

**EU EPAs: Economic and Social  
Development Implications:  
the case of the CARIFORUM-EC Economic Partnership  
Agreement**

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## CONTENTS

<b>LIST OF ACRONYMS</b> .....	<b>5</b>
<b>INTRODUCTION</b> .....	<b>7</b>
TERMINOLOGY .....	7
DISADVANTAGES OF FTAS COMPARED TO MULTILATERAL TRADE AGREEMENTS .....	7
CHANGING VIEWS ON THE EFFECTS OF LIBERALISATION .....	8
"RECIPROCITY" AS A PRINCIPLE IN FTAS .....	9
GLOBAL EUROPE-WHAT DOES THE EU WANT? .....	12
<b>GOODS</b> .....	<b>12</b>
INTRODUCTION .....	12
EPAS .....	13
MFN CLAUSE .....	14
REVENUE LOSS .....	15
AGRICULTURE .....	16
<i>Removal of export restrictions</i> .....	16
COMPARING EPAS AND WITH EARLIER EU FTAS .....	16
<b>RENDEZVOUS CLAUSE</b> .....	<b>17</b>
<b>SERVICES</b> .....	<b>17</b>
GENERAL .....	17
DOES THE DEGREE OF LIBERALIZATION MATTER FOR DEVELOPMENT? .....	18
NEED FOR A COMPREHENSIVE NATIONAL SERVICES PLAN .....	19
FEATURES OF SERVICES CHAPTERS IN FTAS .....	19
CARIFORUM-EU EPA: BRIEF ANALYSIS ON SERVICES .....	20
<b>SINGAPORE ISSUES</b> .....	<b>23</b>
INVESTMENT .....	24
<i>Context</i> .....	24
<i>The need for space and flexibility for investment and development policies and the effects of an investment agreement</i> .....	24
<i>Provisions</i> .....	26
<i>Conclusions</i> .....	27
<i>Analysis of CARIFORUM-EU EPA regarding investment</i> .....	27
GOVERNMENT PROCUREMENT .....	29
<i>Role of government procurement</i> .....	29
<i>Government procurement in trade agreements</i> .....	30
<i>National policy changes needed due to FTA</i> .....	31
<i>Effects of government procurement liberalization under FTA</i> .....	31
<i>CARIFORUM- EU EPA provisions</i> .....	32
COMPETITION CHAPTER .....	33
<i>Background</i> .....	33
<i>Towards a development framework on competition for developing countries</i> .....	36
<i>Competition in EU-FTAs</i> .....	38
<i>CARIFORUM-EU EPA analysis</i> .....	39
State enterprises .....	39
Government procurement .....	39
Subjecting certain enterprises to competition rules and prohibiting measures distorting trade with regard to them .....	40
Cooperation .....	41
State enterprises conclusion .....	41
<b>INTELLECTUAL PROPERTY</b> .....	<b>42</b>

BACKGROUND.....	42
<i>Context</i> .....	42
<i>WTO's TRIPS Agreement</i> .....	43
<i>IP negotiations shift to FTAs</i> .....	44
<i>Is an IP chapter required by the Cotonou Agreement?</i> .....	45
CONTEXT, OBJECTIVES AND PRINCIPLES.....	46
<i>Context</i> .....	47
<i>Objectives</i> .....	47
<i>Principles</i> .....	47
Transition periods.....	48
Harmonisation and regional patents.....	48
COPYRIGHT.....	51
<i>Context</i> .....	51
<i>WCT &amp; WPPT</i> .....	52
TRADEMARKS.....	53
GEOGRAPHICAL INDICATIONS.....	53
INDUSTRIAL DESIGNS.....	54
PATENTS.....	55
<i>What is a generic medicine?</i> .....	55
<i>What is a patent?</i> .....	55
<i>Generic v patented prices</i> .....	55
<i>PCT</i> .....	56
Impact on access to affordable medicines.....	56
Impact on manufacturing: Moving up the value chain.....	57
Biotechnology.....	58
<i>PLT</i> .....	58
<i>Micro-organisms: Budapest Treaty</i> .....	59
Context.....	59
How the Budapest Treaty works.....	59
Implications for developing countries.....	60
More micro-organisms are likely to be patented.....	60
Greater foreign exchange losses.....	61
Increased risk of biopiracy.....	61
Who will benefit?.....	61
Will joining the Budapest Treaty increase the access of developing countries to microorganisms?.....	61
Other restrictions on policy space as a result of joining Budapest.....	62
<i>Paragraph six</i> .....	62
UTILITY MODELS.....	62
PLANT VARIETIES.....	63
<i>Does stronger IP lead to increased agricultural productivity?</i> .....	64
ENFORCEMENT.....	65
<i>Introduction</i> .....	65
<i>Right of information</i> .....	67
<i>Provisional and precautionary measures</i> .....	67
<i>Corrective measures</i> .....	68
<i>Damages</i> .....	68
<i>Border measures</i> .....	69
<i>Lack of safeguards</i> .....	70
<i>Conclusion</i> .....	70
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE.....	71
COOPERATION.....	72
<i>Innovation section</i> .....	72
<i>Cooperation subsection</i> .....	73
CONCLUSION.....	73
<i>Extent to which CARIFORUM's aims were achieved</i> .....	74

<i>Implementation costs</i> .....	74
<b>DISPUTE SETTLEMENT</b> .....	<b>75</b>
<b>EXCEPTIONS</b> .....	<b>75</b>

## List of acronyms

ACP	African, Caribbean and Pacific
AoA (WTO)	Agreement on Agriculture
ASEAN	Association of Southeast Asian Nations
CARIFORUM	Caribbean Forum
CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
CIEL	Center for International Environmental Law
CRNM	Caribbean Regional Negotiating Machinery
EAC	East African Community
EBA	Everything but Arms
EC	European Community
ECDPM	European Centre for Development Policy Management
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
EUROMED	Euro-Mediterranean
FDI	foreign direct investment
FTA	free-trade agreement
GAERC	General Affairs and External Relations Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GLC	government-linked company
GSP	Generalised System of Preferences
HS	Harmonised System
ICTSD	International Centre for Trade and Sustainable Development
IDA	international depositary authority
IMF	International Monetary Fund
IP	intellectual property
IPR	intellectual property rights
IPRED	Intellectual Property Enforcement Directive
LDC	least developed country
MAI	Multilateral Agreement on Investment
MDG	Millennium Development Goals
MEP	Member of European Parliament
MFN	most favoured nation

MUFTA	Malaysia-US free trade agreement
NTB	non-tariff barrier
ODI	Overseas Development Institute
OECD	Organisation for Economic Co-operation and Development
PACP	Pacific ACP
PCT	Patent Cooperation Treaty
PLT	Patent Law Treaty
PNG	Papua New Guinea
RoO	rules of origin
RTA	regional trade agreement
SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SDT	special and differential treatment
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
TDCA (EU–South Africa)	Trade, Development and Co-operation Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UEMOA	<i>Union Economique et Monétaire Ouest Africaine</i>
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UPOV Plants	International Convention for the Protection of New Varieties of
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## Introduction

This paper analyses the various chapters in EPAs. It begins with general comment and analysis of that particular issue, including in USFTAs and its possible consequences. (On some issues, USFTAs may have worse consequences for development than European ones. It is often a matter of degree as the principles are commonly similar). It then goes on to analyse specific provisions of the interim EPAs. For areas other than goods, the analysis is of the CARIFORUM- EU EPA as that is the only ACP-EU EPA which goes beyond goods. Interestingly, the CARIFORUM-EC EPA appears to be a basis for similar provisions for other EU bilateral/regional trade agreements from what we understand.

## Terminology

'FTA' is used here to include EPAs as the EU is also negotiating FTAs with developing countries.

References to obligations for CARIFORUM countries may also apply to the EU. However, because this paper is focused on the implications for development, the focus will be on CARIFORUM's obligations.

## Disadvantages of FTAs compared to multilateral trade agreements

It is generally recognized that bilateral agreements, especially between a developing and a developed country, are not the best option and that multilateral negotiations and agreements are preferable. The reasons for this include:

1. Bilateral agreements usually lead to "trade diversion", in that the partners divert away products that may be more cheaply priced in favour of products from the FTA partner, even if they are not cheaply priced, thus resulting in inefficiency.
2. In an FTA between a developed country and a developing country or countries, the latter are usually in a weaker bargaining position due to the lack of capacity of their economies, their weaker political situation, and their weaker negotiating resources.
3. In the WTO, the principles of special and differential treatment, and less than full reciprocity, are recognized. Thus, developing countries are better able to negotiate on the basis of non-reciprocity and for non-reciprocal outcomes, in which they are not obliged to open up their markets (or undertake other obligations) to the same degree as developed countries. However, these "development principles" are usually absent in FTAs, or they are only reflected in longer implementation periods for the developing country. The FTAs are basically on the basis of reciprocity. This "equal treatment" of parties that are unequal in capacity is likely to result in unequal outcomes.
4. The FTAs contain many items that are not part of the rules of the WTO. Many North-South FTAs include rules on investment, government procurement and competition law, which have so far been rejected by developing countries as subjects for WTO negotiations or rules. Developing countries also refused that labour standards and environment standards be subjects of discussion in the WTO (due to the fear of developing countries that they would become the basis of protectionist measures against their products). All these topics are now entering "by the side-door" through the FTAs, even though the same reasons for developing countries to reject rules on these issues should apply in FTAs as they do in the WTO.

5. Even where issues are already the subject of rules in the WTO (e.g. intellectual property and services), there were many “flexibilities” and options open to developing countries in interpreting and in implementing obligations in these areas. However, there are attempts by developed countries to remove these flexibilities for developing countries in the FTAs. If these attempts succeed, the “policy space” for developing countries to pursue development and socio-economic goals would be significantly reduced.
6. The proliferation of so many agreements also puts pressure on personnel and financial resources in developing countries and requires a lot of technical expertise which may be not adequately available, given the large number of agreements and the limited resources.

The report “The Future of the WTO” commissioned by the WTO Director-General and which was published in January 2005 has criticized the proliferation of bilateral and regional trade agreements (RTAs), which it says has made the “MFN” (most favoured nation) principle the exception rather than the rule, and which has led to increased discrimination in world trade.

However, it appears that FTA negotiations are moving ahead and negotiations on even more FTAs and RTAs are being announced.

Several researchers have pointed out that whilst bilateral agreements may be tempting for a developing country to get some specific advantages from its developed-country partner, such as better market access for some of its products, there are also several potential dangers and disadvantages. Developed countries such as the US, EU and Japan are known to want to use the instrument of bilateral agreements to obtain from their partners what they failed to achieve at the WTO, in which the developing countries have been able to oppose or resist certain negative elements in various agreements.

### **Changing views on the effects of liberalisation**

Whilst an advanced developing country which is already highly liberalized may be able to bear the pressures of faster liberalization, other developing countries may not be able to compete with the faster opening of their markets or with other demands of the developed country.

Up to a few years ago, there was a widespread belief in the orthodoxy (promoted especially by the IMF and World Bank, and by policy makers in developed countries) that liberalization is necessarily good for development, and the faster the liberalization the better it is for development. This was the intellectual basis for developed countries to pressurize developing countries to quickly and deeply cut their tariffs and remove non-tariff barriers, as well as open up their services sector, financial sector and investment regime.

However, there has been growing skepticism not only from civil society but also policy makers regarding this orthodoxy, mainly because such rapid liberalization has led to import surges in many developing countries, with adverse effects on the local industrial and agricultural sectors, and on the balance of payments and the debt position. The emerging paradigm is that developing countries require certain degrees of protection to enable the local firms and farms to compete in their own domestic markets, and that this was the way the now-developed countries arranged their own trade and industrial policies when they were at the development stage.

Such protection is especially required by developing countries when many agricultural products are heavily protected by tariffs and subsidies in the developed countries, and where export and domestic subsidies enable these countries to sell artificially-cheapened products on the world market. Tariff protection is the means by which developing countries can defend their farmers from unfair competition, especially since quantitative restrictions were prohibited under the Uruguay Round.

Arguments have been put forward by developing countries along the above lines in the WTO. The developing countries are also pursuing three tracks to strengthen the development dimension in the WTO: (1) proposals to clarify, review or amend existing WTO rules, due to problems of implementation of these rules; (2) proposals to strengthen existing SDT (special and differential treatment) provisions, and to introduce new ones where they do not exist but are required; (3) proposals to have adequate SDT provisions in new rules or revision of rules in current negotiations (especially in agriculture and industrial products).

Some developed countries are beginning to change their previously strict insistence on liberalisation in developing countries. For instance the UK government has declared that it will not seek to “impose” liberalization on African countries and on least developed countries. The recent G8 summit also has a statement along similar lines. Notably, this change in attitude is stated only for “least developed countries” (LDCs) and thus presumably does not apply to non-LDC developing countries. But it can be noted that a change in attitude towards liberalization has started even in developed countries’ policy circles.

## “Reciprocity” as a principle in FTAs

There is a significant lack of a similar “development track” within FTAs between developed and developing countries. Instead, the FTAs are being negotiated mainly on the basis of “reciprocity”, i.e. that both sides take on similar levels of obligations. The focus is almost strictly on “Market Access” and “National Treatment” i.e. how to open up markets in order to get more business opportunities. There is hardly any development content as such, not is there much sympathy for the unequal capacity the developing country faces, both in its level of development,<sup>1</sup> and in its negotiating capacity.

This is mainly due to the demand for such a basis by trade policy makers of developed countries. They also point to the need for FTAs and RTAs to be consistent with WTO rules, in particular Article XXIV of GATT 1994 (covering customs unions and free trade areas). (WTO 1994: p522-525). This Article enables FTAs to be established under certain conditions. One provision is that “the purpose of a customs union or a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.” It also defines a free-trade area as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are “eliminated on substantially all the trade between the constituent territories in products originating in such territories.” [GATT, Article XXIV.8(b)].

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<sup>1</sup> For example, the farm population in the European Union is less than 5%, whereas in ACP countries it is more than 50-60%; the share of agricultural GDP in total GDP is less than 10% for the European Union and more than 30% for ACP countries; and the share of agricultural products and exports is 2.1% for the European Union and 40% for the ACP countries, Mamadou Cissokho, Réseau des organisations paysannes et de producteurs agricoles de l’Afrique de l’Ouest (ROPPA), High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006. He also notes that ‘by refusing to eliminate subsidies that destabilise our agriculture, the EU has abandoned the idea of building equitable trade relations with ACP countries’.

This is widely taken to mean that FTAs have to be reciprocal in nature, since SDT provisions are not mentioned in the Article, and that tariffs and other trade restrictions have to be eliminated on “substantially all trade” between the parties. It is not defined what constitutes “substantially all trade.” In the course of discussions between the European Union and African-Caribbean and Pacific (ACP) countries, which are negotiating economic partnership agreements (EPAs), it is understood that the EU considers this to mean at least 90% of trade, while some ACP countries interpret it to mean at least 60% of trade.<sup>2</sup>

There have been recent proposals to revise or clarify Article XXIV so that it clearly enables non-reciprocal relations to prevail in FTAs between developed and developing countries. The ACP Group has made such a proposal. Recently, China has also made a development-oriented proposal on Article XXIV.

If the Article is not clarified or revised, if reciprocity remains the principle in an FTA between a developed and developing country, and if the FTA covers almost all products, then a typical developing country is likely to be at a serious disadvantage, as it has less production capacity and probably has significantly higher tariffs, especially on industrial products. Elimination of tariffs will thus hurt the business or viability of local industries and even farms of the typical developing country.

Given this, African Union Trade Ministers reiterated that ‘Article XXIV of GATT needs to be appropriately amended to allow for necessary special and differential treatment, less than full reciprocity principle and explicit flexibilities that are consistent with the asymmetry required to make EPAs prodevelopment. Conclusions of the market access aspects of the EPAs should take place upon completion of the amendment.’<sup>3</sup>

The report of the High-Level Conference on EU-ACP Trade Relations noted that reciprocity is not the preferred option of ACP countries and continues to present serious concerns.<sup>4</sup> The Ambassador of Mauritius in Brussels noted that ‘At no point in time was an EPA as a free trade agreement the first choice for the ACP. It was not. But we had no alternative...’<sup>5</sup>

The Nigerian Ministry of Commerce remarked that ‘If 30 years of non reciprocal free market access into the EU did not improve the economic situation of ACP, how can a reciprocal trading arrangement achieve anything better? . . . There are fears that the liberalisation of trade and investment by the gradual removal of trade barriers between the two economic blocs would further widen the gap between the two and probably destroy the little development that some ACP countries have managed to achieve over the past years.’<sup>6</sup>

The extent to which ACP countries can take advantage of any extra market access into the EU is an open question. For example, the Minister of Foreign Affairs and External Trade for Fiji notes that ‘as far as de-industrialization and employment implications, in the Pacific case an EPA may certainly not boost bilateral trade in goods, because, as I have said, a lot of our members do not even trade with the EU; and with the tyranny of distance, with high freight costs, the supply constraints and the lack of supply diversity in the region, there is not likely to be a major boost in trade.’<sup>7</sup> He continued that ‘We should have or negotiate a suitable translation of substantially all trade, the pace of liberalisation to be

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<sup>2</sup> For example, the Minister of Foreign Affairs and External Trade for Fiji noted that ‘We want a much lower percentage for trade liberalization, i.e. 60-70% instead of 90%, which is the conventional percentage’, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>3</sup> African Union Conference of Ministers of Trade, 4th Ordinary Session, Nairobi Declaration on Economic Partnership Agreements, 14 April, 2006.

<sup>4</sup> High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>5</sup> High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>6</sup> High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>7</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

contingent on developmental status. That is, open up your economy only after you have established a certain degree of competitiveness and addressed the supply side constraints.’<sup>8</sup>

The supply side constraints will make it difficult for ACP countries to take advantage of lower tariffs in the EU. The Minister of Foreign Affairs and Foreign Trade for Barbados noted that ‘the EC view of development ignores the various structural deficiencies and supply-side rigidities that afflict small vulnerable economies’.<sup>9</sup> She went on to note that ‘Commission negotiators are taking the position that EPAs will promote CARIFORUM regional integration and that the resulting market enlargement will lead to greater efficiency, attract investment and promote development in the region. In my view, this is an unrealistic assumption on the part of the EU because it does not address the critical supply-side constraints and other structural problems, which are the real impediments to competitiveness and development in CARIFORUM and other ACP regions.’<sup>10</sup> She also points out that ‘Commission spokespersons themselves have conceded that “trade will not provide development without parallel investment in the supply side”, CARIFORUM negotiators would wish to see their EC counterparts give priority to addressing the region’s supply-side constraints with sufficient urgency to bring about a significant increase in the competitiveness of its economic operators before the reciprocal opening of the region’s markets.’<sup>11</sup>

The Minister of Foreign Affairs and Foreign Trade for Barbados concluded that the ‘EU negotiators must be reminded that neither liberalised trade nor preferential access to the EU markets, separately or jointly, will promote development by themselves; because countries suffering from capacity constraints and institutional inadequacies will not be able to make the best use of market access, even under preferential terms.’<sup>12</sup>

The Minister of Trade for Senegal pointed out that ‘If your country hasn’t a sufficient supply of production capacity you will make very little progress because you will have put “the cart before the horse”’.<sup>13</sup>

Similarly, the Minister of Foreign Affairs and External Trade for Fiji noted that ‘An EPA does need to enhance Pacific ACP states’ supply capacity in order that we can be effective in trading. This has implications on the EPA Resources’.<sup>14</sup>

West African farmers point out that LDCs have nothing to export because of their supply problem.<sup>15</sup> For example, there is ‘low supply-side capacity, numerous standards, particularly sanitary problems for (including when shipping fresh produce), bad production context: research, counselling, credit, financing etc.’<sup>16</sup>

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<sup>8</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>9</sup> Dame Billie Miller, Chair of the ACP Ministerial Trade Committee, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>10</sup> Dame Billie Miller, Chair of the ACP Ministerial Trade Committee, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>11</sup> Dame Billie Miller, Chair of the ACP Ministerial Trade Committee, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>12</sup> Dame Billie Miller, Chair of the ACP Ministerial Trade Committee, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>13</sup> Mamadou Diop, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>14</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>15</sup> Mamadou Cissokho, Réseau des organisations paysannes et de producteurs agricoles de l’Afrique de l’Ouest (ROPPA), High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>16</sup> Mamadou Cissokho, Réseau des organisations paysannes et de producteurs agricoles de l’Afrique de l’Ouest (ROPPA), High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

The Minister of Trade from Senegal called for ‘the reciprocal trade liberalisation objectives to be dropped’.<sup>17</sup>

The Minister of Foreign Affairs and External Trade for Fiji commented that ‘we have reminded the European Union of the need for alternatives . . . Some of our members who do not even trade with the European Union are going to ask the question “what is there in an EPA for me?” and are likely to opt out of the EPA and try to find some alternative trading arrangements. It is prudent therefore that we should have alternative trading arrangements to choose when the time comes.’<sup>18</sup>

The Minister of Foreign Affairs and External Trade for Fiji stated that ‘We should return to the developmental dimension rather than the trade focus of the EPAs. And this will obviously help in the proper reconsideration of the quantum leap of EPA resources’.<sup>19</sup>

## Global Europe-what does the EU want?

The European Commission’s ‘Global Europe: Competing in the world’ document was published in October 2006 and sets out the frame of reference for its current free trade agreement negotiations. The document is clear that the Commission is aiming to open new markets for European companies by targeting developing countries cost of the overall regulatory environment, despite the acknowledged problems this will cause to the development efforts of poorer countries.<sup>20</sup>

The EU is also targeting export restrictions by developing countries because it wants to ensure it has access to natural resources including energy.<sup>21</sup>

In addition to market access, the Commission is clear that it is aiming to get concessions that developing countries refused to give at the World Trade Organization in areas such as the Singapore issues (competition, government procurement and investment). For example, its aims in these FTA negotiations are to tackle ‘issues that are not ready for multilateral discussions’ and to ensure better access for EU companies to major public procurement markets.<sup>22</sup>

## Goods

### Introduction

Given the problems arising from FTAs, the reason some developing countries decide to negotiate an FTA with a developed country is the fear of being left behind, as they see other countries, especially in their region, entering FTA negotiations with developed countries, which constitute their major markets. There is a fear that those developing countries that are entering FTAs will gain a competitive edge and thus leave those that do not join an FTA behind.

The developing country may also believe that entering an FTA will give it benefits in terms of greater access into the markets of the partners, as the FTA will provide preferences in terms of lower tariffs or quotas.

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<sup>17</sup> Mamadou Diop, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>18</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>19</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>20</sup> EU bilateral and regional free trade agreements: bringing women to the centre of the debate, WIDE Network, 2007.

<sup>21</sup> EU bilateral and regional free trade agreements: bringing women to the centre of the debate, WIDE Network, 2007.

<sup>22</sup> EU bilateral and regional free trade agreements: bringing women to the centre of the debate, WIDE Network, 2007.

It is thus crucial that the developing country identify the products which are important for it, whose exports it hopes will expand through the FTA, and to assess whether realistically whether there will be an increase in market access and to what extent. This will then have to be measured against the costs to be incurred by the country, in terms of market access to its own markets by the partner, as well as in terms of concessions in other areas (such as services, investment and intellectual property).

Many countries that had hoped to obtain significant expansion of market access to the major developed countries have been disappointed in the results of the negotiations. A major reason for this is that there are structural, legal and political impediments that prevent the developed country from opening its market beyond a certain limit, in respect of its sensitive products (where further opening will cause dislocation to its producers).

As Smith (2005) points out, there are a number of structural problems that make it difficult for developing countries to obtain market access in sectors of interest to them in FTAs with developed countries. Firstly, there is usually unequal bargaining power in developing-developed country bilateral negotiations, with the developing countries in a weaker position. Secondly, it is not possible for developed countries to reduce or withdraw agricultural export and domestic subsidies on the products that the developing country partner are exporting, as the subsidies would have to be removed for all the products, which would then also benefit non-FTA partners. Thirdly, there may exist laws that frame the terms of reference for what the developed country can offer.

The developing country partner in an FTA may have limited products where it can effectively make use of increased market access opportunities, due to limited supply capacity or inability to market. For instance, most of the ACP countries and the LDCs have been unable to make use of the existing preferential access they have to the EU market. And for products that the developing countries have an advantage in, these are usually “sensitive” to the developed country and thus some may be excluded from the FTA market opening. Also, developed countries like the USA and Europe are well known for making use of “non tariff barriers” (such as safety regulations and anti-dumping measures) to block imports of developing countries. The market access hopes may become illusory.

On the other hand, the developing country is expected to reciprocate by opening up its own market to the developed country, by eliminating its tariffs on a wide range of products. This can result in significant dislocation of local producers.

## EPAs

Of the ACP countries that initialled EPAs, there is variation in how long they take to liberalise (reduce their tariffs), the extent to which they liberalise and how quickly they reduce their tariffs on European products. Some of the EPAs also appear to liberalise their goods trade on a negative list - where all products are liberalized unless they are listed – (for example the CARIFORUM-EU EPA)<sup>23</sup>, while others use a positive list - where only the products listed are liberalized – (for example the Ghana<sup>24</sup> and EAC<sup>25</sup> EU EPAs). The ODI and ECPDM Report<sup>26</sup> analyse this for the initialled EPAs in particular those involving African countries.

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<sup>23</sup> Article 16.2.

<sup>24</sup> Article 13.

<sup>25</sup> Article 11.

