

HIDDEN

THREATS

AN ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS IN EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS: UNVEILING THE HIDDEN THREATS TO SECURING FOOD SUPPLIES AND CONSERVING AGRICULTURAL BIODIVERSITY





The inclusion of IPRs in EPAs works against the principles that EPAs should maintain a development friendly orientation.

ABOUT THIS BRIEFING

“Extending intellectual property rules globally will have wide-ranging implications for the future control of food, many of which are still to be felt.”

Geoff Tansey, 2008

The EU intends to include new rules on Intellectual Property Rights (IPRs) in already controversial and resisted Economic Partnership Agreements (EPAs). This is highly contentious because of the potential impacts on securing food supplies and conserving agricultural biodiversity. The European Union is demanding from African, Caribbean and Pacific countries (ACP) new intellectual property standards beyond those already incorporated in the World Trade Organization (WTO) Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS).

These ‘TRIPS-plus’ standards are detrimental to local food security and communities whose livelihoods depend on agriculture as a source of income and who play a key role in the conservation of agricultural biodiversity. The livelihoods of these communities should not be compromised by EPAs. African, Caribbean and Pacific governments should reject the inclusion of TRIPS-plus provisions in EPAs. Any commitments in EPAs should be in line with the countries’ level of development and not go beyond their current WTO obligations. The inclusion of IPRs in EPAs works against the principles that EPAs should maintain a development-friendly orientation, contribute to the regional integration process and grant special and differential treatment to ACP countries.

The motivation for the EU to seek to include IPRs in the EPAs can be found in several EU policy documents which mandate that the EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments.

This briefing provides an overview of how international rules on IPRs, as proposed to be included in the EPA texts, add significant challenges and threats to securing food supplies, food sovereignty and the sustainable use and conservation of agricultural biodiversity, especially in African, Caribbean and Pacific countries.

By favouring the interests of rights holders, the IPR system is stifling the flow of knowledge which is the very foundation from which innovation thrives.

RISING FOOD INSECURITY AND BIODIVERSITY LOSS

"Instead of challenging or changing the structures that generate poverty and exacerbate inequality, governments are working hand-in-hand with corporations to reinforce the very institutions and policies that are the roots and causes of today's agro-industrial food crisis."

ETC Group, 2008.

The already precarious state of the global agriculture and food system is being threatened by the global economic crisis and climate change. The most affected are the millions of food-insecure and hungry people, especially in the global South. The World Bank warns that the degree of deprivation of the existing poor will continue to increase as already another 155 million people were pushed into poverty in 2008 alone (World Bank 2008). According to the United Nations' Food and Agriculture Organization (FAO), the number of hungry people topped one billion in 2008 (FAO, 2008). Moreover, fifty developing countries and Least Developed Countries (LDCs) are low-income food-deficit countries (LIFDCs).

It is a striking fact that hunger has grown as the world has grown richer and produced more food *per capita* than ever before, meanwhile the rate of deterioration of the environment and biodiversity loss is accelerating. This denotes that the problem is not only related to the ability of the world to produce food. The problem is also the food system, the rules that define it and our consumption patterns.

The way in which intellectual property rules are evolving is contributing to the deteriorating state of the global food system, the environment and biodiversity. Current global intellectual property arrangements are heavily skewed in favour of the economic interests of producers in developed countries. They undermine the ability of developing countries to promote domestic food production and to safeguard biodiversity that is crucial for global food security and environmental sustainability.

Yet even in spite of the severe situation in which many developing countries are today because of the crises, industrialised countries are not changing course. By using regional and bilateral trade agreements, they continue to press developing countries to commit to more and stronger intellectual property protection and enforcement.

IPRs: exclusion and market power

"The immediate impact of intellectual property protection is to benefit financially those who have knowledge and power; and to increase the cost of access to those without."

UK Commission on Intellectual Property Rights (CIPR), 2002

What are IPRs?

IPRs are a legal fiction. They are rights given over intangible creations of the mind.

IPRs give the creator or subsequent owner the ability to exclude others from using or copying of his/her creation for a certain period of time, except for GIs and trade secrets which can be extended ad infinitum.

