

# Intellectual property (f)or development?

A critical analysis of the inclusion of Intellectual Property  
in the Economic Partnership Agreement between  
the EU and ACP countries

Masterthesis International Relations

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## *Table of contents*

1 Introduction.....	4
1.1 Relevance .....	6
1.2 Theory .....	7
1.3 Thesis outline .....	8
2 Theoretical discussions .....	9
2.1 Mercantilist approaches .....	9
2.2 Liberal institutionalist approaches.....	12
2.3 Critical Theory .....	14
2.4 Neo-Gramscian framework.....	16
2.4.1 Hegemony and historic bloc .....	17
2.4.2 Three forces within structure .....	20
3 Research approach .....	24
3.1 Implications of critical Neo-Gramscian perspective for this study.....	24
3.2 Expectations of the case on the basis of theory.....	25
3.3 Methodology .....	28
4 Inclusion of IPR provisions in Economic Partnership agreements .....	30
4.1 History of EU ACP relations .....	30
4.1.1 Treaty of Rome to Lomé .....	31
4.1.2 Critique on Lomé to Cotonou .....	34
4.1.3 EU-Cariforum EPA and the inclusion of IP .....	37
4.2 Trends in Ideology, Material en institutional capabilities.....	39
4.2.1 Rise of Neoliberal Thought.....	40
4.2.2 Rise of the Transnational Capitalist Class.....	43
4.2.3 Changes in institutional structure and interests .....	46
4.3 Trends culminate in negotiation practice.....	51
4.3.1 Structure and EU position.....	52
4.3.2 Input from Council and various DGs .....	53
4.3.3 Input from societal actors.....	55
5 Conclusions .....	60
5.1 Conclusions .....	60
5.2 Reflections and further research .....	62

## *1 Introduction*

The relation between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries was long characterized by developmentalist policies and preferential access to EU markets. With the latest foreign policy tool in this relation, the Economic Partnership Agreements (EPAs), this has changed profoundly. The first and only comprehensive EPA, which was signed with the Caribbean regional grouping, the Cariforum states in October 2008, included a revolutionary scope of issues. Historically, the EU focused on development cooperation with this region. Today the agreements can be viewed as a Free Trade Agreement (FTA), including a range of trade related issues, with some developmental aspects (Hurt, 2003). One of the most controversial features of the new FTA is the inclusion of Intellectual Property Rights (IPRs).

While the scope of the new agreement is groundbreaking, the EPA is a tool in a long tradition of EU-ACP relations. Former colonial ties have established the relations between the EU and the ACP countries and the EU has always remained involved in these states as a partner for development. After the Yaoundé conventions in 1963 and the Lomé agreement in 1975, that were both development oriented, the new Cotonou agreement that was signed in 2000 proved a great shift in the European approach (Flint, 2009). Since Cotonou, development and trade go hand in hand. The basic rationale behind this trend is that free trade stimulates development. The EU 'puts trade at the service of development and poverty reduction' (European Commission, 2014). Cotonou outlined the tools to facilitate this trade regime: EPAs. These 'set out to help ACP countries to integrate in the world economy and share in the opportunities offered by globalisation' (European Commission, 2014). The EPAs are to be negotiated with seven regional communities (Caribbean, East and South Africa, Pacific, West Africa, Southern Africa, Central Africa and East Africa groups).

The first and only comprehensive EPA was signed with Cariforum countries. The extensive agreement includes a section on IPRs. 'High IPR standards are crucial to obtain the developmental goal' is the logic of the European reasoning. The Cotonou agreement outlines that both parties "recognize the need to ensure an adequate and effective level of protection of IPRs" and "underline the importance of the TRIPs agreement" (European Commission, 2000). In light of the ever-increasing importance of knowledge and information in our current information society and economy, one could argue that knowledge has to be protected in order to become profitable. Within the EPA Intellectual Property regulation is seen as an instrument to

foster creativity and technological progress. Moreover, IPRs serve as a tool to attract foreign investments (European Commission, 2008). Also the small producers and farmers benefit from the use of intellectual property tools, as they 'help to maximise the economic value of the goods, the developing and protecting product identity and quality' (European Commission, 2012).

Turning knowledge into property makes it a scarce good, separable and transferable. This affects the socio-economic relations of power in the advantage of corporate actors that have rights to these protected properties, as opposed to society as a whole or the individual creator (May, 2010). And while scholars widely agree that while some IPR regulation actually works in favour of developing states, it is highly contested that the majority of IPR regulation would have a positive influence over technological advancement of developing states (Sell & May, 2001). As with most developing countries, ACP countries are net importers of most knowledge and knowledge goods. Enhancing the protection for these knowledge goods will increase the costs to access these goods mainly in the areas of public health, education and environment (Center for International Environmental Law (CIEL), 2008).

And yet, the concluded EPA agreement between the EU and the Cariforum does indeed include a section on IPRs. A paradox is visible: on the one hand the agreement focuses on opening up the market and trade liberalisation for development and on the other hand the inclusion of IPRs, that might jeopardize developmental goals. The main aim of the agreement is to foster development and eradicate poverty in the Cariforum countries. Yet it is not evident how exactly these IPRs can help to foster this development as their effects are much contested. This leads me to the research question of this thesis:

*What explains the European Union's priority to include intellectual property in the Economic Partnership Agreements with the ACP countries?*

This question aims at explaining a policy shift from earlier agreements that did not include IPR regulation. Why suddenly include IPRs in policy that was much more development-oriented before? The EU-Cariforum EPA is used as an example to show the IPR priority of the EU in international agreements with the ACP states. The Cariforum case is used because of two reasons. First because it is the only full and comprehensive EPA signed to date, and thus the only full example of EU's new IP policy goals within the ACP group. The EPA with Cariforum is said to be meant as a template for other EPA negotiations and possibly even other for FTAs that the EU tries to pursue with developing countries. The second reason is that this EPA, due to massive power imbalances between the actors is believed to be almost a transposition of EU's wishes and

demands (See e.g. Robinson & Gibson 2011; Williams, 2014; Oxfam, 2008). The included IP section in the EPA represents EU's standpoint in the matter, making it possible to use this case to investigate the EU's priorities on IP regulation with ACP countries. This research focuses on the motivations for the EU to push for these inclusions and investigates how this change has come about. Newly introduced in the Cotonou agreement, IPR regulation was never part of EU's development policy, causing a policy shift. Changes in policy can be investigated in many ways. While bargains and trade-offs are often investigated to explain policy outcomes, I use a structural analysis to come to the answer of the research question. To truly understand change structures, power and characteristics of actors, as well as the historical context must be examined (Patomäki and Wight, 2000).

### *1.1 Relevance*

Studying the Intellectual Property (IP) priorities of the EU is interesting from both a societal and a scientific perspective. In the last decades, a focus of many policy makers has been to invest in a knowledge economy and making economies more competitive. In doing so, economies rely more and more on innovation and knowledge, making the field of IP policy increasingly important. The realm of patents, trademarks, trade secrets and many more forms of IP is vastly expanding by the wide commodification of knowledge. Transferring information into separable and tradable scarce goods has an enormous effect on the economies of developed states and arguably even more so on developing states (May, 2010). It is therefore crucial to investigate the foundations, justifications and interests of current policy changes within this field. Especially since EU's member states were colonists in the ACP states, the power and social relations between these countries have a very specific character that is subject to continuous change. To research and reveal the nature power plays of this rather new policy field is crucial in building a better understanding of the evolution in global North-South relations.

Scientifically this policy change is also relevant. Structural explanations of the strict IP agenda that is in place in many international policy making institutes are scarce in existing literature. By employing a critical theory perspective with the use of Neo-Gramscian concepts, I am able to build a deep understanding of how the policy change came about. Only when rooted in historical and transnational context, the mechanisms that led to the inclusion of IP regulation in the EPA can be explained. Because IP protection is such a growing policy field, academic research is needed to map the rapid changes that are taking place within the field. As other approaches seem to fall short in explaining changes that are embedded in a historical context, this critical perspective can show how and why these changes in IP regulation in trade and development

policy have come about. In this research I study the changing IP priorities of the EU in relation with the ACP countries in a longitudinal perspective by making critical use of both primary and secondary sources.

## *1.2 Theory*

Mainstream International Relation theories cannot convincingly account for policy change. Mercantilist approaches offer a systemic and ahistorical approach, which is not helpful because the historical context is essential when studying a policy change. Especially in this case, as the formation of the ACP countries revolved around the colonial historical ties between these countries and EU member states. More importantly this approach has trouble explaining the motivation of development policies in general, as actors act out of self-interest only. For mercantilists, maintaining ties with former colonies only makes sense when this brings about trade benefits. However, former developing policies of the EU were often based on cooperation in the form of financial aid. Also using the EU or more specific the European Commission, as the main actor in the analysis would be problematic as states are the dominant actors within this approach.

Liberal institutionalist approaches do take into account the role of international organisations, as facilitators of trade and cooperation between states. Yet this theory is also ahistorical and follows the same main ontological departures of mercantilism, of states in an anarchic structure that want to compete with each other. These two theories do not take into account the ideational dimension in discussing politics, while this seems a very important factor within the research, as policy makers are clearly driven by a sort of neoliberal ideal of free trade. Moreover, liberal institutionalism assumes that more openness of liberalisation of trade leads to more cooperation. Yet IPRs are actually a restriction to free trade in a sense that they lead to more and not less barriers. In this way IPRs decrease economic efficiency that liberal institutionalists have in such high regards.

Critical theory on the other hand is very useful in studying policy change. It does not consider the current world order as a given but argues that the world is structurally changing. It aims and explaining this change and possibly change this process in which both structure and agency have a role. Using the historical and transnational context it strives to show the power relations that are in place. By drawing on the works of Cox and Gramsci (among others), I will analyse how cultural as well as material bases are used to reproduce the dominant position of certain actors. The notion of hegemony will be discussed and applied to the position of the EU in the EPAs. Neo-

Gramscian literature will be used to draw up a framework consisting of three elements (ideational, material factors and institutions) that constitute hegemony. As I aim to unveil historical and transnational context in which these changes have occurred, I will conduct a longitudinal study, covering the decades leading up to the policy change. Translating the notions ideas, material and institutional capabilities into the three broader contemporary trends that are visible in EU-ACP relation and EU policy making in general, serves to explain the radical policy change. To invigorate these, I will investigate how these trends manifested in the actual negotiations of the EPA by sketching an overview of its most important actors and their positions in relation to the final result. These notions are translated to contemporary trends, showing how this radical policy shift was possible.

### *1.3 Thesis outline*

This thesis is organised in five chapters. After this introduction, I will set out a theoretical discussion in chapter two. This will include two theoretical perspectives often used in International Policies Economy that are in my opinion not suited for this study, mercantilism and liberal institutionalism. I will discuss the origins, main concepts and shortcomings of these theories. After this, the alternative is found, critical theory drawing from a Neo-Gramscian concepts The theoretical concepts will serve as building blocs for the analysis.

In chapter three I will discuss the implication using a critical theory framework has for my research. Also the used methods and use of data will be discussed. In the last part of the third chapter, expectations on the basis of the theory are outlined.

The fourth chapter presents the empirical part of this study. It outlines the historical context of the EU-ACP relationship in the first part. By doing so the power plays become visible that are at stake. The second part will outline the three trends that together can explain the research question. The interacting and reinforcing forces of ideas, material and institutional capabilities are set in a historical and transnational context. Over the last three decades the main influencers of EU policymaking are mapped in order to grasp the structural mechanism that cause policy change. This is followed by a short overview of the negotiations that lead to the EPA, to verify that the three trends have indeed played a role as I argue.

In the final an fifth chapter I will answer the research question, reflect on the research process and outline implication of this study and hint at further interesting research.

## *2 Theoretical discussions*

The research question does not only present a political puzzle but also to an economical one. The theoretical concepts that will be deployed must include both perspectives. At the crossroads of international politics and economics, the field of Global Political Economy (GPE) can be found. As Gilpin described: "The parallel existence and mutual interaction of the 'state' and the 'market' in the modern world create 'political economy... in the absence of state, the price mechanism and market forces would determine the outcome of economic activities; this would be the pure world of the economist. In the absence of market, the state or its equivalent would allocate economic resources; this would be the pure world of political scientist" (Gilpin in Palan, 2000, p.3). In the research of free trade agreements, both 'markets' and 'states' have to be taken into account. This is what is done in the realm of GPE. The strand of theories covers three major perspectives known as mercantilism, liberal institutionalist and historical materialism. Mercantilism and liberal institutionalist approaches link quite well to (neo)realist and liberal approaches that are used throughout the International Relations realm.

In this chapter I will first assess the two strands that have been investigated but did not deem useful in answering the research question: mercantilism and liberalism in 2.1. The examination of these perspectives is divided in three sections, their origins, their main theoretical assumptions and concepts and how they would go about answering the research question. The critical discussion that makes up the last part will show their strengths and weaknesses, and shortcomings that are considered crucial in this research.

In the 2.3 the alternative will be discussed: critical theory. By drawing on the works of Cox and Gill, it will be examined how this strand is different from the other two strands and why this is expected to be more useful in this research. 2.4 will delve deeper into theoretical concepts that will be used in the analysis. By drawing from the literature of Gill, Cox, Robinson, Gramsci, I use a Neo-Gramscian approach. The combination of factors that are employed in this approach is very attractive. I expect that only by taking into account both ideational, power/material aspects and institutional capabilities the policy change in the EPA can be fully understood.

### *2.1 Mercantilist approaches*

Mercantilism serves as the most traditional and earliest Global Political Economy (GPE) perspective. It was the dominant economic philosophy during the 17<sup>th</sup> century. Mercantilism or realism in GPE can be traced back to general IR realism and draws on the works of Morgenthau

(1948), Waltz (1979) and Carr (1946), among others. While different accounts of this theoretical stream differ quite a lot, the basic assumptions are shared among all realists. The main basic assumption is that states are concerned mostly with their own interests in negotiating economic agreements. Morgenthau and Waltz would both argue that this is their only concern, yet Carr adds that states will avoid 'triggering retaliatory actions' of other states as this might harm domestic factors. Thus states will act in conformance with international economic norms. Nevertheless, states are not much influenced by moral considerations (Palan, 2000, p. 5). Mercantilist explanations will always argue that state action is directed towards promoting productive power, which is more important than wealth itself (Balaam, 1996, p. 23). Mercantilists see an important role for the state in the economy, states adhere to economic nationalism. This has a lot to do with protectionism of national economies, as originated in the early modern international state-system. Because of its early conception, imperialism and colonialism were seen as drivers of national wealth. Today, in order to promote the national wealth, autonomy and security and protective measures are used regulate international trade (Palan, 2000, p. 6). These measures are often employed by less developed states, in order to protect their economies from harmful effects of trading with industrialized nations. Import quotas and high tariffs are examples of these measures. However, it is not only the least developed states that use protectionist policies; also the EU and Japan are famous for doing so. Countering the efforts of other states that disrupt or politically threatens a nation's political autonomy is a possible reason for protective measures (Balaam, 1996, p. 33). Subsidizing exports, are such a measure states take, justifying it by stating they are merely countering subsidies of its trade partners.

Next question is how would realists tackle the research puzzle as presented in the previous chapter. Mercantilism offers a systemic approach and takes production power as the most powerful incentive for states to act on. Economic nationalism is therefore always a goal that politicians strive for, according to mercantilists. Mercantilism can explain change when it involves state intervention to promote its advantage in the international economy, however, the mercantilist perspective does not take into account the context this happens in and is considered an static (Watson, 2011) or ahistorical theory (Cox, 1981, p.42). It is an ahistorical theory in a sense that it does not look at the contextual foundation of policy change. The fact that the EU is pursuing free trade agreements with all of its former colonies, makes that the history of their relation does play an important role in the reasons for establishing the partnership agreements with exactly those countries. Moreover, with the signing of the EPA an agreement of a groundbreaking scope was revealed, and the inclusion of IPR in formerly much more development-oriented policies is what is investigated in this research. Therefore, delving into

historical relations between both actors, but also in the policy-making apparatus of the EU over the last decades proves insight of the sudden change in its priorities. This is something mercantilism cannot account for due to their static approach.

