

Intellectual Property and Sustainable Development Series



# Sustainable Development In International Intellectual Property Law – New Approaches From EU Economic Partnership Agreements?



By Henning Grosse Ruse - Khan

Max Planck Institute for Intellectual Property, Competition and Tax Law



International Centre for Trade  
and Sustainable Development

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## LIST OF ABBREVIATIONS AND ACRONYMS

ACP	African Caribbean and Pacific
ASEAN	Association of Southeast Asian Nations
Brundtland Report	United Nations Report of the World Commission on Environment and Development - Our Common Future
CBD	United Nations Convention on Biological Diversity
CIPR	Commission on Intellectual Property Rights
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
EPA	Economic Partnership Agreement
EU	European Union
EU Treaty	Treaty on the European Union
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
IGWG	Intergovernmental Working Group on Public Health, Innovation and Intellectual Property
ILA	International Law Association
IP	Intellectual property
IPR	Intellectual property rights
LDCs	Least developed countries
NAFTA	North American Free Trade Agreement
NSSD	National strategies for sustainable development
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

## FOREWORD

*Sustainable Development in International Intellectual Property Law -New Approaches from EU Economic Partnership Agreements?* is a recent contribution of the ICTSD Programme on Intellectual Property Rights and Sustainable Development. Many trade agreements - in whatever form (free trade or economic partnership agreements) - following the adoption of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), have addressed intellectual property (IP) issues particularly by deepening the minimum standards of protection and enforcement established by TRIPS. In recent years, ICTSD has produced a number of studies analyzing the breadth, scope and implications of such undertakings.\*

Free trade agreements (FTAs) offer opportunities for consolidating and expanding market access and domestic reforms in developing countries. However, the potential impact of IP provisions in these agreements has generated concern among various stakeholders on the use of flexibilities that have been designed to safeguard certain public interests and development objectives. In this regard, trade agreements raise many negotiating and implementation challenges regarding policy coherence and the attainment of public policy objectives.

Against this background, the study by Henning Grosse Ruse-Khan aims to achieve a better understanding of the policy of the European Union (EU) regarding intellectual property rights (IPRs) in bilateral and regional trade agreements. One of its innovative features is the attempt to explore the link between sustainable development and intellectual property and the way the recent comprehensive EPA, signed in October 2008, between the European Community and its member states and the CARIFORUM group of Caribbean countries has approached the issue.

The study suggests that the general objectives and principles of the recent EC-CARIFORUM agreement do allow the concept of sustainable development to play a significant role. According to the author, the obligations the contracting parties undertook with regard to the implementation of the agreement's sustainable development objective empower and commit all actors involved in the application of the treaty to take a holistic approach in the process of decision-making. This is the case with respect to the main provisions in the innovation and IP chapter where it is stated that fostering innovation and creativity is a crucial element in achieving sustainable development and that IP protection should be tailored to the level of development. Furthermore, the provision dealing with the nature and scope of obligations implements a sustainable development objective by adopting an integrative approach that reconciles economic and social interests within the EPA's IP section. Its main function is to determine the nature and scope of the obligations related to IP: their nature and scope must allow the protection of public health and nutrition as well as safeguarding access to medicines.

The author concludes with relevant observations about what can be learned from this sustainable development approach for a reform of the international IP system. He argues that incorporating sustainable development as a treaty objective in international agreements can function as a tool to overcome the structural bias and self-contained nature of international IP regulation. For example, international obligations - especially under TRIPS - should not *a priori* prevent thinking of flexible solutions to integrate all relevant interests affected by IP protection. The policy space flowing from the sustainable development objective in the Preamble of the WTO Agreement offers adequate discretion for a tailored domestic attempt to give effect to public interests.

The EC - CARIFORUM Economic Partnership Agreement may serve as a template not only for EPA negotiations with other regional groups of African, Caribbean and Pacific (ACP) countries, but also for other FTAs the EU is currently pursuing with a number of developing countries. Given

the constraints of multilateral negotiations, the standards set by FTAs are the most important benchmarks that are likely to impact future multilateral processes. In this respect, the agenda pursued and the provisions negotiated by one of the most important trading blocs are particularly relevant. In the IP context, they not only consist of the obvious “TRIPS-plus” standards to be expected from North-South agreements, but also several interesting norms that address and are affected by the concept of sustainable development.

The study is a further contribution by ICTSD to a better understanding of the IP and development nexus. ICTSD’s activities in this important area are premised on the need for a proper understanding of the impact of IPRs to informed policy making in all areas of development while bearing in mind that empirical evidence on the role of IP protection in promoting innovation and growth remains inconclusive and that diverging views persist on the impacts of IPRs on development prospects.

In carrying out its work, ICTSD has been a hub for debate and ideas on various facets of TRIPS and its relationship with development. It has been regularly reporting, through its periodicals, on ongoing activities in the major IP forums and providing stakeholders, through its policy oriented research, with options to implement IPRs rules in a manner that balances private rights and public interests. This work has contributed to identifying many of the concerns regarding the negotiation and implementation of new international commitments in the field of IP and has served as a catalyst for the work of several other organizations now actively involved in TRIPS and TRIPS-plus debates. One important orientation of this work has been the tenet that IP policy could contribute to development if properly formulated to respond to national needs and stages of development by promoting innovation and creativity, as well as contributing to the integration of developing countries in the multilateral trading system. Further, the formulation and implementation of IP should accommodate a diversity of approaches, i.e. developing countries should not be pressed to forgo stages of development by adopting inappropriately high standards of IP protection that are not commensurate with their levels of development.

We hope you will find this new study a useful contribution to this continuous debate on IP and sustainable development particularly in responding to the need for increased awareness about the new trends and implications of proposed IP provisions in FTAs.



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\* See. *Negotiating Health: Intellectual Property and Access to Medicines* Pedro Roffe, Geoff Tansey and David Vivas, (editors), Earthscan (2006); Maximiliano Santa Cruz, *Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries*, ICTSD, Issue Paper 20 (2007); Pedro Roffe, David Vivas-Eugui with Gina Vea, *Maintaining Policy Space for Development: A Case Study on IP Technical Assistance in FTAs*, ICTSD, Issue Paper 19 (2007); Malcom Spence, *Negotiating Trade, Innovation and Intellectual Property: Lessons from the CARIFORUM EPA Experience from a Negotiator’s Perspective*, UNCTAD-ICTSD, Policy Brief 4 (2009); *Intellectual Property and Sustainable Development: Development Agendas in a Changing World* Ricardo Meléndez-Ortiz and Pedro Roffe (editors), Edward Elgar (2009).

## EXECUTIVE SUMMARY

In international law, the concept of sustainable development has an ambiguous meaning and several distinct connotations. Among these, the principle of integration and reconciliation of economic, social and environmental interests functions as a core element. This principle finds support in several general (as well as IP-related) provisions of the first comprehensive economic partnership agreement (EPA), signed in October 2008, between the European Community (EC) and its Member States and the CARIFORUM group of Caribbean Countries. It is also referenced in the objectives of the EU-Korea Free Trade Agreement signed, in Brussels, on 15 October 2009. These provisions may serve as a template not only for EPA negotiations with other regional groups of African, Caribbean and Pacific (ACP) countries; but also for other free trade agreements (FTAs) Europe is currently pursuing with India, ASEAN countries and States in South and Central America. Given the ongoing stalemate in multilateral negotiations under the World Trade Organization's (WTO) Doha Round, the standards set by FTAs are the most important benchmarks that are likely to be "multilateralized". Against this background, the agenda pursued and the provisions accepted by one of the most important trading blocs are particularly relevant. In the IP context, they not only consist of the obvious "TRIPS-plus" standards to be expected from North-South FTAs, but also several interesting norms that address and are affected by the concept of sustainable development discussed in this paper. In a nutshell, the sustainable development objective is indicative of the development dimension of the EU - ACP relationship. Therefore, examining its operation in the IP context might deliver interesting results.

This paper begins with a brief analysis of the role of sustainable development in international law (below section 2). Against this background, section 3 examines the role this concept can play as a treaty objective. It does so by taking the EC - CARIFORUM EPA as an example. This agreement claims to establish a "trade partnership for sustainable development" and incorporates sustainable as a central objective that which must be "applied and integrated at every level of their economic partnership".<sup>1</sup> Whether and how this can be done in relation to the IP provisions of the agreement is further examined in section 4. The focus here is not on individual substantive provisions requiring the contracting parties to protect IP rights. Instead, the paper examines three general provisions setting out the context, objectives and nature and scope of IP obligations in the agreement. The concluding section 5 makes observations on how to operationalize the concept of sustainable development as a treaty objective in international IP agreements. In sum, this paper examines general international law and key provisions in the EC - CARIFORUM EPA to identify the role a sustainable development objective can play as an element for reforming international IP law. Its main findings are as follows.

First, in international law, basically all documents related to sustainable development emphasize the *principle of integration and reconciliation* as a core element. The focus hence is on balancing economic, social and environmental aspects and integrating them in all (governmental, judicial and administrative) decision-making processes. That however gives rise to ambiguities and unresolved questions: what type of issues must be balanced (i.e. where an intersection between economic, social and environmental issues exists) is context-dependent and driven by normative preferences. The principle as such also does not specify, for any given intersection, a concrete integrated outcome. Instead, the focus is on adopting an integrative process in decision-making. Finally, integration has to take place both on international and national levels with ample tools to do so. The more specific the integrative approach adopted internationally, the less policy space for balancing exists domestically. In essence, sustainable development must therefore be understood as an overarching integrative and holistic approach: a call for reconciliation of all relevant economic, environmental and social concerns in decision-making processes.



Second, giving effect to sustainable development *as a treaty objective* means that its core principle of integration guides the interpretation of individual treaty provisions. This balancing act must primarily be performed in the process of treaty implementation by states as the main addressees of a sustainable development treaty objective. Here, the ambiguous nature of the integration principle secures policy space when states implement treaty provisions in light of the sustainable development objective. Since it cannot operate as a norm that constrains state conduct in a way that prescribes one specific integrative outcome, states inevitably retain substantial discretion in giving effect to a sustainable development objective. International courts and tribunals have to recognize this domestic policy space to balance economic, social and environmental concerns. Hence they must exercise deference when assessing a disputed implementation of provisions originating from treaties with a sustainable development objective.

Third, of course, states' discretion is limited and cannot amount to a re-writing of individual treaty provisions. Defining the boundaries of this policy space therefore is crucial. One decisive factor is whether the treaty at stake already contains relevant provisions calling for a *specific integration on the international plane*. If this is the case, implementation on the domestic level must comply with the balancing chosen by the contracting parties on the international level. Another crucial element concerns the general interplay between treaty objectives and the other main elements of interpretation and how that works out in the case at hand. The former will have central importance where the ordinary meaning and context of the treaty provision does not offer concrete results and so allows focusing on the treaties' objective: that is, in particular, the case where the *interpretation of broad and open legal concepts* is at stake. Their openness or ambiguity *a priori* lends itself to assuming a margin of appreciation, flexibility or policy space in the interpretation and implementation process. Sustainable development as a treaty objective is well equipped to guide and direct the utilization of this discretion towards a reconciliation of all relevant economic, social and environmental concerns in domestic decision-making processes. It is here where a significant potential for reforming the international IP system lies. Treaty objectives that focus on overreaching and inclusive goals such as sustainable development and a balance of all interests involved can re-shape the interpretation and implementation of specific IP provisions. In this way, these objectives determine the overall scope and substance of an international obligation to give effect to treaty law.

