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8 The EU's approach to Free Trade Agreements
Intellectual Property

This paper forms part of a series of eight briefings on the European Union's approach to Free Trade Agreements. It aims to explain EU policies, procedures and practices to those interested in supporting developing countries. It is not intended to endorse any particular policy or position, rather to inform decisions and provide the means to better defend them. The views expressed in the briefings do not necessarily reflect the views of the publishers.

What's at stake?

For developing countries

- The management of intellectual property is essential not only to encourage innovation and technological advancement which are crucial to economic development; it also affects access to information and knowledge that has impacts on public health objectives, industrial development, food security and education. The challenge is to strike the right balance between rewarding innovators and promoting public access.
- Developing countries tend not to be owners of conventional intellectual property rights – they owned between 5.3 and 7.0 per cent of global patents in 2006. Developing country interests in intellectual property tend not to be well served by current protections and rules; for example they are rich in traditional knowledge and plant genetic resources.

For the European Union

- Developed countries tend to own the majority of recognised intellectual property rights. The EU, US and Japan together owned 75.7 per cent of the world's patents in 2006.
- IPRs account for a large proportion of the EU's GDP and are important to high-growth sectors. For example, the cultural and creative sector turned over €654 billion in 2003 (2.6 per cent of GDP), and employed 5.8 million people (3.1 per cent of the EU–25 workforce).
- *Global Europe* identifies knowledge sectors as those where EU firms are world leaders and addressing the high costs of poor intellectual property enforcement overseas as a main objective of the strategy.
- The EU has ambitions for multilateral rules on IPRs at the WTO that it is finding difficult to achieve, for example a strict register of Geographical Indications. Gaining acceptance of these rules in regional trade deals will strengthen its position at the WTO.

Intellectual property is any intangible asset that consists of knowledge and ideas, such as a scientific invention or a literary work. Intellectual property rights (IPRs) are legal protections that give the inventor or owner of an idea the exclusive right to certain benefits deriving from their original idea – some examples are patents, copyrights and trademarks. Rules on how these rights should be protected at a minimum are increasingly included in trade deals.

Understanding IPR texts: Key terms and definitions

You may want to look at the following glossary for some of the definitions: www.wipo.int/tk/en/glossary/

Patent: A government grant to an inventor assuring him the sole right to make, use and sell his invention for a limited period.

Copyright: Exclusive right to produce copies and to control an original literary, musical or artistic work granted by law for a specified number of years.

Trademark: Officially registered distinguishing mark to identify goods or services of a particular manufacturer or dealer.

Geographical indications: place names or words associated with a place used to identify products which have a particular quality, reputation or other characteristic because they come from that place; for example Champagne or Harar coffee.

Exhaustion of intellectual property rights: Once a product is sold on a market, the intellectual property owner no longer has rights over it – his/her rights are "exhausted". Whether or not the right continues to be exhausted when the good is imported from one market to another depends on the type of exhaustion regime the country has adopted, whether national or international.

Adapted from
W. Goode, *WTO Dictionary of Trade Policy Terms*, 4th edition, CUP 2003
Concise Oxford English Dictionary, 11th Edition, Oxford University Press 2006

WTO and the legal backdrop to Intellectual Property Rights

There is no WTO obligation to include intellectual property rights in Free Trade Agreements (FTA).

Most countries, including developing countries, are committed to minimum standards of intellectual property rights protection under the WTO Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS). Many countries have not yet been able to implement all its provisions, however, and Least Developed Countries recently won an extension of their exemption from TRIPS rules until 2013.

Other international treaties exist that cover intellectual property, and many developing countries are signatory to them. The main treaties are those administered by the UN's World Intellectual Property Organisation.

With respect to IPRs, the Convention on Biological Diversity (CBD) states that the Contracting Parties shall "ensure that such rights are supportive of and do not run counter to its objectives". IPRs may help to fulfill the objective of the CBD of providing access to genetic resources and fair and equitable sharing of the benefits arising out of the utilisation of such genetic resources.

The additional risk that EU deals might pose is not simply where they go broader and deeper than the partner countries' existing international commitments. Commitments within trade deals are backed up by dispute settlement provisions, and therefore countries could risk sanctions that would not be available under WIPO treaties, for example, for non-compliance.