Additionally, the free trade agreements that the EU pushes for with the ACP countries is difficult to explain with mercantilism because the EU is actually opening up its economy, pursuing free trade. Opening up to these countries and offering them trade incentives would not be predicted from a mercantilist perspective, rather the EU is expected to protect its economy from these countries. From a mercantilist perspective, the EU would be negotiating on behalf of the member states. A state aiming for utility maximization is not likely to propose free trade agreements with other states (Watson, 2011).

But maybe most importantly, development cooperation is a concept that is hard to explain within the mercantilist perspective. In mercantilist reasoning, a state would not care to contribute to the development of other states, as policies are primarily geared toward improving its own role in the international economy. Financial aid to development countries does not directly lead to promoting productive power for the state, while the EPA comes from a long tradition of agreements that involved quite extensive financial aid sections (e.g. Hurt, 2003 and Flint 2009). Insight into the social and institutional dimensions of this research puzzle is much needed. Regarding the main actor, in this case the EU, as a unitary actor will not lead to a better understanding of the new priority on IPRs, as many interests are at play.

IP regulation on the other hand, can be explained by using a mercantilist approach, as this does aim at protecting domestic businesses from competition elsewhere. A mercantilist explanation would only be helpful when IPRs would be discussed outside the context of development policy. Yet the main aim of the Cotonou Agreement that led to the creation of the EPAs is the “reduction and eventual eradication of poverty by contributing to sustainable development and integration into the world economy” (European Commission, 2000).

Mercantilism is not expected to be useful in answering the research question due to several reasons. First it is a static or ahistorical theory and I expect that the evolving relationship between EU and ACP countries and Cariforum countries in specific play a big role in this policy change. As do I expect that history of policymaking and historical ideology in the EU play a big role. Accounting for change without examined the historical context in which the change took place does not lead to a better understanding of this change. Second the fact that the state in the central actor is another problem for my research. And basic mercantilist approaches cannot

explain the developmental focus that EU-ACP agreements had in the past that evolved into this policy change. These are reasons to assess the next theoretical strand in GPE, liberalism.

## *2.2 Liberal institutionalist approaches*

The liberal perspective on GPE is founded on the works of Smith, Ricardo and Keynes. At the time, these works were written as a reaction to mercantilist perspective. Liberal thought centers on the notion of individual freedom. Following Smith, who agitated against a strong mercantilist state that uses its state power to create wealth, the 'individual freedom of the marketplace' is the best alternative to the abusive powers of the state (Balaam & Veseth, 1996, p. 41). As Smith states 'every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage indeed and not that of a society that he has in view (Smith in Balaam, 1996, p. 398). And 'the statesman, who should attempt to direct private people in what manner they ought to employ, would not only load himself with a most unnecessary attention but assume an authority which could safely be trusted, not only to no single person but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.' (Smith, in Balaam, 1996, p. 400). It is this kind of reasoning that forms the foundation of liberal thought. As Balaam sums up: "Liberalism is a view of IPE that sees markets as more important than states. The role of the market as a peaceful coordinating process, which brings together individuals in a mutually advantageous, positive sum game. The role of state power is negligible, largely confined to security structures, but mainly used to strengthen and stabilize markets. In any case, the market is seen as the driving force of IPE" (Balaam & Veseth, 1996, p. 56). In this perspective, states are not unitary actors as they are in mercantilist accounts, but as instruments for realising societal goals (Palan, 2000, p.4)

If we translate this the international organisation, a crucial step for investigating the EU as the main actor in my case, we encounter liberal institutionalism. Liberal institutionalism is a theory that specifically deals with international organisations in the state system. Keohane is one of the most important writers in the liberal institutionalist perspective. In his 'After Hegemony', he builds on the notion that states are in competition, just as mercantilist state, and that they always try to improve their role in the international anarchic state system (Keohane, 1984). His main assumptions about the international system are comparable with those of mercantilists. However, Keohane adds that states can coordinate policies with each other in order to improve welfare, yet this does bring uncertainty. Actors are tempted to impose the burdens of this cooperation on others. This is where international organisations come in. International

organisations are able to reduce the costs of cooperation by bringing more information and thus certainty, “international regimes reduce transaction costs of legitimate bargains and increase them for illegitimate ones” (Keohane, 1984, p. 90). Furthermore, next to being political liberal (small role for government), liberalists are also economically liberal. Trade barriers are to be diminished for the enhancement of international cooperation. This improves the chances of states cooperation, as in seen in the EU, and thus offering a less pessimistic view of cooperation in the international system. In this perspective then, international institutions, such as the EU are instruments of states to cooperate, in order to achieve societal goals.

With these assumptions and concepts in mind, how would liberalists go about researching the case of inclusion of IPR in the EPA between the EU and Cariforum? First thing to discuss is that while this perspective is very different from the mercantilist one, it builds on the same fundamentals. It also accepts an anarchical self-help system of states (Palan, 2000, p. 54). It does not look at domestic considerations, but rather, as do mercantilists see states as billiard balls, reacting on each other. Same as mercantilism, the liberalist perspective is ahistorical and does not take the historical context in consideration in explaining research problems. As for the situation for the EU within the EPAs, I expect that liberal institutionalism would argue that IPRs promote innovation of companies, and free trade would happen more and more because of the international organisations and agreements. These reduce the costs of bilateral free trade agreements. However, IPRs are a protectionist element to the EPA, which reduces the free nature of their trading relation. Many sectors of IP are seen as excessive protectionist (Maskus, 2000). It could be argued that this protectionist element is hard to explain within a liberal perspective as it is another barrier to free trade.

Again there are several reasons not to use a liberalist perspective to answer the research question. The fact that IPRs are an extra barrier to free trade and do not help to open up market more is an important argument. A second reason is that, again, this is a static approach and lacks the ‘historical structural dimension’ (Cox, 1992). The approach does not give the researcher the chance to delve deeper into historical context and transnational changes that have led to the situation today. I believe that by investigating the subject in a more longitudinal approach, mechanisms at play can be understood in a structural and deeper way.

The power relation between the EU on the one hand and the ACP countries on the other hand, has shifted from completely dependent relation to a more diverse and complex relation. It can be expected that these relations reflect in the preferences the EU has in dealing with trade policy and specifically IPRs in the EPA. Before the Cotonou agreement, ACP countries enjoyed

favourable trade regulation from the EU in some cases. As this is practically forbidden under WTO regulation a new approach had to be found (Flint, 2009). Because the perspective and discourse on development within the EU is likely to have greatly influenced by the power relation they have with the ACP countries, a further investigation on how the historical context continuously changes and influences current day politics, a historical materialist approach like the Neo-Gramscian perspective can offer a deeper explanation (Robinson & Harris, 2000). This will be done in the fourth section of this chapter. The next section offers insight in critical theory as opposed to the two perspectives examined above.

### *2.3 Critical Theory*

Delving further into the question of why both mercantilist perspectives and liberal institutionalism are not capable of providing a satisfactory answer to the research question, Cox (1981) proves very helpful. He describes the difference between problem-solving and critical theory. The first kind of theory has the purpose of solving problems. In doing so, these theories take the world as it is, with the framework of social and power relationships as constant and given. Mercantilism and liberal institutionalism are problem-solving theories because they take the agents and structure that they study as given without questioning this static world order. If your framework remains the same and the relations in it as well, you can aim at making general laws and regularities, which they can do according to Cox. However, world order is not static and is continuously changing. A theory therefore cannot take this order as given and has to 'open up' this framework. Authors in problem-solving approaches often argue that they do objective research, a notion that Cox considers to be impossible. He argues that every theory is 'value-bound' as these theories accept the prevailing order as the own framework, thereby supporting this prevailing order in real life (Cox, 1981). An illustrative example of this is a famous article by Smith (2004) in which he claims that the IR discipline has helped to 'sing into existence' 9/11 by reflecting the dominant interest as objective theories. Thereby IR theories have effectively served as a handmaiden to Western power and interests. What both Cox and Smith try to show is that theory is never value free; 'theory is always for someone and for some purpose' (Cox 1981, p. 128).

Critical theory itself is also not value-free, yet it tries to be aware of 'hidden' values. Looking from various perspectives and being critical on each of them helps to unveil these values in theory. Critical theory acknowledges that we, as researchers are studying a 'continuing process of historical change' (Cox 1981, p. 209). This means that world order, agents, structure, relations are not fixed but can change over time. Therefore we have to study the change that happens

inside all of these aspects and look for its origins. Critical theory then, is always historical, in contrast with the abovementioned theories, it always looks at putting into historical context current or past developments. When utilizing a critical theory, a researcher always has to be critical to the perspectives she or he uses and the possible alternatives. Because historical context is important and the changing world order, which can be influenced, critical theory can better account for explaining policy change.

However, while critical theorists agree on the aforementioned general issues, there is not one critical theory that prevails. Different authors use different critical perspectives. Critical research has four fundamentals according to Roach (2008). First, critical theory acknowledges the reflexive dimension of theory. The actions of actors are linked to their ideological orientation. Roach sees ideology as a sort of lens through which one sees the world, as is theory. Social values then lead to our theoretical understanding, and has an effect on the society. The reflexivity of the knowledge entails that the way we think about certain issues shapes how is acted on it, making theory and reality inseparable. Second it assumes that orders and structures can be changed. They are not fixed and people, including researchers and their work, can influence them. Critical theory does not only accept these orders as given and focuses on inequalities between people and groups to try and change them. By seeing the existing world order as a problem for those that have less power, most critical researchers see an emancipatory goal for their research. Structures can lead to the domination or even oppression of some groups. A third fundamental is the notion that knowledge is 'open-ended' or never complete. Critical theory is rooted in ethical concerns and well as in social and economic relations of production. Fourth critical theory provides us with a guide to social reality making it possible to see the big pictures that explain "how economic policy, social institutions, discourses, practices and culture interact to produce a social system" (Roach, 2008, p. xvii)

But these four fundamentals are as far as the consent goes among critical researchers. In fact, there are countless ways to do critical research. In this thesis I choose for a Neo-Gramscian perspective, which always includes three aspects: material, ideological and organisational features (Cox, 1983). This approach offers a valuable basis for analysing the research question, as I believe there are both ideational (free-market and neoliberal values) as material (profits in trade and IPR's, economic markets) at play in this subject. By looking at both structure and agent I hope to develop a convincing analysis of the EPA the Commission signed with CARICOM.

## 2.4 Neo-Gramscian framework

Neo-Gramscianism is inspired by the works of Anthony Gramsci and developed mostly by Robert Cox. Gramsci himself was an Italian politician and political theorist who lived between 1891 and 1937. Gramsci wondered why major revolutions were so rare and decided to investigate the cause of this. He did so by looking at the dominant role that capital plays in liberal democracies. Gramsci realized that the governing structures, as used by Western powers were mostly based on consent rather than coercion. Gramsci emphasizes that role of culture, ideologies and discourse in relation to material and economic power base. Not solely economical or technological factors influence political change, agency is important as well. According to Levy and Egan, agency develops through 'knowledge and consciousness among groups with latent common interests' (Levy & Egan, 2003, p.4). Agency requires active organisational effort and support from 'organic intellectuals' with similar ideological views. The dominance of a coalition of social groups, or 'historic bloc', relies on material, ideological and organisational forces (Levy & Egan, 2003).

In his famous article *Social Forces, States and World Orders: Beyond International Relations Theory* (1981), Cox draws on this basis by Gramsci. Cox describes a change in international relations practice, caused by a shift in the nature of actors (different kinds of states and increasingly non-state entities), a shift in the goals that are pursued in the international arena (both high and low politics), and a shift towards greater complexity in interaction and institutions that are the basis of action (Cox, 1981, p.126). The author is looking for a way of incorporating these trends into a theory by 'look(ing) at the problem of the world order in the whole, but beware of reifying a world system'. With this method he looks to not underrate state power, but also incorporating social forces and processes. As stated above, a critical theory should always be concerned with a continuing process of historical change (p. 129). Cox starts working from a realist and Marxist perspective and aims to broaden the notion of 'the international' so it can include more than political and military interactions. States are 'both the products of evolving societies as shapers of those societies (Cox, 1981, p. 514). In order to make such a framework for understanding 'the international', Cox builds on the works of Gramsci. Gramsci had, long before him, written on identity and culture, as being two important factors often overlooked in international politics. According to Moolakkattu "the Gramscian turn in IR provides conceptualize a world order free of the constraints of state-centric approaches and the interstate relations they focus upon, while explicitly acknowledging their importance" (Moolakkattu, 2009, p. 441). 'World order', according to Cox (1981), comprises of more than 'IR',

as states constitute only one component of world order. Next to this, we scholars, as part of internal characteristics of states also contribute to their external behaviour.

Cox starts from structure as a framework for action. Within this structure, three forces interact: material capabilities, ideas and institutions. First it is important to discuss the relation between structure and agency. The relation between structure and agency is a difficult one for many scholars. Cox states that “structures do not determine people’s actions in any mechanical sense but constitute the context of habits, pressures, expectations, and constraints within which action takes place” (Cox 1981, p. 135). The ‘framework for action’ or ‘historical structure’ is, in Cox’ words a ‘configuration of forces’. This does not mean that there is no room for individual or group opposition of this configuration, but the structure cannot be ignored. Structures then work as some kind of filter of how reality is perceived and a filter for action. This means that within the structure some actions are enabled and other constrained. However, the structure itself is also subject to change. Because agency, as a set of cumulative actions, has the consequence of either maintenance or transformation of these historic structures (Cox, 2001, p. 56). With the transformative ability, agency and structure are situated in a reciprocal relationship.

#### *2.4.1 Hegemony and historic bloc*

Cox connects institutions to hegemony, a concept borrowed from Gramsci. Institutions serve to deal with internal conflicts as to reduce the use of force. Within institutions those with the most favourable material capabilities have stronger enforcement potential. If so, the missions of prevailing powers may be hegemonic. The weaker actors, that see these missions as legitimate will then give in. Structures can be either hegemonic or non-hegemonic. Yet, we must not solely look at the institutional dimension, as hegemony may be reflected in institutions, but does not have to be so (Cox 1981, p. 136-137). Hegemony then, for Cox, is a concept that is based on a configuration of material power, a set of institutions and prevailing ideology. Other actors in the system must recognize action as being hegemonic rather than dominant, as hegemonic is above all consent-based. Bieler and Morton (2008) emphasize that for Cox, hegemony ‘appears as an expression of broadly based consent, manifested in the acceptance of ideas and supported by material resources and institutions, which is initially established by social forces, occupying a leading role within a state, but is then projected outwards on a world scale’ (Bieler and Morton, 2008). Hegemony then, still reflects a form of dominance of the one actor over the other, yet, different from the traditional understanding of hegemony in IR, is based of consent rather than force (Cox, 1981). Hegemony firstly represents an ideological power, and additionally economic

and material power. Because hegemony is an 'opinion-moulding activity' and not a material or strategic dominance then, research focusing on this concept should focus on how this social world order is constructed based on values and interpretations (Cox in Bieler and Morton, 2008). This, again, reflects how reality is shaped by intersubjective meanings, a central tenet of critical theory. As such, hegemony 'filters through structures of society, economy, culture, gender, ethnicity, class and ideology' (Bieler and Morton, 2008, p. 87). What this entails for smaller powers is expressed by Cox: "Great powers have relative freedom to determine their foreign policies in response to domestic interest; smaller powers have less autonomy. The economic life of subordinate nations is penetrated by and intertwined with that of powerful nations" (Cox 1981, p. 137). The question here is how this is reflected in the case of the research and the EU-ACP relation. Yet it is important to emphasize here that even though it may seem that agents are free to choose whatever they want, they are bound by structure as mentioned previously.