Fourth, the EC - CARIFORUM EPA has been called a "Trade Partnership for Sustainable Development" where "sustainable development is the presiding principle governing the whole agreement".<sup>2</sup> The paper shows that the general objectives and principles of the EC - CARIFORUM EPA do allow the concept of sustainable development to play such a role - if the contracting parties are able and willing to use its potential. The obligations the contracting parties undertook in Article 3 with respect to the implementation of sustainable development objectives align with the general understanding of the function of a sustainable development objective in international treaties: to empower and oblige all actors involved in the application of the treaty to take an integrative approach in the process of decision-making. The EC - CARIFORUM EPA further qualifies the obligation of adopting an integrative approach by requiring this decision-making process to incorporate the principles of ownership, participation and dialogue.

Fifth, an examination of the main provisions in the innovation and IP chapter, setting out the context and objectives as well as the nature and scope of obligations related to IP protection further confirms the conclusion on the EC - CARIFORUM EPA's general objectives: to the extent that creativity and innovation promote sustainable development, IP protection is a means to indirectly achieve sustainable development through its promotion of innovation and creativity and should be tailored to the level of development. Article 139 (2) on the nature and scope of obligations implements the sustainable development objective by adopting an integrative

approach that reconciles economic and social interests within the IP section. Its main function truly is to determine the nature and scope of the obligations related to IP: their nature and scope must allow the protection of public health and nutrition and must not impair access to medicines.

Finally, what can we learn from this agreement for a reform of the international IP system? Countries, international organizations and other relevant actors should acknowledge the need for a comprehensive integration of economic, social and environmental concerns in all areas of decision-making. Incorporating sustainable development as a treaty objective in international agreements on the protection of IP can function as a tool to overcome the structural bias and self-contained nature of international IP regulation. This requires action on the international and the national levels. The concept gives negotiators in the treaty-drafting process, domestic actors in the course of treaty implementation, and international courts and tribunals when settling disputes over the proper treaty application an option to address intersections between economic, social and environmental interests.

## 1. INTRODUCTION

In international law, the concept of sustainable development has an ambiguous meaning and several distinct connotations. Among these, the principle of integration and reconciliation of economic, social and environmental aspects functions as a core element. This principle finds support in several general (as well as IP-related) provisions of the first comprehensive economic partnership agreement, the EC - CARIFORUM EPA, signed in October 2008 between the European Community and its Member States and the CARIFORUM group of countries. It is also referenced in the objectives of the EU-Korea Free Trade Agreement signed in Brussels on 15 October 2009. These provisions may serve as a template not only for EPA-negotiations with other regional groups of African, Caribbean and Pacific (ACP) countries, but also for other free trade agreements (FTAs) Europe is currently pursuing with India, ASEAN countries and states in South and Central America. Given the stalemate of multilateral negotiations under the WTO Doha Round, the standards set by FTAs are the most important benchmarks that are likely to be "multilateralized". Against this background, the agenda pursued and the provisions accepted by one of the most important trading blocs are particularly relevant. In the IP context, they not only consist of the obvious "TRIPS-plus" standards to be expected from North-South FTAs, but also several interesting norms that address

and are affected by the concept of sustainable development discussed in this paper. In a nutshell, the sustainable development objective indicates the development dimension of the relationship between the European Union and ACP countries. Therefore, examining its operation in the IP context might deliver interesting results.

This paper begins with a brief analysis of the role of sustainable development in international law (below section 2). Against this background, section 3 examines the role this concept can play as a treaty objective. It does so by taking the EC - CARIFORUM EPA as an example. This agreement claims to establish a trade partnership for sustainable development and incorporates sustainable development as a central objective that must be "applied and integrated at every level of their economic partnership".<sup>3</sup> Whether and how this can be done in relation to the IP provisions of the agreement is further examined in section 4. The focus here is not on individual substantive provisions requiring the contracting parties to protect IP rights. Instead, the paper examines three general provisions setting out the context, objectives and nature and scope of IP obligations in the agreement. The concluding section 5 makes observations on how to operationalize the concept of sustainable development as a treaty objective in international IP agreements.

## 2. THE CONCEPT OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW

In the famous “*Brundtland*” Report of the World Commission on Environment and Development, the term sustainable development is described as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>4</sup> Since then, the term has featured prominently in various international forums, agreements and declarations in distinct contexts and with different connotations.

First, several multilateral, regional and bilateral trade agreements contain sustainable development as their objective and purpose. On the multilateral level, for example the 1994 Marrakesh Agreement establishing the World Trade Organization (WTO) recognizes the objective of sustainable development in its preamble.<sup>5</sup> WTO Members confirmed the importance of this objective in the 2001 Doha Declaration launching the Doha “Development” Round of trade negotiations by reaffirming their “commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement”.<sup>6</sup> Also in regional trade agreements, such as the North American Free Trade Agreement (NAFTA)<sup>7</sup> and the predecessor to the economic partnership agreements (EPAs), the Cotonou Agreement,<sup>8</sup> sustainable development is heralded in the preamble<sup>9</sup> or features prominently as a main treaty objective.<sup>10</sup> Sustainable development further serves as an important principle in the legal foundations of regional economic (and social) integration projects, such as the European Union.<sup>11</sup> The Treaty on the European Union (EU Treaty)<sup>12</sup> expresses the determination of Member States to “promote economic and social progress for their peoples, taking into account the principle of sustainable development” in its preamble, and it lists as its objective *inter alia* to “work for the sustainable development of Europe” internally and to “contribute to (...) the sustainable development of the Earth” in its external relations.<sup>13</sup> International environmental law,

for example the United Nations Framework Convention on Climate Change (UNFCCC)<sup>14</sup> and the United Nations Convention on Biological Diversity (CBD),<sup>15</sup> enshrines the concept of sustainable development and the key principle of reconciling economic, social and environmental priorities and the sustainable use of biodiversity as key objectives.<sup>16</sup>

Sustainable development also appears as a key concept in several important, albeit non-binding, declarations and agreed action programmes of the global community of nations such as Agenda 21<sup>17</sup> and the 1992 Rio Declaration on Environment and Development.<sup>18</sup> The latter embodies a list of 27 principles which *inter alia* focus on the integration and inter-relation of social and economic development and environmental protection.<sup>19</sup> In 2002, the World Summit on Sustainable Development (WSSD) placed the notion of sustainable development at the centre of global attention as the main notion to resolve the environment/development dichotomy. The Summit produced the Johannesburg Declaration on Sustainable Development<sup>20</sup> and the Johannesburg Plan of Implementation.<sup>21</sup> In the former, all participating states assumed

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.<sup>22</sup>

In the same year, the International Law Association (ILA), based on work by its Committee on Legal Aspects of Sustainable Development,<sup>23</sup> adopted a Declaration of Principles of International Law Related to Sustainable Development.<sup>24</sup> The Declaration *inter alia* contained “the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives”. It considers this

principle on integration as “essential to the achievement of sustainable development” and states that all levels of governance and all sectors of society are encouraged to implement it.<sup>25</sup>

Finally, various international courts and tribunals have relied on the concept of sustainable development. In several key decisions, the notion of integration and reconciliation concerning socio-economic development and protection of the environment performed a central function. The concept of sustainable development played such a conflict-resolution and balance of interest role in the *Gabcikovo - Nagymaros* case decided by the International Court of Justice (ICJ);<sup>26</sup> in the Arbitral Award of the Permanent Court of Arbitration for the *Arbitration Regarding the Iron Rhine (“Ijzeren*

*Rijn”)* Railway;<sup>27</sup> and in the decisions of the WTO dispute settlement Panel and Appellate Body in the *US - Shrimp*<sup>28</sup> case.

From this brief overview, it follows that basically all documents related to sustainable development in international law emphasize the principle of integration and reconciliation. The ILA committee described it “as the very backbone of the concept of sustainable development”,<sup>29</sup> and others have identified it as a core principle inherent in that concept.<sup>30</sup> Already the Brundtland Report clarifies that sustainable development requires the “*balanced reconciliation and integration of economic, environmental and social priorities*”.<sup>31</sup> It is this principle of integration that will be at the forefront in the further analysis on the role of sustainable development as a treaty objective.

### 3. EUROPE'S ECONOMIC PARTNERSHIP AGREEMENTS – TRADE PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT?

On 15 October 2008, the EC, its Member States and the CARIFORUM<sup>32</sup> group of Caribbean countries signed a comprehensive EPA. This EC - CARIFORUM EPA<sup>33</sup> is the first of several EPAs the EC has negotiated with different regional groups of ACP countries. Historically, the EC - CARIFORUM EPA builds on the Cotonou Agreement<sup>34</sup> signed between the EC, its Member States and ACP countries in 2000. The Cotonou Agreement itself has to be seen in the context of the special economic relationships between the EC Member States and their former colonies in Africa, the Caribbean and the Pacific. It continued a regime of preferential access for specific products from ACP countries to the EC market that dispute settlement panels in the early 1990s had found to be in conflict with the General Agreement on Tariffs and Trade (GATT).<sup>35</sup> Since the last waiver to “legalize” the preferential treatment for ACP countries expired on 31 December 2007, ACP countries saw a need to negotiate GATT-compatible regional trade agreements with the EC in order to maintain the preferential level of market access.<sup>36</sup> The EC used this bargaining tool to press for comprehensive trade agreements that generally go beyond WTO obligations in scope and in substance. Against this background, it is not surprising that the EC - CARIFORUM EPA addresses not only trade in goods and services, but also a broad list of trade-related matters and is backed by a dispute settlement mechanism as well as an institutional structure.<sup>37</sup> Since it is likely to serve as a template for the further EPAs currently under negotiation, the EC - CARIFORUM EPA provides a first look at how the EU and its Members as well as about 80 countries in Africa, the Caribbean and the Pacific region will conduct their trade and development relations in the future.

The EC - CARIFORUM EPA is considered to be a “Trade Partnership for Sustainable Development”<sup>38</sup> - emphasizing that the overarching objective is the sustainable develop-

ment of the parties to the partnership.<sup>39</sup> The EC Commission even hails the EC - CARIFORUM EPA as “a new kind of free-trade agreement as sustainable development is the presiding principle governing the whole agreement”.<sup>40</sup> Since several other international (trade) agreements contain a sustainable development objective, the innovative character of this EPA may be called into question. This section hence examines the potential of the sustainable development objective in the EC - CARIFORUM EPA to affect the implementation and interpretation of EPA obligations.