Forms of IPRs include patents, copyrights, trademarks, trade secrets, geographical indications, and plant breeders' rights.

Governments grant IPRs to creators or subsequent owners who wish to exercise them in their territory.

The stated purpose of an IPR system is to enhance public welfare. It is meant to provide incentives for innovation and creative endeavour that also foster the proliferation of ideas and information in society. In order to do so, the IPR system must strike an adequate balance between granting exclusive IPRs, and the interests of consumers and society that benefit from the use and copying of goods and services in which IPRs are embodied. Thus, IPRs must be time limited.

Why should we worry about IPRs?

IPR systems today are increasingly unable to strike an adequate balance between protection and access. IPRs are being used strategically, particularly by big multinational corporations, to further their commercial interests. Corporations are able to capture and manipulate the IPR system to support a way of doing business that increases their global market power and ability to fend off competition. By favouring the interests of IPR holders, the IPR system is stifling the flow of knowledge which is the very foundation from which innovation thrives. "In this light, IPRs have become protectionist barriers in a 'knowledge economy' (Tansey et al, 2008).

Monopoly control over seeds through patents and other IPRs is a direct threat to food supplies.

The Global Ratcheting-up of IPRs

The inclusion of IP rules in trade agreements has increased the existing imbalances in the global economy in which developed countries and multinational companies are the main beneficiaries of open markets and international trade. At a global level, IPR rules benefit primarily countries with technologies to sell (developed countries), at the expense of countries that are net importers of technology. Developed countries hold around 97% of all worldwide patents (UNDP, 2007).

Historically, national IPR systems evolved in accordance with the perceived needs and development priorities of each country. The trend towards the systematization of global IPR regimes has eroded the flexibility for countries to establish balanced IPR systems that are appropriate to their national context and level of development.

In 1995 IPRs joined the global system of enforceable trade rules of the General Agreement on Tariffs and Trade (GATT)/ World Trade Organization (WTO). The Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) bound all WTO member countries to rules for the protection and enforcement of IPRs that were modeled on developed country IPR systems. The TRIPS Agreement introduced the most favored nation (MFN) principle with the implication that whenever countries give a higher level of protection to any country, they must immediately accord it to all other members of the WTO. Any subsequent IPR rules cannot grant lower protection than required in TRIPS and will immediately apply to all WTO members, regardless of whether the commitments are made in regional or bilateral agreements.

The Effect of the IPR Upward Ratchet

The proliferation of bilateral and multilateral IPR agreements is setting new and stronger global standards for IPRs and increasing the ability of IPR holders to protect and enforce their IPRs globally. It is further eroding the flexibility that developing countries need to build their IPR systems in a manner that strikes an adequate balance between protection and access that enhances the welfare of their society and is suited to their level of development.

THE IMPACT OF IPRs ON AGRICULTURE, FOOD SUPPLIES AND AGRICULTURAL BIODIVERSITY

"From thousands of seed companies and public breeding institutions three decades ago, ten companies now control more than two-thirds of global proprietary seed sales. Six of the leaders in seeds are also six of the leaders in pesticides and biotech"

ETC Group, 2008.

The way in which legal systems for the protection and enforcement of IPRs continue to evolve is eroding agricultural biodiversity and perpetuating the imbalance in the global food system. The growing concentration and exploding profits of a handful of firms in the agri-food industry is evidence that more IPRs that enclose knowledge are not needed. The explosion of patenting and Plant Breeders' Rights (PBRs) are eroding agricultural biodiversity and devastating small-farmer agriculture. Patents and PBRs increase the cost of seeds and fertilizers for poor farmers and restrict the ability of farmers to save, reuse and sell seeds.

What is Agricultural Biodiversity?

Agricultural biodiversity encompasses the variety and variability of animals, plants and micro-organisms which are necessary to sustain key functions of the agroecosystem, its structure and processes for, and in support of, food production and the human right to food. It results from the interaction between the environment, genetic resources and the management systems and practices used by culturally diverse peoples resulting in the different ways land and water resources are used for production. It is simultaneously the product of and the basis for diverse, resilient food production systems.