Bieler and Morton state that patterns of production are the starting point of analysis of the workings of hegemony. These include not only the production of goods, but also the production of knowledge and social relations. Production and power are in a reciprocal relationship as the social relations of production can promote certain social forces, that can find a foundation in forms of state, which in its turn influences world order (Bieler & Morton 2008, 89). Or, as Overbeek (1994) puts it, "hegemony is thus understood as a form of class rule linked to social forces, as the core collective actors, engendered by the social relations of production". With the social relations of production is meant the ways in which production is formed, in current era this is a global capitalism. This is reflected in the historic bloc and its policies, which I will discuss in a later section of this chapter.

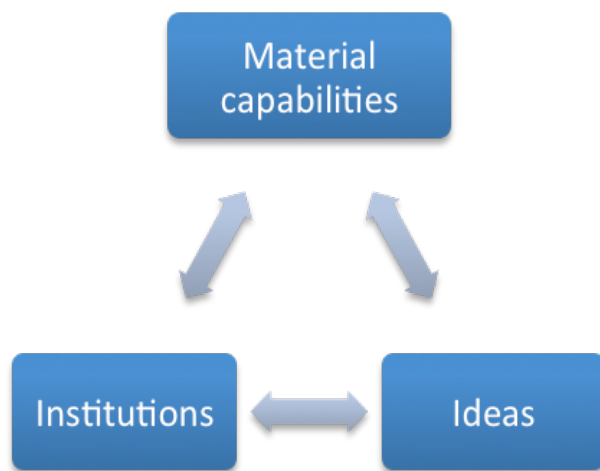
An important and related concept is that of the historic bloc, which Gramsci sees as the way in which leading social forces establish a relationship over competing social forces. It is the integration of different class interests rather than a political alliance. A historic bloc is 'bringing about not only a unison of economic and political aims, but also intellectual and moral unity ... on a "universal" plane' (Overbeek 1994). A hegemonic bloc then represents a configuration of both social and economic forces. Such forces have the capability to reproduce the relations of productions. Hegemonic power by the bloc, as stated previously is not imposed on its subordinates but that it is a negotiated process (Levy & Egan, 2003)

It is important to note that Gramsci used an enlarged notion of the state, comprising of both the political society including the government and party system as well as the civil society. Civil

society can also be interpreted quite broadly, including also media and religious organisations. The ideology that lives within the civil society shapes the goals and functions of the state. New social forces have started to play a major role, such as a globalized civil society. This can be a place for counter-hegemonic forces that oppose the hegemonic bloc that can also be structured through intergovernmental organisations (Cox, 1983). Counter-hegemonic forces express critiques to the hegemonic actor. They do so by resist the current dominant perspective with an alternative view on how society should be organised or which other ideology should be leading. By doing so they often oppose the status quo that is being held up by the historic bloc. Counter-hegemony is aimed at political change and can, if supported enough, lead to an alternative hegemony. This process happens in two phases, the war of position and the war of movement. In the war of position, a social group or movement tries to broaden the support for their critical viewpoint on the hegemonic actors and ideology. This is an intellectual struggle, by which the subordinated group will aim at increasing consciousness of their position, using persuasion and spreading of information. If this movement becomes big enough, the power of the movement gained enough support to overthrow the hegemonic bloc either violently or democratically. The movement itself then establishes a new historic bloc with a new ideology (Cox, 1983). It should be noted though, that when heavily criticised, the dominant class might consider it necessary to make concessions to subordinate classes, to gain their support in return. Thereby the existing historic bloc is reinforced by incorporating differing views and actors (Cox, 1983, p.163).

The dominance of the transnational historic bloc is the hegemony of its social relations of production. As Cox puts it: "Hegemony at the international level is thus not merely an order among states. It is an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of productions." And he continues "it is also a complex of international social relationships, which connect the social classes of the different countries. World hegemony is describable as a social structure, an economic structure, and a political structure. And it cannot be simply one of the things but must be all three." He describes that world hegemony, is expressed in universal norms, institutions and mechanisms which lay down general rules of behaviour for states and for those forces of civil society. These rules support the dominant mode of production and thereby reinforce the world order (Cox, 1983, p. 171-172). The latter refers to the social relations of production of global capitalism.

### 2.4.2 Three forces within structure



Now it is clear what this hegemony entails, how can we use this to research the case? Hegemony, according to Cox's understanding is a configuration material power, a set of institutions and prevailing ideology. These three 'forces' lead to and reinforce hegemony and seem to link back to the three pillars of hegemony according to Gramsci: organisation,

material and ideology (Levy and Egan 2003). The relationship between these forces is reciprocal, it can be that in one case the ideas influence the material capabilities and in another the institutions. The three constitutive factors of hegemony will be used in this research to assess how the strict IP agenda came into place and led to the inclusion of an IP section in the EPA between the EU and Cariforum. The hegemonic idea of the main actor, the EU is that this linkage is a crucial step towards development. What three forces/trends have led to this hegemonic idea? To investigate that, the three forces will be translated into contemporary trends in EU policy making. The trends are not unitary trends, but are placed in an historic and transnational context. This is why the trends are investigated in a longitudinal study, covering the past three decades. But first, the three forces have to be examined more closely so they can be used as tools in the analysis.

#### *Ideas*

The ideational factor can consist of ideas of two kinds according to Cox. The first being intersubjective meanings or shared notions. These shape habits and expectations of behaviour, for example the notion that 'people are organized and commanded by states which have authority over defined territories'. These are the kind of ideas that people generally agree on. They shape the constructed social reality in which we perceive the world and form the basic assumptions by which we live and order our lives. The second kind of ideas are 'collective images of social order held by different groups of people' (Cox 1981, p. 136). Basically these are views on the current power relations and, as a result these can differ from one group (or individual) to another. The first kind of ideas is broadly shared within a particular structure. Opposing views on the second kind can lead to questioning the material and institutional basis

and possible alternative structures. Yet, as is stated before, counterhegemonic ideas are often incorporated and silenced to the prevailing ideology.

Stephen Gill, a scholar working in the Neo-Gramscian tradition researches current historic blocs and their main ideologies. In his article *Globalisation, Market Civilisation, and Disciplinary Neoliberalism* (1995) he investigates the current historic structure and discusses that today a liberalised and commodified set of historical structures is at play. With this he means the globalisation of the ideology of liberalism has taken place. A process structured that was by the 'transnational historic bloc outlined by the G7 apparatus and transnational capital'. More on this bloc the section on material capabilities. The implemented policies often "subject the majority to market forces whilst preserving social protection for the strong" (Gill, 1995, p. 401). With the strong he means corporate capital and highly skilled workers. The discourse that accompanies these policies can be characterized as neoliberal with governments focusing on efficiency, welfare and freedom of the market. The dominant neoliberal discourse is disciplinary in a sense that it is bureaucratised and institutionalised in both the public and private sphere. Gill concludes that the effects of this discourse are both contradictory as they often result in illiberal and anti-democratic instances, and hierarchical outcomes, resulting in an organic crisis of governmental authority and credibility (Gill, 1995). The role of globalisation made it possible for ideas to spread across the world. It is a process that restructures both state and civil society. But globalisation is also an ideology in itself, argues Gill, "largely consistent with the world view and political priorities internationally mobile forms of capital" (1995, p. 405). It is an example of an ideology at play in upper western policy making circles. We already see how this is linked to the 'transnational historic bloc' or the material components. Also the link with the institutions of policy making becomes visible.

In this study I will focus on the leading ideology that is visible in EU policy making and taking into account history how this has changed in the last decades. By following the ideological debate, while taking into account material capabilities and institutional factors, the policy change can be explained.

#### *Material capabilities and the TCC*

Material capabilities are what Cox calls potentials that are both productive and destructive and consists of technological and organisational capabilities, as well as natural resources, equipment and wealth. Industries are part of these material capabilities. The ones in power of the material capabilities are those that own the transnational capital. This group is referred to as the Transnational Capitalist Class (TCC). Globalisation processes led to a restructuring of

transnational capital. This gave rise to the TCC as the global ruling class. It rules over others because it 'controls the levers of an emergent transnational state apparatus and of global decision making' (Robinson and Harris 2000, p. 12). The bloc consist of diverse political and economic forces that centre at international organisations such as WTO, IMF, World Bank, higher policy making circles of the EU and US, and internationally operating business representations. Their interests lie in the 'world economy as a whole and a system of international private property which allows free movement of capital between' (Hymer in Robinson and Harris 2000, p. 13). While Cox and Gill, among others have pointed towards a 'global class structure' of some sort, they focused on international cooperation of national bourgeoisies. What Robinson and Harris add is the idea of a truly transnational class that has emerged out of globalization processes. The notion of *transnational*, in contrast to *international*, is not contained to shared relations between different national groups or factors, but indicates economic social an political processes that supersede the nation state (Robinson and Harris, 2000, p. 17). 'In sum,' Robinson states, 'a global class structure is becoming superimposed on national class structures (Robinson, 2005).

### *Institutions*

Institutions reflect current power relations and stimulate collective images that are consistent with those current relations (Levy & Egan, 2003). Naturally the EU as a policy maker is investigated as one of the major institutions in this research. Internal and external power relation will be examined to see the power struggles and relation to ideology and material capabilities that eventually lead to policy outcome. It is however also important to place these institutions in a wider transnational context to see how they are being constrained and reinforced by institutions such as the WTO. In trade policy, the EU does not act as a isolated actor but is bound in international institutional context.

These three forces constitute and reinforce hegemony and the hegemonic bloc. The power of the TCC leads to a depoliticisation of many issues. Economic decisions are left to technocrats instead of politicians, who are guided by transnational capital. (Gill, 1995). Gill argues that the 'dominant discursive formation' of the current era is a neoliberal concept of globalization. In this discursive formation privatization and transnationalisation of capital are desirable or even inevitable. The positive sides of this are that it promotes free trade and competition, yet this marginalizes non-market alternatives (Gill 1995, p. 406). I think it can be added that it is at least contested whether this discursive formation has positive effects for developing countries, such as most of the ACP states.

How these three forces led to a situation in which the hegemonic bloc could prioritise IPR regulation within the EPA is discussed in chapter 4, First the way in which this will be investigated is set out in the next chapter. Implications of and expectations on the basis of the theory, along with the used methodology, will be examined in the following chapter.

### *3 Research approach*

As is set out in the previous chapter, in this research I employ a critical theory perspective. This critical perspective is not only used in the theoretical part of the study but will show throughout the whole research, as certain assumptions and goals of critical research structure my study. In this chapter the implication of critical theory on my research will be examined, as well as the method of analysis and the operationalization of central concepts from the Neo-Gramscian framework.

#### *3.1 Implications of critical Neo-Gramscian perspective for this study*

The choice to write in the Neo-Gramscian tradition pushes a researcher to investigate both the material bases, events and capabilities as well as the cultural and discursive structures that underlie this material basis (Patomäki & Wight, 2000). These are both important because knowing these underlying structures and cultures affect changes in the material events. In this research the focus on the basic concepts from the theory (the three forces that constitute and reinforce hegemony: ideational, material and institutional capabilities) will provide analysis of both accounts.

Following Cox, critical theory does not take the given world order as given. Unveiling hidden values and assumptions of this world order makes room for criticizing the prevailing power structures (Cox, 1992). As Roach expressed, one of the central tenets of critical theory is the focus on inequalities between people and groups and the possibility for change. Because structures can lead to domination or oppression of certain groups, most critical scholars try to contribute to emancipation with their research. In studying international politics, one studies a 'continuing process of historical change' pushing scholars to investigate changes in agents, structures and relations (Roach, 2008). Because critical theory is per definition historical, one should always include historical context of a case to understand or explain developments and change (Cox 1981, 209). This is taken very seriously in this research, by investigating the three trends over a period of several decades. This means that a longitudinal study will be undertaken, in which the policy change is investigated by looking at the changes in world order, prevailing ideologies and changing institutional constraints and influences. Changes in the historical and transnational context are further investigated to see how they reflect on EU policy making. Only by taking this context seriously into account one can truly understand policy change (Cox, 1983).

Another crucial difference between critical and problem solving theory is their take on epistemology or how to gain knowledge. What differs from a positivist approach to epistemology is the notion that one cannot employ a theory objective research a static world order. According to Cox one must constantly question the power relations and roles of different actors. Critical theory presupposes the reflexivity of knowledge that makes reality and theory inseparable, as the theory can shape real life actions. (Roach, 2008). To do science, Patomäki and Wight write, 'is not a deductive process that attempts to seek out constant event conjunctions, but one that aims at identifying and illuminating the structures, powers, and tendencies that structure the course of events" (Patomäki and Wight 2000, p. 223). To explain changes one must identify structures, powers and tendencies and grasp their characteristic ways of acting. Working in the critical realistic tradition, this means that neither a method of induction, nor deduction is employed but retroductive reasoning. Retroduction means that one searches to a movement or for mechanisms that conceive or produce different events, outcomes or policies (Patomäki & Wight, 2000). Events can be explained by the assumption that certain mechanisms have produced these events. These mechanisms are either known beforehand or hypothesized. Practically speaking, using retroductive reasoning the researcher has to follow these steps. First the question why a certain phenomenon is possible, in my case policy change. Then, by using a suitable theory, conducting research on the event and involved actors. Through the use of theory in combination with empirical data the researcher should be able to distinguish several mechanisms that led to the outcome. Then the researcher goes back and systematically reflects on the mechanisms found earlier, only by questioning these mechanisms over and over again the strongest explanation can be found (Easton, 2010).

### *3.2 Expectations of the case on the basis of theory*

In the previous sections of this chapter I have showed that three forces will serve as building blocks of my analysis: ideas, material capabilities and institutions as the three pillars of hegemony. As I believe these notions to form a foundation for a Neo-Gramscian analytical framework these already lead to some sort of expectations for what I will discover in the analysis. In this section I will set out these expectations based on both the theoretical concepts as interpreted by several authors and the preliminary study of the EU-Cariforum EPA. This will help me to structure my research and assess whether the assumptions made here match the empirical material.

### *Ideas*

The ideology of (neo)liberalism is important in current global politics and plays a leading role in trade related negotiations. It is important to remember that this hegemony is based on consent rather than coercion. It can be expected that specifically the sites of negotiations of trade agreements are the sites of consent by both partners on the prevailing ideological motives. Gill talked about discursive neoliberalism as an ideology that tends to subject a majority of issues to market forces, while preserving protection for corporate capital. With this in mind, I expect that in general liberal policies are being proposed by the EC. The neoliberal policy change in the changed relation between EU and ACP countries will open up markets and aim at increasing transnational trade. Yet, I expect that a restriction is made for intellectual property by defending major corporations interests in IP. By offering those protection on their knowledge and restrict free access of Cariforum countries to this knowledge, corporate capital is being served in the EU. This reasoning, based on Gill assumptions will then show a paradoxical outcome, liberalizing, while protecting corporate interests by going against liberalisation in certain areas. Counterhegemonic ideologies are incorporated by the prevalent ideology. Those who voice ideas that differ from the neoliberal stance taking in many international policy making institutions are forced to accept prevalent ideas at least on a level where they are able to resume dialogues with these institutions to exert influence on them.

