisation in the field of patents with the European Patent Convention (EPC). Internationally, the EU has advanced its position in important subjects, such as the enforcement of IPRs and the protection of geographical indications (GIs). As we will see, the EU coincides with other developed countries on many issues, adopting coordinated positions in international fora and in bilateral relations. Enforcement is one such area where strong coordination between developed countries occurs.

The second section describes the approach followed until now by the EU in its existing bilateral agreements. The first part will deal with the intellectual property chapters included in more than 30 agreements negotiated by the EU in the past decades. We will corroborate that nearly all of them follow the same pattern, in seeking the accession of the other parties to multilateral IP agreements. The second part will describe what has been one of the most important issues for the EU internationally during the past years: the protection of GIs, in the form of bilateral agreements on wines and spirits.

The third section analyses the EU's most recent proposal in current bilateral negotiations, the one made to the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM). The main feature of this section is the departure by the EU, after so many years, from what was a very simple approximation to IP chapters that mainly required accession to existing international agreements, to the incorporation of substantive provisions in most areas of IP, including the predominant field of enforcement.

Finally, we will attempt to determine possible implications for developing countries and draw some conclusions.

1. THE EUROPEAN UNION AND INTELLECTUAL PROPERTY

1.1 The Role and Participation of the EU in World Trade

The EU, originally formed by only six members, today comprises 27 member states after the latest accessions of Bulgaria and Romania in January 2007. It is one of the leading blocs in the world economy and international trade. The EU is the "world's leading trader, accounting for 18% of world merchandise trade in 2004" and "it was the largest merchandise exporter and second largest importer, with extra-EC exports and imports of €969 billion and €1,032 billion, respectively". It is also "the world's leading exporter and importer of commercial services," and, in terms of investment, "the EC is the world's biggest recipient and supplier of foreign direct investment (FDI), accounting for around half of global FDI stocks (inward and outward)".[27]

Together with being a key bloc in world economic terms, the EU is also one of the major players in forging the international IP scene. The EPC countries (of which the EU countries are the main users) together with the US and Japan held close to 83% of existing patents in the world in 2004[28] and the EU and the US accounted for around 71% of the total number of Patent Cooperation Treaty (PCT) applications in 2002.[29] These three actors also hold a substantial share of existing copyrights, be it in the audiovisual, editorial, music or software industries.[30]

The EU has had a long tradition of negotiating trade agreements, many of which include IP provisions. However, in recent years it has lost ground to other developed countries, and mainly to the US. Before 2003, the US had concluded regional trade agreements with only a handful of countries, whereas the EU had already negotiated some type of trade agreement with countries in Africa, Asia, Latin America, and Europe. But since 2003, the US has concluded negotiations with close to ten countries and groups of countries[31] and has on-going negotiations with about eight other countries.[32] The EU, on the other hand, has concluded very few negotiations recently. Nevertheless, there has been activity in the EU in past years, both in the negotiation of a few specific trade agreements and in continuing the process of EU enlargement, including harmonisation in different areas of trade.[33] Furthermore the EU has recently announced that it will engage in new negotiations of Association Agreements.

Lately the EU has preferred to negotiate trade agreements with regional blocs rather than with specific countries. Ongoing negotiations with the Southern Common Market (Mercosur), the six nation Gulf Cooperation Council (GCC) and six regional groups within the ACP, and future negotiations with Central American countries, the Andean Community and the Association of Southeast Asian Nations (ASEAN)[34] are a clear indication of this preference.

1.2 The EU's Intellectual Property Relations with Other Major Players in World Trade

Regarding IP, the EU shares common interests and collaborates closely with other developed countries and blocs, such as the European Free Trade Association (EFTA),[35] Japan and the US. For instance, three members of EFTA – Iceland, Lichtenstein and Norway – participate in the EU's internal market, as members of the European Economic Area (EEA).[36] Through the EEA, these three EFTA states participate in the formulation of EU legislation covered by the EEA, which is later incorporated in their own national legislation. This includes legislation in all aspects of IP.

Except for Norway,[37] the other three EFTA members are also part of the European Patent Office (EPO),[38] which 26 of the 27 EU members are also party to. There is also convergence with

respect to the negotiation of trade agreements, as EFTA and the EU have often coincided on partners with whom to negotiate regional trade agreements.

The EU also holds strong ties with Japan and the US with respect to IP. The EPO, the Japan Patent Office (JPO), and the US Patent and Trademark Office (USPTO) are commonly known as the Trilateral Offices or Trilateral co-operation.[39] The Trilateral co-operation seeks, among other things, to deepen awareness of the benefits of the patent system and to harmonise practices of the three offices. More specifically, one of the Trilateral projects works to harmonise the definitions of prior art, novelty, inventive step, grace period and the principle of first to file versus first to invent.[40]

Indeed, a good example of the close coordination between these countries and offices is the joint proposal submitted to the Standing Committee on the Law of Patents (SCP) of the World Intellectual Property Organisation (WIPO) by the US, Japan and EPO in April 2004, which deals precisely with harmonisation of the above-mentioned issues.[41] Citing a sheer number of proposals in the negotiations, the complexity of the issues and the controversial nature of some of the provisions in the draft Substantive Patent Law Treaty (SPLT), the three co-sponsors proposed to first discuss and reach agreement on four issues (definition of prior art, grace period, novelty and non-obviousness/inventive step). They suggested that only after an agreement was reached on that reduced package could the SCP proceed to discuss other issues.[42] The proposal met the forceful opposition of developing countries, leading to the further stalemate of the SPLT negotiations.[43] Besides opposing the proposals on substantive grounds, developing countries questioned the fact that an international organisation (the EPO) had submitted the proposal, whereas only member states are allowed to make proposals to WIPO bodies and *ad-hoc* committees.[44]

Most importantly, the EU and the US are involved in a strong, joint and international anti-piracy and anti-counterfeiting crusade. As we will see, enforcement is one of the priority areas for the EU, not only internally but also internationally. Among the various initiatives the EU has taken is the joint *Action Strategy for the Enforcement of Intellectual Property Rights*[45], launched on June 2006 at the EU–US summit in Brussels. The Strategy establishes cooperation in customs and border controls, joint actions in third countries, coordination on enforcement issues in multilateral fora and public–private partnerships on enforcement.

Another example of the close relationship between the EU and the US is the Wine Agreement concluded on November 2005 (see Section 2.2 below).

But despite having strong ties of cooperation and having reached agreement in the areas of wine and enforcement, the relationship between the EU and the US has also had its disagreements on IP. This less bright side of their relations is reflected in the report issued by the EU on the US' trade measures[46] and on the US' Special 301 Report.

On the one hand, the EU complains that the US does not sufficiently recognise moral rights; that US producers use European GIs in their products; that there is no protection of GIs as such in the US; that the US does not comply with the WTO panel reports on intellectual property; and that the US insists on using the *first to invent* system for patents, refusing to follow the rest of the world's *first to file* system.

On the other hand, the US has advanced concerns over the way the EU has implemented the adverse recommendations and rulings of the WTO Dispute Settlement Body on GIs of April 2005. For this reason, the EU was placed on the Watch List of the US' Special 301 Report in 2006.[47] In addition, besides placing the EU as a whole on the Watch List, the US also listed specific EU members. For instance, Hungary, Italy and Poland are charged, basically, with growing (and, in Italy's case, "chronic") problems with copyright piracy on the internet;

a lack of adequate enforcement, including weak enforcement at the borders; deficiencies in the protection of undisclosed test and other data submitted by pharmaceutical companies to gain marketing approval for their products; and, lastly, a lack of coordination between health and patent authorities in preventing the market authorisation of generic products still under patent protection.

1.3 The EU's Intellectual Property Policy

1.3.1 Competence of the European Community in harmonisation of intellectual property

The competence of the European Community (EC)[48] to harmonise national laws in the field of IP issues derives from Article 295 and especially from Article 95 of the Treaty establishing the European Community (EC Treaty). These "provisions entitle(d) the Community, in order to achieve the objectives of the Treaty, to legislate in the field of intellectual property, in particular, the attainment of an internal market without frontiers".[49] The internal market is defined in the EC Treaty as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".[50]

The European Commission (the Commission),[51] a main institution of the EU, together with the European Council and the European Parliament, is the body in charge both of preparing harmonisation legislation in the field of IP and of negotiating international trade agreements, including on IP provisions.

The Treaty of Nice amended the Treaty on European Union (Maastricht Treaty) and the Treaty of Rome, the two major founding treaties of the EU. The main purpose of the Treaty of Nice was to settle a series of institutional issues to prepare for the enlargement of the EC by future applicant countries.[52] The Treaty of Nice also dealt with other issues, some of them concerning IP. Mainly, it gave competence to the Commission to negotiate and conclude agreements in the field of commercial aspects of IP.[53] It also gave competence to the Commission to negotiate agreements in non-commercial aspects of IP if "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament" so agreed.

Secondly, it allowed the Council (after consultation with other EU Institutions) to create judicial panels or chambers to hear and determine at first instance certain classes of action or proceedings brought in specific areas, including IP.[54] Although it has yet to happen, IP is seen by many as one of the specific areas where a judicial panel should be created.[55] To date, IP cases have been distributed between the five chambers of the Court of First Instance.

1.3.2 Internal priorities in intellectual property – areas of concern to the European Union

There is no doubt that IPRs are a very important factor in the EU's overall growth strategy, and that it considers IP to be a powerful incentive for innovation:

> "In 2000, European Heads of State established the strategic goal for the EU of becoming the most competitive and dynamic knowledge-based economy in the world by 2010. Innovation was recognised as the key to the success of this strategy, which today is commonly referred to as the Lisbon Strategy or Agenda".[56]

Among the key areas signalled by the European Commission in the implementation of the Lisbon Agenda is the extension and deepening of the internal market, including the creation of an "Internal Market in knowledge", stimulation of the demand side for "content" and the creation of a Community Patent System.[57]

It is not easy to ascertain the main areas of concern for the EU in IP matters. Its efforts towards harmonisation have led it to enact legislation in every area of IP, even going beyond

traditional categories of IP. It has enacted or at least explored legislation in areas not covered by international treaties, which are even unknown to most developing countries (e.g. protection of non-original databases or software patents).

Besides the general goals set by the Lisbon Agenda, the EU sets its specific priorities and policies, including those on IP, through the issuance of green[58] and white papers[59] (no white papers on IP have been issued to date). These papers can deal exclusively with IP matters (e.g. Green Paper on Combating Counterfeiting and Piracy in the Single Market[60]) or indirectly touch upon them (e.g. Green Paper on Public Sector Information in the Information Society[61] which considers copyrights in official texts). Green papers, which are discussion papers circulated by the Commission, may serve as a basis for further development of Community legislation.

The broad range of legislation on IP mentioned above is contained in secondary legislation, which can take the form of Directives, Regulations, Recommendations and Decisions.[62] There are well-known Directives on issues such as Copyright and Non-Original Databases, and Regulations on Geographical Indications, Community Trademark[63] and Community Design.[64] But there is also less well-known community legislation in other important areas, such as the legal protection of biotechnological inventions[65] and the management of online rights in musical works.[66]

An interesting question is whether the EU's IP legislation promulgated before the WTO's Agreements entered into force should be considered as IP treaties, or if the EC Treaty could itself be considered as an IP treaty. This is relevant for purposes of determining whether the EU should extend the rights contained therein to other WTO Members under the Most Favoured Treatment (MFN) obligations of the TRIPS Agreement.[67] It is worth noting that the EC notified the TRIPS Council, pursuant to Article 4(d) of TRIPS (exceptions to MFN),[68] of both the EC Treaty and the Agreement establishing the European Economic Area.[69]

1.3.3 Priorities in intellectual property: areas of concern to the EU in international negotiations

We have seen that internally a key area of interest for the Commission is the extension and deepening of the internal market, including the creation of an Internal Market in knowledge, and stimulation of the demand side for «content». A different task, though, is to ascertain the priorities the EU has displayed in its international negotiations and to speculate on whether these priorities will shift in future negotiations. As we will see in Section 3 below, this shift seems already to have been the case in recent EU proposals on IP.

In this respect, another central area for the Commission in achieving the goals of the Lisbon Strategy is to ensure open and competitive markets. To this end, the Commission points to the need for better respect and enforcement of IPRs in the international trading system. We will also see that the area of enforcement is fundamental to the EU's overall IP strategy.

Despite the EU having legislated on a great number of IP issues[70] and having attained a great degree of internal harmonisation, it has not demanded similar legislative sophistication of its trade partners. As we will see, with few exceptions, the EU's existing trade agreements basically limit themselves to seeking accession to multilateral IP treaties from its trade partners. The fact that the EU is formed by more than 20 states may impact the decision-making process on how to prioritise different interests. Since the end of 2006, however, this approach has been abandoned. The US, meanwhile, has incorporated in its recent agreements very detailed provisions that, for example, mirror almost entire provisions of its Copyright and Patent legislation.[71]

One of the main objectives of the EC Directorate General for Trade's IP policy is to reach the full implementation of TRIPS by each WTO Member, whilst respecting transitional periods.[72] Other objectives include:

- promoting adequate enforcement worldwide;
- "ensuring that IPRs are supportive to public health objectives, to innovation and to technology transfer";
- cooperating with developing countries in implementation and enforcement; and
- reaching specific goals in the WTO's Doha Round of trade negotiations.

