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Working Paper

Assessing the legal and political implications of the post-Cotonou negotiations for the Economic Partnership Agreements

Discussion Paper, No. 4/2017

Provided in Cooperation with:

German Institute of Development and Sustainability (IDOS), Bonn

Suggested Citation: Keijzer, Niels; Bartels, Lorand (2017) : Assessing the legal and political implications of the post-Cotonou negotiations for the Economic Partnership Agreements, Discussion Paper, No. 4/2017, ISBN 978-3-96021-025-2, Deutsches Institut für Entwicklungspolitik (DIE), Bonn

This Version is available at:

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Deutsches Institut für
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German Development
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Discussion Paper

4/2017

Assessing the Legal and Political Implications of the Post-Cotonou Negotiations for the Economic Partnership Agreements

Niels Keijzer
Lorand Bartels

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Bonn, 2017

Discussion Paper / Deutsches Institut für Entwicklungspolitik
ISSN 1860-0441

Die deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>.

ISBN 978-3-96021-025-2

Printed on eco-friendly, certified paper

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With financial support from the Federal Ministry for Economic Cooperation and Development (BMZ)

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Abstract

The role of the Cotonou Agreement during the negotiation of Economic Partnership Agreements (EPAs) between the European Union (EU) and the African, Caribbean and Pacific (ACP) Group of States has been well studied. This paper analyses the inverse of this relationship, namely the legal and political implications of different possible outcomes of the upcoming post-Cotonou negotiations on the EPAs, following the expiry of the Cotonou Agreement in 2020. The EPAs include several cross-references to provisions in the Cotonou Agreement on development and human rights. This paper analyses the legal and political implications for the EPAs of possible negotiation outcomes, including combinations of regional or non-legally binding cooperation agreements. Its main conclusion is that a decision not to renew the Cotonou Agreement would have significant political implications but, contrary to the views of some EU stakeholders, limited legal implications for the EPAs.

Keywords: trade and development; African, Caribbean and Pacific Group; European Union; Economic Partnership Agreements; Cotonou Agreement

Acknowledgements

The authors are grateful to Stefanie Sörensen, Juliana Kliesch and Robert Rossner of the German Federal Ministry for Economic Cooperation and Development (BMZ) for their comments on a draft version of this paper, as well as to their inputs and those of the Brussels-based EU officials whom we consulted in the process of preparing it. We further thank German Development Institute (DIE) colleagues Stephan Klingebiel, Christine Hackenesch and Merran Hulse for their comments. Any views expressed in this paper are the authors' alone, and should not be attributed to any other person or institution.

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Abbreviations

ACP	Africa, Caribbean and Pacific Group of States
CA	Cotonou Agreement
Cariforum	Forum of the Caribbean Group of ACP States
DG	Directorate General
DIE	German Development Institute / Deutsches Institut für Entwicklungspolitik
EAC	East African Community
EC	European Commission
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreement on Tariffs and Trade
LDC	least-developed country
SADC	Southern African Development Community
UK	United Kingdom
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

1 Introduction

In 2016 the European Union (EU) and the African, Caribbean and Pacific (ACP) Group of States intensified preparations for the upcoming negotiations on the arrangement for their relations after the Cotonou Agreement (CA) expires in 2020. Using the same form of a legally binding international agreement as used for governing ACP-EU cooperation under the preceding Lomé Conventions, the Cotonou Agreement was adopted in 2000 and revised in 2005 and 2010. It sets out cooperation agendas under three “pillars”: aid, trade and political dialogue. The central focus of this paper is on the trade pillar, while also analysing important inter-linkages with the other two pillars.

In September 2014, the European Commission (EC) President mandated the Development Commissioner to prepare these negotiations towards the adoption of what he referred to as a “Post-Cotonou Agreement” (Juncker, 2014). These negotiations are to start before September 2018, a total of 18 months before the CA’s expiry in February 2020. At its recent June 2016 Summit of ACP Heads of State and Government, the ACP Group similarly expressed a desire to conclude a legally binding follow-up agreement with the EU after 2020 (African, Caribbean and Pacific Group of States, 2016). But in contrast to the stated desire for continuity of these permanent secretariats, states on both sides have been concerned by the low level of effectiveness of this long-standing approach to cooperation (Keijzer & Negre 2014; Bossuyt, Keijzer, Laporte, Medinilla, & De Tollenaere, 2016). For example, the 13 new states that have joined the EU since 2004 were not involved in the negotiations of the CA and generally have a lower priority for cooperation with the ACP compared to the other member states. Another important factor at play concerns the possibility of the exit of the United Kingdom (UK), whose accession to the European Economic Community (EEC) in 1973 triggered the creation of the ACP Group (Price, 2016).

For the purpose of this paper, we distinguish three possible outcomes of the upcoming “post-Cotonou” negotiations that are relevant to the Economic Partnership Agreements (EPAs), namely (1) an ACP-EU agreement with increased differentiation through regional chapters/articles catering to the African, Caribbean and Pacific regions; (2) three legally binding regional agreements with the African, Caribbean and Pacific regions (with or without a so-called umbrella agreement); and (3) various alternatives to international agreements. This variety of outcomes foreshadows a possibility that the upcoming post-Cotonou negotiations may not lead to a new legally binding ACP-EU agreement after 2020. The aim of this paper is to explore the legal and political implications of such an outcome, which it examines by analysing past negotiations and the resulting relevant provisions in the concluded EPAs. The analysis is based on a structured desk review, reinforced by informal interviews with key stakeholders in Brussels, selected member states, as well as both authors’ participation in past debates on EPAs.