<sup>26</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report). Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhani and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

According to the ODI and ECPDM Report, there are some tariff lines missing from the schedules.<sup>27</sup> This has the effect that up to 44.6% (in Tanzania's case) of the import value of products from the European Union will not be required to lower tariffs under the EPAs (because the EAC EPA liberalises goods trade on a positive list basis), in addition to the 20.2% (of total import value including the unlisted tariff lines) of goods which are excluded from liberalisation under the EPA.<sup>28</sup> It appears, however, that tariffs cannot be increased above the applied rate for the 44.6% of unlisted products<sup>29</sup> (unless one of the safeguards listed in Articles 19 and 21 of the EPA is used).

The other African EU EPA with tariffs that comprise a significant proportion of the import value not listed in the schedule is the one initialled by Botswana, Lesotho, Namibia and Swaziland. According to the ODI and ECPDM Report, 13.9% of imports from the European Union (by value) were not listed in the schedule.<sup>30</sup> The EU-SADC EPA appears to reduce its tariffs on goods on a positive list basis, so the 13.9% of unlisted tariffs will not have to be reduced (in addition to any goods on the exclusion list). Furthermore, the standstill provision – which prevents the introduction of new custom duties or the increase of applied existing customs duties – only appears to apply to products which are subject to liberalisation (so presumably the 13.9% of unlisted products are not subject to the standstill provision and can therefore have a new and/or increased customs duties applied to them).<sup>31</sup>

Leaving aside any missing tariff lines, the proportion of imports from Europe (by value) that is excluded from any lowering of tariffs ranges from 2.5% (Seychelles) to 37.8% (Mozambique).<sup>32</sup> For many African countries about 20% of import value appears to be excluded from liberalisation.<sup>33</sup>

### MFN clause

According to the ODI and ECPDM Report, the MFN clause is in all the EPAs, although the SADC, CARIFORUM and Pacific texts make provision for possible mutually agreed exemptions.<sup>34</sup> 'It requires any tariff preferences granted to other 'major trading economies' (defined as economies accounting for a share of world merchandise exports above 1% or any group of countries acting individually, collectively or through a free trade agreement accounting collectively for a share of world merchandise exports above 1.5%) automatically to be granted to any party of the EPA.'<sup>35</sup> The

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<sup>27</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 9. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>28</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 9. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>29</sup> Due to the standstill provision in Article 13 of the EAC-EU EPA which applies to 'mutual trade'.

<sup>30</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 45. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>31</sup> Article 23 SADC-EU EPA.

<sup>32</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report). Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>33</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report). Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>34</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 58. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>35</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 58. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger,

Report notes that ‘such a clause is unique for the EU: it is not to be found in its FTAs with South Africa, Mexico, Chile or, as far as the authors are aware, any other EU trade agreement.’<sup>36</sup>

This MFN clause has also generated controversy in the WTO. Developing countries such as Brazil and India have criticised this clause in the EPA because it undermines South-South preferential trade. For example, if Brazil has a trade agreement with CARIFORUM or a Caribbean country, and both sides agree to give preferences that are deeper than the level that CARIFORUM or the Caribbean country has given to the EU, then it also now has to give the EU the deeper preference. In the WTO, developing countries are allowed to give preferences to one another without extending them to developed countries. The MFN clause in the EPA would mean that developing countries like Brazil, India, China etc would not be able to have special preferences with Caribbean countries, and if this clause is also in other EPAs that EU signs with other countries, for example African countries, then the special South-South preferences will similarly be undermined.

The Report does note that because the MFN clause is symmetrical (the EU is also required to provide MFN treatment to the developing countries initialising the EPA), any better treatment that the EU provides in sectors covered by the MFN clause (for example in the CARIFORUM- EU EPA it applies to matters covered by the chapter which includes rules of origin, in other EPAs such as the EAC’s it also applies to safeguards and standstill provisions) must also be extended to the developing country initialising the EPA.<sup>37</sup> However, it is unclear how likely it is that the European Union will offer better rules of origin to any country, because it appears to strongly try and maintain consistency in its rules of origin across its trade agreements.

## Revenue loss

The Minister of Foreign Affairs and Foreign Trade of Barbados noted that ‘In most ACP countries, the imposition of tariffs on imports represents a major source of government revenue. Therefore, the question of some form of adjustment mechanism to address the loss of government revenue resulting from EPA-induced trade liberalisation and structural adjustment is pertinent within the context of the developmental aspect of an EPA.

Recent studies have indicated that, given the high percentage of government revenue which comes from tariffs in ACP countries, trade liberalisation could lead to total tariff losses for developing countries of between three and 10 times the projected benefits. This would be particularly the case for small countries without very diverse economies, such as ours in the Caribbean, those in the Pacific, and some of the smaller economies in Africa.

Since CARIFORUM countries depend on tariff revenues to fund social programmes, such as health care, education etc., the sudden loss of this revenue is likely to create much hardship and possibly lead to social dislocation as the burden will fall disproportionately on the poor.’<sup>38</sup>

Similarly, the Minister of Commerce of Senegal noted that ‘Adjustment costs are significant for ACP countries. ACP countries have to struggle hard to offset the loss of tax revenue.’<sup>39</sup> According to the Minister, ‘the removal of tariffs would lead to a drop by 7-10% of governmental revenue and those

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Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>36</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 58.

Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>37</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 59. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>38</sup> Dame Billie Miller, Chair of the ACP Ministerial Trade Committee, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>39</sup> Mamadou Diop, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

losses can rise even higher, for as far as 15-20% in the case of some African countries. This would be a real break put on African economies and would lead to more disequilibrium of our trade balances.<sup>40</sup>

The ODI and ECPDM Report calculates revenue loss for each African country due to the EPA, however it only calculates it for the liberalisation period. Their methodology therefore does not include the revenue lost each year after the EPA has fully come into force. This means that their estimates of revenue loss are likely to be significant underestimates.

Although the Seychelles and Mauritius have only excluded 2.5% and 4.4% of imports from Europe (by value) from liberalisation under their EPAs, the Report is confident that they can replace tariffs as a revenue source with sales tax.<sup>41</sup> This may be more feasible because they are small island economies. Generally, International Monetary Fund economists note that middle income countries are only likely to recover 45-60% of lost tariff revenue from other taxation sources and low-income countries are at best likely to recover 30% or less of lost tariff revenue from other taxation sources.<sup>42</sup> They note that a value-added tax is not proven to make up for the lost revenue from lowering tariffs.

There may be some safeguards in some EPAs.

## Agriculture

### Removal of export restrictions

According to ODI and ECPDM, the recent food export ban imposed by Tanzania to fight domestic shortages would be illegal under any EPA once it is implemented other than the East African Community's.<sup>43</sup>

### Comparing EPAs and with earlier EU FTAs

ODI and ECPDM note that there are variations within the African EPAs. For example the standstill clause is less restrictive in the SADC EPA.<sup>44</sup>

According to the ODI and ECPDM Report, there are also some differences between the relevant chapters of the CARIFORUM- EU EPA and the Pacific- EU EPAs with African EPAs. These have been summarised on pages 60-61 of their Report.<sup>45</sup>

Furthermore, the Report notes that 'the TDCA and EU-Mexico FTA are less restrictive in several respects. Not only do neither have an MFN clause but also they contain no standstill clause, no sanctions in case of a lack of administrative cooperation, and no time restrictions for pre-emptive

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<sup>40</sup> Mamadou Diop, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>41</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 29. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>42</sup> 'Tax Revenue and (or?) Trade Liberalization', Baunsgaard and Keen, June 2005, IMF Working Paper, WP/05/112.

<sup>43</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page xiv. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>44</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 61. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>45</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report). Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

safeguards. But they are also more restrictive in some areas: no multilateral exclusion from AoA safeguards, shorter maximum infant industry protection, and quantitative safeguard restrictions.<sup>46</sup>

## Rendezvous clause

The interim EPAs appear to differ in the areas that are to be covered in future negotiations for a comprehensive EPA. This is often known as the ‘rendezvous clause’. The extent to which the rendezvous clause is binding also appears to differ.

For example, in the Pacific- EU EPA (initialled by Papua New Guinea), instead of listing specific sectors that must be included, the rendezvous clause appears to be the more general ‘comprehensive Economic Partnership Agreement (EPA) in line with the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components and involving all interested countries in the Pacific region.’<sup>47</sup> This is covered by the EPA’s dispute settlement provisions which can ultimately result in increased tariffs for failure to comply<sup>48</sup>. However, the rendezvous clause merely commits to successfully concluding such an EPA aiming at a dead line of end of 2008. (this is not as legally strong and binding as if it said something like ‘the Parties shall sign an EPA covering the following sectors by a certain date’).

## Services

### General

Before the Uruguay Round was launched, many developing countries had tried to resist the inclusion of new areas like trade in services and trade-related intellectual property rights as they believed agreements in these areas would be against their interests as they would not have the capacity to gain from them, whilst they and their local companies would stand to lose. Despite this reluctance, services became a part of the Round on the understanding that developing countries would gain in other areas, especially in enjoying more market access for their goods in agriculture, textiles and clothing and other areas in which they have comparative advantage and where their exports faced tariff and non-tariff barriers. However, given the actual outcome in textiles and clothing and in agriculture, the developing countries did not get their expected benefits.

The WTO allows each member to commit in the WTO to services liberalization according to the extent and rate that it chooses and which suits its conditions. This is especially true for developing countries. These countries may want to try out liberalization in some sectors to see the extent to which it is beneficial, but they do not have to commit the liberalization measures in the WTO (as this makes it irreversible, or difficult to reverse).

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<sup>46</sup> The new EPAs: comparative analysis of their content and the challenges for 2008 ( Final Report), page 60. Christopher Stevens, Mareike Meyn and Jane Kennan: ODI. Sanoussi Bilal, Corinna Braun-Munzinger, Franziska Jerosch, Davina Makhan and Francesco Rampa: ECDPM. 31 March 2008. Available online at: [www.odi.org.uk/iedg/Projects/0708010\\_The\\_new\\_EPAs.html](http://www.odi.org.uk/iedg/Projects/0708010_The_new_EPAs.html).

<sup>47</sup> Article 69.1.

<sup>48</sup> Article 58.2. However, the European Union is supposed to exercise due restraint if the Pacific State has been unable to comply (for example with the provision about concluding a comprehensive EPA by 31 December, 2008) because of capacity constraints, Article 58.4.

The WTO has a positive list approach. A country makes commitments to liberalise only in sectors that it places on its schedule. And if a sector is included in the schedule, the country can decide the extent of liberalisation to commit in that sector, in each of the 4 modes of service delivery. Restrictions and limits can be placed, for example restrictions on foreign equity ownership or on national treatment in Mode 3 on “commercial presence.”

Additional “special and differential treatment” clauses have been established in the GATS and in subsequent documents that clarify that developing countries should be allowed to liberalise less than developed countries and to choose their own pace of liberalisation. These development provisions are especially contained in Article IV of the GATS, Article XIX (2) of the GATS, and the Guidelines and the Procedures for the Negotiations on Trade in Services of March 2001, which is the main document guiding the present services negotiations.

### **Does the degree of liberalization matter for development?**

Developed countries advocate for developing countries the fastest and broadest liberalization in services. Institutions such as the World Bank also encourage or pressurize developing countries to liberalise services so that they can become more efficient. However it is wiser for developing countries to take a cautious approach towards services liberalization.

There are several reasons why it is important for a developing country to maintain or expand beyond a certain degree of local participation (including ownership and control) over services. During the colonial period, the foreign firms were able to control a large and overwhelming share of the services sectors in many countries, including the financial and distribution sectors. Following independence, governments took measures to increase the share of citizens in services. There developed significant local ownership and control in banking, insurance, construction, wholesale and retail trade, transportation, professional services, etc. Governments tended to have monopolies in railways, telecommunications, water, postal services, energy and power resources. When these were privatized or partly privatized, or when private companies were allowed to compete in these areas, local companies were among those that took up local shares. The increased participation of local firms and persons usually developed with the assistance of the government, including preferential treatment to locals and restraint over the growth of foreign companies.

Presently, the services sector is in many developing countries the largest sector, and it is the area where local firms have larger participation and are better able to compete, as compared with the manufacturing sector. While it is important to upgrade technology and techniques, this can often be done by the local firms including through importing modern technology. It does not necessarily require that large foreign firms take over, in order for a country to have modern and efficient services. There are natural advantages of local firms and people in activities that require presence and knowledge of local conditions and customers. Thus it is a sector in which strengthening and development of domestic economy, training and development of local entrepreneurs, restructuring of social imbalances, can and should take place. Also the service sector has many sub-sectors that are strategic in many aspects –

- (a) Economically strategic sectors ( eg finance, distribution);
- (b) Essential to national economic security (energy and power, telecommunications, transport, postal, water);
- (c) Critical for the public interest and to meet social needs (water, education, health, etc).

The present global financial crisis shows the importance of the finance sector, and the need for proper regulation. Liberalisation of financial services, including allowing the introduction of new financial products such as credit derivatives and collateralised debt obligations, trading methods such as short selling of stocks and currencies, and the entry of financial agencies such as hedge funds and investment banks can destabilise a developing country's finances and economy.

While there are benefits to foreign investment, there are also costs, and thus a balance is required. The services sector usually produces services that are "non-tradables". Thus, there is significant foreign exchange loss associated with foreign service providers, as there is an outflow of profits, while most of the output is for local use.

For strategic and security reasons, it is also important that there be local control over several services sectors, including water, electricity, finance, telecommunications, etc. To avoid or cushion financial crises, there should also be significant local participation in banking, insurance, etc.

Public services that meet basic needs, such as water, education, health and electricity, should also be carefully guarded. Primary importance should be placed on meeting the needs of the public, especially the poor.

It is thus crucial that this sector is carefully regulated under national development policy. Foreign participation has a role to play, but this has to be carefully considered and given its proper place, within a planned framework, taking into account the factors above (participation of domestic firms and institutions, economic, financial, infrastructure, public needs, social development). Accelerated and excessive liberalization of key sectors, or worse an across-the-board liberalization, under legally binding rules of an FTA, would disrupt or hinder the process of establishing a national services strategy.

### **Need for a comprehensive national services plan**

Developing countries need to have a comprehensive national services master plan, in order that there be a coherent policy framework. Based on such a plan and framework, the country can formulate positions to take in its national interests, whether in the WTO or in a possible FTA.

Among the issues to resolve in such a services plan is the degree of local and of foreign participation in the various sub-sectors, and the development of each sub-sector. Strategic and public consideration has to be given to key sectors such as finance, telecommunications, water, health services.

Many countries do not have such a comprehensive plan. At best they have a plan for subsectors, such as financial services or health services.

Until such a services plan is formulated, it would not be possible for a country to properly decide on which sectors to commit to liberalise and to what extent.

### **Features of services chapters in FTAs**

Many developing countries have attempted to make use of the flexibilities in GATS, to choose their own pace and sectors to liberalise. They have been cautious to increase their binding commitments in the WTO, as (1) they are worried about the possible consequences, especially since it is difficult to backtrack even if the commitment turns out to be an error; (2) they are unable to benefit from the liberalization of other countries, due to supply constraints (and due to continued protection of the labour market in the North) and thus if they were to themselves liberalise, they would have more costs than benefits; (3) they are within their rights to choose whether to liberalise, in which way, and in which sectors, if at all.

Developed countries have been frustrated by what they perceive as the slow movement by developing countries in the WTO. The reason for their frustration is that services now comprise the largest sector, and their big services enterprises are pushing to have access to the markets of the developing world. The developed countries are now seeking the use the FTA mechanism to accelerate the liberalization process in developing countries.

The CARIFORUM-EU EPA excludes application of the chapter to -“*services supplied in the exercise of governmental authority....which is supplied neither on a commercial basis nor in competition with one or more service suppliers*”. (Article 75.2)

Neither of the criteria is defined. This provision is the same as Article 1 in GATS, which has been the subject of controversy. Many service sectors involve the public interest and thus are delivered by governments through a mixed system that is wholly or partly funded with a minimum charge being paid by consumers, but tightly regulated by governments at the central, regional and local levels. Often these systems co-exist with other private for-profit delivery systems. Following the criteria above, these systems would fall outside the purview of the exclusion and be subject to the terms of the agreement unless expressly reserved.

For example in Malaysia there are public hospitals which are funded by the government with consumers paying for their treatment according to their income, with some being subsidized. Could it be argued that this system is providing treatment on a commercial basis? There are also private hospitals which provide the same treatment as public hospitals and in a way are competing for the same patients. As a consequence the health service sector (it can be argued) may not fall within the exception. As many of the essential public services may not be eligible for exclusion, foreign service providers will likely be able to access public interest sectors such as water, health, education, national parks, and pension funds. These providers are likely to target only the profitable sectors or the higher income earners. Consequently not only does the government lose income but it may also be saddled with having to provide the less profitable service sectors or subsidizing low income earners who cannot afford the prices of foreign service providers.

## **CARIFORUM-EU EPA: brief analysis on services**

In the CARIFORUM-EU EPA, the services aspect is integrated into Title II on Investment, Trade in Services and E-Commerce. This is unlike the US FTAs in which investment is a separate part. Title II has 6 chapters (on (1) general provisions; (2) Commercial presence; (3) Cross-border supply of services; (4) Temporary presence of natural persons for business purpose (5) Regulatory Framework, containing general provisions, and sections on financial services, computer services, courier services, telecommunications, tourism; (6) international maritime transport services; (6) Electronic

Commerce. These chapters cover Articles 60 to 124 of the EPA, having perhaps the most numerous set of articles in the agreement.

By combining services and investment into one Title, the EPA extends the “commercial presence” and right to establishment aspects of services into all other sectors, including manufacturing and agriculture. On the other hand, the provisions on free transfer of funds and capital (which are usually in the investment chapter) also applies to services.

Prof. Jane Kelsey (University of Auckland) has made an analysis of the regulatory implications of Title II.<sup>49</sup> She has also made an article-by-article analysis of Title II.<sup>50</sup> These documents are important for pointing out both the services and investment aspects of the EPA, and the analysis below (as well as in the investment section) draws significantly on them.

As Kelsey points out, the EU has used the CARIFORUM EPA to secure rules and commitments under Title II that it has not been able to achieve at the WTO in relation to both services and investment. According to Kelsey: ‘Some of the rules in Title II impose obligations on CARIFORUM states that are even more onerous than those that Tonga had to accept in its WTO accession. The development rhetoric in GATS and the Cotonou Agreement, especially the promises of flexibility and asymmetry, are diluted or absent from most operational parts of Title II. The level of sectoral commitments made by CARIFORUM states in the EPA exceeds the controversial benchmarks proposed by the EC in the GATS 2000 negotiations: “more developed” CARIFORUM countries have promised to liberalise 75% of their services sectors and the LDCs 65%.’

Among the major points made by Kelsey, in relation to services:

- Obligations under Title II apply to policy and regulation on services, investment and e-commerce at all levels of decision making: central and local government, local communities and NGOs. The rules and commitments apply to the entire range of policy measures, from formal legislation to administrative decisions.
- The disciplines under Title II are supported by enforcement mechanisms in the EPA. These disciplines are expected to take precedence over a country’s national considerations and objectives when there is a conflict.
- The main objective of Title II is to establish enforceable rights to foreign investors and services firms. These rights often contradict the aspirations stated in other parts of the EPA.
- Title II will adversely affect the CARIFORUM’s own regional integration plans. Although the EPA states the pace of regional integration is to be determined by CARIFORUM states, this is “without prejudice” to the commitments undertaken in the EPA. Title II includes issues not yet settled under CARICOM’s internal single market or not yet fully implemented. These include financial and other services, investment, government procurement, e-commerce etc. The EPA provisions will now drive regional integration and pre-empt a more considered assessment of their implications and whether they are appropriate to the region’s needs.
- The government’s right to regulate is severely curtailed by the EPA. The EPA does state that governments retain the right to regulate. But the primary purpose of the EPA is to restrict the ability of governments to choose how they regulate services and foreign investment.
- The EPA has narrowed the right to regulate further than GATS by saying that regulation must be to meet ‘legitimate policy objectives.’ ‘legitimate’ is not defined. A similar phrase has

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<sup>49</sup> Kelsey, J. Regulatory implications of the services and investment chapter of the Cariforum-EU EPA.

<sup>50</sup> Kelsey, J. Comparison of the legal text on investment and services in Cariforum-EC and Pacific-EC EPAs.

been rejected in the GATS negotiations on domestic regulations (aside from the disciplines on accountancy).

- The EPA has narrowed the scope of temporary presence of service workers (Mode 4 in GATS) in a GATS-minus way to cover only the managerial elite, professionals, technical experts and a limited category of contract service suppliers. The temporary entry of foreign service workers in lower value jobs falls outside the legal scope of the EPA and remains an immigration (not trade) matter. There are also many restrictions on the eligible service workers. Regarding quota-free right of entry for Caribbean entertainers, the Caribbean Cultural Industries Network have said that major artists have little difficulty entering Europe and refer to new requirements for a regional registration and certification regime that would have made famous artists like Bob Marley ineligible for entry.
- In the special sections on courier, finance, telecommunications, maritime, e-commerce, the wording of these sections mirrors (often word for word) the EC's sectoral proposals in the GATS 2000 negotiations. These texts are aggressively GATS-plus. For example, the EPA contains language from the WTO reference paper on basic telecommunications and the Understanding on Financial Services that WTO members can choose whether to adhere to; with similar language in the EPA, CARIFORUM members effectively have agreed to adhere to these two documents.
- The sections on courier and telecom services require appropriate measures to prevent anti-competitive practices, defined as the behaviour of the firms "materially affects the terms of participation in the relevant market." This anti-competitive provision is aimed by the EU to satisfy their companies that complain that public monopolies or local companies restrict their access to the markets of developing countries. The telecoms section also defines anti-competitive practice to include cross-subsidisation that has a material effect. This is intended to prevent a firm from using revenues from a monopoly to subsidise another commercial activity.
- The EPA says a government can define the kind of universal service obligation for post and telecom that it wants, but it imposes conditions, that the way it is administered must be non-discriminatory and competitively neutral, which means local companies cannot be given preference or advantage.
- If a government has made full commitments on telecoms, it cannot require investment through a joint venture or limit foreign shareholdings. It could thus become totally dependent on a European telecom firm.
- The financial services section is based on the GATS Annex on financial services and the Understanding drawn up by and largely for OECD countries with advanced financial services industries. Its extreme liberalisation provisions can generate risks to financial stability (See more detailed analysis in this report's section on Investment).
- The sectoral rules on tourism are portrayed as a win for CARIFORUM. However, in contrast with other sectors, this section is very soft. A commitment to use appropriate measures to control anti-competitive practices of big tourism wholesalers, and travel agencies is important, but 'appropriate' is very subjective and the EC may have little influence on firms that operate on a global basis and largely through IT networks. Other promises to support tourist development and to encourage compliance with environment and quality standards are aspirational and will rely on monitoring and review, rather than enforcement.
- The scope and classifications used to make commitments and the format of schedules are different from GATS, creating new uncertainties.
- The EPA maintains the GATS scheduling approach of a positive list of commitments. This is favourable for developing countries as they are not deemed to have made a commitment unless explicitly done in the schedule. This is in contrast to the 'negative list approach' in which the country is deemed to have committed to liberalisation and national treatment,

unless explicitly stated in the schedule. Title II requires three sets of schedules, for investment, cross-border services and movement of business people. But only the EC has done this. CARIFORUM chose to update its GATS schedule (for services) and to create a new schedule for non-services investments (manufacturing, agriculture, hunting and forestry mining, electricity, gas). The EC chose mainly to adopt the EPA's positive list approach. However, CARIFORUM used the negative list approach in the commitments for non-service sectors. These commitments apply to all CARIFORUM countries unless a member state is listed along with a reservation or limitation. [The negative list approach has many disadvantages to developing countries as it implies a default position of total liberalisation and national treatment unless explicitly stated through exceptions, etc. Also, a country may in future want to develop local industry in a particular sub-sector which it at present has not planned for, and thus did not place the sub-sector as an exception. Moreover new industries may emerge in future which are not known at present and these are thus not listed as exceptions, for example the internet would not have been listed as an exception in the 1980s as it would develop only later].

- The EPA also contains provisions on labour and environment standards, which had been rejected in the WTO. Moreover, countries cannot lower their laws and standards on domestic labour, environment or occupational health and safety or cultural protection or diversity, aimed at attracting foreign investment. This would prevent governments from promoting free trade zones or development zones that offer less restrictive regulations.
- The driving objective of Title II is to secure rights for foreign investors and service firms. No enforceable obligations are imposed on them in return.

## Singapore issues

Investment, government procurement and competition are known as Singapore issues as they were first introduced into the WTO through its Ministerial Conference in 1996 in Singapore. However they were only subjects for discussion in working groups and there has been opposition from developing countries to make them subjects of binding rules. There was a groundswell of opposition to starting negotiations on investment and other "Singapore issues" at Cancun in 2003 (including by many developing countries, including India, Malaysia, Indonesia and the Philippines). In July 2004, the WTO General Council agreed that there would not be any negotiations on them during the Doha work programme period, and work in the working groups on these issues stopped. However these topics are proposed by the EU and other developed countries in bilateral FTAs.

African Union Trade Ministers in 2006 declared that 'on the issues of investment policy, competition policy and government procurement [ . . . ] We reaffirm that these issues be kept outside the ambit of the EPA negotiations.'<sup>51</sup>

Similarly, the Nigerian Minister of Commerce<sup>52</sup> stated that 'We do not find ourselves ready to undertake negotiations in the EPAs in some trade-related areas including competition policy, investment rules and government procurement. These are areas in which multilateral rules have not yet been agreed upon.' He went on to note that in West Africa 'there is a lack of expertise as well as

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<sup>51</sup> African Union Conference of Ministers of Trade, 4th Ordinary Session, Nairobi Declaration on Economic Partnership Agreements, 14 April, 2006.