Next to the preamble and Article 1 of the EC - CARIFORUM EPA, the objective of sustainable development is emphasized and defined in Article 3, which carries the heading “Sustainable Development”. According to section 1, this objective

is to be *applied and integrated at every level of their economic partnership*, in fulfilment of the overarching commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development.<sup>41</sup>

Article 3 (1) sets out the function of a sustainable development treaty objective as an interpretative tool; it affects the understanding of all treaty provisions. This draws support from the agreement’s call to operationalize this objective “*at every level of the economic partnership*”. Also, the words “*is to be applied and integrated*”<sup>42</sup> make clear that such action still has to take place. Article 3 (1) therefore primarily addresses national legislators and other actors in the process of implementing the EC - CARIFORUM EPA provisions. The application and integration of the sustainable development goal hence is not a process that has been exhaustively performed during the negotiations and

drafting of the agreement. The substantive EC - CARIFORUM EPA provisions as such do not represent the full and final implementation of the sustainable development objective. Instead, the real operational value of Article 3 (1) lies in its ability to give effect to the sustainable development objective in the process of implementation.

The demand of the EC - CARIFORUM EPA for a comprehensive implementation and application of the sustainable development objective can be of particular relevance for defining the scope of substantive obligations in the EC - CARIFORUM EPA and may support arguments in favour of balancing economic interests with other social or environmental interests in the process of its implementation. Its role however crucially depends on the meaning and scope of the term “sustainable development” as used in the EC - CARIFORUM EPA. Under Article 3 (2), this term is further defined:

The Parties understand this objective to apply in the case of the present Economic Partnership Agreement 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 shall embrace the fundamental principles of ownership, participation and dialogue.

Here, the terms “commitment” and especially the word “shall” in para. a) make clear that at issue is a binding obligation. Article 233:5 of the EC - CARIFORUM EPA further confirms this by stating that contracting parties “shall ensure that they comply with the objectives laid down in this Agreement”. The meaning of the sustainable development objective as defined in Article 3 (2) a) is equivalent to the general understanding of the principle of integration as the core element of sustainable development. In the EC - CARIFORUM EPA, it

requires the contracting parties to “fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations”. In international law, the principle of integration and interrelationship demands reconciliation of social, economic, financial and human rights aspects as well as the needs of current and future generations. The drafters of the EC - CARIFORUM EPA therefore had clearly the principle of integration in mind when they defined the obligation relating to the sustainable development objective in Article 3 (2) a).

The EC - CARIFORUM EPA provision is also consistent with the general opinion in international legal scholarship that an integrated approach cannot and does not demand one specific result or outcome - but rather a duty to adopt *procedures* that balance all relevant elements.<sup>43</sup> This follows especially from the verbs “shall fully take into account” in Article 3 (2) a), which demand an integrative process instead of a particular sustainable development outcome. An obligation to take an integrative procedural approach at all relevant levels of decision-making in applying the agreement further implies policy space as to the outcome of the balancing process. This discretion is also underlined by the Article 3 (2) b) language, according to which the reconciliation must be performed by the contracting parties according to the “best interests of their respective population”. Since determining what is in the best interest will vary according to domestic circumstances, and because such a determination can hardly be imposed from external actors, the obligation for an integrative approach implies policy space on the domestic level.

In sum, the obligations the contracting parties undertook with respect to the implementation of the EC - CARIFORUM EPA’s sustainable development objective under Article 3 align with and support the general function of a sustainable development objective in international treaties.<sup>44</sup> Its main role is to

empower and oblige all actors involved in the application of the treaty to take an integrative approach in the process of decision-making. Given the *constructive ambiguity* of the principle of integration,<sup>45</sup> paired with the formal function of treaty objectives as providing interpretative guidance, sustainable development allows various forms of concrete integration - *if* it is indeed constructively utilized on the domestic level. Hence, to operationalize sustainable development as a treaty objective means that its core principle of integration guides the interpretation of individual treaty provisions.

From the rules of treaty interpretation in international law<sup>46</sup> it follows that a sustainable development objective will have its prime importance where broad and open treaty terms are at stake. Their openness or ambiguity *a priori* lends itself to assuming a margin of appreciation in the interpretation and implementation process. Sustainable development as a treaty objective is well equipped to guide this discretion towards self-determined, integrative outcomes as the result of (domestic) decision-making processes. Surely, the outcome will differ depending on domestic circumstances, priorities and value judgements. The boundaries for such national diversity however are ordinary meaning and context relevant to the international treaty

obligation at stake. The more precise and concrete an international norm is, the less room there is for domestic integrative approaches in its implementation. If however the norm is sufficiently open, the concept of sustainable development can direct treaty interpretation towards a variety of possible meanings that allow reconciling and integrating economic, social and environmental concerns affected by the operation of that norm.

The obligation to integrate first and foremost concerns states and their relevant domestic institutions when implementing the EC - CARIFORUM EPA. In this respect, they have a certain amount of policy space when balancing the economic, environmental or social interests at stake. Unless specific provisions demand a particular form of integration, no specific integrative outcome or result is owed, and the interests to be reconciled can equally be determined by domestic institutions. The amount of discretion then depends on the individual treaty provision and the relative importance of the interpretative role of the treaty objective *vis-à-vis* ordinary meaning and context. Under Article 3 (2) b), the EC - CARIFORUM EPA further qualifies the obligation to adopt an integrative approach by requiring this decision-making process to incorporate the principles of ownership, participation and dialogue.



#### 4. THE EC – CARIFORUM EPA’S SUSTAINABLE DEVELOPMENT OBJECTIVE AND THE IP AND INNOVATION CHAPTER

In Title IV of the EC - CARIFORUM EPA on trade-related matters, chapter 2 deals with “Innovation and Intellectual Property”. As one might expect from an IP chapter of a trade agreement negotiated by the EC whose major industries rely on IP protection, the EC - CARIFORUM EPA contains obligations that go beyond those of the TRIPS Agreement and other international IP treaties. In particular, Article 145 on geographical indications and its subsection 3 on IP enforcement are significantly “TRIPS-plus”. These rather obvious candidates for IP provisions in a FTA will not be further examined here. Instead, this section takes a closer look at some of the general provisions in the IP and Innovation chapter of the EC - CARIFORUM EPA and the section on IP in particular.

The chapter on “Innovation and Intellectual Property”<sup>47</sup> contains in Articles 131 and 132 two general provisions that set out common “Context” and “Objectives” for the section on Innovation as well as the one on IP. In the section on “Intellectual Property”, Article 139 on the “Nature and Scope of Obligations” is equally relevant for all substantive provisions on IP protection. These provisions and their relationship with the sustainable development objective are addressed below. A further focus will be on assessing the impact of the EC - CARIFORUM EPA’s objective on substantive IP obligations.

As a starting point, it is useful to recognize the generally accepted overarching goal of IP protection and deduce its potential role to balance and individually tailor the scope and extent of protection to domestic needs (by means of interpretation and implementation of the broad and open terms in IP provisions).<sup>48</sup> IP protection generally aims at furthering scientific, technological and cultural development and the progress of a

society (and not primarily rewarding creators and inventors).<sup>49</sup> In a market environment, “limited” exclusivity secures an incentive for developing and producing innovative and creative goods and services. Without such an incentive, the argument is that either no innovation/creation takes place or the results are kept secret. The incentive, hence, ensures long-term dissemination and diffusion of innovations/creations in a society. In order for such diffusion to take place, the exclusivity must be sufficiently limited in time and in scope. If the limitations to value-addition and (follow-up) innovation caused by (too) stringent exclusivity regimes outweigh the quantity and quality of further creations and inventions based on the reward/incentive, the IP objectives demand less protection.<sup>50</sup>

The overarching aim to promote societal progress, hence, demands a level of IP protection that takes all relevant interests into account and strikes an appropriate balance among them. This approach is equally inherent in the concept of sustainable development.<sup>51</sup> Based on these arguments, both the sustainable development objective as well as the overall goal of IP protection provide further justification for a balanced and tailored implementation of IP-related obligations under the EC - CARIFORUM EPA. But there are limits to the role of the overall IP goals and the sustainable development objective to determine the outcome in the interpretation and implementation of individual IP provisions. As an interpretative tool it also cannot override IP protection, which follows from explicit and straightforward ordinary meanings of provisions setting out the level of protection. However, as much terminology allows, the sustainable development objective should be used to enlarge the domestic policy space in tailoring the IP regime to domestic needs.

#### 4.1 The Context

Explicitly dubbed “Context”, Article 131 of the IP and Innovation chapter arguably sets out the wider framework within which the promotion of innovation and protection of IP operates. In particular, it emphasizes how the contracting parties envision the chapter on innovation and IP protection to promote the overall goal of sustainable development. Given its title, one could further argue that the norm plays a specific role as interpretative context in line with Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) and hence should be given specific weight when interpreting and implementing individual provisions of this chapter. Based on its link to the general sustainable development objective, such an interpretation would re-emphasize the importance of that objective for the understanding of individual provisions in the IP and Innovation chapter.

In Article 131, the parties agree that

... fostering innovation and creativity improves competitiveness and is a crucial element in their economic partnership, in achieving sustainable development, promoting trade between them and ensuring the gradual integration of CARIFORUM States into the world economy.<sup>52</sup>

In relation to IP in particular, they recognize that

... the protection and enforcement of intellectual property plays a key role in fostering creativity, innovation and competitiveness, and are determined to ensure increasing levels of protection appropriate to their levels of development.<sup>53</sup>

The common denominator in these two sections is the promotion of creativity, innovation and competitiveness as a means for achieving the goal of sustainable development. Even more the protection of IP is no end in itself, but merely an important tool for achieving those means.<sup>54</sup> This focus on the overarching goal

implements the general obligation to “apply and integrate” the objective of sustainable development at “every level of the EPA”.<sup>55</sup> Against this background, Article 131 (1) supports an implementation and interpretation of IP obligations that leaves reasonable policy space and flexibility to the domestic legislator. Given the general recognition that - in choosing a system of IP protection - “one size does not fit all,”<sup>56</sup> the individual circumstances in the implementing country determine the most appropriate level of IP protection for facilitating that country’s (sustainable) economic, technological and cultural development. This “tailoring” of course must further be balanced against security and predictability in trade relations, which demands a certain degree of harmonization among all contracting parties.<sup>57</sup> Reconciling these interests is inherent in the concept of sustainable development and its core principle of integration.<sup>58</sup> In the process of implementation, contracting parties must balance economic interests for a secure and predictable trading environment against the (economic and social) need to tailor the IP regime to domestic needs.