### *Material capabilities*

The ideology of the transnational capitalist class, is represented by the EU and embodied in the EU negotiators. The idea of furthering corporate interests, and promoting industry interests comes naturally to the EU negotiators. The inclusion of IPRs in trade agreements is considered a good thing, flowing from the pressure to establish stricter IP regimes, by several big international actors. The dominant discourse about the link between intellectual property and development is accepted by most international actors and its ideology is (partly) formed with the formation of the World Trade Organisation. Capitalism thrives if ideas can be protected, is the idea, so that IPR's contribute to maximization of economic utility. These basic ideas and assumptions underlie the goals of EU's negotiators. The promotion of IPRs is internalized in such a manner that they are taken for granted by these actors.

Yet, at some sites, as is always the case with hegemony, these ideas are contested. At venues as the European Parliament, in academia and in NGO's the function and ethics of IPR's are extensively discussed and their implications criticized. These various actors usually try to influence EU policy makers to shape policy and promote interests of the non-hegemonic actors. Lobbying and working groups are just two of the ways in which policy makers can be influenced.

But also the transnational corporations, affiliated interest groups and other actors that benefit from certain ideas more or less in line with hegemonic ideology, utilize such tactics.

I expect the lobbies of these organisations to be more influential than those mentioned above, because of superior material capabilities. As part of the hegemonic bloc, I expect them to possess more capabilities to influence policy makers, to know their way with negotiating tactics. Wealth of those organisations together with their organisational capabilities help them to influence policy, build better lobby groups, creation of influential interest (working) groups to protect their interests. This is one way in which the material capabilities influence the EU's preference for strict IP regulation in the EPAs.

### *Institutions*

The EU as an organisation, I expect, structures its employees in such a way the internalized and dominant ideas about trade and intellectual property are carried out, even if the negotiator himself would not want to promote these ideas. The structure of the EU as an institution and the works in such a way that priorities favour the economic interests of the big industrial players. The division of power between the Council and the Commission is plays an important role in this. Also the domination of DG Trade over other DGs in the Commission is important. In such a way the organisation has a constraining effect on the negotiation goals.

Yet the EU as an institution, and DG Trade in specific, is also constrained in an institutional framework. In international trade, the EU does not act as a solitary actor. I expect that the structure and goals of the WTO to which the EU bound itself in the previous decades have a great influence on today's prioritizing and structuring of policy goals. By prescribing to these neoliberal goals, the EU cannot simply decide to pursue entirely different goals, such as pure developmental ones. The successes of multilateralism in the 90s constrained the EU in such a way that being a subscriber to WTO policies and being a large actor on it, policy priorities have been set in this scene. The rising importance of protecting intellectual property is incorporated in EU reasoning. I expect that WTO compliance alone has had a great effect of the priorities of the EU.

All in all, I expect that ideological, material as well as institutional factors have contributed to the inclusion of IPR's in EU's preference towards the EPA with ACP states. These expectations will be tested in the analysis in chapter 4.

### *3.3 Methodology*

This study is an illustrative case study. It is not a case study in a sense that it will lead to generalizable results that can be projected onto EU policies in different sectors. Instead, in line with a critical theory perspective, the study will offer deeper insights in the priority of the EU to include IPR regulation in their EPAs with ACP countries. Using retroductive reasoning, this study aims at grasping mechanisms and relations. Egan and Levy have used a Neo-Gramscian framework to investigate strategies that were used by corporate actors in negotiations (Egan & Levy, 2003). Their use of the three pillars of hegemony inspired me to take the same route. These three concepts offer me support in untangling power relations over the past decades. As stated, taking Neo-Gramscian theory seriously, the historical and transnational context has to be taken into account (Cox, 1983). This is done in this study by adopting a longitudinal approach. Using the three concepts and linking those to trends that took place over the last three to four decades, the recent policy change can be accounted for.

The Cariforum-EU EPA is investigated in particular for several reasons. The first and obvious reason is that it is the first and only full EPA to be concluded with a regional entity of the ACP group as of today. More importantly, this EPA is widely believed to be drafted as a template for other regional EPAs, as evidenced by Williams (2014) and CIEL (2007). Therefore, from a critical perspective it is very interesting to examine the process that led to the actual EPA to investigate the power plays and discourses at work. This is only possible because the IP section in the Cariforum EPA is very close to the EU's proposal for this section and it is practically a transposition of EU's wishes (CIEL, 2008). This is the case due to massive power imbalances between the two regional actors. This makes that I can focus on researching the EU side of the story only and can still account for the outcome of the negotiation process. Thus by researching this particular EPA I can investigate what the EU's IP priorities are with all of the ACP countries.

In order to do so I will deconstruct the link between IP and development in EU reasoning. What assumptions and material opportunities and constraints lie beneath this link? I will investigate this by conducting a document analysis of both primary sources and secondary literature. The primary sources investigated will be policy documents, strategic papers, non-papers, press releases and speeches. Secondary literature will include previous analyses, academic articles, books, background reports by societal actors, and interviews. By making critical use of these sources I will deconstruct the linkage between IP and development in the EPAs with the ACP group. Using both insider (EU documents) and outsider sources (academia and NGOs) will help to create a more informed and nuanced look into the mechanisms at play.

This approach gives the researcher the advantage that in can investigate the illustrative case in great depth. Using a longitudinal perspective, a deep understanding of the changes that lead to a specific outcome. Critical perspective has the advantage that policy change is not seen as just a trade-off or bargaining trick, but that it can offer a structural and context informed view. The mechanisms that led to the policy change can be investigated over an increased period of time. A weakness of this approach is that it cannot help to generalize to other cases. On the basis of this research nothing can be said over the IP priorities of the EU in negotiations with for instance the United States, in the Transatlantic Trade and Investment Partnership. Although some features may be similar, this study does not focus to generalise beyond relations with the ACP countries.

## *4 Inclusion of IPR provisions in Economic Partnership agreements*

Understanding the historical context thoroughly is important for any analysis, however in employing a Neo-Grainsian framework a historical context is crucial if power relations and shifts in those are to be identified. Only in a context of earlier agreements, earlier ideas and capabilities policy changes can be explained and understood. In this chapter I will thus start with a history of EU-ACP relations and conventions in 4.1. In the first section we follow the shifting nature of the agreements between the former colonies and colonizers from mainly aid to a much more elaborate agreement based on trade. A short introduction to IP regulation in the EPA and its expected effects on development follows. In 4.2 I argue that there are three broad trends that can explain the inclusion of IP in the EPA. These correspond with the concepts of ideas, material capabilities and institutional capabilities as discussed in previous chapter, which constitute hegemony. First there is the rise of neoliberalist ideology throughout various policy fields. We will see how and when this manifested in world economics and in the EU in specific. Also its relation towards IP will be examined. The second big trend is the rise of the Transnational Capitalist Class and its growing power on policy making, especially in the EU. The third trend, corresponding with institutional aspects, is the more and more accommodating role of the EU towards these transnational capitalist class en neoliberal thought that go hand in hand. In 4.3 I connect the broader trends to the negotiations held towards the establishment of the EPA with Cariforum, to see how the three trends manifested in the various procedures, dialogues, questions, that the EPA negotiations triggered. How can we see the transnational capitalist class at work in the process and how does the Commission accommodate these views and interests.

### *4.1 History of EU ACP relations*

The enormous scope of the newly signed EPA proves a critical turn in the EU-ACP relations. Linking development so closely to trade is the result of a fairly new vision on development. The inclusion of IPR regulations offers a puzzle in connection to both free trade and development. The ideas of linking trade to development and even linking IP to development, is surprising if we look at the criticism of this stance. In order to shape a context for these shifts of EU-ACP agreements, a look in its history is a crucial step. In this section it becomes visible that the nature of the different agreements has shifted enormously over time. Whereas the sections in the treaty of Rome, when were focused solely on funding of the former colonies, its relationship has shifted towards those of partners signing a free trade agreement, even including a section on IP regulation. While each step proves more equality between partners, true equality lacks. The first

section describes the origins of the relationship while the second section describes the radical changes towards the latest convention, the Cotonou agreement.

#### *4.1.1 Treaty of Rome to Lomé*

Relations between EU and ACP countries go back to colonial times. Bilateral relations between (former) colonies and EU member states were discussed collectively the first time in the Treaty of Rome in 1957. The then six member of the European Economic Community (EEC) lay the foundation of juridical cooperation with 31 colonial and ex-colonial territories. According to Flint (2009, p. 80) it was a condition of the French for its accession to the Treaty of Rome that a 'special' relationship was build between EEC countries and countries tied to Europe through colonialism. As Van Reisen writes, "the fact that General De Gaulle threatened to break off negotiation of the Treaty of Rome if the other parties to the negotiations did not agree to the association of the French Overseas Countries and Territories appears to give strength to the idea that Europe's relation with the South were originally intended to protect French interests" (2007, p. 30). The concept of 'Eurafrica' was considered crucial and consequently led the Treaty of Rome to offer mainly African colonies the 'association status' as Overseas Countries and Territories (OCTs) (Broberg, 2011, p. 10). The treaty also led to the creation of the European Development Fund (EDF) in 1958 to share the burden of financial assistance to the colonies. The funding was mainly spent as grants for France's overseas territories. Despite initial opposition of the Germans and Dutch, because it served mainly French interests, the burden was shared collectively. (Van Reisen, 2007, p. 34)

However, during to years following the establishment of the Treaty of Rome, most of the OCTs gained independence and formed new states, requiring an alteration of previous accords. The new relationship was formally established in Yaoundé, Cameroon in 1963. The treaty, named after the place it was signed in, laid the foundation for AC P-EU relations, starting with only 17 independent states plus Madagascar in 1963. The treaty was being renegotiated when more countries gained independence. Yaoundé I was in force from 1963 to 1969 followed by Yaoundé II from 1969 to 1975. The agreement arranged preferential trade and aid for the new states. These arrangements asked reciprocity and non-discrimination in exchange for EDF funds. Its goal, to create an EEC-African Free Trade zone was never reached due to protectionism of newly formed African economies that relied on import substitution, French business interests that did not want to share with other European businesses and opposition of the United States that wanted to prevent Africa becoming Europe's sphere of influence (Flint, 2009).

As Van Reisen argues, the decline of French and British influence in the developing south, gave rise to more influence for the United States (US). Investors for the US began to invest more and more in African countries, provoked by a shortage of mineral worldwide. US's contempt of colonialism led to the introduction of a new lexicon using concepts of 'development', 'cooperation' and 'partnership'. European states began using the new lexicon as well and the Third World countries were renamed as developing countries (Van Reisen, 2007, p.34-36). Already in 1963, the six members of the EEC declared opening up to third countries that had comparable economic structures as the 18 OCTs to join the Yaoundé convention or a separate association status. This direction promoted the influence of the EEC over Britain and "was an indication that the community was ready to widen the scope of its association with developing countries and five teeth to its development policies with or without Britain" (Dyett in Van Reisen, 2007 p. 36). This showed that the EEC was no longer interested in including solely its colonies in these policies.

With the accession of Great Britain, Ireland and Denmark to the EEC in 1973, a new agreement was needed, one that included the interests of Great Britain and its former colonial ties. These became the Lomé conventions, which lasted 25 years and shaped EU's development agenda (Flint, 2009, p. 81). When negotiations started, the EEC decided to split the Commonwealth countries in two groups. The first being 'associables', who were eligible to discuss association agreements, same as for the other OCTs included in Yaoundé. The other countries 'non-associables' or Commonwealth associables', such as India were considered too developed to prescribe to EDF funds (Flint, 2009). According to Van Reisen, to the Commonwealth associables, the offers of the EEC were only to "institutionalise second-class membership'. It was clear to them that "the association arrangement under the Yaoundé Conventions were first and foremost political and intended to maintain 'privileged relationships". The fact that there was no possibility to establish an independent trade policy, the subservience of states in the Yaoundé led Commonwealth states to accuse the EEC of neo-colonialist policies (Van Reisen, 2007, p.40).

The group of associables preferred to discuss new regulation as one bloc rather than in regional grouping, which the EEC had expected. EEC had expected to discuss with the Association of African States and Madagascar (AASM) group, with 20 Commonwealth states and a handful of non-aligned development states. Their joint efforts and this turned out to be the birth of the ACP group, which was officially established in 1975, consisting of 46 signatory developing countries signing the Georgetown Agreement (Flint, 2009, p. 81). Supposedly this move was a smart one, as the result of the negotiations with the EU, Lomé I, proved a real change in direction in favour of the ACP countries.

The resulting convention, named after and signed in the capital of Togo, had 46 signatory states. The EC has stated the reasons for Lomé I to be “economic and geopolitical interest in the age of the Cold War”, “European anxiety at the first oil crisis” and “a fear of raw material shortages and a desire to hold on to values overseas markets”. (EC in Raffer, 1997, p.2). Lomé I was a set of agreement that both arranged financial aid and regulated trade arrangements. Trade was regulated on the basis of non-reciprocity. This meant that the ACP states were given preferential market access to European markets without having to give EC states the same access to theirs. This form of positive discrimination was most likely influenced by the New International Economic Order (NIEO) The NIEO proposals were geared towards promoting interests of developing countries in the realm of trade, development assistance and tariff reductions. The main rationale was that the existing international economic system was geared mostly to promote Western countries’ interests, neglecting interests of the ‘third world’ (Hurt, 2006). One of the most beneficial achievements for the ACP countries was the introduction of a System for the Stabilisation of Export Earnings (STABEX). This provided an insurance of EDF funds, decoupling this from the fluctuating revenues from export of certain agricultural products that were not covered in the Common Agriculture Policy (CAP) (Hurt, 2003 p. 160).

Flint argues that Lomé proved very different from earlier conventions. According to him, the preferential access to European Markets was a clear breach of the Most Favoured Nation (MFN) principles inherent in the General Agreement of Tariffs and Trade (GATT). This principle asks to treat every country so as the most favoured one, thus eliminating discrimination amongst states. Within the GATT, two possible exceptions for this rule can apply, one if it is motivated by development concerns or two if they threaten the functioning of free trade areas. Lomé seemed to fit in the first condition, however this exemption should then be offered to all developing countries under a non-discrimination clause within the GATT (2006). Furthermore, market pressures and thus free trade were ‘side lined’ because of STABEX and various other protocols that guaranteed producers above market prices for banana, beef, veal and rum (Flint, 2009, p. 81).

Changes to the original convention were made every five years (Lomé I in 1975, Lomé II in 1980, Lomé II in 1985 and Lomé IV in 1990). Since 1975, most developing countries economic situation had worsened; the interest of EC countries in their agricultural produce had decreased. Yet Lomé II did not present major changes. ACP countries that were heavily depended on the export of mineral and in economical crises demanded an extension for minerals in STABEX. EC found these too important to deal with within STABEX and present a System of Mineral Products

(SYSMIN) instead which operated in a similar fashion to STABEX, guaranteeing loans to lessen dependency on this particular export sector, including copper, cobalt and uranium (Flint, 2009).

With Lomé III attention was shifted from industry to 'self-reliant development on the basis of self-sufficiency and food security' (EC, 2014). An increased budget was linked to a stiff conditionality. Aid provision was linked to human rights, which was strongly contested by ACP states. Of this budget, a lot was not spent due to very lengthy and difficult administrative procedures and conditions that were not met (Flint, 2009).

