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Economic Partnership Agreements and Intellectual Property Rights Protection: Challenges for the Southern African Development Community Region

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ABSTRACT

The signing of the comprehensive Economic Partnership Agreement (EPA) by the European Community (EC) and Caribbean Forum (CARIFORUM) countries covering a wide range of issues, including intellectual property (IP) provisions, has the potential to influence negotiations for other EPA groups that have only signed a series of 'goods-only' interim EPAs. Even though IP is not included as one of the areas for further negotiations under the Southern African Development Community (SADC) interim EPA, there is possibility that the EC may make proposals for IP negotiations, since it is known to have a history of including IP provisions in its bilateral agreements. Generally, its approach has been to have its partners sign up to or accede to agreements containing the highest standards of IP as evidenced in the CARIFORUM EPA.

This paper explores the implications for SADC EPA states of inclusion of IP provisions in the EPA in light of the probability that the EC may propose standards similar to those provisions in the innovation and IP chapter of the CARIFORUM EPA. It focuses on those provisions of the CARIFORUM EPA that may pose challenges to the SADC EPA countries and makes recommendations in the approach for possible IP negotiations for the SADC EPA countries.

ABOUT THE AUTHOR

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ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific
ARIPO	African Regional Intellectual Property Organisation
AU	African Union
AU Model Legislation	Draft Model Legislation on Community Rights and Access to Biological Resources
BLNS	Botswana, Lesotho, Namibia and Swaziland
CARIFORUM	Caribbean Forum
CBD	Convention on Biological Diversity
EC	European Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
GATT	General Agreement on Tariffs and Trade
GI	geographical indication
IEPA	interim Economic Partnership Agreement
IP	intellectual property
IPR	intellectual property rights
IPRED 1	Council Directive 2004/48/EC on Intellectual Property Enforcement
LDC	least-developed countries
MFN	most-favoured nation
R&D	research and development
RMI	rights management information
SACU	Southern African Customs Union
SADC	Southern African Development Community
TDC	Trade and Development Committee
TK	traditional knowledge
TRIPS	Trade Related Aspects of Intellectual Property Rights
UPOV	Union for the Protection of New Varieties of Plants
WIPO	World Intellectual Property Organisation
WCT	WIPO Copyright Treaty
WPPT	WIPO Performance and Phonograms Treaty
WTO	World Trade Organisation

INTRODUCTION

The negotiations for Economic Partnerships Agreements (EPAs) between African, Caribbean and Pacific (ACP) countries and the European Community (EC) were launched in 2000. These negotiations were carried out in terms of the Cotonou Agreement, which seeks to replace the non-reciprocal trade preferences (under the Lomé Agreement) that the ACP countries have been receiving from the EC. The aim was to conclude full and comprehensive agreements by the end of 2007 so as to meet the deadline for bringing the EC's preferential trade arrangements for goods with the ACP countries into conformity with the World Trade Organisation (WTO) General Agreement on Tariffs and Trade (GATT).¹ These negotiations were carried out in six groups: the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the Economic and Monetary Commission of Central Africa, the Caribbean Forum (CARIFORUM) and the Pacific Forum.²

By January 2008 only the CARIFORUM group had signed a comprehensive EPA with the EC covering trade in goods and a wide range of other trade and related disciplines, including intellectual property rights (IPR). (This will be referred to as the CARIFORUM EPA.) All the other ACP countries had only signed interim EPAs (IEPAs) with limited subject coverage.³

Regarding the second phase of negotiations, the SADC IEPA expressly provides for further negotiations on 'new generation' issues, i.e. trade in services, investment, competition and government procurement. IPR are clearly excluded. Arguably, the only mandate for the inclusion of IPR is the strengthening of further co-operation pursuant to the Cotonou Agreement itself. SADC EPA countries are not committed to negotiating on IPR and may exclude them entirely from the negotiations. However, the EC has emphasised that certain issues must be included in the EPAs, one of which is IPR.

Questions may be raised in respect of the scope to which the intellectual property (IP) provisions of the CARIFORUM EPA comply with obligations under the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.⁴ The implementation of the TRIPS Agreement already raises many challenges for developing countries, including the SADC EPA countries (three of which are least-developed countries — LDCs).⁵ The inclusion of IP provisions in the EPAs may have serious socio-economic and developmental impacts for ACP countries. The EPA negotiations also have the potential to harmonise ACP standards with EC regulatory norms through proposals being put forward by the EC. It is not clear that this level of regulatory rigour is appropriate to African development realities, nor whether it would be realistically implementable.

It is therefore important that these considerations should be kept in mind when considering IPR issues in the EPAs generally and those related to SADC countries in particular. There is a possibility that IPR provisions in the CARIFORUM EPA may be used as model and therefore influence the negotiation of EPAs for other regions. Consequently, there would be lessons to be learned from the innovation and IP provisions in the CARIFORUM EPA.

The main question to be addressed in this paper is: What are the opportunities and challenges for the SADC EPA group in negotiating IPR? The paper intends to analyse the scope of some of the significant obligations in the innovation and IP chapter of the CARIFORUM EPA vis-à-vis the TRIPS Agreement. It will further evaluate the potential

developmental impact of these provisions on SADC EPA countries. Lessons from these provisions will also be examined.

This paper has been divided into five main parts. Following this introduction, the second part addresses the international context of IP and their status in the SADC EPA negotiations. The third part examines the significant innovation and IP provisions of the CARIFORUM EPA and their developmental impacts. The fourth part analyses regional IP arrangements for the SADC EPA countries, while the fifth part evaluates lessons for the SADC EPA countries drawn from the CARIFORUM EPA IP and innovation chapter. The last part concludes the paper.

BACKGROUND

The past few decades have seen a general acceptance that knowledge is central to development and general human progress. This 'knowledge society' and the rise of institutions that represent the face of globalisation such as the WTO have propelled the hitherto deep issues of IP and the implications for innovation and development into the global public policy debate. International IP rules and standards, which are expanding significantly, have important implications for the governance of knowledge. Policymaking at the national and international levels is struggling to cope with the challenges of technology transformations and the competing ideas about how the knowledge society should be governed. These rules have effects in all aspects of life, e.g. access to medicines, educational materials and seeds. Even though new technologies can empower some actors, they can equally threaten others. For developing countries, the challenge lies in how to transform the power of knowledge and balance the various interests involved so as to get real benefits.⁶

Status of IPR negotiations in the SADC IEPA

By December 2007 most ACP groups, including the SADC EPA countries, had initialled 'goods only' IEPAs with the EC.⁷ These IEPAs contain provisions for further negotiations on other trade-related issues. In the SADC IEPA, the issue of future EPA negotiations is addressed in Part IV, Title IV. Under Article 67 of the IEPA, the parties committed themselves to continue negotiations in 2008.⁸ Regarding this second phase of negotiations, the SADC IEPA expressly provides for further negotiations on 'new generation' issues, i.e. trade in services, investment, competition and government procurement. Clearly, this does not include IPR. Thus, the SADC EPA countries are not committed to negotiating on IPR and may exclude them entirely from negotiations.⁹ Moreover, the SADC framework makes it clear that the members of the SADC group do not consider themselves to be in a position to negotiate substantive obligations regarding what are called 'new generation' trade issues, which include IP.

The EC, however, has made it clear that certain issues must be included in the EPAs, one of which is IPR.¹⁰ The EC has been known to have a history of including IPR in its bilateral agreements. Its approach has been to have its partners sign up or accede to agreements containing the highest standards for the protection of IPR.¹¹ This has also been stated in an EC trade policy review, which states that 'the EC should seek to strengthen IPR

provisions in future bilateral agreements and the enforcement of existing commitments'.¹² The EC has argued that the mandate to negotiate IP protection emanates from Article 46 of the Cotonou Agreement.

Article 46 sets out the objectives of the parties and their understanding regarding IP protection within the EPAs framework. Article 46(1) provides that the parties recognise

the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS including protection of geographical indications, in line with the international standards with a view to reducing distortions and impediments to bilateral trade.

This is, however, subject to the fact that the positions of the parties in the multilateral negotiations should not be prejudiced. To fulfil the requirements of Article 46(1), the parties will therefore have to adhere to the international standards referred to.

Article 46(2) underlines the importance of adherence to the TRIPS Agreement and the Convention on Biological Diversity (CBD). The implementation of the TRIPS Agreement already raises many challenges for developing countries, including the SADC countries. These range from the impact of the various categories of the IPR covered under the TRIPS Agreement on the development of various sectors, to administrative and financial challenges, especially with respect to enforcement.¹³

In Article 46(3) of the Cotonou Agreement, the parties also agree on the need to accede to all relevant international conventions on intellectual, industrial and commercial property, as referred to in Part I of the TRIPS Agreement, in line with their level of development. Part I of the TRIPS Agreement refers to four conventions: the Paris Convention for the Protection of Industrial Property; the Berne Convention for the Protection of Literary and Artistic Works; the International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organisations; and the Treaty on Intellectual Property in Respect of Integrated Circuits. It should be pointed out that SADC countries designated as developing countries under the WTO are already required to implement the provisions of these treaties. However, LDCs will be required to implement these provisions once the transition period under Article 66(1) of the TRIPS Agreement expires.¹⁴

Further, Article 46(4) of the Cotonou Agreement provides that under the EPAs, parties may consider the conclusion of agreements aimed at protecting trademarks and geographical indications (GIs) for products of particular interest of either party. The language that has been used is permissive, using 'may' rather than mandatory language such as 'shall'. ACP countries may thus pursue such further agreements if they wish, but there is no actual obligation to pursue negotiations in this regard and even less so to conclude provisions on trademarks or GIs. ACP countries are well within their rights to refuse to consider or conclude such further agreements. Nevertheless, as will be seen, the EC has strong interest in the protection of its GIs, and in all probability may push for negotiations on GIs.¹⁵ At worst, the SADC countries would therefore have to consider products of particular interest, and on balance there would be benefits from making commitments in this area to the EC.

