

**COMMENTS ON “INNOVATION AND INTELLECTUAL PROPERTY”,
CHAPTER 2 PART II, TITLE IV OF THE DRAFT CARIFORUM-EC EPA DATED
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I. General Notes

Chapter 2 of Title IV of the draft EPA text covers issues linked with key aspects of socio-economic development of the Cariforum states (CF). One can easily assess the different levels of engagement of the parties under Section 1 and Section 2. Section one largely provides for non-binding commitment, declaratory statements, and matters that will be defined during implementation. Section two largely establishes binding TRIPS-plus standards that should be implemented by the parties. If Section 1 is assumed to be of interest for Cariforum (CF), then what they are getting from the EPA will be largely promises that may face the inherent difficulty of determining their scope and the kind of measures that can be considered as adequate implementation of the commitments. The implementation of Section 2 is straightforward, involving the introduction of domestic laws to implement the section that can be easily verified and assessed.

The CF countries are more active in negotiating innovation and IP rights than other ACP countries. The current negotiation appears to be in its final stage. There are indications that the CF states are interested in the development of cultural industry and branded geographic indications (GIs) in their region. That may have led to the assumption that the CF should negotiate IP rights under the EC. However, it should be noted that:

1. There is no mandatory obligation either under the WTO rules or the Cotonou agreement to negotiate on IP rights under EPA negotiations;
2. The EPA provisions and multilateral treaties on IP rights are not necessarily related to national/regional development of cultural industry and branding of indications of origin. They are just a means to create binding relationships among the participants. In effect binding relationships can change the dynamics of domestic policy making on IP rights considering the various competing interests at the local level. If the CF countries determine based on empirical evidence the need to adopt higher standards of copyright protection for development of their cultural industry, they can do so by changing their national laws and acceding to the WIPO internet treaties.¹ Currently, the CF countries largely conform to the TRIPS standard of protection and maintain limited participation in WIPO internet treaties. Their limited participation confirms that, they are considering the treaties only because of the EPA negotiations. As the current draft text of the EPA envisages indications of origin can be protected only if they are protected

¹ WIPO Copyright Treaty (WCT 1996) and the WIPO Performances and Phonograms Treaty (WPPT 1996).

- nationally. The CF countries have several well known indications of origin. The EU also maintains detailed rules on protection of geographic indications. Because of the WTO rules on national treatment (and as confirmed by dispute settlement panel), the EU's protection of geographic indications are available for any other WTO member, without any need to enter into agreement with the EU. As a result, what the EPA will offer for CF in this regard needs careful analysis; and
3. Article 12 of Section 2 dealing with the relationship between the TRIPS Agreement and Convention on Biological Diversity does not provide any concession by the EC to the CF, beyond its current position in the TRIPS Council discussion on the same subject matter. The entire Section 2 of the Chapter will only introduce changes on the standards to be followed by the CF countries on IP rights.

II. Accession/Compliance to WIPO treaties:

Since the agenda of the European Commission (EC) agenda on IP under the negotiation with the CF countries is set to substantially review the standards to be followed by CF countries on IP, it has broadened the scope of international treaties to be complied by the parties. Accordingly, it requires compliance to:

- a) Articles 1 through 14 of the WIPO Copyright Treaty (Geneva, 1996);
- b) Articles 1 through 23 of the WIPO Performances and Phonograms Treaty (Geneva, 1996).
- c) Articles 1 through 52 of the Patent Co-operation Treaty (Washington, 1970, last modified in 1984);
- d) Articles 1 through 15 of the Patent Law Treaty (Geneva, 2000);
- e) Articles 2 through 9 of the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977, amended in 1980).
- f) Revised Trademark Law Treaty, 2006.

The current participation of the CF countries in these treaties is very limited. As a result, the EPA negotiations can swiftly change the legal and policy framework on innovation and technological development in the CF countries. The CF countries had proposed alternatively to 'accede' to (as opposed to comply with) to the WIPO Copyright Treaty (WCT 1996) and the WIPO Performances and Phonograms Treaty (WPPT 1996). It is important that CF countries fully avoid any obligation to 'comply' with the provisions of any treaty other than TRIPS. Obligation to 'comply' is different from obligation to 'accede' to the treaties. If the obligation of the parties is to 'comply' with the treaties, then the multilateral treaties will be bilateral obligations enforceable under the bilateral dispute settlement provisions. The dispute settlement procedure under the WIPO treaties is very weak compared to those that apply to the TRIPS or bilateral free trade/economic partnership agreements. If the CF agrees only to 'accede' to the treaties, then the only enforceable obligation would be whether the countries have acceded or not.