Lomé IV was concluded for a period of ten instead of five years. Its focus shifted towards human rights, democracy and good governance, environmental protection and diversification of the ACP economies. By then it was clear that the Lomé agreements were not so much a stage for southern critiques but adopted a more liberal understanding of development. In both trade and aid parts of Lomé IV this was reflected. The dominance of neoliberal ideas was spread enormously in this Cold War period (Hurt, 2003, p.162). This agreement was revised in 1995 (Lomé IV-bis) because of major economic and political changes in many ACP states. Under the influence of the World Bank and IMF, many developing countries saw their economies change because of the Structural Adjustment Programs. Forcing them to act more so according to the principles of free trade, Lomé IV-bis supported these programs and used EDF funding to support these SAPs, yet criticism to the Bretton Woods system was rising within EU organs. Furthermore conditionality became stricter. When ACP countries would not respect human rights, democratic principles and the rule of law, retrieval of allocated funds was a possibility (EC, 2014).

#### *4.1.2 Critique on Lomé to Cotonou*

When the expiration date of Lomé IV was in sight, many changes had took place in the international realm. The End of the Cold War drew attention to Central and Eastern Europe, at the expense of ACP countries. Geopolitical as well as economical focus shifted towards its neighbours, whose markets had opened up after the lifting of the iron curtain. Aid was redirected and many of it was spend on East European and Mediterranean countries (13 of the top 15 aid recipients in 1970-1974 to 2 of the top 15 recipients by 1996-1997) (Flint, 2009). This trend was further encouraged by the enlargement of the EU with former communist states in 2004 and 2007. These countries had no colonial relation to the ACP states and lacked trade relations. Furthermore, the fall of the iron curtain had also opened up markets in other regions of the world. Latin America, which was part of the American sphere of interest became more open to other markets, and EU has entered into many arrangements with the regions economies

since, for instance between EU and MERCOSUR. Also in Asia, the EU has been trying to gain more market access. These changes has led to a situation in which the EU is a global actor and EU-ACP trade is no longer a major part of global trade (Flint, 2009). Smith (in Flint, 2009, p. 83) argues that this has caused the ACP bloc to be just another, and not a special trade partner of the EU, causing tariff benefits for ACP countries to fall to a level only 2 percent above that of non developing countries.

The Commission started to think about a new way to shape its relationship with the ACP bloc. In the *Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21<sup>st</sup> century. Challenges and Options for a New Partnership* presented in 1996, the EC wrote down its vision on the faults of Lomé and the building blocks of what would later become Cotonou. Suddenly development was closely tied to trade and by incorporating the ACP countries into the world economy would foster development (1996).

According to the EC, the Lomé conventions had three major shortcomings. The first was the inefficiency of the arrangements and the inability to contribute to the long-term goals. The ACP countries had seen little progress on poverty reduction, economic and social development. The share of ACP imports as part of the whole EU market even decreased in the Lomé period. Without 'preferential' treatment a lot of other development countries, in particular Asian had even increased their share in European import. The second, and often considered most important shortcoming of the Lomé arrangements was their incompatibility with the trading regimes of the GATT and the WTO. A GATT panel, already in 1994, ruled that non-reciprocal elements and the discriminatory nature of the agreements were no longer compatible with WTO agreements. The Lomé IV-bis required a WTO waiver to operate, which was to expire in 2007 (Hurt, 2010). Soon later EU policy makers decided that a future agreement would need to comply with WTO regulation. Dickson argues that the EU was under pressure of the WTO to alter more sectors of their policies. Lomé regime was relatively cheap and yielded no major income and had to compete with other policies to maintain preferences to third countries. For instance the 'sacred cow' Common Agricultural Policy (CAP) was to be saved from WTO regulation, and the additional battle over this regulation was viewed as too costly (in Flint, 2009, p. 83). Third, the EU recognized differentiation between ACP countries and their developmental needs. Least Developed Countries (LDCs) were to receive privileges over other ACP countries.

These criticisms led the negotiations towards the Cotonou Agreement. After years of negotiation, the agreement, signed on 23 June 2000 in the largest city of Benin. Its main objective is sketched in this quote from the agreement: "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” (European Commission, 2000). Other objectives are sustainable development and gradual integration of the ACP countries in the world economy. Being broader in its scope than Lomé was and is founded on three pillars: development cooperation, trade and political dialogue. Several arrangements differ from former ones.

One of the most important changes is of course the removal of the non-reciprocity principle, replaced by free trade agreements (EPAs), to be signed by each regional grouping by the end of 2007. With this change, the EU made sure that Cotonou was compatible with WTO regulation (Hurt, 2003). This also meant the abolishment of STABEX and SYSMIN. Second big change is the method of allocation of aid provisions. Under Cotonou funds are no longer allocated solely on the basis of the needs of ACP states, but also based on the performances of the states. Performances are evaluated during the med term reviews. According to Carbone (2013), measure was not a result of consensual negotiations, but a consequence of both general reform of EU external assistance and threats of aid repatriation made by individual Member States. A third major change was the strengthening of political dialogue, which would now include more topics, such as peace and security, migration and governance. Issues that were already part of this political dialogue such as human rights, democratic principles and the rule of law are subject to stricter control. Violations of these more central elements trigger ‘appropriate measures’, which include aid suspension. Political conditionality is thus strengthened under Cotonou. A fourth point of change is the inclusion of non-state actors in all three pillars. These organisations are eligible to access aid funds directly up to a maximum of 15 percent of the aid allocated to that specific state (Carbone, 2013).

The changes in Cotonou are to be realized through WTO compatible EPAs: the Parties agree to conclude new WTO compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade (EC, 2002). The corresponding timeline for these EPAs is also included in the agreement ‘Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest’ (EC, 2000)

Overall, the first critiques on the agreement proved Cotonou to be quite different for earlier agreements. It was and is, often argued that the Cotonou agreement reflects mostly EU preferences, while neglecting ACP inclinations. According to Hurt (2003), the agreement meant that the EU-ACP relationship shifted from cooperation to one of coercion. Others see this

agreement not as a fundamental break with Lomé, but as a gradual restructuring to reflect “liberal and multilateral norm of international relations” (Brown, 2000, p.367). Elgström & Larsén (2010) argue in the same line that the various changes in Cotonou, in relation to Lomé, reflect an ongoing transformation of the normative approach of the EU towards ACP states, which move away from concepts like obligations towards liberalisation and democratization. Whatever the description of the process, a recurring theme in most literature is the prominent liberalisation of the ACP-EU trade relations, which leads to the puzzle of why the inclusion of IP in more and more liberal trade relations.

#### *4.1.3 EU-Cariforum EPA and the inclusion of IP*

In 2008 the European Commission initialled the first full EPA on December 16, 2007 in Bridgetown, Barbados, after three years and two months of negotiations. It was the first comprehensive EPA and still, after years have past, the only full EPA with complete ACP region. After 35 years of quota free and duty free trade between EU and Cariforum countries, the latter were keen on concluding the negotiations on time, before the expiration date of the preferential trading scheme in place. Market access being the most important issue on the table, both parties hurried to conclude the agreement on time say negotiators (Humphrey, 2008).

The EPA between EU and Cariforum does present a groundbreaking agreement. As was promised in Cotonou, the WTO compatible EPA has a wide scope and contains issues such as investment, competition policy and government procurement, issues that are newly introduced in this agreements (Girvan, 2008). The model used provides opportunities for extensive trade and investment, but gives no guarantees. It is a legal binding document with an implementation time of 25 years and an indefinite duration. All members of Cariforum, a total of fifteen countries are signatory to the agreement.

The creation of an integrated regional market in the Caribbean region is at the centre of the agreement. The agreement promotes the harmonization of external tariffs, which will contribute to the attractiveness of the region's market. Tariffs and quotas of export products from the Cariforum region are removed with the exception of sugar and rice, which will be liberalised gradually over the next seven years. EU markets will be opened up for Caribbean service companies, and young Caribbean professionals are given the chance to gain EU work experience. Caribbean markets will be opened gradually to the EU over a period of 25 years. An amount of 165 million Euro is put in the regional programme of the EDF for the period until 2013 (Girvan, 2008).

Clear is that the EPA covers more than a regular FTA would, under the cloak of development, while this is often contested. The provisions on IP are included in the chapter *Innovation and Intellectual Property*. The section on IP starts with an assessment of its principles in articles 139 to 142. This section discussed the adherence to the agreement Trade-Related Intellectual Property Rights (TRIPS) agreement, taking into account the development needs of Cariforum states and states “nothing in this agreement shall be construed as to impair the capacity of the Parties and the Signatory Cariforum to promote access to medicines” (EPA, article 139). Both parties are to implement IP provisions by 2014 and exceptions can made to take into account the development priorities and levels of development in Cariforum states. For Haiti as a Least Developed Country (LDC) the deadline is no later than January 2021 (article 140). Article 141 discusses its aims to regional integration and harmonization of IPR and article 142 agrees to transfer technology by exchanging views and information. The article makes it necessary to “take measures, as appropriate, to prevent or control licensing practices or conditions pertaining to intellectual property rights which may adversely affect the international transfer of technology”, which is voluntarily under TRIPS but made mandatory in the EPA (Article 142).

Next section discusses the standards concerning IP and starts with Copyrights. The compliancy with WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty is discussed in article 143. For Trademarks in article 144 the agreement follows the usual pattern of acceding to existing treaties. For Geographical Indications (GIs) the EU has managed to extend regulation for wines and spirits to all goods. GIs are protected in the other party if they are protected in the home country. This gives a major advantage to the EU members, as their system of protection is more elaborate. The article establishes a mechanism to Cariforum GIs can be developed in order to strengthen both producers and rural economies within the Cariforum (Oxfam, 2008). For Patents, Industrial designs, Utility models, Plant varieties, Genetic resources, traditional knowledge and folklore quite standard and WIPO compatible regulation is discussed.

The most ambitious section is on enforcement of IP. This section, clearly based on the EU Enforcement Directive (EC, 2005) covers articles 151 to 163. The articles force the implementation of most European standards in Cariforum states. This includes an expansion of the “persons entitled to seek applications of the measures, procedures and remedies” (article 152). Article 153 extends the measures that can be taken in cases of infringement of IP in commercial scale to the revealing of information of banking, financial and commercial documents (article 153) and the physical seizure of goods to preserve evidence (article 154). The use of injunctions is expanded and includes possibility to issues for all IPRs without having

to prove the damage for judicial authorities. These can also be used for third parties and those who do not infringe themselves. The enforcement regulation goes beyond TRIPS requirements.

The IPR section in the EPA is criticized heavily from several actors. As CIEL writes “what is clear is that the IPR provisions of the Cariforum EPA can in no way be considered as aimed as sustainable development for ACP countries. Rather they almost exclusively entirely reflect the EU’s mercantile interests, as expressed in it Global Europe Strategy” (CIEL, 2008). Developing countries needs differ greatly to those of well-developed states in the field of IPR. With many regulations the Cariforum states subject themselves to regulation and protection on the level of EU and US. While at the same time systems are not as well advanced, developing states profit a lot from availability and distribution of material over the internet for instance. In general these regulations promote the interests of bigger corporations over small and rural companies that are so essential to the Cariforum economies. IPR provisions that could have helped Cariforum economies, such as traditional knowledge and folklore are not well established to have a real effect. Furthermore, the chapter limits the policy space of Cariforum states in other international fora such as WTO and WIPO (Robinson & Gibson, 2011). Signatories of the EPA will no longer be able to oppose intensifying IPR regulation.

After the signing of the EPA a lot of NGO’s and governances have emphasized the negative aspects of the IPR section in the Cariforum EPA and in response many have given the advice to other ACP states and regions to not negotiate IPR provisions at all. National policy impact assessment should be conducted before negotiating IPR provisions with the EU. IPR section of the Cariforum would be implemented too hastily in order to avoid the deadlines of preferential trade. Other regions should refrain from discussing the issue altogether (CIEL, 2008).

The radical change we have seen in the history of EU-ACP relations is very remarkable in the light of its long history of development-oriented policies. This makes that their relations must be looked upon in an entirely different light. Main question is of course why this radical change and why the prioritising of a reciprocal and comprehensive trade agreement. These questions will be answered in the following two sections.

#### *4.2 Trends in Ideology, Material and institutional capabilities.*

Three trends, translated from Cox’s ideas, power and institutions can explain the inclusion of IP in the EPA with Cariforum. I argue that three broad trends together, have shaped the climate in which the EU prioritised a strong IPR agenda. The three trends are based upon the three factors

that lead to a certain hegemony and reinforce this hegemony, as is discussed by Cox (1981). By using a Neo-Gramscian framework it is crucial to take into account the history and power relations of EU-ACP relations and dynamics within EU policy-making apparatus. As we have seen earlier in this chapter, the EU-ACP relation has changed drastically over time. Whereas it was mostly and development cooperation driven by aid, trade became increasingly more important, leading to a full FTA agreement with some development aspects (Hurt, 2003), I use the decades preceding the EPAs to see what trends in ideals, material and institutional capacities led to the hegemonic ideology that included IP in the EPA. As the EU-Cariforum EPA is virtually dictated by the EU and its policies are transposed in this new FTA, I focus on thinking and changes in the EU realm and Western thought (See Robinson and Gibson, 2011; specifically for IPRs see CIEL, 2007). As Cox describes, the three forces interact and the relationship between them is reciprocal. Therefore they overlap, interact and reinforce each other. This is clearly visible in the TCC cleverly incorporating certain aspects of neoliberal thought and the influence of ideology in the institutional changes over the last three decades.

#### *4.2.1 Rise of Neoliberal Thought*

Neo-Gramscian authors have often discussed the hegemony of the neoliberal discourse. Gill writes that it was “the relentless thirst of capital on a global scale which has been accompanied by neo-liberal, laissez faire discourse which accords the pursuit of profit something akin to the status of the quest for the holy grail” that led to the hegemony of neoliberalism. (Gill, in Hurt, 2003, p. 163). Neoliberalism is an ideology in economics that promotes free trade, open markets and deregulation. Specifically for development, as is the case with EU’s policy, liberalisation of markets, promoting foreign direct investment and removal of subsidies are the policies to achieve such a goal. These policies are often in the interest of transnational corporations. Yet, as Hurt describes there is also another aspect to neoliberalism, as it tries to integrate ‘neo-conservative concerns of strong government and stability’ in development strategies (Hurt, 2003, p.163).

Neoliberalism is an economic stream that came to thrive in the late 70’s and 80’s under Thatcher in Great Britain and Reagan in the United States (US). Especially the US has promoted this ideology in the post cold war era and as such neoliberal thought gained importance and became hegemonic with US’s dominance in the world order. Robinson argues that in the 1990’s the “global elites’ had achieved ‘ a veritable Gramscian consensus on the neoliberal project” (Robinson, 2004, p.81). Jessop shows the development of neoliberalism as an ideology. Neoliberalism derived from liberalism, and economic stream that sees economic, political and

social relations are best organized through free choice of actors that seek own material interests. Institutions should maximize the scope of free choice. Neoliberalism seeks not only to liberalise and deregulate economic transactions within borders but also across borders. "As a political project, it seeks to roll back 'normal' forms of state intervention associated with the mixed economy and Keynesian welfare national state ... as well as the 'exceptional' (or crisis induced) forms of intervention aimed at managing, displacing or deferring crisis in and/or of accumulation regimes and their modes of regulation in Atlantic Fordism, East Asia and elsewhere. (Jessop, 2002, p. 454). Yet, it also involved putting forward new forms of government that are suited to this market driven and knowledge driven economies. This ideology is mainly promoted and institutionalized in institutions as the World Bank and the International Monetary Fund under the so called Washington consensus. By the term, coined by John Williamson (1990) is meant a list of policies that had gained consensus in his time. This consensus was shared in international economic organisations such as the World Bank and the International Monetary Fund. The Washington consensus policies were used by these organisations to open up markets of development countries in order to integrate them in the world economy and thereby stimulating development.