1.3.3.1 Geographical indications

One of the EU's main priorities in international negotiations has been the protection of GIs. This interest is reflected at many levels.

First, the EU has enacted comprehensive legislation on the protection of GIs. While GIs are a type of IP relatively new to most developing countries, the EU, and especially European Mediterranean countries, has a long tradition of protecting GIs and Appellations of Origin. The EU enacted new legislation[73] on GIs immediately after the Dispute Settlement Body of the WTO adopted two panel reports in April 2005[74] which ruled that the EU's legislation on GIs for agricultural products and foodstuffs was inconsistent with national treatment obligations in TRIPS. As we have seen, concern about the impact that the new legislation would have on rights of trademark holders has led the US to place the EU on the Watch List of the 2006 Special 301 Report. The protection of GIs for wines is protected through different legislation.[75]

Second, EU countries were historically among the strongest demanders for the inclusion of, and most active participants in, discussion of GIs during the TRIPS negotiations of the Uruguay Round. Indeed, both the EC and Switzerland made extensive proposals on the protection of GIs, in contrast to much simpler proposals from the US and from a group of developing countries, which basically relied on trademark and unfair competition law respectively.

Third, the EU has been the most ambitious proponent of protection of GIs in the WTO before and during the Doha Round. Notwithstanding the in-built mandate to negotiate the establishment of a multilateral system of notification and registration for wines (and spirits) under TRIPS Article 23.4 (the Register), the EU has pushed for stronger protection of GIs on two other fronts in the WTO. In addition to its proposal for a Register with very strong legal effects,[76] even for countries that would choose not to participate in the system, the EU has proposed to extend the enhanced protection that TRIPS affords to wine and spirits to all kind of products[77] (the Extension). Finally, it submitted a proposal to the Agriculture Committee of the WTO to recoup exclusivity for certain terms of European origin that have long been used by countries of the so-called New World, such as Champagne, Chianti, Rioja, Feta, Parmigiano Reggiano and Roquefort (Clawback).[78]

As discussed in Section 2.2 below, the EU has sought stronger protection of GIs through bilateral trade agreements (by either including protection in comprehensive agreements or by negotiating specific agreements on trade in wine and spirits).

Finally, in the most recent EU proposals in bilateral negotiations, GIs constitute an important part of the overall proposals.

1.3.3.2 Enforcement

Enforcement is another area of fundamental interest to the EU both internally and internationally. Indeed, "tackling piracy and counterfeiting has been established as one of the priorities within the Commission's internal market strategy for 2003-06".[79] Indeed, in the recent past, the EU has taken numerous actions and initiatives destined to tackle IP infringements both inside the EU and abroad. It has recently issued legislation on border measures and enforcement, and is currently discussing new legislation on harmonisation of criminal measures. It has launched initiatives for enforcement in third countries and has also submitted proposals on enforcement in multilateral fora.

1.3.3.2.1 Internal initiatives – harmonisation

Internally, the efforts of the EU have been concentrated on harmonisation of Community legislation. In 2004 the EU enacted the EU Enforcement Directive (2004/48) with the purpose of correcting disparities between the systems of the EU member states "so as to ensure a high, equivalent and homogeneous level of protection in the internal market".[80] The Directive, which does not cover criminal sanctions, followed the issuance of the Green Paper on Combating Counterfeiting and Piracy in the Single Market mentioned above (Section 1.3.2) and an Action Plan in 2000. It applies to all type of IP, but because the scope of rights covered by the Directive may have been unclear, the Commission issued a statement clarifying that the Directive covers a non-exhaustive list of IPRs.[81]

The EU has expressed its willingness to use the Directive as a source of inspiration to "revisit the approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses".[82] As we will see, many of the provisions of the Directive have been included in the EU's most recent FTA proposal.

The Directive[83] goes beyond the TRIPS enforcement provisions in several respects, including: the extension of presumption of authorship detailed in the Berne Convention[84] (benefiting authors) to related rights-holders; the extension of the right of information to aspects not covered by TRIPS, such as identification of distribution networks of infringing goods and quantities and prices of goods; that members may take measures to protect witnesses' identity; details of the grounds on which to adopt measures *inaudita altera parte*; and the encouragement of the development of codes of conduct by private parties.[85]

The EU has also taken strong measures against cross-border goods that infringe IPRs. In 2003 it issued Council Regulation (EC) No 1383/2003 on "customs action against goods infringing certain intellectual property rights".[86] This regulation replaced one dating from 1994, which did not, for instance, cover measures against infringement of plant varieties, GIs and appellations of origin. The new Regulation establishes detailed provisions for action against the import, export and re-export of goods infringing all types of IP, in contrast to the TRIPS Agreement, which mandates border measures only for cases of importation, not exports or goods in transit, and only of counterfeiting trademarks and pirated copyrighted goods, not other types of intellectual property. In addition, while TRIPS states that *ex officio* action by the competent authorities is optional, the Regulation makes it mandatory.

The enactment of the 2003[87] Regulation was complemented in 2004 by Commission Regulation (EC) No 1891/2004 implementing Council Regulation (EC) No 1383/2003, and, later on in December 2005, by an Action Plan on a *Customs response to latest trends in counterfeiting and piracy*.[88] This Plan suggests changes in legislation to prohibit travellers to "import low volume personal use items which may be counterfeit" *(de minimis importations)*.[89] This rules out the flexibility included in TRIPS, which allows members to "exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments".

Finally, the EU has proposed a Directive on criminal measures to supplement the Enforcement Directive.[90] This proposal has been questioned by the Dutch Parliament on grounds that it does not fall within the Community's competence.[91]

1.3.3.2.2 Initiatives outside the EU

The interest of the EU in enforcement outside its borders is not new. Indeed, the EC submitted "detailed proposals" on enforcement in its proposal for a *Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*[92] during the Uruguay Round.[93]

Besides the efforts to harmonise Community legislation, the EU has engaged in several initiatives abroad. For instance, on November

2004 the EU launched a *Strategy to enforce Intellectual Property Rights in third countries*.[94] Resembling the US' Special 301 Report, this key document proposes to identify priority countries where the Commission should concentrate its efforts on enforcement. Countries would be classified as source, transit and target countries, and would be included in a periodical list after consultation with different stakeholders.[95]

Other proposed actions involve raising awareness of the impact of infringement, which include: making a "Guidebook on Enforcement of Intellectual Property Rights" available to other governments;[96] monitoring the enforcement provision in TRIPS and bilateral agreements, including making them more operational in future agreements (see Box 1); emphasising the importance of enforcement to the EC through multilateral and bilateral dialogue, cooperation activities and joint actions with other countries; and providing incentives and technical cooperation, which, instead of "demand-driven", should turn into "dialogue-driven". In this respect, IP should be included in technical assistance programmes, particularly in Latin America, where no programmes are in place; assistance to "production countries" should focus on enforcement instead of on legislation; and finally, there should be more coordination with other international agencies and countries, in considering dispute settlement procedures in the WTO or in bilateral agreements and in creating public-private partnerships.

Box 1 *Strategy to enforce Intellectual Property Rights in third countries*[97]
Proposed Actions: Multilateral/Bilateral Agreements

The EU will consult other trading partners regarding the possibility of launching an initiative in the TRIPS Council highlighting the fact that the implementation of TRIPS requirements in national laws has proven to be insufficient to combat piracy and counterfeiting, and that the TRIPS Agreement itself has several shortcomings. For example, the TRIPS Council could consider in the future a number of actions to tackle the situation, including the extension of the obligation to make available customs measures to goods in transit and for export.

- Ensure a continued effort in the monitoring of the TRIPS compliance of legislation, in particular in the "priority" countries.

- Revisit the approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses. Although in designing the rules for each specific negotiation it is important to take into account the situation and the capacity of our partners, instruments such as the new EU Directive harmonising the enforcement of IPR within the Community, as well as the new customs' Regulation on counterfeit and pirated goods may constitute an important source of inspiration and a useful benchmark.

- Raise more systematically enforcement concerns at Summit meetings and in the Councils / Committees created in the framework of these bilateral agreements. In order to allow the Commission to obtain an effective reaction from its counterparts, it is essential that it receives credible and detailed information from right-holders, either directly or via the EC Delegation or the embassies of the Member States in the countries concerned.

European Commission – External Trade Webpage.[98]

In June 2005 the EU submitted a proposal in the TRIPS Council to discuss enforcement,[99] and one year later submitted a follow-up proposal to start discussions specifically on border measures[100]. In brief, the proposal highlights the fact that since the birth of the WTO rules on border measures have not been changed. Because the TRIPS rules on border measures apply only to trademarked and copyrighted goods, and only with respect to the importation of those goods, the EU proposed to have an in-depth discussion on the application of border measures to all types of IP, with respect to export and in transit goods. Despite the support received from developed countries, the proposal was opposed by several developing countries on various grounds, including the lack of mandate and that it would upset the balance in the Agreement, duplicate work done by other international organisations and deviate attention from issues for which there is a mandate to negotiate.[101]

Although the EU avoided any mention of amending TRIPS in its proposal, and even ruled out this possibility, it has revealed its willingness to amend the TRIPS Agreement in various related documents. For instance, the *Strategy to enforce Intellectual Property Rights in third countries* specifically puts forward the possibility.

2. THE EUROPEAN UNION'S EXISTING BILATERAL TRADE AGREEMENTS

2.1 General Overview of the Chapters on Intellectual Property

The context in which the trade agreements with IP components are negotiated by the EU varies substantially, as they may be part of very different political and commercial processes. Some of the agreements are negotiated simply within the context of a particular bilateral relation; others are negotiated within a broader framework, such as the Barcelona Process with the neighbouring Mediterranean countries, or the Cotonou Agreement with ACP countries; and some are negotiated within the process of integration towards accession of new EU members, such as the agreements with Croatia, Macedonia or Albania.

Despite the differences in context, the complexity and sophistication of the respective IP provisions in the various types of agreements do not vary substantially from one agreement to the other. Indeed, the IP chapters in the agreements are quite homogeneous, with relatively few variations between them. With very few exceptions, the provisions of the EU agreements do not incorporate substantive provisions dealing, for instance, with exclusive rights, exceptions to rights, terms of protection or commitments on enforcement. Instead, they are built, basically, on commitments to adhere to the TRIPS Agreement and to multilateral IP agreements negotiated in the framework of WIPO, such as the PCT or the WIPO Internet Treaties. This simple structure of the EU's IP chapters contrasts with the more aggressive approach taken by the US in negotiating chapters, whereby substantial provisions on most IP issues covered by TRIPS are included and in many cases even go beyond the traditional categories of IPRs included in TRIPS.[102] We will see in the next section, however, that the EU is shifting towards a more comprehensive approach, though not disregarding the idea that its trade partners should accede to multilateral IP agreements.

In a very systematic manner, a paradigmatic EU chapter would conform to the following structure:

(a) A broad definition of IPRs for the purposes of the respective agreement, embodying:

> "copyright – including copyright in computer programs and in databases – and related rights, the rights related to patents, industrial designs, geographical indications including appellations of origin, trademarks, layout-designs (topographies) of integrated circuits, as well as protection of undisclosed information and protection against unfair competition as referred to in Article 10bis of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967)".[103]

As detailed in Section 3 below, the definitions sometime go beyond those employed in the TRIPS Agreement, as they often include issues which are still being discussed multilaterally (e.g. rights to traditional knowledge (TK), folklore and genetic resources) or have not been discussed at all (e.g. protection of non-original databases);

(b) The definition is usually followed by a declaration of intent, stating that the parties confirm the "importance they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights";

(c) A statement of the desired level of protection, which may take two distinct forms. By the first type of formula, used in some chapters, the parties commit to ensure adequate and effective protection of IPRs in conformity with international standards (e.g. Cotonou Agreement). Some agreements add the terms "highest" (e.g. Algeria, Chile, Israel, Jordan,

Lebanon, Morocco, South Africa, Tunisia) or "prevailing" (e.g. Egypt). The second type of formula, incorporated mainly in agreements with candidate or potential candidate countries for accession, consists either in providing a level of protection similar to that existing in the EU, including effective means of enforcing such rights (e.g. Armenia,[108] Azerbaijan,[105] Georgia,[106] Kazakhstan,[107] Kyrgyz Republic,[108] Russia,[109] Ukraine,[110] Uzbekistan[111]) or the strong commitment to approximate present and future IP legislation to that of the Community (e.g. Armenia,[112] Azerbaijan,[113] Georgia,[114] Kazakhstan,[115] Kyrgyz Republic[116], Moldova,[117] Ukraine,[118] Uzbekistan[119]). The second formula probably entails stronger commitments, as the obligation to approximate legislation to Community standards is a clear benchmark, whereas concepts such as international standards or highest international standards are to a great extent ambiguous terms where interpretations may differ.

There has been criticism about requiring developing countries to conform to the highest international standards. However, it seems to have a declaratory nature that would simply show the commitment of the respective parties towards the protection of IPRs.[120] The EU has said that incorporating this statement in the agreements whilst not actually detailing the highest standards allows the flexibility for parties to adjust their legislation to higher standards if they wish, in accordance with Article 1.1 of TRIPS.[121]

(d) Accession to existing multilateral treaties. The most substantive parts of the existing IP chapters consist, firstly, of the parties reaffirming the importance they attach to certain international IP treaties. Usually, this confirmation will be at least with respect to the TRIPS Agreement and to the major treaties in copyright (Berne Convention) and industrial property (Paris Convention). Secondly, parties commit to accede and/or to comply with other international agreements before a specific number of years.[122] Among others, commitments include accession to the PCT, the 1991 Act of the International Union for the Protection of New Varieties of Plants (UPOV) Convention, the Vienna Agreement,[123] the Locarno Agreement,[124]and the Madrid Protocol. A good example of the long list of treaties incorporated in IP chapters is the Stabilization and Association Agreement between the EU and Albania, which is the most recent agreement signed by the EU (see Box 2).