The CF should fully consider avoiding any commitment with regard to WIPO treaties. The current draft EPA text under Article 9.1 (b) and Article 6.4 (Section 2) provides for the parties only to do their level best (endeavour) to accede to PLT, TLT, Rome Convention, Madrid protocol etc. The obligation with respect to UPOV is also loose. This should be the best approach for the CF for all international treaties.

Most of the Mediterranean countries committed to accede to the treaties after the *lapse of a transition period*. Some committed only to do their level best to accede to the treaties. For example, Algeria's commitment under Annex 6 of its Association Agreement with the EC states Algeria shall accede to the treaties before the end of four years from the entry into force of the association agreement. This approach should be considered as second alternative for CF countries, where they were not bale to avoid obligations to 'accede' to treaties..

III. Negotiating Geographic (GIs) Indications and Biological Resources

The most important gain for the EC (and concession for CF) pertains to the GIs and trademark issues. The CF need not appear as if they are interested on the GIs, since, from what is proposed under the current draft EPA text, the EC would secure important concessions that it was not able to do so under the TRIPS.

First, the draft EPA text Article 7.2 (3) and 7.5 (2) extend the higher protection of GIs for wines and spirits to all products. The current draft EPA text eliminates any distinctions between products to determine the level of protection. The EC already has registered regionally more a thousand of GIs for agricultural goods, and beverages. Under the TRIPS, the EC pushes for review of the relevant provisions to extend the higher protection of GIs for wines and spirits to all other products. The EC is unlikely to secure such concessions under the TRIPS Agreement considering the resistance from the New World, especially the United States, Chile, Argentina, South Africa and several other developing countries.

Secondly, the EC will secure negotiation of marks and names that are currently under public domain where the mark and names conflict with EC's GIs. Article 7.3 of the current draft EPA text provides for Annex to the agreement listing terms that should not constitute as terms under the public domain. This is something the TRIPS does not offer and that the EC do not expect to gain from any multilateral process. CF countries have proposed to limit the application of the names under the Annex only where there is a legal basis under the national law.

These important gains for EC should be evaluated in parallel with the gain, if any for CF countries on the protection of genetic resources (that includes marine genetic resources), traditional knowledge (TK) and folklore. The close reading of 12 shows that there is no concession made on part of EC or developments achieved on the legal questions of the protection of genetic resources, TK and folklore. Article 12 (1) & (2) simply reinstate the provisions of the Convention on Biological Diversity without changing the obligations of the parties.

Some of the assertions and arrangements resolving approach to specific issues create systematic advantage for EC, without any meaningful outcome for CF countries. Article 12 (3) establishes the agreement of the parties for implementation of patent legislations and CBD in a mutually supportive way. The provision reduces the question of the relationship between TRIPS and CBD simply to a matter of implementation, as opposed to international law question of equity and fairness. For that purpose paragraph 4 provides that States *may* require identification of sources of biological material in patent application. It can be noted that:

1. The legal problem on the relationship between patent protection and CBD was not whether states *may* adopt procedures for identification of biological resources, , but whether states *should* adopt such procedures as a binding international obligation under the TRIPS to ensure mutual supportiveness of the TRIPS and CBD. For CF negotiators it might be clear that the EC will not agree on a binding commitment in this area. If so, what would be the purpose of discussing biological resources under the EPA? The EC would systematically achieve a landmark gain by shifting the debate towards whether states should be allowed to introduce such procedure from whether EC and other developed countries should introduce such procedures.
2. The EC will also avoid any inconclusive debate whether TRIPS and CBD are in conflict. The TRIPS Agreement while promoting the availability of patent for inventions based on biological resources and traditional knowledge, provide no effective provisions to prevent the availability of patents on such invention from undermining the objectives of the CBD. Now the EC and the CF states agree there is no such conflict, but only an issue of implementation, in which case the solution has to be established under the domestic legislation of the parties.
3. Furthermore, paragraph 5 of Article 12 (Section 2 of the Chapter) establishes the agreement of the parties to regularly exchange views and information on the WIPO and the TRIPS Council discussion on genetic resources, traditional knowledge and folklore. One may ask if this adds anything for the CF countries.

As a result, the *CF countries could consider parallel concessions/gains with respect to GIs and genetic resources*. If the CF is to accept the extension of the higher protection of GIs for all products, it should demand at least the mandatory disclosure requirement for patent applications concerning inventions derived from genetic resources, and associated TK. The disclosure shall include the source and origin of the genetic resources, and associated TK. Where the CF is to accept the list of terms that should cease to be under public domain, then it should also request for the parties to ‘provide the legal means for the protection of TK and folklore’ and to prevent third parties from using TK and folklore except with prior informed consent of the holders of the TK and folklore and arrangements for equitable benefit sharing.