Patents

Patents have the greatest impact. The TRIPS Agreement does not set any ceiling on patenting of life, although it allows countries to exclude plants and animals and "essentially biological processes" from patentability. Governments are extending patent rights over plants and genes with the aim of creating incentives for more research and innovation by industry particularly in biotechnology, since public research increasingly gives way to private research seeking commercial application. Patents act as a means for companies to protect and recoup their investments. The monopoly control over seeds through patents and other IPRs is a direct threat to the right to food of local communities. Seed is the first link in the food chain process and thus seed security is critical for ensuring food supplies.

An important flexibility in the TRIPS agreement that should be maintained is the freedom to choose how to protect plant varieties (PVP) through any effective *sui generis* system.

Plant Breeders' Rights (PBRs)

Many countries are also granting PBRs to reward breeding efforts for new varieties plants. The scope of protection of PBRs is weaker than patents, because the rights holders cannot exclude other breeders from using their varieties to develop and sell new varieties. Nonetheless rights holders can exclude others from selling or commercially exploiting their varieties without their permission. Most seed laws and certification rules in developing countries now comply with the UPOV provisions of distinctiveness, uniformity and stability (DUS). Hence, these seed laws and seed certification rules tend to exclude traditional varieties developed by farmers from the market by prohibiting exchange and sales of such varieties. The existing seed laws treat farm-saved seeds as grain and prohibit their commercialization as seeds. Moreover, farmers' rights are not adequately protected in the international legal framework, their implementation is left at the national level.

International IPR Treaties

The most relevant IPR treaties for agriculture, food security and biodiversity are the WTO TRIPS Agreement, and The Union for the Protection of New Varieties of Plants (UPOV), and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (The Budapest Treaty). Two other treaties include provisions related to intellectual property and their negotiation was affected by the IP treaty negotiations. These are the Convention on Biological Diversity (CBD) and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

The UPOV System of PVP

While PBRs under the UPOV system are the most common form of *sui generis* protection for plant varieties, the TRIPS Agreement makes no mention of UPOV and does not require countries to join it. However, there has been a strong lobbying force from the wealthy OECD countries to convince developing countries to adopt UPOV rather than to establish *sui generis* systems that serve the interests of other countries' national farming systems (Tansey et al, 2008).

The UPOV system provides effective protection to the commercial breeding sector while largely ignoring the human rights of small-scale farmers who have been engaged in seed breeding and development for generations. UPOV 1991 is more inhibiting to local farmers. It gives exclusive rights of sale and reproduction to the IP holders, denying farmers the rights to replant and exchange seeds. This naturally stifles developments in food production by small-scale farmers.

Moreover, it hampers the ability of local farmers to continue with their age-old practice of breeding and conserving their local crop variety gene pool, which is the bedrock of any sustainable food production system.

An important flexibility in the TRIPS agreement that should be maintained is the freedom to choose their own way of plant variety protection (PVP) through any effective *sui generis* system. The EU demand that ACP countries accede to UPOV 1991 curbs this flexibility. ACP countries can develop and adopt *sui generis* systems of PVP to suit their local agricultural and food systems and recognize the rights of their local communities. For example, the India PVP law is modelled on the UPOV 1978 and further develops farmers' rights to save, sow, exchange and sell seeds.

Geographical Indications (GIs)

GIs are marks or symbols that are used to identify certain goods that possess certain qualities or enjoy a certain reputation, due to their geographical origin, such as feta cheese from Greece. Currently the TRIPS Agreement provides a two-tiered protection system for GIs. One is for wines and spirits, the other for all goods that can constitute a GI. GIs are increasingly being used in trade to add value to export goods that contribute to increase the prices for GI-protected products. The EU has the most extensive system of protection for GIs. Also the very nature of GI protection system traditionally adopted under the Lisbon rules and market practice in EU is not cost-effective for poor countries.

What are EPAs?

The stated objective of EPAs is the "sustainable development of the ACP States, their smooth and gradual integration in the world market, and eradication of poverty."