<sup>52</sup> Aliyu Modibo Umar, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

infrastructures for dealing with the issues of competition policy and investment. Secondly, the region lacks a harmonized policy framework on investment and competition issues.<sup>53</sup>

The Minister of Foreign Affairs and External Trade for Fiji commented that ‘The remaining Singapore Issues can stay out of the EPA as far as we are concerned, especially government procurement, due to the prevailing affirmative actions that exist in some countries particularly Fiji.’<sup>54</sup>

## Investment

### Context

There is a long history of developed countries attempting to persuade developing countries to agree to a binding international investment treaty. During the Uruguay Round, the developed countries included investment rules in the Agreement on Trade-Related Investment Measures (TRIMS) negotiations. However, developing countries were unable to accept this and succeeded in restricting the TRIMS agreement to only trade-related measures. The developed countries tried again in 1995-96 to have the WTO negotiate an investment agreement but the Singapore Ministerial only agreed on setting up a working group for discussion on trade and investment. Many developing countries opposed the introduction of an investment agreement in the WTO, as they were concerned this would prevent or reduce their policy space to determine their own investment policies, such as choice of and conditions for foreign investment, including entry requirements, equity requirements, performance requirements, regulation on funds transfer, etc. As noted above, investment negotiations were dropped from the WTO Doha work programme in 2004.

Developed countries tried again through the OECD to have an investment agreement, but this failed. The attempt is being made now through bilateral FTAs which can incorporate the elements and “standards” preferred by the developed countries.

Developing countries should be very cautious, as to whether (a) they would like to include an investment component to their FTA; (b) if yes, that such a component does not commit them to standards and elements that may be detrimental to their investment and development policies. Present national policy and legal space to determine the definition and scope of investment, right to establishment, type of foreign investment to welcome and not welcome, national treatment, transfer of funds etc. should not be narrowed or removed by the FTAs. It should be noted that some of the policies undertaken by Malaysia to successfully extricate itself from the financial crisis of 1997-2000 may not be allowed under provisions that could be proposed under an FTA. There is a strong case that binding rules relating to investment should not be part of a developed-developing country FTA. This is especially since the WTO members have decided not to start any negotiations on an investment agreement in the WTO, as developing countries are concerned about the adverse implications for development.

### The need for space and flexibility for investment and development policies and the effects of an investment agreement

Foreign investment is a complex phenomenon with many aspects. Its relationship with development is such that there can be positive as well as negative aspects. There is an important need for the role of government and government policy to regulate investments so that the positive benefits are derived, while the adverse effects are minimized or controlled. The experience of countries shows that governments have traditionally made use of a wide range of policy instruments in the formulation of investment policy and in the management of investment. It is crucial that developing countries

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<sup>53</sup> Aliyu Modibo Umar, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

<sup>54</sup> Kaliopate Tavola, High-Level Conference, on EU-ACP Trade Relations, South Centre, Brussels, 12 October, 2006.

continue to have the policy space and flexibility to exercise their right to such policies and policy instruments.

Due to its particular features, foreign investment can have the tendency towards adverse effects or trends that require careful management. These include:

- (a) possible contribution to financial fragility due to the movements of funds into and out of the country, and to some types of financially destabilizing activities;
- (b) possible effects on balance of payments (especially increased imports and outflow of investment income, which has to be balanced by export earnings and new capital inflows; if the balance is not attained naturally, it may have to be attained or attempted through regulation);
- (c) possible effects on the competitiveness and viability of local enterprises;
- (d) possible effects on balance between local and foreign ownership and participation in the economy.
- (e) possible effect on the balance of ownership and participation among local communities in the society.

On the other hand foreign investment can make positive contributions, such as:

- (a) use of modern technology and technological spillovers to local firms.
- (b) global marketing network
- (c) contribution to capital funds and export earnings
- (d) increased employment

In order that these potential benefits be realized, and that a good balance is attained between the negative and positive effects, so there be a overall net positive effect, there is a crucial role for governments in a sophisticated set of investment and development policies.

An investment agreement or chapter of the type envisaged by the developed country proponents would make it much more difficult to achieve a positive balance as it would severely constrain the space and flexibility for investment and development policies.

Such an agreement or chapter is ultimately designed to maximise foreign investors' rights whilst minimising the authority, rights and policy space of governments and developing countries. This has serious consequences in terms of policy making in economic, social and political spheres, affecting the ability to plan in relation to local participation and ownership, balancing of equity shares between foreign and locals and between local communities, the ability to build capacity of local firms and entrepreneurs, etc. It would also weaken the position of government vis-à-vis foreign investors (including portfolio investors) in such areas as choice of investments and investors, transfer of funds and protecting the balance of payments (unless there are sufficient safeguards).

It is argued by proponents that an investment agreement will attract more FDI to developing countries. There is no evidence of this. FDI flows to countries that are already quite developed, or there are resources and infrastructure, or where there is a sizable market.

A move towards a binding investment agreement is thus dangerous as it would threaten options for development, social policies and nation building strategies. It is thus proposed that the strategy to be adopted should be to prevent the investment issue from entering the mode of "negotiations." In the negotiations, cogent points should be put forward on why an agreement on investment rules is not suitable nor beneficial for the WTO or for FTAs.

## Provisions

The main features of an international investment agreement (and of an investment chapter in bilateral FTAs) as advocated by the major developed countries are rather well known and have remained constant in the past many years, although there may be differences in some of the details. Among these main features are the following:

- **Scope and definition:** The original definition of investment has been very broad (eg in the proposed OECD Multilateral Agreement on Investment (MAI) it covers FDI, portfolio investments, credit, IP and even non-commercial organisations, and in all sectors except security and defence.). This broad definition is adopted in EU FTAs.
- **Obligations on the right to entry and establishment:** These provide foreign investors the rights to entry and establishment in member countries without (or with minimal) conditions and regulations and to operate in the host countries without most conditions now existing. In FTAs involving the EU, the foreign investor is given "pre-establishment" rights. This means that rights are provided to potential investors even before they enter the country, implying that there would be no or minimal regulation on the entry of investments. In contrast, post-establishment rights means that the host country can decide whether or not to accept a potential investor or investment and can impose conditions on the investment if it decides to allow entry to the investor.
- **"Non-discrimination" and national treatment principles:** National treatment and MFN status would be given to foreign investors and investments. National treatment means that the foreign investor would be given rights to be treated no less favourably than local investors (the meaning is that the foreign investor can be given treatment better than or equal to but not less than the local). Measures that promote or give preferential treatment to local investors may be curbed as these are seen to be discriminating against foreign investors.
- **Rights given for funds transfer:** Obligations to allow free mobility of funds into and out of the country, thus restricting or prohibiting regulations/controls on funds transfer. The provision on free and unrestricted transfer of funds (inflows and outflows) for EU investors has the potential to increase financial instability, and to prevent measures that can be taken to lessen financial instability or crises. It would be more difficult to prevent the entry of speculative funds and instruments (given the provisions on pre-establishment rights and free funds transfer) and to take measures that restrict the outflow of funds, as during an emergency.

## Conclusions

There should not be an investment chapter of the kind envisaged by the developed country proponents in a FTA. There should not be a legally binding agreement for securing establishment rights and national treatment for foreign investment and investors.

The principles that originate for the purposes of trade relations (eg in GATT and WTO) including national treatment and MFN were meant to apply to trade in goods and are inappropriate when applied to investment. Instead, their application to investment would be damaging to the development interests of developing countries. Traditionally developing countries have had the freedom and right to regulate the entry and conditions of establishment and operation of foreign investments; restricting their rights and policy space would have adverse repercussions.

A more appropriate framework must be a balanced one, with the main aim of regulating corporations (instead of regulating governments); it could be one that is not legally binding. An attempt to establish such a balanced framework was made at the UN in the 1980s, when a code of conduct on transnational corporations was negotiated. However the negotiations failed to produce an outcome.

## Analysis of CARIFORUM-EU EPA regarding investment

The EPA contains many of the characteristics of the investment component in North-South FTAs. Thus the general critique on the investment component in FTAs provided above applies also to the CARIFORUM-EU EPA.

There is no separate Investment Title in the EPA. The investment component is contained in Title II on Services, Investment and E-Commerce, as explained in this report's section on services. This section should thus be read in conjunction with the services section of this report. There is also a critical aspect of investment that is in Title III, on Current Payments and Capital Movement.

Some important aspects of investment in the EPA are as follows:

- In Title III on current payments and capital movement, there are obligations for the liberalisation of transfer of funds on both the current account (which refers to payments and receipts from trade and profits and other investment earnings derived from investment) and the capital account of the balance of payments (flows of funds due to direct investment, portfolio investment, loans, etc).
- Article 122 on Current Payments obliges the parties to “undertake to impose no restrictions on and to allow all payments for current transactions” to be made in freely convertible currency. Article 123 on Capital Movements says the parties undertake to impose no restrictions on the free movement of capital relating to direct investments and the liquidation and repatriation of these capitals and any profits stemming therefrom. Thus, the EPA, like most other North-South FTAs, facilitate the maximum opening, deregulation and liberalisation of financial flows. This has many serious implications, including for the state of the balance of payments, for the management of capital flows, and for increasing vulnerability to financial fragility and instability. Given the present global financial crisis, and its lessons about the risks posed by deregulation and liberalisation, the dangers of this obligation for extreme financial liberalisation cannot be overstated. There are several studies especially in recent years on the dangers of liberalisation of capital flows for financial stability, and these will no doubt be supplemented by the lessons from the current global financial crisis.

- Article 124 on safeguard measures says that where in exceptional circumstances, payments and capital movements between the parties cause or threaten to cause serious difficulties for monetary or exchange rate policy, safeguard measures with regard to capital movements that are ‘strictly necessary’ may be taken for up to 6 months. There are several problems with this safeguard clause. Firstly, they can be taken only when a financial crisis or emergency occurs; it cannot be used to enable policies that in the main prevent such crises by being anchored on caution and aimed at stability. Secondly, the definition of exceptional circumstances and serious difficulties is not clearly defined. Thirdly, while current payments and capital movements are identified as possible causes of the difficulties, the safeguard measures can be allowed only in respect of capital movements, and thus measures relating to current payment are not allowed. Fourthly, the measures must face the necessity test, i.e. that they are ‘strictly necessary.’ And finally, the measures can be taken for only 6 months, which is a very short period since crises may continue for years.
- Article 240 of the CARIFORUM- EU EPA is a balance of payments safeguard. This applies to all parts of the EPA and is similar to the one in GATS, but Kelsey notes that it ‘omits the requirement in the GATS to consider the need for developing countries to maintain adequate financial reserves to implement economic development programmes and services that are essential to development.’<sup>55</sup>
- The dangers of liberalisation in the flow of funds is extended by the provisions of the section on financial services liberalisation (Article 103), which covers a wide range of activities in insurance and banking, including trade in foreign exchange, derivatives including futures and options, exchange rate instruments, securities, asset management. On top of this, there is an obligation to enable ‘new financial services’ to be permitted (under a separate Article 106). These are defined as new services that a party allows in its own domestic law. This means that if a new financial service is made available in a Caribbean country, the country must also allow European financial institutions to supply the new service in the Caribbean country, if this finance service activity had been liberalised in the EPA. The current global financial crisis shows up the dangers even to the United States and Europe of introducing new financial services and instruments such as credit derivatives and collateralised debt obligations as well as hedge funds and their activities that are also practised by other financial institutions. It is even more dangerous if such financial services and instruments are allowed to function in developing countries which lack regulatory capacity when even the United States has been shown to be unable to regulate these new financial services. Under Article 106, if a CARIFORUM country that had liberalised financial services in the EPA were for example to newly allow a hedge fund activity domestically, it would have to allow hedge funds from EU countries to enter and introduce similar services. Since the European institutions are much larger than the domestic hedge fund, the risks to the economy by this liberalisation would increase manifold.
- The obligation for liberalisation of investment by granting market access to foreign firms is contained in Article 67. The countries that commit full market access in a sector shall not impose limitations on the number of commercial presences (in the form of quotas, monopolies, exclusive rights etc); on total value of transactions or assets; on total number of operations or quantity of output; on the participation of foreign capital in terms of maximum percentage of shareholding; and on requirements for specific types of commercial presence (subsidiary, branch) or joint ventures. This means that the foreign firm shall be allowed to have 100% ownership and be able to choose the nature of its corporate form.
- A national treatment clause is in Article 68. A party shall grant to investors of other parties treatment no less favourable than that they accord to their own like commercial presences and investors. A broad definition of national treatment is also given, that formally identical or

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<sup>55</sup> [http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific\\_Trade\\_files/CARICOM\\_cf%20Pacific\\_EPA.pdf](http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific_Trade_files/CARICOM_cf%20Pacific_EPA.pdf)

different treatment is considered less favourable ‘if it modifies the conditions of competition in favour of commercial presences and investors’ of the host country as compared to those of the other party.

- There is also a MFN clause for services and investment in Article 70. With respect to measures affecting commercial presence, CARIFORUM states shall accord to EU investors and commercial presences MFN treatment, i.e. similar to that given to “any major trading economy” (industrialised countries and developing countries with more than 1% share of world trade) with whom they conclude an FTA after this EPA is signed. This means that if a Caribbean country or the CARIFORUM signs an agreement with a major developing country, all the terms of the new agreement would also apply to the EU. This undermines the possibility of deeper South-South preferences in relation to trade, services and investment.
- Other provisions oblige the CARIFORUM countries to undertake standards and provisions relating to labour, environment, culture, etc (See section on services of this report).

## Government procurement

### Role of government procurement

Government procurement is in some countries even more important than trade in terms of the value and volume of goods and services involved. In some countries it could account for 15 to 30 per cent of the GNP. It comprises the expenditures of government on goods and services (including projects from the building of schools and roads to billion-dollar mega-dams and industrial complexes), excluding personnel costs. It is a very important tool of government policy (economic, social and political).

Add also the expenditure of state and municipal governments, statutory bodies and state-run enterprises, and the total amount of money spent by the public sector becomes enormous; for many countries, much larger even than their total imports or exports. For example, in some countries, public sector expenditure may comprise 30 to 50 percent of GNP, while imports may comprise 10 to 30 percent of GNP. Even if the salaries of government employees are excluded, government expenditure is often higher than imports.

So far, governments have been able to decide for themselves how this money is to be spent, the system of procuring goods and services, and the tendering, scrutiny of applications and award of projects, subject of course to each country’s laws and procedures.

The system of government procurement has been taken for granted as very much a matter of national prerogative, often challenged in some countries by Parliaments, opposition parties or public interest groups, but seldom or never questioned as an issue that lies within the sovereign right of a country to determine.

Most governments have guidelines that favour the granting of projects to local companies and people (for example by reserving some purchases or projects only for locals, or by allowing local proposals to be up to 10 or 20 per cent higher in cost than foreign ones).

Government procurement and policies related to it have very important economic, social and even political roles in developing countries:

--- The level of expenditure, and the attempt to direct the expenditure to locally produced materials, is a major macroeconomic instrument, especially during recessionary periods, to counter economic downturn. Governments often change the level of expenditure as the major tool of fiscal policy to steer the level of demand and growth in the economy (as Malaysia has done for example). Since liberalization is proceeding so rapidly in other areas (including through EU FTAs and the WTO), government expenditure remains one of the few (and probably the most important) sectors of economic activity which can be used as an instrument to boost local business and domestic demand.

--- In many developing countries, there are national policies to give preference to local firms, suppliers and contractors, in order to boost the domestic economy and participation of locals in economic development as well as to strengthen domestic linkages. In fact, government procurement is a major policy tool for putting into effect a policy of increasing the opportunities for local enterprises to increase their share of the economy. For example through using local banks for its banking after independence, the Malaysian Government successfully increased the share of local banks in the total banking business.

--- Also in several developing countries, there are policies aimed at providing preferences for certain groups or communities, especially those that are under-represented in economic standing. Procurement policy is a major policy tool for attaining greater balance in the participation shares among various communities within a nation. Similarly, it can be used to redress regional imbalances, for instance by specifying that certain provinces be allocated a particular share of procurement business.

--- For procurement or concessions where foreign firms are invited to bid, there could be a preference to give the award to firms from particular countries (eg other developing countries, or particular developed countries, with which there is a special commercial or political relationship).

There is a significant role of government procurement in socio-economic development and national policy. This role would be considerably eroded by the FTA.

### **Government procurement in trade agreements**

Because of the sensitive nature of government procurement, it has so far been excluded from the rules of the WTO, such as market access and national treatment for goods, services, agriculture etc. There is only a plurilateral agreement on government procurement in the WTO, which is not compulsory for WTO members to join, and almost no developing country has signed up to it.

The developed countries tried very hard to introduce a multilateral agreement on government procurement, which would make it mandatory for all WTO members to join. In the heads of delegations process in Geneva in 1999, the US and EU papers on the subject made clear they considered government procurement to be a gigantic business which had hitherto remained outside the WTO's ambit and should be brought in through multilateral rules so that their companies could have full access to the developing country markets. The developing countries were extremely reluctant to agree, as they consider this to be a subject of national policy and that the trade rules of WTO are unsuitable for this subject. Developed countries then proposed that an agreement confined to only "transparency" in government procurement be introduced, which would exclude market access or national treatment. In other words, governments would only have to introduce more transparent rules on what projects are up for tender, who is eligible to apply, and the results, but would not have to open up the projects to foreigners. After years of discussion, even this limited agreement was rejected in July 2004, and remains outside the WTO arena.

As procurement is a trillion-dollar business, the developed countries are determined to break into this business for their companies. (Even though the major industrialised countries themselves favoured local enterprises in their government procurement not too long ago and which had benefitted some of their giant corporations). They are thus now including a full-fledged procurement chapter (dealing with market access and national treatment) in their FTAs.

### **National policy changes needed due to FTA**

To implement the obligations, a developing country would have to undertake reforms and new procedures.

Most developing countries provide preferential treatment to local suppliers in government procurement. Thus, the most important reform would be to give up this preferential treatment, and to give equal (or superior) treatment to foreign suppliers, in accordance with the FTA. There are many consequences for such a significant change in policy.

### **Effects of government procurement liberalization under FTA**

There would be serious effects from an FTA's government procurement chapter on developing countries

Countries that sign on to FTAs containing a chapter on government procurement in future will not be allowed to give preferences to local companies for the supply of goods and services and for the granting of or concessions for implementing projects. (There is however a positive list approach where parties state what sectors they are offering, and thresholds). The effects on developing countries would be severe.

Should government procurement be opened up through the national treatment and MFN principles, the scope and space for a government to use procurement as an instrument for development would be severely curtailed. For example:

- If the foreign share increases, there would be a “leakage” in government attempts to boost the economy through increased spending, during a downturn. This is because an increased part of any expansion in government expenditure would be spent on imported products, thus decreasing the multiplier effects of public spending on the domestic economy.
- The ability to assist local companies, and particular socio-economic groups or ethnic communities, or underdeveloped regions, would be seriously curtailed. This is because “national treatment” would have to be given to foreign firms to bid for supplying goods and services as well as development projects.

Given the great importance of government procurement policy as an important tool required for economic and social development and nation building, it is imperative that developing countries retain the right to have full autonomy and flexibility over its procurement policy.

Therefore, it is important to avoid government procurement as an item in a bilateral trade or economic agreement. This is especially so because the developing countries have fought such a

controversial battle to exclude this as a negotiating issue within the current Doha work programme in the WTO. At the least, there should be national debates about the ramifications of having a government procurement clause within an FTA.

In an FTA involving a developed and a developing country, it is more likely that the developed country can take advantage of a government procurement market access chapter as it has the supply capacity. Most developing countries will not be able to take advantage, or at least to the same degree, because they lack the supply capacity. Thus there is an inherent imbalance in including this in an FTA.

### **CARIFORUM- EU EPA provisions**

The public procurement chapter of the CARIFORUM- EU EPA is extensive and covers market access, procedures and transparency provisions. Perhaps the most surprising part is that it requires immediate market access for European companies to purchasing by CARIFORUM governments.

This may occur through a number of provisions, but the most clear example is under the innocuous heading of ‘supporting the creation of regional procurement markets’.<sup>56</sup> This requires immediate equal treatment of locally established suppliers regardless of their degree of foreign affiliation or ownership by European nationals.<sup>57</sup> This interpretation is confirmed by a Paper commissioned by the German Federal Ministry for Economic Cooperation and Development which says that ‘the EPA does commit signatories to avoiding discrimination against one form of foreign supplier in public procurement procedures . . . the use of the language ‘shall not treat’ in Article 167.1.2.ii is significant. This amounts to an obligation not to discriminate against foreign companies that have a commercial presence in a CARIFORUM State and as such qualify as a domestic company for public procurement bids.’<sup>58</sup>

The use of the phrase ‘degree of foreign affiliation’ makes this a very broad government procurement provision. ‘Affiliation’ is not defined in the CARIFORUM- EU EPA. However, it is likely to include that the following must be treated the same as domestic companies which are entirely owned by locals and stock domestic products:

- a locally established company (which does not even have to be locally incorporated) which is wholly owned by European company. The extent of government procurement market access this provision gives depends on how many sectors CARIFORUM countries have allowed European companies to establish themselves in under Title II (investment and trade in services) of the EPA. However, the extent of government procurement market access cannot be completely limited by restrictive lists under Title II because of the mechanism below.
- A domestic company that has a contract/licence/joint venture/franchise/dealership with a European company. For example if a European pharmaceutical manufacturer was not able to establish locally the CARIFORUM country due to restrictions under Title II of the EPA, if they had a dealer who stocked their products, this is likely to qualify as ‘degree of foreign affiliation’ and so this European company, although not locally established, must still receive national treatment in any government procurement by CARIFORUM governments. This shows that ‘affiliation’ is likely to be broad enough to circumvent any restrictions CARIFORUM countries may impose by restrictions in the schedules to Title II in order to limit the number of sectors and companies it must open its government procurement to.

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<sup>56</sup> Article 167.1.

<sup>57</sup> Article 167.1.2(b)(ii).

<sup>58</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs, The Cariforum-EC EPA: An Analysis of its Government Procurement and Competition Law-Related Provisions – Working Paper – 2008’, Kamala Dawar, Prof. Simon J. Evenett, page 14, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-procurement-and-competition-2008.pdf>

Furthermore, this market access is only for the procuring entities listed by CARIFORUM countries in Annex 6 (a positive list) and is only for procurement above the threshold set out in that Annex.<sup>59</sup> However, the detailed procedural requirements set out in the rest of the chapter will apply to this immediate market access.

The implementation period extension does not appear to apply to this substantive market access obligation because it only delays the start of *procedural* obligations.<sup>60</sup>

Other paragraphs in this Article also move towards broader national treatment for European companies in purchasing by CARIFORUM governments. Article 167.1.2(a) requires CARIFORUM countries to try not to treat any established suppliers differently in procurement on a positive list basis. Similarly, Article 167.1.2(b)(i) effectively requires CARIFORUM countries to try not to discriminate against goods or services from Europe. These put pressure on CARIFORUM countries to provide this treatment. Lastly, if the CARIFORUM-EC council so decide then CARIFORUM governments must give the goods, services and suppliers from Europe national treatment.<sup>61</sup>

CARIFORUM government procurement is also opened to European companies via the competition chapter of the CARIFORUM- EU EPA, see below.

## Competition chapter

### Background

Competition policy is a complex subject, especially when put in the context of trade agreements. At first glance, “competition policy” is taken to mean restricting the power and scope of activities of the large corporations, especially transnational companies.

However, “competition” is usually taken to mean something different by trade officials of developed countries. They have been trying to make use of “competition policy” as a concept linked to market access, in which foreign firms and their products and services should have the right to “free competition” vis-à-vis local firms in markets of developing countries. “Free competition” would, in their approach, mean that the preferences given to local firms, and any advantages or assistance they enjoy, should be curtailed or eliminated, so that the foreign firms can compete on a level playing field.

In this paradigm, the transnational corporations of the US, Europe, Japan, etc, would be able to compete on “equal ground” as local companies in the local markets. In actual fact, these transnational corporations already enjoy great advantages, including big size, large financial resources, high technology, marketing networks, and brand names. Thus there is no “level playing field” to begin with. Without some assistance, preferential treatment, or home-ground advantages (such as being familiar with the local language and customs, and having a distribution system built over generations), the local companies of developing countries will not be able to survive the competition from foreign firms.

A few years ago, the EU backed by Japan and the US tried introduced a proposal for a competition agreement in the WTO that would enable foreign firms and their goods and services to compete “equally” with local firms, through the removal of preference and subsidization of local firms. Later, the proposal was narrowed down to initial topics such as principles of non-discrimination, transparency and procedural fairness, as well as hard core cartels and modalities for voluntary cooperation. This did not preclude the later full-scale introduction of the initial broad proposal.

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<sup>59</sup> Article 167 (chapeau).

<sup>60</sup> Article 180.1. Article 180.3 refers to the implementation in Article 180.1. The implementation delays in Article 180.4 do not apply to the immediate market access obligation provision.

<sup>61</sup> Article 167.1.3 and Article 167.1.4.