What the European Commission might want and what this means for development

The European Commission's (EC's) past practice on IP chapters in free trade deals with developing countries has been to **require accession by the other party to various multilateral treaties**. The parties generally reaffirm their commitment to implement the TRIPS Agreement and also to accede to many or all of the following

international agreements within a specific time period:

- Berne Convention for Protection of Literary and Artistic Works (copyright)
- Paris Convention for the Protection of Industrial Property
- Patent Co-operation Treaty (PCT) and Patent Law Treaty (PLT)
- UPOV Convention 1991 (Act of the International Union for the Protection of New Varieties of Plants)
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks
- Locarno Agreement establishing an international classification of Industrial Designs
- Madrid Protocol for the international registration of trademarks
- WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) (together referred to as the WIPO Internet Treaties).

Many of these agreements are procedural and do not set substantive standards of protection. For example, the Patent Co-operation Treaty allows inventors to file only one international application to facilitate obtaining patents in other member countries. Similarly the Patent Law Treaty seeks to harmonise patent procedures and to restrict the number of requirements in filing patents. This could be problematic for developing countries, who have to raise objections to any application within a limited period to avoid its default acceptance, but who may lack the capacity to deal with high volumes of applications. If countries are newly acceding to the Patent Co-operation Treaty, for example, this could result in a greater number of patents being filed in that country, meaning that protected inventions will not fall into the public domain in that country for the term of the patent's protection (20 years from date of filing, in accordance with TRIPS).

That is not to say that none of these agreements are controversial with respect to their application to developing countries. For example the **WIPO Internet treaties** do contain substantive provisions that go beyond TRIPS commitments and grant new exclusive rights and technological protection measures (TPMs) for rights-holders to protect their works on the internet and in digital media. The implementation of legislation on TPMs has been criticised for stopping not only copyright infringers, but also legitimate activities impacting on scientific research, for example, and impeding competition.

UPOV (1991) has also come under criticism for expanding plant breeders' rights, expanding application to all seed types, extending the term of protection and limiting exceptions for farmers' rights. In contrast to the earlier version of UPOV from 1978, farmers are not automatically allowed to re-sow seed (unless expressly forbidden); instead in the 1991 act the onus is on countries to expressly allow farmers the privilege of re-sowing seed harvested from protected varieties. Extending protection to all seeds and extending the terms of protection encourages cultivation of a narrow range of crops, with possible consequences for nutrition and food security.

Previous EU FTAs have tended to use a **definition of the scope of intellectual property** that is broader than that used in TRIPS – including issues such as traditional knowledge, genetic resources and non-original databases. The first two of these tend to be areas of offensive interest for developing countries and therefore their inclusion is welcome, while the protection of databases has been criticised for protecting investments rather than creativity or original works.

FTAs have also included opening **general statements on the desired level of protection** that parties set out to achieve. These have varied from simply "adequate and effective" to "highest international standards" or, at their most stringent, approximation to Community standards. However, these statements seem to be of a declaratory nature.

At the end of 2006, the EC's strategy shifted to:

- seeking full TRIPS implementation (respecting transition periods)
- promoting enforcement
- co-operating with developing countries in implementation and enforcement
- ensuring IPRs are supportive of public health, innovation and technology transfer
- expanding protection of geographical indications.

Some protection for **Geographical Indications** (GIs) already exists. TRIPS affords protection to GIs to prevent use that misleads the public as to the geographical origin of a good or that constitutes an act of unfair competition. For wines and spirits, TRIPS bars anyone from using the protected terms, even if the public is not misled. The EU would like to see this protection extended to all GIs. It also wants to see a register of protected terms with strong effects (established at the WTO and a clawback of exclusivity on European terms that are now used in new world products, such as Rioja and Roquefort). In previous EU deals, for example, that with South Africa, the EU has also concluded stand-alone agreements on wines and spirits trade which afford mutual recognition of GIs and phase out use of terms of European origin. The EU claims a disproportionate number of GI terms. Impacts could be important for developing-country firms that produce a product designated by one of these terms (either for internal consumption or for export) or import such a good from a third market.

With regard to **enforcement** the EU has adopted a multiple strategy to tackle internal infringements of IPRs through new legislation on border measures and enforcement, practical enforcement initiatives targeted at third countries[1] and through proposals in multilateral fora. The EU has stated that its new international Enforcement Directive will be used as a source of inspiration to "revisit" the IPR chapters in FTAs. The Directive goes beyond TRIPS in several respects including:

- extending the presumption of authorship detailed in the Berne Convention (i.e. for authors), to right-holders of related rights (for example, performer, producers of phonograms), thus shifting the burden of proof from claimants to defendants (eventual infringer would bear the burden of proving that the claimant is not the owner of the related right).
- extra rights of information-gathering in infringement cases, which may disproportionately facilitate the right-holders' work to the detriment of small and medium enterprises.