EPAs are also mandated to follow some basic principles:

- EPAs should serve as instruments of development.
- EPAs should support the existing regional integration initiatives in the ACP states and not compromise them.
- EPAs should maintain and improve upon the current level of preferential access of ACP exports to the European market.
- EPAs should be compatible with WTO rules.
- EPAs should afford special and differential treatment to all ACP countries.

The EU is adamantly pushing to include issues that are of interest to them such as IPRs, which were not included in previous agreements.

ECONOMIC PARTNERSHIP AGREEMENTS

As of 2002, the European Union and the individual and groups of countries that together make up the African, the Caribbean and Pacific (ACP) Group of States have been negotiating "free trade" Economic Partnership Agreements (EPAs). Despite growing controversy on the negotiating process and content of EPAs in both the EU and ACP, the EU expects that all EPAs will be to be concluded as soon as possible.

The general framework for negotiating EPAs is found in a previous agreement between the EU and the ACP known as the Cotonou Agreement. The general objective of EPAs is defined as the "sustainable development of the ACP States, their smooth and gradual integration in the world market, and the eradication of poverty."

What do the ACP and EU seek from EPAs?

For ACP countries, the main aim is to achieve extension by the EU of the special preferential market access and technical assistance they received under previous arrangements, especially the Cotonou Agreement. But other countries that are members of the World Trade Organization (WTO) complain that their economic interests are being threatened by these. The EU is aware of the real threat of a legal challenge being brought against it by third countries against the trade preferences offered by the EU to ACP countries through the WTO dispute settlement mechanism, and is eager to conclude, with ACP countries, new arrangements that are compatible with WTO rules. The EU is faced with two options: either to extend its current unilateral trade preferences now granted to ACP countries to other non-ACP countries that are members of the WTO, or to negotiate new trade agreements with the ACP countries alone that require the ACP countries to reciprocate in opening their markets to the EU. The EU chose the latter.

What is the current state of EPA negotiations?

The ACP Group of States is made up of 79 countries; 48 of these are from Sub-Saharan Africa, while 16 are from the Caribbean and 25 from the Pacific. The majority of ACP countries are Low Income Food Deficit Countries (LIFDCs).

Since the EU began negotiating with ACP countries, in six different regional groupings, the negotiating landscape of EPAs became increasingly complex. Most ACP countries have entered into EPA negotiations with the EU with the aim of having their preferences to the EU market extended. But ACP countries are increasingly resisting the EU deadlines for completion, considering development interests are not being addressed adequately. At the end of 2007, a first full regional EPA was initialled with the Caribbean region (CARIFORUM),

and later signed, and a number of interim agreements have been initialled or signed by specific countries or regions in Africa and the Pacific. Due to the potential impacts of IPRs on food security and biodiversity conservation, there is a need to continuously campaign against their inclusion and only continue with non-contentious issues within EPAs.

Since 2007, and given that the Cotonou Agreement and a WTO waiver that covered it were set to expire, the EU and ACP started to negotiate and conclude "interim agreements" compliant with WTO rules covering trade in goods. The objective was to secure ACP access to EU markets and allow negotiations towards full EPAs to continue without legal challenge from other WTO members. In the same way as full EPAs, interim EPAs establish rules to regulate trade between the EU and ACP countries until they are replaced in another trade agreement.

IPRs IN EPAs

The EU is adamantly pushing in their EPA negotiations to include issues that are of interest to the EU such as government procurement and IPRs, which were not included in the previous agreements. This causes major difficulties for ACP negotiators. For parliamentarians and other stakeholders, there is a lack of transparency and information on the status of negotiations on these sensitive issues. While EPAs are being negotiated only between the EU and ACP countries, any IPR provisions that are included in EPAs will be covered by the same Most Favoured nation (MFN) principle of the TRIPs Agreement. This means that all TRIPs-plus provisions included in the EU-ACP EPAs will apply to nationals of all WTO members with greater negative consequences, however, to economies of countries in global South through unequal terms of trade and limited farmer access to seeds.

Why is the EU demanding IPRs in EPAs?