The CARIFORUM-EU EPA requires the CARIFORUM countries to establish (within five years of the EPA starting) competition legislation that addresses abuse of dominance and agreements between enterprises which decrease or intend to decrease competition.<sup>62</sup> Development economists have questioned whether the framework of competition policy and framework now in place in the US and other developed countries are appropriate for developing countries which are now in their developmental stage. Their concern is that this framework, which the FTA promotes, may hinder the growth of local firms and make them even less able to compete or survive against the large foreign companies especially in the face of globalization. The competition issue in FTAs is thus extremely complex.

These economists argue that developing countries should have competition policy and law, but that these must be tailored to their development needs. Ajit Singh, for example, concludes that the kind of competition policy adopted by Japan in its developmental period (1960s-1970s) is more suitable for developing countries. In this model, competition policy and law were formulated that prevented the full onslaught of large foreign firms that were anti-competitive because of their size and monopolistic characteristics, but local firms were able to develop and expand. The intergovernmental South Centre notes that ‘in the early stages of industrialisation, governments may wish to promote “national champions”, that is, large industrial groups which are likely to compete with foreign firms both in domestic and possibly in regional markets. Hence, governments may want to encourage, at least initially or temporarily, some market concentration. A competition policy primarily concerned only with the obsessive quest for maximum competition is likely to prevent mergers leading to market concentration whereas industrial policy objectives might encourage the same mergers. A classic example of a mix of competition policy alternating market concentration and rivalry can be found in the promotion by the Korean government of national *chaebols*.

Moreover, depending on the stages of development and productive capacity of a developing country, governments may decide to increase or reduce the level of intra-firm competition, hence enforcing more or less strictly competition principles. A good recent example is China, where industrial policies have alternated the promotion or restriction of intra-firm rivalry depending on the perception of the vulnerability or strength of firms in the context of a strategy for the promotion of a “team” of national champions.<sup>63</sup>

It goes on to point out that ‘It could, therefore, be of interest to the ACP countries to maintain their policy options open with respect to intra-firm rivalry and restrictive business small and vulnerable economies such as those of the ACP states, competition policies can aim at specific developmental objectives, for instance:

- (a) Creating an *optimum* level of domestic competition, as opposed to a *maximum* level of competition. This optimum level of competition has to be balanced against and reflect other policy objectives, such as the promotion of local industries and incentives for innovation and R&D;
- (b) Ensuring coordination between competition authorities and legislators and other stakeholders active in development promotion (e.g. agricultural or industrial producers, trade unions, agencies responsible for industrial policies or export promotion, as well as all other agencies in charge of sectoral policies, e.g. education, fisheries, transports, etc.);
- (c) Safeguarding the propensity of firms to invest at high levels, hence protecting encouraging the growth of profits, including by coordinating investment decisions and guaranteeing protected markets. In these instances, a certain degree of market concentration may be encouraged, rather than punished by competition policy;
- (d) Regulating the behaviour of multi-national corporations which frequently enjoy a dominant position in developing country markets thereby restricting, delaying or hindering the establishment of national industries, particularly by controlling any abuse of dominant position in a value chain (standards or inputs);

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<sup>62</sup> Article 127.1.

<sup>63</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

...

(f) Securing the policy space needed to support national firms or sectors; that is, reserving the right to discriminate against foreign economic operators. While non-discrimination is a legitimate request among equal business players, the reality in most ACP economies is that markets are already tilted in favour of foreign firms, to the detriment of much smaller local entrepreneurs. Developed countries and the EU have repeatedly argued that they see national treatment with respect to competition laws as an essential element (i) for increased governance in the attribution of business benefits as well as an instrument to protect governments against rent-seeking behaviours, as well as (ii) for a fairer business environment and hence greater attraction of FDI. For developing countries, however, there are sound arguments why discrimination on the basis of nationality may be useful.

(g) Ensuring that a competition framework does not require the prohibition or privatisation of state monopolies or the deregulation and liberalisation of sectors considered strategic from a developmental perspective (education, energy, health, transportation, finance, etc.). For instance, a case where two large domestic companies are allowed to merge so that they reach economies of scale to compete with other firms at the regional or international level, whereas the same merge involving one domestic firm and a multinational firm may need to be prohibited to avoid a concentration of market power. An additional example is where a government seeks to promote small and medium enterprises through specific benefits and defines an eligibility criteria based on sales or profit thresholds that *de facto* exclude foreign firms (although *de jure* such firms were not facially excluded on the basis of nationality). Finally, another example concerns the promotion of export activity, where, by definition, only domestic firms may be targeted, since foreign competitors are already international.<sup>64</sup>

The South Centre concludes that ‘Fear that these objectives may not be reflected in international instruments was precisely the reason why a multilateral framework could not be adopted at the WTO. The same fear has explained the scepticism of ACP countries in negotiating competition rules with the EU in the context of the EPAs.’

The CARIFORUM-EU EPA has competition policy elements in some chapters, beside the chapter on competition itself. For example there are competition elements in the telecommunications section of the services and establishment title which requires the right to interconnect.

Competition law and policy, in appropriate forms, are beneficial, including to developing countries. However each country must have full flexibility to choose a model which is suitable, and which can also change through time to suit changing conditions. Having an appropriate model is especially important in the context of globalisation and liberalisation where local firms are already facing intense foreign competition. In particular, developing countries must have the flexibility to choose the paradigm of competition and competition policy/law that is deemed to be more suitable to their level of development and their development interests.

The developed countries’ approach, that competition policy should provide “effective opportunity for competition” in the local market for foreign firms, and thus to apply the WTO “core principles” to competition law/policy would affect the needed flexibility for the country to have its own appropriate model or models of competition law/policy.

What is required is a paradigm to view competition from a development perspective. Competition law/policy should complement other national objectives, eg industrial policy, or the need for local sectors to compete in the context of liberalisation. Therefore the traditional or the UK and US models of competition may not be appropriate for a developing country. On the other hand the Japan model of the 1950s-70s may be more appropriate but may not be allowed under the US-EU framework of applying WTO or “national treatment” and “market access” principles to competition policy.

Along the same lines, in a development perspective, a competition and development framework requires that local firms and farms must build up the capacity to become more and more capable of

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<sup>64</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

competing successfully, starting with the local market, and then if possible internationally. This requires a long time frame, and cannot be done in a short while. It also requires a vital role for the state, which has to play the role of nurturing, subsidising, encouraging the local firms. The build up of local capacity to remain competitive and become more competitive also requires protection from the "free" and full force of the world market for the time it takes for the local capacity to build up. This means that development strategy has to be at the centre, and competition as well as competition policy has to be approached to meet the central development needs and strategy.

At present, there is hardly any common understanding let alone agreement among countries on what the competition concept and issue means in the WTO context, especially in terms of its "interaction" with trade and its relationship with development. The whole set of issues of competition, competition law and competition policy and their relation to trade and to development is extremely complex. The proposal of the proponents of a WTO agreement (especially the EU) is to have multilateral rules that discipline Members to establish national competition law and policy. According to the advocates, these laws/policies should incorporate the "core principles of WTO", defined as transparency, non-discrimination (MFN and national treatment).<sup>65</sup> Thus, the location of the venue of the competition issue and the agreement within the WTO would bias the manner in which the subject and the agreement is to be treated. In this case, the "core WTO principles" would be applied to competition.

Furthermore, there are a number of assumptions underlying the position of developed countries on competition which are not accurate in developing countries.<sup>66</sup> For example, the existence of a multitude of independent private actors, the existence of consumers, the presence of no information asymmetries, the capacity of states to enforce contracts and the existence of a strong state, with adequate institutional, human and financial capacity to conduct investigations, monitor markets and sanction prohibited practices to enforce developed countries' competition concepts.<sup>67</sup> The South Centre goes on to note that 'the reality in developing countries is so far from that abstract economic world, that the promotion of narrow competition objectives in developing countries is simply not adequate and can indeed be detrimental to other developmental priorities.'<sup>68</sup>

For the reasons outlined above, developing countries must have the flexibility to choose the paradigm of competition and competition policy/law that is deemed to be more suitable to their level of development and their development interests.

### **Towards a development framework on competition for developing countries**

The developed countries' conceptual and negotiating framework can be challenged through a different framework that looks at competition through the lens of development. Developing countries can argue that only if local firms and agencies are given certain advantages can they remain viable. If these smaller enterprises are treated on par with the huge foreign conglomerates, most of them would not be able to survive. Perhaps some would remain because over the years (or generations) they have built up distribution systems based on their intimate knowledge of the local scene that give them an edge over the better-endowed foreign firms. But the operation of such local distribution channels could also come under attack from a competition policy in the WTO or the FTAs as the developed countries are likely to pressure the local firms to also open their marketing channels to their foreign competitors.

At present, many developing countries would argue that giving favourable treatment to locals is in fact pro-competitive, in that the smaller local firms are given some advantages to withstand the might of foreign giants, which otherwise would monopolise the local market. Providing the giant international firms equal rights would overwhelm the local enterprises which are small- and medium-sized in global terms.

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<sup>65</sup> See for example: WT/WGTCP/W/114 and WT/WGTCP/W/209.

<sup>66</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>67</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>68</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

However, such arguments will not be accepted by the developed countries, which will insist that their giant firms be provided a “level playing field” to compete “equally” with the smaller local firms. They would like their interpretation of “competition” (which, ironically, would likely lead to foreign monopolisation of developing-country markets) to be enshrined in WTO law or in the FTAs.

Competition can be viewed from many perspectives. From the developing countries' perspective, it is important to curb the mega-mergers and acquisitions taking place which threaten the competitive position of local firms in developing countries. Also, the abuse of anti-dumping actions in the developed countries is anti-competitive against developing countries' products. The restrictive business practices of large firms also hinders competition. However these issues are unlikely to find favour with the major countries, especially the US, which wants to continue its use of anti-dumping actions as a protectionist device. In the FTA, the need for foreign firms to have national treatment and a free competition environment in the host country, could well prevail, especially given the unequal negotiating strength which works against the developing countries. The likely result is that developing countries would have to establish national competition laws and policies that are inappropriate for their conditions. This would curb the right of governments to provide advantages to local firms, and local firms themselves may be restricted from practices which are to their advantage.

What is required is a conceptual framework or paradigm to view competition from a development perspective. Competition law/policy should complement other national objectives and policies (such as industrial policy) and the need for local firms and sectors to be able to successfully compete, including in the context of increased liberalisation.

From a development perspective, a competition and development framework should have the following elements:

An understanding that local industrial and services firms and agricultural farms must build up the capacity to become more and more capable of competing successfully, starting with the local market, and then if possible internationally. This requires a long time frame, and cannot be done in a short while.

A vital role for the state is required, to play the role of nurturing, subsidising, encouraging the local firms. The build up of local capacity to remain competitive and become more competitive also requires protection from the "free" and full force of the world market for the time it takes for the local capacity to build up. This means that development strategy has to be at the centre, and competition as well as competition policy has to be formulated as a means to meet the central development needs and strategy.

Therefore some of the conventional models of competition may not be appropriate for a developing country. On the other hand other models may be more appropriate, but their adoption may be hindered or prohibited by a WTO or FTA agreement on competition that is based on the "core principles of the WTO."

For example, the Cambridge University Professor of Economics, Ajit Singh, has pointed out that: (1) The US and European models of competition law and policy are inappropriate and can cause harm to the development efforts of developing countries; (2) More suitable is the Japanese model of the 1950s and 1960s, when Japan was at its developmental stage. The Japanese government enacted competition law which was a tool to prevent the intrusion of large foreign firms and their products, whilst at the same time used industrial policy to nurture and strengthen Japanese firms so that they could develop and eventually successfully compete with the foreign giant companies. The kind of model represented by the Japanese example, in which competition policy is complemented and indeed subsumed under industrial policy, would not be allowed in the kind of competition agreement being propounded in the FTAs.<sup>69</sup> Indeed, they would precisely seek to outlaw the kind of Japanese-style model that developing countries may find consistent with their development needs.

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<sup>69</sup> The intergovernmental South Centre notes that competition laws typically included in free trade agreements contain concepts of interest mostly to advanced economies, even when the FTA is with developing countries.

There is no convincing case for competition policy to be a subject of an FTA (which should be about trade). If it is in an FTA, then the FTA would create a set of binding rules to govern the competition policies and laws of developing countries. Given the “market access” and “national treatment” principles in the FTA, a competition chapter in the FTA is likely to be skewed in a way that is inappropriate for the development interests of developing countries.

If there is to be a discussion on “competition” in trade talks, including in FTAs, developing countries could give their own interpretation of this issue and put forward their own ideas for the discussion (in an attempt not to have a competition chapter in the FTA). The trade expert, B.L. Das has suggested that the following issues could be put forward:

- Obligations of the foreign firms to the host country.
- Obligation of the home government to ensure the foreign firms fulfil their obligations.
- Competitiveness of domestic firms: to consider measures to be undertaken by domestic firms, government and a possible multilateral framework to enable local firms (especially small firms) to remain or to be competitive and to grow.
- Competition impeded by government action (for example, anti-dumping action).
- Competition impeded by intellectual property protection
- Global monopolies and oligopolies and their effect on local firms in developing countries.
- Big mergers and acquisitions (by transnational companies) and their effects on developing countries.

The South Centre notes that ‘By comparison, the CARIFORUM Competition Chapter only reflects the typical objectives of developed countries with respect to competition policy, that is, the prohibition of restrictive business practices to protect their investments and guarantee market access following trade liberalisation.’<sup>70</sup>

### Competition in EU-FTAs

The EU’s aim can be clearly seen in Global Europe which notes that ‘The absence of competition and state aid rules in third countries limits market access as it raises new barriers to substitute for tariffs or traditional non-tariff barriers. The EU has a strategic interest in developing international rules and cooperation on competition policies to ensure European firms do not suffer in third countries from unreasonable subsidisation of local companies or anticompetitive practices. There is much to be done in this area. In most countries there is little transparency over the granting of aids’.<sup>71</sup>

However, to date, there has been variation in the competition chapters in various EU-FTAs.<sup>72</sup>

The Cotonou Agreement ‘recognised broader objectives for competition policy, including the need to promote the industrialisation of ACP countries. The objectives recognised for competition policies were threefold, namely to: “*secure an investment friendly climate, a sustainable industrialisation process and transparency in the access to markets*”. Under the CARIFORUM text, the promotion of greater competition becomes an objective in itself, not an instrument towards the promotion of broader policy objectives.’<sup>73</sup>

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Fact sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>70</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15

<sup>71</sup> Global Europe: Competing in the World – A Contribution to the EU’s Growth and Jobs Strategy, European Commission, 2006.

<sup>72</sup> See Box 1 of the South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>73</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

South Centre notes that ‘The request for the inclusion of competition provisions within the CARIFORUM EPA as well as the actual language used, were initiatives of the EU Commission, not the Caribbean Regional Negotiating Machinery (CRNM).’<sup>74</sup>

### **CARIFORUM-EU EPA analysis**

The CARIFORUM-EU EPA requires the CARIFORUM countries to ensure that they have competition laws which address anticompetitive agreements and concerted practices between companies and abuse of dominance within five years of the EPA beginning.<sup>75</sup> This could include activities such as joint marketing of a commodity such as sugar, chicken or milk (which CARIFORUM countries may need to do in order to compete with subsidised European agricultural production as these EU subsidies are not reduced under the EPA). Furthermore, because these laws must cover practices that ‘affect trade between the Parties’, this would require regulation of both goods and services.

### **State enterprises**

At the WTO, ‘Article XVII of GATT (*State Trading Enterprises*) establishes that these enterprises must operate in a non-discriminatory manner in their sales or purchases of **imports and exports**. Article VIII of GATS (*Monopolies and Exclusive service suppliers*) provides that monopoly suppliers of services must respect the principle of Most Favoured Nation and as well as each WTO Member’s specific sectoral commitments in services.’<sup>76</sup> The CARIFORUM-EU EPA restricts public enterprises and state monopolies much more.

Although Article 129.1 reaffirms the right to the public or private monopolies, the rest of the provision greatly restricts them.

### **Government procurement**

Any state monopolies of a commercial character or nature must not discriminate between the European Union and CARIFORUM countries regarding the conditions under which goods and service are bought or sold.<sup>77</sup> The WTO already requires that state enterprises not discriminate with respect to imports and exports of goods and services, but not the **domestic** sale or purchase of these goods and services. The South Centre points out that ‘The EPA actually grants national treatment to EU nationals in Caribbean domestic markets. Hence, the scope of this measure is much larger than that of WTO rules (*WTO-plus*), and ensures, in practice, much larger market penetration for EU companies or service providers.’<sup>78</sup>

‘the conditions under which goods and services are sold or purchased’ is very broad. For example, it could include how many automatic teller machines a bank that is a state enterprise has, or that the distribution networks and local language advantage of a state monopoly must also be opened to European companies. The South Centre is concerned that this wording ‘could indeed cover virtually all governmental measures and state monopolies’ practices which directly or indirectly create more favourable situations for Caribbean nationals.’<sup>79</sup>

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<sup>74</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>75</sup> Article 127.1 in conjunction with Article 126 which states that the Parties agree that these practices restrict competition.

<sup>76</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>77</sup> Article 129.4.

<sup>78</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>79</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

This means that these state monopolies must not discriminate between the actual goods or services or the nationals selling them<sup>80</sup> as the intergovernmental South Centre notes,<sup>81</sup> unless the discrimination is inherent in the existence of the monopoly. Thus this is national treatment (market access) for government procurement by state monopolies of commercial character/nature, unless the discrimination is inherent in the existence of the monopoly. 'In practice, this prohibits a state enterprise to give preference to a national producer or a national service supplier. This is hence a direct restriction of policy space for the promotion of national productive or supplying capacity.'<sup>82</sup> According to the South Centre, this provision 'curtails the capacity of developing countries to use the procurement operations of state enterprises to promote their own small and medium enterprises or services suppliers.'<sup>83</sup>

This provision is drafted very broadly because it regulates the monopolies, whatever field they are operating in, whether their activities are in sectors where they have a monopoly or are competitive, or are even non-commercial (such as purchasing products for giving to charities, for example as part of corporate social responsibility).

This 'national treatment provision contained in the CARIFORUM EPA text extends clearly beyond WTO requirements.'<sup>84</sup>

This provision must be implemented by the end of the fifth year after the entry into force of the CARIFORUM- EU EPA.

### ***Subjecting certain enterprises to competition rules and prohibiting measures distorting trade with regard to them***

For public enterprises and enterprises to which special or exclusive rights have been granted, there are two further restrictions. Public enterprises which are subject to specific sectoral rules are exempt from these further restrictions.<sup>85</sup> However, it is not clear what might constitute specific sectoral rules. Would scattered legislation on telecommunications or energy constitute sectoral rules?<sup>86</sup> And given the lack of normative and regulatory capacity in developing countries, particularly in services, this exception is likely to be difficult to effectively fulfill.

Even if this exception is satisfied for some public enterprises, this still means that general public enterprises which are not subject to sectoral rules and enterprises to which special or exclusive rights have been granted are subject to the following two additional restrictions once the EPA starts operating. Furthermore, the provision is drafted very broadly because it is 'with regard to' these enterprises.

Firstly, the EPA countries cannot introduce or maintain *any* measure that distorts trade in goods or services between the Parties to an extent contrary to the Parties interest.<sup>87</sup> 'Parties interest' is very broad and vague. It is not even limited to economic interests. It is also not limited to an objective test such as 'legitimate' interests. The South Centre notes that 'no indication of what could constitute the Parties' interests under this provision is given. Presumably, the text refers to the overall commercial

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<sup>80</sup> Government procurement of goods and services is explicitly excluded from GATT (Article III.8(a)) and GATS (Article XIII), South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>81</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15, page 10, 14.

<sup>82</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>83</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>84</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>85</sup> Article 129.3.

<sup>86</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>87</sup> Article 129.2.

interests of the parties or the commercial interests of their nationals (e.g. importers or exporters of services or goods), that is a very vague notion, which could potentially affect any government (behind-the-border) measure.<sup>88</sup> The South Centre also notes that there are no public policy safeguards.<sup>89</sup> The only limitation is that the measures must distort trade in goods or services between the parties in order to be prohibited.<sup>90</sup> This effectively means that market openness prevails over any other policy objective (with the exception of those enterprises subject to sectoral rules, see above).<sup>91</sup>

Secondly, these enterprises must be subjected to competition rules to the extent that the application of these rules do not obstruct the performance of the tasks that have been assigned to them.<sup>92</sup> The South Centre notes that this exception 'is subject to debate and hence is also is of doubtful utility for the ACP.'<sup>93</sup>

### **Cooperation**

While there is a cooperation provision, the South Centre notes that it supports 'the objectives and the implementation of the obligations of the chapter – not Caribbean policymakers' capacity on competition policy issues generally.'<sup>94</sup>

### **State enterprises conclusion**

As the South Centre points out, Article 129 does not use consistent language.<sup>95</sup> At times, it regulates 'public enterprises', in other places it refers to 'enterprises entrusted with/granted special or exclusive rights', 'designated monopolies', 'public or private monopolies', or 'state monopolies' (none of which are defined in the EPA). This makes it difficult to determine if any of the obligations or exceptions are overlapping and which regime(s) in this Article a particular state entity may fall under.

If CARIFORUM countries have carved out state enterprises (however defined) from Title II of the EPA (investment and trade in services), it is not clear what would happen if this carve out conflicts with this state enterprise provision under the competition chapter. 'For instance, if a country has deliberately excluded a specific services sector from the EPA, say, transports, would it have to still have to ensure the activities of its national rail company treats ACP and EU nationals equally whenever selling or buying goods? It would appear that would be the case. In other words, the state monopoly would be able to continue to operate without accepting foreign competition, but it would have to refrain from supporting local (ACP) service providers or producers of goods to the detriment of EU nationals.'<sup>96</sup>

To ensure that the intention of CARIFORUM countries to exempt state enterprises from the EPA is effective, a similar carve out should be made in the competition chapter. This does not currently seem to be the case because the only exceptions to the competition chapter are under the general

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<sup>88</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>89</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>90</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>91</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>92</sup> Article 129.2.

<sup>93</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>94</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>95</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>96</sup> South Centre's Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

exceptions<sup>97</sup> of the EPA which do not necessarily provide all the exceptions that state enterprises may require.

The South Centre concludes that the state enterprises article ‘represent major concessions of Caribbean negotiators to the EU. Moreover, there could be conflicts between competition provisions (especially art.5) and those regarding government procurement and trade in services’.<sup>98</sup> It goes on to note that ‘The inclusion of a competition chapter in the EPAs, together with chapters on other trade-related issues, remains one of the most sensitive and divisive issues in these negotiations. Regions and countries that have not initialled an interim agreement yet have generally maintained their resistance to even discuss the matter or alternatively, have stated their firm intention to negotiate only provisions leading to greater cooperation on these issues.

That prudence seems to be justified given the fact that the interests regarding the promotion of competition differ widely in the EU and in ACP countries because of their enormous economic and productive asymmetries. The EC would very likely refuse, for systemic reasons, to accept an EPA competition chapter which reaffirms the right of developing countries to use competition policy as a developmental instrument (selective or lax enforcement of anticoncentration rules). Moreover, developing country competition policies which actively promote local industries and services suppliers to the detriment of imports or foreign suppliers would actually run frontally against the European interest of tightening competition regulations to improve the conditions of market access for its nationals.

Because many other developmental policy instruments are severely limited either by WTO rules or by the EPAs (for instance, tariff policy, export taxes, intellectual property, and government procurement), ACP negotiators should avoid adding competition rules to the list of instruments their governments will no longer be able to use in a pro-active manner to foster their development.’<sup>99</sup>

## Intellectual property

### Background

#### Context

‘Almost without exception, developing countries are net importers of technology.’<sup>100</sup> Even in an industrialized country like Australia 90% of patents are granted to foreigners according to government statistics.<sup>101</sup> Most countries in the world are net intellectual property importers, except those such as the USA<sup>102</sup> and European Union. For example, in Malaysia, 98% of patents granted are to foreigners (including in 2005).<sup>103</sup> 1.1% of patents granted in Indonesia from 1993-2006 were to Indonesians.<sup>104</sup>

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<sup>97</sup> Part four.

<sup>98</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>99</sup> South Centre’s Fact Sheet no. 8: competition policy in economic partnership agreements (CARIFORUM text), April 2008, SC/AN/TDP/EPA/15.

<sup>100</sup> ‘Integrating Intellectual Property Rights and Development Policy, 2002 report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm).

<sup>101</sup> <http://www.ipaustralia.gov.au/about/statistics.shtml>

<sup>102</sup> ‘Between 1991 and 2001, the net US surplus of royalties and fees (which mainly relate to IP transactions) increased from \$14 billion to over \$22 billion. In 1999, figures from the World Bank indicate a deficit for developing countries for which figures are available of \$7.5 billion on royalties and licence fees.’ Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 21

<sup>103</sup> [http://www.mipc.gov.my/index.php?option=com\\_content&task=view&id=3&Itemid=10](http://www.mipc.gov.my/index.php?option=com_content&task=view&id=3&Itemid=10)

<sup>104</sup> <http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=2715>

From 1998-2005, 0.6-1.4% of patents granted in the Philippines were to Filipinos.<sup>105</sup> In sub-Saharan Africa 0.01% of patent applications in 1997 were by residents.<sup>106</sup>

CIEL notes that ‘ACP countries, as with most developing countries, are net importers of knowledge goods. Providing greater intellectual property protection for knowledge goods from other countries increases the costs of accessing those goods for citizens of ACP countries. This is especially true in areas such as public health, education, and the environment.’<sup>107</sup> Switzerland earns more per capita from exporting inventions than any other country. Nevertheless, in 1990 the Swiss government still said that further extension of patent protection in developing countries could be contrary to the interests of developing countries as they are primarily importers of technology.<sup>108</sup>

If net IP exporters can obtain broader and longer periods of IP protection, the profits of their companies will increase.