Clearly, Article 46 of the Cotonou Agreement does not commit ACP countries to increasing their protection of IP. The mandate for inclusion of IPR is the strengthening of further co-operation pursuant to Article 46(6), which states:

The parties further agree to strengthen their co-operation in this field. Upon request and on mutually agreed terms and conditions cooperation shall inter alia extend to the following areas: the preparation of laws and regulations for the protection and enforcement of intellectual property rights, the prevention of the abuse of such rights by right holders and the infringement of such rights by competitors, the establishment and reinforcement of domestic and regional offices and other agencies including support for regional intellectual property organisations involved in enforcement and protection, including the training of personnel.

Therefore, the EC's assertion that the only way to give effect to Article 46 is to ensure that the EPA will 'include both substantive IP rules, including on enforcement, and co-operation aspects' is incorrect.¹⁶ However, any action to be taken by SADC states will have to take into account that in June 2007 the EC put forward a proposed text on IPR that the SADC group received, but did not officially acknowledge. Even though this text does not represent an agreed basis for negotiations, it is likely that the EC may seek to have it do so. This text also represents the template that the EC used in the ECOWAS and CARIFORUM EPA negotiations. In addition, given the importance of GIs and enforcement to the EC, it is not likely to want significant variation on IPR rules agreed to in EPAs, as it would be unwilling to subject its companies to differing levels of IPR protection in different ACP regions.¹⁷

Consequently, as most of the agreements are interim ones, pending finalisation of full EPAs, new generation issues, possibly including IPR, may be included in the negotiations.

The international framework for IPR

Internationally, IPR have been seen as having played an important role in the rapid growth in the application of science and technology, with new innovations offering vast possibilities to address the challenges of hunger and food security, environmental degradation, and diseases. However, the claims for IPR have in some cases impeded progress or impacted negatively on access to goods and services.¹⁸

The adoption and entry into force of the TRIPS Agreement substantially changed the international IP regime by introducing the principle of minimum IPR standards. Standards in the TRIPS Agreement have constituted a significant conceptual basis for subsequent multilateral and bilateral IPR negotiations, which are increasingly setting higher and more expansive standards.¹⁹ Consequently, this has led to increasing debates on the relationship between IP and innovation, on the one hand, and development, on the other, even within the World Intellectual Property Organisation (WIPO) through the Development Agenda.²⁰ This relationship has been controversial, especially for developing countries. For example, as Musungu puts it, 'proof of the correlation between strong IPR and foreign direct investment ... remains elusive'.²¹

However, a number of international landmarks have been achieved over the past few years that address challenges, especially for developing countries, e.g. the (2001) Doha Declaration on the TRIPS Agreement and Public Health,²² when WTO member states reaffirmed the flexibility of the TRIPS Agreement whereby member states could circumvent patent rights for better access to essential medicines. This could be evidence

of the growing realisation by both developed and developing countries of an appreciation of the development-related concerns in IP. These concerns include the realisation that the implementation of the TRIPS Agreement already raises many challenges for developing countries, including administration in the area of enforcement. SADC countries' and all ACP countries' negotiations on IPR in the EPAs should therefore be premised on the desire to utilise IPR for development, while at the same time minimising the costs of integration into the international IP system. This is linked to the fact that developing countries should realise that generally there are significant factual differences between the EC and the ACP countries in terms of their needs, levels of development and national priorities. These have to be taken into account in the negotiations of the objectives and ingredients of the IP and innovation provisions of EPAs.²³ Moreover, the EC and the ACP countries (including the SADC EPA group) need to realise that the international IP system is constantly changing, as was pointed out earlier.

ANALYSIS OF THE INNOVATION AND IP CHAPTER OF THE CARIFORUM EPA

Chapter 2 of the CARIFORUM EPA contains detailed provisions on IP and innovation. This section analyses important provisions of the innovation and IP chapter of the CARIFORUM EPA. It is important to point out that the chapter has provisions relating to most of the IPR provided in the TRIPS Agreement. However, this analysis will focus on those provisions that may pose challenges for developing countries.

Context and objectives of the innovation and IP chapter

The context of the innovation and IP chapter is set in Article 1(1), where the parties recognise that 'fostering innovation and creativity improves competitiveness and is a crucial element in their economic partnership, in achieving sustainable development, promoting trade between them and ensuring the gradual integration of CARIFORUM States into the world economy'. The parties also recognise that the 'protection and enforcement of IP plays a key role in fostering innovation, creativity and competitiveness'. The parties acknowledge that the level of development should determine the appropriateness of increasing the level of IP protection, while avoiding the presumption that increased levels of protection automatically result in innovation and development.

Article 2 outlines the objectives of the innovation and IP chapter of the CARIFORUM EPA. These include promoting innovation and research and development (R&D),²⁴ fostering the competitiveness of enterprises,²⁵ facilitating the production and commercialisation of innovative and creative products,²⁶ transferring and disseminating technology and know-how,²⁷ promoting and strengthening regional co-operation,²⁸ and achieving an adequate and effective level of IP protection and enforcement.²⁹ These objectives are commendable, as they highlight the developmental approach of IP protection for developing countries.

However, Musungu suggests that the EPA should have had an objective relating to the availability of and access to the products of innovation in various sectors. He argues that the lack of this objective leaves 'doubt as to the centrality of development in the interpretation and implementation of the Chapter'.³⁰ While not undermining the

importance of ‘access’ as a component of innovations, it should be borne in mind that access depends on a number of factors, including pricing, which impacts on affordability; the availability and suitability of the products of innovation; government policies (such as customs duties); and government resource constraints, e.g. where it is the only procurer of the products of innovation, like learning materials for primary and secondary schools. Consequently, the question of access will, arguably, largely depend on the policies of the specific EPA negotiating governments, and including such an objective would add little significance to the developmental orientation of the innovation and IP chapter.

IP in EPAs and the most-favoured nation principle

The most-favoured nation (MFN) principle forms the bedrock of the GATT system.³¹ It ensures equality of treatment among contracting parties by prescribing that all concessions and advantages accorded by a GATT contracting party to any other state should be immediately and unconditionally extended to all other contracting parties. The GATT and the General Agreement on Trade in Services allow for an exception to the MFN principle in respect of regional trade agreements.³² However, this is not included in the TRIPS Agreement,³³ therefore ACP countries that are WTO members will be obliged to extend the same treatment to all WTO members. In addition, any further IP protection that the EC provides to ACP countries will also have to be extended to all WTO members.

The innovation section of the chapter

This is the first time that an innovation section has been explicitly included in a bilateral agreement.³⁴ The section makes provisions for co-operation in the areas of competitiveness and innovation,³⁵ science and technology,³⁶ information society, information and communication technologies,³⁷ and eco-innovation and energy.³⁸ This provision should be praised for being comprehensive. However, shortfalls exist, as there are no substantive obligations. The provisions basically address development assistance and co-operation, with no definite obligations on the part of the EC.

The IP section of the chapter

This is a comprehensive section covering various IP issues. An analysis of this section is warranted, because, as was pointed out above, ACP countries, including SADC EPA countries, are not under an obligation to negotiate on IP in the EPAs.

Nature and scope of IP obligations

Article 1 of the IP section sets out the scope of the IP obligations of the parties to the CARIFORUM EPA. Under Article 1(1), the parties are committed to ‘ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are parties and of the Agreement on Trade-related Aspects of Intellectual Property’. This commitment seems to imply that the obligations are limited to the implementation of the international agreements to which the countries are already parties.

In Article 1(2), the parties further agree that the principles set out in Article 8 of the TRIPS Agreement shall form part of the principles of the CARIFORUM EPA.³⁹ Further, they recognise that

the measures to ensure an adequate and effective enforcement of IPR should take account of the development needs of the CARIFORUM states and provide a balance of rights and obligations between right holders and users and allow the parties to protect public health and nutrition.

The article also provides that nothing in the CARIFORUM EPA agreement can be construed to prevent CARIFORUM countries from ensuring access to medicines.

Transition periods

Article 1(4) provides for a general transition period for the implementation of the EPA. The parties shall give effect to the IP provisions in the agreement and ensure their adequate and effective implementation no later than 1 January 2014. However, taking into account the development priorities and the levels of development of the CARIFORUM states, the Trade and Development Committee (TDC) has the power to determine an extension of the period beyond this deadline.

The transition period for CARIFORUM LDCs is set out in Article 2. These countries have until 1 January 2021 to implement IP provisions, subject to two conditions. LDCs are required to implement these obligations in line with the TRIPS Agreement transitions for such countries. This means that the LDCs' transition period for IP provisions automatically expires the moment the TRIPS Agreement transition for LDCs expires. Under the TRIPS Agreement, LDCs have a transition period until 1 July 2013, and until 2016 for pharmaceutical patents specifically.⁴⁰ As for all other parties of the CARIFORUM EPA, the TDC has the power to extend the transition period, taking into account the relevant decision of the TRIPS Council.

Innovation and technology transfer

Technology transfer is a complex process involving the shift of codified knowledge, know-how and management techniques. There are several formalised means of transferring technologies, including foreign direct investment, joint ventures, wholly owned subsidiaries, licensing, technical service arrangements, joint R&D arrangements, training, and information exchanges. Most developing countries are generally net importers of new technologies and products, and therefore a critical source of technical change is incoming technology transfer. Generally, there is information asymmetry between technology holders in the developed countries and recipients in the developing countries.

Technology transfer is addressed in Article 4 of the IP section of the CARIFORUM EPA. The parties undertake to exchange views and information affecting technology transfer. These shall include measures to facilitate information flows, business partnerships, licensing and subcontracting. There will be a particular focus on creating an enabling environment for technology transfer in host countries, including human capital and a legal framework.⁴¹ This commitment by the EC is very commendable, as there is no similar commitment under the TRIPS Agreement.

Further, the parties agree to

take measures to prevent or control licensing practices or conditions pertaining to IPR that may adversely affect the international transfer of technology and constitute an abuse of IPR by right holders or an abuse of information asymmetries in the negotiation of licences.

This commitment goes beyond the language of Articles 8(2) and 40(2) of the TRIPS Agreement,⁴² which basically leave it up to the member states to determine what constitutes abuse of IPR, and to put in place measures needed to prevent such abuse and practices that unreasonably restrain or affect the international transfer of technology.