(e) On some occasions the parties include an evolutionary clause, by which a council or committee, usually created by the agreement in question, may oblige one party to accede to other treaties besides those expressly mentioned in the chapter.

(f) Referral of problems in the area of IPRs to the said council or committee in order to reach a mutually agreed solution.

(g) Some agreements include a provision on MFN treatment.

(h) Usually, the trade agreements allow for prohibitions or restrictions of imports, exports and transit on grounds of the protection of IP (and public morality, protection of health, natural resources, etc.), along the lines of Article 30 of the EC Treaty.

Box 2 *Stabilization and Association Agreement between the EU and Albania Signed on 12 June 2006*

"Albania undertakes to accede to.....

- WCT[125]
- Geneva Convention[126]
- UPOV 1991[127]"

"The Parties confirm the importance they attach to the obligations arising from the following multilateral Conventions:

- Rome Convention[128]
- Paris Convention[129]
- Berne Convention[130]
- WPPT[131]
- Madrid Agreement[132]
- Budapest Treaty[133]
- Madrid Protocol[134]
- PCT[135]
- Nice Agreement[136]
- EPC[137]
- PLT[138]
- Strasbourg Agreement[139]
- TRIPS Agreement"

European Commission – Enlargement Webpage.[140]

To date the EU has included IP chapters such as these in close to 30 agreements. Broadly speaking, and following at least in part the separation made by the European Commission,[141] it has negotiated agreements with countries in the following groups: (i) candidate and potential candidates for accession to the EU (Association Agreements, and Stabilization and Association Agreements); (ii) African, Caribbean and Pacific states (Cotonou Agreement and Economic Partnership Agreements (EPAs)); (iii) the Gulf Cooperation Council; (iv) agreements under the European Neighbourhood Policy (Partnership and Cooperation Agreements, and Association Agreements); (v) Latin America (Association Agreements); (vi) other countries (cooperation, partnerships and declarations).

As stated above, the IP provisions in all the EU's agreements are quite homogeneous, varying only in minor details. It would be pointless and repetitive to describe each one of the chapters, but it should be said that, within this rigid model, the Cotonou Agreement is probably the one with lesser obligations, whereas those negotiated with candidates and potential candidates for accession to the EU (Albania, Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) have the most stringent standards. Given that this latter group aspires to the highest level of interrelatedness and engagement with the EU, it is natural that the EU's demands on IP reach their highest point here, that is, in seeking a level of protection similar to the EU's own. Additionally, the EU's IP relationship with these countries is not only defined by the respective trade agreements (i.e. Stabilization and Association Agreements), but also by other instruments that help clarify the circumstances surrounding the EU's overall IP policy.[142]

The Cotonou Agreement, on the other hand, has very simple provisions on IPRs. First of all the parties commit to ensure adequate and effective

protection of IPRs in conformity with international standards and they underline the importance of adherence to the TRIPS Agreement, the Convention on Biological Diversity (CBD) and to the conventions mentioned in TRIPS (Paris, Berne, Rome, and the Treaty on Intellectual Property in Respect of Integrated Circuits) in "line with their level of development". It goes on to state that the parties may conclude agreements on the protection of trademarks and GIs for specific products. Finally, the Cotonou Agreement includes the standard definition of IPRs mentioned above.

The Cotonou Agreement is being replaced by Economic Partnership Agreements, for which negotiations began in 2002 and which are supposed to enter into force in 2008. For the negotiation of EPAs, the ACP countries have divided themselves into six regions:[143] (i) the Economic Community of West African States (ECOWAS) plus Mauritania; (ii) Central Africa (Communauté Economique et Monétaire de l'Afrique Centrale or CEMAC) plus São Tomé and Príncipe; (iii) Eastern and Southern African countries (ESA); (iv) the Southern African Development Community (SADC); (v) the Caribbean countries (CARIFORUM); and (vi) the Pacific region. The next section of this paper analyses the extensive proposal made by the EU to the CARIFORUM countries.

2.2 The Treatment of GIs and the Special Protection of Wine and Spirits

As we have seen, one of the main interests of the Community in the field of IP is the protection of GIs. In addition to the harmonisation of EC law, this interest is reflected internationally by way of attempts to raise the level of protection of GIs in the WTO and also by pursuing the recognition and protection of specific GIs in bilateral trade agreements.

To date, the EU has negotiated six specific agreements on the protection of GIs limited to wines and spirits[144] (i.e. Australia,[145] Canada,[146] Chile,[147] Mexico,[148] South Africa[149] and the US[150]),[151]but one should not rule out the EU seeking recognition and protection of GIs for other types of products in the future, mainly agricultural products and foodstuffs. The wine and spirits agreements have been negotiated in the context of much broader framework agreements (e.g. Association Agreement between the EU and Chile and the Agreement between the EC and Switzerland on trade and agricultural products)[152] or in stand-alone sectoral agreements (e.g. Agreements between the EU and Australia and between the EU and Mexico).

The substance of the agreements on wine and spirits may vary depending on whether the agreements cover wines and/or spirits, whether they provide protection for GIs and/or traditional expressions (TE),[153] and whether they include other matters besides the mutual recognition and protection of GIs (e.g. oenological practices, market access, sanitary and phytosanitary measures). They may also range from agreements that for example, deal only with custom duties and tariff quotas, such as the one between the EC and Bulgaria, Hungary and Romania,[154] to very comprehensive agreements covering a wide range of issues. In this paper we will only focus on those agreements which include IP aspects, mainly the mutual recognition of GIs.

The main purpose of the EU agreements on wine and spirits is the mutual recognition of specific GIs, and also the phasing out of the use of terms of European origin, which sometimes have acquired generic or descriptive status in the other party. The latter has been among the most controversial aspects of the agreements, together with the disproportionate number of terms the EU has included in the agreements. For instance, in the Agreement between the EU and Mexico, the EU included close to two hundred GIs against two Mexican GIs (Tequila and Mezcal), while in other agreements the number has amounted to the recognition of thousands of European GIs.

Another controversial issue of these agreements is the protection of so-called traditional expressions, which have not been specifically

recognised in any multilateral treaty. These are terms not necessarily related to a specific geographical region, but rather having to do with methods of production and characteristics of a wine or spirit, such as Clos, Viejo (Spanish for old), Clásico, Superiore, Ruby or Tawny. Moreover, in some cases, the parties obliged themselves to protect terms describing an ingredient of the particular product (e.g. rye whisky for Canada, safeguarding use of the same descriptive terms for the US).[155]

The agreements differ,[156] but the most comprehensive agreements have a similar structure and substance. The basic obligation consists of the parties committing to ensure the reciprocal protection of names and to provide the appropriate legal means to ensure their effective protection.

The commitment to phase out the use of certain names is usually accompanied by transitional periods and conditions depending, for example, on whether production is intended for internal consumption or for export, or whether production will be marketed by wholesalers or retailers.

The agreements usually allow for the coexistence of homonymous GIs, even with respect to GIs from third parties, which ensures fair treatment for the producers involved, avoids misleading consumers and determines practical conditions of use for the differentiation the homonymous GIs[157] following TRIPS Article 23.3. In some agreements, this rule is included with the proviso that the GIs in question should have "been used traditionally and consistently".[158]

In some of the agreements the parties have expressly given up the possibility of using certain exceptions authorised by the TRIPS Agreement (e.g. agreements with Mexico and Switzerland), but have usually at least preserved the exceptions for use of personal names (TRIPS Article 24.8) and the exception from protecting GIs which are not protected in their country of origin. As we will see in Section 3 below, the latest EU draft IP chapter overrides precisely these two exceptions of TRIPS Article 24.

The case of the latest agreement on wines, between the EU and the US, is of particular interest, as it does not refer to GIs, but to "names of origin". It is worth noting that the effects of the agreement are very similar to the other wine agreements, even though the result is reached through labelling requirements (protection and phasing out of certain terms by limiting the use in the US of names of European origin which are considered semi-generic in the US).[159] The purpose of avoiding any mention of GIs may be to restrict the application of the MFN and national treatment principles to other WTO members.[160] Within the Agreement, the US and EU commit themselves to negotiating a second phase which would include "a dialogue on geographical indications in connection with wine, with a view to better understanding each other's policy".[161]

Table 1 *Issues Included in the Agreements on Wine and Spirits Directly Related to Protection of GIs*

	Signed / entered into force	Wines (W) and/or Spirits (S)	Mutual recognition of GIs and/or Traditional Expressions	Give up TRIPS exception (expressly)	Preserve TRIPS exception (expressly)	Homony mous	Prohibition of exports	Progressive phase out
Australia[162]	1994	W	GIs/TE		24.6 and products of vine 24.8 personal name 24.9 unprotected in country of origin	Yes	Yes	Yes
Canada	2003	W & S	GIs		24.6 generics and products of vine 24.7 conflicting trademark 24.8 personal name 24.9 unprotected in country of origin	Yes	Yes	Yes
Chile	2002	W & S	GIs/TE		24.8 personal name 24.9 unprotected in country of origin	Yes	Yes	Yes

Mexico	1997	S	GIs	24.4 grandfather clause 24.5 trademarks 24.6 generics and products of vine 24.7 conflicting trademark	24.8 personal name 24.9 unprotected in country of origin	Yes	Yes	Yes
South Africa	2002	W & S	GIs		24.8 personal name 24.9 unprotected in country of origin	Yes	Yes	Yes
Switzerland	2002	W & S	GIs/TE	24.4 grandfather clause 24.5 trademarks 24.6 generics and products of vine 24.7 conflicting trademark		Yes	Yes	Yes
US	2006	W	GIs /names of origin/TE		24.4 grandfather clause 24.8 personal name	Yes	No	Yes

Table 2 *Other Issues Included in the Agreements on Wine and Spirits Not Directly Related to Protection of GIs*

	Dispute Settlement	Oenological practices	Import certification requirements	Sanitary & phytosanitary	Market access
Australia	Only consultations	Yes	Yes	Yes	No
Canada	First, refer issue to an organisation. Second, arbitration	Yes	Yes	No	No
Chile	General procedure of the Association agreement	Yes	Yes	Yes	No
Mexico		No	No	No	No
South Africa	First, refer issue to an organisation. Second, arbitration	Yes	Yes	No	Yes
Switzerland	General procedure of the Ass. Agreement (consultation)	Yes	No	No	No
US		Yes	Yes	No	No

3. RECENT EVENTS – THE NEW GENERATION OF BILATERAL TRADE AGREEMENTS

As we have seen, the EU is currently involved in negotiations with, among others, six regions into which the ACP countries have been divided. Of the known proposals submitted to the different groupings by the end of March 2007, one of them, that to CARIFORUM,[163] includes comprehensive IP provisions. Of particular note is that it departs from what has been seen until now, in the text of close to 30 agreements described in the previous sections. The EU has moved from the model described above, of essentially seeking the accession of its trade partners to multilateral IP conventions, particularly the effective implementation of TRIPS, to proposing a more elaborate IP chapter.

On the other hand, one of the ACP regional groupings, ESA, has made a proposal to the EU which is very different from the one described above.[164]

Although both proposals provide for specific provisions on IP, they differ in several aspects. Of the two, the one made by the EU to CARIFORUM is the most comprehensive, providing for disciplines in several categories of IP and going beyond the TRIPS Agreement in various aspects. On the other hand, the proposal made by ESA countries to the EU is much simpler, fundamentally limiting itself to establishing rules on cooperation.

We will describe briefly this latter proposal and then analyse the much more substantial proposal made by the EU to the CARIFORUM countries. As both documents are merely proposals, or elements for future chapters on IP, we will attempt to highlight only their most significant parts.

3.1 The Proposal by the Eastern and Southern African Countries

The draft submitted by ESA is composed, essentially, of a broad definition of IP, of two provisions on cooperation, one on implementation and lastly a provision on institutional arrangements.

The definition of IP is very different from the ones in the first generation of existing EU agreements. Instead of a detailed enumeration of the various types of IP, this definition covers copyright, the broad concept of industrial property rights (e.g. trademarks, patents, and industrial designs), plant breeder's rights, rights to traditional knowledge, folklore and genetic resources, and "other rights recognized under the TRIPS Agreement and CBD and the International Agreement on Plant Genetic Resources for Food and Agriculture (FAO Treaty)".[165]

The fact that the definition includes novel areas, such as TK, folklore, genetic resources, and rights under TRIPS, the CBD and the Food and Agriculture Organisation of the United Nations (FAO) is important in two ways. First, the acknowledgement and regulation of these areas within the framework of IPRs has traditionally been heralded by developing countries. Therefore, acceptance by the EU would be a major step. Second, the draft acknowledges the importance of these areas in various concrete ways, such as in seeking to ensure their protection, recognising the flexibilities available in the above-mentioned treaties and creating the necessary institutional and policy frameworks for their protection.