Intellectual property protection can have a macroeconomic impact. For example in 2005, Malaysia had a net outflow of royalties of US\$1.7billion.<sup>109</sup> If intellectual property protection is broadened or lengthened, this royalty outflow can be expected to increase.

## WTO's TRIPS Agreement

The introduction of IP as an issue with binding rules within a trade agreement was very controversial, and remains so, after the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was incorporated within the WTO. Since then, many economists ranging from Joseph Stiglitz to Jagdish Bhagwati have decried the inclusion of IP and TRIPS in the WTO.

There is a growing realisation that high IPR standards, promoted by TRIPS to developing countries, are inappropriate to the development needs of developing countries. In particular, the former head of the World Bank's trade research department, Michael Finger, estimated that the cost to developing countries of implementing their TRIPS obligations amounts to US\$60 billion annually, and that this more than offsets the gains they may expect to benefit from expanded market access in agriculture and textiles in the Uruguay Round. (Khor 2005).

Over the last few years there has been a movement by developing countries to clarify some aspects of TRIPS or to amend them, to reduce the more developmentally-negative aspects. For instance the Doha Declaration on TRIPS and Public Health has reiterated that developing countries can make use of “flexibilities” such as compulsory licenses to offset the monopoly privileges of patent holders.

Developing countries are also trying to have TRIPS amended to deal with the problem of “biopiracy”, by requiring that patent applications involving biological resources and traditional knowledge be accompanied by disclosure of the countries of origin/source, prior informed consent and evidence of benefit-sharing arrangements with these countries. Moreover, TRIPS requires some life forms to be patented (microorganisms and micro-biological processes) but allows the prohibition of patenting of

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<sup>105</sup> <http://www.ipophil.gov.ph/statreport/statistics.htm>

<sup>106</sup> World Bank, World Development Indicators 2000

<sup>107</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for International Environmental Law, April 2008, page 14, [http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>108</sup> Page 23, ‘Patents and Development : Lessons Learnt from the Economic History of Switzerland’, Richard Gerster, Intellectual Property Rights Series #4, Third World Network, 2001.

<sup>109</sup> 9<sup>th</sup> Malaysia Plan, Page 264.

other lifeforms (plants and animals), and gives countries the leeway to define what is an invention and thus what is patentable.

Countries that are members of the WTO are required to abide by the minimum intellectual property protection standards set by TRIPS.

However, least-developed countries (LDCs) that are Members of the WTO do not have to implement any of the substantive obligations of TRIPS until at least 1 July 2013 (although there is a standstill provision whose legality has been criticized). Least-developed country Members of the WTO are also not obliged to implement patents on or data protection of medicines until at least 1 January 2016.

Developing countries which are not yet Members of the WTO (such as the Bahamas) are not obliged to provide TRIPS-level of intellectual property protection until they become WTO Members, unless they are bound to by some other treaty. Although many developing countries are in the process of joining the WTO,<sup>110</sup> some may never join as they have few exports facing significant tariff barriers.

## IP negotiations shift to FTAs

As WTO negotiators have become more aware of the development dimensions of IP, the developed countries have tried to introduce even higher standards of IP globally through WIPO. However, many developing countries have now started a movement to establish a “development agenda” within WIPO. They have also resisted attempts at harmonizing patent and copyright laws at even higher standards.

Thus, there is now an attempt by the developed countries to seek the forum of the FTA to: (a) remove or reduce the flexibilities in the TRIPS agreement and (b) establish even higher standards of IPRs in developing countries. IP is thus a major item in bilateral FTAs, and countries like the US, EU and Japan are keen to have their interests furthered, beyond what is in the WTO-TRIPS agreement. The FTAs threaten the use of TRIPS flexibilities in relation to (a) patents and access to medicines; (b) protection of plant varieties with respect to the sui generis system, and the rights of farmers; biodiversity; (c) the ability to ban patenting of some lifeforms.

There may also be a potential for FTAs to make it more difficult for countries to have disclosure requirements with respect to patent applications involving biological resources and traditional knowledge. Some FTAs also oblige developing countries to have tighter copyright legislation, with adverse effects on technology transfer or access to information and information technology.

Prior to TRIPS, countries were able to tailor their level of IP protection to suit their level of development. Many of today’s industrialised countries such as the USA, Europe,<sup>111</sup> Japan, South Korea and Taiwan did not have high levels of IP protection until it suited them. For example Switzerland did not allow patents on chemicals until 1978; Italy, Sweden and Switzerland did not allow patents on medicines until 1978<sup>112</sup> and Spain did not allow patents on chemicals or medicines until 1992 because it said it could not afford the higher medicine prices as a result of patents.

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<sup>110</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>111</sup> Commission on Intellectual Property Rights, Study Paper 1a, Intellectual Property and Economic Development: Lessons from American and European History, B Zorina Khan.

<sup>112</sup> Human Development Report 2001, United Nations Development Programme.

Countries may increase their level of IP protection through bilateral influence, acceding to the World Trade Organization (WTO) or the intellectual property chapter of a bilateral or regional trade agreement (FTA)<sup>113</sup>. This Paper focuses on FTAs, but the same provisions may enter developing countries via the other routes mentioned above.

According to the Commission on Intellectual Property Rights, ‘development objectives need to be integrated into the making of policy on intellectual property rights’<sup>114</sup> and there should be wide-ranging consultations before any changes to IP laws are made to ensure they are in line with development objectives in agriculture, health and industry.<sup>115</sup> In addition, it emphasizes that ‘developing countries will incur significant costs if they rush to establish an IP regime that is inappropriate to their level of development.’<sup>116</sup>

Apart from the costs to users of IP listed below, implementing and enforcing an IP regime itself is ‘costly’.<sup>117</sup> ‘In developing countries, where human and financial resources are scarce, and legal systems not well developed, the opportunity costs of operating the system effectively are high. Those costs include the costs of scrutinising the validity of claims to patent rights (both at the application stage and in the courts) and adjudicating upon actions for infringement. Considerable costs are generated by the inherent uncertainties of litigation.’<sup>118</sup>

### Is an IP chapter required by the Cotonou Agreement?

Because TRIPS does not allow exceptions to the most favoured nation (MFN) treatment, the ACP countries were not receiving preferential treatment from the European Union under the Cotonou Agreement. Therefore ACP countries do not **need** to negotiate intellectual property provisions in their EPAs in order to maintain any preferential treatment on intellectual property from the European Union.

Are ACP countries nevertheless **required** by the Cotonou Agreement to negotiate stronger intellectual property protection in the EPA? The European Union apparently argues that Article 46 of the Cotonou Agreement requires ACP countries to agree to stronger intellectual property protection in the EPAs.<sup>119</sup> However, when one looks at the provisions in Article 46:

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<sup>113</sup> In this Paper, ‘FTAs’ will also be used to refer to economic partnership agreements which contain typical FTA provisions such as trade liberalisation and stronger intellectual property and investment protection.

<sup>114</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page i.

<sup>115</sup> ‘Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 161.

<sup>116</sup> ‘Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 162.

<sup>117</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 15.

<sup>118</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 15.

<sup>119</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

- Article 46.1 only ‘recognises the need’ to ensure an adequate and effective level of protection of intellectual property rights in line with international standards. Firstly, this does not require **compliance** with an adequate and effective level of protection of intellectual property rights in line with international standards, it merely recognises that it is important. (To require compliance would have required wording like ‘Parties shall ensure an adequate and effective level of protection...’). ‘It is a far cry from “recognising a need”... to taking on obligations to negotiate or implement higher IPR obligations. The language of “recognition” can hardly form the basis of any obligation.’<sup>120</sup> Secondly, even if it did require compliance, compliance with TRIPS may be sufficient to constitute a level of protection ‘in line with the international standards’.
- Article 46.2 merely underlines the importance of adhering to TRIPS. Again, this does not require **compliance** with TRIPS, it merely underlines the importance of adherence. (To require compliance would have required wording like ‘Parties shall comply with TRIPS’).
- Article 46.3 merely agrees on the **need** to accede to all relevant international conventions on intellectual property as referred to in a particular part of TRIPS. Once again, this does not require the ACP countries to join these conventions. (To require compliance would have required wording like ‘Parties **shall** accede to all relevant international conventions...’). Furthermore, even this is only in line with their level of development.
- Article 46.4 only stipulates that ACP countries ‘may consider’ the conclusion of agreements to protect trademarks and geographical indications. As above, this does not require ACP countries to conclude such agreements.<sup>121</sup> It does not even require them to *consider* concluding such agreements. It is optional for them to consider whether they want to sign such agreements. (To require compliance would have required wording like ‘Parties shall conclude agreements aimed at protecting...’).
- Article 46.5 merely defines intellectual property. It does not contain any standards or obligations by itself.
- Article 46.6 is only about cooperation in intellectual property. Furthermore, any cooperation requires a request and it is on mutually agreed terms and conditions.

A study commissioned by the German Federal Ministry for Economic Cooperation and Development notes that ‘There is no requirement under the Cotonou Agreement to include any substantive provisions on IP in EPAs.’<sup>122</sup>

## Context, objectives and principles

The Vienna Convention on the Law of Treaties (VCLT) sets out the principles for interpreting treaties, including EU-FTAs. Articles 31 and 32 of the VCLT reflect customary international law.<sup>123</sup> Customary international law is binding on all countries, so even if countries have not signed the VCLT, they are still bound by the customary international law version of the VCLT.

<sup>120</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for International Environmental Law, April 2008, page 4, [http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf). The Intellectual Property Quarterly Update also notes that recognition does not entail an obligation to accede to any agreements containing such international standards, Fourth Quarter 2006, South Centre, CIEL.

<sup>121</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for International Environmental Law, April 2008, page 3-4., [http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>122</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>123</sup> For example according to the International Court of Justice in *Libya v Chad*, ICJ Reports (1994), page 4 para 41.

Article 31.1 of the VCLT requires the use of the context of the treaty and objectives to interpret the treaty's provisions. This allows an arbitration panel<sup>124</sup> which is established to determine whether one of the parties to the EPA has violated one of the provisions to refer to the context and objectives when interpreting the intellectual property chapter.

### Context

The context of the CARIFORUM- EU EPA first recognises the importance of fostering innovation and creativity.<sup>125</sup> Then it recognises the key role of protection and enforcement of intellectual property in fostering creativity, innovation and competitiveness.<sup>126</sup> In addition to emphasizing the protection and enforcement of intellectual property, the context also states that the Parties are 'determined to ensure increasing levels of protection'. This combination may mean that an arbitration panel interprets an intellectual property provision as requiring stronger protection than would otherwise be the case. The only apparent safeguard is 'appropriate to their levels of development'.<sup>127</sup>

### Objectives

The objectives of the intellectual property chapter are set out in Article 132. They include promoting 'innovation' and 'competitiveness' (which when read in the context above reinforces the importance of the protection and enforcement of intellectual property) as well as explicitly aiming to 'achieve an adequate and effective level of protection and enforcement of intellectual property rights'. There is no corresponding mention of: ensuring access to things protected by intellectual property (such as medicines), taking into account differing levels of development or the goals of development (which may include environmental sustainability, poverty reduction/eradication). Taken together, an arbitration panel may find that these objectives require any intellectual property provisions to be interpreted in favour of stronger intellectual property protection.

### Principles

Many international intellectual property treaties (for example the World Intellectual Property Organization treaties on patents and copyright) do not have an enforcement mechanism. This means that if countries fail to abide by them, no tariffs can be put on their exports etc. However, Article 139.1 may extend the EPA's enforceability to these previously unenforceable intellectual property treaties by requiring adequate and effective implementation of these treaties. This would mean that if for example a CARIFORUM country that was party to the Patent Cooperation Treaty (PCT) did not follow the PCT's requirements, it could be sued by the European Union under the dispute settlement mechanism of the EPA for failing to effectively implement the PCT. If the CARIFORUM country did not obey the ruling by the arbitration panel of the EPA ordering it to comply with the PCT, the EU could increase tariffs on the CARIFORUM country's exports<sup>128</sup>.

Furthermore, for CARIFORUM countries that are not yet members of the World Trade Organization (such as the Bahamas)<sup>129</sup>, it requires them to implement TRIPS when they do not even have the benefits of WTO membership (such as the lower MFN tariff rate on their exports).<sup>130</sup>

Intellectual property rights are also defined very broadly.<sup>131</sup> This means that obligations to protect intellectual property rights are very broad obligations which require the protection of many types of intellectual property rights.

Article 139.2 sets out some safeguards. These include:

- that the principles in Article 8 of TRIPS<sup>132</sup> apply to the intellectual property section of the EPA.

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<sup>124</sup> See discussion in dispute settlement.

<sup>125</sup> Article 131.1.

<sup>126</sup> Article 131.2.

<sup>127</sup> Article 131.2.

<sup>128</sup> Article 213.2.

<sup>129</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>130</sup> Article 139.1.

<sup>131</sup> Article 139.3.

- It also states that the Parties agree that adequate and effective enforcement of intellectual property rights should take account of the development needs of CARIFORUM countries, balance the rights of users and allow the Parties to protect public health and nutrition. However this only applies to the enforcement provisions. It does not apply to the substantive standard setting where the interpretation would be influenced by the context and objectives described above.
- There is also a statement that ‘Nothing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines.’<sup>133</sup> However, there are a number of reasons why this may not be sufficient to protect access to affordable medicines in CARIFORUM countries. Firstly, this is a mere principle which is unlikely to be strong enough to override explicit TRIPS-plus provisions such as joining the PCT. Secondly, this refers to the ‘capacity’ of the CARIFORUM countries to ‘promote’ access to medicines. This would allow the tribunal to find that CARIFORUM countries still have the capacity to promote access to medicines, despite the TRIPS-plus provisions in the EPA, because CARIFORUM countries would just need to spend more money to purchase the more expensive patented medicines. A stronger health safeguard would have been something like ‘nothing in this Agreement shall impair the right/ability to access to affordable medicines.’

In addition, Parties are free to determine the appropriate method of implementing the intellectual property provisions.<sup>134</sup> This is an important safeguard which retains some policy space for CARIFORUM countries, rather than requiring them to institute specialized intellectual property courts etc.

### *Transition periods*

Non-least developed countries must implement the intellectual property section by 1 January, 2014 unless the joint committee decides otherwise.<sup>135</sup> This is without prejudice to existing and future international obligations. Least developed countries only have to implement the specific types of intellectual property protection and enforcement provisions of the EPA by 1 January 2021 unless the joint committee decides otherwise.<sup>136</sup>

### *Harmonisation and regional patents*

The regional integration Article<sup>137</sup> gives rise to three main areas of concern.

Firstly, the CARIFORUM countries undertake to continue to consider further steps towards harmonizing their intellectual property laws within the CARIFORUM region. The Dominican Republic is a member of the CARIFORUM countries who are party to the CARIFORUM- EU EPA. The Dominican Republic has also signed a U.S. free trade agreement (CAFTA-DR USFTA) which requires intellectual property protection at levels much higher than TRIPS. The provisions in this USFTA have been found to make medicines much more expensive, make access to knowledge such as textbooks and scientific journal articles more expensive for longer and increase the cost of inputs to manufacturing and agriculture.<sup>138</sup> Since in the process of any regional harmonisation required by the

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<sup>132</sup> Article 8 of TRIPS: ‘1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.’

<sup>133</sup> Article 139.2.

<sup>134</sup> Article 139.4.

<sup>135</sup> Article 139.4.

<sup>136</sup> Article 140 (b).

<sup>137</sup> Article 141.

<sup>138</sup> For example, the effect of most of these TRIPS-plus provisions according to a World Health Organization model applied to Colombia is that Colombia would require an extra US\$1.5billion to be spent on medicines every year by 2030. If this were not spent, Colombians will have to reduce their medicine consumption by 44% by 2030. (‘Intellectual property in the FTA: impacts on pharmaceutical spending and access to medicines in

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Colombia', Mision Salud and Fundacion IFARMA, Miguel Ernesto Cortes Gamba, Bogota, 2006 available from <http://www.ftamalaysia.org/article.php?aid=153>).

A study of the impact thus far of the TRIPS-plus provisions of the Jordan-USFTA found that: one hospital alone has increased its medicine spending six-fold, medicine prices in Jordan have already increased 20% since 2001 when the FTA began, over 25% of the Ministry of Health's budget is now spent on buying medicines, data exclusivity has delayed the introduction of cheaper generic versions of 79% of medicines launched by 21 multinational companies between 2002 and mid-2006 and ultimately the higher medicine prices are threatening the financial sustainability of government public health programs.

([http://www.oxfam.org/en/files/bp102\\_jordan\\_us\\_fta.pdf/download](http://www.oxfam.org/en/files/bp102_jordan_us_fta.pdf/download)). However, other countries could expect worse outcomes because the Jordan-USFTA has not yet been in force for the approximately 15 years the WHO's model predicts it will take for the full effects to be felt of these provisions on medicine prices.

It was recently estimated that eight years of data exclusivity alone in Canada would have added \$600 million to prescription medicine costs alone in the last five years. (

[http://www.canadiangenerics.ca/en/news/nov\\_14\\_06.shtml](http://www.canadiangenerics.ca/en/news/nov_14_06.shtml)).

The extension of patent terms alone has been calculated by the Korean National Health Insurance Corporation to cost 504.5 billion won (US\$529 million) for having to extend medicine patents for 3 years and 722.5 billion won (US\$757 million) if it has to agree to a four year extension in its USFTA negotiations.

([http://english.hani.co.kr/arti/english\\_edition/e\\_business/165065.html](http://english.hani.co.kr/arti/english_edition/e_business/165065.html)).

Research at the Australia Institute in Canberra has estimated that if provisions in the Australia-US FTA succeed in delaying by 24 months market entry of generic versions of just the top five Pharmaceutical Benefits Scheme (the 'PBS' is the Australian Government medicine reimbursement scheme) expenditure medicines due to come off patent, this could increase the cost of the PBS by \$1.5 billion over 2006-2009. The budgetary cost could easily swamp the \$53 million a year in economic gains from the agreement estimated by modeling work commissioned by a Senate Committee investigating the FTA. ('Regionalism, Bilateralism, and 'TRIP Plus' Agreements: The Threat to Developing Countries', Ruth Mayne, Occasional Paper, Human Development Report 2005, UNDP).

Malaysia issued a type of compulsory licence to import the cheaper generic version of patented medicines for people with HIV/AIDS. It reduced the average cost of treatment per patient per month by 81% and more than doubled the number of patients who could be treated. ('Malaysia's experience in increasing access to antiretroviral drugs: exercising the 'government use' option', Chee Yoke Ling, Intellectual Property Rights Series No. 9, Third World Network, 2006. Earlier version available from

[http://www.twinside.org.sg/title2/FTAs/Intellectual\\_Property/IP\\_and\\_Access\\_to\\_Medicines/Malaysia'sExperienceInIncreasingAccessToAntiretroviralDrugs-CheeYokeLing%5B0ct05%5D.doc](http://www.twinside.org.sg/title2/FTAs/Intellectual_Property/IP_and_Access_to_Medicines/Malaysia'sExperienceInIncreasingAccessToAntiretroviralDrugs-CheeYokeLing%5B0ct05%5D.doc)).

The Thai Government recently issued compulsory licences for three types of medicines and estimates that it could save it up to US\$24million each year. ([http://www.bangkokpost.net/breaking\\_news/breakingnews.php?id=116803](http://www.bangkokpost.net/breaking_news/breakingnews.php?id=116803)).

The World Bank has estimated that if Thailand uses compulsory licensing to reduce the cost of second-line antiretroviral therapy to treat people living with HIV/AIDS by 90%, the government would reduce its future budgetary obligations by US\$3.2 billion discounted to 2025. (p169, 'The Economics of Effective AIDS Treatment', Conference Edition, World Bank, Washington, 2006). The linkage provision in the CAFTA-DR USFTA could effectively stop compulsory licences.

Many have expressed their concerns about the way the intellectual property provisions found in USFTAs make medicines more expensive, including the United Nations Special Rapporteur on the Right to Health, (Press Release, 5 July 2004,

<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/35C240E546171AC1C1256EC800308A37?opendocument>) the World Health Assembly, (WHA56.27, May 2003,

[http://www.who.int/gb/ebwha/pdf\\_files/WHA56/ea56r27.pdf](http://www.who.int/gb/ebwha/pdf_files/WHA56/ea56r27.pdf)), the WHO's Commission on Intellectual Property Rights, Innovation and Public Health, (Public health, Innovation and Intellectual Property Rights', World Health Organization, April 2006. For example recommendation 4.21), Ministers of Health from ten Latin American countries, (Declaration of Ministers of South America over Intellectual Property, Access to Medicines and Public Health, Geneva, 23 May 2006. The Ministers of Health were from Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela, <http://lists.essential.org/pipermail/ip-health/2006-May/009594.html>), the Ministers of Health (Gaborone Declaration, 2nd Ordinary Session of the Conference of African Ministers of Health, Gaborone, Botswana, 10-14 October 2005, CAMH/Decl.1(II),

<http://lists.essential.org/pipermail/ip-health/2005-October/008440.html>.)

of the African Union, the African Union's Ministers of Trade, (AU's Ministerial Declaration on EPA Negotiations, AU Conference of Ministers of Trade, 3rd Ordinary Session, 5-9 June 2005, Cairo, Egypt,

AU/TI/MIN//DECL.(III), [www.twinside.org.sg/title2/FTAs/General/AFRICAN\\_UNION.Cairo\\_Decl.doc](http://www.twinside.org.sg/title2/FTAs/General/AFRICAN_UNION.Cairo_Decl.doc)),

CARIFORUM- EU EPA, the Dominican Republic cannot harmonise down to the level of other CARIFORUM countries without being subject to tariffs on its exports from the U.S., CARIFORUM countries would have to harmonise up to the CAFTA-DR USFTA level of intellectual property protection. This would mean that CARIFORUM countries suffer the negative effects of this stronger intellectual property protection without benefiting from any market access that the Dominican Republic obtained in the USA. When CARIFORUM governments are continuing to consider this regional harmonisation of intellectual property laws as is required by the EPA, they may wish to study carefully the likely effects on their countries of CAFTA-DR USFTA levels of intellectual property protection. (Bearing in mind that the full effects of this stronger intellectual property protection have not yet been felt in any country that has signed a USFTA because the World Health Organization model predicts that it will take about 15 years for the full medicine price rises to be experienced, as the new provisions only apply to each new medicine entering the market).

Secondly, it moves CARIFORUM towards harmonising its intellectual property protection to the European Union level.<sup>139</sup> (Because realistically the European Union will not harmonise down to the CARIFORUM level, especially given the difference in economic, political and bargaining power). Although CARIFORUM only undertakes to move towards this harmonised level, this already opens it to pressure from the European Union if it does not begin increasing its intellectual property protection to the European level. The European Union has much stronger intellectual property protection than TRIPS requires (for example up to 11 years of data exclusivity which prevents access to generic versions of medicines for 11 years even when they are not patented<sup>140</sup>).

Noting that overzealous harmonisation may be dangerous, a study commissioned by the German Federal Ministry for Economic Cooperation and Development remarked that ‘The undertaking by the EC and CARIFORUM countries “to move towards a harmonised level of intellectual property protection across their respective regions” should therefore be viewed with extreme caution.’<sup>141</sup>

Thirdly, this Article and other provisions in this chapter also move CARIFORUM countries closer to regional patents. Patents are usually national (this is the current system in CARIFORUM countries at the moment). That is, the inventor must apply in every country where it wants a patent. Many

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the UK Government’s Commission on Intellectual Property Rights (‘Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights’, Commission on Intellectual Property Rights, London, 2002. For example, pages 39, 49, 113)

and Nobel Peace Prize winning Doctors Without Borders. (‘Access to Medicines at Risk Across the Globe’, Briefing Note, MSF Campaign for Access to Essential Medicines, May 2004, [www.accessmed-msf.org/documents/ftabriefingenglish.pdf](http://www.accessmed-msf.org/documents/ftabriefingenglish.pdf)).

The government of the state of Western Australia was concerned about the impact of the Australia-USFTA on medicine prices in Australia. They noted that ‘PBS data indicates that the prices of brand name (patented) medicines fall by an average of more than 30 per cent after patent expiration and the entry of generic medicines. Delays to the availability of generic pharmaceuticals will therefore significantly increase pharmaceutical expenditures in Australia over time particularly in hospitals where generic brands are used extensively... A rise in medicine costs through the PBS and any delays in the availability of generic equivalent medicines will have a direct impact upon the cost of medicines purchased by the public sector. Medicines are the second most expensive item after salaries in the health budget and a small increase in costs in addition to the implementation of new medicines in the market will have a significant impact upon the health budget.’ (Western Australian Government Submission to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America).

For examples of the effects of longer copyright protection in the USFTA, see <http://www.ftamalaysia.org/article.php?aid=156>.

<sup>139</sup> Article 141.2.

<sup>140</sup> Even the CAFTA-DR USFTA only required five years of data exclusivity. The significant loss of access to affordable medicines that even five years of data exclusivity caused can be seen above. Therefore inter-regional harmonisation would add further TRIPS-plus provisions to the TRIPS-plus level of protection which would be required if CARIFORUM countries harmonised to the level of IP protection in the CAFTA-DR USFTA.