The motivation for the EU to seek to include IPRs in EPAs can be found in several EU policy documents which mandate that the EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments (e.g. Global Europe Strategy, Section V, Strategy for the Enforcement of IPRs in Third Countries).

The inclusion of IPRs in EPAs works against the principles that EPAs should maintain a development-friendly orientation, contribute to the regional integration process and grant special and differential treatment to ACP countries. Depending on how they are framed they could still be WTO incompatible.

There is no valid legal basis for the EU to advance the idea of stronger IPR protection in the EPAs beyond those provided for under TRIPS.

The CARIFORUM EPA commits countries to work with the EU for the enforcement of IPRs to cover all intellectual property.

Must new obligations on IPRs be included in EPAs?

There is no valid legal basis for the EU to advance the idea of stronger IPR protection in the EPAs beyond those provided for under TRIPS.” The EU is claiming that rules on IPRs can be included in EPAs on the basis of Article 46.1 and 46.4 of the Cotonou Agreement. The articles do not mandate negotiations on IPRs in EPAs. Article 46.1 notes that the EU and ACP countries “recognize the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights....in line with the international standards with a view of reducing distortions and impediments to bilateral trade”. Article 46.4 states that the EU and ACP countries “may consider” the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either party.

New Rules on IPRs introduced in EPAs

The extent to which IPRs will be covered in all EPAs is unclear as the negotiations are taking place at the individual and regional level to conclude both interim and full EPAs. The analysis of the only full EPA concluded to date between the EU and the Caribbean CARIFORUM countries tells us that EPAs may include significant rules on IPRs. There is a real danger that the CARIFORUM EPA, the first full EPA to be concluded, may be used as a template by the EU in further negotiations to extract further concessions from other negotiating regions. Interim EPAs do not contain any substantive provisions on IPRs. African and Pacific countries strongly opposed the inclusion of IPRs in interim EPAs and instead requested that these be limited to covering only goods in order to ensure consistency with the WTO rules (Biadgleng, 2008). However, some interim EPAs contain clauses that indicate the levels of negotiation reached on the matter. Some of the clauses legally bind ACP countries to include IPR provisions in final EPAs while others commit ACP countries to further continue negotiations on IPRs but do not mandate their inclusion in the final EPA.

THE CARIFORUM EPA: TROUBLING IPR PROVISIONS

Geographical indications

The EPA commits the CARIFORUM to protect GIs “in the broadest possible way”, to the same extent that such protection is extended within the EU. The GI provision privileges the EU. The EU has an extensive system for GI protection, which has evolved in time that the CARIFORUM lacks. The CARIFORUM countries have not even undertaken a comprehensive assessment of the potential products from their region that could constitute GIs, nor an assessment of the costs that administering a system of GI protection will entail.

Genetic Resources, Biodiversity and Traditional Knowledge

The CARIFORUM countries did not gain any crucial concessions from the EU on aspects of preventing the misappropriation of their biodiversity and the recognition of the rights of their communities over traditional knowledge within the IPR system. The related clause does not go beyond existing commitments in other multilateral agreements such as the CBD. For example, they re-iterate Article 8(j) of the CBD concerning prior informed consent and the sharing of benefits of the use of genetic resources and the protection of traditional knowledge. The EPA mentions the establishment of a national requirement to disclose the origin of the genetic resources and traditional knowledge in a patent application, but does not make disclosure mandatory, as most ACP countries are demanding in current WTO negotiations.

Protection of Plant Varieties

The EPA requests CARIFORUM to consider joining UPOV 1991. The clause does not inhibit CARIFORUM countries from creating more appropriate *sui generis* systems of protecting plant varieties that are suited for their own agricultural systems. However, the clause does not make any concession to CARIFORUM as it merely reaffirms that countries can, subject to restrictions, implement farmers’ rights at the national level.