There has been some criticism as to the inclusion of genetic resources in the definition of IP, because it would mean that parties to the treaty would have to accept the patenting of life forms.[166] Apparently this would be contrary to the African Union's Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, which states that "patents over life forms and biological processes are not recognised and cannot be applied for".[167] Although there may be some

ground for this argument, it should be borne in mind that the definition of IP in Article 46.5 of the Cotonou Agreement already includes "... patents, including patents for biotechnological inventions and plant varieties or other effective *sui generis* systems..." so this proposal would not be departing from what already exists in the Cotonou Agreement. Besides, the African Group proposed the amendment of TRIPS Article 27.3.b to the TRIPS Council in June 2003 to "prohibit patents on plants, animals, micro-organisms, essentially biological processes for the production of plants and animals, and non-biological and microbiological processes for the production of plants and animals".[168] This proposal is still on the table.

The core of the draft is the section on cooperation, divided into objectives and areas of cooperation. Both of them are formulated in an asymmetrical manner, in the sense that the ESA countries are explicitly the beneficiaries of cooperation and the EU would be subject to the most substantive obligations (e.g. requirement of disclosure of origin in patent applications). The draft allows for the ample use of policy space and of flexibilities in trade agreements in general. In this respect, it even goes beyond the scope of application of the prospective treaty, as it states that the economic development and social expansion of ESA countries should not be hampered by restrictive application of international and bilateral obligations on IP in general.

Concretely, the draft proposes, as one of the areas of cooperation, the strengthening of cooperation on the "availability of legal, institutional and policy frameworks necessary for the implementation of the TRIPS Agreement whilst respecting the flexibilities therein, and the CBD and the International Agreement of Plant Genetic Resources".[169] One of the objectives is even more emphatic, as it seeks to ensure that the flexibilities provided in these three agreements are implemented. Because the definition of IP also includes plant breeder's rights, countries negotiating this type of agreement should also consider mentioning the flexibilities in UPOV (e.g. farmer's rights). The same argument would be applicable to multilateral agreements in other areas, such as the WIPO Internet Treaties (e.g. in devising new exceptions and limitations that are appropriate to the digital network environment).

Another concrete area of cooperation would be in the area of "protection of ESA countries' genetic resources, folklore and traditional knowledge and bio-piracy". Specifically, the EC would have to commit to requesting the disclosure of origin and proof of prior informed consent and equitable benefit sharing when granting patents that utilise genetic resources from ESA countries. This obligation, which would apply only to the EC, is compatible with a proposal submitted by the European Communities at the Eighth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[170] The EU proposal in the IGC provides for a mandatory requirement to disclose the country of origin of the genetic resources and associated TK used in all patent applications. This would be done through amendments to the PCT, the Patent Law Treaty (PLT) or to the EPC.

The EU's proposal in the IGC differs from proposals made by developing countries in WIPO and the WTO in three main aspects. First of all, it only requires disclosure of the origin of genetic resources, not of prior informed consent and equitable benefit sharing. Secondly, the EU has said that it opposes the revocation of the patent in case the origin has not been disclosed. Instead it advocates establishing sanctions outside the patent system, whereas developing countries favour the revocation of the patent. Thirdly, the EU favours the amendment of the PCT, PLT and other treaties, instead of amending the TRIPS Agreement.

None of the above-mentioned differences are addressed in the ESA draft, although a related area of cooperation would be that the "exploitation of genetic resources from ESA countries by EU shall take due regard to the principle of prior-informed consent to ensure

indigenous communities holding such genetic resources benefit from such exploitation".[171] This is not precisely a requirement to disclose prior informed consent and demonstrate equitable benefit sharing, but at least takes the principles into account. It would be advisable that this area of cooperation be strengthened, as the current drafting appears to suggest that the principle of benefit sharing ("benefit from such exploitation") is consequential upon the prior informed consent. In other words, that prior informed consent would automatically ensure that indigenous communities benefit from such exploitation.

Despite the existing differences between the EU and developing countries, it is valuable to note that the EU is willing to commit to a mandatory requirement of disclosure of origin in multilateral fora, as today the disclosure of the country of origin is merely voluntary within the EU.[172] East and Southern African countries should keep in mind the submission IP/C/W/404 of the African Group to the TRIPS Council, in which it also called for a mandatory disclosure of the source of origin through an amendment of the TRIPS Agreement.[173] In addition, some African countries have intervened individually, favouring the inclusion of a disclosure requirement in TRIPS as a way to avoid the misappropriation of genetic resources.[174]

Finally, with regards to objectives in and areas of cooperation, the ESA draft contains provisions on technology transfer, and on IP and public health. On this latter issue, in addition to the provisions on use of flexibilities in international agreements, the draft provides for creation of capacities for local production of pharmaceutical products; transfer of technology and the attraction of investment in their pharmaceutical sectors; support to ESA countries to enable them to benefit from the relevant provisions of TRIPS and its in-built flexibilities, especially with regard to public health, including access to pharmaceutical products at a reasonable price.

It is worth noting that, according to Article 67 of the draft proposal, in order to implement the above-mentioned areas of cooperation, the EU would have to provide ESA countries with technical and financial assistance upon request and mutually agreed terms and conditions. Because the provisions on cooperation are stated in very broad terms, it would probably be in the phase of implementation that details would have to be negotiated. However, the provision on objectives seems to be a good framework for achieving a balanced implementation of the areas of cooperation, which should be considered seriously by the EU.

3.2 The Proposal to the Caribbean Forum of the African, Caribbean and Pacific States (CARIFORUM)

The non-paper submitted to CARIFORUM may be the most comprehensive proposal made by the EU in many years (the 1995 Agreement with Turkey also has an extensive chapter on IP). As stated previously, it deviates notably from what has been more or less a blueprint in existing EU agreements.

Despite the proposal having substantive provisions on various areas of IP, it still seeks accession of CARIFORUM countries to multilateral IP agreements. It is worth noting that the language employed with respect to multilateral treaties varies from one subsection to another. In some cases parties "should ensure adequate and effective protection", whilst in others parties shall "comply with", "will apply" or "shall ratify or accede". As detailed below, in some instances the wording may not be the most appropriate.

The draft is divided in four sections: (1) objectives and principles; (2) standards concerning IPRs; (3) enforcement; and (4) regional integration and technical assistance. The essence of the draft chapter is in the sections on standards and in the section on enforcement, both of which go beyond TRIPS in many aspects. The former is divided into eight subsections: (i) copyrights and

related rights; (ii) trademarks; (iii) geographical indications; (iv) industrial designs; (v) patents; (vi) plant varieties; (vii) genetic resources, traditional knowledge and folklore; and (viii) transfer of technology. The part on enforcement is based on the EC Enforcement Directive.

3.2.1 Section 1 - objectives and principles

Section 1, on objectives and principles, confirms the commitments in the Cotonou Agreement and states that the provisions of the draft give effect to those commitments. It could be argued that the provisions of the draft are a reflection of the international standards to which the EU and ACP countries committed to previously in the Cotonou Agreement. In addition, the implementation of the draft shall be guided by the objective of ensuring an adequate and effective level of protection and enforcement of IP, with a wording similar to that used in the Cotonou Agreement.

Besides the reference to Cotonou, three things should be highlighted about the Section 1 objectives and principles. Firstly, with few exceptions, most of the provisions of Part I of the TRIPS Agreement, on General Provisions and Basic Principles, were incorporated in Section 1 of the non-paper. Second, some provisions of this section may be considered to go beyond TRIPS. Third, although the intention in the draft is to respect the extension of the transitional period for the implementation of TRIPS for least developed countries (LDCs), some TRIPS and TRIPS-plus obligations in Section 1 would still be applicable to LDCs, undermining the objectives of the WTO waivers for LDCs.

Regarding TRIPS, the parties would commit to ensure an adequate and effective implementation of the provisions of the Agreement. Specifically, the draft reiterates the TRIPS principle of minimum standards, in the sense that the parties "may implement in their law more extensive protection than is required by this Title, provided that such protection does not contravene the provisions" of the Title on IP.[175] It also affirms the principle of freedom of implementation, as the parties "shall be free to determine the appropriate method of implementing the provisions of (the) Title within their own legal system and practice".[176] It also provides for the TRIPS principles of MFN and national treatment. Although this could be considered redundant alongside TRIPS provisions, the effect of including these principles in the bilateral agreement is to make them applicable with respect to subject matter included in the bilateral but not specifically covered by TRIPS.

Finally, the draft gives parties the freedom to establish their own regime of exhaustion of rights, subject to the MFN and national treatment clauses, similar to Article 6 of TRIPS. However, there is a strong caveat to this last provision: "In determining their exhaustion regime, Parties shall take into account, if relevant, the impact of such regime on the supply of medicines at strongly reduced prices by foreign companies".[177] It is curious that a country's exhaustion regime, usually established through complex legislation and reflecting medium- or long-term policy, should be subject to circumstantial or volitional facts such as the reduction of prices by a foreign company. It should be recalled that the issue of trade diversion in connection with the exhaustion of IPRs was brought up by the EU during the discussions of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, stating that before issuing a compulsory license "the right holder should have an opportunity to supply the products at a reduced price".[178]

The draft proposal incorporates most of the general provisions of the TRIPS Agreement, but at the same time it lacks any provisions on objectives, on principles and on what is known as the non-derogation clause. Articles 7 and 8 of TRIPS, on objectives and principles respectively, are often considered crucial to interpreting the whole Agreement more flexibly, as both Articles provide, among others, for a balance between rights and obligations, and allow for measures to prevent the abuse of IPRs by right holders and the resort to practices which

unreasonably restrain trade or adversely affect the international transfer of technology. On the other hand, the non-derogation clause of Article 2.2 of TRIPS states that nothing in the substantive part of the Agreement shall derogate from existing obligations in other multilateral IP treaties. These treaties often provide for other flexibilities, which sometimes may be superseded by bilateral agreements.

Notwithstanding the similarities between this section and Part I of TRIPS, there are some proposals in Section 1 that go beyond TRIPS. First, we have already seen that the freedom afforded by TRIPS to choose the exhaustion of rights regime would be curtailed by the conditionality on reduction of prices by foreign companies.

A second issue that could be seen to go beyond the TRIPS Agreement is the inclusion of new areas in the definition of IP. Indeed, the draft includes a definition of IP that enumerates the different categories of IP included in TRIPS, but also incorporates the *sui generis* right for non-original databases. This right was created in the EU to protect databases which represent "qualitatively and/or quantitatively a substantial investment" for a limited time of 15 years.[179] This right has been criticised for protecting investments rather than creativity or original works. The economic impact of the sui generis right has even been questioned within the EU.[180] In the US, the Supreme Court rejected the application of copyright law in this case on the grounds that the purpose of copyright is not to protect the efforts of persons ("sweat of the brow") but originality.[181]

The third aspect where Section 1 could be going beyond TRIPS refers to the transitional periods for LDCs. The draft states that LDCs will:

> "not be required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5, or the provisions in sections 2 and 3 of this Title, other than on an equal pace with what may be required from them with regard to the implementation of the TRIPS Agreement under the relevant decisions by the TRIPS Council under Article 66.1 of the TRIPS Agreement".[182]

The initial period granted to LDCs to implement TRIPS was until 1 January 2006, but the WTO extended this transitional period until 1 July 2013.[183] Additionally, in 2002 the WTO adopted another Decision benefiting LDCs, whereby the transitional period for the implementation of patent protection for pharmaceutical products was extended.[184] According to the proposed language of the CARIFORUM text, LDC parties to the EPA should apply neither the substantive parts of TRIPS, nor those of the prospective bilateral agreement (Sections 2 on Standards and 3 on Enforcement) while waivers are in force. However, contrary to TRIPS, where the only obligations for LDCs during the transitional periods are to respect Article 3 (national treatment), Article 4 (Most Favoured Nation treatment) and Article 5 (multilateral agreements on acquisition or maintenance of rights), as we have seen, Section 1 of the EPA does have substantive provisions, other than MFN and national treatment, which go beyond TRIPS. Specifically, LDCs would face conditions related to the exhaustion of rights regime, recognition of non-original databases and application of certain TRIPS-plus provisions, during their WTO transitional periods. To be coherent with the WTO waivers, LDC parties to the EPA should only be obliged to respect the principles of MFN and national treatment, not other provisions in Section 1 of the draft proposal.

3.2.2 Section 2 - Standards concerning intellectual property rights

3.2.2.1 Copyrights and related rights

The subsection on copyrights is rather simple and does not differ substantially from previous EU agreements. Actually, the obligations included in the draft consist of complying with the substantive provisions of three multilateral treaties, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Articles 1 through

22); the WIPO Copyright Treaty (WCT) (Articles 1 through 14); and the WIPO Performances and Phonograms Treaty (WPPT) (Articles 1 through 23). As we have seen in Section 2 above, this has long been a demand of the EU in other bilateral agreements.