All in all, such detailed provisions may affect the freedom of countries stated in TRIPS "to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice" (TRIPS, Article 1.1) and also impose standards originally designed for EU countries.

A Council Regulation on customs actions against goods infringing IPRs, requires authorities to take measures against goods not only when they are imported (the TRIPS requirement) but also on export and in transit. It also covers all types of IP, whereas TRIPS only mandates for trademarks and copyright. Other EU legislation precludes the TRIPS flexibility for small amounts of infringing goods to be imported for non-commercial purposes by travellers or in small consignments. In recent drafts the EU has not included binding provisions on enforcement, although its stated intentions are clear, and these provisions are more frequently appearing in US FTAs.

Recent EU draft IP chapters recognise the importance of the Declaration and Decision on TRIPs and **Public Health** and require the parties to accept the amending protocol. This is a positive measure. However, requirements to sign up to the Patent Co-operation Treaty may indirectly have adverse impacts on public health by increasing the number of patents applicable in developing countries; also it contains a condition that limits the right of countries to select their exhaustion regime. This means that countries are limited in their ability to import cheaper

1 Nov 2004 Strategy to Enforce Intellectual Property Rights in Third Countries, http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_120025.pdf

generic versions of patented drugs from third markets. In recent drafts the EC has avoided provisions on **data exclusivity**. Rules that would prevent producers of drugs or agricultural chemicals being able to use undisclosed data in their licence applications and would hinder the availability of cheaper generic products have not been included. These more lenient provisions in EU FTAs might not apply to the larger developing countries and regions, where the EC might push for more far-reaching deals.

Latest EC drafts also contain far-reaching provisions on **industrial designs**. There is a requirement to sign up to the Hague Agreement concerning the International Registration of Industrial Designs which allows the application for registration of a design to have effect in other parties' jurisdictions. It also extends the term of protection for designs from the ten years required under TRIPS to 25 years. It also seeks short-term protection of unregistered designs for a period of three years.

Finally, the **most favoured nation (MFN)** principle in the TRIPS Agreement means that whenever countries give a higher level of protection to any country, they must immediately accord it to all other members of the WTO. This means that all TRIPS-plus provisions will apply not only to EU nationals, but to nationals of all WTO members. This also means that for countries that have already signed FTAs with the USA, which tends to push for far-reaching TRIPS-plus provisions, these may already apply to EU nationals.

In terms of offensive interests, developing country interests look as though they will be better served in future Economic Partnership Agreements. Draft texts contain provisions relating to protection of genetic resources and traditional knowledge, assistance with implementation costs, and positive action on technology transfer and research and development.

Useful information and where to find it

Information on TRIPS
www.wto.org/english/tratop_e/trips_e/trips_e.htm

World Intellectual Property Organisation (contains links and explanations for most international IPR agreements)
www.wipo.int

Intellectual property watch (provides news and analysis on IPR developments)
www.ip-watch.org

South Centre:
www.southcentre.org/publications/publist_issue_area_GovernanceAndIP_index.htm

UNCTAD/ICTSD portal on IPRs
www.iprsonline.org/unctadictsd/description.htm

NGO websites

Médecins sans Frontières (MSF) on access to medicines
www.accessmed.msf.org

Centre for International Environmental Law on IPR and sustainable development
www.ciel.org/Tae/Trade_IntProperty.html

The EU FTA Manual is a series of eight briefings on the European Union's approach to Free Trade Agreements.

1. Introduction: Tackling EU Free Trade Agreements
2. Inside European Union Trade Policy
3. The EU's approach to Free Trade Agreements: Market Access for Goods
4. The EU's approach to Free Trade Agreements: Services
5. The EU's approach to Free Trade Agreements: Investment
6. The EU's approach to Free Trade Agreements: Competition
7. The EU's approach to Free Trade Agreements: Government Procurement
8. The EU's approach to Free Trade Agreements: Intellectual Property

We will be updating these briefings as negotiations and understanding progress, and would welcome your feedback.

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