According to Williamson, 'Washington' believes in ten policies, all in line with small government and open markets, of which the tenth consensus is the most interesting for this research: the importance of legal security of property rights. Williamson argues that as these are so well established in the US "that their fundamental importance for the satisfactory operation of the capitalist system is easily overlooked" (Williamson, 1990). This last point is very interesting as all other point at more open economies and more competition, the protection of property rights, at least in the case of intellectual property opposes openness.

An author that elaborates on the importance of property rights for development within the neoliberal discourse is Hernando de Soto. His main argument is that "when people have formalized titles they feel that property is under their own legal control and they therefore have the incentive to investing in their intelligence and work in improving it" (De Soto, 1993, p.3). It is only when you give people rights to their property and build a legal system around these rights that this can lead to an expanded market. In this way, those without property rights are not legally protected and cannot use the economic potential of their assets. Property rights give the owner protection against uncertainty and fraud. He goes so far as to say that because there is not enough property in developing countries, markets cannot do their work, and markets make the difference between developed and undeveloped countries. Property that is not protected is seen as dead capital. It cannot be bought, sold or used as a investment. De Soto argues that especially

poor people possess far more capital than they are aware of. However, at this point they often cannot claim their property formally. Without formal property, most people will not be able to thrive in capitalist societies. While Hernando de Soto's arguments are mostly based on tangible property, they can also be applied to intellectual property. In this way people with small businesses, authors, artists can be empowered and their work can be converted into capital (Andersen & Wagner, 2006).

Property rights are often seen as a precondition to development. Yet, property rights are not uncontested within the neoliberal discourse. It can also be argued that property rights do not lead to development in a setting much different than the affluent Western one, with strong legal systems. Can you trust that individuals with property rights to understand how they can gain capital with these rights? (Manders, 2004) Also, De Soto's vision is often seen as an oversimplification, it is not just property that leads to development. Another criticism is that property cannot protect the owners against foreign investments. If formalized, rich countries' investors would be able to buy significant amount of developing countries property rights (Manders, 2004). Rights that can reduce competition and innovation are opposed by many economists within the neoliberal realm. As we see later in this chapter, it is the Transnational Capitalist Class (TCC) that promotes the protection of (intellectual) property rights very effectively, while focusing less on other types of property rights.

Jessop argues that while Washington consensus' regulations often aim at reducing interventions, paradoxically they result in more intervention (Jessop, 2002, p.454). This is in line with the increased conditionality and 'good governance projects' provisions in agreements. Brown argues that this shift towards more neoliberal thought has had an enormous effect on the North-South relations. He states that the development cooperation during the 80's and 90s saw a major shift in principles of trade and in conditions for cooperation. EU-ACP cooperation, he states is not just a web of 'technical' policies and programmes, but are a reflection of political and economic relations and 'has given rise to ... the principles of a liberal international order, the creation, consolidation and extension of which has dominated the post 1945 era' (Brown, 2000, p. 369). These shifts changed the conditions that were imposed on ACP states in order to gain economic and political support in such a way that the (neo)liberal conception of the state and of development was being reinforced in these countries.

This reasoning is in line with the later Lomé agreements and especially the Cotonou agreement as we saw in the shared history of the EU and ACP countries. In the Cotonou agreement it is stated that respect for human rights, adherence to democratic principles and the rule of law are

'essential elements' (European Commission, 2000). This is to say that if states do not adhere to these elements, the agreement can eventually be suspended. In such a way the EU forced other states to turn their political systems as for best integration into the neoliberal international order. Human rights and democratic principles have become the norm in international development by the late 90s. The EU has actively embraced normative instruments in their foreign policies (Zimelis, 2011).

The rise of neoliberal thought could not have happened if those groups that shared these beliefs were not in power. The actors that influenced policy the most in the last two to three decades were the ones profiting the most from these neoliberal policies. In the next section I assess the rise of this important group, the transnational capitalist class.

#### *4.2.2 Rise of the Transnational Capitalist Class*

As Cox stated, hegemony is the result of three interrelated and reinforcing factors: ideas, power (or material capabilities) and institutions (Cox, 1983). Previous chapter described the dominant ideas, this section one of the most powerful groups in influencing policy. The rise of neoliberal thought coincided the rise of the group with most interest in such a policy ideology. This is the group of actors that represent transnational capital and are directing transnational corporations and private financial institutions. The group is formed by the collusion of national elites resulting in international coalitions. Robinson and Harris argue that these national elites, which had large effects on national class structures, crystallized into a transnational elite. Similarly, national capital 'increasingly fused into transnational capital', by the globalization of production of goods and services. Because these are produced all over the world by multinationals, profits also dispersed worldwide, creating a transnationalised circuit of actors. (Robinson and Harris, 2000). The establishment of this group or the Transnational Capitalist Class (TCC) is a key aspect of globalization because of the profound transformative effects it has on class structure globally. Globalization, as has the rise of the transnational capitalist class, 'redefines the relation between production and territoriality, between nation-states, economic institutions and social structures' (Robinson and Harris, 2000, p. 5). More specifically this meant an enhanced division between the global elite and the global proletariat and has influence world politics greatly. The TCC is economically dominant, as it consist of big corporations and big capital that acts on a global level, but is the TCC also politically dominant, and is this the case in the EU?

The TCC has economic interest, which is combined with a political agenda that pursues an integrated global economy. Robinson has called this the 'transnational elite agenda'. The TCC can

only be a dominant class, and as such influence EU policy heavily, if the institutions can represent these interests. "Higher personnel must represent the class, unifying so far as possible its action and reinforcing its control over the process of social reproduction, which in this case means ensuring the reproduction of global capitalist relations of production and at the same time the reproduction of political and cultural institutions". (Robinson and Harris, 2000, p. 11). This happened in the period from the late 1970s on. The 'transnational state apparatus', described as a network of national states, supranational economic and political fora, was used as the mouthpiece of transnational capital in this period. Organisations such as the International Monetary Fund, the World Bank, World Trade organisation and regional central banks formed the economic side of this network. The United Nations, Organisation of Economic Cooperation and Development and the EU, amongst others form the political dimension. These were brought together in the Trilateral Commission, formed in the mid 1970s (Robinson & Harris, 2000). The World Economic Forum stands out as one of the most comprehensive global elite network, bringing together CEOs of the 100 biggest transnational corporations, members of the 100 most influential media companies, key policy makers from national governments plus select academics and experts (Van der Pijl in Robinson and Harris, 2000). Through these fora, the TCC claimed to be building a global economy through restructuring multilateral and national institutions, and have managed to influence heavily international policy making with its hegemonic discourse. Increased liberalisation of EU trade policy in the Uruguay round led to mobilisation of more and new societal interference in the Commission (Dür & De Bièvre, 2007).

Important for this research is of course the position of TCC actors on IP regulation. What agenda is the TCC trying to put forward? First it is important to note that the TCC is not a unified bloc with unanimous interests. The TCC is loosely constituted and its actors often have contesting interests, yet in the 90s more and more consensus was reached on many subjects and the cry for a stricter IPR agenda was broadly shared. It is the TCC that tips the balance towards inclusion of IPRs in the neoliberal agenda that is in place in major institutions. All major scholars in the field of IP agree that the establishment of the strict IP agenda that is in place today is heavily influenced by private interest and corporate actors. This is already evident in the title of Susan Sells book 'Private Power, Public Law: the Globalization of Intellectual Property Rights' (2003). She argues that corporate interest triumphed over governmental interests worldwide, making use of the case of the TRIPS agreement. The revolutionary TRIPS agreement sets minimum standards for the protection of all sorts of IP (f.i. copy rights, geographical indications, patents, trademarks, new plant varieties) to all members of the WTO. This was negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). This drew heavy protests on the negative consequences that strengthening IPRs has on developing countries. In this case, a

committee of 12 men under the umbrella of the Intellectual Property Committee, CEOs of major transnational corporations, together with similar groups for Europe and Japan, managed to gain support for the strengthening of global protection of IP with their proposal to the GATT which later led to the establishment of the TRIPS agreements. To demonstrate their success, Sell uses the perspective of Structured agency. On the deepest level the TRIPS was the result of both structural and ideational change. The structural change is the globalization of capitalism; while the ideational change was the emphasis on a radical free trade agenda by the main actors from the private sector. Yet most importantly the agreement was a result of agents and agency, who act within this deeper context (Sell, 2003, p. 185). This approach differs from a Neo-Gramscian approach in that it places more emphasis on agency and less on the material factors. A scholar that uses the Neo-Gramscian approach to demonstrate private interest in the establishment of a stronger IP agenda is Christopher May. He uses power structures that underlie IP agreements. He also states that these are the direct result of private interests. He sees the TRIPs agreement as a product of non-state actors that find their comparative advantage in innovative, cutting edge and strategic technologies (May, 2005). Those can be mainly found in the Western culture. 'The US government pushed hardest for the TRIPs Agreement, but the power group behind the throne was this well coordinated private sector group (Sell & May, 2010). What becomes clear though, from different perspectives is that it is the TCC, as being part of the governments and companies that matter the most in international policy making that influenced IP agreements the most.

How exactly this is done is shown in an example given by Pugatch (2004). In his book he assesses the ways in which the pharmaceutical industry in Europe secured its interest in IPRs between 1995 and 1999. This is, again the period just after the TRIPS agreement. It was in the pharmaceuticals interest to ensure a timely implementation of TRIPS worldwide to enjoy the benefits that it offered them. Pugatch describes that the EU holds 'similar or almost identical IP views', to those of the advanced pharmaceutical industry in Europe. The language used by both actors is very similar (Pugatch, 2004, p. 195). That the Commission does so is remarkable as it was also exposed to 'antagonistic' vies about IPRs by groups such as the BEUC and TACD (consumer organisations) (Pugatch, 2004, p. 196) and thus prefers to reflect only a specific interest. The pharmaceutical industry treated the TRIPS as a minimum standard agreement tactically. Together with the EU, they sued two states for not implementing TRIPS on time to ensure a timely implementation, and at the same time broadened its scope in one of the cases. Later, in 1999 there was talk about downgrading the TRIPs agreements after heavy protests on the streets of Seattle as well as protests from developing countries, NGOs and many others. The industry used various outlets to convey other that the TRIPs agreement should not be

downgraded, including position papers, conferences, press releases and personal meetings. This made them well prepared for the negotiations to come and influenced heavily the Commission's stance on the TRIPs agreement. Pugatch argues that this could be done by two types of build up, horizontal and vertical. The vertical structure shows how the intra-industry lobby is structured, consisting of national, regional and international levels, which result in lobby groups as the European Federation of Pharmaceutical Industries and Associations (EFPIA). The horizontal structure points to the inter-industry alliances in which the industry bonds with for instance the Union of Industrial and Employer's Confederations of Europe (UNICE) and European Chemical Industry Council (CEFIC). In this way it could present a unified cross-industry position and thereby influencing multi-dimensional negotiations (Pugatch, 2004, p.115)

It is important to notice that the power of TCC has clearly risen since the 70s. Today, the TCC has a lot of power, and has a strong IP agenda in place. While property rights in neoliberalism as an economic current are sometimes contested, the TCC managed to put the strengthening of current IPR regimes on agendas in both the US and Europe. The TCC picks those issues that are most in their interest from the broader neoliberal framework and puts those forward, and today strong IPR is prominently placed on their agenda. The next section will assess the institutional factor and will focus on the EU and the changes it has seen in the last decades to match the ideological and material counterparts.

#### *4.2.3 Changes in institutional structure and interests*

In this section I will discuss why ideas and material power as described in the last two sections go hand in hand with the institution and inner working of the EU when we talk about trade and development policy. This is done by first sketching how earlier economic structures, mainly WTO regulations, tied the EU to certain goals and deadlines for the EPAs. The second section will focus on the institutional side of policy making. In what departments is decided on policies that shape relations with Cariforum and what does that say about important actors in the decision process? Important to notice is that the institutional changes in this section go hand in hand with the ideational changes as described above.

It is clear that WTO-compatibility was a reason for the EU to conduct negotiations with ACP countries and set a deadline for the conclusion of them before January 2008 (European Commission 2000). This meant that the European Commission in its mission was tied to WTO regulation in the process. It is interesting to see how the EU got entangled in such a situation. Therefore I will show how this tie came into being in the first place by focusing on the last

decades of the previous century and EU's role in the WTO. Mortensen shows how the role of the EU in this has changed severely in his article *The Role of the EU in WTO: Realism and Idealism in European Trade Policies*, in which he argues that the EU has changed its role from a "defensive and reactive player" in the trade system to a position of an activist leader (Mortensen, 2007, p. 2).

In the 70s the protectionist voices in the EU were louder than the liberalist ones, as was seen in the part on ideas above. While the principles of the EC and the GATT followed the same logic of dismantling tariff walls, for instance opening up the agricultural market was out of discussion for EC members (especially France). The Common Agricultural Policy was based on the waiver that the US demanded as an exception within the GATT. Yet, the US was on a mission to create an 'open, multilateral trading system to complement the liberal world order of US hegemony in the 1950s and onwards' (Mortensen, 2007, p. 14). Soon, the US began to pressure the EC to abolish the CAP and pushed for more liberal trade policies. The difference in approach made that the Tokyo Round in of the GATT in the late 70s failed to agree on non-tariff barriers. In response, American business demanded a broadened scope of the GATT, to include trade in services and intellectual property rights and enforcement mechanisms, to ensure market access. But, the European diplomats blocked this attempt and spoiled any further reform of the GATT. EC efforts were geared towards protecting domestic interests and trade policy was faced inwards. It was busy with European integration and internal trade. The GATT on the other side was very much influenced by the US as an hegemonic leader, its ideology was embedded liberalism. Due to clashing interest of EU and US interests, the GATT system 'was in a near fatal crisis' in the 70s (Mortensen, 2007, p. 15). But this was about to change when European interests changed. In the 80s, with the influence of Thatcher in power in Great Britain, European states moved away from protectionism towards liberalism as we saw in the previous two sections. The Uruguay Round that started in 1984 proved that Europe's stance had changed. Pro-liberal interests grew as a result of the rising power of the TCC. EC diplomats on their turn gave in to US demands towards a more legalist reform of the GATT, that threatened the GATT system with unilateralism (Mortensen, 2007, p. 16).

In 1989, it became clear the EC indeed wanted to include issues as IPRs and trade in services, as stated in the previous section. In fact the EC diplomats were demanding their inclusion and went beyond that by attempting to strengthen the position of the GATT as a formal international organisation. The roles reversed, as now the US became hesitant to build a multilateral trade organisation, while the EC diplomats stated that the establishment of such an institution was 'an essential and indispensable' goals of the Uruguay Round (GATT documentation in Mortensen

2007, p. 18). The US was hesitant of establishing a very large bureaucratic international organisation, until GATT Director-General Peter Sutherland reassured them this was not the case and the WTO was formally established on January 1<sup>st</sup> 1995 (Sutherland, 2000).

American and European corporate interests, along with other major western powers, overlapped when it came to the trade in services which led to the General Agreement on Trade in Service (GATS). Same was true for their agendas to strengthen IP which led to the TRIPS agreement in the WTO framework. By the end of the Uruguay Round EC proved a real driver and leader of multilateralism and focused more and more on the so-called WTO plus issues, including labour standards, environment, competition policy. The question of why the EC made such a turn can be found in the 'internal policy shifts towards neoliberalism', as we saw in the ideas part (Mortensen, 2007, p.18). With this neoliberal agenda, the EC became a much more active player, actively pursuing its goals, while expanding their economic power in the world.