The Rome Convention is a treaty with close to 80 members, while in the close to ten years of existence of the WCT and the WPPT (known collectively as the WIPO Internet Treaties) they have gained more or less 60 members each. The Internet Treaties are fairly balanced.[185] However, they have been criticised for going beyond TRIPS in several respects. The most controversial parts of the Internet Treaties regard the obligations to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological [protection] measures" (TPMs) that authors and related rights holders use to protect their content. It is argued that these digital locks, although useful to protect content, may sometimes go too far, thus impeding the legitimate use of exceptions and limitations to copyright and obstructing access and use of works that have fallen into the public domain. In the case of the EU, the regulation of TPMs extends not only to copyright and related rights but also to non-original databases. On the other hand, the TPM provisions of the Internet Treaties are fairly broad. They specify neither whether implementation should encompass both the protection of TPMs that restrict access as well as the exercise of exclusive rights, nor whether protection should be against both the circumvention of TPMs and the manufacture, importation, exportation etc. of devices whose main function is to circumvent them. The US in particular has implemented the Internet Treaties in a more restrictive manner and has exported those restrictions into recent FTAs.[186]

A final proposal in the subsection on copyrights deals with the "establishment of arrangements between the respective collecting societies of the parties, with the purpose of mutually ensuring easier access and delivery of content at the regional level between the territories of the Parties".[187] This could be seen as a useful tool for countries negotiating EPAs as many of them may be looking at better exploiting their cultural industries. Lately the EU has regulated collective cross-border management of copyright and related rights for legitimate online music services through a 2005 Commission Recommendation.[188]

3.2.2.2 Trademarks

In a similar way to the subsection on copyrights and to previous existing agreements, the EU seeks accession to two multilateral treaties on trademarks: the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989) and the Trademark Law Treaty (TLT) (1994). The Madrid Agreement is a global protection treaty by which a filing in one country will have effect in other member countries of the Treaty, therefore simplifying procedures and reducing costs.[189] The TLT seeks to harmonise trademark registration procedures.

Besides pursuing accession to the two trademark treaties, the EU proposes the acceptance of three WIPO Joint Recommendations on trademarks: the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, the Joint Recommendation Concerning Trademark Licenses and the Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet. The recommendations, among others, give criteria for determining whether a mark is well known; define concepts which were not defined in the TRIPS Agreement, such as "relevant sector of the public"; include model forms for the recording of trademarks; and establish the maximum requirements applicable to certain situations.

Even though the WIPO recommendations impose reasonable standards, proper consideration must be given to the fact that making them part of a bilateral treaty may subject any non-compliance with the recommendations to the bilateral dispute settlement mechanism. Many of the FTAs negotiated by the US also provide for

the recognition of the Recommendation on Well Known Trademarks.

Finally, while the TRIPS Agreement states that members of the WTO are free to provide for opposition procedures in their domestic legislation, the draft mandate that opposition procedures for the registration of trademarks should be available in the parties' domestic legislation.

3.2.2.3 Geographical indications

Together with the provisions on industrial designs, those on GIs receive considerable attention. In Section 1.3.3.1 we saw the importance of the protection of GIs to the EU and the several initiatives it has undertaken on different fronts.

The most significant provisions on GIs are the ones dedicated to the extension of the additional protection afforded to wines and spirits to all kind of products (the Extension) and the inclusion of the "Clawback" principle for all products. Other important provisions deal with the relation between GIs and trademarks.

Regarding Extension, Article 9.3.3 of the draft puts forward the following proposal:

> "In respect of the same category of goods, the Parties shall prohibit and prevent, ex officio and at the request of an interested party, the use of any sign in the designation or presentation of a good that indicates or suggests that the good in question originates in a certain geographical area, if such goods do not originate in the geographical area indicated by the sign in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as «kind», «type», «style», «imitation» or the like".[190]

The provision on Clawback states that "the terms listed in Annex [...] do not constitute terms customary in common language as the common name for goods or services in the territory of the Parties".[191]

As observed in Section 1.3.3.1 above, the EU has forwarded both these ideas in the WTO. The proposal on Extension would eliminate the standard for protection of non-wines and spirits GIs of TRIPS Article 22.2. Therefore, the use of certain terms would be forbidden even if its use does not mislead the public as to the geographical origin of the good or the use does not constitute an act of unfair competition within the meaning of Article 10bis of the Paris Convention.[192] Together with the proposal on Clawback it would result in stronger protection for all GIs.

When and if countries accept the Clawback of specific terms, they should consider whether there is an imbalance between the numbers of GIs it will be obliged to protect and the number of GIs for which it will gain protection. Other considerations should be the costs of giving up certain names for government, for producers and for consumers; whether giving up certain terms that were used under a TRIPS exception will affect importations from third countries; whether these provisions will apply to all products; and whether they will apply domestically or also with respect to exports to third markets. Although the EU included exceptions in the draft for previous trademarks and for generic terms and products of the vine (similar to TRIPS Article 24.6) and even expanded the exceptions to plant and animal breeds, other important exceptions in TRIPS are missing from the proposal. Such is the case of the grandfathering clause of TRIPS Article 24.4, by which producers in other countries are allowed to continue to use certain terms which have been used for a number of years or in good faith. Another case is the exception that allows anyone to use a name in the course of trade as long as the public is not misled. Similarly, nothing is said about the coexistence of homonymous GIs, as regulated in TRIPS Article 23.3.

An interesting exception included in the draft states that "Parties shall provide for the fair use of descriptive terms, including GIs, as a limited exception to the rights conferred by a trademark. Such limited exception shall take account of the legitimate interests of the owner of the

trademark and of third parties".[193] This is very similar to the exception for trademarks provided by TRIPS Article 17; however, here the exception is mandatory whereas, in TRIPS, WTO Members are free to implement it. This exception is better suited to the subsection on trademarks than to the one on GIs. Although the question of fair use of descriptive terms could indeed involve GIs, the exception provided in the draft is with respect to the rights of trademark holders rather than GIs rights holders. An equivalent exception could be considered with respect to rights for GIs.

Other provisions of the non-paper state that protection would be limited only to GIs that are protected in their country of origin (making the exception of TRIPS Article 24.9 mandatory) and those "which are produced in accordance with the relevant product specifications".[194] Both requirements could be seen to favour systems of registration over systems where GIs are protected either through trademarks (even non-registered) or through rules of unfair competition. This could *de facto* deny protection to certain trademarks that do not have product specifications.

The EU's draft proposal borrows certain principles applied to well-known trademarks, such as TRIPS Article 16.2 which refers to Article 6bis of the Paris Convention, to make them applicable to GIs. These includes parties granting a period of at least five years from the date of registration to allow requests for the cancellation of the GI and no time limit for requesting the cancellation or prohibition of use of GIs registered or used in bad faith:

> "Article 6bis of the Paris Convention shall apply, mutatis mutandis, to geographical indications... In determining whether a geographical indication is well-known, each Party shall take account of the knowledge of the geographical indication in the relevant sector of the public, including knowledge in the Party concerned which has been obtained as a result of the promotion of the geographical indication. No Party shall require that the reputation of the geographical indication extend beyond the sector of the public that normally deals with the relevant goods or services, or that the geographical indication be registered".[195]

The last phrase of the footnote is probably taken from US' bilateral trade agreements. However, the EU draft includes an additional provision clarifying that GIs need not be registered.

Lastly, the non-paper seeks the protection of GIs on the internet, including the application of WIPO's *Joint Recommendation concerning the protection of marks, and other industrial property rights in signs, on the Internet*. The parties would commit to introducing provisions that provide:

> "...a clear legal framework for geographical indications owners who wish to use their geographical indications on the Internet and to participate in the development of electronic commerce. Such provisions will include whether the use of a sign on the Internet has contributed to the usurpation, evocation, acquisition in bad faith or infringement of a geographical indication or whether such use constitutes an act of unfair competition, and determine the remedies, including the eventual transfer or cancellation of the domain name. Parties will hereby use the Joint Recommendations concerning the protection of marks, and other industrial property rights in signs, on the Internet, as adopted by the World Intellectual Property Organisation at the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO September 24 to October 3, 2001".[196]

This language is almost identical to that used in the Preface and the Preamble of the WIPO Joint Recommendation. However, the EU has replaced the language used in the Recommendation to describe the prohibited conducts (acquiring, maintaining or infringing) with one more suited to its aspirations regarding the protection of GIs (usurpation, evocation, acquisition in bad faith or infringement). The expression "usurpation" is incorporated in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, and is often used by the EC in the TRIPS Council to describe the

legitimate use of terms of European origin by third countries.

The use of GIs on the internet has been on the agenda of WIPO's Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) for some years, mainly at the request of the EU.[197] The ultimate ambition of the EU is to include GIs in domain name dispute resolution under the Uniform Domain Name Dispute Resolution Policy (UDRP).

3.2.2.4 Industrial designs

Industrial designs are one of the areas in which the EU has achieved a high level of harmonisation. Hence its interest in including a considerable subsection on industrial designs in its draft proposal. Conversely, the protection of industrial designs is probably the only mainstream IP issue that has not been included in the US' latest generation of FTAs, though EFTA has included it in its FTAs. The EU provides protection for industrial designs through the Community Design system, which offers protection in all EU countries through a single registration. Most of the proposals in this subsection of the draft derive from Community Design legislation.

The main components of the subsection on industrial designs which go beyond the TRIPS Agreement are: (i) accession to the Hague Agreement; (ii) eligibility for protection; (iii) a bar on designs dictated essentially by functional or technical considerations; (iv) protection for unregistered designs; and (v) the extension of the term of protection.

The Geneva Act of the Hague Agreement for the International Registration of Industrial Designs (1999) allows the registration of a design to have effect in the other parties to the Hague Agreement. On 18 December 2006, the Council of the European Union approved the accession of the EC to the Geneva Act of the Hague Agreement.[198] The US is following a similar path.

In addition to the TRIPS requirements for protection of independent creation and novelty/originality, the non-paper incorporates the requirement of individual character. This requirement is described in Article 5 of the *EU Directive on the legal protection of designs* in the following way:

> "1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority.
>
> 2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration".[199]

While TRIPS makes it optional for members to decide whether protection shall extend to designs dictated essentially by technical or functional considerations, the non-paper would make it mandatory for parties to exclude these types of designs. This is the case for the Community Design, which excludes the registration of designs whose appearance is dictated by technical functions and by the need to interoperate with other products of different makes.

The EU's non-paper proposes that unregistered designs also be protected. In the EU recognition is given to these designs, though only for a short-term period of three years. The rationale behind this recognition is that some sectors "produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance".[200]

Regarding the term of protection, whilst TRIPS provides for a minimum term of 10 years, the EU proposes to extend it to 25 years, in line with its *Directive on the Legal Protection of Designs*.[201] Additionally, the Hague Agreement also provides for extended protection beyond the TRIPS minimum standard.

Finally, the EU proposes a system that allows for the accumulation of industrial designs rights and copyrights.

3.2.2.5 Patents

The draft's subsection on patents requests for compliance with certain multilateral treaties and offers provisions on TRIPS and public health.

Concerning international agreements, the non-paper calls for *compliance* with the substantive articles of the PCT, the PLT and the Budapest Treaty. It is peculiar that the EU used a formula of compliance, at least for the PCT, a treaty that has effects only for countries which are parties to it. Up until now, all references to international treaties (Madrid, TLT, Hague) dealing with global protection, procedures and formalities have followed the formula of requiring "ratification or accession" to those treaties. One could conceive compliance with treaties which establish substantive obligations, formalities, and classifications but it is hard to imagine how a country could comply with the PCT, Madrid, Hague or Lisbon Agreements without becoming a member. As we have seen, in previous EU agreements the formula utilised for cases where the other party was already party to the respective agreement was to "confirm the importance" of the treaty. But this would not be the case with the CARIFORUM countries, as not all of them are party to the PCT.

Of these agreements, the PCT has received some criticism because it facilitates a system of registration in which developing countries would not have much to gain, as their participation in world patent statistics is very low. Also, it could entail problems for developing countries because many applications never enter into the national phase after a very long priority (delay) of 30 months, therefore unnecessarily limiting access to these inventions during that period.[202] Nevertheless, to date, the PCT has 137 members and its membership continues to grow (in part due to obligations in bilateral agreements).

The purpose of the PLT is to harmonise patent procedures and to restrict the number of requirements in patent filings. As we have already seen, the EU has proposed amendments to the PCT and PLT in order to incorporate a mandatory requirement for the disclosure of origin of genetic resources.

The provisions of the draft on the TRIPS Agreement and public health involves the parties recognising the importance of the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the WTO, and more importantly the parties relying on the Doha Declaration in interpreting and implementing the rights and obligations under the subsection on patents. Moreover:

> "the Parties shall contribute to the implementation and respect the Decision of the WTO General Council of 30 August 2003 on paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, and take the necessary steps to accept the Protocol amending the TRIPS Agreement, done at Geneva on 6 December 2005".[203]

Although the recognition of these instruments is very important, ESA's proposal to the EU could be considered more complete.