The second paragraph of Article 131 further sets out two rather contradictory aims. An interpretation relying on Article 132 (2) as general context<sup>59</sup> for the IP and Innovation provisions demands reconciling the following (potentially) conflicting elements in particular. On the one hand, paragraph 2 calls for *increasing* levels of protection - thereby building on the assumption that a continuous increase in IP protection is in all cases beneficial and positive.<sup>60</sup> On the other hand, this phrase is subject to the condition that such (increasing) protection must be *appropriate to the levels of development* of the contracting parties. The latter reinforces the recognition that “one size does not fit all”, which already has been deducted from the general objective of sustainable development: IP protection must be tailored to meet the needs of the domestic economy and in particular reflect the comparative advantage (in innovation or imitation) of the country concerned.<sup>61</sup>

One way to resolve this tension would be to adopt a broader understanding of the term “protection” - thus encompassing also the protection of interests of IP users, competitors and the public domain. Such an understanding would find support in the overall goal of IP protection to promote societal progress. Also the relationship between the EC - CARIFORUM EPA sustainable development objective and the Innovation and IP chapter as a means for its implementation<sup>62</sup> speaks in favour of a broader, more balanced understanding that integrates all affected interests. Another approach would be to perceive the individual level of development as a general qualification for (increasing) IP protection:<sup>63</sup> Increases must be justified in a way that is “appropriate to [the contracting parties’] levels of development”.<sup>64</sup> In any case, for the EC - CARIFORUM EPA the term “increasing levels of protection” is not a stand-alone dogma or end in itself. Instead, the overall sustainable development objective via Article 3 (1) and Article 131 (1) as well as the condition “appropriate to their levels of development” in Article 131 (2) inform its meaning. As an operational provision, the role of Article 131 (2) should be limited to serving as a mandate for future negotiations on IP protection. Here, demands for increases in the level of protection (if understood in the traditional, narrow sense of increasing right holders’ interests) must be in accordance with individual development levels. Demandeurs thus must bring evidence of any supportive relation - arguably for all contracting parties.

#### 4.2 The Objectives of the Innovation and IP Chapter

The EC-CARIFORUM EPA chapter on Innovation and IP contains one general provision on the objectives of this chapter. Since neither the Innovation nor the IP Section within that chapter includes further provisions laying out particular objectives, Article 132 applies to both sections and *inter alia* describes the specific objectives of IP protection under the agreement. As a systemic matter, a question

arises concerning the relationship between the general objective of sustainable development and the special objectives for the Innovation and IP chapter. On the one hand, the principle of *lex specialis* may suggest that the objectives in Article 132 are alone decisive for the interpretation of IP-related provisions. On the other hand, Article 31 (1) of the VCLT refers to treaties’ object and purpose as decisive for treaty interpretation - not to that of individual provisions or sections within that treaty.<sup>65</sup> While the specific IP objectives may still be considered as relevant interpretative context under Article 31 (2) of the VCLT, it is the overall treaty object and purpose that is relevant as the third element of treaty interpretation.

Further arguments from the EC - CARIFORUM EPA provisions underline the prevalence of the general sustainable development objective for the purpose of interpretation and implementation of the agreement’s IP provisions: first, Article 3 (1) contains an obligation to apply and integrate the sustainable development objective at every level of the EC - CARIFORUM EPA. It must hence inform the understanding of the specific IP objectives. Second, Article 131 confirms the overall role and function of IP protection as a means to indirectly achieve sustainable development through its promotion of creativity and innovation. Against this background, the individual IP provisions must equally be understood in light of the sustainable development objective.

Article 132 of the IP and Innovation chapter contains a list of objectives including the aims:

- to “promote the process of innovation, including eco-innovation” and foster competitiveness of (especially micro-, small- and medium) enterprises;
- to “achieve an adequate and effective level of protection and enforcement of intellectual property rights”;
- to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology and know-how”;

- to encourage “cooperative research, development and production activities in science and technology” as well as in the “creative industries”.<sup>66</sup>

With respect to the second and third points made above, these objectives resemble the TRIPS Preamble<sup>67</sup> and Article 7 of TRIPS<sup>68</sup> respectively. While the aim for “adequate and effective levels” of IP protection does at first sight appear to emphasize the need for “strong” IP rights, this does not hold upon more detailed scrutiny. First, the term “adequate” implies an assessment on the basis of an individual situation and tailored to the specific circumstances of the case at hand.<sup>69</sup> This is supported by Article 131 (2)<sup>70</sup> and Article 139 (2),<sup>71</sup> which make the level of IP protection (or its increase) dependent on the individual development needs of the contracting parties. Second, the level of IP protection and enforcement must be “effective”. This emphasizes the need for domestic protection of IP that is efficient, is successful or has an effect<sup>72</sup> - both on the substantive as well as the enforcement level. However, the effectiveness, success or efficiency so required has no complete meaning in itself, but must be related to the underlying policy objectives of the EC - CARIFORUM provisions on Innovation and IP.<sup>73</sup> Here, Article 131 (1), (2) make clear that IP protection (and enforcement) is a means to foster innovation and creativity which, in turn, are means to achieve sustainable development. IP protection under the EC - CARIFORUM EPA thus needs to be effective in achieving the sustainable development objective.<sup>74</sup> This implies that effectiveness must be measured by the ability of IP protection to support the economic and social development of the contracting states and allows them to integrate other relevant concerns, such as the protection of the environment.<sup>75</sup> That, in turn, again entails sufficient policy space to tailor IP protection to domestic development needs and to integrate all relevant societal concerns in the implementation process.

With respect to the objective to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology and know-how” in Article 132 (e), the same paradigm laid down in Article 7 of TRIPS demands attention. IP protection must achieve a balance between promoting technological innovation on the one hand and transfer of technology and know-how on the other. Such a balance should allow parties to give due regard to all interests involved, including those of right holders, IP users and the public at large.<sup>76</sup> In a way comparable to the operation of the sustainable development objective above, a question arises concerning who is entitled to perform this balancing - whether it is embodied in the individual provisions or still to be performed by the contracting parties in the process of implementation. In general, the individual EC - CARIFORUM EPA provisions on IP protection surely are an expression of how the contracting parties wished to achieve this balance. However, various arguments support significant discretion for the contracting parties to “fine-tune” the overall equilibrium set by the EC - CARIFORUM EPA IP chapter to fit domestic development needs:

- the overarching objective of sustainable development (and the call to apply and integrate it on all levels) demands policy space in the interpretation and implementation of the EC - CARIFORUM provisions that have a sufficiently open and broad meaning. This discretion must be utilized in line with the integrative approach inherent in the sustainable development objective. It calls upon states to implement IP protection obligations in a way that seeks to reconcile all economic, social and environmental interests at stake;<sup>77</sup>
- in the Innovation and IP chapter, Article 131 reinforces the overarching goal of sustainable development and emphasizes the role of IP protection to foster its achievement. Together with Article 139 (2)

it further stresses the need to tailor the level of IP protection to the individual level of development. As examined above, these provisions offer additional argumentative support for domestic discretion in calibrating IP protection to domestic development needs and to balance all interests involved;

- the aim for adequate and effective IP protection equally sustains the argument in favour of policy space. While “adequateness” must by definition be determined in relation to the individual domestic circumstances, “effectiveness” must be measured in relation to the ability of IP protection to support sustainable development of the contracting parties.

Some have uttered concerns<sup>78</sup> about the limited incorporation of Article 7 of TRIPS, which is generally perceived as a crucial flexibility of the TRIPS Agreement.<sup>79</sup> However, Article 139 (2) of the EC - CARIFORUM EPA on the “Nature and Scope of Obligations” in the IP section does incorporate the further elements of Article 7 - albeit not in identical language.<sup>80</sup> In fact, as the analysis in section 3 below indicates, Article 139 (2) of the EC - CARIFORUM EPA goes significantly beyond what Articles 7 and 8 of the TRIPS Agreement can offer. Furthermore, the overarching sustainable development objective in the EC - CARIFORUM EPA is well equipped to fulfil the balancing role Article 7 of the TRIPS Agreement performs.<sup>81</sup> The related obligation to apply and integrate that goal at every level of the economic partnership (hence also in relation to the Innovation and IP chapter) again goes beyond TRIPS and clarifies that the balancing advocated is not exhaustively inherent in the treaty provisions, but is (also) to be performed in the process of implementation.

Another critique is that the objectives of the Innovation and IP chapter do not address the need for “availability and access of products

of innovation in various sectors”.<sup>82</sup> Is there hence a missing objective in Article 132 of the EC - CARIFORUM EPA related to access as a key element for innovation that allows innovators to “stand on the shoulders of giants” without having to “reinvent the wheel”? The reasoning above does not sufficiently take into account the paradox in Article 132 (e) between innovation incentives and dissemination of the resulting technology and know how. Dissemination arguably includes the ability to access the IP protected material - although not necessarily free of charge or without further conditions attached. Furthermore, in relation to the availability of essential goods, such as medicines or food, the right of the contracting parties to “protect public health and nutrition” arguably implies the right to make these goods available even if this limits the rights of IP right holders.<sup>83</sup>

In sum, the objectives of the IP and innovation chapter of the EC - CARIFORUM EPA therefore encourage the contracting parties to implement the IP provisions and fine-tune their IP systems in accordance with their domestic development needs. Given the influence of the overarching sustainable development objective, this calls for the reconciliation of all relevant economic, social and environmental interests affected by the implementation. The equilibrium between providing an incentive for the creation of new innovations through rewards (usually via negative monopolies ensuring artificial exclusivity and market-lead) and securing the transfer and diffusion of innovations to the public (via disclosure mechanisms, the idea/expression dichotomy in copyright, and exceptions to exclusive rights) is primarily set by the contracting parties in the EC - CARIFORUM provisions. However, where broad and open treaty language allows, IP protection under the EC - CARIFORUM EPA should be implemented in accordance with domestic development priorities and balancing all interests involved.

### 4.3 The Nature and Scope of IP-related Obligations in CEPA

Within the chapter on Innovation and IP, the second section concerns the protection of IP under the EC - CARIFORUM EPA. Within that section, subsection 1 is named “Principles” and *inter alia* contains provisions on the “Nature and Scope of Obligations,”<sup>84</sup> obligations for least developed countries (LDCs),<sup>85</sup> regional integration<sup>86</sup> and the transfer of technology.<sup>87</sup> While all these horizontal provisions have implications for sustainable development and (to different degrees) implementation of the sustainable development objective,<sup>88</sup> this section focuses on the principles expressed in Article 139 (2) of the EC - CARIFORUM EPA, as they embody the main horizontal regulation on the integration of IP- and other social interests in the section on IP protection.<sup>89</sup>

The provision first calls for an application of the principles of Article 8 of the TRIPS Agreement to the IP section. Entitled “Principles”, Article 8 of TRIPS is the only horizontal provision within TRIPS that addresses public interests affected by IP protection and their relation to interests and rights protected under individual TRIPS rules.<sup>90</sup> It states:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

In a nutshell, Article 8:1 of TRIPS allows WTO Members to adopt measures “necessary to protect public health and nutrition” and to promote public interests of vital importance to their socio-economic and technological development. While this phrase places substantial discretion in the hand of WTO Members,<sup>91</sup> its function as a potential defensive shield for domestic public interest measures against inconsistencies with IP obligations under TRIPS is severely limited by a crucial further requirement: any such measures must be “consistent with the provisions of this Agreement”. This qualification (which was only added in the final stages of negotiations on the text of the TRIPS Agreement)<sup>92</sup> prevents Article 8:1 from functioning as a general exception to obligations for IP protection under TRIPS. Article 8:1 does not allow any measures that would conflict with other obligations in TRIPS.<sup>93</sup> In the same vein, Article 8:2 allows domestic measures against the abuse of IP rights and restraints on trade or technology transfer only when they “are consistent with the provisions of this Agreement”.

