Sustainable Development as Treaty Objective in International Agreements on Trade and Intellectual Property

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Outline

- **Research Context**: The new Economic Partnership Agreements (EPAs) between Europe and ACP Countries

- **Sustainable Development** as a Legal Concept in International Law

- Operationalising Sustainable Development as **Treaty Objective**

- Examples for an Integrative Interpretation of Int. Economic Law Agreements

- Conclusions
The Context

**Background:** A Fragmented International Legal Order?

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

- GATT and other WTO Law “is not to be read in clinical isolation from public international law” (US – Gasoline, WTO Appellate Body Report, 1996)
The Context

Background (contd)

■ “The Preamble to the NAFTA (…) suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles: (…) environmental protection and economic development can and should be mutually supportive.” (SD Myers vs. Canada)

■ “The international intellectual property system cannot operate in isolation from broader public policy questions such as how to meet human needs as basic health, food and a clean environment.” (Pascal Lamy, 2009)
The Context

Proposition:

- If the international economic law system wants to gain credibility and legitimacy, it cannot develop as a self-contained regime. Instead, it must address its linkages with current global challenges such as climate change, food security, public health or access to knowledge and information.

- Taken seriously, a sustainable development treaty objective is one (of many) legal tools to achieve an integration of economic, environmental and social interests.
The Context

**Research Focus:** Sustainable Development (SD) in EU 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?
The Context

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
The Context

**Trade & Trade-Related Issues in CEPA**

- Trade Partnership *for Sustainable Development*
- Trade in Goods (incl. Agriculture, TBT, SPS); Services, Investment & E-Commerce; capital movement
- **Dispute** Avoidance and **Settlement**
- Protocol III on **Cultural Cooperation**
Sustainable Development as a Legal Concept

SD Language in Int. Economic Law

→ **CEPA 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 the **Preamble** or as **treaty objective** in various int. agreements: CBD, UNFCCC, 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”
Sustainable Development as a Legal Concept

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)

- “We, the representatives of the peoples of the world, (...) assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — **economic development, social development and environmental protection** — at the local, national, regional and global levels” (World Summit on Sustainable Development (WSSD) - Johannesburg Declaration, 2002)
Sustainable Development as a Legal Concept

SD as Principle of Reconciliation and Integration

- 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)

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

- 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)
Sustainable Development as a Legal Concept

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
Sustainable Development as Treaty Objective

Meaning & Application of SD in CEPA

- Parties understand SD Objective in 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” (Art.3:2 CEPA)

- “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)
Sustainable Development as Treaty Objective

The Role of Objectives in the Process of Treaty Interpretation

“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)

→ 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.
Sustainable Development as Treaty Objective

SD ‘Integration’ as Treaty Objective

- The principle of integration is inherently ambiguous – it does not prescribe a specific integrative outcome, but an integrative process of decision-making
  - SD hence may not be able to function as a (customary IL) norm which contains concrete obligations…

- …but as a treaty objective, this ambiguity translates into policy space for states implementing the treaty:
  - Especially with open treaty terms, states have substantial discretion how to integrate economic, social & environmental concerns
  - Int. Courts must exercise deference accordingly
Examples for an Integrative Interpretation

**General Exception** Provisions in WTO Law

- National laws protecting endangered species as measures “relating to the conservation of exhaustible natural resources” under Art.XX g) GATT?

- “where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought” (…)

- The sustainable development objective in the Preamble to the WTO Agreement “must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement” (WTO AB in US – Shrimp, 1998)
Examples for an Integrative Interpretation

Further Examples from WTO Trade Law

- ‘arbitrary and unjustifiable discrimination’ in Art.XX GATT, Art.XIV GATS: Environmental or social grounds justifying differential treatment?

- ‘like products’ in Art.I & Art.III(2), (4) GATT or ‘like services and service suppliers’ in Art.I and XVII GATS: A different likeness test that considers environmental and social aspects – for example allowing for environmentally (or climate) friendly process and production methods (PPMs) to be taken into account?

- Or is Art.XX GATT lex specialis concerning reconciling economic, social and environmental interests?
Examples for an Integrative Interpretation

Examples in TRIPS

- TRIPS does not contain a general exception clause, but various versions of the ‘three step test’ which relies on open treaty terms like “normal exploitation”, “legitimate interests”, “unreasonable prejudice” in Art.13, 17, 26:2, 30 TRIPS:
  - Open for an integrative interpretation which provides policy space to address the linkages between IP and public health, climate change, access to knowledge and food security?
  - The TRIPS objectives and principles in Art.7, 8:1 – highlighted in the Doha Declaration – support an integrative approach in TRIPS interpretation
Examples for an Integrative Interpretation

An Example from CEPA

- 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)
Examples for an Integrative Interpretation

Examples from BITs?

- the main substantive principles in international investment law are relying heavily on very general and open terms such as
  - ‘fair and equitable treatment’,
  - ‘full protection and security’
  - or the prohibition of ‘expropriation’

- How can a SD treaty objective affect the meaning of these terms?

- In BITs and FTAs with an Investment Chapter however, SD (so far) does not seem to play an equally prominent role…
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 its implementation.
Thank you for your attention!

Any comments and critique to

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