<sup>141</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

CARIFORUM countries may currently receive few patent applications because of their small populations (for example it would be uneconomical for the inventor of a medicine to spend the time and pay the fees to apply for and maintain a patent in a country where only a few people have the disease that needs the medicine). This means that many technologies (whether medicines or inputs used in industry etc) may not be patented in a number of CARIFORUM countries and so their cheaper generic (made by another company under a different brand name) equivalents are currently readily available. If all the CARIFORUM countries are grouped together and the inventor can apply to one central location and get a patent for all CARIFORUM countries, because this is a much greater population than an individual CARIFORUM country, it is likely that many more patents will be applied for and granted (if the rate at which they are granted remains constant). Article 141.1 only requires CARIFORUM countries to continue to consider further progress towards the creation of these regional patents as appropriate. However, despite these safeguards, the onus is now shifted to CARIFORUM countries to show that they are considering further progress and that any hesitation or reluctance they have is appropriate.

## Copyright

### Context

Since 75% of global book exports were from the US (20%), UK (17%), other European countries, Canada and Singapore,<sup>142</sup> it is clear that the benefits of stronger copyright protection largely flow to developed countries.

When the USA was a net importer of copyright materials, it did not recognise copyright on materials printed outside the USA.<sup>143</sup> This is no longer possible for WTO Members.

‘Software, textbooks, and academic journals are key items where copyright is a determining factor in pricing and access, and which are also essential ingredients in education and other spheres crucial to the development process. For instance, a reasonable selection of academic journals is far beyond the purchasing budgets of university libraries in most developing countries, and increasingly in developed countries as well.’<sup>144</sup> Therefore stronger copyright protection can hamper the growth and development of knowledge-based industries. According to a UNESCO report: ‘Copyright has emerged as one of the most important means of regulating the international flow of ideas and knowledge-based products, and will be a central instrument for the knowledge industries of the twenty-first century. Those who control copyright have a significant advantage in the emerging, knowledge-based global economy. The fact is that copyright ownership is largely in the hands of the major industrialized nations and of the major multimedia corporations placing low per capita income countries as well as smaller economies at a significant disadvantage.’<sup>145</sup>

Access to computer software is a ‘pre-requisite for access to information and for competitiveness in the global economy. . . In the knowledge-based global economy, computer technologies are an essential requirement for accessing and using information, accelerating technology transfer and boosting the growth of productivity’ according to the Commission.<sup>146</sup>

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<sup>142</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 97

<sup>143</sup> Page 134, ‘Bad Samaritans : Rich Nations, Poor Policies and the Threat to the Developing World’, Ha-Joon Chang, Random House Business Books, 2007.

<sup>144</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 17

<sup>145</sup> UNESCO (1998) ‘World Information Report 1997/98’, UNESCO, Paris, p.320.

Source: [http://www.unesco.org/webworld/com\\_inf\\_reports/wirenglish/chap23.pdf](http://www.unesco.org/webworld/com_inf_reports/wirenglish/chap23.pdf)

<sup>146</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 100 and 104.

If the developing country is seeking to encourage the growth of copyright-based industries, it should be noted that countries such as Benin and Chad which joined the Berne Convention many years ago 'have not seen significant increases in their national copyright-based industries or in the level of copyright-protected works being created by their people.'<sup>147</sup> So increasing copyright protection alone does not seem to be sufficient to stimulate these industries because they may also be affected by other factors.

Copyright can also increase the cost of creative industries, for example, Cannes Film Festival hit movie *Tarnation* cost US\$218 to make, but to add copyrighted music and video clips will cost US\$400,000 in royalties.<sup>148</sup>

### WCT & WPPT

The CARIFORUM- EU EPA requires CARIFORUM countries to comply with two copyright treaties: the World Intellectual Property Organization Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonogram Treaty, 1996 (WPPT).<sup>149</sup> Compliance with these treaties is not required by TRIPS.

These WIPO Internet Treaties (WCT and WPPT) came about as a result of a Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, proposed by the US and held in December 1996. [A Diplomatic Conference launches negotiations.] The texts of these treaties draw upon studies submitted by national governments, in particular the US, European Community and Japan, thus reflecting the lobbies in those countries.

It has been suggested by some critics that the treaties came about as a way to overcome domestic opposition in the US against strengthening the copyright law domestically. With the existence of the internet treaties, there was then justification for the US government to implement standards as part of their multilateral obligations. It would also in addition ensure the worldwide implementation of strong IP standards preferred by certain individuals and organizations in the US.

WCT has been very strongly criticised because it goes beyond what is required under TRIPS and the Berne Convention for the Protection of Literary and Artistic Works. It provides copyright holders exclusive rights over material in the on-line environment and specifically calls for countries to provide effective legal remedies against the circumvention of the technological protection measures (TPMs).

There are a number of negative consequences for developing countries of joining the WCT according to the intergovernmental South Centre paper.<sup>150</sup> For example 'Signing on to such a right would reduce public access to material on the internet, by ensuring that search engines would have to pay a licence for copying and storing pages and allowing people to search and view them.'<sup>151</sup>

In addition, some of the concerns raised by the Electronic Information for Libraries (eIFL) are as follows:

- (i) TPMs cannot distinguish between legitimate and infringing uses. The same copy-control mechanism which prevents a person from making infringing copies of a copyright work, may also prevent a student or a visually impaired person from making legitimate copies under fair use/fair dealing or a legal copyright exception.
- (ii) Long-term preservation and archiving, essential to preserving cultural identities and maintaining diversity of peoples, languages and cultures, must not be jeopardised by TPMs/DRMs. The average

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<sup>147</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government,

[http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 98

<sup>148</sup> 'Against Intellectual Monopoly', Boldrin & Levine, 2007,

<http://www.dklevine.com/general/intellectual/againstnew.htm>.

<sup>149</sup> Article 143.1.

<sup>150</sup> 'Towards a digital agenda for developing countries', Dalindyebo Shabalala, Research Paper 13, South Centre, 2007.

<sup>151</sup> Page 36.

life of a DRM is said to be between three and five years. Obsolescent DRMs will distort the public record of the future, unless the library has a circumvention right.

(iii) The public domain must be protected. TPMs do not cease to exist upon expiry of the copyright term, so content will remain locked away even when no rights subsist, thereby shrinking the public domain.

The UK Commission Report on IP and Development, states that ‘more analysis needs to be undertaken about the best means of protecting digital content and the interests of right holders whilst at the same time honouring the principles that ensure adequate access and ‘fair use’ for consumers. More specifically policy makers need to gain a better understanding of the impacts of the trend towards on-line distribution and technological protection of content on developing countries’.<sup>152</sup>

The Report adds that it is ‘not clear how reasonable requirements of ‘fair use’ will be guaranteed in such an environment’. It goes on to caution ‘Developing countries should think carefully before joining the WIPO Copyright Treaty’

The South Centre notes that complying with the WCT and WPPT will result in developing countries ‘limiting whatever access they may be able to achieve in the long term. In addition, for those countries that do have some access, the short term costs of access to information will increase substantially.’<sup>153</sup> It concludes that ‘States that have not signed up to the WCT and WPPT should refrain from doing so and those that have, should consider withdrawal.’<sup>154</sup>

## Trademarks

One of the EPA requirements regarding trademarks is for CARIFORUM countries to try to join the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989) and the revised Trademark Law Treaty (2006).<sup>155</sup>

Musungu notes that ‘The Madrid Protocol is a treaty aimed at facilitating the acquisition of trademarks in the member countries. In general, procedures intended to make the grant of rights easier will result in the increase of the number of rights, in this case trademark rights.’<sup>156</sup>

## Geographical indications

A geographical indication is protection given to a product from a particular region such as ‘Champagne’. This protection means that producers from outside the region cannot use the term ‘Champagne’.

There are extensive provisions in the EPA on geographical indications.

For example, ‘The extension to all products of protection even against statements which indicate origin while using terms such as ‘kind’, ‘type’, ‘style’ and ‘imitation’ ‘expands protection far beyond anything that is required by TRIPS and essentially harmonises with the EU standard of protection.’<sup>157</sup>

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<sup>152</sup> Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm),

<sup>153</sup> ‘Towards a digital agenda for developing countries’, Dalindyebo Shabalala, Research Paper 13, South Centre, 2007, page 38-39.

<sup>154</sup> ‘Towards a digital agenda for developing countries’, Dalindyebo Shabalala, Research Paper 13, South Centre, 2007, page 39.

<sup>155</sup> Article 144.5.

<sup>156</sup> ‘An Analysis of the EC Non-Paper on the Objectives and Possible Elements of an IP Section in the EC-Pacific EPA’, Sisule F. Musungu, ICTSD and CAFOD, 2007, <http://www.iprsonline.org/ictsd/docs/Musungu%20Pacific%20EPA.pdf>.

<sup>157</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006. Referring to the content in Article 145.2.3 (b)(iii).

Secondly, ‘protection would be limited only to GIs . . . “which are produced in accordance with the relevant product specifications” . . . This could *de facto* deny protection to certain trademarks that do not have product specifications.’<sup>158</sup>

Some of the comments by experts on the likely impact of the EPA’s geographical indication provisions on developing countries are:

- ‘In the specific case of CARIFORUM countries, as would be the case in other ACP regions, only an empirical study can help make a determination of whether the advantages outweigh the disadvantages and *vice-versa*. Such a study was not undertaken. . . In this regard, the adoption of detailed rules on the protection of geographical indications beyond the requirements of TRIPS before CARIFORUM countries had fully identified their products of interest was a mistake.’<sup>159</sup>
- ‘Protection also raises the spectre of legal challenges and in foreign markets could be used as a trade barrier. More importantly, there are also significant costs in administering the protection system.’<sup>160</sup>
- ‘The EC has an elaborate and well-defined system for granting geographical indications and it is more obvious that its enterprises would benefit significantly from extended protection.’<sup>161</sup>
- As the United Nations Conference on Trade And Development notes, ‘In a static economic sense, wider acceptance of these claims is likely to result in increased IP-rent payments from developing countries to Europe, at least in the short and medium term (such rent payments may be in the form of restricted access to the European market).’<sup>162</sup>

## Industrial designs

According to Chile’s Counsellor to the WTO, there are a number of TRIPS-plus elements in the industrial designs provision, for example:<sup>163</sup>

- the EPA requires protection of unregistered designs for at least three years.<sup>164</sup> This is again the EU position in its own domestic law.<sup>165</sup>
- CARIFORUM countries must endeavour to join the Hague Agreement which makes it easier to register a design in multiple countries and would increase the term of protection to 15 years<sup>166</sup>

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<sup>158</sup> ‘Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries’, Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>. Referring to the content in Article 145.2.2.

<sup>159</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>160</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>161</sup> ‘An Analysis of the EC Non-Paper on the Objectives and Possible Elements of an IP Section in the EC-Pacific EPA’, Sisule F. Musungu, ICTSD and CAFOD, 2007, <http://www.iprsonline.org/ictsdocs/Musungu%20Pacific%20EPA.pdf>.

<sup>162</sup> UNCTAD-ICTSD Resource Book (2005), available online at [http://www.iprsonline.org/unctadicts/ResourceBookIndex\\_update.htm](http://www.iprsonline.org/unctadicts/ResourceBookIndex_update.htm)

<sup>163</sup> ‘Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries’, Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>.

<sup>164</sup> Article 146.5.2.

<sup>165</sup> ‘Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries’, Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>.

<sup>166</sup> Article 17.3.

(compared to 10 years under TRIPS<sup>167</sup>).<sup>168</sup> Joining the Hague Agreement is not required by TRIPS.<sup>169</sup>

Furthermore, the rights of owners of industrial designs appear to be broader in the EPA than those in TRIPS. TRIPS only prohibits others from making, selling or importing articles involving the design.<sup>170</sup> In the EPA, in addition to these activities, offering, stocking or using the articles without the designer owner's consent are also prohibited.<sup>171</sup> Furthermore, TRIPS only prohibits these activities where they are done for commercial purposes.<sup>172</sup> Whereas the EPA also prohibits these acts if they are not compatible with fair trade practice.<sup>173</sup>

## Patents

### What is a generic medicine?

Generic medicines are chemically the same as branded medicines. For example the branded version of paracetamol is called 'Panadol' and is made by GlaxoSmithKline (who once had a patent on it) but the generic version of paracetamol could be made by an Indian generic medicine company such as Cipla. In most countries, generic medicines have been tested by governments to ensure they are just as safe and effective as the branded version.

### What is a patent?

A patent is a monopoly that is usually national<sup>174</sup>. TRIPS specifies that the patent only has to last for 20 years from the date it is applied for. During the patent period, only the patent owner or holder can make, use or sell the patented product unless a flexibility is used.<sup>175</sup>

Before TRIPS, countries were allowed to exempt medicines from being granted patents.<sup>176</sup> This made it easier for these countries to make or import generic medicines that are usually much cheaper. After TRIPS, it was compulsory for WTO Members to allow patents on medicines (although LDC WTO Members have a transition period, see above). But there are many 'flexibilities' in TRIPS which countries can use (such as compulsory licences) to maximize their access to generic medicines. However, North-South FTAs can erode or remove many of these flexibilities.

### Generic v patented prices

Generic versions of medicines are usually much cheaper than the patented equivalent. For example, the patented version of medicines to treat Human Immunodeficiency Virus (HIV)/Acquired Immunodeficiency Syndrome (AIDS) cost US\$15,000 per patient per year, but the generic version only cost US\$99 per patient per year.<sup>177</sup> Malaysian academics found that patented medicines can be 1,044% more expensive than their generic equivalents in Malaysia.<sup>178</sup> Similarly, Fluconazole was

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<sup>167</sup> Article 26.3.

<sup>168</sup> Article 146.1.

<sup>169</sup> 'Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries', Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>.

<sup>170</sup> Article 26.1.

<sup>171</sup> Article 146.4.1.

<sup>172</sup> Article 26.1.

<sup>173</sup> Article 146.4.1.

<sup>174</sup> A few countries are members of a regional patent system which means that a patent can be issued for all the countries in that regional patent system by the regional patent office.

<sup>175</sup> TRIPS also requires WTO Members to allow patents on processes.

<sup>176</sup> This is still possible for non-WTO members such as the Bahamas.

<sup>177</sup> Untangling the web of price reductions: a pricing guide for the purchase of ARVs for developing countries, 10th Edition, July 2007, Médecins Sans Frontières and

[http://www.msf.org/msfinternational/invoke.cfm?objectid=63C0C1F1-E018-0C72-093AB3D906C4C469&component=toolkit.article&method=full\\_html](http://www.msf.org/msfinternational/invoke.cfm?objectid=63C0C1F1-E018-0C72-093AB3D906C4C469&component=toolkit.article&method=full_html).

<sup>178</sup> 'TRIPS, Patents, Technology Transfer, Foreign Direct Investment and the Pharmaceutical Industry in Malaysia', Ida Madieha Azmi and Rokiah Alavi, Journal of World Intellectual Property, Vol 4 No. 6, November 2001.

marketed under patent in Thailand by Pfizer until 1997. When the patent expired generic competitors entered the market, and within one year prices fell to 3% of its original level.<sup>179</sup> Costa Rican officials have estimated, for example, that without generic options the Social Security system, which offers universal health coverage, would have to increase its pharmaceutical budget from \$70 million to \$390 million to offer the same coverage. If the budget was fixed, coverage would be reduced to 18%.<sup>180</sup>

## PCT

Patents are national. It is not possible to apply for a worldwide patent. A given medicine or technology may not be patented in a developing country with a small population who can afford to buy it because the market is too small for the multinational company to spend the time and money applying for a patent in that country. If there is no patent on that medicine in that country, then the country is free to import or manufacture the cheaper generic version of that medicine.

TRIPS does not require countries to join the Patent Cooperation Treaty (PCT). However, the CARIFORUM- EU EPA requires CARIFORUM countries to join it.<sup>181</sup>

The PCT is designed to enable people to apply for a patent in multiple countries more easily.<sup>182</sup> It does this by standardizing the application procedures and requiring Parties to the PCT to accept the standardised procedure. Applications can then be sent to multiple countries by basically ‘ticking a box’.

As the PCT makes it easier for foreigners to apply for patents in developing countries by lowering the procedural hurdles, the developing country can expect more patent applications after joining the PCT. This was the experience of all other countries joining the PCT except one according to a preliminary analysis of WIPO’s data. For example China’s patent applications increased five-fold, Iceland’s increased 12-fold and Vietnam’s increased 15-fold.<sup>183</sup>

The rapid increase in patents in the developing country could have several effects on access to the resources needed for a decent standard of living from manufacturing. A few examples are given below.

The PCT is more beneficial for countries with inventors who wish to apply for patents in other countries. As noted above, most developing countries are net IP importers. Chile’s Counsellor to the WTO notes that ‘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.’<sup>184</sup>

### *Impact on access to affordable medicines*

Assuming CARIFORUM Patent Offices are not overwhelmed by a 15-fold increase in patent applications and so they continue to grant patents to the same proportion of applications, then judging by the experience of other countries, 15 times more patents on medicines could be granted in CARIFORUM countries. So 15 times as many medicines will be at the higher monopoly price due to being patented, whereas prior to joining the PCT, companies may not have bothered applying for patents on these medicines and generic versions could still have been available. See above for how much more expensive patented medicines are than the generic versions.

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<sup>179</sup> ‘Regionalism, Bilateralism, and ‘TRIP Plus’ Agreements: The Threat to Developing Countries’, Ruth Mayne, Occasional Paper, Human Development Report 2005, UNDP.

<sup>180</sup> Pharmacotherapy Department of the Costa Rica Social Security System, 2003

<sup>181</sup> Article 147.1.2 (a).

<sup>182</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006.

<sup>183</sup> The other countries registering significant increases in patent applications were Canada, Croatia, Israel, Mexico, New Zealand, Serbia and Montenegro and Turkey. Of the countries with sufficient data to analyse, only Algeria did not register a significant increase in patent applications when it joined the PCT.

<sup>184</sup> ‘Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries’, Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>.

The World Health Organization (WHO) has an economic model which can be used to estimate the impact of these TRIPS-plus provisions on medicine prices, consumption and a country's generic medicine manufacturers.<sup>185</sup> The model predicts that the full impact of medicine price rises will not be felt until about 15 years after the EPA begins because the stronger IP protection only applies to each new medicine after the FTA starts so it will not affect all medicines in a country and the overall medicine price until about 15 years has passed.

If more medicines are patented, so fewer people in CARIFORUM countries can afford them, the increased level of illness due to the inability to afford patented medicines can also have macroeconomic effects. For example, the World Health Organization's Commission on Macroeconomics and Health found that a 10% increase in life expectancy at birth is associated with a rise in economic growth of at least 0.3-0.4% of economic growth per year (all else being held constant).<sup>186</sup> Conversely, a high malaria prevalence is associated with a reduction in economic growth of more than 1% per year.<sup>187</sup>

Furthermore, it is worth noting that the European Parliament has passed a resolution asking for no TRIPS-plus provisions affecting public health in the EU's FTA negotiations. It 'Calls on the Council to meet its commitments to the Doha Declaration and to restrict the Commission's mandate so as to prevent it from negotiating pharmaceutical-related TRIPS-plus provisions affecting public health and access to medicines, such as data exclusivity, patent extensions and limitation of grounds of compulsory licences, within the framework of the EPA negotiations with the ACP countries and other future bilateral and regional agreements with developing countries';<sup>188</sup>

### *Impact on manufacturing: Moving up the value chain*

IP protection can reduce the ability of companies in developing countries to move into higher technology industries as historical cases show. An example given by economics professors Boldrin and Levine<sup>189</sup> is: in 1864 La Fuchsine, a French dye company was given broad patents on dyes and so dominated the French market. No other French dye companies could manufacture because of the patents so they moved to Switzerland where chemical products were unpatentable until 1978. La Fuchsine innovated little and when its patents expired, it could not compete and disappeared. Meanwhile, the formerly French companies carried out significant innovation in Switzerland where there were no chemical product patents. By World War I, there was no chemical production in France.

By contrast, after patents on medicines were removed in India in 1970, Indian pharmaceutical manufacturers flourished. When India had high levels of intellectual property protection prior to 1970, Indian medicine manufacturers only supplied 32% of the Indian market. After India's intellectual property protection was lowered, the share of the Indian pharmaceutical market supplied by domestic companies has increased to 77%.<sup>190</sup> India has also changed from being a net importer of medicines to a net exporter with exports worth US\$3177 million in 2003-4 and exports are growing at an annual rate of 20.8%.<sup>191</sup> It exports to 65 countries including developed countries such as the USA and Europe

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<sup>185</sup> An example of the application of this model can be seen in 'Intellectual property in the FTA: impacts on pharmaceutical spending and access to medicines in Colombia', Mision Salud and Fundacion IFARMA, Miguel Ernesto Cortes Gamba, Bogota, 2006 available from <http://www.ftamalaysia.org/article.php?aid=153>.

<sup>186</sup> [www.cmhealth.org](http://www.cmhealth.org).

<sup>187</sup> [www.cmhealth.org](http://www.cmhealth.org).

<sup>188</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0353+0+DOC+XML+V0//EN&language=EN>

<sup>189</sup> 'Against Intellectual Monopoly', Boldrin & Levine, 2007, <http://www.dklevine.com/general/intellectual/againstnew.htm>.

<sup>190</sup> The WTO and India's Pharmaceutical Industry, Professor Sudip Chaudhuri, Oxford University Press India, 2005, p18.

<sup>191</sup> The WTO and India's Pharmaceutical Industry, Professor Sudip Chaudhuri, Oxford University Press India, 2005.

and developing countries.<sup>192</sup> India has the most US Food and Drug Administration-approved manufacturing facilities outside the US which indicates the high technology and quality standards achieved by Indian manufacturers when intellectual property protection was lowered.<sup>193</sup>

Similarly, because the Netherlands abolished its 1817 patent law in 1869, Philips was able to start its production of light bulbs in 1891 in the Netherlands without having to worry about infringing Edison's patents.<sup>194</sup>

Likewise, in Switzerland in the 1880s two of Switzerland's most important industries, chemicals and textiles, were strongly opposed to the introduction of patents as it would restrict their use of processes developed abroad. Steiger (a textile manufacturer) commented that 'Swiss industrial development was fostered by the absence of patent protection. If patent protection had been in effect, neither the textile industry nor the machine-building industry could have laid the foundations for subsequent development, nor would they have flourished as they did'.<sup>195</sup> Benziger (a manufacturer) noted that 'Our industries owe their current state of development to what we have borrowed from foreign countries. If this constitutes theft, then all our manufacturers are thieves.' In 1907, Switzerland had to allow patents on chemical processes or Germany would impose trade sanctions. In the debate: Federal Councillor Brenner told the Parliament 'In our deliberations on this law, we would do well to bear in mind that it should be framed in such a way that it is adapted to the needs of our own industries and conditions in our own country. These considerations, rather than the demands and claims of foreign industries, must be our primary concern in shaping the law.'<sup>196</sup>

If the developing country wishes to move up the value chain, joining the PCT could make this more difficult because in higher technology industries, the inputs are also technology. If a greater proportion of machinery etc is patented in the developing country because it joins the PCT, this will increase the cost of inputs (as more royalties will have to be paid) and make it harder for the developing country to move up the value chain. (This would be exacerbated because the EU EPAs only allowed 20% of total import value to be excluded from liberalisation, therefore the ability to protect infant industries with tariffs while they are starting has already been restricted, so new industries higher up the value chain will be exposed to competition from day 1 unless they were excluded in the 20%).

### **Biotechnology**

If the developing country wishes to encourage a biotechnology industry, the developing country actually needs to grant as few patents as possible so that its inputs (such as machinery, consumables for example enzymes etc) are not patented.

To enjoy large (monopoly) profits from any biotechnology inventions the developing country produces, the most important factor is that patents continue to be granted in the main (lucrative) markets for these products, i.e. the USA and European Union. This will continue whether or not an EPA is signed and whether or not it has an IP chapter.

### **PLT**

The EPA requires CARIFORUM countries to try to join the Patent Law Treaty (PLT).<sup>197</sup>

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<sup>192</sup> The WTO and India's Pharmaceutical Industry, Professor Sudip Chaudhuri, Oxford University Press India, 2005.

<sup>193</sup> The WTO and India's Pharmaceutical Industry, Professor Sudip Chaudhuri, Oxford University Press India, 2005.

<sup>194</sup> Page 132, 'Bad Samaritans : Rich Nations, Poor Policies and the Threat to the Developing World', Ha-Joon Chang, Random House Business Books, 2007.

<sup>195</sup> Page 6, 'Patents and Development : Lessons Learnt from the Economic History of Switzerland', Richard Gerster, Intellectual Property Rights Series #4, Third World Network, 2001

<sup>196</sup> Page 10, 'Patents and Development : Lessons Learnt from the Economic History of Switzerland', Richard Gerster, Intellectual Property Rights Series #4, Third World Network, 2001

<sup>197</sup> Article 147.1.3.

The PLT would limit the procedural requirements CARIFORUM countries can demand of patent applicants and so would further lower the procedural barriers and costs to applying for a patent in CARIFORUM countries. The logical effect of this would be to increase the number of patent applications to CARIFORUM countries and therefore the proportion of medicines that are patented, (see PCT above).

## Micro-organisms: Budapest Treaty

### Context

According to a Submission to the Executive Secretary of the Convention on Biological Diversity,<sup>198</sup> ‘The *Global Biodiversity Outlook* estimates that there are approximately 1,000,000 species of bacteria (Archaeobacteria and Eubacteria) of which 4,000 are thought to have been described. There are also approximately 600,000 species of Protoctists (algae, protozoa, etc.) of which 80,000 are thought to have been described. ‘Microorganisms’ therefore represent a significant proportion of the world’s biodiversity and are likely to represent a greater percentage of the world’s biodiversity than is presently reported.’