3.2.2.6 Plant varieties

First, the non-paper, in the same way as previous bilateral agreements, seeks compliance with the UPOV Convention, in this case the 1991 Act. Secondly, the draft states that "Parties shall have the right to provide for exceptions to exclusive rights to allow farmers to save, use and/or exchange protected farm-saved seed or propagating material, subject to national law as appropriate and in line with the applicable international rules".[204]

The formula used in the draft is to "*comply with*" the UPOV Act of 1991. This is precisely a case where adherence or accession is probably not necessary, and parties could indeed carry out the obligations of the Convention without becoming a member. The TRIPS Agreement

declares 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".[205] Accordingly, UPOV is considered an effective *sui generis* system which meets the TRIPS obligations. The EU, however, protects plant breeders[206] both through "national rights in each country in which it is available (21 out of 25), or by applying for a Community plant variety right to cover all 25 countries in one application".[207]

Regarding exceptions, the non-paper recognizes the "farmer's privilege" which, if implemented in line with applicable international rules (and UPOV 1991), is narrower then the one allowed for in the UPOV Act of 1978. The EU's legislation recognises other exceptions to plant breeder's rights permitted by UPOV, such as acts done privately and for non-commercial purposes and acts done for experimental purposes. It also acknowledges that:

> "the exercise of the rights conferred by Community plant variety rights may not violate any provisions adopted on the grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of the environment, the protection of industrial or commercial property, or the safeguarding of competition, of trade or of agricultural production".[208]

3.2.2.7 Genetic resources, traditional knowledge and folklore

The EU's proposal requests parties to "underline the importance of acceding to the Convention on Biological Diversity and agree that, in line with Article 46.2 of the Cotonou Agreement, the patent provisions of this Title and the Convention on Biological Diversity shall be implemented in a mutually supportive way".[209] This issue is closely related to discussions in the WTO on the relation between the TRIPS Agreement and the CBD, and more specifically on whether there is a conflict between the two treaties or whether they can be interpreted in a mutually supportive way. This issue was not resolved in the Cotonou Agreement, as the non-paper suggests. The parties simply underlined the importance of adhering to both conventions. An amendment of TRIPS to incorporate a disclosure requirement would be founded, to an extent, on the argument that it is in conflict with the CBD.

Apart from reiterating the importance of the CBD, the draft has references to specific issues in that Agreement. Article 8(j) of the CBD has been copied almost literally into Article 13 of the non-paper:

> "Subject to their national legislation the Parties respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

However, because the EU drafters did not take into account the "chapeau" of the CBD article in question, the language in the non-paper seems more fitting for a preamble, as it seems a mere declaration. Whereas the chapeau of Article 8(j) states that the "Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect..." etc.[211]

According to the draft, the parties would recognise "the importance of taking appropriate measures, subject to national legislation, to preserve traditional knowledge and agree to further work towards the development of an internationally agreed *sui generis* model for the legal protection of traditional knowledge".[212] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been deliberating for some years on the issues of TK and folklore (traditional cultural expressions or

TCE). The outcome could take various forms, including:

> "binding international instrument or instruments; a non-binding statement or recommendation; guidelines or model provisions; authoritative or persuasive interpretations of existing legal instruments; and an international political declaration espousing core principles and establishing the needs and expectations of TCE/TK holders as a political priority".[213]

The non-paper wording of "agreement on a model" is sufficiently ambiguous to encompass any of the possible approaches considered by the IGC, although in the IGC the EU has expressed its preference for soft law in the form of a statement, recommendation or guidelines, and with similar wording to that of the non-paper it has supported the "development of international *sui generis* models or other non binding options for the legal protection of TK".[214]

It is not surprising that the EU does not propose an equivalent provision in the area of TCE, as in the IGC the EU has been more reluctant to advance in the area of TCE than in that of TK.[215] However, in the IGC both issues have moved on a par with each other. Finally, the draft proposes that parties agree to exchange views and information with respect to multilateral discussions in WIPO and the WTO.

As we have seen, in the proposal made by ESA countries the EU would commit to requiring the disclosure of origin of genetic resources in patent applications. The proposal to CARIFORUM does not include this commitment.

3.2.2.8 Transfer of technology

The subsection on transfer of technology consists of three parts. The first is a broadly drafted provision on exchange of views and information on practices affecting technology transfer. The second refers to contractual licenses, and deals with the control of abuses of IPRs by right holders, which may affect the international transfer of technology. It is not clear that this provision (Article 14.2) would add anything to TRIPS Articles 8 and 40, as the proposal has simply dismembered the latter article. The last part of the subsection is very similar to TRIPS Article 66.2, which sets an obligation for:

> "developed countries to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base".

However, the wording of the non-paper differs with TRIPS in two important aspects. Firstly, the obligation to provide incentives is not applicable only to developed countries, but would be applicable to all parties to the agreement (i.e. developing and least developed countries). Secondly, the purpose of the obligation would not be limited to "create a sound and viable technological base" as this wording of TRIPS was excluded.

3.2.3 Section 3 - Enforcement

As we may recall, the *Strategy to enforce intellectual property rights in third countries* (see Box 1) stated the possibility that the EU may "revisit [its] approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses".

The subsection on enforcement in the CARIFORUM proposal is very extensive and is based on the EU's Enforcement Directive and the TRIPS Agreement. Contrary to the other subsections of the draft, which tackle specific issues in relatively broad terms, or by referring the obligations to different multilateral treaties, the provisions on enforcement are extremely detailed and mirror those of the Enforcement Directive. On occasions entire provisions of the Directive, which as discussed above goes beyond TRIPS in many aspects, have been incorporated in the draft. This brings to mind the recent FTAs negotiated by the US, where, precisely

in the respective sections on enforcement, almost entire and very detailed provisions of US copyright legislation were included (e.g. provisions on TPMs and on the limitation of online service providers based on the Digital Millennium Copyright Act).

More specifically, the draft includes:

- general obligations on the enforcement of TRIPS, such as the obligation that measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays. However, it does not reproduce an important provision in TRIPS (Article 41.5) which states that the Agreement "does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general".[216] This principle, together with the freedom to determine the appropriate method of implementation of TRIPS Article 1.1, is often invoked in the TRIPS Council during discussions on enforcement;
- expansion of the TRIPS mandate for civil judicial procedures from being available to rights holders themselves (including federations and associations having legal standing to assert such rights) to persons authorised to use those rights (particularly licensees), collective rights management bodies, and professional defence bodies, if they are regularly recognised as having a right to represent holders of IPRs, and in so far as permitted and in accordance with domestic legislation;
- presumptions of ownership in copyright similar to that in the Berne Convention,[217] but also extending the presumption to holders of related rights;
- with regards to evidence in cases of infringement on a commercial scale, that judicial authorities may order the communication of banking, financial or commercial documents;
- concerning the preservation of evidence, that judicial authorities may order parties to present evidence subject to the protection of confidential information, in a similar way to TRIPS;[218]
- that judicial authorities may order the infringer or any other person to disclose the origin and distribution networks of infringing goods, including names and addresses of persons, and quantities and prices of goods.[219] This goes beyond TRIPS since TRIPS states that WTO Members may provide judicial authorities with the authority to order the infringer to inform on the identities of persons involved in the infringement of goods and their channels of distribution;[220].
- that the unsuccessful party should, as a general rule, bear the legal costs; whereas TRIPS provides only that the authorities may order the infringer to pay the right holder's expenses;
- on border measures, provisions for action against import, export and re-export of goods infringing all types of IP, in contrast to the TRIPS Agreement which mandates border measures only for cases of importation, not exports or re-exportation, and only of counterfeiting trademarks and pirated copyrighted goods, not other types of IP;
- encouraging the development of codes of conduct by private parties aimed at contributing against infringement, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture. Interestingly, the preamble in the EU Enforcement Directive states that "these technical protection measures should not be misused to protect markets and prevent parallel imports".

4. CONCLUSIONS - IMPLICATIONS FOR DEVELOPING COUNTRIES AND STRATEGIC CONSIDERATIONS FOR NEGOTIATORS, POLICY MAKERS AND RELEVANT STAKEHOLDERS

We have seen that the existing IP chapters in EU agreements follow a very consistent structure, built on the corroboration of the importance of and compliance with the TRIPS Agreement and other multilateral treaties negotiated in the framework of WIPO. Compared, for instance, to the FTAs negotiated by the US and EFTA (both of which incorporate obligations to accede to treaties), the EU agreements are relatively simple and straightforward, and should have much fewer questionable implications than those of the US and EFTA. Besides, it could be argued that many of these multilateral agreements represent the (highest) international standards mentioned in the existing EU chapters. Some of these agreements are widely accepted (as of January 2007 the PCT had 136 members) and many of them are de facto applied by many developing countries.

Of the pool of treaties in question, only some of them entail substantive IP standards (e.g. UPOV, WCT, and WPPT). Others are so-called classification treaties, which create classification systems that organise information concerning the respective type of IPRs (e.g. Strasbourg, Vienna, Locarno and Nice Agreement). The third group of treaties is the so-called global protection treaties, whose only purpose is to "facilitate that one international registration or filing will have effect in any of the relevant signatory States" (e.g. PCT, Hague, Madrid System, and Budapest).[221]

A downside to incorporating these international treaties in trade agreements is that they may become subject to the bilateral dispute settlement mechanisms of the respective agreement. This surely has a stronger dissuasive effect than the threat of being subject to the International Court of Justice. The same argument applies to the proposals on complying with the three WIPO Joint Recommendations on Trademarks.

Almost every multilateral IP agreement dealing with substantive protection negotiated after TRIPS incorporates TRIPS-plus standards. That is the case of the WCT (and WPPT), which expands exclusive rights, extends terms of protection (for photographs)[222] and provides for protection against the circumvention of TPM and rights management information. It is also the case of UPOV 1991, which, contrary to the 1978 UPOV Act, covers all types of species, expands rights, limits exceptions to farmer's rights and extends terms of protection.

Regarding the global protection treaties, we have already seen that the 12-month priority date for patents of the Paris Convention is extended by the PCT for up to 30 months and that participation of most developing countries in patent numbers is almost insignificant. Due to the fact that the number of patents filed under the PCT that ultimately make it into the national phase in developing countries is rather low, some have questioned whether developing countries should bear the burden of protecting, for 30 months, inventions for which protection will never even be requested in these countries. Other global protection treaties, such as the Hague Agreement for industrial designs, extend the 10-year term of protection required by TRIPS to 15 years.

Although the existing IP chapters do not differ substantially from each other, and in the unlikely event that the EU decided that the contents of future agreements should not vary, but instead follow the same structure described above (see Section 2), there are still some differences that could be exploited. As we have seen, some agreements provide for compliance with UPOV 1978 while others seek accession to the 1991 Act; countries could also explore appropriate options for evolutionary clauses and amending the "highest standards" language.

In the likely event that the EU was to change its approach to IP chapters in trade negotiations, as

it has with the proposal to CARIFORUM countries, it is most likely that the area of enforcement will play an important part. Aspects of enforcement that are already included in Part III of TRIPS, but are optional for WTO Members to apply, have been incorporated in the EU Enforcement Directive and transposed into the non-papers. For instance, the TRIPS Agreement states that members may provide that judicial authorities shall have the authority to order the infringer to inform on the identity of third persons involved in the infringement and channels of distribution. As we have seen, the EU's Enforcement Directive makes this provision mandatory (and even goes further by allowing the authorities to order the disclosure of the origin, quantities and prices of the goods), so it is likely that in future proposals the EU will continue to require that this provision be mandatory.

We have also seen that the EU has drafted TRIPS-plus legislation in the case of border measures. Regulation (EC) 1383/2003 applies to goods infringing any kind of IP; to importation as well as to exports of those goods; and it allows authorities to act *ex-officio*. On the contrary, TRIPS applies only to counterfeit trademarks and pirated copyrighted goods; it mandates only for importation of those goods; and *ex-officio* action is optional. It is conceivable that these provisions will continue to be included in EU bilateral proposals. These measures would probably have an impact on the work and obligations of customs authorities.

Regarding GIs, it is probable that the EU may continue to seek the increased level of protection afforded to wine and spirits for all type of products, and also include lists of agricultural products and foodstuffs, in the same fashion as the agreements on wine and spirits. Of course, agreeing to a list of products within the EU should be very difficult. Its list of 41 GIs submitted to the Agriculture Committee of the WTO (see Section 1.3.3.1) was crafted before the accession of 12 current members, many of whom have strong interests in the protection of specific GIs. On the matter of Extension of the protection afforded to wines and spirits to all type of products, some developing countries may feel tempted to accept this demand because they have commercial interests in some products. However, countries opposing this same EU initiative in the WTO have argued that the current protection afforded by TRIPS Article 22 is sufficient and that the EU has been unable to make a case for Extension. It has also been argued that many products coming from developing countries could fall under one of the exceptions of TRIPS Article 24 within some EU countries, therefore not gaining the expected additional protection.

Negotiators should take into account that even though the EU has high levels of protection in all fields of IP, it also provides for policy space through flexibilities, limitations of the scope of protection, exceptions and limitations to rights, and most importantly, through the interrelation of IP with competition policy. It is also fair to say that the multilateral agreements to which the EU proposes accession give leeway to implement exceptions and limitations to rights, and other types of flexibilities (e.g. possibility to "devise new exceptions and limitations that are appropriate in the digital network environment" in the WIPO internet Treaties; farmer's privilege and experimental use in UPOV 1991).

Therefore, countries engaging in negotiations with the EU should consider putting on the table provisions that are already part of community legislation. Good examples of these kinds of provisions could be the EU exceptions and limitations to copyright. The Copyright Directive provides a long and exhaustive list of exceptions and limitations to copyright that in most cases have not been incorporated in the legislation of developing countries.[223] Also, the EU Software Directive has interesting mandatory exceptions which could be taken into account.

Besides seeking guidance from community directives and regulations, one should take into account that secondary legislation (or at least directives) leaves implementation in the hands of EU member states. Thus, another source of flexibilities is precisely in the national laws of member states.