Applying the principles of Article 8 of TRIPS to the IP section of the EC - CARIFORUM EPA means that all measures taken in reliance on these principles must be consistent with the provisions in the IP section. Operationalizing these principles in the EC - CARIFORUM EPA hence cannot authorize overriding any substantive obligations to protect IP.<sup>94</sup> Article 139 (2) however goes significantly beyond Article 8 (1) TRIPS as it states:

The Parties also agree that an adequate and effective enforcement of intellectual property rights should take account of the development needs of the CARIFORUM States, provide a balance of rights and obligations between right-holders and users and allow the EC Party and the Signatory CARIFORUM States to protect public health and nutrition. 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.

This provision contains three distinct elements. First, it again emphasizes the need to take into account the development needs- this time specifically linked to IP enforcement.<sup>95</sup> As this provision is part of the section dealing exclusively with IP (instead of Innovation and IP), the reinforcement of the conceptual link between the levels of obligations and domestic development needs explained above pre-empts any arguments that concept might relate only to the Innovation Section rather than the IP Section. In this instance it is also not related to the issue of further increasing levels of IP protection but establishes a general link between the enforcement of IP protection and development needs.<sup>96</sup> Second, the parties agree that adequate and effective IP enforcement should provide a balance of rights and obligations between right-holders and users. This language borrows from Article 7 of TRIPS and aligns with objectives in Article 132 (d) and (e) of the EC - CARIFORUM EPA.<sup>97</sup> The call for a balance of rights and obligations could, *inter alia*, support the argument that “increasing levels of protection”<sup>98</sup> do not necessarily relate to strengthened exclusivity but also include rights of users as outlined above. Based on the above arguments regarding context in Article 131 and objectives in Article 132, the further emphasis on crucial elements of these provisions in Article 139 (2) effectively supports the existence of domestic policy space to address domestic development needs and integrate all relevant social, economic and environmental interests at stake.

Third and arguably most important, Article 139 (2) substantively widens the public interest principle of Article 8:1 of TRIPS. The contracting parties also “agree that an adequate and effective enforcement of intellectual property rights should (...) allow the EC Party and the Signatory CARIFORUM States to protect public health and nutrition”. Further, “[n]othing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines”. The first element worth stressing

is that both sentences address domestic public interest measures - in particular those relating to public health, nutrition and access to medicines. While the scope of measures covered is hence more limited than in Article 8:1 of the TRIPS Agreement,<sup>99</sup> the crucial point is that measures under Article 139 (2) of the EC - CARIFORUM EPA do not have to be otherwise consistent with the EC - CARIFORUM EPA provisions on IP protection.

At first sight, this may entail a right of the contracting parties to adopt public health or nutrition protecting measures even if these measures are inconsistent with individual IP obligations. Or it might mean that such individual obligations - as part of “an adequate and effective enforcement of intellectual property rights”<sup>100</sup> - must be interpreted and implemented in a way that allows domestic measures to protect public health and nutrition.<sup>101</sup> This would find support in the objectives embodied in Article 132 (d) of the EC - CARIFORUM EPA which equally aim to “achieve an adequate and effective protection and enforcement of intellectual property rights”.<sup>102</sup> Also the title of Article 139 - “Nature and Scope of Obligations” - speaks for a role and function of Article 139 (2) that determines the nature and scope of the individual IP obligations. Their nature and scope must allow the protection of public health and nutrition and must not impair access to medicines. This latter understanding seems preferable. It takes into account the general exception provision in Article 224 of the EC - CARIFORUM EPA, which allows contracting parties to take measures otherwise inconsistent with individual obligations - including those from the IP and Innovation Chapter - for example if such measures “are necessary to protect human, animal or plant life or health”.<sup>103</sup> In order to avoid overlap and reducing the necessity test embodied in Article 224 of the EC - CARIFORUM EPA to redundancy,<sup>104</sup> Article 139 (2) should not be viewed as an authorization to override individual IP obligations under the EC - CARIFORUM EPA. The principle of effectiveness (*effet utile*)<sup>105</sup>

hence demands such an understanding - as it is the most appropriate way to give effect to all the terms of the treaty without rendering one meaningless, null or void. In comparison to the general exception clause, Article 139 (2) thus functions as an IP specific filter-mechanism that obliges those interpreting and implementing the EC - CARIFORUM EPA to develop an understanding of the individual provisions which is supportive to the public interests set out in Article 139 (2). In this way, it truly defines the nature and scope of IP obligations in the EC - CARIFORUM EPA.

In sum, Article 139 (2) contains the main horizontal provision in the EC - CARIFORUM EPA section on IP protection, which explicitly addresses intersections between the interests of IP right-holders and other societal concerns - here in the form of public health, nutrition and access to medication.<sup>106</sup> In terms of international sustainable development law, Article 139 (2) adopts an integrative approach by reconciling economic and social interests within an international agreement. This pro-

vision therefore implements the EC - CARIFORUM EPA's sustainable development objective and its core principle of integration on the international level. Based on the general analysis on the principle of integration above,<sup>107</sup> Article 139 (2) would prevent the contracting parties from taking an integrative approach in the implementation of provisions that departs from the substance of Article 139 (2). The limitation on discretion to integrate IP protection and public health, nutrition and access to medicines on the domestic level is however rather theoretical. The broad language<sup>108</sup> itself implies significant policy space as to how to protect public health and nutrition and to promote access to medication in relation to IP protection. Against this background, the most important aspect of Article 139 (2) - if not of the whole Sub-Section 1 on "Principles" of IP protection under the EC - CARIFORUM EPA - is its function to determine the nature and scope of obligations relating to IP. Their nature and scope must allow the protection of public health and nutrition and must not impair access to medicines.



## 5. OPERATIONALIZING A SUSTAINABLE DEVELOPMENT OBJECTIVE IN INTERNATIONAL INTELLECTUAL PROPERTY LAW

This paper has examined general international law and the EC - CARIFORUM EPA in order to identify the role a sustainable development objective can play as an element for reforming international IP law.

In international law, basically all documents related to sustainable development emphasize the principle of integration and reconciliation as a core element. The focus hence is on balancing economic, social and environmental aspects and integrating them in all (governmental, judicial and administrative) decision-making processes. That, however, gives rise to ambiguities and unresolved questions. What type of issues must be balanced (i.e. where an intersection between economic, social and environmental issues exists) is context-dependent and driven by normative preferences. The principle as such also does not specify, for any given intersection, a concrete integrated outcome. Instead, the focus is on adopting an integrative process in decision-making. Finally, integration has to take place both on international and national levels with ample tools to do so. The more specific the integrative approach adopted internationally, the less policy space for balancing exists domestically. In essence, sustainable development must, therefore, be understood as an overarching integrative and holistic approach: a call for reconciliation of all relevant economic, environmental and social concerns in decision-making processes.

Giving effect to sustainable development as a treaty objective means that its core principle of integration guides the interpretation of individual treaty provisions. Based on the notion of *pacta sunt servanda*, this balancing must primarily be performed in the process of treaty implementation by states as the main addressees of a sustainable development treaty objective. Here, the ambiguous nature of the integration principle secures policy space when states implement treaty provisions in light of the sustainable development objective. Since it cannot operate as a norm

that constrains state conduct in a way that prescribes one specific integrative outcome, states inevitably retain substantial discretion in giving effect to a sustainable development objective. International courts and tribunals have to recognize this domestic policy space to balance economic, social and environmental concerns. Hence, they must exercise deference when assessing a disputed implementation of provisions originating from treaties with a sustainable development objective.

Of course, states' discretion is limited and cannot amount to a re-writing of individual treaty provisions. Defining the boundaries of this policy space therefore is crucial. One decisive factor is whether the treaty at stake does already contain relevant provisions that perform a specific integration on the international plane. If this is the case, an integrative implementation on the domestic level must comply with the balancing chosen by the contracting parties on the international level. Another crucial element concerns the general interplay between treaty objectives and the other main elements of treaty interpretation and how that works out in the case at hand. The former will have central importance where the ordinary meaning and context of the treaty provision at hand does not offer concrete results and so allows focusing on the treaty's objective: that is, in particular, the case where the interpretation of broad and open legal concepts is at stake. Their openness or ambiguity a priori lends itself to assuming a margin of appreciation, flexibility or policy space in the interpretation and implementation process. Sustainable development as a treaty objective is well equipped to guide and direct the utilization of this discretion towards a reconciliation of all relevant economic, social and environmental issues in domestic decision-making processes. It is here that a significant potential for reforming the international IP system lies. Treaty objectives that focus on overreaching and inclusive goals, such

as sustainable development and a balance of all interests involved, can re-shape the interpretation and implementation of specific IP provisions. In this way, these objectives determine the overall scope and substance of an international obligation to give effect to treaty law.

The EC - CARIFORUM EPA has been called a “Trade Partnership for Sustainable Development” where “sustainable development is the presiding principle governing the whole agreement”.<sup>109</sup> The analysis above has shown that the general objectives and principles of the EC - CARIFORUM EPA do allow the concept of sustainable development to play such a role - if the contracting parties are able and willing to use its potential. The obligations the contracting parties undertook in Article 3 of the EC - CARIFORUM EPA with respect to the implementation of its sustainable development objective align with the general understanding of the function of a sustainable development objective in international treaties: to empower and oblige all actors involved in the application of the treaty to take an integrative approach in the process of decision-making. The EC - CARIFORUM EPA further qualifies the obligation to adopt an integrative approach by requiring this decision-making process to incorporate the principles of ownership, participation and dialogue.

An examination of the main provisions in the Innovation and IP chapter setting out the context and objectives as well as the nature and scope of obligations related to IP protection in the EC - CARIFORUM EPA further confirms the conclusion on the agreement’s general objectives: IP protection is a means to achieve sustainable development and should be tailored to the level of development. Article 139 (2) on the “Nature and Scope of Obligations” implements the EC - CARIFORUM EPA’s sustainable development objective by adopting an integrative approach that reconciles economic and social interests within the IP section. Its main function truly is to determine the nature and scope of the EC - CARIFORUM EPA obligations related to IP. Their

nature and scope must allow the protection of public health and nutrition and must not impair access to medicines.

What can we learn from this for a reform of the international IP system? Countries, international organization and other relevant actors should acknowledge the need for a comprehensive integration of economic, social and environmental concerns in all areas of decision-making. Incorporating sustainable development as a treaty objective in international agreements on the protection of IP can function as a tool to overcome the structural bias and self-contained nature of international IP regulation. This requires action on the international and the national level. The concept gives negotiators in the treaty drafting process, domestic actors in the course of treaty implementation and international courts and tribunals in settling disputes over the proper treaty application an option to address intersections between economic, social and environmental interests.

Negotiators are encouraged to identify and regulate such intersections by determining a balance between IP and other interests at stake on the international level. The World Intellectual Property Organization (WIPO) Development Agenda and the ongoing negotiations on the relationship between TRIPS and the CBD in the WTO can be good forums for action. Discourses, views and results “from the outside”, such as the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) at the WHO and the ongoing negotiations on climate change, the transfer of “green” technology and IP in the framework of the UNFCCC should be taken into account. Issues so far not addressed within the IP system but with significant impact or relation to IP protection must be integrated and reconciled with IP rules. *If the IP system wishes to retain relevance and credibility, it cannot be silent on today’s global problems such as climate change, food security and eradication of poverty.*<sup>110</sup> Intersections like the transfer of “green” technology to reduce carbon emissions and patent protection

or securing sustainable, local agricultural production and plant variety must be looked at from the perspective of making the IP system supportive of public policy objectives in these areas.