Enforcement of IPRs

The CARIFORUM EPA contains a full sub-section aimed at increasing the ability of IP rights holders to enforce their rights. The provisions in the CARIFORUM EPA are TRIPS-plus and do not include adequate safeguards to ensure that enforcement measures will not be abused or misused by rights holders. The EPA commits the CARIFORUM countries to work with the EU to extend the use of border measures for the enforcement of IPRs to cover all intellectual property. This is extremely dangerous and controversial. Border authorities are not well placed to define whether a good may be infringing a patent or other IPRs and to decide whether to temporarily prevent the good from entering the market. This is opening the door to corruption and paving the way for the public sector to pay for the enforcement of private rights.

Source: [Ermias Biadgleng, 2008; Dalindyabo Shabalala, 2008]

STATUS OF EPA NEGOTIATIONS BY REGIONS

Source: EC Update on Economic Partnership Agreements as of 17 June 2009

Regional grouping	Countries	Signed EPAs
Caribbean Forum of ACP States (CARIFORUM)	Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Rep, Haiti (LDC), Grenada, Guyana, Jamaica, Saint Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago.	Full EPA signed by all CARIFORUM members except Haiti, which has initialled the full EPA
Eastern and Southern Africa (ESA)	Comoros, Djibouti (LDC), Ethiopia (LDC), Eritrea(LDC), Malawi(LDC), Madagascar, Mauritius, Seychelles, Sudan (LDC), Zambia, Zimbabwe.	Regional Interim EPA signed by Madagascar, Mauritius, Seychelles and Zimbabwe; initialled by Comoros and Zambia
Eastern African Community (EAC)	Burundi (LDC), Kenya, Rwanda (LDC) Tanzania (LDC), Uganda (LDC).	Regional Interim EPA initialled by all countries.
Southern Africa	Angola (LDC), Botswana, Lesotho, Mozambique, Namibia, Swaziland, South Africa.	Regional Interim EPA signed by Botswana, Lesotho, Swaziland and Mozambique; initialled by Namibia.
West Africa	Benin (LDC), Burkina Faso (LDC), Cape Verde (LDC), Cote d'Ivoire, Gambia (LDC), Ghana (LDC), Guinea (LDC), Guinea Bissau (LDC), Liberia (LDC), Mali (LDC), Mauritania (LDC), Niger (LDC), Nigeria, Senegal (LDC), Sierra Leone (LDC), Togo (LDC).	Individual Interim EPA signed by Cote d'Ivoire and initialled by Ghana
Central Africa	Chad (LDC), Central African Republic (LDC), Congo DR (LDC), Sao Tome e Principe (LDC), Cameroon, Congo, Gabon.	Individual Interim EPA signed by Cameroon
Pacific ACP Countries (PACP)	Cook Islands, Fiji, Kiribati (LDC), Marshall Islands, Micronesia, Nauru, Niue Palau, Papua New Guinea, Samoa (LDCs), Solomon Islands, (LDC) Tonga, Tuvalu (LDC), Vanuatu (LDC).	Regional Interim EPA signed by Papua New Guinea* and initialled by Fiji

* Updated 30 July 2009

TRIPS-plus provisions should not be included in EPAs. EPAs should, rather, give priority to the development needs of ACP countries.

IMPACT ON FOOD AND BIODIVERSITY

EPAs should, as originally intended, give priority to the development needs of ACP countries. One of these needs is to have unrestricted access to seed varieties. However, the TRIPS-plus provisions that are proposed for inclusion in EPAs could impact negatively on farmers' access to and control over their seeds, essential for securing local food supplies and for sustaining agricultural biodiversity, including farmers' varieties of seeds.

The application of patents and other IPRs on plant genetic resources, especially farmers' seed varieties, will jeopardize food sovereignty and the security of food supplies. IPRs tend to facilitate control over seeds and associated knowledge by agribusinesses at the expense of small and subsistence farmers. This is caused in part by the royalties that farmers must pay to commercial breeders to acquire protected seeds, even though many commercial varieties have originated in the seeds that farmers have selected and sown for thousand years.

Equally detrimental to poorer farmers are the restrictions embedded in IPRs to their Farmers' Rights to retain the seeds on which the following year's harvest depends – restrictions on saving, replanting, exchanging and selling saved seeds. Traditionally, farmers save their seeds after each harvest and replant them the following year. They trade and exchange their seeds locally with other farmers.