Also, the EU has made interesting proposals in WIPO and WTO regarding the protection of genetic resources. Although these proposals have not met the demands of developing countries, it would be interesting to explore whether the EU would commit to its offer at a bilateral level. We have seen that in this regard the proposal by ESA to the EU provides for stronger commitments. The EU's answer to the issue of disclosure of the source of origin of genetic resources may be to say that this issue is being negotiated in multilateral fora and should be kept that way. In other words, the EU could argue against including issues bilaterally that are being discussed multilaterally. In a case like this, the counterargument should be that the protection of GIs is also being negotiated in multilateral fora, but this has not discouraged the EU from putting the issue on the table in bilateral negotiations.

Parties to a negotiation should consider clear and strong language regarding objectives and principles applied to IP provisions in the agreements. To the extent that it is possible, negotiators could consider proposing a specific preamble to IP chapters.[224] In doing so, the proposal to CARIFORUM that refers to the use of the Doha Declaration on the TRIPS Agreement and Public Health for purposes of interpretation should be given full consideration.

It is welcomed that the EU is willing to respect transitional periods for LDCs, in pace with what may be required from them under the decisions of the TRIPS Council. Nevertheless, the CARIFORUM text should take into account that there are still some TRIPS-plus issues that would fall outside the provisions of transitional periods (i.e. limitations on exhaustion of rights and inclusion of protection of non-original databases in the definition of IP).

The EU has avoided the inclusion of new types of protections which by now are standard provisions in US' FTAs, such as protection for program-carrying satellite signals, for internet domain names, against circumvention of TPMs and for limitations of liability for online service providers. It has also avoided the inclusion of controversial points already included in EU legislation, such as the extension of the terms of protection for copyrights; granting exclusivity for undisclosed information; and protecting non-original databases. Furthermore, it has ventured into areas that are mainly in the interest of developing countries, such as the requirement for a disclosure of origin of genetic resources in patent applications.

Naturally, it will depend on the EU's counterparts where their offensive interests lie. Developing countries, although generally net importers of IP, may expect to have defined interests and advantages in the areas of cultural industries (copyright) and genetic resources, TK, folklore, and even industrial designs. Less so in the areas of patents and enforcement, where the cost of implementing and complying with the EU proposals on enforcement may be quite burdensome. Demands in the area of trademarks should not have a considerable impact on public policy issues such as access to medicines and knowledge, although attention should be paid to their relation with GIs. Finally, there may be gains in the area of GIs, not as a consequence of extending the protection of wines and spirits to all products, but as tool for the promotion of developing countries' quality products.

ENDNOTES

1 http://www.acpsec.org

2 http://www.aseansec.org

3 http://www.crnm.org

4 http://www.biodiv.org

5 http://www.cemac.cf

6 http://www.efta.int

7 http://europa.eu

8 http://www.ecowas.int

9 http://ec.europa.eu

10 http://www.european-patent-office.org

11 http://europa.eu

12 http://www.fao.org

13 http://www.gcc-sg.org

14 http://www.jpo.go.jp

15 http://www.mercosur.int

16 http://www.wipo.int

17 http://www.sadc.int

18 http://www.wipo.int

19 http://www.wto.org

20 http://www.icann.org

21 http://www.upov.int

22 http://www.uspto.gov

23 http://www.wipo.int

24 http://www.wto.org

25 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

26 See the *Strategy to enforce Intellectual Property Rights in third countries* of 10 November 2004 at http://trade.ec.europa.eu.

27 Trade Policy Review of the European Communities, 2007. World Trade Organization. Report by the WTO Secretariat. Document WT/TPR/S/177 at http://www.wto.org.

28 Trilateral Statistical Report 2005 at http://www.trilateral.net.

29 OECD – 2005 Compendium of Patents Statistics, p.35 at http://www.oecd.org.

30 There aren't precise numbers in the field of copyrights as there is no international obligation to register them.

31 Australia, Bahrain, Central America and Dominican Republic, Chile, Colombia, Lao People's Democratic Republic, Morocco, Oman, Panama, Peru and Singapore.

32 Ecuador, Malaysia; Republic of Korea, Southern African Customs Union (SACU), Thailand and United Arab Emirates (UAE).

33 See speech by Peter Mandelson of 9 October 2006 at http://ec.europa.eu.

34 ASEAN is formed by Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

35 The EFTA is formed by Iceland, Lichtenstein, Norway and Switzerland.

36 The European Economic Area was created in 1992 by an agreement between the European Community and the EFTA Members.

37 Norway is not part of EPO although as a signatory country of the European Patent Convention, it is entitled to accede. See Articles 165 and 166 of the European Patent Convention at http://www.european-patent-office.org.

38 The EPO is formed by the EU countries (except Malta), Iceland, Lichtenstein, Monaco, Switzerland and Turkey. EPO has agreements for the recognition of European patents with Albania, Bosnia-Herzegovina, Croatia, Latvia, the Former Yugoslav Republic of Macedonia, and Serbia and Montenegro. EPO's "main task is to grant European Patents according to the European Patent Convention" See Trilateral Statistical Report 2004, p.6

39 See http://www.trilateral.net.

40 http://www.trilateral.net.

41 See WIPO document SCP/10/9.

42 The proposal mentioned discussion on disclosure requirements, claim drafting and unity of invention/restriction, without taking into account that the draft treaty included several "public interest" provisions.

43 This proposal resulted from a meeting of the Trilateral Offices in November of 2003. See Summary of the 21st Trilateral Conference, Tokyo, Japan, 7 November 2003 at http://www.trilateral.net. However the origin of the proposal can be tracked back to a meeting of the Executive Committee of the International Association for the Protection of Intellectual Property (AIPPI) in Lucerne in October of 2003. See AIPPI's Resolution to Question 170 at http://www.aippi.org.

44 WIPO Rules of Procedure, Rules 21 and 24.2.

45 See EU – US Action Strategy for the Enforcement of Intellectual Property Rights at http://trade.ec.europa.eu and http://ec.europa.eu.

46 See the March 2006 European Commission's *US Barriers to Trade and Investment Report for 2005* at http://trade.ec.europa.eu.

47 US Trade Representative's *2006 Special 301 Report*, at http://www.ustr.gov.

48 The European Community, formerly the European Economic Community (EEC), is the first of the three pillars of the EU, concerning economic, social and environmental policies,. The other two pillars are the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters. See http://en.wikipedia.org.

49 Tritton, Guy et al. Intellectual Property in Europe, p.30. Sweet and Maxwell, Second Edition, London 2002.

50 Kapteyn, Verloren van Themmat. Introduction to the Law of the European Communities. Kluwer Law International. Third Edition, p.575. London 1998.

51 "The European Commission is a politically independent collegial institution which embodies and defends the general interests of the European Union. Its virtually exclusive right of initiative in the field of legislation makes it the driving force of European integration. It prepares and then implements the legislative instruments adopted by the Council and the European Parliament in connection with Community policies". See Europa Glossary at http://europa.eu.

52 The Treaty was signed on the 26th of February 2001 and came into force on the 1st of February 2003. Among others, reforms to the EU institutions dealt with weighing of the vote in the decision-making system of the Council, number of votes allocated to Member States, distribution of seats in the European Parliament, regulation of European level political parties, and number and procedure of appointment of members of the Commission. See http://ec.europa.eu.

53 See Article 133 of the Treaty establishing the European Community.

54 See Article 225a of the Treaty establishing the European Community.

55 See Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the «discussion circles on the Court of Justice on 24 February 2003: "The establishment of a judicial panel with jurisdiction over European staff cases and a judicial panel for intellectual property cases is therefore a matter of the utmost urgency". http://register.consilium.eu.int.

56 Intellectual Property Frontiers - Expanding the Borders of Discussion. A Stockholm Network Publication. Edited by Anne K. Jensen and Meir Perez Pugatch. United Kingdom 2005.

57 See http://ec.europa.eu.

58 "Green papers are discussion papers published by the Commission on a specific policy area. Primarily they are documents addressed to interested parties - organizations and individuals - who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation". http://europa.eu.

59 Ibid. "White Papers are documents containing proposals for Community action in a specific area. They sometimes follow a green paper published to launch a consultation process at European level. While green papers set out a range of ideas presented for public discussion and debate, white papers contain an official set of proposals in specific policy areas and are used as vehicles for their development".

60 See COM(98) 569, October 1998 at http://ec.europa.eu. Other green papers on intellectual property are "Promoting Innovation Through Patents - Green Paper on the Community patent and the patent system in Europe" (COM(97) 314, June 1997); "Green Paper on Copyright and Related Rights in the Information Society" (COM(95) 382, July 1995); "Green paper on the Protection of Utility Models in the Single Market" (COM(95) 333, May 1995); and "Green Paper on copyright and the challenge of technology - Copyright issues requiring immediate action" (COM(88) 172, June 1988).

61 See COM(98) 585, January 1999 at ftp://ftp.cordis.lu.

62 Treaty establishing the European Community - Article 249: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
- A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- A decision shall be binding in its entirety upon those to whom it is addressed.
- Recommendations and opinions shall have no binding force."
See http://eur-lex.europa.eu.

63 Council Regulation (EC) No 40/94 of 20 December 1993.

64 Council Regulation (EC) No 6/2002 of 12 December 2002.

65 Directive 98/44/EC of 6 July 1998.

66 Recommendation 2005/737/EC of 18 May 2005.

67 Goldstein, Paul. International Copyright – Principles, Law and Practice, p.88. Oxford University Press, London 2001.

68 See WTO document IP/N/4/EEC/1 at http://docsonline.wto.org.

69 For a thorough discussion of the MFN principle, including notifications under TRIPS article 4(d), see UNCTAD-ICTSD Resource Book on TRIPS and Development, Part 1, pages 77-82 at http://www.iprsonline.org.

70 For a complete list of intellectual property legislation go to http://europa.eu.

71 Roffe, Pedro & Maximiliano Santa Cruz (2006), Los Derechos de propiedad intelectual en los acuerdos de libre comercio celebrados por países de América Latina con países desarrollados, CEPAL, Serie Comercio Internacional 70 at http://www.eclac.org.

72 See http://ec.europa.eu.

73 Council Regulation (EC) No 510/2006 of 20 March 2006 at http://eur-lex.europa.eu.

74 European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Complaint by Australia (WT/DS290/R) and European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Complaint by the US (WT/DS174/R) at http://www.wto.org.

75 Council Regulation (CE) No 1493/1999 of 17 May 1999 at http://europa.eu.

76 See WTO document TN/IP/W/12 consisting of a table with the three proposals submitted to the TRIPS Council, including the EU's (TN/IP/W/11).

77 See WTO document TN/IP/W/11 submitted by the EU on June 2005 with proposals on a Register and Extension.

78 See press release of the EC from 28 August 2003 at http://europe.eu.int and WTO document JOB(06)/190.

79 Trade Policy Review of the European Communities, 2004. World Trade Organization. Report by the WTO Secretariat. Document WT/TPR/S/136, page 79.

80 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights at http://eur-lex.europa.eu.

81 Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (2005/295/EC). "The Commission considers that at least the following intellectual property rights are covered by the scope of the Directive: copyright, rights related to copyright, sui generis right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned. http://eur-lex.europa.eu.

82 See "Strategy for the Enforcement of IPRs in Third Countries", available at http://trade-info.cec.eu.int.

83 For a good summary of the Enforcement Directive see Linklaters, Newsflash at http://www.linklaters.com.

84 In the Rome Convention there is no equivalent to the Berne Convention's presumption of authorship for authors. Article 15(1) "In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity".

85 The purpose of the codes of conduct is that industries afected take an active part in the combat of of piracy and counterfeiting and serve as supplements to the regulatory framework.

86 Council Regulation (EC) No 1383/2003 of 22 July 2003 at http://eur-lex.europa.eu.

87 Commission Regulation (EC) No 1891/2004 of 21 October 2004 at http://eur-lex.europa.eu.

88 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Customs response to latest trends in Counterfeiting and Piracy of 10 November 2005, COM(2005) 479 final at http://ec.europa.eu.

89 In March 2006 the Council of the EU invited the Commission to implement the contents of the Communication. http://eur-lex.europa.eu.

90 Proposal for a European parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights at http://europa.eu.int.

91 See IP-Watch "EU IP Enforcement Directive Questioned On Procedure", 11 July 2006 at http://www.ip-watch.org.

92 GATT Document MTN/GNG/NG11/68 of 29 March 1990 at http://www.wto.org.

93 Cottier, Thomas. Trade and Intellectual Property Protection in WTO Law – Collected Essays. p.34. Cameron May, London 2005.

94 Ibid. op. cit. 27. See the *Strategy to enforce Intellectual Property Rights in third countries* at http://trade.ec.europa.eu.

95 See the Enforcement Survey of 2006 at http://ec.europa.eu.

96 The Guide, written by Professor Michael Blakeney , Queen Mary Intellectual Property Research Institute, Queen Mary, University of London, combines definitions of terms related to enforcement, relevant international institutions dealing with enforcement, description of TRIPS enforcement measures, and best practices for enforcement with specific country examples. See http://trade.ec.europa.eu.

97 For a complete text of the Strategy go to http://trade.ec.europa.eu.

98 http://ec.europa.eu.

99 See WTO document IP/C/W/448 submitted by the EU on June 2005.

100 See WTO document IP/C/W/471 submitted by the EU on June 2005.

101 See minutes of the TRIPS Council meetings, WTO documents IP/C/M/48, IP/C/M/49 and IP/C/M/50.

102 E.g. Issues dealing with domain names on the Internet; protection of encrypted program-carrying satellite signals; technological protection measures; liability of Internet service providers.