Important also is the recognition of the problem of ‘information asymmetries’. This is of particular interest to enterprises in developing countries. Even though there are no detailed rules on how to address this issue, the mere recognition of the problem provides an opportunity to move towards concrete action.⁴³

In Article 4(3), the EC undertakes to ‘facilitate and promote the use of incentives granted to institutions and enterprises in their territories for the transfer of technology to institutions and enterprises of the CARIFORUM states in order to enable these states to establish a viable technological base’. This is an important provision for developing countries, since under Article 66(2) of the TRIPS Agreement, the incentives are only required to be provided to enterprises and institutions to promote transfer of technology to LDCs. Fortunately, in the EPA, CARIFORUM developing countries members will also benefit.

However, there seems to be one shortcoming in this provision. The language seems less obligatory than that of the TRIPS Agreement, which uses the phrase ‘shall provide incentives’. The EC only commits itself to ‘promote’ and ‘facilitate’. It would have been more beneficial for developing countries and LDCs if the language were more obligatory. Overall, it is difficult to envisage implementation of this obligation.

Copyright and related rights

Copyrights give exclusive rights to the authors of original literary, artistic and musical works. The TRIPS Agreement provides that these rights shall last for the life of the author plus a period of 50 years after his/her death.⁴⁴ The essence of copyright is to prevent unauthorised reproduction of the copyrighted work. Copyright seek to balance the rewards to creators with the public interest in gaining access to the work. Copyright has some closely related rights that follow similar principles of protection called ‘related rights’. These rights protect persons other than the creators who are involved in the dissemination of the copyrighted works, e.g. performers, producers of phonograms and broadcasting organisations.⁴⁵

Article 5 of the IP section sets out the obligations of the parties in the area of copyright and related rights. CARIFORUM EPA countries are obliged to comply with the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁴⁶ Article 5(2) also obliges CARIFORUM EPA states to accede to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

The WCT and WPPT were basically adopted to address protection of copyrighted works in the digital environment. The WCT provides protection to authors of literary and artistic works, computer programmes, and data compilations. It specifically provides

for rights of distribution, rental and communication to the public.⁴⁷ Further, Article 11 of the WCT obliges members to provide protection against the circumvention of ‘effective technological measures’ used by authors in connection with the exercise of their rights. This provision requires members to sanction efforts to circumvent technological protections used by owners to control access to or use of protected works. For example, encryption of protected digital content or password protections of such content constitute ‘effective technological measures’. Providing a user with directions to decrypt the content or software that allow a user to bypass the password screen are examples of acts of circumvention prohibited under Article 11.⁴⁸

Article 12 of the WCT requires remedies against persons who tamper with rights management information (RMI) knowing or having reason to know that such tampering will induce, enable or facilitate copyright infringement. The treaty defines RMI as information that identifies the work, including the author, the owner of a particular right in the work or information concerning the terms of use of the work.⁴⁹ Such information is generally intended to facilitate the identification of owners and facilitate payment/permission to use the work. In the digital environment, RMI is an important tool for owners to monitor, control and enforce copyright interests.

The WPPT, on the other hand, provides protection to performers and producers of phonograms. Performers are accorded:⁵⁰

- moral rights for live oral performances or performances fixed in phonograms;
- the right to authorise broadcasting and public communication of unfixed performances and to fix their unfixed performances;
- the right to authorise reproduction of their fixed performances;
- the right to authorise distribution to the public of their fixed performances;
- the right to authorise the commercial rental to the public of copies of their performances; and
- the right to authorise making available to the public their performances fixed in phonograms by wire or wireless means.

Producers of phonograms enjoy the exclusive right of authorising their reproduction, distribution to the public, commercial rental to the public, and making them available to the public by wire or wireless means.⁵¹ Both performers and producers of phonograms enjoy a right to remuneration for commercial broadcasting or any communication to the public.⁵² The WPPT and the WCT contain the same member obligations with respect to the circumvention of technological measures and the protection of RMI.⁵³

As far as developing countries are concerned, the anti-circumvention and RMI clauses in these treaties have been the most controversial, particularly as they apply to public access to digital works. As Okediji puts it, ‘rather than facilitate prospects for diffusion and access to works, the copyright regime has been co-opted to consolidate social gains associated with new technologies and to transform these gains into economic opportunities for owners’.⁵⁴

These treaties therefore pose challenges for public access to digital information for various purposes, including education, research and cultural activities. It is important to point out that most developing countries are being obliged to ratify these treaties, even

though they have extremely low Internet access or penetration rates. As of November 2008 only Botswana among the SADC countries is a signatory of these treaties.⁵⁵

Consequently, membership of the treaties in the absence of the technological infrastructure to access and use digital works may simply transform ACP countries into subsidisers of the global copyright system. These countries are providing protection for works to which they have little or no opportunity of access, at least in the short term. Low Internet use and penetration already supplies a layer of access barriers for the public in developing countries; adding extra copyright obligations to existing technological challenges unjustifiably and pre-emptively raises the cost of access to copyrighted works. In the regional context, this expansive protection for digital works also has implications for how protected works may circulate between high-income developing countries, where access may be more probable, and low-income developing countries, where access rates are negligible. Given the unprecedented availability of literary and artistic works on the Internet, it is highly prejudicial for developing countries and LDCs to adopt copyright laws that make access to this vast resource space more difficult or costly.⁵⁶

Developing countries can also exploit the benefits information technology can offer to their domestic cultural industries, especially through accessing the global music industry. Developing countries can adopt a staged approach that corresponds to the level of available technology to enhance the music supply chain and to generate new markets for the distribution of domestic music. These countries can also utilise the available price and distribution models to facilitate producer-to-consumer sales between artists in developing countries and the global audience.⁵⁷ Information technology can also be used for advertising and promotion, in addition to sales and distribution.

Moreover, developing countries can also utilise information technology in education, since this has been identified as a development priority for the information age. The Internet, therefore, has the potential of playing an important role in this regard. Developed and developing countries can create institutional alliances so as to offer distance learning education, thereby creating an opportunity to educate people from developing countries. In this regard, the copyright laws of many developing countries will have to be modified to legitimise policies that seek to use the Internet to access educational material available in digital format.

Consequently, SADC EPA countries will have to argue against expansive copyright protection at the expense of important development goals. They will have to insist on the possibility of enacting domestic limitations, including the application of compulsory licences that would encourage access to and use of digital works. Developing countries generally should realise that copyright is necessary as a developmental tool. However, this can only be achieved if an effective system of protection is balanced by limitations to encourage competition and socially beneficial uses.

Another important factor to be borne in mind is that exploiting the potential of information technology to facilitate developmental goals requires access to hardware, software and content that are not readily available in developing countries.⁵⁸

Geographical indications

GIs are distinctive signs identifying products of several undertakings located in a specified geographical area. They basically identify a good as originating in the territory where the given quality, reputation or other characteristics of the good are essentially attributable

to its geographical origin, e.g. ‘champagne’ when referring to the sparkling wine from the Champagne district of France, ‘scotch’ for whisky from Scotland and ‘Darjeeling’ tea from India. There are significant differences in the terminology used in national laws and international treaties dealing with this area.⁵⁹

GIs protection can bring benefits to a country’s economy, thereby contributing to uplifting standards of living. GIs are considered more suitable to the ethos and cultural practices of peoples. They tend to be land-based products and exhibit historical and symbolic links between product and place of origin. GIs have potential benefits for developing countries as well. These could include maintaining the reputation of products and securing premium prices for them. GIs can further boost rural development by ensuring greater returns to local producers and offering niche marketing opportunities, and could be a possible tool for protecting traditional knowledge.⁶⁰

The TRIPS Agreement provides two levels of protection for GIs. At the basic level, Article 22 mandates member states to protect all GIs against use that would mislead the public or constitute an act of unfair competition. In addition, under Article 23, TRIPS obligates the protection of GIs on wines and spirits per se or in absolute terms, without requiring any test of confusion or likelihood of deception. In the special case of wines and spirits, Article 23(1) prohibits the use of translations of GIs or the attachment of expressions such as ‘kind’, ‘style’ or ‘imitation’ to products not originating from the place indicated, even though the true origin is clearly indicated.⁶¹ In order to further facilitate the protection of GIs for wines, the TRIPS Agreement provides that negotiations shall be undertaken in the TRIPS Council concerning the establishment of a multilateral system for the notification and registration of GIs for wines eligible for protection.⁶²

In the Doha Round of multilateral trade negotiations, there are negotiations on additional protection of GIs for other products other than wines and spirits, including the establishment of a register for wines and spirits, considerations as to whether the higher protection granted to wines and spirits should be extended to other products, and the linkage between agriculture and GIs negotiations.⁶³

Protection of GIs is one of the areas where the EC has pushed the hardest, not just in the EPAs, but also in the WTO and its other bilateral negotiations. The EC has a well-defined system for granting GIs.⁶⁴ The EC’s approach in negotiating provisions on GIs in the CARIFORUM EPA has been to extend the existing protection for wines and spirits in the TRIPS Agreement to all other goods potentially protectable by GIs.

Article 7 of the IP section of the CARIFORUM EPA contains provisions on GIs that cover a range of issues, including the scope of protection, the rights to be granted to the holders and the relationship with trademarks, among other issues. Article 7.1(1) establishes that GIs are ‘only protected in the other party if they are protected in the country of origin’. While seemingly basic, this provision privileges the EC, which has an extensive system of protection in comparison to CARIFORUM EPA countries, which have yet to establish a full system of identifying and accrediting GIs.

Provisions for GI protection in the IP section are crafted in the broadest possible way to the same extent as in the EC. Article 7.2(1) provides that the protection of GIs shall be indefinite. This protection shall be in accordance with the legal system and practice of the EC and relevant signatory CARIFORUM states. It is important to highlight that most CARIFORUM countries do not have any system of GIs protection, with the result that the EC system will guide the protection of GIs.