A prominent aspect of the ongoing post-Cotonou debate concerns the substance of any follow-up agreement. The key consideration is whether a new international agreement is justified, given that the substance of cooperation has significantly diminished in recent years as a result of reforms guided by the Cotonou Agreement as well as legal changes in the EU. First of all, the World Trade Organization’s waiver allowing for the EU’s special trade preferences to the ACP Group as the central feature of the Cotonou Agreement’s trade pillar expired in 2007, and trade relations between the EU and ACP countries are

now governed by EPAs and unilateral EU trade preference schemes. Second, Article 21 of the Treaty on European Union requires that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, which include human rights (European Union [EU], 2012). This, in turn, means that the EU should give itself the possibility of taking appropriate measures (including sanctions) in order to comply with these principles. Third, the EPAs moreover create organisational structures ("institutions") that overlap with existing ACP-EU institutions established under the Cotonou Agreement.

All of the EPAs concluded between 2007 and 2014 include articles on development cooperation that refer to relevant articles in the Cotonou Agreement (see Annex 1). The Forum of the Caribbean Group of ACP States (Cariforum)-EU EPA has been provisionally applied since 2008, yet negotiations between the EU and other regional groupings have continued at a snail's pace. The EU set deadlines in 2014 and 2016 to respectively push for the conclusion of the negotiations and for countries and regions to sign and ratify their (interim) EPAs (Hulse, 2016b). These more recent EU initiatives resulted in the ratification of the EPA with the South African Development Community, yet insufficient progress was made with the East and West African EPAs. Ratification of the East African EPA could happen in February, whereas no possible date for West Africa was suggested at the time that this paper was finalised.¹

Preparations for the upcoming start of negotiations on post-Cotonou arrangements are in full swing on both sides of the partnership. The European Commission and European External Action Service published a joint proposal in November 2016 proposing building blocks for the EU's negotiation mandate, which will be further discussed during the coming months by EU member states, the European Parliament and all relevant stakeholders with the aim to adopt a negotiation mandate during the autumn of 2017 (EU, 2016a). The European Parliament adopted an own-initiative report in September 2016 to convey its key priorities for future cooperation and took a similar line as the Commission and the European External Action Service (European Parliament [EP], 2016). Earlier in 2016 EU ministers responsible for development cooperation met on two occasions to informally exchange views about the pros and cons of various possible scenarios for ACP-EU cooperation following the expiry of the Cotonou Agreement in 2020, a subject that has also been touched upon by think tanks (see Bossuyt et al., 2016).

In the current process, in which various post-Cotonou options are under review and a decision is being prepared on both sides as to which one to pursue, one important element to consider is the role and importance of the EPAs in this process. The starting point of this article is the observation that the EPAs concern an important outcome of the Cotonou Agreement, yet considerations on the legal and political connection of the EPAs to Cotonou will in turn inform stakeholders' preferences in the upcoming negotiations. The article analyses the literature on past EPA negotiations to understand the various references to the Cotonou Agreement made in the (interim) EPAs. Based on this overview, the potential legal consequences of the various post-Cotonou options for the EPAs are

1 In the case of East Africa, both Kenya and Rwanda ratified the EPA in September 2016 in the margins of the Summit of Heads of State of the East African Community. The Summit Communiqué offers three more months for those states that did not sign to reflect. A following summit is scheduled for February 2017 (East African Community, 2016).

analysed, as well as how these consequences are represented in the political debate. The article's conclusions show that a lack of consensus among the different EU member states – combined with different interests within the European Commission – has led to an evolving discourse on the “development dimension” of the EPAs throughout the negotiations. Although the EPAs were intended to promote “tailor-made” (i.e. differentiated) economic and trade cooperation between the EU and regionally-based groups of ACP states, the resulting provisions in EPAs that feature cross-references to the Cotonou Agreement have had the unintended effect of contributing to a felt need to continue the existing EU and all-ACP partnership.

The paper is structured as follows. It begins with an analysis of the transition from the Lomé Convention's unilateral trade preferences system to the EU's decision to push for reciprocal yet asymmetrical regional trade agreements. Next, it looks at the ways in which the main aims and objectives of the EPAs were – and have been – interpreted and promoted during the EPA negotiations. It then compares and analyses the provisions in the EPAs that emerged from this process and analyses the legal and political implications of the aforementioned post-Cotonou outcomes for the EPAs. The article concludes that the emphasis on perceived legal challenges for the EPAs of these negotiation outcomes mainly serve political purposes in the sense of being used by proponents of renewing the legally binding ACP-EU agreement.

2 From asymmetric preferences to Regional Economic Partnership Agreements

Although trade is considered a key driver of economic growth, how trade and development are connected remains a controversial topic. Offering market access to developing countries, either through agreements or unilaterally, has long been seen as a necessary but insufficient condition of development. In many cases, this can be remedied by development cooperation in the form of “aid for trade” (Hynes & Holden, 2016, p. 593). The understanding that development assistance could promote trade has been a driving factor for justifying budgets for development finance all along and was a key motivation of the EEC's association policy in part IV of the Treaty of Rome. By contributing to the European Development Fund (EDF), the founding member states of the European project provided financial support to the French and Belgian colonies with a view to facilitate their gradual integration into the nascent internal market (see Bartels, 2007; Grilli, 1993; Holland, 2002).

The European Union's concept of development policy evolved in the decades following the rapid wave of independence across the African continent. The 1957 Treaty of Rome granted the associated territories guarantees and rights to protect infant industries and develop production, and the first Yaoundé Convention allowed these now newly independent states to participate actively in the shaping of development policy and their own priorities for cooperation programmes financed through the EDF (European Economic Community, 1962, p. 13; Merrien, 2009; Bartels, 2007). As the existing legal basis in the Treaty of Rome was not adequate for cooperation with the newly independent states, the EEC and the associated states concluded an international agreement in 1963, the Yaoundé Convention, in order to continue cooperation with the newly independent states

on the basis of the Treaty of Rome. A notable feature of the trade provisions of the Yaoundé Convention was that they promoted reciprocity in trade liberalisation, albeit largely for ideological reasons (i.e. to stress equality of relations) as well as to ensure strong commercial linkages between the new states and the EEC market (Bartels, 2007, pp. 722-724).