103 See e.g. Article 169 of the EU – Chile Association Agreement.

104 Partnership and Cooperation Agreement between the EC and Armenia, Article 42 at http://ec.europa.eu.

105 Partnership and Cooperation Agreement between the EC and Azerbaijan, Article 42 at http://ec.europa.eu.

106 Partnership and Cooperation Agreement between the EC and Georgia, Article 42 at http://ec.europa.eu.

107 Partnership and Cooperation Agreement between the EC and Kazakhstan, Article 42 at http://ec.europa.eu.

108 Partnership and Cooperation Agreement between the EC and Kyrgyz Republic, Article 43 at http://ec.europa.eu.

109 Partnership and Cooperation Agreement between the EC and the Russian Federation, Annex 10.1 at http://trade.ec.europa.eu.

110 Partnership and Cooperation Agreement between the EC and Ukraine, Article 50 at http://ec.europa.eu.

111 Partnership and Cooperation Agreement between the EC and Uzbekistan, Article 41 at http://ec.europa.eu.

112 Supra 90, Article 43.

113 Supra 91, Article 43.

114 Supra 92, Article 43.

115 Supra 93, Article 43.

116 Supra 94, Article 44.

117 See Partnership and Cooperation agreement between the European Union and Moldova, Article 50 at http://ec.europa.eu.

118 Supra 92, Article 51.

119 Supra 97, Article 42.

120 See supra 58, p. 33.

121 See answer 34 of WTO document WT/REG164/5 "Association Agreement between the European Communities and Chile – questions and replies" submitted by the EC to the Committee on Regional Trade Agreements on 20 June 2006.

122 For an explanation of the differences between commitments to "accede" and to "comply with" see Subsection on patents in Section 7 below.

123 Vienna Agreement establishing an International Classification of Figurative Elements of Marks (Vienna 1973, amended in 1985).

124 Locarno Agreement establishing an International Classification for Industrial Designs (Locarno Union 1968, amended in 1979).

125 WIPO Copyright Treaty (Geneva, 1996);

126 Convention for the Protection of Producers of Phonograms against Unauthorized Duplications of their Phonograms (Geneva 1971);

127 International Convention for the Protection of New Varieties of Plants (UPOV Geneva Act, 1991).

128 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961);

129 Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967 and amended in 1979);

130 Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971);

131 WIPO Performances and Phonograms Treaty (Geneva, 1996).

132 Madrid Agreement concerning the International Registration of Marks (Stockholm Act, 1967 and amended in 1979);

133 Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the purpose of Patent Procedures (1977, modified in 1980).

134 Protocol relating to the Madrid Agreement concerning the International Registration of Marks (Madrid, 1989).

135 Patent Cooperation Treaty (Washington, 1970, amended in 1979 and modified in 1984);

136 Nice Agreement concerning the International Classification of Goods and Services for the purposes of the Registration of Marks (Geneva, 1977 and amended in 1979);

137 European Patent Convention.

138 Patent Law Treaty.

139 Strasbourg Agreement Concerning the International Patent Classification (Strasbourg 1971, amended in 1979).

140 http://ec.europa.eu.

141 http://ec.europa.eu.

142 The accession of new members to the EU can be analyzed basically through three kinds of instruments: (i) The accession is usually founded on an association type of agreement (e.g. Turkey) or stabilization and association agreements (e.g. south east Europe countries such as the Former Yugoslav Republic of Macedonia and Croatia), which include broad issues, such as political dialogue, international and economic cooperation, and trade; including intellectual property chapters; (ii) Accession Partnerships, which set principles, priorities and conditions that should be fulfilled by candidate states, including short and medium term priorities in intellectual property rights; (iii) The third set of instruments are the Progress Reports, on concrete progress made by these countries in the implementation of the Accession Partnerships. The Reports have fairly detailed information on intellectual property developments in the respective countries.

143 See preliminary list of country groups at http://ec.europa.eu.

144 See http://ec.europa.eu.

145 Agreement between Australia and the European Community on Trade in Wine at http://www.austlii.edu.au.

146 Agreement between the European Community and Canada on trade in wines and spirit drinks at http://eur-lex.europa.eu.

147 Association Agreement between the European Union and Chile at http://www.sice.oas.org.

148 Agreement between the European Community and the United Mexican States on the mutual recognition and protection of designations for spirit drinks at http://europa.eu.int.

149 Agreement between the European Community and the Republic of South Africa on trade in wine at and Agreement between the European Community and the Republic of South Africa on trade in spirits at http://ec.europa.eu.

150 Agreement between the European Community and the US on trade in wine http://eur-lex.europa.eu.

151 The EU and Albania negotiated a comprehensive agreement on wine and spirits in the context of the Stabilization and Association Agreement. *See Agreement between the European Community and the Republic of Albania on the Reciprocal Recognition, Protection and Control of Wine, Spirits Drinks and Aromatized Wine Names*.

152 Agreement between the European Community and the Swiss Confederation on trade in agricultural products at http://europa.eu.int.

153 Traditional expression "means a traditionally used name...referring in particular to the method of production or to the quality, color, type or place, or a particular event linked to the history of the wine concerned and recognized by the laws and regulations of a Contracting Party for the purpose of describing and presenting such a wine originating in the territory of that Contracting Party" Agreement on trade in wine between Chile and the European Community, Article 3(c).

154 Council Regulation (EC) No 678/2001 of 26 February 2001 concerning the conclusion of Agreements in the form of Exchanges of Letters between the European Community and the Republic of Bulgaria, the Republic of Hungary and Romania on reciprocal preferential trade concessions for certain wines and spirits, and amending Regulation (EC) No 933/95 at http://europa.eu.int.

155 See article 17 of the Agreement between the European Community and Canada on trade in wines and spirit drinks: "By the end of a transitional period of two years from the date of entry into force of this Agreement, the Community shall recognise rye whisky as referring only to spirit drinks originating in Canada and shall not permit the use of this name on spirit drinks not originating in Canada".

156 Guy, Steve. Recent Developments in Market Access Facilitation. Presentation at the National Wine Export Conference, May 2005, Australia Wine and Brandy Corporation at http://www.dtftwid.qld.gov.au.

157 E.g. EU – Mexico Agreement on Trade in Wines, Article 6; EU – Canada Agreement on Trade in Wines, Article 34.1(b).

158 E.g. EU – South Africa Agreement on Trade in Wines, Article 7.4; EU – Chile Agreement on Trade in Wines, Article 5.4;

159 See the European Commission press release of 15 September 2005 at http://europa.eu.int.

160 Article 12.4 of the Agreement between the European Community and the US on trade in wine states that the article providing the substantive protection "shall not be construed in and of themselves as defining intellectual property or as obligating the Parties to confer or recognise any intellectual property rights. Consequently, the names listed in Annex IV are not necessarily considered, nor excluded from being considered, geographical indications under US law, and the names listed in Annex V are not necessarily considered, nor excluded from being considered, geographical indications under Community law.

161 See Joint Declaration on Future Dialogues, Agreement between the European Community and the US on trade in wine.

162 Australia and the EU are currently negotiating a revised agreement on trade in wines. The EU sought to protect 725 GIs that were not included in the 1994 agreement. See the list and procedure for objecting (deadline was October 2005) t http://www.awbc.com.au.

163 See the complete proposal at http://www.bilaterals.org.

164 See "Economic Partnership Agreement between Eastern and Southern Africa and the European Community - Title VI - Intellectual property rights", 4th Draft EPA/8th RNF/24-8-2006/ N.B. draft text at http://www.bilaterals.org.

165 Definition, Ibid.

166 See Grain – Bio-IPR Docserver – "Draft EU – Eastern and Southern Africa EPA", of 26 September 2006 at http://www.grain.org.

167 See the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources at http://www.grain.org.

168 Africa Group proposal (WTO doc IP/C/W/404) available at: http://docsonline.wto.org.

169 Article 65.1, Ibid. op. cit. 163

170 EC proposal (WIPO document WIPO/GRTKF/IC/8/11) available at: http://www.wipo.int.

171 Article 66.1(f), Ibid. op. cit. 163

172 The voluntary disclosure of the country of origin in the EU is based on Recital 27 of the EC Directive on the legal protection of biotechnological inventions (98/44/EC). All EU Members that have applied the disclosure requirement, either on a mandatory or voluntary basis, apply sanctions outside the patent field.

173 Ibid. op. cit. 168 – see WTO doc. IP/C/W/404

174 See interventions by Kenya in the TRIPS Council meetings of 25-26 October 2006 (WTO document IP/C/M/52) and 14-15 June 2006 (WTO document IP/C/M/51); of South Africa in the TRIPS Council meeting of 14-15- March 2006 (WTO document IP/C/M/50); of Nigeria in the TRIPS Council meeting of 14-15 June 2005 (WTO document IP/C/M/48).

175 Article 3.1, Ibid. op. cit. 163

176 Ibid.

177 Article 6.2, Ibid.

178 See communication of the European Communities to the TRIPS Council of 20 June 2002 (WTO document IP/C/W/352) and interventions of the European Communities in the TRIPS Council Sessions of 17-19 September 2002 (WTO document IP/C/M/37 par. 87-89) and 25-27 June 2002 (WTO document IP/C/M/36 par. 8-13).

179 See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases at http://europa.eu.int.

180 See DG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases of 12 December 2005 at http://ec.europa.eu.

181 See Feist Publications, Inc., v. Rural Telephone Service Co., 499 US 340 (1991).

182 Article 4.2, Ibid. op. cit. 163

183 See Decision of the TRIPS Council of 29 November 2005 at http://www.wto.org.

184 See Decision of the TRIPS Council of 29 November 2005 at http://www.wto.org.

185 Musung, Sisule and Dutfield, Graham. Multilateral Agreements and a TRIPS Plus World – The World Intellectual Property Organization. QUNO and QIAP, 2003 at http://www.quno.org.

186 See 17 U.S.C. §§ 1201-1205 at http://www.copyright.gov.

187 Article 7.2, Ibid. op. cit. 163

188 See Commission Recommendation 2005/737/EC of 18 May 2005 at http://eur-lex.europa.eu.

189 Accession to the Madrid Agreement has been resisted by local trademark agents in various countries, as they would allegedly stand to lose with international filings.

190 Article 9.3.3, Ibid. op. cit. 163

191 Article 9.3.2, Ibid. op. cit. 163

192 For a complete summary of discussions on Extension see Issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits - Compilation of Issues Raised and Views Expressed (WTO document WT/GC/W/546).

193 Article 9.4.3, Ibid. op. cit. 163

194 Article 9.3.1, Ibid. op. cit. 163

195 Article 9.3.1 and footnote to Article 9.3.1, Ibid. op. cit. 163

196 Article 9.5, Ibid. op. cit. 163

197 See Report of the Thirteenth Session of the SCT of October 25 to 29, 2004 (WIPO document SCT/13/8); See Compilation of Proposals for Future Work of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications in the Fifteenth Session of SCT (WIPO document SCT/15/2).

198 See Council Regulation (EC) No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs at http://eur-lex.europa.eu.

199 See Article 5 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs at http://eur-lex.europa.eu.

200 See Paragraph 16 of the Preamble of Council Regulation (EC) na 6/2002 of 12 December 2001 on Community Designs at http://oami.europa.eu.

201 See Article 10 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs at http://eur-lex.europa.eu.

202 The priority in the Paris Convention is of 12 months. See Article 4 of the Paris Convention.

203 Article 11.2.2, Ibid. op. cit. 163

204 Article 12.2, Ibid. op. cit. 163

205 TRIPS Article 27.3b. TRIPS Agreement available at www.wto.org

206 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights at http://www.cpvo.europa.eu.

207 See Kiewiet, Bart. Plant variety protection in the European Community, Elsevier Ltd. 2005 at http://www.cpvo.eu.int.

208 See Article 13.8 of Regulation on Community plant variety rights.

209 Article 13.3, Ibid. op. cit. 163

210 Article 13.1, Ibid. op. cit. 163

211 CBD Article 8(j). CBD text available at www.biodiv.org

212 Article 13.2, Ibid. op. cit. 163

213 See "Options for giving effect to the international dimension of the Committee's work", WIPO document (WIPO/GRTKF/IC/10/6) at http://www.wipo.int.

214 See par. 15 of Initial Draft Report of the Tenth session of the IGC (WIPO document WIPO/GRTKF/IC/10/7 Prov.) at http://www.wipo.int.

215 See par. 15 of Draft Report of the Ninth session of the IGC (WIPO document WIPO/GRTKF/IC/9/14 Prov 2.) at http://www.wipo.int.

216 TRIPS Article 41.5. TRIPS Agreement available at www.wto.org

217 See Berne Convention, Article 15.1 at http://www.wipo.int.

218 TRIPS, Article 43.1.

219 Draft Article 20 and Directive 2004/48/EC, Article 8.1.

220 TRIPS, Article 47.

221 See WIPO at http://www.wipo.int/

222 See Roffe, Pedro, Bilateral agreements and a TRIPS plus world, The Chile – USA free trade agreement. QIAP 2004. Page 29 at http://www.quno.org.

223 However these can be overridden by contract. Except for the exception to temporary copies in article 5.1, there aren't mandatory exceptions and limitations such as those in the Database and computer software directives.

224 See Chapter 17 of the Chile – US Free Trade Agreement at http://www.sice.oas.org.
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