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IP Provisions of the EU-Central America Association Agreement and Development Issues

Abstract

The recent Association Agreement signed between the European Union and Central American countries contains important intellectual property provisions. Some of these provisions have been inserted in the treaty to meet Central American states' needs, especially with reference to technology transfer issues, the protection of public health and the protection of genetic resources and traditional knowledge.

Legal context and facts

On 19 May the European Union (EU) and the six Central American (CA) countries — El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica and Panama — signed an important association agreement. This is the first single regional agreement of the EU to cover political dialogue, cooperation and trade in Latin America. National ratification processes are due to start soon.

With particular reference to trade issues the background logic to this agreement is evident: the EU wants to catch up with the US which signed in 2004 a free trade agreement with CA states and the Dominican Republic since this geographical Spanish-speaking region is commercially and strategically important to EU.

The association agreement also contains a chapter on intellectual property rights (IPR). The parties are asked to respect certain standards of IPR protection as well as to guarantee an adequate IPR enforcement by making civil, criminal and administrative remedies and measures available to right owners. Most of these provisions complement and integrate the TRIPS Agreement.

In addition to putting emphasis on strong IPR protection (which has been sought more by EU than by the CA negotiators), the agreement also contains provisions specifically meeting the needs of CA countries. The text thus reflects the compromise reached between EU and CA negotiators.

The topics of specific interest to CA states are *inter alia* (i) technology transfer issues, (ii) the protection of public health and (iii) the protection of genetic resources and traditional knowledge.

Analysis

Technology transfer

The provisions of the agreement regarding technology transfer reaffirm and integrate Articles 7, 40 and 66.2 TRIPS. In particular, according to Article 3 of the IP Chapter, the parties undertake to exchange opinions and information on policies involving technology transfer with a view to facilitating business alliances, licence agreements and outsourcing relationships. The parties also recognize that it is important to create mechanisms which strengthen and promote investments in Central America, especially in innovative and high-tech fields. They also recognize that technology transfer is favoured by training and capacity building activities as well as academic, professional and business exchange programs. The EU is also committed to promote programs aimed at carrying out R&D activities in Central America and to facilitating access to infrastructure and medicines (Article XX of the Agreement).

Protection of public health

Health protection issues are specifically dealt with in Article 2.1 of the IP Chapter. This provision stresses the importance of the Doha Declaration on TRIPS Agreement and Public Health, adopted by the WTO Ministerial Conference in November 2001,

which reaffirms flexibility of WTO Member states in relaxing patent protection for better access to essential medicines.

The parties of the treaty also undertake to implement and respect the General Council Decision of 30 August 2003 and the Protocol of amendment to Article 31 TRIPS of 6 December 2005 (Article 2.2 of the IP Chapter). The 2003 Decision introduced a temporary waiver to TRIPS by creating a mechanism to allow WTO members to issue compulsory licences to export generic versions of patented medicines to countries with insufficient or no manufacturing capacity in the pharmaceutical sector; and the 2005 Protocol made permanent that temporary waiver.

Protection of genetic resources and traditional knowledge

Another topic of utmost importance to CA states is the protection of genetic resources and traditional knowledge.

Article 2.4 of the Agreement recognizes the sovereignty of states over their natural resources and the access to their genetic resources pursuant to the 1992 Convention on Biological Diversity of Rio de Janeiro. It also specifies that the parties cannot be prevented from adopting measures aimed at meeting the aims of Rio: (i) conservation of biological diversity, (ii) the sustainable use of its components and (iii) the fair and equitable sharing of the benefits from the use of genetic resources (Article 1 of the Rio de Janeiro Convention).

Further, Article 2.5 stresses the importance to respect and safeguard the traditional knowledge, innovations and practices of indigenous and local communities which are related to the conservation and sustainable use of biological diversity. This provision echoes Article 8(j) of the Rio de Janeiro Convention (which is not expressly mentioned).