While multilateral approaches - especially to global problems, such as climate change and food security - are certainly to be preferred, regional and bilateral negotiations should equally implement the concept of sustainable development and its core principle of integration. The EC - CARIFORUM EPA does seem to offer some interesting examples here, as it includes chapters on the environment; social aspects (dealing primarily with the protection of core workers' rights); and the protection of personal data. Especially in regional and bilateral settings, one must however always be mindful of asymmetric negotiation powers and the impact on key regulatory areas which most likely so far have been in the realm of state autonomy. Regardless of the quality of the substantive obligations, it should be ensured, especially with respect to these "non-trade issues", that outcomes are the result of informed choices by all countries involved and are not imposed upon them by more powerful trading partners.

On the *domestic level*, countries should develop national IP strategies and align them with their national strategies for sustainable development (NSSD).<sup>111</sup> IP protection should be tailored to domestic needs and, in particular, respect social and environmental concerns. This requires connecting the relevant actors and stakeholders in order to identify domestic intersections between IP and "other" concerns. In the absence of specific "integrative" treaty provisions on the international level, a sustainable development (treaty) objective should generally offer sufficient freedom to adopt good faith measures that balance IP with other societal interests at stake.

International obligations - especially under TRIPS - should therefore not a priori prevent thinking on flexible solutions to integrate all relevant interests affected by IP protection.

The policy space flowing from the sustainable development objective in the WTO Agreement by and large offers adequate discretion for a tailored domestic attempt to give effect to public interests. Although not limited to them, the primary provisions with broad and open terms inviting an integrative approach are the various versions of the three-step test regulating the right to foresee exceptions and limitations to IP rights. In Article 13, the TRIPS Agreement, for example,<sup>112</sup> confines exceptions to "special" cases, avoiding conflict with a "normal" exploitation as well as "unreasonable" prejudice of the "legitimate" interests of right-holders offers ample room for a normative understanding that recognizes public interests:

- "special" cases may include those which address public interests recognized in Article 8:1 or the concept of sustainable development;
- an exploitation could be considered "normal" only if it does not significantly interfere;
- with such objectives.<sup>113</sup> Any prejudice caused by good faith measures (necessary for) protecting those objectives may be understood as not being "unreasonable" and "legitimate" interests of right holders may only be those which sufficiently reconcile the public interests recognized in the WTO/TRIPS objectives.<sup>114</sup>

Other versions of the three-step test that explicitly call for "taking account of the legitimate interests of third parties"<sup>115</sup> provide even more options for reconciling economic with public interests and other (fundamental) rights of third parties.

The WTO/TRIPS balancing objectives support an understanding of the general relationship between IP protection and exceptions to it as one of balance instead of (universal) rule and (minor) exception.<sup>116</sup> In the *US - Shrimp* dispute mentioned above, the Appellate Body developed an overall equilibrium between

trade liberalization and public interests as a guiding principle for interpreting the exceptions related to obligations on trade in goods.<sup>117</sup> The same can be deduced for the protection of IP and recognition of public interests under TRIPS. Such a general balance does not only flow from the overarching objective of sustainable development in the WTO preamble, but also from Articles 7 and 8 of TRIPS. It is further a matter of internal consistency of the WTO as a legal system. Allowing a proper balance in one area but denying it in another threatens legitimacy and acceptance for the latter area and the whole system which will easily be perceived as biased.

International courts and tribunals called upon to review the consistency of domestic implementation with international IP obligations finally should also take an integrative approach. While the writings of some scholars and emerging jurisprudence of the ICJ and other tribunals speak in favour of such an approach regardless of any specifically applicable treaty language, this must be even more so when sustainable development forms the agreed objective of the treaty whose provisions are subject to interpretation. Here, the WTO Appellate Body has set a useful precedent

in the trade and environment context that should guide further WTO dispute settlement decisions related to all other areas of WTO law, hence including TRIPS. In the words of the Appellate Body, “The WTO treaties’ objective of sustainable development must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement”.<sup>118</sup>

The domestic policy space in treaty implementation emphasized above means for international courts and tribunals that they must recognize and accept this discretion. They must exercise deference with respect to the integrative approach taken on the domestic level - if that is within the boundaries set by the ordinary meaning and context of the provision at stake. In the so far main sphere of operation alizing the sustainable development objective in the WTO - the general exception provision of Article XX GATT - commentators have described the approach of the Appellate Body as a “disproportionality” test.<sup>119</sup> However, this type of judicial restraint on national policy choices in balancing all relevant economic, social and environmental interests is appropriate only as long as no specific integration has taken place on the international plane.

## ENDNOTES

- 1 See Art. 3 (1) of the EC - CARIFORUM EPA.
- 2 *EC Commission / DG Trade*, below n 40.
- 3 See Art. 3 (1) of the EC - CARIFORUM EPA.
- 4 See United Nations, 'Our Common Future - Report of the World Commission on Environment and Development', UN Doc. A/42/427 - Annex (4 August 1987), chapter 2, 1.
- 5 "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.".. (Emphasis added). See WTO, Legal Texts - The Uruguay Round Agreements, Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), online available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (accessed on 6 May 2010). This language differs significantly from the original GATT preamble that encouraged GATT contracting parties to engage in a "full use of the resources of the world".
- 6 See WTO, Ministerial Declaration, Ministerial Conference - Fourth Session, Doha, Qatar (14 November 2001), WTO Doc. WT/MIN(01)/DEC/W/1, at para. 6, online available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (accessed on 6 May 2010).
- 7 North American Free Trade Agreement (NAFTA), online available at <http://www.nafta-sec-alena.org/> (accessed on 6 May 2010).
- 8 Partnership Agreement between Members of the African, Caribbean and Pacific Group of States (ACP countries) and the European Community and its Member States (Cotonou Agreement), online available at [http://ec.europa.eu/development/icenter/repository/agr01\\_en.pdf](http://ec.europa.eu/development/icenter/repository/agr01_en.pdf) (accessed on 6 May 2010).
- 9 The NAFTA preamble states that "the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: (...) PROMOTE sustainable development (...) HAVE AGREED as follows: (...)" (emphasis in the original).
- 10 The second paragraph of Art. 1 of the Cotonou Agreement explains that "the partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy".
- 11 On the role of sustainable development in EC law see M. Prost, 'Is European Law Becoming More Sustainable?' in M.-C. Cordonier Segger & M. Gehring (eds), 'Sustainable Development in World Trade Law', (The Hague: Kluwer Law International, 2005), 411-459; N. J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours* (2007), 217-412 at 314-316.
- 12 See Consolidated Version of the Treaty on the European Union, OJ 2006 C 321 E, 5-36, online available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF> (accessed on 6 May 2010).

- 13 See Art. 2 sec.3, 5 of the EU Treaty, as amended by the Lisbon Treaty - see OJ 2007 C 306/12, 10-42 (at 13), online available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML> (accessed on 6 May 2010).
- 14 United Nations Framework Convention on Climate Change, ILM 1992, Vol.XXXI, 849 - UN Doc. FCCC/INFORMAL/84 GE.05-62220 (E) 200705 (1992), online available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (accessed on 6 May 2010).
- 15 United Nations Convention on Biological Diversity, ILM 1992, Vol.XXXI, 818, online available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf> (accessed on 6 May 2010).
- 16 In the UNFCCC, sustainable development appears as a key concept which is addressed in the Preamble (recognising the aim to “achieve sustainable social and economic development”) and in the Conventions’ objectives in Art. 3, including the goal “to enable economic development to proceed in a sustainable manner” and further recognising that “the Parties have a right to, and should, promote sustainable development”. The CBD describes its objectives in Art. 1 as “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. The Convention further defines “sustainable use” in Art. 2 as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations”. Finally, Art. 10 on “Sustainable Use of Components of Biological Diversity” contains the principle of integration in form of a binding legal obligation for each Contracting Party “as far as possible and as appropriate” to “integrate consideration of the conservation and sustainable use of biological resources into national decision-making”.
- 17 Agenda 21 comprises a wide-ranging plan of action for the achievement of sustainable development worldwide, online available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=52> (accessed on 6 May 2010).
- 18 United Nations, ‘Report of the United Nations Conference on Environment and Development - Annex I: Rio Declaration on Environment and Development’, UN Doc. A/CONF.151/26 Vol. I, (12 August 1992), online available at <http://www.un.org/documents/ga/conf151/acn15126-1annex1.htm> (accessed on 6 May 2010).
- 19 See United Nations, ‘Rio Declaration’, above n 18, at principle 4: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it” and principle 25: “Peace, development and environmental protection are interdependent and indivisible”.
- 20 Johannesburg Declaration on Sustainable Development, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002, online available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm) (accessed on 6 May 2010).
- 21 The Johannesburg Plan of Implementation, online available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm) (accessed on 6 May 2010)) build on the achievements made since the Rio Summit and aims to expedite the realization of the remaining goals. To this end, states committed themselves to undertaking concrete measures promoting the integration of the three components of sustainable development - economic development, social development and environmental protection - as interdependent and mutually reinforcing pillars.
- 22 Johannesburg Declaration, above n 20 at 5.

- 23 The work of the Committee, in particular its two reports, is online available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> (accessed on 6 May 2010).
- 24 International Law Association, 'Declaration of Principles of International Law Related to Sustainable Development', Resolution 3/2002 adopted at the 70th Conference of the International Law Association, held in New Delhi, India, 2-6 April 2002 (UN Doc. A/CONF.199/8, 9 August 2002). For an analysis of the principles in the ILA Declaration see M.-C. Cordonier Segger & A. Khalfan, 'Sustainable Development Law: Principles, Practices & Prospects' (Oxford: Oxford University Press, 2004), 96 -171.
- 25 International Law Association, above n 24 at 7.2.
- 26 GabCikovo-Nagymaros Project (Hungary vs. Slovakia), Judgment of 25 September 1997, I. C. J. Reports 1997, 7-84, online available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (accessed on 6 May 2010).
- 27 Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium/the Netherlands), Permanent Court of Arbitration - Award of the Arbitral Tribunal (May 24, 2005), online available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1155](http://www.pca-cpa.org/showpage.asp?pag_id=1155) (accessed on 6 May 2010).
- 28 See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998 and Panel Report *United States - Shrimp - Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, adopted 15 June 2000.
- 29 International Law Association, above n 24 at 7.
- 30 See P. Sands, 'International Law in the Field of Sustainable Development', 65 *British Yearbook of International Law* (1994), 303-381 (at 336); N. J. Schrijver, above n 11 at 362.
- 31 M.-C. Cordonier Segger & M. Gehring, 'Introduction', in M.-C. Cordonier Segger & M. Gehring (eds), 'Sustainable Development in World Trade Law', (The Hague: Kluwer Law International, 2005), 1-24, at 5 (emphasis added). In the Brundtland Report, this key principle of "merging environment and economics in decision making" appears *inter alia* as one of seven "critical objectives" that follow from the principle of sustainable development: (see United Nations, *Our Common Future*, above n 4 at para.72: "The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making").
- 32 The group of CARIFORUM countries includes Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago - acting as individual states. While both Haiti and Guyana initially did not sign the EC - CARIFORUM EPA , Guyana signed on 20 October. The Agreement is provisionally applied as of 29 December 2008.
- 33 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed in Bridgetown (Barbados) on 15 October 2008, Official Journal of the European Union (OJ) 2008 L 289/1/3, online available at [http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc\\_137971.pdf](http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf) (accessed on 6 May 2010).
- 34 Partnership Agreement between Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (Cotonou Agreement), OJ 2000 L 317/3, online available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:317:0003:0003:EN:PDF> (accessed on 6 May 2010), amended OJ 2005 L 287/1.