The protection of GIs may involve serious challenges for developing countries, especially the SADC EPA countries. Challenges may include restrictions on local producers from renaming, labelling, remarketing or rebranding. There would also be significant costs for the administration of the protection system.⁶⁵ Consequently, it is important that the CARIFORUM EPA countries carry out an empirical study to help in determining the benefits of GIs protection to their economies. This should involve an identification of products of interest to them and consider the actual or potential market value.⁶⁶

Traditional knowledge and genetic resources

SADC EPA countries, like many other ACP countries, have special interests in the protection of genetic resources, traditional knowledge (TK) and folklore. SADC countries are taking the initiative to develop a regional framework for such protection within the framework of the organisation.⁶⁷ Moreover, specific countries are developing policies and legislation for such protection.⁶⁸ Internationally, there are a range of discussions on this area within the framework of the WTO, the CBD, and WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore, where developing countries are requesting the protection of TK and steps to prevent bio-piracy. However, progress in these forums is not yet definite.

Article 12 of the IP section addresses the issue of genetic resources, TK and folklore. In Article 12(1), the parties commit themselves to promoting, preserving and maintaining the knowledge, innovations, and practices of indigenous and local communities. Although these are important steps, there are no positive commitments regarding the protection of TK and folklore. Nothing in the language of the provision goes beyond already existing language and obligations in multilateral agreements.⁶⁹

The parties agree to continue working towards the development of internationally agreed *sui generis*⁷⁰ models for the legal protection of TK,⁷¹ implement the patent provisions of the IP chapter and the CBD in a mutually supportive way,⁷² and regularly exchange views and share information on relevant multilateral discussion.⁷³

In the WTO Doha Round of negotiations, developing countries have strongly argued for the amendment of the requirements for patentability under Article 27 of the TRIPS Agreement to include a requirement that where the subject matter of a patent application is derived from (or developed through) resources and/or associated TK, applicants should disclose the country of origin of the resources or associated TK. The applicant should also provide evidence of compliance with the applicable legal requirements, including prior informed consent for access and fair and equitable benefit sharing in the country of origin.⁷⁴

In this regard, therefore, one achievement for CARIFORUM countries is the obligation in Article 12(4) requiring that

as part of the administrative requirements for patent application concerning an invention which uses biological material as a necessary aspect of the invention, the applicant should identify the sources of the biological material used, and this should be described as part of the invention.⁷⁵

This disclosure requirement has the potential to enable the tracking of biological resources, improve the quality of patents, prevent misappropriation, and ensure benefit sharing with

local and traditional communities. Although the inclusion of the disclosure requirement is an important step, the system is not mandatory. There are no provisions to address the legal effects resulting from non-compliance. Moreover, it would have been of benefit to CARIFORUM countries if the provision were broadly crafted to encompass all inventions that concern, use, or are derived from biological resources and the use of TK associated with genetic resources.⁷⁶

Overall, it can be discerned that in the protection of TK and folklore, the EC seems to take refuge in the caveat in Article 46(1) of the Cotonou Agreement, where the parties agree that the EPAs 'should not prejudice the position of parties in multilateral negotiations'. SADC EPA countries would have to critically analyse this provision, as it has the potential to address their efforts so far in the various multilateral negotiations on genetic resources and TK in the WTO and WIPO.

Plant variety protection

Article 11 of the IP section makes provisions for plant variety protection. Article 11(1) provides that the parties shall have the right to provide for exceptions to exclusive rights granted to plant breeders to allow farmers to save, use and exchange protected, farm-saved seed or propagating material. However, in Article 11(2), the parties commit themselves to providing protection of plant varieties in accordance with the TRIPS Agreement. In order to achieve this obligation, the parties shall consider acceding to the International Convention for the Protection of New Varieties of Plants (1961; rev. 1972, 1978 and 1991), which established the Union for the Protection of New Varieties of Plants (UPOV).

It should be borne in mind that Article 27(3)(b) of the TRIPS Agreement provides that member states shall provide for the protection of plant varieties 'either by patents or by an effective *sui generis* system or a combination of both'. The TRIPS Agreement does not provide guidance as to what constitutes a *sui generis* system, but the system has to be effective. Consequently, WTO members have the discretion to develop their own unique framework for plant variety protection, as long as it is effective.

Many countries have adopted plant variety protection regimes since the adoption of the TRIPS Agreement. A significant number of these countries have introduced plant variety protection legislation based on the UPOV system. The UPOV creates a system that rewards breeders of new varieties of plants by granting them exclusive rights to their varieties (referred to as plant breeders' rights).⁷⁷ As of 29 October 2008 South Africa is the only country in the SADC EPA that is a member of UPOV. The EC is a member of UPOV and has implemented plant variety protection through Council Regulation 2100/94 of 27 July 1994 on community plant variety rights.

A study conducted by the World Bank on the evaluation of initial experiences with plant breeders' rights in developing country agriculture focusing on five country case studies of China, Colombia, India, Kenya and Uganda concluded that even though it was rather too early to make general conclusions about the impact of plant variety protection in developing countries, overall there is inconclusive evidence as to the effects of plant variety protection both in developed and developing countries. This study concentrated on the effectiveness of new IPR regimes in providing added incentives for the breeding and seed sectors (both public and private) and the equity of outcomes for producers (with particular attention to smallholders).⁷⁸

It has, however, been acknowledged that the situation is quite complex and that IPR can fulfil a variety of roles in strategies to protect IP and to defend the effects of the introduction of plant variety protection in a number of countries.⁷⁹ For example, studies in the US indicate that while private sector breeding of a number of non-hybrid crops has increased following passing of the Plant Variety Act of 1970, for most crops it appears that plant variety protection has played only a moderate role in stimulating breeding activity.⁸⁰ In Argentina, on the other hand, studies concluded that plant variety protection may have prevented domestic companies from reducing or eliminating some breeding programmes and may have helped in reactivating research. However, multinational companies operating in Argentina indicated that their investment decisions were influenced primarily by other factors.⁸¹

In the African context, the Organisation of African Unity (which subsequently became the African Union — AU) developed a draft model legislation for the protection of rights of local communities, farmers and breeders and the regulation of access to biological resources (hereafter referred to as the AU Model Legislation). This was an attempt to assist members of the AU in developing their own policies, laws and regulations on access to bio resources generally.⁸² The AU Model Legislation intends to provide a *sui generis* system for the protection of local communities, farmers and breeders. It tries to give reasoned attention to the conservation of biodiversity, the sustainable use of biological resources, the maintenance of food security and the concept of national sovereignty.

The AU Model Legislation is instructive in that it recognises that states may not always be, and in fact have not always been, protective of the rights of communities over their local bio-resources, or have not ensured that communities benefit from their knowledge and practices.⁸³ It recognises ‘community intellectual rights’ as rights that are enshrined and protected under community norms and practices and customary law. Article 16 specifically acknowledges the rights of communities over their biological resources and knowledge, and the right to collectively benefit from the use of their biological resources and the utilisation of their knowledge, innovations, practices and technologies. These rights are recognised and protected under the norms and practices of customary law. Responsibility for determining what constitutes these rights rests upon the communities themselves.⁸⁴

The AU Model Legislation also acknowledges the enormous contribution made by traditional farmers in meeting food security needs through their agricultural management practices and innovations, which contribute to meeting the seed needs of the continent. These farmers’ rights are recognised as ‘stemming from the enormous contributions that local farming communities ... have made in the conservation, development and sustainable use of plant and animal genetic resources that constitute the basis of breeding for food and agriculture production’.⁸⁵ Article 26 admits the rights of farmers to the protection and equitable share of the benefits arising from their TK relevant to genetic resources; to utilise the farm-saved seeds or propagating material of farmers’ varieties and farm-saved seeds of protected varieties; and to use a protected new breeders’ variety to develop farmers’ varieties.⁸⁶ These farmers’ varieties and breeds shall be recognised and protected under the rules of practice as found in, and recognised by, the customary practices and laws of the concerned local farming communities, whether such laws are written down or not. The community itself has the duty of identifying varieties with specific attributes to be granted intellectual protection through a variety certificate.

Just as under the UPOV system, breeders' rights are protected as stemming from the efforts and investments made by persons/institutions for the development of new varieties of plants.⁸⁷ However, plant breeders' rights are granted subject to farmers' rights.⁸⁸ Of great importance is the scope of exemptions regarding plant breeders' rights that have been provided in Article 31. It allows any person or farming community to propagate, grow or use plant breeders' varieties for non-commercial purposes, including as the initial source of variation for the development of other new varieties; and to sell within a farm the plants or propagating material of the variety as food or to put it to any other use not involving the growing of plants or propagating of material.⁸⁹ Farmers are also free to save, exchange and use part of the seed from the first crop of plants that they have grown for sowing in their own farms in order to produce second and subsequent crops.⁹⁰ The AU Model Legislation can also provide the mechanism through which African countries can protect TK. However, one problem with the legislation is that it has no mechanism for enforcement. No African countries have adopted it as yet.

Therefore, from the analysis above, before SADC EPA countries can develop plant variety protection regimes under EPAs, they need to carefully consider the different seed systems in their countries. They need to balance the economic interests of different stakeholders in their plant variety industries, because, clearly, any monopoly right to be granted for the exploitation of any innovation in agriculture may potentially disadvantage particular stakeholders, in this case farmers. This analysis must take into account the existing systems that regulate seed production and marketing, and set bio-safety standards. Some countries in the SADC EPA, e.g. Namibia, are developing plant variety protection frameworks based on the AU Model Legislation.

Enforcement

One of the strategies for the introduction of IPR in the Uruguay Round of multilateral trade negotiations that resulted in the TRIPS Agreement was to ratchet up enforcement of IPR, particularly in developing countries and LDCs. Notwithstanding this decision, and the efforts that have already been put into implementing the TRIPS Agreement enforcement provisions, there is a growing campaign by developed countries to increase IPR enforcement in developing countries and LDCs.⁹¹ Increasingly, free-trade agreements (FTAs) are also seeking to introduce new and additional standards for IPR enforcement.