The UK's accession to the EEC in 1973 involved the identification of Commonwealth countries that were deemed "associable" to the existing Yaoundé Convention (Hewitt, 1981). The concerned Commonwealth states, however, objected to the notion of reciprocity in trade liberalisation. They included East African states and Nigeria, which already had successfully resisted this notion in trade negotiations with the EEC during the 1960s. These states were instrumental in securing this outcome during the 1973-1975 negotiations, and this led to the adoption of the Lomé Convention between the EEC and the 46 ACP Group of States. These formalised their own grouping in the 1975 Georgetown Agreement (Bartels, 2007, p. 728). The Lomé I Convention offered unilateral trade preferences, internal price support mechanisms for bananas, beef, rum and sugar, and development funds, and this model was continued in various iterations of this Convention until the Cotonou Agreement in 2000 (Heron & Murray-Evans, 2016).

The situation changed after two General Agreement on Tariffs and Trade (GATT) panels in 1993 and 1994 ruled that the Lomé Convention was illegal under GATT (Bartels, 2007; Murray-Evans, 2016, p. 493). These added to a perception among European decision-makers that the Lomé development and trade preferences were not adequate for development purposes, and in addition presented a drain on available resources (Farrell, 2010, p. 69). In 1996, a green paper published by the Commission on the future of cooperation with the ACP presented a critical assessment of the "patchy achievements" of ACP-EU cooperation and suggested that the partnership framework be fundamentally reformed in line with the EU's efforts to forge its external identity, including through "a multilateral trade policy designed to open up markets in accordance with negotiated common rules" (European Commission, 1996, p. 5). Such negotiations were to be led by the Commission with its Directorate-General (DG) for Trade in the lead (Drieghe, 2008). The governing principles for these negotiations had been set out in the EU's Maastricht Treaty of three years earlier, which determined three core aims of its development policy: (1) sustainable economic and social development policies, (2) developing countries' smooth and gradual integration into the world economy and (3) poverty reduction (Hoebink, 2004, p. 3). The key change in the Maastricht Treaty was that the EU now unequivocally considered trade liberalisation as a prerequisite for development.

In 1998 the EU adopted a post-Lomé negotiation mandate, which showed that member states were strongly divided over the Commission's proposal to negotiate World Trade Organization (WTO)-compatible "Regional Economic Partnership Agreements" (later renamed to EPAs). No unanimity was reached on the Commission's proposal, with a minority of member states indicating concern over the effects of such arrangements on less-competitive ACP states. The Netherlands and the UK temporarily broke ranks in 1999 by stating that the "REPAs" were not feasible for all ACP states (Forwood, 2001). Continuing concerns, particularly over the large number of least-developed countries (LDCs) in the ACP Group, led to the introduction of the EU's "Everything But Arms" scheme in 2001, which granted duty- and quota-free trade preferences to all LDCs. These preferences would consequently greatly complicate the EPA negotiations, as the LDCs

that now had little to gain from EPAs joined negotiating groups with non-LDC ACP states for whom the trade negotiations were crucial (Drieghe, 2008; Heron & Murray-Evans, 2016; Holland, 2002).

Following further discussions between the member states, the Commission was mandated to prepare negotiations of Regional Economic Partnership Agreements with the members of the ACP Group. The main motivation for the decision was the incompatibility of the existing system of trade preferences under WTO rules, but also that they had failed to reach consensus on the nature and scope of these trade agreements. Although there was broad consensus on the need to break with the old system, there were two different views among the member states as to what EPAs should be and how they should facilitate development: the majority assumed that deep and comprehensive trade liberalisation would help “trigger” development, whereas some member states called for the agreement to include a “development dimension” to mitigate the potentially negative effects of the trade agreements (Maes, 2011). The negotiations for the 1998 mandate reflected the fact that member states divided according to these two schools, yet importantly the subsequent negotiations showed that the same could be observed between relevant Directorates-General of the European Commission. Although DG Development was in charge of leading negotiations with the ACP Group for the Cotonou Agreement and represented the second school of thought, its ACP trade competence was moved to DG Trade in 2001, which adhered to the first school of thought and had strongly influenced the initial EPA “diagnosis” in the 1996 Green Paper (Holland, 2002; Makhan, 2008). Article 36(2) of the Cotonou Agreement reflected the dominant member state view that EPAs are “development instruments” that “aim to foster smooth and gradual integration of the ACP States into the world economy, especially by making full use of the potential of regional integration and South-South trade” (EU, 2014, p. 48). It is interesting to note that these explicit objectives for the EPAs were added only during the 2010 review of the Cotonou Agreement, that is, when several EPAs had already been concluded.

