CAN IP PROTECTION FACILITATE SUSTAINABLE DEVELOPMENT?

NEW APPROACHES IN EUROPE’S ECONOMIC PARTNERSHIP AGREEMENTS

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Outline

• **Introduction**: Europe’s new EPAs in a fragmented, TRIPS-plus World

• Trade Partnerships *for Sustainable Development*

• Introducing **Ceilings** to the Protection of Trade Interests in International Regulation

• The Concept of **General Exceptions** Beyond Artt.XX GATT, XIV GATS

• **Conclusions**
Introduction

Background I: A Fragmented International Order

• In a pluralistic environment of specialised rules and rule-systems each focussing on solving specific problems, “answers to legal questions depend on whom you ask, what rule-system is your focus on” (ILC, 2006).

• “WTO rules increasingly impinge upon other areas of law and policy, including environmental protection, agricultural and regional policies, labour standards, human rights and culture” (NCCR, Int. Trade Regulation Programme, 2008).

→ How can we achieve a better balance between economic and other regulatory objectives in an environment of structurally biased rule-systems?
Introduction

Background II: From TRIPS to TRIPS-plus

• In the mid-nineties, TRIPS set global IP standards mirroring the interests of R&D intensive industries in industrialised countries (IDs)

• Developing Countries (DCs) managed to negotiate some policy space / flexibilities which allow to take to adjust the standards to domestic needs and to take into account public interests (outside IP) on the domestic level

• Bilateral and Regional Trade Agreements (FTAs) increasingly diminish these flexibilities; while WIPO embarks upon a new Development Agenda

→ How can a new international agenda look like which balances IP protection with other public interests?
Introduction

My Research Focus: IP Regulation in EPAs

• Max Planck Research Project on “Economic Partnership Agreements of the EU - A Step Ahead in Reforming International IP Law?”

• Being aware of WTO/TRIPS-plus elements, my analysis focuses on different approaches for reconciling IP protection with other public and private interests

• Relevance beyond EPAs and beyond IP: Can balancing tools overcome the structural bias of trade- and other economic rule-systems?
Introduction

Background to EC – CARIFORUM EPA:

• **EC – ACP trade relations** to promote economic, cultural and social development of the ACP States (Art.1 Cotonou)

• Upholding **ACP trade preferences** in goods-sector requires WTO consistent RTAs

• EC demands comprehensive **WTO-plus EPAs**; EC Parliament calls to maintain DC policy space

• EC – CARIFORUM EPA (**CEPA**) so far only comprehensive Agreement negotiated
Introduction

Trade & Trade-Related Issues in the CEPA:

• Trade Partnership for Sustainable Development

• Trade in Goods (incl. Agriculture, TBT, SPS); Services, Investment & E-Commerce; capital movement

• Trade-Related Issues (incl. Competition, Innovation and IP, Environment, Social Aspects, Data Protection)

• Dispute Avoidance and Settlement

• General Exceptions, Institutional Provisions

• Protocol III on Cultural Cooperation
Trade Partnership for Sustainable Development

Sustainable Development (SD) Principles in CEPA:

- “Trade Partnership For Sustainable Development” (heading of part I CEPA)
- “establishment of a trade partnership consistent with the objective of sustainable development”; Promoting gradual economic integration of CARIFORUM States “in conformity with their political choices and development priorities”; “taking into account their respective levels of development” (Art.1 CEPA)
- Further: CEPA Preamble; Reference to SD objective of Cotonou; SD meaning in Art.3 CEPA ...

→ SD overarching treaty objective in CEPA, trade obligations dependant on level of development
Trade Partnership *for* Sustainable Development

Sustainable Development (SD) in Int. Trade Law:

- EPA new kind of FTA “as sustainable development is the presiding principle governing the whole agreement” (EC Commission, 2008)?

- Since 1992 Rio Earth Summit, SD appears in Preamble or as treaty objective in various int. agreements: CBD, NAFTA, Cotonou Agreement, and …

- …the WTO Agreement, Preamble: “The Parties (…) allowing for the optimal use of the world's resources in accordance with the **objective of sustainable development** (…), agree as follows”
Trade Partnership for Sustainable Development

Diverse and dynamic Understanding of SD:

- SD as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Brundtland Report, 1987)

- SD Objective in Art.3:2 CEPA understood as “a commitment that:
  a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations;
  b) decision-taking methods embrace the fundamental principles of ownership, participation and dialogue”
Trade Partnership for Sustainable Development

SD as Principle of **Reconciliation** and **Integration**:

- SD “has been generally accepted as integrating **economic** and **social** development and **environmental protection**” (WTO AB in US-Shrimp, 1998)

- The “need to **reconcile economic development with the protection of the environment** is aptly expressed in the concept of sustainable development” (ICJ, Gabcikovo – Nagymaros case, 1997)