In the contexts of the EPAs, as with GIs, the EC has placed emphasis on the issue of IP enforcement as reflected in its Strategy for the Enforcement of IP Rights in Third Countries.⁹² The EC considers the lack of enforcement as a primary barrier to trade. Consequently, the Strategy seeks, among other things, to provide a long-term line of action for the EC with the goal of achieving a significant reduction in IPR violations in third countries, and to describe, prioritise and co-ordinate the mechanisms available to the EC for achieving the said goal. The strategy document argues that the enforcement strategy is, however, not intended to impose unilateral solutions or to propose a one-size-fits-all approach in promoting IPR enforcement or to copy other models of IPR enforcement or to create alliances against certain countries.⁹³

In respect of IPR enforcement, the Strategy notes that 'FTAs should include stronger provisions for IPR and competition, including for example provisions on enforcement of IPR along the lines of the EC Enforcement Directive'.⁹⁴ As a result, the approach by the EC on IPR enforcement in EPAs negotiations is based on its own IPR enforcement

framework as contained in Council Directive 2004/48/EC on Intellectual Property Enforcement (IPRED 1).⁹⁵ IPRED 1 constitutes the EC's exercise of its right to determine the appropriate method of implementing the TRIPS Agreement enforcement provisions and to achieve its own other goals. It is important, however, to highlight that the IPRED 1 was also specifically aimed at addressing the issues in the context of the EC internal market, taking into account the circumstances and legal practices of EC member states.⁹⁶ However, IPRED 1 is TRIPS-plus and, to a large extent, the provisions in the CARIFORUM EPA directly mirror the provisions in IPRED 1.

Key features of the TRIPS Agreement enforcement framework

In respect of IPR enforcement, the TRIPS Agreement contains detailed provisions on general obligations, civil and administrative procedures and remedies, provisional measures, special requirements related to border measures, and criminal procedures and penalties.

The general obligations are provided in Article 41. Members shall ensure that, firstly, the enforcement procedures in the TRIPS Agreement must be available in national laws so as to permit effective action against any act of infringement of IPR covered by TRIPS. These procedures should be applied in a manner that avoids the creation of barriers to legitimate trade and should provide for safeguards against abuse.⁹⁷ Secondly, IPR enforcement procedures must be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.⁹⁸ Thirdly, the decisions on merits should be reasoned, given in writing and made available to the parties of the proceedings without undue delay.⁹⁹ Fourthly, the parties to any enforcement proceedings must have an opportunity to review a first instance decision, provided that such an opportunity for review is not required with respect to criminal acquittals.¹⁰⁰ Finally, no obligation exists for the member states either to put in place a special judicial system for IPR enforcement separate from the normal court and administrative systems or to expend a higher proportion of state resources on IPR enforcement as compared to other laws.¹⁰¹

Articles 42–49 provide for civil and administrative procedures and remedies. Civil judicial IPR procedures should be available to defendants, including the right to have timely and sufficiently detailed written notice. The parties shall also have the right to be represented by legal counsel, present their case and evidence, and protect their confidential information; and not be subjected to procedures that impose overly burdensome requirements of personal appearances in court.¹⁰²

In respect of evidence, Article 43 grants judicial authorities the power to order the parties to produce evidence relevant to the other party's case.¹⁰³ In addition, they also have the power to make preliminary and final determinations based on the information presented to them in certain situations, subject to the parties having an opportunity to be heard.¹⁰⁴ Judicial authorities are also granted the power to order injunctions to prevent further infringement, including entry of goods into the channels of commerce. However, members are not required to grant such authority with respect to unintentional infringement, and they have the right to expressly prohibit injunctions with respect to compulsory licences and government-use licences contemplated under Article 31 of the TRIPS Agreement.¹⁰⁵ Further, judicial authorities are granted the power to:

- order damages to compensate for injury to right holders in cases of intentional infringement;
- order the infringer to pay the right holder's expenses, including legal fees, provided that members are under no obligation to grant judicial authorities power to order recovery of profits or pre-established damages;¹⁰⁶
- order the destruction of infringing goods, as well as materials and implements whose predominant use has been the creation of the infringing goods, provided that the need for proportionality between the seriousness of the infringement and the remedies ordered and the interest of third parties is taken into account in determining the request for the destruction of goods or material and implements;¹⁰⁷
- order rights holders or their representatives who have brought infringement proceedings and who have abused enforcement procedures to pay adequate compensation to the defendants wrongfully enjoined or restrained in their activities and to pay the defendants' expenses, including legal fees;¹⁰⁸ and
- exempt public authorities and officials from liability for IPR infringement, provided that the actions are intended or taken in good faith in the course of the administration of the law.¹⁰⁹

In respect of provisional measures, Article 50 provides that member states are required to grant judicial authorities the power to order prompt and effective provisional measures to prevent infringement from occurring, and particularly to prevent goods from entering the channels of commerce and to preserve evidence of infringement. The article provides detailed provisions on how this purpose can be achieved, including through ex parte orders, requirements for proof that one is the right holder and compensation for defendants.¹¹⁰

Border measures are provided in Articles 51–60. Member states are required to adopt procedures that permit the suspension by customs authorities of the release into circulation of counterfeit trademark or pirated copyright goods, provided that these procedures are not required with respect to other categories of IPR, such as patents, or with respect to goods destined for export.¹¹¹ In this regard, competent authorities shall have the power to order security or equivalent assurance from the applicant for suspension by customs authorities to protect the defendant and the authorities and prevent abuse, provided that such security should not be a deterrent to requests for suspension;¹¹² and, where release is ordered pending further proceedings, to order the owner, importer or consignee to pay security costs.¹¹³ Further, the competent authorities shall have the power to order the indemnification of the importer or owner of goods for wrongful detention of goods.¹¹⁴ However, the TRIPS Agreement does not make it mandatory for member states to make provisions whereby competent authorities are permitted to act on their own initiative.¹¹⁵

The competent authorities must have the power to order the destruction of infringing goods, provided that the safeguards and procedures of Article 46 are observed.¹¹⁶ Member states may exclude from the application of provisional border measures to small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small quantities.¹¹⁷

Article 61 makes provision for criminal procedures. Member states shall provide for criminal procedures and penalties in cases of wilful trademark counterfeiting and copyright piracy on a commercial scale. The remedies and penalties in criminal IPR infringement

cases must include imprisonment and/or fines sufficient to provide a deterrent, but such penalties should correspond to the level of penalties applied for crimes of a similar gravity. In appropriate cases, remedies must include the seizure, forfeiture and destruction of infringing good or implements and materials whose predominant use has been the commission of the offence.

As has already been pointed out, the implementation of TRIPS Agreement enforcement provisions already poses numerous challenges for developing countries and LDCs, especially from a financial and administrative standpoint.

IP enforcement in the CARIFORUM EPA

Provisions on enforcement in the IP section of the CARIFORUM EPA are contained in Articles 13–25, which provide for general obligations, entitled applicants, evidence and measures for preserving it, right of information, precautionary measures, injunctions, corrective and alternative measures, and damages and legal costs.

Article 13 sets the general obligations of the parties in IP enforcement. The parties undertake to provide for the measures, procedures and remedies necessary to ensure the enforcement of the IPR covered in the IP section. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays. Moreover, they shall be effective, proportionate and dissuasive, and be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. These general obligations are a mirror of Article 3 of IPRED 1.

Persons entitled to apply for the application of these measures are given in Article 14. These persons include IPR holders and their licensees in accordance with the laws, IPR collective rights management bodies and professional defence bodies regularly recognised as having the right to represent IPR holders as permitted by the law. This is a mirror of Article 4 of IPRED 1.

In the case of IPR infringement committed on a commercial scale, the parties undertake to take measures to ‘enable judicial authorities to order the communication of banking, financial or commercial documents under the control of the opposing entity’.¹¹⁸ Judicial authorities are also granted the power to order prompt and effective provisional measures to preserve relevant evidence in respect of an alleged infringement. These measures include detailed description (with or without taking samples), or the physical seizure of the infringing goods and materials or implements used in the production and/or distribution of the infringing goods.¹¹⁹ This is a mirror of Articles 6(2) and 7(1) of IPRED 1.

These provisions contain far-reaching and disproportionate evidence-gathering capabilities on behalf of right holders. No safeguards exist to protect the alleged infringer. Suffice it to say that this evidence gathering is ‘subject to the protection of confidential information’. Moreover, there are no provisions for the lodging of security or any assurance by the applicant intended to ensure compensation for the prejudice that may be suffered by the defendant if it is subsequently found that there has been no threat or actual infringement of IPR rights.

These provisions entail many administrative and financial challenges for CARIFORUM countries. As has been pointed out earlier, these rules were developed for the EC’s internal market and are likely to be inapplicable to the situation of most ACP countries, including SADC EPA countries, especially in the context of the informal sectors that predominate

in the business environments of SADC countries. For example, concepts of confidential information and where the line should be drawn are not easy to apply to the informal sector.¹²⁰

Article 18 provides for provisional and precautionary measures. Judicial officers are granted the power to issue interlocutory injunctions on a provisional basis to prevent any imminent IPR infringement,¹²¹ and to allow the seizure or delivery up of goods suspected of IPR infringement.¹²² Even though this provision is identical to Article 9 of IPRED 1, Article 18 does not contain safeguards for the alleged infringer, e.g. ensuring that provisional measures are undertaken while simultaneously observing the rights of the alleged infringer, and ensuring the proportionality of the provisional measure as appropriate to the characteristics of the case. Recital 22 of IPRED 1 explains and contextualises the provisional and safeguard measures. This, however, does not exist in the CARIFORUM enforcement provisions.