During the EPA negotiations, DG Trade did not feel mandated to represent the entire Commission in its negotiations with the ACP regions, and it could not therefore engage with ACP states on development finance. This complicated negotiations because ACP countries could not determine whether adequate assistance for adjustment would be available (Alavi, Gibbon, & Mortensen, 2007, pp. 78-79; Lorenz, 2012). The dilemma imposed by the EU on LDCs, which was to choose between retaining current market access or joining the EPAs (offering additional but uncertain opportunities), was deeply resented by ACP states and hampered their engagement in the EPA negotiations (Hulse, 2016a, p. 249). Lack of consensus was also visible on the side of EU member states during the negotiations, as shown through Council Conclusions critical of the Commission’s approach and several member state governments and the European Parliament publishing papers advancing more “development-friendly” EPAs (Egenhofer, van Schaik, Kaeding, & Núñez, 2006, pp. 64-65; Alavi et al., 2007). As proponents of the first perspective distinguished by Maes (2011), EU trade negotiators negotiated with the aim of obtaining what they perceived as an optimal outcome for the EU and its member states: comprehensive free trade agreements with ambitious liberalisation schedules on the side of the ACP. EU negotiators were moreover accused of applying undue pressure and hard bargaining tactics during the negotiations, thus signalling a clear break from ACP-EU relations that emphasised partnership principles (Elgström, 2010; Heron & Murray-Evans, 2016).

3 EPA negotiations: state of play and ensuing post-Cotonou preparations

The strong representation of EU offensive interests, the apparent differences of views between EU member states, as well as an intensive civil society campaign supported the various regional groupings in either actively or passively resisting the negotiations.² These highly differing views as well as the considerable number of countries involved manifested into protracted negotiations involving considerable periods of “non-negotiation” that resulted in only one comprehensive EPA initialled by the deadline of the WTO waiver in 2007, as well as a patchwork of “interim” or “stepping stone” agreements with a number of non-LDC ACP states to retain market access at similar levels. The use of these indicated that, at least on paper, both parties remained committed to further pursuing a comprehensive agreement that would go beyond trade in goods (Drieghe, 2008). In view of most ACP groupings’ successful delay and resistance of the negotiations, the conclusion of a comprehensive EPA with the Caribbean in 2007 can be explained by the stronger normative convergence between the region and the EU on the link between trade liberalisation and development (Munyi, 2013). Other regions, in fact, regarded the delays they created in the signing and ratification process as a *de facto* negotiation success, since by doing so they managed to prolong the situation while maintaining their preferential exports to the EU while still applying tariffs to EU imports (Munyi, 2013, p. 131). Another key factor to explain this difference is that the Caribbean negotiating team also used the negotiations with the EU as a window of opportunity for pushing the regional integration process in the Caribbean.

In view of the limited success of the negotiations, the EU set a deadline of October 2014 for concluding the negotiations and threatened the ACP states with reverting to its less favourable Generalized System of Preferences. Apart from the Pacific and Central African regions, all regions managed to conclude negotiations in time for limited “trade in goods” agreements – including “rendez-vous” clauses to continue negotiating in the future about the more comprehensive agenda desired by the EU. Thereafter, a subsequently long period of translation and “legal scrubbing” began. The EPA between the EU and its member states on the one side and member states of the Southern African Development Community (SADC) on the other side has been provisionally applied as of 10 October 2014. The next steps for the remaining regions are more uncertain: at the time this paper was finalised, several West African states, including Nigeria as its regional powerhouse, had signalled reservations about signing, whereas both Uganda and Tanzania had indicated by July 2016 that the UK’s possible withdrawal from the EU meant they were not inclined to sign at this point. Kenya and Rwanda subsequently individually signed the EPA, whereas Uganda expressed a commitment to append its signature, which the EC considered a sufficient basis to continue providing unilateral trade preferences under the EU’s market access regulation. However, open questions remain, and a February 2017 EAC Summit would provide the next opportunity for the region as a whole to ratify the EPA. An overview of the state of play for the different EPAs can be found in Annex 1 to this paper.

Negotiations on how ACP-EU relations will be governed after the expiry of the Cotonou Agreement in 2020 are to formally start no later than September 2018, with the EU

2 N.B. In the context of trade negotiations, the term “offensive interests” refers to the partner’s efforts to seek access to the other party’s market.

expected to adopt its negotiation mandate towards the end of 2017. Although the ACP is more likely to react to the EU's position rather than adopt a pro-active post-Cotonou negotiation strategy, its 2016 Summit statement signalled a desire to continue along the path of the CA by means of a new legally binding agreement (African, Caribbean and Pacific Group of States, 2016).

4 Implications of fundamental CA change scenarios for the EPAs

This section analyses the links between the Cotonou Agreement and the EPAs in two respects. It first describes the content of the “development cooperation provisions” of the agreements, defined in terms of being articles that outline the objectives of the agreements in terms of promoting development. Second, it looks into the links between Cotonou and the EPAs in terms of their references to the Cotonou Agreement’s “essential elements” and “non-execution clauses”, that is, articles outlining consequences of the parties’ adherence to fundamental elements of cooperation. The table presented in Annex 1 compares the relevant provisions describing their objectives in terms of promoting development, as well as references to Cotonou found in other chapters. The table clusters the result of the analysis of cross-references to Cotonou articles in two groups so as to clearly distinguish which EPAs include a dedicated “development chapter”, and which ones only feature linkages to relevant Cotonou articles in different parts of the agreement.

4.1 Development cooperation provisions in the EPAs

The overview presented in the annex to this paper shows that the EPAs can roughly be divided into two groups, as regards their content of development provisions. A first group of agreements with southern Africa, the Caribbean and the Pacific (Fiji and Papua New Guinea) feature one or two articles on development in the first part of the agreement, which use similar wording and refer to Articles 1, 2 and 9 of the Cotonou Agreement. Both the southern African and Caribbean agreements feature an additional article called “development cooperation” that refers to the Cotonou Agreement as a relevant framework. In contrast, the agreements with the East African Community (EAC), eastern and southern Africa, and Central Africa include a dedicated part dealing with and entitled “development”.