After the Uruguay Round, the EU took the leadership in the WTO upon itself, driver of the inclusion of the so-called Singapore issues (investment, competition procurement, trade facilitation issues). As Pascal Lamy, former EU Commissioner for trade stated "trade liberalisation must be accompanied by a much needed updating of the WTO rulebook" (Lamy, 2003). In this period the EU managed to shape WTOs agenda, yet this changed again when power balance in the WTO turned in favour of other economies heavyweights such as Brazil, India and China, that acceded to the WTO in 2001. Under their influence, WTO turned towards more traditional WTO issues and moved away from the comprehensive agenda that the EU put in place. After the failed Cancun meeting in the Doha Round, Lamy's reaction was exemplary of European diplomats viewed the WTO: "Despite the commitment of many able people, the WTO remains a medieval organisation. I said this in Seattle, got a lot of flak and I have to repeat it here. The procedures and rules of this organisation have not supported the weight of the task. There is no way to structure and steer discussions amongst 146 members in a manner conducive to consensus. The decision-making needs to be revamped. The EU remains committed to a strong rules-based multilateral trading system and will continue to work in this direction within the WTO" (Lamy, 2003)

While the EU is still very much in favor of multilateralism, the crisis in the WTO after the Singapore Round and many unresolved issues in the Doha Round, the EU seems to have changed it approach. From their economic vision for the as described in the strategic paper 'Global Europe', published in 2006, we can learn that their approach is twofold. On the one hand, the EU still follows the multilateralist approach: "the world needs a strong multilateral trading system"

and “there will be no European retreat from multilateralism”. Yet it also uses bilateral agreements to pursue their goals. “Free Trade Agreements if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation. Many key issues, including investment, public procurement, competition, other regulatory issues and IPR enforcement, which remain outside the WTO at this time can be addressed through FTAs”. (European Commission, 2006, p.10) Rightly so, the strategic paper outlines dangers of FTAs to multilateralism, they can complicate trade and exclude the weakest economies, thus, the paper argues “To have a positive impact FTAs must be comprehensive in scope, provide for liberalisation of substantially all trade and go beyond WTO disciplines. The EU's priority will be to ensure that any new FTAs, including our own, serve as a stepping stone, not a stumbling block for multilateral liberalization” (European Commission, 2006, p.10).

Bilateral agreements are the way to go for now in the EU. It is interesting to see how these are constrained by earlier commitments. In this light it is easy to see why the EU aims for a WTO compatible agreement. The most important stumbling block is the first principle for international trade: non-discrimination. This principle has two components of which previous arrangements were not compatible with the Most Favored Nation (MFN) principle. Under this principle, all WTO members have to treat imports of other WTO members no worse than the most favoured trade partner. “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties” (World Trade Organization, 1986)

This principle makes the use of (positive) discrimination towards other countries impossible for imports, and exports in the form of duties. The MFN is so important to the WTO that it is the first article in the GATT. Also in the two other exponents of the WTO regime this principle is included. There are some exceptions to this clause in both the GATT and the GATS, yet for this investigation is that while both GATT and GATS have exceptions for regional trade agreements the TRIPS agreement does not (CIEL, 2008, p.8). The EU and the ACP states that are member of the WTO thus subscribe to the principle and agree to remove the preferential trading scheme that was in place under Lomé. Until 31 December 2007, a special waiver was in place for allowing the preferential trading scheme. Because of this principle, and because all Cariforum

members are WTO subscribers, these countries are obliged to extend signed IPR provisions in the EPA, some of which are TRIPS-plus IPRs, to all WTO members. By signing this agreement, countries have to provide other industrialized countries, such as the US, with the same regulation (CIEL 2008, p.8).

This shows how the EU was constrained by the transnational institutional structure in pursuing specific goals in the past. But also the decision-making processes within the EU have constrained the ECs position on IP. Before Lisbon, trade policy knew two major actors within the EU, the Commission and the member states united in the Council. Trade policy falls under its prerogative of exclusive competence. This means that the EU is able to legislate and adopt binding acts in the field of trade policy (European Union, 2010). This limits the role of the Member States. Meunier and Nicolaidis state that in order to understand how this process is shaped the relation between the Commission and member states is crucial (Meunier & Nicolaidis, 2005). This relation can be characterized as a principal-agent relation. The process involves several stages of negotiation.

In the first stage, the Council adopts the negotiation mandate. The Commission however initiates this mandate. It is supposed to act in support of the collective goals and needs of the EU as a whole. DG Trade is the designated institution to draft a proposal, after which it is discussed with the council in Committee 133. This committee is named after article 133 of the Treaty of Nice, in which trade policy procedures are outlined. The committee gives the member states the opportunity to influence trade policy, however formal the committee has a consultative role only. After discussion in the committee 133, the proposal is transferred to the Council of Ministers. The outcome can differ quite a lot, some mandates are very precise and detailed, while others are rather vague documents, offering the Commission a greater room for interpretation. The negotiating directive is not legally binding, but if the Commission deviates greatly from the directive it runs the risk of the outcome not to be ratified in the last stage, which is done by qualified majority voting. The negotiations itself are carried out by members of the Commission, under the authority of the Trade Commissioner. Several committees monitor the actions of the Commission in the process. At the end, in the ratification stage, the Council has to approve or reject the final text. While on most issues of trade agreements this is done by qualified majority voting, several exceptions exists. On service and trade-related issues, including intellectual property unanimity is required (Dür & Zimmerman, 2007).

Competence over external trade policies is thus Important to not is that the European Parliament had no formal role in the EPA, as this was as pre-Lisbon Process. Later the role of the

parliament was greatly enhanced. In this period, only informal procedures were in place for informing and consulting the parliament. While the parliament can hold hearing and issue reports about trade policy its role is very minimal (Meunier & Nicolaidis, 2005).

This makes that on paper the Commission and the council have important roles in the process. Within the Commission DG Trade is responsible and takes the lead on proposing the mandate and leads the negotiations. While it can make use of expertise in other DGs overall, the power of DG Trade within the Commission is almost absolute. The competing interests of different DGs would have played a bigger role if the responsibility to deal with the ACP countries was not transferred from DG Development to DG Trade in 1999, with the appointment of Trade Commissioner Pascal Lamy (Meunier & Nicolaidis, 2005). Before this transfer, WTO-plus issues were not discussed at all in relation with ACP policy. The emphasis on these issues, including IPR, features only when the new Trade Commissioner Peter Mandelson was appointed. The importance of WTO-plus issues has clearly risen since the Global Europe strategy was launched. It was DG Trade that was the main driving force behind the Global Europe strategy, which clearly voices a neoliberal trade paradigm (De Ville & Orbie, 2012). The power within the Commission being formally in the hands of DG Trade, this pushes negotiations increasingly in a neoliberal direction. That DG Trade that has institutionalized dialogue with corporate actors can further explain the outcome. How this has affected the actual negotiations is examined in the 4.3.

#### *4.3 Trends culminate in negotiation practice*

These broad trends are said to have led to the hegemonic idea that IP and development are linked. By sketching an overview of the negotiation process, it can be shown how the longitudinal trends pop up in this process. Following the course of the negotiations we will see that indeed the EU was the hegemonic or dominant actor and their ideas are in line with the dominant TCC IPR agenda. We will focus on how different ideas on IP were brought forward by different actors and see how these were handled in the negotiations. In this section we see how the three trends as described above culminated into the outcome of the EPA and inclusion of IPR regulation.

This section will follow the chronology of the negotiations. First the structure of the negotiations is set forth. From the outset it was clear that for the Commission, IP and development are linked closely together. It is also clear that in the process different actors will voice different opinions on this position. The first group of those actors on the way are the Member States that voice their opinions in the Council. It will be shown who has formal competences for what parts of the

negotiations and how these were handled. Thirdly the inter-Commission struggle among the different Directorates General (DGs) will be discussed. Fourthly the civil society view comes in the picture. This consists of both corporate lobby groups and NGOs. This will round up the overview of most important actors in the negotiation process on the EU side and show how the previously described trends pop up in this process.

#### *4.3.1 Structure and EU position*

The Cotonou agreement outlined that the EPAs should be negotiated in the period between September 2002 and December 2007. In the course of 2004 the ACP countries broke up in seven regional groupings under the cloak of ‘regionalization and differentiation’ that the EU promoted. The Dominican Republic joined the existing regional Caribbean Community (CARICOM, consisting of Antigua and Barbuda, The Bahamas, Barbados, Belize, Commonwealth of Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago) and together formed Cariforum for the purpose of negotiation the EPA with the EU. The EU-Cariforum negotiations were launched on April 16<sup>th</sup>, 2004 (European Commission, 2004). As said, because the IPR provisions in the EPA “almost exclusively entirely reflect the EU’s mercantile interests”, solely the negotiating structure of the EU side of the process is analysed in this section (CIEL, 2008). The European Commission will negotiate on behalf of the EU. It is represented by the Commissioner for trade at the Ministerial level, by senior officials from DG Trade at the level of the Principal Negotiator. At the technical level, negotiations are prepared under the coordination by DG Trade, ‘with other DGs participating as appropriate’ (European Commission, 2004).

From the outset it was clear what that the Commission pursued an IPR agenda for the EPAs, as is evidenced by their Global Europe Strategy’: “the EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments” (European Commission, 2006, p.13) however they were aware that criticism would be voiced. “Some will say that by enforcing the protection of IP rights held by Community companies, third countries will not obtain any direct benefit. It would appear, on the contrary, that they are using their resources to protect the investment of entities...” This formed an obstacle they had to overcome, to do so “the EC must get across the message that effective enforcement of IP rights is an essential tool to attract foreign investment and the transfer of technology and know-how, as well as to protect local right-holders in the developing and least-developed countries who are already suffering the misappropriation of their intellectual property” and “In the mid-to-long term, it will also encourage domestic authors, inventors and investors and contribute to the

development of these countries". As of why they pursue these goals the document on enforcing IPR in third countries gives the explanation: "It is a matter of good governance and international credibility, not to mention the need to comply with WTO and other international and bilateral commitments". (European Commission, 2004, p.16). Here it is already evidenced that institutional constraints, namely international credibility and WTO compatibility, play a role in their objective to strengthen IPR regulations.

#### *4.3.2 Input from Council and various DGs*

In this section I will assess internal EU procedures and power relations. As can be read in the previous section, the way EU common external trade policy is regulated is stipulated in Article 133 of the Nice Treaty. As outlined in the above, basically, competences are delegated on two levels, from the Member States to the Council of Ministers and from the Council to the Commission. In external trade negotiations, the Commission is represented DG Trade and the Trade Commissioner. The Commissioner or officials within DG Trade conduct the talks, while the Council adopt the mandate or negotiation guide. The Article 133 Committee controls whether this mandate is not breached. The Council also decides on the ratification of the negotiation outcomes (Dür and Zimmerman, 2007, p.773).

From this quite straightforward division of roles, it seems that the Council has a lot of power over the Commission. Some authors (fi Aggarwal & Foggerty, 2004 and Elsig, 2002 in Elgström & Larsén, 2008) indeed argue this is the case, as Member States "rein in, control and guide Commission behaviour" (Elgström & Larsén, 2008, p. 2). Nevertheless the empirical study of Elgström and Larsén shows that was not the case in the EPA negotiations. In all stages of the negotiation process, the Commission had a high degree of autonomy. DG Trade itself drew up the mandate for the Council to approve. Here the council had a reactive rather than a proactive role, as is devised in Article 133. After drawing up the mandate, it was presented to the Council in April 2002. The foreign ministers unanimously adopted the mandate in the Foreign Affairs Council. Only slight changes were made to the original proposal, with France wanting to include a section on cultural services, and language was formulated more development friendly. Moreover, the negotiating directives in the mandate were very broad and contained fuzzy language. This gives the Commission almost a free pass to negotiate within the mandate, as 'according to the mandate everything is possible' (Interviewee in Elgström & Larsén, 2008, p. 11). These authors argue that the main reason why the Council did not limit the mandate more was disunity among foreign ministers. In fact, some member states that were not satisfied with

the predominant free-trade philosophy gave in on that to ensure that the Commission prevented even more market access restrictions.

During the EPA negotiations, two committees of the Council monitor the Commission, the Article 133 committee and the 'ACP committee, with the former focusing on traditional trade issues and the technical side and the latter focusing on the developmental and, trade-related and political dimensions. In this phase the Commission has a great information advantage. This makes that the action undertaken by the committees are often, information acquiring and ensuring that the Commission does not disobey or overstep the mandate. Committee 133 is even regarded as a partner to the Commission and committee oversight is not effective in influencing the Commission (Dür and Zimmerman, 2007). Yet, the Commission is of course aware of the fact that negotiation outcomes have to be ratified by Member States in the Council. The Commission was not very concerned that a Member State would reject the whole of the negotiation outcomes. Commission calculated that none of the Member States would take the risk rejecting an agreement that 'claims to enhance both development and free trade' (Elgström & Larsén, 2008, p. 18).

Another intra-EU power relation is evident between the different DGs. Article 133 states that DG Trade coordinates the negotiation, 'with other DGs participating as appropriate', but what is appropriate and what is the position of DG Trade vis-à-vis other DGs? Other DGs most involved in the EPA negotiations are DG Development, DG agriculture, DG Enterprise and DG Fisheries. As mentioned in the previous section, DG Trade has a very strong neoliberal ideology. DG Development has also adopted a liberal stance over the last few decades, but of course the developmental focus remains. DG Development often picks sides with developing third parties and supports their demands for aid for liberalisation and more relaxed implementation timing. DG Agriculture, as well as DG Fisheries holds a more protectionist stance, as they strive to protect European producers and business (DG Development official, in Elgström & Larsén 2008, p. 8). DG Trade, as the lead DG for trade negotiations wrote the mandate for negotiations of all EPAs in 2002. This mandate was then presented to other DGs involved, which did not lead to major changes in the mandate. This shows that other DGs either have the same goals or are dominated by DG Trade or a combination of both. DG Trade being the hegemonic DG it forces other DGs to adopt similar views to be able to discuss issues and exert influence (Elgström & Larsén, 2008, p. 11).

In the EPA negotiations DG Trade and DG development worked closely together. With DG Development being the lead DG in the Cotonou negotiations, DG Trade leads the EPA

negotiations (Elgström & Larsén, 2008, p.12). This close cooperation was a fairly new phenomenon, forced to by the demands of both ACP countries and Member States in the Council, which will be discussed shortly after. Elgström & Larsén show that there were some tensions between DG Trade and DG development mainly, but because DG Trade was pushed forward as lead, DG Development “played a minor – rather than opposing – role” (Elgström & Larsén, 2008, p. 19) and in later stages the two DGs fully coordinated, with DG Trade internalising development-friendly language, yet this is often portrayed as a superficial change and not a ‘real change of heart’ (Elgström & Larsén, 2008, p. 13). It is clear from this that DG Trade, with a neoliberal agenda, supported by the TCC, had a great say within the Commission. And because of the internal cooperation, or rather internalisation of ideology and rhetoric as expressed by DG Trade, wrapped in a development friendly language, the Commission could act with a great degree of unity: “It was thus clear that despite being a non- unitary actor with different internal interests, the Commission’s external front was one of unity” (Elgström & Larsén, 2008, p. 19). This allowed them to act as a dominant player in relation to other EU actors such as the Member States in the Council.

#### *4.3.3 Input from societal actors*

Having discussed the two major inter-EU power relations, now the focus is directed to external relations. Societal actors can be decisive in shaping the Commissions trade preferences as is described in the TCC literature. Having established this influence above, let us see what the different interests are among societal actors and how this influenced the Commission. Important to state here is that lobbying EU policy on issues of trade liberalization and trade agreements is mostly conducted on the European level, in cooperation with the Commission. This is in contrast to the more protectionist aspects of trade policies in the agricultural sector that is best, and mostly, defended through national lobbying (Woll, 2007). From May (2005) and Meir Pugatch (2004) we have learned that IP lobbying also takes place mostly on the international level.