- **Principle of Integration and Interrelationship, in particular in relation to human rights, and social, economic and environmental objectives** (ILA Delhi Declaration on the Principles of Int. Law related to SD, 2002)
Trade Partnership for Sustainable Development

Operationalising SD as a treaty objective:

• “The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership” (Art.3:1 CEPA)

• “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Art.31:1 VCLT, applicable via Art.219 CEPA)

→ Taking ordinary meaning as a starting point, the SD objective will be decisive for provisions incorporating broad and open concepts and those with an ambiguous or multi-layered ordinary meaning
Trade Partnership *for* Sustainable Development

Giving effect to SD objective in CEPA - an **Example**:

- Obligation to ensure "*that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement*" (Art.158 CEPA)

→ Implementing Art.158 CEPA: **Discretion** to issue injunction should be **exercised in light of** SD objective as a principle of **reconciling different interests**

→ Courts should consider public interests (**access to drugs via generic medicines**) when determining whether an alleged patent infringement justifies an injunction (compare *La Roche v CIPLA*, Delhi High Court, 2008)
Trade Partnership for Sustainable Development

Achieving similar balancing results under TRIPS?

• The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations (Art.7 TRIPS)

• In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles (Para.5 a Doha Declaration)
Trade Partnership for Sustainable Development

• SD objective in WTO Preamble must “add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement” (AB in US – Shrimp)

→ The balance required under Art.7 TRIPS, WTO preamble similarly informs the understanding of open terms in TRIPS provisions

→ In para.5 a) of the Doha Declaration, WTO Members have emphasized that each TRIPS provision must be read in light of that objective

→ ‘normal exploitation’, ‘legitimate interests’ and ‘unreasonable prejudice’ in Art.13, 17, 36:2, 30 TRIPS offer ample room to enlarge the domestic policy space in regulating exceptions to IP in a balanced way.
Trade Partnership *for* Sustainable Development

**Conclusions:**

• SD as treaty objective calls for reconciling economic, social and environmental interests in the implementation and interpretation of individual treaty provisions – whenever ordinary meaning and context allow.

• In order to be effective and responsive to the individual development needs, such balancing must be performed on the domestic level and thus implies policy space.

• Giving effect to SD treaty objectives therefore determines the scope of an international treaty obligation towards more discretion in implementation.
Ceilings to the Protection of Trade Interests

Meaning of and Rationale for Ceilings

• Binding exceptions and limits to the protection of economic interests in int. (IP) obligations

• Idea for a positive list of exceptions, limitations beyond the three step test (Art.13, 17, 26:2, 30 TRIPS)

• Setting a (multilateral) Maximum level of protection above which no (FTA) IP protection may reach

• Ceilings in TRIPS? Binding limits to IP protection (Art.9:2, 10:2 – also 7, 8:1?); TRIPS-plus protection must “not contravene [TRIPS] provisions” (Art.1:1 second sentence)
Ceilings to the Protection of Trade Interests

Examples for Ceilings in CEPA:

- Design protection shall not extend to designs dictated essentially by technical or functional considerations; A design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality (Art.146 C:2, 3 and Art.139:5 CEPA)

- The EC Party and the Signatory CARIFORUM States shall take measures, as appropriate, to prevent or control licensing practices or conditions pertaining to intellectual property rights which may adversely affect the international transfer of technology and that constitute an abuse of intellectual property rights by right holders or an abuse of obvious information asymmetries in the negotiation of licences (Art.142 CEPA)
Ceilings to the Protection of Trade Interests

Further Ceiling Approaches in Int. IP Law:

- Introducing a mandatory requirement for the disclosure of source (and origin) of biological resources and/or associated traditional knowledge used in patented inventions; evidence of PIC and ABS schemes (India, China, Brazil, Peru et al, Proposal for Art.29 bis TRIPS, 2006)

- Idea for “minimum mandatory exceptions and limitations particularly with regard to educational activities, people with disabilities, libraries, archives” (Brazil et al, WIPO SCCR proposal, 2008)
Ceilings to the Protection of Trade Interests

Extending Ceiling Concept beyond IP?

• Introducing labour-, environment-, human rights protection into Trade Agreements – CEPA examples:
  1) Duty to implement sustainable resource management in all levels of CEPA partnership (Art.183);
  2) Prohibition to attract FDI by lowering social or labour standards or failing to apply such standards (Art.193);
  3) “ensure an adequate level of protection of individuals with regard to the processing of personal data” – in line with UN/OECD guidelines (Art.197); minimum levels of data protection (Art.199)

• US Draft TRADE Act 2008: Review existing FTAs & introduce core labour-, environmental standards; maintain essential public services; ensure access to drugs and climate change technology ‘not obstructed’ by IP
Ceilings to the Protection of Trade Interests

**Problems** to consider:

- How to **effectively enforce** public interest ceilings in an institutional and dispute settlement framework focused on commercial interests?
  - Securing public policy ceilings abroad may serve the domestic interests of certain industries (e.g. generic Pharma and public health; alternative energy producers and environment protection)
  - Need to rethink WTO/DSU: Giving public interests a (greater) voice; time for a ‘guardian of the (WTO) treaties’?