The power of judicial authorities in this regard extends to intermediaries whose services are used by third parties for IPR infringement.¹²³ Intermediary liability for infringement action is introduced in the EPA text based on IPRED 1 language. As with most of the other provisions, this is a TRIPS-plus provision. The key challenge here is that the introduction of intermediary liability is problematic where the safeguard mechanisms for third parties are weak and provisional measures such as injunctions are readily available. Further, the concept of intermediary liability is also not particularly well developed in ACP countries, which raises additional challenges. At the same time, while the EC has left the issue of injunctions against intermediaries to member states' discretion, it is seeking to impose on CARIFORUM EPA countries specific rules in this regard.¹²⁴

Article 22 sets down factors for setting out damages for IPR infringement. Judicial officers shall take into account all appropriate aspects such as the negative economic consequences, including lost profits, that the injured party has suffered; any unfair profits made by the infringer; and, in appropriate cases, elements other than economic factors. This is a TRIPS-plus provision that may raise challenges, especially regarding 'the negative economic consequences'. This is a particularly difficult concept to measure in the context of IPR, as it is hard to quantify and is an extraneous factor to the primary purpose of enforcement, which is to prevent injury to the rights holder. The addition of such a factor to the considerations the courts have to take into account in determining damages has potential to open the floodgates for abuse, unnecessary litigation and delays. The TRIPS Agreement only foresees the payment of damages adequate to compensate for the injury the rights holder suffered as a result of intentional infringement and the recovery of legal expenses.

It should be highlighted that Article 46 of the Cotonou Agreement does not directly address the question of enforcement. It only talks about adequate levels of protection of IPR covered under the TRIPS Agreement in line with international standards and that technical co-operation activities in the field of IP would, on mutually agreed terms and conditions, extend to the preparation of laws and procedures for IPR enforcement and to the addressing of infringement by competitors. The EC IPR enforcement strategy makes it clear that it is not intended to propose a one-size-fits-all approach on enforcement, and considers that it is critical to have a flexible approach that takes into account the different needs, levels of development and levels of infringement activities in the different countries.

Consequently, there seems to be a disconnect between the provisions in the CARIFORUM EPA, on the one hand, and the Cotonou Agreement and the EC IPR enforcement strategy, on the other. The TRIPS enforcement provisions are already onerous for developing countries, so an additional layer of enforcement provisions in the CARIFORUM EPA would be extremely burdensome for these countries. It also raises questions as to how the EC takes into account the levels of development of CARIFORUM countries in line with its IP enforcement strategy. Moreover, although the EC claims not to be imposing a one-size-fits-all approach, it is difficult to see how this is not in fact the case when the proposed provisions are essentially the provisions of IPRED 1, which contains measures designed for the EC internal market.¹²⁵

REGIONAL ARRANGEMENTS FOR IPR IN THE EPA

IP and innovation regional integration

Article 3 of both the innovation and IP sections in the CARIFORUM EPA addresses regional integration aspects of innovation and IP. Article 3 of the innovation section provides that

the parties recognise that measures and policies to be taken at the regional level are necessary to fully attain the objectives of the [innovation] section. The Cariforum States agree to increase action at the regional level with a view to providing enterprises with a regulatory and policy framework conducive to fostering competitiveness through innovation and creativity.

Further, under Article 3 of the IP chapter, the parties undertake to

continue to consider further steps towards deeper integration in their respective regions in the field of intellectual property rights. This process shall cover further harmonisation of [IP] laws and regulations, further progress towards regional management and enforcement of national [IP] rights, as well as the creation and management of regional [IP] rights, as appropriate.

The parties also undertake to move towards a harmonised level of intellectual property protection across their respective regions.¹²⁶

Regional co-operation in IP has important benefits. IP and innovation can be boosted by regional co-operation if countries leverage regional opportunities to use TRIPS flexibilities in the IP instruments.¹²⁷ Moreover, regional co-operation can also provide important cost and efficiency benefits regarding the administration of IP systems. The recognition of regional co-operation in innovation and IP in the CARIFORUM EPA is a positive element.

In an analysis of the BLNS (Botswana, Lesotho, Namibia and Swaziland) countries' IP legislation, Gregory notes that

at the recent US–SACU free trade agreement negotiations, it would have been highly beneficial for SACU [Southern African Customs Unions]¹²⁸ to have a regional patent organisation that was able to negotiate with a united voice and a clear mandate.

She observes that there is lack of TRIPS compliance in certain BLNS states. Consequently,

it is unlikely, if not impossible that successful negotiations can be concluded when there exists, not only a chasm [in terms of compliance with the TRIPS Agreement] between the wants of the negotiating parties but within the member states of one of the negotiating parties itself.¹²⁹

In the same vein, most SADC countries' IP legislation is generally not TRIPS compliant. In this regard, it would therefore be important through TRIPS compliance to have a common starting point on IP negotiations for SADC countries.

For the SADC region, a regional arrangement already exists within the framework of the African Regional Intellectual Property Organisation (ARIPO). ARIPO was created with the objective of, among others, 'promot[ing] the harmonisation and development of industrial property laws and matters related thereto appropriate to the needs of its members and of the region as a whole'.¹³⁰ Membership to ARIPO is open to states that are members of the UN Economic Council for Africa or the AU. Currently, 16 states are party to the Lusaka Agreement and therefore to ARIPO.¹³¹

ARIPO creates a system of regional filing that allows member states to file one application that is recognised by the states designated in the application. This system also allows for the payment of one renewal fee for a patent, provided membership of the organisation is maintained. Consequently, a patent granted by the ARIPO Office shall in each designated state have the same effect as a patent granted under the applicable national law, even though the national IP office also retains the right to grant IPR.

For the SADC EPA, therefore, it would be important to properly analyse the commitments relating to the harmonisation and creation of regional IPR and how the IP regional integration initiatives would relate to the already existing ARIPO system. In this regard, it would also be vital to clearly define the extent of harmonisation and what a regional IPR would entail. Musungu cautions that 'while cooperation can bring benefits, overzealous harmonisation, especially in the area of enforcement, may be dangerous'.¹³²

Co-operation

Article 27 of the CARIFORUM EPA makes provisions for co-operation directed at supporting the implementation of EPA commitments. This co-operation shall include the reinforcement of IP regional initiatives, the preparation of national IP laws and the enforcement of IPR, the identification of products that could benefit from GIs, and support for trade associations to develop codes on enforcement similar to Article 17 of IPRED 1.

Clearly, this co-operation is directed at the areas of particular interest to the EC. No attention is given to the areas of interests for ACP countries like the use of flexibilities in the IP instruments for development.¹³³ The EC's approach runs counter to the principles that have been internationally agreed to guide technical assistance in the WIPO Development Agenda. Under this agenda, WIPO member states agreed that technical assistance needs to

be made development oriented through a focus on addressing the interface between IP and competition issues and ensuring that the assistance takes into account public policy goals relevant to IP policymaking in developing countries and tailors advice to respond to their particular economic, social, and cultural development needs and circumstances.¹³⁴ None of these aspects of co-operation and IP technical assistance is present in the co-operation provisions of the CARIFORUM EPA.

IP IN THE CARIFORUM EPA: LESSONS AND RECOMMENDATIONS FOR SADC EPA COUNTRIES

The analysis of the provisions of the CARIFORUM EPA reveals that there are substantial problems with a number of the provisions. In addition, huge once-off and recurrent implementation costs are likely to be incurred in the establishment of an IP administrative and enforcement framework that includes businesses. Even though there are certain provisions in the innovation and IP chapter that have potential positive developmental impacts, further work will be required to determine the real benefits of these provisions. Others areas in the CARIFORUM EPA such as competition, investment and dispute settlement can also have a bearing on IP protection and innovations in other EPAs.

The SADC EPA countries therefore need to consider the impact of the CARIFORUM EPA provisions on IP and innovation before negotiations in this area can take place. Some positive aspects can be drawn from the CARIFORUM EPA provisions on IP and innovation. These include, firstly, the explicit inclusion of an innovation section in the chapter with the recognition that fostering innovation and creativity improves competitiveness. Therefore, measures in this direction are seen as a crucial step towards achieving sustainable development. Secondly, specific objectives are included focusing on the promotion of innovation, including collaborative innovation and R&D, the transfer of technology, and competitiveness, while the existence of information asymmetries in the transfer of technology between developing and developed countries is also recognised. Thirdly, the obligation of the EC to provide incentives to enterprises and institutions in its territories to transfer their technologies to developing countries and LDCs is included. Fourthly, a longer transition period is included for LDCs, while powers are given to the TDC to extend these transition periods for LDCs and developing countries if there is a need. Finally, the need is recognised to establish mandatory disclosure requirements with respect to genetic resources and TK used in inventions for which patents are applied in members' territories.

However, there are three broad areas that cause significant problems. Firstly, there is generally a gap in the aspirations stated in the provisions and their translation into operational language and specific obligations. This is especially so in the areas of innovation and competitiveness, science and technology, information and communication technology, information asymmetries, genetic resources, and TK protection, where no measures are provided to address these problems. Consequently, these may end up being empty promises on paper with no action on the part of the EC.

Secondly, the existence of TRIPS-plus standards in the innovation and IP section poses its own set of challenges. CARIFORUM EPA countries are being required to accede to WIPO Internet treaties, to the 1991 International Convention for the Protection of New

Varieties of Plants, and to the protection of GIs. The development benefits of obligations in these treaties may not be realised without proper assessment, as the cost of implementation may be far greater than the benefits. Further, CARIFORUM states are required to introduce a broad range of IP enforcement mechanisms. As pointed out earlier, in addition to the existing challenges regarding TRIPS Agreement implementation, these mechanisms pose significant administrative and financial burdens on CARIFORUM EPA countries.

Thirdly, IP technical assistance and co-operation are mere measures or provisions to promote the implementation of IP provisions in an EPA without necessarily adopting a development perspective for the benefit of CARIFORUM countries.

Overall, the inclusion of substantive IP provisions in the CARIFORUM EPA seems to bring more challenges regarding IP and innovation for CARIFORUM EPA countries. SADC countries therefore need to approach the IP negotiations cautiously, and will need to address the issues raised in the analysis of the CARIFORUM EPA. They may further consider including pro-development issues in the EPA. These areas should include:

- specific obligations to promote R&D in the area of health and the use of flexibilities in IP instruments in line with the World Health Organisation's global strategy;¹³⁵
- the inclusion of mandatory minimum standards limitations and exceptions for copyright to support educational and research needs;¹³⁶
- the adoption of obligations to utilise competition policy to address the abuse of IPR, as put forward in the WIPO Development Agenda; and
- the inclusion of provisions to improve access to knowledge in developing countries, which have already been initiated through the WIPO Development Agenda.