These parts repeat similar articles to those in the first group, and in addition include references to the Cotonou Agreement in other chapters, which mainly comes into play when discussing financing matters. Some, however, are also rather specific. For example, Article 75(4) of the EAC EPA states that

financing relating to development cooperation between the EAC Partner States and the EU for the implementation of this Agreement shall be carried out within the framework of the rules and relevant procedures provided for by the Cotonou Agreement, in particular the programming procedures of the European Development Fund and within the framework of the successive relevant instruments financed by the General Budget of the EU.

The first part of this sentence is a dynamic reference (a term discussed below), which has the effect that the envisaged financing will no longer be guaranteed after the expiry of that

agreement. The West African EPA forms an outlier of these two groups by including a sustainable development article in the first part and a separate part on development. It should finally be noted that all EPAs, apart from the Pacific EPA, refer to development finance from the EDF or “within the frameworks of relevant instruments financed by the General Budget of the EU”. The West African EPA also features a different formulation in a separate article that explicitly refers to the use of such instruments in the event of the expiry of the Cotonou Agreement.

Two possible interpretations may be advanced here as to why relatively similar approaches are used in the EPAs negotiated with sub-groups of ACP states at different stages of regional integration and levels of development. First of all, the tendency to refer to articles in the Cotonou Agreement as opposed to reflecting the content of these articles into the EPAs can be linked to the EU’s insistence that the EPAs themselves were development instruments and thus did not need a separate “development dimension” (Heron & Murray-Evans, 2016). At the same time, a more compact approach involving “cross-referencing” to the Cotonou Agreement in the EPAs was a means to minimise the development profile of the agreement and also signal the EU negotiators’ conviction that there should not be additional development finance awarded to EPA-signing ACP states compared to those that did not. EPAs containing separate parts on development indicate that those regions insisted on the inclusion of such an explicit and visible development dimension. Analyses of the negotiations indicate that ACP regional groupings were strongly preoccupied with negotiations on “aid for trade” from the EU and getting guarantees on whether these would be in addition to existing cooperation programmes, and separate development chapters and articles were seen as instrumental to that end. Secondly, given that negotiations took place in parallel, the EU relied on “copy-paste” approaches in preparing the draft agreements, which explains the similarity in formulation in spite of the different regional negotiating counterparts (Merrien, 2009).³ Brussels-based EPA experts noted that this “standardisation” approach was not limited to the trade substance but also guided the EU’s position on its governance arrangements. One example was a note with proposals on the institutional setup of the EPAs that was developed by the EU and taken up in the EPA with the Caribbean, and was also followed in the setup of other EPAs with minor modifications.⁴ Overall, the choice of referring to numbers of articles in the Cotonou Agreement was taken as self-evident by EU officials consulted for this paper, although the alternative of copying the content of the respective Cotonou articles into the agreement would have made the “Cotonou content” more prominent, as well as strengthened the agreement’s human rights clause.

When it comes to analysing the possible effects of the outcome of the forthcoming negotiations between the EU and ACP, it should first and foremost be noted that the content of the Cotonou Agreement reflects an incremental negotiation process following four Lomé Conventions, which in turn were shaped by the Yaoundé Conventions of 1963 and 1967, which were themselves based on Part IV of the 1957 Treaty of Rome (Bartels,

3 It should be noted though that such “copy-paste” approaches are not a unique phenomenon limited to the EPA negotiations, as per the need for EU free trade agreements to build upon former agreed texts.

4 For instance, the EPA with the East African Community did not include a consultative committee to allow for structured dialogue with non-state actors, as defined under Cotonou Article 2.

2007; Grilli, 1993).⁵ For this reason, Article 95(4) of the Cotonou Agreement describes the negotiations on what should govern ACP-EU cooperation after 2020 as “negotiations in order to examine what provisions shall subsequently govern their relations” (EU, 2013, p. 84). The very existence of an international agreement between the EU and the states of the ACP thus represents a strong source of path dependency, with the burden of responsibility for advocating reform mostly resting with reform-orientated parties: whereas actors in favour of keeping the status quo can suffice by defending it, those in favour of reform are challenged to sell a more wholesale reform of EU development policy altogether. Status-quo-orientated parties, moreover, may delay the process of preparing the EU’s post-Cotonou negotiation mandate, including through the European Commission, which has the right of initiative on when to propose this, so that the status-quo becomes the most realistic outcome in view of available time and resources. Linked to this is the fact that the Commission has developed routines and experiences in negotiating on the basis of an existing agreement that can be amended, shortened or expanded, and has less experience in setting up new things “from scratch” (see Frisch, 2016).

Although a similar outcome of a new treaty can be expected for the upcoming negotiations, it should be noted that the Cotonou Agreement itself was not a “consolidation strategy” in the spirit of its Lomé predecessors. The agreement instead sought to reform and “rationalise” the ACP-EU partnership vis-à-vis EU cooperation with other third countries by differentiating cooperation under all three cooperation pillars: trade, political dialogue and development cooperation. As a result, the first two cooperation pillars can be seen as having largely been moved into (sub)-regional frameworks: respectively the EPAs and for the political dialogue regional frameworks such as the 2007 Joint Africa-EU Strategy.⁶ The EPA negotiations can thus be seen as a process of differentiating EU relations with the ACP, which should also have consequences for its overarching cooperation agreement (Hurt, 2009). Moreover, the openly expressed hesitation of some ACP states to sign EPAs, of which they perceive the costs to outweigh the benefits, as recently stated by a former president of Tanzania (Mkapa, 2016), suggests they may not sign a new ACP-EU agreement if they arrive at a similar assessment.⁷ For these reasons, and while taking account of the strong tendency for continuity in the approach to partnership, it is important to consider all possible outcomes of the negotiation process, including those that do not envisage a “Cotonou 2.0” but entail more fundamental changes.

