



Does Cotonou Require IP Chapters in EPAs?

A Legal Reality Check

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List of Abbreviations

ACP	African, Caribbean and Pacific Countries
AoS	WTO Agreement on Safeguards
ARO	Agreement on Rules of Origin (GATT 1994)
CARICOM	Caribbean Community
CBD	Convention on Biological Diversity
CEPA	CARIFORUM-EC Economic Partnership Agreement
BTA	Bilateral Trade Agreements
DDA	Doha Development Agenda
EPA	Economic Partnership Agreement
EC	European Community
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication(s)
IPRs	Intellectual Property Rights
LDC	Least-Developed Country
MFN	Most Favoured Nation
MRA	Mutual Recognition Agreement
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
ORC	Other Regulations of Commerce
PTA	Preferential Trade Agreements
RP	Reference Paper (also: WTO Reference Paper on Basic Telecommunications)
RTA	Regional Trade Agreement
SMEs	Small and Medium-Sized Enterprises
SPS	(Agreement on) Sanitary and Phytosanitary Measures
SSM	Special Safeguard Mechanism

SVEs	Small, Vulnerable Economies
TA & CB	Technical Assistance and Capacity Building
TBT	(Agreement on) Technical Barriers to Trade
TDCA	South Africa Trade, Development and Cooperation Agreement
TRIPS	(Agreement on) Trade-Related Intellectual Property Rights
UPOV	International Union for the Protection of New Varieties of Plants (Union internationale pour la protection des obtentions végétales)
WCT	WIPO Copyright Treaty
WPDR	Working Party on Domestic Regulation (WTO)
WPPT	WIPO Performances and Phonograms Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1 Introduction

The ongoing negotiations on Economic Partnership Agreements (EPAs) between the European Community and its Member States and the various groupings of ACP States include, under the heading of “trade-related issues,” negotiations on the protection of intellectual property rights (IPRs). The only EPA completed at the time of drafting, the CARIFORUM-EC EPA, does indeed contain a chapter on “Innovation and Intellectual Property.”¹ None of the interim, or “stepping stone” EPAs initialed by other ACP regions/countries, however, contains substantive provisions on intellectual property rights, even if most – but not all² – feature a so-called “*rendez-vous clause*” in which the parties agree to negotiate further towards more comprehensive EPAs, *inter-alia* on IPRs.

The inclusion of IPRs in the final EPAs is seen by some as an obvious step in establishing a meaningful economic partnership, by others as yet another area in which the EC pushes the ACP to concessions and commitments that go beyond what is necessary and good for their development. This paper takes a step back to look at the issue from a legal point of view: Does the Cotonou Agreement,³ which forms the basis of the EPA negotiations, require the negotiation of IPR chapters in the future EPAs? In other words: Have the parties already in Cotonou in 2000 committed themselves to proceed on IPRs? If so, what is the minimum content required according to the Cotonou Agreement?

Our analysis in Section 2 below leads to the conclusion that the Cotonou Agreement indeed does contemplate EU-ACP cooperation in the area of IPRs. It does not, however, create any “hard” legal obligation to address IPRs *at all* in the future EPAs, and does not prescribe any specific elements, or minimum contents, for IP chapters in EPAs if negotiated.

One might argue that the question is largely moot, not only for CARIFORUM which, as indicated, has initialed a complete EPA including a chapter on IPRs, but also for the other ACP regions, given the “*rendez-vous clauses*” in the initialed Interim EPAs which call for negotiations on IPRs. We briefly address the issue in Section 3, concluding that the question continues to matter because (1) the EPAs have so far only been initialed and at the time of drafting, (2) at least the SADC EPA as initialed does not contain a “*rendez-vous clause*” calling for negotiations on IPRs and (3) at least some of the “*rendez-vous clauses*” do not appear to add to the legal content of the Cotonou Agreement in this regard.

2 Analysis: Does Cotonou Demand IPR Chapters?

The question under examination is whether any provision, or provisions, of the Cotonou Agreement *legally require* the parties to negotiate a chapter on IPRs in the future EPAs.

¹ Chapter 2 of Title IV (Trade-Related Issues) of the EC-CARIFORUM EPA.