- Binding Ceilings **limit policy space**

- Internalising public interests into a trade environment may lead to a **reconstruction** of these interests from a trade perspective
Ceilings to the Protection of Trade Interests

Conclusions:

• Binding ceilings to the protection of economic interests in Int. IP Regulation may be an option for
  – providing clarity & security about what is WTO-conform;
  – preventing certain TRIPS-plus obligations in FTAs which frustrate (optional) TRIPS flexibilities

• Beyond IP, ceilings could relate e.g. to trade in services and investment protection by setting binding minimum standards for certain public interests and human rights

• Enforcing such ceilings requires a fundamental change in the current institutional setting in the WTO; domestic ‘self-restraints’ on WTO-plus FTAs may be more viable
General Exceptions Beyond GATT and GATS

The Concept of a General Exception in CEPA:

- Systemically applicable to all CEPA chapters – thus allowing to override obligations relating to IP, investment, capital movement, environment, social aspects and data protection?

- Structure and wording resembles Artt.XX GATT, XIV GATS – could it therefore function as a flexible proportionality test similar to the WTO AB interpretation of the general exception in GATT, GATS?

- Is the concept of a general exception applicable to IP; can it serve as a model to address perceived imbalances in Int. IP Law?
General Exceptions Beyond GATT and GATS

PART IV – GENERAL EXCEPTIONS

Art.224 – General Exception Clause

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods, services or establishment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by the EC Party, the CARIFORUM States or a Signatory CARIFORUM State of measures which:

(a) are necessary to protect public security and public morals or to maintain public order;
(b) are necessary to protect human, animal or plant life or health;
(c) are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
   (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
   (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
   (iii) safety;
   (iv) customs enforcement, or
   (v) protection of intellectual property rights;
(f) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption of goods, domestic supply or consumption of services and on domestic investors
General Exceptions Beyond GATT and GATS

Art.224 CEPA applicable to IP obligations?

- Systemic position (Part IV & Art.224 heading) and wording (General Exception; “nothing in this Agreement”) encompass all obligations under CEPA
- Chapeau language (“disguised restriction on trade in goods, services or establishment”) indicates that the drafters likely had only obligations relating trade in goods, services and investment in mind
- Even if one rejects an application to IP, Art.139:2 CEPA provides that “nothing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines”
General Exceptions Beyond GATT and GATS

Art.224 CEPA - A Flexible Proportionality Test?

• Strong similarities in Structure and Substance (individual exceptions, necessity test, chapeau) suggest that CEPA parties intend a Artt.XX GATT-like operation:
  – exceptions are not to be interpreted narrowly – they ensure the overall balance of interests (AB, US – Gasoline)
  – CEPA Parties may to give preference to public interests over trade obligations, but not in a discriminatory manner
  – Need to choose least trade restrictive, equally effective measure which is reasonably available to CEPA Party
  – Overall dynamic proportionality test with sufficient deference to domestic policy space for public interests

→ Art.224 CEPA a key tool for balancing trade- and public interests on the domestic level
General Exceptions Beyond GATT and GATS

General Exceptions – a **Model for Int. IP Law?**

- **No comparable policy space under TRIPS**: Consistency test in Art.8:1 TRIPS; Restrictive application of 3-step-tests; *de facto* limited role of balancing objectives
- **Nature of IPRs does not justify difference**: Negative rights concept (Panel in *EC – GIs*) allows for limits on exploitation, but does not allow to make IP protected subject matter available to the public
- **But difficulty to operationalise a chapeau-like prevention of abuse** of a general public policy exception – obligation not to discriminate amongst ‘like’ IP subject matter a sufficient safeguard?
General Exceptions Beyond GATT and GATS

Conclusions:

• General Exceptions allow countries’ to give effect to accepted public policies in a proportional manner.

• Subject to more IP-relevant individual exception clauses (compare Art.8:1 TRIPS), Art.224 could function to address the structural bias towards right holders’ interests inherent in the Int. IP regime and exemplified in the notion of limited exceptions in the three step test.

• While shifting the balancing exercise to the domestic level guarantees policy space, it opens the doors for abusive reliance on the general exception – an IP specific chapeau needs to be worked out.
General Conclusion

• Can the mechanisms discussed facilitate an IP system which focuses on sustainable development?

→ Operationalising SD as treaty objective and reconciliation-mechanism, it can provide domestic policy space to give effect to public interests in the implementation of broad and open treaty terms

→ Binding Ceilings in Int. Economic Law require consensus on the global protection of public interests and a change in the existing institutional setting

→ General Exceptions function well as a domestic balancing tool – but beyond goods and services, the notion to prevent abuse needs re-conceptualising
Thank you for your attention!
Comments or critique to
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