- 35 See Panel Report, *EEC - Member States' Import Regime for Bananas*, DS32/R, 3 June 1993 (unadopted) and Panel Report, *EEC - Member States' Import Regime for Bananas*, DS/38/R, 11 February 1994, (unadopted).
- 36 For a detailed analysis of the EC's trade relationship with ACP countries see L. Bartels, 'The Trade and Development Policy of the European Union', 18 (4) *European Journal of International Law* (2007), 715-756.
- 37 The agreement covers not only traditional trade related matters, like investment, competition, intellectual property and public procurement, but also a chapter on environment, social aspects (labour standards) and the protection of personal data; see EC - CARIFORUM EPA (above n 33), Part II, Titles I-III and especially IV, as well as Part III and V.
- 38 See the heading of Part I of the EC - CARFORUM EPA which contains the objectives and principles of the agreement (emphasis added).
- 39 See Art. 1 (a) and Art. 3 EC - CARIFORUM EPA .
- 40 *EC Commission / DG Trade*, CARIFORUM - EU Agreement: An Overview, (Brussels, 2008), at 3.
- 41 See Art. 3 (1) (emphasis added). Under Art.1 of the Cotonou Agreement, the partnership between the EC and ACP countries "shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy".
- 42 Art. 3 (1) EC - CARIFORUM EPA (emphasis added).
- 43 S. Jodoin, 'The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives', CISDL Legal Working Papers (Montreal, 2005), at 9, online available at [http://www.cisd.org/pdf/sdl/SDL\\_Integration.pdf](http://www.cisd.org/pdf/sdl/SDL_Integration.pdf) (accessed on 6 May 2010); see also V. Lowe 'Sustainable Development and Unsustainable Arguments', in A Boyle & D Freestone (eds), 'Sustainable Development and International Law: Past Achievements and Future Challenges' (Oxford, OUP, 1999), at 36, who focuses on judicial decision-making processes; and A. Boyle & D. Freestone, 'Introduction', in A Boyle & D Freestone (eds), 'International Law and Sustainable Development' (Oxford: Oxford University Press, 1999), at 17 which refer to ample state practice as well as the ICJ decision in *Gabcikovo - Nagymaros Project* (above n 26) as evidence that the principle of integration should be understood as *procedural integration* requiring development decisions to be the outcome of a process which integrates economic, social and environmental concerns and so promotes sustainable development.
- 44 For an extensive discussion on this general role of sustainable development as a treaty objective see H. Grosse Ruse - Khan, 'A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond' *Journal of International Economic Law*, Vol. 13 No.1.
- 45 *Ibid.*
- 46 See in particular Art. 31-33 of the Vienna Convention on the Law of Treaties (VCLT); in particular Art. 31 (1) which provides: "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".
- 47 M. Spence, 'Innovation and Technology Transfer: Lessons from the CARIFORUM EPA Experience', Draft Paper - CEMAC Regional Dialogue on EPAs, IPRs, Innovation and Sustainable Development (ICTSD, ACDIC, April 2008), at 5, online available at



[http://www.iprsonline.org/ictsd/Dialogues/2008-04-28/Spence\\_Paper2.pdf](http://www.iprsonline.org/ictsd/Dialogues/2008-04-28/Spence_Paper2.pdf) (accessed on 6 May 2010) emphasizes the importance of this heading as “small but important step in changing the paradigm within which the subject of intellectual property is dealt with in trade negotiations” towards a focus on innovation as opposed to plainly the protection of IP. See also Malcolm Spence. *Negotiating Trade, Innovation and Intellectual Property: Lessons from the CARIFORUM EPA Experience from a Negotiator’s Perspective*. UNCTAD - ICTSD Policy Brief No. 4, September 2009, at 4, online available at <http://ictsd.org/i/publications/54502/> (accessed on 8 September 2010).

- 48 An example for an interpretative approach in the TRIPS context is a normative understanding of the terms such as “normal” exploitation or “unreasonable” in the three step test; see H. Grosse Ruse - Khan, ‘Proportionality and Balancing within the Objectives of Intellectual Property Protection’, in P. Torremans (ed), ‘Intellectual Property and Human Rights’ (Alpen aan der Rijn: Kluwer, 2008); S. Ricketson, ‘WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment’ (Geneva 2003), online available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf) (accessed on 6 May 2010).
- 49 See for example Art. 7 TRIPS and Art. 1 Section 8 of the US Constitution according to which Congress has legislative authority to, inter alia “(...) *promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (...)”. Emphasis added.
- 50 Compare C. Geiger, ‘Copyright and the Freedom to Create, A Fragile Balance’, IIC Vol.38 (2007), 707.
- 51 See sections 2 and 3 above.
- 52 Art. 131 (1) EC - CARIFORUM EPA (emphasis added).
- 53 Art. 131 (2) EC - CARIFORUM EPA (emphasis added).
- 54 Compare M. Spence (above n 47 at 5) who further stresses that Art. 131 places innovation and creativity before the protection of IP rights.
- 55 See Art. 3 (1) EC - CARIFORUM EPA.
- 56 See UNCTAD, ‘The Least Developed Country Report 2007 - Knowledge, Technological Learning and Innovation for Development’ (Geneva, 2007), at 105-107; World Bank, ‘Global Economic Prospects and the Developing Countries 2002’ (Washington DC, 2001), at 129; on the historical evidence for tailoring national IP policy and regulation to the domestic economic, technological and development needs of a country see further Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property and Development Policy* (London, 2002), at 18-20, online available at [www.iprcommission.org](http://www.iprcommission.org) (accessed on 6 May 2010)) and especially the two related background papers Z. Khan, Study Paper 1a: ‘Intellectual Property and Economic Development: Lessons from American and European History’; and N. Kumar, Study Paper 1b: ‘Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries’; for an economic and trade theory justification see M. Trebilcock & R. Howse, ‘The Regulation of International Trade’ (3rd Edn, London 2005), at 397-401.
- 57 In the WTO context, see Art. 3:2 of the DSU, which embodies the goal of “providing security and predictability to the multilateral trading system”.

- 58 As section 2 explained, a key function of this concept is to integrate and balance different economic, social and environmental concerns in a mutually reinforcing way.
- 59 Compare the argument above that the term “Context” used as heading for Art. 131 refers to its specific role as interpretative context in the meaning of Art. 31 (1) VCLT.
- 60 For a general debate on minimum standards and increasing levels of protection and binding limitations see A. Kur & H. Grosse Ruse - Khan, ‘Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection’, Max Planck Papers on Intellectual Property, Competition & Tax Law, Research Paper No.09-01, online available at <http://ssrn.com/abstract=1326429> (accessed on 6 May 2010).
- 61 Compare M. Trebilcock & R. Howse, above n 56 at 400-401: Whenever the comparative advantage of a country in a specific industry or field of technology lies more in production based on imitation than innovation, trade and economic theory suggest that such a country should adopt an IP regime which allows (some extent of) imitation. A general explanation of the theory of comparative advantage, its origins in Adam Smith’s and David Ricardo’s work, its main argument for specialisation and (free) international trade and its current implications can be found in P. Van der Bossche, ‘The Law and Policy of the World Trade Organization’ (Cambridge, 2005) at 19-24; For an economist’s perspective see S. Brakman, H. Garretsen, C. Van Marrewijk & A. Van Witteloostuijn, ‘Nations and Firms in the Global Economy’ (Cambridge, 2006) at 63-95.
- 62 See Art. 131 (1) and (2) EC - CARIFORUM EPA, which underline that promoting innovation and protecting IP is a means to achieve sustainable development.
- 63 See M. Spence (above n 47 at 5) who sees herein a general link between the level of IP protection and level of development. S. Musungu ‘Innovations and Intellectual property in the EC - CARIFORUM EPA: Lessons for other ACP Regions’ (GTZ, 2008), online available at <http://www2.gtz.de/dokumente/bib/gtz2008-0393en-cariforum-innovation.pdf> (accessed on 6 May 2010) fears that a general dependency between increases in IP protection and levels of development is an insufficient safeguard against increases which inhibit innovation or creativity: “The reason is that in cases where explicit elaboration of what this means is lacking, there is a general assumption that increased levels of IP protection automatically results in innovation and creativity”. He therefore demands “to be explicit regarding the need for flexibility within the rules and standards and the need to balance the costs and benefits of protection (...)”. This balance however is inherent in the sustainable development objective and - as Art. 3 (1) of the EC - CARIFORUM EPA demands - to be “applied and integrated at every level”. Taking these objectives seriously then makes an explicit mention of flexibilities not necessary whenever the EC - CARIFORUM EPA language is sufficiently open for an integrative approach on the domestic level (compare sections 1) b) and 2) above). An explicit balancing within the EC - CARIFORUM EPA provisions (such as the case in Art. 139 (2); see below) however may be preferred for reasons of clarity and predictability.
- 64 Art. 131 (2) EC - CARIFORUM EPA.
- 65 Art. 31 (1) VCLT states: “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” (emphasis added).
- 66 See Art. 132 (a), (b), (d), (e), (f), (g) EC - CARIFORUM EPA.
- 67 In its relevant corresponding part, the TRIPS preamble recognizes the need for new rules on: (b) the provision of adequate standards and principles concerning the availability, scope

and use of trade-related intellectual property rights; and (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems.