² Most notably the Interim EPA initialed with the SADC countries Botswana, Lesotho, Swaziland and Mozambique does not contain any “*rendez-vous clause*” mentioning IPRs.

³ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the other Part, signed in Cotonou on 23 June 2000.

We therefore leave aside the question whether and to what extent the parties are at this point in time *politically* committed to such negotiations given the path the EPA negotiations have in fact taken, in view not least of the fact that some ACP groupings have themselves more or less actively engaged in negotiations on IPR chapters. We further leave aside any questions relating to the internal negotiating mandates of the respective governments/representatives of the parties, including the European Commission.

In order to analyse the legal question before us, we turn to the potentially relevant provisions of the Cotonou Agreement to establish whether they provide a mandate for negotiations of IPR chapters in the EPAs. The key provisions in this context are contained in Articles 36, 37 and 46 of the Cotonou Agreement.

2.1 The EPA Mandate for “New Trading Arrangements” in Part 3, Title II, Chapter 2

The EPA negotiation process as a whole is – primarily – based on the agreement of the parties to the Cotonou Agreement to negotiate “new trading arrangements.” This mandate is contained in Articles 36-38 of the Agreement. IPRs, however, do not appear *expressis verbis* in these provisions. The question is thus whether a negotiating mandate for an IPR chapter is contained in the general language of these provisions.

The first of the said provisions, namely Article 36.1 of the Cotonou Agreement, entitled “*Modalities*,” reads as follows:

1. In view of the objectives and principles set out above, the Parties agree to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

This provision provides the basic mandate for the EPA negotiations. It also reveals the basic rationale for the EPA negotiations, namely the goal of achieving WTO compatibility. A look at the flipside assists in the interpretation of this goal. The (post-)Lomé IV⁴ regime of unilateral preferences in trade in goods, applicable until 31 December 2007,⁵ was not WTO compatible because it violated the MFN principle in Article I of the GATT. At the 2001 Ministerial Conference in Doha the WTO Members had granted the EC and the ACP States a waiver which, however, expired on 31 December 2007. It is for this reason that the ACP and EU parties agreed to the negotiation of EPAs in the first place.

This context suggests that the mandate for new “trading arrangements” necessarily covers market access for goods, as the EPAs aim to safeguard the goal to maintain or expand the

⁴ The “Lomé IV Convention,” the fourth in a series of special economic partnership agreements between the ACP and the EC that governed the relationship between 1975 and 2000, was the predecessor agreement to the Cotonou Agreement.

⁵ Article 36.3 of the Cotonou Agreement extended the application of the Lomé IV preferences for the duration of the preparatory period, which was set to expire on 31 December 2007, according to Art. 37.1. of the Cotonou Agreement.

ACP goods' market access to the EU, albeit through reciprocal arrangements compatible with Article XXIV of GATT. This, in turn, suggests that the phrase "removing barriers to trade between them" is to be interpreted as mandating, or requiring, specifically the negotiation of preferences for trade in goods that would elevate the resulting agreement to the level of a Free Trade Agreement or a Customs Union, as defined by Article XXIV. IPR protection, however, is without any relevance for the fulfillment of the criteria set by Article XXIV of the GATT.

This focus on classical barriers to trade in goods, in particular tariffs, is expressly confirmed by Article 37.7 of the Cotonou Agreement, which reads as follows:

7. Negotiations of the economic partnership agreements shall aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules. On the Community side trade liberalisation shall build on the acquis and shall aim at improving current market access for the ACP countries through inter alia, a review of the rules of origin. Negotiations shall take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations will therefore be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.

It can thus be concluded that any agreement on IPR protection does not fall under the notion of "removing barriers to trade" in Article 36.1 of the Cotonou Agreement.

IPRs may arguably, however, be contained, or referred to, in the phrase "*and enhancing cooperation in all areas relevant to trade*" in Article 36.1 of the Cotonou Agreement. This interpretation would find strong support in the inclusion of IPRs (in Article 46) under the Chapter title "*Trade-Related Areas*" Part 3, Title II, Chapter 5.