Relations are shaped via dialogues between the Commission and societal actors, that both include business interests as NGOs. It is routine for DG Trade to consult ‘interested parties’ while shaping policies. These dialogues are held as a forum to voice public concerns and hear the ‘civil society view’. At these consultative forums the Commission invites both NGOs as lobby groups to generate discussion about the issues at stake. Regular and structured meeting take place in Brussels (European Commission, 2014).

In the period of negotiating the Cariforum EPA (from start of 2004 to December 2007, at least thirteen dialogues were registered on the Commissions website (European Commission, 2014). For this research it is important to see what different societal actors wishes for an IP section within the EPA. If we talk about IPR, as we have seen the TCC has a strong agenda in place. This is clearly visible in the position actors from this group, such as BussinessEurope. This leading business lobby group is one of the four official social partners of the EU representing workers and employers in Europe (Dür & Zimmerman, 2007). The organisation is of the opinion that “Strong and effective protection of intellectual property rights (IPR) is key for Europe’s innovation and international competitiveness. According to the OECD, global trade in counterfeit and pirated tangible goods reached over €180 billion in 2007 and continues to grow. The EU must address the scourge of counterfeiting and piracy in its bilateral relations with key strategic partners ... It also needs to press for the adoption of the highest standards of IPR protection in the domestic legislation of its trading partners and for global patent harmonization” (BussinessEurope, 2006, p.9).

Another major business lobby is Eurochambres. The organization is a association of Chambers of Commerce and Industry and represent over 20 million European companies, It express similar views to BussinessEurope: “We see that the current international framework for IPR issues is insufficient because counterfeiting and piracy keeps increasing; the Internet phenomenon is growing in importance allowing more fake goods to be traded with impunity; and the discussions on enforcement in international fora is not making enough progress”. Thus ensuring a strong enforcement regime in bilateral agreements is necessary to protect European businesses. It can be expected that they urged (Eurochambres, 2010, p. 2).

IP Watch reports that lobby groups urge the EU strongly to implement stringent standards of IP, with the goal of creating more investment opportunities broad for European firms. The lobby is of course aware that stricter IP does not benefit development in poorer countries and that developing countries have been resisting stricter IP enforcement rules at WTO level. Yet according to BusinessEurope’s advisor on IP regulation stated “I don’t think I would use the word ‘aggressive’. Some developing countries are already members of the TRIPS agreement. And being a member of TRIPS means you have obligations to raise protection standards”. The NGO Women in Development Europe noted that as a reaction on the resistance of developing countries in the WTO, the lobby are now looking at alternative ways of main developing countries comply with IP standards at the levels of industrialised economies (Cronin, 2010).

Many authors have argued that corporate lobby has influenced Commission policies greatly (see Bouwen, 2002; Woll 2007). This effect enhanced when the Commission made an effort to integrate firms and other private actors in their policymaking in the late 90s. In 1998, the Trade Commissioner urged the service industry to organise themselves, which led to the European Services Forum, another major lobbying organisation (Gerlach, 2006, pp.178-179). The Commission actively pursued this, some argue, in order to gain leverage over both third countries and European Member States. In this way the Commission could increase its legitimacy in its proposals and negotiations. In opening up the policy making process to societal actors, firms and corporate lobbying organisations are the 'principal source of expertise on trade issues' (Woll, 2007, p. 2).

At the other side of the societal debate are NGOs, which are also invited in Commission Dialogues. Most of them are development oriented and oppose stricter IP regulation. It is clear most NGOs oppose reciprocal EPAs in general. Of the 26 NGOs surveyed by Dür and De Bièvre, only three supported this move. Four general critiques are prevalent among these NGOs. The first is that the EU does not offer the ACP countries an alternative to negotiate EPAs or to reciprocal trade. The EU should strive to maintain the non-reciprocal exception from the WTO. Second the EPAs are discussed in regional groupings instead of all ACP states together. This makes the countries weaker in the negotiations. Third NGOs oppose the inclusion of the Singapore issues and the comprehensiveness of the EPAs as this not only hinders development, it influences the position of developing countries very negatively in international fora such as the WTO. Fourth, trade liberalisation in current scheme would greatly detriment development greatly (Dür & De Bièvre, 2007, p. 90). Yet, while these NGOs held these positions in early years of the negotiations, they realized they had to at least partially accept these goals in order to participate in dialogue with the Commission on the negotiations. In this way sceptical actors are forced to cooperate to be heard. The linkage between IP and development is being expected by NGOs in order to continue meaningful dialogue with the Commission.

While many NGOs were opposed IP regulation in bilateral agreements in the past, they seem to have changed their viewpoints to be able to still hold actual dialogues. In giving in they get the small chance to influence regulation on those crucial pro-development regulations in IP, as is seen in this statement from ActionAid: "The management of intellectual property is essential not only to encourage innovation and technological advancement which are crucial to economic development; it also affects access to information and knowledge that has impacts on public health objectives, industrial development, food security and education. The challenge is to strike the right balance between rewarding innovators and promoting public access." Yet, they are

aware of the negative influence a strict IP can have on developing countries and thus urge the Commission to take with that “developing countries tend not to be owners of conventional intellectual property rights – they owned between 5.3 and 7.0 per cent of global patents in 2006. Developing country interests in intellectual property tend not to be well served by current protections and rules” (ActionAid, 2008, p.1).

More critique on the stringent IP proposals are voiced by Trade Negotiations Insights: “The initialled EPA’s ... fail to support innovation, as strict intellectual property rules undermine access to knowledge. The toothless commitments the deals contain on technology transfer will not work.” (Trade Negotiations Insights, 2008, p. 4). Third World Network adds an explanation for this: “ACP countries, as with most developing countries, are net importers of knowledge goods. Providing greater intellectual property protection for knowledge goods from other countries increases the costs of accessing those goods for citizens of ACP countries. This is especially true in areas such as public health, education, and the environment.” (Davies, 2008, p. 43).

An Oxfam report assesses the results this could have for signatories of the agreement. One of the most worrying effects will be in the obligation countries sign to adhere to strict rules pertaining to digital content. In its non-paper the EU proposed that the Cariforum countries enforce WIPO copyright and WIPO Performers and Phonograms Treaties. Yet, many experts, such as the Commission on Intellectual Property Rights, have advised developing countries against doing so. Access to digital material for students and researchers will be undermined by these treaties, while WTO regulation exempts educational institutions from similar regulations. This leads to a ‘further widening of the digital divide’, instead of closing, a often pursued developmental goal (Oxfam, 2008, p.33). A second very worrisome effect of the then proposed IPR section is the way in which the will undermine the negotiation position of Cariforum countries in other multilateral forums. Signatories can no longer oppose strengthening IPR regulation after signing the EPA.

However, as Dür and De Bièvre studied with the case of the EPA negotiations, the impact of NGOs on the EU’s approach was limited. They had access to policy makers in dialogues, and Commissioner of Trade Peter Mandelson acknowledged Civil Society’s viewpoint by stating that: EPAs need to change so as their development focus is strengthened. They should become explicitly what they really are: trade and development tools (Mandelson in Dür and De Bièvre, 2008, p. 91). Yet, any action that reflected this goal lacked in later stages. In the case of IP it is clear that the Commission did not take into account the visions of NGOs as the non-paper that was prepared before negotiations is practically transposed in the EPA. Also Elgström argues that

while corporate actors have a big influence in trade policies, the influence of NGOs was very minimal (Elgström & Larsén, 2008).

From this empirical information it is clear that the trends as presented above played a crucial role in the actual negotiations. Neoliberal ideology with focus on strict IP agenda is in place from the outset. The link between IP and development is clear in the Commission's reasoning. Inter EU consultations did not lead to major alterations of this original standpoint. The Council, while on paper quite powerful, did not use its influence and could act less strongly because of mutual disagreements. This is in stark contrast to the Commission that managed to act as a unitary actor. Different DGs' views were incorporated in the dominant view. In the external process the Commission was conducive to the TCC interests in determining its priorities, especially on IP regulation. Expert views from corporate lobbies were consulted while NGOs are forced to mingle in and accept basic linkage between IP and development to be able to continue the discussion with the Commission. Several authors (e.g. Dür & De Bièvre, 2007; Elgström & Larsén, 2008) have pointed out that while the corporate lobby was very successful in securing its interests, the NGO lobbies were not. As expected these actors could not force a real alternation of the Commission's position in the negotiations or the outcome of the EPA with Cariforum.

## 5 Conclusions

In this last chapter of this thesis I will answer the research question that was posed in the first chapter as well as reflect on the research process and its implications.

### 5.1 Conclusions

I started this thesis off by presenting a research puzzle that showed a radical policy change in the trade relations between the EU and the ACP countries. While former agreements between the two groups were geared towards developmental goals, the concluded EPA with the Cariforum states looks more like a regular free trade agreement, as conducted with other developed countries. The groundbreaking scope of the agreement hints that other than developmental goals played a role in EU's reasoning. One of these newly introduced and very controversial aspects to the EPA is IPR regulation. While, according to trade Commissioner Mandelson the EPA is seen as a tool for development and regional economic integration, the developmental effects of the included IPR section is heavily criticised and often considered to detriment and not support development. This led me to ask the following central question:

*What explains the European Union's priority to include intellectual property in the Economic Partnership Agreements with the ACP countries?*

To answer this question I have adopted a critical theory approach, utilising a Neo-Gramscian framework of three constitutive elements: ideational, material and institutional capabilities. These notions cannot be seen separately and also not without the historical and transnational context in which the change took place. This forced me to go back in time and unravel the historical relations between the EU and the ACP group. The EU offered to be a partner in development for the ACP countries since the Treaty of Rome. Development funds were available and previous agreements focused mostly on poverty eradication and financial aid to the ACP group. Through the speeding up of the globalisation process international trade was intensified and the relation between the two groups began to change. More conditionality was implemented and a more liberal understanding of development began to gain popularity. Yet the most convincing explanation for the policy change has to be looked for in the ideational, material and institutional influences and constraints that the EU has faced over the last three decades.

Ideologically speaking, the crisis of the previous hegemony led to a neoliberalist agenda, or a veritable Gramscian consensus on the neoliberal project. This ideational shift has had an

enormous effect on North-South relations. EU-ACP cooperation is a reflection of political and economic relations. Property rights gained importance in this time and through neoliberalism. Though contested in some corners of neoliberal reasoning, many neoliberals argue that giving people formal entitlement over their property will lead to development. Building a legal system that ensures that owners can use the economic potential of their assets. This reasoning laid the basis for the linkage between IP and development that is being used in EU policy making. Yet, for actual implementation of IPR regulation in the EPA with Cariforum also the support of TCC and the right institutional structure was needed.

On the material side of the story, the influential TCC picked exactly this issue from the neoliberal agenda to put forward in discussion with EU policy makers. Organised in different constellations, this class managed to influence policy makers to pursue a very stringent IP agenda in all sorts of international fora. The TRIPS agreement was one of their biggest achievements, accomplished by 12 CEOs of major companies with some institutional help. In the EU, the TCC plays an important role, and they have managed to transform the agenda into an transnational elite agenda. Personnel in higher ranks of the EU are often part of the TCC, such as former Trade Commissioner Pascal Lamy, who later became Director-General at the WTO. In various ways the TCC became the mouthpiece of transnational capital that was listened to in the Commission. DG trade institutionalised this influence in offering them a place around the table for dialogues and expert consultations.

In the institutional capabilities of the EU, two factors have played an important role. In the heyday of multilateralism, the EU evolved into a very proactive player in pursuing trade related issues. By becoming such an active player in the WTO agenda since the late 90s, the EU maneuvered itself in such a position that it is constrained to WTO regulation and principles such as the MFN clause. The Commission could not take a far more developmental stance in the EPA negotiations if it wanted to be taken seriously in further multilateral negotiations. The need to comply with WTO regulation is a matter of international credibility. Internally, institutional arrangements are such that DG Trade played a major role in the process. Their dominant role in the Commission was not challenged very much by other DGs, an indication that their views are incorporated in the dominant approach. The influence of the council, that is quite influential on paper, was similarly minimal.

A further look into the negotiations phase of the EPA with Cariforum confirmed that these factors all played a role in the process. From the outset it was clear that the Commission had the idea that development and IP regulation go hand in hand. The original position of DG trade was

not challenged much by actors within the EU circles. Corporate lobbies pressured the EU to indeed implement strict IP regulation while NGOs challenged the good an IP section would do. Many NGOs expressed very critical view on the subject but while heard their arguments did not lead to a difference in outcome. This shows that the role of counter hegemonic forces was very small in this policy process. In fact NGOs often adopted mild stances towards IP in order to remain in dialogue with the EU.

## *5.2 Reflections and further research*

Using a critical theory framework had forced me to include both historical and transnational context. This has brought me a great deal and was important in understanding the mechanisms at play. By critical examining the power plays that lie behind the agreement, I could soon focus on the EU side only. By examining how economic policy, social institutions, practices and cultures interact I could adopt a set up for my analysis that thoroughly investigated all these factors. The Neo-Gramscian framework and the work done by Levy and Egan steered me in such a way that I came up with the three trends set in a completely historical and transnational context. Delving deeper and deeper for an explanation of the sudden policy change brought me a concrete answer to the research question. Namely that is was the ideology rising since the 1980s, the TCC that reinforced specific aspects of that ideology and the institutions influences and constrains that led to a linkage of IP and development policy in EU's reasoning.

Yet this setup was not clear to me from the beginning. Using retroductive reasoning and aiming at finding a better explanation for the structural mechanisms at work led me to a deeper understanding. At first I tried to explain the linkage by examining in great detail the negotiation process itself, yet when I could not explain structural changes there, I looked back, went over the theory again and decided to take history more seriously. It only makes sense that the ECs position on IP in these policies was shaped in the period preceding the negotiations, and influenced by the constraints and influenced in the decades leading up to the negotiations. This gave me the advantage that I could check whether the broader trends I had find with the negotiations to give me extra explaining power.

As a critical researcher with an emancipatory goal, it was great to see that later, even after signing Cariforum, EU too began to realise that this is indeed very much contested and this linkage is maybe not even tenable in the future. Very interesting is the fact that criticism to the IP section in the EPAs and to the EPAs in general became much louder after the agreement with the Cariforum states was signed. In the meantime, from December 2007 up until today, other

developing countries and regional groupings have refused to discuss IP provision that go beyond TRIPS or IP provisions all together, as many experts and NGOs have advised. SADC has signed an interim EPA which covers 'goods only' and thus leaves out services and IPR provisions. For the full EPAs they will not go further than including new issues such as 'trade in services, investment, competition and government procurement', excluding IP from the agenda altogether (Phiri, 2008).

This is both interesting and topical as the EU supposedly saw the Cariforum EPA as a template for other EPAs. In theory the EPAs have the potential to shape the entire global landscape in international IP regulation. If the EU were to implement higher standards of IP in the EPAs with all CP countries, only a handful of Latin American and Asian developing countries, would have been left as the only states that oppose the expansion of IPR regulation in international fora such as WTO and WIPO. And thus, while the Cariforum EPA was being considered as a success story, this has not been a prelude to ACP wide success. As of today, not one other regional comprehensive EPA was signed. This makes the case for very interesting future research on how the EU handles the setbacks they have faces in EPA negotiations. Where does that leave the IP priority of the EU and which channels are still open to pursue this goal, after the crisis in multilateralism and with the ACP group? Many argue that the Washington consensus approach is also left by the mid 2000s. World Bank Chief Economist, at the time, Joseph Stiglitz, stated that the aspects of the consensus "while important, are neither necessary nor sufficient for successful development" (Multinational Monitor, 2000). With the Washington consensus declared dead, it will be interesting to see if and how the EU changes its course with regard to their IP priorities.

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