IV. Utility models

The standard applicable for the protection of utility models is specified under the current text to constitute ‘**new, involve some degree of non-obviousness and [] capable of industrial application**’. This should be removed. The CF countries should

have the flexibility to determine the kind of inventions that should be protected by utility models. The current standard in the draft EPA text is marginally different from the standard for *patents*. Since utility models are useful at the early stage of development the CF should apply less strict standard for availability of utility models.

V. Enforcement of IP

The current draft EPA text further developed and upgraded IP rights enforcement standards to be adopted under the Cariforum EPA, in addition to the TRIPS Agreement. Although, there are often references declaring the adoption of standards without prejudice to the provisions of the TRIPS Agreement, the draft EPA leaves out the balance recognised under the TRIPS Agreement with respect to enforcement of IP right. With the view of upgrading enforcement standard, the draft EPA:

1. requires appeal before 'Court' of law for refusal to register trademark, without any intermediary administrative proceeding (Art. 6.2);
2. provides for electronic database of trademark 'applications' and trademark 'registration',
3. Expand the requirement with respect to discovery of evidence, application and scope of provisional measures and injunction and right of information;
4. Expanded the application of the enforcement procedures, especially for the special border measure, beyond counterfeit trademarks or pirated copyright goods. The enforcement standard for special border measures is required to include goods which infringe a patent, a plant variety right, a design and GIs. Moreover, the definition for counterfeit goods covers any trademark symbol (logo, label, sticker, brochure, instructions for use or guarantee document), even if presented separately, on the same conditions as the goods infringing the trademark, packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods infringing the trademark.

These standards would require significant changes in laws and practices of CF countries that are striving to implement their obligations under the TRIPS Agreement. At this junction the *CF should have insisted on implementing the TRIPS obligations* than agreeing to new procedures on enforcement of IP rights for detail implementation. The negotiation and implementation of the enforcement procedures in EC was itself, very controversial and complicated considering the divergence in legal practices among members of the EU.

As a result, the CF at least has to contest:

1. The definition of 'counterfeit' and 'piracy': IP rights are mainly territorial in nature. A certain act could infringe a right conferred by a copyright in one territory, but may not do so in another territory. In the absence of harmonisation of substantive standards of protection, defining 'infringement' is problematic. It is important to limit the definition of 'goods infringing an IP' to goods, *which according to the law of the Party in which the application for customs action is made, infringes copyright and trademark.*

2. The applications of boarder measures to patents, plant varieties, design, and GIs. Unlike copyright and trademark, the infringement of patent or plant variety may not always be physically observed. This would result in boarder measures that are disproportionate and, possibly, difficult to implement by the authorities. The CF should request for further safeguard measures that ensure the prevention of the abuse of the enforcement procedures. One way to do that will be to include provision for consultation between the two regions, in cases of boarder measures concerning the export of the parties that are applied in more than one jurisdiction concerning same subject matter and goods, with significant consequence for the export of goods from the parties. In recent case, Argentina's export of Soya was halted at several European ports by Monsanto, Inc. (USA) for about a year based on allegation of violation of its patents. After significant cost to Argentina's trade the courts in the UK and Spain declined the application of Monsanto. This kind of incidents could be disastrous to small countries like those in the Caribbean. As a result, there should be procedures for parties to facilitate release of goods pending court ruling. Alternatively, the CF can request a significant security threshold for lodging application for boarder measures by the plaintiff.

VI. Notes on Section one: Innovation

International agreements related to innovation, R&D, science and technology, technology transfer are generally broad and with limited binding obligations. Much of the areas for cooperation in science and technology can be implemented fully under subsequent execution agreements identifying specific projects for implementation and financing. However, it is important to ensure that the principles for cooperation and further implementation are meaningful and effective. In this regard;

1. The participation of the CF under the Framework programmes of the EC is vaguely defined under para. 1 of Article 4. EC negotiated for implementation of plan of action to increase the participation of Egyptian researchers in the Seventh Framework Programme (FP7) of the EU. There is no reason why the participation of CF to the European FP will not be elevated by stating that the EC agrees to the participation of CF in its existing or future FP. The level of participation could be determined in actual action plans but the EPA agreement has at least to establish the participation of CF conclusively;
2. par. 2 of Article 4 and subsequent provisions of the section rely on the Joint CF-EC Implementation Committee. However, the CF states may need to evaluate whether the establishment of CF-EC Joint committee on Science and Technology could be useful to strengthen the cooperation in the field;
3. Section 1 does not specifically cover pharmaceutical industry. It is import for CF to request for cooperation in such field.

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