However, it is rather unclear to what extent the phrase "*and enhancing cooperation in...*" represents a "hard" mandate in the sense of an *obligation* to negotiate specific elements of agreement, such as a separate IPR chapter. It appears safe to see in the phrase an *authorization* to discuss, and possibly agree, on cooperation measures of various kinds as part of the Cotonou system, including in the area of IPRs. Such cooperation measures may, further, also include issues such as cooperation in IPR enforcement, technical support in IPR administration and possibly "TRIPS plus" substantive standards. All of these elements could be fitted into the Cotonou framework as "legitimate" elements of an EPA.

By contrast, however, it would appear to go beyond the plain meaning, as well as the object and purpose, of the text to assume that "*enhancing cooperation in...*" means that the Cotonou Parties are under an *obligation* to negotiate specific components relating to IPR protection, in particular specific substantive or enforcement-related commitments. The term

“enhancing cooperation” is too wide and undetermined to support such a reading. Not only is *“enhancing”* an open term which does not allow for a determination of the envisaged degree of cooperation. Also the notion of *“cooperation”* appears to point primarily to actual cooperation activities such as administrative coordination, capacity building, drafting support etc., rather than to the assumption of specific substantive or enforcement-related obligations. This reading appears to be confirmed, specifically for the area of IP protection, by the text of Article 46.6 of the Cotonou Agreement (see discussion below).

It can thus be concluded that Articles 36-38 of the Cotonou Agreement as such do not impose, nor obviously support, the conclusion that there is a *legal obligation* on all Cotonou partners to engage in negotiations on an IPR chapter which contains “hard” obligations, such as substantive or procedural IP protection commitments. The provisions can be understood, however, to require the parties to at least engage *bona fide* in talks about cooperation measures such as administrative coordination. The results of these talks, however, remain open, with the notion of *“enhancing”* pointing vaguely towards and increase in cooperation *vis-à-vis* the status quo.

2.2 Article 46 of the Cotonou Agreement on “Protection of Intellectual Property Rights”

The question remains whether a more specific mandate can be discerned from Article 46 of the Cotonou Agreement. To analyze this question it appears useful to examine this provision systematically paragraph by paragraph.

Article 46.1 of the Cotonou Agreement reads as follows:

1. Without prejudice to the positions of the Parties in multilateral negotiations, 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 provision represents a legally vague “recognition” of the importance of IP protection. It does not, however, in itself contain a negotiating mandate for IP chapters in EPAs.

Somewhat similarly, Article 46.2 of the Cotonou Agreement states:

2. They [the Parties] underline the importance, in this context, of adherence to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to the WTO Agreement and the Convention on Biological Diversity (CBD).

Again, while the reaffirmation of the importance of TRIPS and CBD represents a relevant political statement, nothing in this provision suggests a distinct mandate for IP-related negotiations as part of the EPA process. At most, one may read this paragraph (as other

parts of Article 46) to suggest that, where appropriate, the “*enhancing [of] cooperation*” envisaged in Article 36.1 of the Cotonou Agreement may in fact include forms of mutual support in the adherence to, *i.e.*, implementation of, TRIPS and CBD rights and obligations.

Article 46.3 of the Cotonou Agreement provides as follows:

3. They [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.

While the extent of this obligation is not entirely clear (What level of development justifies which approach to accession or non-accession to these agreements?), it clearly represents a stand-alone, self-sufficient obligation. It does not, however, contain a mandate for further *negotiations* as part of the EPAs.

Article 46.4 of the Cotonou Agreement reads as follows:

4. The Community, its Member States and the ACP States may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party.

This provision does indeed appear to suggest that the Cotonou Parties view favourably the possibility of concluding separate, agreements on two specific IP issues, namely trademarks and geographical indications. Given that the adherence to TRIPS and other IP conventions is already addressed in paragraphs 2 and 3 (see above), the provision further seems to suggest that the envisaged separate agreements *may* go beyond TRIPS and the other conventions, possibly even with respect to substantive and procedural protection levels.