- 68 Art. 7 TRIPS, equally named “Objectives” states: “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”.
- 69 For an analysis of the equivalent terms in the TRIPS preamble see H. Grosse Ruse - Khan, above n. 48, at 171-172.
- 70 Under Art. 132 (2) contracting parties “are determined to ensure increasing levels of protection *appropriate to their levels of development*” (emphasis added). For a discussion of this norm, see this section above.
- 71 Art. 139 (2) *inter alia* states that “the Parties also agree that an adequate and effective enforcement of intellectual property rights should take account of the development needs of the CARIFORUM States” (emphasis added). For a discussion of this norm, see below.
- 72 See Chambers Dictionary (Edinburgh 1993), 535.
- 73 For a similar argument on the identical term in the TRIPS preamble see ICTSD / UNCTAD, ‘Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement’ (Geneva, 2005), Part One, sec.1, online available at [www.iprsonline.org/unctadictsd/ResourceBookIndex.htm](http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm) (accessed on 6 May 2010); C. Correa, ‘Trade Related Aspects of Intellectual Property Rights’ (Oxford, 2007), at 101; and H. Grosse Ruse - Khan, above n 48 at 172.
- 74 The need to consider the objective of IP protection follows not only from the term effective itself which has no real meaning if not considered in relation to a specific goal or success to achieve. It is also confirmed by Art. 31 (1) VCLT which calls for the effectiveness criteria (like any other term or provision of a treaty) to be understood “in light of its objective and purpose”; compare also section 2) above.
- 75 For a detailed examination of the meaning of the sustainable development objective in treaty law in general and in the EC - CARIFORUM EPA in particular see H. Grosse Ruse - Khan, above n 44.
- 76 In light of this broader understanding of IP protection, continuously increasing protection (as demanded by Art. 131 (2)), does not necessarily mean increasing the scope and extent of IP exclusivity but could equally mean extended protection of IP users (which are often potential future IP producers); compare section a) above.
- 77 Compare the analysis in sections 1) b), 2) and 3) above.
- 78 See S. Musungu, above n 63 at 17, 19.
- 79 Compare para.5 a) of the Doha Declaration (as note 6 above).
- 80 The missing element from Art. 7 TRIPS (that the protection and enforcement of intellectual property rights should contribute “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”) can be equated with the parties agreement in

Art. 139 (2) “that an adequate and effective enforcement of intellectual property rights should (...) provide a balance of rights and obligations between right holders and users”. The element which remains missing here (“in a manner conducive to social and economic welfare”) is arguably covered by the substantively similar phrase in Art. 8 TRIPS (allowing Members to “promote the public interest in sectors of vital importance to their socio-economic and technological development”) whose principles apply by virtue of Art. 139 (2) as well.

- 81 For a detailed analysis on the balancing objectives in Art. 7 TRIPS see H. Grosse Ruse - Khan, above n 48. For a comparative examination on the role of the WTO sustainable development objective for TRIPS see H. Grosse Ruse - Khan, ‘A Comparative Analysis of Policy Space in WTO Law’ (November 26, 2008), Max Planck Papers on Intellectual Property, Competition & Tax Law Research Paper No. 08-02, online available at SSRN: <http://ssrn.com/abstract=1309526> (accessed on 6 May 2010) - also in M. Levin & A. Kur (eds) Intellectual Property in Transition, forthcoming 2010.
- 82 S. Musungu, above n 63, at 17, 19.
- 83 Compare the further analysis in section c) below.
- 84 Art. 139 EC - CARIFORUM EPA , discussed below.
- 85 See Art. 140 EC - CARIFORUM EPA, which provides for a longer transition period for LDCs to implement the substantive IP obligations until 2021.
- 86 See Art. 141 EC - CARIFORUM EPA, which aims at furthering regional integration in the protection of IP mainly via increased regional harmonisation.
- 87 See Art. 142:2 EC - CARIFORUM EPA.
- 88 Next to the obvious extended transition periods for LDCs (giving effect to the sustainable development principle of common but differentiated commitments), especially Art. 142:2 takes an integrative approach to the intersection between IP protection, free competition and transfer of technology.
- 89 For an analysis of the general exception provisions as tools to integrate social, economic and environmental concerns and their application to IP protection see H. Grosse Ruse - Khan, above n 44.
- 90 For a comparative analysis on Art. 8:1 TRIPS and equivalent provisions addressing the consistency of domestic public interest measures with international WTO obligations under the rules on trade in goods and services see H. Grosse Ruse - Khan, above n 81.
- 91 Compare C. Correa, above n 73 at 105-107; ICTSD/UNCTAD, above n 73, Part I, Chapter 6, section 3.
- 92 While the so called “Brussels Draft” (*Trade Negotiations Committee*, Draft final act embodying the results of the Uruguay Round of Multilateral Trade Negotiations (MTN.TNC/W/35/REV.1), 3 December 1990) retained most of the original language from the initial developing countries’ proposal (*Communication from Argentina, Brazil, Chile, China, Colombia Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay*, Applicability of the Basic Principles of the GATT and of Relevant International Intellectual Property Conventions (MTN.GNG/NG11/W/71), 14 May 1990) on what now is Art. 8:1, that draft added the further requirement of ‘TRIPS consistency’. For an analysis of the history of that provision see H. Grosse Ruse - Khan, above n 81.

- 93 While a majority of commentators seem to agree on this point (see D. Gervais, 'The TRIPS Agreement - Drafting History and Analysis' (2nd Edn, London, 2003), at 2.84; M. Blakeney, 'Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement', (Sweet & Maxwell: London, 1996), at 3.09; ICTSD / UNCTAD, above n 73, Part I chapter 6 section 3.2), the role of Art. 8:1 (especially after its endorsement in the Doha Declaration) remains hotly debated; see for example A. Yusuf, 'TRIPS: Background, Principles and General Provisions', in C. Correa & A. Yusuf (Eds), 'Intellectual Property and International Trade' (Kluwer Law International: London, 1998), (3-20) at 13; C Correa, as note 73 above, at 108; ICTSD / UNCTAD, above n 73 Part I chapter 6 section 3.2.
- 94 Misleading is therefore the statement in the CIEL paper (Intellectual Property in European Union Economic Partnership Agreements with African, Caribbean and Pacific Countries: What Way Forward after the CARIFORUM EPA and the Interim EPAs? (Center for International Environmental Law, Geneva, April 2008, online available at [http://www.ciel.org/Publications/Oxfam\\_TechnicalBrief\\_5May08.pdf](http://www.ciel.org/Publications/Oxfam_TechnicalBrief_5May08.pdf) (accessed on 6 May 2010) which merely mentions a "right to take measures to protect public health and nutrition". One could further debate any interpretative role of these principles as foreseen by para.4, 5 a) of the Doha Declaration (above n 6). On this role in the TRIPS context see H. Grosse Ruse - Khan, above n 81.
- 95 Compare also Art. 131 (2) and the analysis in section a) above.
- 96 See also M. Spence 'Trade and Innovation in the EPAs: Another Step towards Re-framing TRIPS', Trade Negotiations Insights (Vol.7 No.5, June 2008), at 6) who stresses that the contracting parties in the negotiation process aimed to achieve an appropriate balance between the level of development and the level of IP protection.
- 97 Compare section b) above.
- 98 See Art. 131 (2) EC - CARIFORUM EPA.
- 99 One may recall that Art.8:1 covers "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".
- 100 Art. 139 (2).
- 101 On the need for an equivalent understanding of Art.8:1 TRIPS in the context of para. 4,5 (a) of the Doha Declaration (as note 7 above) see H. Grosse Ruse - Khan, above n 81.
- 102 See Art. 132 (d) EC - CARIFORUM EPA.
- 103 Art. 224 EC - CARIFORUM EPA.
- 104 Art. 139 (2) does not contain the requirement that measures must be 'necessary' to achieve a specific aim (such as access to medicines). This requirement however is a crucial element in the WTO case law on Art. XX GATT and Art. XIV GATS - provisions which EC - CARIFORUM EPA drafters have transplanted almost in its entirety into Art. 224.
- 105 On the principle of effectiveness see *United States - Standards for Reformulated and Conventional Gasoline*, Appellate Body Report WT/DS24/AB/R, at 21; *Japan - Taxes on Alcoholic Beverages* (WT/DS8/AB/R), Appellate Body report (4 October 1996) at 96 (106).
- 106 Other more specific provisions addressing such 'intersections' are Artt.142 (2), 144 F, 146 C (3), 147 B, 149 (1), 150 and 155 (3) EC - CARIFORUM EPA.
- 107 Compare section 2 above.

- 108 Art. 139 (2) essentially allowing contracting parties to protect public health and nutrition and to promote access to medication without any further qualification.
- 109 *EC Commission/DG Trade*, above n 40.
- 110 Compare also the following statement of Pascal Lamy, Director General of the WTO in a speech held at the WIPO Conference on Intellectual Property and Public Policy Issues, Geneva 14 July 2009, online available at [http://www.wipo.int/meetings/en/2009/ip\\_gc\\_ge/presentations/lamy.html](http://www.wipo.int/meetings/en/2009/ip_gc_ge/presentations/lamy.html) (accessed on 6 May 2010): “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“.
- 111 See *Agenda 21*, above n 17, at chapter 8 (8.7).
- 112 One may recall the wording of Art. 13 stating “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.
- 113 See the *Declaration on a Balanced Interpretation of the Three Step Test in Copyright Law*, at point 4 (printed in IIC Vol.39, No.6 (2008), 707-713), online available at [http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration\\_on\\_the\\_three\\_step.cfm](http://www.ip.mpg.de/ww/de/pub/aktuelles/declaration_on_the_three_step.cfm) (accessed on 6 May 2010); compare further S. Ricketson, above n 46.
- 114 See A. Kur, ‘Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations under the Three-Step Test?’ In M. Levin & A. Kur (eds) ‘Intellectual Property in Transition’, forthcoming 2010, who however favours an accumulation of public interest balancing on the third step while at the same time ensuring that the individual steps are not separate units but merge into an overall assessment. See also the *Declaration on a Balanced Interpretation of the Three Step Test in Copyright Law*, above n 114 at point 6.
- 115 See Art. 17, 26:2 and 30 TRIPS. Interests could be considered ‘*legitimate*’ inter alia if they pursue recognized public policy concerns or other interests addressed in TRIPS or the WTO Agreements’ preamble.
- 116 *Singularia non sunt extendenda*. See also C. Godt, ‘International Economic and Environmental Law’, in L. Krämer (ed), ‘Recht und Um-Welt - Essays in Honour of Prof. Dr. Gerd Winter’ (Europa Law Publishing, Groningen, 2003), 237-252 (at 242-245), who focuses on the relation between Art. 27:1 (establishing the criteria for patent protection and the need to cover all fields of technology) and Art. 27:2 (allowing exceptions from patentability based on public policies) as an example where a balancing paradigm, instead of a rule-exception principle should apply.
- 117 In the *US - Shrimp* dispute, the WTO Appellate Body 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” (see *US - Shrimp*, as note 28 above, at para.153).
- 118 *US - Shrimp*, above n 28, at para.152.
- 119 H. Schloemann, ‘Brazil Tyres: Policy Space Confirmed under GATT Article XX, Bridges Monthly Trade Review’, Vol.12 No.1, at 11 observes that “the ‘weighing and balancing’ test in particular is a thinly veiled proportionality test, miraculously operating rather well without an agreed value system (constitution) to rely on - probably because it comes along with utmost judicial restraint, if not deference to national policy choices. Perhaps

‘disproportionality’ test would therefore be a better word for it”. Compare also the conclusion reached by M. Andenas & S. Zleptnig ‘Proportionality and Balancing in WTO Law: a Comparative Perspective’, 20 *Cambridge Review of International Affairs (CRIA)*, Vol.20 No.1 (2007), 1 (7-18), at 10) which emphasize not only the flexible balancing approach adopted by the Appellate Body but equally stress “a certain degree of subjectivity on the part of the judiciary”. C. Gerstetter, “The Appellate Body’s Response to the Tensions and Interdependencies between Transnational Trade Governance and Social Regulation”, in C. Joerges & E.-U. Petersmann, ‘Constitutionalism, Multilateral Trade Governance and Social Regulation’, (Hart Publishing, Oxford, 2006), at 123-124) further highlights the Appellate Body’s deference to the WTO Members’ right to balance economic with public interests.

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