Although possible post-Cotonou negotiation outcomes can be framed and presented in different ways (see, for instance, Bossuyt et al., 2016), for the purpose of this paper, the

5 With the exception of reciprocity in trade relations, which was rejected by the ACP states during the Lomé I negotiations and reinstated as an objective for the EPAs in the CA.

6 Another approach to differentiation in political dialogue concerned the introduction of the Governance Incentive Tranche under the 10th EDF, applying a “more for more” idea to development cooperation, whereas conditional tranches in budget support programmes have also been used for promoting more intensified political dialogue in selected ACP states.

7 This can also be observed from the fact that Equatorial Guinea and Sudan refused to sign the 2005 revision of the Cotonou Agreement, which recognised the jurisdiction of the International Criminal Court, and subsequently lost access to development cooperation financed through the EDF. The joint decision not to trigger Cotonou’s review clause in 2015 means that it is not possible to see to what extent additional ACP states would choose to refrain from ratifying in relation to the Court clause, in view of the ongoing steps being made by South Africa, Burundi and the Gambia to withdraw from the Court at the time this article was written.

following three merits are discussed: (1) an ACP-EU agreement with increased differentiation through regional chapters/articles catering specifically to the African, Caribbean and Pacific regions; (2) three legally binding regional agreements with the African, Caribbean and Pacific regions (with or without a so-called umbrella agreement); and (3) various alternatives to international agreements, such as high-level political statements.⁸ Finally, it can also be envisaged that negotiations fail to be completed before the Cotonou Agreement's expiry, meaning that there could be a period of "legal limbo" in which some sort of "bridging agreement" could be put into place.

Having looked into the commonalities and differences across the various EPAs and the ways in which they refer to articles in Cotonou, as well as some aspects and possible outcomes of the upcoming post-Cotonou negotiations, we now proceed to look into how such outcomes could affect the EPAs after 2020. We distinguish two types of implications, which are discussed in the next two sub-sections:

- Treaty law implications: To what extent would the validity of EPA articles referring to articles in the Cotonou Agreement be affected if the latter are no longer in force?
- Political implications: Would the commitment of key stakeholders in both the EU and ACP regions to the EPAs and the nature of the agreements be affected, given that many of them believe that the Cotonou agreement expresses the EU's firm commitment to the development component of the EPAs?

4.2 Legal implications

To begin with the legal implications, a first distinction can be made between static and dynamic cross-references to the Cotonou Agreement in the different EPAs. These terms describe two different effects of a reference in a provision in one instrument that refers to a provision in another instrument (or a concept in that instrument or that instrument as a whole). The referent of a static reference is effective in the referring provision even when its own instrument loses its validity. On the other hand, the referent of a dynamic reference only remains valid if its instrument remains valid.

The EPAs contain both types of reference. For example, the SADC and Cariforum EPAs state that "this Agreement is based on the Fundamental Principles, as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement". The West African EPA states, to similar effect, that "[t]he EPA is based on the principles and essential points of the Cotonou Agreement, as set out in Articles 2, 9, 19 and 35 of the said Agreement".¹¹ The EAC EPA states, more ambiguously, but probably to the same effect, that "[t]his Agreement is based on the following principles: (...) building on the *acquis* of the Cotonou Agreement". These references to the elements and principles of the CA are static, and therefore survive the expiry of the Cotonou Agreement, as they can be considered as incorporated by reference into the EPAs.

However, the EPAs also contain dynamic references, most prominently including those in relation to the non-execution clause in the Cotonou Agreement applicable to human rights

⁸ One example concerns a Joint Strategy that was adopted at the second Africa-EU Summit in Lisbon in 2007.

violations. For example, EPAs for the SADC, the Cariforum and the Economic Community of West African States declare: “Nothing in this Agreement shall be construed so as to prevent the adoption by either Party of appropriate measures pursuant to the Cotonou Agreement.” The EAC EPA adds the phrase “consistent with this Agreement and pursuant to the Cotonou Agreement”, which is somewhat ambiguous in its effect. All of these references are all dynamic, insofar as they refer to organs that depend on the continuing validity of the Cotonou Agreement. This means that when the CA expires, these clauses become functionally ineffective; moreover, so does the system of political dialogue set out in Article 8 of the Cotonou Agreement, which, under the Cotonou Agreement, must precede any adoption of appropriate measures under that agreement’s non-execution clause. The Cotonou Agreement presents a structured and systematic approach of political dialogue that – if no suitable agreement is found – could result in one of the parties taking appropriate measures. Some of the EPAs refer directly to this process, and research indicates that the discussion as to whether non-execution clauses belong in EPAs at all represented one of the biggest obstacles in the negotiations (Hulse, 2016a; Munyi, 2013). In this respect, the Cotonou Agreement’s expiry would in fact strengthen the human rights-related provisions of the EPAs, since evidence of human rights violations would no longer trigger the precondition of dialogue processes but rather authorise appropriate measures under the Vienna Convention on the Law of the Treaties (VCLT).⁹ Most likely, a violation of the fundamental principles incorporated by reference in the EPAs would constitute either a material breach or an implied repudiation of the agreement under Article 60 VCLT. Box 1 presents the concerned article and describes its potential use in the context of an EPA.

Box 1: Article 60 of the Vienna Convention on the Law of the Treaties

VCLT Article 60 reads as follows:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. [...]
3. A material breach of a treaty, for the purposes of this article, consists in:
 - (a) a repudiation of the treaty not sanctioned by the present Convention; or
 - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Article 60(3)(a) grants a party to a treaty a right to suspend or terminate a treaty when the other party repudiates a treaty expressly or by implication, even if this does not amount to a breach of a provision essential to the object and purpose of a treaty. Such repudiation may be express or implied. For example, in its *Namibia* Advisory Opinion, the International Court of Justice (ICJ) stated that “by stressing that South Africa ‘has, in fact, disavowed the Mandate [for South West Africa]’, the General Assembly declared in fact that it had repudiated it” (International Court of Justice, 1971, para. 95). Thus, a party to a treaty that acts in such a matter as to undermine the basis of that treaty can therefore be considered to have by implication repudiated the treaty.