That said, however, the provision does not lend itself to an interpretation that would *require* the Cotonou Parties to negotiate such agreements. The term “*may*” is explicitly vague in this respect. The provision thus primarily “*flags*” the issues. It further provides an *authorization* to fit any such agreements into the Cotonou framework, and hence may be read to require implicitly *some* openness in good faith to receive and consider future proposals by the other Parties. It does not, however, contain any *obligation* to negotiate towards the conclusion of such agreements, neither within nor outside the EPA process.

Article 46.5 of the Cotonou Agreement defines the notion of “intellectual property” for purposes of the agreement. The provision does not have any further legal content, however, so is not relevant for our question here.

Article 46.6 of the Cotonou Agreement, finally, reads as follows

6. The Parties further agree to strengthen their cooperation 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 rightholders 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.

This provision does indeed contain a negotiating mandate, namely for negotiations on further agreements on cooperation in the area of IPRs. The term “*cooperation*,” however, is further defined, even if through a non-exhaustive list, to include those forms of cooperation contemplated above in the context of the interpretation of Article 36 of the Cotonou Agreement, namely legislative support, administrative coordination, institution building and capacity building. The lists suggests, conversely, that this mandate does not aim to cover negotiations on mutual *commitments* regarding substantive or procedural standards of IP protection.

It should further be noted that the introductory phrase “*upon request and on mutually agreed terms and conditions*,” which reflects language routinely found in treaty provisions on technical assistance and capacity building (TA & CB), appears to suggest that the request is assumed to come from the developing country beneficiary’s, *i.e.*, the ACP’s, side. However, as this is not further specified in the text it does not seem possible to conclude that this would categorically exclude advances from the European side.

In any case, however, the said phrase does qualify the mandate for purposes of the question under consideration. It appears to rather clearly exclude any *obligation* on the side of the developing country beneficiaries, *i.e.* the ACP parties, to agree to any specific cooperation agreement. As the forms of “*cooperation*” (which are, effectively, classical TA & CB support measures) may be perceived as intrusive and require a certain degree of practical engagement on the beneficiaries’ side in the form of readiness to receive the support on the technical levels, the phrase acts as a safeguard, or veto right, for the beneficiaries. They are thus not *required* to accept any specific element of “*cooperation*,” or support, offered.

It follows that this provision does not prescribe, or mandate, the negotiation of any specific cooperation agreements, nor specific IP elements of future agreements, including EPAs. The language does, however, provide hortative guidance for elements of cooperation that *could* be negotiated as part of an EPA, as well as in other forms and fora.

3 Is the Question Moot in View of the Interim EPAs?

One might argue that the question of whether the Cotonou Agreement mandates negotiations on IPR is meanwhile moot as most of the Interim EPAs contain “*rendez-vous clauses*” that appear to mandate such negotiations. Three reasons, however, would suggest that the issue remains relevant for the time being.

First, at the time of writing the Interim EPAs – as well as the comprehensive EC-CARIFORUM EPA – have only been initialed, but not signed nor ratified. In fact, the inclusion

of “trade-related issues” in any form is arguably one of the reasons why political opposition to the initialed agreements has not yet subsided and may, in fact, keep the issues on the table for some time to come.

Second, the interim SADC-EC EPA does not contain any such “*rendez-vous clause*.” At least for this relationship the Cotonou Agreement would appear to remain the only yardstick.

Third, where they do appear the “*rendez-vous clauses*” differ in their detailed prescriptive content. At least some of them do not seem to add anything to the pre-existing mandate under Cotonou. This appears to be true for the EAC-EC Interim EPA, which in Article 37 provides as follows:

Building on the Cotonou Agreement and taking account of the progress made in the negotiations of a comprehensive EPA text the parties agree to continue negotiations in the following areas: (...)

e) *Trade related issues namely: (...)*

iv. *Intellectual property rights; (...)*

The clause carefully “builds on” the Cotonou Agreement and only “takes account” of the progress made in the negotiations before the Interim EPA had to be concluded in view of the looming 31 December 2007 deadline. While the text refers to these negotiations as those “of a comprehensive EPA text,” this appears to be a factual account (this is the direction in which the negotiations were in fact moving) rather than a new agreement on that direction. The agreement here is only to continue those negotiations, arguably without in fact changing its original basis, which appears to remain the Cotonou Agreement alone.