In the EPA, this can be done by developing innovation models that maximise the participation of developing countries in the processes of innovation while minimising the social costs of accumulating knowledge.¹³⁷ Overall, there will be a need to address the link between IP and development in developing countries through provisions requiring assessments of the impact of IP on various sectors.

CONCLUSION

Even though there is no requirement for further negotiations on IP in the SADC EPA, the EC may insist on negotiations on IP using the CARIFORUM EPA innovation and IP chapter as a model. The analysis of this chapter reveals that even though there are some positive aspects, the majority of the provisions pose huge challenges for developing countries in terms of their implementation and the benefits to be derived from them.

Therefore, SADC EPA countries should learn from the lessons of the CARIFORUM EPA and approach proposals for IP negotiations cautiously. They should ensure that any obligations that are proposed will have developmental benefits for their region and will enhance the positive aspects of the negotiations and subsequent provisions. They should further build their capacity regarding innovation and access policy needs so that they are adequately prepared to defend their interests in IP in negotiations with the EU.

ENDNOTES

- 1 The deadline came about because of a 2001 waiver from the World Trade Organisation (WTO) obtained by the European Community (EC) and the African, Caribbean and Pacific (ACP) countries regarding the Cotonou Agreement, allowing for the continuation of the preference regime, but only until the end of 2007. Beyond that date, the EC would not have been allowed to continue the preference regime without establishing a regional trade agreement under Article XXIV of the General Agreement on Tariffs and Trade (GATT). The waiver is given in WTO, 'European Communities: The ACP-EC Partnership Agreement', Decision of 14 November, WTO Document WT/MIN (01)/15, <http://www.wto.org/English/thewto_e/minist_e/mmin01_e/mindecl_acp_ec_agre_e.htm>.
- 2 For a list of member countries in each region in 2007, see <http://www.ec.europa.eu/trade/issues/bilateral/regions/acp/plcg_en.htm>.
- 3 For detailed information on the interim Economic Partnership Agreements (IEPAs) and their coverage, see <http://trade.ec.europa.eu/doclib/docs/2007/november/tradoc_136959pdf>.
- 4 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Legal Instruments: Results of the Uruguay Round, 33 I.L.M.1125, 1197 (1994). The TRIPS Agreement sets out minimum standards of intellectual property (IP) protection to which all WTO members must conform.
- 5 CIPR (Commission on Intellectual Property Rights), *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*. London: CIPR, 2002.
- 6 Musungu S, 'Rethinking innovation, development and intellectual property in the UN: WIPO [World Intellectual Property Organisation] and beyond', *TRIPS Issues Papers*, 5. Ottawa: QIAP, 2005, p. 3.
- 7 For the full text, see <http://www.acp-eu-trade.org/library/files/SADC-EU_EN_231107_bilaterals.org_interimagreement.pdf>.
- 8 In terms of Article 67 of the Southern African Development Community (SADC) IEPA, only Botswana, Lesotho, Mozambique and Swaziland will participate from the SADC group. Namibia initialled the IEPA under protest because of certain provisions dealing with goods trade that it was not happy with and, like South Africa, refused to take part in the second phase of the negotiations.
- 9 See CIEL (Center for International Environmental Law), 'Intellectual property in the European Union economic partnership agreements with Africa, Caribbean and Pacific countries: What way forward after the CARIFORUM EPA and the interim EPAs?', April 2008, <http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf>.
- 10 Kruger P, 'SADC-EPA update', *Tralac*, 22 December 2006, p. 4, <http://epa.tralac.org/pdf/2006122_SADC_EPAUPDATE.pdf>.
- 11 Cruz S, 'Intellectual property provisions in European Union trade agreements: Implications for developing countries', International Centre for Trade and Sustainable Development (ICTSD) Programme on intellectual property rights (IPRs) and Sustainable Development Issue Paper, 20, June 2007, <<http://www.iprsonline.org/resources/docs/Santa-Cruz%20Blue20.pdf>>.
- 12 European Commission, 'Global Europe: Competing in the world', *EU Policy Review*, 4, October 2006, section 4.2, <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130370.pdf>.
- 13 CIPR, *op. cit.*, number 6.

- 14 Least-developed countries (LDCs) were granted a transitional period until July 2013 to apply the provisions of the TRIPS Agreement. See WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Extension of the transition period under Article 66(1) for least-developed country members', Decision of the Council for TRIPS of 29 November 2005, WTO Document IP/C/40.
- 15 A detailed exposition of the importance of geographical indications (GIs) to the European Community (EC) will be given in the third part of this paper.
- 16 European Commission, *op. cit.*, section V, number 13.
- 17 CIEL, 'The problem of intellectual property in economic partnership agreements with the African, Caribbean and Pacific Countries', Discussion Paper, May 2007, <http://www.ciel.org/publications/EU_EPAs_Draft_4June07.pdf>.
- 18 Musungu S, 'CARIFORUM EPA and beyond: Recommendations for negotiations on services and trade related issues in the EPAs, innovations and intellectual property in the EC-CARIFORUM EPA: Lessons for other ACP regions', GTZ Working Paper. Eschborn: GTZ, 2008, p. 12.
- 19 Musungu S & G Dutfield, 'Multilateral agreements and the TRIPS-plus world: The World Intellectual Property Organisation', *TRIPS Issues Papers*, 3, <<http://www.quino.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf>>.
- 20 For the recommendations of the World Intellectual Property Organisation (WIPO) Development Agenda, see <<http://www.wipo.int/ip-development/en/agenda>>. For an analysis of the WIPO Development Agenda, see Phiri D, 'Policy and practical impact of the WIPO Development Agenda in developing countries', *IQSensato*, 2008 (forthcoming).
- 21 Musungu S, 2008, *op. cit.*, p. 13.
- 22 The Doha Declaration on the TRIPS Agreement and Public Health was adopted by the WTO Ministerial Conference in Doha on 14 November 2001, <http://www.wto.org/english/tratop_e/public_health_e.htm>.
- 23 Musungu S, 2008, *op. cit.*, p. 14.
- 24 CARIFORUM EPA, Article 2(a) & (f).
- 25 *Ibid.*, Article 2(b).
- 26 *Ibid.*, Article 2(c).
- 27 *Ibid.*, Article 2(e).
- 28 *Ibid.*, Article 2(h).
- 29 *Ibid.*, Article 2(d).
- 30 Musungu S, 2008, *op. cit.*, p. 16.
- 31 The GATT is the predecessor of the WTO. For a detailed discussion of the GATT and the WTO, see <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>.
- 32 GATT, Article XXIV and General Agreement on Trade in Services, Article V, <http://www.wto.int/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIV> and <http://www.wto.int/english/docs_e/legal_e/26-gats_01_e.htm>, respectively.
- 33 TRIPS Agreement, Article 4.
- 34 CIEL, 2008, *op. cit.*
- 35 CARIFORUM EPA, Article 5.
- 36 *Ibid.*, Article 6.
- 37 *Ibid.*, Article 7.
- 38 *Ibid.*, Article 8.
- 39 Article 8 of the TRIPS Agreement allows members in formulating or amending their laws and regulations 'to adopt measures necessary to protect public health and nutrition, and to promote

- the public interest in sectors of vital importance to their socioeconomic and technological development', provided that such measures are consistent with the provisions of the TRIPS Agreement.
- 40 See TRIPS Council Decision of 29 November 2005, press release 424, <http://www.wto.org/english/news_e/pres05_e/pr424_e.htm>.
- 41 CARIFORUM EPA, Article 4(1).
- 42 Article 8(2) of the CARIFORUM EPA states: '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.' Article 40(2) states: 'Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.'
- 43 Musungu S, 2008, *op. cit.*, p. 17.
- 44 TRIPS Agreement, Article 12.
- 45 Watal J, *Intellectual Property Rights in the WTO and Developing Countries*. London: Kluwer Law International, 2001, p. 209.
- 46 These treaties, generally known as the 'Internet treaties', came into force in 2002; see <<http://www.wipo.int/treaties/en>>.
- 47 WIPO Copyright Treaty (WCT), Articles 6, 7 & 8.
- 48 See Okediji R, 'Development in the information age: Issues in the regulation of intellectual property rights, computer software and electronic commerce', Issue Paper, 9. Geneva: ICTSD & United Nations Conference on Trade and Development (UNCTAD), 2004.
- 49 WCT, Article 12(2).
- 50 WIPO Performances and Phonograms Treaty (WPPT), Articles 5–10.
- 51 *Ibid.*, Articles 11–14.
- 52 *Ibid.*, Article 15(1).
- 53 *Ibid.*, Articles 18–19.
- 54 Okediji R, *op. cit.*, p. 8.
- 55 See <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=B&bo_id=18> and <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&search_what=B&bo_id=17>.
- 56 Okediji R., *op. cit.*
- 57 *Ibid.*
- 58 Rens A, Prabhala A & D Kawooya, 'Intellectual property, education and access to knowledge in Southern Africa', Tralac Working Paper. Stellenbosch: Tralac, 2006.
- 59 Conceptually, two main types of GIs may be distinguished: (1) indications of source: these are quality-neutral GIs of source (e.g. 'made in ...'), where there is no suggestion of a direct linkage between the attributes of the products and their geographical origin. This use of an indication of source on a given product is merely subject to the condition that this product originates from the place designated by the indication of source; and (2) appellations of origin: these are qualified GIs having a particular descriptive meaning because the characteristics, quality or reputation of products are essentially attributable to a country, region or locality.