It continues with an example: In 1969 a scientist working for the Switzerland based Sandoz company collected soil samples in the Hardangervidda mountains while on holiday. The samples were found to contain a fungus, *Tolyocladium inflatum* within which a compound which came to be known as Cyclosporin was identified (also known as Cyclosporine). This led to the development of a new and critically important immunosuppressant drug for preventing organ transplant rejection (Sandimmun/Neoral). In 2000, it generated CHF 2,052 million in sales. This has led some commentators to suggest that if 2% annual royalties had applied this would have generated revenue of US\$24.3 million for Norway in 1997.

It gives a second example of the discovery of *Thermus aquaticus* (a bacterium) in Mushroom Pool in Yellowstone National Park in 1966 which was resistant to high temperatures and so was central to the success of polymerase chain reaction (PCR), a vital technique in biotechnology. The patent on the enzyme was reportedly sold for US\$300 million in 1991 and generated an annual revenue of US\$100 million for the company concerned. However, Yellowstone National Park did not directly benefit from the revenue generated by the discovery. According to a recent unconfirmed report: ‘Roche has gained US\$2 billion from control of the PCR process.’ However, the Taq polymerase patent (‘818) has also been the focus of over twelve years of ongoing litigation in multiple jurisdictions and is the subject of a US\$1 billion lawsuit.’

The Submission notes that the cost of a dose of the non-licensed bacteria (the ‘generic’ version) is about 20% of the patented version. For publicly funded research organisations employing PCR such cost differentials are apparently significant and are likely to influence the type and amount of research (i.e. genotyping) that can be conducted. This problem was highlighted in a 1996 workshop convened by the United States National Research Council where participants argued that the cost of the polymerase was inhibiting widespread use of diagnostic tests for HIV RNA. Other participants reported that ‘...the high cost Taq polymerase made many experiments impossible for them’ particularly in areas of research that do not attract the levels of funding of human genetic research. Small biotechnology companies were also reported to be affected by the high cost of the Taq enzyme and related PCR technology.

A further example is that Thai industries rely on imported micro-organisms costing an average of US\$1.6billion-US\$1.9billion per year.<sup>199</sup>

### How the Budapest Treaty works

TRIPS makes it mandatory for WTO members to allow patents for micro-organisms and certain microbiological processes.<sup>200</sup> However, the term ‘micro-organism’ is not defined in TRIPS. It is left to members to determine what types of micro-organisms to allow for patenting or whether to allow

<sup>198</sup> <http://www.cesagen.lancs.ac.uk/resources/docs/microorganisms/microorganismspublished.doc>

<sup>199</sup> [http://nationmultimedia.com/2007/02/17/business/business\\_30027112.php](http://nationmultimedia.com/2007/02/17/business/business_30027112.php)

<sup>200</sup> LDC WTO Members have a transition period, see above.

parts of micro-organisms to be patented. For example, some countries do not allow patenting of naturally-occurring micro-organisms.

The Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure ('Budapest Treaty') is about micro-organisms. TRIPS does not require countries to join the Budapest Treaty. The CARIFORUM- EU EPA requires CARIFORUM countries to join the Budapest Treaty.<sup>201</sup>

Countries may want to require applicants for patents on micro-organisms to deposit a sample of the micro-organism with them. This is because micro-organisms can be difficult to adequately describe on a paper patent application.<sup>202</sup> Part of the quid pro quo underlying the patent system is that a monopoly is granted (for 20 years for WTO members) to the inventor in return for the inventor disclosing how to make the invention so that at the end of 20 years, anyone can make the invention.<sup>203</sup> This disclosure occurs in the patent application. To ensure there is adequate disclosure to justify getting a patent, countries can require the patent applicant to deposit a sample of the micro-organism at a storage facility in the country.

Patent applicants say the cost and effort of posting micro-organism samples to each country they want a patent in makes it procedurally more difficult for them to get patents in multiple countries. The Budapest Treaty aims to make it easier for people to get patents in multiple countries, in this case for micro-organisms.<sup>204</sup> If countries have signed the Budapest Treaty, people seeking to get a patent in those countries only have to give a micro-organism sample to one 'international depositary authority'<sup>205</sup> (essentially a laboratory), instead of to each country. As of March 2006 there were 37 such authorities: seven in the United Kingdom, three in the Russian Federation and in the Republic of Korea, two each in China, Italy, Japan, Poland, Spain and the United States of America, and one each in Australia, Belgium, Bulgaria, Canada, the Czech Republic, France, Germany, Hungary, Latvia, India, the Netherlands and Slovakia. The majority of the depositories are in developed countries and these hold the bulk of the deposits.

Furthermore, the Budapest Treaty sets maximum procedural requirements that its members can demand.<sup>206</sup> These further streamline and simplify the procedure for applying to multiple countries and so is likely to cause an additional increase in applications.

### *Implications for developing countries*

#### **More micro-organisms are likely to be patented**

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<sup>201</sup> Article 147.1.2(b).

<sup>202</sup> UNCTAD-ICTSD Resource Book (2005), available online at [http://www.iprsonline.org/unctadicts/ResourceBookIndex\\_update.htm](http://www.iprsonline.org/unctadicts/ResourceBookIndex_update.htm)

<sup>203</sup> UNCTAD-ICTSD Resource Book (2005), available online at [http://www.iprsonline.org/unctadicts/ResourceBookIndex\\_update.htm](http://www.iprsonline.org/unctadicts/ResourceBookIndex_update.htm)

<sup>204</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006. The United Kingdom Government suggested the Budapest Treaty. According to the World Intellectual Property Organization (WIPO) which administers the Treaty at [http://www.wipo.int/treaties/en/registration/budapest/summary\\_budapest.html](http://www.wipo.int/treaties/en/registration/budapest/summary_budapest.html), 'Disclosure of the invention is a requirement for the grant of patents. Normally, an invention is disclosed by means of a written description. Where an invention involves a microorganism or the use of a microorganism, disclosure is not possible in writing but can only be effected by the deposit, with a specialized institution, of a sample of the microorganism.' The Budapest Treaty 'is primarily advantageous to the depositor if he is an applicant for patents in several contracting States; the deposit of a microorganism under the procedures provided for in the Treaty will save him money and increase his security. It will save him money because, instead of depositing the microorganism in each and every contracting State in which he files a patent application referring to that microorganism, he will deposit it only once, with one depositary authority. The Treaty increases the security of the depositor because it establishes a uniform system of deposit, recognition and furnishing of samples of microorganisms.'

<sup>205</sup> Article 3.1 (a).

<sup>206</sup> Article 3.2.

If CARIFORUM countries sign the Budapest Treaty, as required by the EPA, they are likely to receive more micro-organism patent applications due to the easier application procedure and if these are granted at the same rate, more micro-organisms will be patented in CARIFORUM countries. This is likely to raise the cost of inputs for the food, medical and agricultural industries<sup>207</sup> in the developing country, including the biotechnology industry.

This is a particularly serious problem because patents on microorganisms cause more insoluble problems than patents on other technologies. This is because in contrast with other areas of invention addressed by the patent system, it is not presently possible to readily 'invent around' DNA, amino acids, and proteins such as enzymes. Basically this is because, DNA molecules and complex folded proteins such as enzymes are presently beyond the skill of human beings to actually create i.e. through synthetic chemistry.<sup>208</sup>

If microorganism is defined to include genes and proteins etc then more of the components of vaccines and biological medicines are likely to be patented and therefore more expensive.

### ***Greater foreign exchange losses***

As 93.5% of biotechnology patents between 1990-1995 originated in the USA, Japan or European Patent Office countries,<sup>209</sup> more patents on micro-organisms are likely to increase the outflow of royalties from CARIFORUM countries, contributing to greater foreign exchange losses.

### ***Increased risk of biopiracy***

Developing countries have significant biodiversity, including in micro-organisms. There are concerns that international depositary authorities may not be properly managed so it would be difficult for the country of origin or providing country to safeguard its interests and rights over the samples and this may lead to biopiracy. Furthermore, the international depositary authority may deal with the sample in a way the country does not desire. An example of how a laboratory which is a research entity as well as a recipient of entrusted samples under an international system can end up abusing its position is when Indonesia freely gave samples of its avian influenza virus to the World Health Organization who then passed it onto an Australian company who developed a vaccine and would not give it free to Indonesia but insisted on Indonesia paying commercially for it.<sup>210</sup>

### ***Who will benefit?***

WIPO notes the main beneficiaries of the treaty: 'The Treaty is primarily advantageous to the depositor who is an applicant for patents in several countries; the deposit of a microorganism under the procedures provided for in the Treaty will save him money and strengthen his security. It will save him money because, instead of depositing the microorganism in each and every country in which he files a patent application referring to that microorganism, he can deposit it only once, with one depositary, with the consequence that in all but one of the countries in which he seeks protection he will save the fees and costs that deposits would otherwise have entailed.'<sup>211</sup>

### ***Will joining the Budapest Treaty increase the access of developing countries to microorganisms?***

If a developing country does **not** join the Budapest treaty, it can require that all patent applicants for a microorganism must deposit a sample of a microorganism with that country. This would mean that the developing country has access to 100% of the microorganisms for which a patent is sought in that country (provided it has the capacity to store them safely).

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<sup>207</sup> [http://nationmultimedia.com/2007/02/17/business/business\\_30027112.php](http://nationmultimedia.com/2007/02/17/business/business_30027112.php)

<sup>208</sup> <http://www.cesagen.lanacs.ac.uk/resources/docs/microorganisms/microorganismspublished.doc>

<sup>209</sup> 'Intellectual Property Rights, the WTO and Developing Countries', Carlos M Correa, Zed Books, Third World Network, 2002.

<sup>210</sup> For example <http://www.thejakartapost.com/detailheadlines.asp?fileid=20070212.A07&irec=6>

<sup>211</sup> [http://www.wipo.int/export/sites/www/treaties/en/registration/budapest/pdf/wo\\_inf\\_12\\_e.pdf](http://www.wipo.int/export/sites/www/treaties/en/registration/budapest/pdf/wo_inf_12_e.pdf)

However, once it joins the Budapest Treaty, patent applicants only have to deposit a sample of a microorganism once with an international depositary authority (IDA) and they can apply for a patent in all members of the Treaty. This means that unless the developing country that joins the Budapest Treaty has an IDA, then it will receive no samples of microorganisms.

Developing countries can apply for IDA status however there are a number of conditions. Even if the developing country did manage to become an IDA and joined the Budapest Treaty, it could not force patent applicants in its country to deposit a sample locally because Article 3.1(a) of the Budapest Treaty requires its members to agree that the depositing of a microorganism with any IDA is sufficient. Most patent applicants are from the USA/Europe and according to the World Intellectual Property Organization which administers the Budapest Treaty, they are likely to deposit with their home countries because it is closer, the language is familiar, the fees can be paid in his/her own currency and the authority is familiar.<sup>212</sup>

This is confirmed by the statistics. Most deposits have been made at IDAs in the USA, Japan and Korea. Even Canada only received 71 deposits in 3 years, Italy received 19 deposits in 4 years, Latvia received 16 deposits in 4 years etc.<sup>213</sup>

### ***Other restrictions on policy space as a result of joining Budapest***

Budapest prevents more favourable treatment being offered to locals: If a developing country becomes an IDA, the Budapest Treaty requires national treatment and most favoured nation treatment to depositors, article 6.2 (iv). This would prevent the developing country from being able to charge lower fees to its citizens who use its IDA (whether to make deposits or to request a sample) compared to foreigners, rule 12.1 (c).

Decision to join Budapest is locked in for 7 years: It is worth noting that if the developing country joins the Budapest Treaty, it is locked in for seven years from the date it joins (because it cannot opt to withdraw for five years from the date on which it becomes party to the Treaty and then that withdrawal does not take effect for two more years), Article 17. Thus, if problems arise from the Treaty (such as an increase in patents on microorganisms, or an increase in biopiracy), nothing can be done for seven years. This is even without being locked in by the obligation to abide by the Budapest Treaty in any free trade agreements such as with the USA or European Union. Because of this seven year lock-in, developing countries may wish to consider carefully before joining the Budapest Treaty.

### **Paragraph six**

The EPA states that CARIFORUM countries agree to take the necessary steps to accept the 2005 Protocol amending the TRIPS Agreement. This Protocol amends TRIPS in order to deal with countries that have insufficient or no pharmaceutical manufacturing capacity. However, the procedures required by this Protocol are problematic so many countries are currently choosing to operate under the interim decision (which enables them to enjoy the same benefits as if they accepted the Protocol) in order to keep their options open for a better amendment of TRIPS in the future.

### **Utility models**

Developing countries often find that the small changes that their locals make are more appropriately protected by utility model patents which are easier to obtain than full patents, but do not usually last for the 20 years of full of patents.

TRIPS does not appear to regulate utility model patents. While the CARIFORUM- EU EPA does not require CARIFORUM countries to introduce utility model patents, if they do, they must allow them for a minimum of 5 years. If utility models are not covered by TRIPS, prior to the EPA, CARIFORUM countries could have allowed them for five years for most products but only for 1 year for medicines for example. However, under the EPA, if they choose to allow them, then even medicine utility model patents must be for a minimum of 5 years.

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<sup>212</sup> [http://www.wipo.int/export/sites/www/treaties/en/registration/budapest/pdf/wo\\_inf\\_12\\_e.pdf](http://www.wipo.int/export/sites/www/treaties/en/registration/budapest/pdf/wo_inf_12_e.pdf)

<sup>213</sup> Deposit statistics from <http://www.wipo.int/ipstats/en/statistics/micros/> and date that IDAs began is from <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/budapest.pdf>.

Allowing five year utility model patents for medicines may be a problem because in some countries the patent owning pharmaceutical companies have been using utility models to evergreen their usual 20 year patents. (I.e. they prolong their monopoly after the expiry of the original 20 year patent by obtaining utility model patents for slight changes to the medicine).

Although the EPA notes that the flexibilities in TRIPS will apply to utility models *mutatis mutandis*, the cross-referencing appears to be insufficient to ensure that this is the case.<sup>214</sup>

## Plant varieties

The TRIPS agreement requires that protection be granted to plant breeders for plant varieties, while previously this was an issue for each country to decide on. However, TRIPS allows WTO Members the choice of patenting plant varieties or establishing a 'sui generis' system of protection for plant varieties or a combination of both.<sup>215</sup> Countries can provide for farmers' rights to save and use seeds. They can also provide for other breeders (eg local public sector breeders versus commercial breeders from large corporations) to innovate.

This gives WTO Member countries the freedom to choose their own system, and some countries have stressed the right of farmers to save and re-use their seed. However the EU requires CARIFORUM countries to consider joining UPOV 1991.<sup>216</sup> (Although this puts pressure on CARIFORUM countries to show that they have considered it and decided not to join, it still gives these countries the option not to join). TRIPS does not require countries to join UPOV 1991. If CARIFORUM countries do join UPOV 1991, they will be required to provide a lot of rights to plant breeders (most of whom would be from large institutions and companies), while the rights of farmers to save and re-use seeds will be very limited.

UPOV was 'designed with the commercialised farming systems of the developed countries in mind.'<sup>217</sup> Adopted in 1961, and revised in 1972, 1978, and 1991 each revision of UPOV has led to more benefits for institutional/commercial plant breeders by according them higher and higher proprietary protection. UPOV 1991 creates breeders' rights over plant varieties, including discovered and developed varieties, harvested material and products made directly from harvested material.

UPOV 1991 favours formal plant breeders (in laboratories) and does not sufficiently safeguard the right of small farmers to save and re-use seeds and breed and develop new plant varieties. The balance between farmers and formal plant breeders is more in favour of farmers in UPOV 1978.

The majority of developing countries have chosen not to be a party to UPOV and so of the current 63 UPOV Members, only a few are from developing countries and most of these are members of UPOV 1978. New members can only adopt UPOV 1991 (except for India which can still join UPOV 1978) which would disadvantage small farmers who constitute the vast majority of farmers in developing countries.

Plant varieties are types of the same plant, for example D24 is a *durian* variety in Malaysia. Plant varieties are often developed by private companies and multinational agriculture companies. These 'plant breeders' in laboratories want to maximize their profits by restricting what farmers can do with the plant varieties they develop so that they can have exclusive market shares. It is necessary to find an appropriate balance to ensure that small farmers can re-use seeds and also breed from those protected varieties. Even among plant breeders, there is a need to balance between public researchers in developing countries and foreign researchers in order to ensure that the fruits of research and the use of materials from those developing countries will primarily benefit the countries concerned.

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<sup>214</sup> Article 148.3.1.

<sup>215</sup> LDC WTO Members have a transition period, see above.

<sup>216</sup> Article 149.2.

<sup>217</sup> 'Integrating Intellectual Property Rights and Development Policy, report of the Commission on Intellectual Property Rights established by the British Government, [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm), page 61.

At the current stage of research and development in agriculture in most developing countries, in practice UPOV 1991 would allow breeders' rights to be claimed much more by foreign researchers rather than local farmers or researchers.

Joining UPOV 1991 would restrict the policy space of developing countries, for example by:

- a) removing the protection which can be given to farmers and indigenous peoples who have developed varieties themselves over the millennia in the field, to prevent biopiracy (where others take their plant resources and make profits without their prior informed consent or providing them with a fair and equitable share of the benefits). UPOV 1991 essentially only gives legal protection to the varieties arising from formal laboratory techniques.
- b) preventing protection against biopiracy (for example requirements that applications for plant variety protection include the source of the genetic resource and associated traditional knowledge, prior written consent of the indigenous people or local community if they developed it from traditional varieties and evidence that the applicant has complied with any law regulating genetically modified organisms if the plant variety was developed via genetic engineering).
- c) preventing small farmers from exchanging seeds amongst themselves and selling the farmer's farm-saved seeds if the farmer cannot make use of them because of natural disaster, emergency or other factors beyond the farmer's control. UPOV 1991 would instead require a compulsory licence to be applied for if farmers wanted to sell their farm-saved seed in this situation. This is more difficult, time consuming and not an automatic right the way TRIPS allows.
- d) reducing the situations in which a compulsory licence can be issued (to overcome plant variety protection).
- e) preventing a country from prohibiting the registration of plant varieties that may cause a negative impact on the environment (for example the Malaysian law requires that a new plant variety passes bio safety requirements before it can be registered).
- f) preventing safeguards that ensure that plant varieties developed from samples from the developing country are available in that developing country for example for local researchers to work on.

According to CIEL, UPOV 1991 'has generally privileged large corporations such as Monsanto over the groups that have historically been responsible for development of new plant varieties, *i.e.* farmers. UPOV 1991 prevents farmers from exercising their traditional form of saving and exchange of seeds, limiting them to saving seeds only for use on their own fields, locking them into vertical relationships with seed corporations rather than cooperative and sustainable relationships with their local farming communities. UPOV 1991 would diminish independent food production by small-scale farmers and prevent the adaptation, localization and diversification that is key to small-scale sustainable farming in developing countries.'<sup>218</sup>

If CARIFORUM countries do join UPOV 1991, the exceptions<sup>219</sup> for certain farmers rights in the EPA may actually be ineffective.<sup>220</sup>

### **Does stronger IP lead to increased agricultural productivity?**

Increasing agricultural productivity can reduce poverty which enables families to spend more on health and education etc.<sup>221</sup> Looking at agriculture in particular, Boldrin and Levine found that total

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<sup>218</sup> 'Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?', Center for International Environmental Law, April 2008, page 11,

[http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>219</sup> Article 149.1.

<sup>220</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006.

<sup>221</sup> See for example page 74, Human Development Report 2003, UNDP.

factor productivity in US agriculture overall did not accelerate after the introduction of patents on plants.<sup>222</sup> Furthermore, a case study of US corn showed that yields did not increase faster after patents on plant varieties were allowed.<sup>223</sup> According to Alston and Venner, the results of introducing Plant Variety Protection Act (PVPA) in USA were that ‘The PVPA appears to have contributed to increases in public expenditures on wheat variety improvement, but private-sector investment in wheat breeding does not appear to have increased. Moreover, econometric analyses indicate that the PVPA has not caused any increase in experimental or commercial wheat yields. However, the share of U.S. wheat acreage sown to private varieties has increased - from 3 percent in 1970 to 30 percent in the 1990s. These findings indicate that the PVPA has served primarily as a marketing tool ...’<sup>224</sup>

## Enforcement

### Introduction

TRIPS recognises that intellectual property rights are private rights. A private right is one which the right owner should enforce themselves (for example by bringing a civil case). The CARIFORUM-EU EPA shifts more of the burden and cost to the government to enforce these private rights.

The European Commission’s ‘Global Europe’ report sets out the EU’s trade strategy.<sup>225</sup> It states that ‘FTAs should include stronger provisions for IPR and competition, including for example provisions on enforcement of IP rights along the lines of the EC Enforcement Directive.’<sup>226</sup>

Therefore it is not surprising that ‘In general, the approach to enforcement in the EC-CARIFORUM EPA, which is based mainly on proposals by the EC, reflects the approach laid out in the EU strategy on enforcement and the EU’s Intellectual Property Enforcement Directive (IPRED). The effect of this is that, although the provisions on enforcement in the EPA are framed as obligations for both the EC and CARIFORUM states, the reality is that CARIFORUM countries have simply assumed additional IP enforcement obligations developed for the EC’s internal market. . . The provisions on enforcement in the EC-CARIFORUM EPA are . . . substantially TRIPS-plus. Many of the provisions mirror the provisions of the EC’s enforcement directive - IPRED or other EC practices. This is a problem because IPRED constitutes the EU’s exercise of its right to determine the appropriate method of implementing the TRIPS enforcement provisions and to achieve its own internal market goals. IPRED was specifically aimed at addressing issues in the context of the EU internal market, taking into account the circumstances and legal practices of EU member states.

It follows that the imposition of the approach in IPRED and other EC practices on CARIFORUM countries will deny these countries the opportunity to determine their own method of implementation of the TRIPS enforcement provisions and to achieve their own other goals related to technological innovation, knowledge diffusion and competition. In effect, the approach to enforcement here means that CARIFORUM countries have directly bargained away a fundamental parameter on which the TRIPS Agreement is built by accepting detailed prescriptive rules on enforcement in the EPA.’<sup>227</sup> (TRIPS specifies that enforcement rules must take into account ‘differences in national legal

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<sup>222</sup> ‘Against Intellectual Monopoly’, Boldrin & Levine, 2007, <http://www.dklevine.com/general/intellectual/againstnew.htm>.

<sup>223</sup> ‘Against Intellectual Monopoly’, Boldrin & Levine, 2007, <http://www.dklevine.com/general/intellectual/againstnew.htm>.

<sup>224</sup> ‘Against Intellectual Monopoly’, Boldrin & Levine, 2007, <http://www.dklevine.com/general/intellectual/againstnew.htm>.

<sup>225</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006.

<sup>226</sup> [http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc\\_130376.pdf](http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf)

<sup>227</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

systems'.<sup>228</sup> TRIPS also specifies that 'Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'<sup>229</sup>

Musungu also notes the application of 'the basic international law rule that the implementation and interpretation of treaty provisions (in this case the enforcement provisions of TRIPS) must be done in light of the object and purpose of the treaty. The purpose and objective of TRIPS is that the protection of IPRs would contribute to technological innovation, the transfer and dissemination of technology and that the TRIPS framework would ensure the balance of benefits for producers (IPR holders) and consumers of knowledge and technology (general public, competitors etc.) in a manner conducive to social and economic welfare.'<sup>230</sup> The implication is that the enforcement provisions should help ensure the achievement of these objectives by, among others, facilitating measures necessary to protect public health and nutrition and promote public interest in sectors of vital importance to the country and to prevent the abuse of IPR by right holders as well as anti-competitive practices and measures that restrain legitimate trade.'<sup>231</sup> In comparison, it is clear that the EPA's enforcement provisions are not informed by these types of aims.

CIEL notes that 'In addition to the unprecedented inclusion of enforcement provisions in the EPA, the provisions are worrisome because of their breadth and scope and the ways that they transfer essentially European standards and norms to ACP countries. In particular, the level of resources required to implement and meet these obligations will distort the administrative and judicial systems of most ACP countries, shifting the focus from crucial areas such as enforcement of criminal law.'<sup>232</sup>

IP enforcement can also act as a disguised restriction or barrier to legitimate trade in order to protect markets.<sup>233</sup> It is also open to abuse by the intellectual property rights holders.<sup>234</sup> Furthermore, IP enforcement is costly for developing countries<sup>235</sup> and so diverts scarce resources from other more pressing development needs. Even TRIPS-level enforcement is expensive according to the South Centre: 'Establishing and strengthening the enforcement of intellectual property rights is a costly exercise both in terms of budgetary outlays and the employment of skilled personnel. It is particularly expensive for many developing countries, as economic benefits will go largely to foreign firms over the intermediate term.'<sup>236</sup>

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<sup>228</sup> Preamble paragraph 2 (c).

<sup>229</sup> Article 1.1.

<sup>230</sup> Article 7 TRIPS.

<sup>231</sup> 'Developing A Positive Agenda on Enforcement Provisions of EPAs', Sisule F. Musungu, *Regional Dialogue on the Economic Partnership Agreements, Intellectual Property and Sustainable Development for the ECOWAS*, Organized by ICTSD, in partnership with ENDA and QUNO, Saly, Senegal, 30-31 May 2007.