The phrasing is notably different in the ESA-EC Interim EPA. There the introductory phrase of Article 53, the corresponding “*rendez-vous clause*” reads:

Building on the Cotonou Agreement and taking account of the progress made in the negotiations of a comprehensive EPA text the parties agree to continue negotiations in accordance with Article 3 with a view to concluding a full and comprehensive EPA covering the following areas (...) (emphasis added)

This phrasing could indeed be seen to add to the Cotonou Agreement mandate a joint commitment to negotiate towards an explicitly “full and comprehensive” agreement, which equally explicitly aims to “cover” *inter alia* intellectual property rights – without, however, providing any prescription as to the extent of that coverage.

The two Interim EPAs initialed by Côte d’Ivoire (in French) and Ghana (in English), the only two countries from the ECOWAS region having proceeded to this step, use again a slightly different wording. Their respective Article 44⁶ states :

⁶ The corresponding text of the Côte d’Ivoire Interim EPA reads as follows: “*En se basant sur l’accord de Cotonou, les parties s’engagent à prendre toutes les mesures nécessaires pour négocier et conclure dans les meilleurs délais un accord de partenariat économique global avec l’ensemble de l’Afrique de l’Ouest dans les domaines suivants (...)*” It is worth noting in passing that the list of issues under this *chapeau* is significantly longer in this agreement than in the one with Ghana, even though both purport to aim at the same “global” agreement between the EC and the Western African region.

Building on the Cotonou Agreement, the Parties will cooperate to facilitate all the necessary measures leading to the conclusion as soon as possible of a global Economic Partnership Agreement between the whole West African Region and the EC in the following: (...)

d) intellectual property. (emphasis added)

The phrasing “global Economic Partnership Agreement (...) in the following” can be read as a mandate to negotiate with a view to covering the issues, including intellectual property. Again, however, a specific content or degree of coverage is not prescribed.

The Interim EPAs involving the Pacific states Fiji and Papua New Guinea, again, contain an entirely different “rendez-vous clause.” Their respective Article 69 (entitled “Modalities for the continuation of negotiations”) reads as follows:

1. The EC Party and the Pacific States covered by this agreement are committed to the continuation and successful conclusion of the currently ongoing negotiations of a comprehensive Economic Partnership Agreement (EPA) in line with the Cotonou Agreement and previous Ministerial Declarations and Conclusions, including all components and involving all interested countries in the Pacific region. (...)

3. The Parties note that this Interim Partnership Agreement does not predetermine the positions that the region will be taking in the negotiations of a comprehensive EPA on development co-operation. (...)

Like the EAC-EC Interim EPA, this phrasing rather explicitly does not aim to add anything to the existing basis for negotiations, namely the Cotonou Agreement. It further does not mention intellectual property (or any other “trade-related issue”).

The picture is thus inconclusive. Some “rendez-vous clauses” indeed provide for intensified mandates demanding coverage of IPRs, albeit unspecified in its reach, while others do not appear to extend the mandate beyond what the Cotonou Agreement already does, or does not, cover.

4 Conclusions

Neither the general EPA mandate in Articles 36-38 of the Cotonou Agreement nor the specific provisions addressing IP protection in Article 46 support the notion of a stringent legal *obligation* to negotiate on IP matters, neither on separate agreements nor on IP chapters in the EPAs. It follows that also no minimum standards for an IP chapter, if negotiated, result directly from the Cotonou Agreement.

However, the following “soft” obligations to engage *bona fide* in talks can be distilled from the said provisions:

- The obligation to discuss in good faith generally the “*enhancement*” of “*cooperation*” in the area of IP protection, with “*cooperation*” meaning primarily administrative

coordination, legislative support, institution building and training and “enhancement” referring vaguely to any form of improvement over the present situation (Articles 36.6 and 46.6).

- The even softer obligation to “*consider*” in good faith the possibility of further agreements specifically on trademarks and geographical indications (Article 46.4)

These “soft” obligations, as well as more broadly the other parameters of Article 46 of the Cotonou Agreement, may offer useful guidance for IP chapters in EPAs, *if* negotiated. They do not, however, contain a “hard” obligation to negotiate, nor minimum standards for results.

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