- These indications consist of a name that is used to designate a product. See WIPO, 'What are geographical indications?', 2002, <<http://www.wipo.int/aboutip/en/index.html>>.
- 60 Rangnekar D, 'The socio-economics of geographical indications: A review of empirical evidence from Europe', UNCTAD/ICTSD Project on IPRs and Sustainable Development, Issue Paper, 8, May 2004, <<http://www.iprsonline.org>>.
- 61 Watal J, *op. cit.*
- 62 TRIPS Agreement, Article 23(4).
- 63 For a detailed discussion of the Doha Development Round of trade negotiations, see <http://www.wto.org/english/tratop_e/dda_e/dda_e.htm>.
- 64 The EU's GI regime is contained in Council Regulation 510/2006 of 20 March 2006 on the protection of geographical indications and designation of origin for agricultural products and foodstuffs; Council Regulation 1493/1999 of 17 May 1999 specifically for the organisation of the market in wine; and Council Regulation 1576/89 of 29 May 1989 specifically on spirits. For a detailed discussion on the importance of GIs to the EC, see Blakeney M, 'Proposals for the international regulation of geographical indications', *Journal of World Intellectual Property*, 4, 5, 2005, pp. 629–52 and Blakeney M, 'The protection of geographical indications after Doha: Quo vadis?', *Journal of International Economic Law*, 9, 3, 2006, pp. 575–614.=
- 65 A system of GIs protection, however, already exists in some African countries covered by the African Intellectual Property Organisation. See Annex VI of the Revised Bangui Agreement, <http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf>.
- 66 Musungu S, 'An analysis of the EC non-paper on the objectives and possible elements of an IP section in the EC–Pacific EPA'. London & Geneva: Catholic Agency for Overseas Development (CAFOD) & ICTSD Programme on Intellectual Property Rights and Sustainable Development, 2007a, <<http://www.iprsonline.org>>.
- 67 For the protection of indigenous knowledge systems policy, see <<http://www.sadc.int>>. Moreover, member states of the African Regional Intellectual Property Office have also developed a framework for the protection of traditional knowledge (TK).
- 68 South Africa already has an indigenous knowledge systems policy and the South African Department of Trade and Industry is spearheading efforts to create a legal framework that seeks to protect and promote TK using existing IP law mechanisms through the Intellectual Property System and Intellectual Property Law Amendment Bill of 2008. For a detailed discussion of this initiative, see <<http://www.dti.gov.za>>. Namibia has also promulgated the Access to Genetic Resources and Associated Traditional Knowledge Act, which was first introduced in the Namibian parliament in 2001.
- 69 For example, Article 8(j) states: 'Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.'
- 70 *Sui generis* is a Latin term meaning 'of its kind' and is used to describe something that is unique or different. What makes an IP system *sui generis* is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter (e.g. TK and plant varieties) and the specific policy needs that led to the establishment of a distinct system.
- 71 CARIFORUM EPA, Article 12(2).

- 72 *Ibid.*, Article 12(3).
- 73 *Ibid.*, Article 12(5).
- 74 WTO Document IP/C/W/474, para. 2.
- 75 CARIFORUM EPA, Article 12(4).
- 76 Musungu S, 2008, *op. cit.*
- 77 Article 6 of the 1991 Act of the International Convention for the Protection of New Varieties of Plants requires that these varieties must be new, distinct, uniform and stable in order to be granted protection.
- 78 Loawars N *et al.*, *Impacts of Strengthened Intellectual Property Rights Regime on the Plant Breeding Industry in Developing Countries: A Synthesis of Five Case Studies*. Wageningen: Wageningen UR, 2005.
- 79 *Ibid.*
- 80 Musungu S, 2007a, *op. cit.*
- 81 Louwars N *et al.*, *op. cit.*; see also Tansey G, *Food Security, Biotechnology and Intellectual Property: Unpacking some Issues Around TRIPS*. Geneva: Quaker United Nations Office (QUNO), 2002.
- 82 In April 1998 the Scientific, Technical and Research Commission of the then Organisation for African Unity drew up the Draft Model Legislation on Community Rights and Access to Biological Resources. It was presented at the 34th Summit of Heads of State and Government in June/July 1998, where it was decided that governments of member states should formally adopt it.
- 83 Feris L, 'Protecting traditional knowledge in Africa: Considering African approaches', *African Human Rights Law Journal*, 4, 2004, p. 242.
- 84 AU Model Legislation, Article 23.
- 85 *Ibid.*, Article 24.
- 86 It states that farmers' rights shall, with due regard for gender equity, include the right to:
- a) protection of their traditional knowledge relevant to plant and genetic resources;
 - b) obtain an equitable share of benefits arising from the use of plant and animal genetic resources;
 - c) participate in making decisions, including at the national level, on matters related to the conservation and sustainable use of plant and animal genetic resources;
 - d) save, use, exchange and sell farm-saved seed/propagating material of farmers' varieties;
 - e) use a new breeders' variety protected under this law to develop farmers' varieties, including material obtained from gene banks or plant genetic resource centres; and
 - f) collectively save, use, multiply and process farm-saved seed of protected varieties.
- 87 AU Model Legislation, Article 28.
- 88 *Ibid.*, Article 30(2).
- 89 It states: '1) Notwithstanding the existences of Plant Breeders' Rights in respect of a plant variety, any person or farmers' community may:
- a) propagate, grow and use plants of that variety for purposes other than commerce;
 - b) sell plants or propagating material of that variety as food or for another use that does not involve the growing of the plants or the propagation of that variety;
 - c) sell within a farm or any other place at which plants of that variety are grown any plants or propagating material of that variety at that place;
 - d) use plants or propagating material of the variety as an initial source of variation for the purpose of developing another new plant variety except where the person makes repeated

- use of plants or propagating material of the first mentioned variety for the commercial production of another variety;
- e) sprout the protected variety as food for home consumption or for the market;
 - f) use the protected variety in further breeding, research or teaching;
 - g) obtain, with the conditions of utilization, such a protected variety from gene banks or plant genetic resources centres.’
- 90 AU Model Legislation, Article 31(2).
- 91 The US, EC and Japan are proposing the creation of a plurilateral anti-counterfeiting trade agreement in order to set out new, higher benchmarks for enforcement of intellectual property rights; see Sell S, ‘The global upward ratchet, anti-counterfeiting and piracy enforcement efforts: The state of play’, 2008, <http://www.twinside.org.sg/title2/intellectual_property/development_research/SusanSellfinalversion.pdf>.
- 92 European Commission, Directorate General for Trade, ‘Strategy for the Enforcement of Intellectual Property in Third Countries’, *Official Journal of the European Union*, 2005/C129/03. Brussels: EC, 2004, p. 4.
- 93 *Ibid.*
- 94 European Commission, 2006, *op. cit.*
- 95 Directive 2004/48/EC, *Official Journal*, L 195, 02/06/2004 P.0016–0025, adopted in 2004, covers rules on standing, evidence, seizure, injunctions and other matters in civil cases.
- 96 Musungu S, 2008, *op. cit.*
- 97 TRIPS Agreement, Article 41(1).
- 98 *Ibid.*, Article 41(2).
- 99 *Ibid.*, Article 41(3).
- 100 *Ibid.*, Article 41(4).
- 101 *Ibid.*, Article 41(5).
- 102 *Ibid.*, Article 42.
- 103 *Ibid.*, Article 42(1).
- 104 *Ibid.*, Article 42(2).
- 105 *Ibid.*, Article 44(1) & (2).
- 106 *Ibid.*, Article 45.
- 107 *Ibid.*, Article 46.
- 108 *Ibid.*, Article 48(1).
- 109 *Ibid.*, Article 48(2).
- 110 *Ibid.*, Article 50(3)–(8).
- 111 *Ibid.*, Article 51.
- 112 *Ibid.*, Article 53(1).
- 113 *Ibid.*, Article 53(2).
- 114 *Ibid.*, Article 56.
- 115 *Ibid.*, Article 58.
- 116 *Ibid.*, Article 59.
- 117 *Ibid.*, Article 60.
- 118 *Ibid.*, Article 15.
- 119 *Ibid.*, Article 16.
- 120 Musungu S, ‘Developing a positive agenda on enforcement provisions of the EPAs’, paper presented at the Regional Dialogue on the Economic Partnership Agreements, Intellectual Property and Sustainable Development for the ECOWAS, organised by ICTSD, in partnership

with Environmental Development Action in the Third World (ENDA) and the Quaker United Nations office (QUNO), Saly, Senegal, 30–31 May 2007b.

- 121 TRIPS Agreement, Article 18(1).
- 122 *Ibid.*, Article 18(2).
- 123 *Ibid.*, art 18(1).
- 124 IPRED 1, Recital 23.
- 125 Musungu S, 2007b, *op. cit.*
- 126 CARIFORUM EPA, Art 3(2).
- 127 Musungu S, Villanueva S & R Blasetti, *Utilising the TRIPS Flexibilities for Public Health Protection through South–South Regional Frameworks*. Geneva: South Centre, 2004.
- 128 Southern African Customs Unions (SACU) comprises South Africa and the BLNS countries.
- 129 Gregory S, 'Intellectual property rights and South Africa's innovative future', Trade Policy Report, 23. Johannesburg: South African Institute of International Affairs, 2008, p. 32. <http://www.saiia.org.za/images/stories/pubs/dtpp/dtpp_rep_23_gregory.pdf>.
- 130 Agreement on the Creation of the African Regional Intellectual Property Organisation (ARIPO), Article 3.
- 131 The member states of ARIPO are Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. It is important to mention that all the SACU countries except South Africa are members of ARIPO.
- 132 Musungu S, 2008, *op. cit.*
- 133 For a detailed discussion, see CIPR, *op. cit.* and MSF (Médecins Sans Frontières), 'Doha derailed: Technical assistance a case of malpractice?', 2003, <http://www.msf.org/msfinternational/invoke.cfm?objectid=2ECD1BDD-94B2-49EB-8EC939E2C87E54C7&component=toolkit.report&method=full_html>.
- 134 WIPO Development Agenda, recommendation 7.
- 135 See <<http://www.who.phl/en>>.
- 136 Hugenholtz B & RL Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report*. Institute for Information Law, University of Amsterdam and University of Minnesota Law School, 6 March 2008, <<http://www.ivir.nl/publicaties/hughholtz/finalreport2008.pdf>>.
- 137 Musungu S, 2008, *op. cit.*, p. 37.

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