<sup>232</sup> 'Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?', Center for International Environmental Law, April 2008, page 10,

[http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>233</sup> Viviana Munoz Tellez, South Centre, 2<sup>nd</sup> South Centre International Symposium on 'Examining IP Enforcement from a Development Perspective', 16 September, 2008, Geneva.

<sup>234</sup> Viviana Munoz Tellez, South Centre, 2<sup>nd</sup> South Centre International Symposium on 'Examining IP Enforcement from a Development Perspective', 16 September, 2008, Geneva.

<sup>235</sup> Viviana Munoz Tellez, South Centre, 2<sup>nd</sup> South Centre International Symposium on 'Examining IP Enforcement from a Development Perspective', 16 September, 2008, Geneva.

<sup>236</sup> 'Who should bear the TRIPS enforcement cost?', Policy Brief 12, if South Centre, January 2008. It goes on to note that 'This direct cost of TRIPS enforcement includes: (a) Judicial cost; (b) Administrative cost; (c) Litigation cost; and (d) Cost of litigation error. The second category of costs is indirect cost, which may have deeper implications than the first category of costs, although not the focus of the instant policy brief. These costs are duly associated with static losses which developing countries have to face due to TRIPS or TRIPS-plus compliance and the ensuing static consumer welfare losses, impediments to informal and formal modes of anti-competitive effects, etc.'

CIEL notes that ‘Specific areas of concern raised by the provisions include<sup>237</sup>: The expansion of the categories of persons entitled to bring cases and request provisional, precautionary and border measures (Article 152).’

### Right of information

There is a right of information article in the EPA<sup>238</sup> which has some protection for the accused, but only if these provisions are required by legislation in the accused’s country (rather than case law or equity requirements).<sup>239</sup>

The provisions on evidence<sup>240</sup> and right to information<sup>241</sup> in the EPA are missing proportionality and other basic safeguards that are in TRIPS.<sup>242</sup> Musungu comments that ‘The implications of these disproportional evidence gathering and production requirements, both from the standpoint of the administrative and financial burden, as well as on business practices for CARIFORUM countries, could be far-reaching. Evidence requirements and right to information rules developed for the internal market of the EU are likely to be inapplicable to the situation of most CARIFORUM and other ACP countries especially in the context of the informal sectors that predominate the business environment. Concepts of confidential information and where limits should be set, for example, are not easy to apply to the informal sector.’<sup>243</sup>

‘The extension of the ability of complainants to access private information, such as to banking and financial documents and act to have goods seized to preserve evidence’ is also a concern for CIEL.<sup>244</sup>

### Provisional and precautionary measures

The article on provisional and precautionary measures requires judges to be able to order the seizure of the property of the alleged infringer, including blocking of bank accounts if the infringement is being committed on a commercial scale and there are circumstances likely to endanger the recovery of damages.<sup>245</sup> Musungu comments that ‘These are new powers which are not required under the TRIPS Agreement with potentially challenging implications.’<sup>246</sup> In addition to these being broad powers, ‘the most striking characteristic of this provision is the complete lack of protection for third parties against abusive applications for interlocutory injunctions and the need to require right holders to provide security. This is particularly important because the anticipated disputes are likely to occur between

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<sup>237</sup> Sourced from a presentation by C. Correa on EPAs and IPR Enforcement at the CIEL/Oxfam/ChristianAid Workshop on Intellectual Property, EPAs and Sustainable Developments in Brussels in May 2007. Materials available at [http://www.ciel.org/Tae/IPR\\_Brussels\\_Jun07.html](http://www.ciel.org/Tae/IPR_Brussels_Jun07.html).

<sup>238</sup> Article 155.

<sup>239</sup> Article 155.3 (because of the use of the word ‘statutory’ provisions).

<sup>240</sup> Articles 153 and 154.

<sup>241</sup> Article 155.

<sup>242</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>243</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>244</sup> Sourced from a presentation by C. Correa on EPAs and IPR Enforcement at the CIEL/Oxfam/ChristianAid Workshop on Intellectual Property, EPAs and Sustainable Developments in Brussels in May 2007. Materials available at [http://www.ciel.org/Tae/IPR\\_Brussels\\_Jun07.html](http://www.ciel.org/Tae/IPR_Brussels_Jun07.html).

<sup>245</sup> Article 156.3.

<sup>246</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

competing business enterprises. There is a real danger here for unbridled interference with legitimate trade and competition.<sup>247</sup>

‘The expansion of the use of injunctions, corrective and preliminary and provisional measures against third party intermediaries who are not themselves infringers’ also worries CIEL.<sup>248</sup> Intermediaries involved in the (physical or digital) transfer and dissemination of IP-protected material can include internet service providers.<sup>249</sup> The CARIFORUM- EU EPA allows interlocutory and permanent injunctions against intermediaries. Musungu notes that ‘Intermediary liability for infringement action by third parties was introduced in the EC-CARIFORUM enforcement through a number of provisions. This includes under . . . right to information . . .provisional and precautionary measures; and . . . injunctions. The key challenge here is that the introduction of intermediary liability, apart from its own problems, is doubly problematic where the safeguard mechanisms for third parties are weak and provisional measures such as injunctions are readily available as foreseen in Article [158] . . . Indeed, because of these challenges, among others, the EC member states, under IPRED have left the issue of injunctions against intermediaries to member state’s discretion.’<sup>250</sup>

### Corrective measures

While the provision<sup>251</sup> on corrective measures is similar to TRIPS,<sup>252</sup> the EPA provisions lacks the safeguards in TRIPS such as the proportionality test, consistency with constitutional requirements, taking into account the interests of third parties, subject to the right to review by a court and exceptional cases. Musungu notes that ‘This has added importance since there is a TRIPS-plus obligation to ensure that the corrective measures are carried out at the infringer’s expense’<sup>253</sup> unless particular reasons are invoked for not doing so<sup>254</sup>.

### Damages

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

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

The concept of negative economic consequences is extremely hard to quantify is clearly extraneous to the primary purpose of enforcement – which is to prevent injury to the right holder. . . the addition of

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<sup>247</sup> Sisule F. Musungu ,University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>248</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for International Environmental Law, April 2008, page 10, [http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08). Interlocutory injunctions may be issued against intermediaries whose services are being used by a third party to infringe an intellectual property right, Article 156.1.

<sup>249</sup> Henning Große Ruse-Khan, Max-Planck-Institute for Intellectual Property, Competition and Tax Law, 2<sup>nd</sup> South Centre International Symposium on ‘Examining IP Enforcement from a Development Perspective’, 16 September, 2008, Geneva.

<sup>250</sup> Sisule F. Musungu ,University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>251</sup> Article 157.

<sup>252</sup> Articles 46 and 59.

<sup>253</sup> Sisule F. Musungu ,University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>254</sup> Article 157.2.

these broadly worded considerations to what courts have to consider in the determination of damages simply opens the floodgates of abuse, unnecessary litigation and delays.<sup>255</sup>

### Border measures

The border measures provision<sup>256</sup> in the EPA is particularly problematic for a number of reasons. Firstly, TRIPS only requires border measures to be applied to goods suspected of infringing trademarks or copyright.<sup>257</sup> UNCTAD notes that ‘This provision does not apply either to other types of intellectual property rights. The reason for this differentiation is that infringement in the case of trademark counterfeiting and copyright piracy may be generally determined with certain ease, on the basis of the visual inspection of an imported good, since infringement will be apparent “on its face”’.<sup>258</sup> By contrast, patent infringement is harder to see with the naked eye. For example, it is very difficult for customs authorities to simply look at a white tablet which is a patented medicine and a white tablet which is a generic version of the medicine and decide if the generic version has infringed the patent or not. Usually this would take sophisticated chemical analysis, review of the manufacturing process and patent lawyers to interpret the claims of the patent because the generic version may have changed one of the chemical ingredients slightly so that it does not infringe the patent.

Despite this, the EPA has extended this to goods suspected of infringing designs and geographical indications as well.<sup>259</sup> Furthermore, CARIFORUM countries have agreed to collaborate to expand the scope of this to cover goods infringing all intellectual property rights, which would include patents.<sup>260</sup> If patents are eventually subject to border measures because of this provision, it is likely that lots of technologies such as medicines will be seized. This may interrupt the medicine supply for the period of the seizure which can lead to resistance being built up to those medicines. In addition, in order to obtain the release of the generic medicines, the importer is likely to have to deposit a significant bond.<sup>261</sup> Because the EPA requires more expansive damages than TRIPS (see above), this could remove CARIFORUM’s freedom under TRIPS to set the bond at an amount sufficient to cover the lower TRIPS level of damages. If this causes delays and interruptions to the medicine supply, resistance to the medicine is likely to develop in patients. Once resistance develops, for example to HIV/AIDS medicines or antibiotics, patients must take the significantly more expensive second-line medicines.

Secondly, TRIPS<sup>262</sup> only requires border measures to be applied to goods being imported. Whereas the EPA provision also requires customs authorities to check customs free zones, goods being exported and re-exported.<sup>263</sup> According to Musungu, ‘such an obligation is likely to place a significant burden on CARIFORUM countries’ administrative and financial resources. For example, the discussions in the WTO on the question of lack of manufacturing capacity in the pharmaceutical sector showed that placing strict obligations on developing countries and LDCs such as the CARIFORUM countries to police re-exports, is particularly burdensome and unwarranted.’<sup>264</sup> This requirement will more than double the workload of customs authorities which will presumably require

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<sup>255</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>256</sup> Article 163.

<sup>257</sup> Article 51.

<sup>258</sup> UNCTAD-ICTSD Resource Book (2005), available online at [http://www.iprsonline.org/unctadictsd/ResourceBookIndex\\_update.htm](http://www.iprsonline.org/unctadictsd/ResourceBookIndex_update.htm)

<sup>259</sup> Footnote 27 to Article 163.1.

<sup>260</sup> Footnote 27 to Article 163.1.

<sup>261</sup> Article 163.2 of the EPA incorporates articles 52 to 60 of TRIPS. Article 53 of TRIPS states that the security must be ‘an amount sufficient to protect the right holder for any infringement.’

<sup>262</sup> Article 51.

<sup>263</sup> Article 163.1.

<sup>264</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

at least double the budget and double the number of staff to implement. Given the limited budgets of developing countries including CARIFORUM, the many other more pressing development needs and that most of the intellectual property being protected will be owned by foreign companies (see context above), it is unclear that this is the best use of stretched government resources.

In combination with the extension of border measures to goods suspected of infringing patents, this is likely to have detrimental effects on access to technology including medicines. This is because many least developed countries do not have their own generic medicine manufacturing capacity, so they import generic medicines from another country. The same LDCs may not be a direct air transport hub.

For example Rwanda may want to import generic medicines from India (because Rwanda does not have the ability to make generic medicines), however, there may not be a direct flight from India to Rwanda. Therefore the medicine may travel from India to Kenya (where it is patented) and then on to Rwanda. This is allowed under TRIPS.

For example, aid organisations keep stockpiles of materials, medicines and medical equipment in different places, including in places where the products may be patented, to be shipped to places when needed. This may be prevented under the EPA.

Chile's Counsellor to the WTO notes that this is very similar to the European Union's own internal law (Regulation (EC) 1383/2003) which also applies to goods infringing any type of intellectual property whether they are imported or exported.<sup>265</sup> Once again, developing countries have largely had to accept the European Union's own TRIPS-plus level of implementation of TRIPS provisions.

### **Lack of safeguards**

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

This means that CARIFORUM countries have assumed new enforcement obligations without sufficient safeguards for third parties. While it is conceivable that this countries can introduce such safeguards in national law, their compatibility with the assumed obligations can always be questioned.<sup>266</sup>

### **Conclusion**

The intergovernmental South Centre notes that if ACP countries agree to these TRIPS-plus provisions, this will have a significant impact on intellectual property negotiations at the multilateral level. 'If all 76 countries in the ACP sign up to proposed European standards, the IP discussion in international fora (especially WIPO and the WTO TRIPS Council) will be transformed. One consequence will be the destruction of strong alliances between developing countries built at the multilateral level. On the issues covered in the EPAs, especially enforcement, geographical indications and copyright, the shift of ACP countries to the EU position would leave a handful of Latin American and Asian countries as the only states opposing the expansion of international IP

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<sup>265</sup> ' Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries', Maximiliano Santa Cruz S., Counsellor, Permanent Mission of Chile to the WTO, Issue Paper No. 20, June 2007, ICTSD, <http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>.

<sup>266</sup> Sisule F. Musungu, University of Bern, 'Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA', ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

rights in fora such as WIPO and the WTO.<sup>267</sup> Therefore by agreeing to such provisions, ACP countries would also be harming the interests of other developing countries (who have not even signed an EU FTA).

The intergovernmental South Centre remarked that ‘Currently, we note that a number of developing nations are spending more and more their limited resources on endeavours related to the enforcement of IPRs while more efforts should be made in realizing the objectives of poverty reduction, hunger elimination, health and educational causes under the Millennium Development Goals.’<sup>268</sup> It concludes that ‘It is advisable that developing countries should deny bearing undue costs in respect of providing these measures beyond TRIPS requirements, such as border measures beyond the requirements of Article 51’.<sup>269</sup>

It is important to remember that unintentional intellectual property infringement can occur in the context of companies doing legitimate business activities. The Cariforum- EU EPA intellectual property chapter significantly shifts the balance of rights and obligations between intellectual property owners and users in favour of the owners. Given the context above where most developing countries are net intellectual property importers, this is likely to make it even more difficult for CARIFORUM companies to compete with those from Europe.

Musungu notes that stronger enforcement clauses ‘will impact, directly, on the implementation of flexibilities in the TRIPS Agreement in these countries, as well as the competitive relations among firms in the economy. In other words, there are significant TRIPS-plus implications that will arise out of such new clauses on enforcement. Consequently, the issue of IP enforcement in EPAs is neither a mundane nor a neutral subject. It is highly complex and economically significant. It therefore warrants special attention by CEMAC countries as well as other ACP countries. . . The TRIPS enforcement provisions are already onerous for a developing country including CARIFORUM countries. The addition of a layer of new obligations therefore rightly raises questions as to how the EC has taken into account the levels of development of CARIFORUM countries.’<sup>270</sup>

## Genetic resources, traditional knowledge and folklore

This is an area of offensive interest for developing countries as they are rich in biodiversity and traditional knowledge. To protect their resources from biopiracy, more than 100 developing countries have proposed an amendment to TRIPS to ensure that there is disclosure of origin/source, prior informed consent and fair and equitable benefit sharing before a patent is granted on a material containing a genetic resource. However, the EPA does not make it compulsory to disclose these elements before obtaining a patent. It merely makes it optional to require this<sup>271</sup> and only for disclosure of origin which is the least useful of the three elements for preventing biopiracy. Therefore this provision has not provided CARIFORUM countries with any further protection against biopiracy.

The other paragraphs in Article 150 are similarly ineffective for preventing biopiracy.

According to CIEL ‘The Cariforum EPA provides nothing new on these issues and does nothing to further the goals of Cariforum countries as they seek them out at the multilateral level... Nothing in the language of the Article goes beyond already existing language and obligations in multilateral agreements. Article 150.1 simply reiterates Article 8(j) of the Convention on Biological Diversity (CBD), while Article 150.4, restates what countries have been able to do in any case, which is to establish a national disclosure of origin requirement if they wish to do so.’<sup>272</sup>

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<sup>267</sup> Intellectual Property Quarterly Update, South Centre, CIEL, Fourth Quarter 2006, [http://www.ciel.org/Publications/IP\\_Update\\_4Q06.pdf](http://www.ciel.org/Publications/IP_Update_4Q06.pdf).

<sup>268</sup> ‘Who should bear the TRIPS enforcement cost?’, Policy Brief 12, if South Centre, January 2008.

<sup>269</sup> ‘Who should bear the TRIPS enforcement cost?’, Policy Brief 12, if South Centre, January 2008.

<sup>270</sup> Sisule F. Musungu, University of Bern, ‘Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for the CEMAC Region from the EC-CARIFORUM EPA’, ICTSD and ACDIC CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development, 28- 29 April 2008.

<sup>271</sup> Article 150.4.

<sup>272</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for

A study commissioned by the German Federal Ministry for Economic Cooperation and Development similarly found that there is no major achievement for the CARIFORUM countries in this area and there is no obligation on the EAC to establish a mandatory system.<sup>273</sup> It therefore concludes ‘Overall, therefore, the treatment of genetic resources and traditional knowledge in the EC-CARIFORUM EPA adds little value and offer no major development benefit to CARIFORUM countries.’<sup>274</sup>

## Cooperation

Cooperation is split into two parts in the intellectual property chapter. The innovation section and a separate cooperation subsection under the intellectual property section.

### Innovation section

Whilst the innovation section may have been intended to increase innovation in CARIFORUM countries,<sup>275</sup> it is unlikely to achieve this for a number of reasons.

Article 133 actually may require CARIFORUM countries to increase their level of intellectual property protection because once again they have agreed to provide the regulatory framework that fosters competitiveness through innovation and creativity, which as noted above in the context, is likely to require stronger intellectual property protection and enforcement.

The cooperation is unlikely to materialise because the cooperation activities in all the subsequent articles are too vague to be enforceable<sup>276</sup> and/or are subject to the approval of the European Union<sup>277</sup>. Furthermore, no legally binding budget for the cooperation activities can be provided in the EPA.

The transfer of technology provision<sup>278</sup> is not strong enough to ensure that technology is transferred from Europe to CARIFORUM countries. This is because it only requires:

1. The exchange of views and information
2. The control of abusive licensing practices **where appropriate**
3. Facilitation and promotion of incentives to European companies and institutions to transfer technology to institutions and companies in CARIFORUM countries. (However there are no specific levels of incentives set, so theoretically this could be met by an ineffective and meaningless token gesture, such as offering a €1.00 tax deduction once, to one company).

This is not surprising because as CIEL notes, industrialized countries ‘have argued that they do not have sufficient information on developing country technological needs and that, in any case, most technology is held in private hands and that they cannot do anything to force their companies to transfer technologies.’<sup>279</sup>

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International Environmental Law, April 2008, page 11 if,  
[http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08)

<sup>273</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>274</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>275</sup> See for example ‘The EPA at a Glance...An Overview of the CARIFORUM-EC Economic Partnership Agreement’, CRNM Information Unit, 2008 which notes that one of the benefits of the EPA is ‘support for innovation’ and ‘Development of CARIFORUM innovation systems to develop and enhance the competitiveness of CARIFORUM firms through technological transfer, research and development, and participation in joint ventures.’

<sup>276</sup> Articles 134, 135, 136, 137, 138.

<sup>277</sup> Article 134.1, 135.2, 136.1, 136.4, 137.2, 138.2.

<sup>278</sup> Article 142.

<sup>279</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for

A study commissioned by the German Federal Ministry for Economic Cooperation and Development found that the innovation section of the CARIFORUM- EU EPA ‘suffers from a number of important shortcomings with the result that the extent to which the provisions on innovation in the IP Chapter of the EPA will support the development of CARIFORUM States through innovation and competitiveness remain largely uncertain.

The most prominent of these shortcomings is the failure to translate the laudable aspirations to promote innovation and competitiveness, science and technology, information society, ICTs, eco-innovations and renewable energy into operational language and specific obligations particularly on the part of the EC. All the proposed measures are limited to best endeavour cooperation activities. . . . Another shortcoming is the failure to address questions related to access to essential innovations by the general populations as well as the research community.’<sup>280</sup>

### Cooperation subsection

The study commissioned by the German Federal Ministry for Economic Cooperation and Development further noted that the cooperation mainly focuses on implementing the obligations of CARIFORUM countries but will not necessarily include activities on the use of flexibilities.<sup>281</sup> Therefore it concludes that ‘This approach falls far short of the principles and parameters that have been internationally agreed to guide IP technical assistance, under the auspices of the Development Agenda.’<sup>282</sup>

### Conclusion

CIEL points out that ‘It is an irony that those ACP states with the most extensive national IPR systems (e.g. South Africa) have been most adamant about the exclusion of IPR provisions in EPAs. If these countries do not consider themselves sufficiently prepared to negotiate IPR provisions, it strains credulity to suggest that other ACP countries, the majority of whom are LDCs, are fully prepared to negotiate provisions on intellectual property that go beyond those already negotiated in the TRIPS Agreement.’<sup>283</sup>

The intergovernmental South Centre concludes that the EPA ‘negotiations should not include provisions on intellectual property rights.’<sup>284</sup>

The study commissioned by the German Federal Ministry for Economic Cooperation and Development concludes that ‘there are significant challenges and problems that they will face in implementing these obligations. . . . The overall conclusion of this study is therefore that African and Pacific countries, learning from the example of the CARIFORUM EPA, should approach proposals for additional obligations on IP issues in their regions with utmost caution. Even in cases where the

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International Environmental Law, April 2008, page 16,

[http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>280</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>281</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>282</sup> ‘Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper’, 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>283</sup> ‘Intellectual property and European Union economic partnership agreements with the African, Caribbean and Pacific countries: what way forward after the CARIFORUM EPA and the interim EPAs?’, Center for International Environmental Law, April 2008, page 13,

[http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf)

<sup>284</sup> ‘Development and intellectual property under the EPA negotiations’, Policy Brief 6, South Centre, March 2007.

issues addressed have the potential of development benefits, the overall obligations assumed may be too onerous for these countries.<sup>285</sup>

It is surprising that there are still TRIPS-plus provisions that reduce access to affordable medicines in the CARIFORUM- EU EPA given the European Parliament's July 2007 resolution (five months before the CARIFORUM- EU EPA was initialled) on this topic which 'Calls on the Council to meet its commitments to the Doha Declaration and to restrict the Commission's mandate so as to prevent it from negotiating pharmaceutical-related TRIPS-plus provisions affecting public health and access to medicines, such as data exclusivity, patent extensions and limitation of grounds of compulsory licences, within the framework of the EPA negotiations with the ACP countries and other future bilateral and regional agreements with developing countries';<sup>286</sup>

### **Extent to which CARIFORUM's aims were achieved**

According to Audel Cunningham<sup>287</sup>, 'CARIFORUM'S negotiating guidelines identified its main offensive interests in this area as being:

- (i) Achieving an agreement that facilitated the development within CARIFORUM of competitive technologies,
- (ii) Attaining an agreement conducive to the protection of CARIFORUM indigenous knowledge,
- (iii) Obtaining development support to facilitate the development and exploitation of intellectual property resources by CARIFORUM private sector entities.<sup>288</sup>

Unfortunately, (i) failed because the high levels of intellectual property protection will make development of technology more difficult and the cooperation provisions are ineffective, see above. (ii) has not been achieved according to expert commentators (see genetic resources section above). (iii) has also not been achieved, see cooperation section above.

### **Implementation costs**

The study commissioned by the German Federal Ministry for Economic Cooperation and Development cited a Leesti and Pengelly study which 'included figures for one CARIFORUM country – Jamaica, which could provide some sense of the implementation costs one is looking at with respect to EPA obligations. In the study, it is reported that in the financial year 1999/2000 Jamaica's expenditure on IP administration was USD 283, 752 while revenues for the same period was USD 161,693. That means that the tax payers in Jamaica had to spend USD 122,059 in direct costs for IP administration excluding indirect costs and the costs to businesses and other entities. Although during the initial period of implementation some of these costs may be borne through technical assistance and capacity building projects provided by WIPO, the EC and/or other providers, the recurrent costs are likely to be picked up, in the longer-term by the tax payers in CARIFORUM countries.

It is therefore obvious that although it is difficult to be definitive about the cost of implementing the IP provisions of the EPA, the costs are likely to be substantial. This is because:

- CARIFORUM countries have assumed new onerous obligations especially in the areas of geographical indications and trademarks, industrial designs and enforcement. The costs associated with enforcement activities, in particular, may be the highest though the most difficult to estimate.

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<sup>285</sup> 'Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper', 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>286</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0353+0+DOC+XML+V0//EN&language=EN>

<sup>287</sup> Legal Advisor in the Caribbean Regional Negotiating Machinery, [http://www.crn.org/legal\\_officer.htm](http://www.crn.org/legal_officer.htm)

<sup>288</sup> 'Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper', 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

- CARIFORUM countries have undertaken to accede to or consider acceding to nine (9) WIPO treaties all of which would come with additional costs for establishing administrative and enforcement systems.<sup>289</sup>

## Dispute settlement

The dispute settlement mechanism applies to any dispute concerning the interpretation and application of the EPA.<sup>290</sup> After consultations or mediation, an arbitration panel is formed.<sup>291</sup> The EPA sets out its procedures. If the Party does not comply with the arbitration panel's ruling, the complaining Party can 'adopt appropriate measures'.<sup>292</sup>

## Exceptions

Part IV of the CARIFORUM-EU EPA has general exceptions that apply to the whole EPA. The wording appears to largely follow Article XX of GATT, however the EPA does not allow exceptions if it would constitute arbitrary or unjustifiable discrimination where 'like' conditions prevail. (Whereas the GATT provision is where the 'same' conditions prevail). This may mean that it is harder to use the EPA's exceptions because more situations would qualify as being discriminatory.

Some exceptions have been added to the GATT Article XX list. However, some of the GATT exceptions that may be of interest to developing countries have been left out of the EPA's exceptions: measures: 'involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;' and 'essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.'

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<sup>289</sup> 'Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs Innovations and Intellectual Property in the EC-CARIFORUM EPA: Lessons for other ACP Regions – Working Paper', 2008, GTZ, <http://www.gtz.de/en/dokumente/en-epa-cariforum-and-beyond-innovation-and-intellectual-property-2008.pdf>.

<sup>290</sup> Article 203.1.

<sup>291</sup> Article 206.1.

<sup>292</sup> Article 213.2.