In contrast, Article 60(3)(b) entitles a party to a treaty to suspend or terminate a treaty in the event that the other party breaches a provision essential to the accomplishment of the object or purpose of the agreement. Article 60(3)(b) would be applicable if, by acting in a manner so as to undermine the basis of an agreement, a party breaches a provision. It is not however certain that, in the context of the EPAs, a party that violates human rights would actually violate any obligations, in a normative sense. It is therefore more likely that violations of the principles set out in Article 9 of the Cotonou Agreement would trigger a right to suspend the agreement under Article 60(3)(a) of the Vienna Convention.

⁹ An unsettled question is whether suspension under the Vienna Convention is subject to any compulsory dispute settlement procedures set out in an EPA.

From the perspective of trade policy, the Cotonou Agreement's procedure can be considered to be preferable, as it requires a formal dialogue before a decision on taking any appropriate measures, whereas the VCLT neither requires nor excludes such a dialogue. Although these differences should be considered in the debate on the various post-Cotonou options, it should be kept in mind that the non-execution clause would only be used in extraordinary circumstances to suspend trade obligations. Suspending development cooperation as well as direct sanctions against the country's leadership are more likely to be triggered first, and in many cases are not later extended to trade sanctions. Moreover, the implications for other signatory parties of sanctioning one ACP state would mean it would be less likely to be invoked than EU trade agreements with individual states such as Syria, where this has actually taken place. Although there are legal implications, we observe that this aspect of the EPAs is considered to be particularly relevant for its political implications and should therefore not only be discussed as a self-standing issue, but also as a key issue that is advanced in political discussions in the run-up to the post-Cotonou negotiations.

A second group of dynamic references concerns roles given to ACP-EU structures created under the CA, notably the ACP-EU Council of Ministers, which meets on a yearly basis and adopts a negotiated statement as its main outcome. The Cotonou Agreement also provides for ACP-EU Joint Ministerial Trade Committee, a regular ministerial meeting on trade matters between the ACP and the EU. Some interviewees argued that this forum allows for discussion and exchange across EPA groupings and would allow for "connecting" these, with the Cotonou Agreement being needed to guarantee that this dialogue takes place. However, others argued that the ACP-EU trade meetings are mainly used by individual ACP states to promote trade issues of national concern, as opposed to being used to pursue a dedicated ACP-EU joint dialogue on trade issues. It could be argued that there is a certain "baked-in" tension between the Cotonou Agreement's provisions for dialogue at the all-ACP and EU level and EPAs entailing differentiation in trade relations between the EU and the various ACP sub-groups.

4.3 Political implications

Contrary to the legal interpretation set out here, some Brussels-based stakeholders have advanced the case that not concluding a new legally binding agreement would cause "collateral damage" to the EPAs. In a joint paper prepared for the post-Cotonou public consultation, the European Commission and European External Action Service, for instance, maintain that the CA "remains the framework agreement for EPAs" (EU, 2015, p. 7) by defining objectives and essential elements. The same is argued by the European Parliament, whose Own Initiative Report on post-Cotonou, as adopted in October 2016 by the European Parliament, "calls for a post-Cotonou Agreement as a political umbrella agreement under which binding minimum requirements for EPAs are set, in order to ensure continuity for EPA linkages in the existing Cotonou Agreement" (EP, 2016).¹⁰ The

¹⁰ Reference is made here to a "political umbrella agreement", though from the context of the sentence and references in other paragraphs of the report, one may expect the rapporteur to instead be referring to a legally binding umbrella agreement.

European Parliament specifically refers to human rights, good governance as well as social and environmental standards, suggesting that those would be somehow eroded should there be no new legally binding agreement. The Impact Assessment carried out in preparation of the EU's November post-Cotonou Communication goes further than this and asserts that not renewing the legally binding agreement would generate "substantial drawbacks" to ACP-EU trade relations. Motivating that assessment, it claims that the absence of a legally binding framework "might" necessitate revising the agreements' texts that include references to the Cotonou Agreement to ensure legal certainty and maintain political dialogue and the possibility of using appropriate enforcement mechanisms (EU, 2016b, p. 67). There is no legal basis for such an assumption: as self-standing international agreements, the EPAs' functioning does not depend on the existence of Cotonou or a similar legally binding ACP-EU partnership agreement.

In terms of the further political implications of outcomes 2 and 3 as introduced above, or a "limbo period" after 2020 before any is reached, it could be suggested that ACP states may interpret this politically as a lower commitment of the EU to the "development dimension" of the EPAs. Moreover, the Caribbean and Pacific regions may fear that more "radical" outcomes of the post-Cotonou negotiations could further intensify the EU's focus on relations with Africa to the detriment of its cooperation agenda with the Caribbean and Pacific. If the negotiation outcomes were to de-emphasise the political standing of these regions in the EU's wider external action policy, so the argument goes, the EU's willingness to invest in and support the implementation of the Caribbean and Pacific EPAs may be negatively affected. Finally, as per the aforementioned comments alleging legal consequences of the outcomes for the EPAs' non-execution clauses, a political implication could be that the interpretation and subsequent use of these provisions is affected.