It is essential that farmers should retain control over their seeds so that they may continue to improve and adapt varieties to suit changing needs and conditions—seed varieties that are diverse and resilient. Such practices, common among small-scale farmers, of on-farm conservation and development of farmers' seed varieties are essential to secure food supplies and livelihoods for communities, including those in ACP countries. As the Indian environmentalist, Vandana Shiva, wrote, "Seed is the first link in the food chain. It is the embodiment of life's continuity and renewability; of life's biological and cultural diversity. Seed for the farmer is not merely a source of future plants or food; it is the storage place of culture, history and knowledge. Seed is the ultimate symbol of food security."

The IPR clauses proposed for EPAs will impact negatively on the availability of farmers' seeds and the possibilities for realising food sovereignty that will secure local food supplies. Instead, the EPA negotiations should be focusing on delivering sustainable development, including securing food supplies, together with conserving agricultural biodiversity and the environmental justice embodied in defending farmers' seeds.

RECOMMENDATIONS FOR EPA NEGOTIATIONS

As highlighted in this briefing, if EPA negotiations continue, there is an urgent need to stop the inclusion of intellectual property rules in EPAs; if anything, EPAs should reduce the negative impacts of existing international rules. ACP countries should not agree to comply with, or commit to accession to, UPOV 1991 in their EPAs. Those states that are already UPOV parties should not make their implementation of UPOV 1991 subject to dispute settlement under the EPA. The negotiating countries could consider the inclusion of adoption of a *sui generis* system (Article 27.3b of TRIPS) that also recognises Farmers Rights while complying with UPOV '78 (e.g. as in the Indian PVP law). ACP countries should also refrain from negotiating provisions on genetic resources, biodiversity and traditional knowledge in EPAs and focus their energies in intergovernmental fora of the United Nations. For those that wish to proceed with such negotiations, they should, at a minimum, include a requirement that the EU party take measures, including disclosure of origin requirements for patent applications, to prevent the misappropriation of ACP genetic resources and traditional knowledge by EU individuals and enterprises. (Dalindyebo Shabalala, 2008)

Many ACP states could consider rejecting full EPAs. If they choose to continue negotiating EPAs and their implementation, ACP states should minimize the effects on already existing IPR regimes, and:

- **Reject the inclusion of IPR provisions in EPAs**
- **Negotiate for the recognition of *sui generis* provisions of protecting Farmers' Rights and existing access and benefit sharing mechanisms**
- **Negotiate for the adoption of food sovereignty as a fundamental principle in EPAs in order to enhance local food provision**
- **Ensure that flexibilities in the TRIPS agreement are maintained, including transition periods for LDCs to domesticate their *sui generis* legislative frameworks**
- **Ensure that IPR provisions in EPAs do not include obligations to accede to the UPOV Convention 1991 Act and TRIPS-plus agreements**
- **Ensure that IPR chapters and clauses, if included, are not subject to a dispute settlement mechanism under the EPA Provisions but only under existing mechanisms e.g. under the TRIPS Agreement.**