Compliance with these principles and provisions is paramount to CA countries, which are biodiversity-rich and are therefore exposed to a major risk, i.e. the risk of misappropriation of their genetic resources and traditional knowledge taken from (and without the prior consent of) local people or farming communities and subsequently patented in industrialized countries (so-called biopiracy cases, of which there have been several in CA.). Accordingly, the fact that the association agreement makes reference to the Rio de Janeiro Convention, both expressly (in relation to its main aims) and impliedly (with reference to the protection of genetic-related traditional knowledge), gives a clear message to the EU that its companies and individuals should refrain from taking and developing further genetic resources and associated knowledge from CA and from patenting it in Europe, unless they obtain a prior and informed consent of the community providing the resource in question (see Article 15.5 Convention on Biological Diversity) and share with that community the benefits deriving from the use of said resources.

Another issue of particular interest to CA States is the protection of plant varieties. Article 10 of the IP Chapter reiterates what is already provided by Article 27.2(b) TRIPS and thus leaves the parties free to protect plant varieties either by patents or by an effective *sui generis* system or by any combination of them. Yet this provision clarifies that there should be no clash between such protection and the right of parties to the association agreement to protect and safeguard their farmers and genetic resources.

In particular Article 10 affirms the right to insert limitations to breeders' rights to allow farmers to save, use and exchange protected seeds or other propagating material. This is the so-called "farmers' exemption" or "farmers' privilege", according to which farmers who have purchased a seed of a protected variety have the

right to save seeds from the resulting harvest for planting in the subsequent season as well as to exchange those seeds with other farmers without risk of being sued by the IPR holder. This important exemption allows traditional and age-old practices of farmers: seed exchange is important for purposes of crop and variety rotation (crop rotation is considered a wise practice for many reasons, disease avoidance being a major one) as well as food security.

The insertion of the farmers' exemption is therefore an important result obtained by CA negotiators.

The result is even more striking if we look at other free trade agreements entered into by industrialized countries and biodiversity-rich countries. For example, several free trade agreements concluded by the US oblige the other parties to adhere or to ratify the 1991 version of the UPOV Convention (see *inter alia* the agreements entered into with CAFTA-DR in 2004, with Chile in 2003 and Colombia in 2006). Also the 2008 Economic Partnership Agreement between EU and the members of CARIFORUM provides that the parties must consider acceding to the 1991 UPOV Convention.

It has been important for CA countries not to accept an obligation to adhere to the 1991 version of the UPOV Convention (only Costa Rica so far has done so), since it strongly limits the farmers' exemption and is not considered as meeting biodiversity-rich countries' needs: in particular it does not authorize farmers to exchange seeds with other farmers for propagating purposes, but merely authorizes them to save and use seeds for propagating purposes on their own holdings within certain limits and subject to the safeguarding of the legitimate interests of the breeder.

Practical significance

The provisions of the EU-CA Association Agreement analysed here are expected to have a positive impact on Central American social, economic and agricultural system.

Technology transfer and access to medicines will be facilitated. Yet it is in the field of genetic resources that CA states have obtained the most important negotiation results. Stressing, in an IPR set of rules, that patent protection must not interfere with countries' rights to protect their genetic resources under the Convention on Biological Diversity is a good point, taking into consideration that CA is biodiversity-rich (seldom do IPR treaties include rules protecting genetic resources). Linking IPR with the protection of biodiversity – as the EU-CA association agreement does - is far-sighted and will probably help prevent the misappropriation of genetic resources. The insertion of a broad “farmers’ privilege” into the association agreement is also beneficial to CA countries as it will allow farmers to continue carrying out wise traditional practices, such as seed exchange. These practices – which usually take place within the same community and are cooperative rather than profit-oriented – are essential to preserve the vitality of the crops across their different generations, and contribute to genetic diversity and the fight of hunger and poverty (see M. Ricolfi, *Interface between Intellectual Property and International Trade: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, in *International Conference on Intellectual Property Education and Training (New Delhi, July 11 to 13, 2001)--Collection of Papers compiled by the WIPO Worldwide Academy (2001)*, p.80).