A clear and early signal from the EU that it is open to alternatives to a legally binding agreement with the ACP Group could also be construed as carrying a risk of having unintended effects on ACP states' willingness to ratify the remaining EPAs. However, this seems far-fetched, given that, in recent months, other factors seem to have been more dominant in determining EPA ratification by the remaining ACP states. West Africa, Nigeria and the Gambia did not refer to the ACP-EU partnership and Cotonou Agreement as having motivated their decisions to delay ratification of the EPAs, whereas Ghana and Côte d'Ivoire have since taken steps to ratify their interim EPAs. The ratification of EPAs with individual countries shows that these two states attach greater value to continued market access to the EU than to the prospect of supporting regional integration, as promoted by the EPAs. In the case of East Africa, the discussions in Tanzania (see Mkapa, 2016) show that the content and likely effect of the EPAs on the country's development and the UK's intention to leave the EU are seen as being of much greater significance than any legal insecurity caused by the aforementioned potential post-Cotonou outcomes.

In recent months, statements of the Caribbean in relation to "Brexit" have primarily, if not exclusively, focussed on the implications for market access to the UK as their dominant trading partner in the EU (Price, 2016). There are two main issues. First, the UK would no longer trade with the Caribbean countries under the Cariforum-EU EPA, as it would not be a "party" for the purposes of that agreement. In addition, imports of input products processed in the UK for export to the EU would be affected by the UK ceasing to be part of a customs union with the EU, unless this is replaced by a free trade agreement. Their

reactions have so far not focussed on the likelihood of the UK dropping out as a signatory partner to a legally binding follow-up agreement between the EU and the ACP, even though this seems to be an inevitable consequence of a Brexit. However, this issue is unlikely to affect their support for a possible legally binding follow-up agreement to replace Cotonou, but would rather more directly affect their political commitment to the EPAs – regardless of whether these are already in force or still in the process of being ratified.

5 Conclusion

This paper has examined three possible outcomes of the upcoming “post-Cotonou” negotiations on their legal and political implications on the EPAs, namely (1) an ACP-EU agreement with increased differentiation through regional chapters/articles catering specifically to the African, Caribbean and Pacific regions; (2) three legally binding regional agreements with the African, Caribbean and Pacific regions (with or without a so-called umbrella agreement); and (3) various alternatives to international agreements. To understand why these options may inform the EU’s future negotiation position and to comprehend the current relation between the EPAs and the Cotonou Agreement, this article started with an analysis of past EPA negotiations and what role the Cotonou Agreement played in this regard. This analysis showed how the absence of consensus as well as diverging interests among EU member states, paired with differing interests across key DGs of the European Commission, led to inconsistent and evolving discourse around the “development dimension” of the EPAs throughout the negotiations.

The comparison of the different EPAs shows that the EU has sought to ensure a consistent and standardised approach in terms of including Cotonou Agreement references, yet the differences across EPAs indicates that different groups of ACP states either rejected some of the EU’s proposals or presented their own. As per the resulting provisions in EPAs that feature cross-references to the CA, an instrument to differentiate relations between the EU and ACP states may have had the unintended effect of increasing pressure to continue a partnership between the EU and the all-ACP level. However, the analysis of the implications of the three possible post-Cotonou negotiation outcomes indicates that, from a legal standpoint, the EPAs – as self-standing international agreements – would not be affected. The main exception would be the non-execution clause, as the formalised and phased approach of the Cotonou Agreement would no longer apply, which, however, would not prevent the contracting partner from formally committing to engaging in such a process, should there ever be a perceived need to do so on either side. It can be concluded that the emphasis on perceived legal challenges for the EPAs of these negotiation outcomes is instead being applied for political purposes by those partners who strongly favour an outcome in the form of a legally binding ACP-EU agreement.

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Annex

Annex 1: Comparison of Cotonou cross-references in EPAs

Regional grouping, year of conclusion and status	Dedicated development chapters...	...including references to the Cotonou Agreement	Comment	Further Cotonou references in other EPA chapters
Fiji and Papua New Guinea <i>(2011/2014; trade in goods EPA with Papua New Guinea and Fiji, in force)</i>	n.a.	Mentioning of the Cotonou Agreement Arts. 1, 2, 9	Similar wording of the respective articles across these three agreements	98
SADC <i>(2014; trade in goods EPA signed and ratification ongoing)</i>	n.a.			49, 50, 46 → protection of intellectual property 41-43 98
Cariforum <i>(2007; comprehensive EPA in force)</i>	n.a.			15, 32, 98, 96, 97
West African States <i>(2014; regional trade in goods EPA, prepared for signature; trade in goods EPAs with Ghana and Côte d'Ivoire in force since 2016)</i>	Part III: Cooperation for implementation of development and achievement of the objectives of the agreement Arts. 52-61	Arts. 1, 2, 9, 19, 21, 22, 23, 28 and 29 And indirect "... provisions of the Cotonou Agreement"	Refers to other financial instruments to be created in the event of the expiry of the Cotonou agreement	34, 35, 53, 69 98, 15 → referring to institutions or procedures
East African Community <i>(2014; trade in goods EPA, prepared for signature)</i>	Part V: Economic and development cooperation Arts. 75-101	Arts. 34 and 35	Highlights that development cooperation is essential for realising the EPA	96-98
East and Southern Africa <i>(2009; trade in goods EPA, in force)</i>	Part IV: Economic and development cooperation Arts. 36-52	Only indirect: "... framework of the rules and relevant procedures provided for by the Cotonou Agreement..."	Refers to a possible EPA fund	34, 35, 95.4, 12, 98, 11b, 96, 97
Central Africa <i>(2009; trade in goods EPA with Cameroon, in force since 2014)</i>	Title II: Partnership for development Arts. 4-12	Reference to the provisions and framework given by the Cotonou Agreement	Reference to role of development cooperation in "maximising benefits" of EPAs	74, 78, 98, 96, 97
Source: Agreements as posted on DG Trade website, Directorate General for Trade (2017) for the status of the agreement				

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