REFERENCES

- Commission on Intellectual Property Rights (CIPR) (2002). *Integrating Intellectual Property Rights and Development Policy*. London. See: www.iprcommission.org/home.html
- Dalindyebo Shabalala (2008). *Intellectual Property in European Union Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What way Forward after the Cariforum EPA and the interim EPAs?*. CIEL and Oxfam. See: www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf
- Ermias Biadgleng (2008). *Negotiating Caribbean IP Rights: Question of Balancing National Policy Priorities with Foreign Trade Policy?* Trade Negotiation Insights. Volume 7. Number 6 / July & August 2008. See: ictsd.net/i/agriculture/international-trade-agreements/regional-international-trade-agreements-agriculture/africa/14146/
- ETCgroup (2008). *Who Owns Nature?: Corporate Power and the Final Frontier in the Commodification of Life*. Communiqué, Issue 100. November 2008. See: www.etcgroup.org/upload/publication/pdf_file/707
- European Commission (2006). *Global Europe: competing in the world. EU Policy Review*. See: EU.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm
- European Union (2009). *Update on Economic Partnership Agreements - 23 March 2009*. See: trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142689.pdf
- Food and Agriculture Organization (2008). *The State of Food Insecurity in the World 2008*, FAO. See: www.fao.org/docrep/011/i0291e/i0291e00.htm
- Geoff Tansey and Tasmin Rajotte (2008). *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*. Earthscan. See: www.idrc.org/en/ev-119945-201-1-DO_TOPIC.html
- Graham Dutfield (2003). *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History*. Ashgate
- ICTSD (2002). *Intellectual Property Rights in EPA Negotiations*. See: www.acp-eu-trade.org/library/files/ICTSD%20-%20IPR%20in%20EPA%20Negotiations.pdf
- Julian A. Oram (1999). *The TRIPs Agreement and its Implications for Food Security*. International Famine Centre
- Peter Drahos (2007). *Patent Reform for Innovation and Risk Management: A Separation of Powers Approach*. Knowledge Ecology Studies. See: www.anu.edu.au/fellows/pdrahos/articles/pdfs/2007patentreformforinnovriskgmt.pdf
- Peter Drahos and John Braithwaite (2007). *Information Feudalism - Who Owns the Knowledge Economy*. Earthscan
- Viviana Munoz Tellez (2008). *Lessons from the Food Crisis: Patchwork Will Not Mend Our Vulnerable Food System*. 16 June, Issue 17. South Bulletin, South Centre. See: www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=860&Itemid=
- Vandana Shiva (2001). *Patents: Myths and Reality*. Penguin Books (India),
- World Bank (2008). *Economic Partnership Agreements between Africa and the European Union: What to do Now?*. World Bank. See: www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/03/24/000333038_20090324034203/Rendered/PDF/459450SR0white10Box338867B01PUBLIC1.pdf
- World Bank (2009). *Swimming Against the Tide: How Developing Countries are Coping with the Global Crisis*. Background Paper prepared by World Bank Staff for the G20 Finance Ministers and Central Bank Governors Meeting, Horsham, United Kingdom on March 13-14, 2009. See: siteresources.worldbank.org/NEWS/Resources/swimmingagainsthethide-march2009.pdf

GLOSSARY

ACP	African, Caribbean and Pacific bloc of countries
CARIFORUM	Caribbean Forum of ACP countries
CBD	Convention on Biological Diversity (UN)
CIPR	Commission on Intellectual Property Rights (UK)
DUS	Distinct, Uniform and Stable (UPOV criteria)
EAC	Eastern African Community
EC	European Community
EPA(s)	Economic Partnership Agreement(s) (EU)
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication
IP	Intellectual Property
IPR(s)	Intellectual Property Right(s)
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture (FAO)
LDC(s)	Least Developed Country(ies)
LIFDC(s)	Low Income Food Deficit Country(ies)
MFN	Most Favoured Nation principle of the TRIPS Agreement
PACP	Pacific ACP countries
PBR(s)	Plant Breeders' Right(s)
PVP	Plant Variety Protection
TRIPS	Trade-Related aspects of Intellectual Property Rights (WTO)
TRIPS -plus	Any requirement to provide stronger intellectual property protection than the World Trade Organisation's TRIPS Agreement
UPOV	Union for the Protection of New Varieties of Plants (French acronym) - The currently recognised Acts of UPOV were agreed in 1978 and 1991.
WTO	World Trade Organisation

HIDDEN THREATS:

AN ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS IN EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS: UNVEILING THE HIDDEN THREATS TO SECURING FOOD SUPPLIES AND CONSERVING AGRICULTURAL BIODIVERSITY

The European Union intends to include new international rules on Intellectual Property Rights (IPRs) in the Economic Partnership Agreements (EPAs) that are currently under negotiation. Agreeing these would be beyond countries' obligations under the World Trade Organisation's TRIPs agreement on intellectual property. This Briefing provides an overview of how these new rules add significant challenges and threats to food security, food sovereignty and the sustainable use and conservation of biodiversity, especially in African, Caribbean and Pacific countries.

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